Plenary Three:
Candor Before the Tribunal

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THE REQUIREMENT OF CANDOR, AND OTHER LIMITATIONS ON THE DUTY OF CONFIDENTIALITY, UNDER THE NEW YORK RULES OF PROFESSIONAL CONDUCT

I. BACKGROUND

The Rules of Professional Conduct ("Rules") were implemented in New York in 2009. These Rules were the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. These Rules are significant both for some of the changes that were made to the prior Code as well as for some of the changes that were not made.

The first professional conduct rules for lawyers were adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970's, virtually every state had adopted the Model Code, albeit sometimes with variations, with New York's Code adoption effective January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted the Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the New York State Bar Association's House of Delegates. As of 2008, 47 states and the District of Columbia had adopted the Model Rules, although sometimes with variations, with California, Maine, and New York as the only holdouts.

In 2002, as a result of "Ethics 2000," the ABA published significant modifications to the Model Rules. Again, while a number of states adopted many of those changes, New York did not.

While there had been modifications to New York's Code over the years, with the most significant coming in 1990, 1999, and with the addition of a comprehensive set of advertising guidelines in 2007, the basic format and many of the substantive provisions of the original Code remained in place, until 2009.

In 2003, the New York State Bar Association empaneled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, to determine whether it could be brought more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately these proposals were endorsed by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Courts' rules.

The former Code consisted of Disciplinary Rules (DRs) and Ethical Considerations (ECs). The DRs were mandatory standards of conduct which existed as court rules (found in 22 NYCRR Part 1200 and jointly adopted by the four Appellate Divisions), while the ECs were aspirational

standards established by the Bar Association. The submission to the Appellate Divisions included both new Rules to replace the DRs, and supporting and explanatory Comments to take the place of the ECs. The Bar Association recommended that the Courts adopt both.

On December 17, 2008, the Courts announced adoption of new "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Courts' version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed changes. And unfortunately, the Courts did not explain (and still have not explained) why some changes were adopted and some were not, so lawyers are left to guess as to the Courts' thinking. For example, the Courts completely ignored the Bar Association's recommendation to include provisions dealing with multijurisdictional practice. (This was actually the second time in the past few years that the Courts refused to entertain such a recommendation from the Bar Association. The Courts just recently adopted MJP rules, see Part 523 of the Rules of the Court of Appeals.)

In addition, the Courts neither adopted nor even commented on the supplementary Comments proposed by the Bar Association, leaving them for the Bar Association to separately implement as "non-mandatory" guidance, in the same vein as the prior ECs.

The Rules have undergone some modifications since 2009 and the latest version can be found on the New York State Bar Association's website, www.nysba.org, under "Resources on Professional Standards for Lawyers."

The focus of this paper is on exploring the balance between a lawyer's obligation to maintain client confidentiality and the duty of candor owed to a tribunal and/or third parties under these the Rules of Professional Conduct. One of the hallmarks of New York's former Code was the primacy afforded to client confidentiality, calling for its preservation in almost all circumstances. That, however, is no longer the case in a number of contexts under the Rules.

II. THE SCOPE OF THE CONFIDENTIALITY OBLIGATION

The Rules' basic confidentiality provision is found in Rule 1.6. Subsection (a) states that "[a] lawyer shall not knowingly *reveal* confidential information . . . or *use* such information to the *disadvantage* of a client or for the *advantage* of the lawyer or a third person." (emphasis added). This prohibition against revealing or using confidential information is subject to a number of exceptions, including when the client gives informed consent, as defined in Rule 1.0(j), or when the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community. Rule 1.6(b) also gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime;

3. 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;

4. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

5. (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

6. when permitted or required under these Rules or to comply with other law or court order.

A. "Confidential Information"

Previously, the Code's DR 4-101 defined two types of information ("confidences" and "secrets") which a lawyer was required to keep confidential. A "confidence" referred to information protected by the attorney-client privilege, while a "secret" referred to other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 abandons the dichotomy between "confidence" and "secret" and instead defines a single concept of "confidential information." Confidential information consists of information *gained during or relating to* the representation of a client, whatever its source, that is:

1. protected by the attorney-client privilege,

2. likely to be embarrassing or detrimental to the client if disclosed, or

3. information that the client has requested be kept confidential.

See also New York State Bar Association Formal Opinion 831 (2009). In substance, the core definition of "confidential information" mirrors that found in DR 4-101. Rule 1.6, however, then narrows this definition of confidential information by expressly excluding two categories of information: (1) "a lawyer's legal knowledge or legal research" and (2) "information that is generally known in the local community or in the trade, field or profession to which the information relates." As to the latter exclusion, the comments note that "information is not 'generally known' simply because it is in the public domain or available in a public file." Rule 1.6, Comment [4A]; *see* NYSBA Formal Opinion 991, at ¶¶ 19 and 20 (The "legislative history" of Comment 4[A] "strongly suggests that information in the public domain may be protected as confidential information even if the information is not "difficult or expensive to discover" and even if it could be obtained without "great effort.... In our view, information is generally known only if it is known to a sizeable percentage of people in "the local community or in the trade, field or profession to which the information relates."); cf. ABA Formal Opinion 479 (2017) (interpreting similar language under the Model Rules to refer to information that is "widely recognized by members of the public...or in the [client's] industry, profession or trade"). No similar explicit exclusions existed under the former Code.

In addition, the scope of confidentiality obligation under New York's Rules differs from that under the Model Rules. Model Rule 1.6 prohibits revealing (with no explicit mention of "using") information "relating to the representation of the client," unless falling within an exception, without regard to whether that information is protected by the attorney-client privilege, its disclosure would be embarrassing or detrimental to that client, or the client has asked that it be kept confidential.

B. "Gained During or Relating to the Representation"

Disciplinary Rule 4-101 made information confidential if it was "gained in the professional relationship." Rule 1.6 replaces the phrase "gained *in* the professional relationship" with the phrase "gained *during or relating to* the representation of a client, whatever its source." This change adds clarity to the definition, including making it explicit that confidential information includes information obtained from the client as well as information obtained from other sources, such as witnesses or documents. Comment [4A] to Rule 1.6 defines "relates to" as "has any possible relevance to the representation or is received because of the representation." (An earlier version of Comment [4A] provided that "gained during or relating to the representation" does *not* include information gained before a representation begins or after it ends," but that portion of Comment [4A] has since been deleted.)

The New York State Bar Association's Committee on Professional Ethics, in Formal Opinions 866 (2011) and 998 (2014), indicated that the "during" requirement is not purely temporal but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information."

The basic confidentiality rule applicable to prospective clients and former clients differs somewhat from the foregoing rule which is applicable to current clients. With respect to prospective clients, Rule 1.18(b) provides, "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." With respect to former clients, Rule 1.9(c) states that a lawyer who has formerly represented a client in a matter shall not thereafter:

1. *use* confidential information of the former client protected by Rule 1.6 to the *disadvantage* of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

2. *reveal* confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Thus, while the Rules protect the confidential information of current clients from disclosure, use to the disadvantage of the client *or* use to the advantage of the lawyer or a third person, a prospective or former client's confidential information is, at least literally, only protected from disclosure and use that is disadvantageous to the former/prospective client. No explicit restriction is placed on the use of this information for the benefit of the lawyer or another person.

III. PERMISSIVE DISCLOSURE TO PREVENT REASONABLY CERTAIN DEATH/SUBSTANTIAL BODILY HARM

In one of the more significant changes from the former Code, Rule 1.6 now *permits* a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. According to Comment [6B], this new exception to the duty of confidentiality "recognizes the overriding value of life and physical integrity."

While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. The closest equivalent was DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."[1] Rule 1.6(b)(1) is much broader in that it permits a lawyer to disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the client is not involved and even if the conduct in question is not criminal.

