

## Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)

BY ROY SIMON

This month's column, which continues my series of comments on the new New York Rules of Professional Conduct, begins with Rule 3.3(a)(3) and ends with Rule 3.3(d).

### Rule 3.3(a)(3) and 3.3(b): Preventing Future Perjury

Rule 3.3(a)(3) and Rule 3.3(b) each covers both future and past perjury. Since the old New York Code of Professional Responsibility dealt with past and future perjury in very different ways, I will separate my discussion of past perjury from my discussion of future perjury. With respect to future perjury, Rule 3.3(a)(3) and (b) provide as follows:

(a) A lawyer shall not knowingly:

(3) offer or use evidence that the lawyer knows to be false. ... 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 before a tribunal and who knows that a person intends to engage ... in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The first sentence of Rule 3.3(a)(3) – “A lawyer shall not knowingly ... offer or use evidence that the lawyer knows to be false” – just rephrases old DR 7-102(A)(4), which provided that a lawyer shall not “[k]nowingly use perjured testimony or false evidence.” Thus, the old prohibition on a lawyer’s knowing use of future perjury is alive and well in the new Rules. But what if a lawyer does not *know* that the client’s testimony will be false? What if the lawyer merely *believes* that the client will lie? Rule 3.3(a)(3) adds a sentence to deal with this situation: “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.” (Emphasis added, here and throughout this article.)

### The Lawyer’s Mental State

Thus, Rule 3.3(a)(3) implicitly divides a lawyer’s mental state into three possible levels. The highest level is “knows.” The middle level is “reasonably believes.” The lowest level is anything short of a reasonable belief (*e.g.*, a suspicion, a hunch, or a guess). Both “knows” and “reasonably believes” are defined in Rules 1.0(k) and (r), which provide as follows:

Rule 1.0(k): “Knowingly,” “known,” “know,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

Rule 1.0(r): “Reasonable belief” or “reasonably believes,” when used in reference to a lawyer, denotes that a lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. Terms like “suspicion,” “hunch,” “guess,” “suspects,” and “thinks” are not defined in the new Rules and do not even appear in the Rules, but in my view (and in common usage) they all mean something less than “reasonably believes.”

If a lawyer “knows” that the testimony of a client or other witness will be false (or knows that a document is false), then Rule 3.3(a)(3) prohibits the lawyer from offering that evidence even if the client is a criminal defendant. This does not create a constitutional problem because the United States Supreme Court held in *Nix v. Whiteside*, 475 U.S. 157 (1986), that a criminal defendant has no right to testify falsely.

A lawyer may be required to allow a criminal defendant to take the stand and testify to matters that the lawyer does not know to be false, and the lawyer may even have to ask a court to allow a criminal defendant to testify falsely in narrative form; see *People v. Darrett*, 2003 WL 22867872 (N.Y. App. Div. 1<sup>st</sup> Dep’t 2003) (stating in *dicta* that a lawyer who knows a criminal defendant will testify falsely should “request the court’s permission to allow the defendant-client to testify in narrative form”). But the lawyer does not have a duty to – and indeed must not – knowingly present false testimony in the usual question-and-answer manner – even testimony from a criminal defendant.

In a civil case, in contrast, where the client has no constitutional right to testify in her own behalf, a lawyer may decide to keep the client off the stand based simply on the lawyer’s reasonable belief that the client will testify falsely. And in both civil and criminal cases, a lawyer must always refuse to present false testimony of a witness other than the client if the lawyer knows in advance that the witness will testify falsely.

If a lawyer does not “know” that a criminal defense client will testify falsely but “reasonably believes” the client will do so, then the lawyer *must* allow the client to take the stand and offer the testimony, although it may later prove to be false. That’s the way the adversary system works in criminal cases – if the client insists on testifying, the defense lawyer is obligated to let the defendant testify unless the lawyer *knows* the defendant will lie. *A fortiori*, if the lawyer for a criminal defendant merely suspects or thinks or guesses that the client’s testimony will be false, the lawyer must allow the client to offer that testimony. (Of course, the lawyer can and should counsel the defendant about the risks of testifying in a way that the lawyer reasonably believes or suspects is false, but the defendant has the last word unless the lawyer knows the client will lie on the stand.)

