



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I represented a party selling an industrial property. After the conclusion of the transaction, I discovered, while reviewing records of the client for a different purpose, that the client made a misrepresentation concerning a material condition of the property that was sold. What may and should I do?

A: This is a case of a completed misrepresentation. Because you did not know it to be false when made, you have not engaged in unethical conduct. But do you have a duty to do something now?

Model Rule 4.1(b) states that a lawyer shall not knowingly "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6," but this does not address a completed fraud. Rule 1.6 precludes disclosure of information "relating to the representation" without client consent, but the current version of subsection (a)(3) states that the lawyer "may" reveal information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that ... has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." In jurisdictions with this version of the rule, disclosure to the extent necessary to "rectify" or "mitigate" completed frauds furthered through the lawyer's services may be allowed, but may not be required. Several states have different or earlier versions of Rule 1.6 that do not allow disclosure except to prevent future or pending crimes or frauds, similar to the crime-fraud exception to attorney-client privilege, and in varying circumstances. See, e.g., Mo. Rule 4-1.6; Ks. Rule 1.6.

The lawyer should first check the rules applicable in their jurisdiction. The lawyer should consult with the client to attempt to ascertain whether the misrepresentation was in fact a fraud, or there is some other explanation. If there is not a more innocent explanation, the lawyer should counsel the client concerning correction or disclosure of the misrepresentation, noting harmful consequences that could result, mitigation opportunities and other factors. If the client will not consent to disclosure and there is at least a permissive disclosure option in the jurisdiction, the lawyer should determine whether disclosure would accomplish rectification or mitigation, whether other provisions of substantive law may apply to the lawyer's conduct, and determine a course of action. When in doubt the lawyer should obtain their own legal counsel concerning their obligations.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.