Holland & Knight

ETHICAL ISSUES FOR WHITE COLLAR DEFENSE AND INVESTIGATIONS LAWYERS

Part 3 of 3: Representing Clients Who May be Engaged in Unlawful Conduct During the Course of the Representation

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[1] Holland and Knight's Legal Profession Team represents lawyers and law firms in the broad array of issues unique to the legal profession. The Legal Profession Team provides advice on, *inter alia*, compliance with ethical rules, disciplinary defense, retail legal malpractice, partnership formation, partnership dissolution, partnership disputes, lateral lawyer moves (i.e., switching firms), attorney fee disputes, disqualification motions, and complex attorney-client privilege or work product questions. The authors would like to extend a special thank you to Peter Jarvis and Allison Rhodes (co-chairs of Holland & Knight's Legal Profession Team), for their contributions to the first installment of this paper.

Series Overview

Recent corporate scandals have made effective and honest corporate governance the chief priority for every company. Proactive and incisive white collar defense counsel in this area is a must. Reacting swiftly to serious problems can be an important factor affecting the final outcome. But white collar defense and investigation lawyers must be mindful of unique ethical issues that can arise in representing clients in criminal and civil government investigations.

This series of articles discusses three general sources of ethical issues for white collar defense lawyers that we see most frequently: (1) entering into Joint Defense Agreements with other defendants or other subjects in government investigations; (2) privilege and confidentiality considerations when conducting corporate internal investigations; and (3) representing clients who may be engaged in unlawful conduct during the course of representation.

This series may be used as a general reference, but it focuses on ethical rules (and related evidentiary and procedural rules) applicable in California, including both the California Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. The California Supreme Court has noted:

> [R]ule 1–100(A) of the Rules of Professional Conduct, applicable to California attorneys, provides that "[e]thics opinions and rules and standards promulgated by ... bar associations may also be considered" when judging the actions or omissions of an attorney. "Thus, the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California." (State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656, 82 Cal. Rptr. 2d 799.) "[C]ourts and attorneys find the [ABA Model Rules] helpful and persuasive in situations where the California rules are unclear or inadequate." (Witkin, 1 Cal. Procedure (5th ed. 2008) Attorneys, § 407(3), p. 521.)[2]

It is important to keep in mind that the ABA Model Rules, which have been largely adopted in every jurisdiction other than California, can differ substantially from the California Rules; it is therefore sometimes difficult to assess how much weight to give to the Model Rules in California. The salience of the Model Rules should be assessed on a cases-by-case basis. Although other states may have similar rules and guidelines on the issues discussed herein, lawyers should always check their home-state rules, as well as the rules applicable in their federal district and circuit courts, which sometimes differ from state standards.

[2] *In re Reno*, 55 Cal. 4th 428, 466-67 (2012); California lawyers are also extensively regulated under Cal. Bus. & Prof. Code, Chapter 4.

Finally, we caution that the article is intended to provide a survey of potential issues and pertinent authorities, but is not intended to be comprehensive.

Part 3 of 3: Representing Clients who may be Engaged in Unlawful Conduct During the Course of Representation.

Lawyers are exposed to potentially tremendous liability when a client engages in criminal or fraudulent conduct under the lawyer's watch. Such liability may include Bar discipline, civil, or even criminal sanctions. This article offers practical guidance for white collar defense lawyers on how to spot and navigate certain ethical issues that arise when clients engage in such conduct during representation.

Overview

The notion that a lawyer must not participate in a client's illegal conduct is generally known and widely accepted. Indeed, ABA Model Rule 1.2(d) precludes lawyers from counseling or assisting in a client's criminal or fraudulent conduct.[3] In practice, however, it is often difficult to assess whether a client is seeking legal advice or *illegal* advice, and it is even more difficult to determine how to proceed once the lawyer realizes a client has crossed the line.

