DUPLICITY IN DISCOVERY

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Most lawyers know intuitively the principle of MRPC 3.3(a)(1): lawyers don't lie to judges. It's simply not done. No one needs to teach that to even a fledgling lawyer.

But what about when the client tells the lawyer that he intends to lie or has lied to the judge? Forests have been decimated in the publication of scholarly tomes written on the excruciating dilemma of the practitioner faced with the duty of preserving client confidences vis-a-vis a perjurious criminal defendant. The wood pulp settled when the U.S. Supreme Court finally put that issue to rest, stating that the "Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure."Ftn 1

So what happens when the client in a civil case lies, and the lawyer knows it? And does it make a difference if the client lies, not to the judge in the courtroom, but during discovery? Do the principles of candor toward the tribunal apply in that factual context? The short answer is yes. But what must a lawyer who learns that a client has lied during discovery do? Guidance for Minnesota practitioners comes from a lawyer discipline case recently decided by the Minnesota Supreme Court and also from an ABA formal opinion issued last year.

In August 1994 the Supreme Court suspended a Minnesota lawyer who failed to recognize his obligations upon hearing of a client's deception during the pretrial process.Ftn 2 The facts are as follows:

A client retained a lawyer to bring a declaratory judgment action against an insurance company. The client's daughter was involved in a serious car accident while using a family car. The insurance company denied coverage because of nonpayment of the premium, due the month preceding the accident. The lawyer filed a complaint, alleging timely payment. He attached to the complaint a canceled check dated two days before the premium was due, but not charged against the account until 10 days after the accident. Also attached was a renewal premium notice with a handwritten note "Pd. 6/13/90 ck # 8440."

When the insurance company deposed the client, she testified that the check had been timely mailed before the premium due date, not after the accident, and that she herself had made the notation on the premium notice regarding the check number and date of payment.

Approximately nine months later, the client confessed to the lawyer that she had not told the truth at the deposition, and that she had in fact written the premium check only after the accident and then left it on the floor in the post office. The lawyer testified at the disciplinary hearing that he had advised the client that she could "continue the lawsuit and simply 'rely on her right to remain silent,"' but that if she testified at trial that she should reveal the deception. The referee found that the lawyer neither advised the client to

disclose the misrepresentations nor disclosed it himself to either the court or the opposing side.

The lawyer was suspended from practice some 6 months later for unrelated ethical violations, and the client's case was turned over to another lawyer for trial. The two lawyers discussed the client's falsehood at the time the case was referred. The court in the disciplinary action found that the two lawyers had agreed that the false statements should be disclosed on direct examination at trial. During the opening statement at declaratory judgment trial, however, the second lawyer continued with the claim of timely payment, and on direct the client again testified that the premium was paid before it fell due. It was not until cross-examination of the client that she admitted that the check was not written until two days after the accident.Ftn 3

Criminal charges of perjury against the client based upon the false deposition testimony were later dismissed by the prosecutor when it appeared that the client's lawyers had thwarted her attempts to set the record straight.

In the disciplinary case, the court found that the first lawyer had violated, among others, MRPC Rule 3.3(a)(2) ("A lawyer shall not knowingly: fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client") and Rule 3.3(a)(4) ("A lawyer should 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 lawyer defended his actions on the ground that the attorney-client privilege prevented him from disclosing his client's lies. The court acknowledged that a lawyer is generally required to protect the client's confidences and secrets by virtue of Rule 1.6(a), MRPC, but pointed out that Rule 3.3(a) specifically trumps the obligation of confidentiality otherwise imposed:

> Rule 3.3 directly imposes a duty to disclose or take reasonable remedial action under circumstances described in Rule 3.3(a) even if compliance required disclosure of information otherwise protected by Rule 1.6.Ftn 4

The Court noted that the lawyer's silence under these facts was "tantamount to acquiescence to the deception." Silence, then, obviously does not comport with the requirement to take reasonable remedial measures imposed by Rule 3.3(a)(4). So, what should a lawyer do if found in similar circumstances?

