

# New York State Bar Association

## Committee on Professional Ethics

Opinion 742 – 5/25/01

Topic: Confidentiality; Duty to report violations of law

Digest: Lawyer who learns in the course of representing client that a third party non-lawyer has violated applicable law may not report same if the information would be protected as a confidence or secret of the client.

Code: DR 1-103; DR 1-105(A), (B); DR 4-101(A), (C); DR 7-102 (B)

### QUESTION

The inquirer is an attorney admitted in New York and working overseas for a private company. In the course of employment, the inquirer has come across information indicating that a party (not a lawyer) with whom the inquirer's employer has a business arrangement engaged in a violation of law in connection with obtaining an agreement to which the employer and the third party are two of the contracting parties. Although the inquirer worked on the agreement that is the subject of the inquiry, the inquirer's services were not involved in the violation of law that occurred. No other lawyer was involved, and the matter has not been presented to any tribunal. Does the inquirer have an obligation to report the violation of law where the malfeasor is not the client?

### OPINION

Although the inquirer is employed overseas, as an attorney admitted in New York the attorney is subject to the New York Lawyer's Code of Professional Responsibility (the "Code"). See DR 1-105(A) (lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs). Whether the rules of professional conduct that would be applied are those of New York

or some other jurisdiction depends on whether the lawyer is also admitted in another jurisdiction and, if so, the place where the lawyer "principally practices" or where the lawyer's conduct has its "predominant effect." See DR 1-105(B)(2).

Because questions of law are beyond this Committee's jurisdiction, we are unable to advise whether the inquirer would have any legal duty to report a particular violation of law and, if so, to whom.<sup>1</sup> On the facts presented, we cannot identify any ethical obligation to report a violation of law. A lawyer's reporting obligations under the Code are found in DR 1-103, concerning conduct of another lawyer or judge, and in DR 7-102, concerning fraud upon a person or tribunal. The former provision is not applicable because the facts presented in the inquiry do not involve the conduct of another lawyer or a judge. DR 7-102(B)(1) is applicable to situations where a lawyer's client has perpetrated a fraud in the course of the representation, which is not the case here. Finally, DR 7-102(B)(2) is applicable to a lawyer who receives information "clearly establishing" that a person other than the client "has perpetrated a fraud upon a tribunal." The terms "fraud" and "tribunal" are defined in the "Definitions" section of the Code. Specifically, the term "tribunal" is defined to include "all courts, arbitrators and other adjudicatory bodies." Regardless of whether the conduct described would amount to a "fraud" within the meaning of the Code, it did not involve a tribunal and the inquirer accordingly would have no obligation to report same under DR 7-102(B)(2). See also N.Y. State 523 (1980) (limiting DR 7-102(B)(2) to "information bearing upon a fraud committed in a proceeding where the lawyer's professional services are, or have been, employed)."

Indeed, the inquirer may be prohibited under the Code from reporting to a law enforcement authority the information acquired. DR 4-101 of the Code prohibits a lawyer from revealing or using to its disadvantage confidences or secrets of a client. As used in the Code, the term "secrets" refers to information gained in the professional relationship the disclosure of which "would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). The information need not be obtained *from* the client to constitute a secret; it is enough that it was "gained in the professional relationship." Accordingly, information regarding a violation of law committed by a third party in the course of obtaining a business agreement with a client may be protected from disclosure as a "secret" if disclosure would be detrimental to the client. Cf. N.Y. State 523 (1980) (construing DR 7-102(B)(2); "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"). Even if a "secret," the information may be disclosed if it satisfies the "future crime" exception embodied in DR 4-101(C)(3) (permitting a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime"). Because this Committee does not decide questions of law, we express no opinion on whether disclosure would be permitted under this rule.

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<sup>1</sup> Likewise, the Committee has no authority to determine whether particular conduct amounts to a violation of law. For purposes of responding to this inquiry we assume that, as reported in the inquiry, such a violation has occurred.

## CONCLUSION

A lawyer who receives information that a third party engaged in a business arrangement with a client may have violated the law in the course of obtaining that arrangement may not report the violation to a law enforcement authority if the information is protected as a confidence or secret.

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