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Civil Litigation Ethics: From Depositions to Trial and Beyond

False Testimony or Documents
Rule 3.3(a)(3)

"**A lawyer shall not knowingly offer evidence that the lawyers 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."

"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."

Candor Toward the Tribunal, Ann. Mod. Rules Prof. Cond. § 3.3

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Before False Evidence is Offered

- A lawyer is ***required*** to refuse to offer evidence that the lawyer ***knows*** to be false, regardless of the client's wishes. *Id*. at Comment 5.
- **What if a lawyer does not know for certain that the evidence or testimony is false?**
  - A lawyer is not prohibited from introducing such evidence, but a lawyer ***may*** refuse to offer testimony or evidence that the lawyer reasonably believes to be false. *Id*. at Comment 8.
  - However, a lawyer should always try to resolve doubts about the veracity of testimony or other evidence in favor of the client, but cannot ignore an obvious falsehood. *Id*.

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Actual Knowledge vs. Reasonable Belief

- **Definitions, Rule 1.0:**
  - "Knowingly, "known," or "knows"– Denotes ***actual knowledge*** of the fact in question, which may be inferred from the circumstances.
  - "Reasonable belief" or "Reasonably believes": Denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
  - "Reasonably should know": Denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question. [This term is not used in Rule 3.3]
  - "Reasonable": Denotes the conduct of a reasonably prudent and competent lawyer.

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Before Testimony Is Offered

- ***What if your client insists on testifying?***
  - First, try to persuade your client not to testify. *See* Comment 6.
  - If persuasion is ineffective, but you continue to represent your client, **you must refuse to offer client's false testimony**. *Id*.
  - However, if only a portion of the testimony is false, you may call the witness, "but may not elicit or otherwise permit" the false testimony. *Id*.

- ***When should a lawyer withdraw from representation?***
  - A lawyer who is required to disclose false testimony or evidence to the tribunal is not normally required to withdraw from representation. *See* Comment 15.
  - However, if the lawyer's candor "results in such an extreme deterioration of the client-lawyer relationship," a lawyer may seek permission to withdraw in accordance with Rule 1.16(a). *Id*.

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What If False Evidence is Offered?

- **Remedial Measures**
  - The proper course is to "remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence." *See* Comment 10.
  - If this course fails, then the lawyer must disclose the falsity, as is reasonably necessary, to the tribunal in order to remedy the situation if lawyer is not permitted to withdrawal from representation. *Id*.
- ***When does this duty to disclose end?***
  - A lawyer's duty of candor ends at the conclusion of the proceeding.
  - A proceeding concludes when it has been affirmed on appeal or the time for review has passed. *See* Comment 13.

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Examples of Violations of Rule 3.3—Candor Towards the Tribunal

In re Filosa, 976 F. Supp. 2d 460 (S.D.N.Y. 2013)

In *Filosa*, the Southern District Court of New York found that an attorney violated Rule 3.3 when he failed to correct false testimony offered by his client. *Id*. at 466.

- Indeed, the attorney admitted that he knew client's testimony was "evasive, if not outright false" and that it "misled opposing counsel." *Id*. at 467.
- The court found that the attorney completely failed to take any steps to correct the false testimony or bring it to the court's attention. *Id*. Instead, the attorney continued to engage in settlement negotiations in light of the false testimony given by his client. *Id*.
- The court further reasoned that even if the attorney did not intentionally commit perjury, this lack of intent does not relieve an attorney of his or her professional obligation of candor and to correct the record in a given case. *Id*.
    - It held: "an attorney faced with a client who has offered false testimony 'should explore whether the client may be mistaken. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct.'" (Internal citations omitted.) *Id.*
- Moreover, **"while there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment."** (Emphasis added.) *Id*. In this case, the attorney not only knew the opposing party would rely upon the false testimony, but used it as leverage during settlement negotiations. *Id*.

Examples of Violations of Rule 3.3—Candor Towards the Tribunal

Attorney Grievance Comm'n of Maryland v. Dore, 433 Md. 685, 73 A.3d 161 (2013)

In *Dore,* a Maryland Court of Appeals found that an attorney violated Rule 3.3 based upon the use of his forged signature on an affidavit. *Id*. at 703.

