Ethics Opinion No. 83-3

Whether the Disciplinary Rules Require an Attorney to Inform (1) the Court of a Former Client's Perjury, and (2) the Current Client's Attorney of the Perjury And, Further when Such Disclosure Should Be Made.

In this case, attorney A was requested by defendant D to represent him in a criminal proceeding. During the course of the initial client interview, D informed attorney A that D had an extensive prior criminal record involving both felonies and misdemeanors, and that on previous occasions D had used a number of different aliases and false identities. D then stated his intention to commit perjury at an upcoming bail hearing, which perjury concerned both D's real identity and his prior criminal record. Attorney A informed D that attorney A could not and would not support D in his proposed actions, and further informed D that if his intention was to carry out the proposed perjury at the upcoming bail hearing that attorney A would not be able to represent D. On that basis, the interview was ended.

Subsequently, attorney A attended the bail hearing in question, but not as D's attorney. The attendance at the bail hearing was coincidental, as attorney A was appearing for a different client in an unrelated proceeding that was following the bail hearing in the same courtroom. D at this point was being represented by attorney B. Attorney A's contact with attorney B prior to the bail hearing was limited to introducing D to the attorney B, and informing attorney B of the names and addresses of relatives of D who might be willing to testify on D's behalf. During the bail hearing, it became obvious to the attorney A that D was committing the perjury that he had described to attorney A in the initial client interview, and that attorney B was totally unaware of the perjury.

Attorney A, having become aware that D perpetrated a fraud upon the court, and that attorney B had no knowledge of the perjury, has inquired of the Committee whether or not the disciplinary rules require attorney A to inform the court or attorney B of the perjury, when such disclosure should be made, and whether attorney A may inform attorney B of the perjury if there is no requirement to do so.

Such disclosure should be made in the manner set forth in this opinion.

DR 7-102(B) provides:

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 tribunal and may reveal the fraud to the affected person.

> (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

It is the opinion of the Ethics Committee that under authority of DR 7-102(B), DR 4-101(C), and Alaska Evidence Rule 503 (d)(1), attorney A is obligated to inform the Court of the perjury if D is unwilling to immediately correct the fraud on the Court which (1) has occurred, (2) is continuing, and/or (3) which may again occur in the future. The fraud must be corrected or prevented, regardless of whether it took place in the past, is taking place in the present, or will take place in the future.

Attorney A should immediately advise attorney B of all of the facts and inform D, through attorney B, that D must immediately correct the fraud or attorney A will be obligated to advise the Court himself. The Committee suggests that attorney A set a specific time by which the fraud must be divulged. What date is selected depends upon the specific facts. However, the rules provide that the fraud must be corrected promptly. If D has not corrected his perjured testimony and misrepresentations by the date set, then the Committee believes that attorney A must inform the Court immediately.

In analyzing this problem the Committee has concluded that DR 7-102(B)(1) and (2) is intended to be all encompassing. This interpretation furthers the goals of the subsection which is to prevent fraud upon a tribunal in the situation where an attorney is aware of the fraud.

The Committee believes that the procedure outlined in DR 7-102(B)(1) is the better course to follow since it allows D an opportunity to rectify the fraud himself, thus minimizing the negative impact upon him and his case before the tribunal.

Guidance in this situation is also found in Alaska Evidence Rule 503(d)(1) which provides as follows:

> There is no privilege under this rule . . . if the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; . . .

Further, DR 4-101(C) provides that:

> A lawyer may reveal: . . .
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

There is no privilege in this situation and attorney A must promptly correct the fraud which has been perpetrated on the Court.

Approved by the Board of Governors on August 27, 1983.