Inadvertent Commissions of Fraud: How far does the Duty of Candor Spread?

Benjamin J Adams, Albany Law School
I. Introduction

II. Knowing Commission of Fraud

III. Discovering a Committed Fraud During a Tribunal Proceeding
   a. NY Code of Professional Responsibility
   b. The Model Rules
   c. New York Attorney’s New Duty

IV. Discovering Your Client’s Fraud After Adjudication
   a. New York’s Code of Professional Responsibility
   b. The Model Rules Approach: Wrongfully Imitated
   c. What Other Jurisdictions Have to Say

V. Which Way to Go? The Minority’s Overriding Interest in JUSTICE

VI. What Should New York Do?

VII. Conclusion
In the United States Judicial System, attorney-client privilege, and the many diverse ethics rules that govern attorneys give clients vast amounts of rights. Occasionally, however, these rights come in direct conflict with the duties of attorneys.

Attorneys are, above all else, are officers of the court. No matter a client’s wishes, nor how helpful to a case a lawyer may think it would be, attorneys cannot ethically make knowingly false statements. This issue was brought to the forefront in the ‘Duke Lacrosse’ case, in which an elected district attorney has been disbarred for, among other things, knowingly making false statements. The decision to drop charges against Senator Ted Stevens of Alaska has also brought attention to the possible misconduct of attorneys through misleading tribunals by making false statements. What can attorneys do to ensure they do not run afoul of these ethics regulations?

II. Knowing Commission of Fraud

All attorneys know the classic case, which is taught in every professional responsibility class, in every law school. The New York State Bar Association was presented with this exact dilemma. It is of a bitter divorce. The parties are fighting tooth and nail for every penny. The client then provides the attorney with a net worth statement, which the lawyer must sign and present to the court. In New York, “by signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under

---

4 Id.
the circumstances, the presentation of the paper or the contentions therein are not frivolous. . .\textsuperscript{5}

If an attorney, practicing in New York, has been actually informed of or has discovered, with factual support, that the client has, in the course of the representation, perpetrated fraud upon a person or tribunal, the attorney \textbf{shall} ask the client to rectify the discrepancy, and if the client refuses to or is unable to properly inform the court, the lawyer \textbf{shall} reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.\textsuperscript{6}

The Model Rules of Professional Responsibility also codify that a lawyer cannot purposefully mislead a tribunal. Model Rule 3.3(a) states, “A lawyer shall not knowingly” “make a false statement of fact or law to a tribunal or. . .“. . . or 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.”\textsuperscript{7}

From the rules of different jurisdictions, and especially in New York,\textsuperscript{8} it is clear that an attorney cannot intentionally mislead a tribunal.\textsuperscript{9} Doing so would lead to an attorney being subject to discipline. In addition, the discipline may not be simply professional. If this commission was done knowingly, it could amount to a criminal charge, as in the Minnesota case of State v. Casby.\textsuperscript{10} In this case, a defendant was attempting to avoid an enhanced sentence, and therefore pretended to be his brother, both to the police officer who originally arrested the man

\textsuperscript{5}22 NYCRR §130-1.1
\textsuperscript{6}N. Y. ST. RULES OF PROF’L CONDUCT RULE 3.3 et. seq.; N.Y ST. LAWYER’S CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1)
\textsuperscript{7}MODEL RULES OF PROF’L CONDUCT R. 3.3; NY ST. LAWYERS CODE OF PROF’L RESPONSIBILITY DR 7-102; NY ST. RULES OF PROF’L CONDUCT R. 3.3
\textsuperscript{8}Id.
\textsuperscript{10}State v. Casby, 348 N.W.2d 736 (Minn.1984)
and the court in which he appeared.¹¹ The attorney in this case was guilty as she knowingly consented to her client deceiving the court.¹²

In New York State, § 130-1.1-a (a) provides that each "pleading, written motion, and other paper, served on another party or filed or submitted to court shall be signed by an attorney, or by a party if the party is not represented by an attorney."¹³ Anything that is not signed by the attorney is discarded, and by signing it, the attorney is, to the best of his or her knowledge, vouching for its truthfulness.¹⁴ Therefore, an attorney in New York is making a declaration to the court, when they file any paper.

