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Client Perjury: That Sinking Feeling

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Imagine this scenario: You are in trial. Your case is going well. Your client just finished cross-examination and you are preparing him for re-direct over the lunch hour. The client admits to you that he lied during his cross-examination on a material issue. You have a sinking feeling that takes away your appetite for the sandwich you have in front of you. What do you do when the trial reconvenes that afternoon?

Fortunately, the Oregon State Bar has issued some clear-cut guidance in the form of Formal Ethics Opinion 2005-34. The opinion, in turn, draws directly on an Oregon Supreme Court decision, *In re A*, 276 Or 225, 554 P2d 479 (1976) (decided under the corresponding provisions of the former Disciplinary Rules). 2005-34 won't make the personal dynamics of the situation any easier, but at least it provides a quick road-map through what is always a bumpy road.

2005-34, citing *In re A*, concludes in addressing hypothetical facts not too different than those just posed:

> "[W]hen a lawyer knows through confidential information that a client has committed perjury, the lawyer must call on the client to rectify the perjury. If, however, the client does not do so, the

lawyer's only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client's wrongdoing." *Id.* at 2.

As noted, in seeking withdrawal, the lawyer cannot reveal the perjury. Rather, the lawyer must simply tell the court to the effect that a matter has arisen that, under the Rules of Professional Conduct, do not allow the lawyer to continue. Although somewhat artificial, both 2005-34 and *In re A* are clear that the lawyer cannot reveal the perjury.

Like the Supreme Court in *In re A*, the Bar reached its conclusions by balancing the conflicting duties involved. On one hand, RPC 1.6 and ORS 9.460(3) prohibit lawyers from revealing clients' past wrongs communicated to the lawyer confidentially. On the other, RPC 3.3(a)(3) prohibits lawyers from offering false evidence and RPC 8.4(a)(4) prohibits lawyers from engaging in conduct prejudicial to the administration of justice. Under RPC 3.3(c), a lawyer's general obligation to reveal perjury is tempered by RPC 1.6's duty of confidentiality: "The dut[y] stated in paragraph… (a) . . . continue[s] to the conclusion of the proceeding, *unless* compliance requires disclosure of information otherwise protected by Rule 1.6." (Emphasis added.) Therefore, both the Supreme Court and the Bar resolved this tension by requiring withdrawal if the client will not correct the testimony involved.

2005-34, relying on *In re Lathen*, 294 Or 157, 166-67, 654 P2d 1110 (1982), also concludes that if the court will not permit withdrawal that the lawyer

may continue on the case. In that circumstance, however, "the lawyer could not endeavor '[k]nowingly [to] use perjured testimony or false evidence' in arguing the client's case [under RPC 3.3(a)]." *Id*. at 2 n.2.

In our opening example, therefore, the lawyer must urge the client to correct the perjury. If the client does not, the lawyer must then seek leave to withdraw without revealing the perjury. If the court will not grant the motion, then the lawyer may continue but cannot use the perjured testimony.

2005-34 concludes with two caveats.

First, for Oregon lawyers handling cases in other jurisdictions, 2005-34 notes that the conclusion here is not necessarily the same elsewhere if the other jurisdiction has adopted without modification the ABA Model Rule on this point: "ABA Model Rule 3.3(c) . . . states that the duty to disclose the fraud to the tribunal applies 'even if' compliance requires disclosure of information protected by Model Rule 1.6, whereas Oregon requires disclosure 'unless' Oregon RPC 1.6 is offended." *Id.* at 2 n.2. As we discussed in last month's column, under the choice-of-law rule, RPC 8.5(b), the law of the state in which the court involved sits will control.

Second, 2005-34 also stresses that it is focused on perjury that has already occurred. It notes that OSB Formal Ethics Opinion 2005-53 counsels that a lawyer may not represent a potential client who informs the lawyer in advance that the client intends to use the lawyer's services to defraud a court.

2005-34 is available on the Oregon State Bar's web site at www.osbar.org.

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