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Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Our client was sued for breach of contract, and discovery requests were served with the complaint. I immediately reviewed relevant documents and determined that a constituent of the client had fraudulently entered the contract knowing it could not be performed, in order to boost sales figures upon which bonuses would be based on his way out the door. May we settle the case immediately for the full amount requested, or even confess judgment on the contract claim, in order not to reveal the fraud reflected in the internal documents that would otherwise have to be disclosed?

A: Yes. Under these circumstances, the Model Rules contain no affirmative obligation for the lawyer who has discovered a completed fraud under the umbrella of privilege and Rule 1.6 that did not previously involve the lawyer's services to reveal to the opposing party or court the information the lawyer has discovered. Of course, the lawyer may not participate in any obstruction of access to or falsification of evidence. See Rule 3.4. Therefore, if the case continues, and the documents and information showing the fraud are responsive to discovery requests, they will have to be produced when due.

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.