NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 700 - 5/7/98 (49-97)

Topic: Confidentiality; Unauthorized Disclosure; Fraud on Tribunal

Digest: Lawyer who receives unsolicited communication from former employee of adversary's law firm regarding alteration of documents may not communicate further with employee and should seek judicial guidance as to use of the unauthorized communication.

Code: Canon 7; DR 1-102 (A), DR 1-103(A), DR 4-101 (A), DR 4-101 (D), DR 7-102 (B)(2), DR 7-104(A)(1), DR 7-110 (B); EC 4-4, EC 4-5, EC 7-35

QUESTIONS

An attorney for a government agency responsible for prosecuting an administrative proceeding received an unsolicited telephone call from a person who identified himself as a former non-lawyer employee of a law firm that represents the respondent in the proceeding. In substance, the former employee told the attorney that certain key records submitted to the government agency in connection with its investigation of respondent had been materially altered prior to submission. Aware of the sensitive ethical issues raised by this communication, the attorney refrained from asking the former employee any questions, such as whether the law firm is aware of the alleged alteration of documents.

This opinion addresses three questions arising from this set of facts:

1. Whether the attorney may seek further information from the former employee regarding the allegedly altered documents;

2. Whether the attorney must inform the respondent's law firm of the communication from its former employee; and

3. Whether the attorney must inform the hearing officer presiding over the administrative proceeding of the communication and, if so, whether that may be done *ex parte.*

OPINION

The questions posed implicate provisions of the Lawyer's Code of Professional Responsibility (the "Code") regarding a lawyer's duty to the client, to the adversary and to the administration of justice. In the inquiry presented, those duties may seem to conflict; nevertheless, the Committee believes that the proper course for the attorney is to refrain from exploiting the willingness of the adversary's former employee to breach the duty of confidentiality, and to seek judicial guidance regarding the use, if any, that may be made of the unauthorized communication.

Confidentiality

The protection of the confidences and secrets of a client are among the most significant obligations imposed on a lawyer. We assume that the communication from the former employee of respondent's law firm regarding the alteration of documents was unauthorized and may have violated the attorney-client privilege. Alternatively, the information that documents were altered prior to submission to the government agency may be a "secret" under Disciplinary Rule ("DR") 4-101(A) of the Code, which broadly defines "secret" as any non-privileged "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The ethical obligation of a lawyer to guard the confidences and secrets of a client "exists without regard to the nature or source of information or the fact that others share the knowledge." Ethical Consideration ("EC") 4-4. Indeed, a lawyer has an ethical obligation to "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee." DR 4-101(D). *See also* EC 4-5 ("lawyer should be diligent in his or her efforts to prevent the misuse of such information by employees and associates").

Although the attorney did not solicit the unauthorized communication or the breach of the former employee's duty of confidentiality, the attorney may not exploit the willingness of the former employee to undermine the confidentiality rule. The Code prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation," DR 1-102(A)(4); and "conduct that is prejudicial to the administration of justice." DR 1-102(A)(5). We believe that further *ex parte* communications by the government attorney with the former employee to procure confidential information of the respondent would violate the letter and spirit of these Rules. *Accord MMR/Wallace Power & Indus., Inc. v. Thames Assocs.,* 764 F. Supp. 712, 718-19 (D. Conn. 1991) (spirit if not letter of ethical rules precludes an attorney from acquiring, inadvertently or

otherwise, confidential or privileged information about his adversary's litigation strategy); N.Y. City 1989-1 (client's interception of adversary's communications with counsel involved dishonesty and deceit; lawyer may not help his client take advantage of such wrongdoing). Just as a lawyer should never initiate contact with a former employee of an adversary's law firm for the purpose of obtaining confidential information of the adversary, neither may a lawyer take advantage of a former employee's willingness to violate the duty of confidentiality to the former employer's client.

The cases and ethics opinions permitting *ex parte* contacts with unrepresented former employees of a corporate adversary are not to the contrary. These opinions hold that the prohibition on such contact applies only to current employees, not to former employees. *See, e.g., Dubois v. Gradco Sys., Inc.,* 136 F.R.D. 341 (D. Conn. 1991); *Neisig v. Team I et al.,* 76 N.Y.2d 363, 558 N.E.2d 1030 (1990); ABA 359 (1991), but they are also uniform in holding that an attorney engaged in such *ex parte* contacts may not seek to obtain from former employees information that might be protected under the attorney-client privilege or the work product doctrine. As one court has observed:

> "[I]t goes without saying that, with respect to any unrepresented former employee, plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy. After all, the privilege does not belong to, and is not for the benefit of, the former employee; rather, it belongs to, and is for the benefit of, [the former employer]." *Dubois,* 136 F.R.D. at 347.

