



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2(e), 1.6(b)(2), and 3.3. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 95-14
May 17, 1996**

Topic: Confidentiality--Disclosure to court of information conflicting with client's indigency affidavit.

Digest: Under facts presented by inquiry, lawyer may disclose to court client's fraud upon the court if lawyer's efforts to persuade client to rectify fraud fail.

Ref.: Illinois Rules of Professional Conduct, Rules 1.2(g), 1.6(c)(1), 3.3(a)(2), (a)(6) and (b)
ISBA Advisory Opinion Nos. 94-24, 91-24
ABA Formal Opinion No. 93-376

FACTS

An indigent defendant completes an assets and liabilities affidavit. Based upon the information in the affidavit, the court appoints the public defender. During the course of this representation, the defendant confides to counsel that he has a trust fund with the ability to access up to \$3500.

QUESTION

May counsel reveal the information about the concealed asset to the court?

OPINION

This inquiry involves the applicability of three separate and distinct duties imposed by the Rules of Professional Conduct.

Rule 1.2(g) states:

A lawyer who knows a client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Rule 1.6 provides, in pertinent part, that a lawyer shall not use or reveal a confidence or secret unless the client consents after disclosure except when required by law or court order. Subparagraph (c)(1) of Rule 1.6 states:

A lawyer may use or reveal:

(1) Confidences or secrets when permitted under these Rules or required by law or court order.

Rule 3.3 states, in part, that:

(a) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(2) fail to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent;

(b) The duties stated in paragraph (a) are continuing duties and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The duty imposed by Rule 1.2, requiring a lawyer to reveal the client's fraud to a tribunal if rectification efforts fail except when the information is privileged, is inapplicable here because the fraud upon the tribunal occurred prior to the public defender's appointment and was not "in the course of representation" so as to trigger application of the Rule.

Rule 1.6 imposes the duty of confidentiality as to client confidences and secrets except when the use or revelation of confidences or secrets as permitted under the Rules required by law or court order.

Rule 3.3 specifies a lawyers' duties regarding conduct before a tribunal and states that those duties are continuing and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6

This inquiry presents the conflict faced by lawyers between their private duty of maintaining client

confidentiality and their public duty to maintain the integrity of the judicial system by complete candor with the court. Both the ethical opinions and case law agree that limits to zealous representation are necessary to maintain the integrity of the adversary process. Those authorities also conclude that a failure to disclose when required by the Rules to do so is tantamount to affirmative misrepresentation.

To respond to the question posed by this inquiry requires the Committee to determine whether Rule 3.3 applies and permits disclosure of otherwise confidential information protected by Rule 1.6.

The Committee has assumed that the lawyer knows that the court's knowledge of the client's concealed asset of \$3500 would preclude the appointment of the public defender. If so, it is a material fact known to the lawyer and disclosure may be necessary if the lawyer is to avoid assisting the client's fraudulent act by the lawyer's silence. Failure to disclose the client's fraud in securing the free legal services of the public defender assists the client in continuing the fraud upon the court. Subsection (a)(2) of Rule 3.3 prohibits failure to disclose a material fact if necessary to avoid assisting a fraudulent act by the client, and subsection (a)(6) restricts a lawyer from assisting a client in conduct the lawyer knows to be fraudulent.

In response to the question posed by the inquiry, the lawyer not only may reveal, but might be required to reveal such information to the court if it is necessary to rectify the fraud if the lawyer's efforts to persuade the client to rectify the fraud are unsuccessful.

Opinion No. 94-24 involved fraudulent conduct by the lawyer's client by concealing marital assets from the court, even though the lawyer represented the client at the hearing when the fraud was perpetrated. That opinion includes a comprehensive discussion of the applicable ethical considerations and concludes, in circumstances similar to those of this inquiry, that it was the lawyer's duty to insist that the client rectify the fraud committed upon the court and, if the client refused to take or authorize remedial action, Rule 3.3(b) required the lawyer to make sufficient disclosure to rectify the fraud.

The facts in Opinion No. 94-24 were that the fraud upon the court occurred outside the lawyer's presence after the client had employed another lawyer, but the original lawyer was still the only lawyer of record. In the present inquiry, the fraud occurred prior to the public defender's appointment. Opinion 94-24 concluded that the lawyer's duties under Rule 3.3(b) were continuing and required disclosure if remedial efforts failed.

Opinion No. 91-24 involved the taking of money by a guardian from an estate under a claim of right which the guardian's lawyer believed to clearly belong to the estate. That opinion found that since the lawyer was not representing the client "personally" the information about the disputed funds was not a secret or confidence and, in any event, subparagraphs (a)(2) and (a)(6) of Rule 3.3 required the lawyer to take the necessary steps, including a report to the court, to disclose the taking of funds.

ABA Formal Opinion No. 93-376 extended application of Rule 3.3 to client fraud in the pre-trial discovery process. That opinion stated that the lawyer who discovered that a client intentionally misstated a material fact in response to a discovery request must take all reasonable steps to rectify the fraud, including disclosure to the court if the client failed to take appropriate remedial action.

Rule 3.3 was applied even though the false answer had not been received in evidence and the lawyer was not appearing before a tribunal when the fraud occurred.

A critical fact in this case is that the fraud was perpetrated directly upon the tribunal by the client concerning a matter outside the underlying criminal case. The confidence involved in this inquiry is distinguishable from confidences disclosed by a criminal defendant concerning the principal criminal case. Under the circumstances presented here, the Rules permit, and may require the public defender to disclose the fraud to the court if efforts to persuade the client to rectify the fraud fail. Continued participation in this case by the lawyer without rectification of the fraud, or disclosure to the court if necessary, would assist the client in continuing to receive free legal assistance of the public defender secured by the client's fraudulent act.

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