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HOW LONG IS A LAWYER OBLIGATED TO CORRECT FALSE EVIDENCE THAT WAS SUBMITTED ON BEHALF OF THE CLIENT?

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One of the cardinal ethical rules governing a lawyer's conduct is the prohibition, with some exception, from revealing a client's confidential information. This information, which must be kept confidential, is normally gained during the course of the representation of the client. Still, at the same time, a lawyer is also prohibited from offering or using evidence before a tribunal that the lawyer knows to be false. If a lawyer gets to know about the submission of false evidence to the tribunal, the lawyer is required to take reasonable remedial measures, and in some states, when the lawyer is unsuccessful in obtaining the client's cooperation to remedy the fraud, the lawyer is also required to inform the tribunal. ABA Model Rule 1.6 governs a lawyer's duty of confidentiality while ABA Model rule 3.3 governs a lawyer's duty of candor to the tribunal. These two rules are often in tension.

The modern trend in legal ethics is that the lawyer's duty of candor to the tribunal will almost always trump his or her duty of confidentiality to the client. This is especially true in New York. New York's Rule 3.3 not only prohibits a lawyer from offering evidence that he or she knows to be false, but requires a lawyer to take reasonable remedial measures, including, if necessary, disclosure to the tribunal. The proper course, when the lawyer learns that false evidence has been submitted, is to first remonstrate with a client confidentially, and seek the client's cooperation with respect to the withdrawal or correction of the false statement. Most clients will likely understand that taking such a measure is also in their best interests, and that a lawyer is likely to take steps that are least damaging to the client. For instance, if an asylum claim otherwise includes truthful elements but some false information or evidence, the

withdrawal of the damaging evidence may be presented at the same time as part of a packet of evidence that is otherwise truthful and supportive of the client's claim. If the client is uncooperative and withdrawal from the representation cannot remedy the false statement, the lawyer, under Rule 3.3(b), must make disclosure to the tribunal as is reasonably necessary to remedy the situation, even if such disclosure is protected under the attorney client rule of confidentiality.

Prior to April 1, 2009, New York did not require a lawyer to reveal a client's submission of false evidence to a tribunal if it was protected as confidential information between an attorney and the client, but all that changed when New York adopted Model Rule 3.3. After this sea change in New York, I wrote from an immigration lawyer's perspective, What Remedial Measures Can A Lawyer Take To Correct False Statements Under New York's Ethical Rules? When writing the article I puzzled on how long does the lawyer's obligation to correct a client's false statement last. Does it last till the completion of the case or forever? Unlike Comment 13 to ABA Model Rule 3.3, which clearly suggested that the obligation lasts till the conclusion of the proceeding, there is no similar comment to New York's Rule 3.3.

This has now been answered in New York City Bar's Formal Opinion 2013-2. Recognizing that the New York rule does not contain a similar limiting comment like the ABA Model Rule, the New York City Bar concludes that the lawyer's obligation to correct the presentation of false evidence survives the conclusion of proceedings. However, agreeing with opinions of its sister NY State Bar (see State 831, fn 4 and State 837), the NYC Bar opinion states that this obligation does not last forever, and "should end when a reasonable 'remedial' measure is no longer available." Still, a lawyer is required to take remedial measures even after the conclusion of the proceeding if the tribunal in question, or a reviewing tribunal, is still in a position to review the new evidence, which in turn could result in an amendment, modification or vacatur of the prior judgment. Action that cannot result or is highly unlikely to result in such a reversal or modification of the judgment cannot be said to be "remedial," and then the obligation of the lawyer under Rule 3.3 may end. The opinion also cautions, "The amount of work involved in fulfilling the 3.3 obligation should neither force the lawyer into insolvency or jeopardize the lawyer's ability to continue to diligently and competently perform legal services on behalf of the lawyer's other clients ."

