

Opinion 480
June 1991
Tex. Comm. on Professional Ethics, Op. 480, V. 56 Tex. B.J. 705 (1993)

FACTS

Attorney A was retained by Defendant, a corporation, to defend it against Involuntary Chapter 7 Bankruptcy Petition filed by Plaintiff, a corporation.

Plaintiff alleged Defendant was not paying its debts as they came due. Plaintiff also claimed that pursuant to a pre-litigation contract, it was entitled to funds received by Defendant in settlement of a state court suit filed by Defendant against a third party. Plaintiff further alleged that the transfer of such funds by Defendant to one of Defendant's other creditors was a preferential transfer which could be recovered in bankruptcy pursuant to 11 U.S.C. Section 547.

Plaintiff was the sole petitioning creditor. Ordinarily three creditors are required to join in filing an involuntary petition. Plaintiff alleged that Defendant's conduct amounted to trick, artifice, or scam and that therefore Plaintiff could, as a sole petitioning creditor, place Defendant into an involuntary bankruptcy.

At the conclusion of trial, the Court denied the involuntary Petition finding, inter alia, that the transfer of funds by Defendant to the third party did not constitute trick, artifice, or scam and that Plaintiff had an adequate state court remedy it could pursue. Plaintiff did not appeal the bankruptcy court's decision.

Plaintiff then filed a state court lawsuit against the party who had received the settlement funds and a separate suit against Defendant. Depositions were taken by Plaintiff in those suits, which are still pending. Also, Attorney A is not representing and has not represented Defendant in state court suit.

Six months after the bankruptcy court's ruling, Plaintiff filed a Motion for Relief from Order Denying Involuntary Petition on grounds other than those for which this opinion is sought.

Defendant consulted Attorney A regarding the filing of a response to Plaintiff's Motion from Order Denying Involuntary Petition. Defendant-Client revealed at this time that the settlement funds paid to the third party had been returned to Defendant's president and placed in a "Trust." The "Trust" is drafted so that the president and sole shareholder of Defendant corporation is the grantor, trustee and beneficiary along with such other parties, individuals, companies, charities, or organizations as the trustee may choose.

At the time of the bankruptcy suit trial Attorney A had no knowledge that the funds had been returned to the Defendant's president for placement on this "Trust." There was, therefore, no evidence presented regarding the "Trust" at the time of the trial. Attorney A is of the opinion that if the bankruptcy court had known of this transaction, then its decision might have been different.

Attorney A is not representing the Defendant in the Motion for Relief from the Order Denying Involuntary Petition. Defendant-Client has invoked and has not released the Attorney from the attorney-client privilege.

QUESTIONS PRESENTED

1. Does Attorney A have an obligation to reveal to the bankruptcy court the fact that the settlement funds were returned by the third party to the Defendant to be placed in what purports to be a Trust?

2. Is Attorney A prevented by the attorney-client privilege from revealing the transaction to the bankruptcy court?

DISCUSSION

Rule 3.03(a) provides that a lawyer shall not knowingly fail to disclose a fact to a court when disclosure is necessary to avoid a criminal or fraudulent act. Moreover, the duty to disclose continues until remedial legal measures are no longer reasonably possible. Supreme Court Of Texas, State Bar Rules, Art. X, Section 9, Texas Disciplinary Rules Of Professional Conduct, Rule 3.03(a) and (c) (1989). Fraud is defined as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information. *Id.*, Terminology. Knowingly is defined as actual knowledge of the fact in question but a person's knowledge may be inferred from circumstances. *Id.*

A lawyer may reveal confidential information when he/she has the reason to believe it is necessary to do so in order to comply with a court order, a Texas Rule of Professional Conduct, or other law. *Id.*, Rule 1.05(c)(4) (1989). Belief denotes that the person involved actually supposes the fact in question to be true. *Id.*, Terminology. The dictates of Rule 1.05 are governed by a strong public policy of not affording protection to client information where the client seeks to use the services of the lawyer to aid in the commission of a crime or fraud. *Id.*, Rule 1.05, Comment 10. Rule 1.05(c)(4) therefore permits revealing information necessary to comply with Rule 3.03(a). *Id.*, Comment 11. If a lawyer's services are made an instrument of the client's crime or fraud, the rule gives the lawyer professional discretion to reveal confidential information because the lawyer has a legitimate interest in both rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. *Id.*, Rule 1.05(c)(6) and (8), Comment 12. The Rules of Professional Conduct mandate that a lawyer reveal confidential information when required by Rules 3.03(a), 3.03(b) and 4.01(b). *Id.*, Rule 1.01(f). Finally, the rule provides that [i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts. *Id.*, Rule 3.03(b); Comment 7.

CONCLUSION

Under the facts presented to this Committee, Attorney A is required to make a good faith effort to persuade the former client to authorize him/her to tell the bankruptcy court that the settlement funds were returned by the third-party to the former client to be placed in what purports to be a Trust. And, if this effort is not successful, to disclose such fact to the bankruptcy court without the former client's consent.