

**NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Opinion #2008-09/ 3**

Remedial Measures Under Rule 3.3

RULE REFERENCES:

**1.0
1.6
3.3
4.1**

SUBJECTS:

***Knowing
*Candor to the tribunal
*Remedial measures
*Truthfulness in statements to others**

ANNOTATION:

Although attorneys are required to maintain strict confidentiality of client information, attorneys are also required to be truthful to the tribunals in which they appear. As a result, there are occasions when attorneys must take steps to remediate statements made to the tribunal on behalf of a client or by a client regardless of potential harm to the client's interests. If remediation is required, it must be done promptly.

HYPOTHETICAL FACTUAL BACKGROUND

An attorney represents a client who has suffered an injury to his left hand. He is, with the attorney's help, seeking damages. The client testified on day one of the trial, which was then continued to the next week, that there were no prior injuries to his hand. The attorney took him at his word. Now the attorney has unexpectedly received a medical report from a hospital that was thought to be merely background information when it was requested months ago. The report states that the client had been treated for a previous injury to that hand. The report makes it very clear that the client's testimony at the trial was false.

QUESTION PRESENTED

What remedial measures, if any, are required when an attorney knows that misleading or false information has been submitted to a tribunal?

ANALYSIS

Rule 3.3(a)(3) of the Rules of Professional Conduct states in pertinent part that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of the falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.¹ Though seemingly clear in what it requires, the rule does implicitly ask when the attorney "knows" something, a question the rules take pains to address.² The falsity of testimony or evidence will not always be clear. This opinion takes the "easy case" and assumes that there is no question about the falsity of the testimony. "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." ABA Model Rule 3.3, Comment [8].

Faced with a client's false testimony, what is an attorney required to do? Every attorney will likely face this question at some time. Credibility is often an issue. Clients and witnesses are no different from the lot of humanity, and some do not tell the truth. An untruthful client puts a representing attorney between a rock and a hard place—between the duty to represent the client's interests and the larger duty to be truthful to the tribunal.

In such a circumstance, the first answer to that question is to communicate with the client. If possible, the attorney should get the client to "own up" to the false testimony. The 2004 ABA Model Rules Comment [10] on remedial measures begins with the advice "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." Of course, such discussions include whether the testimony was ambiguous, based upon a false assumption, simply incomplete, or otherwise explained in the face of what appears to be plainly false testimony. An attorney

¹ The current Rule 3.3 differs significantly from the prior rule. The current rule states, "(a) A lawyer shall not knowingly: * * * (3) offer evidence that the lawyer knows to be false. If a lawyer, *the lawyer's client, or a witness called by the lawyer*, has offered material evidence and comes to know if (*sic*) its falsity, the lawyer shall take reasonable remedial measures, *including, if necessary, disclosure to the tribunal.*" (Emphasis added.)

The prior rule stated, (a) A lawyer shall not knowingly: * * * (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures."

² The definitions to the rules distinguish among "know," "reasonably know" and "should have known." See Rule 1.0(f), (i) and (j). That said, the ABA comments to the rule make clear that the drafters intended the test to be "know," and that anything less than that will not trigger a duty to comply with Rule 3.3. See 2004 ABA Model Rules Comments [7] – [9](contrasting reasonable belief and knowing).

also needs to discuss the penalties for perjury.³ One would be well advised to put such “remonstrations” in writing to the client, because of the potential for a falling out between the lawyer and the client. But if such remonstrations are unsuccessful, Rule 3.3 requires that reasonable remedial measures be taken.

Such remedial action can include withdrawal from the representation. However, if withdrawal is not permitted or will not “cure” the false testimony, then the lawyer will have to disclose the falsity to the tribunal to remedy the false testimony.

May an attorney withdraw from the case without stating a reason for withdrawing? The problem with such a “quiet withdrawal” is that maintaining client confidentiality may result in the lawyer engaging in wrongdoing where the client has engaged in a deceiving the tribunal. A number of court decisions address the need to take remedial measures, and those decisions make it clear that false testimony must be remedied promptly. One decision faulted a prosecutor who knew the testimony of a witness was false when the testimony was presented but failed to disclose the falsity until the next day, by which time both the opposing counsel and the judge had learned that the testimony was false. *Idaho State Bar v. Warrick*, 44 P.3d 1141 (Idaho 2002).

An apparently contrary opinion comes from New Hampshire, which concluded that Rule 3.3 did not apply to a lawyer who withdrew from representation upon becoming aware that a third party may have submitted false evidence to a tribunal that bolstered the client’s case. N.H. Ethics Op. 1995-96/5, “Presentation of False Evidence to a Tribunal by a Third Party Non-client.” That opinion turned on the particular facts, notably that the attorney did not knowingly present false evidence. See <http://nhbar.org/pdfs/FO95-96-5.pdf> . That opinion is no longer valid, because the new Rule 3.3 expressly requires disclosure of the falsity, something the prior rule did not expressly require.

