

matter of ETHICS / By Alan Goldfarb

Limits on Loyalty: Dealing with Clients Who Lie

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

—From the Preamble to the ABA's Model Rules of Professional Conduct

THE PREAMBLE TO THE ABA'S MODEL RULES of Professional Conduct (Model Rules) recognizes a lawyer's simultaneous responsibilities to clients, the legal system, and the lawyer's own interest in remaining ethical. While a lawyer's responsibilities are generally consistent, they occasionally come into conflict. This is particularly true when a lawyer learns that a client has offered false evidence.

Misrepresentation

There are many immigration law scenarios in which this may happen. An immigration lawyer represents a client who is applying for adjustment of status based on his marriage to a U.S. citizen. After the applications are submitted, the client tells the lawyer that he included a fraudulent divorce decree, that his prior marriage has not been terminated, and that he intends to travel home to visit his first wife. The lawyer assumes that the false representation regarding the divorce was intentional. If the client intentionally submitted the divorce decree knowing that it was fraudulent, he may also have fraudulently submitted his application for the purpose of obtaining immigration benefits. The client faces potential INA §204(c) and criminal sanctions for marriage fraud.

Duty to Client and Court

In determining the appropriate response to the client's misrepresentation, the lawyer has to balance the competing duties of loyalty and candor. Specifically, the lawyer must decide whether the Model Rules require disclosure of the client's fraud, despite the lawyer's duty of confidentiality and the severe consequences to the client. Rule 1.6 prohibits a lawyer from revealing information relating to the representation of a client. This prohibition is qualified by other ethical obligations, including Rule 3.3, Candor Toward the Tribunal, which requires the lawyer to take reasonable remedial measures when the lawyer learns that a client has given false evidence. Rule 3.3(a)(3) provides, "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." →



Disclosure

The lawyer should know the extent of the obligation to disclose. Rule 3.3 applies only to conduct during proceedings before a tribunal. Rule 1.0(m) defines tribunals to include courts, arbitrators, and administrative agencies where a neutral officer renders a binding legal judgment affecting a party's interests in a particular matter. U.S. Citizenship and Immigration Services (USCIS), in granting or denying an application for permanent residence or other immigration benefits, fulfills an adjudicative role to be considered a "tribunal" within the meaning of the term. Assuming that USCIS is a tribunal, the lawyer's obligation to disclose false evidence only applies during the proceeding. According to the comment to Rule 3.3, the "conclusion of the proceeding is a reasonably definite point for the termination of the obligation." The proceeding ends when there has been a final decision and the time for review has passed.

Because of the duties of loyalty and confidentiality owed to the client, the lawyer must explore all other reasonable remedial measures before considering outright disclosure. The lawyer's first step should be to talk with the client, explain the serious consequences of his conduct, and urge him to rectify the situation. The lawyer should make it clear to the client that the Model Rules require disclosure of false or fraudulent evidence. If unsuccessful, the lawyer must withdraw from the case. Whether withdrawal satisfies the lawyer's ethical obligation depends in part on whether the false statements already have been made. If they have been made, the lawyer's withdrawal may not be enough. The duty to disclose continues after withdrawal. Simply withdrawing will not remedy the problem if the agency will continue to rely on the misrepresentation.

If the client fails to correct the false evidence and the lawyer's withdrawal will not rectify the situation, disclosure may be the only reasonable remedial measure. Although such disclosure conflicts directly with the lawyer's duty of confidentiality, the duty to take reasonable remedial measures applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Rule 3.3(c). If required, the adverse disclosure should be no greater than necessary to accomplish the purpose. In this case, the purpose would be to keep improper evidence from the tribunal. It would be sufficient then for the client or the lawyer to withdraw the application without comment, so as not to create a record of intentional misrepresentation, while ensuring that the tribunal does not consider the improper evidence.

The lawyer has a responsibility to be a forceful advocate for clients and to maintain client confidences. The lawyer also has a responsibility to the legal system.

Jurisdictions with rules based on Model Rules 1.6 and 3.3 include: Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Louisiana, Maryland, Michigan, New Jersey, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia. 

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