CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# WHAT REMEDIAL MEASURES CAN A LAWYER TAKE TO CORRECT FALSE STATEMENTS UNDER NEW YORK'S ETHICAL RULES?

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This advisory analyzes an immigration lawyer's ethical duty in New York upon realizing that a previously filed application for immigration benefits contained false or fraudulent information or a material omission.While a lawyer must competently advocate on behalf of a client, he or she must also represent the client within the bounds of the law. Therefore, knowingly assisting a client in the filing of a fraudulent application, or an application that contains false statements or evidence, violates the ethical obligation of candor toward a tribunal. Such an act may also criminally implicate the lawyer and client. For example, 18 USC §1001, the federal penal provision which covers a broad range of offenses, provides:

a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully—

1. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
2. makes any materially false, fictitious, or fraudulent statement or representation; or
3. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term

of imprisonment imposed under this section shall be not more than 8 years.

Since it is obviously unethical to assist a client in preparing an application that contains false or fraudulent information, this advisory instead examines what steps the lawyer must take after belatedly realizing that he or she in good faith prepared and filed such an application on behalf of the client.

On April 1, 2009, New York replaced its existing professional responsibility rules with the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), with some modifications. These rules were promulgated as Joint Rules of the Appellate Division of the U.S. Supreme Court, effective April 1, 2009, (New York Rules or Rule). They supersede the former Disciplinary Rules of the Code of Professional Responsibility. The new rules can be found on the websites of the New York Unified Court System at www.courts.state.ny.us/rules/jointappellate/NYRulesofProfConduct_09.pdf and of the New York State Bar Association at www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalCondu ct4109.pdf. Although the New York State Bar has issued comments to the new rules, they have not been officially incorporated by the Appellate Divisions of the Supreme Court in New York. The document with both the rules and comments is available at www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments(April12009).pdf. You can also visit www.nysba.org and click on the relevant links to find these documents. While this article refers to New York's Rule 3.3, it should also be relevant to lawyers in other jurisdictions, as the New York Rules, especially Rule 3.3, are similar to the ABA Model Rules.

## NEW YORK RULE 3.3

New York Rule 3.3, entitled "Conduct Before a Tribunal" provides:

(a) 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 controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
3. offer or use evidence that the lawyer knows to be false. 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal 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.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. New York Rule 1.6 prohibits a lawyer from knowingly revealing confidential information. "Confidential information" includes information protected under the attorneyclient privilege, the attorney work product doctrine as well as secrets protected under the fiduciary duty of an attorney towards the client under ethical rules. Rule 1.6 accounts for both these sources and defines such information gained during or relating to the representation of a client as (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. As will be noted, infra, there are several exceptions to this rule.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

1. fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
2. engage in undignified or discourteous conduct;
3. intentionally or habitually violate any established rule of procedure or of

evidence; or

4. engage in conduct intended to disrupt the tribunal.

New York Rule 3.3 makes several references to the need of a lawyer to take remedial measures. New York Rule 3.3(a)(1) states that " lawyer shall not knowingly … fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." New York Rule 3.3(a)(3) requires the lawyer to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal" when the lawyer comes to know of the falsity of material evidence that he or she may have offered on behalf of a client or a witness. New York Rule 3.3 (b) further states, " lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduction related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

While the terms "false" and "fraudulent" are both used in New York Rule 3.3, according to the definition of "fraud" or "fraudulent," in New York Rule 1.0(i), these terms denote:

> conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

Thus, unlike the term "fraudulent," which requires an intent to deceive and detrimental reliance by another, the term "false," according to Black's Law Dictionary, denotes something that is simply untrue. Something can be false through knowing and intentional conduct as well as through negligence or an innocent mistake. New York Rule 3.3 imposes remedial obligation on an attorney not just when something that the attorney offers is fraudulent, but also when it is false.