In contrast, if a lawyer for a criminal defendant reasonably believes that a witness *other than* the client will testify falsely (e.g., an alibi witness of doubtful credibility), then the lawyer has the right (but not the duty) to decide whether or not to elicit that testimony. In other words, in the case of every witness other than a criminal defendant, a lawyer has discretion whether to call or not to call that witness if the lawyer reasonably believes the witness will commit perjury.

The lawyer’s discretion is limited, however, by Rule 1.2(a), which provides (with restrictions not relevant here) that a lawyer “shall abide by a client’s decisions concerning the *objectives* of representation and ... shall consult with the client as to the *means* by which they are to be pursued.” Whether to call a given witness is generally a question of means, but sometimes calling a witness can implicate the client’s objectives. For example, if the client wants to present a particular defense (e.g., an alibi) and only one

witness is available to support that defense, then the lawyer's decision not to call the only available witness would clash with the client's objective of presenting an alibi defense. (Vice versa is also true – the lawyer may want to call a truthful witness that the client does not want to call – but that is a pure Rule 1.2(a) problem that has nothing to do with Rule 3.3.)

### **A Lawyer's Hunch**

If a lawyer neither knows nor reasonably believes that a witness will testify falsely, but merely thinks, suspects, guesses, or has a hunch that the witness will commit perjury, then the lawyer has the unfettered right to call that witness, and the jury will decide (or the judge at a bench trial will decide) whether the testimony is credible. But the lawyer does not have the duty to call a witness that the lawyer suspects will testify falsely, any more than the lawyer has a duty to call every witness who will testify truthfully. Again, the lawyer's discretion is bounded only by Rule 1.2(a), which allocates decision-making authority between lawyers and clients. In this column I will not spend any more time trying to address Rule 1.2(a)'s line between objectives and means.

Several other new rules are relevant to the question of future perjury. Rule 1.2(d) provides that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent ...." Thus, a lawyer who knows that a client will commit perjury, or who knows that a client has arranged for a friend to provide a false alibi, must not ask questions that will elicit the false testimony. Rule 1.6(b)(2), like old DR 4-101(C)(3), permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent the client from committing a crime." Thus, a lawyer who knows that a client intends to testify falsely will not violate the duty of confidentiality under Rule 1.6 by advising the court that the lawyer knows the client intends to commit perjury.

Another relevant new provision is Rule 3.3(b), which will sometimes convert former DR 4-101(C)(3)'s optional disclosure of intended perjury into a mandatory disclosure. Rule 3.3(b) provides that a lawyer who represents a client before a tribunal and who knows that a person (whether the client or someone else) "intends to engage ... in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Let's consider an example. Suppose a lawyer learns that a client and the client's accountant both intend to commit perjury in a civil fraud trial. (The lawyer has no doubt that the proposed testimony is false – i.e., the lawyer "knows.") Is it "necessary" to disclose the intended perjury? No. Under the first clause of Rule 3.3(a)(3), the lawyer is prohibited from offering evidence that the lawyer knows to be false. However, the lawyer in a civil case has the right to keep the client and the accountant off the stand, which will remedy the perjury problem by preventing the perjury, so it is not necessary to disclose the accountant's planned perjury to the court. Ditto a witness who intends to testify falsely on behalf of the lawyer's client in a criminal case – simply keeping the witness off the stand will remedy the problem, so disclosure is not necessary. Only when the client is a criminal defendant, or when the witness will be called by another party to the litigation, may it be "necessary" to alert the court to the planned perjury.

If the lawyer plans to present the client's false testimony in narrative form, the lawyer will need to request court permission, but the court is unlikely to grant permission unless the lawyer confirms that he "knows" (not just reasonably believes or suspects) that the client intends to commit perjury. In contrast, if

counsel for *another* party intends to call a witness that the lawyer knows will testify falsely, and if the lawyer cannot remedy the problem by talking the other party's counsel out of doing so, then the lawyer must disclose that intended perjury to the court.

