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Difficult Conversation: Confronting Clients About Perjury

> Remonstrate: "A presentation of reasons for opposition[.]"
> ~Black's Law Dictionary

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Comment 10 to ABA Model Rule 3.3, which like its Oregon counterpart addresses candor toward tribunals and related litigation settings, counsels that a lawyer who discovers that a client has offered perjured testimony should "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." Although that is sound advice, it doesn't make the conversation with the client any easier. Nonetheless, it is a conversation that must take place.

In this column, we'll first look at what a lawyer must do when the lawyer discovers that a client has committed perjury during an ongoing case. We'll then examine what a lawyer must do if the client refuses to correct the testimony.

Before we do, two qualifiers are in order.

First, we'll focus on civil cases in this limited space due to the complex constitutional issues surrounding a defendant's right to testify in a criminal case. That said, the U.S. Supreme Court succinctly observed in *Nix v. Whiteside*, 475 US 157, 173 (1986): "Whatever the scope of a constitutional right to testify, it is

elementary that such a right does not extend to testifying *falsely*." (Emphasis in original.)

Second, we'll focus on deposition rather than trial testimony. It is not that clients never commit perjury at trial—with, for example, the leading case in Oregon on this subject, *In re A.*, 276 Or 225, 554 P2d 479 (1976), painted against the backdrop of trial testimony. In my experience over the years advising lawyers in this unhappy area, however, errant testimony is more common at depositions than trials in civil cases for the simple reason that depositions precede trials.

Confronting the Client

Although there is no "typical" pattern, a recurring scenario is a client who has intentionally testified inaccurately and then reveals that fact to the lawyer during a break in the deposition—sometimes spontaneously and in other instances when the lawyer probes the client over a point that sounded inconsistent.

RPC 3.3(a)(3) offers succinct direction:

> (a) A lawyer shall not knowingly:
>
> . . .

> (3) 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 permitted, disclosure to the tribunal.

Comment 1 to the corresponding ABA Model Rule notes that the duty to the "tribunal" extends to ancillary proceedings like depositions. Although RPC 1.0(h) defines "knows" as "actual knowledge," knowledge is often supplied by the client's own admission to the lawyer. "Material" in the context of false statements has been defined (*In re Davenport*, 335 Or 67, 70, 57 P3d 897 (2002)) as evidence "'capable of influencing the decision-making process[.]'"

OSB Formal Opinion 2005-34 (rev 2016) underscores (at 3) the need to confront the client in this circumstance: "[W]hen a lawyer knows through confidential information that a client has committed perjury, the lawyer must call upon the client to rectify the perjury." In addition to explaining to the client that a lawyer cannot suborn perjury, a lawyer can also properly advise the client that if the client does not correct the testimony, the lawyer will be forced to withdraw. This combination often convinces the client to correct the record. Mechanically, this can usually be done by stating when the deposition resumes (or, depending on the timing, voluntarily reopening the deposition) that the client wishes to address earlier testimony and then allowing the client to make the necessary

correction. Under RPC 3.3(c), this duty "continue[s] to the conclusion of the proceeding[.]"

Withdrawing If Necessary

Formal Opinion 2005-34 also outlines (at 3) the result if the client refuses to make the necessary correction: "The only option available to Lawyer . . . if Client . . . will not voluntarily correct the wrongdoings is to endeavor to withdraw from the representation." The OSB Ethical Oregon Lawyer notes in this regard (at 6-31) that Oregon's approach differs from the ABA Model Rules. ABA Model Rule 3.3(a)(3) requires disclosure to the tribunal "if necessary" whereas Oregon RPC 3.3(a)(3) only allows disclosure "if permitted." Oregon's confidentiality rule—RPC 1.6—does not include an exception for revealing a client's completed criminal conduct and, therefore, Formal Opinion 2005-34 explains that withdrawal is the only option here.

In forums requiring court permission to withdraw, OSB Formal Opinion 2011-185 (rev 2016), which addresses withdrawal generally, suggests simply citing "professional considerations" as the basis to withdraw in any public motion papers or public proceedings. If the court nonetheless requires the lawyer to continue, OSB Formal Opinion 2005-34 (at 3 n.2) concludes based on *In re Lathen*, 294 Or 157, 166, 654 P2d 1110 (1982), that it is appropriate to do so.

Formal Opinion 2005-34 cautions, however, that although a lawyer may continue to represent the client in that event, the lawyer may not offer the evidence the lawyer knows to be false. For example, a lawyer whose motion to withdraw was denied following the discovery of client perjury in a deposition could not then use the testimony involved to support the client's summary judgment motion.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.