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Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

March 10, 2015

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ISSUE

1. Does an attorney breach a duty of confidentiality to a "client" by sending information about the client's actions and their contact information to law enforcement if they appear to be using the attorney/ client relationship to commit a money fraud upon the attorney which could cause substantial injury to the attorney's financial interests?

FACTS

2. The query before the Committee relates to the issue that individuals have sought to retain a law firm via the Internet allegedly to collect a large debt from a party in Utah. The alleged debtor sends the law firm payment which is supposed to be forwarded to the client. The scam is that the checks are counterfeit and the attorney is asked to wire the funds immediately before the checks have cleared. When the "client" is informed that the funds will not be wired until the check clears, the client disappears. The issue is whether the attorney can report this conduct to law enforcement.

OPINION

3. An individual whose purpose in communicating with an attorney is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality. Therefore, it would not violate any ethical rules for an attorney to disclose relevant information to investigators. See New York State Bar Ass'n Committee on Prof. Ethics, Ethics Op. 923 (May 18, 2012).

ANALYSIS

4. Under Rule 1.6(a) of the Rules of Professional Conduct, a lawyer "shall not reveal information relating to the representation of a client," subject to certain exceptions. Whether an attorney is bound by this duty of confidentiality turns on whether the purported client was an actual client and whether the information was obtained during the

representation. Under the circumstances presented here, an attorney has no duty of confidentiality under Rule 1.6 because the "client" never intended to form an attorney-client relationship, but rather sought to defraud the lawyer. Thus, the attorney may report the scheme without violating any duty of confidentiality.

5. A handful of state authorities have agreed that there is no duty of confidentiality owed to an internet scammer posing as a "client" solely for the purpose of perpetrating a crime in which the lawyer is the victim. New York State Bar Ass'n Committee on Prof. Ethics, Ethics Op. 923 (May 18, 2012) (citing California and South Carolina authority). As discussed in the Oregon State Bar Bulletin:

"…the duty imposed by RPC 1.6 and ORS 9.460(3) applies only to actual or prospective clients. If the person contacting the lawyer has no real intention of creating a lawyer-client relationship, but is only interested in victimizing the lawyer, then the person is not an actual client and the duty of confidentiality does not apply. In the absence of such a duty, there would seem to be no reason why lawyers who are the targets of these scams could not cooperate with law enforcement authorities in sharing whatever information they have about the perpetrator of the fraudulent scheme."

Hierschbiel, Helen, "Scammers Take Aim at Lawyers: How to Avoid Becoming the Next Victim," *OSB Bulletin* (May 2010).

The ethics counsel of the Virginia State Bar has also addressed the issue:

Although a formal opinion from the Standing Committee on Legal Ethics has not addressed this issue, the communications by and between the Internet scammer and lawyer are not protected as confidential. The initial uninvited e-mail communication from the scammer and the communications that follow are not for the purpose of obtaining any legal advice or legal representation. The scammer does not have any "reasonable expectation of confidentiality" in the communications used to obtain the lawyer's money under false pretenses. Therefore, reporting such information to the appropriate law enforcement authorities is not a breach of the lawyer's duty of confidentiality.

James M. McCauley, Virginia State Bar Ethics Counsel, "Internet Scams Target Lawyers", March 28, 2011 (available at <http://www.vsb.org/site/news/item/internet-scams-target-lawyers>).

CONCLUSION

6. The Committee believes you may disclose information regarding the counterfeit check scheme without violating your ethical responsibilities.