

ETHICS OPINION 112314

Facts: Three Scenarios:

1. Attorney represents a client through a bankruptcy. After the bankruptcy is complete, the client returns to the attorney for work on a different matter. During the interview addressing the scope of the new representation, the client shares how especially pleased he is that he did not reveal to anyone his valuable baseball card collection as an asset during the bankruptcy, sharing the fact that he'd just sold a card for \$15,000. The attorney knew nothing of the existence of the baseball card collection.

2. A bankruptcy attorney is helping a client with a bankruptcy. After the attorney has submitted the asset disclosure information, but before the bankruptcy is complete, attorney receives a letter from the client's bitter ex-spouse revealing the existence of a valuable baseball card collection. Attorney asks client if this is true, and client admits that he'd hidden the cards. Following this admission, the client asserts that he will do the right thing and allow the attorney to amend the asset disclosure to include the cards. Before the attorney is able to do so, the client fires him.

3. A potential client spends an hour discussing his possible bankruptcy with a bankruptcy attorney, asking if his prized baseball card collection would be at risk. The attorney explained the bankruptcy process, including that the existence of the cards would need to be disclosed and the cards possibly sold. The potential client leaves the office saying "thanks for the information, I think I'll hold off. I don't want to lose these cards." Six months later, while waiting her turn at Bankruptcy Court, the attorney sees the former potential client at a bankruptcy hearing with an attorney, testifying about client's assets but without mentioning the baseball cards.

Questions Presented:

Scenario 1: Does an attorney who learns that the attorney has submitted false information to a tribunal have an obligation to disclose the misrepresentation to the tribunal after the matter is completed?

Scenario 2: Does an attorney who is fired after filing false information have an obligation to discuss the matter with the former client, new counsel to the former client, and even the tribunal?

Scenario 3: Does an attorney who witnesses a former potential client lie to the tribunal have an obligation to discuss the matter with the former potential client, the current attorney or the tribunal?

Short Answers:

1. No. The matter is complete.
2. Yes, but in the stages suggested: attempting first to allow the former client to correct the misrepresentation, then to discuss with new counsel and ultimately with the tribunal if the record created by initial counsel is not corrected.
3. Yes, in the stages suggested, because the attorney is obligated to follow the Rules of Professional Conduct, in particular the rule on confidentiality, with a former potential client. The exceptions within the confidentiality rule include obligation of candor toward the tribunal.

General Discussion:

The three scenarios require the balancing of the attorney's responsibilities under no fewer than eight Rules of Professional Conduct: Rule 1.2 on Scope of Representation and Allocation of Authority Between Client and Lawyer, Rule 1.6 on Confidentiality, Rule 1.16 on Declining or Terminating Representation, Rule 1.20 Duties to Prospective Clients, Rule 3.3 on Candor Toward the Tribunal, Rule 4.1 on Truthfulness in Statements to Others, Rule 4.2 Communication with Person Represented by Counsel and Rule 8.4 on Misconduct.

What a Montana lawyer should do in each of the scenarios depends on a careful reading of the Montana rules. Montana's rules, adopted in 2004, reflect most of the changes that the ABA made to the Model Rules of Professional Conduct in 2002-2003. Significantly, however, the Montana Supreme Court chose not to adopt the ABA's 2003 revisions to Model Rule 1.6 on the subject of revealing a clients' fraud. The Montana rule follows the short-lived version of Model Rule 1.6 that the ABA adopted in 2002.

Montana's Rule 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to secure legal advice about the lawyer's compliance with these Rules;
 - (3) 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
 - (4) to comply with other law or a court order.

The ABA's 2003 Rule 1.6 (b) includes these additional exceptions (using the ABA's numbering):

- (b)(2) to prevent the client from committing a crime or 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;
- (b)(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...

The Montana Supreme Court adopted the ABA's Rule 3.3, Candor Toward the Tribunal, verbatim:

RULE 3.3: Candor Toward the Tribunal

- (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;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (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.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The Montana Supreme Court has made it absolutely clear that the duty of candor toward the tribunal under Rule 3.3(a)(2) supercedes a lawyer's duty of confidentiality under Rule 1.6, even when a client has specifically directed the lawyer to protect the client's confidence:

Rule 3.3(a)(2) sets forth the duty of candor toward the tribunal and prohibits a lawyer from failing "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Once Potts made representations to the court in the signed stipulation, the duty of candor to the tribunal as stated in rule 3.3(a)(2), M.R.P.C., trumped any duty of confidentiality that he owed to his clients [citation omitted]. Regardless of the duty of confidentiality as stated in Rule 1.6, M.R.P.C., Potts had an affirmative duty to be truthful in his statements to the court as mandated by Rule 3.3(a)(2), M.R.P.C. [paragraph 35].

In the Matter of Potts 2007 MT 81.