In general, if a client is engaged (or plans to engage) in criminal/fraudulent conduct, the lawyer often may and sometimes must take remedial measures, including withdrawing from the representation. Factors that can help guide lawyers representing such clients include: (1) what the lawyer does and does not know; (2) the seriousness of the client's misconduct; and (3) the extent of the lawyer's involvement in the client's misconduct. The latter consideration will largely determine the scope of the attorney's remedial duties and options—at least under the ethical rules.

After providing an overview of these general factors, this article focuses on four specific scenarios in this regard: (1) the white collar defense lawyer receives a Grand Jury subpoena seeking information about the client; (2) the client jumps bail; (3) the client commits or intends to commit perjury; and (4) the client attempts to pay attorney fees with criminal proceeds.

1. The Lawyer's Knowledge

ABA Model Rule 1.2 is only triggered when the lawyer *knows* the client's conduct is criminal or fraudulent. California Rule 3-210, on the other hand, has no express knowledge requirement. Regardless of this apparent inconsistency, it is safe to assume that a lawyer with knowledge of such conduct is at more risk under either rule than a lawyer without such knowledge.

[3] ABA Model Rule 1.2(d) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

As discussed, *infra*, while lack of knowledge may protect the lawyer from liability under Model Rule 1.2(d), the lawyer's ignorance will not insulate the lawyer from other troubles. For example, a lawyer paid with criminal proceeds may have to forfeit attorney fees regardless of the lawyer's knowledge about where the money came from. Lawyers will generally benefit from looking into any concerns about the client's conduct, motives, and/or truthfulness as soon as such concerns arise. And one method that can be used if the client appears to be holding back information is to premise any legal advice on well-documented assumed facts.

2. The Seriousness of the Client's Conduct

If a lawyer does have knowledge that a client is engaged in unlawful conduct (or plans to be), the lawyer should then assess the seriousness of the conduct. As noted, Model Rule 1.2(d) only applies to "criminal or fraudulent" conduct.[4] But understanding exactly what conduct is included in "criminal or fraudulent" conduct may be difficult. "Criminal" is not defined in the Model Rules, and the definition of "fraudulent" is imprecise.[5] Rule 1.2(d) is at least directed at relatively serious, and therefore relatively easy-to-detect, misconduct. California Rule 3-210,[6] on the other hand, precludes advising "the violation of any law, rule, or ruling of a tribunal."[7] Because a violation under Rule 3-210 includes, but is not limited to crimes and fraud, the California rule appears to be broader than the Model Rule.[8]

In the white collar defense practice, the lawyer will most often be concerned with ongoing criminal conduct, which clearly triggers both rules. Thus, the difference between Rule 1.2(d) and California Rule 3-210 may be largely immaterial in this arena. But this distinction could be material in government investigations involving alleged civil violations.

Additionally, in assessing whether and how to advise a client with respect to an issue that may border on the criminal or fraudulent, lawyers should keep in mind that Rule 1.2(d) does allow for discussion of "the legal consequences of any proposed course of conduct with a client[,]" and also allows lawyers to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Similarly, California Rule 3-210 notes "[a] member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal."

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[4] Of course, the fact that a client is not engaged in criminal or fraudulent conduct should not end the lawyer's inquiry. A client engaged in lesser forms of unlawful conduct can still pose many problems for the lawyer, as discussed *infra*.

[5] ABA Model Rule 1.0(d) provides, "'Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."

[6] Rule 3-210 (Advising the Violation of Law) states, in part: "A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid."

[7] *See also Restatement (Third) of the Law Governing Lawyers*, section 94.

[8] On the other hand, Rule 1.2's proscription on *counseling* or *assisting* arguably covers a broader array of attorney conduct than the California rule, which is limited to *advising*. Both rules contain exceptions allowing the lawyer to make a good faith argument testing the validity of a law.

