

New York County Lawyers Association

Committee on Professional Ethics

Formal Opinion 752

TOPIC: Conduct Before a Tribunal

DIGEST: Where a supervising lawyer misrepresents a client’s compliance with a court order in response to a direct inquiry from the Court, the lawyer is required to correct the misrepresentation to the Court. If the supervising lawyer refuses to correct the record, the supervised lawyer who was in court with the supervising lawyer and aware of the misrepresentation must take steps to correct the record, which may include consulting with the General Counsel or other appropriate supervisor at the firm to urge that the firm correct the record. If the firm fails to take action, the supervised lawyer must inform the Court of the misstatement.

RULES OF PROFESSIONAL CONDUCT: 3.3, 5.1, 5.2

OPINION

1. Associate A recently joined the ABC law firm. She has been asked by Partner P to assist in the defense of NewMed, a medical device manufacturer that has been sued by Med-D.¹ Med-D claims that one of its former employees, who now works at NewMed, stole proprietary code used in Med-D’s medical device inventory software, COUNT, and used it in NewMed’s medical device inventory software, WARECOUNT. Med-D’s lawyers obtained a preliminary injunction prohibiting NewMed from further use of its WARECOUNT software pending the conclusion of expedited discovery, an evidentiary hearing, and the court’s decision on Med-D’s claims. NewMed was to be in full compliance with the Court’s order by the next status conference.

2. A accompanied P to the status conference in this matter. The Judge asked P if NewMed had complied with the preliminary injunction, and P replied that it had. In fact, the prior evening P spoke to the Chief of Operations at NewMed, and he explained that NewMed needed another week to fully take down the WARECOUNT software and install other software. A was present for the call with the Chief of Operations, and after the status conference asked P why she said NewMed was in compliance when it would not complete the takedown for another week. P said NewMed had partially complied, the week delay was not material and, most important, NewMed would be in full compliance weeks prior to the evidentiary hearing, so there was no need to inform the court of the delay. P also directed A that she was “duty-bound” to heed P’s instructions not to disclose NewMed’s partial compliance to the Court or opposing counsel.

3. Several rules in the New York Rules of Professional Conduct (“RPC”) govern the conduct of P and A in this scenario. RPC 3.3(a) provides that “[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

¹ The companies and product names used in this hypothetical are all fictitious, and are being used solely to aid discussion of the underlying issues herein.

material fact or law previously made to the tribunal by the lawyer.” Here, P will have violated RPC 3.3(a)(1) by misrepresenting NewMed’s compliance with the injunction to the Court, and has a duty under that same rule to correct the misrepresentation. Indeed, had P stated truthfully that NewMed had not fully complied and explained the logistical barriers to full compliance, the Court may simply have modified the order consistent with NewMed’s truthful representation about when full compliance could be achieved.

4. In addition, RPC 8.3(a) provides that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct 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.” If P does not correct the misrepresentation to the Court, A has an independent obligation to report P’s misrepresentation to the Court or some other disciplinary authority. Further, A is not relieved of her independent duty to report P’s misrepresentation even if she was directed by P or the ABC firm not to do so. *See* RPC 5.1, Cmt. 8 (supervisory duties imposed under RPC 5.1 on supervising lawyers “do not alter the personal duty of each lawyer in a firm to abide by these rules”); RPC 5.2(a) (“A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person”).

5. Importantly, the RPC provides a safe harbor for supervised lawyers whose conduct is deemed to be in violation of the RPC if, and only if, the supervised lawyer “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” RPC 5.2(b). In the instant scenarios, for example, P, in addition to telling A she is “duty bound” not to disclose the client’s noncompliance, may inform A that the misrepresentation to the Court regarding the client’s compliance is in the client’s best interest and is not material because the client will have complied prior to the evidentiary hearing, which is the date on which full compliance will matter. Associate A should understand that making intentional misrepresentation to the Court can never be deemed a reasonable resolution of an arguable question of professional duty, and therefore she will not be protected by RPC 5.2(b)’s safe harbor if she fails to report the misrepresentation.

6. It remains unclear, however, whether the lack of candor before the Court becomes moot a week later when NewMed purportedly will be in full compliance. At that point, arguably there no longer is “a false statement of *material* fact” to be corrected. We believe that NewMed’s compliance one week later (and before the evidentiary hearing) does not cure the issues raised by P’s misrepresentation to the Court. At the status conference the Court relied on the fact that NewMed was in compliance as reason to keep the current injunction order in place without modification. Learning that NewMed was not in full compliance might have caused the Court to take action, ranging from granting a permanent injunction to merely extending the date for compliance by one week. The status of NewMed’s compliance plainly was “material” to the Court. Moreover, the Court relied on the truth of the P’s representations regarding NewMed’s compliance. Thus, P’s misrepresentation of NewMed’s compliance was a false statement of a material fact that required correction under RPC 3.3(a); we do not interpret RPC 3.3 to suggest that there is no longer an obligation to correct the record because NewMed complied shortly after the date of the status conference. In addition, P’s intentional misrepresentation to the Court about NewMed’s compliance and actions to conceal the misrepresentation subsequently demonstrates that his conduct raises a substantial question as to the P’s honesty, trustworthiness

or fitness as a lawyer. Accordingly, if A tries to convince the P to correct the misstatement to the Court and the P refuses, Associate A will have an obligation under Rule 8.3(a) to report the lawyer.

7. The Committee appreciates that a supervised attorney – such as an associate in a law firm – may feel that she has been put in an impossible position where she has knowledge of misconduct by a supervisor and either believes that revealing the misconduct may be career-ending or has been implicitly or explicitly told that disclosing will have an adverse effect on her career. While difficult, the lawyer must remember her duty to comply with the RPC, and her duties to the Court, clients, adversaries, and the administration of justice. In this regard, it may be helpful to consider interim measures that may be available to her. For example, if P does not agree to correct the court record, A may consult with her supervisor at the ABC firm (if this is someone other than the P) or the General Counsel or ethics counsel for the ABC firm regarding P’s misrepresentation and the need to correct the record. If the ABC firm still refuses to act, then A may be left with no alternative other than to inform the Court of the misrepresentation, leaving to the Court to determine if it wishes to take any action with respect to the P’s misrepresentation and failure to correct the record. Because the Court is “a tribunal or other authority empowered to investigate or act upon such violation,” A’s report to the Court would discharge any duty she may have under RPC 8.3(a).

CONCLUSION

8. A supervising lawyer who misrepresents her client’s compliance with a court order has a duty to correct the misstatement. If the supervisory lawyer does not correct the misstatement, and a supervised lawyer knows of the supervisory lawyer’s misrepresentation, the supervised lawyer must take reasonable remedial measures to correct the record. If the supervised attorney remonstrates with the supervisor to correct the record and the supervisor refuses, the supervised attorney may consult with the firm’s General Counsel or some other appropriate supervisor at the firm and urge that the firm correct the record. If the firm does not act on the supervised lawyer’s report, the supervised lawyer should report the misrepresentation to the court.