# Emergency Ethics: To Disclose or Not to Disclose, That is the Question

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#### I. Introduction

The focus of this paper is on exploring the new balance between a lawyer's obligation to maintain client confidentiality and the duty to disclose owed to a tribunal and/or third parties under the new Rules of Professional Conduct. One of the hallmarks of New York's former Code of Professional Responsibility was the primacy afforded to client confidentiality, calling for its preservation in almost all circumstances. That, however, is no longer the case in a number of contexts under the Rules.

#### II. The Scope of the Confidentiality Obligation

The Rules' basic confidentiality provision is found in Rule 1.6. Subsection (a) states that "[a] lawyer shall not knowingly *reveal* confidential information . . . or *use* such information to the *disadvantage* of a client or for the *advantage* of the lawyer or a third person." (emphasis added). This prohibition on revealing or using confidential information is subject to a number of exceptions, including where the client gives informed consent, as defined in Rule 1.0(j), and where the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community. Rule 1.6(b) also gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- 1. to prevent reasonably certain death or substantial bodily harm;
- 2. to prevent the client from committing a crime;
- 3. to withdraw a written or oral opinion or 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 opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- 4. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
- 5. (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
- 6. when permitted or required under these Rules or to comply with other law or court order.

#### A. "Confidential Information"

Previously, the Code's DR 4-101 defined two types of information which a lawyer was required to keep confidential. A "confidence" referred to information protected by the attorney-client privilege, while a "secret" referred to other information "gained in the professional relationship

that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 abandons the dichotomy between "confidence" and "secret" and instead defines a single concept of "confidential information." Confidential information consists of information gained during or relating to the representation of a client, whatever its source, that is:

- 1. protected by the attorney-client privilege,
- 2. likely to be embarrassing or detrimental to the client if disclosed, or
- 3. information that the client has requested be kept confidential.

See also New York State Bar Association Formal Opinion 831 (2009). In substance, the core definition of "confidential information" mirrors that found in DR 4-101. Rule 1.6, however, then narrows this definition of confidential information by expressly excluding two categories of information: (1) "a lawyer's legal knowledge or legal research" and (2) "information that is generally known in the local community or in the trade, field or profession to which the information relates." Significantly, this latter exclusion extends to information generally in the public domain unless that information is difficult or expensive to discover (such as information that can only be obtained through a Freedom of Information request or similar process). Rule 1.6, Comment [4A]. No similar explicit exclusions existed under the former Code.

# B. "Gained During or Relating to the Representation"

Disciplinary Rule 4-101 made information confidential if it was gained "in the professional relationship." Rule 1.6 replaces the phrase "gained *in* the professional relationship" with the phrase "gained *during or relating to* the representation of a client, whatever its source." This change adds clarity to the definition, including making it explicit that confidential information includes information obtained from the client as well as information obtained from other sources, such as witnesses or documents. Comment [4A] to Rule 1.6 defines "relates to" as "has any possible relevance to the representation or is received because of the representation." Despite this expansive definition, the comment also states that "gained during or relating to the representation" does *not* include information gained before a representation begins or after it ends. *Id*.

The basic confidentiality rule applicable to prospective clients and former clients differs somewhat from the foregoing rule which is applicable to current clients. With respect to prospective clients, Rule 1.18(b) provides, "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client." With respect to former clients, Rule 1.9(c) states that a lawyer who has formerly represented a client in a matter shall not thereafter:

1. *use* confidential information of the former client protected by Rule 1.6 to the *disadvantage* of the former client, except as these Rules would permit or require

with respect to a current client or when the information has become generally known; or

2. *reveal* confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Thus, while the Rules protect the confidential information of current clients from disclosure, use to the disadvantage of the client *or* use to the advantage of the lawyer or a third person, a prospective or former client's confidential information is only protected from disclosure and use that is disadvantageous to the former/prospective client. No restriction is placed on the use of this information for the benefit of the lawyer or another person.

# III. Permissive Disclosure to Prevent Reasonably Certain Death/Substantial Bodily Harm

In one of the more significant changes from the former Code, Rule 1.6 now *permits* a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. According to Comment [6B], this new exception to the duty of confidentiality "recognizes the overriding value of life and physical integrity."

