

## RECTIFICATION OF CLIENT FRAUD

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What should a lawyer do on learning that a client is using the lawyer's services to assist in the client's criminal or fraudulent conduct? Can the lawyer disclose information to alert innocent third parties to the fraud? Or must the lawyer stand mute in the face of client wrongdoing, in order to protect overarching principles of client confidentiality?

Minnesota has a rule covering the situation. In 1989, Rule 1.6(b), Minnesota Rules of Professional Conduct ("MRPC") was amended to add current subp. 4. The rule now permits:

(b) A lawyer may reveal:

(4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used; ...

Rule 1.6(b) is permissive, not mandatory. Thus, in Minnesota, a lawyer may exercise his or her discretion, professional judgment, and personal code of morality in deciding what course to take after discovering that he or she has unwittingly assisted in a client's crime or fraud. Under this rule, the lawyer may choose to disclose information -- confidences and secrets -- to rectify the consequences of the client's crime or fraud. The lawyer may also choose to disclose nothing. Consideration of Minnesota's Rule 1.6(b)(4), however, does not, or probably should not, end the inquiry, particularly for transactional lawyers. [Ftn1](#)

There is no uniformity among the states as to what a lawyer may, should, or must do with respect to this issue. Some state ethics codes purport to prohibit disclosure; other states, like Minnesota, permit it; still other states require disclosure. [Ftn2](#) It doesn't strain the imagination to conceive of situations where a transactional lawyer licensed to practice in more than one state could find him or herself with conflicting obligations as to a single multistate transaction.

The lack of uniformity among the states' ethical codes is in part a reflection of the inconsistent and sometimes confusing theories that the ABA has offered with respect to this complex issue. A brief look at the historical background regarding Rule 1.6 is helpful to the practitioner faced with such a dilemma.

In 1969, the ABA adopted the Model Code of Professional Responsibility, which imposed seemingly contradictory obligations of general nondisclosure regarding client confidences, and mandatory disclosure with respect to disclosure of client fraud. [Ftn2](#) The ABA subsequently tried to resolve this inconsistency. The disclosure requirements relating to rectification of client fraud contained in the Model Code provision DR 7-102(B)(1) were amended in 1974 to except from disclosure "information ... protected as a privileged communication" (defined as confidences or secrets). [Ftn3](#) Under this approach, lawyers were required to rectify the effects of a client's fraud, but could do so only by revealing information which was not a "confidence or secret": essentially, therefore, by disclosing only information not learned in the course of the

representation.

Minnesota adopted this amendment in 1976, and it was the rule until 1985.<sup>Ftn4</sup> Under this approach, a lawyer in Minnesota, when confronted with client fraud, was *required* to call upon his client to rectify the fraud, but if the client refused, was also *required* to reveal the fraud to the affected person, but only if he could do so *without* revealing any privileged information.

The ABA and the profession as a whole have continued to struggle with this issue. The ABA's attempts to reconcile the conflict have, however, only deepened the mire. The ABA has twice considered and rejected proposals that would, like Minnesota's current Rule 1.6, permit a lawyer to reveal confidential information that would "rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services have been used."<sup>Ftn5</sup> Instead, the ABA has embarked on a course that allows lawyers to do indirectly what they are prohibited from doing directly under the Model Rules.

ABA Model Rule 1.6, as adopted in 1983, permits disclosure of client confidences only to prevent a client from committing a crime likely to result in imminent death or substantial bodily harm, or for the lawyer's own benefit in certain defined situations.

In the official comments to Rule 1.6, however, the ABA approved a provision that would allow a lawyer to withdraw his or her services when faced with client fraud, and also to "withdraw or disaffirm any opinion, document, affirmation or the like."

This "noisy" withdrawal provision has drawn fire from a host of commentators as ineffective at best, and intrinsically dishonest.<sup>Ftn6</sup> The gist of the criticism is that this approach protects a third party who gets the "hint" that something is amiss from the fact of a lawyer's withdrawal from representation and disavowal of his or her workpapers, but leaves to their own devices more naive persons, who are too unsophisticated to get the "hint".

Recently, the ABA again had to confront the issue, with apparently no greater ability to create a consensus. The ABA Ethics Committee has released Formal Opinion 92-366 - Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud - with a dissenting opinion by 3 of the 8-person committee. The facts presented to the committee were hypothetical, but many of the details were taken from the case of O.P.M. Leasing Services Inc., a computer leasing firm that borrowed almost \$200 million from banks using phony computer leases as collateral.<sup>Ftn7</sup> The committee interpreted several provisions of the Model Rules (Model Rules 1.6, imposing a broad requirement of confidentiality; 1.2(d), prohibiting a lawyer from assisting client crime or fraud; and 1.6(a)(1), requiring withdrawal from a representation where continuing it would result in a violation of the Rules)) to reach the following results:

A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy" withdrawal may have the collateral effect of inferentially revealing client confidences.

When a lawyer's services have been used in the past by a client to perpetrate a fraud, but the fraud has ceased, the lawyer may but is not required to withdraw from further representation of the client; in these circumstances, a "noisy" withdrawal is not permitted.

The dissent, which agreed that the majority opinion reflects a “desirable” result, nonetheless maintained that the majority reasoning is “fatally flaw[ed].” The dissent pointed out that the ABA House of Delegates has twice voted down a specific rectification provision, that “the words of the Model Rules as they presently exist will not bear the weight of the opinion’s construction,” and that “[i]f the House of Delegates wishes to have the result espoused in the opinion, it has but to amend Rule 1.6.”

The profession will doubtless continue to debate the merits of the various rules governing withdrawal and disclosure when a lawyer’s services have facilitated client wrongdoing. Public confidence would best be served by a uniform standard. In that regard, the Minnesota rule has much to recommend it. A permissive approach like Minnesota’s treats lawyers like true professionals. It enables them to use their judgment about what the circumstances may require and to take direct, effective steps to rectify the consequences of client fraud.

In the meantime, lawyers should also be aware of potential civil liability to third parties for failure to reveal client wrongdoing facilitated by the lawyer’s services, particularly in jurisdictions where the ethical duty is mandatory. While a permissive rule may appear to provide more comfort than a rule mandating disclosure, at least one commentator has suggested “that if an ethics rule says a lawyer may do something, a judge or jury is likely to impose a mandatory duty.”<sup>Ftn8</sup> It remains to be seen whether or under what circumstances a permissive rule would provide a defense to liability to a lawyer who chooses not to reveal client wrongdoing”<sup>Ftn9</sup>

## NOTES

1. For litigators, the issue is relatively clear. Rule 3.3, MRPC specifically contemplates that confidential information shall be disclosed “to a tribunal.” For transactional lawyers, however, the strictures do not normally apply, as there is not tribunal.
2. Compare DR 4-101(B) and DR 7-102(B)(1).
3. See Kenneth J. Drexler, “Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure,” 6 Georgetown Journal of Legal Ethics 393, 396-398.
4. See Minnesota Code of Professional Responsibility DR 7-102(B)(1)(1976).
5. In 1983 and again in 1991 the House of Delegates had before it proposals that would permit direct disclosure of client fraud.
6. See, e.g. Drexler, supra n.3, at 407-409, and articles cited therein.
7. 670 F.2d 383 (2<sup>nd</sup> Cir. 1982).
8. Gillers, “Cleaning Up the S&L Mess,” ABA Journal, February 1993 at 93.
9. See, e.g., In re American Continental/Lincoln S&L Securities Litigation, 794 F. Supp. 1424, 1452 (Ariz. 1992) (Jones Day motion for summary judgment against plaintiffs - purchases of debentures - denied).