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Tips from Bar Counsel

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CLIENT LIES: IT'S THEIR PROBLEM, BUT IT CAN ALSO BE YOUR PROBLEM

Maybe current economic conditions are to blame, but lately the Office of Bar Counsel has received more calls from attorneys who have discovered or suspect that their clients have been deceiving them. The dilemma may stem from possible fictitious or forged documents, upon which the attorney relied in court, or the concerns may arise after receiving evidence that clearly refutes the client's representations.

Sometimes the fraud has already been committed upon the court or another party; other times the attorney learns of the deceit beforehand. Two Rules of Professional Conduct (RPC) are frequently involved in such instances.

First is RPC 1.6 (Confidentiality), which contains exceptions to attorney/client confidentiality when the client is using, or has used, the attorney's services to commit a criminal or fraudulent act.

RPC 1.6 (b) states that:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...

- (2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;
- (3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;

When the misrepresentation is made to the court, RPC 3.3 (Candor Toward the Tribunal) applies. RPC 3.3 states that

- (a) A lawyer shall not knowingly:
 - (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The simpler scenario occurs when no fraud has been committed upon the court. If the client denies wrongdoing, but the attorney does not believe the client, often the attorney can simply withdraw.¹ If the false information was presented to an opposing party, the attorney has the option of revealing the confidence pursuant to the exceptions in RPC 1.6(b). However, in such instances disclosure is discretionary, not mandatory, pursuant to RPC 1.6.

However, the attorney's options are more restricted when the fraud is made to a tribunal and the matter remains pending. As indicated in RPC 3.3(c), the attorney's duty to take remedial measures trumps the confidentiality requirements of RPC 1.6. Although the rule does not necessarily require the attorney to inform the tribunal, "reasonable remedial measures" must be taken.

The key words in RPC 3.3 are "knowingly" and "knows." If the attorney has suspicions regarding a client's testimony or evidence, but, after investigating the matter, cannot reasonably conclude that it's false, the rule is not triggered. According to the comments to the ABA Model Rule 3.3(c) upon which Nevada's rule is based, "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, [but] the lawyer cannot ignore an obvious falsehood."²

Of course, if the information or evidence ends up truly being false, you may have to convince the court, and perhaps a disciplinary panel, why your conclusion was not unreasonable.

RPC 3.3(c) notes that the attorney's obligations under the rule carry until the "conclusion of the proceeding." Comments to the Model Rule 3.3(c) note that a "proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."³ So, if the matter is pending, sitting on appeal, or even open to appeal, the duty remains attached.

Sometimes, the concerned attorney calling our office needs a few days or a short amount of time in order to verify information before submitting an order, distributing funds or deciding to present a witness. And sometimes the client is adamant that the attorney take immediate action, especially when the action in question finalizes the matter.

When we receive such calls, we usually recommend that the attorney take the necessary time and confront the client. Such clients, when confronted with being dishonest, either quickly understand the behavior is ultimately counterproductive and unacceptable, or they try to pressure the attorney to finalize the matter while they are still ahead. Sometimes these clients threaten or submit bar complaints as a pressuring tactic.

We would respectfully note that it's easier to defend a bar grievance stemming from you stepping back to verify the veracity of your evidence than one where a court has already sanctioned you for violating Rule 11 or otherwise making misrepresentations to the court.

If you know or suspect a client is attempting to use your services to deceive a party or the court, confront them. After such a meeting, if you conclude that you can no longer trust your client, the best course of action is to withdraw if possible. If the client has used your services to deceive the court, make sure you protect yourself and take appropriate measures to mitigate the deception.

It's no sin to believe your client, but it is a sin (and a disciplinary violation) to allow the client to use your services to deceive others. ■

- 1 RPC 1.2(d) states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
- 2 Model Rule of Professional Conduct 3.3, Comment 8.
- 3 Model Rule of Professional Conduct 3.3, Comment 13.