NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #523 - 6/30/80 (22-80)

Topic: Perjury; duty to report; prior proceeding in which lawyer not employed.

Digest: Lawyer under no duty to report perjury committed in proceeding in which his services were not employed.

Code: Canons 4 and 7; EC 4-4, 7-19; DR 1-103(A), 4-101(A) 7-102(B)(1) and (2); Definition 6.

QUESTION

A lawyer has received information clearly establishing that an adverse party committed perjury in a prior proceeding. Neither the lawyer nor his client was involved in the prior proceeding; however, the lawyer believes that it would not be in his client's interest to reveal the perjury.

Under the circumstances, must the lawyer report what he has learned to some authority empowered to act on such information?

OPINION

The question posed requires us to construe DR 7-102(B)(2) which states that "[a] lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." Cf., DR 1-103(A)(concerning "unpriviledged knowledge" of professional misconduct).

It will be observed that DR 7-102(B)(2) is unqualified with respect to the source of the lawyer's information, the circumstances under which it was obtained, whether it relates to a matter in which the lawyer's professional services were employed, and the status of proceedings before the tribunal to which the lawyer is obliged to report.

Nevertheless, reading the subject provision in the light of its evident purpose and in relation to the balance of DR 7-102(B), 1/ we are convinced that it should be limited in its application by no less than two significant qualifications. First, we believe that DR 7-102(B)(2) should be understood to address only informa-

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tion bearing upon a fraud committed in a proceeding where the lawyer's professional services are, or have been, employed. Second, to the extent that disclosure of the information may prove detrimental to the client, we believe that the lawyer should be under no obligation to reveal it. In neither case should the status of proceedings before the tribunal to which the lawyer might otherwise be required to report be determinative of his ethical obligation.

Our conclusion that DR 7-102(B)(2) should be deemed to apply only to fraud committed in a proceeding where the lawyer's services have been employed is predicated upon the structure and apparent purpose of DR 7-102(B).

DR 7-102(B)(1) is logically and structurally related to DR 7-102(B)(2). Together they comprise the totality of DR 7-102(B) and are intended to state the lawyer's ethical obligation to rectify the consequences of fraud, including "fraud" perpetrated on a "tribunal" -- or, in common parlance, perjury. Subdivision (1) relates to fraud committed by a client, while Subdivision (2) relates to fraud committed by persons other than a client.

Subdivision (1) was derived from former Canon 41 ("Discovery of Imposition and Deception") which dealt exclusively with a lawyer's obligation upon discovering his client's fraudulent conduct. Former Canon 41, like the present Subdivision (1), was intended to reach every manner of fraud committed by a client, whether or not the same was perpetrated on a court or other adjudicatory body. Cf., Definition 6("'Tribunal' includes all courts and all other adjudicatory bodies.")

Subdivision (2) had no precise analogue under the former Canons. The latter Subdivision was apparently engrafted onto DR 7-102(B) to fill what was perceived to be a need to cover in all its aspects the lawyer's special obligation upon discovering that a fraud had been committed on a "tribunal". Cf., ABA Final Draft CPR (July 1, 1969), p. 87 with ABA Preliminary Draft CPR (January 15, 1969), pp. 87-88. In this respect, however, Subdivision (2) is intended to address only a portion of the various kinds of fraud reached by Subdivision (1), albeit limited to a fraud committed by "[a] person other than [a] client." Logically, then, there is no reason to differentiate the established preconditions for the application of Subdivision (1) from those which should be implied under Subdivision (2). To the extent that Subdivision (1) has been deemed to apply only to information bearing upon proceedings in which the lawyer's services were employed (i.e., a "fraud" perpetrated "in the course of the representation"),

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it would seem to follow that Subdivision (2) should be implicitly subject to the same qualification. See, N.Y. State 466 (1977).

Since neither the lawyer in question nor his client was involved in the prior proceeding, we believe that the mandatory disclosure provisions of DR 7-102(B) should not be deemed to apply; and, this result should be equally as valid by implication under Subdivision (2) as it would under the expressly stated conditions of Subdivision (1).

The logical relationship of Subdivisions (1) and (2) can also be viewed as a reflection of the abiding tension between the broadly stated requirements of Canons 4 and 7: the former requiring a lawyer to preserve his client's confidences and secrets; the latter enjoining him to represent his client "zealously within the bounds of the law." We have elsewhere observed that these principles will sometimes appear to conflict in their application to particular circumstances and it is necessary that a balance be struck. See, e.g., N.Y. State 479 (1978). Generally, the balance is struck by favoring the personal interest of the client in preserving his confidences and secrets against the relatively impersonal obligation of the lawyer to secure the system of justice against fraud. Cf., ABA Draft Model Rules of Professional Conduct (January 30, 1980), Proposed Rule 3.1(b) with ABA Inf. 1314 (1975)("[T]he confidential privilege . . . must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud . . . .").

In November 1976, our House of Delegates acknowledged the primacy of the lawyer's obligation under Canon 4 when it amended the mandatory disclosure provision of DR 7-102(B)(1) to except "information . . . protected as a confidence or secret." See, N.Y. State 454 (1976); see also, ABA 341 (1975) and ABA 287 (1953). Then, as now, our preponderate concern for the principles of Canon 4 was not, of course, intended to signal a diminution in the profession's duty to the system of justice, but a simple recognition of the fact that the system could not long survive if the rule were otherwise and lawyers failed to enjoy the confidence of their clients. Cf., EC 7-19.

On the facts of the matter now before us, while the adversary's perjury (or "fraud") is by no means a client confidence, it could be considered a "secret" to the extent that its "disclosure . . . would likely . . . be detrimental to the client." DR 4-101(A).[2] In this connection, it should be noted that the term "secret" encompasses all information coming to the lawyer "in the professional relationship" regardless of its nature or source. Ibid. As explained by EC 4-4:

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> "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

Hence, if DR 7-102(B)(2) is subject to the same implicit exception recently memorialized by our amendment of DR 7-102(B)(1), disclosure of the adversary's perjury under the circumstances here presented would not be required for yet a second reason.

Theoretically, the lawyer's obligation to correct the consequences of fraudulent conduct should be greatest when the fraud is one committed by a client in the course of his representation because the lawyer's services have been used to accomplish the fraud. That, of course, is the situation addressed by Subdivision (1). As noted, there is an exception to that obligation; specifically, the lawyer need not reveal the fraud if to do so would entail the disclosure of information protected under Canon 4 as a confidence or secret.

Where the fraud has been committed by one other than the client, it would be anomalous to require disclosure of information detrimental to the client when the lawyer's obligation to correct the record is of a lesser magnitude. We believe, therefore, that the long-recognized exception memorialized in amending Subdivision (1) should be available under Subdivision (2) by necessary implication.

Accordingly, lawyers should not be required to reveal frauds committed by persons other than their clients when the information would otherwise be protected as a client confidence or secret under Canon 4; and, to the extent that the information in question would amount to a "secret" under the circumstances presented, the lawyer need not disclose it.

For the reasons stated, the question posed is answered in the negative.

FOOTNOTES

1. DR 7-102(B) provides in full text:

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"A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

(Emphasis supplied)

2. DR 4-101(A), defining "confidence" and "secret", provides in full text:

"'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client."

(Emphasis supplied)
