

Utah Ethics Opinions

2005.

05-02. UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 05-02

Issued April 28, 2005

1 **Issue:** What is the ethical responsibility of an attorney serving as defense counsel in a criminal case, when expressly requested by the court at a sentencing hearing for information obtained from or about the defendant regarding the defendant's prior convictions?

2 **Opinion:** An attorney may only answer such a query with the client's informed consent. Otherwise, the attorney must respectfully decline to answer the court's request in a manner that will not be misleading to the court. The attorney may respond by asserting the client's right to remain silent, and the attorney's ethical responsibilities or a by giving a similar explanation that does not disclose client confidences. 1

3 **Facts:** An attorney represents a defendant in a criminal case. At a sentencing hearing, the court requests information from the attorney regarding the defendant's prior convictions. The attorney has obtained such information during the course of the representation from conducting an independent investigation or from a confidential communication with the client. After consultation, the client does not consent to the disclosure.

4 Applicable Rules:

Rule 1.6 - Confidentiality of Information

(a) A lawyer shall not reveal information relating to 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 that the lawyer believes necessary . . . (4) To comply with the Rules of Professional Conduct or other law. 2

5 Rule 3.3 - Candor Toward the Tribunal

(c) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. 3

6 Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration or justice . . . 4

DISCUSSION

7 The issue touches on a fundamental aspect of the attorney-client relationship, namely, confidentiality. A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of all information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. 5 The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. 6

8 Information given to an attorney by a client, including the client's name, address and telephone number, is confidential, and the attorney is prohibited from disclosing such information under Rule 1.6 unless the client consents after consultation. 7 Information provided by an accused to his attorney in an initial telephone conference is confidential, even as against a request for such information by law enforcement authorities seeking to apprehend the accused client. 8 A disclosure of information harmful to the client would be utterly inconsistent with the relationship of trust and confidence protected by Rule 1.6. Thus, Rule 1.6 9 precludes disclosure by the lawyer, whether voluntary or in response to an inquiry from the court, absent informed consent from the client.

9 Under Rule 1.6(a), a lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after consultation. As indicated above, the client has not consented and, presumably, would not consent due to the potential adverse consequences from the disclosure. Here, the only possible exception to this rule is subpart (b)(4) which permits a lawyer to reveal information "to the extent the lawyer believes necessary to comply with the Rules of Professional Conduct or other law."

10 Rule 3.3(a)(1) and (2) prohibit a lawyer from "knowingly making a false statement of material fact or law to a tribunal," and from "failing to disclose a material fact to

a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Rule 8.4 defines "professional misconduct" as a lawyer engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation" or to engaging in conduct that is "prejudicial to the administration of justice." Arguably, in this situation, the attorney's duty to the client under Rule 1.6 may conflict with the attorney's duty to the court under Rule 3.3 and with the attorney's duty to the administration of justice under Rule 8.4.

11 Attorneys also owe a duty of candor to the court, and they must maintain the respect due to courts of justice and to judicial officers. Thus, attorneys may not intentionally deceive a judge or intentionally provide misleading or deceiving information to a court. If a lawyer knows that his client has materially misled the court, the attorney may not remain silent and continue to represent the client, for doing 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. 10

12 Rule 3.3 prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal, or from failing to disclose a material fact to a tribunal when disclosure is "necessary to avoid assisting a criminal or fraudulent act by the client." Arguably, Rule 3.3 only applies to "false statements," and to inactions which assist in the commission of a crime or fraudulent act by the client. Here, the attorney's silence is not a "false statement," except to the extent that the attorney knows that the silence is interpreted by the court as an affirmation that there is no prior criminal conviction, in which case the attorney is obligated to inform the court that silence is not intended as a statement of any kind and that it is not appropriate for the attorney to comment further.

13 In addition, silence by the advocate is not assisting the client to commit a criminal or fraudulent act, even though it may enable the client to avoid a more severe punishment for a criminal act. Thus, while Rule 3.3 creates an ethical obligation on the lawyer to not knowingly make a false statement to the tribunal about the defendant's criminal record, it does not create an ethical obligation to affirmatively disclose confidential information that could harm the client. Rule 3.3, however, does prohibit a lawyer from making a statement that misleads the court or that is false, such as a statement here to the effect that the client has no prior convictions. Thus, the proper course of action for counsel is to decline to answer any such question that is posed by the court.

14 Finally, it is professional misconduct under Rule 8.4 for

a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation" or to engage in conduct that is "prejudicial to the administration of justice." Although the lawyer's silence respecting the client's prior criminal history could prevent the client from receiving a more appropriate sentence, the protection of confidential information by the lawyer is not dishonest, fraudulent, deceitful or a misrepresentation proscribed by Rule 8.4(c). The protection of the client's confidential information does not prejudice the administration of justice. On the contrary, it advances the administration of justice.

15 For the foregoing reasons, in the absence of the client's informed consent, the lawyer must not provide to the court information obtained from or about the defendant regarding prior convictions. Limited strictly to an approach that would be ethically satisfactory, we have concluded that the lawyer may properly (and tactfully) inform the judge that the lawyer's ethical responsibilities under the Rules of Professional Conduct prevent him from providing such information, and that the failure to respond is not to be construed as indicating one way or another whether there are any convictions.

16 The lawyer's approach, however, will necessarily depend on the specific circumstances. Inasmuch as the issue before us may well implicate the client's substantive rights under the Fifth Amendment to the United States Constitution or Article 1, Section 12, of the Utah Constitution, the attorney is strongly advised to be fully aware of the current state of the law in this area and to proceed accordingly. 11 The client may have an absolute right to remain silent, with attendant benefits, in such situations. The lawyer may be required to exercise due care not to make any statement inconsistent with those rights, unless knowingly and intentionally waived by the client. As it is outside our purview, we have not analyzed this area of the law or opined as to what may be the most appropriate course of action with respect to constitutional principles.

Footnotes

1 The attorney's approach may require being fully informed and conversant with respect to the client's substantive rights under the Fifth Amendment to the United States Constitution and Article 1, Section 12, of the Utah Constitution. *Mitchell v. United States*, 526 U.S. 314 (1999). The Committee has made no attempt to analyze this substantive area of the law.

2 Utah Rules of Professional Conduct 1.6 (2004).

3 *Id.* Rule 3.3(a).

4 *Id.* Rule 8.4(c) & (d).

5 *Id.* Rule 1.6, cmt.

6 *Id.*

7 Utah Ethics Advisory Op. 97-04, 1997 WL 223850 (Utah St. Bar).

8 Utah Ethics Advisory Op. 97-02, 1997 WL 45141 (Utah St. Bar).

9 See, e.g., *Industrial Indemnity Co. v. Great American Ins. Co.*, 73 Cal. App. 3d, 529, 536 (1977).

10 Utah Ethics Advisory Op. 00-06, 2000 WL 1523292 (Utah St. Bar).

11 See note 1, *supra*.