

New York State Bar Association

Committee on Professional Ethics

Opinion 797 – 4/26/06

Topic: Client fraud/misstatements.

Clarifies: N.Y. State 674 (1995)
N.Y. State 781 (2004)

Digest: Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must withdraw any misstatements the lawyer made in certifying the client's statements. The lawyer must also consider whether the lawyer is required or permitted to withdraw from the representation under DR 2-110(B) or (C).

Code: DR 2-110(A); 2-110(B), 2-110(B)(2); 2-110(C); 2-110(C)(1)(g); DR 4-101; 4-101(A); 4-101(C); 4-101(C)(3), (5); DR 7-101(A)(1); DR 7-102(A)(2), (3), (4), (5), (7); 7-102(B); 7-102(B)(1); EC 1-1; 1-9; 5-1; 7-10.

QUESTION

1. A lawyer has filed a probate petition that sought the issuance of letters testamentary to a person who was ineligible to receive them by reason of that person's prior conviction of a felony. The lawyer did not know of these facts when the lawyer filed the petition, but learned them later. What are the lawyer's ethical obligations?

OPINION

2. A lawyer represents a client who was named the executor under a decedent's will and is the sole beneficiary named in the will and the decedent's only heir at law. The lawyer files the client's oath, required to seek appointment as executor, with the Surrogate's Court. In order to file the papers with the court, the lawyer also signs the form, which constitutes a certification that to the best of the lawyer's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the form contains no material misstatements of fact.¹ The

¹ The oath of an executor includes the statement, "I am not ineligible to receive letters [testamentary]." Under the Rules of the Chief Administrator (22 NYCRR § 130-1.1A(b), by signing a paper, an attorney certifies that, to the best of the attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not

court issues letters testamentary. Subsequently, the client informs the lawyer that the client is a convicted felon. As such, under SCPA §707(1)(d), the client is ineligible to receive letters testamentary. The estate remains unsettled.

3. Does the lawyer have any obligations to the Surrogate's Court and other potentially interested third parties? Is the information about the client's felony conviction protected as a confidence? Must the lawyer withdraw if the client refuses voluntarily to disclose the client's status as a felon?

DR 7-102(B)(1): Authority to Disclose Fraud on Person or Tribunal

4. DR 7-102(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") states that a lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal

shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

5. Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee. The answer will depend upon whether the client knew that he or she was misstating information or omitting information in the Executor's oath. See Code, Definition 9 (fraud includes knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another). If the lawyer concludes that the client has committed a fraud, the lawyer must call upon the client to disclose to the court that the client was not eligible to receive letters testamentary. If the client refuses to make or authorize the correction, as noted above, DR 7-102(B)(1) instructs the lawyer to reveal the fraud "*except when the information is protected as a confidence or secret.*" (Emphasis supplied.)

Exception for Information Protected as a Confidence or Secret

6. The extent to which the lawyer may disclose the client's fraud thus depends upon whether the information that would be disclosed is protected as a confidence or secret. Under DR 4-101(A), a confidence is information protected by the attorney-client privilege under applicable law. Determining whether information is protected by the attorney-client privilege is a question of law that is beyond the scope of our jurisdiction. See CPLR § 4503.

7. A secret is any information gained by the lawyer 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. Whatever the conclusion with respect to the attorney-client privilege, either the fact of the felony conviction or the fact that the client has committed perjury would qualify as "secrets" under the Code.

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(3)

frivolous as defined in Part 130. Under that Part, a paper is "frivolous" if, among other things, it asserts material factual statements that are false. In determining whether the conduct was frivolous, a court will consider whether or not the conduct was continued when its lack of factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. 22 NYCRR §130-1.1(c).

8. DR 4-101(C) contains a number of exceptions to the lawyer's duty of confidentiality, including DR 4-101(C)(3) and (5). DR 4-101(C)(3) permits a lawyer to reveal the client's intention to commit a crime and the information necessary to prevent the crime. It does not specifically apply to frauds, unless the fraud itself constitutes a crime. It appears that, because the lawyer did not know of the client's intention to misrepresent the client's status, but only learned of it after its occurrence, the client's fraud is now a past fraud and DR 4-101(C)(3) is inapplicable.²

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(5)

9. Until 1990, the rule in New York was that, if the client refused to correct a fraud or to authorize the lawyer to do so, the lawyer was prohibited from disclosing the fraud, and was required either to stand by silently or to withdraw from the representation under DR 2-110(C)(1)(g) (lawyer may [but is not required] to withdraw when the client has used the lawyer's services to perpetrate a crime or fraud.)

10. In 1990, DR 4-101(C)(5) was added to the Code. Under DR 4-101(C)(5), a lawyer may reveal confidences or secrets of the client to the extent "implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

11. By signing the client's papers in accordance with Part 130, the lawyer has made a representation to the Surrogate's Court. We have considered whether the Surrogate's Court is a person within the meaning of DR 4-101(C)(5). The term "person" is defined in Definition 3 of the Code as *including* "a corporation, an association, a trust, a partnership, and any other organization or legal entity." DR 7-102(B) clearly distinguishes between a "person" and a "tribunal," indicating that the intent of the drafters may have been to exclude tribunals from the ambit of the term "person." In addition, many Code provisions that use the term "person" or "third person" clearly are referring to clients, potential clients, witnesses and other participants in the legal process. See, e.g., EC 1-1; EC 1-9. On the other hand, there are several Code provisions where a tribunal logically could be included within the ambit of the term. See, e.g., EC 5-1; EC 7-10; DR 7-101(A)(1). We do not believe that the drafters of DR 4-101(C)(5) intended to exclude tribunals from the scope of the term "person" as used in this rule, and thus give lawyers less discretion to correct fraudulent acts towards tribunals than towards others. Accordingly, we believe that DR 4-101(C)(5) gives discretion to a lawyer to withdraw the lawyer's representation under Part 130, which requires the withdrawal of the client's affidavit. The lawyer is not authorized by DR 4-101(C)(5) to explain the reasons for the withdrawal of the affidavit, since that section authorizes the disclosure of client confidences and secrets only to the extent *implicit* in withdrawing the representation.

