Committee Opinion
July 17, 1990

LEGAL ETHICS OPINION 1362

CONFIDENCES AND SECRETS – PERJURY – REPRESENTATION WITHIN THE BOUNDS OF THE LAW: PROPRIETY OF ATTORNEY ALLOWING CLIENT TO TESTIFY UNTRUTHFULLY.

You have advised that an attorney represented a husband and wife in a loan default action brought by a bank which had repossessed clients' vehicle. The bank then filed suit to collect the loan against both husband and wife as endorsers and brother and sister-in-law who earlier had assumed the automobile loan. At the General District Court trial, the attorney presented the defense that the wife believed she and her husband had been released from liability when the loan was assumed by brother and sister-in-law. The husband testified under oath that he knew nothing about the loan transaction or the fact that his wife had signed his name on the loan documents until he received the civil warrant in the case. As a result, judgment was entered against the wife and in favor of the husband, and an indictment was returned against the wife for forgery.

At the subsequent criminal trial, attorney presented the defense that the wife signed her husband's name to the loan documents with his permission. Both wife and husband testified under oath that wife had signed husband's name to the loan documents with his authorization. At the conclusion of the criminal case, the forgery charge against the wife was dismissed. Finally, you indicate that the same attorney, on behalf of the client/wife, has brought charges of malicious prosecution against the bank on the grounds of instigating the forgery proceedings against the wife.

You have asked the Committee to consider the propriety of an attorney presenting the defense and offering testimony that the client/husband had no knowledge of a certain transaction until the civil warrant was filed and then, subsequently, in a criminal action brought against his wife, presenting the defense and offering client/husband's testimony which was contrary to the earlier testimony in the civil case. You indicate your belief that the testimony offered in one of the trials was necessarily false and the attorney had allowed his client to testify untruthfully.

In addition, you have asked the Committee to opine on the propriety of an attorney representing a client in a civil matter and then in a subsequent collateral criminal case when that attorney may be called as a witness to testify as to the representations and defenses presented in the lower court.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:4-101(D)(1) and (2) dealing, repectively, with an attorney's mandatory disclosure of his client's intent to commit a crime or of information which clearly establishes that his client has perpetrated a fraud upon a tribunal; DR:5-102(B), which permits a lawyer to continue to represent a client, after having been called as a witness other than on behalf of his client, until it is apparent that his testimony is or may be prejudicial to his client; and DR:7-102(A), which requires that a lawyer represent his client within the bounds of the

law and prohibits a lawyer from, among other things: (1) knowingly using perjured testimony or false evidence; (2) participating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; or (3) taking action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Under the specific facts as you have stated them in the inquiry, the Committee believes that the conflicting testimony offered by the husband at the civil and criminal indictment proceedings clearly indicates that he was not testifying truthfully on at least one occasion. If the attorney had prior knowledge that the client intended to perjure himself at trial, it would have been improper for the attorney to have permitted such testimony. In keeping with the procedures outlined under the Disciplinary Rules, the attorney should have advised the client of the consequences and indicated that such information would have to be revealed to the court. In addition, the attorney would be required to withdraw as counsel unless the client agreed to abandon his intent to commit perjury.

The Committee is of the opinion that it would be improper for an attorney to put on a witness whose testimony is contradictory to earlier statements made under oath without first determining which of the two statements is truthful, and then, using the procedure outlined above, rectifying any earlier false testimony presented. The Committee believes that the only way the attorney can prove the veracity of the witness' second statement would be through the witness' renunciation of his first statement. Alternatively, the attorney may move the court for leave to withdraw from the case. If leave is granted, the attorney may so withdraw and thus preserve the secret of the client's first false statement since it would constitute the past crime of perjury and would, therefore, not be an intended crime which must be disclosed.

Where an attorney knowingly failed to comply with the Disciplinary Rules, presented or participated in presenting perjured testimony or false evidence, or where an attorney counseled his client in conduct that is illegal, fraudulent or contrary to a Disciplinary Rule, such conduct would be *per se* improper and violative of DR:7-102(A). Similarly, it is improper for an attorney to file a suit the basis for which relied upon false testimony or evidence. Such conduct may be construed as serving merely to harass or maliciously injure another and would be similarly improper.

With regard to your inquiry related to the attorney being called as a witness, if the attorney knows or should know that he may be called as a witness in the malicious prosecution case against the bank, presumably by opposing counsel who will want the attorney to testify as to the representation and defenses presented in the lower court, the attorney may continue the representation of the client and appear as a witness until it is apparent that his testimony is or may be prejudicial to the client. However, given the likelihood that, in the instant case, opposing counsel's questioning will attempt to establish that the witness' testimony was perjured and that a fraud may have been perpetrated upon the tribunal, the Committee is of the opinion that the attorney should withdraw as counsel immediately after having been called as a witness since his testimony would, by definition, be prejudicial to his client.

Finally, the Committee directs your attention to DR:1-103(A), which mandates reporting to the appropriate authority by an attorney having knowledge that another attorney has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects. Whether an attorney's conduct is such that it raises a "substantial question as that lawyer's fitness to practice law in other respects" requires a case-by-case determination which should be made after consideration of the facts and analysis of the impact on the offending lawyer's fitness to practice law. (See LE Op. 1308 and *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988))

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Editor's Note. – Overruled in part by L E Op. No. 1528. See footnote of the opinion for scope.