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Client Perjury: That Sinking Feeling

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Imagine this scenario: You are defending your client's deposition in a hard-fought commercial case. You prepared your client thoroughly for the deposition and the morning session went well. The deposition will continue in the afternoon. Over the lunch hour, your client admits they lied on a key point. That revelation takes away your appetite for the sandwich sitting in front of you. What do you do?

RPC 3.3(c) addresses the uncomfortable situation when a lawyer "has offered material evidence and comes to know of its falsity[.]"[1] Although the rule provides straightforward guidance, that likely won't make the personal dynamic any easier.[2] Because Washington's rule varies somewhat from its ABA Model Rule counterpart, we'll begin by briefly surveying the Washington version for context. We'll then turn to the difficult conversation that must be had with the client involved. Finally, if the client will not voluntarily correct the testimony, we'll discuss how to approach the court concerned to withdraw.

Before we do, three qualifiers are in order.

First, as our opening example illustrates, for many civil litigators client perjury often surfaces in depositions rather than trials simply because the former precedes the latter. Comment 1 to RPC 3.3 notes that the rule applies with equal

measure to an "ancillary proceeding" like a deposition. Therefore, although the rule certainly applies to trials, we'll focus on the corrective actions available pretrial.

Second, in my experience advising lawyers over the years in this unhappy predicament, virtually all involved situations where the clients disclosed the perjury to the lawyers—either directly or with a slight nudge from the lawyer when the testimony involved did not sound consistent with what the client had told the lawyer earlier. We'll take that approach here.[3] That said, the ABA addressed the issue of "reasonable suspicion" that a client may be committing a crime or fraud using the lawyer's services in Formal Opinion 491 (2020). Drawing on authority nationally and across several areas within the ABA Model Rules, Formal Opinion 491 makes the point that a lawyer cannot simply adopt a posture of "deliberate ignorance or willful blindness" without risking being held culpable for the client's wrongdoing. The duties under RPC 3.3(c) are triggered when a lawyer "knows" that a client has testified falsely. "Knows" is defined as actual knowledge under RPC 1.0A(f). Actual knowledge, however, can be "inferred from circumstances" under that same Terminology provision.[4] Comment 8 to RPC 3.3 puts it this way: "[A]lthough a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious

falsehood." In short, although the standard under RPC 3.3(c) is actual knowledge, lawyers need to carefully evaluate, as Comment 8 suggests, whether a client's testimony is obviously false. If something just doesn't add up, therefore, lawyers are often prudent to push back on the client's story in deposition preparation to avoid having the client dig themselves (and the lawyer) into a hole that can be difficult to find their way out of.[5]

Third, we'll focus on civil rather than criminal proceedings. Although the rule is the same in criminal proceedings, the application can vary in light of a criminal defendant's right to testify in their own behalf. Professors Tom Andrews and the late Rob Aronson discuss this intersection in detail in their *Law of Lawyering in Washington* that was published by the WSBA.[6]

The Washington Rule

Washington RPC 3.3 contains a subtle, but significant, variation from the corresponding ABA Model Rule when it comes to potential disclosure of client perjury.

Under ABA Model Rule 3.3(a)(3), a lawyer who comes to know that a client has committed perjury "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Under Washington RPC

3.3(c), by contrast, a lawyer in that situation "shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by RPC 1.6."

In other words, while candor toward the tribunal trumps confidentiality in the ABA Model Rule, the Washington rule puts the policy accent on confidentiality over candor. This distinction is not coincidental.

When the ABA Model Rules were developed in the early 1980s, the American College of Trial Lawyers suggested that the duty to disclose under Model Rule 3.3 be tempered with the phrase "unless disclosure is prohibited by Rule 1.6."[7] The proposal was rejected. Washington, however, added the American College of Trial Lawyers' qualifier.[8]

When the ABA Model Rules were later amended in the early 2000s, the ABA made the duty to disclose more specific by adding the phrase noted above: "including, if necessary, disclosure to the tribunal."[9] The WSBA proposed moving to the Model Rule formulation in the wake of the ABA amendments.[10] The Supreme Court, however, rejected that suggestion and retained the qualifier "unless disclosure is prohibited by RPC 1.6."[11]

Commentators have noted that this distinction may be illusory in the sense that perjury is a crime[12] and Washington RPC 1.6(b)(2) allows a lawyer to "reveal information relating to the representation of a client to prevent the client from

committing a crime[.]"[13] Nonetheless, although disclosure is required under the ABA Model Rule, the exception to confidentiality under Washington RPC 1.6(b)(2) is discretionary. In short, while disclosure is mandated under the ABA Model Rule, it remains discretionary under the Washington rule—with that discretion tethered to RPC 1.6(b)(2).[14]

Talking to the Client

RPC 3.3(d) requires a difficult conversation with the client once a lawyer learns of the perjury:

> If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure.

