

## When Lawyers Break the Law

### A talk with Hal R. Lieberman

#### I. When Lawyers Commit Crimes – Rules and Laws

- A. When lawyers commit crimes, they may be subject to both the criminal justice system and the legal profession's disciplinary system.
  - 1. Each state bar imposes its own set of ethics rules on the lawyers admitted to practice in the jurisdiction.
  - 2. The American Bar Association's Model Rules of Professional Conduct provides general guidelines that each state may incorporate into its ethics rules. Model Rule 8.4 provides that lawyers shall not engage in criminal acts that reflect adversely on the lawyer's trustworthiness, involving dishonesty, or prejudicial to the administration of justice. See Appendix A.
- B. In many states, certain types of crimes will automatically result in discipline.
  - 1. In NY, the New York Judiciary Law § 90 governs the admission to and removal from practice.
  - 2. An attorney convicted of a felony, whether in New York or elsewhere, is subject to automatic disbarment.
    - a. § 90(4)(a) provides:
      - i. *Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or be competent to practice law as such.*
    - b. § 90(4)(e) provides:
      - i. *For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.*
  - 3. An attorney convicted of a serious crime is subject to suspension.
    - a. § 90 (4)(f) provides in part:
      - i. *Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.*
    - b. § 90 (4)(d) provides:
      - i. *For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which*

*does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.*

- C. Other crimes that may not necessarily rise to the level of a serious crime could nevertheless subject the attorney to discipline.
1. Such crimes may include a misdemeanor assault, disorderly conduct, or repeat and flagrant traffic violations.
    - a. *Attorney Grievance Commission v. Protokowicz* (1993)<sup>1</sup>
      - i. Mr. Protokowicz was disbarred for animal cruelty, among other infractions. The court found that Mr. Protokowicz killed his client's wife's cat by microwaving it.
  2. Certain misdemeanors in one state may be felonies in another. Nonetheless, this may constitute a crime serious enough to be subject to disciplinary proceedings.
- D. Advising clients on committing crimes
1. Involvement with organized crime
    - a. *In the Matter of Bruce Cutler, An Attorney* (1996): Cutler represented mob boss John Gotti, among others. He was temporarily suspended from practice in the mid-1990s for contempt of court.<sup>2</sup>
  2. Lawyers cannot advise their clients on how to commit crimes or assist them in committing a crime.
    - a. ABA Model Rule 1.16: Declining or Terminating Representation. See Appendix B.
      - i. New York and Illinois have adopted similar rules. See Appendix C and D respectively.
    - b. ABA Model Rule 1.6: Confidentiality of Information. See Appendix E.
      - i. Lawyers can't knowingly or unknowingly reveal confidential information.
      - ii. New York and Illinois have adopted similar rules. See Appendix F and G respectively.

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<sup>1</sup> *Att'y Griev. Comm'n v. Protokowicz*, 329 Md. 252, 262-63, 619 A.2d 100, 105 (1993).

[http://www.leagle.com/decision/1993581329Md252\\_1568/ATTORNEY GRIEV. COMM'N OF MARYLAND v. PROTOKOWICZ](http://www.leagle.com/decision/1993581329Md252_1568/ATTORNEY%20GRIEV.%20COMM'N%20OF%20MARYLAND%20v.%20PROTOKOWICZ).

<sup>2</sup> *Matter of Cutler*, 227 A.D.2d 8 (1996).

[http://www.leagle.com/decision/1996235227AD2d8\\_1233/MATTER OF CUTLER](http://www.leagle.com/decision/1996235227AD2d8_1233/MATTER%20OF%20CUTLER).

