PROFESSIONAL COUNSEL®

Advice and Insight into the Practice of Law®

Spyware, Schemes and Sticky Fingers: Reacting to Client Misconduct

Introduction

A client's past misdeeds are rarely a dealbreaker for a prospective attorney-client relationship. Every day, lawyers help clients address the consequences of illegal conduct and analyze the legal aspects of questionable conduct. These discussions are consistent with a lawyer's ethical responsibilities and lawyers are bound to preserve the confidentiality of their content.

When clients consult a lawyer to further a fraudulent or criminal act, whether they seek assistance with committing a new act or benefiting from a past one, a lawyer's ethical duties shift in a major way. The American Bar Association ("ABA") Model Rules of Professional Conduct and their state corollaries provide a number of possible exceptions to confidentiality, and the crime-fraud exception to the attorney-client privilege may vitiate testimonial protection, if the communications were ever privileged in the first place.

In addition to exceptions permitting an attorney to take action, under certain circumstances attorneys may have a duty to act even if action requires divulging client secrets. Failing to act appropriately may ultimately expose attorneys to professional discipline, civil suits or criminal liability. While obligations can vary by jurisdiction, this article explores situations where client misconduct pits an attorney's duties to a client against duties owed to courts, third parties, and the general public.

Snooping and Stolen Material

Clients play a pivotal role in fact-gathering, but a client turned private investigator creates a serious headache for their attorney. A New Jersey ethics opinion, for example, considered a scenario where a client stole files from opposing counsel during the lunch-break of a document inspection.[1] Imagine instead a divorcing wife using her husband's login credentials to access his emails or a husband installing spyware on his wife's smartphone. How must attorneys respond when clients reveal that they have crossed a line in gathering information?

Refrain from any Assistance

Not surprisingly, an attorney cannot turn a blind eye to the client's behavior and use the ill-gotten evidence for the client's benefit. ABA Rule 1.2(d) precludes an attorney from knowingly assisting a client in criminal or fraudulent activity. Even where the attorney did not assist with the theft itself, using the material for the client's benefit would violate the rule. Additionally, ABA Rule 4.4(a) prohibits an attorney from "us[ing] methods of obtaining evidence that violate the legal rights" of a third party. While the client, rather than the attorney, has used the improper method in these circumstances, violating an ethical rule through the acts of another is professional misconduct under ABA Rule 8.4(a).

Under certain circumstances attorneys may have a duty to act, even if action requires divulging client secrets.

1 N.J. Adv. Comm. On Prof. Ethics, Op. 680 (1995).

Substantive law, as well, may prohibit the attorney from accepting and using stolen material. Receiving property one knows or should know is stolen is a crime in every state. Whether these criminal statutes apply to intangible, electronic data, however, remains an open question in many jurisdictions. Consider the Seventh Circuit Court of Appeals' decision in *Epstein v. Epstein*,[2] in which the client-wife programmed her husband's email account to auto-forward all emails to her. The court affirmed the dismissal of Wiretap Act claims against the attorney, who received several of the embarrassing and salacious emails from his client, primarily because the attorney never *used* the emails in the divorce proceedings.

Reacting to Past Misconduct

While it is clear that an attorney cannot use the stolen material, exactly how attorneys should respond when clients reveal their theft or offer the fruits of their crime is a murkier ethical issue. ABA Rule 1.6 renders the client's divulgence confidential. The rule provides exceptions to prevent a client's crime or fraud furthered by the attorney's services, but no such exception applies to past criminal or fraudulent acts conducted independently of the attorney-client relationship. ABA Rule 4.4(b) imposes a duty to notify the sender when an attorney has received material inadvertently, but not when a client has purposefully taken a document.[3]

If the attorney represents the client in any adjudicative proceeding, including before any court, administrative agency, legislative body or binding arbitrator, ABA Rule 3.3 applies. Subsection (b) requires attorneys who know that their client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding" to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Subsection (c) of the rule further clarifies that an attorney's duty under these circumstances applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6."

ABA Rule 3.3(b) first requires the attorney to know that the client has engaged in a crime or fraud. A client snatching a folder out of opposing counsel's briefcase or surreptitiously accessing their spouse's email account has, without a doubt, acted criminally and fraudulently. Other cases may not be so clear. Perhaps one spouse left an email open on a shared device or an employer neglected to revoke access to company systems from a terminated employee. Close calls may warrant consultation with outside counsel or other resources, but lawyers with lingering doubts concerning what a client did or whether it amounts to a crime or fraud should err on the side of nondisclosure.

