

OPINION 504

August 1994

Question Presented

Does a lawyer's duty of candor to a tribunal under Texas Disciplinary [Rule 3.03](#) require defense counsel in a criminal case to correct mistaken or inaccurate statements made in court by a prosecutor about prior convictions of the defendant, if neither the defense lawyer nor the defendant makes any false statements to the court about such matters?

Statement of Facts

Defendant in criminal trial asserted his Fifth Amendment privilege against self-incrimination and did not testify. The prosecutor introduced evidence in the form of affidavits and police reports, and the court ruled that the defendant was guilty. During the sentencing and punishment phase of the trial, the judge asked defense counsel whether he intended to seek to qualify defendant for probation. Defense counsel advised the court that probation could be considered under applicable law regardless if the defendant testified or not as to the absence of any prior felony convictions. The judge then asked the prosecutor, "Does the defendant have any prior convictions?" The prosecutor mistakenly stated to the court that police records reflect that defendant has no prior convictions. Prosecutor turned to the defendant and asked, "Right?" The defendant and defense counsel make no statement and the court granted probation of defendant's sentence.

When the judge asked the prosecutor about prior convictions of defendant, defense counsel knew that the prosecutor's statement to the court was inaccurate because defendant had previously informed defense counsel about his prior felony convictions. After the trial concluded, defense counsel advised defendant that if he is asked by probation officials about his prior arrests or convictions, defendant must answer and must answer truthfully. In fact, probation officials subsequently learn about defendant's prior convictions as a result at a post-trial interview in which the defendant answered such questions truthfully about his prior convictions.

Discussion

Ethical dilemmas arising under Texas Disciplinary [Rule 3.03](#) present very difficult issues because ethics rules governing lawyers' conduct attempt to balance, on the one hand, a lawyer's duty of candor to the court and, on the other hand, a lawyer's duty of loyalty to and zealousness on behalf of a client, along with a duty to maintain confidential client information. Establishing the line between these competing obligations requires an examination of the specific facts in view of the standards for candor to the tribunal articulated in the Texas Disciplinary Rules.

Pursuant to Texas Disciplinary Rule 3.03(a)(1), a lawyer may not knowingly make a false statement of material fact or law to a tribunal; pursuant to Texas Disciplinary Rule 3.03(a)(2), a lawyer may not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; pursuant to Texas Disciplinary Rule 3.03(a)(5), a lawyer may not knowingly offer or use evidence that the lawyer knows to be false. These rules constitute exceptions to a lawyer's duty to maintain client confidential information under Texas Disciplinary [Rule 1.05](#).

The particular Question Presented in the Statement of Facts does not involve a lawyer knowingly making a false statement of material fact or law, or a situation where the client has permitted perjury or made a fraudulent statement in which the lawyer's silence may be tantamount to assisting a criminal or

fraudulent act. Rather, the situation presents the issue of whether a lawyer may remain silent when neither he nor his client has made a false statement to the tribunal, but the lawyer knows that the court is relying upon mistaken or inaccurate information stated in court to the benefit of his client.

Several situations related to the issue of a criminal lawyer's silence about his client's prior criminal convictions have been considered in ethics opinions previously issued by the American Bar Association Committee on Ethics and Professional Responsibility. In ABA Formal Opinion 287 (1953) dealing with the earlier ABA Canons of Professional Ethics, three very similar situations were considered. These situations included:

1. the judge asks the defendant whether he has a criminal record and the defendant falsely answers that he has none;
2. the judge asks the defendant's lawyer whether his client has a criminal record; and
3. the judge is told in court by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based upon his own investigation or upon his client's prior disclosure of information to him.

The ABA Committee concluded under the earlier Canons of Professional Ethics that in each of these three situations, the lawyer's obligation under Canon 37 to preserve a client's confidential information prohibits any disclosure to the court of information the lawyer has concerning his client's prior criminal record. However, the lawyer must not make any false statement to the court.

After adoption of the Model Rules of Professional Conduct by the American Bar Association, the ABA Committee on Professional Ethics reconsidered the issues presented in Formal Opinion 287. In ABA Formal Opinion 87-353 issued in 1987, the ABA Committee stated that Model Rule 3.3(a) and 3.3(b), which are virtually identical to Texas Disciplinary [Rules 3.03\(a\)\(1\) and \(2\)](#), represent a major policy change with regard to a lawyer's duty when his client testifies falsely. It is now mandatory under Texas Disciplinary Rule 3.03(a)(1) (as well as under Model Rule 3.3(a)), that when a lawyer knows that his client has committed perjury, the lawyer must disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury. A lawyer's silence under those circumstances will have the effect of corroborating or assisting fraudulent misstatements made by a client.

Likewise, under Texas Disciplinary Rule 3.03(a)(1) of the Texas Disciplinary Rules (and Model Rule 3.3(a)(1) and if a judge specifically asks the defendant's lawyer whether his client has any prior criminal convictions, the lawyer may not make any false statements of fact to the court. If the question by the court to the defendant's lawyer follows an inaccurate statement in court by another person such as in the Statement of Facts, the lawyer must correct the inaccurate information made in court by a person other than the lawyer or his client, or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement, or the lawyer may ask the court to excuse him from answering the question. If the lawyer refuses to corroborate the inaccurate statement or ask to be excused from answering the question, the court is at least alerted to a problem and presumably will inquire further to discover the truth.

Texas Disciplinary Rule 3.03(a)(2) requires disclosure to the tribunal only when it is necessary for a lawyer to "avoid assisting a criminal or fraudulent act." Hence, a lawyer's silence in the absence of client fraud or perjury does not require disclosure of the client's confidential information or correcting false information provided to the court by persons other than the lawyer or his client.

Texas Disciplinary Rule 3.03(a)(5) further provides that a lawyer shall not knowingly "offer or use evidence that the lawyer knows to be false." Does silence by the lawyer and his client in the situation

described in the Statement of Facts constitute the use of evidence that the lawyer knows to be false? The phrase "or use" evidence was added into Texas Disciplinary Rule 3.03(a)(5) primarily to address a circumstance where a client or other witness who testified truthfully under direct examination later provides false testimony under cross-examination by another party. (*See* Schuwerk & Sutton, "A Guide to the Texas Disciplinary Rules of Professional Conduct," 27A Houston Law Review 1, 264, 265 (October 1990)). Comment 13 to Texas Disciplinary Rule 3.03 suggests that while a lawyer should urge his client to correct or withdraw false evidence given in cross-examination, disclosure of such perjured testimony or other false evidence given during examination by another party is discretionary rather than mandatory. Accordingly, silence by the lawyer under the Statement of Facts should not be deemed to be "use" of false testimony under Texas Disciplinary Rule 3.03(a)(5).

Conclusion

Since neither lawyer or his client in the Statement of Facts made a false statement to the court, the lawyer has not violated Texas Disciplinary Rule 3.03(a)(1); since the client did not commit fraud or perjury, the lawyer's silence does not constitute assisting a criminal or fraudulent act. The lawyer may remain silent without violating Texas Disciplinary [Rule 3.03](#), and therefore is prohibited under the Texas Disciplinary [Rule 1.05](#) from disclosing confidential information about his client's prior convictions.