III. Discovering a Committed Fraud During a Tribunal Proceeding

So what must an attorney do when he or she has accidentally allowed a client to mislead a tribunal or inadvertently done so themselves? An example of this would be an attorney, in a bankruptcy proceeding, during a trial, finding that he or she had a client who was on the stand discussing the available liquid assets with the court, however, the client intentionally did not mention assets that the client had tried to hide. Perhaps, some accounts were kept, off-shore, and the client thought they would get away with this money being outside of the given court’s jurisdiction. However, this attorney does discover these accounts, through a wire transaction that he or she saw. There are things that the attorney should do to correct the false statements, however, as will become apparent throughout this paper, it may depend on where and maybe even when that attorney is practicing.

¹¹ Id.
¹² Id.; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. 1 (2000)
¹³ 22 N.Y.C.R.R. §130-1.1 a (a)
¹⁴ 22 N.Y.C.R.R. §130-1.1-a (b)
a. NY Code of Professional Responsibility

Until April 1, 2009, New York Attorneys were governed by the NY Code of Professional Responsibility. This particular situation would have fallen under Disciplinary Rule 7-102.15 Specifically, Disciplinary Rule 7-102 (b) shows what to do if a lawyer “receives information clearly establishing…” that someone has committed fraud.16 7-102 (b) (2) gives the lawyer a duty to report this to the tribunal, if this is a person other than that attorney’s client.17 However, in our given situation, the person who has committed the fraud is the client, and this information is a confidence or secret. Under 7-102 (b) (1), the attorney “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.”18 Now, under New York’s old rules, not only does this attorney not have a duty to remedy the situation, they in fact have the exact opposite. They are handcuffed to keep this confidence, and cannot remedy the situation.

There were certain exceptions to this, however, one of which was described previously. A financial statement, upon which a tribunal is relying, could have been and in fact had to be withdrawn. New York Ethics Opinion 781 stated that, “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. In short, permissive disclosure under DR 4-101(C)(5) mandates

15 N.Y. ST. LAWYERS CODE OF PROF’L RESPONSIBILITIES DR 7-102 (2007)
16 N.Y. ST. LAWYERS CODE OF PROF’L RESPONSIBILITIES DR 7-102 (b) (2007)
17 N.Y. ST. LAWYERS CODE OF PROF’L RESPONSIBILITIES DR 7-102 (b) (2) (2007)
18 N.Y. ST. LAWYERS CODE OF PROF’L RESPONSIBILITIES DR 7-102 (b) (1) (2007)
disclosure under DR 7-102(B)(1). . .” if the client has committed fraud, which is continuing, upon a tribunal.19 In 2006, an Ethics Opinion further expanded upon Opinion 781. This opinion, Ethics Opinion 797, defined an attorney’s obligation to remedy a fraud committed by their client.20 If the commission of fraud could fall under an exception “where the lawyer is permitted to reveal a confidence or secret under DR 4-101(C), disclosure of the fraud is mandatory under DR 7-102(B).”21

b. The Model Rules

There is a very distinct difference between how this would have been governed in New York, and how it would be governed in an ABA Model Rules Jurisdiction. Rule 3.3(c) of the Model Rules is where this difference from New York Disciplinary Rule 7-102(b)(1) is found, as an attorney’s duty to reveal fraud in a Model Rules jurisdiction “continue[s] to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”22 This is a major difference, and in our case, would lead to a complete shift from the duty to keep this client’s confidence to attorney having a duty to remedy this fraudulent action.

