NYSBA Opinion 1011 (7/29/14)

New York State Bar Association
Committee on Professional Ethics

Opinion 1011 (7/29/2014)

Topic: Duty to remedy fraudulent submissions to administrative agency

Digest: Duty under Rule 3.3 to remedy false statements made to a "tribunal" does not apply to applications for visas or work permits, though other rules may apply.

Rules: 1.2(d), 1.6, 3.3, 4.1, 8.5(b)

FACTS

1. The inquirer is a New York attorney representing a corporate client (the "Employer," or the "Corporation") in matters related to immigration benefits. In the course of the representation, the inquirer filed several employment-based immigrant visa petitions with the Department of Labor, and related petitions with the Department of Homeland Security, in order to obtain the appropriate visas for foreign workers allowed to accept full-time employment in the United States when no U.S. worker is able to fill the position.

2. The application process required the Corporation to certify that it undertook sufficient efforts to locate a U.S. worker qualified for and willing to accept the position before offering the position to a foreign worker. As another required part of the visa petitions, an employee of the Corporation (the "Corporate Recruiter") signed and submitted attestations regarding the various methods of local recruiting the Corporation had supposedly undertaken. Relying on the Corporate Recruiter's assurances, the inquiring lawyer signed each application and submitted them to the Department of Labor. In each instance, the Department of Labor certified each application, at which time the lawyer prepared and filed related petitions with the Department of Homeland Security, which incorporated the applications certified by the DOL, to obtain permanent resident status for the foreign workers.

3. After the submission of these applications, and after some of the foreign workers acquired permanent resident status, the Corporation discovered that its employee, the Corporate Recruiter, had submitted knowingly false attestations.

4. Upon learning of this misconduct, the inquiring lawyer withdrew from representation of the Employer in connection with the applications that were filed but not resolved and in connection with similarly tainted documents that the lawyer had prepared but had not filed, and urged the Employer to disclose the conduct to the federal agencies. The Employer has refused to give the lawyer consent to disclose information regarding the fraudulent conduct to the federal agencies, claiming that the information is privileged and confidential.

QUESTION

5. Where an attorney learns of misconduct by an employee of a client that resulted in both the client and the attorney making false representations to a government agency in an application for a foreign-workers' visa, does Rule 3.3(b) require the attorney to disclose the underlying misconduct to the federal agency that granted the visa if the client declines to do so?

OPINION

<u>The New York Rules of Professional Conduct Apply</u>

6. The inquiry concerns conduct before a federal agency with its own rules of professional

conduct. *See* 8 C.F.R. § 1003.102. The choice-of-law provisions in Rule 8.5 of the New York Rules of Professional Conduct (the "Rules") distinguish between an attorney's "conduct in connection with a proceeding in a court," Rule 8.5(b)(1), and "any other conduct," Rule 8.5(b)(2). For conduct in connection with a proceeding in a court, "the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For all other conduct, if "the lawyer is licensed to practice only in this state" – as is the case here – "the rules to be applied shall be the rules of this state." Rule 8.5(b)(2).

7. Rule 8.5(b)(1) is limited to a proceeding before "a court"; the New York Appellate Division declined to adopt a proposed version of the rule that would have extended it to govern conduct in connection with proceedings before any "tribunal." *See* N.Y. State 968 ¶6 (2013) ("we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals"). We discuss below whether consideration of a visa application is a proceeding before a "tribunal," but it is clearly not a proceeding before a "court." *See* N.Y. State 750 (2001) (conduct of attorney "who represents individuals in immigration matters" is conduct that "does not involve court proceedings"). Accordingly, Rule 8.5(b)(2) governs, and the conduct is subject to the New York Rules of Professional Conduct.

8. Attorney conduct rules of the federal agencies involved, such as those cited above, could also be relevant to the inquirer's obligations. For example, the rules of professional conduct for practitioners before the Executive Office for Immigration Review provide: "If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures." 8 C.F.R § 1003.102(c); *see* 8 C.F.R § 1001.1(i) (defining "practice" to include acts of any person appearing in a case through "the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board"). However, our jurisdiction is limited to interpreting the New York Rules. We thus analyze the inquirer's ethical obligations under those Rules, but we express no view as to whether those obligations are modified or supplemented by ethics rules of the agencies in question.

Rule 3.3 Does Not Apply to False Statements in an Administrative Immigration Proceeding

9. Rule 3.3, which is entitled "Conduct Before a Tribunal," addresses a lawyer's obligations upon learning that evidence provided to a "tribunal" was false. In relevant part, Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or
>
> (3) offer or use evidence that the lawyer knows to be false. 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. …
>
> (b) A lawyer who represents a client before a tribunal 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.

10. Of central importance here, Rule 3.3(c) requires that a lawyer take such remedial measures "even if compliance requires disclosure of information otherwise protected by Rule 1.6." That is, the duty to remedy false statements of fact or law made to a tribunal, or false "evidence" presented to the tribunal, can override the lawyer's duty of confidentiality to a client.

