NYSBA Opinion 982
(10/2/13)

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 982

New York State Bar Association
Committee on Professional Ethics

Opinion 982 (10/2/13)

Topic: Obligation to disclose potential fraud on a tribunal

Digest: A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

Rules: 1.0(b), 1.0(q), 1.0(c), 1.6(a), 1.6(b)(2), 1.6(b)(3), 3.3(a), 3.3.(b),

FACTS

1. The inquiring lawyer represented a client in an estate matter in which a will has yet to be offered for probate. The inquirer is not admitted in this State and so associated with a member of the New York bar to handle the matter.

2. Although the will has not been offered for probate, it is likely to be, and, in the inquirer's judgment, will result in a contested proceeding between two siblings. The inquirer represented one of the siblings – for ease of reference "AB" – who provided the inquirer with seemingly credible and material information which the lawyer in turn sent to counsel for the sibling, the adverse client to whom we refer as "CD." Upon review of the information, CD's counsel responded by strongly questioning the accuracy of the information. When the inquirer confronted AB with CD'S response, AB admitted in confidence that the information AB had provided to the inquirer was false. The inquirer urged AB to correct the information, citing the lawyer's own ethical obligations and AB's potential criminal liability. Despite these entreaties, AB refused to correct the information. Thereafter, the inquirer terminated the attorney-client relationship with AB, and notified opposing counsel of the withdrawal without reference to the inquirer's earlier provision of information to CD's lawyer that the inquirer now knows to be false. While we are not opining on the propriety of the resignation, there is every reason to believe it proper under Rule 1.16.

3. The inquirer states that no basis exists for a reasonable belief that CD's counsel is relying on the statement that the inquirer provided to CD which the inquirer now knows to be untrue, a belief apparently rooted in the tenacity of opposing counsel's rejection of the information. Nevertheless, the inquirer apprehends that some party to the probate proceeding, be it AB or CD, will submit the inquirer's statement to the tribunal. This prospect gives rise to the inquirer's interest in whether, in such a circumstance, a lawyer may or must reveal "confidential information" as defined in Rule 1.6 of the N.Y. Rules of Professional Conduct. For our purposes, we assume that the information AB imparted qualifies as such. We do not address purely legal questions such as the application of evidentiary privileges, in this instance, for example, whether AB provided the information in furtherance of a crime or fraud, thereby removing the information from the protection of the attorney-client privilege. These issues are for courts to decide.

4. The inquirer suggests two exceptions to Rule 1.6(a) that may permit but not require the lawyer to disclose the information. One is Rule 1.6(b)(2), which permits a lawyer to prevent a client "from committing a crime," and the other is Rule 1.6(b)(3), which allows a lawyer to "withdraw a written or oral opinion or representation previously given to the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The lawyer also asks whether Rule 3.3(a), which concerns a lawyer's candor to a tribunal, requires the lawyer to disclose the information.

QUESTION

5. The inquiry before us asks that we determine whether a lawyer has an obligation to disclose a fraud on a tribunal when the lawyer is not appearing, and has never appeared, before that tribunal. We find no such language in the Rules of Professional Conduct and accordingly answer the inquiry in the negative.

Analysis

6. We begin with Rule 1.6(b)(2), which permits a lawyer to disclose confidential information to prevent a client from committing a crime. Whether AB's failure to correct the false information constitutes a crime at this stage of the matter, or even later, is also a legal issue beyond our jurisdiction to address. If the inquirer concludes that AB has already committed a crime, then Rule 1.6(b)(2) would not apply and thus would not allow the lawyer to disclose AB's confession. N.Y. State 674 (1994). This is true even though AB is now a former client. N.Y. City 1994-8 (1994). The inquirer's fear that AB may later commit a crime by submitting the false information to a tribunal – namely, the court overseeing the probate proceeding – is unduly speculative. The permissive disclosures in Rule 1.6(b) allow the revelation of confidential information only "to the extent that the lawyer reasonably believes necessary" under one or more of the

enumerated circumstances. As of the date of the inquiry, the probate proceedings have not yet started. That AB and her new counsel may elect not to submit the information remains a possibility and calls into question the necessity of disclosure. Even if the lawyer were to conclude that the commission of a crime were imminent, the restricting language of Rule 1.6(b) cautions that disclosure should be to AB's current counsel, not to the opposing counsel or the court.

