What to Do When Your Witness' Testimony Doesn't Match His or Her Declaration

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One of the most difficult ethical dilemmas a lawyer can face is the false testimony of a client on a material issue. What should lawyers do when their client takes the stand and his testimony conflicts with his affidavit or previous deposition testimony? What actions should lawyers take when discovering that something in their client's declaration is false? Even worse, what do lawyers need to do if they learn that their client lied under oath?

This article will provide a framework for analyzing these situations, understanding the ethical issues, and meeting obligations to the court while minimizing harm to the client and the case.

I. The Ethical Dilemma

When your client presents conflicting or false evidence, it is necessary for you meet your obligations to the court while at the same time minimizing the harm to your client and your case. To properly understand how to respond to these situations, it is necessary to first understand the competing ethics rules underlying those obligations.

A. Duty of confidentiality

One of the lawyer's most fundamental duties to the client is to keep client information confidential. Model Rule 1.6(a). This is a much broader duty than most lawyers realize. Many lawyers incorrectly assume that confidential information is similar to privileged information. Information considered confidential under Model Rule 1.6 includes more than just information shared by your client; it also includes information lawyers learn when investigating claims, conducting discovery, or even from discussions with opposing counsel or another party. A lawyer's duty of confidentiality applies to "any information relating to the representation of a client." *Id.*

If the duty of confidentiality were absolute, lawyers could never talk about their cases or make arguments to the court. So, Model Rule 1.6 includes several exceptions to the general rule of confidentiality. First, lawyers may reveal information when "the disclosure is impliedly authorized in order to carry out the representation ... " Model Rule 1.6(a). This exception allows lawyers to perform common activities such as discuss information during oral arguments and depositions. Second, if the disclosure is not "impliedly authorized;" lawyers may reveal confidential information with a client's informed consent. *Id.*

Lawyers should also be aware that public policy allows lawyers to disclose confidential information in certain circumstances where the client intends to, or has, committed a crime or fraud. Model Rule 1.6(b)(I)(3). Lawyers should consider these exceptions to the duty of confidentiality when analyzing whether they can (or must) disclose confidential client information.

However, even when none of these exceptions allow disclosure, lawyers may have an obligation to disclose information concerning a client's false statements because disclosure is necessary "to comply with other law:" Model Rule 1.6(d)(6). One such "other law" is the duty of candor found in Model Rule 3.3. *See* Model Rule 1.6 cmt. 17; Model Rule 3.3(c).

B. Duty of candor

Although the duty of confidentiality owed to clients is important, it is superseded by the lawyer's duty of candor to the court. All lawyers should know that they must not make false statements of fact or law to the court. Model Rule 3.3(a)(I). Similarly, lawyers cannot knowingly fail to disclose directly adverse law to the court when opposing counsel fails to do so. Model Rule 3.3(a)(2).

The duty of candor also applies to the submission of false evidence. Lawyers can't offer evidence that they know to be false. Model Rule 3.3(a)(3). Additionally, lawyers must "take reasonable remedial measures" to correct any false material evidence offered by the lawyer, the client, or a witness called by the lawyer when the lawyer learns of the falsity. *Id.*

The duty to "take remedial measures" in such situations applies until "the conclusion of the proceeding ... " Model Rule 3.3(c). Moreover, the duty applies even if compliance would require the lawyer to disclose confidential information otherwise protected by Model Rule 1.6. *Id.*

C. Conflicts of interest

In certain situations, a conflict of interest might arise between a lawyer and client when the lawyer is confronted with a client misrepresentation. For example, if a client refuses to correct a material misrepresentation where the disclosure of that misrepresentation could expose the client to criminal charges, the lawyer's duty to remediate the false evidence would likely create a conflict. Model Rule 1.7(a)(2) (lawyer shall not represent a client where there is a significant risk that the representation will be materially limited by the personal interest of the lawyer).

II. Resolving the Ethical Dilemma in the Civil Case

Lawyers must take their obligations as officers of the court seriously. Indeed, the duty of candor to the court may be the lawyer's most important ethical duty. So, how do lawyers determine whether they have an obligation to correct inaccurate or false testimony? And, if they have such an obligation, how can they remediate the problem while minimizing the harm to their client and their case?

A. Duty of candor supersedes the duty of confidentiality

The model rules explicitly state that the lawyer's duty of candor to the court is paramount and takes precedence over the duty of confidentiality. Model Rule 3.3(c); Model Rule 1.6 cmt. 17. Consequently, lawyers cannot refuse to correct false statements or evidence by claiming that doing so would violate their duty of confidentiality to the client.

B. How to determine if there is a problem

1. Do you "know" that false evidence was submitted to a tribunal?

Rule 3.3's requirement to correct false evidence is premised on the lawyer's *knowledge* of its falsity. Model Rule 3.3(a)(3). The term "know" under the model rules means "actual knowledge of the fact in question:' Model Rule 1.0(0. Unknown information or information that the lawyer *shoul*d have discovered are insufficient. See Restatement (Third) of the Law Governing Lawyers §120 cmt. c. However, "a person's knowledge may be inferred from circumstances:" Model Rule 1.0(f). For example, a lawyer who has a strong factual basis to believe that the client's testimony is false may have inferred knowledge of the falsity. See Restatement (Third) of the Law Governing Lawyers §120 cmt. c. *See also Wyle v. R.]. Reynolds Indus., Inc.*, 709 F.2d 585, 590 (9th Cir. 1983) (holding that deliberate ignorance was "the equivalent of knowledge" of a fact).

The disclosure must also be to a "tribunal:" That term is defined broadly under the model rules. It includes "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity:" Model Rule 1.0(m). Additionally, Rule 3.3's requirements are not limited to statements made directly to a tribunal. It also applies to any "ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition:" Model Rule 3.3 cmt. 1. Consequently, the rule applies to statements not made directly to the court, such as those in affidavits, depositions, or any proceeding over which the tribunal has authority. Although Model Rule 3.3 does not apply to mediations, lawyers

are still prohibited from making false statements of material fact or law to a third party pursuant to Model Rules 4.1 and 8.4(c).

2. Was the false evidence "material?"

The obligation to take remedial action does not apply to every inaccurate statement by the lawyer or his client. Remediation is only required when the false evidence offered is "material:" When determining whether the evidence is "material;" lawyers should consider whether the evidence would be significant to the court or jury and would be reasonably likely to affect a ruling or verdict. *See Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994). False information could also be considered "material" if an opposing party relies on it in reaching a settlement agreement. *See, e.g., Kath v. W Media, Inc*., 684 P.2d 98, 101-02 (Wyo. 1984) (setting aside settlement agreement because lawyer failed to disclose knowledge of false evidence).

C. What to do

Once the lawyer determines that false evidence has been offered and that the evidence is material, the lawyer must take reasonable remedial measures. So, what is a "reasonable remedial measure?" There are a couple of guiding principles. First, it must be reasonably calculated to put the tribunal on notice that evidence offered is unreliable. Second, it should be tailored as narrowly as reasonably possible to minimize prejudice to the client. The key is to undo the wrong- the effect of the false evidence-as quickly as practicable.

It should be noted that the lawyer cannot simply seek a quick settlement in hopes of avoiding disclosure. If the client submitted false material evidence, the opposing party may have reasonably relied on that evidence when agreeing to settle the case. If the lawyer does not remediate the false evidence before entering into the settlement agreement, the lawyer will likely have violated Model Rule 3.3 and the settlement may be unenforceable. *See, e.g., Kath, supra*.

1. Step 1: Secure client authorization to disclose

The first step is to privately meet with the client and explain why the lawyer must withdraw the false evidence. As part of this conversation, the lawyer should explain his or her ethical duty to remedy the falsity. Depending on the circumstances, the lawyer might also need to recommend that the client consult with criminal defense counsel if there is a potential for criminal liability (*e.g.,* perjury).

The best course of action will usually be for the client to allow the lawyer to withdraw the false evidence or submit corrected testimony. The lawyer should make

every effort to explain to the client that this approach will almost always minimize the prejudice to the client and his case.

For example, assume that the client previously signed an affidavit stating that he did not talk to Mr. Smith on January 1, 2010 (a material fact in the case). After Mr. Smith testifies that they talked that day, the client admits to the lawyer that he did, in fact, talk to Mr. Smith that day. The best response would be for the lawyer to submit a revised affidavit with the corrected information. The same approach could be used regarding erroneous deposition testimony.

A trickier issue arises when the client changes his testimony regarding a material fact while on the witness stand at trial or at a hearing. In that situation, the lawyer should talk to the client at the earliest available break and may even need to request an early break if possible. During the break, the lawyer needs to have the client conversation discussed above. If the client's trial testimony is false, then the client needs to correct it upon re-taking the stand. If the client doesn't agree, then the lawyer may need to withdraw in addition to notifying the court of the false testimony.

When withdrawing false evidence or submitting corrected testimony, though, the lawyer should be careful to avoid going beyond what is necessary to put the tribunal on notice that the previously offered evidence was unreliable. Any further disclosure could unnecessarily prejudice the client. For example, it is rarely necessary to disclose the reason for the false testimony or suggest that the client bears fault for submitting the false evidence.

2. Step 2: disclose without client consent

The lawyer still has an obligation to remediate the false evidence if the client refuses to consent to withdrawing the evidence or submitting corrected testimony. As part of the lawyer's conversation with the client, the lawyer should have explained that the lawyer has an ethical duty to correct the record regardless of whether the client consents.

If this occurs, the lawyer should usually file an appropriate motion with the tribunal with jurisdiction. For example, if a false affidavit had been submitted, the lawyer could file a Motion to Withdraw Affidavit or Motion to Submit Corrected Affidavit. The motion should be filed with the court with copies provided to all parties. The motion should reasonably place the court and parties on notice that the falsely submitted evidence is unreliable, but should avoid disclosing the client's misconduct. If asked to explain the change in testimony, the lawyer should refuse (unless there is a

court order to do so), citing Model Rule 1.6, the attorney-client privilege and, if applicable, the Fifth Amendment.

The lawyer also needs to be cognizant of potential conflicts of interest when disclosing without consent. For example, the client may threaten to file a disciplinary complaint against the lawyer, which would likely create a disqualifying conflict of interest. Or the lawyer disclosure could expose the client to potential perjury charges. If such a conflict arises, the lawyer will need to withdraw from the case and advise the client to retain new counsel. If the lawyer withdraws from the case, he will still need to remediate the false evidence if the withdrawal alone doesn't adequately provide notice to the tribunal and parties that the false evidence is unreliable.

3. What to do if you're no longer representing the client

It is possible that the lawyer no longer represents the client because the client fired the lawyer or the lawyer withdrew from the case. If the client retained new counsel, then the lawyer should disclose the false evidence to the new counsel and solicit his assistance in securing client consent to correct the evidence.

If the client did not retain new counselor if the newly retained counsel does not make an appropriate disclosure, then the lawyer must make a disclosure directly to the court. Again, the lawyer should not disclose any client misconduct. Because the lawyer is no longer counsel of record, though, the disclosure can be made by sending a letter to the court with a copy to the (now former) client. The lawyer need not send a copy to opposing counsel. The court will determine whether to share the information with opposing counselor a finder of fact.

III. Conclusion

Once a lawyer determines that a client has offered false testimony or provided false information regarding a material fact, the lawyer needs to take appropriate remedial measures to ensure that the tribunal understands the offered evidence is unreliable. The method and scope of disclosure will depend on the circumstances of the case, the false evidence that was offered, and the lawyer's status in the case. The lawyer should attempt to minimize the prejudice to the client, but the duty of candor to the court supersedes the duty of confidentiality and loyalty. By using the framework proposed in this article, the lawyer should be able to avoid a violation of his own ethical duties when confronted with client misrepresentations.

IV. Attachments

Selected Model Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) 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 the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Client-Lawyer Relationship

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Advocate

Rule 3.3 Candor Toward the Tribunal

(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;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer 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.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(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.

(d) 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.

Transactions with Persons Other Than Clients

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.