3. The Extent of the Lawyer's Involvement

When and if the lawyer learns of a client's ongoing or impending unlawful conduct, the lawyer's next steps should be dictated by the extent of the lawyer's involvement in the client's conduct. If the lawyer learns of the client's conduct before the lawyer has become involved, the ethical approach is generally to avoid involvement and advise the client to avoid or cease engaging in such conduct. Next, the lawyer must decide whether and how to prevent any serious harm that will result from the client's conduct, including whether to reveal the client's confidential information to accomplish that end.[9]

Disclosure of otherwise confidential information is often permitted under ABA Model Rule 1.6 when the client has committed or will commit serious misconduct during the representation. Disclosure is allowed, for example, if it is reasonably necessary "to prevent reasonably certain death or substantial bodily harm."[10] That is true even if the client has not used the lawyer's services in furtherance of criminal/fraudulent conduct. Nor is disclosure prohibited if it will prevent a crime or fraud that "is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[11] Similarly, disclosure is not prohibited "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[12]

If the lawyer has become actively involved with and/or facilitated the client's unlawful conduct, the lawyer is faced with more complicated decisions and obligations. One common example is when the lawyer discovers that the client has been dishonest with the lawyer about material facts, and the lawyer has taken action (*e.g.*, filed a pleading) in reliance on the client's untrue version of the facts. There are at least some situations in which that reliance compels a lawyer to take remedial measures. ABA Model Rule 3.3, for example, requires lawyers to "correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." As for false statements made during the representation, but not to a tribunal, ABA Model Rule 4.1 requires disclosure of material facts as "necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Note that, as discussed above, disclosure may not be prohibited by Rule 1.6 where a client is engaging or will engage in serious criminal conduct.

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[9] *See* ABA Model Rule 1.6(b)(1)-(3); California RPC 3-100(B).

[10] Model Rule 1.6(b)(1); *see also McClure v. Thompson*, 323 F.3d 1233, 1245 (9th Cir. 2003) (holding that attorney's disclosure of location of client's children's bodies was permissible under Rule 1.6(b)(1) because attorney believed there was at least a possibility that the children were still alive).

[11] Model Rule 1.6(b)(2).

[12] Model Rule 1.6(b)(3).

California, unfortunately, does not specify when such duties to correct or disclose arise. California RPC 5-200(A)[13] and Business and Professions Code 6068(d)[14] essentially call for truthfulness without much further guidance.[15] And California RPC 3-100 merely gives the lawyer discretion to reveal confidential information as necessary "to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[16] Thus the circumstances under which the lawyer may/must take remedial measures appear to be narrower under the California Rules.

The ABA Model Rules and California Rules are generally consistent, however, in scenarios where the client insists that the lawyer avoid taking necessary remedial measures, or insists that the lawyer aid in the client's unlawful conduct. In such scenarios, the lawyer generally must at least withdraw.[17]

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[13] Rule 5-200 (Trial Conduct) states, in part:

> In presenting a matter to a tribunal, a member:
> (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
> (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

[14] Section 6068(d), which generally tracks Rule 5-200(A), calls for the lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

[15] *See* California Formal Op. 2013-189 (recognizing that a lawyer may have an obligation to disclose information to opposing counsel to avoid committing fraud, a material misstatement, or deceitful conduct).

[16] California RPC 3-100 states, in part:

> (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
> (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
> (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
> (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

[17] ABA Model Rule 1.16(a)(1); California Rule 3-700(B). Comments [9] and [10] to ABA Model Rule 1.2 offer further guidance:

> [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis

In sum, the prudent white collar defense attorney must tread lightly with clients who may be engaging or planning to engage in unlawful conduct—especially where such conduct may be tied to the lawyer's services. The nature of the client's conduct and the level of the lawyer's knowledge and involvement dictate the lawyer's appropriate and ethical response when unlawful conduct is discovered. The next four subsections discuss specific ethical challenges in white collar defense, each of which may stem from the core problem of representing a client engaged in ongoing unlawful conduct.

4. Defense Counsel Receives a Grand Jury Subpoena

The issuance of a subpoena to a criminal defendant's lawyer likely means the government has reason to believe the lawyer has assisted the client, either knowingly or unwittingly, in committing a crime.[18] Most often, this issue will arise when the prosecutor is asserting the crime-fraud exception to the attorney-client privilege, or when the client is asserting an advice-of-counsel defense.

