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FORMAL OPINION NO. 386

ATTORNEY AND CLIENT - DISCLOSURE
OF CLIENT PERJURY.

Where an attorney has learned that a former client in a continuing case may have committed perjury, he need not call upon the client to rectify it, and he may not disclose it to the client's present counsel, the court, opposing counsel or the State Bar. The client's present attorney should call upon the client to rectify it, but may not disclose it to the court or opposing counsel.

AUTHORITIES CITED:

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California Rules of Professional Conduct No. 7-105
L.A. County Opinions Nos. 264, 267, 271, 274, 305
California Business & Professions Code § 6068 (West 1974)
California Evidence Code § 956 (West 1974)
Hinds v. State Bar, 19 Cal.2d 87 (1943)
Abbott v. Superior Court, 78 Cal.App.2d 19 (1947)
People v. Singh, 123 Cal.App. 365 (1932)
ABA Code of Professional Responsibility,
DR 4-101; DR 7-102; DR 7-105
ABA Canons of Professional Ethics No. 29
ABA Opinions Nos. 23, 202, 216, 268, 287
Oregon Opinion No. 289
M. Friedman, Professional Responsibility of the Criminal Defense
Lawyer: The Three Hardest Questions, 64 Mich. L. Rev.
1469 (1966).

1 The Committee's opinion has been asked in relation to
2 the following facts. Attorney Y substituted in to represent
3 Client C in place of Attorney X in contested litigation. At a
4 later date, X substituted back in to represent C in place of Y.
5 After X substituted back in as C's attorney, Y was approached by
6 a third person, D, who advised him that C had committed perjury
7 in the case and produced documentary evidence to substantiate
8 this allegation. Y examined the purported documentary evidence
9 of perjury, and concluded that the evidence established that C
10 had made serious misrepresentations under oath to the Court. It
11 appeared that the alleged misrepresentations were made while X
12 represented C, X had been advised of this by Z, another
13 of Client C's attorneys, and that X had chosen to disregard Z's
14 unequivocal advice that C had committed perjury. Y did not
15 receive the documentary evidence of perjury from a confidential
16 source or during the period of time when he represented C.

17 In connection with the foregoing facts, the Committee
18 has been asked the following questions.

- 19 1. Should Y call upon either X or C to rectify the
20 alleged perjury?
- 21 2. If Y calls upon X and C to rectify the
22 alleged perjury, and both of them refuse
23 to rectify the alleged perjury, should Y
24 (a) Reveal the alleged perjury to opposing
25 counsel in the litigation?
26 (b) Reveal the alleged perjury to the Court?
27 (c) Report X's conduct to the State Bar?

28

- 1 3. Should X call upon C to rectify the alleged
2 perjury?
- 3 4. Should X have called upon C to rectify the alleged
4 perjury at the time that Z advised him of the
5 alleged perjury?
- 6 5. If X calls upon C to rectify the alleged perjury,
7 and C refuses, should X
- 8 (a) Reveal the alleged perjury to opposing
9 counsel in the contested litigation?
- 10 (b) Reveal the alleged perjury to the Court?

11 Although the facts presented do not make it clear, it
12 is assumed in this Opinion that the questions presented are in
13 the context of a civil action, and not in a criminal prosecution.
14 The problems presented by these questions are not without diffi-
15 culty, and present a situation where different interests conflict.

16 It should be made clear at the outset that the facts
17 as stated do not show that Y knows with certainty that C has
18 committed perjury: They only show that he has made serious
19 misrepresentations to the Court, which D has alleged to be
20 perjury. Y's unwillingness to conclude that C in fact has
21 committed perjury is well founded: It is an unusual case where
22 documentary evidence is so persuasive that an attorney should
23 believe it instead of the oral testimony of his client or former
24 client. Y has no duty to investigate whether C has committed
25 perjury.

26 If the information is a client secret, it is subject
27 to California Business and Professions Code § 6068(e), which
28 provides:

1 "It is the duty of an attorney:

2 . . .

3 (e) to maintain inviolate the confidences, and at
4 every peril to himself to preserve the secrets,
5 of his client."

6 Although "confidence" and "secret" are not defined in the statute,
7 they are defined in the analogous provisions of the ABA Code of
8 Professional Responsibility DR 4-101(A), which provides:

9 "'Confidence' refers to information protected by the
10 attorney-client privilege under applicable law, and
11 'secret' refers to other information gained in the
12 professional relationship that the client has requested
13 be held inviolate or the disclosure of which would be
14 embarrassing or would be likely to be detrimental to
15 the client."

16 Section 6068(e) has been rigidly adhered to by California
17 courts, and its command has been given liberal application. See
18 L.A. County Opinion No. 274; People v. Singh, 123 Cal.App. 365
19 (1932). The rule applies even where the facts are already part
20 of the public record or where there are other sources of informa-
21 tion. L.A. County Opinion No. 267.

22 Since disclosure of alleged perjury would clearly be
23 embarrassing to the client, this Committee believes that the
24 information presented to Y is the secret of a former client, and
25 may not be disclosed. See ABA Opinion 23, which held that an
26 attorney should not disclose a fugitive client's hiding place to
27 prosecuting authorities when he learns it from information given
28 to him by his client's relatives.

1 This Committee holds that Y must respect the secret
2 of C, and may not communicate it to X.

3 Competing with the obligation to protect client confi-
4 dences and secrets is an attorney's obligation to rectify any
5 fraud or deception which has been imposed upon the Court or a
6 party. Bus. & Prof. Code § 6068(d); L.A. County Opinion No.
7 271; Hinds v. State Bar, 19 Cal.2d 87, 93 (1943) (dictum).

