

NEW HAMPSHIRE BAR ASSOCIATION

Obligations of Attorney to Report Possible Welfare Fraud

Ethics Committee Formal Opinion
10/12/82

FACTS:

At a contested support hearing in a divorce action, the husband testified that he was unemployed but in the process of building a house for his mother who was paying all of the construction costs. The wife receives public assistance, but the amount of such assistance which she receives from the State is reduced by the amount of support received from her husband. After the hearing, the wife admitted to her attorney that, in fact, the house belonged to her husband and that he had transferred it and other assets to his mother so as to reduce his liability to pay support.

The wife's attorney believes that if the Court knew that the husband owned the house and other assets, the Court order for support payments would have been higher. The wife refuses to divulge any information concerning the concealed assets to either the Court or the State Division of Welfare because she wants to protect her child's future interests in the assets. We have been asked what duty the wife's attorney has to disclose the information concerning the concealed assets to the Division of Welfare.

RESPONSE:

An attorney has the duty to preserve the confidences and secrets of his clients. Canon 4; DR 4-101 (B). An attorney may reveal such confidences and secrets, however, "when permitted by the Disciplinary Rules or required by law or court order." DR 4-101 (C)(2). Under DR 4-101 (C)(3), an attorney may reveal his client's intention "to commit a crime and the information necessary to prevent the crime."

"A lawyer should represent a client zealously within the bounds of the law." Canon 7. However, DR 7-102 (B) provides that:

A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the

affected person or tribunal (except when the information is protected as a privileged communication).

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. (The present A.B.A. Code of Professional Responsibility includes the exception shown in parentheses above. The Ethics Committee has recommended adoption of the language in parentheses in New Hampshire.)

"The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information...given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B)." A.B.A. Formal Opinion 341 (1975); A.B.A. Formal Opinion 287 (1953). The wife's confirmation of the husband's failure to disclose assets was a confidential communication to her attorney. Even if the information provided to the attorney "clearly established" a "fraud" upon the court or other person, the duty of the attorney to preserve the confidential nature of this communication supercedes the attorney's obligation to reveal the husband's failure to disclose assets to the court or any person under DR 7-102(B)(1) or (2). A.B.A. Informal Opinion 1416 (1978); A.B.A. Formal Opinion 341 (1975). If the wife was a party to the "fraud" and will not voluntarily reveal the failure to disclose assets, her attorney must withdraw from further employment. A.B.A. Informal Opinion 1314 (1975); A.B.A. Informal Decision C-778 (1964). If the wife's actions constitute a future crime under RSA 167:17-c or any other law, her attorney additionally would be entitled, though not required, to disclose that fact to the appropriate authorities under DR 4-101 (C)(3) if the wife refuses to do so herself. A.B.A. Formal Opinion 287 (1953); A.B.A. Formal Opinions 155 and 156 (1936); A.B.A. Informal Opinion 1141 (1970); A.B.A. Formal Opinion 23 (1930).