



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-05
May 2013

Subject: Client Fraud; Court Obligations; Withdrawal from Representation

Digest: When a lawyer discovers that his or her client in an administrative hearing has previously submitted false material evidence to the tribunal, the lawyer must attempt to persuade the client to correct or withdraw the false evidence, but if that fails and if the effect of the false evidence cannot otherwise be undone, the lawyer must disclose the false evidence.

References: Illinois Rules of Professional Conduct 1.0, 1.2, 1.7, 1.16, 3.3 and 4.1

In re Rantis, 09-CH-65 (Review Board, November 14, 2011)
Administrator's petition for leave to file exceptions denied, M.R. 25098
(March 19, 2012)

In re Winthrop, 219 Ill. 2d 526, 848 N.E.2d 961 (2006)

ISBA Opinion 95-14 (May 1996)

Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)

ABA Comm. on Professional Responsibility, Formal Opinions 92-366
(1992), 93-376 (1993), and 98-412 (1998)

New York State Bar Assoc. Ethics Opinion 837 (March 16, 2010)

FACTS

Lawyer represents an applicant for supplemental security income (“SSI”) benefits before a Social Security Administration (“SSA”) administrative law judge. The Client is contesting the denial of SSI benefits. The initial SSI application is in the form of a sworn affidavit, submitted by Client prior to retaining Lawyer. The application purports to state all the financial resources of Client. Lawyer discovers during the representation that Client failed to disclose significant assets, resources and income in the SSI application, which will likely have a significant effect on the disposition of the application. The false application is

part of the administrative record upon which the administrative law judge will render a decision.

QUESTIONS

1. Is a SSA hearing considered a “tribunal” under the Rules of Professional Conduct?
2. What are Lawyer’s obligations, if any, concerning disclosure of the false application to the SSA administrative law judge?
3. May Lawyer satisfy his or her ethical requirements by advising Client of any ethical or criminal impropriety with respect to the false affidavit and then withdraw as counsel without disclosure?

OPINION

1. SSA Hearing as a Tribunal

The language of Rule 3.3 of the Rules of Professional Conduct (“Candor Toward The Tribunal”) specifically references a lawyer’s obligations when appearing before “tribunals,” “adjudicative proceedings,” or “proceedings.” The term “tribunal” is defined at Rule 1.0(m) to mean:

“A court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

The SSA is an administrative agency. Further, the proceeding at issue in this inquiry to determine the correctness of an initial benefit decision is adjudicative in that evidence will be presented; legal arguments made; and the rights of a party will be determined by a neutral official. Accordingly, the hearing at issue falls within the definition of a tribunal and therefore, the conduct of Lawyer must conform to the Rules of Professional Conduct.

2. Lawyer’s Obligations Regarding a Client’s False Material Evidence

The issues posed by this inquiry present one of the most troubling ethical situations with which a lawyer may be confronted. Addressing a client’s presentation of false evidence to a tribunal “can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.” Rule 3.3, Comment [11]. In direct contrast to these client-centric concerns is a lawyer’s paramount duty to the tribunal to prevent it from being misled by false evidence. Rule 3.3 Comment [5] (“This duty [of refusing to offer known false evidence] is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.”); *In re Winthrop*, 219 Ill. 2d 526, 848 N.E.2d 961 (2006)(reminding the bar that “a lawyer’s high

vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions”, the Court noted a lawyer’s failure to do so demonstrated a “lack of judgment that is quite disturbing.”). Notwithstanding the difficulties and consequences of this situation, when confronted with the knowledge of a client’s presentation of false information to a tribunal, a lawyer’s obligations are clear (this Opinion does not address a lawyer’s obligations in a criminal proceeding).

Before fully answering the inquiry, the Committee reasonably assumes two underlying facts. First, Client’s failure to disclose certain assets, resources and income in the initial SSI application was done intentionally for the express purpose of obtaining social security benefits, because if the nondisclosure of assets and income was inadvertent, then Client should not object to the filing of an amended application or other method. Second, the false information contained in the SSI application is material evidence in the SSA hearing. Not only is the SSI application the focus of the proceeding, but inasmuch as it is one of the documents comprising the record under review it will be available for consideration by the administrative law judge as evidence.

