NYSBA Opinion 980
(9/4/13)

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 980

New York State Bar Association
Committee on Professional Ethics

Opinion 980 (9/4/13)

Topic: Disclosure of confidential information to collect a fee; candor toward a tribunal

Digest: A lawyer, having learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal, has a duty to take reasonable remedial measures that may still be available, including, if necessary, disclosure to that tribunal. Even if the correct information about the former client's finances is confidential, the lawyer may disclose it in the former client's bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer.

Rules: 1.6; 3.3(a)-(c)

FACTS

1. While the inquiring attorney was representing a client in a contested judicial proceeding in which the client's finances were at issue, the client disclosed confidential information to the attorney about the client's finances (including that the client was working "off the books"). The information was inconsistent with what the client was providing to the court. The attorney, according to the inquiry, did not "promote" this information in the judicial proceeding.

2. Subsequently, the client filed for protection from creditors, including the inquiring lawyer, who is owed a legal fee from the prior representation. The lawyer wishes to reveal the confidential information from the first proceeding in the bankruptcy proceeding so as to aid the lawyer's effort to be paid the legal fee.

QUESTION

3. Having received confidential information from the client in one proceeding, may the inquiring lawyer disclose that information in a subsequent bankruptcy proceeding in an effort to collect an unpaid legal fee?

OPINION

4. Ordinarily, under Rule 1.6(a) of the New York Rules of Professional Conduct (the Rules), a lawyer shall not "knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer." One of the exceptions to this proscription is Rule 1.6(a)(3), which says that a lawyer may do so if "the disclosure is permitted by paragraph (b)" of Rule 1.6. That paragraph, among other things, permits a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to establish or collect a fee." Rule 1.6(b)(5)(ii).

5. We caution that Rule 1.6(b)(5)(ii) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee. The Rules do not shed much light on these terms.[1] Nonetheless, these terms provide significant limits beyond which a lawyer may not go in seeking to collect a fee. We have previously discussed those limits, and while some of the opinions were decided under the prior Code of Professional Responsibility, we believe they generally remain sound guides under the Rules.

6. First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances.[2] Second, the lawyer should try to avoid the need for disclosure.[3] Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee.[4] Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.[5]

7. Bearing in mind these limits on the fee-collection exception, we now turn to its applicability. The exception, as set forth in Rule 1.6(b)(5)(ii) and quoted above, is not reserved for any particular kinds of proceedings. In particular, the fee-collection exception "has been applied to bankruptcy proceedings." D.C. Opinion 236 (1993) (citing examples and concluding that a "well-established but narrow exception to the general rule against revealing client confidences and secrets ... permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances").

8. Of course the limits on the exception also apply in bankruptcy proceedings.[6] Indeed, there is some authority as to how those limits may apply to particular uses of confidential information in the bankruptcy context.[7] However, because the inquiry does not specify the particular planned uses of confidential information, we leave to the inquiring attorney a careful consideration of whether disclosure is appropriate under the above principles, and if so, how to limit it to the minimum necessary.

9. The inquiring attorney should also consider whether the information from the client is not only confidential under the rules of ethics, but also subject to attorney-client privilege, and whether such privilege might affect the permissibility of the proposed disclosure.[8] However, questions of privilege are legal matters on which we do not opine.

10. We turn to a second question that was not part of the inquiry but is raised by its facts. The inquiring attorney says that the attorney did not "promote" the client's apparently false evidence about the client's finances during the first proceeding. Depending on when that first proceeding occurred, however, the lawyer may have had a greater duty to the tribunal than forbearing from relying on the false evidence. Specifically, the applicable rule may have obliged the attorney to disclose the confidential information to the first tribunal if the client declined to do so and lesser remedial measures were insufficient to cleanse the record of the untrue evidence.

11. The Rules of Professional Conduct became effective, replacing the former Code of Professional Responsibility, on April 1, 2009. On that day, a lawyer's duty in appearing before a tribunal materially changed. The relevant provision of the Code had required that a lawyer who learned that the lawyer's client had clearly perpetrated a fraud upon a 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 ... tribunal, except when the information is protected as a confidence or secret." DR 7-102(B)(1) (emphasis added).

12. In contrast, one of the new rules that took effect on April 1, 2009, sweeps more broadly. The duty to take remedial steps is triggered when "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." Rule 3.3(a)(3). The duty is also triggered whenever the lawyer knows of "fraudulent conduct related to the proceeding."[9] In either case, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3), (b). There is no longer any exception for confidences or secrets. See Rule 3.3(c) (duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6"); N.Y. State 837 ¶¶ 6-7 (2010).

13. The application of the new standards of Rule 3.3 depends on when the first proceeding occurred. In N.Y. State 831 (2009), we concluded that, notwithstanding the adoption of Rule 3.3, DR 2-107(a) remained in force as to a fraud committed by the client prior to April 1, 2009, regardless of when the lawyer came to know the falsity of the information. Here, the lawyer's duty to disclose the information to the tribunal depends on whether the client imparted the false information to the tribunal before or after April 1, 2009.

14. If the false information was imparted before that date, the lawyer had a duty to call upon the client to rectify the fraud. However, if the client declined to do so, the lawyer had no further duty to disclose the information to the tribunal if that information was protected as a confidence or secret. And the information was undoubtedly so protected, given its nature and the way the lawyer learned it. On the other hand, if the false information was material and was imparted to the tribunal on or after April 1, 2009, then the lawyer had a duty to take reasonable remedial measures, and if measures short of disclosure were insufficient, then the lawyer would have a duty of disclosure to the tribunal.

