

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 00-06

Approved September 29, 2000

¶ 1 **Issue:** What are the ethical obligations of an attorney who, unaware his client will lie, hears the client commit perjury or otherwise materially mislead a tribunal?

¶ 2 **Opinion:** Counsel who knows that a client has materially misled the court may not remain silent and continue to represent the client; to do so would be "assisting" the client in committing a fraud on the court. Rather, counsel is obligated to remonstrate with the client and attempt to persuade the client to rectify the misleading or untruthful statements to the court. If this is unsuccessful, counsel must seek to withdraw. If withdrawal is denied, counsel must disclose the fraud to the court.

¶ 3 **Facts:** This issue came to the Committee in the narrow setting of a criminal sentencing hearing in which the court asks the lawyer's client, who is not under oath, about the client's prior criminal history. The defendant misleads the court and gives false material information that counsel knows to be untruthful. Counsel is now confronted with ethical considerations.

Analysis: *A. Counsel may not remain silent and continue to represent the client; to do so would be "assisting" the client in committing a fraud on the court.*

¶ 4 Rule 3.3(a)(2) provides that "[a] lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." (fn1) The issue on the facts presented here is whether a lawyer, by remaining silent in response to unanticipated false client testimony not presented by the lawyer, is "assisting" the client in committing a fraud on the court.

¶ 5 Ethical dilemmas arising under Rule 3.3 present difficult issues requiring balancing of competing duties. A lawyer's duty of candor to the court must be balanced against the duty of loyalty to and zealousness on behalf of a client and the duty to maintain confidential client

information. (fn2)

¶ 6 After the adoption of the Model Rules of Professional Conduct by the American Bar Association, the ABA's Committee on Professional Ethics reconsidered its prior opinions regarding a lawyer's duties in response to false testimony by a client. In ABA Formal Opinion 87-353, the ABA Committee stated that Model Rules 3.3(a) and 3.3(b) were a "major policy change with regard to a lawyer's duty . . . when his client testifies falsely. It is now mandatory under [Model Rule 3.3] for a lawyer who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury." (fn3) That opinion considered the same facts presented here: "judge asks the defendant whether he has a criminal record and he falsely answers that he has none." (fn4) The opinion states that "where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 [decided in 1953 under the 1908 Canons of Professional Ethics] that the lawyer is prohibited from disclosing the client's false statement to the court is contrary to the requirement of Model Rule 3.3. This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal" (fn5)

¶ 7 We agree that a lawyer who knows (fn6) that a client has materially misled the court but remains silent and continues to represent the client is "assisting a criminal or fraudulent act by the client" within the meaning of Rule 3.3(a)(2). In our view, however, a lawyer who is surprised by false client testimony in response to questions of the court or opposing counsel has not assisted the client's fraud either if: (1) she persuades the client to correct the misstatement or; (2) failing that, she is allowed to withdraw from further representation of the client. A prompt request to withdraw will signal to the court the lawyer's unwillingness to assist her client's conduct and, if allowed by the court, avoid Rule 3.3's prohibitions without disclosure of client confidences.

¶ 8 Consideration of Texas Rule of Professional Conduct 3.03, adapted from Model Rule 3.3, is instructive in this context. The Texas Rule, unlike Model Rule 3.3 and Utah Rule 3.3, includes explicitly in its text the duty to correct or withdraw false evidence when efforts to persuade the client to do so have failed:

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to withdraw or correct the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures,

including disclosure of the true facts. (fn7)

The official comments to the Texas rule distinguish, however, the circumstance in which the false evidence was not introduced by the lawyer. Comment 13 to Texas Rule 3.03 provides:

False Evidence Not Introduced by the Lawyer. A lawyer may have introduced testimony of a client or other witness who testified truthfully under direct examination but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of the false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

¶ 9 We agree that there is a significant difference for purposes of Rule 3.3's prohibition on "assisting" client fraud when the false evidence is not introduced by the lawyer. We do not agree, however, that the lawyer can continue to represent the client without any disclosure.

