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Reckoning:
The Duty to Correct under RPC 3.3

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In the course of a case, litigators typically make all sorts of statements to courts on the facts and the law. Some, like pleadings, are governed by specific standards of lawyer personal knowledge that, although prohibiting lawyers from knowingly offering false evidence, recognize that litigation inherently involves a clash of competing narratives.[1] In other situations, however, litigators make specific representations of fact or law based on personal knowledge.[2] Some are in briefs, while others are made in open court. Some are representations uniquely within the lawyers knowledge, while others may be based on information supplied by a client. Although made in good faith at the time, lawyers sometimes come to learn that their statements were inaccurate or came to be inaccurate in light of later developments. In addition to triggering a range of human emotions, this uncomfortable discovery may also raise a duty to correct under RPC 3.3(a)(1): "A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]"

The sources of errors are many and varied. Some are "old fashioned." A lawyer in Tennessee, for example, was disciplined under their version of RPC 3.3(a)(1) for failing to correct a statement made to a court that he had the original documents confirming a real estate transaction, when, as it turned out, he did

not.[3] Similarly, a Washington lawyer was fined as a sanction for failing to correct inaccurate statements about the record in an appeal.[4] Others are more contemporary. A lawyer in Colorado, for example, was disciplined under Colorado RPC 3.3(a)(1) for failing to correct a brief that contained citations to non-existent cases generated by an artificial intelligence tool the lawyer had used.[5]

When a lawyer discovers an earlier statement is not correct, typically three questions race forward: (1) was the statement "material"? (2) how do I correct it? and (3) how long does the duty last? In this column, we'll look at all three.

Before we do, however, four qualifiers are in order.

First, we'll leave the even more searing issue of client perjury for another day. Discovering client perjury or similar situations involving evidence offered that the lawyer later learns was false can raise very difficult issues under other aspects of RPC 3.3, along with the confidentiality rule, RPC 1.6, and the withdrawal rule, RPC 1.16.[6]

Second, although conceptually similar, we'll also leave for another day the duty under RPC 3.3(a)(3) to disclose adverse legal authority to a tribunal.

Third, we'll focus on situations where lawyers did not intend to misspeak. Lawyers who intentionally lie to courts or engage in similar misconduct are

usually on quick path to a new line of work through disbarment or a long time to think about their error while serving a suspension.[7]

Fourth, because the duty to correct under RPC 3.3(a)(1) arises in the context of court proceedings,[8] court rules and statutes on sanctions can also enter the mix—principally CR 11 that governs certifications and its federal counterpart.[9] Here, however, we'll focus on the ethics rule. In doing so, it is important to remember that the rule uses the word "tribunal" rather than "court" and the term "tribunal" is defined broadly by RPC 1.0A(m) to include administrative hearings and arbitrations.[10] Comment 1 to RPC 3.3, in turn, notes that the duty also applies to "ancillary" proceedings conducted under a tribunal's authority—including depositions.

Materiality

The duty to correct is expressly predicated on the statement involved being "material."[11] Although the word "material" is not defined in the text or the comments to RPC 3.3, the Washington Supreme Court in *In re Dynan*, 152 Wn.2d 601, 613-14, 98 P.3d 444 (2004), defined materiality in the context of RPC 3.3 as "'those facts upon which the outcome of the litigation depends in whole or in part.'" In doing so, the Supreme Court took the same approach to the term "material" in RPC 3.3 as it had two years earlier under RPC 4.1—which

prohibits material misrepresentations to third persons—in *In re Carmick*, 146 Wn.2d 582, 600, 48 P.3d 311 (2002). *Carmick*, in turn, relied on a similar definition for "material" facts in the summary judgment rule—CR 56(c).[12]

Case law both within and outside the disciplinary realm recognizes that materiality is inherently contextual.[13] Black's, for example, notes that materiality is case specific: "A fact that makes a difference in the result to be reached in a given case . . . What constitutes a material fact is a matter of substantive law."[14]

Because the trigger for correction is contextual, the lawyer who made the misstatement is often in a unique position to answer the question of materiality. That said, it is always difficult to maintain dispassionate lawyerly professional judgment when it is your mistake—whether ultimately classified as "material" or not. Therefore, it is usually best to seek the assistance of a trusted colleague, ideally one who is familiar with the case, in the assessment.

In making this often-nuanced decision, it is also important to keep in mind the underlying rationale for the duty expressed in the title to the rule: "Candor Toward the Tribunal." In other words, the fact that your client benefited from your misstatement to the court doesn't excuse the duty to correct.[15] Comment 2 to RPC 3.3 puts it this way:

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal.

In weighing whether a misstatement was material, lawyers are often understandably concerned about how the judge involved will react. If, as often happens, the misstatement will likely come to light later anyway, prudence suggests that it is better to make the correction promptly rather than appear to have intentionally misled the court (and the opposing party) through the failure to correct. In a case from the federal court in Seattle, the judge wrote the following after a lawyer corrected an earlier statement that a letter was privileged:

> Plaintiff's counsel filed his disclosure pursuant to Rule of Professional Conduct 3.3, which requires counsel to correct a false statement of material fact previously made to the tribunal. The Court appreciates counsel's candor with this Court, and is confident that counsel believed that the document was privileged when he previously made the assertion.[16]

Those laudatory comments contrast sharply with the pointed language courts have used in many of the cases cited earlier when they concluded that lawyers were intentionally deceptive.

Correction

RPC 3.3 does not specify a particular way to correct an error. The nature of the error, however, may suggest the method of correction. An error in a declaration, for example, might be corrected through an amended declaration correcting—and explaining—the error. Similarly, a statement made during court proceedings might be corrected on the record when the matter reconvenes. In still others, a letter to the judge and opposing counsel may be appropriate. Prudent practice suggests that whatever method is chosen should be in the court record in the event of later proceedings at either the trial or appellate level.

RPC 3.3 also does not specify a particular time to correct an error. Although a lawyer should ordinarily be accorded a reasonable period of time to assess the nature of the error, it does not mean that a lawyer can wait indefinitely. The practical problem with not promptly disclosing a material misstatement is that both the court and the opposing party may have relied on it in, for example, judicial rulings or settlement negotiations. Those kinds of scenarios raise additional risks for the lawyer involved that are well beyond the professional embarrassment of having to reveal a misstatement because it may appear that the lawyer intentionally withheld the correction to gain advantage in

the case involved. To borrow an old adage, "bad news rarely improves with age."

Duration

RPC 3.3(b) states the duration of the duty to correct: "The duties stated in paragraph (a) continue to the conclusion of the proceeding." Comment 13 to RPC 3.3 elaborates on this point:

> 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 proceedings 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 in the proceeding has been affirmed on appeal or the time for review has passed.[17]

The time limit in RPC 3.3(b) addresses situations where the inaccuracy of a prior statement only comes to light after the proceeding involved has concluded. It is not, however, an invitation to "run out the clock" by keeping mum until the conclusion of the proceeding on the assumption that once the proceeding concludes the lawyer is safe from any consequence. In that situation, the duty arose (and was breached) during the representation, and there is no statute of limitation in disciplinary proceedings under Rule for the Enforcement of Lawyer Conduct 1.4.

Summing Up

No one likes to admit they made an error. Given the sensitivity of our duty of candor to courts, however, when a lawyer discovers they misspoke to a court, they should promptly analyze whether the statement was material and, if so, make the necessary correction.

ABOUT THE AUTHOR

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[1] Comment 3 to RPC 3.3 distinguishes pleadings, which typically do not require a lawyer's personal knowledge, from statements made directly by the lawyer based on the lawyer's personal knowledge. This column focuses on the latter, rather than the former—which are

subject to other RPCs, such as RPC 3.1 on meritorious claims and contentions, and court rules, such as CR 11(a) governing pleading standards.

[2] The facts involved need not be "evidentiary facts" in the sense that the lawyer would qualify as a witness in the proceeding concerned under ER 602. For example, a lawyer might say: "Judge, that key point is in the record" when, as it turns out, it is not. For a discussion of this conceptual distinction and the attendant gray area of representations made on "information and belief," *see* Brooks Holland, *Confidentiality and Candor under the 2006 Washington Rules of Professional Conduct*, 43 Gonz. L. Rev. 327, 363-65 (2008).

[3] *Board of Professional Responsibility of the Supreme Court of Tennessee v. Walker*, 638 S.W.3d 127, 131-34 (Tenn. 2021).

[4] *In re Welfare of R.H.*, 176 Wn. App. 419, 429-431, 309 P.3d 620 (2013) (citing RAP 18.9(a) and RPC 3.3(a)(1)).

[5] *People v. Crabill*, 2023 WL 8111898 at *1 (Colo. Nov. 23, 2023) (unpublished).

[6] For thoughtful discussions of the intersection of these rules in the context of client perjury, see the chapters written by Professors Brooks Holland and Tom Andrews in, respectively, the WSBA *Legal Ethics Deskbook* at 21-11 to 21-12 (2d ed. 2020), and WSBA *Law of Lawyering in Washington* at § IV (2012).

[7] *In re Osborne*, 187 Wn.2d 188, 386 P.3d 288 (2016) (lawyer disbarred for, in relevant part, false testimony in declaration submitted to a court); *In re Kamb*, 177 Wn.2d 851, 305 P.3d 1091 (2013) (lawyer disbarred for intentionally altering court document); *In re Christopher*, 153 Wn.2d 669, 105 P.3d 976 (2005) (law firm associate suspended for 18 months for intentionally falsifying document submitted to court).