- Specifically, the attorney had his employees forge his signature, which was then notarized under penalty of perjury. *Id*. at 706.
- The court found that the attorney knowingly made a false statement to the court through not only forgery, but failing to affirm the truthfulness of the information contained in the affidavits, resulting in a violation of Rule 3.3. *Id*. at 707

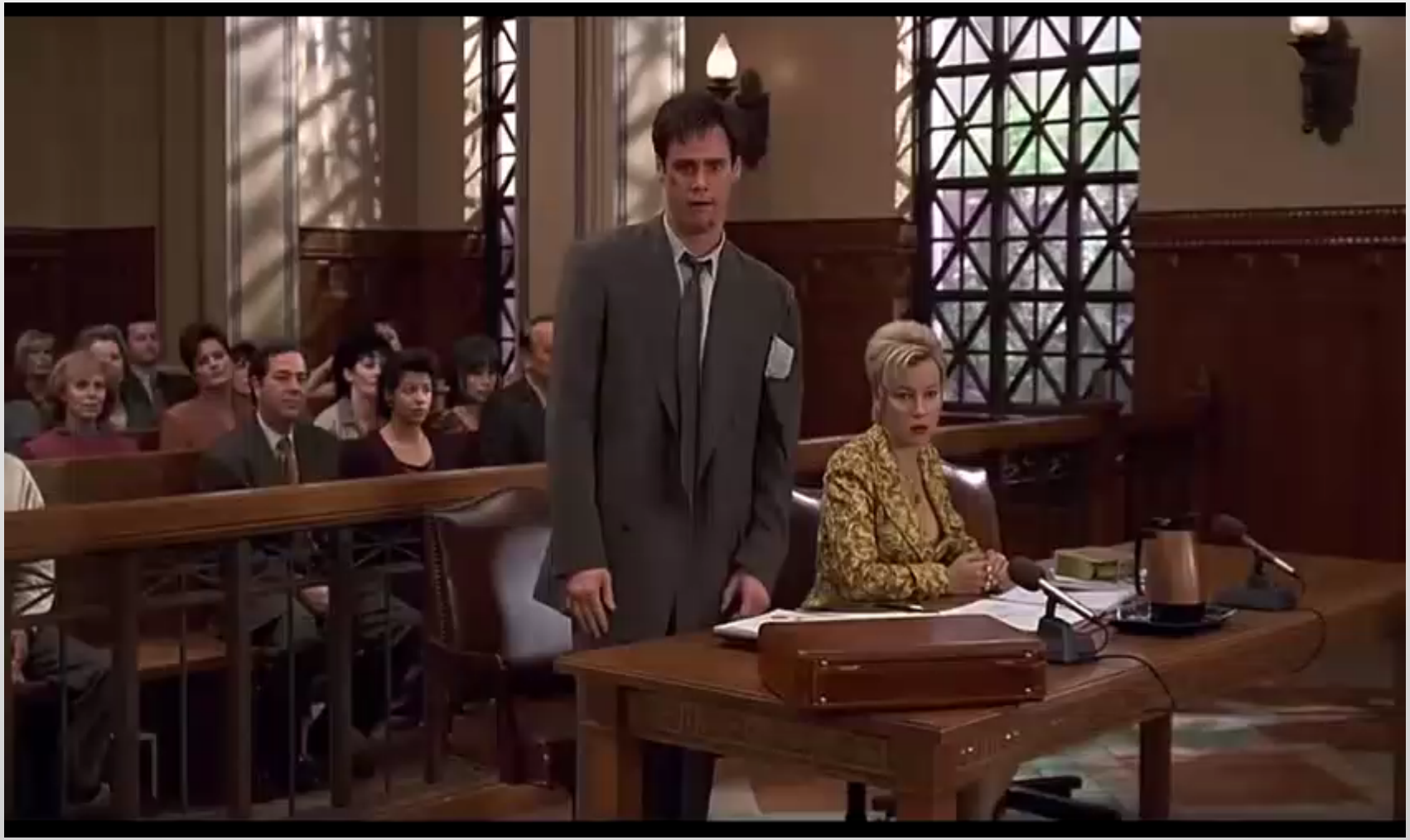
Examples of Violations of Rule 3.3—Candor Towards the Tribunal

***In re Krigel*, 480 S.W.3d 294 (Mo.2016).**

In *Krigel*, the Supreme Court of Missouri found that an attorney knowingly elicited false testimony from his client during a hearing to terminate parental rights. *Id*. at 299.

