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New York State Bar Association
Committee on Professional Ethics

Opinion 998 (2/5/14)

Topic: Confidential information; criminal conduct

Digest: Lawyers who become aware of fraudulent conduct by buyer and seller in a real estate transaction, including delivery of a fraudulent check in payment of the fee of buyer's lawyer, may not disclose attempted or completed fraud unless necessary to withdraw a representation by the lawyer still being relied upon; to the extent necessary to collect the fee; or where required by other law.

Rules: 1.6(b), 3.3

FACTS

1. Buyer, seller and the mortgage-holding lender agreed to a short-sale residential real estate transaction. A short sale is a transaction in which the holder of a mortgage on the property consents to release its lien in a sale for less than the outstanding amount of its loan. Such a sale is often an alternative to initiating a foreclosure proceeding. In this case, buyer and seller secretly agreed prior to the closing (and without informing their lawyers) that the buyer would pay the seller an amount in addition to the amount being paid to the mortgage holder. At the closing, the buyer and seller signed affidavits swearing that there had been no side agreements and that no money would be exchanged outside of the approved arrangements. Buyer delivered checks to pay the broker's fee and to pay the buyer's own lawyer. Unbeknownst to counsel for either party, the buyer also delivered to the seller a check for the additional amount on which they had agreed.

2. The closing was completed, and a day or two later, the broker, seller and buyer's attorney all discovered that the checks they had received were fraudulent. (The buyer otherwise had used non-fraudulent checks to consummate the closing.) The account on which the fraudulent checks were drawn did not exist. The seller asked the seller's attorney for advice regarding the fraudulent check the seller had received, resulting in that attorney also learning about the side agreement and ultimately about the other fraudulent checks. We are told, and it seems reasonable to conclude, that the side agreement was an attempt to defraud, if not an actual fraud upon, the mortgage holder.

QUESTION

3. In a short-sale residential real estate transaction in which buyer and seller may have, without the knowledge of their lawyers, committed a fraud on the lender, and buyer has also

issued fraudulent checks to buyer's attorney and others involved in the transaction, may or must the lawyers reveal the fraudulent conduct to the lender or law enforcement authorities?

OPINION

4. The critical facts here – that the buyer and seller had agreed on and attempted to consummate a side payment and swore affidavits to the contrary, and the buyer's issuance of fraudulent checks – are clearly "confidential information" within the meaning of Rule 1.6 of the Rules of Professional Conduct. 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.

The information here was gained during or relating to the representation of each lawyer's client. In N.Y. State 866 (2011), we opined that the term "during" in Rule 1.6 should not be read to be purely temporal, but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information – for example, if the lawyer learned the information because of the lawyer-client relationship." *Id.* ¶ 17 (footnote omitted). The seller's lawyer clearly learned the information during the course of his representation of the seller in this sense – indeed, the lawyer learned it in the course of a request for legal advice. The buyer's lawyer might have learned the information after the end of the representation, and thus not "during" the representation, but the information clearly "relat[ed] to" the representation.[1]

5. Moreover, the disclosure of that information by either lawyer is likely to be detrimental to that lawyer's client: the fact that the buyer and seller apparently defrauded the lender would be detrimental to each client if disclosed; the disclosure of the buyer's delivery of fraudulent checks would clearly be detrimental to the buyer; the disclosure of that fact likely would be detrimental to the seller as well, because it would likely lead to disclosure of the apparently illegal side agreement. Under Rule 1.6(a), each side's lawyer is therefore barred from revealing this information unless his or her client gives informed consent or the disclosure is permitted by Rule 1.6(b).

6. Rule 1.6(b) merely authorizes, but does not require, disclosure in the circumstances enumerated therein (and discussed below), and no other rule requires disclosure of confidential information in the present case. Another rule, Rule 3.3, does compel disclosure of confidential information, but it is inapplicable here. Rule 3.3 provides, among other things, that a lawyer who knows that a person has engaged in criminal or fraudulent conduct related to a proceeding before a tribunal must take remedial measures, including, if necessary, disclosure of confidential information. But Rule 3.3 only applies to lawyers who represent clients before a tribunal and only to criminal or fraudulent conduct related to a proceeding before the tribunal. Here, the lawyers do not represent clients before a tribunal and there is no applicable proceeding.

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[1] *Cf. Levitt v. Brooks*, 669 F.3d 100, 104 (2d Cir. 2012) (disclosure of client's "vulgar remark" relating to fee dispute did not violate Rule 1.6 because "remark contained no material *information* beyond the use of profanity directed at counsel").

7. Turning to the permissive-disclosure provisions of the Rules, Rule 1.6(b) contains several exceptions to the obligation not to reveal confidential information. There are five exceptions that merit discussion here:

> A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: …
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> (2) to prevent the client from committing a crime;
>
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; . . . .
>
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
>
> (ii) to establish or collect a fee; or
>
> (6) when permitted or required under these Rules or to comply with other law or court order.

8. Rule 1.6(b)(2) permits disclosure to prevent the client from committing a crime, but not to remedy a past crime.[2] Here, it appears that each of the potential crimes was complete before the lawyers learned of it. The Comments to this Rule recognize that some crimes are continuing crimes, and state that a lawyer "whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts … ." Rule 1.6, Cmt. [6D]; *see also* N.Y. State 866 ¶ 26 (2011) (discussing disclosure of continuing crimes). While we do not opine on questions of law, as opposed to ethics, the frauds here do not appear to be continuing crimes, so Rule 1.6(b)(2) does not appear to be applicable.