While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. The closest equivalent was DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." Rule 1.6(b)(1) is much broader in that it permits a lawyer to disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the client is not involved and even if the conduct in question is not criminal.

But even this new basis for permissive disclosure is very limited. As explained in Comment [6B], harm is "reasonably certain" to occur only if (1) "it will be suffered imminently" or (2) if "there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." The Comments provide a number of illustrations to demonstrate the scope of this provision. For example, if a client has accidentally discharged toxic waste into a town's water supply, the lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Another example given is that the wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.

In contrast, if the harm the lawyer seeks to protect against is merely a statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years, there is no present and substantial risk justifying disclosure. Furthermore, the fact that an event will

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<sup>&</sup>lt;sup>1</sup> The new Rules also explicitly continue this Code exception allowing a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary "to prevent the client from committing a crime." Rule 1.6(b)(2).

cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure. *Id*.

The ABA's Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. ABA Model Rule 1.6(b)(2). New York's Rule 1.6 does not similarly permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime, Comment [6A] sets out a number of factors for the lawyer to consider in deciding whether to disclose or use confidential information:

- 1. the seriousness of the potential injury to others if the prospective harm or crime occurs;
- 2. the likelihood that it will occur and its imminence;
- 3. the apparent absence of any other feasible way to prevent the potential injury;
- 4. the extent to which the client may be using the lawyer's services in bringing about the harm or crime:
- 5. the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and
- 6. any other aggravating or extenuating circumstances.<sup>2</sup>

Comment [6A] further cautions that disclosure adverse to the client's interest should be only the minimum disclosure the lawyer reasonably believes is necessary to prevent the threatened harm or crime. Where disclosure would be permitted under Rule 1.6, the lawyer's initial duty, where practicable, is to remonstrate with the client. Only when the lawyer reasonably believes that that client nonetheless will carry out the threatened harm or crime may the lawyer disclose confidential information.

# A. Related Impact – Representing an Organization

Former DR 5-109 set out an attorney's special obligations when representing an organizational client. One of those obligations was that when the lawyer knew that someone associated with the organization was engaged in action, intended to act, or refused to act in a matter related to that representation which involved a violation of a legal obligation to the organization or a violation of law and it was likely to result in substantial injury to the organization, the lawyer had

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<sup>&</sup>lt;sup>2</sup> These same factors apply in the context of a lawyer withdrawing a representation based on materially inaccurate information or being used to further a crime or fraud, which is discussed in Part IV, *infra*.

to proceed as was "reasonably necessary in the best interests of organization." This explicitly included, in appropriate circumstances, reporting that action or inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization was not permitted unless the report fell within the "future crimes" exception of DR 4-101's confidentiality requirements.

New Rule 1.13 exactly follows DR 5-109. However, because new Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

# IV. Permissive Disclosure to Withdraw the Lawyer's Prior Representations Based on Materially Inaccurate Information or When Being Used to Further a Crime or Fraud

Rule 1.6(b)(3) contains another exception to the lawyer's duty to maintain confidentiality. It permits the lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary "to withdraw a written or oral opinion or 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 opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The scope of Rule 1.6(b)(3) is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

The predecessor to Rule 1.6(b)(3) is DR 4-101(C)(5), which provided that "[a] lawyer may reveal . . . [c]onfidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." On its face, Rule 1.6(b)(3) appears broader than its predecessor in that it explicitly permits revealing or using confidential information "to withdraw" a representation while DR 4-101(C)(5) only allowed the disclosure of confidences and secrets to the extent "implicit in withdrawing" a representation. Nevertheless, Comment [6E] to Rule 1.6 states that "[p]aragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information." Comment [6E] goes on to explain that the "lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts" unless such disclosure is permitted to prevent the client from committing a crime. Thus, based on the Comments, Rule 1.6(b)(3) apparently is no broader than the former DR 4-101(C)(5). That is, in most circumstances, only a bare-bones withdrawal of an opinion or representation will be permitted. For example, "I hereby withdraw my opinion letter relating to this matter dated November 20, 2009" is permitted even though by doing so, the lawyer is implicitly revealing that the opinion was "based on materially inaccurate information or is being used to further a crime or fraud." The lawyer may not, however, disclose that that is in fact the case, nor may the lawyer disclose the underlying facts or how the lawyer came to know that the opinion was based on materially inaccurate information or is being used to further a crime or fraud.