Although a client may initially be reluctant to "fess up," having the lawyer tell the client that the lawyer will at least need to withdraw (or that the lawyer will disclose the perjury on their own) if the testimony is not corrected is usually enough to convince the client to make the necessary correction voluntarily.

While it won't make the conversation any easier, client perjury is usually easier to "fix" when it occurs during a deposition than at trial. Assuming the client agrees to the correction, the lawyer can inform opposing counsel that the client wishes to correct a portion of the client's earlier testimony when the deposition

resumes. If the deposition has concluded, the lawyer can instead inform opposing counsel that the record should be reopened and corrected.[15]

The fact that revelation of the perjury will likely harm the client's case is not a reason to avoid the discussion. RPC 3.3 is entitled "Candor Toward the Tribunal" and underscores that we have duties to the court as well as our clients. Comment 2 to RPC 3.3 puts it this way:

> 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.

Withdrawal

RPC 3.3(d) expressly allows the lawyer to seek leave to withdraw if the client will not correct the testimony:

> If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

The practical dynamic on withdrawal will vary depending on whether the lawyer has disclosed the perjury to the court or not.

If the lawyer has exercised the discretionary exception to confidentiality under RPC 1.6(b)(2) discussed above and disclosed the client's perjury, courts will usually recognize that the attorney-client relationship has likely been irretrievably broken and permit withdrawal. Comment 15 to RPC 3.3 notes that a

lawyer in this circumstance may be required to withdraw when "the duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client." Because the reason for the withdrawal will ordinarily be clear through the disclosure of the perjury, this situation does not usually involve the delicate confidentiality issues present when the lawyer has not disclosed the perjury.[16]

By contrast, if the lawyer opts to withdraw without revealing the perjury, the lawyer will need to tread carefully through the confidentiality rule. WSBA Advisory Opinion 201701 (2017), which is available on the WSBA website, addresses navigating confidentiality considerations when withdrawing and should be read closely in this situation. The opinion counsels that confidential information should not be disclosed in either public motion papers or public proceedings and that, if required to seek leave of the court,[17] the shorthand that "professional considerations" require withdrawal should usually be sufficient to inform the court without compromising client confidentiality.[18] If, however, the court orders more (and, therefore, triggers the exception under RPC 1.6(b)(6) for revealing otherwise confidential information in response to a court order), the lawyer is permitted to reveal more but, as Advisory Opinion 201701 suggests,

should use available protective procedures such as an *in camera* hearing (preferably *ex parte* with permission of the court) and sealed filings.[19]

ABOUT THE AUTHOR

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[1] The word "offer" in this context is used in the sense that a lawyer's client has presented testimony that is materially false. *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (ABA Legislative History) at 473-74 (2013) (discussing the scope of "offering" material false evidence). RPC 3.3(c) should also be read in conjunction with RPC 3.3(a)(2), which reads: "A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless the disclosure is prohibited by Rule 1.6[.]"). "Tribunal," in turn, is defined broadly under RPC 1.0A(m) to include courts, administrative proceedings, and private arbitration. Read together, these provisions are intended to protect the integrity of the adjudicative process. Therefore, the key for present purposes is that the client has testified falsely on a material point—not whether the false testimony was in response to a question on

direct, cross-examination, or from the court. The Washington Supreme Court has interpreted the qualifier "material" used in RPC 3.3 as "those facts upon which the outcome of the litigation depends in whole or in part." *In re Dynan*, 152 Wn.2d 601, 613-14, 98 P.3d 444 (2004).

[2] By its terms, RPC 3.3(c) is not limited to clients and can include non-client witnesses whose testimony the lawyer has offered. Because client confidentiality issues are not usually triggered in this situation, however, the analysis—and the personal dynamic—are generally more straightforward than when client perjury is involved.

[3] In theory, a client could also disclose to a lawyer an intent to commit perjury in the future. Although public statistics are not available on this point, anecdotal evidence from my advisory practice suggests that this scenario is rare. In any event, under RPC 3.3(e), "[a] lawyer may refuse to offer evidence the lawyer reasonably believes is false."

[4] In *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (Wn. App. 1997), the Court of Appeals suggested a test of "reasonable belief." *Berrysmith* has been criticized by knowledgeable commentators as inconsistent with the actual knowledge standard in Washington RPC 3.3 through its use of the terms "knowingly" and "knows." *See* Thomas R. Andrews and Robert H. Aronson, *The Law of Lawyering in Washington*, Ch. 6, at 6-39 through 6-43 (2012) (Andrews and Aronson); *see also* Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 Gonz. L. Rev. 327, 365-66 (2008) (Holland).

