

New York State Bar Association

Committee on Professional Ethics

Opinion 681- 2/9/96 (28-95)

Topics: Withdrawal of Assigned Counsel; Confidences and Secrets of Client.

Digest: Lawyer assigned by court to represent client who misrepresented financial eligibility for assigned counsel may not disclose client confidences or secrets in support of motion to withdraw, but may disclose client secrets if ordered by the court to do so.

Code: DR 4-101; 2-110; 7-102; EC 5-1; 7-1;7-6.

QUESTION

May a lawyer assigned by a court to represent an indigent client withdraw from the representation after learning that the client has the means to retain counsel if such withdrawal can only be effected by disclosing client confidences or secrets?

OPINION

The withdrawal of a lawyer from representation is governed in the first instance by DR 2-110. DR 2-110(C), which pertains to permissive withdrawal, provides that a lawyer may withdraw from representation if the withdrawal can be accomplished without material adverse effect on the interests of the client or if the client "[p]ersists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." DR 2-110(C)(1)(b).

Similarly, the lawyer may withdraw if "[t]he lawyer's continued employment is likely to result in a violation of a Disciplinary Rule." DR 2-110(C)(2). Withdrawal under DR 2-110(C) is conditioned upon compliance with DR 2-110(A) [permission of tribunal if required] and the interplay of DR 7-102(B)(1) [fraud on the tribunal] with DR 4-101 [preservation of confidences and secrets of a client].

Questions of law are outside the scope of this Committee's jurisdiction. Yet, as in this instance, the resolution of a lawyer's ethical dilemma will often depend on the legality of the client's conduct because a fundamental tenet of legal ethics is that all of a lawyer's obligations to a client must be exercised "within the bounds of the law." See EC 5-1, 7-1; DR 7-102(A)(3), (4); N.Y. State 562 (1984). A lawyer can not properly "assist the client in conduct that the lawyer knows to be illegal." DR 7-102(A)(7). The lawyer, in deciding whether withdrawal is permissible pursuant to DR 2-110, must determine whether the ongoing actions of the client are criminal or fraudulent, whether permission of the tribunal is required and whether confidences or secrets may be revealed.

Although the lawyer must independently determine whether the client's conduct is criminal, the Committee notes that conduct similar to that of the subject client has been characterized by a sister state bar committee as the "theft of free legal services" that would justify withdrawal and, if necessary, the revelation of client confidences and secrets. Oregon State 1991-34. An examination of the New York Penal Code concerning larceny and other theft offenses suggests that the client's actions may not necessarily be criminal in New York because New York law apparently does not recognize legal services as "property" that is within the larceny statute or a type of service that, if wrongfully taken or appropriated, can give rise to criminal liability. See N.Y. Penal Law §§ 155.00 & 165.15 (McKinney's 1988 & Supp. 1995). In the event that the client filed an affidavit as to financial resources in connection with the assignment of counsel, the client may have committed a crime, either of a completed or continuing nature.

Regardless of the legal determination of the criminal effect of the client's actions, it appears that the client may be using the lawyer's services to perpetuate a fraud on the tribunal. Definition 9 of the Code states:

"Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

Here the client led the court to believe that he or she is eligible for assigned counsel when this is not the fact. The client misrepresented his or her

means to the court to obtain assigned counsel. The client should have reasonably expected the court and the lawyer to rely on this misstatement to their detriment. Although the client's misrepresentation is in the past, the client continues to accept legal services from assigned counsel under false pretenses resulting from his or her prior misrepresentation. DR 7-102(B)(1) requires that the lawyer remonstrate with the client in an attempt to persuade the client to rectify his or her fraudulent actions. If the client refuses to correct misrepresentations after they have been called to his or her attention by the lawyer, the client's conduct may be deemed fraudulent under the Code definition of fraud because it involves a knowing failure to correct the misrepresentations. This fraud therefore provides the lawyer with a basis for permissive withdrawal under DR 2-110(C). See N.Y. State 126 (1970); N.Y. City 1994-8; N.Y. City 214 (1932).

As a practical matter, however, having a basis for permissive withdrawal may not allow the lawyer to withdraw. The lawyer must also satisfy DR 2-110(A)(1), which states:

If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

If the tribunal does not require assigned counsel to obtain the court's permission to withdraw or if the lawyer is not required to state specific reasons for the motion to withdraw, the lawyer will be able to withdraw pursuant to DR 2-110(C)(1)(b), provided the lawyer also complies with the requirement of DR 2-110(A)(2) to take "steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client." However, in the event that the tribunal requires that assigned counsel obtain permission for withdrawal and, further, requires the lawyer to state the reasons for the withdrawal, DR 4-101's prohibition on disclosure of client confidences and secrets will be implicated.

