Nebraska Ethics Advisory Opinion for Lawyers
No. 73-12

A LAWYER APPOINTED BY A COURT TO DEFEND AN INDIGENT PERSON ACCUSED OF A CRIME, WHETHER THE LAWYER BE A PUBLIC DEFENDER OR IN PRIVATE PRACTICE, MUST PERMIT HIS CLIENT TO TESTIFY ON HIS OWN BEHALF, IF THE CLIENT INSISTS ON DOING SO, EVEN THOUGH THE LAWYER KNOWS OR HAS REASON TO BELIEVE THAT HIS CLIENT WILL GIVE FALSE AND PERJURED TESTIMONY.

CODE PROVISIONS INTERPRETED:

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known, the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC 4-12 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when * * * necessary to perform his professional employment, when permitted by a

Disciplinary Rule or when required by law.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

. . . .

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

FACTUAL SITUATION

The inquiry comes from a deputy public defender. In his letter, he requests an opinion as to his professional rights and obligations with regard to:

"1. A client who has advised his Public Defender that he intends to commit perjury in a trial before a jury. I will add parenthetically that I have advised on several occasions against the same, explained the penalties and consequences thereof, but I am further convinced that despite any effort to dissuade the same, it will occur; and,

> "2. A client who tells his Public Defender what his story will be on the witness stand at his trial, makes no representations of its truth or veracity, but after thorough and independent investigation, the Public Defender determines that testimony would be perjurious at the trial. Again, in this situation, the client has been advised of the results of the investigation, the likelihood of the disbelief of his story by a jury, encouraged to tell the truth and that his testimony will be unresolvably in conflict to the great weight of evidence."

The inquirer states that:

> "Both situations above assume exhaustive attempts by the Public Defender to prevent perjury."

QUESTION

The question is what the defending attorney should do under the circumstances.

DISCUSSION

The first thought that occurs to an attorney in such a situation is to secure the permission of the court to withdraw and to get the court to appoint another lawyer to defend the client. If this were a situation where the lawyer had been employed by the client, it seems clear that the lawyer could, with propriety, attempt to dissuade the client from giving false and perjured testimony and to advise the client that he (the lawyer) will withdraw from the case if the client continues to insist upon his right to be sworn and testify. Even under these circumstances, the lawyer has a duty to preserve the confidences and secrets of his client pursuant to the requirements of Section 7-105 R.R.S. 1943, and he should therefor not disclose to the court his reason for withdrawing from the case unless the court insists upon such disclosure.

The inquiry here, however, pertains to court-appointed counsel, so we must now attempt to determine if a different situation prevails under these circumstances. We think it does. It should be noted that a public defender does not act per se without court appointment and that he is still in the general category of court-appointed counsel by virtue of the provisions of Section 29-1804.07 R.S.S. 1972, which, in referring to the defendant, states:

> "* * * If the court determines him to be indigent, it shall formally appoint the public defender * * *"

Again, the first thought of court-appointed counsel might be to attempt to withdraw in much the same fashion as discussed above in the case of retained counsel. Here, however, such effort, even though successful, would simply place the next court-appointed counsel in the same ethical dilemma and this could go on ad infinitum, and to this extent we agree with comments of the inquirer. We disagree, however, with his statement that "* * * advising the court or the county attorney of the possible commission of a criminal act by the accused seems to be a viable alternative," assuming that he uses "viable" in the sense of "workable."

In our opinion, the provisions of Section 7-105 R.R.S. 1943, override the provisions of the Code of Professional Responsibility set forth at the beginning of this opinion. This section of our statutes sets forth the duties of attorneys and counselors in the following language:

> "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers; (2) to counsel or maintain no other actions, proceedings or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense; (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth;

> (4) to maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client; (5) to abstain from all offensive practices and to advise no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged; (6) not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest." (emphasis supplied)

It should be noted that subsection (5) above is nearly identical to the next to the last paragraph of the recommended form of oath of admission as promulgated by the American Bar Association. The provisions of subsection (2) above would seem to be controlling in the present discussion. We accept the definition of "public offense" in Shumaker & Longsdorf's Cyclopedic Law Dictionary as including "all criminal offenses including violation of municipal ordinances."

CONCLUSION

The Committee concludes that court-appointed defense counsel must use every reasonable means to dissuade his client from taking the witness stand to give false and perjured testimony, but that he must acquiesce if the client persists in his determination to do so. We would suggest that the lawyer communicate his understanding of the facts to the court and to the county attorney as soon as possible after the defendant is sentence or discharged and that a record be made of such disclosure.