OPINION 94-2
CLEVELAND BAR ASSOCIATION
PROFESSIONAL ETHICS COMMITTEE

SYLLABUS

1. A lawyer is obligated by DR 7-102(B) to reveal fraud committed by a client upon any affected person or tribunal, unless the client rectifies the fraud. This obligation is not altered by the fact that the affected person is another client of the lawyer. Nor is the lawyer’s obligation altered if the fraud did not specifically occur in the course of the lawyer’s representation, but would affect that representation.

2. Where a lawyer represents multiple clients in a single representation, communications received by the lawyer from one client pertaining to the representation are not ordinarily privileged from disclosure to the other client. Where one client in a multiple representation requests that the lawyer hold a communication in confidence from other clients, the lawyer must determine whether he can continue the multiple representation.

3. A lawyer may represent and continue to represent multiple clients if it is obvious that he can adequately represent the interests of each and if each client consents to the multiple representation after full disclosure, DR 5-105(C).

FACTS

A lawyer and his co-counsel together represent a minor and the minor’s unmarried parents in a personal injury action plus an underinsured motorist claim which result from a motor vehicle accident. The mother sustained personal injuries in the accident and prematurely gave birth to the minor as a result of the accident. The minor sustained injuries as a result of the accident.

The mother and father were not married at the time of the accident but the father acknowledged paternity in Juvenile Court more than a year after the accident. A year after the father had acknowledged paternity, the mother had the son’s name changed in Probate Court without the consent of the father. The mother signed an affidavit in Probate Court swearing that the whereabouts of the father were unknown and could not with reasonable diligence be ascertained. The lawyer believes the mother was untruthful in doing so because the lawyer himself knew of the father’s whereabouts. When the lawyer informed the mother of his belief that her affidavit was inaccurate, she told the lawyer not to mention the change of her son’s name to the father.
The lawyer is concerned about what he may divulge to the father plus how to deal with the Probate Court concerning the affidavit. He also seeks guidance regarding his obligations to his co-counsel and how he or they can represent the clients in the future.

**QUESTIONS PRESENTED**

1. Whether a lawyer is obligated by DR 7-102(B) to reveal fraud committed by one client upon a person or tribunal when the affected person is also a client in the same matter and the fraud affects the lawyer’s representation of the clients.

2. Where a lawyer represents multiple clients, whether communications made to the lawyer by one client are privileged from disclosure to any other client.

3. Under what circumstances may a lawyer represent or continue to represent multiple clients having personal injury claims and/or claims for loss of services arising out of the same accident or occurrence.

**DISCUSSION**

Section 1

DR 7-102(B) provides:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Assuming that the lawyer is correct in his belief that the mother’s affidavit was false, that affidavit constitutes a fraud upon the Court. By signing an affidavit falsely asserting that the whereabouts of the father were unknown and not reasonably ascertainable, the mother committed a fraud upon the Probate Court for the purpose of legally changing her son’s name. The mother’s admission of how she obtained the name change and her instructions to the lawyer not to tell the father “clearly” established the fraud upon the Court.

The issue, however, is whether the fraud occurred “in the course of the representation”, thus requiring the lawyer to promptly call upon the client to rectify the fraud or disclose it to the tribunal. DR 7-102(B) (1) does not define “in the course of the representation.” Although the lawyer was not involved in the mother’s changing of the minor’s name by utilizing a false affidavit, that event occurred while the lawyer was representing the minor, mother and father in the accident case. The legal steps taken by the mother to affect the name change impact the respective claims of the mother, father, and child. For example, if the matter goes to trial, the father’s claim for loss of the child’s services could easily be affected by the affidavit. The affidavit could contradict the father’s claim of his involvement with his child. It is clear, therefore, that the mother’s affidavit has the potential to affect the representation of the three clients by the lawyer.

The mother’s steps to change the son’s legal name may have an effect upon the father’s claims in the personal injury action and uninsured motorist claim. The mother’s actions...
may preclude the lawyer from continuing in the representation (see Section 3, infra). In any event the lawyer must assure that the mother’s fraud is revealed to the tribunal, in the event the mother fails to rectify the fraud, and to the affected person, the father. DR 7-102(B)(1).

Section 2

“Confidence” and “secret” are defined in DR 4-101(A).

