The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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Opinion 99-8
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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A criminal defense attorney has a duty to notify the court of a clerical error in a defendant's sentence in a judgment entry drafted by the prosecutor's office that may result in the defendant serving a lesser sentence than ordered by the court. Whenever an attorney (prosecutor or defense attorney) knows that a judgment entry contains a clerical error that changes the plea, verdict or findings, or the sentence the attorney has a duty to notify the court. To remain silent when there is a known clerical error that changes the plea, verdict or findings, or the sentence is conduct prejudicial to the administration of justice.

A criminal defense attorney does not have an ethical duty to notify the court of a possible misinterpretation of a sentence by the Department of Rehabilitation and Correction that may result in the defendant serving less time than ordered by the court.

OPINION: This opinion presents questions as to an attorney's duty with regard to errors and misinterpretations that may result in a criminal defendant serving a lesser sentence than ordered by the court.

1. Does a criminal defense attorney have a duty to notify the court of a clerical error in a defendant's sentence in a judgment entry drafted by the prosecutor's office that may result in the defendant serving less time than ordered by the court?

2. Does a criminal defense attorney have a duty to notify the court of a possible misinterpretation of a sentence by the Department of Rehabilitation and Correction that may result in the defendant serving less time than ordered by the court?

Question 1: Clerical Errors in a Judgment Entry

Does a criminal defense attorney have a duty to notify the court of a clerical error in a defendant's sentence in a judgment entry drafted by the prosecutor's office that may result in the defendant serving a lesser sentence than ordered by the court?

A clerical error in a criminal judgment entry is a serious matter. "Clerical error" is defined as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Black's Law Dictionary* 563 (7th ed. 1999).

A criminal judgment sets forth the "plea, the verdict or findings, and the sentence" as required under Crim R. 32(C). Mistakes in drafting the plea, verdict or findings, or the sentence may result in outcomes not intended by the court. Even a minor mistake or inadvertence in drafting a criminal judgment may result in a major difference in outcome particularly when the mistake changes the sentence to be served.

The rules of criminal procedure permit clerical errors to be corrected. Under Crim R. 36 "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."

Obviously, neither the prosecutor nor the defense attorney should approve an entry that they know contains a clerical error in the plea, findings or verdict, or the sentence. Under Sup R 7(A) a judgment entry is to be filed and journalized within thirty days of the verdict, decree, or decision and if it is not prepared and presented by counsel it shall be prepared and filed by the court. Under Sup R. 7(B) "[a]pproval of a judgment entry by a counsel or party indicates that the entry correctly sets forth the verdict, decree, or decision of the court and does not waive any objection or assignment of error for appeal." Approving a judgment with a known clerical error would be tantamount to knowingly making a false statement of law or fact which is prohibited under DR 7-102(A)(5).

Ideally, clerical errors would be noticed by the prosecutor or the court and corrected immediately after a judgment entry is filed. A prosecutor as standard bearer of the truth has an obvious duty to correct known clerical errors in judgment.

But, what if the clerical error goes unnoticed for months maybe even years? For example, what if the error is discovered by the incarcerated defendant upon receipt of prison paperwork setting a release date earlier than what the judge ordered at the sentencing hearing? What if the prisoner then notifies the attorney who checks the judgment entry against the transcript of the hearing and discovers that an error was made in the judgment entry that will result in the prisoner serving a lesser sentence time?

In those situations where the clerical error goes unnoticed for months or years, what is a defense attorney's duty? Is there a duty upon a defense counsel to correct a known clerical error in the judgment when the error is favorable to the defendant? Is an attorney's duty to a client qualified by the attorney's duty as an officer of the court?

The Ohio Code of Professional Responsibility provides rules regarding an attorney's duties to a client *and* an attorney's duties as an officer of the court. As to client duties, an attorney must represent a client zealously under DR 7-101. Under DR 7-101(A)(3), an attorney shall not "[p]rejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B) [reporting fraud upon a person or tribunal]." Also, an attorney must preserve client confidences and secrets under DR 4-101. Under DR 4-101(B)(1) a lawyer shall not "[r]eveal a confidence or secret of his

client." Under DR 4-101(B)(2) a lawyer shall not "[u]se a confidence or secret of his client to the disadvantage of the client."

