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The Sound of Silence: "Noisy Withdrawal"

By Mark J. Fucile
Fucile & Reising LLP

As lawyers, we are frequently put in positions where we relay information from our clients to third parties during business negotiations or similar non-litigation settings. Sometimes, we have independent knowledge that the information conveyed is accurate. In others, we are simply relying on our clients. Most of the time, our role as conduits for information from our clients passes without event. Occasionally, however, we discover that our clients have communicated material information through us that was either inaccurate when conveyed or became so through developments to which we were not privy.

RPC 4.1(b) prohibits a lawyer from "fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting in an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Although RPC 1.6(b)(1) broadly permits a lawyer "to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime[,]" it is not always completely clear that an ongoing crime is being committed in this setting. A potential solution to this uncomfortable situation is a "noisy withdrawal." Despite its name, this approach does not involve revealing client confidential information. Rather, the lawyer's withdrawal is simply accompanied by a statement to the

counterparty that no reliance should be placed on the representations the lawyer made on the client's behalf.

In this column, we'll first discuss the availability of "noisy withdrawal" in Oregon. We'll then turn to the mechanics of actually making a "noisy withdrawal."

Before we do, two qualifiers are in order because this column focuses on settings outside litigation. First, OSB Formal Opinion 2005-34 (rev 2016) addresses the circumstances permitting disclosure of client perjury in court proceedings under RPC 3.3. Second, OSB Formal Opinion 2011-185 (rev 2016) discusses the constraints—and available alternatives—on information that can be shared in public court proceedings when seeking court permission to withdraw under RPC 1.16(c).

Availability

RPC 1.2(c) prohibits a lawyer from assisting a client "in conduct the lawyer knows is illegal or fraudulent[.]" RPC 1.16(a)(1), in turn, requires that a lawyer withdraw if remaining in a representation would cause the lawyer to violate the RPCs. In short, when a lawyer discovers that a client is using the lawyer to communicate a material misrepresentation that may constitute an ongoing crime or fraud that the client refuses to reveal, the lawyer must ordinarily withdraw.

Oregon lawyers, in turn, have been disciplined for failing to correct statements they made on behalf of clients that the lawyer either learned later were not true or ripened into a misrepresentation through changing circumstances. In *In re Williams*, 314 Or 530, 840 P2d 1280 (1992), for example, a lawyer was disciplined for failing to correct a statement made to a landlord when representing a tenant in negotiations over rent payment and associated repairs that was correct when made but became materially inaccurate through changing circumstances the lawyer knew of but did not tell the landlord who had relied on the information the lawyer had communicated earlier.

Oregon State Bar Formal Opinion 2005-167 (rev 2014) identifies "noisy withdrawal" as a path out of this difficult situation. Although OSB Formal Opinion 2005-167 is framed from the perspective of a lawyer-mediator, its discussion of "noisy withdrawal" relies on an ABA ethics opinion—92-366 (1992)—that is painted against the backdrop of business negotiations being conducted through counsel. Both are predicated on scenarios similar to our opening example: the lawyer discovers that the client is engaging in an ongoing fraud and refuses to reveal the truth.

In that unhappy circumstance, ABA Formal Opinion 92-366 summarizes the nub of "noisy withdrawal":

> [T]he lawyer may disavow any of her work product to prevent its use in the client's continuing or intended future fraud, even though this may have the collateral effect of disclosing inferentially client confidences obtained during the representation. In some circumstances, such a disavowal of work product (commonly referred to as a 'noisy' withdrawal) may be necessary in order to effectuate the lawyer's withdrawal from representation of the client. (*Id*. at 3.)

Mechanics

The key to "noisy withdrawal" is that client confidential information is not disclosed. Rather, "noisy withdrawal" is silent. The lawyer instead informs the counterparty (through counsel if the counterparty is represented) that the lawyer is withdrawing and that the lawyer also—in the phraseology of the ABA opinion—"disaffirms" the representations the lawyer made on behalf of the client. To avoid actually revealing client confidential information, the ABA opinion counsels that the lawyer should essentially leave to the counterparty to draw its own conclusions.

The Oregon State Bar *Ethical Oregon Lawyer* echoes ABA Formal Opinion 92-366 in its most recent edition:

> In almost all situations, a 'noisy withdrawal' (e.g., a statement by the lawyer to third parties that the lawyer is withdrawing from a matter and that no further reliance should be placed on anything that the lawyer previously said or did) will be sufficient to avoid any argument that the lawyer assisted in illegal or fraudulent conduct. (*Id*. at 6-31.)

It also concludes with advice on "noisy withdrawal" that is both pithy and prudent:

> The bottom line is that by one means or another, a lawyer should not permit him- or herself to become the means by which a client causes harm to another. (*Id*. at 21-21.)

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.