Similarly, the inquirer here may not seek to cause the former employee of his adversary's counsel to reveal the confidences or secrets of the former employer's client. *See MMR/Wallace Power & Indus., Inc.* 764 F. Supp. at 720 (disqualifying law firm because of ex parte contact with former employee of adversary who had obtained confidential information as member of litigation team); *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984) ("If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney"). *See also Plan Comm. v. Driggs,* 1998 WL 88575 (D. Md., Feb. 18, 1998) (approving communication with former in-house lawyer where crime-fraud exception was likely applicable).

Although the Code does not expressly require a lawyer to refrain from encouraging a breach of client confidentiality by opposing counsel's staff, our conclusion in this regard is supported by several decisions of other ethics committees. In ABA 368 (1992), that Committee concluded that a lawyer who receives confidential materials under circumstances where it is clear that they were not intended for the receiving lawyer (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt, and (c) should abide by the sending lawyer's instructions as to their disposition. This and other "inadvertent disclosure"

decisions rely heavily on the strong public policy in favor of confidentiality, which the ABA and others find to outweigh heavily the competing principles of zealous representation (Canon 7) and encouraging more careful conduct (here, supervision of former employees) on the part of opposing counsel.

More recently, the ABA addressed the closely analogous situation of a lawyer who receives on an unauthorized basis confidential materials of an adverse party. ABA 382 (1994). Distinguishing the situation where the confidential materials were inadvertently supplied to the receiving lawyer, the ABA Committee declined to establish an absolute rule couched in terms of professional responsibilities that required the return of such materials. Because the receiving lawyer may be legally entitled to use the transmitted materials, the Committee opined that a lawyer receiving such privileged or confidential materials [where the sender had no authority to transmit them] satisfies his or her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed; (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents; (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. ABA 382 (1994). *See also* N.Y. City No. 1989-1 (unethical for lawyer to use intercepted communications unless lawyer discloses his possession of the documents and returns them to adversary).

Because it is beyond the Committee's jurisdiction to opine on questions of law, we express no opinion on whether the information regarding the altered documents loses its confidential status under the so-called "crime-fraud" exception to the attorney-client privilege. *See United States v. Zolin*, 491 U.S. 554, 563 (1989) (crime-fraud exception to the attorney-client privilege assures "that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime") (citations omitted). "The test for invoking the crime-fraud exception to the attorney-client privilege is whether there is 'reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme.'" *United States v. Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996) *cert. denied,* 117 S. Ct. 1429 (1997) (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996)). Because the government attorney has no information regarding the communications (if any) between the law firm and the respondent on the subject of the altered documents, the attorney is in no position to determine whether there exists a "causal connection" or "functional relationship" between the advice given and the illegal action taken. *See United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). Accordingly, the attorney is not in a position to determine the applicability of the crime-fraud exception. As suggested below, the attorney is free to seek judicial review of the apparently confidential information received from the former employee to attempt to determine whether the information falls within the crime-fraud exception. If it does, or if the information is otherwise required to be disclosed to a tribunal, then the inquirer might no longer be bound by the important concerns underlying the confidentiality rule embodied in DR 4-101.

Administration of Justice

Unlike the facts in ABA 382, the attorney here has received information that suggests possible criminal activity or fraud in which opposing counsel may be assisting. There are no documents that can be returned to opposing counsel, and the attorney's duties to the tribunal may require disclosure. *See* DR 7-102 (B)(2) ("A lawyer who receives information clearly establishing that … [a] person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal"). There is little question here that the information conveyed to the attorney by the former employee of the respondent's law firm, if true, would constitute fraud that must be revealed to the tribunal under DR 7-102(B)(2). In such circumstances, we believe it would be appropriate for the attorney, on notice to opposing counsel, to notify the hearing officer presiding over the proceeding of the allegation. Such a course will satisfy the attorney's possible ethical duties under DR 7-102 (B)(2) and will also allow the tribunal to address the legal issues (such as applicability of crime-fraud exception, and whether the actions of the former employee constitute a civil or criminal wrong) affecting the receiving lawyer's ability to use the communication and any evidence derived therefrom. *See Fayemi v. Hambrecht & Quist, Inc.,* 174 F.R.D. 319 (S.D.N.Y. 1997) (court has authority to limit the use of evidence because of the manner in which the information was obtained outside the litigation process). The communication to the hearing tribunal regarding the allegedly altered documents should not be made on an *ex parte* basis, as DR 7-110(B) of the Code generally prohibits communications "as to the merits of the cause with a judge or an official before whom the [adversary] proceeding is pending." *See also* EC 7-35 ("[o]rdinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel").

The inquirer may, however, bring the allegation of document alteration to the attention of another court or other appropriate authority (such as a law enforcement agency or disciplinary authority) on an *ex parte* basis if the attorney reasonably concludes that it would not be appropriate to notify opposing counsel in the first instance. *See* for example, DR 1-103(A) (duty to report in certain circumstances another lawyer's violation of DR 1-102 to a tribunal or other authority empowered to investigate or act upon the violation).

CONCLUSION

A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Where the information communicated involves alleged criminal or fraudulent conduct in which opposing counsel may be assisting, the receiving lawyer should communicate with a tribunal or other appropriate authority to get further direction as to the use of the information.