Comment ten to Model Rule 3.3 states, “In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures.”23 Those measures are described as an attorney must first bring the matter to

---

21 Id.
23 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (1983)
the client’s attention and ask the client to remedy the situation and ask that they remedy it, if the client will not, the attorney must go further to either withdraw for representation or even disclose the fraud to a tribunal.24 No matter how damaging it may be to a client, the attorney must remedy the situation.25

A Michigan Ethics Board was faced with a situation that is analogous to this hypothetical case, and it verified that an attorney must first ask the client to rectify the situation.26 If the client will not, the attorney must make steps to do so, even if doing so would require the attorney to reveal confidential information to the tribunal.27

The ABA further advanced this position in Formal Ethics Opinion 87-353. If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation. This opinion notes that "... withdrawal can rarely serve as a remedy for the client's perjury."28 Therefore, disclosure really would be the only way to remedy the situation.

c. New York Attorney’s New Duty

24 Id.
25 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983)
26 MICH. ETHICS OP. RI-184 (January 19, 1994)
27 Id.
28 ABA FORMAL ETHICS OP. 87-353
Since April 1, 2009, New York attorneys have been governed under the New York Rules of Professional Conduct. These new rules reorganized New York State’s Ethics Rules in a similar fashion as the Model Rules. However, not all of these rules are exactly the same as they use to be, under the previous Code of Professional Conduct. One of these differences is exactly the rule that covers this situation. Rule 3.3 (c) states that the duty to remedy the situation “appl[ies] even if compliance requires disclosure of information otherwise protected by Rule 1.6.” While the rest of Rule 3.3 may seem similar to DR 7-102, Rule 3.3(c) radically reduces protection for clients who have perpetrated a fraud on a tribunal. A New York attorney now must remedy a fraud committed by their client, even if compliance requires disclosure of confidential information.

All the above described a situation of an attorney finding out they had accidentally mislead a tribunal or that the client had done so during the actual trial. What if an attorney discovers the fraud even later?

IV. Discovering Your Client’s Fraud After Adjudication

Now, imagine a situation in which you are a well known divorce attorney. You have had a long career, but are not involved in the most intense divorce with which you have ever been involved. Both sides are fighting over every penny, and there certainly are a lot of pennies to be had. Your client is convinced he or she is about to be taken for everything they are worth, and wants you to be as aggressive as possible.

---

N.Y. St. Rules of Prof’l Conduct (2009)

New York has produced a side by side comparison for this change, available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/CorrelationtableofnewNYrules.pdf

N.Y. St. Rules of Prof’l Conduct R. 3.3(c) (2009)
The proceeding have been long and dragged out, but it is finally over. You are relieved, and think you have done your client justice. The decision is handed out, and your client even seems to be relieved, despite that they are handing over a substantial sum of money. You walk out of the court room, anxious to leave this whole ordeal behind you, account for your hours and send out the bill, as in these hours you have more than earned your wages. As you shake your client’s hand and pretend it has been a pleasure working for them, like Lawrence Taylor coming from the blind side on you as an unsuspecting quarterback, your client sacks you, by saying, “Thanks, and thank god my _ _ _ _ _ _ _ of an ex-spouse never found out about that couple million I moved to the Caymans a couple years ago, before everything went real sour.” LT, your client, just hit you harder than you can even imagine. All that is going through your head is you, signing a net-worth statement, without that bank account on it, and certifying its truth. Do you simply feel bad, or did your client just have you violate a rule of professional conduct? Are you in the clear, do you now owe a duty to your client, or do you owe a duty to the court and must you take action to remedy the situation?

a. New York’s Code of Professional Responsibility

Applying DR 7-102 to this situation, it would seem that the lawyer not only does not have a duty to report this fraud, in fact the attorney would have a duty to not disclose this information, as it would most likely be “protected as a confidence or secret.” One may think this is similar to Opinion 781; however, there is one glaring difference between Opinion 781 and our current situation. The tribunal, in our hypothetical situation, is no longer relying upon this

---

32 Lawrence Taylor broke Joe Theismann’s leg, ending his career with a brutal blind side blitz.
33 Ending your career, like Theismann’s? Please read on.
34 N.Y. ST. LAWYERS CODE OF PROF’L RESPONSIBILITIES DR 7-102 (b) (1) (2007)
financial statement. Therefore, this no longer falls under an exception to confidences or secrets, and is protected. Disclosing this fraud would have been a violation of the rights of a client in New York State.

