NASSAU COUNTY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No.: 2003-1
(Inquiry No.): 698

Topics: Preservation of Confidences and Secrets; Effect of Statute Permitting Disclosure of Client's Financial Ineligibility for Assigned Counsel Program.

Digest: An attorney appointed by a tribunal to represent a criminal defendant under a publically funded Assigned Counsel Program based upon indigence, must not voluntarily reveal the client's financial misrepresentation to the tribunal since the information constitutes a confidence or secret. A statute which permits assigned counsel to disclose his or her client's financial misrepresentation to the tribunal for the purpose of terminating the legal representation or directing payment from the client does not vitiate the attorney's duty to preserve the confidences and secrets of a client. However, if the attorney receives information clearly establishing that the client has intentionally misrepresented his or her financial status to the court in order to obtain assigned counsel, the attorney must call upon the client to correct the misrepresentation. If the client fails to do so, the attorney should seek to withdraw from the representation, but may not reveal the client's misrepresentation unless ordered to do so by the court.

Code Provisions:
DR 4-101
DR 7-101 (A)
DR 7-102(B)
EC 4-1
EC 4-4
EC 4-5
EC 5-1

Facts Presented: Inquiring counsel administers a legislatively mandated and publically funded Ass Assigned Counsel Program for indigent defendants in criminal and family court matters. He seeks an opinion in that capacity on behalf of the participating attorneys in the program. The inquiry asks whenever it is ethically proper for an appointed attorney to disclose information acquired during the course of the representation that bears upon the client's financial ability to pay for all or a portion of t ; legal representation. County Law § 722-d permits counsel to report a client's apparent financial ability to pay for legal representation to the court, which may then terminate the assignment or order the client to pay for the

representation.

Article 18-B of Chapter 11 of the Consolidated Laws of New York obligates the county governments to assign and pay for legal counsel on behalf of indigent criminal defendants. This publically funded assigned counsel system is commonly referred to as the "18-B Program". The County of Nassau contracts with the Assigned Counsel Defender Plan, Inc., to administer the program and to provide a pool of participating attorneys for 18-B assignments. Criminal defendants qualify for 18-B assignments by meeting certain indigence criteria. Eligibility standards are uniform for all Nassau County Courts with requisite jurisdiction, and generally follow federal poverty guidelines based on income statistics published by the United States Department of Labor. Candidate screening was formerly performed by the Defense Counsel Screening Bureau, an agency of the Nassau County government. As part of the application process, candidates were formerly required to execute an affidavit demonstrating eligibility and containing the statement: "I understand that a false statement in this affidavit can result in my being charged with violating Penal Law § 210.45 for 'Making a punishable false written statement.'" However, the Defense Counsel Screening Bureau was recently abolished and indigence screening is now the responsibility of the presiding judge before whom the application is made. The current screening procedures vary from judge to judge. Typically, a criminal defendant or family court defendant who requests assigned counsel will be questioned by the Court to ascertain his or her financial resources and obligations. During this inquiry, the Court may or may not place the defendant under oath. In either case, the defendant makes affirmative representations to the court concerning his or her financial status for the purpose of determining an ability to afford legal representation.

Legal counsel is assigned from a panel of approved criminal and family law attorneys maintained by the Assigned Counsel Defender Plan. Panel attorneys sign a participatory agreement with the County of Nassau and are compensated directly by the County on the basis of a voucher submitted at the conclusion of the representation. Attorneys do not enter into a separate retainer agreement with the criminal or family law defendant. In some cases, the criminal or family law defendants are directed by the Court to pay a portion of the legal fees incurred. In those instances, the defendant pays his or her portion of the legal fee directly to assigned counsel.

The Administrator of the Assigned Counsel Defender Plan advises that on occasion an 18-B attorney may learn during the course of the representation that his or her client has adequate financial resources to pay for all or a portion of the customary legal fee. It is asserted that in such instances, County Law § 722-d authorizes counsel to report the

client's financial status to the court for the purposes of terminating the assignment or directing the client to pay all or a portion of the legal fee by his or her own resources. That statute provides:

> Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel **may** report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise. (Emphasis added.)

See also, *Matter of Legal Aid Society of Nassau County v. Samenga*, 39 A.D.2d 912, 333 N.Y.S.2d 729 (2d Dept. 1972)(defense assignment could be terminated for reasons of nonindigency only at the instance of counsel).

An earlier opinion by the New York State Bar Association Committee on Professional Ethics, N. Y. State 681 (1996) concluded that assigned counsel may not reveal a client's financial misrepresentation to the court in support of a motion to withdraw from the representation if the information was acquired as a confidence or secret. However, that opinion did not address the effect of County Law § 722-d. Therefore, this inquiry seeks an opinion as to whether it would be ethically proper for the attorney to make this disclosure to the Court in light of § 722-d.