Moreover, the terms "knowing," "knowingly" and "knows" denote actual knowledge of the fact in question.  New York Rule 1.0(k). Thus, according to the New York State Bar's Comment 7 to Rule 3.3, " lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."  Yet, a lawyer is permitted to refuse to offer testimony or other proof that the lawyer

reasonably believes to be false, according to Comment 9 to New York Rule 3.3. Yet, according to the definition, " person's knowledge may be inferred from circumstances." Id. Under the doctrine of "conscious avoidance," or using a more apt description, the "ostrich" doctrine, knowledge may be inferred from a combination of suspicion and indifference to truth or if one made a deliberate effort to avoid guilty knowledge by burying one's head in the sand. *See U.S. v. Draves,* 103 F.3d 1328 (7th Cir. 1997); *Cf. U.S. v. Catano-Alcate,* 62 F.3d 41 (2d Cir. 1995) (doctrine of "conscious avoidance" permits an inference of actual knowledge of a particular fact if the person is aware of a high probability of the fact's existence, unless the defendant actually believes that it does not exist). At times, a lawyer may know that the testimony is false even when the client or witness says it is true, especially when the lawyer has a firm factual basis to believe facts contrary to the proposed testimony. *See* Restatement (Third) of the Law Governing Lawyers §120 Cmt. (2000). Immigration lawyers have also been prosecuted successfully under the "conscious avoidance" doctrine. *U.S. v. Abrams,* 427 F.2d 86 (2d Cir. 1970) (although the attorney may not have been specifically aware of his client's plan for departure, the jury could have found that the attorney acted with reckless disregard of whether statements in an affidavit supporting an extension were true and that he acted with a conscious purpose to avoid learning the truth); *U.S. v. Sarantos,* F.2d 877 (2d Cir. 1972) (rejecting Sarantos' contention that an attorney must investigate "the truth of his client's assertions" or risk going to jail, the court stated that an attorney should not counsel others to make statements in the face of obvious indications of which he is aware that those assertions are not true); *U.S. v. Sheldon Walker,* 191 F.3d 326 (2nd Cir. 1999) (rejecting attorney's contention that responsibility for a false application rested on his employees as he deliberately remained ignorant of their conduct). *See also* H. Joe, "Ethics in Immigration Law: Immigration Benefit Fraud and the Peril of Conscious Avoidance," *Immigration Briefings,* No. 02-6, June 2002. It should be noted that a material omission can also fall under this rubric. *Cincinnati Bar Association v. Nienaber,* 887 N.E.2d 678 (Ohio 1997) (lawyer violated Code analogue of Rule 3.3 prohibiting false statements of fact when he did not reveal information about his record when asked by the court at sentencing). This case and many others relevant to what constitutes a material omission are cited in the Annotated Model Rules of Professional Conduct, Fifth Edition, Center for Professional Responsibility, American Bar Association, p. 333. While it is true that the lawyer must resolve any doubts regarding the veracity of testimony or

evidence in favor of the client, the lawyer cannot ignore an obvious falsehood, according to Comment 7 to New York Rule 3.3.

How does an immigration lawyer take remedial measures after belatedly learning that the client committed fraud under his or her watch? Take the example of a lawyer who prepared and submitted an application for political asylum with either the Department of Homeland Security (DHS) or the immigration court on behalf of a client in good faith. After submitting the application, the client reveals to the lawyer that certain information that indicated on the application was fabricated. Since the lawyer may now have actual knowledge of the fraud, New York Rule 3.3 requires the lawyer to remonstrate with the client to correct the false statement. If the client refuses to correct the false statement, New York Rule 3.3, includes as a remedial measure, "disclosure to the tribunal." Indeed, New York Rule 3.3(c) puts a higher emphasis on the lawyer's duty of candor toward the tribunal over the lawyer's duty to maintain a client's confidences under New York Rule 1.6. In the event that a lawyer knows of the client's fraud, New York Rule 3.3(c) states that the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal" notwithstanding that the information is protected by Rule 1.6. It should be further noted that Rule 1.6(b)(1) and (2) also contain various exceptions, and the most notable allow the lawyer to use or reveal confidential information that the lawyer believes is reasonably necessary to prevent reasonably certain death or substantial bodily injury or to prevent the client from committing a crime. Moreover, Rule 1.6(b)(3) also allows the lawyer to withdraw a written or oral opinion or representation if relied upon by third parties, where the lawyer has discovered that it is based on materially inaccurate information or is being used to further a crime or a fraud.

