

Duty To Correct False Statement

In N.Y. State Opinion 781, December 8, 2004, the NYSBA Committee on Professional Ethics considered the responsibility of a lawyer who has certified the accuracy of a financial statement submitted to the family court and who later finds that the statement contains a material error in omitting substantial client assets.

The Committee cited DR 7102 (B) (1) of the New York Code:

A lawyer who receives information clearly establishing that: ... (1) 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.

The first question for the lawyer who suspects a client's fraud is to determine whether there is evidence "clearly establishing the fraud." Under the New York Code, fraud requires "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." 22 NYCRR 1200.1(i), *Definitions*. Unless it satisfies this definition, conduct characterized as fraudulent by statute or administrative rule is not included.

If the lawyer is not certain that the client's state of mind exhibited intent to deceive, he should "resolve reasonable doubts in favor of the client." EC 76. If the lawyer is satisfied that the evidence clearly establishes fraud, he must call upon the client to rectify the fraud. 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 7102 (B) (1), *supra*.)

This exception in DR 7102(B)(1) requires a balancing of interests: 1) protect the integrity of the proceeding by revealing the client's fraud to the court; or 2) preserve the client's confidence and withhold the evidence of fraud. The Committee quoted an earlier opinion (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 7102 (B) to mean those confidences and secrets that must be preserved by DR 4101. In a case where the lawyer is permitted to reveal a confidence or secret under DR 4101(C), disclosure of the fraud is mandatory under DR 7102 (B).

Under DR 4101(C)(5), a lawyer is permitted to reveal a confidence

...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.

Whenever the facts come within DR 4101(C)(5), disclosure becomes mandatory under DR 7102(B) “because the statement is still being relied upon by the court and because the lawyer certified the accuracy of the statement in submitting it to the court.” The Opinion states:

In short, permissive disclosure under DR 4101(C)(5) mandates disclosure under DR 7102(B)(1).

How does the client’s fraud affect the lawyer’s right to withdraw? A lawyer may withdraw if 1) withdrawal can be accomplished without material adverse effect on the client’s interests, or 2) if 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 in conduct violating the Disciplinary Rules, or has used the lawyer’s services to perpetrate a crime or fraud. (DR 2110 (C)(1)(b, c and g) – Permissive Withdrawal.) The lawyer must withdraw if the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule. (DR 2110(B)(2) – Mandatory Withdrawal.)