An attorney's duties as an officer of the court begin upon admission to the bar when an attorney swears or affirms to uphold the Oath of Office. The Oath of Office includes language referring to both "capacity as an attorney *and* officer of the Court." *See* Gov.Bar R. I §8 (A) (emphasis added). As an attorney and officer of the court, an attorney must represent a client within the bounds of the law under DR 7-102. For example, under DR 7-102(A)(3) a lawyer may not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." Under DR 7-102(A)(5) a lawyer may not "[k]nowingly make a false statement of law or fact." Under DR 7-102(A)(8) a lawyer may not "[k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule." Under DR 7-102(B) (1) and (2) an attorney has specific duties with regard to reporting fraud upon a person or a tribunal. The duty of zealous representation of DR 7-101 is tempered by the duties set forth in DR 7-102. Also, pertinent to an attorney's duties as an officer of the court is that an attorney shall not "[e]ngage in conduct prejudicial to the administration of justice" under DR 1-102(A)(5).

Ohio case law in disciplinary matters is instructive as to the proper balance between the rules governing duties to a client and the rules governing duties as an officer of the court. Thirty-five years ago, the Supreme Court of Ohio indefinitely suspended an attorney who impeded the administration of justice by telling a person to burn records he knew would be relevant to an inquiry by a federal grand jury. *Cincinnati Bar Ass'n v. Leggett*, 176 Ohio St. 281, 282 (1964). The court stated "[i]t is the duty of an attorney, an officer of the court, to aid in the administration of justice." *Id*. at 282.

In 1991, the court ordered a six months suspension of a criminal defense attorney for his inaction in failing to reveal to the court that the defendant had perpetrated a fraud on the court at the time of trial. *Disciplinary Counsel v. Heffernan*, 58 Ohio St. 3d 260 (1991). The defendant lied to the court about his identity by using his brother's identity. The attorney did not know of the fraud perpetrated on the court until after the time of trial. However, the court found that the attorney's inaction upon learning of the fraud was a violation of the rules.

> We accept the findings of the board that respondent did not know of the fraud perpetrated on the court at the time of trial in the Shaker Heights Municipal Court. However, once respondent learned of the fraud and confronted the Fresenda brothers, he had a duty to reveal the fraud to the court. See DR 7-102(B)(1). We consider respondent's inaction in this matter a serious breach of duty for which a public reprimand is not an adequate sanction.
> *Id*. at 261.

In 1995, the court, in *Disciplinary Counsel v. Greene*, 74 Ohio St. 3d 13 (1995), suspended an assistant prosecuting attorney for misrepresenting a crucial fact to the court. The court stated that the case presented "an opportunity to state a clear test that should be applied in all cases where an officer of the court intentionally misrepresents a crucial fact to the court in order to effect a desired result to benefit a party." *Id.* at 15. The court held that "when a lawyer intentionally misrepresents a crucial fact to a court in order to effect

a desired result to benefit a party, the lawyer will be suspended from the practice of law in Ohio for an appropriate period of time." *Id*. at 16, 17. The court addressed the co-existing duties of lawyers.

> It is true that the vigorous and effective representation of a client is the responsibility of all attorneys. This duty, however, does not exist in isolation from the other obligations imposed upon an attorney through our Disciplinary Rules. In addition to the commitment to a client, a lawyer's responsibilities include a devotion to the public good and to the maintenance and improvement of the administration of justice. While an attorney, as a zealous advocate, may characterize facts favorably to the attorney's client, the attorney's duty, as an officer of the court, is to uphold the legal process and demonstrate respect for the legal system by at all times being truthful with a court and refraining from knowingly making statements of fact or law that are not true. Respect for the law and our legal system, through both an attorney's words and actions, should be more than a platitude. The obligations of professional responsibility may not be overshadowed by either a desire to win a case or as a favor to any person.
> *Id.* at 16.

More recently, the court indefinitely suspended an attorney in a criminal case for making affirmative representations to the courts that were untrue and by silence allowing the court to make unwarranted inferences.'' *Cincinnati Bar Ass'n v. Nienaber*, 80 Ohio St. 3d 534, 537 (1997). The court emphasized the requirement of candor.

