

Lawyer's Duty To Disclose Client's Fraud In Litigation

BY LAZAR EMANUEL

Facts: While represented by Lawyer 1 in a bitter divorce action, Client signed a Net Worth Statement. Lawyer 2 was substituted for Lawyer 1 and proceeded to respond to several motions by Client's wife challenging the truth of the Net Worth Statement. Wife alleged that Client was hiding cash from his business. In response to a *pendente lite* motion, Lawyer 2 certified that he had no knowledge of any facts contradicting the Net Worth Statement. In the absence of any extrinsic facts to the contrary, the Court found that Client was not hiding any assets. The action was settled under terms which did not refer to any hidden assets.

Following the divorce, Lawyer 2 and Client entered into a joint venture which anticipated that both would contribute capital. Client revealed to Lawyer 2 that his capital would come from cash assets which he had hidden from his wife and which he had not disclosed to Lawyer 2. The joint venture was subsequently dissolved by Lawyer 2 on other grounds.

Query: Does Lawyer 2 have any obligation to report to the court or to Client's wife that Client has admitted hiding cash assets during the divorce action?

Those facts and that question were recently considered by the Committee on Professional Ethics of the Nassau County Bar Association in Opinion 01-8.

The Committee analyzed the interlocking effect of several Disciplinary Rules. DR 1-102(A)(5), one of the provisions defining lawyer misconduct, prohibits a lawyer from engaging in conduct that is prejudicial to the conduct of justice. This has been called "one of the broadest subparagraphs in the rule. It covers any kind of conduct that makes it more difficult for the justice system to work, or that undermines public confidence in the justice system." *Simon's New York Code of Professional Responsibility Annotated*, p.30, 2002 Edition. EC 8-5 characterizes fraudulent or deceptive conduct before a court as "inconsistent with the fair administration of justice."

Requiring Client To Rectify His Fraud

DR 7-102(B) requires a lawyer who receives information that clearly establishes that his client has "defrauded a person or tribunal" in the course of the representation to call upon the client to rectify "the same." If the client refuses or is unable to do so, the lawyer must reveal the fraud to the affected person or tribunal "except when the information is protected as a confidence or secret."

Construing these rules, the Nassau Committee assumed for its analysis that the filing of a false Net Worth Statement by Lawyer 1 and the certification of false statements by Lawyer 2 in connection with the *pendente lite* motion constituted a fraud on the court and on Client's wife. It therefore instructed Lawyer 2 to call upon Client to reveal his fraud to his ex-wife and to the court and to explain to Client the consequences of his refusal. If Client refused, Lawyer 2 was under a duty to inquire whether Client's disclosures to him fell within the "confidence" or "secret" exceptions of DR 7-102(B).

In determining whether Client's disclosures to Lawyer 2 were a "confidence" or a "secret," the Committee construed DR 4-101(A). This Rule defines both terms as follows:

"Confidence" refers to information protected under the attorney-client privilege under applicable law, and "secret" refers to 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."

The Committee concluded that the disclosures did not constitute a "secret" because they were made after the litigation was concluded and the attorney-client relationship had come to an end. Therefore, they were not "gained in the professional relationship"; instead, they were gained in a post-representation business relationship in which Client and Lawyer 2 were joint venturers.

The Committee was unable to determine whether the disclosures constituted a "confidence." Relying on CPLR §4503, which codifies the New York law on attorney-client privilege, the Committee concluded that the question was a mixed question of law and fact beyond its competence. It nevertheless referred Lawyer 2 to a prior opinion in which it had questioned whether "information conveyed to an attorney acting in a business capacity and not as the client's attorney may, in fact, not be privileged."

In any event, Lawyer 2 was obligated to withdraw the certification which he himself had submitted to the court in connection with the wife's *pendente lite* motion. This obligation existed whether or not Client's disclosures were a confidence or a secret.

Rules Require Lawyer To Withdraw

Certification In analyzing Lawyer 2's duty to withdraw his certification, the Committee considered both DR 4-101(C)(5) and DR 1-102(A)(5). DR 4-101(C)(5) entitles a lawyer to withdraw when he discovers that an opinion or representation previously given by him "was based on materially inaccurate information or is being used to further a crime or fraud" even though implicit in his withdrawal may be the revelation of a client's confidences or secrets. DR 1-102(A)(5), supported by EC 8-5, *supra*, on the other hand, expressly requires the lawyer's withdrawal when he discovers his client's fraud before the court. The effect of both Rules in this case was to require that Lawyer 2 withdraw his certification.

Further, if the court subsequently issues an order requiring Lawyer 2 to disclose Client's admissions to him, Lawyer 2 must comply.

Finally, if Lawyer 2 has information which "clearly establishes" that Lawyer 1, as well as Client, perpetrated a fraud upon the court in connection with the Net Worth Statement, Lawyer 2 is obligated to report the information to the court under DR 7-102(B)(2). ("A lawyer who receives information clearly establishing that... (2.) A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.")

[Editor's note: The Committee did not cite DR 1-103(A), which requires a lawyer to report his knowledge of another lawyer's misconduct under DR 1-102 that raises a substantial question as to that lawyer's "honesty, trustworthiness or fitness as a lawyer."]