8 Because the attorney-client relationship with C has
9 ended, Y has no duty to call upon C to rectify the alleged
10 perjury. Even the ABA standard in DR 7-102(B), which has not
11 been adopted in California, only requires disclosure of fraud
12 committed "in the course of the representation." Y may call
13 upon C. however, without violating the confidential communi-
14 cation rule.

15 No case has been discovered that has authorized (let
16 alone required) the disclosure of client perjury to opposing
17 counsel under any ethical rules. See Hinds v. State Bar,
18 19 Cal.2d 87 (1943), condemning disclosure of a wife's perjury
19 to her husband in a divorce action. Thus, neither X nor Y
20 should disclose D's information to opposing counsel.

21 Y may not contact the State Bar to institute disci-
22 plinary action against X, because to do so would necessarily
23 involve a disclosure of C's secrets. ABA Formal Opinion 202.

24 X's duties to C are different from Y's, since X is
25 continuing as C's attorney of record. If X believes that C has
26 committed perjury, he should call upon C to rectify it. Both
27 § 6068(d) and California Rule 7-105 require that an attorney
28 "employ only such means as are consistent with truth."

1 Unlike Y, X is subject to the conflicting duties of
2 loyalty to his client and the prevention of fraud on a court.
3 The ABA Code of Professional Responsibility authorizes a lawyer
4 to reveal the intention of his client to commit a crime, DR
5 4-101(C)(3), or the perpetration of a fraud upon a person or a
6 court, DR 7-102(B)(1). Although there is no such provision in
7 California statute or the Rules of Professional Conduct, an
8 exception for the intention to commit a crime has been estab-
9 lished by California case law. Abbott v. Superior Court, 78
10 Cal.App.2d 19, 21 (1947). Similarly, Evidence Code § 956
11 provides the following exception to the attorney-client
12 privilege:

13 "There is no privilege under this article if the
14 services of the lawyer were sought or obtained to
15 enable or aid anyone to commit or plan to commit a
16 crime or a fraud."

17 The California exception for a present or future crime
18 is severely limited. Evidence Code § 956 is limited to the
19 narrow circumstance where the attorney is hired for the specific
20 purpose of facilitating the commission of the future crime or
21 fraud. Furthermore, the exception to the § 6068(e) prohibition
22 on disclosure of confidences and secrets does not authorize an
23 attorney to disclose the intention of his client to commit
24 future crimes if he receives such information in confidence in
25 connection with the confession of past crime. Singh, supra.

26 A final limitation on the disclosure of a future crime
27 is that such disclosure is authorized only if it is needed to
28 prevent immediate and serious injury. L.A. County Opinion

1 No. 264; L.A. County Opinion No. 274. There is no "misprision
2 of a felony" statute in California.

3 Even if the alleged perjury here at issue is viewed as
4 a continuing crime, this Committee is of the view that it must
5 not be disclosed by X under the crime or fraud exception. Such
6 disclosure would necessarily also involve the disclosure of the
7 past perjury, which should not be disclosed by a lawyer. See
8 L.A. County Opinion No. 264.

9 The exception to the requirement to preserve client
10 confidences and secrets in the case of an announced intention of
11 a client to commit a crime does not extend in California to the
12 prevention of an intended civil fraud, as opposed to an actual
13 criminal act. An attorney cannot voluntarily extend the scope
14 of the future crime exception to § 6068(e) in the absence of a
15 court decision that it is subject to an exception allowing an
16 attorney to make disclosures to prevent intended civil fraud.
17 L.A. County Opinion No. 264.

18 Although it appears that California has never adopted
19 a rule similar to DR 7-102(B), or its predecessor, Canon 29 of
20 the Canons of Ethics of the American Bar Association, in L.A.
21 County Opinion No. 274 this Committee considered the relationship
22 between an attorney's duty under Canon 29 to disclose corrupt or
23 dishonest conduct to a tribunal and an attorney's obligation to
24 respect the confidences of his client, and concluded that the
25 obligation to the client takes priority. A number of this
26 Committee's decisions and ABA decisions have similarly given
27 priority, in a variety of circumstances, to the obligation
28

1 of confidentiality to the client over the obligation to the
2 tribunal. See L.A. County Opinion No. 274; ABA Opinions Nos.
3 216, 268, 287.

4 If X calls upon C to to rectify the perjury and C
5 refuses, X should not disclose the perjury to the Court. The
6 authorities are in conflict as to X's proper course of action.
7 (Although most authorities discuss the conflict addressed herein
8 in the criminal context, the policy considerations apply equally
9 in the civil context). One school of thought holds that X
10 should withdraw from the case, without disclosing the reason to
11 the Court. See, e.g., L.A. County Opinion No. 305. A second
12 school of thought holds that X should continue his vigorous
13 representation of C as if the perjury had never occurred, on the
14 grounds that to do less would violate the attorney-client privilege
15 and the attorney's role in the adversary system of justice. See
16 e.g., Oregon Opinion No. 289; M. Friedman, Professional Responsi-
17 bility of the Criminal Defense Lawyer: The Three Hardest Questions,
18 64 Mich. L. Rev. 1469, 1475-1478 (1966). This Committee favors
19 the first course of conduct for X in this case, provided that
20 prejudice to C is avoidable, and that X takes reasonable steps
21 to avoid any prejudice to C.

22 Both schools of thought agree that X should not
23 disclose the perjury to the Court. See ABA Opinion 268; Cf.
24 Hinds, supra, 19 Cal.2d at 93 (dictum).

25 This opinion is advisory only. The Committee acts
26 only on special questions submitted ex parte, and its opinions
27 are based only on such facts as are set forth in the question
28 presented.