

NEW YORK COUNTY LAWYERS' ASSOCIATION
Committee on Professional Ethics

QUESTION NO. 712

TOPIC: DISCLOSURE OF CLIENT
CONFIDENCES AND SECRETS;
WITHDRAWAL FROM REPRESENTATION

DIGEST: WHERE A CLIENT ADVISES LAWYER
THAT PRIOR DEPOSITION
TESTIMONY WAS FALSE, LAWYER
MAY CONTINUE IN THE
REPRESENTATION PROVIDED THAT
THE LAWYER DOES NOT KNOWINGLY
USE THE PERJURED TESTIMONY OR
FALSE EVIDENCE.

CODE: DR 2-110(A) and (B); DR 4-
101(A) and (C); DR 7-102(A);
EC 4-1, 7-5

QUESTION:

The inquirer's client is a defendant in a civil litigation. After the client provided deposition testimony to the plaintiff, the client advised the lawyer that certain of the testimony was untrue. The facts that are the subject of the false deposition testimony are material to the case so that no objection as to relevance will be available. The deposition transcript, which remains in the lawyer's possession, has not been signed by the client. The client has rejected the lawyer's advice to correct the transcript or otherwise rectify the fraud.

Discovery has been completed and the case is now on the trial calendar. The inquirer has asked what action he may or must take to withdraw from the representation and/or to notify the trial judge or opposing counsel of the false deposition testimony of his client.

OPINION:

The information communicated to the inquirer by the client that the deposition testimony was false is either a "confidence" ("information protected by the attorney-client privilege under applicable law") or a "secret" ("information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client") within the meaning of DR 4-101(A) of the Code of Professional Responsibility (the "Code") as in effect in New York. A lawyer may not knowingly reveal a confidence or secret of a client

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except under the very limited circumstances described in DR 4-101(C) of the Code. The policy considerations underlying this rule of confidentiality are set forth in EC 4-1: "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance."

Under DR 4-101(C) (3) a lawyer may reveal "[t]he intention of a client to commit a crime and the information necessary to prevent the crime." The language of that section of the Code is discretionary; while the lawyer may reveal the information, there is no ethical duty to do so. Whether the client's failure to correct the false deposition testimony is a continuing crime that would trigger the lawyer's right to disclose information "necessary to prevent the crime" is a question of law that is beyond the jurisdiction of this Committee. We do note, however, that a lawyer may not make disclosure under DR 4-101(C) (3) in these circumstances based only on the prediction that the client will lie on the witness stand.

As to withdrawal from the representation, a "lawyer may continue in the representation of the client even though the client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as the lawyer does not thereby knowingly assist the client to engage in illegal conduct" EC 7-5. A lawyer may not "[k]nowingly use perjured testimony or false evidence" in the representation of a client. DR 7-102(A) (4). Accordingly, the inquirer may not directly or indirectly use the client's untrue statement in negotiations or at trial, or otherwise vouch for or affirm the false testimony of the client.

In NY County 686 (1991), this Committee dealt with the situation where, based upon information supplied by the client, the lawyer made a false representation in settlement negotiations that the lawyer knew was being relied upon by the adversary. In that situation, the Committee advised that the lawyer could, under DR 4-101(C) (5), disclose confidences or secrets to the extent implicit in withdrawing the representation previously made by the lawyer that was based on materially inaccurate information supplied by the client.

Unlike the situation in NY County 686, the lawyer's inability to obtain the client's correction of the deposition testimony does not, in our view, constitute the attorney's affirmance of the truth of the deposition testimony even if, as a matter of law, the client is held to have affirmed the deposition by a failure to correct it. Accordingly, the attorney may not disclose the information under DR 4-101(C) (5). Further, if the attorney reasonably believes that he can argue or settle the case without using the false testimony, he need not withdraw from the representation. If, on the other hand, the false testimony is

so critical to the case that a lawyer could not effectively defend or settle without use of the false testimony, withdrawal under DR 2-110(B) would be required (mandatory withdrawal, with permission of tribunal where required, if continued employment will result in violation of a Disciplinary Rule). Even if withdrawal is mandatory under DR 2-110(B), it must be accomplished so as to avoid foreseeable prejudice to the rights of the client. See DR 2-110(A)(2).

CONCLUSION

For the foregoing reasons, a lawyer may continue representing a client who advises the lawyer that prior deposition testimony provided by the client that is material to the case was false. However, the lawyer may not knowingly use the perjured testimony or false testimony in the representation of the client. The information that the testimony was false may not be disclosed by the lawyer.