

ETHICS ADVISORY PANEL
OPINION #93-85 REQUEST #428
Issued May 5, 1994

The inquiring attorney represents a client who is an illegal alien in a matter before a state court and believes that the client's immigration status may become the subject of questioning in court. The inquiring attorney asks: 1.) whether he/she is permitted to represent the client pursuant to Rule 1.2(d); 2.) whether Rule 3.3 requires the inquiring attorney to disclose to the tribunal the client's immigration status; 3.) whether the inquiring attorney is assisting the client in committing a criminal or fraudulent act if he/she represents the client before the tribunal; and 4.) what action, if any, must the inquiring attorney take if the client fails to disclose to the tribunal or opposing counsel that he/she is an illegal alien.

With respect to the inquiring attorney's first query, the Panel opines that he/she is permitted to represent the client pursuant to Rule 1.2(d). That Rule states:

A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of law.

Under the Rule, the inquiring attorney is permitted to counsel the client as to the legal consequences of his/her conduct. The Panel believes that under these circumstances, the inquiring attorney should encourage the client to testify truthfully as to his/her immigration status and advise the client as to his/her right to invoke the Fifth Amendment privilege against self-incrimination under the state and federal constitutions.

As to the inquiring attorney's second query, Rule 3.3(a) provides as follows:

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;

Under Rule 3.3(a), "a lawyer has an affirmative duty to appraise the court of material facts if a failure to do so would assist a crime or fraud upon the court or an opposing party." Annotated Model Rules of Professional Conduct at 336 (2nd ed.1992).

In this case, the client's apparent illegal entry into the United States is a crime pursuant to 8 USC §1325. The Panel does not believe that the inquiring attorney will be assisting the client in committing a crime by failing to appraise the court of the client's immigration status. However, if the client commits perjury before the tribunal, the Panel opines that the inquiring attorney must take appropriate remedial measures as stated in the Comments to Rule 3.3(a)(4).

In response to the inquiring attorney's third query, the Panel does not believe that the inquiring attorney is assisting the client in committing a criminal or fraudulent act if he/she represents the client before the tribunal. The Panel believes that the inquiring attorney should seek to persuade the client to either testify truthfully or to invoke the Fifth Amendment privilege against self-incrimination in response to questions concerning his immigration status.

Finally as to the inquiring attorney's fourth query, the Panel believes that the inquiring attorney does not have to take any action if the client fails to disclose that he/she is an illegal alien. However, as stated above, if the client commits perjury, the inquiring attorney has an affirmative obligation to take remedial measures.