The attorney-client privilege does not protect communications between the lawyer and client that were made in furtherance of criminal activity.[19] This is known as the crime-fraud exception to the attorney-client privilege. To invoke the crime-fraud exception successfully, the government "has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality . . . and that there is some relationship between the communications and the illegality."[20] "For the crime-fraud exception to apply, 'the attorney need not himself be

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> of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
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> [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[18] As a threshold matter, you should first consider retaining separate counsel before speaking with your client about the Grand Jury subpoena and before responding to the subpoena. As explained below, you and your client may now have conflicting interests upon receipt of the attorney subpoena. Depending on the circumstances, you may even need to terminate your representation of the client.

[19] *See, e.g.*, *In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992).

[20] *In re Grand Jury Proceedings*, 87 F.3d at 380 (citing *United States v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988); *see also United States v. de la Jara*, 973 F.2d 746, 748 (9th Cir. 1992) ("In order to successfully invoke the crime-fraud exception to the attorney-client privilege, the government must make a prima facie showing 'that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity'") (citations omitted); *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986).

aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality.'"[21] "Inasmuch as today's attorney-client privilege exists for the benefit of the client, not the attorney, it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need not know anything about the client's ongoing or planned illicit activity for the exception to apply."[22] It is therefore irrelevant that the attorney may have been "in the dark" about the details of the client's criminal activity for purposes of determining whether the attorney-client communications were made in furtherance of a crime.

Another possibility is that the client has asserted an advice-of-counsel defense, and now the prosecutor is investigating that defense. A defendant can use reasonable reliance on the advice-of-counsel as a defense to the willfulness and unlawful intent elements of certain crimes. "Advice of counsel is not regarded as a separate and distinct defense rather it is a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of . . . intent."[23] A defendant is entitled to a jury instruction concerning the advice-of-counsel defense if there is some foundation in the evidence for such an instruction.[24] In order to assert advice-of-counsel, a defendant must have made a full disclosure of all material facts to his or her attorney, received advice as to the specific course of conduct that he or she followed, and relied on the advice in good faith.[25]

Implicit in any advice-of-counsel defense is waiver of the applicable attorney-client privilege. The client cannot credibly argue good faith on the basis of advice-of-counsel while at the same time using the attorney-client privilege to preclude the government from understanding the facts and circumstances surrounding the legal advice.[26] This principle is often expressed in terms of "preventing a party from using the privilege as both a shield and a sword."[27] Therefore, if the

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[21] *In re Grand Jury Proceedings*, 87 F.3d at 381 (quoting *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1971); *see also United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977) ("The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose."); *In re Grand Jury Proceedings #5*, 401 F.3d 247 (4th Cir. 2005); *United States v. Doe*, 429 F.3d 450 (3d Cir. 2005).

[22] *In re Grand Jury Proceedings*, 87 F.3d at 381-382.

[23] *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961); *see also United States v. Beech-Nut Nutrition*, 871 F.2d 1181 (2d Cir. 1989).

[24] *United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987).

[25] *Id*.; *see also U.S. v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195-96 (2d Cir. 1989).

[26] *Rock River Communications, Inc. v. Universal Music Group, Inc.*, 745 F.3d 343, 353 (9th Cir. 2014); *Trans world Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964), cert. denied, 380 U.S. 248 (1965); *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999).

[27] *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (citations omitted); *Chevron Corp. v. Pennzoil Co*., 974 F.2d 1156, 1162 (9th Cir. 1992).

client is asserting an advice-of-counsel defense, the lawyer will very likely be required to disclose privileged communications, and possibly attorney work product, to the government.[28]

Regardless of what leads to the issuance of a subpoena, a lawyer in this situation will be confronted with difficult ethical considerations. Even if the lawyer no longer represents the client, the lawyer risks violating her ongoing duty of confidentiality by testifying or producing documents. ABA Model Rule 1.6(b)(6) and Comment [2] to California Rule 3-100 both indicate that an exception to the duty of confidentiality exists for compliance with "other law," but it is not always clear whether compliance with a subpoena meets this exception. To avoid this conundrum, the white collar lawyer should insist that the prosecution obtain a court order compelling the lawyer's cooperation.[29]

