

DELAWARE STATE BAR ASSOCIATION
PROFESSIONAL ETHICS COMMITTEE

OPINION 1981-4

The Committee has received and responded to a question from a member of the Delaware Bar.

The inquiring lawyer is active in criminal and domestic relations matters. Ordinarily, in preparing for a trial of a child custody case, the inquiring lawyer would not examine into the criminal records of potential witnesses for the purpose of developing impeachment evidence. In the case which led to the inquiry, however, solely because the inquiring lawyer formerly represented a potential witness in a criminal matter, he was aware that the witness had a criminal record. The representation of the potential witness had ended before the domestic relations case began.

The lawyer inquired of this Committee whether it was ethical for him to alter his usual course of trial preparation to check the public records for the former client's criminal record and to use such information as was discovered to cross-examine the witness when he testified. Since a prompt reply was required we answered by letter. This opinion contains the substance of the letter.

OPINION

So long as the lawyer reveals no confidences or secrets reposed in him by his former client in connection with his former representation, it is ethical to cross-examine the former client by reference to his publicly disclosed criminal record.

If, however, the inquiring attorney were, himself, to conclude, or the Court were to rule, that he is limited in his cross-examination because it would necessitate revealing confidences and secrets, the inquiring lawyer would have the additional ethical problem of adequate representation of the present client. Disclosure and informed consent would, if the consent were forthcoming, obviate this conflict. Without such consent, the inquiring lawyer should withdraw in favor of someone not so limited.

DISCUSSION

If at trial an objection to the proposed cross-examination on behalf of the former client were to be made, the trial judge would probably consult Rule 502 of the Delaware Uniform Rules of Evidence. Rule 502(b) provides that a client has the privilege "to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between

himself or his representative and his lawyer or his lawyer's representative...." Rule 502(a)(5) states that a communication is confidential "if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." If this were simply an evidentiary matter, the parties could present their best arguments to a trial judge for decision on the question of privilege. It is not our role to comment on what the result would be.

Because of the unusual facts here, however, this question may not simply be an evidentiary matter. An attorney has certain obligations with respect to the confidences and secrets of his clients, quite apart from the matter of attorney-client privilege. See Pennwalt Corp. v. Plough, Inc., D.Del., 85 F.R.D. 264, 269 (1979); EC4-4, ABA Code of Professional Responsibility. Specifically, the Delaware Lawyer's Code of Professional Responsibility (the "Code") provides as follows:

Except when permitted under DR4-101(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 disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Code, DR4-101(B).

The Code defines "confidence" to mean information protected by the attorney-client privilege under applicable law, and "secret" to mean 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 be likely to be detrimental to the client. DR4-101(A). Moreover, the only exception contained in DR4-101(C) that would seem applicable to the case posed is the exception relating to consent by the client after full disclosure.

The Ethical Considerations promulgated by the ABA and approved in principle by the Delaware Supreme Court amplify the requirements imposed by DR4-101(D). For example, EC4-5 makes clear that "a lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client...." EC4-6 makes clear that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

There is a digest of a state bar association opinion on a similar point. That digest reads as follows:

A lawyer who is cross-examining an adversary witness who was a client of his may not make use, in the cross-examination, of privileged communications received from the client during former attorney-client relationship.

Arizona State Bar, Opinion 204, dated October 3, 1966, 6

Ariz. D.J. 33 (Dec. 1970), reprinted in Maru, 1970 Supplement to Digest of Bar Association Ethics Opinions 127 ¶5958 (1972).

Thus, it would appear that the inquiring attorney's concern for the propriety of his cross-examination may be well-founded, the real question being whether or not the former client's criminal record is a "confidence" or "secret".

Formal Opinion No. 287 of the ABA Committee on Professional Ethics is of some help. There, the question posed was as follows:

A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation'.

Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

The response of the Committee (which drew several dissents) does give some authority for approaching this question by observing that whether or not a person has a criminal record is a fact which may come to the attorney in a variety of ways. It reads:

Where the court is about to impose a sentence based on the misinformation that the defendant has no previous criminal record, if the attorney for the defendant learns of the previous record from his client's communications, he has no duty to correct the misinformation. But if he learned of the record independently of his client's communications and he has reason to believe that the court is relying on his silence and his corroboration, he should inform the court not to rely on his silence as corroboration.

ABA Committee on Professional Ethics, Formal Opinion No. 287 (June 27, 1953).

The dissenters from the Opinion of the Committee on Professional Ethics stressed that there is no basis for distinguishing between information received by the lawyer in a direct communication from the client and information received by the lawyer through other sources while engaged in representation of the client. Thus, they would require the lawyer to preserve the confidence regardless of how it came to him. Even under this view, however, information learned after the representation of a client may well not be covered even though it came to the lawyer from a lead

developed during the representation, itself. The ultimate ruling should be in the province of the trial judge.

In Pennwalt Corp. v. Plough, Inc., supra, the court considered the question of whether a law firm should be disqualified from further participation on behalf of a plaintiff in a Lanham Act case because the firm was concurrently representing an affiliate of the Lanham Act litigation defendant in another, wholly unrelated matter. The court discusses the question of preservation of confidences and secrets at some length, and states the following:

All information acquired by the attorney during the course of the representation of a client is sheltered and may not be used to the disadvantage of a client except under specified circumstances. The clear underlying goal and objective of Canon 4 is to prevent use of confidential information acquired from any source during the course of the representation of a client where such use would ultimately result in the incurring of a detriment or disadvantage by that client.

85 F.R.D. at 269-70 (citations omitted, emphasis added).

To summarize:

(1) It would appear that if the inquiring attorney did not reveal confidences received during the course of his representation, he would not breach his duty to his former client in a cross-examination based on facts

of public record. If the inquiring attorney is satisfied that the material used in cross-examination was not furnished in confidence by the former client during his representation, the lawyer may proceed. On objection, the proper method to determine the scope of examination should be established by the ruling of the trial judge.

(2) If the inquiring attorney or the trial court were to limit the cross-examination, the present client may be harmed by a limitation on his attorney's actions. The present client should be so advised of this risk immediately and his consent or instructions obtained. In the extreme case, the present client might require the inquiring attorney to withdraw in favor of an attorney not so limited although, as a practical matter, the Committee believes that this solution would probably be more drastic than desirable, and rather than exposing the present client to the delays such a course might entail it might well be advisable to raise the matter at a pre-trial conference and seek advance guidance from the Court.

Dated: June 4, 1981