## II. Disciplinary Procedure

- A. Disciplinary actions commence after a lawyer is found guilty of a crime.
  1. *Matter of Mitchell*, 40 N.Y.2d 153 (N.Y. 1976)
    - a. John Mitchell, Attorney General under President Nixon, was convicted of several crimes, including conspiracy, for his role in the Watergate scandal and was subsequently disbarred following his conviction. He sought a reversal of his disbarment, arguing that it was a violation of his due process rights because the conviction was being appealed.
    - b. The New York Court of Appeals concluded that an attorney does not suffer a deprivation of due process by the fact that he is disbarred while an appeal of his conviction is pending.
- B. The lawyer must self-report if found guilty of a crime.
  1. N.Y. Jud. Law § 90(4)(c) provides:
    - a. *Whenever an attorney shall be convicted of a crime in a court of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.*
    - b. *The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.*
- C. The disciplinary committee will commence an investigation and notify the attorney.
  1. The attorney will have an opportunity to respond and show why he should not be subject to discipline.
  2. N.Y. Jud. Law § 90(4)(f) provides:
    - a. *Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.*
  3. N.Y. Jud. Law § 90(4)(h) provides:
    - a. *If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice, or judge appointed by the appellate division for hearing, report and recommendation.*
  4. Typically, disciplinary proceedings are sealed. If there is discipline in the form of a censure, suspension, or disbarment, the records relating to that proceeding are public.
- D. If an attorney has been disbarred for a felony conviction, in many jurisdictions, disbarment is permanent.

1. In New York, disbarment is a minimum of seven years, after which the attorney may apply to vacate the disbarment.
2. To be readmitted, the attorney must not have been convicted of a crime during the seven-year period.
3. After the seven-year period, the attorney may petition for reinstatement, submitting affidavits and information showing that he has fully complied with the order of suspension or disbarment. He must also retake and pass the Multi-State Professional Responsibility Exam.
4. When considering the attorney's readmission, the courts will consider a variety of factors including the attorney's admittance of wrongdoing and remorse, absence of other crimes, restitution, evidence of financial responsibility and employment, and any treatment for alcohol or drug abuse.

### III. Alcoholism, Substance Abuse, and Other Violations

- A. A problem in the legal profession
  1. Alcoholism and substance abuse in the legal profession is a very costly problem, both to attorneys and clients.
  2. There are many factors contributing to high rates of alcoholism and substance abuse among attorneys, including but not limited to workplace culture and stress and pressures of the job.
- B. When an attorney has a substance abuse problem, it may become a legal ethics issue if it interferes with proper representation of clients.
  1. Client neglect isn't only an issue of substance abuse – such circumstances could also be a result of depression or other mental health issues.
  2. Lawyers reported for an ethics violation stemming from alcohol abuse may instead be diverted to a program (such as Alcoholics Anonymous) to help with rehabilitation and recovery.
- C. In most jurisdictions, lawyers have an obligation to report colleagues who they know are involved in illegal/illicit activity.
- D. Billing clients for time spent "working" while impaired
  1. Regardless of any involvement with substances, this is billing abuse/fraud and is unambiguously inappropriate.
  2. Representing a client while impaired may violate ethics rules. ABA Model Rule 1.16(a)(2) provides that a lawyer shall not represent a client if the lawyer's ability to do so is materially impaired. See Appendix B.

## Appendix

### A. **ABA Model Rule 8.4 Misconduct.**

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html)

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

### B. **ABA Model Rule 1.16: Declining or Terminating Representation.**

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html)

(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.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

**C. New York Rules of Professional Conduct 1.16: Declining or Terminating Representation.** <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law; -27-

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

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

- (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 with which the lawyer has a fundamental disagreement;
- (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
- (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
- (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; -28-
- (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
- (10) the client knowingly and freely assents to termination of the employment;
- (11) withdrawal is permitted under Rule 1.13(c) or other law;
- (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
- (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

**D. Illinois Rules of Professional Conduct Rule 1.16 Declining or Terminating Representation.** <https://www.iardc.org/2010%20Rule%201.16.htm>

(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.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

E. **ABA Model Rule 1.6 Confidentiality of Information.**

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html)

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing 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;

(3) 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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

F. **New York Rules of Professional Conduct 1.6 Confidentiality of Information.**

<http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or  
 (3) the disclosure is permitted by paragraph (b). “Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

“Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
- (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
- (6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

#### G. Illinois Rules of Professional Conduct 1.6 Confidentiality of Information.

<https://www.iardc.org/2010%20Rule%201.6.htm>

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
- (2) to prevent the client from committing 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;
- (3) 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;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.