



ISBA Professional Conduct Advisory Opinion

Opinion No. 20-05
September 2020

Subject: Client Fraud; Confidentiality; Withdrawal from Representation

Digest: A lawyer who knows about a client's fraud may disclose otherwise confidential client information to third parties if done in such a manner as to prevent, lessen or rectify the client fraud. However, even if the information is not disclosed, the lawyer will still likely need to withdraw as client's attorney and take other actions.

References: Illinois Rules of Professional Conduct, Rules 1.2, 1.6, 1.7, 1.16, 3.3, 4.1

ISBA Opinion No. 13-05 (2013)

In re Estate of Halas, 159 Ill. App. 3d 818, 825, 512 N.E.2d 1276, 111 Ill. Dec. 639 (1987)

Obermaier v. Obermaier, 128 Ill. App. 3d 602, 470 N.E.2d 1047, 83 Ill. Dec. 627 (1984).

People v. Lopez, 129 Ill.App.3d 488, 472 N.E.2d 867, 84 Ill.Dec. 730 (1st Dist. (1984).

FACTS

A now-deceased "Husband" established an estate planning arrangement (grantor/revocable trust) in which a gift would be made (upon the proper conditions) to a (1) "marital trust" (for the benefit of "Wife" only) and a (2) "family trust" (for the benefit of the Wife and children, but with a life estate interest to Wife and a remainder interest to their children). However, because of the value of the assets in the trust upon Husband's death and the applicable estate tax exemption, all of the Husband's trust assets should have been funded into the "family trust" (with none going to the Wife's "marital trust"). Under the trust arrangement, Wife and "Daughter" (one of the offspring of Husband and Wife) were named as the successor co-trustees in the event of Husband's death. Wife is aware that both she and Daughter are

successor co-trustees, but Daughter has not been informed of her appointment. Additionally, Daughter (and the other children) has not been informed that she was named a beneficiary under the terms of Husband's trust.

The Wife has assumed control of the trust assets and has been acting as if she is the sole trustee. Wife has hired a non-attorney financial planner who is assisting her in transferring all of the trust assets into the “marital trust” (with none to the “family trust”). These actions are being taken without any notification to the Daughter that the trust documents name her as a co-trustee.

Wife has retained Lawyer to act as her personal counsel and to provide her with additional estate planning services, although this lawyer was not involved in the Husband’s creation of the original estate planning documents. Upon Lawyer’s review of the trust documents, it is his opinion that the Wife has ignored the requirements of the trust by taking steps to distribute all of the trust assets directly to her own “marital trust,” and by acting as a sole trustee when there are supposed to be co-trustees.

Lawyer notes that if the trust assets were properly placed in the “family trust,” the Wife would be entitled to typical interest income, but the principal would be provided to her only at the discretionary direction of the co-trustees. However, Wife has told Lawyer of her belief that her Husband’s trust assets should now become her exclusive property, without any restrictions. Her belief in this regard conflicts with the apparent purpose of Husband's credit shelter estate tax planning which intentionally shifted property away from Wife, as the surviving spouse, so as to avoid future estate taxation as of time of Wife’s death.

Lawyer has notified Wife that (1) Husband’s assets need to be funded into the family trust arrangement, (2) the Daughter must be notified that she is a co-trustee and the Wife and Daughter must then act as co-trustees, and (3) the children must be notified that they are beneficiaries of the “family trust.” Unfortunately, Wife is ignoring this advice and continues to exercise exclusive control of the funds.

ISSUES RAISED

Does Lawyer have an obligation to notify Daughter (as a successor co-trustee and trust beneficiary) and her siblings (as other beneficiaries) of the terms of the trust, that Wife is ignoring the terms of the trust by not sharing trustee responsibilities with Daughter and is making a distribution of assets which is contrary to the terms of the trust.

ANALYSIS

This somewhat complicated fact scenario raises more generalized issues concerning a lawyer's duty to maintain the confidentiality of client information as compared to a lawyer’s obligation to avoid harm to others resulting from a client’s wrongful actions.

Our analysis begins with the Lawyer's duty to his client. In this case, Lawyer represents Wife personally for her estate planning purposes. The Lawyer does not represent the estate of decedent, or a trustee, nor does he represent the decedent's offspring as potential beneficiaries of the estate.¹ Thus, the Lawyer's client is the Wife and his primary obligation is owed to her.

Under Rule 1.6, a lawyer owes a duty of confidentiality to a client. Specifically, in relevant part (with added emphasis), the Rule states as follows:

(A) A LAWYER SHALL NOT REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT UNLESS ... THE DISCLOSURE IS **PERMITTED** BY PARAGRAPH (B) OR **REQUIRED** BY PARAGRAPH (C).

(B) A LAWYER **MAY** REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT TO THE EXTENT THE LAWYER REASONABLY BELIEVES NECESSARY:

(1) TO PREVENT THE CLIENT FROM COMMITTING A CRIME IN CIRCUMSTANCES OTHER THAN THOSE SPECIFIED IN PARAGRAPH (C);

(2) TO PREVENT THE CLIENT FROM COMMITTING FRAUD THAT IS REASONABLY CERTAIN TO RESULT IN SUBSTANTIAL INJURY TO THE FINANCIAL INTERESTS OR PROPERTY OF ANOTHER AND IN FURTHERANCE OF WHICH THE CLIENT HAS USED OR IS USING THE LAWYER'S SERVICES;

(3) 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;

(4) TO SECURE LEGAL ADVICE ABOUT THE LAWYER'S COMPLIANCE WITH THESE RULES;

(5) TO ESTABLISH A CLAIM OR DEFENSE ON BEHALF OF THE LAWYER IN A CONTROVERSY BETWEEN THE LAWYER AND THE CLIENT, TO ESTABLISH A DEFENSE TO A CRIMINAL CHARGE OR CIVIL CLAIM AGAINST THE LAWYER BASED UPON CONDUCT IN WHICH THE CLIENT WAS INVOLVED, OR TO RESPOND TO ALLEGATIONS IN ANY PROCEEDING CONCERNING THE LAWYER'S REPRESENTATION OF THE CLIENT; OR

(6) TO COMPLY WITH OTHER LAW OR A COURT ORDER; OR.

¹ Although beyond the scope of this Opinion, a lawyer representing an estate or the executor owes independent fiduciary duties to the beneficiaries. *In re Estate of Halas*, 159 Ill. App. 3d 818, 825, 512 N.E.2d 1276, 111 Ill. Dec. 639 (1987). Such independent fiduciary responsibilities to beneficiaries do not exist here as Lawyer has only been retained by Wife for her personal estate planning issues.

(7) TO DETECT AND RESOLVE CONFLICTS OF INTEREST IF THE REVEALED INFORMATION WOULD NOT PREJUDICE THE CLIENT.

(C) A LAWYER *SHALL* REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT TO THE EXTENT THE LAWYER REASONABLY BELIEVES NECESSARY TO PREVENT REASONABLY CERTAIN DEATH OR SUBSTANTIAL BODILY HARM.

It is important to recognize that Rule 1.6 requires a lawyer to keep confidential all “*information* relating to the representation of a client.” Comment 3 to Rule 1.6 specifies that the duty of confidentiality “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Comment 3 (emphasis added). The extension of the duty of confidentiality to all “information” relating to a client is a change from the pre-2010 Rules of Professional Conduct which protected only information that was a “confidence or secret of the client.”

Disclosure of Client Information

In discussing a lawyer’s possible disclosure of client information, Rule 1.6 refers to disclosures which are required to be made (mandatory), and those which are made at the lawyer’s discretion (permissive). Under this Rule, the only situation under which a lawyer must reveal client information is when it is reasonably necessary to prevent death or substantial bodily harm. Such a situation is not presented by the above facts. See Rule 1.6(c).

The other situations involving potential lawyer disclosure of client information are all permissive, meaning the lawyer is allowed to make a disclosure at his/her discretion.

Under Rule 1.6(b), a lawyer has the discretion to disclose confidential client information if the facts fall within one of the seven scenarios established in paragraph (b) of Rule 1.6. Under Rule 1.6(b), the Committee believes that the only realistic exceptions to the Lawyer’s duty of confidentiality presented by this fact situation are found in subparagraphs (1), (2) and (3), relating to the possibility of criminal theft or civil fraud being committed by Wife. Those subparagraphs permit disclosure:

(1) TO PREVENT THE CLIENT FROM COMMITTING A CRIME IN CIRCUMSTANCES OTHER THAN THOSE SPECIFIED IN PARAGRAPH (C);

(2) TO PREVENT THE CLIENT FROM COMMITTING FRAUD THAT IS REASONABLY CERTAIN TO RESULT IN SUBSTANTIAL INJURY TO THE FINANCIAL INTERESTS OR PROPERTY OF ANOTHER AND IN FURTHERANCE OF WHICH THE CLIENT HAS USED OR IS USING THE LAWYER’S SERVICES;

(3) 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;

Although the Committee does not express opinions on the elements of substantive criminal law, cursory research suggests the real possibility that an estate trustee can be subject to criminal prosecution for criminal “theft” related actions. See e.g., *People v. Lopez*, 129 Ill.App.3d 488, 472 N.E.2d 867, 84 Ill.Dec. 730 (1st Dist. 1984). In fact, there is a criminal statute of limitations provision which makes special mention of the situation in which there is a criminal breach of a fiduciary obligation. 720 ILCS 5/3-6(a)(2). The Illinois Criminal Code provides that “A person commits theft when he or she knowingly ... obtains or exerts unauthorized control over property of the owner; or obtains by deception control over property of the owner; or” 720 ILCS 5/16-1(a)(1) and (2).