But even this new basis for permissive disclosure is very limited. As explained in Comment [6B], harm is "reasonably certain" to occur only if (1) "it will be suffered imminently" or (2) if "there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." The Comments provide a number of illustrations to demonstrate the scope of this provision. For example, if a client has accidentally discharged toxic waste into a town's water supply, the lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Another example given is that the wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.

In contrast, if the harm the lawyer seeks to protect against is merely a "remote possibility" or carries a "small statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years," there is no present and substantial risk justifying disclosure. Furthermore, the fact that an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure. *Id.*

The ABA's Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. ABA Model Rule 1.6(b)(2). New York's Rule 1.6 does not similarly permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime, Comment [6A] sets out a number of factors for the lawyer to consider in deciding whether to disclose or use confidential information:

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[1] The New York Rules also explicitly continue this Code exception allowing a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary "to prevent the client from committing a crime." Rule 1.6(b)(2).

1. the seriousness of the potential injury to others if the prospective harm or crime occurs;

2. the likelihood that it will occur and its imminence;

3. the apparent absence of any other feasible way to prevent the potential injury;

4. the extent to which the client may be using the lawyer's services in bringing about the harm or crime;

5. the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and

6. any other aggravating or extenuating circumstances.[2]

Comment [6A] further cautions that disclosure adverse to the client's interest should only be the minimum disclosure the lawyer reasonably believes is necessary to prevent the threatened harm or crime. Where disclosure would be permitted under Rule 1.6, the lawyer's initial duty, where practicable, is to remonstrate with the client. Only when the lawyer reasonably believes that that client nonetheless will carry out the threatened harm or crime may the lawyer disclose confidential information.

A. Related Impact – Representing an Organization

Former DR 5-109 set out an attorney's special obligations when representing an organizational client. One of those obligations was that when the lawyer knew that someone associated with the organization was engaged in action, intended to act, or refused to act in a matter related to that representation which involved a violation of a legal obligation to the organization or a violation of law and it was likely to result in substantial injury to the organization, the lawyer had to proceed as was "reasonably necessary in the best interests of organization." This explicitly included, in appropriate circumstances, reporting that action or inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization was not permitted unless the report fell within the "future crimes" exception of DR 4-101's confidentiality requirements.

Rule 1.13 follows DR 5-109. However, because Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

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[2] These same factors apply in the context of a lawyer withdrawing a representation based on materially inaccurate information or being used to further a crime or fraud, which is discussed in Part IV, *infra*.

IV. PERMISSIVE DISCLOSURE TO WITHDRAW THE LAWYER'S PRIOR REPRESENTATIONS BASED ON MATERIALLY INACCURATE INFORMATION OR WHEN BEING USED TO FURTHER A CRIME OR FRAUD

Rule 1.6(b)(3) contains another exception to the lawyer's duty to maintain confidentiality. It permits the lawyer to reveal or use confidential information 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 (including opposing counsel), 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 scope of Rule 1.6(b)(3) is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

Disciplinary Rule 4-101(C)(5), which was the predecessor to Rule 1.6(b)(3), provided that "[a] lawyer may reveal . . . [c]onfidences or secrets *to the extent implicit* in withdrawing a written or oral opinion or representation previously given by the lawyer and 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." While on its face, Rule 1.6(b)(3) may appear broader than its predecessor, in that it explicitly permits revealing or using confidential information "to withdraw" a representation (without expressly limiting that disclosure to only that "implicit" in the withdrawal itself), Comment [6E] to Rule 1.6 states that "[p]aragraph (b)(3) permits the lawyer to give *only the limited notice that is implicit in withdrawing an opinion or representation*, which may have the collateral effect of inferentially revealing confidential information." Comment [6E] goes on to explain that the "lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, *but paragraph (b)(3) does not permit explicit disclosure of the client's past acts*" unless such disclosure is permitted to prevent the client from committing a crime. Based on these Comments, Rule 1.6(b)(3) apparently is no broader than the former DR 4-101(C)(5). That is, in most circumstances, only a bare-bones withdrawal of an opinion or representation will be permitted. For example, "I hereby withdraw my opinion letter relating to this matter dated November 20, 2009" is permitted even though by doing so, the lawyer is implicitly revealing that the opinion was "based on materially inaccurate information or is being used to further a crime or fraud." The lawyer may not, however, disclose that that is in fact the case, nor may the lawyer disclose the underlying facts or how the lawyer came to know that the opinion was based on materially inaccurate information or is being used to further a crime or fraud.

V. PERMISSIVE DISCLOSURE TO PREVENT A CLIENT FROM COMMITTING A FUTURE CRIME

Rule 1.6(b)(2) contains another exception to the duty of confidentiality, which allows the lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." This provision is nearly identical to its counterpart in the former Code, DR 4-101(C)(3), which permitted the lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This exception is limited to instances in which the client's conduct, and not someone else's, will constitute an actual crime. In exercising her discretion under Rule 1.6(b)(2), a lawyer should consider those factors set out in Comment [6A] to Rule 1.6, as discussed in Part III above.

While this Rule generally does not permit disclosure of past crimes, the Rules recognize that past conduct (*e.g.*, prior fraud) which has a continuing effect (*e.g.*, deceiving new victims), can constitute a continuing crime to which this disclosure rule applies. The Comments to Rule 1.6 state that a "lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts." Rule 1.6, Comment [6D].

VI. REQUIRED DISCLOSURE IN THE FACE OF FALSE STATEMENTS/EVIDENCE BY A LAWYER, THE LAWYER'S CLIENT AND/OR THE LAWYER'S WITNESS TO A TRIBUNAL

Rule 3.3, regarding conduct before a tribunal, represents one of the most significant shifts between the former Code and the new Rules. Perhaps the most important part of Rule 3.3 concerns a lawyer's obligation if the lawyer learns that the lawyer's client, a witness called by that lawyer, or the lawyer himself has spoken or written a falsehood to a tribunal. Rule 3.3 states in pertinent part:

> (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. 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.

A. "Tribunal"

Rule 1.0(w) provides that a "tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The definition goes on to provide that "[a] legislative 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." Furthermore, Comment [1] to Rule 3.3 indicates that the Rule "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." This application of Rule 3.3 to discovery proceedings has been confirmed in several ethics opinions. *See* ABA Formal Opinion 93-376 (1993); New York County Bar Association Opinion 741 (2010); Association of the Bar of the City of New York, Formal Opinion 2013-2.

In NYSBA Formal Opinion 838 (2010), the Committee on Professional Ethics offered the following guidelines in analyzing whether a particular administrative proceeding is sufficiently adjudicatory to qualify as a tribunal:

> (a) are specific parties affected by the decision;
>
> (b) do the parties have the opportunity to present evidence, and cross examine other providers of evidence; and
>
> (c) will the ultimate determination be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

In NYSBA Formal Opinion 1011 (2014), the Committee on Professional Ethics determined that the filing of employment based immigration visa petitions with the Department of Labor and related petitions with the Department of Homeland Security did not qualify as proceedings before a "tribunal." This determination was based on, among other things, the unilateral nature of these proceedings, and the absence of "legal argument," an adverse party, cross examination, and any "trier of fact." Similarly, in NYSBA Formal Opinion 1045 (2015), arising under a different context (the lawyer-witness provisions of Rule 3.7), the Committee concluded that an agency investigatory proceeding that could lead to either a decision not to pursue charges or a decision to pursue charges which would then result in an administrative hearing, was not itself a proceeding before a tribunal.

If a lawyer is not actually counsel appearing before the tribunal on behalf of a client, she has no obligation under Rule 3.3. NYSBA Formal Opinions 963 and 982.