In sum, Rule 3.3(b) superficially appears to require a lawyer to disclose the intention of a client or other witness to commit perjury, but in most instances the lawyer can remedy the problem in other ways and disclosure can be avoided... As we have seen, under Rule 1.6, if disclosure of confidential information is not necessary under one of the exceptions in Rule 1.6(b), then it is flatly prohibited.

### **Rule 3.3(a)(3) and (b): Remedying Past Perjury**

The most controversial part of Rule 3.3(a)(3) is its treatment of false evidence that has already been offered. What may or must a lawyer do if the lawyer learns definitively that a client or other witness called by the lawyer has testified falsely? Rule 3.3(a)(3) provides as follows:

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.

This approach parts company with the Code's approach, so the historical background is worth recounting. In the Code, the rule governing disclosure of client fraud was DR 7-102(B)(1), which provided that a lawyer who received evidence "clearly establishing" that a client had perpetrated a fraud on a tribunal (for example, by committing perjury) had to urge the client to withdraw or correct the fraud, and if the client refused to correct the fraud, the lawyer was required to disclose the fraud to the tribunal, except when the information was "protected as a confidence or secret."

The information was almost always protected as a confidence or secret (because "secret" was defined to include any information embarrassing or detrimental to the client, as well as any other information that the client asked the lawyer to hold "inviolable"). As a practical matter, therefore, the lawyer's only choices – until 1990 – were either (i) to stand by silently, or (ii) to withdraw from representing the client. The duty of confidentiality trumped the duty of candor to the court, thus prohibiting the lawyer from correcting the fraud.

In 1990, the tide began to turn. The Courts adopted DR 4-101(C)(5), which gave a lawyer the right, in narrow circumstances, to withdraw the lawyer's own opinion or representation to a third person if the information on which the opinion or representation was based turned out to be "materially inaccurate." And in 2004 and 2006, the New York State Bar Association Committee on Professional Ethics determined that DR 4-101(C)(5), when read together with DR 7-102(B)(1), *required* a lawyer to withdraw a false opinion or representation that the lawyer had made to a tribunal. But the lawyer was still prohibited from disclosing the nature of the fraud, because DR 4-101(C)(5) permitted him to reveal confidences and secrets only to the extent "implicit" in withdrawing the false opinion or representation. That is as far as the Code went.

What about false testimony in court? Under the Code, if a lawyer received information clearly establishing that a witness *other than* the client had "perpetrated a fraud upon a tribunal" (*e.g.*, testified

falsely or submitted false evidence), DR 7-102(B)(2) provided that the lawyer “shall reveal the fraud to the tribunal.” There were no exceptions.

However, fraud outside of court was treated differently from fraud in litigation. If a lawyer learned that a person other than a client (*i.e.*, a third party) had perpetrated a fraud on a person other than a tribunal (*e.g.*, a gullible investor), DR 7-102(B)(2) was silent – it did not address the situation at all, and therefore imposed no obligation of any kind on the lawyer. Moreover, if the information about the fraud by the third party was a confidence or a secret, then the lawyer was prohibited from revealing the information unless an exception to the duty of confidentiality applied (which it rarely did).

Fraud by a client was another story. Under DR 7-102(B)(1), if a lawyer received information clearly establishing that a client had, in the course of the representation, “perpetrated a fraud upon a person or tribunal,” then the lawyer “shall promptly call upon the client to rectify the same, and if the client refuses” – which was almost always the case – then “the lawyer shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a confidence or secret.*” Because the term “secret” was so broadly defined, the information was nearly always protected as a confidence or secret. As discussed above, therefore, the lawyer essentially had to stand by silently unless the lawyer personally had made a representation to the court that now turned out to be “based on materially inaccurate information” or was being “used to further a crime or fraud.”

In that narrow circumstance, the lawyer was required (per N.Y. State 781 and 797) to withdraw from the representation – but the lawyer could go no further without a court order to reveal confidential information. Rule 3.3(a)(3) now goes further. The mandate is not simply to withdraw false evidence but also to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” The focus, then, is on “reasonable remedial measures.” What will remedy false testimony by a client?