¶ 10 In *Disciplinary Counsel v. Greene*, the Supreme Court of Ohio said:

It is true that the vigorous and effective representation of a client is the responsibility of all attorneys. This duty, however, does not exist in isolation from the other obligations imposed upon an attorney through our Disciplinary Rules. In addition to the commitment to a client, a lawyer's responsibilities include a devotion to the public good and to the maintenance and improvement of the administration of justice. . . . [T]he attorney's duty, as an officer of the court, is to uphold the legal process and demonstrate respect for the legal system by at all times being truthful with a court and refraining from knowingly making statements of fact or law that are not true. (fn8)

¶ 11 In *Cincinnati Bar Ass'n v. Nienaber*, the Supreme Court of Ohio disciplined an attorney for both affirmatively making false statements and for remaining silent when the silence would result in two judges having a false appreciation of the situation. (fn9) As the court concluded, quoting from an opinion of the Nebraska Supreme Court, "[a]n attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The [lawyer] cannot serve two masters; and the one [he has] undertaken to serve primarily is the court." (fn10)

¶ 12 We agree and apply these principles in this context. We conclude that counsel's silence and continued

representation of a client who has lied to the court constitutes "assisting" the client, by acquiescence or tacit assent, in committing a fraud upon the court. (fn11) Such assistance is prohibited by Utah Rule 3.3(a)(2). This is true whether or not the client is under oath. Counsel may not, at will, detach himself from the client in those instances where the client is misleading the court, thus making the defense's positions or statements only reliable when defense counsel is questioned or the client is under oath. Because silence and continued representation is "assisting" the client in those cases where counsel knows that the client has lied about information that is material to the court's decision, counsel has an obligation under Rule 3.3 to take remedial measures. (fn12)

B. Counsel is obligated to remonstrate with the client. If remonstration is unsuccessful, counsel must seek to withdraw. If withdrawal is denied, counsel must disclose the fraud to the court.

Considerations Under Rule 3.3

¶ 13 When a lawyer knows that a client has offered false information to the court, a conflict arises between the lawyer's duty to keep the client's revelations in confidence and the duty of candor to the court. The official comments to Rule 3.3 give the following direction in that circumstance:

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocates should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.

¶ 14 ABA Opinion 87-353, while acknowledging "Rule 3.3[s] suggest[ion] that the lawyer may be able to avoid disclosure to the court if the lawyer can effectively withdraw," concludes that "withdrawal can rarely serve as a remedy for the client's perjury." (fn13) Under Rule 3.3(a)(2), however, it is the lawyer's duty not to assist the client's fraud; it is not the lawyer's duty to correct the inaccurate representations of the client unless such disclosure is necessary to avoid the lawyer's assisting the client's fraud. (fn14) Prompt withdrawal in response to unanticipated false testimony by a client, if allowed by the court, will comply with Rule 3.3. Depending on the timing and circumstances of the lawyer's request, however, the court may not allow withdrawal. (fn15) If leave for withdrawal is denied, the advocate must make disclosure to the court.

¶ 15 The ethical dilemma in representing a criminal defendant who has misled the court while not bound by an oath is complicated by two important constitutional

considerations: (1) the defendant's right to a free exchange with the court; and (2) the defendant's right to effective assistance of counsel. Some scholars have explored whether, by correcting any misleading information given by the defendant to the court, the lawyer would be infringing on the defendant's right to testify. However, a defendant does not have a constitutional right to mislead the court or to have the assistance of an officer of the court, namely, the attorney, to assist in the fraud. (fn16)