B. "False" Statements/Evidence

Rule 3.3(a)(1) prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer.[3] Rule 3.3(a)(3) prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client or the lawyer's witness offers false material evidence. Much like its nearly identical counterpart in the ABA Model Rules, the term "false" is a critical but undefined term. Two very different meanings can be given to this term. The first is that evidence is "false" if it is objectively erroneous or untrue. The second is that evidence is "false" only if it is a deliberate falsehood known to be such by the person making the statement or offering the evidence. The Rule would apply quite differently under each variant of the term. If the former were the appropriate meaning, then the remedial measures of Rule 3.3 would be required even if the lawyer making the statement or the witness/client giving the testimony believed it to be true at the time it was made or offered. However, if the latter meaning were appropriate, the Rule's coverage would be far less expansive and essentially limited to cases where a lawyer discovered a client or witness engaged in deliberate perjury or fabricated exhibits for the lawyer to offer in court.

There are substantial indicators that the broader meaning of the term was intended for both the Model Rules and the New York Rules. First, both the Model Rules and the New York Rules, elsewhere, separately reference "fraudulent" conduct (*see*, *e.g.*, Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, as defined by Black's Law Dictionary, "false" simply means "untrue." Thus, the plain meaning of these terms suggests a different, and broad, meaning for "false." Second, if only deliberate falsehoods could invoke the duty to disclose or rectify under Rule 3.3(a)(3), that Rule would be superfluous because such conduct is already covered in Rule 3.3(b). Rule 3.3(b) states that "[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." Thus, a client's or a witness's deliberate falsehood would constitute criminal or fraudulent conduct which is treated in Rule 3.3(b). *See* New York State Bar Association Formal Opinion 837 (2010) (noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered."); Association of the Bar of the City of New York, Formal Opinion 2013-2 ("it makes no difference if the falsity was intentional or inadvertent").

In addition, the broader interpretation makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit both the making of such a statement and then the failure to correct that same misstatement. However, if "false" means inaccurate or untrue, then the duty to correct is more understandable (and significant).

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[3] Rule 4.1 also prohibits a lawyer from knowingly making a false statement of fact or law to anyone. Misrepresentations, for this purpose, can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." *See* NY Rule 4.1, Comment [1]; *In Re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013).

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Rule to apply equally to both. Geoffrey C. Hazard, W. William Hodes, *The Law of Lawyering*, 29-20 (Aspen Publishers 2009).

The Restatement of the Law Governing Lawyers also resolves this question in favor of the broader reading. Restatement § 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . *[A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false.* (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. *See, e.g., Morton Bldg., Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). *See also* Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules?* 12th Annual AILA New York Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, *The Law of Lawyering*, 29-20.

Finally, the broader reading is probably more consistent with Rule 3.3's underlying objective. As illustrated in the Comments to the Rule, the purpose of imposing the duty of candor toward the tribunal is to keep the tribunal from going astray when the lawyer is in a position to prevent it. *See* Rule 3.3, Comments [2] and [5]. Thus, only the knowledge of the lawyer and the actual incorrectness of the information should be relevant. If a lawyer knows her witness is mistaken, the lawyer should not allow the witness's mistake to lead the tribunal astray.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the New York Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

C. Materiality

While Rule 3.3(a)(1) and (3) prohibit a lawyer from making any false statement or offering/using any false evidence, those sections only require a lawyer to take affirmative corrective action in the event "material" false statements are made or material false evidence is offered. Determining whether this materiality threshold is met is fact specific, "depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result." Association of the Bar of the City of New York, Formal Opinion 2013-2. *See also* NYSBA Formal Opinions 837 and 732.

D. Lawyer's Duty to Correct His Own False Statements/Evidence

Rule 3.3(a)(1) reads: "[a] lawyer shall not knowingly . . . 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." The first clause of this rule imposes essentially the same obligation as its predecessor, DR 7-102(A)(5), requiring that a lawyer not knowingly make a false statement of law or fact. Its application is narrower, however, in that Rule 3.3(a) is limited to statements "to a tribunal." Disciplinary Rule 7-102(A)(5) was not limited to a tribunal setting. While Rule 4.1 more generally prohibits false statements of material facts to a third person, Rule 4.1 does not contain the "correction" provision of Rule 3.3(a)(1).

The second clause of Rule 3.3(a)(1) explicitly imposes a new duty. It requires the lawyer to affirmatively *correct* a false statement of material fact[4] or law previously made to the tribunal by the lawyer. This mandatory duty to correct a false statement made by the lawyer to a tribunal is not an entirely new concept, but it has not previously been explicit or quite this broad.

As previously discussed, DR 4-101(C)(5) had *permitted* a lawyer to withdraw a representation made by the lawyer where that representation was based on materially inaccurate information or was being used to further a crime or fraud, and that representation was believed to still be relied upon by third parties. In New York State Bar Formal Opinions 781 (2004) and 797 (2006), the Committee on Professional Ethics concluded that where the lawyer's representation is the product of a client's fraud upon a tribunal, then the combined effect of DR 7-102(B)(1) (which otherwise required the disclosure of the client's fraud upon the tribunal *unless* it constituted a confidence or secret) and DR 4-101(C)(5) (which *permitted* the lawyer to reveal confidences or secrets of the client to the extent implicit in withdrawing a previously given written or oral opinion or representation, provided it was still being relied upon by others) was to *require* withdrawal of the lawyer's representation. However, the obligation was simply to withdraw the lawyer's representation. Disclosure of client confidences and secrets beyond that implicit in the act of withdrawal were not permitted. Under Rule 3.3(a)(1), if the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather to *correct* it, which may require the explicit disclosure of confidential information. *See* Simon, *Roy Simon on the New Rules – Part VII Rule 2.1 through Rule 3.3(a)(1)*, 4-5 (New York Professional Responsibility Report, September 2009).

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[4] While 3.3(a)(1) prohibits a lawyer from making any false statement of fact or law to a tribunal, it only imposes upon a lawyer an affirmative obligation to correct a "material" false statement.

In addition, this duty to correct under Rule 3.3(a)(1) applies even when no one is continuing to rely on the false statement.[5] *Compare* Rule 1.6(b)(3) (permitting a lawyer to "reveal or use confidential information 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."). (emphasis added).

Comment [3] to Rule 3.3 also recognizes that there "are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation."

E. Lawyer's Duty In Light of False Evidence by the Lawyer's Client or Witness

Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. In another of the more significant changes in the New York Rules, Rule 3.3(a)(3) goes on to require that if a 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 must take reasonable remedial measures, *including, if necessary, disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information.

As close as we came to this requirement under the former Code was DR 7-102(B)(1) which provided that if a lawyer received information clearly establishing that a client (but only a client), in the course of representation, had perpetrated fraud upon a person or tribunal, the lawyer was required to call upon the client to rectify it.[6] If the client refused or was unable to do so, then the lawyer might be required to withdraw from the representation pursuant to DR 2-110(B) if the lawyer could not continue without maintaining or advancing the earlier misrepresentation. Nassau County Bar Association Opinion 05-3 (2005). Disciplinary Rule 2-110(B) mandated withdrawal where the continued employment would result in violation of a disciplinary rule. A lawyer would have violated the disciplinary rules by maintaining or advancing the earlier misrepresentation because DR 1-102(A)(4) prohibited a lawyer from engaging in conduct that involved dishonesty, fraud, deceit, or misrepresentation and DR 7-102(A)(7) prohibited a lawyer from counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent.

If the client refused or was unable to rectify the fraud, the lawyer was required under DR 7-102(B)(1) to reveal the fraud to the person or the tribunal, *except* to the extent that the information was protected as a client confidence or secret, in which case confidentiality was the order of the day. However, in most instances, this exception – disclosure unless the information was a client confidence or secret – swallowed the rule because this information was almost always protected as a confidence or secret.

For example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which

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[5] *See* the discussion on the duration of the obligation to disclose under Rule 3.3 at Part VIII, *infra*.