[8] RPC 3.3(a)(1) is not limited to representational contexts. *See, e.g., In re Whitney*, 155 Wn.2d 451, 120 P.3d 550 (2005) (violation of RPC 3.3(a)(1) while acting as guardian ad litem); *In re Dornay*, 160 Wn.2d 671, 161 P.3d 333 (2007) (witness); *In re Jensen*, 192 Wn.2d 427, 430 P.3d 262 (2018) (witness); *In re Conteh*, 175 Wn.2d 134, 284 P.3d 724 (2012) (applicant in immigration proceedings).

[9] *See Gordon v. Robinhood Financial, LLC*, __ Wn. App.2d __, 547 P.3d 945, 958-960 (2024) (discussing Washington CR 11 for failure to correct statements made to the court); *Olympic Steakhouse v. Western World Insurance Group*, 2023 WL 6962711 at *1-*4 (W.D. Tenn. Oct. 20, 2023) (unpublished) (discussing Fed. R. Civ. P. 11 in the context of misleading quotation of statute). *See also Gibson v. Credit Suisse Group Securities (USA) LLC*, 733 Fed. Appx. 342, 345 (9th Cir. 2018) (affirming sanctions under 28 U.S.C. § 1927 prohibiting "vexatious litigation" for failure to correct statements to court). Although some courts in the sanctions context cite RPC 3.3(a)(1), others simply rely on applicable sanctions rules and statutes or the court's inherent authority to control the conduct of counsel appearing before them. *See Descanleau v. Hyland's, Inc.*, 26 Wn. App.2d 418, 445 n.22 (2023) (noting that a sanction must ultimately depend on the applicable authority of the court rather than the RPC standing alone).

[10] *See, e.g., In re Kamb*, *supra*, 177 Wn.2d 851 (Department of Licensing hearing); *In re Rodriguez*, 177 Wn.2d 872, 306 P.3d 893 (2013) (immigration proceeding). *See also Angelo v. Kindinger*, 2022 WL 1008314 at *8-*9 (Wn. App. Apr. 4, 2022) (unpublished) (discussing RPC 3.3(a)(1) and the duty to correct in the context of an arbitration).

[11] Under RPC 3.3(a)(1), there is no materiality threshold for *making* false statements: "A lawyer shall not knowingly . . . make a false statement of fact or law[.]" Rather, materiality is now

a qualifier for the duty to correct: "A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." This distinction was introduced by the ABA when it amended the Model Rule in 2002 by deleting "material" as a qualifier for making a misrepresentation and adding the duty to correct that included "material" as a qualifier. ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 468 (2013) (ABA Legislative History). Washington made a similar amendment to our RPCs in 2006. *See* Washington Supreme Court Order 25700-A-851, July 10, 2006 (adopting comprehensive amendments to Washington RPCs generally mirroring then-recent amendments to the ABA Model Rules).

[12]146 Wn.2d at 600, quoting *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001) (use of "material" in the context of CR 56(c)). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986) (using similar definition of materiality in interpreting the federal summary judgment standard). *Dynan* was decided when RPC 3.3(a) read differently than the present version but included the word "material." *See* Note 11, *supra*. There is nothing in the history of either Washington rule or the ABA Model Rule on which the Washington version is patterned suggesting that this change altered the meaning of the word "material." *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 179-181 (2004) (explaining proposed changes to RPC 3.3 that moved the word "material" within RPC 3.3(a)(1)); ABA Legislative History, *supra*, at 468-474 (2013) (same). As noted earlier, these changes added the duty to correct to the then-existing duty not to mispresent facts or law to a tribunal.

[13] *See, e.g., In re Dynan, supra*, 152 Wn.2d at 613-14; *Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at 248.

[14] Black's Law Dictionary (12th ed. 2024).

[15] As noted at the outset, this column addresses lawyer misstatements rather than situations involving client perjury and the like that involve additional analysis of the competing duties of candor and confidentiality. *See* Note 6, *supra*.

[16] *Tilton v. McGraw-Hill Companies, Inc.*, 2007 WL 777523 at *5 n.4 (W.D. Wash. Mar. 9, 2007) (unpublished).

[17] By its terms, Comment 13 does not include any additional period governing relief from a judgment, such as CR 60. It is conceivable, however, that a party who was affected adversely by a lawyer's intentional delay in correction until after a judgment became final might argue that the failure to timely correct constituted a ground to set aside the judgment under CR 60(b). *See generally* New York City Bar Formal Op. 2013-02 at 3-4 (2013) (discussing duration in the context of the New York rule that does not have a defined end-point).