Additionally, if the white collar lawyer receives a subpoena regarding a client during the representation, the lawyer will need to assess potential conflicts of interest. A subpoenaed lawyer faces at least two potential conflicts: a personal interest conflict and the conflict that arises when a lawyer may be called as a witness at trial. Regarding the former, the lawyer must provide a written disclosure to the client of any personal interest conflict arising when "[t]he member has or had a legal, business, financial, or professional interest in the subject matter of the representation."[30] This rule may be triggered when a lawyer receives a subpoena—especially if the subpoena suggests a link between the attorney's advice and the client's alleged misconduct. [31]

Moreover, under California Rule 5-210, "[a] member shall not act as an advocate before a jury which will hear testimony from the member." Receipt of a subpoena could implicate this rule, thereby requiring the lawyer to obtain the client's informed written consent to continue representation. [32] Similarly Model Rule 3.7(a) generally prohibits acting as advocate in a trial in which the lawyer is likely to be a necessary witness. Unlike most conflicts under Rule 1.7, this prohibition cannot be waived by the client. On the other hand, a lawyer's disqualification under Rule 3.7 is not imputed to the lawyer's colleagues, who may continue to represent the client.[33]

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[28] A district court must impose a waiver of attorney-client privilege that is no broader than needed to ensure the fairness of the proceedings before it. *Bittaker*, 331 F.3d at 720. Courts should impose waivers that are closely tailored to the needs of the opposing party. *Id.*

[29] Although there may be scenarios where a lawyer might reasonably refuse to testify despite the issuance of a court order, such scenarios are beyond the scope of this paper.

[30] California Rule of Professional Conduct 3-310(B)(4); *see also* ABA Model Rule 1.7(a)(2).

[31] Both of the scenarios discussed in this section (i.e., the prosecution asserting the crime-fraud exception, or the client asserting advice-of-counsel) may put the lawyer uncomfortably close to the line drawn by ABA Model Rule 1.2 and California Rule 3-210, discussed *supra*. Where, for example, a client asserts an advice-of-counsel defense, one potential implication is that the attorney advised a violation of the law as proscribed by Rule 3-210. The same implication may exist if the crime/fraud exception to the attorney-client privilege is successfully asserted. An attorney who is faced with these considerations may well have a personal interest in distancing herself from this implication.

[32] This rule is substantially different from its ABA counterpart, Model Rule 3.7, which, among other differences, does not allow for client consent.

[33] *See* Model Rule 3.7(b).

Fortunately, there are procedural protections in place that recognize the damaging effect an attorney subpoena can have on the attorney-client relationship. Both the Rules of Criminal Procedure and the policy manuals governing federal prosecutors contain safeguards.

Rule 17(c)(2) of the Federal Rules of Criminal Procedure confers discretion on the district court to quash a grand jury subpoena if compliance would be "unreasonable or oppressive." [34] Rule 17(c)(2) requires a discretionary, case-by-case inquiry. One factor the district court must consider is whether the testimony of a lawyer against his or her client before a Grand Jury would necessarily destroy the attorney-client relationship. Other circumstances, such as the risk of imminent physical harm to others, magnitude of the case, and the scarcity of evidence, can legitimately be weighed against the harm to the attorney-client relationship that may result from enforcing the subpoena.[35]

Similarly, DOJ mandates that all federal prosecutors must obtain the authorization of their respective Assistant Attorneys General ("AAGs") before issuing such subpoenas in any matter, criminal or civil.[36] Unless a specified exception applies, authorization must be obtained even for a "friendly subpoena" for client-related information; that is, even in situations where the attorney witness is willing to provide the information but requests the formality of a subpoena.[37]

In determining whether to issue the subpoena, the prosecutor "must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement."[38]

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[34] *In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1224 (9th Cir. 2005) (Federal appellate courts review orders quashing subpoenas under Rule 17(c)(2) for abuse of discretion).

