

“Client Misconduct”

By the NHBA Ethics Committee

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In our adversarial legal system there will always be tension between a lawyer's role as zealous advocate for his or her client and the ethical and moral constraints on the lawyer's behavior that are necessary if the Courts are to be able to discern the truth and dispense justice. This conflict is most serious and difficult to resolve when a client seeks a lawyer's acquiescence, if not active assistance, in fraudulent, false, or otherwise improper conduct. The drafters of the Rules of Professional Conduct anticipated a number of ways in which this dilemma could arise, and the Rules contain a series of guidelines, both specific and general, to help the lawyer who finds him or herself in this position.

While a lawyer is generally supposed to abide by the client's wishes concerning the scope of the lawyer's representation, Rule 1.2(d) provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" Rule 1.2(e) requires a lawyer who knows that his or her client expects assistance not permitted by the Rules or other law to "advise the client regarding the relevant limitations on the lawyer's conduct."

Although a lawyer must not counsel or assist a client in fraudulent or criminal conduct, the lawyer is never required to reveal confidential client information. Instead, Rule 1.6(b)(1) permits but does not mandate the disclosure of information the lawyer reasonably believes is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or bodily harm or substantial injury to the financial interest or property of another." According to the New Hampshire Comments to Rule 1.6, the authorization to reveal confidences in order to prevent a property or financial crime has no counterpart in the ABA model rules, but the Comment emphatically states that this change is not to be "interpreted to encourage lawyers to disclose the confidences of their clients." The question of whether to disclose a confidence, "an extreme and irrevocable act," is left to the individual conscience of each New Hampshire lawyer.

As an alternative to revealing confidential information about client misconduct, the Rules permit and in some instances require the lawyer to terminate his or her representation. Under Rule 1.16(a)(1) the lawyer must withdraw if continuing representation of the client will result in a violation by the lawyer of the rules of professional conduct or other law. Withdrawal is permitted but not required if

- "(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyers services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent"

In these instances, the lawyer may withdraw only if the withdrawal can be accomplished without any material adverse effect on the client. If the tribunal considering the case refuses to permit the lawyer to withdraw, then the lawyer must continue, even if good cause exists for the withdrawal.

Client misconduct is most difficult for a lawyer to grapple with when it occurs during a trial or some other formal legal proceeding. A lawyer has a duty of candor toward all tribunals imposed by Rule 3.3, which prohibits making false statements of law or fact or offering evidence known to be false. When a lawyer subsequently learns of falsity in material evidence the lawyer has already offered, Rule 3.3(a)(3) imposes a duty -to take "reasonable remedial measures." Unfortunately, the Rule does not specify what these remedial measures should be, although the ABA Model Code Comments, not adopted by the New Hampshire Supreme Court, first suggest confidentially urging the client to correct the testimony. If this fails, then the Comments suggest that the lawyer should seek to withdraw if that will remedy the situation." If withdrawal is not possible or will not resolve the problem, then the lawyer can disclose the false testimony to the Court.

Rule 3.3(b) provides that this duty to take remedial measures continues throughout the proceeding and that it applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6. Although the New Hampshire Comments emphasize that a New Hampshire lawyer does not have to affirmatively disclose to a tribunal a material fact necessary to prevent a crime or fraudulent act by a client, the Rule does clearly require the attorney to take remedial measures, which may include disclosure if necessary, once the lawyer learns evidence he or she has offered is false. See *Nix v. Whiteside*, 106 S. Ct. 988 (1986) and RSA 311:6.

At some point in the career of every lawyer with an active practice, there will be a confrontation between a client's strongly, expressed desire for passive or active cooperation in wrongful conduct and the lawyer's own ethical and moral principles. The Rules of Professional Conduct prescribe a resolution for this conflict that absolutely prohibits fraudulent or false conduct by any lawyer but gives the lawyer great discretion and flexibility about disclosure, so that the principle of protecting client confidences, so critical for effective representation, is not unduly compromised.