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To Discountenance the Haughty and the Lawless: The Ethics of Dealing with Bad Clients

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By Don Burnett

Lawyers face hard choices—not only between right and wrong, but also between right and right. For example, it is "right" for a lawyer to be loyal to a client; but it is also "right" for a lawyer to protect others from harm, to serve conscientiously as an officer of the legal system, and to pursue justice. When these "rights" conflict with each other, how should the lawyer choose?

The newly amended Idaho Rules of Professional Conduct, effective July 1, 2004, clarify how these conflicting "rights" must be prioritized, or accommodated to each other, in specific situations. The 2004 amendments place increased emphasis upon a lawyer's obligations to society and to the legal system, vis-à-vis duties to clients. The Rules reaffirm the noble calling of the law as a learned profession dedicated to public service, in contrast to the cultural stereotype of lawyers as mercenaries. The amended Rules echo the spirit of the now-famous letter written by a young John Adams to his friend Jonathan Sewall, in which the budding lawyer and future president declaimed:

> Now to what higher object, to what greater character, can any mortal aspire than to be possessed of all this knowledge, well digested and ready at command, to assist the feeble and friendless, to discountenance the haughty and lawless, to procure redress to wrongs, the advancement of right, to assert and maintain liberty and virtue, to discourage and abolish tyranny and vice?"[1]

Sadly, but inevitably, lawyers throughout history have encountered people, including their own clients, who are "haughty and lawless"—who expect lawyers to help them lie, cheat, or steal. This, of course, is not the proper role of lawyers; and it never has been. As long ago as 1908, when the ABA adopted the Canons of Professional Ethics, lawyers were understood to be more than the educated tools of their clients. In Canon 15 ("How Far a Lawyer May Go in Supporting a Client's Cause") the ABA stated:

> The office of the attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

Canon 16 ("Restraining Clients from Improprieties") imparted a similar message:

> A lawyer should use his best efforts to restrain and prevent his clients from doing those things which the lawyer himself ought not to do.... If a client persists in such wrongdoing, the lawyer should terminate their relation."

Today, the Idaho Rules of Professional Conduct are restoring and strengthening these venerable precepts. In particular, the Rules provide (a) that a lawyer must decline, or must terminate, the representation of any client who seeks the lawyer's assistance in committing a crime or fraud; (b) that a lawyer is authorized to disclose confidential information if necessary to prevent reasonably certain physical harm to others or serious harm to an organizational client; and (c) that the lawyer must speak truthfully and may not abide false statements by others.[2] Consider the following illustrations:

A. Refusing to be Part of a Client's Crime or Fraud

- A prospective client comes to your office and asks you to create a business corporation. In the course of the conversation, it becomes clear to you that the corporation will be a sham; it will have no assets or genuine business operations, but will merely be a device to raise money from gullible investors. Rule 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...." This rule interlocks with Rule 1.16(a), which provides that a lawyer "shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client, if ... the representation will result in violation of the rules of professional conduct or other law...." In the case of the sham corporation, representing this prospective client would violate Rule 1.2(d). Unless you were successful in counseling the client to create a legitimate business entity, you would be required to decline the representation.[3]
- Suppose the prospective client's criminal or fraudulent intentions are not apparent at the outset; but you discover them after the representation has begun and you have provided legal services advancing the client's scheme. As noted above, you must terminate the representation. Moreover, the ABA has issued an advisory opinion stating that whenever a lawyer must terminate a representation in order to avoid involvement in a crime or fraud, the lawyer also may withdraw "noisily"—that is, the lawyer may disaffirm his or her work product, such as documents the lawyer has prepared and furnished to third parties, in connection with the crime or fraud.[4] Such a statement of disaffirmance, without more, does not breach the lawyer's duty to refrain from disclosing confidential information. The disaffirmance may well induce third parties to raise questions and to draw inferences; but it performs the salutary purpose of disconnecting the lawyer, and the legal profession, from a crime or fraud.

  It also keeps the lawyer well clear of violating Rule 8.4(c), which prohibits any "conduct involving dishonestly, fraud, deceit, or misrepresentation ...."

B. Preventing Harm to Persons or to Organizations

- In the course of representing a manufacturer, you learn that the

client and several nearby enterprises are secretly discharging a highly toxic pollutant into a stream from which the community draws its water supply. Such information, acquired in the course of a representation, is confidential under Rule 1.6. Under subsection (b) of the Rule, however, confidentiality is subject to exceptions. The current version of Rule 1.6(b) provides that a lawyer may reveal protected information "to the extent the lawyer reasonably believes necessary

1. to prevent the client from committing a crime, including disclosure of the intention to commit a crime; [or]
2. to prevent reasonably certain death or substantial bodily harm... ."