[6] Disciplinary Rule 7-102(B)(1) was only triggered by a client fraud, but it could be a fraud upon either a tribunal or a third party.

could not be disclosed. *See* New York State Bar Association Formal Opinions 674 (1995) and 523 (1980); New York County Bar Association Opinion 706 (1995); Association of the Bar of the City of New York Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal – but only if continued representation could be accomplished without reliance on that perjured testimony – or, in most cases, to withdraw from the representation. *See* New York County Bar Association Opinion 712 (1996); *People v. Andrades*, 4 N.Y.3d 355 (2005). Disclosure under the former Code was not permitted; the duty of confidentiality trumped the duty of candor to the court.

DR 7-102(B)(2) provided that if a lawyer learned that someone *other than a client* (*e.g.*, the lawyer's non-client witness) had perpetrated a fraud on the tribunal (but not on a third party), the lawyer should reveal the fraud. DR 7-102(B)(2) contained no explicit exception for protecting client confidences and secrets in that circumstance. However, in NYSBA Formal Opinion 523 (1980), the Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

Marking a dramatic shift in this area, Rule 3.3(a)(3) now provides that if either a lawyer's client or a witness called by the lawyer has offered material evidence to a tribunal and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including if necessary disclosure to the tribunal. There is no caveat for confidential information. In other words, the Rule may require disclosing client/witness falsity, as a last resort, even if that knowledge is otherwise protected as client confidential information. So Rule 3.3(a)(3) differs from DR 7-102(B) in that (1) Rule 3.3(a)(3) applies equally to the lawyer's client and witnesses (but not to others); (2) is triggered by false material evidence and not necessarily fraud; (3) does not extend to false statements (or frauds) to third parties; and (4) can ultimately require disclosure of even client confidential information.

As detailed in Comment [10] to Rule 3.3, the first remedial measure – calling upon the client to correct the false testimony – is the same as it was under DR 7-102(B)(1) and in the case of intentionally false testimony is not likely to be successful in many cases. *See also* NYSBA Formal Opinion 837 (must bring issue of false evidence to client's attention before taking unilateral action). If that course of action fails, the lawyer is required to take further remedial action. One possibility is to withdraw from the representation.[7] However, as Comment [10] explains, at times withdrawal is not permitted or will not undo the effect of the false evidence. On the latter point, at least one noted commentator has expressed the view that withdrawal in and of itself is not sufficient since the record is not corrected and the problem of the false evidence is simply transferred to another lawyer. Simon, *Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)*, 4-5 (New York Professional Responsibility Report, October 2009). *See also* New York County Bar Association Opinion 741; New York State Bar Association Form Opinion 837. Under the New York Rule, then, the lawyer must "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule

[7] Of course, even in a withdrawal from representation, a lawyer has to be careful about what information is communicated to the Court. See NYSBA 1057 (2015).

1.6." Rule 3.3, Comment [10]; *see also* Rule 3.3(c) ("The duties stated in paragraph (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"); NYSBA Formal Opinion 837 (disclosure only required if "necessary" and if not necessary, disclosure is not permitted). Depending on the circumstances, however, full disclosure might not be required and something less, in the form of a "noisy withdrawal" of the false evidence, might be sufficient. NYSBA Formal Opinion 837; *see also* NYSBA Formal Opinions 980, 982 and 998 (even when disclosure of confidential information is permitted, that disclosure should be no broader than reasonably necessary to achieve that permissible end).[8]

While disclosure may have grave consequences for the client, "the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement." Rule 3.3, Comment [11]. Thus, under the new Rule 3.3, the duty of candor toward the tribunal rises above the duty of confidentiality, in stark contrast to the Code.

Rule 3.3(a)(3) is broader than former DR 7-102(B)(1) and (2) not only because the exception for client confidences and secrets has been eliminated, but also because it is triggered by "false" material evidence and not just fraudulent conduct. Thus, for example, helpful but inaccurate testimony offered by the lawyer's witness must be remedied, even if that testimony was provided in good faith and was not fraudulent or perjured. Under DR 7-102(A)(4), a lawyer was precluded from using perjured or false evidence, but had no explicit duty to remedy the introduction of false evidence. Now that obligation exists.

On the other hand, Rule 3.3(a)(3) is limited to false statements by the lawyer's client or a witness called by the lawyer, and does not extend to false statements provided by the other side's witnesses. In other words, a lawyer is not required to disclose to the tribunal merely "false" information provided by opposing counsel, the adverse party, or its witnesses. However, under Rule 3.3(a)(3) (as was the case under DR 7-102(A)(4)), the lawyer may not "use" this false evidence (regardless of its source), which means that the lawyer cannot maintain or advance the falsity, including referencing the false but favorable evidence or otherwise using it to advance her client's cause.

The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k). New York County Bar Association Opinion 741 looks to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue, indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required either. *See also* NYSBA Formal Opinion 1034 (mere suspicion not enough to trigger disclosure obligation, but may be grounds for withdrawal from representation).

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[8] A lawyer confronted with this remedial obligation must also keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (*e.g.*, crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. *See* NYSBA Formal Opinions 837 and 980.

If a lawyer knows that a client or witness intends to offer false testimony, the lawyer may not offer that testimony or evidence. If a lawyer does not know that his client's or witness' testimony is false, he *may* nonetheless *refuse* to offer it if he "reasonably believes" it will be false.[9] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8].

VII. DUTY TO DISCLOSE ADVERSE AUTHORITY

Pursuant to section 3.3(a)(2) of the Rules of Professional Conduct, attorneys cannot knowingly "fail to disclose to [a] tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Unfortunately, the Rules of Professional Conduct do not explain when legal authority is controlling or directly adverse. It is important to remember that in New York, lower courts are bound to apply precedent from other departments when there is no contrary precedent established by its own department.[10] Accordingly, if an attorney is before a Supreme Court within the Fourth Department, and the Fourth Department has not ruled on a particular issue that he or she is briefing, the attorney cannot ignore an unfavorable decision from the First, Second or Third Departments because such a decision would be controlling on the Supreme Court in that instance.

Additionally, attorneys should not fail to cite adverse authority merely because they believe that it is distinguishable. The American Bar Association's Committee on Ethics and Professional Responsibility has stated that it is an attorney's duty to disclose a decision of a controlling court "which may be interpreted as adverse to his client's position."[11] While attorneys are required to disclose the adverse authority, they are free to challenge the reasoning of the decision, to distinguish it from the case at bar, or to present any other reason why it should not be followed. In a prior opinion, the Committee stated the test for determining whether disclosure is required as follows:

1. Is the decision one which the court should clearly consider in deciding the case?

2. Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision was lacking in candor and fairness? And;

3. Might the judge consider himself or herself misled by an implied representation that the lawyer knew of no adverse authority?[12]

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[9] A lawyer may not refuse to offer his client's testimony in a criminal proceeding unless he knows it to be false. Even a reasonable belief that the client may lie in that setting does not override the client's constitutional right to be heard. *See* Rule 3.3(a)(3).

[10] *See Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dep't 2015). Decisions and opinions referred to are attached as Exhibit 1.

[11] ABA Informal Opinion No. 84-1505 (1984).

[12] ABA Formal Opinion No. 280 (1949).

