

## **Plaintiff's Counsel Caught in the Crosshairs of Ethical Dilemmas: Practical Solutions**

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Attorney John Jones (Jones) represents husband and wife who were injured in a motor vehicle accident. It was a rear end accident and the defendant was cited for DUI. At the time husband and wife told the police that wife was driving. While husband has recovered, wife has not, having sustained a serious neck injury which required neck surgery.

Jones filed a complaint just short of two years from the date of the incident, on behalf of husband and wife.

Within weeks of filing the Complaint, the husband alone advised Jones that from the start, husband and wife had lied, and that in fact husband was driving and not the wife. The husband stated they had lied because the husband "was not carrying his driver's license, and the couple wanted to avoid any problems with the police". The husband indicated that the couple had decided to disclose the truth to Jones because, since litigation had started, they did not want Jones to be blindsided during a deposition or other proceeding in the litigation process.

Jones Questions:

1. Can or must Jones withdraw as counsel?
2. Does the Complaint need to be withdrawn?
3. Can the existing Complaint be amended to reflect the facts as Jones now knows them to be?
4. What disclosures are necessary to the Court and the insurance carrier who is handling the third party liability claim?
5. What may Jones disclose without violating any applicable privilege even if the potential ramifications include criminal charges?
6. Would it be permissible (of course with the client's consent and authorization) to discontinue the action & walk away without the need to notify anyone of anything? In other words does the requirement of candor to the tribunal extend to correcting a pleading even if the action is discontinued?

Several of the New Jersey Rules of Professional Conduct (including all amendments through those effective September 1, 2015) apply to this situation.

### **RPC 1.0 Terminology**

(e) "Informed consent" denotes the agreement of a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

### **RPC 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered

to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

### **RPC 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) 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;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

## **RPC 4.1 Truthfulness in Statements to Others**

(a) In representing a client a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a third person; or
- (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Before we get to Jones' questions: is there fraud in this case. Since it is a rear end accident, what difference does it make who was in the driver's seat?

The potential fraud in this case, specifically, the identification by the clients of the wife as driver and husband as passenger, if it is material to the liability claim, a complaint has now been filed which involves the attorney's services.

The wife's neck injuries, and whatever other injuries suffered by either husband or wife could be impacted by where each was sitting in the car when it was struck. The filing of the complaint and the use of mails to in furtherance of this claim could be characterized as insurance fraud and be the basis of potential civil and criminal claims.

It is against this background that Jones' questions must be considered. In addition, in discussing the various courses of action with the clients, it is Jones' responsibility to insure that the clients are making their decision(s) about what to do based on "informed consent" (as defined in Rule 1.0(e)) to such actions.

As such, prior to taking any action, Jones must advise the clients of the full range of possible solutions and actions as well as the consequences of each and should refer the clients to a criminal attorney so that they can understand that aspect of the decisions that they eventually make.

The central problem for the lawyer here is posed by Rule 3.3. That rule provides that a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

Unfortunately, due to circumstances beyond his control Jones has made a false statement to the court, and it must be corrected.

As to Jones' first question, if the client allows the lawyer to rectify the falsity, then no rule would require the lawyer's withdrawal.

However, if the clients refuse to rectify the situation, then Jones must withdraw. That is because the lawyer must himself disclose the falsity here and if he were to do so over the clients' objection (which he may have to do), then it would give rise to a conflict of interest under Rule 1.7.

Simply withdrawing without doing anything more, would in my opinion violate both Rules 3.3 and 4.1. However, provided that clients will admit the lie, and do the best they can under the circumstances to rectify the situation, and if Jones takes the appropriate action to avoid violations of these Rules, he may not be *required* to withdraw.

Whether Jones may withdraw from representation is governed by both Rules 1.16(b)2 and 3. Clearly, if the clients refuse to take any corrective action regarding their misrepresentation and fraud, then Jones has grounds for permissive withdrawal under both of these Rules.

I will address Jones's second and third questions together. Withdrawal of the complaint in and of itself will not address Jones' duties under Rule 3.3 to correct the fundamental material misrepresentation made to the Court in the pleading. However, because Jones knows that the clients are lying about a material fact, he must take corrective action.

Merely withdrawing the case without prejudice allows the clients to move forward with their claim again, and does nothing to correct the fraud committed upon the court.

However, withdrawing the claim with prejudice in fact ends any claims that the clients are able to make against the defendant and thus permanently concludes any matters before the court on a third party liability claim, thus effectively rectifying the clients' misrepresentation to the court.

But there is another way. This is not the only way to accomplish such rectification. Amending the complaint to accurately reflect who was the driver and the passenger cures the material misrepresentation and in addition, provides adequate notice to the defendant through his counsel. This one action will in fact address the issues facing Jones and his duties under Rules 3.3 as well as 4.1.

As a practical matter, the balance of Jones' questions would apply should the clients refuse to cooperate in rectifying the fraud upon the court and will be answered as one.

At that point, prior to withdrawing Jones will be required to notify the defendant (or counsel) of the clients' fraud because of the interaction between Rules 4.1 and the exceptions to confidentiality as contained in Rules 1.6 . It is clear that Rule 4.1 requires

disclosure of material fraud providing it is not prohibited by Rule 1.6. Given that the facts of this inquiry fall into an exception to confidentiality results in Jones being required to make a disclosure to the insurance carrier or its representative regarding the clients' misrepresentation.

Jones should not characterize it as fraud or a crime, but rather simply make the disclosure as to who was the actual driver and who was the actual passenger and allow the carrier to investigate. I acknowledge that this could have devastating impact to the clients. However, the situation requires the disclosure, and does not allow the clients to be protected by confidentiality under Rule 1.6.

Jones will clearly be disclosing confidential information in making any disclosure required or taking the action necessary to amend the complaint. Should the clients refuse to allow the Jones to rectify their fraud both with the tribunal (Rule 3.3) and the carrier (Rule 4.1), then the Jones is required to make the disclosures necessary as noted above as regards Rule 4.1. Refusal to cooperate in the rectification of the fraud, either by amending the complaint or withdrawing it with prejudice would result in the Jones's violation of Rule 3.3. Not only would Jones then be required to withdraw from the case, he would have to disclose to the court in some fashion as to the reason for it when withdrawing. Jones should request an *in camera, ex parte* meeting with the court to make that disclosure in a fashion that is the least prejudicial to the clients. However, should the court deny such a request, the disclosure must be made under the circumstances which the court directs. Again, what is required to be disclosed is simply that the husband was driving and not the wife.

Should the clients fire Jones and choose to go to new counsel, Jones clearly should make disclosure to the new attorney. However, in the Committee's view this does not necessarily meet the Jones's obligations under Rule 3.3. If the complaint is not amended by the new attorney, the Jones is required under the Rule to report the lie to the court, and as previously stated to the insurance carrier or its representative as well.