Finally, it should be noted that "tribunal" is broadly defined to encompass not just a court but even an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w) defines the term as follows:
"Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. The definition of "tribunal," and its reference in Rule 3.3 with respect to an administrative agency still

connotes a court-like adversarial proceeding involving two parties. At issue is whether offices within DHS, such as USCIS, along with the Department of Labor and Department of State, would be considered "tribunals" under this definition. The definition of tribunal goes on to state, " legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting the party's interests in a particular matter." There is no question that a proceeding before an immigration judge or the Board of Immigration Appeals would be before a "tribunal," but there is ambiguity as to whether it would extend to the above agencies too as it is unclear whether there is a neutral official who will render a legal judgment when one files an application with USCIS or with a U.S. consulate. As a practical matter, though, if an attorney knowingly assists a client in filing a false application, such conduct will likely trigger criminal liability regardless of whether the application was made to a tribunal or not. An attorney is also required to be truthful to third persons, governmental or otherwise, under Rule 4.1. Moreover, as noted, Rule 1.6(b)(3), while not mandating it, allows a lawyer to withdraw a written or oral opinion or representation relied upon by a third person (even if not with a tribunal), where the lawyer belatedly learns of its falsity. For purposes of the discussion in this article, the author assumes that the above noted agencies are tribunals as a similar duty of candor applies to immigration agencies under parallel ethical rules in 8 CFR §1003.102(c) and 8 CFR §292.3(b), infra, although the requirement is to "take appropriate remedial measures" without specific requirement to disclose to the tribunal.

## Change From Prior Rule

Rule 3.3 changes the prior New York Disciplinary Rule (DR) 7-102(B)(1), which stated:
A lawyer who receives information clearly establishing that:

> The client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a confidence or secret* (emphasis added).

While DR 7-102(B)(1) also required the lawyer to take remedial measures upon learning of the client's fraud, it contained a big exception, which effectively

swallowed the rule. A lawyer was not required to reveal the fraud to the tribunal when the information was protected as a confidence or secret. According to Professor Roy Simon, "Only rarely will a lawyer have information about a client's fraud that will not be protected as a confidence or secret." Simon's New York Code of Professional Responsibility Annotated, 2008 Edition, Thomson/West, p. 1238 (hereinafter "Simon's New York Code"). Yet, despite DR 7-102(B), several efforts were made by bar associations and courts to water down the exception. For instance, in N.Y. State Bar Opinion 781 (2004), a lawyer was permitted to reveal a client's fraud to the tribunal if it fell under one of the exceptions of the lawyer's duty to maintain the confidences of a client. One exception was DR 4-1-101(5), which allowed a lawyer to reveal confidences "in withdrawing a written or oral opinion or representation previously given by the lawyer and 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." *Id.* Professor Simon also discusses *People v. DePallo,* 96 N.Y.2d 437 (2001), which held that a criminal defense lawyer's revelation to the court that his client committed perjury on the stand was consistent with DR 7-102(B). This exception to confidentiality is now encapsulated in new Rule 1.6(b)(3), *supra*, and provides further legal basis for a lawyer to reveal a client's fraud to the tribunal.

Because the exception in DR 7-102(B) had been diluted even prior to the promulgation of New York Rule 3.3, it is now clear that New York Rule 3.3, effective April 1, 2009, obligates a lawyer to take remedial measures, including revealing to the tribunal, in case the lawyer knows that the client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct." See New York Rule 3.3(b). Moreover, Rule 3.3 does not limit the disclosure requirement only to fraudulent conduct, which requires conduct that results in detrimental reliance by another; it also requires a lawyer to take reasonable remedial measures with respect to the offering of false evidence. N.Y. State Bar Op. 781 (2004) ("Fraud" as defined in the Code "does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another"). The New York rule similarly defines "fraud" at 1.0(h).

## RULES OF EOIR GOVERNING PROFESSIONAL CONDUCT

In addition to the state rules governing the professional conduct of lawyers, 8 Code of Federal Regulations (CFR) §1003.102 provides independent grounds that give the Board of Immigration Appeals (BIA) power to impose disciplinary sanctions against a practitioner who violates them. With respect to fraudulent conduct, 8 CFR §1003.102(c) empowers the BIA to sanction a practitioner who:

> Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures….

