NEW YORK STATE BARASSOCIATION
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Committee on Professional Ethics

Opinion 923 (5/18/12)

Topic: Disclosure of information obtained from purported client

Digest: An individual whose purpose in communicating with an attorney is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality, and it would not violate any ethical rules for the attorney to disclose relevant information to investigators.

Rules: 1.6(a); 1.9(c); 1.18(a) & (b)

FACTS

1. The inquirer is an attorney who received a client referral from a real estate agent. The would-be client held himself out to be a Japanese investor who was interested in purchasing a coop apartment.

2. The inquirer and the purported investor exchanged several emails discussing legal fees and details concerning the transaction. The purported investor suggested that he would send a check to be deposited into the inquirer's escrow account, from which the inquirer could close on the purchase and pay all required fees including the inquirer's own legal fee. The inquirer was skeptical about the proposed arrangement and did not enter into a retainer agreement with the investor. However, the inquirer says that the emails on their face "would lead one to believe that the investor would have a reasonable expectation that an attorney-client relationship may be formed."

3. The inquirer then received a letter from a third party enclosing a $300,000 check on behalf of the purported investor. The inquirer called that third party, and the conversation made the inquirer even more skeptical. The inquirer then called the bank on which the check was drawn. A bank employee told the inquirer that the check was fraudulent and asked for a copy of it, which the inquirer supplied. In another conversation, the inquirer told a bank employee the name of the third party, and the employee said the bank had received other fraudulent checks involving that person. The inquirer has since been told by another attorney that the name of the purported investor was used in a scam involving ads placed by brokers in the newspaper. Based on the available information, the inquirer has concluded that the check was counterfeit and sent to him as part of a fraudulent scheme.

4. The bank then asked for the original check, the cover letter, the envelope received by the inquirer, and any related correspondence, if the inquirer is "legally able" to provide it.

5. The inquirer asks whether it is permissible to provide the bank with (a) the original check; (b) the cover letter and envelope from the third party; and (c) the emails with the purported investor. The inquirer "would like to give all possible assistance so that this fraud can be properly investigated" but does not wish to "breach any … ethical obligations."

QUESTION

6. May an attorney cooperate with a bank or law enforcement authorities by providing information obtained from someone purporting to be an investor seeking representation, when in fact the purported investor was trying to defraud the attorney rather than to obtain legal services?

OPINION

The Scam

7. This inquiry relates to a scam that has become common in recent years. There are many variations, but a typical one is that a supposed client asks a lawyer to close a real estate transaction, and the client or a third party then sends the lawyer a check and instructs the lawyer to deposit the check and wire the funds (minus the lawyer's legal fees) to an overseas bank account (said to be the account of a participant in the real estate transaction). The lawyer complies with those instructions, but after the funds have been wired, the bank discovers that the check is counterfeit. Since the scam artists cannot be located, the lawyer is charged with the shortfall.

8. The FBI recently reported that its Internet Crime Complaint Center "continues to receive reports of counterfeit check schemes targeting U.S. law firms,"[1] and the prevalence of such schemes has also been noted in bar publications.[2]

9. As noted above, the inquirer has concluded that that the check was counterfeit and sent to him as part of a fraudulent scheme rather than in any actual effort to obtain legal advice or other legal services. Given all the evidence before him, we cannot say that the inquirer's conclusion was unreasonable.

Confidentiality Rules

10. The New York Rules of Professional Conduct (the "Rules") afford protections of

[1] FBI, "U.S. Law Firms Continue to be the Target of Counterfeit Check Scheme," New E-Scams & Warnings (Mar. 12, 2012) (available at http://www.fbi.gov/scams-safety/e-scams).

[2] See, e.g., James McCauley, Virginia State Bar Ethics Counsel, "Internet Scams Target Lawyers," Virginia State Bar News (Mar. 28, 2011) (available at http://www.vsb.org/site/news/item/internet-scams-target-lawyers); State Bar of California Committee on Professional Responsibility and Conduct, "Internet Scams Targeting Attorneys," Ethics Hotliner (Jan. 2011) (listing six common characteristics of most such scams) (available at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=z8N90vbh088=). These publications describe the scams in greater detail, offer lawyers advice on how to avoid them, and consider the ethical responsibilities of victimized lawyers.

confidentiality to actual clients and also to prospective clients.

11. Under Rule 1.6(a), a lawyer may not knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, subject to certain exceptions.

