

ETHICS ADVISORY PANEL  
OPINION #94-32 REQUEST #493  
Issued June 2, 1994

The inquiring attorney was retained by a client to represent the client in an adoption of his wife's child. The attorney obtained information from the client for the Petition of Adoption which included whether or not the client had a past criminal record. Subsequent to the filing of the Petition for Adoption, the attorney learned from the client that the client had engaged in criminal behavior which could have a profound effect on the adoption.

The Family Court Investigation Unit conducted its investigation and apparently was not aware of the client's criminal record which is relevant to the adoption proceeding. Furthermore, the client is presently out on bail for a second sexual assault charge. It is apparent to the attorney that the court is unaware of the client's past criminal history. The attorney seeks guidance regarding his/her obligation of client confidentiality under Rule 1.6 and whether he/she must reveal information pursuant to Rule 3.3.

Rule 1.6 entitled "Confidentiality of Information" states that:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraph (b).

(b) A lawyer may, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 3.3 entitled "Candor Toward the Tribunal" states that:

(a) 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;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In the ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

In this situation, the investigation conducted by the Family Court Investigation Unit is incomplete or inaccurate. It is the duty of this agency not the inquiring attorney to provide a complete analysis to the court regarding a potential adoption. However, an attorney cannot offer false evidence to the tribunal. Rule 3.3.

Under Rule 1.6, the attorney may reveal such information to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial bodily harm. In this situation, if the inquiring attorney reasonably believes that the client will harm the child, then the attorney may, but is not obligated to, reveal the client's criminal record to the court. Pursuant to Rule 3.3(d), in an ex parte proceeding, the inquiring attorney "shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision."