

ADVISORY ETHICS OPINION 89-06

SYNOPSIS:

A prosecutor must disclose facts discovered for the first time after conviction which indicate that the trial testimony of the State's expert witness may have been incorrect on an issue material to an essential element of the State's case.

FACTS:

A state prosecutor requests our opinion regarding the State's duty to disclose information to a defendant post-trial. The context for the request involves the post-trial discovery by the prosecutor that testimony given by an expert witness called by the State pertaining to an essential element of the crime charged against the defendant was technically incorrect. The expert gave an affirmative answer thereby establishing one of the essential elements of the crime charged when, technically, a negative answer to the narrow question posed by the prosecutor would have been correct. The expert's response was given in good faith under a then-existing belief in its accuracy. Moreover, had the expert given a technically accurate negative answer and had the expert been asked to fully explain the answer given, the explanation would undoubtedly have established the essential element.

DISCUSSION:

Under these circumstances, does the state prosecutor have an affirmative duty to disclose the fact that the expert's response was technically incorrect? In our opinion the answer is "yes". DR 7-103(B) requires that a public prosecutor disclose to a defendant the existence of "evidence" that tends to negate the guilt of the accused. Here, the "evidence" is the fact of an inaccurate answer that established an essential element of the prosecution's case. In a narrow view, an accurate yes/no response to the prosecutor's question at trial regarding an essential element of the crime would have negated it. Whether the defendant can now complain, having failed to cross-examine the expert on this point, and whether the inaccuracy may be harmless beyond a reasonable doubt, as would appear from the facts provided, are questions of law for the court to decide, if raised by the defendant. In our opinion, the prosecutor must inform the defendant of the State's discovery if, under any view of the evidence, an accurate reply to the prosecutor's question could be deemed to negate the guilt of the accused. Guilt in a criminal case is highly technical and depends in its narrowest sense on a determination beyond a reasonable doubt that the defendant committed acts establishing each of the essential elements of the offense charged. If the State fails to establish a technical element, the defendant must be acquitted as a matter of law. Here, without the incorrect response of the State's expert witness, an essential element of the State's case arguably would have been missing.

EC 7-26 states, in part, that "the law and the disciplinary rules prohibit the use of . . . false . . . testimony . . . A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline." Here, the prosecutor clearly did not knowingly participate in the introduction of false testimony; however, it is our view that the disclosure requirement of the Rule extends to the disclosure of even inadvertently false testimony, if the falsity is facially material to an essential element of the offense. Here, it is.

The prosecutor's duty to disclose is a continuing one and applies to facts that come to the prosecutor's attention after conviction.¹ Thus, where facts learned post-trial could arguably negate the trial proof of an essential element, even though that gap in proof could easily have been corrected by the prosecutor at trial, the prosecutor has a duty to disclose the new-learned facts for whatever value they may have at that point to the defendant.

We should note that on the facts presented here it would appear that the inaccuracy may well be harmless beyond a reasonable doubt, and in any event, in the absence of intentional perjury it is not clear that the defendant has any legal basis to raise the fact of the misstatement in a post-trial proceeding. These are legal questions, however, and are best left to the parties to address once full facts are known.

¹ See *Imbler v. Pachtman*, 424 U.S. 409, 427, n.25 (1976).