

# Ethics Opinion

## 981212

**FACTS:** During the course of an investigation or administrative hearing, the attorneys for the Child Support Enforcement Division (CSED) on occasion encounter apparent or actual violations of law. The violations typically discovered include tax evasion, perjury, or violation of the Parental Kidnapping Prevention Act.

**QUESTIONS PRESENTED:** What is the duty under the rules of professional conduct of a CSED attorney to report apparent violations of law that are revealed during the course of an investigation or civil administrative hearing?

**SHORT ANSWER:** If the discovery of the violation is made during the investigation, the obligation of the CSED attorney is not defined within the Rules of Professional Conduct, but becomes a policy issue for the CSED. If the discovery is made during an administrative hearing or before another tribunal, the CSED has obligations under Rule 3.3 to correct false or incorrect representations to the tribunal.

**DISCUSSION AND AUTHORITY:** The answer to this inquiry is fact driven, and depends on the specific violation alleged, as well as the CSED attorney's knowledge under the circumstances. The absence of the full picture precludes us from tendering a definitive opinion on this issue, but we offer the following discussion of the controlling principles within the framework provided.

Central to the full discussion is the identification of the CSED client. In Montana, the CSED client is identified by statute to be the Department of Public Health and Human Services. Given the clear statutory definition, the CSED attorney is not bound by the rule of confidentiality (Rule 1.6) or conflict of interest (Rule 1.7) from disclosing violations of the law to the appropriate governmental entity. The obligations inherent in those rules arise in from the attorney-client relationship. As there is no attorney-client relationship, the CSED attorney's duty to report violations is not governed by the Rules of Professional Conduct, but rather by the policy of the CSED.

Given the potential for confusion that might arise on behalf of obligees and obligors, we suggest that these and other parties to CSED actions be specifically apprised that the protections afforded to clients by attorneys do not arise between the CSED attorney and those parties.

The obligation of the CSED attorney to act with the discovery of a violation of the law within an adjudicative proceeding potentially involves the obligation of candor toward the tribunal, Rule 3.3. This rule provides:

*(a) A lawyer shall not knowingly:*

- (1) make a false statement of material fact or law to a tribunal;*
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a*

*criminal or fraudulent act by the client;*

*(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;*  
*or*

*(4) 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.*

*(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.*

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

*(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.*

In the event a discovery is made by the CSED attorney suggesting Rule 3.3 has been violated, the CSED attorney has an obligation to take the corrective action prescribed by the rule. While some of Rule 3.3 addresses responsibilities in the attorney/client context, not present here, the general principles of disclosure apply. Notable is the level of knowledge required for disclosure. Lawyers shall not knowingly make a false statement of material fact to a tribunal; but if a lawyer reasonably believes evidence is false, the lawyer may refuse to offer it.

**THIS OPINION IS ADVISORY ONLY**