Utah Ethics Opinions

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62. USB EAOC Opinion No. 62

Utah State Bar

Ethics Advisory Opinion No. 62

Approved April 12, 1979

Summary: An attorney may not reveal confidences and secrets gained in the course of professional employment when the attorney is subpoenaed to appear and testify regarding criminal charges against a client unless the information gained clearly indicates fraud.

Facts: The Committee has been asked to assume the following facts: Attorney "A" is licensed to practice law in the State of "X". "A" then comes to Utah to study for the bar exam and to become admitted to practice law in Utah. "A" obtains employment as a law clerk for the in-house counsel of Corporation "G". During the course of this employment, "A" is subsequently directed to become more knowledgeable with the operations of "G". "A" then sits in on many business meetings and is also instructed to deal directly with customers of the corporation concerning corporate business. "A" then passes the bar exam and is admitted to practice in Utah and ceases employment with "G" shortly thereafter. "G" and its officers, directors and employees become the subject of a criminal investigation. "A" is served with a subpoena duces tecum to appear before prosecutorial authorities of the Utah. "A" is directed by the corporation, its officers, directors and their lawyer to refuse to speak to the authorities claiming the attorney-client privilege of the corporation and its officers, and that any information and knowledge possessed by "A" is a secret of the corporation and must not be revealed.

The following questions arise out of the aforestated facts:

1. May "A" discuss with and make public to the prosecuting authorities the affairs and workings of the corporation and its officers, directors, employees that "A" knows of and learned during the course of employment.

2. If "A" can discuss such matters what limits are there, if any, with regard to what matters can be discussed; and with regard to establishing those limits of discussion, who is required to state facts sufficient to establish the limits and who should make the decision.

3. Assuming the above facts, and in addition thereto, attorney "A" is charged with the felony arising from the employment by "G" along with its officers, directors, and certain employees. May "A" then fully discuss and make public to the prosecutorial authorities or others, "A's" knowledge as to the affairs and workings of the corporation and the performance of "A's" duties.

4. If "A" can, at this point, discuss and make public the above matters, what limits are there, if any with regard to what matters can be discussed; and with regard to establishing those limits of discussion, who is required to state the facts sufficient to establish the limits and who should make the decision.

5. Assuming the above facts, and in addition thereto, the criminal charges are dismissed as against "A" and "A" has not disclosed any information that "A" learned during the employment at "G", may "A" then fully discuss and make public to the prosecutorial authorities or others "A"s" knowledge as to the affairs and workings of the corporation and the performance of "A's" duties.

6. If "A" can, at this point, discuss and make public the above matters, what limits are there, if any, with regard to what matters can be discussed; and with regard to establishing those limits of discussion, who is required to state the facts sufficient to establish the limits and who should make the decision.

7. In the above factual setting, would "secrets" encompass all knowledge gained by "A" in employment at "G" including those times when "A" was engaged in furthering the corporate business.

Opinion: Portions of both Canon 4 and, Canon 7 are applicable to, the facts and questions presented herein. Canon 4, DR 4-101, relating to the preservation of confidences and secrets of a client, provides as follows:

"(A) "Confidences" refers to information protected by the attorney-client privilege under applicable law and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C) a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the advantage of the client.

(3) Use of a confidence or secret of his client for the advantage of himself or of a third person, unless the client

consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or, to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall not exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

Canon 7, DR 7-102(B)(1) provides guidance that is in some conflict with the foregoing provisions of Canon 4, as follows: "A lawyer who receives information clearly, establishing that: . . 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 persons or tribunal."

ABA Formal Opinion 341 (1975) discussed the apparent conflict between DR 7-102(B) (I) and DR 4-101(C). The Committee referred to an earlier opinion under the former Canons, Formal Opinion 287, rendered in 1953. Under the then existing Canons, a lawyer was bound to "preserve his clients confidences," but also required to reveal perjury. Additionally, a lawyer was under the duty to reveal, under some circumstances "fraud or deception." In the facts in the earlier matter, a client had committed perjury during a divorce trial. Approximately three months after the trial, the client revealed to his lawyer the existence of the perjury. The Committee in that opinion held that the duty to preserve the confidences of the client prevailed. They stated that the lawyer should not disclose the facts to the court or to the authorities. In 1974 Canon 7 was amended to include the present DR 7-102(B)(1). The Committee in its 1975 opinion, stated as follows:

"It was as unthinkable then as now that a lawyer shall be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client and the lawyer in that untenable position. The lawyer no longer can be confronted with the necessity of either breaching his client's privilege at law or breaking a disciplinary rule . . . [A lawyer who breaches his fiduciary duty to his client be revealing confidences protected by the attorney-client privilege may be liable to the client in tort. He may also be guilty of a crime in some jurisdictions .3 . . . However, it is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation."

The Committee further noted that in order for the requirements of DR 7-102(B) to apply,, the information must have been received "in the course of representation," must "clearly establish" fraud, and must not be information "protected as privileged communication." Thus, the Committee determined that revelation of client confidences without full consent of the client, would be appropriate only in exceptional circumstances. The policy behind the attorney-client privilege was held to be paramount.

The interplay between the two disciplinary rules was further considered, the Committee stating that the duty under DR 7-102(B),

"would remain in force if the information clearly establishing a fraud on a person or tribunal and by a client in the course of representation were obtained by the lawyer from a third party (but not in connection with his professional relationship with the client), because it would not be a confidence or secret of a client entitled to confidentiality. DR 4-102(C) sets out severe circumstances under which revelation of a secret or confidence is permissible, and thus in areas where these exceptions apply. DR 7-102(B) may make the optional disclosure on information under OR 4-101 a mandatory one. For example, when disclosure is required by law, the privileged communication exception of DR 7-102(B) is not applicable and disclosure may be required.