If the Lawyer in this situation reasonably determines that the Wife, his client, is going to be taking steps which will constitute a crime, then Lawyer may choose to disclose the confidential information in order to prevent the commission of that crime.

Additionally, Rule 1.6(b) makes exceptions for disclosure to prevent or rectify financial frauds. Rule 1.0 of the Rules of Professional Conduct explains the meaning of various terms used in the Rules, including Rule 1.6’s reference to “fraud,” which is therein defined as follows:

[5] WHEN USED IN THESE RULES, THE TERMS “FRAUD” OR “FRAUDULENT” REFER TO CONDUCT THAT IS CHARACTERIZED AS SUCH UNDER THE SUBSTANTIVE OR PROCEDURAL LAW OF THE APPLICABLE JURISDICTION AND HAS A PURPOSE TO DECEIVE. THIS DOES NOT INCLUDE MERELY NEGLIGENT MISREPRESENTATION OR NEGLIGENT FAILURE TO APPRISE ANOTHER OF RELEVANT INFORMATION. FOR PURPOSES OF THESE RULES, IT IS NOT NECESSARY THAT ANYONE HAS SUFFERED DAMAGES OR RELIED ON THE MISREPRESENTATION OR FAILURE TO INFORM.

It appears that Wife’s actions in failing to advise Daughter they were co-trustees and then by distributing trust assets solely to herself constitute “fraud.” We note that Illinois case law indicates “[a] trustee owes the highest duty to his beneficiary to fully and completely disclose all material facts when he is dealing with the trust.” *Obermaier v. Obermaier*, 128 Ill. App. 3d 602, 607, 470 N.E.2d 1047, 83 Ill. Dec. 627 (1984). Further, “[i]n a fiduciary relationship, where there is a breach of a legal or equitable duty, a presumption of fraud arises.” *Obermaier* at 607. Thus, there is a very high likelihood that the Wife’s actions, as trustee, would be viewed as breaching her fiduciary duties to her co-trustee (Daughter) and the beneficiaries of the trust (Daughter and her siblings), and that by transferring the trust assets solely to her own accounts, Wife has defrauded the Daughter and other offspring.

Interestingly, Rule 1.6(b)(2)’s discretionary disclosure of information to prevent a client from committing a fraud in the future is limited to those instances when done “in furtherance of which the client has used or is using the lawyer’s services.” Rule 1.6(b)(3)’s discretionary disclosure for past and future frauds is when done “in furtherance of which the client has used the lawyer’s services.” Rule 1.6(b)(1)’s discretionary disclosure as to crimes is not limited to any relationship to the lawyer’s actions. In any event, in this scenario, all three of these conditions are satisfied. The Client (the Wife) is using the Lawyer’s estate planning services to take the money she has “stolen” from the beneficiaries and is having him take steps to protect, invest and

make provisions for its retention. Thus, the lawyer is playing an active role in the Client's scheme to make present and future use of the monies.

Based on the foregoing, and assuming Lawyer reasonably believes Wife's actions constitute a fraud, the lawyer may (but is not required to) reveal information relating to the representation of his client pursuant to Rule 1.6(b)(2) and (3) to the extent the disclosure may prevent fraud or mitigate injury from the fraud.

Manner of Lawyer's Disclosure of Client Information

If the Lawyer decides to disclose the Wife's confidential information, the nature of the disclosure could include providing information to the Daughter and other beneficiaries that Daughter is supposed to be a co-trustee of the trust, and that the terms of the trust agreement established by Husband are not being carried out by Wife, or other similar information which could prevent, mitigate or rectify the fraud.

However, caution should be exercised by Lawyer in the scope of his disclosure and the manner in which he chooses to disclose information. Rule 1.6(c) states that Lawyer may reveal the client information "to the extent the lawyer reasonably believes necessary" to prevent the client's fraud. Comment 16 to Rule 1.6 states:

"PARAGRAPH (B) PERMITS DISCLOSURE ONLY TO THE EXTENT THE LAWYER REASONABLY BELIEVES THE DISCLOSURE IS NECESSARY TO ACCOMPLISH ONE OF THE PURPOSES SPECIFIED. WHERE PRACTICABLE, THE LAWYER SHOULD FIRST SEEK TO PERSUADE THE CLIENT TO TAKE SUITABLE ACTION TO OBTAIN THE NEED FOR DISCLOSURE. 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.

