

**ETHICS OPINION NUMBER 205
OF THE MISSISSIPPI BAR
RENDERED OCTOBER 30, 1992**

CLIENT MISCONDUCT/ATTORNEY RESPONSIBILITY - An attorney is under an obligation to report the criminal misconduct of a nonclient which prejudices the administration of justice; the client's attorney is under an obligation to remonstrate with the client, and if unsuccessful, disclose the conduct to the tribunal.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following facts:

In the course of a deposition, the deponent/plaintiff admits to having committed perjury in a bankruptcy proceeding in another state. The deponent's attorney then proposes to counsel opposite to dismiss the lawsuit if opposing counsel and his client agree not to report the admissions of perjury to prosecutorial authorities.

The Ethics Committee has been requested to opine as to (1) whether the deponent's attorney has any obligation to report the perjury, and if so, to whom; and (2) whether opposing counsel has any obligation to report the deponent's perjury, and if so, to whom.

An attorney's obligation of loyalty and fidelity to a client is of the highest order, but it is not absolute. There are circumstances, while admittedly few, that nonetheless require an attorney to place the sacrosanct attorney-client relationship second to his obligation to the tribunal and the administration of justice.

In this instance, an attorney has become aware that his client has committed perjury in a tribunal. It is of no consequence that the tribunal in which the perjury was committed is out-of-state, or that the attorney may not be admitted to practice before that tribunal or that he may not represent the client in that tribunal. M.R.P.C. 3.3(a)(2) states that:

A lawyer shall not knowingly: (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. . . .

The Comment is specific in its admonition of the attorney's responsibility when he learns of his client's perjury.

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done. . . .

Furthermore, the failure of the attorney to address his client's perjury by convincing his client to take remedial steps, or by disclosing the perjury to the tribunal, in fact assists the client in both committing perjury and perpetrating a fraud on the tribunal and is in violation of the Mississippi Rules of Professional Conduct. M.R.P.C. 1.2(d); M.R.P.C. 1.6(b)(1); M.R.P.C. 1.16(b); M.R.P.C. 4.1(b); and M.R.P.C. 8.4(b), (c) and (d).

Therefore, it is the opinion of the Ethics Committee that the deponent's attorney is under an obligation first to counsel the deponent to disclose to the tribunal the perjury committed, and if the deponent refuses, it is then the obligation of the attorney to withdraw from representation and to report the perjury to the tribunal.

The obligation of opposing counsel to report the perjury of the deponent is also affected by consideration of his attorney-client relationship. Typically, the disclosure by the attorney of information relating to the representation requires informed consent of the client. M.R.P.C. 1.6(a). However, in the facts before the Committee, the disclosure being considered is that of informing a tribunal that it has entertained perjury. Again, the failure of opposing counsel to disclose to the tribunal the existence of perjury would place the attorney in the position of assisting in the commission of a crime in violation of M.R.P.C. 8.4(b) and (c). It is also the opinion of the Ethics Committee that the failure of opposing counsel to report perjury to the tribunal is a violation of M.R.P.C. 8.4(d), which states that It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice...

The Committee recognizes that the client of opposing counsel may not think it to be in his best interest to refuse to enter into an agreement which would result in the dismissal of the lawsuit pending against him. However, the clear dictates of the Mississippi Rules of Professional Conduct and the necessity to protect the integrity of the administration of justice outweigh the personal considerations of the client, and in fact inure to the client's benefit by ensuring the client of the same nonprejudicial administration of justice in the various tribunals in which the client may appear.

Therefore, it is the opinion of the Ethics Committee that opposing counsel must disclose the deponent's perjury to the tribunal in which it was committed, and

therefore cannot enter into an agreement in which the attorney agrees not to disclose perjury.

The Committee recognizes and points out that there are legal obligations which may be imposed on both counsel concerning which this Committee cannot opine.