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**CANDOR TO THE TRIBUNAL AND
REMEDIAL MEASURES IN CIVIL
PROCEEDINGS***Adopted June 18, 2011****Introduction and Scope***

The Colorado Rules of Professional Conduct (Colo. RPC or the Rules) establish a lawyer's duties of candor to tribunals. This opinion addresses the lawyer's duties of candor only in civil matters. In criminal litigation the accused has constitutional rights to testify and to the assistance of counsel, which may require a different analysis.

Following an analysis of the lawyer's duties in civil matters, the Colorado Bar Association Ethics Committee (Committee) provides four illustrations designed to provide practical guidance to lawyers facing these situations.

Syllabus

Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. If a lawyer knows that a client or a witness called by the lawyer has offered material evidence that is false, the lawyer has a duty to take reasonable remedial measures. This duty may override a lawyer's duty under Colo. RPC 1.6(a) not to disclose information relating to the representation of the client.

If the false evidence was presented by a client (for example by testimony at a trial or hearing), the lawyer must remonstrate confidentially with the client. If the client refuses to rectify or permit the lawyer to rectify the situation, then the lawyer must take further remedial action. In most cases, withdrawal of the false evidence, with the consent of the tribunal, will constitute an adequate remedial measure. In some cases, the conflicts created will require the lawyer to withdraw from the representation. Depending upon the circumstances, withdrawal from the representation alone may or may not be an adequate remedial measure, and in some cases the tribunal may not permit the lawyer's withdrawal. When the tribunal does not permit withdrawal from the representation or when withdrawal from the representation alone is insufficient to undo the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is necessary to undo the effect of the false evidence.

The content of the disclosure that may be required by Colo. RPC 3.3 necessarily depends on the facts and circumstances. Nevertheless, certain general principles offer guidance. In most situations, Colo. RPC 3.3 will not require the disclosure of information protected by the attorney-client privilege; and in all situations, the lawyer should make every reasonable effort to avoid the disclosure of privileged information. However, in some circumstances, only the disclosure of information that may be protected by the attorney-client privilege will be sufficient to meet the lawyer's obligations under Colo. RPC 3.3. In those limited circumstances, the plain language of Colo. RPC 3.3 does not create an exception for information that may be protected by the

attorney-client privilege. Such disclosures must be limited to those that are reasonably necessary to undo the effects of the false evidence and must be made in a manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3. The lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction into evidence of privileged information, including the information previously disclosed by the lawyer under Colo. RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of communications that are protected by the attorney-client privilege.

Finally, under Colo. RPC 3.3(a)(1), a lawyer has a duty to remedy a false statement of material fact or law made by the lawyer, and in this regard, reasonable remedial measures may require the lawyer to disclose the false statement to the tribunal. In this case, too, the disclosure to remedy such a false statement must be limited to the extent reasonably necessary to achieve such ends and must be made in the manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3.

Analysis

I. Candor to the Tribunal: Colo. RPC 3.3

Colo. RPC 3.3 provides:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material 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 legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or 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 in an adjudicative proceeding 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) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (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.

Colo. RPC 1.0(m) defines a "tribunal" as

a court, an arbitrator in a binding 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 binding legal judgment directly affecting a party's interests in a particular matter.

Thus, under Colo.RPC 3.3, the lawyer has several separate duties of candor to a tribunal. Each of these duties presents the lawyer with separate but related problems. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 29.8, at 29-9 to 29-10 (Supp. 2007) (Hazard & Hodes). This opinion addresses only the prohibitions against offering false evidence, the duty to take remedial measures regarding false evidence, and the duty to correct false statements by the lawyer.¹

A. Materiality

Certain of the duties imposed by Colo.RPC 3.3 turn on whether statements made to the tribunal or evidence offered in the proceeding are “material.” The Colorado Rules do not define “material”, and different jurisdictions have derived different definitions of materiality in the context of their counterparts to Colo. RPC 3.3. The Colorado Supreme Court interpreted “materiality” under Colo.RPC 3.3(a)(1) in *In re Fisher*². There, the Supreme Court held that “the concept of materiality encompassed in Colo. RPC 3.3(a)(1) is not directed by the outcome of a particular matter, but rather whether there is potential that the information could influence a determination as to that matter.”³

B. Confidential Remonstrations with the Client

The concept of confidential remonstrations with the client is a fundamental part of the reasonable remedial measures mandated by Colo. RPC 3.3. Comment [6] to Colo. RPC 3.3 describes the process as follows:

If a lawyer learns that the client or a witness that the lawyer plans to call intends to offer false evidence, the first challenge for the lawyer is to remonstrate with the client to attempt to persuade the client or witness that the false evidence should not be offered. It is at this initial stage that the problem of false evidence is best and most frequently resolved.

