

New York State Bar Association Committee on Professional Ethics

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Opinion 837 (3/10/10) (41-09, 46-09)

New York State Bar Association Committee on Professional Ethics
March 10, 2010

TOPIC: Confronting false evidence and testimony under the New York Rules of Professional Conduct.

DIGEST: New York Rule 3.3 requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The old Code exception for client "confidences and secrets" no longer exists.

RULES AND CODE: Rule 1.0(k); Rule 1.6; Rule 1.16; Rule 3.3; DR 4-101; DR 7-102

COMMENTS: Comment 3 to Rule 1.6, Comments 7, 8, 10 & 11 to Rule 3.3

QUESTION

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.
2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document and some of the client's testimony concerning the document were false.
3. Inquiring counsel raises the following questions:
 - (1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?
 - (2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are

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being withdrawn, and that he intends to proceed based on all other evidence properly before the

tribunal?

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Division and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

A lawyer who receives information clearly establishing that:

(1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information is protected as a confidence or secret.*

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

A lawyer who represents a client before a tribunal and who knows that a person . . . is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take

reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

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The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[fn1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

perhaps the most radical break with the existing Code. Under DR 7-102(B) (1) of the Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" – which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1). . . .

8. As noted in Comment [11] to Rule 3.3:

A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. See, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known,"

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"know," or "knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. See, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[fn2]

12. Remedial measures are limited, however, by CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR § 4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes.

The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer

confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C. Page 5

Sisk, *Rule 1.6: Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics § 5:6(d)(4)(E)(2009ed.).

13. As elaborated by Professor Sisk, *Rule 3.3: Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3) (2009 ed.):

Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[fn3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the

United States Constitution. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in

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criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. See, e.g., *People v. Andrades*, 4 N.Y.3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) - (8)); *People v. DePallo*, 96 N.Y.2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding" The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." See Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. Cf. N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the

close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. See N.Y. State 831, n. 4 (2009).

Application to the facts on this inquiry

17. Information must be materially false for Rule 3.3(a)(3) to apply. While inquiring counsel has not specifically addressed this question, for purposes of this opinion we assume that the testimonial and documentary evidence at issue were material. See, e.g., N.Y. County 732 (2004) at p. 5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

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18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. See, e.g., N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding – he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. See *People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to

present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation . . . not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation. . . .

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

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22. Counsel remains under the continuing obligation of CPLR § 4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5.

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b) (1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION

24. An attorney is required to take the remedial measures required by Rule 3.3 even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by