Under the foregoing, before Lawyer makes a disclosure of client information to Daughter or others, he should speak to his client (the Wife) regarding the Lawyer's ethical duties and the legal effects of Wife's actions, in an effort to persuade Wife to comply with the trust's terms. The Lawyer must indicate his intention to advise the Daughter and her siblings of the facts if the Wife chooses not to do so. If the client rejects Lawyer's pleas, and Lawyer wishes to make a disclosure of information, then the Lawyer's disclosure of information to Daughter and the other beneficiaries must be limited so as to minimize the adverse effects on the client, but still sufficient to prevent or rectify the fraud. Further, the disclosure should be no greater than the lawyer reasonably believes necessary to accomplish his purpose in making the disclosure. Thus, the Lawyer must still strike a balance between protecting client information and protecting third parties affected by the client.

Need for Lawyer to Withdraw

Additionally, regardless of whether the Lawyer discloses the confidential client information about the Wife's fraud/theft, the Lawyer should anticipate that continued representation of the Wife will be improper. First, the Lawyer's knowledge of Wife's fraudulent basis for obtaining and keeping the trust assets suggests he cannot continue to represent her for estate planning purposes. Any advice or counsel for the Wife's estate planning would necessarily

require Lawyer to include the trust assets as a part of the planning. As such, the Lawyer would then be assisting his client in the handling of assets which she obtained and maintains fraudulently, and the estate plan would likely be used to perpetuate the secretion of the funds from the children-beneficiaries. Under Rule 1.2(d), “a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...” Comment 12 to Rule 1.2 makes this prohibition even more relevant in this fact scenario as it states “Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.” Further, under Rule 1.16(a)(1), because the Lawyer’s continued representation will violate Rule 1.2 (above), it is required that the Lawyer withdraw: “[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....”

Additionally, regardless of whether he chooses to disclose the confidential information, the Lawyer would have to consider whether his client’s fraudulent actions have imposed upon him a conflict of interest under Rule 1.7(a)(2), stating in relevant part: “[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to ... a third person or by a personal interest of the lawyer.” The client’s fraud or theft might establish for the Lawyer additional responsibilities owed to third persons (the beneficiaries) whose interests are at odds with his client (the Wife). Because the Lawyer must then consider the competing interests of the Wife and the beneficiaries, the conflict of interest exists for the Lawyer. Although Rule 1.7 provides a potential for lawyers to continue with representation of a client in spite of a conflict of interest in certain circumstances, it is difficult to understand how continued representation would be permitted in this instance if the Wife continued her fraud. Even if the Lawyer chooses to not disclose the fraud to the beneficiaries, he must consider their interests, and further, he will need to take steps in his estate planning advice which are limited by his own interest in order to avoid a charge that he has violated Rule 1.2’s prohibition against assisting a client in a fraud.

Lawyer’s Communications with Others

Finally, Lawyer would need to exercise caution with respect to his dealings with others regarding Wife’s actions and the trust agreements, regardless of whether he discloses information about the Wife’s fraud/theft. Rule 4.1 indicates:

IN 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.

Under Rule 4.1, once a lawyer has communications with others regarding the subjects relating to a client's fraud, that lawyer may not withhold material facts if full disclosure is required for the lawyer to avoid assisting the client's fraud. If the Lawyer chooses to disclose otherwise confidential client information to the beneficiaries, he must be certain to not withhold some of the information which would be significant and which essentially makes the Lawyer a part of the deception. Even if the Lawyer does not make a formal disclosure of the information, however, if he interacts with others as a part of his estate planning legal services in a manner which suggests a deception, misrepresentation or hiding of a material fact which must be disclosed, then the lawyer violates Rule 4.1.

CONCLUSION

The Lawyer's Client is the Wife. Because the Lawyer would reasonably believe that his client is committing or will commit fraud or a theft crime related to her role as co-trustee, the Lawyer has the discretion to disclose client information about the fraud/theft which is otherwise confidential. Regardless of any action taken by the Lawyer, he should attempt to convince his Client to change her actions and to stop her deceptions. If the Lawyer chooses to disclose the information, he must do so in a manner which does not overexpose the Client's confidential information, but also does not withhold such information as to misrepresent or deceive the persons who need to receive it. Even if the Lawyer chooses to not disclose the information, the Lawyer will very likely need to terminate his representation of the Client in order to avoid assisting her in the fraud, and to stop the conflict of interest.

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