

New York State Bar Association

Committee on Professional Ethics

Opinion 781 – 12/8/04

Topic: Matrimonial lawyer's duty upon discovery that financial statement filed with family court contained material errors due to fraud by client.

Digest: A matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court contains a material omission, and that the client perpetrated a fraud on the tribunal, must call upon the client to rectify the material omission. If the client refuses, the lawyer must withdraw the financial statement. If the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule, the lawyer must withdraw from the representation, with the court's permission if required under its rules.

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

QUESTION

A matrimonial lawyer, in order to submit a financial statement on behalf of a client, certified the accuracy of the statement to family court.¹ After filing the statement,

¹ See 22 NYCRR §202.16(e) ("Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1[A] of this Title"); see also 22 NYCRR §130-1.1A(b) ("By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of this Subpart"). 22 NYCRR §130-1.1(c) states that:

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

the lawyer learns that it contains a material error relating to the omission of substantial client assets. Is the lawyer required to withdraw the financial statement?

OPINION

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.

Therefore, the lawyer must first determine if he or she received information "clearly establishing" that the client has committed a fraud. "Fraud" under the Code "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." Code, Definition 9. If the lawyer is uncertain of the client's state of mind in making this determination, EC 7-6 states that the lawyer should "resolve reasonable doubts in favor of the client."²

If the lawyer has information clearly establishing the client's fraud, then the lawyer must call upon the client to rectify the same, and if the client refuses, the lawyer must "reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret." DR 7-102(B)(1). As we stated in N.Y. State 674 (1995):

In order to balance the attorney's dual duties to preserve confidences and reveal frauds, we interpret the phrase "confidences and secrets" in DR 7-102(B) to mean those confidences and secrets that must be preserved by

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

² See also *Attorney Grievance Commission v. Rohrback*, 323 Md. 79, 93-100 (Ct. of Ap. Md. 1991) (discussion of what constitutes client fraud under Maryland ethics rules).

DR 4-101. In a case 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).³

Although a lawyer is generally prohibited from disclosing a client's confidence or secret,⁴ DR 4-101(C)(5) permits disclosure to the extent implicit in withdrawing the financial statement because the statement is still being relied upon by the court⁵ and because the lawyer certified the accuracy of the statement in submitting it to the court.⁶ In short, permissive disclosure under DR 4-101(C)(5) mandates disclosure under DR 7-102(B)(1).

Therefore, the lawyer is required to withdraw the financial statement, and is required to reveal confidences or secrets to the extent implicit in such withdrawal.

In addition, the lawyer *may* withdraw from the representation if (i) withdrawal can be accomplished without material adverse effect on the client's interests, or (ii) the client persists in involving the lawyer's services in conduct the lawyer reasonably believes is criminal or fraudulent, insists that the lawyer engage in illegal conduct or conduct that violates the Disciplinary Rules, or has used the lawyer's services to perpetrate a crime or fraud. DR 2-110(C)(1)(b, c and g). The lawyer *must* withdraw from the representation⁷ if the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule. DR 2-110(B)(2).

³ Emphasis added. In N.Y. State 674, this Committee concluded that the false testimony provided by a corporate officer in the first day of testimony before a tribunal did not constitute an ongoing crime such that the lawyer would be permitted to disclose the perjury to the tribunal under DR 4-101(C).

⁴ DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as "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."

⁵ DR 4-101(C)(5) permits disclosure of confidences or secrets "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."

⁶ In Nassau County 2003-1, a lawyer learned that his client had misrepresented indigence in order to obtain the lawyer's representation through an indigent lawyer program. The committee concluded that, although the lawyer must call upon the client to "rectify the fraud" and, failing that, to seek to withdraw from the representation, that the fact of the misrepresentation could not be disclosed to the court because the information was protected as a secret. In that case, the lawyer had no role in submitting the fraudulent financial statement that suggested that the client was indigent, whereas here the representation had been certified by the lawyer. See DR 4-101(C)(5); see also N.Y. City 2002-1 (DR 4-101(C)(3) crime exception to confidentiality does not apply if crime is completed or upon "mere suspicion" that client intends to commit a future crime); N.Y. City 1994-8 (even if the lawyer has information clearly establishing that the client has perpetrated a fraud, the information is protected as a secret); *Rohrback*, *supra* n.2, at 93-100 (discussion of what constitutes attorney's assistance in client fraud under Maryland ethical rules).

⁷ With the court's permission if required under its rules.

CONCLUSION

The lawyer is required to withdraw the erroneous financial statement.

(18-04)