## **Remedial Measures**

The first remedial measure a lawyer should take is the same one required by DR 7-102(B)(1) – call upon the client to correct the false testimony. But that remedy is no more likely to succeed under the Rules than it did under the Code. Clients who are willing to lie under oath seldom correct their testimony just because their lawyer calls them out.

A second remedial measure, in theory, is to move to withdraw. In my view, however, withdrawal is not a reasonable “remedial” measure because it does not remedy the record. Withdrawal is a remedial measure only if the court asks the lawyer why he wants to withdraw and the lawyer, upon being ordered to do so, reveals the fraud to the court. Such an order is the result of a delicate dance. When the court asks the lawyer why he is moving to withdraw, the lawyer should initially say, “Your Honor, all I can say is that professional considerations require me to withdraw.” The judge may understand that explanation as a euphemism for client perjury, and if so, the judge may order the lawyer to reveal the reason in greater detail.

If the judge insists on a detailed response, the lawyer cannot successfully assert the attorney-client privilege because the crime-fraud exception will vitiate the privilege of a client who has lied. (In general, the crime-fraud exception does not protect a client’s communications to an attorney in furtherance of a crime or fraud.) Nor can the lawyer parry the court’s order by invoking the ethical duty of confidentiality,

because Rule 1.6(b)(6) expressly permits a lawyer to reveal confidential information “to comply with ... [a] court order.” Even if the court does not order the lawyer to reveal in detail the reasons for moving to withdraw, withdrawal is not a remedial measure because it simply dumps the perjury problem in another lawyer’s lap – and the new lawyer might even facilitate the perjury because the client may skillfully hide the lie from the new attorney. The third remedial measure, and the only one likely to work, is “disclosure to the tribunal.” This remedial measure is built into the text of Rule 3.3(a)(3), which mandates “reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Disclosure is likely to be “necessary” because, in most cases, nothing short of disclosure to the tribunal will remedy the perjury or false evidence.

The duty of confidentiality does not stand in the way of disclosure because Rule 1.6(b)(6) permits disclosure “when permitted or required under these Rules,” and Rule 3.3(c) says that the duties stated in Rule 3.3(a) “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

The next question is: What should be the content of the disclosure to the tribunal under Rule 3.3(a)(3)? Let’s try a variation on the facts in *People v. DePallo*, 96 N.Y.2d 437 (2001), the leading New York Court of Appeals case on client perjury. (I discussed *DePallo* and other client perjury cases more than five years ago in NYPRR – see, *Anticipating and Responding To Client Perjury* (NYPRR Jan. 2004)).

Defendant, a teenaged boy, was charged with taking part in the brutal murder of a 71-year-old man, and the evidence against the boy was damning and overwhelming. Defendant’s blood was found at the scene and on the victim’s clothing; defendant’s fingerprints were found in the murdered man’s home; and defendant admitted to the police that he had been at the scene of the crime. At trial, however, the defendant testified that he was home the entire evening of the crime, and that his incriminating statements to the police had been induced by promises that he could return home if he confessed. What would defense counsel be required to disclose to the court under Rule 3.3(a)(3) if this happened today, assuming (i) the lawyer knew that the defendant’s testimony was false, (ii) the client refused to correct it, and (iii) the court would not permit the lawyer’s withdrawal?

A sufficient remedial measure, in my view, would be to say to the court (outside the presence of the jury, of course), “Your Honor, my client’s testimony was partly false.” Rule 3.3(a)(3) does not require the lawyer to tell the court what the truthful testimony would have been. Nor does it automatically require the lawyer to tell the judge which parts of the client’s testimony were false. Once the court knows that a part of the client’s testimony was false, the court can order the lawyer to disclose the details, so greater initial disclosures are not “necessary” within the meaning of Rule 3.3(a)(3).

