

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1995-96/5
Presentation of False Evidence to a Tribunal by a Third Party Non-client
November 16, 1995

RULE REFERENCES:

*Rule 1.2
*Rule 1.16
*Rule 1.6
*Rule 3.3
*Rule 3.9
*Rule 4.1

SUBJECTS:

*Attorney-client privilege
*Evidence presented to tribunal
*Terminating representation
*Truthfulness in Statements to others

STATUTORY REFERENCES:

*RSA 311:8

ANNOTATION:

In a situation in which an attorney becomes aware that a third party non-client may have submitted false information to a tribunal, the attorney may not reveal the falsity of this evidence to the tribunal or to the third party unless the client consents. The attorney may terminate representation if this can be accomplished without adversely impacting on the interests of the client.

FACTUAL BACKGROUND:

The attorney represented a client before an administrative agency. The agency was furnished with written documents by third party non-clients. The third party submitted the documents into evidence to be considered by the agency. The attorney was not furnished with copies of these documents before, during or after their submission. Through the ruling rendered by the agency, the attorney discovered that based on the submissions, the agency found that a requirement (condition A) was continuously maintained by the client for a certain period of time. The attorney has substantial evidence to believe that the condition A was not maintained by the client on a continuous basis. The attorney is unsure whether the period of time enumerated in the documents includes the suspected period of non-compliance. The attorney has withdrawn and has counseled the client to withdraw the documents if they are false.

QUESTION PRESENTED:

In a situation in which an attorney has reason to believe that misleading or false information has been submitted to an administrative tribunal:

- A. Does the attorney have an obligation to so inform the tribunal or to refrain from informing the tribunal?
- B. Does the attorney have an obligation to investigate the matter to determine whether the information submitted by the third party is indeed false?
- C. Does the attorney have an obligation to take remedial action to correct the misleading or false information, and if so, what remedial action is necessary?

ANALYSIS:

A. Whether an attorney has an obligation to inform a tribunal of false evidence presented to it is governed by Rule 3.3. In pertinent part, Rule 3.3 states that: “. . . A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . (or) . . . (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”

This requirement of honesty and candor before a tribunal applies equally in matters in which an attorney is representing a client before a legislative or administrative agency. Rule 3.9. Furthermore, the rules specifically prohibit an attorney from counseling a client to or in assisting a client in engaging in conduct which is criminal or fraudulent. Rule 1.2(d). Indeed, satisfactory evidence of fraud is a specific cause for suspension or disbarment of an attorney. RSA 311:8

In the matter presented to the Committee, material evidence which the lawyer believes to be false was offered by a third party unbeknownst to the lawyer and the tribunal relied on this evidence in making its decision. The lawyer did not offer the evidence. The client does not wish the falsity of this evidence to be revealed to the tribunal. Rule 3.3 does not compel disclosure of the attorney's suspicion about false evidence introduced by someone other than the attorney.

Indeed, Rule 1.6 - Confidentiality of Information - dictates that the attorney may not disclose “. . . information relating to representation of a client unless the client consents . . .” The client in this matter does not wish for the attorney to disclose the attorney's suspicions, and the attorney may not do so.

The attorney has a duty of truthfulness when making statements to others and must disclose material facts to a third person when necessary to avoid assisting in a criminal or fraudulent act. Rule 4.1(b). However, disclosure can only be made if it does not violate the confidential communication between the client and the attorney or if the client consents after consultation. Rule 1.6. The client in this matter does not consent to such disclosure.

B. In the matter presented to the Committee, the attorney inquired as to whether the attorney has an obligation to obtain and review documents and to interview witnesses in order to determine if the evidence presented by the third party was false.

Rule 3.3 prohibits an attorney from knowingly presenting false evidence. Rule 4.1 prohibits an attorney from knowingly making a false statement to others or failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Both of these rules indicate that actual knowledge or falsity dictate that an attorney must take certain action. If an attorney does not have actual knowledge that the evidence is false, then the Rules do not compel that the attorney act.

C. The inquiring attorney queried whether that attorney had an obligation to take remedial action to correct the false or misleading information.

The false information which was reviewed by the tribunal was not submitted by or with the knowledge of the attorney and consequently the requirements in Rule 3.3 to take reasonable remedial measures does not apply to this situation.

In this matter, upon suspecting that false or misleading evidence had been submitted to the tribunal, the attorney withdrew from the matter and urged the client to withdraw the evidence if in fact this evidence were false. Rule 1.16 allows an attorney to withdraw “. . . if withdrawal can be accomplished without material adverse effect on the interests of the client . . .” The rules permit, but do not require, withdrawal by the attorney in this matter.

CONCLUSION:

Based on the particular circumstances of this case:

- (1) The Rules of Professional Conduct do not require an attorney to correct false evidence submitted to a tribunal by a third party non-client.
- (2) The Rules of Professional Conduct do not permit an attorney to reveal to the third party a suspicion that the evidence is false if doing so would violate confidential communications with the client.
- (3) The Rules of Professional Conduct do not require that an attorney thoroughly investigate the veracity of evidence submitted by a third party.
- (4) The rules of Professional Conduct allow an attorney to terminate representation if there is no material adverse impact on the client.

In the matter before the Committee, the inquiring attorney became aware that a third party submitted evidence which may have been false to a tribunal. The attorney withdrew from the case and urged the client to correct the evidence if it were false. It is the opinion of the Committee that the attorney has no further obligation under the Rules.