

# Ethics Opinion 2009-1

- **Rules:** Rule 1.2(d); 1.6; 4.1
- **Subject:** Disclosure of client actions to third party.
- **Summary:** Actions of client in entering contract with third party were not criminal nor fraudulent and were not material facts, thus were not exceptions to confidentiality rules which would require disclosure.

The Committee is responding to your request for an opinion regarding any obligation or discretion you may have to disclose the actions of your former client. We conclude that disclosure is not mandated based on the facts you have presented.

## FACTS

You represented a client as the plaintiff in a personal injury action. The client independently chose to pursue a third party contract which advanced funds with repayment contingent on successful settlement or prosecution of the claim.

After your client entered that third party contract, you were provided a copy of the agreement. It contained certain representations regarding advice given to the client of the terms of the agreement that appeared to have been signed by you. You had not signed the agreement. Your client subsequently admitted signing the document in your name.

Based on these facts you informed your client that you intended to withdraw from the case and an order granting your motion to withdraw was entered. Your client then obtained other counsel who reached a settlement through mediation. The amount of the settlement was only slightly more than the repayment amount of the loan obtained by your client and less even than the amount of outstanding medical subrogation claims. Your client's new counsel negotiated a distribution of the funds to the various claimants. You have now been provided a check from the client's current counsel for your accrued costs and fees.

## QUESTION PRESENTED

You have asked the Committee whether the Rules of Professional Conduct require that you disclose to the third party contractor that your client signed the disclosure portion of the contract in your name.

## DISCUSSION

Rule 1.2(d) precludes an attorney from assisting a client in the commission of any criminal or fraudulent act. Additionally, Comment 10 to that rule indicates that in certain instances, simple withdrawal may not be adequate and that an attorney must consider the obligation to disclose the criminal or fraudulent act of a client pursuant to Rule 4.1. Similarly, Rule 1.6(4) provides an exception to the requirement of maintaining the confidentiality of client communications "to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used...." Rule 1.6(5) also allows disclosure when compelled "by other law...."

Unlike Rule 1.6 which simply allows disclosure, Rule 4.1(b) mandates disclosure of "a material fact" if necessary "to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Comment 3 to this rule makes clear that this mandate is a specific application of the confidentiality exceptions stated in Rule 1.6. This rule governs the situation you have presented. The controlling question appears to be whether your client's actions were "material" under the rule.

The agreement for the third party contractor to advance funds and for your client to repay was made solely between them. The body of the contract required no signature by you and the terms of the agreement are contained solely and entirely in that document. Attached to that contract is an "ACKNOWLEDGEMENT OF AUTHORIZATION" which is the document your client signed with your name. That acknowledgement is not notarized, but is simply signed by the attorney and dated. It acknowledges the following: that you represent the client on the claim being advanced upon, that you have reviewed the terms of the contract with the client and agree to be bound by it, that any proceeds will not be advanced to client without first notifying and paying the third party contractor but that attorney fees and costs may be advanced, that you will notify the third party contractor of withdrawal or of any fraud by your client relating to the claim, and other miscellaneous administrative items. Each of these obligations is contained also in the agreement signed by your client.

It is the opinion of the Committee that your failure to sign the "ACKNOWLEDGEMENT OF AUTHORIZATION" was not a "material" fact under Rule 4.1. The obligations of the agreement were contained in the contract which was signed by your client. The enforceability of the contract was therefore dependent upon the validity of your client's signature on that document, not yours on the acknowledgement. The validity of your signature was therefore not "material," and disclosure of its invalidity is not required under Rule 4.1.

A minority of the committee did question if the facts presented provided enough information to determine if your failure to actually sign the "ACKNOWLEDGEMENT OF AUTHORIZATION" was material to the third party contractor. The minority also raised the question of whether the document itself, although not your client's statements regarding the document, must be disclosed pursuant to the ruling in *State v. Guthrie*, 2001 SD 89, 631 NW2d 190. While the Committee acknowledges this minority viewpoint for your consideration, it is not the opinion of the Committee as a whole.

### **CONCLUSION**

It is the opinion of the Committee that the fact that your client signed your name to the "ACKNOWLEDGEMENT OF AUTHORIZATION" was not a material fact under the circumstances. There is therefore no obligation under Rule 4.1 of the Rules of Professional Conduct for you to disclose that fact.

Neil Fulton, Chair  
Ethics Committee  
State Bar of South Dakota