b. The ABA Model Rules Approach: Wrongfully Imitated

It seems, based on the comments to the ABA Model Rules and the rules of many jurisdictions, that a lawyer must still take action if the case is or could still be under appeal.\textsuperscript{35}

Comment thirteen of Model Rule 3.3 states:

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 in the proceeding has been affirmed on appeal or the time for review has passed.\textsuperscript{36}

In these rules, as long as the statute of limitation for review has not run out, nor has the opinion been finalized, the attorney must disclose this fraud. Applying the Model Rules, as well as the majority of State’s Rules of Professional Conduct, to our matrimonial case, our attorney has not yet violated the rules. However, the attorney now has a duty to disclose his client’s


\textsuperscript{36} MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (1983)
fraud. Therefore, in most jurisdictions, an attorney who does not disclose that a tribunal has been misled would not have yet violated Professional Conduct Rules, but he or she must remedy the situation. In addition, it seems as though the attorney must do so rather quickly after discovering this issue. In Idaho, a prosecutor who knew witness’s testimony was false when presented was disciplined even when he disclosed the next day, as the court stated that he should have taken prompt corrective action and not waited until following day, by which time court and defense counsel already knew of the false statements.  

However, there are states which do not even require a disclosure about a client’s fraud during a period of appeal, or before the time of review eclipses. Tennessee, for example, does not require disclosure of any facts discovered after commission:

In cases in which the lawyer learns of the client’s misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client’s misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client’s offense will be deemed completed as of the conclusion of the proceeding. An offense that occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. 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 an appeal has passed.

This seems to go so far, in Tennessee, just as had previously been the case in New York, as to say that not only is a lawyer relieved of his or her duty to of candor to a tribunal, but also prohibits an attorney’s ability under Rule 1.6 to reveal the fraud in order 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

37 Idaho State Bar v. Warrick, 44 P.3d 1141 (Idaho 2002)
38 Tennessee Rules of Prof’l Conduct R. 3.3 cmt. 16
the client has used the lawyer's services”, as Tennessee will consider the fraud a prior act, that is now protected, if the person making a false statement is a client.\textsuperscript{39}

Other jurisdictions have also placed a limit on the time for the duty of remedying a fraudulent or misleading action in front of a tribunal. An attorney in Maryland found out about and disclosed a former client making a misrepresentation in a bankruptcy proceeding; however, Maryland’s ethics committee opined that an attorney may not tell the court of former client’s misrepresentation in bankruptcy petition unless lawyer knows misrepresentation intended to defraud.\textsuperscript{40} In Virginia, according to an ethics opinion an attorney who learns that former client that he represented in obtaining a discharge in bankruptcy did not notify the court of subsequent inheritance may not notify court unless lawyer knows nondisclosure resulted from fraud rather than mistake.\textsuperscript{41}

In addition, in Arizona, it does not even matter that the attorney was fired from representation. In an Ethics Opinion, the committee decided that when a client in unemployment compensation proceeding admitted perjury and then fired the attorney, the attorney must inform tribunal that "certain evidence is unreliable"; unless the case had closed and client was no longer receiving unemployment compensation.\textsuperscript{42}

c. What Other Jurisdictions Have to Say

\textsuperscript{39} Id.; MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3)
\textsuperscript{40} MD. ETHICS OP. 2004-19 (2004)
\textsuperscript{41} VA. ETHICS OP. 1777 (2003)
\textsuperscript{42} ARIZ. ETHICS OP. 05-05 (2005)
Other states have broadened the obligations duration. Connecticut is just such a state. Connecticut is especially sensitive to a criminally adjudicated proceeding, and reasonably so. The comments to the Connecticut Rules of Professional Conduct Rule 3.3 state, “The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. In criminal and juvenile delinquency matters, the duty to correct a newly discovered and material falsehood continues until the defendant or delinquent is discharged from custody or released from judicial supervision, whichever occurs later.”43 This can be seen in the 2004 Connecticut Supreme Court case of Daniels v. Alander.44 In this case, the court found that the attorney’s duty had not concluded until appeal rights of every party exhausted, including right to petition for certiorari.45

