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NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion 1993-94/7
Candor to Tribunal: Use of Questionable Evidence In Criminal Defense
January 27, 1994

RULE REFERENCES:
- *Rule 1.2
- *Rule 1.2(a)
- *Rule 1.2(d)
- *Rule 1.2(e)
- *Rule 1.3
- *Rule 1.4(a)
- *Rule 1.16(a)
- *Rule 1.16(a)(2)
- *Rule 1.16(b)
- *Rule 3.3
- *Rule 3.3(a)(3)
- *Rule 3.3(b)
- *Rule 3.3(c)
- *Rule 3.4(b)
- *Scope
- *Terminology

CODE REFERENCES:
- *DR7-102(A)(4)
- *DR7-102(A)(6)

SUBJECT:
- *Candor Toward Tribunal
- *Court Appointed Lawyer
- *Criminal Representation
- *Trial Conduct
- *Witnesses

ANNOTATIONS:

A Lawyer must not offer evidence to a tribunal that the lawyer knows to be false. (Rule 3.3(a)(3)).

A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. (Rule 3.3(c)).

If a lawyer refuses to offer evidence because the lawyer believes it to be false, the lawyer must promptly notify the client. (Rule 1.4(a)).

In criminal cases, a defense lawyer's options under Rule 3.3 may be qualified by constitutional provisions for due process and the right to counsel. (ABA Comment to Rule 3.3).

QUESTIONS:

I. Is it ethically permissible for an attorney, during a criminal representation of a client, to use an affidavit obtained by the client's prior attorney, when such affidavit (absolving client of criminal liability), contradicts prior statements of the affiant (an alleged co-conspirator of client's)?

II. What ethical limitations are there for a lawyer representing his client in a criminal proceeding in using an affidavit not known to be false, but clearly contradicted by prior statements and actions of the affiant?

III. Does the fact that the attorney is aware that the client's prior attorney who prepared the affidavit withdrew for "ethical reasons," preclude attorney's use of an affidavit absolving client of criminal liability, which affidavit the attorney does not know to be false?

FACTS:

The inquiring attorney is a substitute and second counsel appointed to represent a criminal client charged with drug sales and related criminal charges. The prosecution's case relies heavily on statements of a witness and alleged co-conspirator with client. Through discovery, the attorney has obtained transcripts of conversations between (1) the witness and the police before the witness' arrest (and subsequent successful prosecution); (2) "wiretapped" conversations between witness and client after witness' arrest; and (3) wiretapped telephone conversations between witness and client. The transcript of witness' conversations with the police prior to witness' arrest are inconsistent, and the transcripts of the "in person" and telephone conversations between witness and client suggesting a business arrangement, are confusing and ambiguous (with respect to the prosecution's claim that they relate to drug sales), and based upon other information known to the attorney could be construed to relate to prior legitimate business transactions.

Prompted by a letter to client from the co-conspirator/witness (subsequent to the witness' conviction and incarceration), client's prior attorney obtained an affidavit from witness disavowing client's criminal involvement (hereinafter "Affidavit"), and explaining the witness' prior statements to police and actions as having been performed in an attempt to protect himself and others by cooperating with the police to implicate the client.

Affidavit prepared by prior counsel was the subject of a motion to suppress. While Affidavit was not formally admitted into evidence by the Court, prior attorney subsequently withdrew from representation of client on the basis of "ethical reasons." Present attorney is unaware of any specific reasons or explanations surrounding the withdrawal.

During a recent pretrial hearing, prosecution filed motions attempting to utilize incriminating hearsay statements of the witness under the co-conspirator exception to the hearsay rule. In response, inquiring attorney disclosed his intention to enter Affidavit. Prosecution objected to the admission of Affidavit, asserting that it would be unethical for inquiring attorney to attempt to enter the document based upon (1) contradictions between Affidavit and transcripts of earlier conversations of the witness and client, in which inquiring attorney "should know that the witness is lying in the affidavit"; and (2) because of the withdrawal of prior attorney who represented client.

Inquiring attorney has no actual knowledge of the falsity of Affidavit. From a careful review of all transcripts and evidence, inquiring attorney can only conclude that there are inconsistencies and contradictions between Affidavit and prior statements, but that such inconsistencies are reasonably explained by the witness in Affidavit. Inquiring attorney furthermore has not received any confidential communication from his client that would seriously question or contradict the truthfulness of the contents of the affidavit.

While the inquiring attorney must assume that the witness is lying at some point during the proceedings, it is not unreasonable for him to conclude that witness' motivations stated in Affidavit (why he was previously lying to the police) were truthful. The prosecution's assumption (that witness is lying in Affidavit) is one reasonable belief that can be formed upon review of the contradictory statements; in the opinion of inquiring attorney, however, there are other reasonable alternative beliefs that could also be found that are believed to be in the best interest of his client to use at trial. Client has requested use of Affidavit at his trial. The witness/affiant is now inaccessible to attorney and will not be available to testify at trial.

