The Attorney, the Client and the Criminal History: A Dangerous Trio

by Philip A. Cherner

Defense attorneys have long anguished over the proper response when a client's criminal record is being discussed in court. The debate has intensified with Colorado's adoption of the Rules of Professional Conduct ("Rules"), effective January 1, 1993. This article examines the ethical considerations governing the defense attorney's conduct when the client's prior criminal record is before the court.

Background

In 1953, the American Bar Association ("ABA") issued Formal Ethics Opinion 287. The Opinion considered three fact patterns:

1. At sentencing, the custodian of records advises the court that the defendant has no criminal history. The defense attorney knows, from the client or independent investigation, that this is incorrect but says nothing. The court expressly relies on the clean record in imposing probation. Must the lawyer disclose such knowledge?

2. Same situation as Number 1, but the court asks the defendant if he has a criminal record and the client says he has none. Must the lawyer disclose such knowledge?

3. Same situation as Number 2, but the question is asked of the lawyer. How should the lawyer respond?

The criminal defense attorney has several concerns: whether the attorney must correct a client who misrepresents his or her criminal history to the court; whether "the court" includes probation and pretrial services organizations on which the judge relies; whether the defense attorney may (or must) disclose privileged information when the court appears to rely on the client's misrepresentations; and what the defense attorney can do prospectively to avoid the problem. The attorney must discern what (if anything) has changed with the advent of the Rules in Colorado.

Correcting a Client's Assertions

Prior to the adoption of the Rules, the issue of correcting a client's assertions was governed by DR

7-102(5) of the Code of Professional Responsibility ("Code"), which prohibited a lawyer from knowingly making a false statement of law or fact, and DR 7-102(7), which barred a lawyer from counseling or assisting the client in conduct the lawyer knew to be illegal or fraudulent.

ABA Formal Opinion 287 also was instructive. The authors of the Opinion concluded that the attorney had no obligation to correct a court which erroneously believed that the client had no criminal record, if the lawyer's information came from a privileged source (that is, the client). The privileged nature of attorney-client communications was paramount.1 The court, according to the Opinion, should not be allowed to rely on the attorney's silence as corroboration if the source of the information was from a nonprivileged source.

Therefore, under Formal Opinion 287, if the knowledge of the criminal history came from the client, the lawyer had no obligation to correct the record in situations 1, 2 and 3, above. The lawyer was directed to remonstrate with the client in situation 2 and seek to withdraw if that failed. The lawyer's duty of candor to the court required the lawyer to refuse to answer if questioned by the judge, rather than giving false or misleading information.

The next step is to assess Opinion 287 in light of the Colorado Rules. Rule 3.3 regulates candor to the tribunal. A lawyer may not knowingly make a false statement of material fact to the court or fail to disclose a material fact when a failure to do so assists the client in a criminal or fraudulent act. Under Rule 3.3, this duty to disclose applies even when the source of the information is privileged.2 On its face, the Rule appears to go further than the Code by imposing an affirmative duty on the lawyer to disclose a client's confidence when the client is misrepresenting a material fact to the court.

ABA Formal Opinion 353 (1987) reconsidered the fact patterns set forth in Opinion 287 in light of Model Rule 3.3 (from which the Colorado Rule was taken). This Opinion concluded that the defense attorney must disclose his or her privileged knowledge of the client's criminal history when that history is misrepresented by the client (situation 2 in Opinion 287, above). The outcome in situations 1 and 3 was unchanged.

In determining whether the attorney's obligation under Colorado's Rules is different than that imposed by the Code, it is necessary to examine the pre-Rules obligation. In *People v. Schultheis*,3 the defendant insisted that his lawyer present the perjured testimony of a witness. In holding that the lawyer's refusal to do so did not violate the client's right to effective assistance of counsel, the Colorado Supreme Court commented:

The integrity of the adversary system can be maintained only if prosecution and defense counsel present reliable evidence to guide the trier of fact. Honesty and candor are essential to the fair and impartial administration of justice. Consequently a lawyer has a professional duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony or other false evidence. [Citations omitted.] It is unprofessional conduct for a lawyer, while representing a client, to perpetrate or aid in the perpetration of a crime or dishonest act.4

However, the court strictly protected the trial judge from disclosure of the details of the attorney-client conflict, noting the client's right to an impartial judge (a consideration of perhaps

even greater concern at sentencing). The court also stated this crucial rule: "Defense counsel should not, in any way, be required to divulge a privileged communication to the trial court."[5] Thus, Opinion 287 correctly stated the law in Colorado under the Code.

Colorado's adoption of the Rules included amendments which bear directly on the question. Model Rule 3.3(b) states that the lawyer's duty to disclose overrides the duty of confidentiality. Colorado adopted this phrase unchanged, but the Comments to Rule 3.3 were revised. Where the Model Rule, Comment 11, called for disclosure of the client misconduct if all else failed, Colorado modified Comment 11 to require only "reasonable remedial measures." The picture is further muddied by Colorado's adoption of Comment 12, which states in part:

The general rule -- that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances.

Given the recognition in Schultheis of the perils of disclosure before the judge who will pronounce sentence, Colorado's mandate is equivocal. While the Colorado Rules do not impose a duty substantially different than that imposed by the Code regarding situations 1 and 3, the answer is uncertain regarding situation 2. *Schultheis* and the Code[6] elevated client confidentiality over candor to the tribunal, the Model Rules reversed the priority and the Colorado Rules are ambiguous. The defense attorney's ability to take "appropriate remedial measures" means that the attorney may disclose, but the question remains whether the attorney must disclose.

The scope of the ambiguity is limited. In any of the situations presented, the lawyer may not mislead the court: the lawyer can speak the truth or say nothing. It is only when the client has engaged in a material falsehood that the lawyer is faced with the ethical dilemma. At that point, the lawyer must urge the client to correct the misinformation or, if that fails, move to withdraw.[7] Only if withdrawal is denied is disclosure an option.

No ethical issue arises unless the attorney has actual knowledge of the falsehood.[8] In practice, this means the attorney must be certain the facts presented are incorrect. Experienced defense attorneys know that rap sheets and related information are often flawed. Clients are often mistaken about their criminal history, confusing felonies with misdemeanors and deferred judgments with convictions. Thus, who is correct and who is incorrect is not always clear.

The decision as to what, if any, action on the part of the defense attorney is needed turns on the specifics of the hearing. The sticky situations are those in which the silence of the client and the attorney (based on privilege) will affirmatively encourage the court to infer a criminal history less serious than is warranted.

In this author's experience, clients misrepresent their criminal history at sentencing infrequently. However, at the initial bail hearing, the issue has more relevance. The defense attorney must always be careful to avoid active or passive participation in any misrepresentations. A judge's offhand comment or even a glance seeking confirmation can make the defense attorney appear to be standing behind the comments of the client.

Revealing Client Confidences

Often, the focus is on the lawyer's obligation to disclose otherwise privileged information. Nevertheless, the lawyer who wrongfully discloses privileged information also may be disciplined.

The issue is cast in sharp relief by the following hypothetical situation:

The client has told the defense attorney that the client has three prior out-of-state aggravated robbery convictions. As the attorney prepares for sentencing on an auto theft felony, the attorney notices that the probation department is apparently unaware of the priors. At the sentencing hearing, the judge opines that the attorney need say little because the judge is inclined to order probation for the client.

If the attorney does "say little," he or she may have participated in a fraud on the court and may be subject to discipline for violating Rule 3.3. If the attorney candidly corrects the court, he or she may have improperly disclosed a client confidence and may be subject to discipline for violation of Rule 1.6. The attorney will likely have less than ten seconds to make the decision.

Determining the "Tribunal"

The Rules repeatedly refer to candor toward the "tribunal," yet the tribunal is not defined. The probation department (as in the hypothetical above) is an arm of the court.[9] It follows that representations made to the probation officer are akin to those made to a judge and that the same ethical constraints apply.

By the same logic, pretrial release personnel also qualify as the tribunal. Therefore, if the court relies on client statements in the probation report at sentencing or in a pretrial release report at a bond hearing, a safe assumption is that the statements will be treated for ethical purposes as if they were made in open court.

Prophylactic Measures

Although a full disclosure of the defense attorney's obligations is necessary early in the attorney-client relationship, telling the client that the attorney might have to reveal what the client discloses is not conducive to the free sharing of information. Nevertheless, the client should know from the start that the attorney cannot join the client in any future fraudulent acts, be they at sentencing, a bail reduction hearing or elsewhere.

One extreme solution must be rejected. It has been suggested that the attorney should not ask the client about the client's criminal history. Setting aside for the moment whether this conscious ignorance is ethical, it is unworkable for the attorney. Repeat offender, habitual criminal and mandatory sentence aggravation statutes make ignorance of the client's criminal record malpractice.

A more general discussion of the nature and scope of the attorney-client privilege is appropriate. The client should be told that what is said is said in confidence, with limited exceptions such as

threats to commit future crimes or commission of perjury. Presenting this information to the client in a nonthreatening manner is essential.

Conclusion

The defense attorney has two options when communicating with a tribunal. If questioned by the court, the defense attorney can speak candidly or say nothing at all. If the court is misled by someone other than the client,10 the attorney must avoid participation. If the client participates in the misrepresentation, the attorney must privately (but immediately) encourage the client to correct the misrepresentation.11 If this fails, the attorney should move to withdraw but may not cite any specific grounds.12 Only if these options fail to rectify the situation may the attorney take "appropriate remedial measures," which may include disclosure of otherwise privileged client communications to the tribunal.13

NOTES

1. To like effect is DR 7-102(B)(1).

2. Rule 3.3(b).

3. 638 P.2d 8 (Colo. 1981).

4. Id. at 11.

5. Id. at 13. The court relied on DR 4-101 regarding confidentiality of attorney-client communications.

6. DR 7-102(B)(1).

7. Rule 3.3, Comment 11.

8. The Preamble to the Rules defines knowingly as "actual knowledge," which may be inferred from the circumstances. In this regard, the Rules are similar to the Code. DR 7-102; EC 7-26; *Schultheis*, supra, note 3 at 11.

9. *Smith v. People*, 428 P.2d 69 (Colo. 1967).

10. Counsel's duty to correct the information before the court extends only to criminal or fraudulent acts by the client. Rule 3.3(a)(2).

11. Rule 3.3, Comment 11; *Schultheis*, supra, note 3.

12. *Schultheis*, supra, note 3 at 13. Counsel should make a confidential record with the court reporter for later appellate review, if necessary. Presumably, this is done in the absence of the judge and prosecutor.

13. Rule 3.3(b); Comments 11 and 12. 

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