

Do New York's New Rules of Professional Conduct Really Change an Attorney's Obligations with Regard to Client Confidences?



BY CHARLES L. ROSENZWEIG, ESQ. AND
CATHERINE S. CAMPBELL, ESQ.*

On its face, perhaps the most dramatic change imposed by New York's *Rules of Professional Conduct* ("Rules"), effective April 1, 2009,¹ relates to an attorney's obligations with regard to client confidences. For generations, New York attorneys lived by the ethical proviso that a client's confidences are sacrosanct; not to be shared with outside parties or tribunals except in very limited and circumscribed circumstances. The new *Rules* impose new exceptions and obligations to the confidentiality requirements that appear to make inroads into the near inviolability of client confidences found in the former, and now superseded, New York *Code of Professional Responsibility* ("Code"). Or do they?

Addressing the new duties of disclosure of client confidences found in Rule 1.6 ("Confidentiality of Information") and Rule 3.3 ("Conduct Before a Tribunal"), in comparison with the disciplinary rules under the former *Code*, this article will also

* Charles L. Rosenzweig is a partner in the law firm of Rand Rosenzweig Radley & Gordon LLP, with offices in White Plains, N.Y. and New York, N.Y. He is a graduate of Princeton University and New York University School of Law. Mr. Rosenzweig is a former member of the Executive Committee of the New York State Bar Association's Commercial and Federal Litigation Section, and a past chair of its International Litigation Committee. He is a member of the Westchester County Bar Association's Ethics Committee. Mr. Rosenzweig can be reached at crosenzweig@randrose.com.

Catherine S. Campbell is an associate attorney at the law firm of Rand Rosenzweig Radley & Gordon LLP in its White Plains, N.Y. office. She is a graduate of Colgate University and Georgetown University Law Center. Ms. Campbell can be reached at ccampbell@randrose.com.

assess the impact of the recent New York State Bar Association (“NYSBA”) Ethics Opinion 837² on the new *Rules*. While addressing the duty of an attorney who subsequently learned from his client that a document admitted into evidence on the client’s sworn testimony was a forgery, the NYSBA opinion raised, but did not answer, the question of whether statutory and ethical considerations outside the *Rules*, diminished the right of an attorney to make disclosures to tribunals that are required by the language of Rule 3.3.

I. Rule 1.6 Confidentiality of Information

A. Confidential Information: A New Definition

New Rule 1.6 restates an attorney’s duty of confidentiality with some subtle changes from the former *Code*. Confidential information is now defined as: “information gained during or relating to the representation of a client, whatever the 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.”³ This new formulation adds two important concepts: 1) including information obtained “whatever the source” during the representation (*i.e.*, not just obtained directly from the client) and 2) collapsing the *Code*’s distinction of “confidential” and “secret” into a single definition for confidential information. The *Rules* also note that “confidential information does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.”⁴

B. Permitted Disclosures Under Rule 1.6

The *Rules* not only contain more exceptions to the duty of maintaining confidential information confidential, but also provide greater explanation for a lawyer’s course of conduct in making permissible disclosures. As expressed in Rule 1.6, a lawyer shall not knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer or a third party *except*, upon: 1) informed consent, 2) implied authorization, or 3) a reasonable belief that disclosure is necessary. Unlike the *Code*, the *Rules* specify the form of an informed consent, namely “the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”⁵

The second exception in Rule 1.6(a) explicitly states what was missing in the *Code*, but was inferred nonetheless, that “disclosure is impliedly authorized [if it advances] the best interests of the client and is either reasonable under the circumstances or customary in the professional community.” As now clearly stated, a lawyer may rely on a client’s implied authority to disclose confidential information when necessary in the midst of a court hearing or negotiations sessions (*i.e.*, at a time when it is not possible to obtain informed consent).

The third exception, a reasonable belief that disclosure is necessary, has six subparts

under Rule 1.6(b), which allow a lawyer to reveal confidential information to:

1. prevent reasonably certain death or substantial bodily harm;
2. prevent the client from committing a crime;
3. 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;
4. secure legal advice about compliance with these Rules or other law by the lawyer;
5. (i) defend a lawyer or the lawyer's employees and associates against an accusation of wrongful conduct or (ii) establish or collect a fee; and
6. comply with the Rules or other law or court order.

Rule 1.6(b)(1) now allows disclosures of confidential information to prevent reasonably certain death or substantial bodily harm to any person, even if the conduct is not a crime, as had been the rule under the *Code*. For example, a lawyer representing a client's purchase of a building who learns of structural defaults in the building from the client's structural engineering report that are unknown to others and will likely result in the imminent collapse of the building, is permitted under Rule 1.6 to disclose this information. Also new is the ability of lawyers to reveal confidential information to obtain legal advice from outside lawyers on ethics or other legal questions.⁶

C. Was the noisy withdrawal exception extended?

In 1990, the New York Courts adopted DR 4-101(C)(5) which permitted, but did not require, attorneys to implicitly reveal client confidences or secrets by withdrawing a prior written or oral representation "previously given by the lawyer and believed by the lawyer still to be relied upon by a third party where the lawyer has discovered that the ... representation was based on materially inaccurate information or is being used to further a crime or fraud."⁷ Thereafter, two NYSBA ethics committee opinions interpreted this *Code* provision, in conjunction with D.R. 7-102(B)(2), to require a lawyer to withdraw a prior false representation.⁸ Commonly referred to as the "noisy withdrawal exception," this provision allowed only implicit disclosure of confidential information when making the withdrawal, as in "I withdraw my opinion letter regarding X matter." The *Rules*, in 1.6(b)(3), similarly permit withdrawals of legal opinions but without reference to the manner of the withdrawal. There is debate as to whether the practitioner now has the option to make an explicit withdrawal such as "I withdraw my opinion letter regarding X matter because Y is materially inaccurate information." One prominent ethics law professor has opined that the implicit withdrawal standard remains intact and lawyers cannot explicitly state the information being withdrawn.⁹ In its comments to the *Rules*, NYSBA follows this view interpret-

ing Rule 1.6(b)(3) to require attorneys to withdraw false statements without explicit disclosure of client confidences except where necessary to prevent a crime.¹⁰

Rule 3.3 Conduct Before a Tribunal

A. Under the Code, an attorney's duty of candor was subordinate to the duty of client confidentiality.

The language of the *Rules* seems to impose a new and significant duty on attorneys to disclose confidential information to a tribunal. As New York's practitioners well know, the *Code* imposed no duty of disclosure on lawyers to reveal and correct prior false statements of material fact or law made by either the lawyer or his/her client if such a disclosure involved a client confidence. D.R. 7-102(B)(1) provided that a lawyer must reveal a fraud to the tribunal "except where the information is protected as a confidence or secret." Since a client "confidence or secret" includes any information that when revealed would be detrimental and embarrassing to the client, and revelation of a false statement is clearly detrimental and embarrassing, the exception swallowed the rule. In effect, as described by one writer, the *Code* was interpreted such that an attorney's duty of candor to a tribunal was subordinate to his/her duty of client confidentiality.¹¹

B. The Code required a different result in cases of future perjury.

The Court of Appeals issued two decisions in the past decade interpreting the *Code* to authorize an attorney to make limited disclosures to avoid participating in his or her client's future perjury. In *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001), the Court of Appeals affirmed the denial of a criminal defendant's claim of ineffective assistance of counsel where the attorney advised the court in chambers that the defendant wished to take the stand and was about to commit perjury. The defendant was permitted to testify in narrative form and the attorney did not mention the testimony in summation. The jury never heard the disclosure. New York's highest court declared that "an attorney's duty to zealously represent a client is circumscribed by an 'equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds upon the court.'"¹²

In *People v. Andrades*, 5 N.Y.3d. 355, 795 N.Y.S.2d 497 (2005), the attorney first sought to withdraw from representation because of an "ethical dilemma," but refused to elaborate. The prosecutor opposed the application to withdraw because of the age of the case and the Judge denied the application. Thereafter, the defendant was allowed to testify in narrative form only, with the attorney making no closing argument. While the reason for the attorney's ethical dilemma was obvious, it was also implicit, and consistent with the "noisy withdrawal" remedy discussed above. The Court of Appeals affirmed the denial of defendant's claim of ineffective counsel.

Significantly, both cases dealt with an attorney's responsibility with respect to future perjury about to be offered to the court. Until the *Rules*, there was no authority requiring an attorney to disclose confidential information regarding his or her client's past perjury.

C. The rules allow occasions where the duty of candor trumps client confidentiality.

Clearly the new Rule 3.3 imposes a duty on New York lawyer's to take remedial steps if the lawyer has made a false statement of material fact or law to a tribunal [Rule 3.3(a)(1)] or if the lawyer comes to know of the falsity of material evidence offered to a tribunal by his client or a witness called by the lawyer, [Rule 3.3(a)(3)], even if such steps will reveal confidential information otherwise protected by Rule 1.6. Thus, the duty of client confidentiality presented in Rule 1.6 is explicitly superseded by the requirements contained in Rule 3.3(a). Rule 3.3(b) also requires remedial measures when a lawyer knows that his/her client is intending to engage, is engaging or has engaged in criminal or fraudulent conduct related to a proceeding before a tribunal. The remedial measure imposed by the *Rules* relate to tribunals which is broadly defined in the *Rules* as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity."¹³

Practically speaking, what form these remedial measures should take is not directly addressed in the *Rules*. Rules 3.3(a)(3) and 3.3(b) both state that the remedy for false, fraudulent or criminal acts relating to the proceeding may include "if necessary, disclosure to the tribunal," but provide no further guidance. The NYSBA Comments to the *Rules* suggests that the initial move is to persuade the client to correct the false act, and failing any remediation by the client, the attorney must either withdraw from representation (*i.e.*, the former *Code* method) or if such withdrawal will not remedy the effect of the false evidence, overtly disclose to the tribunal the false evidence.¹⁴ One prominent ethics commentator has opined that only the third method is likely to work because the court has the ability under Rule 1.6(b)(6) (which permits disclosure of confidential information with respect to a court order) to question the reasons for the withdrawal.¹⁵ Thus, a lawyer under questioning from the court would be required by the *Rules* to reveal the client confidences to remediate false conduct before the tribunal. In contrast, other commentators have countered that the permissiveness of Rule 3.3 will result in increased false statement to courts because clients will not fully trust their lawyers and fail to confide in them truthfully, eliminating the ability of lawyers to discourage perjury or other false acts in court.¹⁶

III. NYSBA Ethics Opinion 837

A. A lessening of the standards of Rule 3.3?

The foregoing suggests that the *Rules* lead to a different result than would have been the case under the *Code*, and that an attorney, who learns of his or her client's false statement to a tribunal, must remedy the falsehood by bringing it to the attention of the tribunal. That was the situation confronting the attorney who made the inquiry addressed in NYSBA Opinion 837. There, the attorney's client, a party to arbitration, testified about a document. The document was admitted into evidence based upon this testimony. In a subsequent conversation between the client and the attorney, the client informed the attorney that the document was a forgery and that

some of the client's testimony about the document was false. The attorney inquired whether there was a requirement to disclose the forgery to the tribunal and that some of his client's testimony was false. He also suggested that in lieu of such disclosure, he be permitted to inform the tribunal and opposing counsel that the document and related testimony were being withdrawn without providing any further explanation. Essentially, he asked that the same procedure be followed as had the situation been brought under the *Code*.

The opinion noted the differences in the *Code* and the *Rules* with respect to disclosure of confidential information, as discussed above. The ethics committee assumed that the evidence was material when the attorney came to know of its falsity. On the other hand, the ethics committee noted that CPLR § 4503(a)(1) relating to the attorney-client privilege, was legislatively enacted, and hence takes precedence over court rules such as the *Rules*. Moreover, in the criminal sphere, Rule 3.3's mandate to disclose confidential information may be limited or prohibited by constitutional guarantees in the Fifth Amendment (self-incrimination) and Sixth Amendment (effective assistance of counsel). Although the opinion did not delineate the scope of the *Rules* in relation to the constitutional and statutory mandates, the ethics committee was reluctant to interpret Rule 3.3 in a vacuum.

The ethics committee noted that Rule 3.3 requires an attorney to take reasonable remedial measures to remedy the false statements, but disclosure to the tribunal is to be taken "only if necessary." It further noted that CPLR § 4503(a) imposed a continuing obligation on the attorney not to disclose attorney-client privileged communications adverse to the client. With this in mind, the committee approved the attorney's suggestion that the evidence be withdrawn without making any disclosure of the truth or falsity of the withdrawn evidence. The opinion would thus appear to have come to the same result as had the inquiry been made under the *Code*.

