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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

We recently mediated a litigation matter for a demanding and difficult client whom I was happy to put in the rearview mirror. This morning, a couple of days after the settlement agreement was signed, and the client's check conveyed, I ran into the client at a coffee shop. He pulled me aside and said he was really happy to have settled the case so easily, because (looking sheepish) it could have gone so much worse for him had the other side learned about some bad documents that he had kept in his drawer and not produced.

Shocked, I told the client we'd never work for him again, and that I'd have to consider what to do about his disclosure. He immediately said that I should do nothing because what he told me about the documents being withheld was privileged and confidential, and besides the matter was over now. Back at my office, I checked the status of the Order of Dismissal agreed to as part of the settlement. I learned that it has been submitted to the Court for signature, but has not yet been signed or filed. Do I have any obligation to do anything? Does the attorney-client privilege or Rule 1.6 mean I cannot reveal the client's admission? Can I or should I tell anyone?

A: This presents some complicated issues. The attorney-client privilege applies only to communications relating to the giving or receipt of legal advice. Here, the client's "coffee shop admission" does not appear to be related to a request for any advice or action by the attorney, and therefore may not be privileged. Moreover, if it were, the crime-fraud exception to privilege generally excludes from protection communications related to committing or planning to commit a future crime or fraud. Of course, if a fraud (here, settlement of the case without required disclosure of material facts) has already been completed, and the communication is otherwise within the privilege umbrella, then the crime fraud exception does not apply.

Similarly, but more broad in scope, the original version of Model Rule 1.6 precluded disclosure of information relating to a representation except to prevent a crime or fraud. The current version of Rule 1.6 adopted in some form in many jurisdictions adds additional exceptions, including for mitigation or rectification of financial injury through use of the lawyer's services, and that type of exception may apply to permit disclosure here. You have to determine whether a fraud on the settling party is still pending or has already been completed, the privilege status of the coffee shop admission and whether the version of Rule 1.6 in your jurisdiction permits disclosure, either to prevent or rectify or mitigate a fraud pending or completed.

There is another substantial issue here that likely takes precedence. The unique status of this matter, with the Order of Dismissal remaining unsigned, implicates Rule 3.3(b) concerning candor to a tribunal. It requires a lawyer who knows that a client has engaged in fraudulent conduct "related to the proceeding" to take

"reasonable remedial measures," including if necessary, disclosure to the tribunal. Comment 12 clarifies that fraudulent conduct that undermines the integrity of the adjudicative process, such as "concealing documents" falls within the Rule. Rule 3.3(c) extends the duty to undertake reasonable remedial measures to the "conclusion of the proceeding." Here, the client has admitted to the lawyer concealing documents, fraudulently undermining the integrity of the proceeding. Although close, the proceeding has not yet officially concluded, so the lawyer is obligated to act. The lawyer should first remonstrate with the client confidentially to obtain the client's agreement to disclose the concealed documents, see Comment 10; noting the consequences of a failure to do so. If the client still refuses to disclose the documents, the lawyer must disclose the matter to the court.

Remember, you may always seek counsel about your ethical obligations. Use your firm's counsel, if available, or seek outside assistance in complicated situations like this one.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.