## V. Permissive Disclosure to Prevent a Client From Committing a Future Crime

Rule 1.6(b)(2) contains another exception to the duty of confidentiality, which allows the lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." This provision is nearly identical to its counterpart in the former Code, DR 4-101(C)(3), which permitted the lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This exception is limited to instances in which the client's conduct, and not someone else's, will constitute an actual crime. In exercising her discretion under Rule 1.6(b)(2), a lawyer should consider those factors set out in Comment [6A] to Rule 1.6, as discussed in Part III of this paper.

While this rule generally does not permit disclosure of past crimes, the Rules recognize that past conduct (*e.g.*, prior fraud) which has a continuing effect (*e.g.*, deceiving new victims), can constitute a continuing crime to which this disclosure rule applies. The Rules allow a "lawyer whose services were involved in the criminal acts constituting a continuing crime to reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts." Rule 1.6, Comment [6D].

# VI. Required Disclosure in the Face of False Statements/Evidence by a Lawyer, the Lawyer's Client and/or the Lawyer's Witness to a Tribunal

Rule 3.3, regarding conduct before a tribunal, represents one of the most significant shifts between the former Code and the new Rules. Perhaps the most important part of Rule 3.3 concerns a lawyer's obligation if the lawyer learns that the lawyer's client, a witness called by that lawyer, or the lawyer himself has spoken or written a falsehood to a tribunal. Rule 3.3 states in pertinent part:

- (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; [or]
  - (3) offer or use 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 the lawyer 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.

#### A. "Tribunal"

"Tribunal" is defined more broadly in the new Rules than it was in the Code. In the Code of Professional Responsibility, "tribunal" was defined to include "all courts, arbitrators and other adjudicatory bodies." 22 N.Y.C.R.R. § 1200.1(f). As defined in Rule 1.0(w), "tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The definition goes on to provide that "[a] legislative body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." Furthermore, Comment [1] to Rule 3.3 indicates that the Rule "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." This application of Rule 3.3 to discovery proceedings has been confirmed in two ethics opinions. *See* ABA Formal Opinion 93-376 (1993); New York County Bar Association Opinion 741 (2010).

#### B. "False" Statements/Evidence

Rule 3.3(a)(1) prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer. Rule 3.3(a)(3) prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client or the lawyer's witness offers false material evidence. Much like its nearly identical counterpart in the ABA Model Rules, the term "false" is a critical but undefined term. Two very different meanings can be given to this term. The first is that evidence is "false" if it is objectively erroneous or untrue. The second is that evidence is "false" only if it is a deliberate falsehood known to be such by the person making the statement or offering the evidence. The Rule would apply quite differently under each variant of the term. If the former were the appropriate meaning, then the remedial measures of Rule 3.3 would be required even if the lawyer making the statement or the witness/client giving the testimony believed it to be true at the time it was made or offered. However, if the latter were appropriate, the Rule's coverage would be far less expansive and essentially limited to cases where a lawyer discovered a client or witness engaged in deliberate perjury or fabricated exhibits for the lawyer to offer in court.

There are substantial indicators that the broader meaning of the term was intended for both the Model Rules and the New York Rules. First, both the Model Rules and the New York Rules, elsewhere, separately reference "fraudulent" conduct (*see*, *e.g.*, Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, as defined by Black's Law Dictionary, "false" simply means "untrue." Thus, the plain meaning of these terms suggests a broad meaning for "false." Second, if only deliberate falsehoods could invoke the duty to disclose or rectify under Rule 3.3(a)(3), that Rule would be superfluous because such conduct is already covered in Rule 3.3(b). Rule 3.3(b) states that "[a] lawyer who represents a client before a tribunal 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." Thus, a client's or a witness's deliberate falsehood would constitute criminal or fraudulent conduct which is treated in Rule 3.3(b). *See* New York State Bar Association Formal Opinion 837 (2010)

(noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered.")