Remedial Measures

A determination that a client's conduct amounts to criminal or fraudulent behavior permits the attorney to take remedial measures, but to make a court disclosure only "if necessary." A Pennsylvania Bar Association ethics opinion considered a scenario where a client's spouse installed spyware on her personal laptop.[4] Because the attorney had not "offered or used" the improperly obtained material in the underlying divorce matter, the attorney was not obligated to inform the court of the client's conduct. Similarly, the New York State Bar Association opined that an attorney's duty of confidentiality precluded a disclosure that the client accessed and read the opposing party's emails.[5] The client did not provide the emails to nor share their content with their attorney, so urging the client to stop the behavior and refusing to use what the client obtained was enough to remedy the misconduct.

These opinions, and others like them, are premised on the attorney having not already used the stolen material. They also contemplate scenarios in which the client has viewed or obtained an email or a copy of a document. Where material has already been used to the client's advantage, or where an opposing party has been deprived of an original or sole copy, the only sufficient remedy may be disclosure to the court or opposing counsel.

Before doing so, however, the attorney must inform the client of their intent to disclose, explain the legal and ethical bases authorizing the disclosure, and encourage the client to act on their own accord. Only after the client has declined this opportunity should the attorney unilaterally disclose the necessary facts and seek permission to withdraw. Whether the client agrees to the disclosure or not, the attorney should also recommend that the client consult with a criminal defense attorney.

Where Rule 3.3(b) Does Not Apply

Although a majority of states have adopted a rule identical or substantially similar to ABA Rule 3.3(b), some states have not. Lawyers in these states, facing a client with wrongfully acquired material, are not ethically compelled to take remedial measures. Where a lawyer has already used the material to the client's advantage, Rule 1.6 may permit the attorney to disclose the client's conduct in order to prevent, mitigate or rectify a reasonably certain and substantial injury to the financial interests or property of another. Such a disclosure would not be required, however.

2 *Epstein v. Epstein*, 843 F.3d 1147 (7th Cir. 2016).
3 *See* ABA Formal Ethics Op. 11-460 (2011).
4 Penn. Bar Ass'n Ethics Op. 2011-29 (2011).
5 N.Y. State Bar Ass'n Ethics Op. 945 (2012).

Even in states that have adopted ABA Rule 3.3(b), the rule applies solely to attorneys representing clients before a tribunal. In a non-litigation setting, or where a complaint has not yet been filed, an attorney remains precluded from using stolen material, but has no ethical obligation to take remedial measures. Additionally, Rule 3.3(b) requires that the conduct in question be "related to the proceeding." Although Rule 1.6 may provide an avenue for permissive disclosure, a lawyer who discovers that a client has been embezzling from an entity, defrauding a government agency or stealing from other third parties ordinarily has no affirmative duty to remedy the client's misconduct.[6]

Fibbing and Fabricating

Where some unscrupulous clients choose to steal, others may choose to lie. Lawyers frequently rely upon, and offer as fact, the statements of their clients to courts and third parties. Clients are also given opportunities to produce their own facts in oral testimony or in the documents they provide to their lawyer. How should attorneys respond when they discover that a client has given them false information? Worse yet, what if an attorney realizes that information is false only after it was relayed as fact?

Refrain from any Assistance

Much like an attorney confronted with stolen evidence, an attorney who discovers that a client has fabricated evidence or deliberately misstated a fact cannot assist the client's fraud. Lying to a court or third party is "misconduct" under ABA Rule 8.4 and is at least "fraudulent" conduct prohibited by ABA Rule 1.2(d), if not also "criminal" conduct. Intentionally providing false information to a bankruptcy court, for example, constitutes bankruptcy fraud. Advice to omit an asset, or an overly creative valuation of an asset, could expose a lawyer to professional discipline and criminal liability in addition to any consequences the client would face. If a client, despite the attorney's warnings, insists on offering a misstatement or using doctored evidence, the attorney would be forced to withdraw.

Reacting to Past Fraud

A more difficult situation arises where clients lie without prior warning, or where attorneys discover that a statement or document they submitted to a court is inaccurate only after the fact. Pursuant to ABA Rule 3.3(a), attorneys who offered a "statement of material fact" or "material evidence" they now know to be false are compelled to take "reasonable remedial measures," irrespective of whether these measures would require disclosure of otherwise confidential information.[7] Unlike the stolen material scenario above, this duty does not hinge on whether the client's fraud was intentional; even an innocent mistake demands a remedy.