- By way of background, the attorney's client wanted to put her child up for adoption. At the time of representation, the client was not on speaking terms with the child's birth father and her attorney was well-informed of this fact. *Id*. at 297.
- However, during the hearing, the attorney allowed his client to give false testimony to the court that she had obtained the birth father's consent in placing their child up for adoption when the attorney ***knew*** this to be false. *Id*. at 298.
- Because of this clear, unequivocal knowledge of falsity, the court found the attorney violated his duty of candor. *Id.* at 300.

How *Not* to Maintain Candor



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How to Ethically Prepare Witness

- First, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Rule 1.2(d).
- Indeed, it is professional misconduct for a lawyer to:
  - engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4(d)
  - engage in conduct that is prejudicial to the administration of justice. *See* Rule 8.4(e)
- A lawyer ***may*** discuss, however, the legal consequences of a proposed course of conduct and assist a client to make a good faith effort to determine the validity, scope, and meaning of the law. *See* Rule 1.2(d).
  - "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(d)

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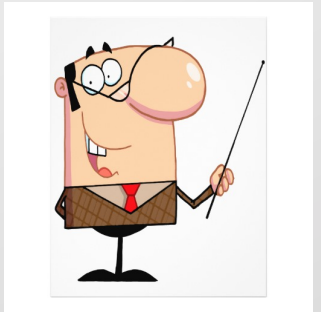
How to Ethically Prepare a Witness (Cont'd.)

The Restatement (Third) allows for the following:

A lawyer may:

- Invite the witness to provide truthful testimony favorable to the lawyer's client
- Discuss the role of the witness and effective courtroom demeanor
- Discuss the witness's recollection and probable testimony or evidence
- Ask the witness to reconsider his or her recollection
- Discuss the applicability of the law to the events in issue
- Review the factual context of the witness's observations
- Discuss how opposing counsel may cross-examine the witness
- Rehearse testimony with the witness



A lawyer is not allowed to:

- Unlawfully obstruct another party's access to a witness
- Unlawfully induce or assist a prospective witness to evade or ignore process.
- Request a person to refrain from voluntarily giving relevant testimony or information to another party unless:
  - The person is the lawyer's client
  - The person is a relative, employee, or agent of the lawyer or lawyer's client, so long as the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.

Restatement (Third) of the Law Governing Lawyers, §116 (2000).

How *Not* to Ethically Prepare a Witness

Duty to Disclose Adverse Authority

- "A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Rule 3.3(a)(2).
- "Controlling jurisdiction" includes appellate courts, courts of coordinate jurisdiction, and even lower courts.
  - Even dicta in controlling jurisdiction's opinions must be disclosed if directly adverse
- ***When should a lawyer disclose?***
  - If known while arguing: While arguing
  - If no oral argument is expected: Better brief it
  - If issued after an order that is not a final, appealable decision: Promptly
  - When in doubt, always disclose
- After disclosing, a lawyer may challenge the soundness of the decisions, present reasons why the Court should not follow, and close cases can also be suggested

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Duty to Disclose Adverse Authority

- **The Test:**
  - Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case?
  - Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him or her?
  - Might the judge consider him or herself misled by an implied representation that the lawyer knew of no adverse authority?

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1505.

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Directly Adverse To The Position Of The Client: Statute of Limitations

- A lawyer is under no ethical duty to inform opposing party that the statute of limitations has run on its client's claim.
- A lawyer does, however, have a duty to inform his or her own client and the likelihood that the action will be defeated if the defendant realizes the statute has run and asserts this as a defense. *See* Rule 1.4

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387

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Examples of Violations of Rule 3.3—Failure to Disclose Controlling Legal Authority

Ortega v. Colvin, No. CV 15-688 WPL, 2016 WL 9776332 (D.N.M. Nov. 29, 2016).

In *Ortega*, an attorney failed to point out a judicial opinion published by the U.S. District Court of New Mexico, the very court that was presiding over his case. *Id*. at *1.

- Further raising the court's suspicion was that the attorney seemingly modeled his arguments around the opinion he failed to cite, reasoning that they were "shockingly similar" to the court's own words. *Id*.
- The attorney attempted to argue that he simply forgot the case when drafting his brief and that he had no intention of misleading the court. *Id*. at *4.
- The attorney in this case got lucky. The judge in *Ortega* gave the attorney "the benefit of the doubt" and cautioned the attorney his future pleadings "will be thoroughly scrutinized and remind him that his reputation and credibility with the Court is paramount." *Id*. at *5.

