



Ohio Board of Professional Conduct

OPINION 2020-03

Issued April 3, 2020

Withdraws Adv. Op. 1990-7

Duty of Disclosure of Prospective Client's Fraudulent Conduct

SYLLABUS: A lawyer should not agree to represent a prospective client who has provided fabricated records to an administrative agency, unless the client agrees to correct the materially false information. If after the lawyer undertakes the representation the client fails to correct the materially false information within a reasonable time, the lawyer must withdraw from representation to avoid assisting the client in an illegal or fraudulent act. If the client places the lawyer in a position where withdrawal is not sufficient to avoid assisting the client in an illegal or fraudulent act, the lawyer must disclose the material facts to the administrative agency. A lawyer who declines to undertake the representation of a prospective client who has provided fabricated records to an administrative agency has no obligation to, and in most circumstances must not, notify the agency of the fabricated records.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

HON. JOHN W. WISE

CHAIR

PATRICIA A. WISE

VICE-CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. MCANAU

COUNSEL

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QUESTIONS PRESENTED: The requesting lawyer has met with a prospective client who previously offered fabricated records to an administrative agency investigating the client. The administrative agency is unaware that the records are fabricated. The fabrication was completed without the lawyer's knowledge or participation

1). If the lawyer agrees to the representation, does the lawyer have an obligation to reveal the existence of the fraudulent records to the administrative agency?

2). If the lawyer declines the representation, does the lawyer have an obligation to reveal the fraudulent records to the administrative agency?

APPLICABLE RULES: Prof.Cond.R 1.6, 1.18, 3.9, 4.1

OPINION: The questions posed do not indicate whether the prospective client has already provided the fabricated records to the administrative agency or has simply proposed to offer the records. Likewise, the questions do not provide details as to what type of records were provided and whether the records contain material information. Nor do the questions provide any information about the timing of the prospective client's initial consultation with the lawyer, such as whether the prospective client is seeking advice at the onset of the administrative agency investigation or at its completion. For the purposes of this opinion, the Board assumes the prospective client provided the records to the administrative agency prior to the initial consultation with the lawyer, that the investigation is in its early stages, and that the fraudulent records contain information that either misrepresents or falsifies material facts.

Duties Upon Initial Consultation

During the initial consultation, the lawyer must discuss with the prospective client the lawyer's professional obligations and the limitations on his or her conduct due to the Ohio Rules of Professional Conduct. *See* Prof.Cond.R. 1.2(d) cmt.[13] & 1.4(a)(5). The lawyer must explain to the prospective client that while representing the client in the course of the investigation he or she is ethically prohibited from assisting the client in illegal or fraudulent conduct. Prof.Cond.R. 1.2(d). When a lawyer represents a client in connection with an *investigation* of the client's affairs by an administrative agency, rather than a *proceeding* before an administrative agency, Prof.Cond.R. 4.1 dictates the lawyer's conduct in interactions with the agency. *See* Prof.Cond.R. 3.9 cmt. [3](emphasis added). As such, the lawyer must explain to his or her prospective client that he or she will be required to disclose material facts, to the extent reasonably necessary, in order to avoid assisting the client in illegal or fraudulent conduct. Prof.Cond.R. 4.1(b). Because most people are familiar with the concept of confidentiality and the attorney-client privilege restrictions placed on attorneys, the prospective client will likely question how the lawyer could be required to disclose material facts and information about the representation. The lawyer must reiterate his or her obligations under Prof.Cond.R. 4.1 and explain to the prospective client that the specific rule governing disclosure of information, Prof.Cond.R. 1.6, specifically addresses the lawyer's duty to disclose material facts to the

extent reasonably necessary to avoid assisting in illegal or fraudulent conduct of the client.¹ Prof.Cond.R. 1.6(d) & 4.1(b), cmt. [3].