In the water pollution case, the first exception to confidentiality would apply only if discharging the toxic pollutant were a crime. The second exception would apply more readily because it serves a broader purpose. Rather than seeking to prevent crime, the second exception seeks to prevent harm to physical wellbeing. Thus, the second exception does not require the harm to be a product of criminal conduct, or to be imminent (as opposed to "reasonably certain"), or even to be caused by the client. Rather, it is sufficient that the lawyer be aware of circumstances and conduct threatening death or substantial bodily harm. In this case, if you reasonably believe it necessary to disclose the landowners' polluting practices in order to alleviate the harm to the lives or health of inhabitants of the community, you may make such a disclosure.

- Now, suppose you become aware of conduct and circumstances creating a risk of economic harm rather than harm to physical wellbeing. If the economic harm arises from the client's commission of a crime, disclosure will be permissible under the first exception to Rule 1.6 and under the following additional exception, which allows a lawyer to disclose confidential information

  3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime in furtherance of which the client has used the lawyer's services ...."

  Although the first and third exceptions to Rule 1.6 look similar, they differ in scope and focus. The scope of the first exception includes any client crime, while the third exception extends only to client crimes in which the lawyer's services have been used. Moreover, the focus of the first exception is upon future or ongoing crimes, while the third exception focuses upon past crimes with future or ongoing consequences that can be prevented, mitigated or rectified. Notably, the ABA model version of the third exception refers to "fraud" as well as to "crime," but Idaho has deleted that reference. Consequently, if a potential harm is economic rather than health-related, and if it arises from a "fraud" that does not constitute a "crime," an Idaho lawyer may not disclose confidential information in order to alleviate the harm.

But here is a point some lawyers forget—and bad clients hope *you* will forget. Adhering to confidentiality does not fully discharge your professional obligations. Under Rules 1.2(d) and 1.16(a), as you will recall, you must withdraw from the representation if your services are being used in a fraud; and under the ABA advisory opinion mentioned above, your withdrawal may be "noisy."

- What if your client is an organization rather than an individual? Rule 1.13 contains specific provisions governing lawyers for organizations. Among these is a requirement that the lawyer act "in the best interests of the organization" whenever an officer, employee or other constituent of the organization in a matter related to the lawyer's representation, is violating the law, or causing the organization to do so, thereby creating a risk of substantial injury to the organization. If necessary, the lawyer's action will include taking the issue to the highest authority in the organization, such as a board of directors. Rule 1.13, however, merely supplements—and does not displace—the organizational lawyer's authority and responsibility under the other rules.[v] Thus, if the organization faces possible liability for harm to others, the lawyer not only should act under Rule 1.13(b), but also should consider whether the harm triggers an exception to confidentiality under Rule 1.6(b).

  Here, there are forks in the analytical road. If the harm relates to physical health—like toxic pollutants in a community's water supply—then the lawyer is permitted, as would be the lawyer for any individual client, to make a disclosure in order to prevent "reasonably certain death or substantial bodily harm." If the harm is economic, and the conduct in question is criminal, then the first and third exceptions to Rule 1.6(b) also would allow disclosure, either to prevent future and ongoing crimes, or to address future and ongoing consequences of past crimes. But if the harm to others is economic, and the conduct in question is fraudulent yet not criminal, then the analysis is more nuanced.

  The analysis begins by recognizing that even though a particular fraud might not violate a criminal statute, it nevertheless would constitute the violation of a legal obligation, triggering an organizational lawyer's duty to act under Rule 1.13(b).[6] Although the lawyer could not disclose confidential information under Idaho's exceptions to confidentiality under Rule 1.6(b), there is now another exception to confidentiality embedded in Rule 1.13 itself. Subsection (c) of the Rule currently provides, in essence, that if the lawyer's efforts to obtain corrective action within the organization are unsuccessful, and if the lawyer "reasonably believes that [a violation of law] is reasonably certain to result in substantial injury to the organization," then the lawyer may reveal information otherwise protected under Rule 1.6. Thus, Rule 1.13(c) contains a limited, permissive exception to confidentiality for "whistleblowing."

If you represent an organization, you may have to decide some day whether to blow the whistle on an organizational fraud related to the subject matter of your representation. Regardless of how you resolve that question, however, remember that in any event Rule 1.2(d) precludes you from participating in the fraud (or in a crime). If your client does not cease its criminal or fraudulent conduct, Rule 1.16(a) will require you to withdraw from the representation. Even if you have chosen not to disclose confidential information under Rule 1.13(c), you still can make such a withdrawal "noisy" by disaffirming any work product connected with the crime or fraud. The organization may remain corrupt, but you will not be corrupted.