In one case, the New York County Supreme Court issued a warning to an attorney who made an assertion contrary to controlling adverse authority, even though the attorney did disclose that authority to the court. The judge warned the attorney that if he was seeking to protect his right to challenge that law on appeal, "it would be advisable for counsel to avoid such unqualified assertions . . . and expressly state that intention in setting forth their arguments against that authority, rather than risk any claims of unethical conduct."[13]

In most reported decisions in New York's state and federal courts, violations or possible violations of Rule 3.3(a)(2) have merely resulted in warnings to the attorneys; however it is possible that a violation can result in sanctions. A magistrate judge in the Western District of New York caught attorneys who advised a different court of a recent decision by the Second Circuit in one matter, but failed to advise the magistrate in a different matter where the recent decision was adverse to their position. In his decision, the magistrate judge ordered the attorneys to show cause as to why they should not be sanctioned pursuant to Rule 11 for their conduct.[14] Similarly, in Queens County Supreme Court, a judge ordered a hearing to determine whether sanctions were appropriate where an attorney failed to disclose adverse controlling authority, which the attorney was expressly aware of, to the Court. Clearly it is better to be safe than sorry as even a warning from a court would be extremely embarrassing; however sanctions remain a possibility for attorneys who fail to disclose adverse controlling authority.

VIII. DISCLOSURE IN THE FACE OF CRIMINAL OR FRAUDULENT CONDUCT BY ANY PERSON

Rule 3.3(b) provides that if a lawyer represents a client before a tribunal and that lawyer knows that *anyone* intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if this requires disclosure of information otherwise protected by Rule 1.6 as confidential information.

Rule 3.3(b) requires a lawyer to take reasonable remedial measures regarding the criminal or fraudulent conduct (including perjury) of *any* person. Unlike Rule 3.3(a)(3), it is not limited to conduct by the lawyer's client or witness, and extends to conduct of the other side. On the other hand, it is not triggered by "false evidence," but rather requires criminal or fraudulent conduct. Furthermore, as evidenced by the phrase "intends to engage, is engaging, or has engaged," Rule 3.3(b) covers past, present and future events. But like Rule 3.3(a)(3), once triggered, remedial action is required, including disclosure of confidential information if need be.

In this regard, the closest provision to Rule 3.3(b) in the former Code was DR 7-102(B)(2), which required the lawyer to reveal to the tribunal the fraud of a person, other than the client, committed upon the tribunal, subject to an implicit exception for client confidences and secrets. Rule 3.3(b) differs from DR 7-102(B)(2) in that it (1) applies to criminal or fraudulent conduct (not just fraud); (2) which relates to the proceeding (and not just fraud upon the tribunal); (3) which is occurring, has occurred or will occur in the future; (4) extends to client as well as non-

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[13] *Denehy v. Copperman*, Index No. 800349/11, 2013 N.Y. Misc. LEXIS 6099 at fn. 1 (Sup. Ct. N.Y. Cty. Dec. 12, 2013).

[14] *Felix v. Northstar Location Servs.*, 290 F.R.D. 397 (W.D.N.Y. 2013).

client conduct; and (5) can ultimately require the disclosure of even client confidential information.

Rule 3.3(b) actually goes beyond issues of client/witness perjury and false evidence and extends to any criminal or fraudulent conduct by any person related to a proceeding. Thus, for example, it extends to intimidating witnesses, bribing a witness or juror, illegal communications with a court officer, destroying or concealing documents, and failing to disclose information to the tribunal when required to do so. *See* Rule 3.3, Comment [12]. The duty to take remedial action, including disclosure, applies in these circumstances as well.

IX. DURATION OF THE OBLIGATION TO REMEDIATE

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provided that the remediation (including disclosure) obligation "continue to the conclusion of the proceeding," defined by Comment [13] to mean "when a final judgment has been affirmed on appeal or the time for review has passed."[15] However, the final version of Rule 3.3 as adopted by the New York Courts contains no such temporal limitation. The Courts gave no indication as to whether this omission was intended to signal that the obligation to remediate continues forever. However, one possible limitation to the duration of a lawyer's remediation obligation may be found in the term "reasonable" as Rule 3.3 only requires the lawyer to take "reasonable remedial measures." Yet without further explanation, this ambiguous term offers little guidance.

The obligation to remedy false statements or criminal/fraudulent conduct related to a proceeding before a tribunal extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever. NYSBA Formal Opinions 831, 837 and 980; *see also* Association of the Bar of the City of New York Formal Opinion 2013-2 (obligation ends "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence").

X. REQUIRED DISCLOSURE IN THE CONTEXT OF EX PARTE PROCEEDINGS

Rule 3.3(d), governing a lawyer's conduct during ex parte proceedings, adds an entirely new obligation; it had no equivalent at all in the old Code. Rule 3.3(d) fills a void by explaining how a lawyer is to behave when appearing before a tribunal in a legitimate ex parte proceeding. It provides:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The policy behind the new provision is explained in Comment [14]. Typically in our adversary system an advocate has the limited responsibility of presenting one side of the matter to the tribunal since the opposing position will be presented by the adverse party. In an ex parte

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[15] New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (available at www.nysba.org/proposedrulesofconduct020108).

proceeding, however, there may be no presentation by the opposing side. Nevertheless, the object of an ex parte proceeding is to yield a substantially just result. Because the judge must accord the opposing party, if absent, "just consideration," the lawyer for the represented party "has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision." Rule 3.3, Comment [14].

Accordingly, a lawyer in an ex parte proceeding before a tribunal – whether before a court, an arbitrator, or a legislative or administrative agency acting in an adjudicative capacity – has the duty to present adverse facts favorable to the opposition. However, Rule 3.3(d) does not require the lawyer to "present" her adversary's case. For example, a lawyer does not have to draw inferences favorable to the adversary or present adverse facts in the most persuasive manner to persuade the court. Furthermore, Rule 3.3(d) only requires the lawyer to disclose adverse facts, not adverse law. A lawyer must only advise the tribunal about unfavorable cases if they are "controlling" pursuant to Rule 3.3(a)(2).

More importantly, the language of this portion of the Rule itself may be subject to the interpretation that it requires the lawyer to disclose all material facts, regardless of whether they constitute client confidential information. The mandatory words used in Rule 3.3(d) – "a lawyer *shall* inform the tribunal of *all* material facts" –suggests that the disclosure obligation is unconditional. *See* Jill M. Dennis, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. Legal Ethics 157 (1994) (discussing ABA Model Rule 3.3(d)); *see also Restatement (Third) of the Law Governing Lawyers* §112, cmt. B(2000) ("To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law…"). However, this Rule may not require the disclosure of privileged information. *See* n.7, *supra; Restatement (Third) of the Law Governing Lawyers* §112, cmt b; *compare* Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(3) ("A lawyer shall not knowingly . . . in an ex parte proceeding, fail to disclose to the tribunal an *unprivileged* fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.") (emphasis added). On the other hand, Rule 3.3 (c) expressly provides that the duty of candor found in 3.3(a) and 3.3(b) applies even if it requires disclosure of confidential information, but makes no mention of 3.3(d). Compare Florida Rule 4-3.3(d) (expressly extending the exception to client confidentiality to all provisions of Rule 4-3.3, including the ex parte communications provision). Final resolution of this issue will likely have to await the issuance of individual ethics opinions; however – given the straightforward requirement on the face of the Rule – lawyers should be cautious that the tradeoff for participation in an ex parte proceeding may be the sacrifice of client confidences.

XI. CANDOR IN INVESTIGATIONS

Issues of candor, in the sense of deceit and misrepresentation, often arise in the context of workplace investigations. Rule 8.4 provides:

> A lawyer or law firm shall not:
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> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or]

From time to time, in assisting clients with investigations, it may be necessary to seek information through means other than overt interviews, and may even entail the use of outside private investigators. One common investigatory technique is pretexting – pretending to be someone you are not in order to secure that information. Pretexting may entail impersonating another, real individual, or it may involve pretending to be a fictional person. An example of the latter is the use of testers in employment or housing discrimination cases – someone creating and using an entirely false identity to assist in ferreting out discrimination. Both involve deceit and both implicate Rule 8.4 (c). Of course, pretexting can take a variety of forms in between.

Whether the pretexting is done directly by a lawyer or indirectly by a private investigator or staff member working under the lawyer's direction, the ethical issues generally are the same. While the Rules of Professional Conduct apply only to lawyers, Rule 8.4 (a) provides that a lawyer or law firm shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." In addition, Rule 5.3 (b) provides:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if :
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> (1) the lawyer orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or
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> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
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> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
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> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time the consequences of the conduct could have been avoided or mitigated.

Despite the unequivocal language of these ethics rules, the response of courts and disciplinary authorities to various forms of pretexting has been mixed, although pretexting in the extreme – impersonating another to obtain information about that other person – is likely to always be viewed as a violation.

There has been some recognition that pretexting in furtherance of some greater societal benefit, such as in the discrimination tester context, is permissible. Courts generally have recognized the value of testers in the fight against discrimination, providing some condonation for them. *See, e.g., Village of Bellwood v. Dewired*; 895 F.2d 1521 (7th Cir. 1990); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). So have some bar authorities. For example, in Arizona Opinion No. 99-11 (1999), the Committee on the Rules of Professional Conduct of the State Bar of Arizona condoned use of the limited deceit associated with testers to "protect society from discrimination based upon disability, race, age, national origin, and gender." *See also*, Isbell and Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (1995). A recent amendment to the rules of professional conduct in Oregon also explicitly permits such activity. *See* Oregon DR 1-102(D) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity"...means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" maybe commenced by a lawyer or involve a lawyer as an advisor or supervisory only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.")

An "exception" to the general ethical prohibition against deceit also has been recognized by some authorities when the pretexting occurs in the context of law enforcement or other lawful governmental operations. *See, e.g.*, Utah Ethics Opinion 02-05 (2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct."); D.C. Bar Legal Ethics Comm., Op. 323 (2004) ("Lawyers employed by government agencies who act in a non - representational official capacity in a manner they reasonably believe to be authorized by law do not violation [the ethics rules] if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties."); *United States v. Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (same).

Some courts have gone further, permitting "incidental deceit" to promote more private interests. In *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), a trademark owner sent private investigators posing as customers to a retail store operated by the defendant to determine whether infringement was occurring. The investigators posed as "typical customers" and engaged the defendant's sales people in conversation regarding items sold by the defendant. The conversations were "typical" of the interaction between a customer and salesperson and, apparently, were not intended to trick any salespeople into making any specific admissions. In response to a claim that the plaintiff's lawyer's involvement in this activity violated the proscription against lawyer deceit, the court observed:

> As for DR 1-102 (A)(4)'s prohibition against attorney "misrepresentations,"[16] hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as "is the quality the same?" or "so there is no place to get their furniture?"
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> * * * *
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> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not promote the purpose of the rule, namely preservation of the attorney/client privilege.

82 F.Supp.2d at 122.

In *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456 (D.N.J. 1998), a lawyer for Apple had instructed her secretary, private investigators, and others to contact the defendant posing as interested customers in an effort to buy certain items that the defendant was not authorized to sell. In concluding that this conduct did not violate New Jersey's prohibition on deceit, the court held that "misrepresentations solely as to identify or purpose and solely for evidence gathering purposes," are not prohibited.[17] 15 F.Supp.2d at 475.

Relying explicitly on the decisions in *Gidatex* and *Apple*, the District Court for the Southern District of New York has concluded that

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[16] Like former Disciplinary Rule 1-102(A)(4), current Rule 8.4(c) states that a lawyer or law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[17] While understanding the court's conclusion in the context of these particular facts, it seems unlikely that the court truly intended this sweeping language to apply in all contexts. For example, it seems clear that it would be inappropriate for a lawyer, or his agent, to misrepresent an association with an adverse party for the purpose of inducing a recalcitrant witness to share information, even when doing so involved "merely" a misrepresentation as to identity and purpose. *See, e.g.*, Kansas Bar Association Opinion 94-15 (1995) (inappropriate for lawyer to have staff member contact third party posing as a "friend" of an adverse party for purpose of securing information from that person.)

> the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005).

Notwithstanding these views, there are still other authorities which have been far more literal in their application of the deceit rules, even when the lawyer's conduct was arguably serving some greater societal good. For example, *In re Malone*, 105 A.D. 2d 455 (3d. Dept. 1984), involved an attorney serving as the Inspector General of the New York State Department of Correctional Services. In the course of an investigation into prisoner abuse, Malone took a "private statement" from a corrections officer who had witnessed such abuse. The statement was taken under oath and recorded. This private statement was taken the day before a number of officers, including this individual, were scheduled for formal investigatory interviews. In conjunction with the private statement, Malone instructed the corrections officer to give a false statement that next day (denying any knowledge of abuse), to protect the individual and avert suspicion from him as the informer. The individual did as instructed. In sustaining discipline subsequently imposed on Malone for his role in this ruse of the false second statement, the Appellate Division explicitly rejected the notion that the "ends" (protection of the informer) can justify the "means" (deceit).

A similar result was reached in *Matter of Mark Pautler*, 47 P.3d 1175 (Colo. 2002). Pautler was a Deputy District Attorney. He arrived at a particularly gruesome crime scene in which three women had been murdered with a wood splitting maul. While there, he learned that three other individuals had called the Sheriff's office with information about the murderer. One of those three was someone the murderer had kidnapped and attempted to kill. Eventually, the Sheriff and Pautler made phone contact with the murderer (who by that time had already confessed to the murders and threatened to kill again), although they did not know his location. The murderer made it clear that he would not surrender without legal representation. After a failed attempt to locate the murderer's requested lawyer, the Sheriff agreed with the murderer to locate a public defender. Instead, however, Pautler pretended to be a public defender and eventually secured the murderer's surrender to the Sheriff. The murderer was ultimately convicted and sentenced to death. Subsequently, misconduct charges were brought against Pautler for his deceitful conduct and his misrepresentations. Refusing to create an exception to Colorado's rules against attorney deception even in this context, the Supreme Court upheld Pautler's three month suspension (due to the mitigating circumstances involved, however, it stayed the suspension during a twelve month probation period). However, on September 28, 2017, the Colorado Supreme Court amended Rule 8.4 to include an exception allowing a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities." *See* Colorado Rules of Prof. Cond., Rule 8.4(c).

Other courts also have been reluctant to create exceptions to the deceit rules. *See Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653 (D. Colo. 1992) (recognizing, in context of surreptitious tape recordings, that attorney's interest in ferreting out misconduct does not justify deceptive practices); *In re the Complaint as to the Conduct of Daniel J. Gatti*, 8 P.3d 966 (Or. 2000)

(lawyer posing as someone else as part of an investigation into suspected fraudulent conduct violated ethical rules); *In re Ositis*, 333 Ore. 366 (2002) (lawyer reprimanded for giving direction to private investigator falsely posing as journalist to interview opposing party in litigation); *In the Matter of the disciplinary proceedings against James C. Wood*, 190 Wisc.2d 502 (1995) (pretending to be someone else violates ethics rules).

Consistent with this more stringent view, the Eighth Circuit, on facts similar to those in *Gidatex* and *Apple*, has suggested that the use of investigators posing as customers and engaging salespersons in discussion violates these rules. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F. 3d 693 (8th Cir. 2003).

On May 23, 2007, the New York County Bar Association issued Opinion 737 addressing this issue. While recognizing that it is generally unethical for non-governmental lawyers to knowingly utilize and/or supervise an investigator who will employ "dissemblance" in an investigation, it nonetheless recognized a limited exception to this proscription. Specifically, it concluded that non-governmental lawyers may ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where " (1) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taken place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including the "no contact" rules of DR 7-104)[18] or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of their parties. The investigator must be instructed, however, not to elicit information protected by the attorney-client privilege. In this context, the Committee distinguished dissemblance from dishonest, fraud, misrepresentation and deceit by the degree and purpose of dissemblance, defining dissemblance as "misstatements as to identify and purpose made solely for gathering evidence."