In addition, the broader interpretation makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit both the making of such a statement and then the failure to correct that same misstatement. However, if "false" means inaccurate or untrue, then the duty to correct is more understandable (and significant).

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Rule to apply equally to both. Geoffrey C. Hazard, W. William Hodes, *The Law of Lawyering*, 29-20 (Aspen Publishers 2009).

The Restatement of the Law Governing Lawyers also resolves this issue in favor of the broader reading. Restatement § 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . [A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. *See*, *e.g.*, *Morton Bldg.*, *Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). *See also* Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules?* 12<sup>th</sup> Annual AILA New York

Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, *The Law of Lawyering*, 29-20.

Finally, the broader reading is probably more consistent with Rule 3.3's underlying objective. As illustrated in the Comments to the Rule, the purpose of imposing the duty of candor toward the tribunal is to keep the tribunal from going astray when the lawyer is in a position to prevent it. *See* Rule 3.3, Comments [2] and [5]. Thus, only the knowledge of the lawyer and the actual incorrectness of the information should be relevant. If a lawyer knows her witness is mistaken, the lawyer should not allow the witness's mistake to lead the tribunal astray.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the new Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

# C. Lawyer's Duty to Correct His Own False Statements/Evidence

Rule 3.3(a)(1) reads: "[a] lawyer shall not knowingly . . . 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." The first clause of this rule is essentially the same as the obligation in former DR 7-102(A)(5) that a lawyer shall not knowingly make a false statement of law or fact. Its application is narrower, however, in that Rule 3.3(a) is limited to statements "to a tribunal." Disciplinary Rule 7-102(A)(5) was not limited to a tribunal setting. While Rule 4.1 prohibits false statements of material facts to a third person, Rule 4.1 does not contain the "correction" provision of Rule 3.3(a)(1).

The second clause of Rule 3.3(a)(1) explicitly imposes a new duty. It requires the lawyer to affirmatively *correct* a false statement of material fact<sup>3</sup> or law previously made to the tribunal by the lawyer. This mandatory duty to correct a false statement made by the lawyer to a tribunal is not an entirely new concept, but it has not previously been explicit or quite this broad.

As previously discussed, DR 4-101(C)(5) had *permitted* a lawyer to withdraw a representation made by the lawyer where that representation was based on materially inaccurate information or was being used to further a crime or fraud, and that representation was believed to still be relied upon by third parties. In New York State Bar Formal Opinions 781 (2004) and 797 (2006), the Committee on Professional Ethics concluded that where the lawyer's representation is the product of a client's fraud upon a tribunal, then the combined effect of DR 7-102(B)(1) (which otherwise required the disclosure of the client's fraud upon the tribunal *unless* it constituted a confidence or secret) and DR 4-101(C)(5) (which *permitted* the lawyer to reveal confidences or secrets of the client to the extent implicit in withdrawing a previously given written or oral opinion or representation, provided it was still being relied upon by others) was to *require* withdrawal of the lawyer's representation. However, the obligation was simply to withdraw the lawyer's representation. Disclosure of client confidences and secrets beyond that implicit in the act of withdrawal were not permitted. Under Rule 3.3(a)(1), if the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather

<sup>&</sup>lt;sup>3</sup> While 3.3(a)(1) prohibits a lawyer from making any false statement of fact or law to a tribunal, it only imposes upon a lawyer an affirmative obligation to correct a "material" false statement.

to correct it, which may require the explicit disclosure of confidential information. *See* Simon, *Roy Simon on the New Rules – Part VII Rule 2.1 through Rule 3.3(a)(1)*, 4-5 (New York Professional Responsibility Report, September 2009).

In addition, this duty to correct under Rule 3.3(a)(1) applies even when no one is continuing to rely on the false statement.<sup>4</sup> *Compare* Rule 1.6(b)(3) (permitting a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or 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 opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."). (emphasis added).