RESPONSE:

Inquiring attorney is well aware of his conflicting duty to his criminal client (under the Constitution) and that corresponding duty to the Court in not participating in the use of false evidence (under Rule 3.3), with the inevitable tension and ethical dilemma that results.

It is clear that the use of the exculpatory Affidavit by the witness in client's criminal trial is mandated in order to zealously represent and advocate the interests of the client and in order to fulfill the attorney's Rule 1.3 duty of diligence.[i] Subject to stated limitations enunciated in Rule 1.2, the lawyer must also abide by a client's decision concerning the objectives of representation (Rule 1.2(a)).

The thrust of this inquiry, however, is what, if any, ethical limitations are there on the inquiring attorney's use of Affidavit. For this purpose it must, of course, be assumed that it is in the client's best interest, and that the client is directing the use of Affidavit pursuant to Rule 1.2(a). It is also assumed for the purpose of this inquiry that the attorney has no actual knowledge as to the falsity of Affidavit; neither affiant, client nor prior attorney has in any way indicated to inquiring attorney that Affidavit is false or perjurious. This assumption, however, should not be made lightly by the inquiring attorney. The inquiring attorney is directed to review very carefully those definitions found under the "Terminology" section of the ABA Model Code Comments.[ii] ABA Model Code Comments defines "knows" as "denotes actual knowledge of the fact in question. A person's

knowledge may be inferred from circumstances." This is contrasted with the definition of "belief" or "believes," which "denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances." The term "reasonably believes", "when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." The inquiring attorney must carefully review these definitions in determining whether or not the inquiring attorney actually "knows" or "reasonably believes" Affidavit to be false (critical to the following analysis).

While the contents of the co-conspirator/witness' Affidavit are clearly contradicted by prior statements of such witness, for the purpose of this inquiry, it will be assumed by the Committee that the surrounding circumstances, in fact, would not constitute knowledge of its falsity by inquiring attorney.[iii] Were inquiring attorney to discover that Affidavit was, in fact, perjurious or false, then clearly such false evidence could not be used. Rule 3.3(a)(3) states that "a lawyer shall not knowingly ... offer evidence that the lawyer knows to be false." The fact that the false evidence is not produced by the client makes no difference whatsoever. "When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes." Rule 3.3, ABA Comments, "False Evidence."

The prohibition against using false evidence is further reinforced by both Rule 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent") and Rule 1.2(e) ("[w]hen a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client regarding the relevant limitations on the lawyer's conduct").

Apart from that prohibition regarding use of false evidence, however, is the attorney's duty with respect to using evidence that attorney may *reasonably believe* to be false. Rule 3.3(c) provides as follows:

> A lawyer *may* refuse to offer evidence that the lawyer reasonably believes is false. [emphasis supplied]

Given the inconsistent prior statements of the witness, together with the various transcript statements of the witness and client, it is quite conceivable that inquiring attorney "reasonably believes" that the proffered affidavit may be false.[iv] The lawyer's duty in this situation, however, is clearly permissive. "Thus, Rule 3.3(c) gives the lawyer discretion to refuse to offer evidence that the lawyer "reasonably believes" is false." ABA Annotated Model Rules of Professional Conduct**,** 2d Edition (1992), at page 346. The attorney may ethically either use it or not, as the attorney elects, without being in violation of attorney's ethical obligation, or Rule 3.3 duty of candor to the tribunal. Should inquiring attorney decide not to use Affidavit, then the client should be promptly notified of that decision in advance of trial (Rule 1.4(a), mandating that the lawyer "keep a client reasonably informed regarding the status of a matter").

It is further noted that there was no counterpart to Rule 3.3(c) in the earlier Code of Professional Responsibility, which provided that the attorney should not "knowingly use perjured testimony or false evidence" (DR 7-102(A)(4)), as well as the prohibition for the attorney to "participate in the

creation or preservation of evidence when he knows or it is obvious that the evidence is false." (DR7-102(A)(6)).

The ABA Comments with respect to Rule 3.3(c) are further instructive:

> *Refusing To Offer Proof Believed to Be False.*
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> Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Also of interest to the criminal lawyer are the ABA Comments under Rule 3.3 regarding "*Constitutional Requirements*," which describes that "the definition of the lawyer's ethical duty in such a situation [disclosure of perjury of a client by a defense counsel] may be qualified by Constitutional provisions for due process and the right to counsel in criminal cases." It is beyond the scope of this inquiry to engage in a thorough discussion or analysis of state or federal constitutional requirements that the inquiring criminal attorney will also have to consider. Nor, from an ethical analysis, would the criminal attorney be prohibited from using evidence believed but not known to be false (since such use would be ethically permissive under Rule 3.3 (c)).

