

PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2012-4  
(August 2012)

The inquirer asks for guidance regarding the conduct of government lawyers, or possibly administrative staff, in an immigration matter which "likely [involves] official misconduct/corruption..." A summary of pertinent facts is as follows:

1. In 1996, the inquirer's client, an immigrant, missed an immigration hearing and was ordered deported; in late 2003 or early 2004, the client was deported while the client's family remained in the United States.
2. The inquirer successfully represented her client and ultimately achieved victory on his behalf, resulting in the client's return to the United States in November 2011.
3. The process required to achieve this result took eight years, and involved three appeals to the Third Circuit Court of Appeals, as well as numerous hearings both before the Board of Immigration Appeals and the Immigration Judge.
4. The inquirer focuses on two "document issues." The first is the disputed question of what papers were before the Judge when the original 1996 Deportation Order was entered. The inquirer believes that no documents relating to her client were in the file examined and relied upon by the Judge when the Deportation Order was entered in 1996; that only documents relating to another person were in that file; that therefore there was no basis for the Deportation Order; and that to cover up that problem government personnel later tried to add documents to the file that had not been there in 1996, and make it appear that they had been in that file.
5. The second issue also relates to the contents of the court file. The inquirer states that sometime after 2008, the Immigration Judge issued a hand written Order that the client be returned to the United States, but that the Order was later missing from the file, thus preventing client from returning until further proceedings, in November 2011.

The inquirer asks a number of questions. Many deal with whether the inquirer has any continuing obligation to the client to pursue further, unidentified remedies arising out of the government's handling of the case, presumably for some compensation for having been deported wrongly. The inquirer does not state the client's wishes regarding this topic. Even if the client does want to proceed further, any definitive answer would depend on the scope of the representation originally undertaken by the inquirer. Absent some affirmative undertaking in the

inquirer's retention letter to pursue civil remedies arising out of his deportation, the inquirer has discharged her obligations to client by securing his return to the United States. The inquirer can evaluate whether she would want to undertake further representation of the client, seeking monetary damages or other relief. If the inquirer agrees with the client to do this, then the inquirer should enter into a new representation agreement with the client outlining the scope of this further representation. If the inquirer does not wish to so proceed, she should send a letter to the client advising that her representation has concluded in the matter. In that letter, the inquirer should advise the client that there are various civil remedies to pursue, the time limits for doing so (if accurately known by the inquirer) and finally the advice to find new counsel as soon as possible.

If, on the other hand the original retention agreement with the client can be understood to have covered the making of claims now contemplated by the inquirer, if the client wishes to pursue them then the inquirer should consult Pennsylvania Rule of Professional Conduct 1.16<sup>1</sup> (the "Rules") regarding the possible termination of the representation, should she not wish to pursue the claim.

The inquirer also asks about any ethical obligation to report the conduct she questions. There are two categories to be addressed--reporting misconduct pursuant to Pennsylvania Rule of Professional Conduct (the Rules) 8.3 and any other disclosure(s) governed by Rule 8.2.

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<sup>1</sup> Rule 1.16. Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

Rule 1.6. **Confidentiality of Information** provides in part that,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent...

Rule 8.2 **Statements Concerning Judges and Other Adjudicatory Officers** provides in part that,

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer...

**Comment:**

(1) Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. **Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.** ... [emphasis added]

Rule 8.3. **Reporting Professional Misconduct** provides that,

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment [2] to Rule 8.3 provides that,

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

Taking all these rules and comments into account, first, the inquirer must communicate with her client to learn whether the client will give informed consent to any reporting or disclosure. The obligation of client confidentiality pursuant to

Rule 1.6 is referenced in Rule 8.3c and clearly prohibits a lawyer from revealing any information "relating to representation of a client, unless the client gives informed consent." The information at issue relates to representation of the client. Reading Rule 8.3(c) in conjunction with Rule 1.6a, it is clear that the client's informed consent is necessary even for reporting conduct for which reporting under that Rule is otherwise mandatory.

Furthermore, any obligation or desire to disclose is thus secondary to the client's best interests. Significantly, comment [2]<sup>2</sup> to Rule 8.3, indicates that the inquirer should 'encourage' the client's consent "**where prosecution would not substantially prejudice the client's interests.**" [emphasis added] This suggests that any risk that such reporting might substantially prejudice the client, prohibits any encouragement to consent.

Thus, if the inquirer has any concern that reporting the conduct might later harm client, then the inquirer cannot seek informed consent from the client in order to make the report. Even if the inquirer considers that she can seek informed consent, the client's decision not to give it must be honored.

Turning to the specifics of the complaint itself, the Committee is of the opinion that the inquirer does not have an ethical duty to report the conduct, even apart from the need to obtain consent from the client. Rule 8.3 only mandates disclosure when the lawyer "knows" that another lawyer has committed a violation of the ethics rules that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects..." Based on the information provided in the inquiry, it appears that the inquirer does not have actual personal knowledge of improper conduct either by a Judge or by other attorneys, and as such there is no mandatory obligation to report. Only the inquirer knows for sure all the facts and circumstances upon which she has formed a belief as to the allegedly purposeful conduct by the judge or others, but the Committee has seen nothing to suggest she 'knows' of wrongdoing to the degree that might mandate reporting. Subject to the considerations as noted above, such a step is optional.

The inquirer does not indicate how or to whom she proposes to "disclose" the "official misconduct/corruption," nor does she specify whether she would disclose the conduct of an attorney, Judge or Administrative Law Judge. There are some distinctions for the inquirer to consider. Under Rule 8.3, any disclosure is to be made to "the appropriate professional authority." For such reporting, the inquirer may have immunity. Pennsylvania Rule of Disciplinary Enforcement (PaRDE) 209(a) establishes that such disclosures to the Disciplinary Board, a hearing committee, special master or Disciplinary Counsel are "absolutely privileged and the person making them shall be immune from civil suit based on such communication or testimony." However, depending on where the agency

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<sup>2</sup> The Comments to the Rules, while not adopted by the Supreme Court of Pennsylvania, are provided in order to give guidance in the interpretation of the Rules themselves.

attorney and the US Attorney who were involved in the case on the government's side are admitted (which could be the jurisdiction to whose disciplinary authorities a report would be made), as well as the jurisdiction and governing rules for complaints about a Judge or Administrative Law Judge, the Committee cautions the inquirer to determine if such immunity is provided under that state's ethical rules.

Should the inquirer be contemplating "disclosure" by some means other than a report under Rule 8.3 (for example making public statements or granting interviews), the Committee draws the inquirer's attention to the caution provided in Rule 8.2a and recommends that the inquirer be guided by the limits on conduct cited therein.

While the two document issues are extremely disturbing, and resulted in harm to the client, one could explain the document issues as resulting from simple human error or inattentiveness, rather than from actions with bad motives. Thus, without more specific evidence, there is some risk that a charge of "misconduct" or "corruption" will be found to reflect "reckless disregard" should the inquirer make her allegations in a manner and forum other than that provided for in Rule 8.3b.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.