[5] ABA Formal Opinion 491 (at 7) frames this approach as a part of the lawyer's duty of competent representation. RPC 3.3(a)(4) expressly prohibits a lawyer from knowingly offering "evidence that the lawyer knows to be false."

[6] *See* Andrews and Aronson, *supra*, at 6-36 through 6-39 (2012); *see also Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed.2d 123 (1986) (addressing client perjury in the context of effective assistance of counsel); ABA Formal Op. 87-353 at 3-4 (1987) (discussing *Nix*). *See also* Holland, *supra*, 43 Gonz. L. Rev. at 365-66 (discussing the interplay between RPC 3.3 and a criminal defendant's constitutional right to testify); RPC 3.3, cmt. 7 (addressing criminal proceedings); ABA, *Annotated Model Rules of Professional Conduct* at 413-15 (10th ed. 2023) (compiling authorities nationally on this point).

[7] ABA Legislative History, supra, at 458 (recommending that qualifier to ABA Model Rule 3.3(a)(2) and (c)).

[8] Jan. 18, 1985, Letter from WSBA Board of Governors to Washington Supreme Court recommending adoption of ABA Model Rules with selected changes at 3 (WSBA Archive); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 863 (1986) (Aronson) (surveying the then-new Washington RPCs).

[9] ABA Legislative History, *supra*, at 468-69.

[10] WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 179-181 (2004).

[11] *See* Washington Supreme Court Order 25700-A-851, July 10, 2006 (adopting amendments to RPCs); Douglas J. Ende, *Supreme Court Adopts "Ethics 2003" Amendments to Rules of Professional Conduct*, 60 No. 9 Wash. St. Bar News 13, 14 (Sept. 2006) (discussing Washington Supreme Court's rejection of WSBA proposed amendments to RPC 3.3).

[12] RCW 9A.72.020; 18 U.S.C. § 1621.

[13] Holland, *supra*, 43 Gonz. L. Rev. at 362 ("This distinction between Model Rule 3.3 and 2006 RPC 3.3 largely may be obviated, however, by the broader 'any crime' disclosure authorized by 2006 RPC 1.6(b)(2)."); *see also* Andrews and Aronson, *supra*, at 6-37. This approach implicitly assumes that the effect of the perjury is on-going as RPC 1.6(b)(2) is framed in terms of preventing a client from committing a crime. Under RPC 3.3(b), a lawyer's duty to correct a material fact when "necessary to avoid assisting a criminal or fraudulent act by the client" under RPC 3.3(a)(2) continues until the conclusion of the proceeding. Comment 13 to RPC 3.3 explains that this obligation continues until a final appellate judgment or the equivalent has been entered in the proceeding concerned.

[14] *See* WSBA Advisory Op. 1236 (1988) (with abbreviated analysis, essentially reaching this conclusion). There is an argument that because Washington uses the word "prohibited" in RPC 3.3(a) and (c) with reference to RPC 1.6 and, in a sense, disclosure is not absolutely "prohibited" because RPC 1.6(b)(2) allows discretionary disclosure, that disclosure is actually mandatory under RPC 3.3. *See* ABA Legislative History, *supra*, at 468 (mentioning this argument when discussing similar provisions under the former ABA Model Code). The counterargument is that if the Washington Supreme Court wanted mandatory disclosure, it could have simply adopted the ABA Model Rule in 2006 as the WSBA suggested. The Supreme Court, however, rejected the ABA formulation. Therefore, it is for the Supreme Court to clarify if it believes the approach it adopted is ambiguous.

[15] Because opposing counsel will likely wish to examine the client on the correction, simply attempting to make the correction on a deposition correction sheet is an impractical alternative.

[16] The discretionary exceptions to confidentiality under RPC 1.6(b), however, limit disclosure "to the extent the lawyer reasonably believes necessary[.]" *See also* RPC 3.3, cmt. 15 ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation as permitted by Rule 1.6.").

[17] RPC 1.16(c) requires that a lawyer withdrawing in a court proceeding comply with any applicable rules of the forum. Unless the client or the opposing party objects, CR 71(c) allows withdrawal on notice. If there is an objection, however, CR 71(c)(4) requires court permission. Similarly, LCR 83.2(b) in the federal Western District and LCivR 83.2(d)(4) in the Eastern District generally require court approval to withdraw.

[18] RPC 1.16, cmt. 3 ("The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.").

[19]If the lawyer has incorporated the client's perjury into a statement the lawyer has made, *see* RPC 3.3(a)(1) on the duty to correct. Washington also recognizes so-called "noisy withdrawal" where a lawyer, without saying why, disavows representations previously made. *See* RPC 1.6, cmt. 27; *Dewar v. Smith*, 165 Wn. App. 544, 342 P.3d 328 (2015) (discussing concept in context of accountants); *see also* ABA Formal Op. 92-366 (1992) (discussing contours of "noisy withdrawal").