

Inadvertent Disclosure Revisited

In a previous column¹ we explored the proscriptions against making a false statement of material fact of law to a third person, particularly in the context of negotiating a settlement. The ethical rule involved, ER 4.1 (Truthfulness in Statements to Others),² has a subparagraph (b) that states that a lawyer has an additional duty to not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6 (Confidentiality of Information).

Under ER 1.6 as it existed prior to Dec. 1, 2003, when the new rules of professional conduct came into effect, all information relating to a representation of a client was deemed to be confidential, except such information that the lawyer believed necessary to prevent the client from committing a criminal act that was likely to result in death or substantial bodily harm.

In view of this, ER 4.1(b) was limited in its scope, and lawyers were ethically prevented from disclosing information to others even though it could prevent a client from committing a crime or fraud reasonably certain to result in substantial injury to the financial interests or property of another, particularly if the client had used the lawyer's services to do so.

The new rules of professional conduct have changed the landscape considerably.

ER 1.6(d) now allows (*i.e.*, no longer prohibits) a lawyer to reveal and disclose to third persons confidential information concerning the representation (1) to prevent a client from committing a crime or fraud where the client has used the lawyer's services to do so and (2) to mitigate or rectify substantial injury to the financial interests or property of another that might have resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.


The result is that the information that ER 1.6 *permits* a lawyer to reveal under certain circumstances may now be *required* to be disclosed to third parties by virtue of the mandates of ER 4.1(b). The risk in failing to make such disclosures is to expose the nondisclosing lawyer to accusations of assisting the client in criminal or fraudulent conduct,³ or to have aided and abetted the client in criminal or fraudulent activities.⁴

The Comment to ER 4.1(b) states that ordinarily a lawyer avoids assisting a client's crime or fraud by withdrawing from the representation. Under certain circumstances, a "noisy" withdrawal is necessary, as when a document or report that the lawyer has prepared must be disavowed.⁵ The Comment discusses "extreme cases" in which a lawyer must disclose confidences that the former ER 1.6 used to protect. The Comment closes by stating that if disclosure is permitted by ER 1.6, such disclosure is required under ER 4.1(b), but only to the extent necessary to avoid assisting a client's crime or fraud in which the lawyer's services were used.

Two recent opinions may give us an indication of where we are heading concerning disclosure of client confidences.

In a recent case from New Hampshire,⁶ a lawyer was found not to have violated his duties of confidentiality when he disclosed the existence of a life insurance policy that had been misappropriated by the executor of an estate, the lawyer's former client. And in a North Carolina ethics opinion,⁷ it was stated that a lawyer's obligations of confidentiality under ER 1.6 are preempted by the disclosure requirements set forth in the Sarbanes-Oxley Act of 2002.⁸

Neither of these opinions mentioned ER 4.1(b) as requiring the confidences at issue to be disclosed. As the expanded obligations occasioned by new ER 1.6 and the requirements of ER 4.1(b) become better understood, we can expect not only more lenient views of a lawyer's duties of confidentiality, as expressed in the opinions above, but cases requiring lawyers to disclose the information necessary to keep their clients from harming third persons.

It's not always easy to withdraw from representing a client who pays its bills, but withdrawal in whatever form it may take could, in certain cases, be the only way to avoid having to comply with the very clear disclosure mandates found in ER 4.1(b). 

endnotes

1. *Misstatements in Negotiations*, ARIZ. ATT'Y, Nov. 2006, at 8.
2. Rule 42, ARIZ.R.S.C.T.
3. This is prohibited by ER 1.2(d).
4. For collected authorities on this aspect, *see* DANIEL MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK §1.2:620 (2d ed. 2003); MALLEN & SMITH, LEGAL MALPRACTICE § 28.27 (2005).
5. *See* ABA Formal Op. 92-366 (Withdrawal When a Lawyer's Services will Otherwise Be Used To Perpetrate a Fraud) (Aug. 8, 1992) and ABA Formal Op. 93-375 (The Lawyer's Obligation To Disclose Information Adverse to the Client in the Context of a Bank Examination) (Aug. 6, 1993), both issued prior to the promulgation of new ER 1.6.
6. *In re Lane*, 889 A.2d 3 (N.H. 2005).
7. North Carolina 2005 Formal Ethics Op. 9 (Jan. 20, 2006).
8. *See Standards for Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer*, 17 C.F.R. Part 205 (known as "Rule 205").

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