#### D. Lawyer's Duty In Light of False Evidence by the Lawyer's Client or Witness

Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. In another of the more significant changes in the new Rules, Rule 3.3(a)(3) goes on to require that if a 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 must take reasonable remedial measures, *including*, *if necessary*, *disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information.

As close as we came to this requirement under the former Code was DR 7-102(B)(1) which provided that if a lawyer received information clearly establishing that a client (but only a client), in the course of representation, had perpetrated fraud upon a person or tribunal, the lawyer was required to call upon the client to rectify it. If the client refused or was unable to do so, then the lawyer might be required to withdraw from the representation pursuant to DR 2-110(B) if the lawyer could not continue without maintaining or advancing the earlier misrepresentation. Nassau County Bar Association Opinion 05-3 (2005). Disciplinary Rule 2-110(B) mandated withdrawal where the continued employment would result in violation of a disciplinary rule. A lawyer would have violated the disciplinary rules by maintaining or advancing the earlier misrepresentation because DR 1-102(A)(4) prohibited a lawyer from engaging in conduct that involved dishonesty, fraud, deceit, or misrepresentation and DR 7-102(A)(7) prohibited a lawyer from counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent.

If the client refused or was unable to rectify the fraud, the lawyer was required under DR 7-102(B)(1) to reveal the fraud to the person or the tribunal, *except* to the extent that the information was protected as a client confidence or secret, in which case confidentiality was the order of the day. However, in most instances, this exception – disclosure unless the information was a client confidence or secret – swallowed the rule because this information was almost always protected as a confidence or secret.

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<sup>&</sup>lt;sup>4</sup> See the discussion on the duration of the obligation to disclose under Rule 3.3 at Part VIII, infra.

<sup>&</sup>lt;sup>5</sup> Disciplinary Rule 7-102(B)(1) was only triggered by a client fraud, but it could be a fraud upon either a tribunal or a third party.

For example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which could not be disclosed. *See* New York State Bar Association Formal Opinions 674 (1995) and 523 (1980); New York County Bar Association Opinion 706 (1995); Association of the Bar of the City of New York Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal – but only if continued representation could be accomplished without reliance on that perjured testimony – or, in most cases, to withdraw from the representation. *See* New York County Bar Association Opinion 712 (1996); *People v. Andrades*, 4 N.Y.3d 355 (2005). Disclosure under the former Code was not permitted; the duty of confidentiality trumped the duty of candor to the court.

DR 7-102(B)(2) provided that if a lawyer learned that someone *other than a client* (*e.g.*, the lawyer's non-client witness) had perpetrated a fraud on the tribunal (but not on a third party), the lawyer should reveal the fraud. DR 7-102(B)(2) contained no explicit exception for protecting client confidences and secrets in that circumstance. However, in New York State Bar Association Formal Opinion 523 (1980), the Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

Marking a dramatic shift in this area, Rule 3.3(a)(3) now provides that if either a lawyer's client or a witness called by the lawyer has offered material evidence to a tribunal and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including if necessary disclosure to the tribunal. There is no caveat for confidential information. In other words, the Rule may require disclosing client/witness falsity, as a last resort, even if that knowledge is otherwise protected as client confidential information. So Rule 3.3(a)(3) differs from DR 7-102(B) in that (1) Rule 3.3(a)(3) applies equally to the lawyer's client and witnesses (but not to others); (2) is triggered by false evidence and not necessarily fraud; (3) does not extend to false statements (or frauds) to third parties; and (4) can ultimately require disclosure of even client confidential information.

As detailed in Comment [10] to Rule 3.3, the first remedial measure – calling upon the client to correct the false testimony – is the same as it was under DR 7-102(B)(1) and in the case of intentionally false testimony is not likely to be successful in many cases. *See also* New York State Bar Association Formal Opinion 837 (must bring issue of false evidence to client's attention before taking unilateral action). If that course of action fails, the lawyer is required to take further remedial action. One possibility is to withdraw from the representation. However, as Comment [10] explains, at times withdrawal is not permitted or will not undo the effect of the false evidence. On the latter point, at least one noted commentator has expressed the view that withdrawal in and of itself is not sufficient since the record is not corrected and the problem of the false evidence is simply transferred to another lawyer. Simon, *Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)*, 4-5 (New York Professional Responsibility Report, October 2009). *See also* New York County Bar Association Opinion 741; New York State Bar Association Form Opinion 837. Under the new Rule, then, the lawyer must "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing

so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6." Rule 3.3, Comment [10]; *see also* Rule 3.3(c) ("The duties stated in paragraph (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"). Depending on the circumstances, however, full disclosure might not be required and something less, in the form of a "noisy withdrawal" of the false evidence, might be sufficient. New York State Bar Association Formal Opinion 837.

