

ETHICS ADVISORY COMMITTEE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

FORMAL OPINION 90-2

QUESTION PRESENTED

Must an attorney disclose to a state court that his or her client is charged under a false name where the prosecutor thinks that the client is an illegal alien but the client is actually a resident alien with a visa where the client has specifically requested that the attorney not disclose his or her true identity?

DIGEST

The attorney must not disclose the client's true identity to the court because it is a confidential communication and it is protected by the client's privilege against self-incrimination. The lawyer should seek to get the client to either disclose his or her true identity or permit the lawyer to do so. If the client refuses, the lawyer may continue to represent the client without withdrawing as long as the client does not affirmatively misrepresent his identity.

OPINION

A member of NACDL has requested a written opinion concerning the issue of confidentiality and attorney-client privilege in the identity of the client when the client has falsely represented his or her identity to a criminal court to prevent possible deportation and permanent ineligibility to return to the United States, which the client fears might result if the client gave his name.

The facts are as follows: The client is charged in state court with a drug offense under the name of "John Doe," and he has an apparently valid identification in that name. He told the arresting authorities that he entered the country illegally under that name. He has instructed the lawyer, however, that his name is really "Richard Roe,"

and he holds a valid visa under that name. He has instructed the lawyer that he does not want the lawyer to disclose his true identity so immigration authorities will not take action against his visa. The member further advises that it is a felony in the jurisdiction for one to knowingly assume a false identity and do some act with the intent of benefiting himself or another.

I. ETHICAL RULES INVOLVED

Rule 3.3 (a) of the Rules of Professional Conduct (RPC) provides as follows:

(a) 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 the client;

...

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The Comment to Rule 3.3, ¶ 6, states as follows:

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is

clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

RPC Rule 1.2(d) provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" RPC Rule 1.6 provides that "A lawyer shall not reveal information relating to a representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation...."

DR 4-101 of the Code of Professional Responsibility (CPR) provides as follows:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(C) A lawyer may reveal:

...

(3) the intention of his client to commit a crime and the information necessary to prevent the crime.

DR 7-102(A) (4,5) provides that a lawyer shall not knowingly use false evidence or make a false statement of fact in his or her representation of a client.¹

II. CRIMINAL LAW IMPLICATIONS

It is a crime in most jurisdictions for a person to knowingly assume a false identity and do some act with the intent to unlawfully benefit oneself or another. Based on the facts presented to the Committee, it would appear that the client may be committing a continuing crime; *i.e.*, every time he appears in court he falsely represents his identity. Underlying resolution of the ethical issue, however, is the fact that his false identity is not material to the drug charge.

If the false identity is put forth in state court, the federal government is still arguably a potential victim of that false statement since the client is trying to defeat the federal immigration laws. Whether the false identity is assumed in state or federal court, the client is arguably attempting to defraud the federal government. The client could also be accused of obstruction of justice or even perjury for falsely swearing to his name (as in, perhaps, the plea allocution). The lawyer must also be aware that any conduct that furthers the client's false identity could conceivably be considered as part of a conspiracy to defraud the government in the enforcement of the immigration laws in violation of 18 U.S.C. § 371.

III. CONSTITUTIONAL IMPLICATIONS

Because the client's past false statement as to his identity is a potential criminal offense, there is a self-incrimination problem in the attorney's disclosing the client's true identity because the client could be charged with a crime, whether it be criminal impersonation, attempted criminal impersonation, obstruction of justice, perjury, or even contempt of court. The ethical rule² and cases³ are woefully inadequate in considering the problem.

This situation is close to the client perjury issue.⁴ In that situation, the Comment to RPC Rule 3.3 recognizes that constitutional requirements may qualify the lawyer's supposed duty to prevent it.⁵

IV. ATTORNEY-CLIENT PRIVILEGE

As a general rule, the client's true identity is not considered to be protected by the attorney-client privilege. *See generally* Annot., 16, A.L.R.3d 1047; Annot., 84 A.L.R. Fed. 852; *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1519-21 (1985). There are four exceptions to this rule. The first is

where revealing the client's identity would implicate the client in the very matter for which he sought the attorney's advice ("legal advice exception").⁶ The second is where the client's identity would provide the "last link" in a chain of incriminating evidence that could lead to an indictment of the client.⁷ The third and most widely accepted is the "communication rationale" which holds as privileged client identification information if disclosure would connect the client to an already disclosed or independently privileged exchange.⁸ The fourth is where unusual circumstances are present.⁹

The attorney-client privilege, of course, does not apply to future or ongoing crimes or frauds.¹⁰ It clearly holds, however, that the lawyer may not reveal past crimes.¹¹

V. DISCUSSION

It is axiomatic that, according to the ethical rules, it is the lawyer's duty to attempt to persuade the client to inform the court of his or her true identity. But, how does the lawyer ethically handle this problem and what if the client refuses to disclose his or her true identity?