An added layer of concern in the pretexting context arises when the party contacted by the pretextor is a "represented" person. As discussed earlier, a lawyer is prohibited from communicating, or causing another to communicate, with a represented person whose interests may be adverse to those of her client. Thus not only is a lawyer prohibited from directly communicating with a represented adversary, but a lawyer breaches the Rules if a private investigator working for or under the supervision of that lawyer does so.

Application of this prohibition becomes even more complicated when the individual contacted by the pretextor is an employee of a represented corporation, raising the issue of whether that employee is deemed "represented" by virtue of the company's representation. Generally in New York, employees of a represented employer (1) whose acts or omissions in the matter under inquiry are binding on the corporation or are imputed to the corporation for liability purposes or (2) who are involved in implementing the advice of counsel, are deemed represented if the corporation is represented. *See Niesig v. Team I*, 76 N.Y. 2d 363 (1990). Other employees and, generally all former employees, fall outside this scope, are not considered represented by virtue of the corporate employer's representation, and are fair game for direct communications. *See*

[18] Now codified at Rule 4.2 of the Rules of Professional Conduct.

Muriel Siebert & Co., Inc. v. Intuit, Inc., 8 N.Y.3d 506 (2007); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); ABA Formal Opinion 95-393.

Applying these rules in the pretexting context, a lawyer must be careful to not allow private investigators, posing as someone they are not, to have contact with anyone who might be considered a represented person. *See Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. In. 2006) (ethical rules violated when investigators, with knowledge and under at least some degree of supervision of lawyers, sent into plant posing as employees and engaged in discussions with other employees regarding possible workplace harassment where some of the employees contacted were represented claimants); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (ethical breach when investigators, under lawyer's supervision, posing as customers engaged in discussions with employees of adverse party in effort to solicit damaging information); *Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F.Supp.3d 419, 430-32 (M.D. Pa. 2016) (ethical violation when attorney listened and took notes on a phone call with an adversary, known to be represented by counsel, without disclosing his presence).[19]

However, as is the case in the use of deceit generally, not all courts are in agreement that all contact with a represented person is off limits. In *Gidatex*, the court not only found that the use of investigators to pose as customers was not a violation of the rules against deceit, it also found that the investigators' conversations with employees of a represented adverse party (who were deemed to be represented themselves) was not a violation of the no contact rules. In that case, although the court concluded that the investigator's communications with the other party's salespeople literally ran counter to former DR 7-104 (a)(1)[20], it nonetheless observed that it

> did not violate the rules because [these] actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. Gidatex's investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [other side's] showroom and warehouse.

82 F.Supp.2d at 126. And in *Apple*, the court similarly noted:

> RPC 4.2 [prohibiting contact with represented persons] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general

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[19] Simply because evidence is obtained in violation of ethical rules does not mean it is inadmissible. Both the Second Circuit and New York courts have recognized that the means by which evidence is obtained is not necessarily a barrier to admissibility. *See United States v. Hammad*, 858 F. 2d 834 (2d Cir. 1988); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999); *Stagg v. New York City Health & Hosp. Corp.*, 162 A.D. 2d 595 (2d Dept. 1990).

[20] Now Rule 4.2(a).

> public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. *See, e.g., Weider*, 912 F. Supp. 502. Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate RPC 4.2.

15 F.Supp.2d at 474-75.

It is difficult to generalize too much from these few authorities. Nonetheless, it would appear that conduct which employs some minor deceit or covert activity designed to obtain information that the opposing party seems otherwise willing to make generally available – such as that obtained by posing as a customer and asking nothing more than what a normal customer would ask – might pass muster. However, once an investigator begins to probe below the surface – pushing and pulling as investigators are quick to do -- to acquire more information than would normally be provided to "just anyone," or if the investigator pretends to be a specific person in an effort to acquire private information about that person, the line likely has been crossed.

Social networking sites present almost limitless opportunities as investigatory tools, and almost as many ethical traps for the unwary. If a lawyer is able to access an individual's information on social networking sites (e.g, Facebook, Twitter, etc.) because that information is publicly available, then there is no ethical prohibition to doing so. The New York State Bar Association Committee on Professional Ethics, in Formal Opinion 843, has issued an opinion reaching this conclusion. The Committee found that acquiring information in this manner is no different than acquiring information through some publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva. See West Virginia Legal Ethics Opinion No. 2015-02 (2015) ("WV LEO 2015-02"); Pennsylvania Bar Association Formal Opinion 2014-300 (2014) ("Pa Formal Opinion 2014-300"); Massachusetts Bar Ass'n, Comm. On Prof. Ethics Op. 2014-5 (2014) ("MBA 2014-5"); Kentucky Bar Ass'n Ethics Opinion KBA E-434 (2014) ("KBA E-434"); New Hampshire Ethics Committee Advisory Opinion 2012-13/05 (2013); ("NH Opinion 2012-13/05") San Diego County Bar Legal Ethics Opinion (hereafter "SDCB Legal Ethics Opinion") 2011-2 (2011); New York State Bar Association, Comm. On Prof'l Ethics, Formal Opinion 843 (2010) ("NYSBA Formal Opinion 843") (2010); Oregon State Bar Formal Ethics Op. No. 2005-164 ("OSB 2005-164). Generally, this public viewing is simply not considered a "communication" with the individual (thus avoiding any application of Rule 4.2, prohibiting "communications" with represented individuals) and it does not matter if the individual is represented or not. Commentators have expressed the same view. NYSBA Commercial and Federal Litigation Section, Social Media Ethics Guidelines at p. 18 (2017); Witnov, *Investigating Facebook, supra*, at 61-63; Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It is Also Dangerous*, www.abajournal.com/magazine/article (February 1, 2011); Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 McGeorge L. Rev. 271 (2010).

However, a lawyer may run afoul of New York's Rules of Professional Conduct if she tries to access sites that are not open to the public. On many social networking sites access is limited to

those granted access rights by the page creator. In some cases, access is limited to those who "friend" the creator. While NYSBA Formal Opinion 843 declined to address that situation, because it was not the case presented to it for an opinion, it did note a recent opinion issued by the Philadelphia Bar Association. In Opinion 2009-02, the Philadelphia Bar was confronted with a situation in which a lawyer inquired about using a third party to access the social networking site of an unrepresented adverse witness in a pending lawsuit for the purpose of obtaining information that might be useful for impeachment purposes at trial. Access could only be gained by the third party "friending" the adverse witness. The inquiring lawyer was proposing that the third party would friend the witness, using only truthful information but concealing the connection between the third party and the lawyer. The Philadelphia Bar Association concluded that such conduct would violate the Pennsylvania Rules of Professional Conduct. Specifically, the Philadelphia Opinion concluded that the third party's failure to reveal the connection with the lawyer would constitute deception in violation of the Rules and since the third party was acting under the supervision of the lawyer, the lawyer would be responsible for that deception.

While NYSBA Formal Opinion 843 declined to formally opine on the "friending" situation presented in the Philadelphia Opinion, it seems likely that the NYSBA Committee on Professional Ethics would reach a similar conclusion, given its comments. Other bar associations have reached this same conclusion. . See DC Bar Opinion 371 (2016); WV LEO 2015-02 (based on Rule 4.3); Pa Formal Opinion 2014-300 (based on Rule 4.3); MBA Opinion 2014-5 (based on Rules 4.1 and 8.4); NH Bar Opinion 2012-13/05 (based on Rules 4.1 and 8.4); SDCBA Opinion 2011-2 (California does not have Rules comparable to Rule 4.1 or Rule 8.4 and the San Diego Bar reached this conclusion based upon, among other things, a common law duty not to deceive.); see also Social Media Ethics Guidelines 18 (NYSBA/Commercial and Federal Litigation Section, May 2017)(in "communicating" with an unrepresented person via social media, a lawyer must use his/her full name and accurate profile; if the unrepresented person askes for additional information from the lawyer, the lawyer must accurately provide the information requested or otherwise cease all further communications and withdraw the request).

