Candor in the Legal Profession

Your Obligations Under the ABA Model Rules of Professional Conduct

BY MEAGAN A. CAUDA AND DANA M. HRELIC

As lawyers, we are all aware (or should be) that we carry a duty of candor toward the tribunal and a duty of fairness to opposing parties and counsel. But the question becomes: What exactly do these duties require? What are our obligations under these rules? And in what circumstances do these obligations arise? That is the focus of this article.

The American Bar Association (ABA) Model Rules of Professional Conduct 3.3 and 3.4 govern an attorney's candor toward the tribunal, and fairness to opposing party and counsel, respectively. Specifically, Rule 3.3 instructs that a lawyer shall not knowingly: (1) 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; (2) 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; or (3) offer evidence that the lawyer knows to be false. It further provides that, 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.

Rule 3.4 governs a lawyer's duty of fairness towards opposing parties and counsel, and requires, in relevant part, that a lawyer not unlawfully obstruct another party's access to evidence or alter, destroy or conceal a document having potential evidentiary value, falsify evidence, disobey obligations under the rules of a tribunal, make frivolous discovery requests or fail to make a diligent and reasonable effort to comply with a valid discovery request, allude to matters during trial that will not be supported by admissible evidence, or request a person (other than a client) to refrain from giving relevant information, subject to certain exceptions.

Prior to understanding our precise obligations under these Rules, it is important to consider why these rules exist (though you might be thinking, "Isn't it obvious?"). One court has explained "the duty of candor is an integral part of ensuring that our system of justice functions properly because first and foremost an attorney is an officer of the court, an institution whose purpose is to seek the truth in order to do justice." *Penna v. United States*, 153 Fed. Cl. 6, 41–42 (Ct. Fed. Cl. 2021). It also noted that the duty of candor "is important to providing clients with an attorney's 'independent professional judgment' so as not to create unreasonable client expectations, which when dashed can undermine confidence in the justice system." *Id.* Finally, "the duty of candor helps promote judicial efficiency and avoid crossing the court's docket with frivolous actions." *Id.* In sum, the rule exists because "[t]he system can provide no harbor for clear devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *Id.* at 42.

We know that the purpose of the attorney role is to ensure

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justice is served through truthfulness and honesty. But don't we also have an obligation to our clients to fight for them and their interests as best we can, using all the tools we have to do so? Sure we do. So this leads to another commonly considered question: is there a distinction between mere "puffery" or "exaggeration" on the one hand, and deception or untruthfulness, on the other? If so, where is that line drawn? Take the language of Rule 3.3 again: a lawyer cannot "knowingly" make a false statement of fact or law, fail to disclose adverse legal authority, or offer evidence they know to be false. Thus, under the plain language of the rule, a lawyer will not run afoul of their ethical obligations unless they know that the evidence they are presenting or the statement they are making is purely false. And in practice, there is often a recognized difference between making false statements, which would be a violation of the ethical rules, and engaging in mere "puffery" or exaggerated legal argument for the benefit of your client's case. For example, lawyers have some latitude to embellish the strength of their case or the weakness of their opponent's, or to "spin" certain evidence in their favor, which is different than intentionally introducing evidence or argument that the lawyer knows to be false (which would be a violation of the Model Rules).

So, we know we cannot knowingly make false statements or offer false evidence, and we know the reason behind why we should not do so. But let's introduce a slightly different scenario: What do you do when you are presented with evidence that is untrustworthy (but not necessarily false)? What (if anything) are your obligations? Do you have a duty to disclose such evidence?

Let's say you are representing a client who presents you with a piece of potential evidence, and you know at the outset that such evidence is untrustworthy. For example, what if you represent an individual, and you strongly suspect that he and his father, who co-own a business together, are "cooking the books" as they prepare for a business valuation. When your client provides you with financial information ahead of the violation, what, if anything, do you do with it?

In such an instance, most can probably agree that you should not use or introduce such untrustworthy evidence. Indeed, introducing or offering evidence that you know comes from an untrustworthy source—and thus has a high likelihood of being false—runs the risk of a Rule 3.3 violation, unless, of course, you are able to verify the information and evidence and confirm its veracity. And if you cannot verify the evidence or the statement's truthfulness, and you choose not to introduce it, then it follows that there are no disclosure obligations. Of course, you do not have to disclose (to the court or opposing counsel) false evidence or statements that you are not using in your case or otherwise presenting in any form.

