ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My client is currently engaged in a litigation where her net worth is an issue.

At her deposition, my client testified that she had no income other than her salary. I had been planning on negotiating with my adversary to see if we could settle the case before an upcoming trial and I had called my client for some final settlement authority.

On the call, my client told me that she now "remembers" something she "forgot" to mention at her deposition. Previously, she had testified that she had no income other than what was reported on the W-2 that she received from her employer. Now she remembers she had received $50,000 from her recently deceased uncle a few weeks before her deposition when his estate was distributed based on his will. She does not want me to tell the opposing side or the court about the $50,000. Still, she's worried that the court might find out about the $50,000 since her uncle's will is a matter of public record. So, she gives me settlement authority.

Meanwhile, the private investigator I had previously hired just reported to me that the opposing party's statement in his affidavit that he is unable to work because he is injured is false. In fact, the opposing party has been working off the books as a messenger at the law firm of his attorney, Fraud U. Lent. By my calculation, if the opposing party reported the additional income, it would be relevant to damages.

Can I settle the case without admitting that my client had received the $50,000 from her uncle? If the case does not settle, and I am unable to convince my client to correct her testimony, am I obligated to withdraw from her representation? Am I permitted to disclose the $50,000 to the court?

In addition, the other side has made a settlement offer. May I tell my adversary that I am aware that his client's affidavit is false to try to get a better offer?

May I tell Mr. Lent that I will not file a disciplinary grievance against him based on his role in drafting the false affidavit if his client will just make a better offer?

May I tell opposing counsel that my client will pursue criminal perjury charges against the opposing party?

Sincerely,

A. Lot Goingon

Dear A. Lot Goingon:

There are a myriad of ethical issues which you have raised in this scenario. At the outset, N.Y. Rules of Professional Conduct Rule 4.1 requires that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Furthermore, when dealing with an opposing party and the opposing party's counsel, Rule 3.4 requires that attorneys act with fairness and candor. Rule 3.4(a)(1) states that "a lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Moreover, Rule 3.4(a)(4) requires that "a lawyer shall not . . . knowingly use perjured testimony or false evidence." Additionally, Rule 3.4(a)(5) states that "a lawyer shall not . . . participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." Lastly, Rule 3.4(a)(6) requires that "a lawyer shall not knowingly engage in other illegal conduct or conduct contrary to these Rules."

Simply put, if your client was not truthful during her deposition about her assets, which appears to be a material fact that would be integral in determining the amount to be awarded in this particular action, there may be circumstances that would require disclosure to opposing counsel. The key words utilized in the aforementioned subsections of Rule 3.4(a) are "know" or "knowingly." "Know" does not mean believe. Here, depending on the precise on-the-record question and answer during the deposition, your client's purported recollection after her deposition that she had $50,000 in funds may be a significant deviation from her prior sworn testimony that she possessed no other income. This is further complicated by the fact that your client does not want you to inform either the opposing party or the court of the true disposition of her assets. The reality is that you do not have knowledge of your client's financial affairs. Your client's request that you not make any disclosure as to her actual financial status requires an examination of your responsibilities under subsections (1), (4), (5) or (6) of Rule 3.4(a). Lawyers may rely on a client's recitation of the facts. Even if a lawyer has some doubts about the client's veracity, so long as a lawyer's investigation of the facts does not conclusively demonstrate that the client's version of the facts is false or fraudulent, a lawyer can accept the client's word. Thus, if you maintained the position in settlement discussions

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which arose from you client's sworn testimony that she had no assets even though she may have $50,000 in funds, you would not be in violation of these provisions of Rule 3.4(a) since you do not have knowledge of her actual financial status. However, if you had actual knowledge that your client "had" $50,000 while maintaining the position that your client had no assets as she had previously testified, then you could be in violation of subsection (1), (4), (5) or (6) of Rule 3.4(a).

Turning to your follow-up question on this point, assuming that you had actual knowledge that your client "had" the $50,000 and you are unable to convince your client to correct her testimony, then you could be obligated to withdraw as her counsel. Rule 1.16(b)(1) states that ". . . . a lawyer shall withdraw from the representation of a client when . . . the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law." You could also be obligated to withdraw pursuant to Rule 1.16(b)(4) which states that " . . . . a lawyer shall withdraw from the representation of a client when . . . the lawyer knows or reasonably should know that the client . . . asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person." As you have previously indicated, your client does not want you to tell the opposing side or the court about the $50,000, and this appears to be done "merely for the purpose of harassing or maliciously injuring" the opposing party. This could be an example of conduct which would permit a lawyer to withdraw under Rule 1.16(b)(4).

Whether it is appropriate for you to disclose to the court the fact that your client informed you that she did have $50,000 is a trickier issue. Such information may be disclosed under Rule 1.16(b)(3). "Confidential information" under Rule 1.16(a) "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." As mentioned in your inquiry, although it is possible that the information concerning your client's receipt of the $50,000 may be a matter of public record, your client did request that this information be kept from both the opposing side and the court. Therefore, this information could be deemed as "confidential." Rule 1.6(b)(3) allows for the disclosure of "confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." From the facts you have described, it does appear that your client's failure to disclose her actual assets (after she had given sworn testimony at her deposition that she had no assets other than the prior support that she was receiving) was a fraudulent attempt by her to force a more favorable settlement from the other side and may be disclosed to the court.