Inquiry:

May a lawyer assigned by the court to represent an indigent criminal defendant under a publically funded Assigned Counsel Program ethically reveal his client's financial ability to pay for the representation in accordance with a statute permitting such voluntary disclosure?

Determination:

A lawyer who represents an ostensibly indigent defendant under a publically funded Assigned Counsel Program, who subsequently learns that the client has intentionally misrepresented his or her financial eligibility for the program, as mandated by DR 4-101 may not report the client's misrepresentation to the court for the purpose of terminating the assigned representation or to secure repayment of the fee to the program by the client. The attorney, however, pursuant to DR 7-102(b) must call upon the client to rectify a fraud upon the tribunal. If the client fails to do so the attorney should seek to withdraw from the representation, but may not reveal the client's misrepresentation unless ordered to do so by the court. An attorney must be mindful that he or she has a duty of undivided loyalty to the client which cannot be compromised no matter what the circumstances of the retention or the source of the attorney's fee. The attorney is also strictly prohibited from revealing any confidences or secrets of the client unless a court orders the attorney to make disclosure.

An attorney may not voluntarily use information about a client to the detriment of the client, even if disclosure is permitted (but not required) by statute.

The inquiry invokes two fundamental principles of conduct which elevate the attorney-client relationship above ordinary associations of a business or personal nature: the obligation to preserve the confidences and secrets of the client mandated by Canon 4 of the Code of Professional Responsibility, and the duty of undivided loyalty to the client which permeates the entirety of the Code.

In most circumstances, clients in a criminal or civil setting, lack the knowledge and ability to represent themselves. This is particularly so for the accused in criminal proceedings where the potential adverse consequences are great. An attorney appointed to represent a defendant is, therefore, entrusted to preserve the liberties of the client as zealously as if they were his or her own. If the attorney is to be a forceful advocate for the client's cause, the relationship should not be unduly or unnecessarily burdened with collateral obligations that compete with the attorney's allegiance to this client.

Analysis:

The 18-B program contemplates that the process of screening defendants for financial eligibility will be performed by the county or the court. The responsibility to police the qualification process is principally theirs. It would be inappropriate to place the assigned attorney in the conflicting role of representing the client and simultaneously act as an investigator for the Court to ascertain or monitor the client's eligibility for the program, for that would only serve to place a wedge between the attorney and the client. Legal representation is ineffective without open communication between the two. Fidelity is the universal currency for candor; and it is unreasonable to expect that a defendant will confide in an attorney (especially one who has been appointed rather than chosen) if the attorney may freely exercise a statutory privilege to betray the client's trust.

It needs little reminder that the attorney's duties of loyalty and confidentiality are an essential prerequisite to an adversarial system of justice. EC5-1 advises:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

EC 4-1 states further:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer. A client must feel free to discuss anything with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client.

In furtherance of these fiduciary obligations, DR 7-101(a)(3) mandates that the attorney may not prejudice the client during the course of the professional relationship absent certain discreet and circumscribed exceptions. Disclosure is permitted only in accordance with DR 7-102(b) which authorizes an attorney to disclose a client's fraud, but then only if the lawyer has received information clearly establishing that (1) the client has perpetrated a fraud on a person or tribunal; (2) the client refuses to rectify the fraud; and (3) the information about the fraud was not acquired as a confidence or a secret. The term, "fraud" is defined by the Code of Professional Responsibility to include the element of scienter, even if the intent to deceive is not a necessary element of the offense ostensibly perpetrated by the client. See, 22 N.Y.S.R.R. § 1200.1 (i). Thus the attorney must have received information clearly establishing the client's fraudulent intent. The circumstances by which a defendant within an assigned counsel program might misstate his or her financial resources so as to qualify for free legal representation are varied and errors might be the result of mistake, not fraud. Certainly an innocent misrepresentation does not threaten so serious an injustice as to warrant a forfeiture of the confidentiality that is so central to effective representation. Even if the client deliberately misled the court as to his or her financial eligibility for assigned counsel, it should not be the attorney's role to scrutinize the client's motives or to put the fiscal administration of the program above the constitutional right of the client to the effective assistance of counsel.

Moreover, the exception to DR 7-102(b) prohibiting the disclosure "when the information is protected as a confidence or secret" will in most circumstances consume the rule. DR 4-101 (A) defines a "confidence" as any information protected by the attorney-client privilege under applicable law; and "secret" as any 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. EC 4-4 counsels that the attorney's ethical obligation to preserve the confidences and secrets of a client is in fact broader than the attorney-client privilege. Unlike the evidentiary privilege the duty "exists without regard to the nature or source of the information or the fact that others share the knowledge". It is difficult to envision a

circumstance in which the attorney might acquire information about his or her client's financial misrepresentation that would not qualify as a confidence or secret.[1] Certainly to the extent that the client confides information to the attorney without any intent to commit fraud, the attorney-client privilege would attach. Furthermore, disclosure of client's errors would be "embarrassing" or "detrimental" to the client, and the client would surely want the information withheld from the court.