7. Whether Rule 1.6(b)(3) permits disclosure of the information depends on the reasonableness of the lawyer's belief that CD's lawyer continues to rely on the information the lawyer provided. That CD's lawyer "rejected" the information – that an adversary questioned its veracity – does not invariably mean that CD and her counsel are not relying on the information. Rule 1.0(b) defines "belief" to mean that "the person involved actually believes the fact in question to be true," which "may be inferred from the circumstances." Rule 1.0(q) defines "reasonable" to be "conduct of a reasonably prudent and competent lawyer." Rule 1.0 (r)'s definition of "reasonable belief" combines these two concepts. "A mere suspicion or theoretical possibility that a third person is still relying is not enough – the lawyer must actually believe it." Simon's Rules of Professional Conduct Annotated 223 (2013). Without knowing the information or the content of the exchanges between counsel, we must accept the inquirer's unqualified statement that the lawyer does not reasonably believe that CD's counsel is still relying on the inquirer's statement. If that is so – if in light of all the facts and circumstances a lawyer does not reasonably believe that CD's counsel is so relying – then Rule 1.6(b)(3) provides no license for the lawyer to reveal the information.

8. This does not end the inquiry, for the lawyer asks also whether Rule 3.3(a) requires the lawyer to disclose the information if the probate proceeds and AB's successor counsel presents the court with lawyer's prior factual representation as a true statement. That Rule mandates disclosure, notwithstanding the confidentiality restrictions of Rule 1.6, in certain circumstances. That a lawyer appearing before a tribunal must correct a client's false statement to the tribunal (after unsuccessfully trying to persuade the client to do so) is not at issue. The question, instead, is whether a lawyer who knows that a former client is using the lawyer's prior statements or work product to place false evidence before a court is required or permitted to disclose the information.

9. The requirement that a lawyer do so is not readily apparent in Rule 3.3. Rule 3.3(a), unlike Rule 3.3(b), does not limit its application to a "lawyer who represents a client before a tribunal," yet the mandate of disclosure in Rule 3.3(a) extends only to the knowing failure of a lawyer "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." It is difficult to read this phrase to mean anything other than a statement that the lawyer personally makes to the tribunal, rather than a statement the lawyer previously made to an adverse counsel which another lawyer then places before the court. In contrast to some other jurisdictions, the New York Rules do not make the obligations of Rule 3.3 "ongoing," or cross-

reference Rule 3.3 in Rules 1.6 and 1.9, e.g., Indiana Opinion 2 (2003); Illinois Opinion 98-07 (1999), which would clarify the duties of former counsel in these circumstances. Absent such clarity, we cannot conclude, based on Rule 3.3 alone, that a lawyer who is not counsel appearing before the court has an obligation to correct information that another lawyer submits to a court. See Virginia Opinion 1777 (2003) (forbidding disclosure); but see ABA 93-376 (1993) (holding that "noisy withdrawal" does not relieve the lawyer of the duty of candor in Rule 3.3).

10. Practical concerns support this conclusion. Rule 1.16(a)(3) permits a client to discharge a lawyer at any time for any reason. For better or worse, Rule 1.6 does not allow a discharged lawyer to reveal confidential information to successor counsel without a client's consent. These Rules, taken together, mean that a client may discharge a lawyer precisely because the lawyer is unwilling to further a client's ill-advised and potentially fraudulent pursuits. The so-called "noisy withdrawal" provisions of Rule 1.6(b)(3) supply some leverage to the lawyer in these circumstances, but only upon a "reasonable" belief that reliance on a lawyer's prior statements persists. As we have said, if, as here, that condition is not met, then the avenue of permissive disclosure is closed. Upon withdrawal from a matter, the lawyer's interest in the representation ends except insofar as Rule 1.9 protects former clients from the disclosure of confidential information and the lawyer's involvement in matters adverse to the onetime client substantially related to the prior representation. To impose on the former lawyer the additional obligation to monitor the client's use of a lawyer's onetime statements to opposing counsel exceeds any duty that the language of the Rules imposes.

11. The inquiry does not require us to speculate on the lawyer's obligations if, despite having no duty to watch over the matter, the lawyer somehow learns that the lawyer's erstwhile client intends to use, or has used, the lawyer's statement before a tribunal. For now, we deal only with the question before us, which does not present those facts. Whether a lawyer may or must disclose information in such circumstances implicates a variety of Rules that are best left for consideration when the issue is presented.

Conclusion

12. A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

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One Elk Street, Albany , NY 12207
Phone: 518-463-3200 **Secure Fax:** 518.463.5993