

Briefing Doc: Attorney Ethics and Client Perjury in Arizona Civil Proceedings

Subject: Navigating Ethical Obligations Upon Discovering Former Client's Perjury in a Civil Proceeding.

Sources:

Arizona Supreme Court Attorney Ethics Advisory Committee Opinion No. EO-20-0007 (Updated version of Opinion No. 05-05)

State Bar of Arizona, Rules of Professional Conduct Committee Opinion No. 05-05

Main Themes:

Balancing the duty of confidentiality with the duty of candor to the tribunal.

Identifying and implementing appropriate remedial measures upon discovering a client's false testimony.

Understanding the scope and duration of ethical obligations related to former clients and concluded proceedings.

Key Facts and Ideas:

Scenario: The opinions analyze a situation where an attorney discovers, after a successful unemployment compensation appeal, that their former client committed perjury during the hearing.

Shifting Ethical Landscape: The opinions highlight the evolution of ethical rules, moving from prioritizing client confidentiality to emphasizing candor towards the tribunal. As stated in Opinion 05-05, "Under the present Arizona Rules of Professional Conduct, however, the balance has shifted away from preserving client confidences and towards the attorney's duty of candor to the tribunal."

Duty of Candor (ER 3.3): This rule dictates that a lawyer:

Cannot knowingly offer false evidence.

Must take reasonable remedial measures upon discovering false evidence has been presented, including disclosure to the tribunal if necessary.

This duty continues until the conclusion of the proceeding.

Reasonable Remedial Measures: The opinions outline a step-by-step approach to remedying the situation:

Private Remonstrance: The attorney should first attempt to persuade the client to cooperate in withdrawing the false evidence, explaining the attorney's ethical obligations.

Motion to Withdraw Evidence: If the client refuses, the attorney should move to withdraw the evidence without disclosing the client's misconduct, citing confidentiality and privilege.

Withdrawal from Representation: In some cases, withdrawal from representation may be considered, though it may not be sufficient under current rules.

Involving Successor Counsel: If discharged, the attorney should advise the former client to retain successor counsel and consider disclosing the matter to them to facilitate remediation.

Disclosure to the Tribunal: As a last resort, if other measures fail or are unsuitable, the attorney must disclose the misconduct to the tribunal, tailoring the disclosure to undo the effect of the false evidence.

Duration of Ethical Obligation:

The duty to take remedial measures survives the termination of the attorney-client relationship.

It ends only when the proceeding has concluded, meaning all appeals are exhausted or deadlines have passed.

If the client continues to receive benefits subject to modification, the proceedings may not be considered concluded.

Specific Considerations:

The opinions emphasize narrowly tailoring disclosures to minimize harm to the client.

Attorneys are advised to consult relevant statutes, rules, and case law to determine the proper "tribunal" to notify and confirm the conclusion of the proceeding.

Quotes:

Opinion No. EO-20-0007: "The Rules make the policy determination that insuring the integrity of the decision-making process trumps, in some instances, a lawyer's traditional duty to protect a client's confidences."

Opinion No. 05-05: "The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence."

Conclusion:

These opinions provide a framework for attorneys facing the ethical dilemma of client perjury in civil proceedings. They stress the paramount importance of candor to the tribunal, even when it conflicts with the duty of confidentiality. Attorneys must take appropriate remedial measures, prioritizing those that minimize harm to the client while upholding the integrity of the legal process.