DR 4-101 PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

(A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(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.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rule or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Where a lawyer represents the interests of multiple clients in a single representation, the general rule is that communications between one client and the lawyer are not privileged from disclosure to the other clients, see Netzley v. Nationwide Nut. Ins. Co., 34 Ohio App.2d 65 (1971); Chitty v. State Farm Mut. Auto Ins. Co., 36 F.R.D. 37 (1964).

Whether the mother’s disclosure to her attorney constitutes a “confidence” or a “secret” could be debated, but to do so would not advance the analysis. In this case, the mother’s “secret” or “confidence” that she misrepresented facts in the name change proceedings, could not be held in confidence by the lawyer even if he represented only the mother. A fortiori the information cannot be withheld from other clients engaged in a common representation.
Section 3

The question remains whether the lawyer, after the mother’s fraud has been rectified, can continue to represent the multiple interests of mother, father, and minor. The Disciplinary Rule which is applicable is DR 5-105 which states:

... B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Ethical Consideration 5-14 states:

[m]aintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two . . . clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

The mother and father have conflicting interests with respect to the name change.

As stated by the Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, in Opinion 88-021, August 12, 1988, page 2:

Ethical Consideration 5-15 recommends that a lawyer should resolve all doubts against the propriety of the representation of clients having potentially differing interests. There are however, instances in which a lawyer is justified in representing clients having differing interests. See, e.g., Code of Professional Responsibility, EC 5-15. Although, if a lawyer feels justified in representing clients with differing interests, he or she should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. Code of Professional Responsibility, EC 5-16 (emphasis added).

In addition, EC 5-19 states that,

[a] lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

Thus, when a lawyer represents multiple clients it is the client and not the lawyer who determines whether the representation shall continue. (Emphasis added.)
Ethical considerations are aspirational. The Disciplinary Rule is mandatory:

As stated in Opinion 88-021:

Therefore, in order to avoid disqualification under DR 5-105(3), a lawyer must satisfy the two conditions found in DR 5-105(C). *Unified Sewerage Agency of Washington County, Oregon v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981). First, it must be obvious that the lawyer can adequately represent the interests of each client and second, each client must consent to the multiple representation after full disclosure of the risks. Id.

The necessity of obtaining a client’s consent to multiple representation places the burden of affirmatively providing disclosure and obtaining consent upon the lawyer. *IBM v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978). “Full disclosure means just that - affirmative revelation by the attorney of all the facts, legal implication, possible effects, and other circumstances relating to the proposed representation. A client’s mere knowledge of the existence of his attorney’s other representation does not alone constitute full disclosure.” *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 771 (D.D.C. 1981)

Furthermore, maintaining public confidence in the bar requires an attorney to decline employment adverse to his or her client, even though the nature of the employment is wholly unrelated to that of his existing representation. *Cinema 5, Ltd. v. Cinerama, Inc., et al.* 528 F.2d 1384, 1387 (2d Cir. 1976). The *Cinema 5* case also stands for the proposition that “[w]here the relationship is a continuing one, adverse representation is prima facie improper, (citation omitted) and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.” Id. (emphasis in original).

DR 5-105 (B) and (C) contemplate a continuing evaluation in situations involving multiple representations. Have the mother’s conduct and subsequent events made it impossible for the lawyer to continue with the multiple representation? In order to answer the question the lawyer must first determine whether it remains “obvious” that he can continue to adequately represent the interests of all concerned. Has the mother agreed to disclose the fraud? Are the mother and father in apparent agreement as to how to proceed? The lawyer must consider these questions and all other circumstances.

If the lawyer concludes that an adequate representation of all is not obvious, he must withdraw from employment. If he concludes that it is obvious that he can adequately represent the interests of all, he should once again obtain the clients’ consents, following full disclosure of the possible effects of multiple representation.

This factual pattern also illustrates that full disclosure of the possible effects of multiple representation should include a discussion of the effect of multiple representation upon confidences and secrets. Lawyers who are asked to represent multiple clients should advise the clients that one of the effects of multiple representation is that communications made to the lawyer by one client will not ordinarily be privileged from disclosure to the other clients. We do not answer in this opinion the ethical issues presented by a situation
in which one client asks a lawyer to maintain from other clients a secret that other ethical rules do not require be disclosed.