If the court orders the lawyer to disclose more details, the lawyer cannot successfully invoke the attorney-client privilege because, as already explained, the client has used the lawyer’s services to commit a crime, and the crime fraud exception would therefore destroy the privilege with respect to the false testimony. Nor can the lawyer successfully raise the ethical duty of confidentiality as a shield because Rule 1.6(b)(6) permits a lawyer to disclose confidential information upon court order. Thus, simply advising the court that part of a client’s testimony was false provides the court with all of the tools it needs to investigate further, making the bare disclosure a reasonable remedial measure and making further voluntary disclosure unnecessary.

## Constitutional Questions

Some would say that revealing a criminal defendant's fraud to a court violates the client's Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective assistance of counsel. Constitutional questions are above my pay grade, but I would not expect a constitutional challenge to Rule 3.3(a)(3) to succeed, because the Fifth Amendment does not give a client the right to testify falsely. In any event, Rule 3.4(c) provides that a lawyer shall not "disregard a standing rule of a tribunal ... but a lawyer may take appropriate steps in good faith to test the validity of such rule ...." Thus, criminal defense lawyers may challenge Rule 3.3(a)(3), but they will have to comply with it unless and until a court holds that it is unconstitutional. In any event, parties to civil cases have no right to effective assistance of counsel (though the right against self-incrimination might apply).

Others say that the separation of powers prevents a court rule such as Rule 3.3(a)(3) from overriding New York's statutory protection for the attorney-client privilege, which is codified in CPLR § 4503. But despite this statutory codification, courts have long created exceptions to the attorney-client privilege. The crime fraud exception is one of these judicially created exceptions, and Rule 3.3(a)(3) is essentially just a logical extension of the crime-fraud exception. Rule 3.3(a)(3) does not contradict the attorney client privilege because the privilege "takes flight" (to use Justice Cardozo's colorful phrase) when the client uses the lawyer's services to accomplish a fraud. The only difference between Rule 3.3(a)(3) and the crime-fraud exception to the privilege is that the crime-fraud exception allows an attorney to disclose under the compulsion of a specific order whereas Rule 3.3(a)(3) constitutes a general "standing" order requiring disclosure in all cases. To me, that difference does not give rise to a constitutional violation.

Still others say that requiring lawyers to inform the courts when a criminal defendant has committed perjury or submitted false documents will cause defendants to mistrust their lawyers and discourage them from telling their lawyers the truth. That may well be. My colleague Monroe Freedman, dean of the legal ethics bar for four decades, has consistently argued that we can reduce perjury if defendants fully trust their lawyers and therefore confide in them about their plans to lie. That will give the lawyers a chance to talk the clients out of committing perjury, which will reduce the overall amount of client perjury in the system. If defendants do not trust their lawyers fully, then they are more likely to fool their lawyers, who will then unwittingly spread perjury on the record. We should not destroy client trust by forcing attorneys to turn against defendants who lie. Instead, when a lawyer has done everything in his power to discourage a criminal defendant from lying and the defendant nevertheless insists on committing perjury, the lawyer should put the client on the stand, question the client in the normal way, and argue the truth of the client's testimony in closing argument. Do you find this line of reasoning persuasive? It doesn't matter. By adopting Rule 3.3(a)(3) New York's courts have apparently rejected it.

Rule 3.3(b) adds almost nothing to Rule 3.3(a)(3) with respect to past perjury. It provides that a lawyer 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." That is the same duty imposed by Rule 3.3(a)(3) regarding evidence that the lawyer has offered. But what if another lawyer has offered the false evidence? For example, what if an opposing witness in a civil case has testified falsely? Ordinarily, the aggrieved lawyer would initially try to remedy the false testimony via vigorous cross-examination. If the cross-examination is successful, the judge or jury will recognize that the testimony was false and no other remedial measure should be required. If the cross examination is unsuccessful, on the other hand, then any lawyer who discloses to the court that the witness has lied will

lack any credibility. If the lawyer couldn't catch the lie using cross-examination, why should the judge or jury believe that the witness was lying?