Although the lawyer's conclusion that the client committed a fraud on the tribunal makes applicable the mandate of DR 7-102(B)(1) that "the lawyer shall reveal the fraud to the . . . tribunal," that rule provides an explicit exception from the obligation to report the client's fraud "when the information is protected as a confidence or secret." DR 7-102(B)(1). Hence the lawyer's ability to disclose the reasons for withdrawal turns on the application of DR 4-101.

DR 4-101(A) defines "confidence" and "secret":

"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 be likely to be detrimental to the client.

It is settled law in New York that "[t]he attorney-client privilege extends only to confidential communications made to an attorney for the purpose of obtaining legal advice." *Hoopes v. Carota*, 74 N.Y.2d 716, 717, 543 N.E.2d 73, 73, 544 N.Y.S.2d 808, 809 (1989); *see also Priest v. Hennessy*, 51 N.Y.2d 62, 69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980). If the client revealed the extent of his or her assets to the lawyer confidentially to obtain legal advice concerning the disposition of the assets in the client's pending proceeding – the proceeding for which the lawyer was assigned as counsel – the information regarding the client's assets is a "confidence" within the meaning of DR 4-101(A) and protected by the attorney-client privilege. If the information is gained in the professional relationship from sources other than the client, but the client has requested that the information be held inviolate, or regardless of any such request the disclosure of the information would be embarrassing or would likely be detrimental to the client, the information is a "secret" within the meaning of DR 4-101(A).

Even though the relevant information is a confidence or secret within the meaning of DR 4-101(A), the information may nonetheless not be "protected" from disclosure if it is excepted under DR 4-101(C). The circumstances of this inquiry arguably invoke two of these exceptions. DR 4-101(C), in pertinent part, states that the lawyer may reveal:

2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. [or]
3. The intention of a client to commit a crime and the information necessary to prevent the crime.

Whether disclosure is authorized by the exception in DR 4-101(C) for communications respecting a client's intention to commit a crime may turn on whether the fraud constitutes a continuing crime, *see, e.g., N.Y. State 674* (1995), a legal determination outside the scope of this Committee's jurisdiction. The exception authorizing disclosure "when permitted under Disciplinary Rules" does not appear applicable, as the most pertinent rule, DR 7-102(B)(1), explicitly forbids disclosure of information protected under DR 4-101 as a confidence or secret. Similarly, the exception in DR 4-101(C) for disclosure "required by law" may not be apposite, as we are not aware of any "law" that would mandate disclosure in these circumstances (though we note that any such determination is, again, outside our jurisdiction). Consequently, the assigned counsel who seeks to withdraw is likely to be barred by DR 4-101 from disclosing in the motion papers filed with the court the basis for the requested withdrawal to the extent that information qualifies as either a client confidence or secret. We do not believe that compliance with DR 4-101 precludes assigned counsel from filing a

motion for leave to withdraw, however, provided no client confidence or secret is disclosed in the motion papers. See N.Y. State 592 (1988) (attorney compelled to withdraw from representation of two clients in unrelated litigations because of event creating conflict may not disclose client secrets but “should simply opine that the continued representation ... would violate the Code of Professional Responsibility”).

Disclosure may ultimately be permissible in connection with a lawyer’s motion for leave to withdraw if the disclosure is “required by ... court order.” In light of that exception in DR 4-101(C), a lawyer who files a motion for leave to withdraw without stating the facts identifying the grounds for the requested withdrawal may be ordered by the court to disclose such grounds. If the responsive information qualifies as a “secret,” the lawyer will be permitted to disclose it in compliance with the court’s order. If the lawyer believes that the information is protected as a “confidence,” however, the lawyer may have an ethical obligation to appeal the court’s ruling rather than comply with a trial court’s order to disclose what the lawyer believes in good faith is a communication governed by the attorney-client privilege. N.Y. State 528 (1981). (court “order” compelling disclosure is one “not subject to further review”). See generally *Matter of Balter v. Regan*, 63 N.Y.2d 630, cert. denied 469 U.S. 934 (1984) (duty of lawyer to follow a court order despite the fact the order is premised upon an erroneous view of conflict of interest provisions of the Code).

In light of the possibility that client secrets may be required to be disclosed once an application for withdrawal has been filed, the lawyer would be well advised to inform the client in advance of the filing of such an application that the disclosure of client secrets may result, so that the client can determine if he or she wishes to discharge the assigned counsel. Finally, if the court does not order any disclosure and rejects the application for failure to set out sufficiently the grounds for the requested withdrawal, assigned counsel will be obligated to continue the assigned representation.

CONCLUSION

Assigned counsel may not reveal client confidences or secrets to support a motion for leave to withdraw from a court-appointed representation, but may disclose a client secret if ordered to do so by the court. A lawyer is not prohibited by the Code from applying to a tribunal for leave to withdraw from a court-appointed representation without setting forth facts supporting the request where such facts are protected from disclosure by the Code.