In general, a lawyer’s obligations to ensure truthfulness to a court or tribunal are contained in Rule 3.3. That Rule states in relevant part 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 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding 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) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.3(a)(3) prohibits a lawyer from offering material evidence known by the lawyer to be false, even if the information was placed before the tribunal by the client prior to the lawyer’s representation of the client. If, such as in the factual scenario presented, a lawyer comes to know a client has offered false material evidence to a tribunal, the lawyer must take “reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Rule 3.3(a)(3).

The specific “reasonable remedial measures” a lawyer must take are outlined in Comments 10 and 11 to Rule 3.3. It is important that a lawyer in such a situation understand that the remedial measures might require creative and persistent effort in a series of

progressively demanding steps to correct a client's false evidence. The lawyer must first remonstrate with the client in an effort to have the false material evidence withdrawn or corrected. As part of this discussion, the lawyer must advise the client of the lawyer's ethical duties which may include the requirement that the lawyer unilaterally disclose the false information to the tribunal. Ideally, the client will choose to cooperate and will then correct the fraudulent information.

If a client refuses to voluntarily rectify, further remedial measures may be necessary before a lawyer must disclose the fraud to the tribunal. In fact, a lawyer's duties of loyalty and confidentiality to a client "require a lawyer to explore options short of outright disclosure in order to rectify the situation." ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 93-376 (1993). Varying factual scenarios will dictate which, if any, other remedial steps may be taken by the lawyer to correct the false information, however, disclosure to the tribunal may not always be required if other actions short of disclosure will undo the effects of the false evidence. *In re Rantis*, 09-CH-65 (Review Board, November 14, 2011) Administrator's petition for leave to file exceptions denied, M.R. 25098 (March 19, 2012)("disclosure to the court is not required in every instance and should occur when the effect of the false evidence cannot be undone through other measures.").

In *Rantis*, the ARDC Review Board dismissed claims that a lawyer violated his duty to disclose a client's false testimony to the court when the lawyer remonstrated with the client to undo the effect of the improper testimony, the lawyer worked with opposing counsel to remediate its effect, and nothing of significance occurred during the proceedings that might have prejudiced the opposing party based upon the false evidence. The Review Board cited favorably to Restatement Third, The Law Governing Lawyers §120 (2000), Comment (h), which states "A lawyer has discretion as to which measures to adopt, so long as they are reasonably calculated to correct the false evidence."

The Committee accepts the *Rantis* analysis that whether and when a lawyer is required to disclose a client fraud to the tribunal depends on "when the effect of the false evidence cannot be undone through other measures." Because the parties therein worked out an arrangement to avoid the effect of the client fraud and the matter was dismissed, it was found to be unnecessary that counsel formally disclose the fraud to the court. The key should always be to undo the effect of the fraud on the proceeding. *See also* Rule 3.3, Comment 10 ("If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation.") *See also* New York State Bar Assoc. Ethics Opinion 837 (March 16, 2010)(approving a procedure whereby the false testimony is withdrawn without any statement regarding its truth or falsity.).

Of course, if the client refuses to withdraw or correct the false evidence and the lawyer's own efforts to undo the false evidence are impractical or unsuccessful, the lawyer "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation." Rule 3.3, Comment [10]; *Accord* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)("the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the trier of fact.") Importantly, this disclosure must occur even if doing so requires the lawyer to reveal information that is

otherwise confidential and would be protected by Rule 1.6, including information obtained by the lawyer from his or her client. Rule 3.3, Comment [10].

This analysis is consistent with prior ISBA Opinions such as 95-14 where the Committee concluded that a lawyer not only may, but might be required to, reveal a client's fraud in completing an assets and liabilities affidavit which was the basis for the appointment of a public defender. The analysis is also consistent with ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 98-412 (1998) ("It is well established that when a client actually has testified falsely or the lawyer otherwise has presented false evidence and the lawyer later learns of the falsity of the evidence or testimony before the conclusion of the proceeding, the lawyer must disclose the client's perjury to the court if the lawyer is unable to convince the client to rectify the perjury.")

If disclosure to the tribunal is made, a lawyer must be cautious to tailor the disclosure so as to disclose only so much information as is necessary to satisfy the purpose of disclosure (e.g. preventing a trier of fact from being misled). *See* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)(when taking reasonable remedial measures the lawyer should ensure that the client is faced with only "minimal adverse effects."); *See also* Rule 1.6, Comment [14] "In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.")