However, what if the lawyer finishes cross-examination and the court dismisses the witness, but the lawyer later discovers a smoking gun document proving that the opposing witness has lied under oath? (E.g., an e-mail to a friend saying, "The jury bought my [false] story hook, line, and sinker.") The lawyer could approach the opposing party's lawyer with the smoking gun document and seek to settle the case on favorable terms, but that would remedy only the private harm. It would not remedy the public harm – lack of respect for the court system and for the oath to tell the truth – because the public would not know that the settlement was favorable to the truthful party. (Maybe the settlement could remedy the public harm if the settlement terms included a press release explaining that the settlement resulted when the perjury was unmasked, but I have never heard of such a settlement term and am not holding my breath.)

Alternatively, the lawyer who discovered the perjury could ask the court to recall the perjurious witness on the basis of newly discovered evidence, and then continue the cross-examination using the smoking gun document. A successful cross-examination at this point should remedy the perjury, and a failed cross-examination would render any further attempt at a remedy ineffectual. Or, the lawyer could submit the smoking gun document to the court and let the court decide what to do.

In sum, Rule 3.3(b) adds nothing to Rule 3.3(a)(3) with respect to past perjury except when the false evidence was offered by another party and was not discovered until after the perjurious witness stepped down from the stand. In all other situations that I can envision, Rule 3.3(b) duplicates verbatim the mandate of Rule 3.3(a)(3) to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

### **Rule 3.3(b):**

#### **Misconduct Related to a Proceeding**

Rule 3.3(b) (quoted in full above) nevertheless deserves a place in the Rules because it covers substantial and significant ground beyond past and future perjury. If a lawyer represents a client before a tribunal and knows that *any* person "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding [the lawyer] shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The word "person" is all-encompassing. It includes the lawyer's client, the opposing party, co-counsel, a juror, a witness, a non-party, a bailiff, a court reporter, a party's relative, or anyone else. The phrase "intends to engage, is engaging, or has engaged" covers the past, present, and future.

The phrase "criminal or fraudulent conduct related to the proceeding" includes intimidating a witness, bribing a juror, illegally communicating with a court officer, destroying or concealing documents, and any other criminal or fraudulent conduct that would compromise the integrity of the judicial process – see Rule 3.3, Comment 12. To combat all of these wrongs, Rule 3.3(b) requires a lawyer to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Thus, although Rule 3.3(b) adds very little with respect to perjury, it adds important new provisions regarding other wrongs that can undermine the system of justice. These significantly expand a lawyer's duties as they existed under the old Code. The closest Code analog was DR 7-108(G), which provided that a lawyer "shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another

toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.” Rule 3.3(b) is broader than DR 7-108(G) because it covers misconduct in proceedings both in a “court” and in any other type of “tribunal,” a term defined in Rule 1.0(w) to denote not only a court but also “an arbitrator in an arbitration proceeding or a legislative body, administrative agency, or other body acting in an adjudicative capacity.” Moreover, although Rule 3.3(b) can sometimes be satisfied by “remedial measures” short of revealing the improper conduct to the tribunal, it covers a much broader range of misconduct than DR 7-108(G) did. In any event, Rule 3.3(b) will often require a lawyer to make “disclosure to the tribunal,” just as DR 7-108(G) did.

When will disclosure to the tribunal be “necessary” under Rule 3.3(b)? If the wrongs are merely future wrongs that are intended but have not been carried out, then the first remedial measure is to persuade the person not to engage in the wrongful conduct. If the person relents and gives up the planned criminal or fraudulent conduct relating to the proceeding, then disclosure to the court is no longer necessary. But if the person cannot be dissuaded and actually goes ahead with the wrongful conduct, then the only viable remedial measure is likely to be disclosure to the tribunal, to a prosecutor, or to some other authority with power to investigate or act upon the violation. Cf. Rule 8.3(a): (a lawyer who knows that another lawyer has violated the Rules of Professional Conduct in a way that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer “shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation”).

In sum, with respect to wrongs other than perjury, Rule 3.3(b) adds significantly to the duties imposed by the old Code. In the long run, this should deter much criminal and fraudulent conduct in connection with proceedings before tribunals, and should spur disclosures by lawyers that will remedy wrongful conduct that was not deterred.