¶ 16 The U.S. Supreme Court has noted, and we agree, that the lawyer has an undisputed ethical duty to remonstrate with the client when the lawyer knows the client intends to commit perjury, and that a lawyer should inform the client that misleading the court as to some material fact that the court is relying on not only subjects the client to possible criminal prosecution and undermines the client's credibility, but also may expose the lawyer to criminal and disciplinary sanctions. (fn17) We conclude that this rule applies regardless of whether counsel was aware of the client's future intentions of lying or is surprised when the client lies. It also applies whether the client is under oath and, therefore, committing a crime of perjury or not under oath and, therefore, committing a fraud on the court. (fn18)

¶ 17 If a lawyer is unsuccessful in persuading the client that the client should inform the court as to any misleading statements the client made to the court, counsel must seek to withdraw. Most courts, however, require a factual basis, as opposed to a mere hunch or suspicion, for the lawyer's belief that the client intends to commit perjury or knowledge that the client has truly misled the court. (fn19)

¶ 18 If leave to withdraw is denied, counsel is then faced with proceeding with the case. One possible course of action, discussed in the literature, is for counsel simply to permit the client freely to engage the court without counsel's participation. In *Nix v. Whiteside*, the U.S. Supreme Court addressed a similar issue in the context of perjury; i.e., permitting the client whom counsel knows will mislead the trier of fact to take the stand; and noted:

In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony

to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. . . . The Rule finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenges.

The essence of the brief amicus of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury. (fn20)

¶ 19 This Committee agrees that the narrative form of presenting perjury or of simply permitting the client freely to mislead the court without counsel's intervening and taking remedial measures is not an acceptable practice. For parallel reasons, we reject the positions adopted in the Texas rules and by the Arizona ethics committee, (fn21) which would allow a lawyer whose client has testified falsely in response to questioning by another party or the court to continue representing the client but refrain from use of the false testimony in support of the client's case.

¶ 20 Considerations Under Rule 1.6 and Rule 1.16

The issue before the Committee includes the question of whether counsel can or must reveal confidential client information in an attempt to remedy a client's lie to the court. Utah Rule 1.6 provides in relevant part that:

(a) A lawyer shall not reveal information relating to the representation of a client except as stated in paragraph (b), unless the client consents after consultation.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary: . . . (2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used; . . . (fn22)

This rule is *permissive*. It allows, but does not mandate, that confidential information be revealed to rectify the fraud perpetrated on the court.

¶ 21 However, Rule 1.6 is "trumped" by Rule 3.3(a)(2), (fn23) which, we have concluded, triggers the mandatory disclosure of a material fact, even if confidential, if that is necessary to avoid assisting the fraudulent act of the client's lying to the court. While disclosure may be necessary, counsel should first attempt to persuade the client to correct

the falsity and, if that fails, seek to withdraw.

¶ 22 A lawyer must withdraw, as stated in Rule 1.16(a)(1), if the lawyer's services are being used or have been used to further a course of criminal or fraudulent conduct. Rule 4.1(b) provides that a lawyer shall not knowingly fail to disclose material facts to a third person when necessary to avoid the client's criminal or fraudulent conduct, unless prohibited by Rule 1.6. The comment to Utah's Rule 1.16 notes that:

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interest. Withdrawal is also justified if the client persists in a course of action that the lawyer believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it.

C. Conclusion

¶ 23 Counsel may not affirmatively or passively mislead the court by allowing the court to rely on information that counsel knows to be untruthful. Specifically, counsel may not remain silent when counsel is aware that the client has misled the court in some material fashion. "The attorney's duty, as an officer of the court, is to uphold the legal process and demonstrate respect for the legal system by at all times being truthful with a court and refraining from knowingly making [or permitting] statements of fact or law that are not true." (fn24) It is difficult to imagine how remaining silent and continuing to represent the client is not "assisting" a client who has misled the court. Neither the U.S. Supreme Court nor the ABA Model Rules approve of the narrative approach in perjury situations because the lawyer is nevertheless assisting the client, albeit passively, in perpetrating a fraud on the court. (fn25) The distinction is not whether the client is under oath, but whether counsel is assisting. Counsel who continues to represent the client knowing that the client has misled the court is, either passively or affirmatively, "assisting" the client by not bringing the falsehood to the attention of the court.