The Restatement (Third) of the Law Governing Lawyers (Restatement) further explains this process as follows:

Remonstrating with a client or witness. Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstrations is [*sic*] a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client’s trust in the lawyer’s loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer’s duty not to offer false evidence and, if it is offered, to take appropriate remedial action (*see* Comment *h*).

Rest., § 120, cmt. g (2000) (emphasis added).

In his treatise on modern legal ethics, Professor Charles W. Wolfram details the process of remonstrating with a client or witness:

Remonstrations is clearly required: a lawyer must attempt to persuade a client not to present or, if it is presented, to correct, false testimony. Remonstrations in most cases should cover the fact that perjury is a criminal offense, the risks of its deception, and the importance of truthful testimony, the attorney’s duty to withdraw, and the extent of the lawyer’s duty to disclose perjury.

Charles W. Wolfram, *Modern Legal Ethics* § 12.5.3, at 656 (1986) (footnotes omitted). See also Colo.RPC 3.3, cmts [6], [10].

Thus, when material evidence has been presented to the tribunal and the lawyer subsequently discovers that the evidence is false, the lawyer must first remonstrate with the client confidentially. In this discussion, it is appropriate for the lawyer to inform the client that the client's failure to correct the false evidence may require the lawyer to seek withdrawal from the representation⁴ and that the lawyer may have to disclose the false evidence to the tribunal with or without the client's consent, with the potential for dramatic adverse effect on the client, both as to the outcome of the pending matter and in terms of potential perjury charges. If the lawyer lacks competence in criminal law practice, the lawyer may also wish to advise the client to seek independent criminal defense counsel.

II. A Lawyer May Not Knowingly Offer False Evidence

Colo.RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. Colo.RPC 1.0(f) provides that "knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." If the lawyer knows before the evidence is presented that it is false, then the lawyer may not offer it. Colo.RPC 3.3(a)(3).⁵ A lawyer also may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, if the lawyer reasonably believes it is false. Colo.RPC 3.3(a)(3). ""

If a lawyer reasonably believes that evidence is false, but does not "know," Rule 3.3(a)(3) provides that the attorney *may* refuse to offer the evidence. This provision leaves up to the discretion of the lawyer whether to seek admission of questionable evidence. Some lawyers may err on the side of inclusion and risk the need to correct the submission at a later time. Other lawyers may prefer to be cautious and demand additional proof of its authenticity. This Rule permits a lawyer's decision to override client choice on whether to admit the evidence.

Ronald Rotunda & John Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, 741 (2009-10).

In any event, a lawyer is prohibited from assisting a client in conduct the lawyer knows is criminal or fraudulent. Colo.RPC 1.2(d). Knowingly assisting a person to testify falsely is criminal conduct.⁶

If the lawyer's efforts at persuasion are not effective, the lawyer's duties may vary, depending on whether the witness is the client. If a witness (including a client) whom the lawyer intends to call in a civil case insists on giving false evidence despite the lawyer's efforts at persuasion, then the lawyer must not call the witness. If only a portion of the witness's testimony would be false, the lawyer may call the witness but "may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false."⁷ Colo.RPC 3.3, cmt. [6]. If the witness nevertheless gives evidence the lawyer knows to be false, then, as explained below, the lawyer must take remedial measures.

