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Ethics Advisory Opinions

Ethics Advisory Opinion 97-14

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

Client C and her boyfriend B were in an automobile that collided with a car driven by P in a private parking lot. Insurance Company insured both automobiles. C settled a bodily injury and property damage claim with Insurance Company under P's liability policy. P then sued C, alleging among other claims that C was driving at an excessive rate of speed when the accident occurred.

Lawyer L was hired by Insurance Company to defend C in the action brought by P. At trial, C testified that she was not speeding. L also called B as a witness, who testified that he was riding in the passenger seat and that C was not speeding. C prevailed at trial upon a jury finding that P was 55% at fault for the accident.

After the trial had ended, while B was helping L load exhibits into L's car, B told L that B had actually been driving the car when the accident occurred. B did not have a valid driver's license and had switched seats with C after the accident. As a result of B's admission following the trial, L is now aware that both B and C committed perjury and believes that C's earlier settlement of claims may have been a fraud on Insurance Company. Both the earlier settlement of C's claims and the dismissal of a traffic ticket received by C in connection with the accident were handled by a lawyer other than L.

At the time of B's disclosure to L, the period for appeal had not expired.

Questions:

- 1) Does L have a duty to encourage C to reveal her perjury and possible fraud?
- 2) Does it matter that L learned of the perjury from a person other than the client?
- 3) Does L have a duty to inform the court of the perjury?
- 4) Does L have a duty to inform Insurance Company that B was the driver?

5) Does L have a duty to report the information to any other authority, such as law enforcement?

Summary:

L has a duty to inquire with C about B's statement that B and C testified falsely. If L is satisfied that false testimony has been offered, L should inform the tribunal. L's duties are unaffected by the fact that L learned of the perjury from a third party. L's duty to rectify the perjury continues "until the conclusion of the proceeding," a term not defined by the Rules of Professional Conduct or the comments. Several authorities have held that the conclusion of the proceeding extends until the conclusion of any appeal. The Committee does not express an opinion on whether L has a duty to inform Insurance Company, but it appears likely that Insurance Company will learn of the perjury when L informs the court. L has an ethical obligation not to inform any other authority, such as law enforcement.

Opinion:

Rule 1.6 provides that a lawyer has an ethical duty of confidentiality as to "Information relating to representation of a client," subject to certain exceptions. Model Rule 3.3, which deals with a lawyer's duty of candor to a tribunal, creates a special exception to Rule 1.6 when perjury occurs before a tribunal. Rule 3.3(a)(4) states:

A lawyer shall not knowingly . . .

(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.

In some cases a lawyer may not have sufficient "knowledge" of perjury to take action under this rule. See *State v. Jones*, 923 P.2d 560 (Mont. 1996) (defendant's Sixth Amendment rights violated when lawyer moved to withdraw on unsubstantiated belief that defendant intended to commit perjury). In this case B's admission to L that B and C committed perjury under circumstances in which B has no reason to lie is sufficient knowledge to trigger L's obligations under the rule. The fact that L learned of the false testimony from B rather than C does not diminish L's duty under the rule because the rule does not require the lawyer to learn of the perjury from the client.

L has a duty to inquire with C and B's statement that B and C testified falsely. If L is satisfied that false testimony has been offered, the comments to Model Rule 3.3 state that a lawyer's first duty under the rule is to try to persuade the client to rectify the perjury, but that if this fails, the lawyer should inform the court:

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. Since the jury has already returned a verdict for C, withdrawal will not remedy the situation, so L's only course of action if C refuses to inform the court is for L to do so.

Model Rule 3.3(b) places a time limit on the lawyer's duty to disclose perjury: "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." The rule and comments do not define what is meant by the "conclusion of the proceeding," but several authorities indicate the duty continues until the expiration of any period for

appeal: The "conclusion" of a proceeding for purposes of Rule 3.3(b) should be the point where the time to appeal has normally expired, or the point of affirmance if there has been an appeal. It would be equally plausible to extend the duty up to any specific time limit in the applicable rules for relief from judgment, where the ground for relief is the very fraud in question. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* Sec. 3.3:301 at 616 (2d ed. 1994).

The American Law Institute's proposed Restatement of the Law of Lawyering adopts a similar view: Responsibilities of a lawyer under this Section extend to the end of the proceeding in which the question of false evidence arises. Thus, a lawyer representing a client on appeal from a verdict in a trial continues to carry responsibilities with respect to false evidence offered at trial, particularly evidence discovered to be false after trial.

Section 180, comm.h (Tent.Draft #8, March 21, 1997).

The relationship and duties between defense counsel, insurer, and insured is not clearly covered by the Rules of Professional Conduct and is a topic of considerable current debate in the profession. Further, L's duties depend on the nature of L's engagement. See ABA Formal Opinion 96-403 (by agreement defense counsel may represent only insured or both insurer and insured). Accordingly, the Committee expresses no opinion on whether L has a duty to inform Insurance Company of the perjury by B and C. It appears likely, however, that Insurance will learn of the perjury when the matter is brought to the attention of the court.

L's duty to inform the tribunal under Model Rule 3.3(a)(4) is a specific exception to L's duty of confidentiality set forth in Rule 1.6. The Rules of Professional Conduct do not require a lawyer to inform law enforcement of perjury committed by a client. Accordingly, L's duty of confidentiality to C controls, and L may not inform law enforcement of C's perjury.

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