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Ethical Responsibilities and Opinions

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 1986-7

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

December 19, 1986

ACTION: Formal Opinion

OPINION:

Until his recent discharge, Lawyer X was an attorney for the ABC Company ("ABC"). The principals of ABC have been indicted on conspiracy charges, and also for obstruction of justice by destroying incriminating documents during the investigation that culminated in the indictment. The prosecutor has advised Lawyer X that he is himself the subject of an ongoing grand jury investigation and that certain employees of ABC have provided information incriminating him.

Lawyer X is also an accountant, and a partner in the accounting firm retained by ABC. In his capacity as ABC's accountant, Lawyer X has produced accounting records pursuant to a grand jury subpoena and has been interviewed by the prosecutor. The prosecutor now wishes to interview Lawyer X in his capacity as ABC's attorney. This interview would concern conversations Lawyer X had with the principals of ABC about its legal obligations and about events that preceded the criminal investigation. The prosecutor has offered Lawyer X use immunity for any information disclosed in the requested interview, and has agreed to consider granting transactional immunity to Lawyer X following the interview.

Lawyer X asks (1) whether he may ethically disclose to the prosecutor his pre-investigation conversations with ABC principals and certain other conversations he had with his clients after the commencement of the investigation. According to Lawyer X, the conversations would tend both to exculpate him (by establishing his lack of prior knowledge of or participation in the crimes charged) and to incriminate the principals of ABC. Additionally, Lawyer X asks (2) whether the freedom to make such disclosure is

affected by the procedural posture of the matter (Lawyer X has not been indicted or served with a grand jury subpoena), and (3) whether he is obligated to disclose the fact or substance of the requested interview to ABC's principals either before or after it takes place. For the reasons set forth below, we answer the first and third inquiries in the affirmative (in each instance with an important qualification) and the second inquiry in the negative.

In addressing this inquiry, the Committee has proceeded on two assumptions. The first is that the information Lawyer X would disclose regarding ABC and its principals was imparted to him in his capacity as an attorney, and not as an accountant. The provisions of the Code of Professional Responsibility dealing with disclosure of confidential information apply only to individuals acting as attorneys. The second assumption is that the information Lawyer X proposes to disclose constitutes a "confidence" or "secret" within the meaning of DR 4-101(A) of the Code. DR 4-101(B) speaks, with certain exceptions, of a lawyer's duty to preserve, and his correlative obligation not to disclose, "confidences and secrets."

The information Lawyer X wishes to disclose to the prosecutor appears to have been gained in the course of his professional relationship with ABC, and Lawyer X acknowledges that disclosure of the information to the prosecutor would be detrimental to ABC's principals. In those circumstances, the information, whether or not protected by the attorney-client privilege, is subject to the strictures of Canon 4, and its implementing Disciplinary Rules and Ethical Considerations, regardless of the source of the information or whether it has been shared with others. DR 4-101(A); EC 4-4. These strictures are applicable even where the information is related to a client's alleged past commission of a crime. See N.Y. City 82-67 (1983); N.Y. State 479 (1978).

The duty to preserve client confidences and secrets is one of the most solemn and significant governing attorneys; it inheres in the fiduciary relationship between attorney and client and is essential to the proper functioning of the legal system. EC 4-1. As Lawyer X implicitly recognizes, this duty continues after the termination of a lawyer's employment. EC 4-6. Although disclosure by an attorney of a present or former client's confidences and secrets is generally proscribed, DR 4-101(B), a lawyer may reveal them if "necessary . . . to defend himself . . . against an accusation of wrongful conduct." DR 4-101(C)(4).

Assuming that DR 4-101(C)(4) confers a "right of self-defense," see *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 497 F.2d 1190, 1196 (2d Cir.), cert. denied, 419 U.S. 998 (1974), it is a right fraught with the potential for abuse and other dangers. An expansive interpretation of the Rule may encourage the joinder of attorneys as defendants in civil suits in order to obtain evidence otherwise unavailable, see *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171, 188 (N.D. Cal. 1977), and may encourage prosecutors to threaten attorneys with indictment in order to obtain such evidence. Moreover, such an interpretation may discourage clients from making full disclosure to their attorneys in the first place, and thereby frustrate one of the principal purposes of Canon 4 and its implementing Ethical Considerations and Disciplinary Rules. See generally American Bar Foundation, *Annotated Code of Professional Responsibility* 180-83 (1979). The issue is most difficult when, as here, the disclosures that will exculpate the attorney will, at the same time, incriminate his client or former client.