While disclosure may have grave consequences for the client, "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." Rule 3.3, Comment [11]. Thus, under the new Rule 3.3, the duty of candor toward the tribunal rises above the duty of confidentiality, in stark contrast to the Code.

Rule 3.3(a)(3) is broader than former DR 7-102(B)(1) and (2) not only because the exception for client confidences and secrets has been eliminated, but also because it is triggered by "false" material evidence and not just fraudulent conduct. Thus, for example, helpful but inaccurate testimony offered by the lawyer's witness must be remedied, even if that testimony was provided in good faith and was not fraudulent or perjured. Under DR 7-102(A)(4), a lawyer was precluded from using perjured or false evidence, but had no duty to remedy the introduction of false evidence. Now that obligation exists.

On the other hand, Rule 3.3(a)(3) is limited to false statements by the lawyer's client or a witness called by the lawyer, and does not extend to false statements provided by the other side's witnesses. In other words, a lawyer is not required to disclose to the tribunal merely "false" information provided by opposing counsel, the adverse party, or its witnesses. However, under Rule 3.3(a)(3) (as was the case under DR 7-102(A)(4)), the lawyer may not "use" this false evidence (regardless of its source), which means that the lawyer cannot maintain or advance the falsity, including referencing the false but favorable evidence or otherwise using it to advance her client's cause.

The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k). New York County Bar Association Opinion 741 looks to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue, indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required either.

<sup>&</sup>lt;sup>6</sup> A lawyer confronted with this remedial obligation must also keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (*e.g.*, crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. *See* New York State Bar Association Formal Opinion 837.

If a lawyer knows that a client or witness intends to offer false testimony, the lawyer may not offer that testimony or evidence. If a lawyer does not know that his client's or witness' testimony is false, he *may* nonetheless *refuse* to offer it if he "reasonably believes" it will be false. However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8].

## VII. Disclosure in the Face of Criminal or Fraudulent Conduct by Any Person

Rule 3.3(b) provides that if a lawyer represents a client before a tribunal and that lawyer knows that *anyone* intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if this requires disclosure of information otherwise protected by Rule 1.6 as confidential information.

Rule 3.3(b) requires a lawyer to take reasonable remedial measures regarding the criminal or fraudulent conduct (including perjury) of *any* person. Unlike Rule 3.3(a)(3), it is not limited to conduct by the lawyer's client or witness, and extends to conduct of the other side. On the other hand, it is not triggered by "false evidence," but rather requires criminal or fraudulent conduct. Furthermore, as evidenced by the phrase "intends to engage, is engaging, or has engaged," Rule 3.3(b) covers past, present and future events. But like Rule 3.3(a)(3), once triggered, remedial action is required, including disclosure of confidential information if need be.

In this regard, the closest provision to Rule 3.3(b) in the former Code was DR 7-102(B)(2), which required the lawyer to reveal to the tribunal the fraud of a person, other than the client, committed upon the tribunal, subject to an implicit exception for client confidences and secrets. Rule 3.3(b) differs from DR 7-102(B)(2) in that it (1) applies to criminal or fraudulent conduct (not just fraud); (2) which relates to the proceeding (and not just fraud upon the tribunal); (3) which is occurring, has occurred or will occur in the future; (4) extends to client as well as non-client conduct; and (5) can ultimately require the disclosure of even client confidential information.