However, what happens in a slightly different situation, where you discover that evidence you have already presented turns out to be untrustworthy, inaccurate, false, or not a fair representation? Or what if you discover that your client has provided false testimony in a deposition or at trial? Are you obligated to take remedial measures or disclose what you have discovered? Do you risk violating Rules 3.3 and 3.4 if you don't?

The answer to both questions is yes, which is expressly considered by Rule 3.3(a)(3): "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." But this leads to yet another question: What are "reasonable remedial measures" short of disclosure? Comment 10 to Rule 3.3 provides some guidance on this topic. It explains that, when a lawyer offers material evidence in the belief that it was true, and subsequently comes to know it was false, or when a lawyer encounters his client providing false testimony on cross-examination or in a deposition, "the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty to candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."

If that fails, the lawyer must take further remedial action, which might include withdrawal from the representation. However, if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as necessary to remedy the situation. Importantly, this is the case even if doing so would require the lawyer to reveal information that would otherwise be protected by Rule 1.6 (confidentiality of information).

Finally, let's discuss other common circumstances concerning disclosure obligations. First, coming across case law that does not favor your position (and in fact, may expressly disavow your position) is something that happens far more often than we would like. So, what are our obligations, if any? This circumstance is expressly contemplated by Rule 3.3, which requires that a lawyer 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."

Thus, lawyers must disclose to the tribunal any legal authority, from the jurisdiction the case is in, that is "directly adverse" to the position of the client. But what is "directly adverse"? Does this rule require that lawyers disclose every case they discover that doesn't support their client's position? Of course not. However, lawyers should exercise caution and inform the tribunal of case law that directly undermines or contradicts his client's position in a matter, particularly where such case would weaken or defeat his client's arguments, claims or defenses.

For our second circumstance, what happens if you *inadvertently* disclose information relating to the representation of a client in violation of Rule 1.6? Or, what if opposing

The Lawyer's Duty of Candor When Using AI

One extremely important and timely category that concerns a lawyer's duty of candor is the use of artificial intelligence (AI) in the legal profession. AI, as we all know, is a relatively new form of technology that makes predictions based on historical data patterns in its possession. And, while such technology comes with many benefits, it also comes with some very concerning drawbacks. One is the potential—and, in some cases, the likelihood—of misinformation (i.e., inaccurate and unreliable results). Thus, lawyers must be wary of using AI technology such as ChatGPT or even Westlaw's AI-Assisted Research to perform legal research and utilize such research to engage in legal argument. Indeed, this directly affects a lawyer's duty of candor: Remember, 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. Blindly trusting AI-generated research runs the extreme risk of making a false statement of law to the tribunal. It is, therefore, crucial for lawyers to review and double-check the accuracy of the information they receive from such resources. This includes reviewing, for example, an associate attorney's work if you are the lead attorney signing a motion or arguing in front of a tribunal, particularly where that associate has used AI to perform research; you, as the signing attorney presenting an argument to the tribunal, can be on the hook for an ethical violation if such research contains misrepresentations.

An especially common problem that the profession is facing is lawyers' citation to and reliance on cases to support their position; cases that either do not exist, have been overruled, or simply do not support (or often even mention) the position the lawyer is citing it for. To demonstrate the magnitude of the problem that such "hallucinated cases" are causing, consider the fact that there exists a database that tracks legal decisions in cases here generative AI produced hallucinated content, which typically includes fake citations (but also types of other hallucinated arguments). As of the date of the drafting of this article, there are 398 cases concerning the improper use of AI identified in states including New York, Florida, Pennsylvania, Texas, South Carolina, Idaho, Ohio, Indiana, New Jersey, Arizona, Louisiana, Nevada, and Oklahoma (and that number increases weekly). The sanctions involved in such cases include bar referrals, monetary sanctions, complaints dismissed, recommendations for Rule 11 sanctions, show cause orders, public warning, submissions stricken, admonishment, and personal costs against lawyers. Notably, many—if not all—of these cases admonish lawyers for committing misrepresentations to the Court, which, as we know, is a direct violation of Rule 3.3. What's more, some states have begun to modify their ethical rules to require certain conduct or behavior concerning AI.