9. Rule 1.6(b)(3) permits disclosure to the extent reasonably believed necessary to withdraw a written or oral opinion or representation that was based on materially inaccurate information and that the lawyer reasonably believes is still being relied upon by a third person. We do not know whether either lawyer might have given a representation upon which any third person – presumably, the lender – is still relying. If either lawyer gave a representation implying the absence of fraud in the transaction, it may be possible to conclude that the lender is continuing to rely on that representation in not pursuing remedies against the buyer and seller for their

[2] We note that New York has not adopted the ABA version of the exceptions, which include a provision that a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." ABA Model Rule of Prof. Conduct 1.6(b)(3). New York's rule thus provides a significantly narrower scope to reveal information about already completed crimes than the ABA model.

attempted fraud.

10. Rule 1.6(b)(5)(i) permits a lawyer to disclose confidential information to defend the lawyer against an accusation of wrongful conduct. On the facts known to us, there does not appear to have been any accusation of wrongful conduct leveled against either lawyer. Unless and until such an accusation is made, this exception to the bar on disclosure of confidential information is inapplicable.

11. Rule 1.6(b)(5)(ii) permits a lawyer to disclose confidential information to collect a fee. The buyer's lawyer thus would be entitled to disclose confidential information to the extent necessary to collect the fee that was purportedly paid with a fraudulent check. Any such disclosure would need to be limited, however. *See* Rule 1.6 Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose"); N.Y. State 980 ¶¶ 5-6 (2013) (discussing limitations on authorization to reveal information to collect fee). For example, the buyer's lawyer might reasonably conclude that the Rule does not authorize disclosure of the side agreement for the secret payment, but only the use of the fraudulent check to pay the lawyer's fee. The lawyer will also need to consider whether reporting the fraud to law enforcement authorities is reasonably necessary to collect the fee. Ordinarily, one need not report a crime in order to initiate a civil action to collect damages caused by the criminal conduct, but we do not exclude that in certain circumstances a lawyer could reasonably conclude that such reporting is necessary. *Cf.* N.Y. State 980 (2013) (addressing whether disclosure of fact that client had been "working off the books" was necessary to collect fee in bankruptcy proceeding); N.Y. State 684 (1996) (concluding that lawyer could not disclose to credit bureau client's failure to pay fee because disclosure was not necessary to collect fee).

12. Finally, Rule 1.6(b)(6) permits disclosure to the extent reasonably believed necessary "when permitted or required under these Rules or to comply with other law or court order." There are statutes that require reporting information about some crimes, or that at least prohibit concealment of such information, though the obligations they impose may be limited by judicial consideration of ethical principles.[3] As our jurisdiction is limited to questions of legal ethics under the Rules, we express no view as to whether other law may require disclosure here.

13. There is nothing anomalous about our conclusion that the lawyers may not be able to disclose the frauds to law enforcement authorities. There are various circumstances in which

[3] See, e.g., Wayne LaFave, Substantive Criminal Law § 13.6 & n.86 (2013) ("There is a misprision of felony statute in the United States Code, but it is not a true misprision statute in that it requires an act of concealment in addition to failure to disclose."); *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Co. Ct. Onondaga) (dismissing, on grounds of attorney-client privilege and in interests of justice, indictment of lawyer for failure to report, under Public Health Law §§ 4143 (requirement to report death occurring without medical attendance) and 4200 (duty of decent burial), where location of murder victim's body had been disclosed in attorney-client communication), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dept. 1975), *aff'd*, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976); Stephen Gillers, Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence, 63 Stan. L. Rev. 813, 829-46 (2011) (discussing criminal statutes and court cases dealing with disclosure of evidence of a crime).

confidentiality obligations prevent a lawyer from exercising the full set of remedies for wrongful conduct available to others, even when the lawyer has suffered the consequences of the wrongful conduct. *See, e.g., Simon's New York Rules of Professional Conduct Annotated* 215 (2013 ed.) (explaining rule that lawyer may reveal confidential information relating to future but not past crimes on ground that "preventing client crimes is more important than the duty of confidentiality, but solving crimes is not"); N.Y. City 1994-1 (citing cases for proposition that where an attorney "was pursuing a common law remedy, several courts have not permitted in-house attorneys to sue former employers for retaliatory termination, basing their conclusion on the confidential nature of the attorney-client relationship and the ethical requirements relating to clients' confidences and secrets").

14. Finally, we note that even though the lawyers might be barred from disclosing the information at issue here voluntarily, that does not answer the question whether they might be compelled to disclose it. Some of the information may be protected from compulsory process by attorney-client privilege, such as any facts about the side agreement that were revealed by client to lawyer in confidence. But some of the information at issue here may be confidential for reasons other than the attorney-client privilege, and thus the lawyers may be compelled to disclose it. For example, the receipt of the fraudulent check might well not be privileged. *See In re Subpoena to Testify Before the Grand Jury*, 39 F.3d 973, 976 (9th Cir. 1994) (identity of client who paid lawyer with counterfeit bill was "entirely distinct from the matter in which the client sought the lawyer's services. It was therefore unprotected by the privilege.").

CONCLUSION

15. Neither the buyer's lawyer nor the seller's lawyer may disclose the apparent fraud on the lender or the delivery of fraudulent checks, except (i) to the extent reasonably believed necessary to withdraw any opinion or representation made by the lawyer asserting the absence of such conduct where the lender is reasonably believed still to be relying on such opinion or representation, (ii) where required by other law, or (iii) by the buyer's lawyer, to the extent reasonably believed necessary to collect the lawyer's fee.

(44-13b)