III. A Lawyer Must Correct False Evidence Already Presented -- Remedial Measures

If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take "reasonable remedial measures." Colo.RPC 3.3(a)(3). The "reasonable remedial measures" that are required are not specifically listed in the Rules. Colo.RPC 3.3(c) explains that "[t]he duties ... continue to the conclusion of the proceeding,⁸ and apply even if the compliance requires disclosure of information otherwise protected by Rule 1.6." The measures taken should be the least damaging to the client consistent with the lawyer's duties to the tribunal as established in Colo.RPC 3.3 and consistent with the purpose of remedial measures to undo the taint of the false evidence. *See, e.g., Rest., § 120, cmt. h* (2000); *State Bar of Ariz Ethics Op. 05-05* (2005).⁹

Comment 10 of Colo.RPC 3.3 provides guidance in this regard. It states:

Having offered material evidence in the belief that it was true, a lawyer 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. In such situations, 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 attorney to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

One remedial measure available to the lawyer, under some circumstances, is withdrawal of the false evidence. If the tribunal permits the withdrawal of the evidence, in most cases the lawyer will have fully satisfied his or her responsibility under Colo.RPC 3.3. Although rare, circumstances may arise where withdrawal of the evidence, even if permitted by the tribunal, will not undo the effect of the false evidence and thus will not constitute an adequate remedial measure. Because the duty of candor under Colo.RPC 3.3 continues until the conclusion of the proceeding and because the lawyer might come to know at various times in the process that false evidence was presented, the form, nature and effectiveness of the attorney's disclosure necessarily varies. For example, if the lawyer learns during a hearing or trial that false evidence was presented, then withdrawal of the false evidence would constitute an adequate remedial measure. Rest. § 120, cmt. h. Specifically, if the lawyer learns that a witness testified falsely after the witness has left the stand but still during trial, the lawyer could recall the witness and thus withdraw the false evidence. Again, such a withdrawal of the evidence would constitute an adequate remedial measure. *Id.*¹⁰ In contrast, if the lawyer learns during an appeal that false evidence was presented, then withdrawal of the false evidence, (even if feasible and permitted by the tribunal) likely would not be sufficient to undo the effect of the false evidence and thus would not, by itself, constitute an adequate remedial measure. Just as in the situation before false evidence is offered, obtaining the client's consent to correct false evidence already presented is critical not only to fulfilling the lawyer's duty of candor to the tribunal but also to maintaining the client's trust in the lawyer's loyalty and diligence.

Withdrawal from the representation also may constitute, under appropriate circumstances, an adequate remedial measure either by itself, or in combination with other remedial measures, and, in any event, may be required when conflicts of interest under Colo.RPC 1.7(a) arise and cannot be resolved. When the client permits the lawyer to withdraw the false evidence and the tribunal permits the withdrawal of the evidence, the lawyer's withdrawal from the representation ordinarily will not be required. However, when the lawyer makes disclosure to the tribunal regarding the false evidence without the client's consent, and particularly when the client specifically directs the lawyer not to make the disclosure, withdrawal from the representation may be required or permitted under Colo.RPC 1.16. *See* Colo.RPC 1.7, 1.16(a)(1), (b)(1)(B)-(D), 3.3, cmt. [10]. *See also* Rest., 120, cmt. [h]. Moreover, the client's actions may be grounds for permissive withdrawal under Colo.RPC 1.16.

Depending upon the circumstances, however, withdrawal from the representation alone may not constitute an adequate remedial measure. And, in some cases, the tribunal may not permit withdrawal from the representation. If withdrawal from the representation alone is not sufficient to undo the effects of the false evidence, or if the tribunal does not permit withdrawal from the representation, the lawyer must make such disclosure to the tribunal as is reasonably necessary to undo the effect of the false evidence. Colo.RPC 3.3, cmt. [10]. The Committee believes that in most, if not all, cases where the false evidence has already been

presented to the tribunal, withdrawal from the representation alone will not constitute an adequate remedial measure. See ABA Comm. on Ethics and Prof. Resp., Formal Op. 98-412 (1998) (lawyer must correct his or her own false representations to the tribunal).¹¹

IV. Distinctions Between Confidentiality and the Attorney-Client Privilege

The ethical duty of confidentiality is set forth in Colo.RPC 1.6. The scope of the duty of confidentiality is extremely broad, encompassing “information relating to the representation of a client. . . .” Colo.RPC 1.6(a). Included within this broad scope of confidentiality under Colo.RPC 1.6 is information that is subject to the attorney-client privilege. See Colo.RPC 1.6, cmt. [3]. The attorney-client privilege is a matter of the substantive law of evidence, not legal ethics. In Colorado, the attorney-client privilege is codified by statute.¹² Under federal law, the attorney-client privilege is governed by federal common law when the underlying dispute involves federal law and is governed by state law if jurisdiction is based on diversity of citizenship.¹³

Comment [3] to Colo.RPC 1.6 explains this distinction as follows:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

Colo. RPC 1.6, cmt. [3].