The lawyer's obligation to act in the face of a client's presentation of false material evidence under Rule 3.3 is consistent with other Rule obligations as well. Rule 1.2(d) prohibits a lawyer from "assisting" a client in conduct that the lawyer knows is criminal or fraudulent. "Assisting" is broadly interpreted by Rule Comments to include "drafting or delivering" documents that the lawyer knows are false. Rule 1.2, Comment [10]. Under this broad interpretation, perpetuating or allowing a client's presentation of false material evidence (by definition both criminal and fraudulent conduct) to the court to remain unaddressed would be improper. In the inquiry presented here, and notwithstanding the fact that Lawyer played no role in the preparation or submittal of the false application to the SSA, knowledge of its falsity cannot be ignored.

Additionally, Rule 4.1 provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) 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 Rule 1.6." Notably, the requirements of Rule 3.3 for candor to a tribunal are higher than the Rule 4.1 requirement of truthfulness to others as a lawyer is not permitted under Rule 4.1 to disclose a client fraud if the lawyer came to know of the falsity as the result of confidential information received from the client and as protected by Rule 1.6.

3. Withdrawal

If the lawyer has unsuccessfully remonstrated with the client as outlined above, the lawyer should ordinarily seek to withdraw from the representation at the time of his or her disclosure of the false material evidence to the tribunal. Rule 3.3, Comment [10].

Disclosure, particularly if against the client's wishes, would likely damage the professional relationship between the client and lawyer. In addition, although withdrawal under Rule 3.3 is not specifically mandated, withdrawal may be consistent with a lawyer's obligations under other provisions of the Rules of Professional Conduct, and may in fact be mandatory. *See* Rule 1.2, Comment [10](A lawyer cannot continue to assist a client in conduct that the lawyer may have believed was proper but then discovered was fraudulent or criminal and must withdraw); Rule 1.16(a)(“a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law...”). Notwithstanding these Rule requirements concerning withdrawal, if the false material evidence is disclosed (and all ill effects remedied) and the client wishes the disclosing lawyer to continue the representation, that would not be prohibited under these Rules. However, the lawyer would likely have to consider whether the situation presented a conflict under Rule 1.7(a)(2). Additionally, the client's actions would be grounds for the lawyer to choose to withdraw, although not mandated, if “the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent” or “the client has used the lawyer's services to perpetrate a crime or fraud.” *See* Rule 1.16(b) as to the requirements for permissive withdrawals.

Turning to the specific question posed above, mere withdrawal without disclosure of a client's presentation of false material evidence to a tribunal would be improper. *See* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)(“Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal.”); *See also* Rule 1.2, Comment [10](“In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.”). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Opinions 92-366 (1992) and 93-376 (1993) for further discussion of a “noisy withdrawal.” However, in what would likely be extremely rare circumstances, a lawyer's withdrawal from representing a client without disclosure of the client's presentation of false material evidence to a tribunal might be appropriate. Under Rule 3.3, Comment [10], withdrawal without disclosure of the false evidence would satisfy a lawyer's obligations where the withdrawal would “undo the effect of the false evidence.” Notwithstanding this possibility of withdrawal without disclosure, the Committee finds it difficult to construct any scenario where the act of withdrawal by the lawyer, without more, would undo any false evidence already submitted to the tribunal. In the factual scenario at issue in this opinion, Lawyer's withdrawal would have no effect on ensuring that the false information would not be considered by the administrative law judge and would thus be insufficient.

CONCLUSION

Applied to the inquiry before the Committee, Lawyer must attempt to get Client to correct the false information contained on the SSI application for benefits. This necessarily must be a frank discussion where Lawyer's ethical obligations are explained, including the need for Lawyer to disclose the false material evidence if Client fails to do so. If Client still refuses to rectify the fraud, Lawyer must seek to withdraw from representing Client. Finally,

because the Lawyer's withdrawal by itself likely will have no effect on remedying the false evidence before the tribunal, Lawyer must take steps to correct the effects of the fraud. If nothing else can reasonably undo the effects of the fraud, the disclosure to the tribunal will be necessary as a last resort. This course of action, admittedly difficult in execution, is nevertheless justified and appropriate.

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