

Candor to the Tribunal: Changes to Rule 3.3 of the Professional Rules

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It should be self-evident that lawyers ought not lie to the court or knowingly submit false evidence. There have been some recent changes to the Rules of Professional Conduct that expand upon this concept.

A lawyer's obligation of candor to a tribunal is embodied in Rule 3.3 of the Minnesota Rules of Professional Conduct (MRPC). That rule governs the conduct of lawyers appearing before tribunals and in proceedings conducted pursuant to a tribunal's adjudicative authority, such as depositions. Tribunals, as defined in Rule 1.0(n), include courts, arbitrators in binding arbitrations and legislative bodies and administrative agencies that are acting in an adjudicative capacity.

Duty to correct false statements

Changes to the Rules of Professional Conduct, effective Oct. 1, 2005, include changes to Rule 3.3. Rule 3.3(a)(1), as it previously read, prohibited lawyers from, amongst other things, knowingly making a false statement of fact or law to a tribunal. The rule was silent on whether a lawyer who made a false statement of fact or law to a tribunal, believing at the time the statement was true, and later came to learn that the statement was false had an obligation to alert the tribunal to the falsity.

The recent amendments to the rule now make it clear that a lawyer has a duty to correct false statements of material facts or law made to a tribunal. This change in the rule was intended by the drafters of the ABA Model Rules of Professional Conduct to parallel a lawyer's obligation to take reasonable remedial measures when she or he learns that they have submitted false evidence.

Submission of false evidence

The amendments to Rule 3.3 clarify the extent of a lawyer's duty to take reasonable remedial measures upon learning that she or he has submitted false evidence.

The rule as it previously read provided, in part, that "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

The rule as amended retains the prohibition on the knowing offering of false evidence but clarifies that the obligation to take remedial measures applies not only when it is the lawyer or the lawyer's client who has offered the false material evidence, but also when a witness called by the lawyer offers false material

evidence.

The rule continues to distinguish between the offering of evidence known by the lawyer to be false and evidence that the lawyer only reasonably believes is false. The amended rule now reads, “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.” Thus, except when dealing with the testimony of a client who is a criminal defendant, a lawyer may not offer evidence known to be false and may (or may not) refuse to offer evidence which the lawyer only reasonably believes (but does not know) is false.

When representing a criminal defendant, because the client is, pursuant to the provisions of Rule 1.2(a) and the state Constitution, exercising his or her right to testify at trial, the lawyer must allow the defendant to testify even if it is reasonably believed (but not known) the testimony will be false.

The amendments to Rule 3.3 elaborate on the nature of remedial actions that must be taken if it is learned that false evidence has been submitted and the duration of the obligation to take those measures. The rule now specifically provides that reasonable remedial measures include, if necessary, disclosure of the false evidence to the tribunal.

The obligation to take those remedial measures previously was without limit in terms of duration. The rule now provides that the obligation continues only to the conclusion of the proceedings. The conclusion of the proceedings is defined in the comment to the rule: “A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.”

Expanded obligation

A new provision added to Rule 3.3 expands a lawyer’s obligation to take reasonable remedial measures. Rule 3.3(b) provides, “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

Thus, if you know that someone – be it your client or someone else – is going to, has or intends to commit such misdeeds as witness tampering, perjury, bribery or other types of misconduct related to the proceedings, you must take reasonable remedial measures.

While, at first glance, this seems to be a new obligation, in fact, DR 7-102(2) of the Minnesota Code of Professional Responsibility (in effect from 1970 through 1985) contained a similar provision.

In sum, Rule 3.3 continues to embody, and the amendments have strengthened, a lawyer’s duty as an officer of the court to preserve the integrity of the judicial process.