Oklahoma, in general, will end the duty of candor for the attorney “. . . when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.”46 However Oklahoma has built some ‘wiggle room’ into their guidance. The Comment to Rule 3.3 includes that “[i]n certain circumstances, after the conclusion of the proceeding, a lawyer still has the discretion to rectify the effects of false evidence or false statements of law and fact.”47

Texas and Iowa have the most encompassing view of this duty. Iowa states, “A proceeding has concluded within the meaning of this rule when it is beyond the power of a tribunal to correct, modify, reverse, or vacate a final judgment, or to grant a new trial.”48 This makes sense. An Iowa attorney has a duty to rectify any wrong-doing that comes from any fraudulent situations that led to an incorrect adjudication before a tribunal.

43 CONN. RULES OF PROF’L CONDUCT R. 3.3 cmt. (2007)
44 Daniels v. Alander, 844 A.2d 182 (Conn. 2004)
45 Id.
46 OKLA. RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (2008)
47 Id.
48 IOWA RULES OF PROF’L CONDUCT R 3.3 cmt. 13 (2005)
A Texas attorney has the same duty. If there is anything under the law that the attorney can do, he or she must do it, as the comments to Texas Disciplinary Rules of Professional Conduct state, “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.”

V. Which Way to Go? The Minority’s Overriding Interest in JUSTICE

As illustrated above, there is minority of states, who have not blindly followed the ABA Model Rules. These other states seem to place a higher value on truth and justice through the preservation of candor to the tribunal than other states who have placed time limits on the duty to remedy adjudicated proceedings, which were done so on false pretences. Truth already has its struggles in the courtroom as, “... our adversary system rates truth too low among the values that institutions of justice are meant to serve.” The reasoning behind having this rule that gives the attorney a duty of candor is that it “… sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”

Rule 3.3 of the ABA Model Rules of Professional Conduct is a safeguard of truth, as “… although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the

---

49 TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (2005)
50 Compare MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (1983) with CONN. RULES OF PROF’L CONDUCT R. 3.3 cmt. (2007); FLA. RULES OF PROF’L CONDUCT R. 4-3.3(b); ILL. RULES OF PROF’L CONDUCT R. 3.3(b); IOWA RULES OF PROF’L CONDUCT R. 32:3.3 cmt. 13 (2005); OHIO RULES OF PROF’L CONDUCT R. 3.3 (2007); OHIO RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (2007); OKLA. RULES OF PROF’L CONDUCT R. 3.3 cmt. 13; TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 3.03 cmt. 14 (2005)
51 Marvin E. Frankel, The Search for Truth: an Umperial View, 123 UPALR 1031 (May 1975)
52 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 2 (1983)
lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”53 Lawyers do have an extremely important duty to their clients, but above all else “. . . an officer of the legal system and a public citizen having special responsibility for the quality of justice.”54 If attorneys were not held to this standard, it would be impossible for a court to make its decision in fact. “An advocate seeks to achieve the client's objectives but in doing so may not distort fact finding by the tribunal by knowingly offering false testimony or other evidence.”55

The Florida Supreme Court opined, “In our system the courts are almost wholly dependent on members of the bar to marshal and present the true facts of each cause in such manner as to enable the judge or jury to cook the adversary contentions in a crucible and draw off the material, decisive facts to which the law may be applied.”56

In the best interests, the Ohio Supreme Court has arguably gotten it right. In this case, an attorney discovered that one brother, whom he represented, had pled guilty to a charge of having driven left of center, while the other brother was actually the one who had committed the crime.57 The trial court and he Ohio Supreme Court both came to the conclusion that the attorney, at the time of the trial did not know of his client’s deceit, but he did, a period of time after the proceeding, discover that his client had mislead the court, and he did not remedy that falsehood.58 The attorney, not for committing a fraudulent act of his own, but for not rectifying one that had happened in a tribunal proceeding in which he was an attorney, when he discovered the falsehood months later.

