

ETHICS OPINION 2012-02

Rules: 3.3, 3.4
Subject: Efforts necessary to correct misrepresentation by former client
Summary: Attorney has an obligation to take reasonable efforts to remediate false interrogatory answers given by client

Attorney provided pro bono assistance to Client and Client's Primary Attorney on a matter in litigation. Attorney's involvement was limited because Client was an acquaintance and Primary Attorney is now handling the matter without Attorney's involvement.

During discussions, Client indicated to Attorney an intention not to be truthful with Primary Attorney regarding one response to pending interrogatories. Attorney advised Client to be honest with Primary Attorney and in response to the interrogatory. Later believing that Client had not been honest with Primary Attorney, Attorney contacted Primary Attorney and provided the information which demonstrated that the interrogatory answer was not correct. Primary Attorney contacted opposing counsel and indicated an intention to amend the interrogatory answers, presumably to correct the misstatement.

Attorney now asks if there is any additional obligation to disclose Client's misstatements or take other corrective action.

OPINION

Pursuant to Rules 3.3 and 3.4 of the Rules of Professional Conduct, an attorney may not knowingly make, or participate with a client in making, a false statement on material issues to a tribunal or opposing party and counsel. If an attorney learns that such action has been taken, they must "timely take reasonable remedial measures" to correct the misconduct.

Comment 10 to Rule 3.3 nicely illustrates how an attorney should remediate false statements. First, the client should be confidentially reminded of the duties of honesty and candor. If the client corrects their misstatements, it is sufficient. If not, additional steps such as withdrawal or disclosure to the court may be considered.

Here, Attorney correctly told Client of the need to be honest. When that initially failed, Attorney confidentially called the issue to the attention of Primary Attorney. Primary Attorney indicated that remedial measures would be taken in the form of amended interrogatory answers.

Under the facts presented, Attorney has taken proper "reasonable remedial measures" and has no further obligations of disclosure or action.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota