



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

In a confidential interview in connection with a civil case, one of my client's corporate officers told me that she did not remember if she became aware of a critical accounting issue at the company before or after a sale of stock in question. At trial, you do not ask her about the matter on direct, but on cross examination by the opposing lawyer she testifies definitively that she is certain the issue only came to light after the stock sale. Do I have an obligation to disclose the client's earlier statement to the court or the opponent? What do I do?

A: Model Rule 3.3 protects the integrity of matters before a "tribunal," barring a lawyer from offering evidence the lawyer knows to be false, and requiring the lawyer to take "reasonable remedial measures" if the lawyer, the lawyer's client or a witness offered by the lawyer has offered "material" evidence the lawyer has come to know is false. In this situation, the testimony was by the lawyer's client and is clearly material. Thus, the remaining question is whether the lawyer "knows" the testimony to be "false." Model Rule 1.0(f) states that "knowingly" denotes "actual knowledge of the fact in question."

The prior seemingly inconsistent statement is an indication of falsity, but could there be another explanation for the change in her story? Before taking any action, the best practice would be to seek or take advantage of a recess to ask the client about the change in her answer – maybe something in the course of the trial or otherwise has refreshed or jogged her memory in a different direction.

If after that conversation, the lawyer is convinced that the testimony is false, the lawyer's duty to take "reasonable remedial measures" should begin with efforts to remonstrate with the client to agree to correct her own testimony, pointing out both the potential consequences of false testimony and the lawyer's obligations. If remonstration is unsuccessful, the lawyer, if necessary to correct the false evidence, must disclose the facts to the tribunal. Rule 3.3(c) makes it clear that this is required notwithstanding the duty of confidentiality under Rule 1.6. *Note: Rule 3.3(c) is applied differently to criminal defendants; in many jurisdictions the expected false testimony of a criminal defendant may be offered in another way, such as by narrative rather than specific questions posed by the lawyer.*

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.