12. Rule 1.18(a) says that "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship is a 'prospective client.'" Rule 1.18(b) sets forth an attorney's duties of confidentiality to prospective clients: "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

13. Rule 1.9(c) provides in relevant part as follows:

> "A lawyer who has formerly represented a client in a matter … shall not thereafter:
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> > "(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> >
> > "(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client."

14. The application of these rules depends on whether the information in question is confidential as defined in Rule 1.6(a):

> "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

Analysis

15. To determine whether and how the above confidentiality rules apply to the current inquiry, we first consider the nature of the information.

16. The communications with the third party would not appear to be protected as privileged communications between attorney and client. Moreover, if the communications, whether with the third party or with the purported investor, were made in furtherance of a criminal or

fraudulent scheme, then they would appear not to be privileged for that reason as well.[3]

17. Privilege, however, is not the only way in which information becomes confidential under the Rules. As seen above, information gained during the representation of a client can also be confidential if "likely to be embarrassing or detrimental to the client if disclosed." In all likelihood it would be embarrassing and detrimental to the purported investor if there were disclosure of communications and documents indicating that he had engaged in a fraudulent scheme involving a counterfeit check. The remaining question, to which we now turn, has to do with the relationship between the inquiring attorney and the purported investor. There is a duty of confidentiality under Rule 1.6(a)[4] only if the purported investor was a client and the information in question was gained during his representation by the inquirer.

18. Whether an attorney-client relationship exists is not for us to say because it is not a question of ethics, though ethical consequences turn on it. As noted in material prefatory to the Rules, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. .... Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Rules, Scope ¶ [9]. We will review some relevant factors because they will shed light on our analysis, but we will then base that analysis on the inquirer's own determination of the crucial question of fact.

19. The inquiry mentions various facts relevant to whether an attorney-client relationship has been formed. The absence of a written retainer agreement would not preclude an attorney-client relationship, but the contents of the emails, and the reasonable expectations that they seem to reflect, would ordinarily be an important factor. *See*, *e.g.*, Restatement (Third) of the Law Governing Lawyers §14 & cmt. c (relationship does not require written contract but does require manifestation of "person's intent that the lawyer provide legal services for the person"). In this case, however, the emails may not be what they seem, so a different factor – having to do with the purported investor's intent – may override all the others.

20. If the purported investor's aim was perpetrate a scam on the inquiring attorney, then he was not making a bona fide attempt to obtain legal advice or other legal services. We believe that in that case, there would be no representation and consequently no duty of confidentiality under Rule 1.6. This view finds support in a number of sources.

21. The issue has been addressed in California. "Generally speaking, ... assuming the scammer never in fact intended to form an attorney-client relationship, but rather acted to perpetrate a fraud on the attorney, it is possible that no attorney-client relationship even has been formed." State Bar of California Committee on Professional Responsibility and Conduct, Ethics Hotliner at 3 n. 8 (Jan. 2011).

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[3] *See*, *e.g.*, *Clark v. United States*, 289 U.S. 1 (1933); *United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997); *Superintendent of Insurance v. Chase Manhattan Bank*, 43 A.D.2d 514 (3d Dept. 2007); *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 A.D.3d 223 (1st Dept. 2003).

[4] We analyze the import of Rule 1.18 separately. See paragraph 25 below.

22. The same issue has also arisen (though in a different context) in South Carolina. A law firm had fallen prey to a counterfeit check scheme similar to the one at issue here. The defrauded bank asserted claims against the firm, which then sought defense and indemnification from its professional liability insurer. The insurer argued that the policy did not apply because (*inter alia*) there had been no attorney-client relationship. The court agreed, finding a lack of evidence that the purported client ever sought the firm's assistance with a view to employing it professionally. Instead, the court said, the "only reasonable inference" was that scammer contacted the firm "and purported to seek representation ... solely for the purpose of perpetuating a fraud." Because South Carolina law requires that both parties to an attorney-client relationship intend that legal advice be provided and received, the court concluded that "there was no attorney-client relationship formed."[5]

23. An informal analysis advanced by the ethics counsel of the Virginia State Bar, addressing scams like the one at issue here, is to a similar effect:

> "Some lawyers ask if it is ethical to report the scam after they have agreed to undertake representation, citing the duty to keep client information confidential. Although a formal opinion from the Standing Committee on Legal Ethics has not addressed this issue, the communications by and between the Internet scammer and lawyer are not protected as confidential. The initial uninvited e-mail communication from the scammer and the communications that follow are not for the purpose of obtaining any legal advice or legal representation. The scammer does not have any 'reasonable expectation of confidentiality' in the communications used to obtain the lawyer's money under false pretenses. Therefore, reporting such information to the appropriate law enforcement authorities is not a breach of the lawyer's duty of confidentiality."

James McCauley, Virginia State Bar News at 2-3 (Mar. 28, 2011); *cf*. Rule 1.18 (excluding from definition of prospective client those who communicate information unilaterally to a lawyer without reasonable expectation that lawyer is willing to discuss possibility of forming an attorney-client relationship).

24. As seen above, whether an attorney-client relationship arises in a given case can be a mixed question of fact and law. While this Committee does not independently opine on such questions or make the necessary findings of fact, we note the implications of the inquirer's own factual determination. The inquirer has concluded – reasonably, we believe – that the purported investor was not actually seeking legal services. It follows from that conclusion that no attorney-client relationship was formed. However, that does not end the inquiry as to whether the inquirer owes any duties of confidentiality. As noted above, confidentiality protections are not limited to

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[5] *Bradford & Bradford, P.A. v. Attorneys Liability Protection Society, Inc.*, 2010 WL 4225907, slip op. at 5 (U.S.D.C., D.S.C. 2010). *See also Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. American Guarantee and Liability Ins. Co.*, 85 A.D.3d 1291 (3d Dept. 2011) (on similar facts finding coverage by a policy, "[r]egardless of whether the imposter qualified as a 'client,'" because "the policy does not require an actual 'client'; the policy only requires that plaintiff 'render Legal Services for others' and the imposter fell within that broad category").

actual clients – they also extend to prospective clients, defined in Rule 1.18(a) as persons who have "discuss[ed] with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

25. It follows from the inquirer's conclusion about the purposes of the consultation that the purported investor was not a "prospective client" within the meaning of Rule 1.18(a). If the purported client was not actually seeking legal services, then he did not, in reality, discuss with the inquirer the possibility of forming a client-lawyer relationship, but merely pretended to do so. If from the beginning, the purported investor's aim was to perpetrate a fraud on the inquirer rather than to obtain legal services, then the purported investor never became even a prospective client within the meaning of the Rules, much less an actual one, and is therefore not entitled to the protection of the confidentiality rules.

26. We note two important caveats. First, in the inquiry at hand there was abundant evidence to support the inquirer's conclusion that the purported investor was engaged in a scam, but in other cases the motive of a purported prospective client may not be so clear. A person who seems to communicate with a lawyer about the possibility of forming an attorney-client relationship is presumptively a "prospective client" and is therefore presumptively entitled to the protection of Rule 1.18. A lawyer should exercise diligence and great care before concluding that a purported prospective client is making a bogus inquiry and is therefore not entitled to the confidentiality enjoyed by genuine prospective clients. The presumption of confidentiality gives way only if and when the lawyer reasonably concludes that the purported client was not actually seeking legal services. Only then is it permissible to make such disclosures as the lawyer considers appropriate to the circumstances.

27. Second, even when a lawyer reasonably concludes at some point that a purported client is seeking to defraud the lawyer, that conclusion by itself may not be dispositive. If a person who contacts a lawyer was, at the outset of the relationship, actually seeking legal services, then that person may be entitled to those confidentiality protections enjoyed by prospective clients, or, depending on how the relationship develops, the protections enjoyed by actual clients. The fact that the actual or prospective client, then or later, <u>also</u> may have sought to defraud the lawyer does not necessarily undercut those protections. In such a case, it would be necessary to analyze the exceptions to confidentiality to see if any of them would allow the lawyer to report the scheme.[6] For the present inquiry, we did not need to reach any question of possible exceptions, because the inquirer reasonably concluded that the motives of the purported investor were unmixed from the start and involved no desire to obtain legal services.

CONCLUSION

28. A person who communicates with a lawyer seemingly for the purpose of forming a relationship to obtain legal services is presumptively a "prospective client" entitled to protections of confidentiality under the Rules. However, if the purported prospective client is actually seeking to defraud the lawyer rather than to obtain legal services, then the person is neither an actual nor a prospective client and is not entitled to those confidentiality protections. In that

[6] *See*, *e.g.*, Rule 1.6(b)(2) (allowing a lawyer to disclose or use confidential information to extent lawyer reasonably believes necessary to prevent client from committing a crime).

case, the inquiring attorney may report the scheme to affected banks or law enforcement authorities, and may supply information and documents to those investigating the scheme, without violating any duty of confidentiality that would be owed to persons genuinely seeking legal services.

(48-11)