The duty to take reasonable remedial measures continues, under Rule 3.3(d), until the conclusion of the proceeding and that duty applies “even if compliance requires disclosure of information otherwise protected by Rule 1.6”, which is the attorney confidentiality requirement. Care needs to be taken in deciding whether one has come to “the conclusion of the proceeding.” “A proceeding has concluded within the meaning of this Rule when a final judgment . . . has been affirmed on appeal or the time for review has passed.” ABA Model Rule 3.3 Comment [13].

Even if the matter can be settled, settlement may not end the duty to disclose under Rule 3.3 if the false statement was made in pleadings or to the tribunal. While a settlement may “conclude” the dispute, a settlement does not

³ Ariz. Ethics Op. 05-05 (client in unemployment compensation proceeding committed perjury and then fired lawyer; lawyer had duty to inform tribunal of unreliable evidence unless case closed and client no longer receiving unemployment benefits).

necessarily cure the falsity, and hence would not be a reasonable remedial measure. In this regard, a distinction needs to be made between learning of the falsity before settlement and learning of the falsity after settlement. Prior to settling the matter, there is a duty to take remedial measures under Rule 3.3(a)(3).⁴ Learning of the falsity after a settlement may not require disclosure, because Rule 3.3(d) provides that the duty “continue[s] to the conclusion of the proceeding,” but not thereafter.

Rule 3.3 has a broad reach. “Tribunal” is defined in Rule 1.0(m) as “...a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity...” A proceeding is “adjudicative” when that proceeding will “...render a binding legal judgment directly affecting a party’s interests in a particular matter.” This would include special education hearings, workers compensation hearings, Social Security appeals, and many other proceedings.

The Rule 3.3 duty extends even to non-adjudicative proceedings under the New Hampshire Rules. As Rule 3.9 states, the duty of candor under Rule 3.3(a), (b) and (d) applies to the representation of clients before “...a legislative body or administrative agency in a non-adjudicative proceeding...” Thus lobbying efforts and rulemaking proceedings come with the rule’s reach.

No New Hampshire court has ruled on either the question of whether advocacy prevails over candor or the question of what constitutes reasonable remedial measures. However Rule 3.3 specifically states that candor overrides the duties to clients under Rule 1.6. Other jurisdictions have said the answer to the first question—whether advocacy prevails over candor—is that candor prevails. Thus the duty of vigorous representation “must be met in conjunction with, rather than opposition to, other professional obligations.” *Thornton v. United States*, 357 A.2d 429 (D.C. 1976).

Courts know that lawyers are officers of the court. That role includes the general duty of candor to the court. *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993). Although there is an inherent conflict between the lawyer’s role as an officer of the court and the lawyer’s role as a zealous advocate, courts quite properly conclude that the lawyer’s first duty is to the court and the proper administration of justice. *State v. Taylor*, 468 So.2d 701 (Fla. 1995). Any debate on this issue takes place among legal commentators more than courts. See, e.g., Monroe Freedman, *Understanding Lawyers’ Ethics* (1990) (arguing that the adversarial system works best when a lawyer’s duty to a client is the paramount duty). Thus, courts emphasize candor over advocacy.

⁴ There may also be a duty to disclose falsity under Rule 4.1, which states in pertinent part that, “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”

The obligation to take remedial measures is not just a trend. The new rules make it clear that—like it or not—an attorney cannot rely on zealous advocacy to evade the duty of candor. Indeed, there is no reference to “zealous advocacy” in either the ABA’s Model Rules or the New Hampshire Rules. Rule 1.3 requires that a lawyer act with “reasonable diligence” in representing a client, but no more. The phrase “zealous advocacy” appears only in an ABA Comment. Thus, the 2004 ABA Model Code Rule 1.3 Comment [1] states that a lawyer must act with “zeal in advocacy upon the client’s behalf.” However, the same ABA Comment also states that a lawyer’s pursuit of a client’s interest must be “lawful and ethical.”

Rule 3.3 (a)(3) remedial measures confirm the importance of truth in the administration of our legal system. Though notions of zealous advocacy may still resonate among attorneys, it is not mentioned anywhere in the current rules. Hence, remedial measures must take precedence, as hard as that may be in some circumstances.

Additional support for the notion that New Hampshire attorneys must uphold the truth above all else can be found in the oath that attorneys take upon admission to the bar. The oath states as follows: “I solemnly swear or affirm that I will do no falsehood, nor consent that any be done in the court, and if I know of any, that I will give knowledge thereof to the justices of the court, or some of them, that it may be reformed.” See RSA 311:6. The oath should not be taken lightly, as Rule 3.3 makes especially clear. See also *In re: Kalil’s Case* 146 N.H. 466 (2001) and cases cited therein.

CONCLUSION

An attorney who learns that the client has testified falsely about his prior hand injury should try to convince the client to explain the discrepancy, admit error, or otherwise correct the apparent falsehood. If the client is not willing to do so, the attorney is under an ethical duty to disclose the falsity to the tribunal. Remedial measures should be taken promptly, as the Idaho attorney who waited until the next day to disclose the falsity learned to his detriment.

* * * * *

ADVOCATE

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, 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.

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

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

Ethics Committee Comment

1. New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an *ex parte* proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6.

2. See Rule 3.9 regarding non-adjudicative proceedings.