8 CFR §1003.102(c) differs from New York Rule 3.3 as it includes both a knowing and a "reckless disregard" standard. New York Rule 3.3 only implicates a lawyer if the lawyer "knowingly" offers a false statement on behalf of the client and precludes implicating a lawyer who was merely suspicious that the evidence or statement submitted was false. On the other hand, 8 CFR §1003.102(c)'s "reckless disregard" element may be superfluous for even if the standard was limited to "knowingly," the lawyer may still be implicated if under the "conscious avoidance" doctrine there were sufficient facts for the BIA to find that the lawyer ought to have known about the false submission. However, 8 CFR §1003.102(c) is in another sense narrower than New York Rule 3.3 as it only requires the practitioner to take appropriate remedial measures who has come to know of the falsity of the evidence that was offered. Unlike Rule 3.3, it does not state that the lawyer may also reveal the falsity of the evidence to the tribunal.

Notwithstanding 8 CFR §1003.102(c)'s silence regarding whether a lawyer ought to disclose to the tribunal, the fact that it requires the lawyer to take "appropriate remedial measures" would permit the lawyer to disclose to the tribunal after all other measures that the lawyer undertook failed, which included remonstrating with the client in confidence. At times, mere withdrawal from the representation may not remedy the client's illegal conduct. On the other hand, a "noisy withdrawal," where the lawyer does not directly reveal that

the withdrawal is motivated by the client's fraud, but which results in the tribunal being able to guess the reason, might also be appropriate under certain circumstances.

Practitioners may be guided by the New York State Bar's Comment 10 to Rule 3.3, This comment is identical to Comment 10 to ABA Model Rule 3.3. as follows:

> A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of 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 advocate must take further remedial action. 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 is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

Comment 11 is even more forceful:

> The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truthfinding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer

into being a party to a fraud on the court.

Here are a few words of advice on how an immigration practitioner can prevent fraud or take remedial measures. Always give the client the impression that you will never tolerate or permit fraud. Better still is to know the law so well that you can counter any suggestion of illegal or inappropriate conduct with a correct and ethical legal approach. Suppose you are approached by a client who has been placed in removal proceedings after a worksite raid, and this client suggests that she can get married to a U.S. citizen friend who is willing to "help" her out of her immigration troubles. After some more probing, you know that this marriage will be entered into solely for purposes of obtaining an immigration benefit. While some unconventional marriages can still pass muster, *See Matter of McKee,* 17 I&N Dec. 332 (BIA 1980) (marriage was not a sham solely because the parties to the marriage were no longer living together). this one will not in your expert opinion. Your gut also tells you that the marriage will be a sham and you immediately dissuade the client from going through with it. You advise the client about the devastating consequences, especially the imposition of a bar on the approval of a future petition under INA §204(c), inadmissibility for fraud under INA §212(a)(6)(C)(i), and criminal liability to boot. While a lawyer cannot counsel a client to engage in conduct that the lawyer knows is illegal or fraudulent, New York Rule 1.2(d) permits the lawyer to discuss the legal consequences of any such proposed course of conduct with a client. On the other hand, since you are a lawyer with mastery over your subject area, you advise your client about better options, which may not be so readily obvious. You find that the information obtained regarding your client's nationality and immigration status during the raid was an egregious Fourth Amendment violation, and thus grounds to suppress and terminate proceedings. The writer refers readers to an interesting recent decision of immigration judge M. Strauss in New Haven, CT, where removal proceedings were terminated due to egregious constitutional violations, http://drop.io/xrkcjn8. You may also find that your client has another basis for relief lurking on the horizon, such as an I-130 petition that was filed by a lawful permanent resident parent prior to the sunset of INA §245(i) under the family 2B preference, and you may be able to seek continuances until the priority date becomes available. A noncitizen who was the subject of an immigrant visa petition or a labor certification, filed prior to April 30, 2001, remains "grandfathered" to adjust status under §245(i), even if he or she is being

sponsored through another petition or labor certification filed subsequent to April 30, 2001. If the petition or application was filed after January 14, 1998, the individual, to claim eligibility under §245(i) must also show that he or she was physically present on December 21, 2000. *See also* 8 CFR §245.10. For guidance on requesting a continuance based on pending relief, *see Matter of Hashmi,* 24 I&N Dec. 785 (BIA 2009). On the specific topic of continuances until a priority date becomes current, *see Ahmed v. Gonzales,* 465 F.3d 806 (7th Cir. 2006).

Finally, if the client has been in the United States for 10 years prior to the issuance of the notice to appear, and meets other conditions, she could potentially apply for cancellation of removal under INA §240A(b), if she can demonstrate exceptional and extremely unusual hardship to her permanent resident mother.

What if you in good faith filed the marriagebased I-130 petition on behalf of the client, and now know for certain, that the marriage was not bona fide? You remonstrate with the client privately and seek to withdraw the I-130 petition. Since New York Rule 3.3 requires the lawyer to only take reasonable remedial measures, the withdrawal of the I-130 petition without disclosing the reason for the withdrawal may be appropriate under the circumstances. If the client agrees to withdraw the petition, you also need to warn the client that INA §204(c) imposes a bar to the approval of a future petition, notwithstanding the withdrawal, as §204(c) also penalizes one who has sought to apply for a benefit through a sham marriage. The I-130 petition filed by the parent would in any event be automatically voided upon your client's marriage to the U.S. citizen as the family 2A category is only applicable to single sons and daughters. 8 CFR §205.1(a)(3)(i)(I). On the other hand, she would still be eligible for cancellation of removal under INA §240A(b), and although the demonstration of good moral character over the past 10 years might be undermined, the client can demonstrate mitigating circumstances that she quickly withdrew the I-130 petition upon realizing her error and got no further benefit from it. While providing an in depth analysis on strategies for clients in removal proceedings is beyond the scope of this article, this commentary at least provides a demonstration of how a good lawyer can still ethically represent a cooperative client in difficult and sticky situations.

But what if the client decides not to withdraw the I-130 petition after all your efforts? You as a lawyer cannot possibly continue with the representation, but what is your obligation regarding candor to the tribunal? New York Rule 3.3(b)

requires you to make disclosure to the tribunal. If you do not want to flat out state that the I-130 is fraudulent, can you make a "noisy" withdrawal, such as letting the court know that as its officer, you are ethically unable to continue representation on the I-130 petition? This is obviously difficult to answer. If you feel that a "noisy" withdrawal will signal to the immigration judge the reason for your withdrawal and will put him or her on notice about the fraud in the I-130 petition, you may have taken necessary measures to rectify the fraud. Also, because 8 CFR §1003.102(c) does not require a lawyer to make disclosure to the tribunal, a "noisy" withdrawal may be an appropriate compromise in light of the conflict between the federal and the New York rule. Even Comment 15 of the New York State Bar to New York Rule 3.3 states, "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6."

Finally, it is worth mentioning that while the lawyer's duty of candor to the tribunal is paramount, he or she is also required to seek the objective of the client.  New York Rule 1.1(c)(1). This tension should result in thoughtful ways in which the attorney's duty of candor can be fulfilled, and in a manner least damaging to the client. This may involve, for example, timing of the "noisy withdrawal" or other notification to the tribunal at an effective time, perhaps before reliance by the tribunal, but when another avenue for relief has ripened for the client. Or in the case of the political asylum applicant described earlier in the article, this may involve contextualizing the rectification of the record in a manner least damaging to the client's case. For example, if the asylum claim otherwise includes truthful elements, the withdrawal of the damaging evidence should be presented at the same time and as part of a packet of documentation or evidence that is truthful and otherwise supportive of the client's claim.

## Duration Of Obligation

How long is the lawyer's obligation? What if the former client in the above example meets you after 20 years in a bar, long after she has become a U.S. citizen, and tells you that the marriage that supported the I-130 petition was a sham? According to Comment 12A of New York Rule 3.3, a lawyer's obligation to take reasonable remedial measures is "limited to the proceeding in which the

lawyer has offered or used the evidence in question." Nor is the obligation to remedy applicable, according to Comment 12A, where another lawyer is retained to represent a person in an investigation or proceeding concerning the person's conduct in a prior proceeding.

