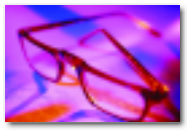

Perjury Pitfalls

There are lines that lawyers cannot cross in their endeavor to increase "the bottom line," and their duty of candor toward the court cannot be sacrificed to please a client. This is the lesson learned in a recent case from New York demonstrating the limits of advocacy in civil matters.[1]

In the case,[2] the plaintiff filed a trademark infringement suit against another company, alleging that the defendant was using plaintiff's trade name. The defendant submitted an affidavit from one of its officers insisting it had been selling a product using the name since 1993, a year before plaintiff had started using the name. When the plaintiff pointed out that the label supposedly used by defendants since 1993 contained a bar code that did not then exist as well as a telephone number with an area code that did not come into use until several years later, defendant's counsel resigned. The New York firm Pennie & Edmonds then substituted as defendants' counsel.

Pennie & Edmonds subsequently submitted another affidavit from the same officer, which asserted that defendant had used two different labels, one of which had been in use only since 1999 and which had been mistakenly submitted to the court the first time. The "real" label was then offered as being the one in use since 1993.

The plaintiff revealed that the label allegedly used since 1993 had a trademark registration that had not been issued until 1996. The court found the defendant's current story to be as false as the first and issued an order *sua sponte* directing Pennie & Edmonds to show cause why it should not be sanctioned under Rule 11 for permitting its client to submit a false affidavit.

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The court's opinion revolves around Rule 11 sanctions but can just as well be a discussion of the ethical principles found in ER 3.3(a)(4), which prohibits a lawyer from knowingly offering material evidence that the lawyer knows to be false.[3]

The court concluded that the firm could not have had a reasonable belief that the statements in its client's affidavit were true. "[A]ll of the facts available … should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on [the client's] statements."

The court required the firm to deliver the opinion to each of its lawyers with a memorandum directing each lawyer to adhere to the highest ethical standards—even if it results in the loss of a client.

A recent Arizona ethics opinion[4] is required reading for any Arizona lawyer who has a notion that he or she is being lied to by a client or who thinks the client plans to lie or has lied to others, including a court.

It says that a lawyer's duty of candor to the tribunal (ER 3.3) overcomes the same lawyer's ethical duties to preserve client confidences (ER 1.6), including cases in which the client has terminated the lawyer's services. Under Arizona's new ER 3.3, a lawyer who learns he or she has offered false evidence must first "remonstrate" with the client confidentially, advise the client of the lawyer's duty of candor and seek the client's cooperation in withdrawing or correcting the false statements or evidence. If that fails, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."[5]

This is a new and more rigorous standard than former ER 3.3, which merely forbade the lawyer from "assisting a criminal or fraudulent act by the client." In those cases, withdrawing from a civil case would usually resolve the problem. Now, however, remedial measures are required, even in cases in which the lawyer has withdrawn or been fired. These would include moving to withdraw the offending evidence, with or without the client's permission, and/or disclosing the matter to the court.

The opinion also discusses the duration of these responsibilities. The obligation to take remedial measures survives the end of an attorney–client relationship; it terminates only when the "tainted proceedings" have concluded.[6] This generally means that the time for appeal or other review of the case has been concluded and that judgment in the case is final. As a practical matter, this means that the client cannot prevent you from rectifying his transgressions by simply firing you, and you are not absolved of your ER 3.3 duties because you are no longer "the lawyer." Your duties of candor to the tribunal are personal, and last until the proceedings have been finally adjudicated.

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endnotes

1. For the situation in criminal matters, *see* David Dodge, *When Your Client Wants to Lie*, ARIZ. ATT'Y, Aug.–Sept. 1998, at 12.
2. *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 2002 WL 59434 (S.D.N.Y. 2002).
3. ER 1.0 (Terminology) provides that "(f) 'knowingly', 'known' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *See* Rule 42, ARIZ.R.S.CT.
4. Ariz. Ethics Op. No. 05-05 (July 2005).
5. *See* cmt. 10 to ER 3.3.
6. *See* cmt. 13 to ER 3.3.