NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 741
Date Issued: March 1, 2010

TOPIC: Lawyer learns after the fact that a client has lied about a material issue in a civil deposition.

DIGEST:

A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics Opinion 712.

RULES:

RPC 3.3, 1.6

QUESTION:

What are a lawyer's duties and obligations when the lawyer learns after the fact that the client has lied about a material issue in a civil deposition?

OPINION:

This opinion provides guidance under the newly promulgated New York Rules of Professional Conduct, 22 NYCRR 1200 et seq. (April 1, 2009) (RPC), for a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case. As explained in detail below, this opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially.

Lawyers are ethically obliged to represent their clients competently and diligently and to preserve their confidential information. At the same time, lawyers, as officers of the court, are ethically and professionally obliged not to assist their clients in perpetrating frauds on tribunals or testifying falsely. Balancing the duties of competent representation, client confidentiality and candor to the tribunal requires careful and thoughtful analysis.

Rules of Professional Conduct

Effective April 1, 2009, the New York Rules of Professional Conduct, in RPC 3.3 (a)(3), forbid a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client false testimony:

> 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.

Two other provisions of RPC 3.3 are also relevant here. RPC 3.3 (b) provides that a lawyer who "represents a client before a tribunal and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In addition, a lawyer is duty bound to "correct a false statement of material fact previously made to the tribunal by the lawyer." RPC 3.3 (a) (1).

RPC 3.3 (c) requires a lawyer to remedy client false testimony "even if compliance requires disclosure of information otherwise protected by Rule. 1.6." The lawyer's duty of confidentiality is contained in RPC 1.6, which states that a lawyer shall not knowingly reveal confidential information, including information protected by the attorney-client privilege, except in six enumerated circumstances. One of those circumstances is "when permitted or required under these Rules or to comply with other law or court order." (RPC 1.6(b)(6).) Under the explicit language of RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court or known client false testimony or to correct prior false statements offered by the lawyer supersedes the lawyer's duty to maintain a client's confidential information under RPC 1.6.[1]

NYCLA Ethics Opinion 712 Is Superseded Because It Was Based upon the Old Code

The lawyer's duty to remedy false statements by disclosure of confidential information if necessary represents a change in the ethics rules, and requires us to revisit and withdraw our prior opinion on client false testimony in depositions.

In a prior opinion on this issue, we stated that a lawyer who learns of a client's past false testimony at a deposition must maintain the confidentiality of that information but cannot use it in settlement or trial of the case. The former Code's protection of client confidences formed the basis for NYCLA Ethics Opinion 712, www.NYCLA.org, 1996 WL 592653 (1996), which addressed the issue of admitted past client false testimony in a civil deposition. That opinion

[1] The Committee notes that Section 4503 of the New York Civil Practice Law and Rules ("C.P.L.R.") provides that unless the client waives the privilege, an attorney...shall not disclose or be allowed to disclose such communication. RPC 3.3 thus seemingly contradicts the C.P.L.R. The apparent contradiction between Section 4503 of the C.P.L.R. and the RPC 3.3 has not been addressed by any court thus far. Resolution of the contradiction is a matter of law, and Committee opinions do not address matters of law.

analyzed the conflict between the lawyer's duty to preserve client confidences under former DR 4-101, and the lawyer's competing duty to avoid using perjured testimony or false evidence under former DR 7-102. We concluded, in Ethics Opinion 712, that the lawyer may not use the admitted false testimony, but also may not reveal it: "The information that the testimony was false may not be disclosed by the lawyer." The lawyer could ethically argue or settle the case, provided that the lawyer refrained from using the false testimony.

NYCLA Ethics Opinion 712 was based upon the prior Code of Professional Responsibility, which was superseded by the Rules of Professional Conduct on April 1, 2009. In light of the adoption of RPC 3.3 on April 1, 2009, N.Y. County 712 is no longer valid, and accordingly does not provide guidance for conduct occurring after April 2009.[2]

Is a Deposition Tantamount to Testimony before a Tribunal?

An important question under the new rules is whether deposition testimony is considered to be different from trial testimony.

The text of the rules does not explicitly refer to depositions and other pretrial proceedings in civil cases. RPC 3.3 (a) (3) applies when a witness, the client or the lawyer "has offered material evidence" that the lawyer learns to be false, and RPC 3.3 (b) applies to "criminal or fraudulent conduct related to the proceeding." RPC 1.0 (w) defines "Tribunal" as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting 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." RPC 1.0 (w).

The literal language of the RPC 3.3 (a) (3) applies when a lawyer "has offered material evidence," which the lawyer later comes to learn was false. While the phrase is not defined in the rules, the taking of a deposition is no different from calling a witness at a trial. Under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial.

While not formally adopted as part of the Rules, the comments to the New York Rules of Professional Conduct explicitly contemplate the applicability of Rule 3.3 to depositions:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. ... It 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. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

Rules of Professional Conduct 3.3 comment [1].

