

THE WEST VIRGINIA STATE BAR
COMMITTEE ON LEGAL ETHICS

UNPUBLISHED LEGAL ETHICS INQUIRY 78-19
October 2, 1978

Reference is made to your letter of September 25, 1978, requesting an opinion of the Committee concerning your duties upon discovery that your clients have perpetrated a fraud upon an administrative tribunal. You state that your clients, husband and wife, came to you to represent them before the Social Security Administration to appeal an adverse determination concerning supplemental security income benefits for one of their children. You further state that they initially, and throughout your representation of them, maintained that their income was limited to approximately Six Hundred Dollars (\$600.00) per month and that they were receiving no additional income. You informed your clients on several occasions that your basis for requesting the reconsideration involved attempting to show that there was no material change in your clients' status concerning living quarters or income merely because they had moved from a single family dwelling occupied by themselves and families of three married children, to four mobile homes, one for each family, at another property. Essential to this proposition was your clients' representation that they were receiving no rental payments from the other families. You further state that one of your clients and an adult representative of each of the other families gave sworn testimony at the ex parte hearing consistent with the information previously given by your clients concerning their income. Five days after the hearing you received a telephone call from one of the witnesses stating that she had not testified truthfully at the hearing regarding the receipt of additional income by your clients, due to her knowledge of rental benefits paid by the West Virginia Housing Development Fund on behalf of the three families living in three of the mobile homes on your clients' property. She further stated that she was aware of these facts at the time she so testified, but intimated that she was pressured to testify untruthfully. You indicate that without divulging the reason for your inquiry, you have been able to independently verify the truth of the witness' assertions during that telephone conversation. Thereupon, you confronted the husband, who denied knowing about the checks from the West Virginia Housing Development Fund, but did admit misrepresenting the fact that in-laws of one of their children were living in one of the mobile homes on the subject property.

You inquire as to your ethical responsibilities in the foregoing situation, in light of what you feel may be a conflict between Canon 4, concerning preserving the confidences of your client, and the Canon 7 provisions relating to your responsibility to the affected tribunal.

Disciplinary Rule 7-102(B), as amended, states that:

A lawyer who received 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 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.

2. A person other than his client has perpetrated a fraud upon the tribunal shall promptly reveal the fraud to the tribunal.

Under the foregoing provision, your duty to the tribunal is to be determined by the nature of the information which you now hold. Of course, by revealing that the witness has committed perjury you necessarily implicate your clients.

Disciplinary Rule 4-101(A) defines confidences and secrets of a client 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.

Disciplinary Rule 4-101(C) states in part that:

A lawyer may reveal:

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

The information brought to your attention comes from one so closely identified with your client and implicated in whatever course you pursue that such information must be deemed a "secret"

of your client as defined above. However, there are other considerations concerning the nature of this information which are paramount. In the event that the administrative law judge finds in your client's favor without the benefit of the new information, such a reinstatement of benefits would mean the erroneous resumption of payments to your clients from the Social Security Administration. Thus, a continuing fraud upon the public would have been successfully perpetrated by your clients.

Mr. Drinker states that "[a] disclosure of confidential information may be made where necessary to prevent a contemplated crime or fraud." Drinker, Legal Ethics 137 (1953). Further, the American Bar Association Committee on Professional Ethics, in Opinion 156 (May 4, 1936), stated that:

We held in Opinion 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.
(Emphasis added)

Moreover, this Committee's view of the circumstances in this case in light of the Code of Professional Responsibility is aptly stated in ABA Opinion 287, Dissenting Opinion (June 27, 1953), in the dissenters' discussion of the old Canon 29:

The sweeping provisions of Canon 29 do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but requires him to report any perjury, including that committed by his own client or witnesses. No exception is made in Canon 29 as to the manner in which the knowledge or perjury is acquired by the lawyer. No longer is a trial supposed to be a "game" to be played by unscrupulous laymen with lawyers as mere pawns. Canon 29 seeks to make a trial an organized search for truth--charging the lawyers with the duty of seeing that no litigant prevails through perjury.

You express concern that revelation of the fraud could subject your clients and their witnesses to criminal prosecution. In this regard, you should be mindful of Ethical Consideration 9-2, which provides in part:

While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to his clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

It is the opinion of this Committee that you should promptly withdraw from representation of these clients and reveal the fraud perpetrated by them to the affected tribunal, if your said clients refuse to do so. Any conflict between the applicable provisions of Canons 4 and 7 must yield to the overriding considerations of public policy regarding the effective administration of justice and the integrity of our legal system.