11. In contrast to Rule 8.5(b)(1), which is limited to proceedings before a "court," Rule 3.3 applies

broadly to false statements made to any "tribunal." Rule 1.0(w) defines the term "tribunal" as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts 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.

12. We have previously offered the following general criteria to help guide analysis of whether a particular administrative proceeding is sufficiently adjudicative to qualify as a "tribunal":

(a) Whether specific parties will be affected by the decision;

(b) Whether the parties have the opportunity to present evidence and cross examine other providers [of] evidence; and

(c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

N.Y. State 838 ¶12 (2010).

13. Based on the facts provided to us, we conclude that the immigration proceedings at issue here do not qualify as proceedings before a "tribunal." The ordinary meanings of the words "tribunal" and "adjudication" do not encompass an administrative procedure involving a unilateral application for a benefit. In ordinary parlance, the material presented with such an application, although attested to "under penalty of perjury," is not "evidence," and the answers to the questions in the required forms are not "legal argument," both terms used in the Rule's definition of "tribunal." There is also no adverse party, no oral proceeding and no cross-examination, which are hallmarks of many adjudicative proceedings. The consular officers and other government officials who consider these applications, while they presumably endeavor to administer the laws in an impartial and conscientious way, would not be called "triers of fact," another common feature of adjudicative proceedings to which we pointed in N.Y. State 838. We do not say that unilateral proceedings may never be adjudicative – the Rule expressly contemplates that an adjudication may result from a proceeding in which there is "presentation of evidence or legal argument by a [single] party." But the visa and work permit proceedings at issue here do not meet the test.

14. Two ABA ethics opinions have reached a similar conclusion with respect to administrative proceedings, although each involved proceedings that were more akin to investigations than those here. ABA 93-375 advised that a "routine bank examination" should not "be considered an 'adjudicative proceeding' so as to bring into play the lawyer's duty of candor under Rule 3.3(b)." The opinion relied on a prior ABA opinion that had held, for purposes of predecessor rules, that the Internal Revenue Service was "neither a true tribunal, nor even a quasi-judicial institution," at least when settling tax cases. ABA 314 (1965) (withdrawn on other grounds by ABA 85-352). Professor Wolfram concludes that a patent application, which is in some respects similar to the visa applications at issue here, is "a substantially nonadjudicatory proceeding" for purposes of a predecessor to Rule 3.3 in which "tribunal" was similarly defined to mean "all courts and all other adjudicatory bodies." Wolfram, *Modern Legal Ethics* § 12.6.5, at 673-74 (1986). He notes that "many administrative agencies can be regarded as 'adjudicatory bodies' only if the concept of adjudication is taken very far from its judicial roots" and that the "adjudicatory model" involves

"adversarial presentation of two points of view." *Id.*

15. We are aware of contrary authority. In particular, three courts have found applications for a visa or other government benefit to be proceedings before a "tribunal" for purposes of Rule 3.3, but none explained its analysis. In *In re Vohra*, 68 A.3d 766, 781-82 (D.C. 2013), the District of Columbia Court of Appeals affirmed a conclusion that the District of Columbia's version of Rule 3.3 applied to an attorney who forged his clients' signatures on a visa application, but the attorney did not dispute the finding that the Rule applied, and the violation of Rule 3.3 was one of approximately a dozen rules that the underlying disciplinary board had found to have been violated. In *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D. 1994), the South Dakota Supreme Court found that statements made to the Industrial Commissioner of Iowa regarding the attorney's fee arrangement in an application for a lump-sum payment on a worker's compensation claim were also "before a tribunal" for purposes of Rule 3.3, but the attorney there also had admitted that the rule applied. In *In re Disciplinary Proceeding Against Conteh*, 284 P.3d 724 (Wash. 2012), the Washington Supreme Court found a lawyer's misrepresentation of his own employment history in his asylum application to be a violation of Rule 3.3, but the opinion does not discuss whether the application was made before a "tribunal." *See also* Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.) (stating, without citing authority, "Rule 3.3(d) applies to such matters as applications before the Patent Office and other *ex parte* presentations").

16. In addition, while not determinative of the ethics question, we note that Congress, in creating the Bureau of Citizenship and Immigration Services, referred to one of the functions being transferred from the Immigration and Naturalization Service as "[a]djudications of immigrant visa petitions." 6 U.S.C. § 271(b)(1). This is in line with the Administrative Procedure Act, which treats "licensing" as "adjudications." 5. U.S.C. § 551(6), (7).