B. Was the opinion correctly decided?

On the narrow question presented in the opinion, the committee's decision appears eminently correct and reasonable. After all, Rule 3.3 specifically calls for reasonable remedial measures, and in this particular case, where the client apparently agreed with the remedy, withdrawal of false testimony and documentation could be accomplished, consistent with the plain language of Rule 3.3, without explicit disclosure of their falsity. However, by referring to legislative and constitutional provisions outside the *Rules*, the committee suggests that in a different case, an attorney proceeding in accordance with the plain language of Rule 3.3 would be violating other protections for his client. Indeed, after raising the possibility that Rule 3.3 conflicts with the attorney-client privilege, the committee's statement that the application of the attorney-client privilege is "beyond the Committee's purview," while perhaps technically correct, is remarkably unhelpful. In short, if in the proper case, disclosure to a tribunal is required by the plain language of Rule 3.3 to remedy a false statement or fraud, then an attorney should not be left in the limbo of guessing whether such required disclosure might nevertheless run afoul of statutory or constitutional provisions.

To take just one example, if one were to suppose that the client had objected to the attorney's suggestion of withdrawing the evidence in question and proceeded in the case *pro se*, would the attorney have a duty to advise the tribunal that his client's testimony was false? Under the *Code*, such information was protected from disclosure as a client's confidence or secret.¹⁷ On the other hand, under Rule 3.3, disclosure would be required, as no other course would result in the tribunal not being misled by the testimony. Yet the committee's reference to superseding legislative and constitutional provisions suggests that an attorney cannot simply follow the dictates of Rule 3.3.

It is certainly a matter of debate as to whether the *Rules* correctly balance the attorney's responsibilities to the truth and the proper functioning of the judicial system with the responsibilities to zealously represent the client. Both are important and their balance is not always obvious. On the other hand, what should be obvious, is that attorneys require clear guidelines of their responsibilities. If the ethics committee finds that the Rule 3.3 is inadequate in relation to an attorney's conflicting constitutional and statutory obligations to the client, then Rule 3.3 should be amended to reflect those additional considerations.

Endnotes

1. 22 N.Y.C.R.R. § 1200 *et. seq.*

2. N.Y. State 837 (2010).

3. Compare Rule 1.6 with D.R. 4-101(A).

4. *Id.*

5. *Id.* at Rule 1.0(j).

6. While arguably this exception was implied under the *Code*, it is now explicit under the *Rules*. Compare Rule 1.6(b)(4) with D.R. 4-101.

7. D.R. 4-101(C)(5).

8. N.Y. State 797 (2006) (lawyer must withdraw petition for letters testamentary upon learning client lied in "oath" supporting petition); N.Y. State 781 (2004) (lawyer must withdraw certification of matrimonial client's financial statement upon discovering client omitted assets).

9. Roy Simon, *New York Professional Responsibility Report*, www.nypr.com/New-NY-Rules-of-Professional-Conduct.php, at Rule 1.6(b)(3) (2009).

10. NYSBA Comments to the *Rules*, Rule 1.6 Comment [6E] (as amended through April 15, 2011) (NYSBA's Comments are not included in the *Rules* promulgated by the Appellate Divisions of the Supreme Court, effective April 1, 2009).

11. *Attorney Professionalism Forum*, NYSBA Journal, at 48 (Sept. 2009).

12. *DePallo*, 96 N.Y.2d 437 (quoting *Nix v. Whiteside*, 475 U.S. 157 (1986)).

13. Rule 1.0(w).

14. NYSBA Comments to the *Rules*, Rule 3.3 Comments [10]-[11]. Accord N.Y. Cty Lawyers' Assoc. Comm. on Professional Ethics Opinion No. 741 (March 1, 2010).

15. Simon, *supra*, at Rule 3.3(a)(3) and (b).

16. *Id.*

17. Of course, withdrawal by the attorney under the *Code* may result in an "implicit" disclosure, but that is qualitatively different than a disclosure revealing a client's perjury.