

Opinion 499
February 1994
Tex. Comm. on Professional Ethics, Op. 499, V. 58 Tex. B.J. 178 (1995)

PEC No. 92-19

QUESTION PRESENTED

Is it a violation of the Code of Professional Responsibility for an in-house lawyer for a government agency to knowingly misrepresent to an opposing attorney and an administrative law judge that a factual basis for jurisdiction of an administrative proceeding initiated by the agency does exist?

FACTS

A government agency initiates an administrative proceedings against respondent. Respondent's attorney raises an affirmative defense that the proceeding was not commenced in accordance with law and regulation and requests the in-house attorney for the agency to provide a delegation of authority to show that the proceeding was commenced by an agency representative with authority to do so.

The government agency refused to provide a delegation of authority but through a supervising attorney directs its in-house attorney to represent to the respondent and the administrative law judge that jurisdiction exists. Based upon that representation, the administrative law judge denies respondent's motion to dismiss for want of jurisdiction. After hearing, a decision favorable to the government agency is made by the administrative law judge.

No delegation of authority relevant to the administrative proceeding in question had been issued. The supervising attorney knew, or reasonably could have known, that no delegation of authority existed when he directed the in-house attorney to represent that a factual basis for jurisdiction existed.

Later, the respondent's attorney learns that a delegation of authority did not exist. An employee of the same government agency then issues a delegation of authority, retroactively effective for the preceding five and one half years.

The inquiry to the Professional Ethics Committee states that without a delegation of authority there would have been no basis for jurisdiction by the administrative law judge. The Committee makes no determination of the validity of that statement but assumes it to be correct, both the in-house attorney and the supervising attorney are licensed in Texas.

QUESTIONS

1. Does an in-house attorney for a government agency violate any Disciplinary Rule if he represents to an opposing attorney and an administrative law judge that a factual basis for jurisdiction exists when he knows it does not?
2. Does a supervising attorney violate any Disciplinary Rule if he directs a subordinate attorney to represent to an opposing attorney and an administrative law judge that a factual basis for jurisdiction exists when he knows it does not?
3. Does an in-house attorney for a government agency violate any Disciplinary Rule by representing to an opposing attorney and an administrative law judge that a factual basis for jurisdiction exists unless he has a reasonable belief that jurisdiction does exist?

DISCUSSION

An attorney's representation to the administrative law judge that a factual basis for jurisdiction existed if the attorney knew that it did not exist is a violation of DR 3.01 and DR 3.03.

DR 3.03 provides: "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act. . . ."

DR 3.01 provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

If the in-house attorney for the government agency did not know that a delegation of authority existed, he should have had a reasonable basis for believing that one existed before representing to the judge that a basis for jurisdiction existed. If he had no reasonable basis for believing that a delegation of authority existed, he violated DR 3.01.

Additionally, if he knew no factual basis for jurisdiction existed, the lawyer for the government agency violated DR 4.01 by representing to his opposing attorney that jurisdiction existed. DR 4.01 provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person, or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetuated by a client.

If the supervising attorney for the in-house lawyer for the government agency knew that no basis for jurisdiction existed and directed the in-house lawyer to represent to his opposing attorney and the administrative law judge that jurisdiction existed, the supervising attorney violated DR 5.01, which provides: "A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if: (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved" (b) The lawyer . . . has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation."

If the in-house attorney for the government agency did not know the misrepresentation was false when made but later discovered that his statement was untrue, he has a duty to make reasonable efforts to persuade his client (the government agency) to take corrective action. DR 1.02(e). His failure to do so would violate that Rule. Likewise, the supervising attorney has the same duty if he did not know the representation was false when made but later learned it to be untrue.

CONCLUSION

Disciplinary Rules 3.01, 3.03 and 4.01 would be violated if the in-house attorney knew that no factual basis for jurisdiction existed at the time he represented to the opposing attorney and the administrative law judge that jurisdiction existed.

DR 3.01 would be violated if the in-house attorney did not have a reasonable basis for

believing that jurisdiction existed when he represented that it did.

Rule 5.01 would be violated if the supervising attorney ordered, encouraged, or knowingly permitted the in-house attorney to make false statements to the opposing attorney or the administrative law judge or if he failed to take reasonable remedial action to avoid or mitigate the consequences of the in-house lawyer's violation.

Rule 1.02 would be violated if the in-house lawyer failed to take reasonable efforts to persuade his client (the government agency) to take corrective action if he reasonably believed at the time he made them that his statements to the opposing attorney and the administrative law judge were true but later learned that they were not true.