With that as the predicate, the nub of the problem that really underlies this inquiry is whether a permissive statute trumps a mandatory Disciplinary Rule that governs an attorney's conduct. The Committee is not aware of specific authority one way or the other that has determined whether it is the statute or rules of conduct codified by the Appellate Divisions that triumph in the face of a perceived conflict in wording and approach. In fact, assuming this was a question the Committee was empowered to answer, the Committee was seriously divided as to which is to take precedence. On the one hand, there were some who held to the view that in the absence of legislative history to the contrary, it is the statute which is specific to the issue (permitting an attorney to report financial ineligibility of a client) that should control, similar to where a procedural rule or regulation might conflict with the statute under which it was promulgated. In that event, County Law § 722-d would permit, but not mandate, disclosure to be made by the attorney. In contrast, the majority view that ultimately prevailed is that the Disciplinary Rules, which are, in fact, specific insofar as they govern the attorney's conduct in all representation, cannot be rendered meaningless and ineffectual by a permissive statute. In this regard, DR 4-101 (C) (2) provides that "[a] lawyer may reveal [c]onfidences or secrets when **permitted** under the Disciplinary Rules or **required** by law or court order", but otherwise DR 4-101 (B)(1) and (2) mandate that "a lawyer **shall** not knowingly [r]eveal a confidence or secret of the client", nor "[u]se a confidence or secret of a client to the disadvantage of the client."(emphasis added.) Here, there is no exception contained within the Disciplinary Rules that would authorize disclosure by the attorney[2], and since County Law § 722-d is permissive, disclosure of the confidence or secret concerning the client's financial eligibility is not required by law or court order. There being no recognized exception met under DR 4-1-1(C)(2), it is the view of the Committee that DR 4-1-1(B)(1) and (2), which mandates the preservation of secrets and confidences, must be followed. Support for this position may also be gleamed from *Matter of Serazio-Plant*, 299 A.D.2d 696, 750 N. Y. S.2d 347 (Third Dept. 2002), involving an attack by a lawyer on an arbitrator's award in a fee arbitration arising out of a matrimonial action, in which the Court found in a closely related question that Judiciary Law § 474 did not take precedence over the matrimonial rules (22 NYCRR Part 1400), by fairly reading the statute so as not to be in conflict with the rules. On balance, it is again the belief of the Committee that here also County Law

§ 722-d, as a permissive statute, should not be read so as to conflict with the Disciplinary Rules that mandate the attorney's silence in this circumstance. [3]

However, an attorney may not facilitate a client's efforts to perpetuate a fraud upon the tribunal. Therefore, under DR 7-102(B) (1) if the attorney receives information clearly establishing that the client has misrepresented his or her financial condition for the fraudulent purpose of securing the legal services of the 18-B program, the attorney must call upon the client to rectify the fraud upon the tribunal. If the client fails to do so, the attorney should seek to withdraw from the representation, but he or she may not reveal the client's misrepresentation unless ordered to do so by the Court. DR 4-101 (C) (attorney may reveal secrets if "required by ....court order"). If the disclosure is not ordered and the motion to withdraw is not successful, then the attorney at least will have taken those steps ethically necessary to fulfill his or her duties under the Code of Professional Responsibility.

[Approved by the Executive Committee on February 11, 2003; approved by the Full Committee, subject to Executive Committee editing, on February 26, 2003; Edited and approved by the Executive Committee on March 5, 2003]

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1. One perspective addressed before the Committee is that to reconcile the apparent conflict in authorities, County Law § 722-d should be read as implying that only if the information obtained by the attorney ("[w]henever it **appears** that the defendant is financially able") is not a confidence or secret, but is information from an outside source or the attorney's own observations, the attorney "may" then make disclosure under the permissive nature of the statute, without running afoul of DR 4-101. However, we do not believe this to be a viable interpretation. It is true that information learned from an outside source or from an attorney's own observation would not be protected by the attorney-client privilege, and would therefore not be a "confidence", but all information gained in the professional relationship is a "secret" if its disclosure would embarrass or harm the client, and may, therefore, not be disclosed absent an exception to DR 4-101.

2. We agree with the view expressed by the New York State Bar Association in N. Y. State 681 (1996) that whether disclosure is authorized by the exception in DR 4-101 (C) ("lawyer may reveal the intention of a client to commit a crime and the information necessary to prevent the crime") turns on whether the "fraud" constitutes a continuing or future crime, which is a legal determination beyond the purview of the

jurisdiction of this Committee.

3. The Committee recognizes that because this has generated such divergent views, and the issue of whether a statute or disciplinary rule trumps the other and whether the client's "fraud" constitutes a continuing crime, are ultimately questions of law that are beyond the purview of this Committee, the Administrator of the Assigned Counsel Program may want to explore the effectiveness of seeking a declaratory judgment from the Court.