

# ADVISORY ETHICS OPINION 95-07

## SYNOPSIS:

Where a client knowingly testifies falsely regarding a material matter and where the case remains pending before the court for decision when the client's attorney learns that the client testified falsely, the attorney has a duty to call upon the client to reveal the false testimony to the court prior to the court's decision, and if the client refuses, the attorney must make the disclosure.

## FACTS:

An attorney represents a client in a matter in which one issue is custody of the client's children. In the course of the client's testimony at hearing, the client falsely testifies regarding some personal background facts pertaining to the client's current and recent past living arrangements and relationships. At the time the testimony was given, the attorney does not realize the testimony is false. The attorney does, however, regard the testimony given by the client as material to the court's ultimate decision regarding custody of the client's child.

Shortly after the testimony was given, the lawyer learns through a third-party source, not in the presence of the client, that the client's testimony on the point was knowingly false. The lawyer has confronted his client with the information and the client has acknowledged that the testimony given was false, but the client does not consent to disclosing the information to the court. The court has not yet rendered decision on the matter and, in fact, another hearing has been scheduled.

The lawyer seeks our advice as to whether he is obliged to disclose the false testimony to the court or is bound by his duty of loyalty to the client not to disclose.

## DISCUSSION:

The relevant disciplinary rules are DR 7-102(A)(3), (4), (6), (7), (8) and (B)(1) provide as follows:

DR 7-102(A)(3), (4), (6), (7), (8) and (B)(1) provide as follows:

- (A) In his representation of a client, a lawyer shall not:
  - (3) Conceal or knowingly fail to disclose that he is required by law to reveal.
  - (4) Knowingly use perjured testimony or false evidence.
  - (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
  - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
  - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
- (B) A lawyer who receives information clearly establishing that:
  - (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

The first issue is whether the lawyer's failure to disclose the false testimony of his client prior to the issuance of the Court's decision would constitute the "use" of perjured testimony or false evidence within the meaning of DR 7-102(A)(4). This committee concludes that it would. In our view, the client's effort to deceive the Court has not yet been completed. In essence, the fraud continues until such time as it is disclosed to the Court or the Court renders a decision, whichever comes first. By failing to disclose the information to the Court prior to its decision, the attorney would be "using" false testimony in the representation of his client.

Similarly, the exception afforded by DR 7-102(B)(1) is not available on these facts. DR 7-102(B)(1) applies to the situation where a fraud has been perpetrated and not to the situation where a fraud is in progress. Thus, the fact that some measure of the lawyer's knowledge of the false testimony was obtained by means of a privilege communication does not alter the lawyer's obligations under DR 7-102(A)(4).

Finally, disclosure is not barred by DR 4-101 which provides at DR 4-101(C)(2) that a lawyer may reveal confidences or secrets when permitted under the Disciplinary Rules.

**CONCLUSION:**

As a result of this analysis we conclude that the lawyer should call upon his client to disclose the falsity of his or her testimony to the Court. In the absence of his client's willingness to do so, the lawyer has an affirmative obligation to make the disclosure prior to the issuance of the Court's decision. The Oath states, in pertinent part, that an attorney shall "do no falsehood, nor consent that any be done in Court, and if you know of any, you will give knowledge thereof to the judges of the Court . . . ."<sup>1</sup>

We note that by resolving the issues before us on the foregoing bases, we have not been required to reach the much thornier issues presented where the lawyer's knowledge of the fraud is obtained from a third-party and confirmed by means of a privileged communication between attorney and client after the fraud has been perpetrated.<sup>2</sup>

---

<sup>1</sup> See §12 of the Rules of Admission to the Bar of the Supreme Court at p. 268 of the 1994 Supplement to the Supreme Court Administrative Orders and Rules for full text of the oath.

<sup>2</sup> See ABA Formal Opinion 341 (9-30-75).