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The Legal Ethics Project. **Supporting professionalism with information.**

Q: Dear Ethics Lawyer,

Today I defended a deposition of my client. Toward the end of today's session, my client was asked a question that we were expecting and had specifically discussed in the preparation session. But, unexpectedly, the client gave an answer that is the opposite of what she said in our preparation. I don't know which version is true, but obviously she either was untruthful one time or the other, or changed her story in a significant way. I need some quick advice before the deposition concludes a week from now. I certainly do not want to participate in untruthful testimony. Is there a possibility I would have to disclose my client's change of answer? This is not a good place to be. What do I do?

A: Please take a deep breath, then read Model Rule 3.3, Candor Toward the Tribunal. Rule 3.3(a)(3) states that a lawyer shall not knowingly "offer evidence that the lawyer knows is false" and "shall take reasonable remedial measures, including, if necessary, disclosure to the Tribunal" if the lawyer comes to know of false material evidence offered by the lawyer's client or a witness called by the lawyer. Breaking this down a bit and before action is required, there are some preliminary steps to consider or investigate. First, the evidence in the record, if false, must be material to the proceeding. We will assume that is the case in your situation, because the question is one that was important enough that you covered in deposition preparation. Second, the lawyer must "know" the testimony or other evidence to be false, not just "suspect" or even have a reasonable belief that it is false. The lawyer's knowledge can be inferred from circumstances. Comment 8; Rule 1.0(f). This is worth additional discussion in your case.

Here, the client first told you one thing, then testified in the deposition to the opposite. Does that prove falsity in the deposition, or is there some other explanation? For example, could the client's recollection have been corrected or refreshed by exposure to documents, other questions, or just thinking about it some more since she met with you? Or could the client have told you a false answer to begin with, but reconsidered and decided to testify truthfully when placed under oath in the deposition? Either of these possibilities would lead to a conclusion

that the testimony given in the deposition is not false. This uncertainty triggers the first action you should take—talk to your client privately to obtain her explanation for the changed answer to evaluate whether you "know" the deposition testimony is actually false. If it is not, then you have no further obligation.

What about the distinction between offering evidence at a trial versus the testimony in question being elicited in a discovery deposition being taken by your opponent? Even if you know the evidence is false, can you avoid the issue by simply not "offering" the evidence at trial? No, at least outside the criminal law context, where there is a Constitutional overlay to how potentially false testimony may be presented. Comments 1 and 10 to Rule 3.3 make it clear that the rule also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

If you do conclude that you "know" that your client's testimony in the deposition is false and material, what "reasonable remedial measures" must you then undertake? Again, a step-by-step process is required. Step one is to remonstrate with the client confidentially, warning her that you have an obligation to disclose the falsity of the testimony if uncorrected and the potential consequences of that on her and her case. Use this conversation to try to get her to voluntarily correct the testimony on the record in the least harmful manner. If this can be done before the deposition concludes, all the better to minimize the impact to your client and others. If not, do so before any reliance on the false testimony can taint the remainder of the proceeding. But, if the client refuses to correct a false answer, you may be obligated to withdraw under Rule 1.16 (when the representation will result in violation of the Model Rules or other law). In addition, as a last step, if withdrawal "will not undo the effect of the false evidence"—which is likely if you are the only one who knows it to be false—you must then disclose the matter to the tribunal "as is reasonably necessary to remedy the situation." Comment 10.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.