

**Legal Ethics Committee Notes.** – In LEO 1650, the committee added a “materiality” element to this analysis.

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 fraud upon a tribunal, if the client refuses to do so. *See* LE Op. 727, LE Op. 1093, LE Op. 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

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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.