A key requirement of Rule 3.3, however, is that the attorney *knows* the statement or evidence is false. A recent pair of Missouri ethics opinions is illustrative. In Opinion 2020-24, a client told his attorney that he was employed and testified as such at a deposition.[8] A few days after the deposition, the client admitted to his attorney that he had been unemployed for three months. Similarly, in Opinion 2020-25, an attorney submitted to the court in a divorce matter a statement asserting that the client's children lived with her.[9] Later, the Guardian Ad Litem informed the attorney that the children had not lived with the client for several months. In both cases, Ethics Counsel opined that the attorney should "resolve any doubts about the veracity of [the client's] testimony" in the client's favor, but cautioned that failing to take remedial action would be "ignor[ing] an obvious falsehood."

"Knowing" that a statement or piece of evidence offered by the client is false requires a level of certainty, based on the client's own admission or other reliable sources. Attorneys are not triers of fact, and are not duty-bound to withhold or correct information offered by their clients that is possibly or even probably false. Under Rule 3.3(a)(3), lawyers may refuse to offer evidence that they *reasonably believe* is false, but are not required to correct such evidence if already offered and would likely violate their duty of confidentiality in doing so.

Remedial Measures

In contrast to a situation where a client has stolen bona fide evidence, where a client has misstated a fact or falsified evidence there is a much greater chance that "remedial measures" will not require disclosing the client's conduct. Documents can be corrected, testimony stricken and statements disaffirmed while at least leaving open the possibility that the client made an honest mistake rather than engaged in fraud. Where circumstances warrant broader disclosure, attorneys should consider whether informing opposing counsel, as opposed to the court, is a sufficient remedy.[10]

Ideally, the attorney employs these measures with the client's blessing, following a discussion concerning the attorney's ethical duties and the consequences of inaction. Where the statement or evidence has already been offered, however, the attorney must take corrective measures regardless of the client's wishes. In this case, these measures would almost certainly precede the attorney's withdrawal.

6 *See* Ill. State Bar Ass'n Ethics Op. 20-05 (2020) (describing the non-mandatory disclosure options of an attorney who uncovered the fraudulent actions of a client-trustee).
7 ABA Model Rule 3.3(c).
8 Mo. Supreme Court Adv. Comm. Op. 2020-24 (2020).
9 Mo. Supreme Court Adv. Comm. Op. 2020-25 (2020).
10 *See* Phila. Bar Ass'n Ethics Op. 2004-12 (2005) (opining that disclosure of husband's concealment of a second mortgage to wife's counsel in a divorce matter would be a "reasonable and proportionate" response).

Pursuant to ABA Rule 3.3(c), this duty continues until "the conclusion of the proceeding," clarified in Comment 13 to mean "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." Consequently, attorneys who learn of false evidence or statements after they have been terminated or the representation has ended are nonetheless compelled to remedy that falsity if proceedings are ongoing. This remedy may require disclosure to successor counsel, appellate counsel or the appellate court.[11]

Jurisdictional Variations

While a majority of jurisdictions have adopted a version of Rule 3.3 at least substantially similar to ABA Rule 3.3 and apply the rule consistently with the discussion above, attorneys must examine their state's version of the rule for deviations. Connecticut, for example, includes no provision in its Rule 3.3 that permits attorneys to refuse to offer evidence they reasonably believe is false. Washington D.C. omits language permitting disclosure notwithstanding a Rule 1.6 violation, and the Washington State version of Rule 3.3 expressly *prohibits* any disclosure that violates Rule 1.6.

California Rule 3.3 mirrors the Model Rule in most respects, but permits measures to remedy false evidence or client fraud only "to the extent permitted by [California] Business and Professions Code section 6068." Subdivision (e) of this code permits the revelation of client secrets only where an attorney reasonably believes necessary to prevent a criminal act likely to result in death or substantial bodily harm. Disclosing the falsity of statements or evidence to a California court, or even disclosing a client's fraud, is permitted in only the rarest of circumstances.[12]

Where Rule 3.3(a) Does Not Apply

In addition to jurisdictional limitations, the duties imposed by ABA Rule 3.3 are limited to attorneys appearing before a tribunal. Nevertheless, all attorneys, including those representing clients in a non-litigation or pre-litigation context, may be required under ABA Rule 4.1(b) "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[13]

For example, a 2020 ethics opinion issued by the Ohio Board of Professional Conduct considered a prospective client who revealed to an attorney that the records he previously submitted to an investigative agency were fabricated.[14] In view of Rule 4.1(b), the attorney could not accept the representation unless the client agreed to correct the records; representing the client without a correction would amount to assisting the client's fraudulent act. If the attorney provided services to the client before discovering the fraudulent act, or if the client agreed to the correction but changed course after the attorney began working on the case, the Board opined that the attorney must unilaterally disclose the material facts to the agency before withdrawal.

