NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 831 - 08/14/09

Topic:	Disclosure of fraud on the tribunal and fraudulent conduct
Digest:	Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new N.Y. Rules of Professional conduct), had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009
Rules and Code:	Rules 1.0(i), 1.6, 1.7(b)(4), 1.9(a), 3.3(b); Code Definitions "fraud"; DR 4-101, 7-102(B)(1)

QUESTION

1. Where a lawyer, prior to April 1, 2009, represented a client in obtaining a conditional discharge of a misdemeanor charge, contingent on the client's not being arrested for a period of time, and then, after April 1, 2009, the lawyer learned from the client that the client had been arrested shortly before the plea, must the lawyer disclose the arrest to the prosecutor or the tribunal?

OPINION

2. The inquirer represented a defendant accused of a misdemeanor. The inquirer arranged a plea bargain under which the defendant pleaded guilty to a violation of disor-

derly conduct with a conditional discharge. Under the terms of the sentence of conditional discharge, the defendant avoided incarceration or probation as long as she was not arrested within the next six months. In the course of the plea, the client represented to the court and the prosecutor that she (the client) had "stayed out of trouble" since the misdemeanor arrest.

3. A short time later, but after April 1, 2009, the client told the inquirer that in fact she had been arrested the week before the plea in a different county. The inquirer asks whether he must inform the prosecutor or the court about the client's prior arrest.

4. New York adopted new Rules of Professional Conduct that became effective on April 1, 2009.[1] Both the new Rules and the former Code of Professional Responsibility have provisions addressing a lawyer's obligations where a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial measures, but the rules differ on two significant points: First, and most clearly, the provisions differ on the critical question of whether a lawyer must disclose protected confidential information if required to remedy the fraud. Second, the definition of "fraudulent conduct" in the new rules differs from the interpretation we placed on the definition of "fraud" in the old rules with respect to whether fraudulent conduct includes misleading or deceptive conduct short of actual fraud under the applicable law.[2]

5. Under DR 7-102(B)(1) of the old Code, a lawyer who learned that a client had "perpetrated a fraud upon a person or tribunal" was required to "promptly call upon the client to rectify the same. If the client refuse[d] or [was] unable to do so," the lawyer was required to "reveal the fraud to the . . . tribunal, *except when the information is protected as a confidence or secret.*" (Emphasis added.)[3]

6. Rule 3.3(b) of the new Rules eliminates the exception for confidences and secrets (now called simply "confidential information"). Rule 3.3(b) provides:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudu-

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1 Joint Order of the Appellate Divisions, December 30, 2008.

2 See paras. 9-10 below

3 The italicized language was added to the Code in 1976. *See* N.Y. State 454 (1976). This rule was not absolute. The exception extended only to information "protected" as a confidence or secret. We repeatedly held that information was not protected as a confidence or secret if one of the exceptions to disclosure in DR 4-101 applied. N.Y. State 797 ¶ 13 (2005); N.Y. State 781 (2004); N.Y. State 674 (1995); N.Y. State 466 (1977). In addition, the Court of Appeals stated that in certain circumstances "counsel has a duty to disclose witness perjury to the Court." *People v. Berroa*, 99 N.Y.2d 134, 142, 753 N.Y.S.2d 12, 18, 782 N.E.2d 1148, 1154 (2002) (*citing People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001)).

lent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

7. Contrary to the Code exception for confidences and secrets, new Rule 3.3(c) expressly states that this duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." (Rule 1.6 defines the protections accorded to confidential information.)[4]

8. There is also a difference in the definitions of the applicable conduct that triggers this requirement, at least as we had interpreted it. The definition of the term "fraud" in the old Code was not a definition as such, but rather a clarification. It said:

> "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

9. In the absence of a Code definition of "fraud," we interpreted the term "fraud upon a tribunal" in DR 7-102(B) to refer to the term "fraud" in the law outside of the Code (except to the extent that any such law should require a mental state other than that set forth in the above definition). We said in N.Y. State 797 (2005), "Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee."[5]

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[4] It is unclear when the disclosure obligations under the new rule end. In past opinions, we appear to have assumed that the disclosure obligations in DR 7-102(B) where information was not "protected" as a confidence or secret ended when the proceeding in question concluded. N.Y. State 674 (discussing whether a lawyer must reveal perjury "discovered after the fact when the proceeding in which the perjury was committed (and later discovered) has not yet concluded"); N.Y. State 466 ("since the existence of the negotiable instrument is not relevant to any pending proceeding"). The New York State Bar Association proposal for the new rule, adopting the language of the ABA Model Rules, would have codified this interpretation in Rule 3.3. The proposal stated, "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (emphasis added) (available at www.nysba.org/proposedrulesofconduct020108. As noted in the text, Rule 3.3 as adopted by the courts omits the phrase "continue to the conclusion of the proceeding and." There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely – or at least for some reasonable period of time. The broadest version of this interpretation seems to us implausible. We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies.

[5] *But see* N.Y. State 681 (1996) ("Regardless of the legal determination of the criminal effect of the client's actions, it appears that the client may be using the lawyer's services to perpetuate a fraud on the tribunal.").