So, should we not use AI? Are we risking ethical violations if we do so? Simply put, the use of AI in the legal profession carries a risk. Part of that risk is the risk of violating Rule 3.3 by providing misstatements of law to the tribunal. However, so long as you use best practices and double check the cases, assertions, or theories such AI-generated research provides—and remember your duties of disclosure if you do inadvertently cite, for example, a false case—AI can nonetheless remain a helpful tool for lawyers.

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counsel inadvertently discloses confidential information to you? Do you have any obligations? The short answer is yes. As to the former, if you discover that you have inadvertently disclosed information, you have an obligation to act quickly, notify the client, and take remedial action to limit the damage caused by the inadvertent disclosure. For example, if you accidentally send opposing counsel an email with privileged client information, you must inform the client of the inadvertent disclosure and discuss with the client steps that need to be taken to protect their interests. Then, you should take remedial action by requesting that opposing counsel delete and ignore the email as it was inadvertently sent with confidential information enclosed.

If you receive inadvertently disclosed information from someone else (for example, if opposing counsel sends you an email that you realize was not meant for you), you should notify opposing counsel that you received the inadvertently disclosed information, delete the email or correspondence and any attachments, and, of course, do not use the information for any reason, including in the ongoing representation of a client.

Finally, what about a situation where you learn that a client is engaging in bad acts related to your representation of them? Do you have a duty to disclose such bad acts to opposing counsel or to the court? For example, say you are representing a client where there are automatic orders in place against transferring any property, and you learn your client has done so. Or what if you are representing a client in a divorce who you know has an inheritance coming to them, and that client represents that they plan to transfer their interest in that inheritance to their brother, so that their spouse cannot get half of it as part of equitable distribution (which may also be a violation of automatic orders)? Do you have a duty to disclose these acts? Does it violate the duty of confidentiality you're owed to your client if you do disclose such information?

The question largely turns on whether the client is engaging in "fraudulent or criminal conduct" related to the proceeding, as Rule 3.3 (b) provides that "a lawyer who represents a client in an adjudicative proceeding 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." Thus, if a client is engaging in, has engaged in, or intends to engage in fraudulent conduct related to the proceeding at hand, the lawyer must take reasonable remedial measures, which may involve disclosure to the tribunal.

To go back to our examples, is violating automatic orders and/or transferring property "fraudulent or criminal conduct?" The comments to Rule 3.3 only detail a lawyer's obligation to "protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so."

However, most can probably agree that transferring a portion of your inheritance you know your spouse is entitled to would be fraudulent behavior that undermines the integrity of the adjudicative process. And it may very well be that transferring property in violation of automatic orders is as well, though that may walk a finer line. And as discussed above, this situation also triggers a lawyer's duty of confidentiality to the client under Rule 1.6, so it is a question that walks a fine line between a lawyer's duty to disclose and a lawyer's duty of confidentiality.

Even if a lawyer does not have a duty to disclose their client's transferring of property, however, a lawyer should certainly advise the client that he should not knowingly violate court orders, as that could certainly—at the very least—lead to a situation where the client is providing false information (such as if the client avers in a deposition that he has not transferred any property) that the lawyer would then have to disclose.

In sum, a lawyer should always keep in mind his or her obligations under Rules 3.3 and 3.4 (remember: *knowledge* is the key word!) and keep in mind the common scenarios mentioned above that may trigger his or her disclosure obligations. Doing so will only help him or her avoid an ethically complicated situation (or worse, an ethical rule violation). FA

MEAGAN A. CAUDA (mcauda@pullcom.com) is an associate at Pullman & Comley LLC at Hartford, Connecticut, in the firm's Litigation practice, where she focuses on civil appeals and general commercial litigation matters.

DANA M. HRELIC (dhrelic@pullcom.com) is a member at Pullman & Comley LLC at Hartford, Connecticut, and co-chair of the firm's Appellate practice.