Duties Upon Agreeing to Representation

The Board observes that Prof.Cond.R. 4.1(b) applies only to ongoing or future fraudulent acts and does not apply to completed fraudulent acts. Prof.Cond.R. 4.1, cmt.[4]. In this particular instance, the prospective client's fraudulent conduct is ongoing. It is reasonable for the lawyer to assume that because the investigation is in the early stages, the prospective client intended for the administrative agency to review and rely on the fraudulent documents throughout the investigation. Prior to agreeing to the representation, the lawyer must remonstrate with the prospective client and encourage the client to correct the materially false information provided to the agency. The lawyer should only agree to the representation if the prospective client is willing to do so. If after agreeing to the representation and upon a commitment from the client that he or she will correct the materially false information provided to the agency, the client fails to do so within a reasonable time, the lawyer should withdraw from representation to avoid assisting an illegal or fraudulent act by the client. *See* Prof.Cond.R. 4.1, cmt. [3]. If the client puts the lawyer in a position that withdrawal is not sufficient to prevent the assistance of the client's illegal or fraudulent act, the lawyer must unilaterally disclose the material facts to the administrative agency. *Id.* The lawyer should remain mindful that disclosure may require disaffirming an opinion, document, or affirmation of the client. *Id.* The client should be placed on notice that this type of disclosure could occur in the course of representation due to the lawyer's thorough warning and explanation to the client of his or her duties under the Rules.

Duties Upon Declining Representation

A prospective client is any person who consults with a lawyer about the possibility of forming a client-lawyer relationship. Prof.Cond.R. 1.18(a). Even if a client-lawyer relationship does not form after consultation, a lawyer may not use or reveal information learned in the consultation except as permitted by Rule 1.9(c). Prof.Cond.R. 1.18(b). The effect is that the lawyer consulted must treat the prospective client's confidential information in the same manner he or she treats confidential information of former

¹ The Ohio Rules of Professional Conduct includes Prof.Cond.R. 1.6(d) that specifically requires lawyers to reveal information in order to comply with Prof.Cond.R. 3.3 and 4.1. This rule is a stronger fraud-prevention rule not present in the A.B.A. Model Rules of Professional Conduct.

clients. Thus, information may only be used or revealed as the rules would permit or require or when the information has become generally known. Prof.Cond.R. 1.9(c)(1) and (2). Both the Supreme Court of Ohio and this Board have previously indicated that a lawyer owes a prospective client a reasonable expectation of confidentiality, and therefore, must not reveal confidential information disclosed to the lawyer by a prospective client. *Disciplinary Counsel v. Cicero*, 134 Ohio St.3d 311, 2012-Ohio-5457; Adv. Op. 2016-10.

If the lawyer declines representation of the prospective client there is no requirement under the Ohio Rules of Professional Conduct that the lawyer reveal the client's fraudulent act in providing fabricated records to the administrative agency. Because the lawyer is not representing the client in connection with the investigation of the administrative agency, any disclosure required pursuant to Prof.Cond.R. 4.1 does not apply. Further, the permissive guidelines for mitigation of a substantial injury due to a client's commission of a fraudulent act under Prof.Cond.R. 1.6(b)(3) do not apply because the prospective client did not use the lawyer's services to provide the fabricated records to the administrative agency. Consequently, the lawyer must not disclose the prospective client's fraudulent acts to the administrative agency.

CONCLUSION: When a prospective client consults with a lawyer about undertaking representation of the client, after the client has already provided fabricated documents to an administrative agency, the lawyer must describe his or her professional duties and obligations to the client. A lawyer must inform a prospective client that he or she is prohibited from assisting the client in any illegal or fraudulent conduct and, in some circumstances, may even be required to reveal confidential information to the extent necessary to avoid assisting the client. A lawyer must not agree to represent a prospective client who has provided fabricated records to an administrative agency unless the client agrees to correct the materially false information. If, after the lawyer undertakes the representation, the client has not corrected the materially false information within a reasonable amount of time, the lawyer should withdraw from the representation. However, if the client puts the lawyer in a position where withdrawal is not possible, the lawyer must reveal confidential information to avoid assisting the client in an illegal or fraudulent act. If the lawyer declines representation of the prospective client there is no requirement under the Ohio Rules of Professional Conduct that the lawyer reveal the client's fraudulent act in providing fabricated records to the administrative agency.