[35] *In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d at 1227.

[36] DOJ Grand Jury Manual (1st ed. 1991), at p. III-20 (available at http://federalevidence.com/pdf/LitPro/GrandJury/Grand_Jury_Manual.pdf).

[37] USAM § 9-13.410.

[38] *Id.* In considering whether to approve the issuance of a subpoena to an attorney, the DOJ Criminal Division AAG applies the following principles:

- The information sought shall not be protected by a valid claim of privilege;
- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful;
- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution;
- The subpoena must not be used to obtain peripheral or speculative information;
- In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation;
- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client; and

Also keep in mind these kinds of subpoenas can be served on an attorney advising clients on civil matters; thus, the issue is not limited to criminal cases.

5. The "Bail-Jumping" Client

A defendant who flees the jurisdiction to avoid prosecution, the so-called "bail-jumping" client, can put the lawyer in a difficult ethical position. If the lawyer is questioned by government officials about the client's whereabouts, the lawyer may be constrained from providing information by the lawyer's duty to maintain the client's confidences.[39] But the lawyer will also be constrained from assisting the client's bail-jumping efforts per the considerations relating to assisting a client's unlawful conduct discussed above. The lawyer's obligations in this situation will largely turn on whether or not the prosecutor has subpoenaed the lawyer to testify about the client's whereabouts and why the client failed to appear for trial.

Absent a court order or other legally binding obligation, the lawyer has no obligation to inform anyone (private citizen, prosecuting authorities, bondsmen, or otherwise) of a client's whereabouts.[40] At least one court has also held that where the FBI seeks to locate the client, information related to the client's whereabouts (*i.e.*, address and telephone number) is protected.[41]

But an attorney who is compelled to testify as to a client's whereabouts will be faced with conflicting duties to the client on one hand and to the fair administration of justice on the other hand. As noted, in addition to the duty of confidentiality owed to the client, an attorney also has a duty of candor to the court (at least under the Model Rules). And California Rule 5-200(B) provides that a lawyer "[s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ." Thus, the lawyer must navigate between protecting the bail-jumping client's confidences while honoring the integrity of the court by not misleading the court in any way.[42]

- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

USAM § 9-13.410.C; *see also* DOJ Grand Jury Manual, at pp. III-20-21 (AAG must be satisfied that: (1) the information is reasonably necessary to investigate or prosecute a crime that is being or has been committed by any person; (2) all reasonable attempts to secure the information from alternative sources have failed; (3) the need for the information outweighs the adverse impact on the attorney-client relationship; and (4) the information is not protected by a valid claim of privilege).

[39] *See* ABA Model Rule 1.6(a); California Rule 3-100, Comment [2]; San Diego County Bar Ass'n Legal Ethics Opinion, 2011-1.

[40] Shelly K. Hillyer, *The Attorney-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of Fugitive Client's Whereabouts*, 68 Temp. L. Rev. 307, 354 n.290 (1995) (citing *In re Young*, 49 Cal. 3d 257, 265 (1989) (per curiam) (attorney would have breached attorney-client duty if attorney had disclosed client's identity to bail bondsman)); but see Florida Ethics Op. 90-1 (July 15, 1990) (opining that counsel has an ethical obligation to advise the court that a client has left the state if leaving the state is a violation of the client's bond).

[41] *In re Stolar,* 397 F. Supp. 520, 524 (S.D.N.Y. 1975).

[42] *See also* ABA Rule 3.3 (a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal").