17. We are not persuaded by these authorities. We are concerned that interpreting the terms "tribunal" and "adjudicatory" to apply to unilateral applications for government benefits would lay a trap for the unwary, because such an application would, as Professor Wolfram notes, take the term "adjudicative" "very far from its judicial roots." Wolfram, *supra*, at 673-74. There may well be, as Professor Wolfram also notes, *id.*, policy reasons that duties of candor should apply with even more rigor in unilateral proceedings. But the drafters of the Rules were conscious of the very strong countervailing force of a lawyer's duty of confidentiality. The circumstances in which a lawyer is required to override that duty are thus very limited. Indeed, the New York Rules do not contain the one other rule in the ABA Model Rules in which the lawyer has an obligation to disclose false testimony, Rule 3.9. ABA Model Rule 3.9 states that a lawyer representing a client "before a legislative body or administrative agency in a nonadjudicative proceeding ... shall conform to the provisions of Rules 3.3(a) through (c) ...." New York's version of that Rule omits the duty to conform to Rule 3.3 and does not does not address the question of correcting false statements.

18. A Comment to the ABA version of Rule 3.9 also supports the conclusion that administrative proceedings such as those at issue here are not "adjudications" for purposes of ABA Model Rule 3.3 (which served as the model for New York's Rule 3.3). Comment [3] provides that Rule 3.9 applies only when the lawyer or the lawyer's client "is presenting evidence or argument. *It does not apply to representation of a client* in a negotiation or other bilateral transaction with a governmental agency or *in connection with an application for a license or other privilege* or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns." ABA Model Rule 3.9 Comment [3] (emphasis added). The Comment thus appears to consider "applications for a license or other privilege" not to involve the presentation of "evidence or argument." As quoted above, the definition of "tribunal" indicates that the presentation of "evidence or legal argument" is one of the required elements of adjudication.

Other Rules or Law May Permit, or Even Require, Disclosure of the False Statements

19. The inquirer asks only about the obligation to correct false statements under Rule 3.3. We note, however, that even if, as we conclude above, Rule 3.3 does not apply to *require* disclosure of the false statements here, Rule 1.6(b)(3) *permits* a lawyer to reveal confidential obligation to the extent that the lawyer reasonably believes necessary to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

The forms that we understand the inquirer submitted each require that the "preparer" of the form certify that the information contained in the forms is true to the best of the preparer's knowledge. If the inquirer reasonably believes that the relevant federal agencies are continuing to rely upon any certification that the inquirer may have made, or that such certification is being used to further a crime or fraud, then Rule 1.6 permits (but does not require) him to withdraw that certification.

20. In addition, Rule 1.6(b)(6) permits disclosure of confidential information to the extent a lawyer reasonably believes necessary "when permitted or required under these Rules or *to comply with other law* or court order." (Emphasis added.) Thus, for example, if the federal rule noted in paragraph 8 above (8 C.F.R § 1003.102(c)) requires that the inquirer take action to remedy the false statements here, and the inquirer reasonably concludes that disclosure of confidential information or withdrawal of his certification is necessary to comply with that obligation, then such disclosure or withdrawal would not violate Rule 1.6. However, any such "disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Rule 1.6, Cmt. [14].

21. Further, Rule 1.2(d) provides that a lawyer generally shall not assist a client "in conduct that the lawyer knows is illegal or fraudulent," and Rule 4.1 provides that a lawyer, in representing a client, "shall not knowingly make a false statement of fact or law to a third person." A comment notes that "[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like." Rule 4.1, Cmt. [3]. We do not express any view on whether silence in the present circumstances could be deemed to be a continuing affirmative statement of fact such as to *require* correction. *Cf.* D.C. Ethics Op. 336 (2006) (opining that when incapacitated person gave false name and social security number, and court-appointed guardian used that information to obtain benefits and learned later that the information was false, withholding those facts in periodic reports to the court "would likely constitute a 'circumstance[] where the failure to make a disclosure is the equivalent of an affirmative misrepresentation'" for purposes of Rules 3.3 and 8.4).

CONCLUSION

22. The lawyer's conduct is subject to the New York Rules of Professional Conduct. The immigration proceedings at issue here do not constitute adjudicative proceedings before a "tribunal" so as to trigger the lawyer's obligations under Rule 3.3. The lawyer should consider, however, whether obligations may by imposed by other ethics rules including rules of the federal agencies involved.

(23-14)

[1]The ABA opinion predates the inclusion of the definition of "tribunal" in the ABA Model Rules, but the ABA committee viewed Rule 3.3 as applying to an "'adjudicative proceeding' before a 'tribunal,'" a view derived from the contrast to Rule 3.9, which applies to "nonadjudicative proceedings." The opinion thus predicted the definition of "tribunal" that was later adopted.

[2]The D.C. definition of "tribunal" is different from New York's, although the gist of the test appears to be similar. In place of the term "adjudicative capacity," the D.C. rule defines "tribunal" to be "a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a *judicial or quasi-judicial nature*, based on information presented before it, regardless of the degree of formality or informality of the proceedings." *See* Report and Recommendation of Hearing Comm. No. 1, *In the Matter of Robert N. Vohra*, Bar Dkt. 324-06, at 42 n.6 (Aug. 9, 2011) (emphasis added).

[3]Issuance of a visa appears to be a form of "licensing," which is defined as, among other things, the grant of "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8)-(9).