This Committee does not believe that a lawyer must resist disclosure until formally accused through the return of an indictment, the service of a summons and complaint or the institution of disciplinary charges. The cost and other burdens of defending against a formal charge and the damage it can inflict on a lawyer's reputation, even if ultimately resisted successfully, argue against such a restrictive interpretation of DR 4-101(C)(4). See *Application of Friend*, 411 F. Supp. 776, 777 n. (S.D.N.Y. 1975); see also *Michigan Op. CI-900* (1983). On the other hand, the values furthered by Canon 4 and the corresponding Disciplinary Rules and Ethical Considerations require more than a whisper or suspicion of wrongdoing before client confidences and secrets may be disclosed.

In the Committee's opinion, Lawyer X has been accused of wrongful conduct within the meaning of DR 4-101(C)(4) because, according to the prosecutor, statements tending to incriminate him have been made by certain ABC employees. We hold this opinion even though he has not yet been indicted, and the prosecutor has not yet stated an intention to seek such an indictment if the requested interview is not given

and exculpatory information not disclosed.

Accordingly, Lawyer X is free to disclose confidences and secrets of his former client to the prosecutor. We note, however, that it may not be "necessary" for Lawyer X to disclose all his conversations with the principals of ABC -- particularly the post-investigation conversations about which the prosecutor has not asked and of which he may be unaware -- in order to escape indictment. Caution should therefore be exercised to avoid violation of DR 4-101(C)(4) through excessive disclosure. Any such disclosure should be no more extensive than is "necessary" to establish the non-involvement of Lawyer X in the alleged conspiracy. See N.Y. City 79-63 (1980); Michigan Op. CI-569 (1980).

There is no explicit requirement under Canon 4 that a lawyer notify a present or former client of the lawyer's intention to disclose client confidences or secrets in order to defend himself against an accusation of wrongful conduct. Nevertheless, the Committee is of the opinion that a lawyer should notify the client of such intended disclosure unless there are compelling reasons under the circumstances for him not to do so. See Michigan Op. CI-900 (1983); Maine Op. 55 (1985).

Prior notification of intended disclosure of client confidences should not be required where (i) a lawyer reasonably believes that his client, if informed of the lawyer's intention to disclose confidences or secrets to a prosecutor, might take effective steps to continue or conceal the client's wrongdoing, see Michigan Op. CI-586 (1980) or (ii) a lawyer reasonably fears that such notification might result in bodily or other harm to the lawyer, to members of his family or to others. Neither of these circumstances, nor any other that might justify non-notification appears to be involved in the present inquiry.

A requirement of prior notification to the client is particularly appropriate in the circumstances posed by the present inquiry, for the duty to preserve client confidences and secrets is of greatest moment, and its breach likely to have the most adverse consequences, where (as here) the communications to be disclosed would incriminate the client.

Moreover, a requirement of prior notification to the client is supportable on practical, as well as principled, grounds. If the former clients, presumably after consulting with the attorney they have retained to defend them in the criminal proceeding, consent to the disclosures deemed by Lawyer X necessary to defend himself, he would be permitted under DR 4-101(C)(1) to make the disclosures. The consent would be effective, of course, only if Lawyer X had fully informed his former clients of his intended course of action and the circumstances prompting it.

Alternatively, or in addition, Lawyer X may wish to consider seeking a judicial ruling in limine, as in Application of Friend, *supra*, on the propriety of disclosure in these circumstances. A court presented with the facts (including submissions by the prosecutor, Lawyer X and the lawyer now representing ABC's principals), would be in a better position than either Lawyer X himself or this Committee to balance the probative value of the specific intended disclosures against the harm to ABC's principals resulting from those disclosures, and to consider as well the likelihood of harm to Lawyer X if the disclosures are not made. The submissions could be made in camera and the court requested to issue its order and any opinion under seal. A judicial determination might well resolve the ethical questions raised by Lawyer X. If the court were to direct disclosure, such an order would provide an independent ethical ground for revealing client confidences and secrets. DR 4-101(C)(2).

For the foregoing reasons, the Committee answers the first and third inquiries in the affirmative with qualifications stated above (acknowledging that an affirmative answer to the third inquiry is not mandated by any explicit provision of the Code) and answers the second inquiry in the negative.

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