Viewing these obligations together, an attorney may not disclose the whereabouts of his client if it would violate the client's confidentiality, nor may the attorney claim that her client's whereabouts are unknown if it would violate her duty of candor to the court. Authorities have struggled with this balance, sometimes changing positions over time.[43] The solution offered by the San Diego County Bar Association is that the:

> Attorney may not answer the court's question in any fashion; she must respectfully decline to answer, citing her ethical duty of confidentiality. This is true even though in jurisdictions that follow some version of the ABA Model Rules, the result may be different.[44]

6. The Perjurious Client

The threshold question in handling potentially perjurious clients is whether the lawyer truly *knows* that the client is lying. Even a lawyer who personally disbelieves client testimony does not necessarily know that it is perjurious, and therefore may not have ethical obligations in relation to such testimony.[45]

If the knowledge requirement is met, the next question is what steps the lawyer may or must take. The appropriate next steps depend largely on whether the lawyer knows the client intends to commit future perjury or whether the client surprises the lawyer by testifying perjuriously without forewarning.

If the lawyer has notice of the client's intent, the lawyer should first strongly discourage perjurious testimony. The lawyer may seek to withdraw if the client insists on staying the course. An approach that is less disruptive than withdrawal, and that has been sanctioned by some courts, is to allow the client's testimony under the narrative approach (*i.e.*, allowing the client to narrate instead of asking any questions).[46] Lawyers who take this approach should not adopt or rely on any perjured testimony later in the trial.

When the client testifies falsely without forewarning, California authorities do not offer clear guidance. California State Bar Ethics Opinion No. 1983-74 (1983), however, offers the following direction in the narrow context of civil, non-jury trials:

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[43] *See, e.g.*, the varying positions set out in ABA Formal Op. 155 (1936); ABA Formal Op. 1453 (1980); ABA Formal Op. 84-349 (1984).

[44] San Diego County Bar Association Legal Ethics Opinion 2011-1.

[45] *See People v. Bolton*, 166 Cal. App. 4th 343, 357 (2008); *see also* ABA Model Rule 3.3(b)(3) (prohibiting knowing presentation of perjured testimony).

[46] *See People v. Johnson*, 62 Cal. App. 4th 608, 624-25 (1998); *United States v. Omene*, 143 F.3d 1167, 1170-71 (9th Cir. 1998).

> An attorney employed in a civil, non-jury trial does not have a duty to advise the court that his/her client has committed testimonial perjury; the attorney is precluded from divulging the perjury absent the client's consent. However, the attorney is required promptly to pursue remedial action. If the remedial action fails, the attorney is required to move to withdraw – but without disclosing any confidence or secret of his/her client. If the attorney is unable to withdraw, the attorney may not use the perjured testimony to support the client's claim.

Similarly, Comment [10] to ABA Model Rule 3.3 notes, "the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."

But in *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978), the court held that a lawyer who is surprised by a client's perjury is not required to withdraw as long as the lawyer does not act to advance the perjury. The court further held, under the facts presented, that the client had been denied a fair trial because the lawyer's attempted withdrawal drew the fact finder's attention to the client's perjury.[47] The client may not have been denied a fair trial if the lawyer had instead alerted the trial judge that he had a matter for the presiding judge, and made his motion to withdraw before a judge who was not sitting on the case.

7. The Client Pays Attorney Fees from Criminal Proceeds

Another recurring ethical issue in white collar defense practice is the risk of attorney's fees paid from criminal proceeds. This is less of a concern in cases where counsel represents the company (assuming the company is not otherwise permeated with fraud), or the company and/or its insurance carrier is paying the attorney's fees for its individual directors or employees. But the risk increases in situations where counsel is representing an individual defendant charged with fraud, and the client is paying your fees with his or her own money.

A lawyer being paid from a questionable source faces a number of ethical issues, as well as the possibility that the government will seek fee forfeiture. The considerations discussed above (assisting a client in criminal or fraudulent conduct) will be ripe from the outset because the lawyer may be at risk of partaking directly in the fruits of the client's criminal conduct.

