Advisory Opinion 1990-2

ATTORNEY'S ETHICAL DUTY OF CANDOR TO THE TRIBUNAL AND DUTY OF TRUTHFULNESS IN STATEMENTS TO OTHERS

Two similar situations have given rise to a question as to the attorney's ethical duty of candor to the tribunal (SCRA 16-303) and duty of truthfulness in statements to other (SCRA 16-401).

SITUATION ONE: At a probation revocation hearing due to a client's arrest for driving while under the influence (DWI), the client was asked by the judge whether she had been driving. She stated to the Court that she had not been driving. Later, the judge asked the arresting officer the disposition of the DWI charge which was filed in the municipal court; the officer told the Court that he did not know the disposition. The defense attorney was aware that his client had, in fact, pled guilty to the DWI charge.

Previously, the defense attorney had questioned his client regarding her actions and she had maintained to him that she was not driving the vehicle.

ISSUE: Whether the attorney had a duty to disclose to the Court the disposition of the DWI charge and whether the attorney has a duty to inquire or investigate further as to whether his client was, in fact, driving the motor vehicle?

OPINION: Under both SCRA 16-303 and 16-401, the attorney is prohibited from making a false statement of a material fact or law to a third person or in failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (unless disclosure is prohibited by SCRA 16-106).

In the factual description described above, neither the attorney nor his client were asked the disposition of the municipal court proceeding. Neither the attorney nor the client attempted to conceal the disposition. If the outcome of the municipal court proceeding was material, the Court could have recessed to ascertain the disposition, could have directed the prosecutor to report on the outcome or could even have directly questioned the defense attorney or the client. The Court did none of those things.

Furthermore, facts could exist that explain the plea of guilty to the DWI charge when in fact, the client had not actually been driving. In the factual situation given, the attorney did not know that his client was lying and did not assist his client in lying; it is possible that his client was not lying. Indeed, Judge Weinstein notes in his treatise on evidence that motivation to defend misdemeanor cases may be so lacking that he does not believe misdemeanor pleas should be admissible to prove facts essential to sustain the judgment. 4 J. Weinstein, *Weinstein's Evidence* ¶ 803(22)[01] at 803-354 to -55. Thus, it is quite common to plead guilty to misdemeanor charges and yet maintain innocence.

Although an attorney might want to explore the events more fully with his client, particularly if additional hearings are to be held, the attorney has no duty under either SCRA 16-303 or 16401 to investigate his client's statements. Because it is reasonable under these facts for the attorney to believe that his client pleaded to the misdemeanor charge for reasons other than that she was driving, we do not believe there was a special duty to investigate here.

Therefore, it is the opinion of the State Bar's Committee for Advisory opinions that under the facts outlined above, the attorney has no duty to volunteer to the tribunal the disposition of the municipal court proceeding and has no duty to investigate his client's statements.

SITUATION TWO: An attorney is representing a client in Metropolitan Court. The client has either pled guilty or has been tried and found guilty; sentencing was to be at a later date. Even though an extended period of time has elapsed, perhaps even months, the attorney has received no notice of a sentencing hearing.

ISSUE: Whether the attorney has a duty under SCRA 16-303, 16401 or other ethical canon to alert the Court to the failure to schedule the hearing?

OPINION: It is the opinion of the State Bar's Committee for Advisory Opinions that under the facts outlined above, the attorney has no duty to notify the Court that the case has "fallen through the cracks." In fact, under some situations such as a failure to timely prosecute, the attorney might commit malpractice if he did alert the Court or prosecutor. The Court of appeals has held that a defendant has no duty to expedite the indictment against him. *State v. Kilpatrick*, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986). A duty to notify the Court would exist if the client requested or desired a speedy conclusion to his case; however, this would depend on the particular facts and the wishes of the client, not on a general ethical duty to the Court or opposing attorney.