

LEGAL ETHICS OPINION 1688

LETTER FROM OPPOSING COUNSEL
TO OPPOSING CLIENT OBTAINED BY
CLIENT AND CONTENTS NOT
REVEALED TO ATTORNEY; DUTY TO
DISCLOSE; ZEALOUS
REPRESENTATION

You have presented a hypothetical situation in which the attorney's client, who is involved in civil litigation against her former employer, has received from a current employee of the employer, a copy of a letter to employer from employer's attorney discussing the defense in the suit brought by the attorney's client. The current employee was not given the authority to reproduce the letter for the client but did have legitimate access to the letter as part of his job responsibilities as a secretary. The current employee's decision to obtain a copy for the client was unilateral; neither the client nor the attorney knew of the letter until the current employee provided the copy to the client. The letter is currently in a sealed envelope in the custody of the attorney, who has not read the letter. The client believes any use of the letter would identify the role of the current employee in the matter and, thereby, trigger severe job sanctions for the current employee. Out of a desire to protect that employee, the client has requested that the attorney destroy the letter.

Under the facts you have presented, you have asked the committee to opine as to 1) whether the existence of this letter is a client confidence or secret; 2) whether the duty of zealous representation requires that the attorney review the contents of the letter; 3) whether anything about the letter must be revealed to opposing counsel; 4) whether you may comply with the client's request to destroy the letter; 5) whether there is any duty to withdraw from representation of the client; and 6) whether the client could assert the attorney-client privilege if disclosure is sought by a discovery request.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-108(A)(1) which requires an attorney to withdraw from representing a client if continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules; DR:4-101(A) which, in pertinent part, defines a client "secret" as, "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;" DR:4-101(B) which prohibits an attorney from revealing client confidences and secrets except in certain enumerated situations; DR:4-101(C) which allows an attorney to reveal confidential information with client consent, when required by law, under court order, or if the attorney has information clearly establishing certain fraud by the client; DR:4-101(D) which requires an attorney to disclose client confidences and secrets when the attorney has the requisite information that his client plans to commit a crime or has perpetrated a fraud on a tribunal; and DR:7-101(A)(1) which requires a lawyer to seek the lawful objectives of his client through reasonable means.

The committee responds to your inquiries relative to the facts presented as follows:

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1. The committee opines that both the existence and contents of this envelope as well as the circumstances regarding their acquisition are client secrets, as that term is defined in DR:4-101(A), because the client has clearly requested the attorney to hold that information inviolate.

2. As to whether the lawyer must read the letter in the envelope to fulfill the requirement of zealous representation, the committee notes that DR:7-101(A)(1) requires the attorney, for zealous representation, to seek the legal objectives of one's client. In your inquiry, the client's objective is to protect the current employee who provided this letter from job sanctions. The client believes that any use of the information in that letter creates a substantial risk of revealing the identity of that current employee. Thus, the committee opines that in furtherance of the client's lawful objective and instructions, the attorney's duty of zealous representation in this instance does not require the attorney to read the letter.

3. Due to the committee's determination in Item #1 that the information regarding this letter is a client secret, the committee opines that the attorney is precluded from disregarding his client's instructions not to reveal this information unless circumstances trigger one of the exceptions enumerated in DR:4-101(C) and (D). Those exceptions override an attorney's general obligation to hold all client confidences and secrets inviolate. As there is no ongoing client crime or fraud involved in the existence of this photocopy, no such exception is triggered in your inquiry; therefore, the attorney's obligation to protect this client secret prevails. See, LE Op. 1324, LE Op. 1316, LE Op. 1141. The committee distinguishes LE Op. 1076, in which the committee advised an attorney to inform opposing counsel that he had received from an unknown third party documents from the opponent's file, in that the 1076 attorney did not receive the documents from the client and the client did not request the attorney to hold the information inviolate; therefore, the fact of the documents receipt was not a client secret as it is in your inquiry. In sum, the committee opines that the attorney in your inquiry should not disclose this information to the opposing party.

4. As to the client's request that the attorney destroy the document, the committee reiterates the attorney's obligation under DR:7-101(A)(1) to seek the legal objectives of his client. As the committee has opined in Item #3 that the attorney has no duty to reveal the information regarding this photocopy, the committee further opines that the attorney need not provide the opposing counsel with that copy. Accordingly, the attorney may handle the document pursuant to client instructions, including the destruction of the document so long as such destruction is not prohibited by law. It is beyond the purview of this committee to determine the legality of destruction of this letter. Note that this conclusion concerning the client's instructions assumes no outstanding pertinent discovery requests.

5. Regarding the need for this attorney to withdraw from this representation due to the circumstances regarding this letter, as the attorney played no role in the original production of this document, the committee opines that the attorney is not precluded from

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further representation of this client. See, LE Op. 1324, LE Op. 1141, LE Op. 278. DR:2-108(A) enumerates three instances triggering mandatory withdrawal: two of those (attorney impairment and client discharge) are not pertinent. The remaining trigger for mandatory withdrawal is where, “[c]ontinuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules.” No such illegal or unethical consequence results from continued representation in this case; therefore, the attorney may continue to represent this client.

6. As this committee opined in Item #1, above, all the circumstances regarding this photocopy constitute a client secret. Should the attorney receive a discovery request seeking the document's disclosure, the attorney should file an objection to such request. Whether the attorney-client privilege is an appropriate basis for an objection to the disclosure of the document or the circumstances under which it was obtained is a legal issue beyond the purview of the committee. However, should the objection be overruled, with the court ordering disclosure, the attorney would then be permitted to make the ordered disclosure pursuant to DR:4-101(C)(2). See, LE Op. 1628, LE Op. 967, LE Op. 645, LE Op. 334, LE Op. 300.