Legal Times
WEEK OF OCTOBER 17, 2005 • VOL. XXVIII, NO. 42
ALM

In the Face of Client Wrongdoing

Yes, he may have to withdraw, but until then an ethical lawyer must balance competence and diligence.

With the heightened scrutiny of lawyers in the aftermath of Enron and other corporate scandals, many lawyers view risk management from the perspective of a defensive crouch. With all of the warnings to "beware of this" and "watch out for that," the tendency is to respond with caution that borders on wariness.

Caution and prudence are wise. But an overabundance of caution can itself, on occasion, become a danger if it impairs the lawyer's focus on the interests of his client. This is most likely to occur when a lawyer is confronted by a client's possible wrongdoing.

While suspicion or knowledge of a client's wrongful conduct should raise important alarms relating to a lawyer's potential obligations to the court and third parties—and may indeed require a lawyer to withdraw from the representation—until a lawyer withdraws, he should not ignore his obligations to his client.

By Arthur D. Burger

Ethics

The primacy of a lawyer's ethical obligations of competence and diligence to clients is reflected in the rule numbers: A lawyer's obligation to act with competence is in Rule 1.1; the obligation to act with diligence is in Rule 1.3.

The case of *Breezevale Ltd. v. Dickinson,* in which the D.C. Court of Appeals has ruled three times (in 2000, 2001, and 2005), illustrates this point. In that case a jury found that a law firm, confronted with potential wrongdoing by a client, had committed malpractice, notwithstanding the client's fraudulent acts. The jury, in other words, felt that the firm still owed the client its uninhibited representation and that the client didn't receive it. The law firm ultimately succeeded in overturning the jury's verdict of malpractice, but only after seven years of litigation, including three appellate decisions.

In the underlying suit giving rise to the malpractice case, the law firm Gibson, Dunn & Crutcher represented Breezevale, a London-based corporation, in a suit against

Bridgestone/Firestone Inc. for breach of contract relating to the distribution of tires to Iraq and other matters.

Just before a deposition of a Breezevale employee, the employee told Breezevale's counsel that she had been instruct-

© 2005 ALM Properties Inc. All rights reserved. This article is reprinted with permission from Legal Times (1-800-933-4317 • LTsubscribe@alm.com • www.legaltimes.com).

ed by executives in the company to forge certain documents and that she intended to testify as to that wrongdoing. Counsel, confronted with this jarring disclosure, and perhaps understandably shaken, did not promptly advise corporation management of this development before the deposition. When counsel finally warned Breezevale executives of the employee's anticipated testimony ahead of the afternoon session of the deposition, one executive protested that the employee was lying and demanded that counsel postpone the deposition so that her charge could be investigated.

Counsel declined to postpone the deposition, and the employee testified as to the forgeries. Shortly thereafter, Breezevale was forced to settle the suit for a small fraction of the amount the company had initially sought. Breezevale then sued the firm for malpractice, contending that counsel should have postponed the deposition to give company executives an opportunity to investigate whether the employee's charges were true. Breezevale officials also argued that the firm should have recognized that the employee's damaging testimony created a conflict of interest for the firm and it should not have represented the employee during the deposition.

After a seven-week trial in the malpractice case, the jury agreed with the allegations that the firm had engaged in malpractice, but it also found that the company had ordered the forgeries, as the employee claimed.

While the firm ultimately prevailed in the malpractice action and recouped its attorney fees from Breezevale for the malpractice suit, the D.C. Court of Appeals initially held *en banc* that wrongful client conduct does not automatically prevent a client from presenting a claim for malpractice. The appeals court said it was "unable to agree with the sweeping nature of an assertion that regardless of malpractice, a client who engages in wrongdoing in connection with any aspect of litigation thereby as a matter of law forfeits all rights against the attorney."

The court went on to remand the case to the trial court with instructions for the court to make further findings of fact in order to balance the client's wrongdoing against the firm's malpractice. The trial court thereupon made specific findings of fact both as to Breezevale's complicity in creating the forgeries and as to its bad faith in continuing to assert, throughout the course of its malpractice suit, that the employee was lying about the forgeries and the company's role in them.

As a result, the trial court dismissed the malpractice suit as a sanction for Breezevale's bad-faith litigation conduct, and the appellate court upheld the trial court's dismissal and its award of attorney fees to the law firm. Thus, even though the jury found the firm negligent, the firm still escaped liability because of the client's pervasive wrongdoing during the course of the malpractice suit. The implication here is that if the client's wrongdoing had been limited to the underlying representation, the law firm might have been held liable.

Can You Help?

An even more extreme example of client wrongdoing is presented to a lawyer when a client goes beyond merely advising the lawyer of client wrongdoing and also asks a lawyer to *assist* in fraudulent or illegal activity. While surely the lawyer must promptly and unequivocally decline such a request, his or her obligations don't necessarily end there.

A lawyer presented with such a circumstance should explain to the client that if the client takes steps to carry out the plan, then the attorney-client privilege will be lost by the crime-fraud exception. The lawyer should further explain that in order to avoid the possibility that he may be compelled to reveal the conversation, and in order to retain the privilege, the client must abandon the plan.

This point was highlighted in *In Re Public Defender Service* (2003), in which the D.C. Court of Appeals noted that clients can, from time to time, be expected to come up with improper ideas such as illegal tax shelters, evasion of regulatory requirements, withholding evidence, or falsely embellishing a witness's testimony. But the court stressed that discouraging clients from illegal conduct is a central component of the practice of law.

The court, therefore, held that when a lawyer persuades a client to abandon an illegal or fraudulent plan, the crime-fraud exception does not apply and the privilege is preserved. In this fashion the court provides protection for a client who initially raises a plan for illegal conduct but then is persuaded by the lawyer to abandon the plan. This enhances a lawyer's ability to persuade a client to pull back from an illegal plan by advising the client that the only way the initial suggestion can remain confidential is if the client agrees to drop it. This is a powerful tool for a lawyer.

Similarly, in addition to the crime-fraud exception, the tightening of ethical obligations in the post-Enron era has focused on carving exceptions to client confidentiality where public harm will be implicated. This includes amendments to Model ABA Rules 1.6 and 1.13 and the promulgation of rules for attorneys practicing before the Securities and Exchange Commission that were required by the Sarbanes-Oxley Act of 2002.

In each of these instances, the "weakening" of the duty of confidentiality carries with it a shift of power to the lawyer, who can now point out to the client that unless he corrects his behavior, confidentiality cannot be assured. Presumably, and hopefully, this will work for the long-term best interests of the client as well as others.

Finally, when a lawyer's concerns about a client's possible wrongdoing cause the lawyer to focus on his own potential liability to the exclusion of his client's, the lawyer may thereby have a conflict of interest with his client and should consider withdrawing from the representation.

Indeed, withdrawal is mandatory under Rule 1.16(a) when continued "representation will result in violation of the Rules of Professional Conduct or other law." But withdrawal itself can be harmful to a client, and a client who is abandoned just as things get difficult may feel betrayed by his lawyer's hasty retreat.

Accordingly, even when client wrongdoing leads to a withdrawal, a lawyer should not neglect his continuing obligation to his client.

Arthur D. Burger is a director with D.C.'s Jackson & Campbell and is chair of the firm's professional responsibility practice group. He represents law firms and attorneys in ethics-related matters.

© 2005 ALM Properties Inc. All rights reserved. This article is reprinted with permission from Legal Times
(1-800-933-4317 • LTsubscribe@alm.com • www.legaltimes.com).