LEGAL ETHICS OPINION 1451  ATTORNEY — DUTY TO DISCLOSE
CLIENT'S MISREPRESENTATION IN DEPOSITION TESTIMONY.

You have advised that an attorney represents a defendant in a civil matter in which
defendant's deposition was taken. Defendant later informs her attorney that she lied about
some matters during the deposition. The attorney believes the matters to be irrelevant to
the case's merits, but possibly relevant to the defendant's credibility. Defendant's attorney
believes the case might settle shortly after the deposition. You indicate further that if the
case does not settle, and if the defendant has to testify later, she has indicated she will
correct her deposition testimony at that time.

You have asked the Committee to opine whether, under the facts of the inquiry, the
attorney must, if the defendant is unwilling to do so, disclose the misrepresentation in the
deposition testimony.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:4-
101(D)(2) which mandates that a lawyer reveal

information which clearly establishes that his client has, in the course of the
representation, perpetrated a fraud related to the subject matter of the representation
upon a tribunal. Before revealing such information, however, the lawyer shall
request that his client advise the tribunal of the fraud. Information is clearly
established when the client acknowledges to the attorney that he has perpetrated a
fraud upon a tribunal.

The Committee has consistently opined that an attorney has a duty to disclose a client's
1140, and LE Op. 1362.

The Committee believes that the answer to your question requires a step-by-step
analysis of the impact of DR:4-101(D)(2) on facts you have provided. First, the
Committee is of the opinion that a knowingly false statement by the client does constitute
a "fraud" as articulated in DR:4-101(D)(2). Further, the Committee opines that, because
the knowingly false statement occurred during the course of pre-trial depositions, the
fraud is "related to the subject matter of the representation." The Committee is of the
view that the disciplinary rule's reference in that regard encompasses a broader
interpretation than simply whether or not the fraud impacts upon the merits of the case.

Having concluded thus that the misrepresentation during the deposition does constitute
a fraud related to the subject matter of the representation, the committee believes, then,
that the answer to your question turns on the final component of DR:4-101(D)(2), i.e.,
whether the fraud was perpetrated upon a "tribunal." The Committee adopts the view of
other jurisdictions which have implicitly included depositions within the definition of
"tribunal." See, e.g., Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa
Legal Ethics Committee Notes. – In LEO 1650, the committee added a “materiality” element to this analysis.

1976) (where a client falsely testified at deposition, the lawyer should have stopped deposition testimony, remonstrated the client, and revealed the client's perjury to the affected person or court if the client refused to do so). The Committee believes the determinative factor to be whether disclosure is necessary to prevent a judgment from being corrupted by the client's unlawful conduct. See ABA Formal Op. 87-353 (1987). The Committee believes that it would be unjust to allow the false deposition testimony to stand, regardless of whether the case proceeds to trial.

Thus, in the facts you present, the Committee opines that the defendant, in falsely testifying at deposition, perpetrated a fraud related to the subject matter of the representation upon a tribunal. The Committee further opines that the defendant's attorney must reveal the client's knowingly false statement (fraud) to the tribunal if the client is unwilling to do so.