

When the Lawyer Is the Victim: ABA's New Guidance on Confidentiality and Client-Perpetrated Crimes

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When a client turns from seeking your counsel to victimizing you or your staff, what ethical obligations still bind you? The American Bar Association's Standing Committee on Ethics and Professional Responsibility tackles this thorny dilemma in its recent Formal Opinion 515. The opinion addresses a scenario every attorney hopes to avoid but should be prepared to navigate: becoming the victim of a client's crime. Whether it's a sophisticated financial scam that empties your trust account, a violent outburst in your conference room, or theft of personal property during a consultation, the opinion provides important guidance on when attorneys can disclose information to protect themselves and seek justice without violating their professional obligations. The opinion acknowledges that while confidentiality remains sacrosanct in legal practice, lawyers should not be forced to remain silent when clients try to make victims of their lawyers and seek to weaponize the attorney-client relationship against them.

The opinion recognizes an implicit exception to the confidentiality duty under ABA Model Rule 1.6 when a client commits a crime against the lawyer. This exception permits disclosure of information relating to the representation to the extent reasonably necessary to seek investigation, prosecution, or other remedies when a client commits a crime against the lawyer or a related person witnessed by the lawyer. The opinion clarifies that this discretionary exception is intended to address situations not fully covered by existing explicit exceptions and acknowledges the lawyer's right to seek recourse as a crime victim. It also states that this implicit exception is permissive, not mandatory, thus imposing no affirmative duty on attorneys to report clients' crimes. Finally, it suggests that such criminal conduct by a client will likely impair the lawyer's ability to continue representing the client, often necessitating withdrawal.

I. Duty of Confidentiality and the Attorney-Client Relationship

The attorney-client relationship rests upon the bedrock principle of confidentiality. Model Rule 1.6(a) states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [...]." This obligation extends beyond current clients to prospective clients, defined in Rule 1.18(a) as individuals who consult with lawyers about potentially forming a professional relationship. Per Rule 1.18(b), even when no professional relationship materializes, attorneys must safeguard information learned from prospective clients, with limited exceptions governed by Rule 1.9. Such comprehensive protection fosters trust and encourages candor, essential

elements in effective legal representation.

The opinion distinguishes scenarios involving purported clients with fraudulent intentions, where the fundamental duty of confidentiality may never arise. A legitimate attorney-client relationship requires good faith intent to seek legal services. When an individual engages a lawyer solely to perpetrate fraud – as illustrated in the opinion’s Hypothetical #1 (fraudulent foreign creditor scheme) and Hypothetical #2 (sham parties targeting lawyers) – several state ethics and disciplinary committees have concluded that no genuine professional relationship forms and, consequently, no duty of confidentiality attaches under Rule 1.6.

Similarly, someone attempting to defraud a lawyer would likely not qualify as a “prospective client” under Rule 1.18(a), lacking genuine intention to form a professional relationship. In such cases, attorneys generally remain free to report information about the fraudulent actor to law enforcement, financial institutions, and other relevant parties. The opinion encourages thorough initial inquiries, consistent with recent amendments to Rule 1.16(a), to identify such sham engagements early.

The opinion then addresses more challenging scenarios where actual clients commit crimes against their lawyers or associated individuals, as illustrated in Hypothetical #3 (violent office assault) and Hypothetical #4 (theft from lawyer’s desk). Here, the information attorneys would typically wish to report – such as the client’s identity, details of their meeting, and specifics of the criminal act – falls squarely within “information relating to the representation” protected by Rule 1.6(a).

II. Express Exceptions to Confidentiality under Rule 1.6(b)

Rule 1.6(b) provides several express exceptions permitting disclosure in specific circumstances where public interest outweighs confidentiality. The opinion examines potentially relevant exceptions. First, Rule 1.6(b)(1) allows disclosure to prevent reasonably certain death or substantial bodily harm, which is applicable in situations involving ongoing threats following a client’s assault, but limited to information reasonably necessary to prevent the threatened harm. Rule 1.6(b)(3) permits disclosure to prevent, mitigate, or rectify substantial financial injury resulting from a client’s crime or fraud where the lawyer’s services were used in furtherance of the wrongdoing. This might apply in certain financial crime scenarios but would not cover the hypotheticals, as they involve crimes where the lawyer’s services were not instrumentally used or where the primary harm befalls the lawyer. Rule 1.6(b)(5) allows disclosure to establish a claim or defense in a controversy between lawyer and client. While this exception would permit disclosure if the lawyer initiates civil litigation against the client for redress, it does not justify an initial report to law enforcement, to the extent a criminal investigation does not constitute a “controversy between the lawyer and the client.”

