BBA Ethics Opinion 93-2

Summary: A law firm, consistent with DR 4-101C)(4), may reveal and use client confidences or secrets (the existence of the client's bank deposits and of amounts owed to the client by a third party) learned during the course of a prior professional relationship in order to facilitate trustee process "necessary to . . . collect [a] fee" owed the firm by the client. Even though the information to be revealed and used may be known or knowable by third parties, it is still subject to the restrictions on disclosure set forth in DR 4-101(B). In revealing and using this information, the firm must take steps to minimize the information which is disclosed, and the degree of disclosure, to that minimal extent necessary to effect collection. Before initiating trustee process the firm must consider whether such a step is, in fact, reasonably necessary to ensure collection. As well, before commencing litigation at all, the firm should fully investigate any less coercive means by which its fee could be obtained.

Facts: The law firm has represented a client corporation on various matters since 1988. The client owes the firm approximately $40,000 in outstanding legal fees and disbursements. The firm has been active of late in its efforts to collect this balance due. We assume for purposes of this opinion that the amount due is not, to the firm's knowledge, fairly in dispute. Recently, the client terminated its professional relationship with the firm. The firm intends immediately to file suit against the client for the outstanding fees and disbursements, and wishes to utilize trustee process to reach funds of the client on deposit with a bank and monies owed to the client by one of its customers. The firm's knowledge of the existence of the bank account and of the amounts owing to the client from its customer was derived from information received by the firm during the course of its representation of the client, although this might also be known to or ascertainable by others.

Discussion: The firm has asked whether, under DR 4-101(C)(4), it may use information concerning its former client, learned during the course of representing the client, in order to facilitate trustee process to collect fees and disbursements owed to the firm by the client [1]. DR 4-101(B) provides that,

Except when permitted under DR 4-101(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.

The only relevant exception to these facts is DR 4-101(C)(4), which provides that "[a] lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee . . . ."

Initially, the firm asks whether the basic rule of non-revelation and non-use applies at all to information which, though learned during the course of the professional relationship, might be available to others. "[T]he ethical obligation of a lawyer to guard the confidences and secrets of his client . . . exists without regard to the nature or source of information or the fact that others share the knowledge." Ethics Op. No. 84-3 (quoting Ethical Consideration 4-4). "Even if something is 'generally known,' that is not a guarantee that it will come up in a given context,

and a former client has a justified expectation in not having the matter brought up . . . by his former attorney." Id. We are of the opinion, therefore, that the general rule of non-disclosure and non-use applies to information obtained by the firm in the course of the professional relationship even though it might be available to others.

A more difficult question is whether the exception under DR 4-101(C)(4), permitting an attorney to reveal confidences or secrets necessary to establish or collect the attorney's fee, permits the measures intended by the firm here. Our research has revealed no Massachusetts cases and no MBA ethical opinions on point.

We note that the legal tool of trustee process appears, on these facts, to involve not only the revealing but also the use of client confidences or secrets. In Private Reprimand No. PR- 90-43, 6 Mass. A.D.P. 457 (1990), the attorney received a private ,reprimand for submitting an affidavit (setting forth his client's bank and account number, and disclosing the existence of the client's escrow account maintained as part of the professional relationship) in support of trustee process and attachment sought by the attorney's brother against the client. This action violated not only DR 4-101(B)(1) (barring revealing of information), but also 4-101(B)(2) (barring use of information to the client's disadvantage) and 4-101(B)(3) (barring use of information to the advantage of the attorney or a third person, absent client consent).

The safe harbor found in 4-101(C), by its terms, only permits an attorney to "reveal" confidences or secrets to collect a fee, and provides no express sanctuary for an attorney making "use" of such information for the same purpose. We acknowledge the resulting difficulty in construing the exception set forth in 4-101(C)(4) to apply both to the revealing and using of protected client information, particularly since those terms are employed differently, and subject to different restrictions, in DR 4-101(B). We have found, however, no case or opinion, from any jurisdiction, which draws this distinction in applying DR 4-101(C)(4). While we are troubled by this ambiguity, we believe that the better reading of the Rule is to apply the "fee collection" safe harbor equally to revelation and use, of the sort here in question, of client confidences and secrets.[2]

Having noted this concern, and the absence of any precedent directly on point, we believe, subject to the limitations discussed below, that the revelation and use of a former client's confidences or secrets in order to collect a fee through trustee process is permitted, and is within the range of options fairly available to an attorney facing a former client's unwarranted refusal to pay, at least where the firm has a reasonable doubt about collectibility. This result is supported by both a pre-Model Code formal opinion of the American Bar Association (the "ABA"), and by each of the few cases and opinions addressing the issue under the Model Code.