Proper due diligence will help the lawyer avoid the unenviable position of discovering this problem midway through representation and being faced with the task of assessing whether remedial measures and/or withdrawal are called for. The nature and extent of such due diligence will necessarily depend on the type of case, the specific criminal allegations, and the form of proposed payment. Unfortunately, counsel needs to walk a careful line when conducting source-of-funds due diligence. An attorney's first task is to build trust and confidence with his or her prospective

[47] *Id.*

client, which can be undermined if counsel "cross-examines" the client about the source of the money used to pay attorney's fees.[48]

Compliance with ethical rules is not the only incentive for performing due diligence in the face of questionable fee payments. The United States Supreme Court has held that the government may forfeit monies paid to counsel as attorney's fees if the monies are derived from tainted funds. That conclusion is based on the reasoning that the Sixth Amendment to the United States Constitution offers no defense to statutory forfeiture of criminal proceeds.[49]

In criminal cases, DOJ may seek forfeiture of attorney fees where there are "reasonable grounds"[50] to believe that the attorney had "actual knowledge"[51] that the asset was subject to forfeiture at the time of the transfer.[52] Of course, the inquiry into what the lawyer did and did not know about the source of funds often runs squarely into the lawyer's duty of confidentiality. Therefore, such "reasonable grounds" must be "based on facts and information other than compelled disclosures of confidential communications made during the course of the representation."[53]

Additionally, a lawyer who is forced to return fees may well have a conflict of interest in not wanting to continue the representation for free or in wanting to minimize her own exposure to liability for accepting the tainted funds. The lawyer may therefore need to seek permission from the tribunal to withdraw. And even if the lawyer feels comfortable that a conflict does not exist,

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[48] *See* Diana Digges, *Balancing Life and Practice: How Clean Is Your Client's Money?*, Lawyers Weekly USA (2004) (so stating).

[49] *See Caplin & Drysdale v. United States*, 491 U.S. 617, 632-33 (1989) (holding use of forfeiture statute to prevent payment of attorney fees did not violate Sixth Amendment); *see also United States v. McGorkle*, 321 F.3d 1292, 1294 (11th Cir. 2003) (after attorney F. Lee Bailey's clients were found guilty of laundering proceeds of a fraudulent telemarketing scheme, Eleventh Circuit judge ordered the forfeiture of $2 million in legal fees to Bailey, which had been placed in an offshore account); Money Laundering Control Act of 1986, 18 U.S.C. § 1956(b) (giving the government the power to seize fees from attorneys if they are the fruit of illegal activities).

[50] "Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was known to the attorney at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct." USAM § 9-120.107.

[51] "'Actual knowledge' refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct." USAM § 9-120.107. Rather, the attorney must have actual knowledge that the monies received were subject to forfeiture. *Id*. A government civil forfeiture proceeding, if known to an attorney, can lead to "actual knowledge" of the forfeitability of any assets which are the subject of the proceeding because such assets must be specifically identified in the complaint. However, the situation can be less clear in circumstances where there is no pending civil forfeiture proceeding to put an attorney on notice of the possibility that criminal proceeds were used to pay attorney's fees. The existence of actual knowledge that an asset is from criminal misconduct is "determined on a case-by-case basis, taking into consideration all of the relevant evidence." USAM § 9-120.109. DOJ may institute proceedings to forfeit attorney's fees only after the approval of the Assistant Attorney General, Criminal Division have been obtained. USAM § 9-120.112.

[52] USAM § 9-120.104.

[53] *Id.*

the lawyer should be mindful that both the court and the prosecutor also have a duty to monitor defense counsel's potential conflicts; thus lawyers in this situation may be especially vulnerable to disqualification. *Cf. United States v. McKeighan*, 685 F.3d 956 (10th Cir. 2012) (prosecution raised a potential conflict with the district court, after which the district court discussed four potential conflicts—including the possibility that defense counsel may be found to have engaged in illegal activity by accepting criminal proceeds for his fee—with both defense counsel and defendant during a hearing; defense counsel withdrew soon thereafter).

Conclusion

White collar defense lawyers must always consider whether and to what extent their clients might be engaged in ongoing criminal or fraudulent conduct. Even lawyers with the most lawful of intentions (and/or ignorance of the client's misconduct) can easily run into ethical dilemmas with such clients.

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