



ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 3.4(e). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 84-2
October 24, 1984

Topic: Disclosure to Court of Information Obtained in Client Communication

Digest: It is improper for an attorney to attempt to influence a court by revealing information disclosed to him in a privileged communication and which is inadmissible as evidence.

Ref.: Rule 4-101; Rule 7-102(b) (1); Rule 7-106(c)
ABA Informal Opinion No. 869; Opinions 216, 268, 287;
ISBA Opinions 533, 564

FACTS

Smith, a defendant in a criminal forgery trial, subpoenaed a witness who was in custody serving a sentence for another unrelated crime. The case was to be heard by the judge in a bench trial. The witness was represented by the public defender who advised the Court that the witness would take the Fifth Amendment if called to testify. The public defender then advised the Court:

"...I feel ethically bound to tell the Court that I have information, and again the Canon of Ethics does not allow me to reveal where I got this information, but I feel bound to tell the Court that I have information that this man, this defendant here, is not guilty of this charge, and I want the Court to be aware of that."

The public defender did not reveal what his information was or its source. He also informed the Court that there was absolutely no way the court could consider this information as evidence in the trial. He then stated that it was not his purpose to influence the judge, but rather appeared to ask the Court to consider the matter in sentencing.

The Court found Smith guilty, holding that "...the evidence of his guilt is overwhelming."

QUESTION

What is the ethical obligation of an attorney whose client-witness will assert the 5th Amendment, but who believes he has learned in privileged communications that the defendant in the proceeding is innocent?

OPINION

In this case, the public defender had ethical obligations to both his client and the court. As to his client, the lawyer had a duty to maintain the confidence disclosed to him. DR 4-101 provides that:

"A lawyer shall not knowingly, ... (1) reveal a confidence or secret of his client; or ... (3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." (Emphasis added)

The attorney's ethical obligation to guard his client's secrets is broader than the limits of the attorney/client privilege. People v. Curry, 1 Ill. App.3d 87, 272 N.E. 2d 669 (1971); Skokie Gold Standard Liquors v. Joseph E. Seagram & Sons, 116 Ill. App.3d 1043, 452 N.E.2d 804 (1983).

Because the public defender believed his client had information proving the defendant's innocence, DR 4-101 should be read with DR 7-102(b)(1) which 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." (Emphasis added)

The committee commentary following Rule 7 states that the Code attempts to accommodate the conflicting duties to preserve the confidences of the client and to reveal a fraud on the court. However, the scope of the attorney's duty to disclose in order to prevent a fraud is limited by the ambient of the privilege.

The ABA and ISBA opinions which have addressed the issue of whether an attorney may reveal a client's confidence to a court generally conclude that preservation of the confidence is the superior

obligation. In ABA Informal Opinion No. 869, the attorney for a plaintiff in a divorce action was held not obligated to advise the court of his client's admission that she had become pregnant by a man other than her husband. The opinion suggests that the lawyer advise his client that adultery constitutes a defense and that she must be truthful if questioned under oath or must assert her right not to incriminate herself.

Similarly, ABA Opinion No. 268 holds that a lawyer consulted by a non-resident in a divorce who learns from his client that she did not have bona fide resident in the jurisdiction could not reveal that fact either to the court or to his successor retained by the client. The opinion states:

"While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences.

See also, ABA Opinion Nos. 287 and 216.

The ISBA Opinions agree with those of the ABA. ISBA Opinion No. 533 holds that it would be improper for a public defender to report to the court or prosecutor information which comes to his attention indicating that the client has filed a false financial affidavit. If the client refuses to reveal the additional assets voluntarily, the public defender should move to withdraw. Similarly, ISBA Opinion No. 564 holds that an attorney cannot reveal a client's prior fraud or perjury.

The public defender in this situation clearly breached his obligation to keep his client's confidence. Moreover, there was no danger that the client would perpetrate a fraud on the court. Having taken the fifth amendment, the client would not have testified at all and therefore would not have misinformed the court.

Of perhaps equal importance is the public defender's breach of his duty to the court. DR 7-106(c) provides:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

* * *

(4) assert his personal opinion as to the justness of a cause, as to the creditability of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused..."

By his own admission, the public defender could not present admissible evidence to the court

concerning the defendant's innocence. His statement was an attempt to influence the court with nothing more than opinion and thus violated Rule 7-106(c)(4). His statement was thus an interference with the judicial fact finding process which, in fairness to all litigants and to preserve its own integrity, must rely on evidence, and not opinion. The public defender, while perhaps feeling bound by his "conscience," overstepped his ethical duty to his client and the court. Indeed, in this situation, there was no inconsistency between those two obligations since his client had elected not to testify. The public defender's sense of "conscience" should not have taken precedence over his ethical obligations.

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