Also, beyond the scope of this inquiry is the duty of disclosure by the criminal attorney that would arise if, after presenting Affidavit, the attorney later came to know of its falsity which would, of course, require a careful analysis of Rule 3.3(a)(3) ("[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.").

Based upon the facts presented by this inquiry, the use by inquiring attorney of Affidavit, not known to be false, does not raise or require any analysis of Rule 3.4(b), which states the attorney shall not "falsify evidence, counsel or assist a witness to testify falsely".

There are no prior opinions of this Committee since the adoption of the Rules that have analyzed Rule 3.3(c) or provide any useful clarification or analysis. But see, "Client Misconduct", Law Weekly**,** Vol 15, #3, Page 37 (July 20, 1988), which discusses the Rule 3.3(a)(3) duty to take reasonable remediable measures upon the discovery of subsequently learning of the falsity of material evidence, including disclosure of confidential communications allowed under 3.3(b).[v]

SUMMARY:

In light of the above ethical analysis of applicable rules, the Committee concludes that:

I. It is ethically permissible for inquiring attorney to utilize Affidavit if the attorney does not know of its falsity;

II. While it may be ethically permissible to use Affidavit not known to be false under Rule 3.3(c), inquiring attorney is ethically permitted to make the choice of whether or not to use such evidence, absent substantive criminal constitutional law requirements (including right to counsel, effective assistance of counsel, etc.);

III. The fact that prior attorney withdrew from representation "for ethical reasons" does not in and of itself establish that inquiring attorney has knowledge of the falsity of affidavit provided that (1) there are other reasonable alternatives that would justify prior counsel's withdrawal and (2) inquiring attorney has no knowledge of the withdrawal being as a result of prior counsel's knowledge of the falsity of Affidavit. It is conceivable that prior attorney may have withdrawn for totally different considerations such as (1) an expectation that he might be a valuable witness in subsequent proceedings; (2) the development of a subsequent conflict of interest after discovery (i.e. involvement of spouse, family member or close friend that such attorney was previously unaware of); (3) a physical or mental condition which would impair prior attorney from properly representing the client (i.e. Rule 1.16(a)(2)); or (4) other good cause for withdrawal[vi]. Prior attorney's withdrawal, therefore, does not itself establish any knowledge of falsity of Affidavit by inquiring attorney.[vii]

The Committee notes, in the above analysis, that it will be the trier of fact that is to determine the credibility of the evidence to be submitted at trial. Before any attorney hastens to accuse opposing counsel of unethical conduct in utilizing certain evidence, such attorney should be instructed by the following:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.* The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

Rules of Professional Conduct, "Scope" [emphasis supplied].

[In this Opinion, the Committee does not consider or comment upon an attorney's use of knowingly false evidence for the purposes of impeachment only, since the specific facts of the inquiry indicate inquiring attorney had no knowledge of the falsity of Affidavit, nor was the Affidavit to be used for purposes of impeachment.]

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[1]*See, i.e.*, Rule 1.3, ABA Model Code Comments, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." It is noted that in adopting the Rules of Professional Conduct, the New Hampshire Supreme Court

did not adopt or approve either the ABA Comments, the New Hampshire Comments, or the Committee Notes to Decisions, pursuant to New Hampshire Supreme Court Order of January 16, 1986.

[2]The Committee is uncertain as to whether or not in its order of January 16, 1986, the Supreme Court intended to adopt or approve "Scope" or "Terminology" sections of the ABA model Rules, in that it specifically did not adopt or approve the ABA Comments, see footnote 1, above. Although the "Scope" section is not clarified to be an ABA Comment, clearly "Terminology" is. On the other hand, in order to effectively construe the Rules, certain definitions must be assumed. For the purpose of this inquiry, therefore, the Committee is assuming that the inquiring attorney can rely upon the definitions found in the "Terminology" section. Even if "Terminology" was not intended to be adopted by the Supreme Court, the plain meaning definitions of "know" and "believe" are consistent with those as defined in this section.

[3]It must be clear, however, that the Committee cannot substitute its opinion and determination for that of the inquiring attorney who has a full knowledge of all surrounding documents and facts.

[4]Incidentally, prior to using any pre-affidavit statements of the co-conspirator/witness, the prosecutor will also have to undertake the same ethical analysis regarding the quality of such evidence, as would the defense attorney before using the affidavit.

[5]***See, also***, NH Op 1985-86/6 (NH Ethics Opinions Annotated, page 16 (1993)) (attorney shall attempt to dissuade client's use of knowingly false testimony and may withdraw); NH Op 1991-92/13 (***Ibid***, page 261) (attorney has a duty to disclose to court potential juror misconduct).

[6] It is not clear from the inquiry whether withdrawal was mandated under Rule 1.16(a) or was a voluntary withdrawal under Rule 1.16(b).

[7] Whether or not such fact together with other circumstances may form either a knowledge or reasonable belief of falsity, of course, must be left to the inquiring attorney's analysis as discussed above.