Attorneys should note that any disclosure required by Rule 4.1(b) must also be permissible under Rule 1.6. While Ohio Rule 1.6 expressly authorizes disclosure to comply with Rule 4.1, attorneys must review their state's version of Rule 1.6 before taking action.

Willful Blindness

An attorney's culpability for a client's misconduct largely depends on the attorney's knowledge. ABA Rule 1.2(d) prohibits an attorney from counseling a client to engage in or assisting a client with conduct the attorney "knows" is criminal or fraudulent. When clients offer stolen or fabricated evidence to their attorney, the attorney's knowledge of the client's conduct is what precludes the attorney from accepting the unfair advantage.

Morally flexible attorneys, therefore, may be tempted to purposefully avoid information that would confirm the illegality of a client's conduct and cut off a lucrative source of fees. In the most severe cases, law firms have ignored warning signs that a real estate purchase was a scheme to launder money or that a distribution of client funds was financing terrorism.

In 2020, the ABA issued Formal Opinion 491 to address these concerns. According to the opinion, attorneys must not only avoid assisting clients with transactions they know to be fraudulent, but also "make a reasonable inquiry" into the client's conduct where facts "indicate a high probability," but do not yet confirm, that the client seeks the lawyer's services in furtherance of a crime or fraud. Failure to make such an inquiry constitutes "willful blindness punishable under the actual knowledge standard" of Rule 1.2(d).

Facts related to the client's identity, the attorney's relationship with the client, the nature of the matter, the risk profile of the relevant jurisdiction or the potential harm of the proposed activity, among other factors, may trigger a duty to inquire further. This inquiry includes asking the client questions and using third party sources, to the extent confidentiality rules permit, in order to resolve doubts. If the client refuses to cooperate, the attorney may be forced to decline the representation or withdraw.

In summary, attorneys cannot circumvent their ethical duties by sticking their heads in the sand. Although ABA opinions are merely advisory, Opinion 491 is based upon existing case law and state ethics opinions and indicates a broader trend toward holding attorneys accountable for their role in their clients' misconduct.

11 *See* Md. State Bar Ass'n Ethics Op. 2005-15 (2005).
12 *See* Calif. State Bar Formal Ethics Op. 2019-200 (2019).
13 Nearly all states have adopted a rule substantially similar to ABA Rule 4.1(b), but a few states have not.
14 Ohio Supreme Court Bd. of Prof. Cond., Op. 2020-03 (2020).

Risk Control Takeaways

Stay In Bounds

Counseling a client on the consequences of fraudulent conduct is one thing; counseling a client to take fraudulent action, or assisting the client's action, is another.

It Starts with the Client

Give clients an opportunity to cease misconduct, disclose it of their own volition, or otherwise make things right before taking action.

Be Tactical with Disclosure

If you are required to take remedial action, consider whether and to what extent disclosure is necessary.

Maintain a Detailed File

Document your communications with the client and your course of action in the client file in the event that your actions are later scrutinized.

Keep Your Eyes Open

Resolve doubts in your client's favor, but ignoring obvious facts or red flags may expose you to professional discipline or even criminal liability.

Embrace Pickiness

Rely on intake procedures and trust your instincts: declining the engagement is the easiest way to prevent a client's trouble from becoming your own.

This article was authored for the benefit of CNA by:

Matthew Fitterer

Matthew Fitterer is an Illinois-licensed attorney and risk control specialist for CNA's Lawyers Professional Liability program. He provides risk control guidance to CNA insureds in the form of written publications, training seminars and direct consultations. Prior to joining CNA, Matt practiced law at a Chicago-area criminal appeals and civil rights firm, and later at a firm specializing in commercial litigation. He received his bachelor's degree from the University of Illinois at Urbana-Champaign and his law degree from Chicago-Kent College of Law. Matt has been designated as a Commercial Lines Coverage Specialist (CLCS) by the National Underwriter Company and a Certified Information Privacy Professional (CIPP/US) by the International Association of Privacy Professionals.