Inadvertent Receipt of Documents

Rule 4.4(b) requires:

> "A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall ***promptly notify*** the sender."

Does a lawyer need to actually return the inadvertently sent documents?

- The Model Rules only provide that lawyer should promptly notify.
- Thus, it is a matter of professional judgment to voluntarily ***return*** a document or ***delete*** electronically-stored document.
  - However, a lawyer should always be careful of reading a document that contains privileged or confidential information as this may raise other ethical issues.
    - *See* Fed. R. Civ. P. 26: If disclosed information is subject to a claim or privilege, the party making the claim must notify the other party, and the other party must then promptly return, sequester or destroy the information.
- "Document" or "electronically-stored information" includes paper documents, email, metadata.
  - "Metadata" or "Embedded Information"– A lawyer receiving an electronic document can mine it for any metadata under Rule 4.4(b). *See* ABA Formal Opinion 06-442 (August 2006).

Examples of Violations of Rule 4.4—Failure to Notify

Chamberlain Grp., Inc v. Lear Corp., 270 F.R.D. 392 (N.D. Ill. 2010).

In *Chamberlain*, attorneys received correspondence and documents from an unnamed individual claiming to have knowledge relevant to the case, and who ultimately turned out to be a former employee of the opposing party. *Id*. at 397.

- Although the court found that the attorneys did not solicit the information, they failed to disclose the receipt of privileged and confidential documents to the opposing party. *Id*. at 398.
- The attorneys attempted to argue that Rule 4.4 did not apply because the documents were unsolicited and sent without permission or consent. *Id*.
- The Northern District Court of Illinois rejected this argument, finding "[e]ven in the absence of privilege . . . It is an improper litigation tactic to use a disgruntled employee to secretly obtain non-public internal business documents from the opposing party." (Internal citation omitted.) *Id*.
- Further, the attorneys "suspected from the outset" that the documents were confidential, resulting in a breach of duty to promptly disclose and an award of sanctions against the un-disclosing attorneys. *Id*.

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Overarching Duty to Maintain Civility

Although a lawyer should always act with reasonable diligence towards his or her client per Rule 1.3, this duty does not require nor allow for the following:

- The use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. Rule 1.3, Comment 1.
- Taking action that merely serves to harass or maliciously injure another. *See generally*, Rules 3.1, 3.2 and 3.3.
- Use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. Rule 4.4.
- Engage in conduct that is prejudicial to the administration of justice or treat other discriminatorily. Rule 8.4.

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Examples of Violations of Duty of Civility

***In re Gamble,* 301 Kan. 13, 338 P.3d 576 (2014)**

In *Gamble*, the Supreme Court of Kansas suspended an attorney from the practice of law for six months following a finding that the attorney engaged in conduct prejudicial to the administration of justice. *Id* at syllabus.

- By way of background, the attorney represented a father in an adoption case. Following a deposition of the unrepresented birth mother, the attorney sent the mother a Facebook message urging her to "fight for her daughter," to reconsider the adoption, and attached a revocation for relinquishment of parental rights and consent for the mother to sign. *Id*. at 14.
- The court found that the attorney committed clear and prejudicial professional misconduct warranting a suspension. *Id*. at 26.

***In re Disciplinary Proceedings against Isaacson,* 361 Wis. 2d 479, 860 N.W.2d 490 (Wis. 2015).**

In *Isaacson*, the Wisconsin Supreme Court suspended an attorney for making inappropriate, albeit colorful, statements against trustees and various judges involved in the case, which included "dirty Catholic inquisitor," "a priest's boy," a "black-robed bigot," and a "Catholic Knight Witch Hunter," to name a few. *Id*. at 488.

- The court found that the attorney's repeated "frivolous and harassing personal attacks" made in numerous documents, along with attacks against the judiciary, warranted a one-year suspension. *Id*. at 495.

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Examples of Violations of Duty of Civility

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How to Maintain Professionalism

- Don't take it personally. Otherwise, you risk becoming part of the problem
- Make a record
- Don't involve the judge unless the behavior impairs the administration of justice
- Involve the Attorney Registration and Disciplinary Commission (ARDC) or Lawyers Assistance Program (LAP) if there are serious concerns about a lawyer's mental fitness

- Talk it out with others. *E.g.,* ARDC Ethics Inquiry Program

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Questions?

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