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New York State Bar Association
Committee on Professional Ethics

Opinion 963 (3/19/13)

Topic: Duty to report false evidence offered by, and apparent criminal conduct by, actual or prospective client

Digest: A civil legal services attorney is not required to report to a tribunal (a) inaccuracies in an application filled out by an actual or prospective client and contained in the record of an administrative tribunal, or (b) the actual or prospective client's apparent criminal failure to register his current address as a sex offender.

Rules: Rules 1.6(a), (b)(2); 1.9(c); 1.18; 3.3(a), (b)

FACTS

1. A person contacted a civil legal services agency for representation on an unspecified administrative law matter and met with an employee of the legal services agency. The person gave the legal services agency a written consent to view the administrative record.

2. The legal services agency supplied the administrative tribunal with the person's written authorization for the legal services agency to review the administrative record, and the inquiring attorney reviewed the administrative record.

3. The administrative record contains the person's signed written application. The application contains the following statement:

> "You declare under penalty of perjury that all the information on this summary is true and correct to the best of your knowledge. Anyone who knowingly gives a false or misleading statement about a material fact in an application … commits a crime and may be sent to prison or may face other penalties, or both."

4. On the application, the person admitted having been convicted of a felony, and gave an address at which he stated he had resided for ten years.

5. During a telephone conversation between the inquiring attorney and the person, the person revealed that he had served time in the New York State prison system for rape. However, the legal services attorney was unable to find the person's name in the New York State Department of Corrections and Community Supervision ("DOCCS") information database. The attorney then conducted an internet search for the person's name, which showed that the person is also known by a name different from the one on his application. The newly discovered name

yielded a hit on both the DOCCS site and the New York State sex offender registry. The latter indicated that the person is a level-three sex offender (indicating a high risk of repeat offense and a threat to public safety), with ongoing reporting responsibilities. The person's photo on the sex offender website, dated approximately one year ago, has been positively identified by the legal services agency employee who initially met with the person.

6. The address given to the legal services agency by the person is in a different county than the address contained in the sex offender registry (which the website says is up to date.) An offender is required to report a new address within ten days of moving, check in every ninety days, and report his whereabouts to local law enforcement after any move. Failure to report is a felony.

7. After the person failed to appear at the legal services agency for two appointments and failed to return telephone calls, the agency determined not to represent him going forward, and it never filed an appearance on behalf of the person before the administrative tribunal. However, the administrative matter remains pending.

QUESTION

8. Does the legal services attorney have an ethical obligation to report to the administrative tribunal the conflicting information about the name and address of the person who sought representation?

9. Does the legal services attorney have an ethical obligation to alert local police or the sex offender registry as to the whereabouts of the person who sought representation?

OPINION

10. The duties of an attorney to a particular person may vary depending on whether the attorney formed an attorney-client relationship with the person. The person who sought representation from the legal services agency was at least a "prospective client," defined in Rule 1.18(a) of the New York Rules of Professional Conduct (the "Rules") as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The person may eventually have become a client. Whether the prospective client relationship blossomed into a full-fledged attorney-client relationship is a matter of substantive New York contract law, *see, Toussaint v. James*, 2003 WL 21738974, at *8 (S.D.N.Y. 2003); *Gottlieb, Rackman & Reisman, P.C. v. Marusya, Inc.*, 2004 WL 3188074, at *1 (Civ. Ct. N.Y. Co. 2004); Rules Scope ¶ [9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"). This Committee does not have jurisdiction to opine on questions of substantive law.

11. If an actual attorney-client relationship developed, then the person is now a former client because the legal services agency has declined to represent him any further. An attorney owes a duty of confidentiality to a former client under Rule 1.9(c), which in turn cites to Rule 1.6. Rule 1.6(a) prohibits the attorney from knowingly revealing confidential information unless a

countervailing obligation or exception requires or permits the disclosure. Rule 1.6(a) defines confidential information as follows:

> "'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. …"

12. The information learned about the person in question here was "gained during or relating to the representation" and would "likely be embarrassing or detrimental to the client if disclosed." It is therefore "confidential information" under Rule 1.6(a).

13. Even if the interactions never blossomed into an attorney-client relationship, the person in question was nevertheless a "prospective client" within the meaning of Rule 1.18(a) because the person contacted the legal services agency seeking representation, met with an agency employee to discuss the possible representation, and spoke about it with the inquiring attorney by telephone. (Rule 1.18(e) excludes certain categories of people from the definition of prospective clients, but those exceptions are not relevant here.) Accordingly, the inquiring attorney owes some degree of confidentiality to the person because Rule 1.18(b) provides as follows:

> "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."