III. The Implicit Exception to Confidentiality for Reporting a Crime against a Lawyer or Their Associates under Formal Opinion 515

Recognizing that express exceptions in Rule 1.6(b) inadequately address situations where clients victimize their lawyers or those close to them, Formal Opinion 515 posits an implicit exception to confidentiality in these specific circumstances. This conclusion derives from the “reason” underlying the Model Rules, which, according to the Scope section, “should be interpreted with reference to the purposes of legal representation and of the law itself.” The opinion concludes that a lawyer who is the victim of a crime by a client or prospective client may disclose information relating to the representation to the appropriate authority in order to seek an investigation and potential prosecution of the alleged offender or other services, remedy, or redress.

The opinion notes that attorneys would naturally assume they possess the right to report a client's crime against them or their staff – an assumption the opinion confirms as correct. It draws parallels to other previously recognized implicit exceptions, such as lawyers seeking ethics advice from outside experts (later codified in Rule 1.6(b)(4)) and disclosing limited client information for conflict checking when moving between firms (subsequently codified in Rule 1.6(b)(7)). It reasons that requiring lawyers to remain silent when victimized by their clients would be unreasonable, effectively making attorneys vulnerable targets and depriving them of rights afforded to other crime victims. Furthermore, maintaining confidentiality in such situations does not serve the rule's fundamental purposes: encouraging clients to seek legal assistance and fostering trust. As the opinion states, while attorneys may occasionally "take a bullet for the client," they cannot reasonably be expected to "take a bullet from the client and to keep quiet about it."

This implicit exception extends to situations where lawyers witness clients' crimes against associated individuals, such as staff members or family members. The opinion emphasizes that this exception, like express exceptions in Rule 1.6(b), is limited to disclosures the lawyer reasonably believes necessary to accomplish the permitted purpose, including enabling investigation and prosecution, securing medical treatment or insurance coverage, or obtaining other necessary redress, provided such information is not reasonably available elsewhere.

The opinion provides guidance on permissible disclosure scope under this implicit exception. In Hypothetical #1 (assuming, for the same of argument, a legitimate representation existed), disclosing certain representational details would likely be necessary to explain financial fraud. However, in Hypotheticals #3 and #4, involving violent crime and theft, far less detail would likely be required beyond the client's identity and crime facts. While subsequent disclosures to authorities for investigation and prosecution may be necessary, attorneys should cautiously limit information to what is reasonably needed.

IV. Impact on the Attorney-Client Relationship

Formal Opinion 515 addresses the inevitable consequences of such disclosure on the professional relationship. It concludes that the relationship "almost certainly cannot continue" after an attorney reports a client's crime against them or an associate. Under Rule 1.4, the lawyer ordinarily has a duty to inform the client that disclosure will be or was made. If the client then terminates the representation, Rule 1.16(a)(3) mandates withdrawal. Moreover, the crime and subsequent disclosure likely create a conflict of interest materially impairing the attorney's ability to represent the client competently, also requiring withdrawal under Rule 1.16(a)(1). The opinion notes it is "hard to imagine a scenario in which a lawyer who is actively seeking the prosecution of a client would not be materially impaired in the ability to competently represent the client." Even without mandatory withdrawal, Rule 1.16(b)(6) permits withdrawal if the client's criminal conduct renders continued representation unreasonably difficult.

V. Practical Tips for Practicing Attorneys

ABA Formal Opinion 515 navigates the tension between attorney-client confidentiality and lawyers' legitimate interests when victimized by clients. While reaffirming confidentiality's paramount importance, the opinion recognizes a necessary implicit exception in these limited circumstances, allowing disclosure of reasonably necessary information to seek investigation, prosecution, services, or redress.

For practitioners navigating these challenging ethical waters, Formal Opinion 515 offers seven key

1. Conduct Due Diligence Before Accepting New Clients

- The opinion emphasizes the importance of conducting preliminary assessments before accepting new engagements. It references recent amendments to Rule 1.16(a) and notes that “lawyers who make initial inquiries and assessments before accepting a new engagement... may be able to more readily identify sham clients.”
- **Practical Tip:** Implement a robust client intake process that includes verification of identity, checking for red flags in initial communications (such as vague details or unusual fee arrangements), and confirming the legitimacy of potential clients through referral sources or independent verification.

