

Client Dishonesty 101

By Peter R. Jarvis

Most of us have the privilege of dealing with clients who are at least tolerably honest and honorable most of the time. But what do we do when our clients are neither? The short answer is, or at least should be, “as little as possible.”

The classic client-perjury litigation setting is presented in OSB Legal Ethics Op No 1991-34 and *In re A.*, 276 Or 225, 554 P2d 479 (1976). In Oregon, at least, a lawyer who is representing a client in a pending case and who becomes aware that the client has committed perjury in that case must (1) call upon the client to correct the perjured testimony and (2) if the client refuses to do so, inform the court that the lawyer must withdraw but decline to explain why. Although the court and opposing counsel will presumably know that the basis for the withdrawal lies in some sort of client wrongdoing, the lawyer will not have gone any further than is necessary to avoid personal, if indirect, involvement in a continuing wrong. In fact, the balance between client rights and duties to the system that Oregon strikes in this case is clearly preferable to the ABA approach in which the lawyer must disclose the specifics of the client’s perjury. ABA Formal Ethics Ops 93-376 (1993), 87-353 (1987).

However, suppose that the wrongdoing does not involve knowingly false or fraudulent testimony, but instead involves knowingly false or fraudulent representations in the course of contract or settlement negotiations. What if the client refuses to allow curative disclosure, or to withdraw from any and all negotiations, even after the lawyer has pointed out the risks of such refusal?

In this case, the Oregon lawyer arguably has two strings to her bow, but they turn out to be similar to one another. One is the so-called “noisy withdrawal” under which the lawyer informs opposing counsel or the unrepresented opposing party that the lawyer is withdrawing from the representation and is also withdrawing any right of the opposing party to rely on any documents, statements or representations that the lawyer or her client may have provided. *Cf.* ABA Formal Ethics Op 93-375 (1993), 92-366 (1992). Noisy withdrawals appear to be permissible in most, if not all, American jurisdictions.

In fact, many jurisdictions, including Oregon, Washington and Idaho, allow a lawyer who has reasonably and in good faith concluded that her client intends to commit a crime to reveal the information that is necessary to prevent that crime. *See, e.g.*, OSB Legal Ethics Op No 1991-34; Oregon DR 4-101(C)(3); Idaho RPC 1.6(b)(1); Washington RPC 1.6(b)(1). This is a different position from the one taken in ABA Model Rule 1.6(b), which allows a lawyer to reveal the intention of a client to commit a crime only if the crime involves a significant and immediate risk of death or serious bodily injury. In most circumstances, however, the more prudent and appropriate course for the Oregon lawyer would be to say less—by making a noisy withdrawal, rather than going further and revealing the client’s specific plans and intentions.