

Nicole Hyland
(212) 826-5552
nhyland@fkks.com

New Ethics Opinion Discusses Duty to Disclose Fraud Against a Tribunal

In New York, the only mandatory exception to the duty to preserve client confidences is contained in Rule 3.3 of the Rules of Professional Conduct. Rule 3.3(a)(3) provides that "If a lawyer, a 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." This obligation trumps a lawyer's duty of confidentiality to his or her client.

The Ethics Committee of the New York City Bar Association has issued an [opinion](#) that provides guidance on how to interpret and apply this rule. Specifically, the opinion addresses (1) how long the obligation to correct the fraud lasts and (2) what measures are required to comply with the obligation.

The opinion notes that lawyers are not required to correct all false evidence -- only evidence that is "material." Whether false evidence is "material" depends on a variety of "factors relevant to the ruling in the particular matter." The opinion suggests, however, the main criteria for determining materiality is "whether the evidence is of a kind that could have changed the result" in the proceedings.

The opinion also notes that the lawyer's obligation under Rule 3.3 "survives 'the conclusion of the proceeding,'" but does not continue "forever." Rather, the duration of the duty is tied to the point where "reasonable remedial measures" are no longer available.

The opinion discusses at length what types of remedial measures are reasonable under the circumstances.

The full text of the opinion can be found at: <http://www.nycbar.org/ethics/ethics-opinions-local/2013opinions/1780-formal-opinion-2013-02>

[In the interests of full disclosure, I am a member of the NY City Bar Ethics Committee that issued this opinion]

Originally published on the Legal Ethics Forum Blog, June 7, 2013