In *Potts*, attorney Potts wrote and submitted a stipulated agreement that set the value of the estate at issue in the litigation at an amount that did not include joint tenancy accounts. Potts' client had directed Potts not to clarify that the estate value did not include the joint tenancy accounts.

The Montana Supreme Court addressed the challenge presented by the Montana rule departure from the ABA Model Rule 1.6's fraud exceptions:

...Rule 1.6, M.R.P.C., may have absolved Potts from disclosing any information relating to the representation of his clients even if they had engaged in fraudulent conduct. Under Rule 1.6(b)(1), M.R.P.C., a lawyer may disclose information relating to client representation only if the client consents to a disclosure or to prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. The rule provides no exception for disclosing fraudulent conduct of a client to prevent, rectify, or mitigate fraud. Potts could not have disclosed his clients' confidences under Rule 1.6, M.R.P.C. [paragraph 36].

Rule 1.6, M.R.P.C., does not stand alone, however, and thus our analysis does not end here. Rule 1.2(d), M.R.P.C., prohibits the lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. Under certain circumstances, a lawyer's nondisclosure of a material fact can be taken too far even in light of the duty of confidentiality. Nondisclosure of client information "can amount to a misrepresentation in some circumstances and can also have the effect of assisting a criminal or fraudulent act by a client, thus implicating the lawyer in the client's wrongdoing."...Under Rule 4.1, M.R.P.C., such nondisclosures can be revealed only to "a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless* disclosure is prohibited by Rule 1.6." [Emphasis in original. Paragraph 37.]

Here, Rule 1.6, M.R.P.C., prevented Potts from disclosing his clients' information because his clients had not consented to a disclosure and his clients' conduct was not likely to result in imminent death or substantial bodily harm so as to warrant disclosure outside of their consent. Potts cannot use the duty of confidentiality, however, to shield himself from other potential misconduct. Potts, while maintaining his duty of confidentiality, also must comply with the other rules of professional conduct, including Rule 1.2(d), M.R.P.C., the rule that prohibits a lawyer from assisting a client in fraud.

Rule 1.16, M.R.P.C., requires a lawyer to withdraw from representing a client if such representation will result in violation of the rules of professional conduct. Potts should have withdrawn from representation as soon as his clients' demands for nondisclosure of information propelled his services into the realm of assisting in his clients' fraudulent behavior. *We concede that Rule 1.6, M.R.P.C., prevented Potts from disclosing the*

information against his clients' wishes. We will not endorse legitimate nondisclosure under Rule 1.6, M.R.P.C., however, as an excuse for noncompliance with Rule 1.2(d), M.R.P.C. [paragraph 38-39.]

Ultimately, the Court found that Potts violated Rule 1.2(d), explaining that the omission constituted a misrepresentation that assisted in his clients' fraudulent purpose of taking the joint tenancy accounts outside of the settlement. "Potts could have avoided this situation by withdrawing from representation under Rule 1.16, M.R.P.C." [paragraph 55] On balancing the obligations within the Rules, the Court concluded:

The first sentence of the preamble to the M.R.P.C. states that a lawyer must "pursue the truth." The duties of candor toward the tribunal under Rule 3.3(a), M.R.P.C., and the prohibition against assisting in a client's fraudulent conduct under Rule 1.2(d), M.R.P.C., guide the lawyer in this quest for truth. In breaching this fundamental tenet, Potts shunned his most basic responsibility owed to the profession. [paragraph 78]

Scenario 1: An attorney who learns that the attorney has submitted false information to a tribunal does not have an obligation to disclose the misrepresentation to the tribunal after the matter is completed.

Both the Rule and the Comment to Rule 3.3 address the issue of when a matter is complete for purposes of applying the candor obligation head on. The rule provides:

(c) The duties stated in paragraphs (a) and (b) [mandating candor] continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The lawyer's duty of candor "continue[s] to the conclusion of the proceeding." The ABA has adopted comments in conjunction with the Model Rules. Comment 13 of Rule 3.3 provides:

"Duration of Obligation: A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

While the Montana Supreme Court did not adopt the ABA's Comments verbatim, it frequently relies on them in processing the Montana Rules of Conduct. The Rule and the Comment recognize a need for finality to the attorney's obligation of candor. In scenario 1, the matter is complete. The attorney has no obligation to disclose the fraud or deceit to the tribunal. That said, the Ethics Committee believes that best practices dictate that the attorney should explain to the client the repercussions of the client's fraud and potential for future criminal charges, whether or not the attorney chooses to go forward with the new proposed representation.

Scenario 2: An attorney who is fired after filing false information has an obligation to discuss the matter with the former client, new counsel and perhaps the tribunal.

As discussed in Scenario 1, the duration of an attorney's obligation is to the conclusion of the proceeding. In Scenario 2, the proceeding is not concluded. While the attorney has been terminated, the attorney's obligation of candor continues. Rule 3.3 provides in both (a) and (b) that upon learning false material evidence has been offered "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The candor obligation applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Rule 3.3(c). To further cement the obligation, Rule 3.3(d) provides: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."

