

## **A lawyer's duty to correct a court's administrative error absent the client's informed consent**

**Summary:** The caller represented a criminal defendant in presenting a post-sentencing motion based on two contentions. The first issue was whether the client was entitled to credit for the time they spent in custody prior to trial. The second contention dealt with whether the client was entitled to a reduced sentence. Upon searching the sentencing records, the caller determined that the client was entitled to a credit for the time they spent in custody before trial, but also that the sentencing record did not provide any support for otherwise reducing the client's sentence. Subsequently, the lawyer submitted a motion advancing the meritorious claim of pre-trial credit and expressly stated that no argument was being made or advanced as to the client's contention that the client was otherwise entitled to a reduced sentence. At some point after the matter concluded, the caller was made aware that due to an administrative error the client's sentence had been reduced by an amount that exceeded the time they spent in custody before trial. The caller contacted the client and explained that there had been an error and attempted to secure the informed consent of the client to alert the court to the error. The client refused. This scenario raises questions about whether a lawyer has an obligation to correct the administrative error without the client's consent to do so and how the duties of confidentiality and candor inform that analysis.

**Question:** Does the caller have an obligation to correct the error with the court in the absence of their client's informed consent?

### **Discussion:**

A lawyer analyzing this scenario may consider starting the analysis with Illinois Rules of Professional Conduct 1.6, (Confidentiality of Information), and Rule 3.3, (Candor Toward the Tribunal).

#### **Rule 1.6-Confidentiality of Information**

Rule 1.6 of the Illinois Rules of Professional Conduct generally requires lawyers to keep all information relating to representation of a client confidential unless an exception applies. Some exceptions, discussed in section (b) of Rule 1.6, permit lawyers to reveal otherwise confidential information under limited circumstances. Section (c) of Rule 1.6, which does not apply here, requires a lawyer to reveal information "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

Having failed to obtain informed consent, a lawyer must determine whether one of the exceptions listed in Rule 1.6(b) applies.

The facts most closely support an analysis of exceptions included in Rule 1.6(b)(1) and Rule 1.6(b)(2). Under these paragraphs a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to

prevent the client from committing a crime in circumstances other than those specified in paragraph (c); and

to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

The substantive question of whether the client exploiting the sentencing error amount to crime or fraud is beyond the scope of this article. But if the caller reasonably believed that either of these paragraphs applied to these facts, then the Rule could permit the caller, in their discretion, to disclose the error absent the client's informed consent. However, there are some important additional considerations for an attorney in this situation to consider.

Comment [16] to Rule 1.6 provides some guidance as to how that information is to be disclosed. Specifically, a lawyer should:

1. Disclose the information only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish the purpose for which it is being disclosed;
2. If the disclosure is adverse to the client's interests, the disclosure should be no greater than the lawyer reasonably believes necessary to accomplish the purpose; and
3. If the disclosure is made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Comment [17] to Rule 1.6 states that even if disclosure may not be authorized pursuant to Rule 1.6(b), other Rules (including Rule 3.3) may require disclosure. This leads to the next stage of analysis for the lawyer. Does Rule 3.3 require the caller to disclose the error?

### **Rule 3.3-Candor Toward the Tribunal**

The analysis starts with determining whether the facts implicate any obligations pursuant to Rule 3.3(a), which prohibits lawyers from knowingly making a false statement of fact or law to a tribunal, failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or offering evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

In the situation described by the caller, it is clear that neither the lawyer nor the client made a false statement to a tribunal or offered false evidence: the incorrect information that resulted in the reduction of the client's sentence was the result of an administrative error. As such, there appears to be no requirement that the lawyer take any corrective action.

Pursuant to Rule 3.3(c), the duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. Comment [13] states, “[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.” In the situation described by the caller, their involvement in the case appears to have ended when the motion was allowed and no appeal was taken from that order.

**Note:** The substantive question of whether the client exploiting the sentencing error amounts to a crime or fraud is beyond the scope of this article, although there are cases that reference the doctrine of “mistaken liberty” or “credit for time at liberty,” which suggest that a defendant who is released due to government error is not responsible for that error unless they actively misled authorities or escaped custody. See, e.g., *Dunne v. Keohane*, 14 F. 3d 335 (7<sup>th</sup> Cir., 1994)