NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

# New York State Bar Association
# Committee on Professional Ethics

Opinion 1123 (5/15/17)

**Topic**: False evidence; remedial measures

**Digest**: A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

**Rules**: 1.0(i) & (k), 1.6(b), 3.3(a), (b) & (c)

## FACTS

1. After a divorce case resulted in a decree of divorce and property distribution, the inquiring lawyer's client revealed the existence of an asset that was omitted from the client's sworn Statement of Net Worth ("SNW"). The omitted asset was legally required to be included in the SNW and was subject to equitable distribution in the divorce. The client now wishes to use the omitted asset to pay off other obligations under the judgment of divorce. The value of the omitted asset is material to the size of the estate.

## QUESTION

2. When a lawyer who represented one of the parties in a divorce action learns, post-judgment, that the lawyer's client omitted an asset from the mandatory Statement of Net Worth, is the lawyer ethically obligated or permitted to reveal the omission?

## OPINION

Offering Material Evidence that is False

3. We begin with Rule 3.3(a)(3), which provides, in relevant part:

> If a lawyer, the lawyer's client, or a 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. [Emphasis added.]

The language of the rule raises at least five subordinate questions: Was the SNW "evidence"? Was it "material"? Was it "false"? Does the inquirer now "know" of its falsity? What "remedial measures" are necessary?

4. The SNW plays a central role in a divorce case. Section 236 of the N.Y. Domestic Relations Law ("DRL") provides for compulsory disclosure by both parties to the divorce of their respective financial states and prohibits the concealment of any property, if demanded by the other party. DRL § 236 also requires that a completed SNW be sworn before a notary under penalty of perjury. The court relies on the SNW in determining the equitable distribution of assets and liabilities, and in awarding maintenance. Thus, we believe the SNW is "evidence" and that the omission of an asset renders the SNW "false." Further, the inquiry states that the inquirer has knowledge of the omission. *See* Rule 1.0(k) (defining "knows" and "knowledge").

5. The question of whether evidence is "material" can be a more complicated question of law and fact. Although the term "material" or its variants is used as an adjective or adverb more than 200 times in the Rules and their Comments, it is not defined there. *Black's Law Dictionary* defines "material evidence" as evidence that "goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision in the case." In a useful discussion of Rule 3.3, the New York City Bar Committee on Professional Ethics explained the importance of the materiality standard:

> Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result.

N.Y. City 2013-2.

6. We agree that evidence is material if it could have materially changed the result in the matter – *i.e.* it has a consequence and is not merely an inconsequential omission. Here, evidence is material if it would have materially changed the equitable distribution of property, which will depend on the value of the asset that was not disclosed. This is a factual question that is beyond our jurisdiction to determine. However, for purposes of the remainder of this opinion, we will assume that the value of the asset is material.

7. Rule 3.3(b) may also apply here. It states, in part, that a lawyer who represents a client before a tribunal and who knows that a person has engaged in criminal or fraudulent conduct related to the proceeding "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 1.0(i) defines "fraud" as denoting conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive," unless it lacks an element of scienter or a knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. If the inquirer concludes that the client's omission was knowingly made with a purpose to deceive, Rule 3.3(b) would also be implicated.

Duty to Take Remedial Measures

8. As noted above, under Rule 3.3(a)(3), if the lawyer or the lawyer's client has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Similarly, Rule 3.3(b) requires a lawyer who knows that a client has engaged in fraudulent conduct relating to a proceeding before a tribunal to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

9. The rule does not contain a time limitation on the lawyer's duty to take remedial measures. In this respect, it differs from Rule 3.3(c) of the ABA Model Rules of Professional Conduct, which states "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* . . . ." (Emphasis added.) New York omits the phrase "continue to the conclusion of the proceeding," and does not specify any other time limit. Since the marital proceeding here has concluded, it is important to determine whether New York's omission of the phrase "continue to the conclusion of the proceeding" is significant.

10. In N.Y. State 837 (2010), we concluded that the difference between the NY version of Rule 3.3 and the ABA version of the same rule is significant:

> 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 . . . . 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.* [Emphasis added.]