This is not to suggest that the lawyer rush to the tribunal and tell all upon the lawyer's dismissal in Scenario 2. Comment 10 of Rule 3.3 sets out the steps a lawyer should take:

"Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the

lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. 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, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.”

Comment 11 to Rule 3.3 further provides:

“The disclosure of a client's false testimony 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. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.”

Finally, under the caption “Preserving Integrity of Adjudicative Process”, Comment 12 provides:

“Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.”

Scenario 3: An attorney who witnesses a former potential client lie to the tribunal has an obligation to discuss the matter with the former potential client's current attorney and, if that fails, with the tribunal.

As discussed in Scenarios 1 and 2, the matter is not complete. The duration of an attorney's obligation is to the conclusion of the proceeding. Even though the attorney was never hired in Scenario 3, the consultation was reasonably sufficient to permit the client to appreciate the significance of the matter in question, i.e. the baseball cards would be disclosed as an asset. Rule 1.20, Duties to Prospective Clients, imposes the same responsibilities on a consulted attorney as if the consulted attorney had engaged in the representation. Rule 1.20 provides, in part:

- (a) A person who consults with or has had consultations with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had consultations with a prospective client shall not use or reveal information learned in the consultation(s), except as Rule 1.9 would permit with respect to information of a former client.

Rule 1.9 is titled "Duties to Former Clients." Among the duties owed to former clients is the duty to protect the former client's confidences. The confidentiality rule's 1.6 (b)(4) exception ("may disclose...to comply with other law or court order") also attaches. The "other law" includes Rule 3.3's obligation of candor toward the tribunal discussed above. It also includes the Bankruptcy Code.

Bankruptcy is a privilege, not a right. Bankruptcy is premised upon full disclosure. Receiving a discharge is a privilege earned through truthful disclosure, not a right given to everyone who files regardless of their honesty. The quid pro quo for a discharge is full and unabridged honesty and disclosure. See *In re Retz*, 606 F.3d 1189 (9th Cir. 2010), *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) and *Aubrey v. Thomas*, 111 B.R. 268, 274 (9th Cir. BAP 1990). In *Retz*, the Court asserted "bankruptcy limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor" and "the opportunity to obtain a fresh start is conditioned upon truthful disclosure." The Ninth Circuit has opined, "The purpose of a discharge is to release an honest debtor from his financial burdens and to facilitate the debtor's unencumbered fresh start." *In re Bowman*, 14 Mont. B.R. 79, 81 (9th Cir. BAP 1994). Similar language is found in *Torgenrud v. Wolcott*, 194 B.R. 477, 486 (Bankr. D. Mont. 1996) and *Khalil v. Developers Sur. & Indem. Co.*, 379 B.R. 163, 172 (9th Cir. BAP 2007), *aff'd* 578 F.3d 1167 (9th Cir. 2009).

The Bankruptcy Code provides, at 11 U.S.C. section 727 (a) “The court shall grant the debtor a discharge, unless (4) the debtor knowingly and fraudulently, in or in connection with the case... (A) made a false oath or account.”

Paragraph 14 of the Preamble provides:

“Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. All lawyers understand that, as officers of the court, they have a duty to be truthful, which engenders trust in both the profession and the rule of law. The Rules of Professional Conduct, when properly applied, serve to define that relationship. Trust in the integrity of the system and those who operate it is a basic necessity of the rule of law; accordingly truthfulness must be the hallmark of the legal profession, and the stock-in-trade of all lawyers.”

When a lawyer witnesses a former potential client lie to a tribunal, the lawyer must make an effort to disclose the misrepresentation. When and to whom the lawyer discloses raises another issue. In Scenario 3, the client is represented by other counsel. Rule 4.2, Communication With Person Represented by Counsel, prohibits direct communication with a represented party unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. In Scenario 3, it is appropriate that the lawyer approach the former potential client’s new lawyer and discuss the fact of the earlier consultation and the existence of baseball cards as an asset.

Does the originally consulted attorney have an obligation to pursue the matter with new counsel to confirm whether the asset disclosure should have included baseball cards? Yes. The matter—the client’s bankruptcy—is not complete. The originally consulted attorney’s burden is to confirm that the tribunal is not misled. If the originally consulted attorney learns that in fact the cards are in the former potential client’s possession, and learns that new counsel has failed to correct the record as to the fact of the existence of the asset, then the former potential counsel has an obligation to disclose that information to the tribunal. Rule 3.3 and the Potts case require disclosure. Comments 10 and 11 to Rule 3.3, quoted above, direct disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done. Comment 12 to Rule 3.3 is also particularly compelling. Titled “Preserving Integrity of Adjudicative Process.” It provides:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as ... unlawfully concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b)[of Rule 3.3] requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

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