



## Committee on Professional Ethics

Opinion #525 - 11/14/80 (43-80)

Topic: Confidences and secrets of prospective client; conflicting interests

Digest: Lawyer cannot disclose secret imparted to him by potential client, and cannot continue to represent that client or existing client with respect to subject matter of that secret.

Code: DR 2-110(B)(2), 4-101(A), (B) and (C), 5-105(A), (B) and (C)

### QUESTION

A lawyer has been consulted by his client about a theft. Thereafter an employee of the client, seeking in good faith to retain the lawyer, confesses to the lawyer that he, the employee, committed the theft.

Under the circumstances stated, may the lawyer continue to represent his present client with respect to the theft or undertake to represent the thief?

### OPINION

Information obtained by a lawyer in his professional relationship with a client is a "secret", within the meaning of the Code of Professional Responsibility, if its disclosure would be likely to be detrimental to the client. DR 4-101(A).

With certain exceptions not here relevant, a lawyer is forbidden to reveal a secret of his client, to use it to his client's disadvantage or to use it for the advantage of a third person, in the absence of the client's consent after full disclosure. DR 4-101(B) and (C). All of this is equally true where the "secret" is imparted in good faith by a prospective client seeking to retain the lawyer. The fact that the lawyer makes no charge and declines the retainer is irrelevant. See, e.g., N.Y. County 243 (1926) and Drinker, Legal Ethics 134 (1953).

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It follows that the lawyer cannot inform the client who first consulted him of the employee's confession, nor can he use that confession to the employee's disadvantage, without the employee's consent. Accord, N.Y. County 241 (1926), N.Y. City 109 (1928-1929) and N.Y. City 88 (1928-1929); cf., N.Y. City 225 (1932).

Clearly, the lawyer must decline the retainer offered by the employee, because even if the employee consented to disclosure of his confession, and both clients consented to the dual representation after full disclosure, it is far from "obvious that [the lawyer] can adequately represent the interest of each." DR 5-105(C). Furthermore, without fault on his part or on the part of the client who first consulted him, he has been inadvertently placed in a position in which he cannot possibly discharge his duty to that client without revealing the secret of the employee or using it to the employee's disadvantage. In the circumstances, he has no choice but to withdraw from the representation of the first client with respect to the matter in question. See DR 2-110(B)(2) and DR 5-105(A) and (B); see also, N.Y. City 109, supra.

In rendering this opinion, we are not unmindful of the potential for abuse if an individual is permitted to compel a lawyer to withdraw from representation of a client through the simple expedient of revealing secret information to him. Our opinion is limited to the situation where, as here, the prospective client reveals confidences or secrets in a good faith effort to retain the lawyer and without any knowledge that he already represents an adverse party.

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

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