The ABA, in Formal Opinion 93-376, (August 6, 1993), provides guidance as to a lawyer's obligations upon learning that a client has lied in the course of pretrial proceedings. The facts considered by the ABA committee were remarkably similar to those of the Minnesota disciplinary case ¾ a lawyer representing an insurance company discovers that an agent of the company has lied at a deposition and has supplied a falsified document in response to a request for production of documents. As in the Minnesota case, the information that the client had lied came from the client directly.Ftn 5

Before reaching the question of what remedial measures suffice in such a situation, the ABA first considered whether fraud in the pretrial context should be regarded as a lack of candor toward the tribunal under Rule 3.3, or as untruthfulness toward the opposing party and counsel under Rule 4.1. The distinction is dispositive, because the duty toward others under Rule 4.1 does not explicitly override a lawyer's duty to keep client confidences under Rule 1.6, such as is true under Rule 3.3.

The ABA Committee found that Rule 3.3(a)(2) and (4) apply to fraud in the pretrial context, even

before a document or deposition transcript is filed with the court, such as attached to a summary judgment motion. The committee determined the "potential ongoing reliance" on the content of the deposition or documents would "inevitably result in the deception of the other side" and "subvert the truth-finding process" of the adversary system. The potential use of such content as evidence was enough to invoke the lawyer's duty to take reasonable measures to correct the fraud under Rule 3.3(a)(4).

Taking reasonable measures, however, does not mean that a lawyer must immediately divulge the client's fraud to the court and opposing party. The ABA points to a number of less onerous measures that should first be invoked to attempt to correct the situation, shy of outright disclosure. Duties of loyalty and confidentiality owed the client require that these options first be invoked.

The first, of course, is to talk to the client in private and urge him or her to fix the situation. There may be means for the lawyer to then rectify the fraud without actually breaching the client confidences. There may be situations where the lawyer could supplement or amend incomplete or incorrect answers to discovery without actual disclosure of the client fraud.

A lawyer also may have to withdraw from the representation to avoid assisting in the client fraud, pursuant to Rule 1.16(a)(1). It is important to recognize, however, that withdrawal alone will rarely if ever solve the problem. Rule 3.3(a)(4) requires the lawyer to do more that [sic] simply walk away from a bad situation. Reasonable measures must be taken to ensure that the false evidence not continue to infect the potential outcome of the litigation. Thus, even if the lawyer does withdraw, he or she must take additional measures to rectify the fraud.

The key point is that if the client refuses to take remedial actions, the obligation to remedy the situation remains with the lawyer, who must take sufficient measures to rectify the fraud. As difficult as it may be, if other measures do not rectify the fraud, counsel must then directly divulge the false evidence to opposing counsel, or if necessary to the court.

Importantly, to be truly remedial, actions must also be taken promptly. A lawyer cannot, as did the Minnesota practitioner, simply bide his time and hope that the problem will be cured at trial, or turn the responsibility over to someone else.Ftn 6

NOTES

1 Nix v. Whiteside, *475 U.S. 157, 168-169 106 S. Ct. 988, 89 L.Ed. 123, 135-136 (1986).*

2 In re Mack II, *CX-90-2713, decided August 5, 1994. The respondent lawyer had previously been suspended by the Court in October 1991 for unrelated ethical violations pursuant to a stipulation entered into by the lawyer and the Director's Office.*

3 *A stipulation for public discipline is pending before the Court, as to the second lawyer, admitting violations of Rules 3.3(a)(2) and 8.4(c) and (d).* In re Clem, *C2-93-1957.*

4 Mack II, *slip op. at 4-5.*

5 *Thus, there was no question as to whether the lawyer "knew" of the fraud.*

6 See, e.g. In re King, *322 P.2d 1095, 1097-1098 (Utah 1958); Comment to Rule 3.3 ("Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed.")*