How does the lawyer's continuing obligation even after the conclusion of the case to take remedial measures under Rule 3.3 work in immigration practice? The term "tribunal" is broadly defined in Rule 1.0(w) to encompass not just a court but even an "administrative agency or other body acting in an adjudicative capacity." But the definition of "tribunal," and its reference in Rule 3.3, as well as in the NYC Bar opinion, with respect to an administrative agency still connotes a court-like adversarial proceeding involving two parties and opposing counsel. At issue is whether the United States Citizenship and Immigration Services, along with the Department of Labor and Department of State, would be considered "tribunals" under this definition. The definition of tribunal goes on to state: "A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting the party's interests in a particular matter." There is no question that a proceeding before an Immigration Judge or the Board of Immigration Appeals, would be before a "tribunal," but there is ambiguity as to whether it would extend to the above governmental agencies too as it is unclear whether there is a neutral official who will render a legal judgment "after the presentation of evidence or legal argument by a party or parties" when one files an application with the USCIS or with a U.S. Consulate. There is also no opposing counsel in such instances. It is thus arguable whether such agencies constitute a "tribunal," and whether the 3.3 obligation exists regarding the need to take reasonable remedial measures to correct a client's false statement or submission of false evidence, even after the case has been completed.

As a practical matter, though, whether an immigration-related agency is a tribunal or not should not matter. If an attorney knowingly assists a client in filing a false application, such conduct may trigger criminal liability regardless of whether the application was made to a tribunal or not. An attorney is also required to be truthful to third persons, governmental or otherwise, under Rule 4.1. Moreover, Rule 1.6(b)(3), while not mandating it, allows a lawyer to withdraw a written or oral opinion or representation relied upon by a third person (even if not with a tribunal), where the lawyer belatedly learns of its falsity. In such a situation, as confirmed by NY State Opinion 837, a noisy withdrawal may constitute a reasonable remedial measure under Rule 3.3. Finally, a similar duty of candor applies to immigration agencies under parallel

ethical rules in 8 C.F.R. §1003.102(c) and 8 C.F.R. 292.3(b), governing the conduct of private immigration attorneys, although the requirement is to "take appropriate remedial measures" without a specific requirement to disclose to the tribunal.

Regardless of the ambiguity in the definition of tribunal with respect to immigration agencies, it behooves a lawyer to ensure at the outset of the representation, and prior to filing an immigration application, that there is no false, misleading or inaccurate statement. For example, it always makes sense to meet with both the spouses, and run some typical questions by them, to ascertain that the marriage is bona fide prior to taking on the case and filing the applications.

Let's examine how the NYC Bar Formal Opinion 2013-2 requiring a lawyer to take remedial action works in immigration practice. In the most obvious case of a tribunal setting, which is a proceeding before an Immigration Judge, a lawyer would have a continuing obligation to take "reasonable remedial measures" even after the case has concluded based on the NYC Bar opinion. So in the example of the client who submitted material false evidence in her asylum claim, and the lawyer learns of it after the client has been granted asylum by the Immigration Judge, to what extent does the lawyer's obligation last? First, the lawyer must have actual knowledge that such evidence was false, although such knowledge "may be inferred from circumstances." Rule 1.0(k). The false evidence that was submitted must also be "material," which is whether the evidence could have changed the result of the outcome. Assuming that the lawyer has actual knowledge of its falsity and it is material, a case can only be reopened no later than 90 days after the issuance of a final administrative order. INA 240(c)(7); 8 CFR 1003.2(c)(2), 8 CFR 1003.23(b)(1). If the lawyer has actual knowledge of the false evidence after 90 days from the final order, can a lawyer argue that the law does not allow for a motion to reopen, and thus any action will not result in a modification of the grant of asylum by the Immigration Judge?

The NYC Bar Opinion was not written for immigration practitioners, but there are exceptions to the 90 day time limitation, such as the BIA's sua sponte reopening authority under 8 CFR 1003.2(a). Also, reopening is possible when both parties, including the government, agree to reopen under 8 CFR 1003.2(c)(3)(iii) or 8 CFR 1003.23(b)(4)(iv). Even after the foreign national gets lawful permanent residence, the government can start rescission proceedings

within 5 years or place her once more in removal proceedings. And even after this client naturalizes, it is possible for the government to start de-naturalization proceedings against her on the ground that she did not properly obtain permanent residence due to the false evidence that resulted in her grant of asylum.

