

THE WEST VIRGINIA STATE BAR
COMMITTEE ON LEGAL ETHICS

UNPUBLISHED LEGAL ETHICS INQUIRY 78-15
October 2, 1978

Reference is made to your letter of September 5, 1978, requesting an opinion from the Committee concerning your ethical duties in the following factual situation:

An attorney, duly licensed to practice law within this state, was appointed to represent an indigent defendant upon an indictment charging a felony before the Circuit Court. Before trial, while the attorney was preparing the defense of the case, a third party verbally informed the attorney, outside the presence of the defendant, of that third party's intention to offer money to the complaining witness in return for the witness "changing" her story. The following day the third party verbally informed the attorney, again outside the presence of the defendant, that she had made such an offer to the witness but that the witness' husband wanted more money, and the third party wasn't sure she could "come up" with the additional money.

Approximately one week later, at a time when the attorney was no longer counsel of record for the defendant, the attorney was informed that the prosecuting witness had signed an affidavit substantially changing her previous testimony, and which new affidavit tended to exculpate the defendant. The attorney, without any disclosure being made, was allowed to withdraw as counsel for the defendant but continues to represent him in another matter.

In a telephone conversation with Committee Counsel, you indicated that the third party in question is your client's mother, but that you do not believe your client had any knowledge of his mother's actions nor did he influence her to pursue the course that she apparently did. Also, you posed an additional question concerning your continued representation of the same client in the completely unrelated criminal matter.

First, a determination must be made as to the exact nature of the information which has come to you. Disciplinary Rule 4-101(A) defines privileged information as follows:

"Confidence" 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 be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The information you have was neither communicated to you by your client nor by another while in his presence. You feel it is quite likely that your client had no knowledge of his mother's actions. We will assume that your client's mother is not a prospective witness for the defendant on the merits of the case. Thus, even though the third party is a close blood relation to your client, she has no connection with the felony case. Your client apparently had no part in his mother's wrongdoing and, therefore, your knowledge of his mother's suspected felonious acts is not privileged information in the ethical sense.

Further, since the information concerns the commission of criminal acts and the resultant perpetration of a fraud upon the court, you, as an officer of the court, cannot conceal it. Your duty in this regard is set forth in Disciplinary Rule 7-102(B) as follows:

A lawyer who receives information clearly establishing that:

. . .

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal except when the information is protected as a privileged communication.

Your obligation, then, is to forthwith advise the court of your information and of your belief in your client's lack of knowledge of his mother's actions. Once you have so informed the court, the question of the manner in which the State is so advised will be for the court's determination.

Concerning the continued representation of your client in an unrelated criminal case, consideration must be given to the following provisions of Disciplinary Rule 2-110(C).

Permissive Withdrawal. If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

. . .

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His client knowingly and freely assents to termination of his employment.

In this particular situation, your client apparently is not responsible for his mother's conduct, thus eliminating the requirement for mandatory withdrawal. However, you must consider and determine whether your revelation to the court has so impaired your attorney-client relationship with the defendant as to severely limit your ability to represent him in a professionally competent manner. You should consult with your client in this regard. If your informing the court of his mother's conduct has produced a situation where you will not have your client's cooperation in preparing and conducting his defense to the other charge, then you should take proper steps to withdraw. If you have been court-appointed in the case, perhaps an examination of your client by the presiding judge out of your presence would be desirable. In any event, since the matter is apparently before the court, the court will make the ultimate determination concerning your representation. Of course, if the attorney-client relationship has not been irreparably damaged, you can and should continue to represent your client in the other matter.