The Committee also acknowledged that the scope of the lawyer-client privilege varies in different jurisdictions. They found that it was unreasonable to ask a lawyer to determine if the information received "clearly" establishes fraud or to determine the relevant rule of the attorney-client privilege. These considerations are matters of law, which ought to be determined within the judicial system.

In ABA Informal Opinion 1349 (1975), house counsel for a corporation had learned of acts of bribery by corporate officials and employees wherein they had attempted to bribe employees of the United States Government. me lawyer, also knew of continuing activities concerning bribery. In that decision, the Committee determined that generally a corporate lawyer could not reveal past defalcations of a client, but could reveal confidences when required to by law or court order. The Committee stated,

"We cannot pass upon questions of law and we do not

decide whether local criminal law makes it unlawful for S [the involved attorney] to fail to reveal the information to proper authorities. If disclosure is required by such, S may, but is not required under DR 4-101(C)(2) to make disclosure."

The meaning of the term "in the course of representation" was discussed to some extent in Formal Opinion 216 (1941). The attorney in that situation had given advice to a friend in an informal situation. There was no payment received for the advice, and no further contact regarding the same. The contact between the attorney and the friend disclosed information concerning a proposed fraudulent and collusive divorce action. The Committee found as follows:

"The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal advisor . . . . The privilege applies to communications made in seeking legal advice for any purpose . . . . The mere circumstance that the advice is given without charge therefor does not nullify the privilege."

Therefore, the Committee found that the failure to disclose the information was unethical.

Henry S. Drinker, in his treatise, Legal Ethics, (1953), addresses some problems in this area not specifically considered in the above opinions. Drinker notes that the duty to preserve client confidences where the information was obtained by the lawyer in a capacity other than legal advisor. "Communication must be regarded as confidential where it possibly is so, although it is not entirely clear that the relation exists. The mere fact that advice is given without charge therefor does not nullify the privilege, nor does the fact that the lawyer does not take the case."

The rule applies, according to Drinker, only where the communications by the client were made under circumstances clearly indicating that they were intended to be confidential. Thus, the rule does not apply, "where the communication was made in the presence of other parties to the case, nor where it was not made to the lawyer in the capacity of the legal advisor." Drinker also notes "the lawyer may make such disclosures as are necessary to protect himself against false accusations, or to protect his rights, including reasonable compensation, but may not in order to avoid being sent to jail by the judge." Also, "before making a permissible disclosure, he should, if possible, notify his client of his intention to do so and give him reasonable opportunity himself to disclose the information or to show that the lawyer's information is incorrect or irrelevant."

Addressing now the facts presented herein, the initial question appears to be whether or not the attorney is bound by Canon 4 regarding information gained prior to being admitted to practice in Utah and while acting as a law clerk under direction of in-house counsel. An affirmative answer to this question seems clear, from the provisions of DR 4-101(D), providing that employees, associates, and others utilized by the licensed attorney are to fall under the same interdiction. This would be particularly true in the case of an employee who subsequently became licensed to practice law in Utah, now having a duty to generally uphold the Canons, including doing nothing to vitiate the duty of a former supervising attorney, the in-house counsel, to maintain client confidences.

In regard to question (1) and (2) addressed to the Committee, the ABA Opinions and the Canons indicate that "A" may not reveal confidences and secrets gained in the course of professional employment unless the information gained "clearly" indicates fraud. Of course, the difficult part of this advice, is the determination of what information was gained within the scope of the professional employment and what facts, in any, "clearly" establish fraud. The opinions indicate, that where there is doubt as to the scope of the professional employment, i.e., the giving of professional legal advice or services, any doubt should be resolved in favor of expansion of the privilege, thus limiting disclosure. A similar bias in favor of preserving client confidences, applies to a determination of acts which might constitute fraud. It appears to the Committee, that under these circumstances, no information should be revealed by the attorney without an express order of the court involving a legal interpretation of the applicable rule of law regarding attorney-client privilege, as contained in Rule 26 of the Utah Rules of Evidence. Under DR 4-101(C)(2), the lawyer is free from disciplinary censure by the bar when revealing client information pursuant to a court order.

Question (3) arises from the charging of the attorney with a felony, arising from the employment by "G". DR 4-101(C)(4) allows an attorney to reveal confidences or secrets "necessary to . . . defend himself, his employees or associates against an accusation of wrongful conduct." However, the information revealed at this point, should be limited solely to that necessary to defend lawyer "A" against the felony charges. Determination of the exact parameters of the information which can be revealed, again, should be determined by the court in order to bring the attorney under the protection of DR 4-101(C)(2) and to protect the attorney from suit by the client for breach of the law regarding attorney-client privileges.

The answer to questions (5) and (6) are similar. If "A" is absolved of any criminal wrongdoing, the information which may be revealed by "A" should be limited as under the answers to questions (1) and (2). In this situation information to be revealed would be restricted to that not legally protected by the attorney-client privilege, and would

not include secrets or confidences relating to defense of "A". Ethically, the lawyer could reveal information gained outside the professional legal advisor spectrum, but because of the apparent difficulty of drawing a line between the professional and non-professional relationship, it is suggested that the question of demarcation be submitted to the court.

Rule Cited:

Canon 7