[2] The New York State Bar Association has opined (Opinion 831) that if client fraud occurred before the effective date of the New York Rules of Professional Conduct, April 1, 2009, and the fraud is protected as a client confidence or secret (DR 4-101(A)), then an attorney may not reveal the fraud.

We conclude that testimony at a deposition is governed by RPC 3.3, and is subject to the disclosure provisions of RPC 3.3 (c). False testimony at a deposition may be perjury, punishable as a crime. The victim of the perjury is the adversary party, which may rely on the false testimony, and the justice system as a whole even if the deposition is not submitted to a court, or not submitted to the court for months or even years after the testimony is reduced to transcript form.

Remediation of False Testimony at a Deposition

A lawyer's duty under RPC 3.3 comes into effect immediately upon learning of the prior testimony's falsity, and requires a lawyer to remedy the false testimony. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony.

Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the court.

Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See RPC 1.13 (organization as client).

Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

When faced with the necessity to remedy false deposition testimony, a lawyer no longer has the option to simply withdraw from representation while maintaining the client confidential information.[3] Prior to the adoption of the New York Rules of Professional conduct in April 2009, when remonstration failed, the attorney was presented with a dilemma. The attorney could not reveal a client confidence, and yet could not stand by and allow false testimony to be relied on by others. Withdrawal was the only option. The Committee now concludes that withdrawal from representation is not a sufficient method of handling false testimony by a client where prior remonstration has failed to correct the false deposition testimony. Withdrawal, without more, does not correct the false statement, and indeed increases the likelihood that the false statement, if unknown by a substituting attorney, will be presented to a tribunal or relied upon by the adverse party. Unless in withdrawing, the lawyer also communicates the problem sufficiently to enable the false testimony to be corrected, withdrawal from representation is no remedy.

Accordingly, a lawyer is required to remedy the false testimony. Depending on the circumstances a lawyer may be able to correct the false testimony or withdraw the false statement. RPC 3.4 directs a lawyer to abstain from preserving known false testimony. A lawyer may not "participate in the creation or preservation of evidence when the lawyer knows

[3] Pursuant to RPC 1.6, confidential information includes the definition of confidences and secrets contained in former DR 4-101(A).

or it is obvious that the evidence is false." RPC 3.4 (a) (5). Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement.

Ultimately the false testimony cannot be perpetuated. If remonstration is not effective, the attorney must disclose the false testimony. However, disclosure of client confidential information should be limited to the extent necessary to correct the false testimony.

Knowledge of Falsity under RPC 3.3 and 1.0

New York lawyers should note that the duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer "comes to know of its falsity. . .." RPC 3.3 (a) (3). The lawyer may refuse to introduce, in a civil case, evidence "that the lawyer reasonably believes is false." RPC 3.3 (a) (3), (emphasis added). Thus, it is only when the lawyer knows that the prior testimony is false that the rules trigger a duty to take corrective action.

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) defines knowledge as "actual knowledge of the fact in question," which "may be inferred from circumstances."

While there is no known precedent under the 2009 Rules, some guidance is provided by authorities decided under the prior rules. In *In re Doe*, the Second Circuit Court of Appeals articulated the standard of knowledge required to trigger reporting to the tribunal under former DR 7-102:

> [T]he drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.
>
> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

In re Doe, 847 F.2d 57, 63 (2d Cir. 1988). While the Court's discussion of a lawyer's duty to report a fraud on the tribunal dealt with a non-client's fraud, the Court's cogent analysis of the "knowledge" standard also applies to a lawyer's duty with respect to a client's fraud on a tribunal. It is clear that only actual knowledge triggers the duty to report the fraud on the tribunal. In *In re Doe*, the Court held that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report.

While the following case does not directly address the ethics rules, it may, nevertheless, provide further guidance by way of analogy, and illustrates the notion that actual knowledge may be gleaned from the circumstances. In *Patsy's Brand Inc. v. I.O.B. Realty et al.*,2002 U.S. Dist. LEXIS 491, (vacated by *In re Pennie & Edmonds LLP*, 2003 U.S. app LEXIS 4529 (2d Cir. 2003)) the United States District Court for the Southern District of New York sanctioned defense counsel for F. R.Civ. P. Rule 11 violations. There, a law firm having substituted as counsel for defendant offered an affidavit that prior counsel had disavowed in withdrawing. The Court stated that "rather than risk offending and possibly losing a client, counsel simply closed their eyes to the overwhelming evidence that statements in the client's affidavit were not true." The Court found that by the time the law firm substituted as counsel, the affidavit had been conclusively proven to be false in very material respects. Counsel was aware that their client had made prior false statements under oath. Although the law firm discussed the false statements and the affidavit with their client, and relied on the client's explanation, the Court determined that all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on (their client's) statements.[4]

While *Patsy's Brands* was decided under Rule 11, a lawyer confronting the question of what may constitute actual knowledge may find some guidance in that opinion and in *Doe*, above.

Conclusion

A lawyer who comes to know that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer does disclose the client's false statement to the tribunal, the lawyer must minimize the disclosure of client confidential information.

[4] The finding was reversed on appeal because the law firm had not been given an opportunity to withdraw the false affidavit before sanctions were levied.