### **Rule 3.3(c):**

#### **Trumping the Duty of Confidentiality**

As pointed out in the discussion of Rules 3.3(a) and (b), *supra*, Rule 3.3(c) reinforces the duty to disclose to the tribunal the facts necessary to remedy perjury or other criminal or fraudulent conduct related to a proceeding. Rule 3.3(c) provides as follows:

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

Rule 3.3(c) is unique. It is the only rule in the New York Rules of Professional Conduct that expressly trumps the sacred duty of confidentiality expressed in Rule 1.6. Like DR 7-102(B) (2), it mandates disclosure to a tribunal when a person other than the client has perpetrated a fraud upon a tribunal. But it contrasts sharply with former DR 7-102(B)(1), which did not require disclosure to a tribunal when the information about a *client’s* fraud on a tribunal was “protected as a confidence or secret,” which it nearly always was.

### **Rule 3.3(d):**

#### **Ex Parte Proceedings**

Rule 3.3(d) governs a lawyer’s conduct before the court in an ex parte proceeding such as a TRO or an application for a search warrant. It provides:

(d) 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.

This provision had no equivalent at all in the old Disciplinary Rules. Indeed, the phrase “ex parte” did not appear anywhere in the old Code except in EC 7-15, which reminded lawyers that proceedings before administrative agencies vary widely in nature and purpose, and that they may be “legislative or quasi judicial, or a combination of both,” and “may be ex parte in character ....” This EC foreshadowed the expanded definition of “tribunal” in Rule 1.0(w), which includes “a legislative body, administrative agency or other body acting in an adjudicative capacity.”

The definition goes on to say that a legislative body or administrative agency “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.” All of this is important because Rule 3.3(d) applies to ex parte proceedings in every form of tribunal, not just courts.

In the Code, DR 7-110(B), which has been imported into Rule 3.5(a)(2) in the new Rules, implicitly prohibited ex parte contacts with the judge or other official before whom the proceeding was pending “except: (1) In the course of official proceedings in the cause; (2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel ...; (3) Orally upon adequate notice to opposing counsel ...; or (4) As otherwise authorized by law, or by the Code of Judicial Conduct.” EC 7-35 states various rationales for the DR – giving all litigants and lawyers equal access to tribunals, guarding against the appearance of impropriety, and avoiding an “undue advantage” for one party. Unfortunately, neither the DRs nor the ECs explained how a lawyer was to behave when appearing before a tribunal in a legitimate ex parte proceeding in which communicating with a court was both “in the course of official proceedings” and “authorized by law.”

Rule 3.3(d) fills that void. It obligates a lawyer who appears in an ex parte proceeding to “inform the tribunal of all material facts known to the lawyer [including ‘adverse’ facts favorable to the opposition] that will enable the tribunal to make an informed decision ....” Comment 14 explains the policy. Usually in our adversary system, an advocate only has to present one side, because the opposing party will present the other side. In any ex parte proceeding, however, “there may be no presentation by opposing advocates,” and yet the “object of an ex parte proceeding is nevertheless to yield a substantially just result.” Since the judge must accord “just consideration” to an absent opponent, 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.”

Thus, a lawyer in an ex parte proceeding, whether before a court, an arbitrator, or a legislative body or administrative agency acting in an adjudicative capacity, has the duty to present the facts “warts and all.” The lawyer cannot give a one-sided view but must inform the court of the good, the bad, and the ugly. However, Rule 3.3(d) does not obligate a lawyer to present adverse facts in the best possible light, or to argue inferences favorable to the adversary, or to weave the adverse facts into a coherent story line that may persuade the court.

Nor does Rule 3.3(d) require a lawyer to present a balanced view of the law (compare Rule 3.3(a)(1), which obligates a lawyer to correct a false statement of “material fact or law”). Therefore, a lawyer need

not advise the tribunal about unfavorable cases unless they are “controlling” – see Rule 3.3(a)(3) (providing that a lawyer shall not fail to disclose “controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

The last two paragraphs of Rule 3.3, which have no equivalent in the ABA Model Rules of Professional Conduct, are taken nearly verbatim from old New York DR 7-106(B) and (C), so there is nothing new on which to comment.

Next month, I will continue my discussion of the New York Rules of Professional Conduct.

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