However, at least two opinions provide that so long as the information that is provided is truthful, even though it may not indicate the lawyer's connection to the matter, friending is permissible. Association of the Bar of the City of New York, Opinion 2010-2; Oregon Formal Ethics Opinion 2013-189.

Also, if the party to be friended is represented, Rule 4.2 is also likely implicated. That Rule prohibits communication by a lawyer (or another at the direction of a lawyer) with any represented party without the consent of that party's counsel.

XII. CONCLUSION

The adoption of the Rules of Professional Conduct marked a new chapter in professional responsibility in New York. On the one hand, these Rules bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special "New York flavor," which continues to mean lawyers practicing in New York cannot not simply assume that our rules are like those which govern everyone else (or govern even them when their practice takes them to other jurisdictions).

Unfortunately, the Courts' adoption of these Rules – most identical to those proposed by the Bar Association, but some not, and without any explanation as to why – leaves New York lawyers in the dark about the meaning of a number of these provisions, even years later.

EXCERPTS REGARDING PROPOSED REVISIONS TO RULE 3.3(c)

FROM THE

COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT'S SEPTEMBER 30, 2018 REPORT TO THE NYSBA HOUSE OF DELEGATES

Rule 3.3
Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding," *see* Rule 3.3(b), then the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) "continue to the conclusion of the proceeding." COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer's duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6" (New York's basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase "remedial measures" to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

> We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

> 16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

> [T]he obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase "conclusion of a proceeding" means "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." We believe that the courts' rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented "as long as it is still possible to reopen the proceeding based on this disclosure," or (ii) "to opposing counsel where another tribunal could amend, modify or vacate the prior judgment."

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer's duties continue until remedial legal measures are "no longer reasonably possible." *See* Texas Rule 3.03(c) ("The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible"). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: "The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal."

In COSAC's view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client's reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer's obligation upon the "conclusion of the proceeding." On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York's current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client's fraud on a court if the information to be disclosed was protected as a confidence or secret.[1] New York did not appear to suffer from frequent unremedied fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

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[1] DR 7-102(B) provided as follows:

> B. A lawyer who receives information clearly establishing that:
>
> 1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret.*
>
> 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – *see* *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf* or *https://bit.ly/2kfYBpx* .

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to "when a final judgment in the proceeding has been affirmed on appeal," as in the ABA Comment, but also more broadly to "when a final judgment or order in the proceeding has been entered after appeal." Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

> [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York's convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Candor Before The Tribunal

Hypotheticals

Hypothetical 1: Direct Representation By Lawyer

You are representing a client in a harassment case brought by a former employee. In your early interviews with your client's HR representative, she has mentioned to you that she doubts there is any merit to the plaintiff's claims because, among other things, in response to the former employee's internal complaint, a "thorough" investigation had been conducted and "at least a dozen individuals must have been interviewed," with no one supporting the former employee's version of events. Because it is early in the case and discovery hasn't even started, you have not had a chance to review the full details of the investigation. Despite this early stage, you recently started settlement discussions with plaintiff's counsel. You made some progress, but you were still apart on a settlement amount, in part because plaintiff's counsel apparently didn't think that an adequate internal investigation occurred when his client first complained internally. Up to this point there had been no reason to reveal the scope of the investigation but sensing that now it might push the settlement discussions into a more acceptable range, you blurt out that of course there was a thorough investigation with "at least a dozen" individuals interviewed. With that information, there is a noted change in the plaintiff's position and he reduces the settlement demand enough that you are now confident that you will be able to complete a settlement.

When you explain to your client where things stand, and how disclosing the scope of the investigation has made a significant difference in the tenor of the settlement discussions, your client reluctantly tells you that while she did in fact do an investigation at the time of the internal complaint, due to time constraints caused by the Company preparing for massive layoffs, it was a pretty perfunctory review. While she said she remembers early on that she may have casually indicated to you that she talked to a number of people as part of that internal investigation, she in fact only spoke to the former employee and the alleged harasser. When you tell her that you need to correct your statement to opposing counsel, she insists that you not do so, because she sees how close you are to settlement and how important that piece was in getting there.

Just as you finish up with the client, plaintiff's counsel calls to see where things stand regarding settlement discussions and to see if "we have a deal."

What do you do now?

Would it matter if you had made the representation to the court itself, perhaps in the context of a settlement conference?

Hypothetical 2: False Testimony By The Lawyer's Client

During the course of an arbitration over a subcontracting dispute with the union, your client's HR Director testifies, based on his review of Company records, to the Company's history of subcontracting, providing numerous examples of instances in which subcontracting had happened in the past with the union's knowledge and acquiescence, albeit a number of years ago (predating the personal involvement of your HR director/witness or any of the union's witnesses).

About two weeks after you have submitted your brief, but before the arbitrator has reached any decision, your client calls you. He tells you that in the course of a Company effort to clean out old files, he just came upon a file which makes it clear that his testimony, to the effect that the union acquiesced in this prior subcontracting, was simply wrong. Apparently, the union had disputed it when it occurred years ago, and a resolution had been agreed to as to how subcontracting would be handled, which apparently everyone simply forgot about. The fact that the Company had in fact been operating in accord with that resolution (for many years) until this most recent dispute arose probably explains how this agreed upon resolution had been forgotten about. Your client contact is clear that he was previously unaware of this resolution agreement until just now. Of course, his first reaction (because the case otherwise seemed to go so well) was that he was glad he only uncovered this information now and not before he had testified.

What do you do with this information?

Hypothetical 3: Learning Client's Position Is False

You are representing a union in an arbitration on behalf of a member who was fired for allegedly submitting a forged note to his employer. The note in question states that the member could not stay at work to provide overnight coverage during a snowstorm because the member had to pick up his child from school, which was closing early on account of the snow. The note is on the school's letterhead but contains several typos that make the employer suspect it is forged.

The union, employer and member met several times pre-arbitration to attempt to resolve the grievance. You were not present at these meetings, but understand that the member maintained at these meetings that the note was not forged. When you met with the union and the member pre-arbitration, the member insisted to you that the note was not forged, but was unable to provide you with the name or description of the employee of the school who wrote it.

The morning of the arbitration, you learn from the employer's counsel that the employer intends to call as a witness an employee of the school who will testify that the member did not pick up his son from school on the day in question. You also learn that the member's spouse works for the school in a position where she has access to the school's letterhead, but is not authorized to provide such a note on behalf of the school.

When you relay this to the union and member, the member tells you that he forged the note. The union advises the member that it is in his best interests to try to negotiate a settlement agreement so he does not have to testify. You tell the employer's counsel and arbitrator that the union wants to pursue settlement. The arbitrator insists that first he wants to hear opening statements on the record.

During its opening statement, the employer says that the member forged the note and then lied about it. You make an opening statement without saying anything about the origin of the note. As soon as you're finished, the arbitrator turns to you and asks who wrote the note.

What do you do?

Hypothetical 4: False Testimony By The Other Side

In the course of a trial, one of the witnesses called by your opponent incorrectly testifies that she personally observed your client's Supervisor at a very specific time and place engage in some harassing conduct. The fact is that she is wrong about the time and place. However, that testimony is very helpful to your position, because it actually undermines other evidence of a far more serious nature offered by your opponent. From your own investigation (including interviews with other disinterested witnesses, now known to the other side) you know that the incident which this witness described she observed did in fact happen, but three days earlier than she indicated in her testimony. But by placing the Supervisor where she did, when she did, this witness' testimony is extremely helpful to you.

Do you have to advise the court of the witness's mistake?