

Dealing With Clients Who Lie: What Can You Ethically Do?

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The preamble to the Minnesota Rules of Professional Conduct provides that "a lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."

As noble as those responsibilities are, they occasionally come into conflict with one another. The preamble notes that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." Perhaps at no time is that conflict clearer than when the lawyer learns that information that he or she has offered into evidence is false.

Lawyer represents Client in a claim against client's automobile insurer. The insurer has denied coverage for an auto accident because of non-payment of the insurance premium. In her sworn deposition Client contends that the premium payment was mailed several days before the accident. If true, Client's testimony provides a basis for arguing that her insurer has a duty to provide coverage. However, several months after the deposition, but before the matter comes to trial, Client admits to Lawyer that her testimony was false. Client tells Lawyer that she wrote the check several days after the accident and then left it in an inconspicuous spot in the post office.

She had anticipated that the check would be found and the blame for the late delivery could be placed on the postal service. How does the lawyer reconcile his or her responsibility to the client and the duty as an officer of the legal system?

A resolution of Lawyer's ethical conundrum involves a consideration of Rule 3.3 of the Minnesota Rules of Professional Responsibility, Candor Toward the Tribunal. Rule 3.3(a)(4) provides in part that "if a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." Any lawyer faced with a similar situation must consider whether evidence was offered, whether it was material, whether the lawyer knows of its falsity and finally (and most importantly) what is the lawyer to do?

Had Lawyer actually offered evidence? After all, the title of the Rule is Candor to the Tribunal. Client's testimony was only given in the context of a discovery deposition. Is Rule 3.3 even applicable?

As the ABA Committee on Professional Responsibility has indicated, the answer is yes. "A lawyer in a civil case who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud." American Bar Association Committee on Professional Responsibility and Ethics

Formal Opinion 93-376.

The lawyer's obligations under Rule 3.3(a)(4) apply not only to evidence offered during trial, but also information provided during discovery.

The reasoning behind that conclusion is twofold. First, some of what is produced in discovery may end up as evidence in trial. It makes no sense to delay the application of the Rule until the evidence is actually presented to the court. Second, even before the evidence is submitted to the court (or even when it is not submitted) there is the potential for reliance on the false evidence. That reliance could determine the outcome of the case and subvert the truth-finding process.

Since the evidence was "offered," Lawyer must next consider whether the evidence was material and whether Lawyer "knew" of its falsity. At least as to this situation, those questions are easily answered. Was the evidence offered "material?" Clearly it was. The question of when Client sent the check was crucial in determining whether her case would proceed. Did Lawyer "know" of the falsity of the evidence? Again, yes. The admission by Client left no doubt as to the falsity of the evidence offered. However, it should be noted that the Rule uses the term "to know." The lawyer's obligation under Rule 3.3 does not arise in a situation where the lawyer merely questions the veracity of the evidence (although Rule 1.16(b) permits the lawyer to withdraw in such a case).

Lawyer has offered material evidence that Lawyer has come to learn is false. What are the reasonable remedial measures available to Lawyer? Lawyer's first option is to talk to Client in confidence to explain the problems with her conduct and urge her to rectify the problem. As described in the comment to Rule 3.3, the lawyer "is to remonstrate with the client confidentially."

So yes, you are permitted to remonstrate with your client.

In some situations, such as incomplete answers to interrogatories, lawyer and client may be able to correct the false evidence by supplementing the answers or otherwise providing information to the opposing party.

If Lawyer is unable to persuade Client to rectify the problem, Lawyer must act to see to it that a fraud is not perpetrated on the tribunal. At a minimum this may mean withdrawal from the representation to avoid assisting the client in committing fraud. "A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent" Rule 1.2(c), MRPC.

However, in the situation described above simply withdrawing from the representation will not remedy the problem. In such a case, the lawyer must take additional action. The lawyer's failure to take appropriate measures can and has resulted in lawyer discipline. See e.g., *In re Mack*, 519 N.W.2d 900 (Minn. 1994), *In re Clem*, 528 N.W.2d 862 (Minn. 1995).

If the client fails to correct the false testimony and the lawyer's withdrawal will not rectify the situation, then disclosure by the lawyer to the opposing party (or where appropriate, to the court) may be the only reasonable remedial measure. Although such a remedy is in conflict with the lawyer's duty of confidentiality, it is specifically permitted by Rule 1.6 and Rule 3.3(b), MRPC. A lawyer may reveal "confidences or secrets when permitted under the Rules of Professional Conduct" [or may reveal] "confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services were used." Rule 1.6(b)(2) and (4). The duty to take reasonable remedial measures applies "even if compliance requires disclosure of information otherwise protected by

Rule 1.6." Rule 3.3(b).

So, while a lawyer's duties of loyalty and confidentiality require the lawyer to explore options other than disclosure of client confidences, such disclosure may on occasion be required. Again, while the lawyer is a representative of the client, the lawyer is also an officer of the legal system and a public citizen having special responsibility for the quality of justice.