53 Id.
54 Model Rules of Prof'l Conduct Preamble: A Lawyer’s Responsibilities (1983)
55 Restatement (Third) of Law Governing Lawyers § 120 cmt. b (2000)
56 Dodd v. Florida Bar, 118 So.2d 17 at 18 (Fla. 1960)
58 Id.
was suspended for six months. They required that an attorney must correct false testimony, regardless of when they actually discover the wrongdoing.

VI. What Should New York Do?

New York State, as is discussed above, recently adopted a new set of ethics rules that are similar to the Model Rules of Professional Responsibility, the New York Rules of Professional Conduct, which went into effect on April 1, 2009. New York was one of the last states to adopt the Model Rules form of ethics rules, and took over twenty-five years to do so. In addition, New York has modified a number of the Model Rules, presumably to a form that New York felt was better.

The rules are generally organized in the same matter as the Model Rules, and the rule giving a duty of candor to a tribunal is Rule 3.3 in both the Model Rules and the New York Rules of Professional Conduct. After each rule, New York recently provided comments for attorneys who were trying to stay in compliance with these rules. However, after New York Rule of Professional Conduct 3.3, under Comment 13, an attorney, looking for guidance on the duration of the duty, will find “[Omitted.]”.

For whatever reason, this omission is a promising sign that New York will not make the mistakes of the Model Rules limiting the time that an attorney has a duty to disclose to “... when a final judgment in the proceeding has been affirmed on appeal or the time for review has

---

59 Id.; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. h (2000)
60 Id.
61 N.Y. ST. RULES OF PROF’L CONDUCT (2009)
62 N.Y. ST. RULES OF PROF’L CONDUCT Preamble (2009) The Model rules were drafted in 1983, while the New York Rules were not effective until April 1, 2009
64 N.Y. ST. RULES OF PROF’L CONDUCT R. 3.3 (2009); MODEL RULES OF PROF’L CONDUCT R. 3.3 (1983)
65 N.Y ST. RULES OF PROF’L CONDUCT R. 3.3 cmt. 13 (2009)
passed." It is easy to think of a situation in a products liability that the case has gone all the way to the Supreme Court, and the court has made a decision. Until April 1st, 2009 if this case was decided for those harmed by the product because of a falsified doctors reports or was found or the company, who had hid a trial case that shows they knew the potential harms of their product, and the New York attorneys involved in this case discovered their client was committing the fraud, they would have no duty to remedy the situation, and in fact they would have a duty to keep this confidence. Even worse, if, going forward, New York adopts the Tennessee guidelines of a “...client’s offense [being] deemed completed as of the conclusion of the proceeding”, New York Attorneys would not only not have a duty, they would not even have the ability to reveal their client’s actions through Rule 1.6.

New York should take the more truth focused approach to the lawyer’s duty of candor to a tribunal of the minority. At the very least, New York should follow the lead of Connecticut, in criminal and juvenile proceeding, which hold matters of extreme importance, the duty should be expanded in duration “...until the defendant or delinquent is discharged from custody or released from judicial supervision, whichever occurs later.” However, one could argue that New York should go further.

New York should become the state third in line with Texas and Iowa to extend this duty to the time at which there is no legal remedy that could be used to rectify the situation. With the finality of the rulings of tribunals, there needs to be a failsafe option. One could easily think of a situation of a person who is found guilty that was being represented by a public defender.