10. The definition of "fraud" or "fraudulent" in the new rule appears to be broader. It provides:

> "Fraud" or "fraudulent conduct" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.[6]

While the new phrase "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction" codifies our interpretation of "fraud" under the Code, the inclusion of the disjunctive "or has a purpose to deceive" would appear to draw in conduct beyond conduct that constitutes "fraud" under applicable law.[7]

11. In this case, any "fraud" or "fraudulent conduct" occurred prior to April 1, 2009. In N.Y. State 829 (2009), we opined that the new rules requiring that waivers of conflicts of interest be "confirmed in writing"[8] apply only to waivers given by clients after April 1, 2009. We relied both on the language of the particular rules at issue there as well as on the general rule that, unless otherwise clearly stated, statutes are to be construed as prospective in application only.[9]

12. The application of the effective date here is less straightforward. The language of the rule does not provide much guidance. Conceivably, because the rule speaks of a lawyer who "knows" of fraudulent conduct -- in the present tense -- it could be interpreted to refer to anyone who has such knowledge on or after the effective date, regardless of when the fraudulent conduct occurred and regardless of when the lawyer learned of that conduct. We do not believe this interpretation is correct. The new rule is a dramatic break from the prior understanding of a lawyer's duties in the face of improper conduct by a client or witness.

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[6] Rule 1.0(i) (emphasis added).

[7] The use of the disjunctive here was a change from the New York State Bar Association proposal. New York State Bar Association Proposed Rules of Professional Conduct, *supra* n.3, at 4 ("'Fraud' or 'fraudulent conduct' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and* has a purpose to deceive . . . .") (emphasis added).

[8] Rules 1.7(b)(4) and 1.9(a).

[9] *Id.* ¶¶ 5, 6 & n.4 (citing *Hays v. Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1st Dep't 1992) ("Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application."); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985)).

13. The presumption that new rules do not apply retroactively has particular strength where a person may rely on the pre-existing rules. Where the rules have changed, a client -- even a client who has engaged in fraud -- should be able to rely on the advice or warnings he or she may have received, or the correct understanding he or she had, regarding the "rules of the road" that govern the lawyer-client relationship. We believe the same should apply whether the lawyer learns of the fraud before or after April 1, 2009, as long as the client's fraudulent conduct occurred prior to that date. The client has committed himself or herself when the fraud occurred.[10]

14. In this case, as noted, the fraudulent conduct in question occurred before the effective date of the new rules. We therefore apply DR 7-102(B)(2) and not Rule 3.3(b) to determine whether the lawyer has an obligation to disclose the fact that the client was arrested a week before entering a conditional discharge plea. Even if the client's false representation that he had stayed out of trouble was a "fraud on the tribunal" within the meaning of DR 7-102(B)(1) -- as seems likely -- it is clear that the information that the lawyer subsequently acquired was a confidence or secret. The lawyer would therefore have an obligation to disclose the information only if the information was not "protected" under DR 4-101.[11] Here, no exception to the duty of confidentiality applies, and therefore the information remains "protected" as a confidence or secret. While under DR 4-101(C)(3) (as under new Rule 1.6(b)(2)) a lawyer may disclose information necessary to prevent a future crime, the inquirer here learned of the client's misrepresentation after it occurred, when it was past wrongdoing, not a future crime.[12]

15. Some writers have questioned whether Rule 3.3 is inconsistent with the protections afforded criminal defendants under the Fifth and Sixth Amendments of the United States Constitution.[13] There is also some question whether the new requirement of Rule 3.3, a court-adopted rule, can override the statutory protection to the attorney-client privi-

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[10] Of course, once the lawyer learns of the fraud, he or she cannot use the fraudulent testimony in argument or otherwise. That was true under DR 7-102 as it is under Rule 3.3.

[11] *See* note 2 *supra*.

[12] The answer might be different if the lawyer himself had made a "written or oral opinion or representation . . . believed by the lawyer still to be relied upon by a third person [and that] was based on materially inaccurate information or is being used to further a crime or fraud." In that circumstance, the confidence might not be protected to the extent disclosure is implicit in the lawyer's withdrawing the prior representation. DR 4-101(C)(5).

[13] *See, e.g.*, Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. L. ETHICS 133, 157-163 (2008); John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE 3d §§ 26:6, 26:21 n.8 (database updated July 2008); Joel Androphy, WHITE COLLAR CRIME § 20:12 (2d ed.) (database updated June 2008); 1 CRIMINAL PRACTICE MANUAL §§ 8:12, 8:23 (database updated March 2009); Formal Op. 92-2, Ethics Advisory Committee of National Association of Criminal Defense Lawyers.

lege afforded by CPLR § 4503(a).[14] In view of the result we reach, we express no opinion on these questions.

CONCLUSION

16. Where a lawyer learns that, prior to April 1, 2009, a client had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, and not by Rule 3.3 of the new Rules of Professional Conduct. Unlike Rule 3.3, DR 7-102(B)(1) did not permit disclosure of information protected as a confidence or secret in these circumstances.

(16-09)

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[14] "Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing . . . ."