

ORANGE COUNTY BAR ASSOCIATION
PROFESSIONALISM AND ETHICS COMMITTEE

FORMAL OPINION NO. 94-003

STATEMENT OF FACTS

A physician faces concurrent legal problems: (1) A criminal prosecution, and (2) An administrative action aimed at revoking his license to practice medicine. At a noticed hearing on the license revocation issue, the doctor and his lawyer failed to appear. When the Administrative Law Judge inquired of the deputy attorney general who was present to prosecute the matter whether he had been contacted by defense counsel, the prosecutor responded truthfully that he had heard neither from the doctor nor his lawyer concerning their non-appearance. In fact, the deputy attorney general was then aware from other sources that the doctor and his counsel were at that very hour appearing for arraignment in the criminal matter in the local Superior Court. Immediately thereafter, the doctor's default was noted and his medical license revoked.

APPLICABLE RULES

California Rules of Professional Conduct; Rule 3-310, provides in part:

"(c) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the client actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

California Rules of Professional Conduct, Rule 5-200, provides in part:

"In representing a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer or jury by any artifice or false statement of fact or law."

California Business and Professions Code, section 6068, provides in part:

"It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain such actions, proceedings, or defense only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client.

(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged."

ISSUES

I

DOES THE STATE BAR OF CALIFORNIA HAVE THE JURISDICTIONAL AUTHORITY TO DISCIPLINE AN ELECTED PROSECUTOR OR HIS OR HER DEPUTY FOR PROFESSIONAL MISCONDUCT?

II

WHAT IS THE ETHICAL OBLIGATION OF A PROSECUTOR IN A CONTESTED MATTER TO APPRISE THE COURT OF FACTUAL INFORMATION OF WHICH THAT PROSECUTOR IS AWARE AND WHICH MAY BE ADVERSE TO THE POSITION OF HIS OR HER CLIENT?

ANALYSIS

I

THE STATE BAR OF CALIFORNIA DOES MAINTAIN THE AUTHORITY AND JURISDICTION TO DISCIPLINE ELECTED PROSECUTORS AND THEIR DEPUTIES FOR PROFESSIONAL MISCONDUCT.

A minority of states have determined that neither an elected prosecutor nor his or her duly appointed deputies can be disciplined for professional misconduct while in office. (E.g., Simpson v. Alabama State Bar (1975) 294 Ala. 52.) The majority of states disagree. California is in accord with the majority. The

Supreme Court of California has concluded that public attorneys, whether elected (Price v. Superior Court (1982) 30 Cal.3d 537) or appointed (In re Bloom (1977) 19 Cal.3d 175), and their deputies may be disciplined by the State Bar for professional misconduct committed while in office.

II

A PUBLIC PROSECUTOR'S DUTY TO PURSUE AND PRESENT THE TRUTH TRANSCENDS HIS OR HER RESPONSIBILITY TO PURSUE THE INTERESTS OF HIS CLIENT, THE PEOPLE OF THE STATE OF CALIFORNIA.

California Rules of Professional Conduct, Rule 3-310, set forth in part above, clearly suggests the high degree of loyalty which any California attorney owes to a client. Nonetheless, no attorney may ethically engage in deceptive activity. "A member of the bar should not under any circumstance attempt to deceive another." (Segretti v. State Bar (1976) 15 Cal.3d 878, 888.) A public prosecutor may be held to an even higher standard in this area than private counsel.

"The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is then solemn duty of the trial judge to see that the facts material to the charge are fairly presented. [Citations omitted.] In light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not subvert our procedures in criminal trials designed to ascertain the truth." (In re Ferguson (1971) 5 Cal.3d 525, 531.)

The Supreme Court in Ferguson thereafter inferentially addressed the apparent tension between Rule 3-310 and Rule 5-200 of California Rules of Professional Conduct:

"The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (5 Cal.3d at 531, *emph. added.*)

More recently, the Supreme Court has specifically applied the requirement of Business and Professions Code section 6068 to a public prosecutor.

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (People v. Espinoza (1992) 3 Cal.4th 806, at 820, citing People v. Kelly (1977) 75 Cal.App.3d 672.)

Such language seems to resolve any debate which might arise concerning the propriety of our hypothetical deputy attorney general's conduct given its "passive" rather than "active" nature. Although no California court has specifically reviewed facts such as these, Oregon has passed judgment on a prosecutor's passive misconduct.

In In re Barnes (1978) 281 Ore 375, the Oregon Bar reprimanded a deputy district attorney for his conduct associated with the issuance of a search warrant which sought a blood sample from a criminal defendant. Although the prosecutor was aware when he drafted the affidavit in support of the warrant that a hearing was pending before an appellate court on the propriety of this request, he failed to include that information in the new affidavit. The district attorney's office took the position that, since there was no settled law on the subject, it had no duty to disclose the pendency of the appellate hearing.

Oregon's Supreme Court disagreed and sustained the Bar's reprimand of the prosecutor. In its ruling the Court commented that its concern in the matter was insuring that its state prosecutors were candid with all judges at all levels all of the time.

Such rationale is consistent with the oft stated motivation of Bar disciplinary actions in this state.

"The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity for the protection of the public, the courts, and the legal profession." (Bradpiece v. State Bar (1974) 10 Cal.3d 742, 748.)

This opinion neither addresses nor analyzes the analogous situation in which defense counsel may be queried by the court concerning matters affecting a client. Such an inquiry may give rise to an ethical conflict between counsel's duty of loyalty to the client and counsel's duty to be candid with the court, and therefore requires a careful ethical analysis prior to the formulation of an appropriate response.

CAUTIONARY NOTE

Opinions rendered by the Professionalism and Ethics Committee are given as an uncompensated service of the Orange County Bar Association. Opinions are advisory only and no liability whatsoever is assumed by the Committee or the OCBA in rendering such opinions. Opinions are relied upon at the risk of the user.

Opinions of the Committee are not binding in any manner upon any courts, the State Bar of California, the Board of Governors, any of the disciplinary committees, the OCBA or the individual members of the Committee.

In using these opinions, you should be aware subsequent judicial opinions and revised rules of professional conduct may have dealt differently with the areas covered.