

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1988-89/19
Confidentiality: Revealing Client Scheme to Defraud
April 6, 1989

RULE REFERENCES:

*Rule 1.6
*Rule 1.6(b)(1)

SUBJECTS:

*Attorney-Client Privilege
*Client Communications
*Confidentiality
*Duty to Report
*Real Estate/Realtors

CODE REFERENCES:

*DR4-101(B)
*DR7-102(B)(1)
*DR7-102(B)(2)

STATUTORY REFERENCES:

*RSA 78-B

ANNOTATION:

A lawyer may reveal information relating to representation of a client without consent of the client in order to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or bodily harm or substantial injury to the financial interest or property of another. (Rule 1.6; Rule 1.6(b)(1)).

The New Hampshire Rules of Professional Conduct do not require nor allow a lawyer to disclose information relating to the representation of a client, where a criminal act has already occurred, such a criminal act is concluded and where the attorney is not in a position to prevent the client from committing a criminal act. (Rule 1.6; Rule (b)(1)).

FACTS:

A New Hampshire resident/homeowner was moving out of state for business purposes. As a company benefit, the employer made arrangements for a "relocation service" to "purchase" the employee's home. The inquiring attorney was retained by an out-of-state title company to prepare a deed for the conveyance of the property. The deed was drawn up with the homeowner listed as the grantor and, at the request of the title company, the grantee clause was left blank. The form of deed was forwarded to the out-of-state title company.

Several months later, the "relocation service" requested the inquiring attorney to represent it in the closing of that same real estate to a third person buyer. At the time of the closing, the inquiring attorney realized that the deed which was being used was the deed the attorney had originally drafted with the blank grantee clause. The third person, subsequent buyer, was listed as the grantee and the original New Hampshire resident/homeowner was listed as the grantor. The subsequent buyer had a title search conducted and closed on the sale.

A record title passed only from the original New Hampshire homeowner/seller to the subsequent third party buyer. One set of New Hampshire real estate transfer tax stamps was purchased.

QUESTION:

The inquiring attorney has requested an opinion from the Ethics Committee as to whether the attorney has a duty as a member of the Bar to assist the State in preventing what the attorney characterizes as a fraud perpetrated by the relocation service in that it is the inquiring attorney's opinion that there were two "transactions" which should have each required the purchase of transfer tax stamps pursuant to RSA 78-B.

RESPONSE:

The Committee cannot and does not comment on whether the facts as alleged constitute a fraud or a violation of RSA 78-B. However, to the extent that the inquiring attorney may or may not be required or allowed to disclose what the attorney believes to be a fraud, the committee responds as follows:

New Hampshire Rule Of Professional Conduct (Rule) 1.6 Confidentiality Of Information, Subsection (b) (1) states that a lawyer may reveal information relating to representation of a client without consent of the client in order "to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or bodily harm or substantial injury to the financial interest or property of another; . . ." Nothing in Rule 1.6 would allow the inquiring attorney to reveal information relating to the representation of the relocation service. There is no current relationship ongoing and if the facts as alleged above constitute a fraud or "criminal act" such act has apparently been concluded and, therefore, the attorney is not in a position to "prevent the client from committing a criminal act . . ." Rule 1.6(b)(1).

This committee issued a formal opinion entitled *Obligations Of Attorney To Report Possible Welfare Fraud*, dated 10/12/82. Although that opinion preceded the adoption of the New Hampshire Rules of Professional Conduct and cites to certain ABA Disciplinary Rules, the issue presented was similar. In that opinion, the Ethics Committee stated "even if the information provided to the attorney 'clearly established' a 'fraud' upon the Court or other person, the duty of the attorney to preserve the confidential nature of this communication supersedes the attorney's obligation to reveal the husband's failure to disclose assets to the Court or any person under DR 7-102(B)(1) or (2)."

ABA Informal Opinion 1470, dated July 16, 1981 entitled *Duty Of A Lawyer To Inquire Into Fraudulent Or Criminal Conduct And Disclose Past Activities Of A Prospective Client* dealt with a situation where a prospective client had been employed abroad and received substantial payments from sources other than his employer. The prospective client consulted with a lawyer for advice as to bringing funds to the United States in a manner which would avoid or minimize United States tax liability. Sufficient facts were not revealed by the prospective client to enable the lawyer to determine the legality of the transactions surrounding the payment, but the lawyer suspected that the payments may have been unlawful bribes or kickbacks. Those payments were no longer continuing at the time of consultation. The attorney inquired as to whether or not the attorney had a duty to look further into the circumstances surrounding receipt of the funds and to what extent the attorney had a duty to disclose "any client fraud or criminal conduct to governmental agencies."

That informal ABA opinion also cited to ABA Disciplinary Rules. In response to the second inquiry, it stated, in part, "[e]ven if the facts reveal the commission of a crime, the lawyer may have no duty of disclosure to authorities. Information received by a lawyer from a client as to the client's past crime is privileged and should not be divulged. DR 4-101(B); ABA Formal Opinion 341 (1975)".

SUMMARY:

The New Hampshire Rules of Professional Conduct do not require nor allow the disclosure of information relating to representation of a client in the fact situation herein. Rule 1.6, Confidentiality of Information, precludes the revelation of such information.