It is the Committee's belief, on the facts before it, that the client's potential "fraud" on the court, if it is one, is not material or relevant to the drug case before the state court. In this instance, the client's identity is of no relevance to the issues involved in the case. Thus, in this situation, the Committee feels that attorney-client confidentiality still protects the client's communication from disclosure since it will not foster a fraud on the court. While ethical rules are not co-extensive with the evidentiary privilege, RPC Rule 3.3 (a) (2) requires the lawyer to disclose the fraud if the client refuses to do so. CPR DR 7-102(B)(1) requires the lawyer to disclose client frauds where not protected by the attorney-client privilege. The Committee believes that RPC Rule 1.6 and CPR DR 4-101(B), concerning the preservation of confidences and secrets of a client, control in this limited situation and require the lawyer to maintain the confidence.

A further troublesome problem is the that disclosure will perhaps lead to the client being charged with a crime. Thus, the question arises: Does the privilege against self-incrimination, invoked by the client, prohibit the lawyer from disclosing what the ethical rules might otherwise require the lawyer to disclose? It is the Committee's opinion, as an alternative ground for this opinion, that ethical rules must, at least in this instance, give way to constitutional guarantees.¹² In this

situation, the privilege against self-incrimination overrides any claimed ethical duty and the lawyer shall not disclose the client's true identity.

If, however, the client is called as a witness, the problem of client perjury, fraud on the court, and the lawyer's complicity therein will be implicated.¹³ The Committee believes that the lawyer may seek to withdraw if the client will not rectify the situation once a fraud on the court occurs. RPC 1.16 (a) (1); CPR DR 2-110(B)(2), (C)(2).¹⁴ If the client refuses and the lawyer decides to seek withdrawal, the lawyer cannot disclose to the court the information which caused the withdrawal.¹⁵

The Committee also makes the following suggestion: The lawyer should consider methods to protect himself or herself from also being accused of a crime or other other misconduct. The lawyer may consider documenting¹⁶ for posterity: (1) the fact the client made a privileged communication revealing an arguably ongoing crime; (2) that the lawyer clearly asked the client to reveal and discontinue the crime (with full advice of the risks of doing so); (3) that the lawyer clearly and unmistakably has advised the client that he or she will not participate in any acts which further the client's crime or fraud;¹⁷ (4) that the client prohibits the lawyer from disclosing the true facts; (5) that the lawyer believes that the privilege against self-incrimination prohibits him or her from disclosing the ongoing crime; and (6) that the lawyer told the client that he or she may have to withdraw (without disclosing the facts to the court) to avoid furthering a fraud on the court.¹⁸

Notes

1 Since there are often variations in ethical rules from state to state, members are advised to consult their state rules and law to determine what their duty is.

2 This is likely a result of the fact that few criminal lawyers were on the committees drafting the ethical rules.

3 *See, e.g., State v. Casby*, 348 N.W. 2d 736 (Minn. 1984) (attorney convicted of "attorney misconduct" for aiding client's use of false name; privilege against self-incrimination does not apply to disclosure of client identity, but possibility of client being exposed separate crime not mentioned), *disciplinary proceeding*, Matter of Casby, 355 N.W. 2d 704 (Minn. 1984) (attorney reprimanded and given two years probation.)

4 As to contemplated client perjury, *see* NACDL Formal Opinion 90-3 (December 1990) (trial) & 90-4 (December 1984) (grand jury).

5 RPC Rule 3.3, Comment ¶ 12. "The obligation of an advocate under these Rules is subordinate to such a constitutional requirement." *Id.* *See* text accompanying note 3, *supra*.