66 MODEL RULES OF PROF’L CONDUCT R. 3.3 (1983)
67 TENN. RULES OF PROF’L CONDUCT R. 3.3 cmt. 16
68 N.Y. ST. RULES OF PROF’L CONDUCT R 1.6 (2009)
69 Refer to Section IV. b. Supra p. 8
70 CONN. RULES OF PROF’L CONDUCT R. 3.3 cmt. (2007)
71 IOWA RULES OF PROF’L CONDUCT R 3.3 cmt. 13 (2005); TEX. DISCIPLINARY RULES OF PROF’L R. 3.3 cmt. 13 (2005)
This person does not have the financial means to go on appeal, and the statute of limitations had run out. However, recently, the public defender has come across definitive information that proves his client could not have committed the crime, as the State’s key witness has admitted to the attorney that he lied on the stand. Unfortunately, the client has now been in jail, wrongfully, for over five years, however, the statute of limitations has expired. The public defender has no obligation under the ABA Model Rules to take action, and one could imagine that he or she, with an already over-stretched schedule may not want to jump through the hoops for his or her ex-client, but this is not protected, as the public defender does not represent the State’s witness. Under the Iowa and Texas rules, this public defender has an obligation to rectify the situation. Any wrong that is made in the tribunal process can only be rectified by the actions of attorneys, as “. . . the courts are almost wholly dependent on members of the bar to marshal and present the true facts of each cause.” 72

New York State has shown that it does have an interest in justice, as it has already, on the books, procedure to relieve a person of a wrongful judgment, in New York C.P.L.R. Rule 5015.73 Specifically applicable to this paper would be New York C.P.L.R. 5015(a), which lays out how an attorney can make a motion to the court, which had rendered the prior opinion, on a number of different grounds.74 However, this rule in New York does not create any sort of duty for an attorney, nor does it give New York guidelines to an attorney whose client actually committed the fraud, as New York C.P.L.R. 5015(a)(3) deals specifically with the “fraud, misrepresentation, or other misconduct of an adverse party”.75 It would not be too much of a stretch for C.P.L.R. 5015 to include fraud committed by a New York attorney’s own client.

72 Dodd v, Florida Bar, 118 So.2d 17 at 18 (Fla. 1960)  
73 N.Y. C.P.L.R. 5015 (McKinney 2007)  
74 N.Y. C.P.L.R. 5015 (a) (McKinney 2007)  
75 N.Y. C.P.L.R. 5015 (a) (3) (McKinney 2007)
Should New York accept the view that candor to a tribunal is a most important aspect of an attorney’s duties, and that with the finality of the judicial process there should be a safeguard against fraud and misleading a tribunal, the Comments to Rule 3.3 of the New York Rules of Professional Conduct should be amended to extend this duty of candor to the same duration as Texas and Iowa. If this were the case an attorney in New York who learned of a fraud commission would have a duty no matter when they learned of the fraudulent action to act, as they always would have the ability to either raise a C.P.L.R. 5015 motion or inform opposing counsel who could do the same, and therefore would have “a reasonable possibility of taking corrective legal actions before a tribunal.” 76

VII. Conclusion

The many different rules of professional conduct are designed to safeguard the adversarial judicial system, and those who are seeking justice within it. Attorneys are those who are responsible for providing all information to the judicial process, and they should hold the ultimate responsibility to safeguard it. Truth should be encouraged at all cost.

Even though disclosing a client’s fraud or “false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury” an attorney cannot be an instrument to the furtherance of the client’s transgression and “subverting the truth-finding process which the adversary system is designed to implement.” 77

76 TEX. DISCIPLINARY RULES OF PROF’L R. 3.3 cmt. 13 (2005)
77 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983)
All United States jurisdictions recognize that their attorneys cannot intentionally mislead a tribunal. There is no way the justice system would be able to perform the duties that it has been tasked with. However, as we have seen above, not all jurisdictions insist upon this, after a client has already misled the tribunal, while others actually would consider it a punishable offense, should the attorney attempt to do so. This would seem to run afoul with the ideals that should be instilled, with all clients being open and honest with their attorneys. Not allowing for disclosure of prior fraud committed in a tribunal to which the attorney was representing a party, in fact may do the opposite, with clients not being fully honest with their attorneys, as they wish to lie to the tribunal, and know they can get away with it, as long as they do not tell their attorney.

In order to ensure the best possible outcome for all those who are forced through the American Judicial System, attorneys should be made to protect the righteousness of the tribunal process. In order to do so, attorneys must have a duty to report all instances in which they are made aware of a misrepresentation to a tribunal, which may have altered the outcome of that proceeding, until a point in time in which there is no possible way that there is any legal avenue of remedy.