² Academics and others have suggested that, even if a client's criminal or fraudulent conduct occurred in the past, it might constitute a continuing crime or fraud, and, thus, not constitute past conduct for purposes of DR 4-101(C)(3). Some have suggested that a fraud should be deemed continuing where it has future consequences. Some have suggested that the mere continuation of the harmful effect of an otherwise completed client wrong should not affect the determination of whether the client's conduct is past conduct, especially when disclosure of the future consequences necessarily would involve disclosure of the past conduct. Finally, others suggest a distinction based on whether the client disclosed the wrongful conduct for the purposes of seeking legal advice with respect to the conduct. See *generally* N.Y. City 2002-1.

12. Our opinion in N.Y. State 781 (2004) implicitly reaches a similar conclusion that a tribunal is a third “person” within the meaning of DR 4-105(C). In that opinion, we discussed a matrimonial lawyer who learned that a financial statement submitted by the lawyer to family court contained a material omission. In order to submit the financial statement on behalf of the client, the lawyer had certified the accuracy of the statement to the court. We therefore found that the lawyer had made a misrepresentation to the court, and that DR 4-101(C)(5), permitting disclosure to the extent implicit in withdrawing such a certification, was applicable.

13. In N.Y. State 781, we went on to state that, since the lawyer was permitted to reveal the information under DR 4-101(C)(5), the information was not “protected as a confidence or secret” within the meaning of DR 7-102(B)(1), and the lawyer therefore was required to reveal the information to the court to the extent implicit in withdrawing the financial statement, if the client refused to do so. This conclusion was based on our opinion in N.Y. State 674 (1995), which also addressed which information is “protected” as a confidence or secret within the meaning of the last clause of DR 7-102(B)(1), and interpreted the phrase as meaning those confidences and secrets that must be preserved by DR 4-101. We therefore concluded that “where the lawyer is *permitted* to reveal a confidence or secret under DR 4-101(C), disclosure of the fraud is *mandatory* under DR 7-102(B).” (Emphasis in original.)³

14. We clarify that this broad language, which was quoted in N.Y. State 781, means only that the lawyer must reveal the fraud to the extent permitted by DR 4-101(C). DR 4-101(C)(5) authorizes disclosure of the client’s fraud only to the extent implicit in withdrawing the lawyer’s representation under Part 130. Consequently, the facts surrounding the client’s conduct are still protected as a confidence or secret. Since DR 7-102(B)(1) requires the lawyer to reveal the fraud “except when the information is protected as a confidence or secret,” the lawyer cannot reveal the facts underlying the fraud, but only do what the lawyer is permitted to do – withdraw the lawyer’s own certification.

15. In the case at hand, DR 4-101(C)(5) authorizes the lawyer, and therefore the lawyer is required, to withdraw the lawyer’s certification. Because the lawyer is not authorized to disclose the nature of the falsehood, the lawyer is not authorized further to disclose the client’s secret and therefore is not required to disclose it under DR 7-102(B)(1).

16. The fact that the client is the sole beneficiary named in the will and the decedent’s only heir at law should not, in our opinion, affect the lawyer’s decision in this matter. The executor has a responsibility to pay creditors of the estate, as well as estate taxes, if any. Consequently, the executor’s duties are not only to the beneficiary. Public policy in this state has determined that faithful execution of the duties of executor should not be entrusted to a person convicted of a felony.

³ N.Y. State 781 quoting N.Y. State 674. In N.Y. State 674, the information “protected” was the information that the client had committed perjury in an arbitration proceeding. We concluded that this information was a past fraud and that it could not be characterized as continuing or ongoing for purposes of the future crimes exception in DR 4-101(C)(3). Consequently, we held that, if the client refused to recant the perjury, the lawyer was not authorized to disclose it under DR 4-101(C)(3) and therefore was not required to disclose it under DR 7-102(B)(1). Nassau County 2003-1 is to a similar effect. In that opinion, a lawyer learned that his client had misrepresented indigence in order to obtain the lawyer’s representation through an indigent lawyer program. Because the lawyer had not made any representations to the court, the Nassau County Bar Association ethics committee concluded that, if the client refused to rectify the fraud, the information was protected as a secret and the lawyer could not disclose it to the court. (Since continued representation, however, would result in a fraud on the program, the opinion went on to conclude that the lawyer must withdraw from the representation.)

17. After withdrawing his or her certification, the lawyer must consider whether the lawyer must withdraw from representing the client. Withdrawal would be mandatory if the lawyer knows that continued employment would result in violation of a Disciplinary Rule. DR 2-110(B)(2). Such rules might include DR 7-102(A)(2), (3), (4), (5) or (7). In a matter before a tribunal, court permission may be required for withdrawal. DR 2-110(A).

CONCLUSION

18. Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must consider what additional steps to take. Where the lawyer has made a representation to the court regarding an affidavit or other filing, the lawyer must withdraw the representation. However, the lawyer is not authorized to disclose the client's confidences and secrets except to the extent implicit in such withdrawal. The client's disclosures to the lawyer do not lose their protection as confidences or secrets simply because the withdrawal of the lawyer's representation may imply to a court that there is a problem with the filing. The lawyer should also consider whether he or she may or must withdraw from representing the client under DR 2-110(B) or (C).

(9-05)