2. Know When No Confidentiality Duty Exists

- The opinion clarifies that individuals who approach lawyers solely to perpetrate fraud are not “clients” or “prospective clients” under the ABA Model Rules. Conduct thorough initial inquiries to identify potential fraud, recognizing that confidentiality obligations do not attach to sham engagements lacking genuine intent to seek legal services.
- **Practical Tip:** Document your basis for concluding someone is not a bona fide client when you identify fraud attempts. This documentation should include specific facts demonstrating the person never intended to seek actual legal services but only entered the engagement to defraud you.

3. Consider Whether Express Exceptions Apply First

- Before relying on the implicit exception, evaluate whether one of the express exceptions in Rule 1.6(b) applies to your situation. Maintain familiarity with specific circumstances permitting disclosure without client consent, understanding their scope and limitations.
- **Practical Tip:** Create a checklist based on the Rule 1.6(b) exceptions to systematically evaluate whether any apply before invoking the implicit exception. Document your analysis of why specific exceptions do or do not apply to your situation.

4. Understand the Scope of “Information Relating to Representation”

- The protection of Rule 1.6 extends beyond attorney-client communications to include client identity and potentially any information that could lead to the discovery of protected information. The opinion emphasizes repeatedly that any disclosures must be limited to what is “reasonably necessary” for the permitted purpose.
- **Practical Tip:** When contemplating disclosure of client information, analyze whether the information is “relating to the representation” under the broad interpretation of Rule 1.6. Avoid assuming that information is outside the scope of confidentiality simply because it seems peripheral to the legal advice provided.

5. Limit Disclosures to What Is “Reasonably Necessary”

- The decision whether to report remains discretionary, requiring balanced consideration of personal safety, harmed parties’ interests, and professional principles. When invoking any exception, strictly adhere to the principle of disclosing only information reasonably necessary to achieve the permitted purpose, exercising judgment and erring toward caution.
- **Practical Tip:** Before disclosing client information, identify specifically what information is truly necessary for the intended purpose. Draft written statements or prepare talking points when reporting crimes to ensure you don’t inadvertently disclose more than required. For instance, in a theft case, it might be necessary to disclose the client’s identity and the fact of theft, but not the substance of your legal

consultation.

6. Properly Handle Withdrawal from Representation

- The opinion acknowledges that after reporting a client's crime, the attorney-client relationship will almost certainly need to end, requiring withdrawal under Rule 1.16. Anticipate that reporting a client's crime will likely necessitate representation termination, requiring compliance with Rules 1.4 and 1.16 regarding client notification and withdrawal.
- **Practical Tip:** Develop a protocol for managing client communications, case transitions, and court notifications when withdrawing after reporting client crimes. Ensure that withdrawal is handled in compliance with Rule 1.16, including obtaining tribunal permission where required and protecting client interests during the transition.

7. Maintain Limited Confidentiality Even After Disclosure

- The opinion notes that even when disclosure is permitted under an exception, the information remains otherwise protected under Rule 1.6.
- **Practical Tip:** Implement safeguards to ensure that information disclosed for permissible purposes (like reporting a crime) is not subsequently used or disclosed for other unauthorized purposes. Limit knowledge of the situation within your firm to those with a need to know, and remind those individuals of continuing confidentiality obligations.

VI. Conclusion

Formal Opinion 515 represents a practical approach to an ethical dilemma, balancing lawyers' obligations to clients against their right to seek redress when they are victim of a crime. By recognizing an implicit exception to confidentiality rules, the Committee acknowledges that lawyers should not be uniquely vulnerable to client crimes due to their professional obligations.

The limited scope of the exception, however, reaffirms the fundamental importance of confidentiality in the attorney-client relationship. The opinion does not create a broad license to disclose client confidences whenever convenient. It specifically limits disclosures to what is "reasonably necessary" for pursuing redress for crimes directly against the lawyer or witnessed by the lawyer when committed against someone associated with or related to the lawyer.

For practitioners, understanding both the permissions and the limitations described in the opinion is essential to navigating these challenging situations ethically. For law firm management, the opinion highlights the importance of establishing protocols for responding to client misconduct, particularly when it threatens the safety or financial security of the firm, its partners, or its personnel. Firms should consider developing clear guidelines for when and how to report client crimes consistent with ethical obligations.

By recognizing this implicit exception, Formal Opinion 515 acknowledges the practical realities facing attorneys in these unfortunate situations while preserving the integrity of the confidentiality principle in all other contexts. This balanced approach serves both the legal profession's core values and the individual attorney's rights and responsibilities when confronted with client criminality directed at them or their associates.

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