In Formal Opinion 250, the ABA opined that, where "the lawyer is seeking to obtain payment of his fees . . . [i]f grounds for attachment exist, and use of confidential information as to the client's property is reasonably necessary to compel the client to respond to the lawyer's just claim for a fee, then...the lawyer is not prohibited by the canon from using or disclosing such information, since such disclosure is necessary to enable the lawyer to obtain his rights. The client should not be permitted to take advantage of the rule to defeat the just rights of the lawyer growing out of the lawyer-client relation." ABA Formal Op. 250 (1943) (construing Canon 37 of the Canons of Professional Ethics, requiring client confidences to be preserved, and containing no express exception for the collection of a fee).

The same result was reached in Nakasian v. Icontrade, 409 F.Supp. 1220 (S.D.N.Y. 1976). There, the Court held that an attorney's use of confidential information to obtain an attachment order against his client was not improper:

"[Canon 4] was never intended to prevent a lawyer from attaching the funds of his clients, even where the attachment is facilitated by confidential information possessed by the lawyer . . . . If arguendo (the lawyer] is entitled to recover in this litigation, the [clients] may not use the lawyer-client relationship to avoid their obligations . . . "

Id. at 1224 (citing DR 4-101(4)). See also Ala. State Bar Ethics Op. RO-81-493 (citing with approval ABA Formal Op. 250 and Nakasian, supra, for the foregoing propositions); compare Conduct of Jordan, 712 P.2d 97, 99 n.1 (Or. 1985) (en banc) (attorney's use of knowledge of client's pay day in order to effect garnishment of client's wages not permitted under 4-101(C)(4) exception, where attorney was also acting on behalf of two of client's other creditors; exception only applies to attorney's efforts to collect attorney's own fee.)

We are of the opinion that the revelation and use of confidences or secrets to effect trustee process with respect to the assets of a former client in order to collect a fee would be allowed under the disciplinary rules in this jurisdiction. [3] Having said this, we believe that some final cautions are in order.

First, the firm must consider whether trustee process, as a distinct phase of the overall fee litigation (and one which will require the use and revelation of confidences or secrets which might otherwise not arise), is reasonably "necessary" to collection of the fee. This will require a consideration of the nature of the fee dispute, and of the factors which have led the firm to seek the special security provided by pre-judgment process, including: the extent of the firm's other efforts to collect the fee; the risk of non-payment if judgment enters for the firm; and the existence of other sufficient client assets, knowledge of which was not derived from the professional relationship.

Second, in employing client confidences and secrets to collect a fee, the firm should pursue the course of collection least damaging to the client's interests, while still enabling the firm to collect. This will apply both to what information is used or revealed ("(dlisclosures beyond the necessary minimum may be grounds for disciplinary proceedings." New Mexico Bar Association Ethical Opinion 1988-7), and the form of use or revelation: "the law firm must be particularly sensitive to the problems which may be created by the fee litigation and take all feasible steps to minimize the prejudice. For example, it might seek to have all documents necessary to the fee litigation which might affect the client in [other) litigation produced or filed under seal." New York City Bar Association Ethical opinion 82- 43.

ENDNOTES

[1] We note that the firm has indicated an intent "immediately" to bring suit against its former client. Though it concerns an issue on which our views have not been asked, and on which the facts presented to us do not permit any firm conclusion, we believe that ethical concerns, as well as considerations of sound business judgment, should lead the firm at least to consider, if it has not already done so, any less stringent means (short of litigation) by which the fee dispute can be resolved, or by which the amount owing can be secured. Indeed, for the reasons discussed below, if the expedient of bringing suit is not reasonably necessary to collection, then incidental use or disclosure of client secrets or confidences -- whether through trustee process or otherwise -- may be improper.

[2] Our reluctance to rely on this distinction is somewhat bolstered by the point that, if the DR 4-101(C) exceptions applied only to the prohibition on revealing client confidences or secrets, then the "except" clause found at the outset of DR 4-101(B) should have been incorporated, as a matter of draftsmanship, into the sub-rule (DR 4-101(B)(1)) to which arguably it is limited, and not placed in the preamble to the entire rule (including the restrictions on use). Compare the specific "unless" clause found in DR 4-101(B)(3).

Note, however, the separate ethical considerations governing "use" (EC 4-5) and "revelation" (EC 4-2). See EC 4-5:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client, and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes."

Compare EC 4-2:

"The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law."

[3] We do not believe that the rule's use of the term "fee" should be so narrowly construed as to lead to a different result in

an action to collect "fees", on the one hand, and "disbursements", on the other. Though we have found no authority discussing this point, we believe that the collection of amounts properly owing to the firm as a direct result of the professional relationship brings the matter within the ambit of 4-101(C)(4), whether those amounts are in the form of fees or disbursements.