Telling the Truth and Requiring Others to Do So

- You represent a client in a divorce proceeding. During a deposition, the client provides what you know to be an inaccurate description of assets subject to division in the divorce. During a recess, your client says, "Maybe I didn't mention everything, but I'll straighten it out if we go to trial. Wouldn't this be a good time to settle the case?" The answer, of course, is, "No, it's a bad time—an unethical time." Rule 3.3 requires lawyers, as officers of the legal system, to be candid toward a tribunal and to demand candor from others as well. In an advisory opinion, the ABA has stated that proceedings before tribunals are deemed to include discovery proceedings. Accordingly, the duty of candor extends to depositions, and the ABA's opinion is now reflected in official commentary to Rule 3.3.[7]

  Therefore, at trial, in any other kind of hearing, or in discovery, a lawyer shall not knowingly make a false statement of fact or law, nor shall the lawyer offer evidence the lawyer knows to be false.[8] If the lawyer learns of the falsity of material evidence after it has been offered, but while the case is still pending, the lawyer must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The key word here is "remedial." The lawyer must take action that is *timely and effective* in correcting the falsehood. Under subsection (c) of Rule 3.3, this duty of disclosure trumps your duty of confidentiality under Rule 1.6.

  In the case of the divorce deposition, you should begin—as noted in the ABA opinion—by remonstrating with your client about the false testimony. Usually, such a conversation will convince the client that the falsehood is going to be corrected and it will look better if he or she makes the correction rather than leaving it to you. If the client is intransigent, however, you must make a disclosure to the other party(ies) or to the court, as appropriate to the circumstances. Only when a material falsehood has been corrected should settlement negotiations proceed.

- Suppose a client's false statement occurs during a settlement negotiation, or in the negotiation of a business transaction, rather than in a deposition or a trial. In that event, Rule 3.3 is not implicated. Rather, the applicable standard is set forth in Rule 4.1, which—in addition to providing that a lawyer shall not knowingly make a false statement of material fact or law to any third person—requires the lawyer to "disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...." The Rule goes on to say, however, that this duty—unlike the duty to correct a falsehood in a proceeding before a tribunal—does *not* override confidentiality under Rule 1.6.

  Thus, as a lawyer representing a client in any setting, you must always speak truthfully. When falsehoods come from your client or from others in a tribunal context, you should correct the falsehoods; and your duty of candor will trump confidentiality. But in other contexts, if the falsehoods can be corrected only by disclosing confidential information, your duty of confidentiality will trump candor. This contextual differentiation of duties relating to disclosure illustrates the difficulty of balancing "right v. right" when fundamental values collide.

  Resolving the confidentiality and disclosure issues, however, will not end your professional responsibility. As we have seen in the discussion of other dilemmas posed by bad clients, Rules 1.2(d) and 1.16(a) require you to withdraw from any representation in which your services are being used to assist the client in a crime or fraud. In the case of a falsehood uttered by the client in a negotiation, if the misrepresentation is tantamount to a fraud, and if the client later insists that you refrain from using confidential information to set the record straight, you must withdraw; and you may do so noisily by disaffirming any of your work product or prior statements related to the fraud.

  If the client's actions cause you to withdraw and disaffirm, you should recognize that this is a client well worth losing. And the legal profession should recognize that it has found in you an ethical lawyer well worth keeping.

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ENDNOTES

1 Quoted in David McCullough, *John Adams* (Simon & Schuster, 2001).

2 Violation of the Rules of Professional Conduct will cause a lawyer to be subject to professional discipline, which is different from malpractice liability. The violation of a Rule "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Idaho Rules of Professional Conduct, "Preamble" para. 20.

3 Rule 1.18, a new rule added in 2004, further addresses a lawyer's duties to a prospective client. Even if the lawyer declines the representation, the prospective client (by analogy to a former client) is entitled to protections relating to confidentiality and conflicts of interest.

4 *See* ABA Formal Opinion 92-366 (American Bar Association Committee on Ethics and Professional Responsibility, 2002).

5 Comment 6 to Rule 1.13 states, in part, "The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules.... Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an *additional* basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6)." (Emphasis supplied.)

6 Comment 3 to Rule 1.13 states that "when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization."

7 *See* ABA Formal Opinion 93-376 (American Bar Association Committee on Ethics and Professional Responsibility, 1993). Comment 10 to Rule 3.3 illustrates the application of the rule to false testimony given by a client in a deposition.

8 Rule 3.3 applies to all lawyers and all cases, even to defense counsel in criminal prosecutions. Comment 7 to the Rule cites the U.S. Supreme Court decision in *Nix v. Whiteside* for the propositions (i) that a criminal defendant has no constitutional right to testify *falsely*, and (ii) that a lawyer does not render ineffective assistance of counsel simply by refusing to participate in the presentation of perjured testimony. The comment also notes that a court may allow a criminal defendant to give narrative testimony without question-and-answer participation by defense counsel. (The lawyer should not refer to such testimony in a closing statement, if the lawyer knows the testimony was false.)