Enduring Ethics Opinions - By Rita M. Farry, Esq. - Professional Ethics Commission

In 1994 the Professional Ethics Commission issued Opinion #140 regarding an attorney's obligation under the Bar Rules to disclose a client's false testimony to the Court. The abrogation of Maine Bar Rules 3.6 and 3.7 and the adoption of the current rule, M. R. Prof. Conduct 3.3, effective August 1, 2009, may render Opinion #140 to be more of an "Evolving Ethical Opinion" rather than a strict "enduring" opinion.

The fact pattern before the Commission involved a criminal client who, prior to trial, confided to his attorney that he, in fact, committed the acts alleged in the indictment. The attorney advised the client not to testify at trial and advised the client of what would likely occur if he did testify falsely. In Opinion #140, the Commission determined that the then governing Maine Bar Rules did not require the attorney "to reveal to the Court the Client's perjury under the circumstances presented." However, the Commission stated that the Attorney may be required "as a matter of law to disclose the Client's perjury."

In reaching its decision, the Commission discussed the history of Maine Bar Rule 3.6(b) and its derivation form DR 7-102(B) of the ABA Model Code. The Model Code section, as originally adopted by the ABA in 1969, did not contain the exception to the attorney's required disclosure of perjury "when the information is protected as a privileged communication." This exception was added in 1974. The Opinion noted that while the SJC adopted the Model Code, including the exception language for Maine lawyers in 1979, most other states had not.3

Opinion #140 proceeded to discuss the marked difference between the ABA Model Code/Maine Bar Rule and the 1983 Model Rules, which required "a lawyer to take remedial measures, including disclosure, when a client has committed perjury, even if the lawyer knows of the client's perjury because of what would otherwise be a confidential communication." The Commission's Opinion highlighted the comment to Model Rule 3.3: the "disclosure requirement of that Rule 'may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.'"

While these constitutional provisions may continue to weigh heavily on Maine attorneys, the adoption of M.R.Prof.Conduct 3.3(a) (3), (b) and (c) informs us that "under certain clearly specified circumstances, a lawyer's obligation to disclose to a tribunal, information otherwise protected under Rule 1.6 (Confidentiality of Information) [now] supersedes the lawyers' obligation of confidentiality under Rule 1.6." (Reporter's Notes to M. R. Prof. Conduct 3.3 (emphasis added)).

The Commission clearly struggled with its decision in Opinion #140, citing the lawyer's "solemn oath to 'do no falsehood nor consent to the doing of any in court'." 4 M.R.S.A. § 806. The Commission also noted the tension between Maine Bar Rules 3.6(b) and 3.7(e)(1)(i) and suggested manners in which this tension could be resolved, which ultimately was achieved with the adoption of M. R. Prof. Conduct 3.3(a)(3), (b) and (c). Accordingly, while these waters may have been muddy under the former Maine Bar Rules, they are much clearer under the Rules of Professional Conduct where there is no doubt that the attorney must report a client's perjury to the tribunal, notwithstanding client confidentiality concerns.
1See the Opinion for more complete facts and analysis.

2One member of the Commission dissented from the Commission's conclusion that the Maine Bar Rules did not require disclosure of client perjury under the circumstances presented.

3See Footnote 2 to Opinion #140 for the status of various other states relative to the balancing of these interests and attorney disclosure requirements as of 1994.