Consequently, the fact that the divorce case here has concluded does not, by itself, terminate the lawyer's obligation of remediation.

11. How long does the obligation to remediate endure? We said in Opinion 837:

> [T]he endpoint of the obligation . . . 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).

*See also* N.Y. State 980 (2013) (a lawyer who learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal has a duty to take reasonable remedial reassures that may still be available, including, if necessary, disclosure to the tribunal); N.Y. City 2013-2 ("because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable 'remedial' measure is no longer available"). *Cf.* N.Y. State 781 (2004) (matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court omitted material information and perpetrated a fraud on the tribunal must call upon client to rectify and, if client refuses, lawyer must withdraw the financial statement).

12. N.Y. City 2013-2 concludes that Rule 3.3(a)(3) imposes a duty to take remedial action either before the tribunal to which the false evidence was presented, or before a tribunal that could review the decision of the tribunal to which the false evidence was submitted, as long as the tribunal is in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. *See also* N.Y. City 2013-2, note 8 (discussing the bases for reopening a judgment under CPLR 5015(a)).

13. It is not uncommon to re-open divorce decrees due to changed circumstances. Consequently, if it is still possible here to remediate the omission, the lawyer must pursue remediation.

14. What action does remediation require? Comment [10] to Rule 3.3 sets out the contours of that obligation.

> 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 . . . .

15. In N.Y. State 837 (2010) we discussed the concept under Rule 3.3(a) and (b) that disclosure is required only "if necessary." Counsel's knowledge came from the client, constituted confidential information under Rule 1.6, and did not fall within any of the exceptions contained in Rule 1.6(b). Consequently, we stated that, if disclosure was not "necessary" under Rule 3.3, it would not be permitted under Rule 1.6. Rather, we said, "if there are any reasonable remedial measures short of disclosure, that course must be taken." Id. at ¶ 19. Moreover, we noted that, in the criminal sphere, Rule 3.3's mandate to disclose may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the U.S. Constitution.

16. Here, counsel's knowledge of the falsity of the SNW also comes from the client. It may be confidential because it is protected by the attorney-client privilege or because its disclosure is likely to be embarrassing or detrimental to the client. What information is protected by the attorney-client privilege and whether any exceptions to the privilege apply are questions of law that are beyond the jurisdiction of this Committee. *See, e.g*. the discussion of continuing crimes in Rule 1.6, Cmt. [6D].

17. Because the proceeding has ended, the lawyer's withdrawal from the representation will not remediate the false evidence. Therefore, the lawyer's duty to remediate begins with remonstrating with the client to amend the SNW to disclose the unreported asset. Moreover, the lawyer should inform the client that, if the client does not voluntarily correct the false SNW, the lawyer will be required to take reasonable remedial measures.

18. If the client refuses, we believe that, consistent with N.Y. State 837, there are measures short of disclosure that may achieve remediation. For example, if the lawyer has certified the client's SNW or has referred to it in court proceedings, and the lawyer believes the SNW was materially inaccurate and is still be relied upon by the client's spouse or by the tribunal, Rule 1.6(b)(3) would allow the lawyer to withdraw the certification:

> A lawyer may reveal . . . confidential information to the extent the lawyer reasonably believes necessary . . . to withdraw a written or oral . . . representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the . . . representation was based on materially inaccurate information or is being used to further a crime or fraud.

Because withdrawing the certification or representation is likely to trigger follow-up action by the tribunal or by the former spouse, it is likely to satisfy the "reasonable remedial measure" requirement of Rule 3.3(a)(3) and (b). It could also result in another exception to confidentiality under Rule 1.6(b)(6), which is disclosure to comply with a court order.

19. Similarly, the lawyer might withdraw the SNW or state that it should not be relied upon, which also should lead the court or former spouse to request further explanation. *See* N.Y. State 781 (2004) (where divorce proceeding apparently had not yet ended, withdrawing a false financial statement would be sufficient under the Code predecessor to Rule 3.3).

20. Because identification of remedial measures depends on the facts and circumstances of the case, we cannot set out a definitive roadmap in this opinion. We believe the inquirer is in the best position to determine what steps are "reasonable" and "necessary."

**CONCLUSION**

21. A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

(4-17)