
**E-88-10 Client fraud and lawyer disclosure
duties in real estate transaction**

Facts

A lawyer represents a seller in a commercial real estate transaction. Shortly before the closing, the lawyer learns from his or her client that hazardous wastes are buried beneath the surface of the land being sold. The existence of such hazardous materials has not been disclosed to the purchaser.

Questions

1. What are the lawyer's obligations concerning disclosure of such information to the purchaser?
2. If the lawyer has obligations of disclosure to the purchaser, must or should the lawyer advise the client in advance that lawyer intends to make such disclosure?
3. May the lawyer avoid any disclosure obligation by terminating his representation of the client?
4. What are the lawyer's obligations if his or her knowledge of the hazardous wastes is acquired after termination of the representation?

Opinion**Question 1**

Whether the lawyer must inform the buyer about the hazardous wastes or withdraw from the representation if his or her client objects to informing the buyer largely depends on whether disclosure is necessary to prevent the client from committing "a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another." SCR 20:1.6(b). The terminology section of the SCR chapter 20 states that "'fraud' or 'fraudulent' denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." Furthermore, "[T]he general rule

is that silence, a failure to disclose a fact, is not misrepresentation unless the nondisclosing party has a duty to disclose that fact.” *In Matter of Estate of Lecic*, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1981). Whether a legal duty to disclose exists under the facts as presented is not within this committee’s jurisdiction to decide.

However, assuming hypothetically that failure to disclose the presence of these hazardous wastes would be criminal or fraudulent conduct, the lawyer may not continue representing the client unless the disclosure is made. *See* SCR 20:1.2(d), 20:1.6(c)(1), 20:1.16(a)(1) and (b)(1), 20:4.1(b) and 20:8.4(c).

Further assuming hypothetically that a legal duty to disclose exists on these facts but that the lawyer’s client has refused to disclose, the lawyer must make the disclosure “to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another” (i.e., the buyer of the real estate). SCR 20:1.6(b). *See also* SCR 20:4.1(b).

Question 2

Assuming that a duty to disclose the presence of the hazardous wastes exists, the lawyer must consult with the client prior to the lawyer’s making any disclosure to the buyer. *See, e.g.*, SCR 20:1.2(d) and (e), 20:1.4(b), 20:1.6(a), 20:1.7(b), 20:1.16(b)(1) and 20:2.1. Specifically, the lawyer should consult with the client regarding the options for rectifying the situation. *See, e.g.*, 20:1.2(d) and (e) and 20:1.4(b).

Question 3

Withdrawal from the representation would not relieve the lawyer from any duty to disclose if the disclosure was reasonably believed “necessary to prevent the client from committing a criminal or fraudulent act. . . .” SCR 20:1.6(b).

Question 4

If the lawyer’s knowledge of the hazardous wastes was acquired after representation had terminated, the lawyer would have a mandatory disclosure duty under SCR 20:1.6(b) if, under the law, the situation involves a continuing criminal or fraudulent act. In any event, because of the lawyer’s substantial involvement in the transaction (i.e., “[s]hortly before the closing”), the lawyer

may disclose the information “to rectify the consequences of [the] client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used.” SCR 20:1.6(c)(1). Of course the lawyer’s potential exposure to tort or criminal liability for failing to disclose under particular circumstances may dictate that disclosure be made.

Caveat: ABA Model Rule of Professional Conduct (MRPC) 1.6 differs significantly from Wisconsin SCR 20:1.6. Therefore, lawyers not subject to Wisconsin disciplinary jurisdiction or in a state in which a different rule may apply must evaluate this opinion accordingly.