Rule 3.3(b) actually goes beyond issues of client/witness perjury and false evidence and extends to any criminal or fraudulent conduct by any person related to a proceeding. Thus, for example, it extends to intimidating witnesses, bribing a witness or juror, illegal communications with a court officer, destroying or concealing documents, and failing to disclose information to the tribunal when required to do so. *See* Rule 3.3, Comment [12]. The duty to take remedial action, including disclosure, applies in these circumstances as well.

#### **VIII.** Duration of the Obligation to Remediate

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provided that the remediation (including disclosure) obligation "continue to the conclusion of the proceeding,"

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<sup>&</sup>lt;sup>7</sup> A lawyer may not refuse to offer his client's testimony in a criminal proceeding unless he knows it to be false. Even a reasonable belief that the client may lie in that setting does not override the client's constitutional right to be heard. *See* Rule 3.3(a)(3).

defined by Comment [13] to mean "when a final judgment has been affirmed on appeal or the time for review has passed." However, the final version of Rule 3.3 as adopted by the New York Courts contains no such temporal limitation. The Courts gave no indication as to whether this omission was intended to signal that the obligation to remediate continues forever. However, one possible limitation to the duration of a lawyer's remediation obligation may be found in the term "reasonable" as Rule 3.3 only requires the lawyer to take "reasonable remedial measures." Yet without further explanation, this ambiguous term offers little guidance.

In the only opinions to address this matter to date, New York State Bar Association Formal Opinion 831 speculated in a footnote, and New York State Bar Association Formal Opinion 837 confirmed, that the obligation to remedy fraud contained in Rule 3.3(b) extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever.<sup>9</sup>

## IX. Required Disclosure in the Context of Ex Parte Proceedings

Rule 3.3(d), governing a lawyer's conduct during ex parte proceedings, adds an entirely new obligation; it had no equivalent at all in the old Code. Rule 3.3(d) fills a void by explaining how a lawyer is to behave when appearing before a tribunal in a legitimate ex parte proceeding. It provides:

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.

The policy behind the new provision is explained in Comment [14]. Typically in our adversary system an advocate has the limited responsibility of presenting one side of the matter to the tribunal since the opposing position will be presented by the adverse party. In an ex parte proceeding, however, there may be no presentation by the opposing side. Nevertheless, the object of an ex parte proceeding is to yield a substantially just result. Because the judge must accord the opposing party, if absent, "just consideration," the lawyer for the represented party "has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision." Rule 3.3, Comment [14].

Accordingly, a lawyer in an ex parte proceeding before a tribunal – whether before a court, an arbitrator, or a legislative or administrative agency acting in an adjudicative capacity – has the duty to present adverse facts favorable to the opposition. However, Rule 3.3(d) does not require the lawyer to provide a completely balanced view of the case. For example, a lawyer does not have to draw inferences favorable to the adversary or present adverse facts in the most coherent manner to persuade the court. Furthermore, Rule 3.3(d) only requires the lawyer to disclose

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<sup>&</sup>lt;sup>8</sup> New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (available at www.nysba.org/proposedrulesofconduct020108).

<sup>&</sup>lt;sup>9</sup> Formal Opinion 831 also indicates that Rule 3.3(b) is not applicable to fraud committed by a client prior to the April 1, 2009, the effective date of the Rules, regardless of when the lawyer learns about that fraud.

adverse facts, not adverse law. A lawyer must only advise the tribunal about unfavorable cases if they are "controlling" pursuant to Rule 3.3(a)(2).

More importantly, the language of the Rule itself appears to require the lawyer to disclose all material facts, regardless of whether they constitute client confidential information. The mandatory words used in Rule 3.3(d) – "a lawyer *shall* inform the tribunal of *all* material facts" – suggests that the disclosure obligation is unconditional. *See* Jill M. Dennis, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. Legal Ethics 157 (1994) (discussing ABA Model Rule 3.3(d)). *Compare* Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(3) ("A lawyer shall not knowingly . . . in an ex parte proceeding, fail to disclose to the tribunal an *unprivileged* fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.") (emphasis added). Final resolution of this issue will likely have to await the issuance of individual ethics opinions; however – given the straightforward requirement on the face of the Rule – lawyers should be cautious that the tradeoff for participation in an ex parte proceeding may be the sacrifice of client confidences.