¶ 24 The Committee concludes that the first requirement upon hearing one's client lie to the court is for counsel to remonstrate with the client and attempt to rectify the misleading statements with the court. If this is unsuccessful, counsel must promptly seek to withdraw. If withdrawal is denied, counsel must promptly disclose the fraud to the court

Footnotes

1. Utah Rules of Professional Conduct 3.3(a)(2) (1999).

2. See Utah Rules of Professional Conduct 1.6.

3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353, at 4 (1987).

4. *Id.* at 3.

5. *Id.* at 3–4.

6. Rule 3.3's prohibitions apply only when the lawyer has actual knowledge. "The lawyer's obligation to disclose client perjury to the tribunal . . . is strictly limited by Rule 3.3 to the situation where the lawyer *knows* that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. The lawyer's suspicions are not enough." *Id.* at 6–7.

7. Texas Rule of Professional Conduct 3.03(b).

8. 655 N.E.2d 1299, 1301 (Ohio 1995).

9. 687 N.E.2d 678, 680 (Ohio 1997), citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).

10. *Id.*, citing *In re Integration of Nebraska State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937).

11. We disagree in this regard with a recent opinion of the Arizona Committee on the Rules of Professional Conduct which concluded that a lawyer who remains silent in these circumstances "is not even assisting in the presentation of testimony." Arizona Op. 2000–02 (March 2000), at 11. The Arizona Committee analogized silence in these circumstances "to allowing a client to testify in narrative form" (*id.*), which we also reject. See *infra*, at 7–8.

12. The lawyer's duties under 3.3(a) "continue to the conclusion of the proceeding." Rule 3.3(b). The ABA Committee has commented that "it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment." ABA Formal Op. 87–353, at 2–3.

13. ABA Formal Op. 87-353, *supra* note 3, at 4 n.7.

14. The Committee notes that the ABA's Ethics 2000 Commission has circulated for public discussion a draft revision that would eliminate the current Rule 3.3(a)(2) and add the following new Rule 3.3(a)(3):

A lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary,

disclosure to the tribunal. . . .

We do not express an opinion on whether the draft revision would change the analysis or the outcome in the situations we consider here.

15. See *Nix v. Whiteside*, 475 U.S. 157, 170 (1986) ("[w]ithdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy").

16. See *Nix*, 475 U.S. at 173–74.

17. See *id.* at 169 ("at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct").

18. The ABA Committee on Ethics and Professional Responsibility has even applied Rule 3.3's disclosure requirements to *pretrial* matters. "Further supporting the applicability of Rules 3.3(a)(2) and (4) to pretrial discovery situations is the fact that while paragraphs (a)(1) and (3) presuppose false or incomplete statements made to the tribunal, neither paragraph (a)(2) nor (a)(4) expresses any such condition precedent that the tribunal must have been aware of the crime, fraud, or false evidence." ABA Formal Op. 93-376 (1993). We note the inclusive categorization of deliberate material lies as "crime, fraud, or false evidence."

19. See, e.g., *United States v. Long*, 857 F.2d 436 (8th Cir. 1988) (counsel may withdraw only upon showing "a firm factual basis for believing" that false testimony has or will be presented; "it will be a rare case in which this factual requirement is met").

20. *Nix*, 475 U.S. at 170-71 & n.6.

21. See *discussion supra* at notes 7 and 11 & accompanying text.

22. Utah Rules of Professional Conduct 1.6 (1999).

23. The official comment to Utah Rule 1.6 provides that: "Rule 1.6(b)(4) permits revealing information to the extent necessary to comply with Rule 3.3(a)."

24. *Disciplinary Counsel v. Greene*, 655 N.E.2d 1299, 1301 (Ohio 1995).

25. See *Nix*, 475 U.S. at 171 ("under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony").

Rule Cited: