

LEGAL ETHICS OPINION 1731

ATTORNEY'S DUTIES TO CLIENT AND  
OTHERS WHEN CLIENT HAS BEEN  
ARRESTED UNDER SOMEONE ELSE'S NAME.

You have presented a hypothetical situation in which an attorney represents a client in a criminal matter in which sentencing is pending. Prior to sentencing, the client contacts the attorney and advises she has been arrested for driving while intoxicated and driving with a suspended license. The client also advises that at the time of this arrest, she provided false identification (her girlfriend's driver's license) and was arrested under her girlfriend's name.

Under the facts you have presented, you have asked the committee to opine as to 1) what ethical obligations the attorney has to the client and to the client's friend whose identification was used in the second arrest; 2) how to advise the client when she inquires whether she should appear in court on the driving while intoxicated and driving on a suspended license charges; and 3) what ethical obligations the attorney has to the court concerning the pre-sentencing investigation in the original criminal matter.

The appropriate and controlling disciplinary rules relative to your inquiry are [DR:4-101](#) requiring the preservation of client confidences and secrets; [DR:5-105](#) which addresses an attorney's representation of multiple clients with conflicting interests; [DR:2-108](#) which sets out the requirements for termination of or withdrawal from the representation; and [DR:7-102\(A\)\(3\)](#) and (5) which require that the attorney not conceal from the court that which he is required by law to reveal and not misrepresent facts or law to the court. The committee has previously opined that information given by a client to an attorney concerning activity by the client that may constitute a past crime must be protected by the attorney as a confidence or secret under [DR:4-101\(B\)](#). Generally, absent client consent, information concerning a client's past criminal conduct cannot be revealed. [LE Op. 364](#) (1980) (A lawyer may not advise a Commonwealth's Attorney of his client's commission of a crime unless the client consents); [LE Op. 1087](#) (1988) (A lawyer cannot reveal his client's past criminal conduct).

[DR:4-101\(C\)\(3\)](#) states that an attorney *may* reveal information that clearly establishes that his client has perpetrated a fraud on a third party, but the fraud must be *related to the subject matter of the representation*. The committee believes that this rule does not apply, however, because the subject matter of the attorney's representation of the client (sentencing hearing on criminal drug charge) and the fraud committed by the client (misrepresentation of identity to police officer during arrest for DWI) are unrelated. Therefore, the attorney may not reveal the client's fraud unless the client consents. As to the first question, in the facts you present, the committee

<sup>1</sup> Even if the client were convicted of the criminal charges of DWI and DOSL prior to the sentencing hearing, the burden is on the Commonwealth to document these convictions in the pre-sentence report. A defense attorney has no obligation to disclose a client's record of prior convictions in order to prevent the court from imposing sentence on incomplete or inaccurate information, provided that neither the defense lawyer nor the defendant affirmatively misrepresent to the court that there were no prior convictions. North Carolina State Bar Op. 98-5 (1998); Texas Prof. Ethics Op. 504 (1995); Fla. State Bar Ass'n Op. 86-3 (1986). The voluntary revelation of such information without the client's consent would breach the lawyer's duty of confidentiality.

believes that the attorney cannot advise or assist both the client and her girlfriend, charged with a criminal offense she did not commit, as a direct consequence of the client having perpetrated a fraud by misrepresenting her identity to the police. Due to the inherent and direct conflict, the attorney cannot adequately represent the interests of both parties, and the conflict cannot be waived. [DR:5-105\(C\)](#). In fact, the only communication which the attorney may have with the client's girlfriend is for her to seek legal advice from another attorney, because of the conflicting interests of the client and the girlfriend. [DR:7-103\(A\)\(2\)](#).

Your second question is whether the attorney should advise the client to appear in court on the scheduled court date for the trial of the criminal charges of driving while intoxicated (DWI) and driving on a suspended operator's license (DOSL). At this juncture, the committee believes that the attorney must inform the client of the potential adverse legal consequences she faces if she does not voluntarily come forward with the truth concerning her actions during the arrest, which will likely be discovered regardless of whether she cooperates. The attorney should include in this discussion the risk that the client will face more serious criminal charges than those for which she was arrested. In assisting his client to reach a proper decision, it is proper and desirable for the lawyer to identify those factors which may lead to a decision that is morally just, as well as legally permissible. [EC:7-8](#). In the final analysis, should the client choose to remain silent and not appear in court to explain the truth, it is the opinion of the committee that the attorney must abide by the client's decision, even if it is against the attorney's advice and judgment. *Id.*

Your third inquiry involves the lawyer's ethical duties in his continuing representation of the client at her sentencing hearing in three weeks on the drug charges to which she pled guilty. Specifically, you ask what ethical duty, if any, does the attorney owe the court to correct or add to the pre-sentence report or memorandum if it fails to include information about the client relative to the charges of DWI and DOSL? [DR:4-101\(D\)\(1\)](#) requires an attorney to reveal information, as admitted to the attorney by the client, which clearly establishes that the client intends to commit perjury, but the facts in your inquiry do not lead necessarily to the conclusion that the client must testify at the sentencing hearing or that the attorney must vouch for the accuracy of the pre-sentence memorandum. Of course, the client may not perpetrate a fraud on the court, nor may the attorney affirmatively misrepresent factual matters at the hearing. [DR:4-101\(D\)\(2\)](#); [DR:7-102\(A\)\(5\)](#). But what if neither attorney nor client is required to make any statements in court concerning the contents of the report or its accuracy?

A lawyer must always balance his duty as an advocate to zealously represent the client's interests and his duty of candor to the court. In [LE Op. 1186](#) (1989), the committee concluded that a defense lawyer is under no obligation to advise the court that it has overlooked a criminal

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## Committee Opinion

June 29, 1999

charge, since the facts are on the public record and the lawyer has done nothing to conceal them. The committee relied on [DR:7-101\(A\)\(3\)](#) stating that it would be unethical to reveal information that would prejudice or damage the client. In [LE Op. 1400](#) (1991), the committee opined that a criminal lawyer representing a client found guilty of a felony is under no duty to reveal that the sentencing document later signed by the judge erroneously states the defendant was found guilty of a misdemeanor (assuming that the lawyer did not endorse the document or otherwise participate in drafting it). In fact, the lawyer was ethically obligated not to reveal the error since the revelation would damage his client. The opinion assumed that the lawyer did not endorse the document or otherwise participate in its creation. Similarly, in [LE Op. 1215](#) (1989), the committee concluded that a defense attorney was not required to inform the court or the Commonwealth that the court had rescheduled a trial date beyond the statutory limitation period for the prosecution of a particular felony. The defense attorney had not sought the continuance nor had he agreed to it.

An attorney shall not intentionally mislead the court nor conceal that which he is required by law to reveal. [DR:7-102\(A\)\(3\)](#), (5). In the facts you present, the committee is unaware of any ethical requirement to voluntarily reveal unadjudicated criminal charges during a sentencing hearing.<sup>1</sup> However, the committee cautions that the attorney must be careful not to mislead the court in any statements made to the judge concerning the pre-sentence report. In that regard, you ask the committee how the attorney should respond to the court if it asks counsel if counsel has any corrections or additions to make to the report. The committee believes that the answer to this question depends on how the question is phrased and presented by the court. The committee believes that the appropriate course of action is for the attorney to function, within the bounds of the law and ethics, as an advocate in the adversary system. This means that the attorney should avoid revealing information that would materially prejudice or damage the client, unless required by law or the disciplinary rules to do so. Inviting the court to order such disclosure, under the facts you present, is not in the client's best interest. If the attorney is asked directly by the court whether the client has a prior criminal record, the committee believes that the attorney must be truthful in his response and not mislead the court.

You ask whether the attorney may permissibly withdraw from the representation of the client so as to avoid the ethical dilemma presented in the preceding paragraph. Withdrawal would require leave of court which may be difficult to obtain three weeks before the sentencing hearing, especially if the attorney represented the client from the beginning. [DR:2-108\(C\)](#). Withdrawal would require a motion and notice to the client who may object. The court may also expect, on such short notice, good cause or explanation of the basis for the motion to withdraw. This puts the attorney back squarely in the ethical dilemma presented in the preceding paragraph concerning what to disclose to the court. Moreover, absent one of the specific grounds

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Committee Opinion  
June 29, 1999

enumerated in [DR:2-108](#) to support termination of the attorney-client relationship, the attorney may not withdraw if there is material prejudice to the client. [DR:2-108\(B\)\(1\)](#). The committee is of the opinion that withdrawal cannot be effectuated without prejudice to the client. Therefore, in the committee's opinion, withdrawal is not an option available to the attorney to resolve the dilemma presented in the preceding paragraph. However, the committee believes that the attorney has an obligation to explain to the client how the representation might be limited at the sentencing hearing, so as to avoid the risk of disclosing the client's criminal activity. The attorney would be required to withdraw, however, if the client were convicted of the criminal charges before the sentencing hearing, had misrepresented to the court that she had no prior convictions, and the attorney was unable to convince the client to rectify the fraud on the court. [DR:4-101\(D\)\(2\)](#); [DR:2-108\(A\)\(1\)](#).

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