

November 2010 *Multnomah Lawyer Ethics Focus*

When Good Clients Go Bad

**By Mark J. Fucile
Fucile & Reising LLP**

Imagine this scenario: Your firm represents a seemingly successful investment company, Ponzi Enterprises. The company's founder, Bernie Madeup, is equally celebrated for his business acumen and his charitable works. Bernie's business has been great for your firm, too. You have helped with several of his key investment funds, including Bermuda Triangle and Enron Again. One day, however, the company bookkeeper tells you that Bernie and Ponzi are both frauds. You confront Bernie and he admits those sad facts but insists that he plans to continue his evil ways. What next?

When a lawyer discovers that a client is engaging in a continuing fraud or other illegal conduct, three questions usually rush forward: (1) must I withdraw? (2) do I tell? and (3) do I face exposure?

Withdrawal

If Bernie had been an outlier in an otherwise upstanding company that was equally shocked by his conduct, fired Bernie on the spot and immediately went to the authorities, the lawyer might remain to assist the company in dealing with the fallout. Even in this situation, however, developments might trigger the lawyer's withdrawal later, such as a lawyer-witness or other conflict, and the lawyer would need to continually monitor any potential conflicts moving forward.

In my example, though, Bernie is effectively “the company,” he has used your services to further his fraud and he plans to continue. In these circumstances, it’s time to head for the exit. RPC 8.4(a) includes knowing participation in fraud or other dishonest conduct within the definition of “professional misconduct” and RPC 1.2(c) prohibits advice in furtherance of fraudulent or illegal conduct. RPC 1.16(a)(1) also expressly requires lawyers to withdraw from a representation when continuing “will result in violation of the Rules of Professional Conduct or other law.”

Revealing Client Fraud

If Bernie had been the proverbial “lone wolf” in an otherwise upstanding company, RPC 1.13(b) counsels that a lawyer’s principal duty upon discovery of fraud (or other illegal conduct) by an entity constituent that “is likely to result in substantial injury to the organization” is to report the findings to management so that the organization can take action appropriate to the circumstances. In the vernacular of RPC 1.13, this is sometimes called “reporting up.”

Again, however, in my example Bernie is “the company” and is bent on continuing his fraud. Under these circumstances, both the confidentiality rule (RPC 1.6) and the entity client rule (RPC 1.13) permit what is sometimes called “reporting out.”

RPC 1.6(b)(1) permits a lawyer to reveal continuing client fraud that constitutes a crime:

“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

“(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime[.]”

RPC 1.13(c) permits a lawyer who has “reported up” to reveal continuing client fraud that constitutes a crime if:

“[D]espite the lawyer’s efforts . . . the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law . . . and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization[.]”

It is important to note that disclosure under both rules is permissive rather than mandatory. Oregon State Bar Formal Ethics Opinion 2005-34 finds that a lawyer could ethically either disclose the fraud or withdraw without revealing a client’s continuing crime. Oregon’s rule also leaves room for the middle course of a so-called “noisy withdrawal” where the lawyer withdraws and simply disavows any representations made to third parties. A lawyer may well conclude that the most prudent course is either to reveal the fraud or to at least make a “noisy withdrawal” that achieves the same objective in practical effect.

Exposure

Whenever and however the client’s fraud unravels, having been the client’s lawyer when the fraud was underway is never a comfortable position even if the lawyer is absolutely innocent of any wrongdoing. Bruce Schafer, the

PLF's Director of Claims, put it this way in his chapter on legal malpractice in *The Ethical Oregon Lawyer*:

“The damages claimed are often astronomical, and the lawyer frequently is the deepest, or only, pocket available when the dust settles.” (at 15-30).

Although any particular course of action will be dictated by the facts, two considerations are usually uniform. First, don't ignore the situation and hope it will go away. It almost always won't and looming disasters usually don't improve with age. Second, get advice. When issues of this sensitivity and potential magnitude arise, you need sound professional advice from seasoned counsel (whether from outside counsel, the PLF or a combination).

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the

quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.