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February 24, 2009

# Client Perjury Under the New Rules of Professional Conduct

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## Client Perjury Under the New Rules of Professional Conduct

Barry R. Temkin  
02-24-2009

The problem of client perjury has bedeviled courts and ethicists for decades. The literal language of the current Code of Professional Responsibility<sup>1</sup> seemingly obligates a lawyer, in some circumstances, to maintain a client's secrets and confidences - even when the client admits to false testimony.<sup>2</sup>

However, the law has been changing in respect to client perjury. On Dec. 16, 2008, the Appellate Division adopted a new set of rules governing the conduct of attorneys in New York, which will be effective on April 1, 2009. The new Rules of Professional Conduct are posted at the Unified Court System's Web site: [www.nycourts.gov/rules](http://www.nycourts.gov/rules).

The new rules follow the format of the American Bar Association Model Rules of Professional Conduct, and eschew the structure of the Lawyer's Code, which is divided into mandatory Disciplinary Rules and exhortatory Ethical Considerations. Some of the new rules import the substance of the corresponding provisions of the current code, while others are new.

The focus of this article is the new Rule of Professional Conduct (RPC) 3.3, which expands a lawyer's duty to report client perjury to a tribunal and eliminates an exception for client confidences and secrets contained in current Disciplinary Rule 7-102. In that regard, RPC 3.3 follows a trend among courts and ethics committees, particularly the Court of Appeals' decision in *People v. DePallo*.<sup>3</sup>

Under the new rules, a lawyer who comes to know of a client's false testimony must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal" [RPC 3.3 (a)(3)].

In a departure from the literal language of the current rules, RPC 3.3 (c) provides that past client fraud must be corrected even if compliance requires disclosure of client confidences. But the analysis is more complicated even under the current Code of Professional Responsibility.

Disciplinary Rule 7-102 (A)(4) of the code states that a lawyer may not "knowingly use perjured testimony or false evidence." The code further obligates a lawyer to reveal a recalcitrant client's fraud on a tribunal or "upon a person," but contains a carve-out for client confidences and secrets [DR 7-102 (B) (1)]:

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.

Thus, the code requires a lawyer to reveal a fraud occurring in the course of the representation, subject to the confidentiality provisions of Disciplinary Rule 4-101. Professor Roy Simon has written that the "confidence or secret" exception to the reporting requirement of DR 7-102 (B) has "almost gutted" the rule: "Only rarely will a lawyer have information about a client's fraud that will not be protected as a confidence or secret."<sup>4</sup>

The code's "crime/fraud exception" permits a lawyer to reveal, "[t]he intention of a client to commit a crime and the information necessary to prevent the crime" [DR 4-101 (C)(3)].

In addition, a lawyer may reveal client confidences to the extent implicit in withdrawing a false representation previously given by the lawyer which is being relied upon by a non-client, "or is being used to further a crime or fraud" [DR 4-101 (C)(5)].

Thus if a lawyer believes another person is relying on materially inaccurate information emanating from the lawyer, the code permits the disclosure of client secrets, but only to the extent necessary to withdraw the misrepresentation.

Two recent opinions of the New York State Bar Association Committee on Professional Ethics interpret the exceptions to DR 4-101.

NYSBA Ethics Opinion 781 (2004) considered the case of a matrimonial attorney who signed and filed with the court a financial disclosure statement she later learned, from her client, to be false.

The state bar opined that the attorney's signature on the disclosure statement triggered a duty to correct the misrepresentation: "Although a lawyer is generally prohibited from disclosing a client's confidence or secret, DR 4-101 (C)(5) permits disclosure to the extent implicit in withdrawing the financial statement because the statement is still being relied upon by the court and because the lawyer certified the accuracy of the statement in submitting it to the court."

Since the misstatement was not protected as a confidence or secret under DR 4-101, withdrawal of the financial statement was mandatory under DR 7-102.

NYSBA Ethics Opinion 797 (2006) involved a lawyer who filed a certification with the Surrogate's Court that she subsequently learned, from her client, to be false. The ethics committee opined that the lawyer's certification should be withdrawn, as an incorrect representation by the lawyer being relied upon by a third person.

However, the committee cautioned that the lawyer should be careful to disclose only those confidences implicit in withdrawing her previous certification: "DR 4-101 (C)(5) authorizes disclosure of the client's fraud only to the extent implicit in withdrawing the lawyer's representation under Part 130.

Consequently, the facts surrounding the client's conduct are still protected as a confidence or secret."<sup>5</sup> Thus the state bar opined that lawyers' false representations to the court must be withdrawn without revealing the underlying client confidences.

In *People v. DePallo*, the Court of Appeals outlined the steps that criminal defense lawyers should take when a client insists on committing admitted trial perjury.<sup>6</sup>

When the lawyer knows that the client intends to commit perjury, she should attempt to dissuade the client from testifying falsely. Should remonstrance fail, then the lawyer should notify the court of the client's intention to testify falsely, present the testimony in narrative form, and abstain from referring to the perjured testimony in closing argument.

According to the Court, a client's "intent to commit a crime is not a protected confidence or secret."<sup>7</sup> Accordingly, "an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response."<sup>8</sup>

In *People v. Darrett*, the defense lawyer revealed client confidences unnecessarily at a pretrial *Huntley* hearing in which the sole issue was the voluntariness of the defendant's confession.<sup>9</sup> Defense counsel secretly approached the hearing judge *ex parte* and disclosed client confidences about the case.

The lawyer's revelations to the court violated the client's right to counsel because "counsel revealed to the court more than was necessary to convey her belief, ultimately unrealized, that her client intended perjury."<sup>10</sup>

The Appellate Division admonished counsel to "make every reasonable effort to limit the amount of information he or she conveys to a judge who is acting as a fact-finder," and ordered a new hearing.<sup>11</sup>

## **New Rules**

Effective April 1, 2009, Rule of Professional Conduct 3.3 (a)(3)<sup>12</sup> forbids a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client perjury:

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.

The lawyer's duty of confidentiality is contained in RPC 1.6. However, RPC 3.3 (c) requires a lawyer to remedy client perjury "even if compliance requires disclosure of information otherwise protected by Rule 1.6."<sup>13</sup>

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) requires "actual knowledge of the fact in question," which "may be inferred from circumstances." See also *In re Doe*.<sup>14</sup>

Under RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court trumps the lawyer's duty to maintain client confidences under RPC 1.6.

## **Conclusion**

Under the new Rules of Professional Conduct a lawyer must take reasonable measures to remedy a client's known past perjury, including, if necessary, disclosure of confidential information to a tribunal.

However, the lawyer should respect the client's confidentiality rights by disclosing no more than is necessary to correct the fraud on the court.

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**Endnotes:**

1. 22 NYCRR 1200.0 et seq.
2. See NYCLA Ethics Op. 712.
3. 96 N.Y. 2d 437 (2001).
4. Simon's New York Code of Professional Responsibility Annotated (2007) at 1144.
5. NYSBA Ethics Op. 797 at 4.
6. 96 N.Y. 2d 437 (2001).
7. 96 N.Y. 2d at 442.
8. 96 N.Y. 2d at 441 (quoting *Nix v. Whiteside*, 475 U.S. 157).
9. 2 A.D. 3d 16 (2003).
10. 2 A.D. 3d at 19.
11. 2 A.D. 3d at 25.
12. RPC 3.4 further proscribes knowing use of perjury or false evidence.
13. RPC 3.3 (c).
14. 847 F. 2d 57 (2d Cir. 1988) (lawyer must have clear knowledge rather than "mere suspicions of fraud" to trigger disclosure duty).