

Correcting the record under Rule 3.3

by

**Craig D. Klausing, Senior Assistant Director
Minnesota Office of Lawyers professional Responsibility**

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The Minnesota Rules of Professional Conduct occasionally seem to impose conflicting duties on lawyers. This is because as a member of the legal profession the lawyer is not only a representative of clients, but also an officer of the legal system.

Perhaps nowhere is this tension better illustrated than in the duty of the lawyer to keep confidential client information and the duty of the lawyer to take reasonable remedial measures when the lawyer's client has submitted false evidence to a tribunal.

Rule 1.6(a) imposes a duty of confidentiality, requiring that the lawyer "not knowingly reveal information relating to the representation of a client." As the second comment to the rule notes, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

On the other hand, Rule 3.3(a)(3) requires that "[i]f 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."

Under Rule 3.3(c), such disclosure may include revealing information that otherwise would be protected by Rule 1.6. This is the one instance in the rules where confidentiality must yield.

So how does the lawyer reconcile these duties?

On one level, the reconciliation could be seen as simple. As explained above, in some circumstances the obligations of Rule 3.3 simply trump the requirements of Rule 1.6. In those cases the duty of candor to the tribunal will require that the lawyer reveal information that would otherwise be protected by the duty of confidentiality.

Yet, the lawyer still has professional obligations to the client and undoubtedly wants to avoid unnecessarily disclosing information that will be harmful to the client. This is recognized by the comment to Rule 3.3, stating that "[t]he disclosure of a client's false

testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.”

Again, so what’s a lawyer to do?

The one thing the lawyer may not do is to simply report to the tribunal “my client is a liar!”

As indicated, the rules attempt to balance these sometimes differing roles. Simply disclosing the false evidence provides little balance between those roles. Rather, the lawyer should discuss the matter with the client and hopefully obtain “buy-in” from the client for the client, or the lawyer, to disclose the false evidence. As explained by the comments to Rule 3.3, “the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to . . . correction of the false statement or evidence.”

If the client is not persuaded by a lofty discussion of the importance of preserving the integrity of the adjudicative process, a discussion of the more practical consequences of failing to correct the false evidence may prove fruitful. (Perhaps something such as, “The court is going to find out about this anyway and it would be a lot better for you if the court heard it from you” would suffice.)

As a corollary to that, the lawyer may again remind the client of the lawyer’s duty to disclose the false evidence should the client fail to do so. Comment 11 to Rule 3.3 states: “[U]nless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.”

Ultimately, under MRPC 1.16 and Comment 15 to Rule 3.3, if the client refuses to cooperate or voluntarily disclose the falsehood, the lawyer must withdraw from representation and make the necessary disclosure.

Reconciling the differing roles lawyers serve in the legal system can sometimes be difficult. Striking the proper balance between the lawyer’s duty to clients and to the legal system will depend on a number of factors and will often be the appropriate subject for an advisory opinion from the Director’s Office.

However, being conscious of those roles and knowing the requirements imposed by the Minnesota Rules of Professional Conduct can be a successful start to striking that balance.