> We require complete candor with courts. We agree with the Supreme Court of Nebraska, which sixty years ago said, "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The [lawyer] cannot serve two masters; and the one [he has] undertaken to serve primarily is the court," *In re Integration of the Nebraska State Bar Assn*. (1937) 133 Neb. 283, 289, 275 N.W. 265, 268.
> *Id.* at 537.

These cases do not address clerical errors in judgments. An attorney's duty with regard to reporting clerical errors in judgments to the court has not been ruled upon or advised upon in Ohio. Yet, these cases persuade the Board that the proper interpretation of the Ohio Code of Professional Responsibility is that the duties of an attorney as an officer of the court are absolute, they co-exist with and may at times override other duties.

In so expressing this view that the duties of an attorney as an officer of the court may override other duties, the Board acknowledges that advisory committees in other states have expressed different views in their consideration of related issues.

> Virginia State Bar, LEO 1400 advises that "defense counsel is not under any affirmative obligation to reveal that the court document erroneously stated that the client had been sentenced for a misdemeanor rather than a

> felony, unless the client requested that he inform the court of the error. Under DR 7-101(A)(3), it would be unethical for an attorney to reveal information that would prejudice or damage his client."
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> State Bar of Michigan, Op. RI-165 advises that "[a] lawyer has no duty to inform the prosecutor's office of its failure to initiate criminal charges against the lawyer's client, even though the initiation of the charges was part of a negotiated plea agreement between the lawyer and the prosecuting attorney."
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> State Bar of New Mexico, Op. 1990-2 advises that "the attorney has no duty to notify the court that the case has 'fallen through the cracks.'" (The attorney had received no notice of a sentencing hearing for his client who had either pled guilty or been tried and found guilty).

Nevertheless, this Board's view is that whenever an attorney (prosecutor or defense attorney) knows that a judgment entry contains a clerical error that changes the plea, verdict or findings, or the sentence the attorney has a duty to notify the court. A clerical error is not a confidence or secret of a client that must be protected. Revealing a clerical error is not damaging or prejudicial to a client even though the clerical error is favorable to the client, for it is not damaging or prejudicial to a client to serve the actual sentence that the court imposed at the sentencing hearing.

In conclusion, the Board advises that a criminal defense attorney has a duty to notify the court of a clerical error in a defendant's sentence in a judgment entry drafted by the prosecutor's office that may result in the defendant serving a lesser sentence than ordered by the court. Whenever an attorney (prosecutor or defense attorney) knows that a judgment entry contains a clerical error that changes the plea, verdict or findings, or the sentence the attorney has a duty to notify the court. To remain silent when there is a known clerical error that changes the plea, verdict or findings, or the sentence is conduct prejudicial to the administration of justice.

Question 2: Misinterpretation of a court's order by the Department of Rehabilitation and Correction.

> Does a criminal defense attorney have a duty to notify the court of a possible misinterpretation of a sentence by the Department of Rehabilitation and Correction that may result in the defendant serving less time than ordered by the court?

It is the Board's view that a criminal defense attorney does not have an ethical duty to notify the court of a possible misinterpretation of a sentence by the Department of Rehabilitation and Correction that may result in the defendant serving less time than ordered by the court. First, a defense attorney is not required to oversee the decisions of an administrative agency such as the Department of Rehabilitation and Correction. Second, a defense attorney is not required to second guess whether a sentence is being misinterpreted by the Department of Rehabilitation and Correction, for there could be a multitude of statutory and administrative factors that contribute to the decisions of the Department of Rehabilitation and Correction.

In general

Attorneys should be aware that there are legal implications to consider with regard to a client's erroneous release from serving a sentence. Those issues are beyond the scope of this opinion. For a discussion of the legal issues see Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, Cath U. Law Rev. 403 (1996). *See also, e.g., Jefferson v. Morris, Superintendent, Southern Ohio Correctional Facility*, 48 Ohio App. 3d 81 (1988); *Jefferson v. Ohio Adult Parole Authority*, 86 Ohio St. 3d 304 (1999).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.