14. The inquiry raises interesting questions about the duty of confidentiality to a prospective client where no actual attorney-client relationship develops, including whether the inquiring attorney is permitted to disclose the person's other name to the administrative tribunal, or is permitted to alert local police or the sex offender registry as to the person's current address. But we do not address those questions because the inquiring attorney has not asked us whether he is *permitted* to disclose that information – he has asked only whether he is *mandated* to disclose that information. We therefore analyze the questions of mandatory disclosure, and do not reach questions relating to permissive disclosure. As we now explain, the inquiring attorney has no mandatory disclosure duty.

A. Is there a duty to disclose to the administrative tribunal?

15. The only provisions in the New York Rules of Professional Conduct that require a lawyer to disclose confidential information are found in Rule 3.3 ("Conduct Before a Tribunal"). The relevant sections provide as follows:

"(a) A lawyer shall not knowingly:

> "(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the

tribunal by the lawyer; …

"(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. …

"(b) 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 fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

"(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

16. For purposes of this inquiry, we assume that the information given by the actual or prospective client to the administrative tribunal, as to his true name and address history, was false.

17. Rule 3.3(a)(1) does not apply here. It applies to a false statement of material fact or law previously made to the tribunal "by the lawyer." Here, the false statements were made not by the lawyer, but rather by the client or prospective client. Rule 3.3(a)(1) therefore does not require the inquiring attorney to correct the false statements.

18. Rule 3.3(a)(3) likewise does not apply. The main thrust of Rule 3.3(a)(3) is to prohibit an attorney, in conduct before a tribunal, from offering or using evidence that the lawyer knows to be false. Here, although the lawyer made some preliminary inquiries as to the administrative matter, he never filed an appearance in that matter. Because the lawyer did not and will not represent the person before the tribunal, he did not and will not "offer or use" the false information on the person's application.

19. At first glance, the second sentence of Rule 3.3(a)(3), taken in isolation, might appear to apply. It says that "[i]f … the lawyer's client … has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." But this sentence cannot be read in isolation. It must be read together with the opening clause of Rule 3.3(a)(3), and it clarifies that a lawyer's duties under the rule apply even when the lawyer has offered the false evidence through a client or witness, and even when the lawyer learns of the falsity subsequent to the admission of that evidence. Here, the lawyer has not offered false evidence in any of these ways. It would not make sense to require a lawyer to take reasonable remedial measures regarding proceedings before a tribunal in which the lawyer has never appeared on behalf of the client.

20. There is a second reason that Rule 3.3(a)(3) may not apply. This provision is triggered when a client has offered material "evidence" which the lawyer comes to learn is false. The term "evidence" presumably refers to documents and testimony submitted to a tribunal to persuade it to reach a decision on the merits. In some contexts, therefore, an "application" may not constitute evidence, within the meaning of this Rule, unless and until it were offered to the tribunal as part of formal proceedings. We do not opine on this in the present context, however, as the inquiry does not reveal the nature of the application or the administrative proceeding.

21. Rule 3.3(a)(1) and (3) therefore place no obligation upon the attorney.

22. Similarly, Rule 3.3(b) requires corrective action by an attorney who learns of a client's intended or past criminal or fraudulent conduct even where the attorney has had no active role in the misconduct, but only if the lawyer "represents a client before [the] tribunal." Here, the legal services agency has declined to represent (or to continue to represent) the person, and it never filed a notice of appearance. Because the inquiring attorney has not represented the client before the administrative tribunal, Rule 3.3(b) is inapplicable as well.

B. Does the attorney have a duty to disclose to the police or the sex offenders registry?

23. The inquiring attorney has learned that the client has apparently committed the felony of failing to report a new address within ten days of moving, as is required of sex offenders. Rule 1.6(b)(2) permits an attorney to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime, but as explained by this Committee in N.Y. State 866 at ¶26 (2011):

> "Rule 1.6(b)(2) does not permit disclosure of confidential information concerning a completed or past crime; it applies only to confidential information necessary to prevent a continuing or otherwise future crime."

24. Whether the alleged crime is a continuing or future crime is a question of law, *see, e.g.*, *Willette v. Fischer*, 508 F.3d 117 (2d Cir. 2007) (rejecting State's contention that "the change-of-address violation was a 'continuing violation, with each day potentially giving rise to a new charge'"). We do not opine on such legal questions. N.Y. State 866 at ¶26 (2011) ("Whether the [client] has committed a crime …, and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee.").

25. In any event, Rule 1.6(b)(2) is strictly permissive – it does not *require* a lawyer to disclose anything. Thus, the inquiring attorney has no duty to disclose address information to the police or to the sex offender registry.[1]

[1] This reasoning also applies to the actual or prospective client's false statements on the application to the tribunal. Even if submission or use of that false application were to constitute a crime, neither Rule 1.6(b)(2) nor any other Rule *requires* a lawyer to disclose a client's intention to commit a crime, much less the client's commission of a past crime.

CONCLUSION

26. The attorney has no mandatory disclosure obligations.

(36-12)