In the immigration context, it may appear that a lawyer's obligation to remedy a client's fraud or false statement, if it was made to a tribunal, could last in perpetuity. It could result in draconian results, if say, a child or a spouse derived a green card, or even a derivative citizenship benefit innocently based on the false evidence that was submitted by the principal applicant. As I had suggested in my previous article, there are very good policy reasons to limit the obligation to the end of the proceeding, or at least when the statutory limit for filing a motion to reopen has passed. As time passes, the undoing of previously committed fraud implicates the status and rights of other people, such as spouses, children and other relatives. Indeed, even the Board of Immigration Appeals has held in an unpublished decision, *Matter of Gumapas*, that a person who became a citizen through fraud is still a citizen, and can sponsor a spouse for permanent residence. The imposition of such a limitless obligation on an attorney would also diminish the purpose of the ethics rules themselves in preventing fraudulent representations to the tribunal. In this example, the lawyer acted in good faith before the tribunal even though the client may have presented false evidence without the knowledge of the lawyer. Also, there are other processes in place that can rectify the situation, such as the government's ability to commence de-naturalization proceedings against her through their own investigations, without relying on the attorney to inform them. And last, there are reasons to end the obligation at the conclusion of the proceeding similar to why statutes of limitation exist. Over time, witnesses and documents may not be available and memories fade. This author has heard speeches by distinguished personalities whose parents may have entered the US as immigrants where they wax lyrical about how their parents perpetrated a small misrepresentation in order to immigrate to the US so that their children could succeed and realize the American dream. If a lawyer who represented this distinguished person's parents is in the audience, is this lawyer today under a 3.3 obligation to inform the relevant immigration agency regarding the parent's fraud even if the parent is deceased?

Indeed, Comment 13 to ABA Model Rule 3.3 is clearer than the New York rule:

> *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.*

Even NY State Bar Opinion 831, supra, tempers the absurd effects of rule 3.3 by holding that if the client's fraud on the tribunal took effect before April 1, 2009, then the old NY Disciplinary Rule 7-102(B)(1) applies where any confidence or secret that arose in the attorney-client relationship could not be disclosed even if it was false at the time of submission to the tribunal. Footnote 4 in Opinion 831 is also worth noting:

It is unclear when the disclosure obligations under the new rule end. In past opinions, we appear to have assumed that the disclosure obligations in DR 7-102(B) where information was not "protected" as a confidence or secret ended when the proceeding in question concluded. N.Y. State 674 (discussing whether a lawyer must reveal perjury "discovered after the fact when the proceeding in which the perjury was committed (and later discovered) has not yet concluded"); N.Y. State 466 ("since the existence of the negotiable instrument is not relevant to any pending proceeding"). The New York State Bar Association proposal for the new rule, adopting the language of the ABA Model Rules, would have codified this interpretation in Rule 3.3. The proposal stated, "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." New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (emphasis added) (available at www.nysba.org/proposedrulesofconduct020108. As noted in the text, Rule 3.3 as adopted by the courts omits the phrase "continue to the conclusion of the proceeding and." There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely – or at least for some reasonable period of time. The broadest version of this interpretation seems to us implausible. We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever. If disclosure could not remedy the effect of the

conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies.

As interpretations regarding the continuing obligation of an attorney under Rule 3.3 evolve in New York and elsewhere (at least in states where the obligation does not end at the conclusion of the case), it is hoped they take into account how an attorney's potential obligation to report a client's fraud in perpetuity might impact foreign nationals who may have obtained immigration benefits a very long time ago, as well as their impact on innocent families.

(*The views expressed in this blog are solely those of the author and do not necessarily reflect the views of any of the organizations that he may be involved with.*)