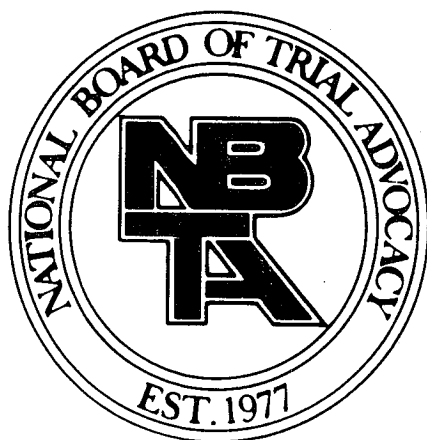
6 *See* cases cited in Annot., 84 A.L.R.Fed. 852, § 4-6.

7 *See* cases cited in *id.* § 8. The "last link" exception has fallen into disfavor. *See e.g.* Re Grand Jury Investigation No. 83-2-25 (Durant), 723 F. 2d 447 (6th Cir. 1983), *cert. den. sub nom. Durant v. United States*, 467 U.S. 1246 (1984).

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8 *Developments, supra*, at 1521; Annot., 84 A.L.R.Fed. 852, § 7.

9 *See, e.g., Re Shargel*, 742 F.2d 61 (2d Cir. 1984); *Re Semel*, 411 F.2d 195 (3d Cir. 1969), *cert. den.* 396 U.S. 905; *Re Michelson*, 511 F.2d 882 (9th Cir. 1975), *cert. den.*, 421 U.S. 978; *Tomlinson v. United States*, 68 U.S. App. D.C. 106, 93 F.2d 652 (1937), *cert. den.* 303 U.S. 642.

10 U.R. Ev. 502(d) (1); 8 Wigmore, Evidence § 2298 (McNaughton rev. 1961); McCormick on Evidence § 95 (2d ed. 1984).

11 *See, e.g., Alexander v. United States*, 138 U.S. 353 (1891); Annot., 16 A.L.R.3d 1029.

12 *See* note 4, *supra*. But *see State v. Casby, supra*, note 3.

13 *See, e.g., State v. Casby, supra*, at 739 (attorney aided client's deception of using false name in court; *In re Young*, 49 Cal.3d 257, 261 Cal.Rptr. 59, 776, P.2d 1121 (1989) (attorney who arranged bail knowing the client's use of a false identity and who provided financial support to client to avoid arrest was disciplined); *Office of Disciplinary Counsel v. Hazelkom*, 18 Ohio St.3d 297, 480, N.E.2d 1116 (1985) (attorney knowingly bailed out client under a false name and affirmatively misled the court as to the client's identity; indefinite suspension because of prior reprimand).

Query: Can the lawyer alleviate the problem at any hearings or trial which the client testifies by simply asking: "Are you the person charged in this case?" If so, what happens if the false statement occurs on cross-examination? The only way to avoid the problem may be to not call the client at all.

14 The Committee has taken the view in NACDL Formal Opinions 90-3 (December 1990) & 90-4 (December 1990) that withdrawal is not always a viable remedy for client perjury and that the lawyer must sometimes stay with the case without promoting the perjury while seeking to mitigate its effect on the case. *See, e.g., State v. Casby, supra* at 739 (attorney could have withdrawn to have avoided the fraud on the court).

15 The Committee recognizes that withdrawal is often not an effective remedy in promoting the truth-seeking function of the court because the client may be educated as to how to perpetuate the fraud and simply not tell the new lawyer about his or her true identity. *See* our opinions cited in note 14, *supra*.

16 The Committee recognizes that requesting the client to sign a writing may frighten or alienate the client and cause him or her to lose confidence in the lawyer or to seek another lawyer. Therefore, the Committee has decided that the decision whether to withdraw should be a discretionary one for the lawyer. If a writing is used, the Committee recommends that the document specifically state that it is protected by the attorney-client privilege and that the lawyer advises the client that the document is only for the file and not for disclosure to others unless the lawyer is accused of misconduct later.

17 *See, e.g.* cases cited in note 12, *supra*.

18 The biggest threat to the lawyer might be the potential of prosecution for conspiracy to defraud the government under 18 U.S.C. § 371. While, as a practical matter the risk of prosecution requires that the government find out the client's true identity and immigration status, one never knows when the client might make a deal with the prosecution and then turn on the lawyer. The lawyer should protect him or herself from that risk by dealing candidly and at arm's length with the client and pressing the client to disclose his or her true identity to the court.