15. This leaves us with two remaining matters, each on the assumption that Rule 3.3, not DR 7-102(B), governs the lawyer's obligations. One is the issue of whether, even if the Rules of Professional Conduct would seem to require disclosure of the false information, such information might nevertheless be shielded from disclosure in the first proceeding by the attorney-client privilege.[10] As noted above, however, privilege issues are questions of law beyond our purview.

16. The other remaining issue is the duration of the lawyer's obligation to make a Rule 3.3(a) disclosure to a tribunal. Although the State Bar proposed that the duty continue only to the conclusion of the proceeding, the courts did not adopt that proposal. N.Y. State 837 ¶16 (2010). Thus it appears that the obligation to disclose "may continue even after the conclusion of the proceeding in which the false material was used." We nevertheless opined that the endpoint of the obligation "cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3." Id. (citations omitted); accord N.Y. City 2013-2 (opining that "for a measure to be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process," and discussing how application of that standard requires consideration of law and court procedures applicable to correction of the false evidence in question).

CONCLUSION

17. A lawyer who in one proceeding obtains confidential information about a client's financial affairs may disclose that information in a subsequent bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer and disclosure is not barred by attorney-client privilege.

18. If a lawyer learns that a client has imparted false and material information to a tribunal since Rule 3.3 has been in effect, then the lawyer has a duty to take reasonable remedial measures that are still available, including, if necessary, disclosure to that tribunal, unless disclosure is barred by attorney-client privilege.

(48-12)

[1] A lawyer "reasonably believes" something when "the lawyer believes the matter in question and ... the circumstances are such that the belief is reasonable." Rule 1.0(r). The Rules do not define "necessary," but Webster's Unabridged Dictionary at 1200 (2nd ed. 1983) says that the word means "unavoidable, essential, indispensable, needful."

[2] See N.Y. State 684 (1996) (analogizing to rule allowing withdrawal when client "deliberately disregards" a fee obligation, which occurs when "'the failure is conscious rather than inadvertent, and is not de minimis in either amount or duration'"); Restatement (Third) of the Law Governing Lawyers §41 cmt. c (2000) [hereinafter Restatement] ("The lawyer's fee claim must be advanced in good faith and with a reasonable basis.").

[3] See Rule 1.6, Cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."); N.Y. State 608 (1990) (noting Code principle that a lawyer should "zealously avoid," and "attempt amicably to resolve," fee controversies with clients, and concluding that lawyer may use a collection agent to collect a fee but only after all other reasonable efforts short of litigation have been exhausted).

[4] See N.Y. State 684 (1996) (disclosure to a credit bureau would appear to aid collection process if at all "only by virtue of its in terrorem effect on the client," and where "the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is 'necessary' for the collection"); Restatement §41 cmt. c (lawyer "may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling").

[5] 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," and disclosure in adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable"); Restatement §65, cmt. d (describing requirements that use or disclosure of confidential information in compensation dispute be proportionate and restrained); id. §41, cmt. c ("lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order").

[6] "[T]he inquirer must have a good faith expectation of recovering more than a de minimis amount of the outstanding fee." D.C. Opinion 236 (1993). "[T]he proposed disclosure to the bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to

protect the identity and interests of the client. Id.; accord Los Angeles County Opinion 452 (1988) (attorney may prosecute adversary proceeding to have a debt declared non-dischargeable but "as in any fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose").

[7] One ethics committee, while opining that an "attorney may make a claim in the bankruptcy case, and may prosecute a dischargeability proceeding as to the claim," also opined that the attorney may not participate in the "collective collection effort of the bankruptcy process." In other words, "the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors," or otherwise "assist [the] trustee or other creditors in recovering assets." Los Angeles County Opinion 452 (1988).

[8] We have previously noted a question whether the court-adopted rules of legal ethics "can override the statutory protection to the attorney-client privilege afforded by CPLR § 4503(a)." N.Y. State 831 (2009). Even if they cannot, however, it is not clear that privilege would bar disclosure in the case at hand. We note that in certain proceedings seeking relief from creditors, the privilege typically belongs to the Trustee and not to the person seeking relief. Thus, the person with capacity to waive the privilege may reside in someone other than the lawyer's onetime client. Moreover, an exception to the privilege could apply. See, e.g., Alexander, CPLR §4503 Practice Commentaries, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"); Restatement §83(1) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding ... to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer"); Restatement §82(a) (exception to privilege when client "consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud").

[9] Rule 3.3(b). Under the new rules, "fraudulent" conduct includes not only conduct that is fraudulent under applicable law, but also conduct that "has a purpose to deceive." Rule 1.0(i). This new definition apparently broadened the category of conduct constituting client frauds that could require remedial steps. See N.Y. State 831 (2009).

[10] We have already noted issues as to whether privilege might bar disclosure otherwise permitted for the purpose of collecting a fee, see footnote 8 supra, and some of the same considerations (including possible applicability of the crime-fraud exception) apply to whether privilege might bar disclosure otherwise mandated by Rule 3.3. In any event, even if the privilege applied to the client communications in question, it may not extend to the context of disclosure under Rule 3.3. See Rule 1.6, Cmt. [3] (attorney-client privilege is part of evidence

law and applies "when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client"); N.Y. State 837 ¶¶ 12-13 (2010) (noting that CPLR §4503's limit on remedial measures "extends only to the introduction of protected information into evidence"); Restatement §86(1) (privilege may be invoked "[w]hen an attempt is made to introduce in evidence or obtain discovery" of a privileged communication).

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