Comment 12A is not so clear. Does this mean that an attorney is relieved of this responsibility once the proceeding is over before that particular tribunal, and not a further proceeding such as an appeal? If this were the case, an attorney could perpetuate the fraud during appeal after it had first been perpetrated in the lower tribunal. Perhaps Comment 12A could be read more to define the scope of an attorney's obligation under the rule, i.e., (i) the duty is limited to the actual proceeding in which the false information has been provided and (ii) the duty would not extend to a new attorney who is hired to represent someone in connection with his or her conduct in the prior proceeding. Assume for example, that in the above hypothetical the former client who has become a U.S. citizen wishes to sponsor her mother for permanent residency, and instead of in the bar, she discloses to you after you have filed the I-130 petition to sponsor her mother that her marriage supporting the previous I-130 petition was a sham. Based on Comment 12A, it seems that the attorney would not be required to take remedial action either by disclosing the misrepresentation to the tribunal in the new case or by going back to the prior tribunal, since the duty to take remedial action ended once the prior case became final. Suppose the client was still a permanent resident and retained you to represent her in filing an N-400, Application for Naturalization, and revealed the prior fraud with respect to the I-130. The author believes there would still be an obligation to disclose the fraud on the N-400 notwithstanding the New York rule, because the N-400 specifically asks the following questions:
1. Have you ever given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal?
2. Have you ever lied to any U.S. government official to gain entry or admission into the United States? But this issue is still up in the air. There is nothing in Rule 3.3, adopted by the New York courts, that suggests a temporal limitation, unless the phrase in Comment 12A "limited to the proceeding" means not only the subject matter of that proceeding but also the time period in which the proceeding takes place. It is possible that a court might hold that the obligation extends in perpetuity although the results would be quite ridiculous if the line

is not drawn at the time the proceeding ends. Suppose a lawyer represents a client who derived citizenship at birth from a parent who the lawyer had also represented and who, it turns out, had obtained his citizenship inappropriately. Would the lawyer be required to rectify this issue pertaining to the client's parent at the time the current client, the daughter, retains the lawyer to file an I-130 petition for a relative? As the above example illustrates, there are very good policy reasons to limit the obligation to the end of the proceeding itself. As time passes, the undoing of previously committed fraud implicates the status and rights of other people, in this case the daughter. The imposition of such a limitless obligation on an attorney would also diminish the purpose of the ethics rules themselves in preventing fraudulent representations to the tribunal. In this example, the lawyer acted in good faith before the tribunal even though the client may have bamboozled him. Also, there are other processes in place that can rectify the situation, such as the government's ability to commence denaturalization proceedings. And last, there are reasons to end the obligation at the conclusion of the proceeding similar to why statutes of limitation exist. Over time, witnesses and documents may not be available and memories fade. Indeed, Comment 13 to ABA Model Rule 3.3 is clear:

> A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

## CONCLUSION

Some may be alarmed and dismayed with the elimination of DR 7-102(B), which prevented the lawyer from disclosing a client's fraud to the tribunal if it was protected as a confidence or secret. But DR 7-102(B) was problematic, and as noted earlier, the exception had been substantially diluted. New York Rule 3.3, on the other hand, replicates ABA Model Rule 3.3, and is thus in harmony with the ethical rules of the majority of states. Indeed, New York Rule 3.3 encourages a lawyer to be ever more vigilant and develop a keen nose to sniff out and smite a client's proclivity for fraudulent conduct at the very outset of the representation. From a public policy perspective, lawyers are officers of the

court, and should not, under the cover of an ethical rule safeguarding a client's confidence or secret, be a party to a client's fraudulent or criminal conduct before the tribunal. While a lawyer can continue to zealously advocate the facts and law in a manner from the client's point of view, according to Comment 2 of New York Rule 3.3, "the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false."

Following ethical guidelines regarding a lawyer's duty of candor to the tribunal does not merely keep a lawyer out of trouble, it also compels and incentivizes him or her to attain excellence, which in turn will enhance the lawyer's reputation and esteem among clients, within the legal community and before the community and society at large.