It is also important to take note of the requirements of Rule 3.3(a)(1) which states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." In addition, Rule 3.3(a)(3) requires that "[a] lawyer shall not knowingly . . . offer or use 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 . . . " As mentioned above in our discussion concerning Rule 3.4, a lawyer would be deemed to have been in violation of subsections (1) and (3) of Rule 3.3(a) if he or she had knowledge that the information received from the client is false. It is also important to note that Comment [8] to Rule 3.3 states that "[t]he prohibition against offering or using false evidence applies only if the lawyer *knows that the evidence is false*" (emphasis added) and that "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Lastly, Rule 3.3(b) states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Notwithstanding your client's statement that she "remembered" having $50,000 after previously testifying that she had no assets, it may be argued that you did not have knowledge but instead had a reasonable belief as to your client's financial affairs and you could argue the position that she had no assets while maintaining compliance with subsections (1) and (3) of Rule 3.3(a). Any doubts that a lawyer may have about a client's factual representations must be resolved in favor of the client. Put in somewhat different language, lawyers are not judges of their client's positions.

With regard to your knowledge that your adversary may have falsified his client's affidavit, you must be extremely careful in how you handle this matter. There is nothing that prevents you under the Rules of Professional Conduct from sharing your knowledge with your adversary that his client's affidavit was false. However, you should be aware of Comment [5] to Rule 3.4 which states that the use of threats in negotiation may constitute the crime of extortion. You also may not threaten to file a disciplinary grievance against Mr. Lent based on his purported role in drafting the alleged false affidavit of his client. Rule 8.3(a) states that "[a] lawyer

who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Only if there is a good faith basis or suspicion as to Mr. Lent's conduct would it then be appropriate to file a grievance complaint against him. The best thing you can do is to conduct some discovery on this particular issue in order to prove your investigator's purported findings that the affidavit that was submitted was indeed false.

Lastly, you may not tell opposing counsel that your client will pursue criminal perjury charges if a better settlement offer is not made. As Rule 3.4(e) states, "a lawyer shall not . . . present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Sincerely,
The Forum by,
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I was retained by a company that was sued in a trademark infringement case. The plaintiff company's Vice President for Marketing and Sales was recently deposed, and I chatted amicably with him during several breaks. Parenthetically, the Vice President is also an attorney (non-practicing) and he is the plaintiff's primary decision maker.

The plaintiff-company's lawyers have been very accusatory and difficult to deal with. I do not believe that it will be possible to settle the case with them, or that they have communicated my settlement offer to their client.

Can I speak with the Vice President directly after the deposition phase and advise him of the settlement offer? Would it make a difference if the Vice President was also the plaintiff-company's general counsel? What if the Vice President calls me after the deposition phase (without informing his company's attorney) to discuss settlement? Should I take the call? What if my client seeks my advice about directly approaching the plaintiff-company to settle the matter (and bypass the attorneys)?

In addition, I have been regularly using email to communicate with my adversary during the course of settlement negotiations. Recently, I received an email from my adversary with a "cc" to the Vice-President. The email misstated my settlement offer and I saw this as a golden opportunity to communicate with the Vice-President. I pressed "reply all" and sent an email that responded to my adversary's email and stated my settlement position. Opposing counsel went ballistic and accused me of communicating with his client in violation of the Rules of Professional Conduct. Since I was responding to a communication that had "cc'd" the plaintiff, I believe that opposing counsel invited the use of "reply all" and implicitly gave his prior consent.

Who is right?

Sincerely,
What A. Mess

Book Review
Continued from Page 48

matter to fund-raisers; the registration requirements for charitable solicitation; compliance with grant terms; planned gifting; corporate contributions; lawyers as fund-raisers; IRS reporting; prudent investor standards; investment policies; risk management; financial distress and insolvency; the dynamics of human resource considerations, including employment relationships; the role of volunteer and intern personnel; labor law constraints and liability as they affect nonprofits; facilities and real estate management and the laws affecting those operational activities; political activities and lobbying, including their restrictions, prohibitions and limitations; record keeping; financial disclosure; the importance of taking charge of the various legal functions appropriate to nonprofits; and mobilizing other appropriate and necessary legal forces.

My favorite segments have to do with fund-raising and lobbying, both of which are so much in the news and public consciousness these days.

The book identifies a wide variety of operational traps and solutions, and it includes a reference to a companion website containing glossaries of nonprofit-related terms and links to a variety of additional materials and information appropriate to the subject.

While it is common in book reviews to include a paragraph or so of negative comment just to keep it honest, I've looked hard here for some basis of negative comment and I just can't find one. This single-volume treatise, a first of its kind, is a rather remarkable, up-to-date and virtually all-inclusive practice treatment that should be read by anyone seeking to enter the nonprofit area of law practice, and it should appear for ready reference on the shelves of every attorney responsible for counseling nonprofits. It is an achievement by one whose demanding responsibilities might be expected to leave little time for such a project. Lesley Rosenthal's willingness to display her prodigious writing skills and to offer her valuable personal time to share what has been for her an intense professional experience at one of the world's most significant arts providers is indeed worthy of conspicuous note. ■