The duty of disclosure under Colo.RPC 3.3 is, on its face, unqualified. In particular, Colo.RPC 3.3 does not by its own terms exclude from the lawyer’s duty of disclosure information that is or may be protected by the attorney-client privilege. Rather a lawyer’s disclosure to the tribunal under Colo.RPC 3.3 is a matter separate and apart from any determination about whether and how that information might be used as evidence in a proceeding. Comment [10] to Colo.RPC 3.3 states, in relevant part, that where the lawyer knows that evidence already offered or admitted is false and remonstrated with the client to correct the false evidence has failed,

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 disclosures to the tribunal as is [*sic*] reasonably necessary to remedy this situation even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. *It is for the tribunal to then determine what should be done*—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Colo. RPC 3.3, cmt. [10] (emphasis added). Because information protected by Colo.RPC 1.6 includes privileged information, a lawyer’s duty to disclose under Colo.RPC 3.3 includes the duty, in some cases, to disclose privileged information.

The Colorado Supreme Court has not expressly addressed whether the duty of disclosure under Colo.RPC 3.3(a)(3) includes information that may be subject to the attorney-client privilege or whether that information is somehow exempt from disclosure. However, in *In re Petition for Disciplinary Action Against John E. Mack*,¹⁴ the respondent lawyer was disciplined for violating Minnesota version of Colo.RPC 3.3 by failing to take reasonable remedial measures after the introduction of evidence he knew to be false. Mack defended the

disciplinary charge on the ground that he could not make the disclosure contemplated under Minnesota Rule 3.3 because the information was privileged. The Minnesota Supreme Court rejected this defense without distinguishing between privileged and other information relating to the representation that is protected under Minnesota Rule 1.6.¹⁵

The Colorado Supreme Court's decision in *People v. Casey*¹⁶ supports the conclusion that the disclosure duty under Colo.RPC 3.3 extends to privileged information, even though *Casey* did not address this precise issue. In *Casey*, a disciplinary case, the Supreme Court addressed the interplay between a lawyer's duty to be truthful to the court and the lawyer's duty to competently represent the client. Casey represented a defendant in a criminal case who was an imposter; the actual defendant was another individual. Nevertheless, Casey appeared before the court and expressly and implicitly represented to the court that his client was the defendant when Casey knew that was not the case. According to the Court, Casey "portray[ed] his situation as involving a close question between the loyalty he owed his client and his duty to the court."¹⁷ The Court emphatically rejected Casey's argument:

Colo. RPC 3.3 (b) clearly resolves the respondent's claimed dilemma in that it provides that the duty to be truthful to the court applies even if to do so requires disclosure of [otherwise confidential information]. It is not "arguable" that the respondent's duty to his client prevented him from fulfilling his duty to be truthful to the court.¹⁸

While the Supreme Court did not specifically refer to the attorney-client privilege in *Casey*, the case is noteworthy in that, like *Mack*, it placed no limit on the type of confidential information that must be disclosed to discharge the attorney's obligations under Colo.RPC 3.3. Similarly, in *In re Hill*,¹⁹ a federal bankruptcy court stated:

Firm attorneys who had knowledge, in light of privileged e-mails of which they were aware, of misleading nature of testimony of member of firm in proceedings in bankruptcy court had duty to take some remedial action, even though it could potentially require divulging attorney-client privileged material.²⁰

Outside of Colorado, several authorities have attempted to reconcile the duty of disclosure under other states' version of Colo.RPC 3.3(a)(3) with the attorney-client privilege, by distinguishing between non-evidentiary disclosures on the one hand and evidentiary submissions on the other hand.

This reconciliation finds support in a recent Ethics Opinion of the New York State Bar Association.²¹ The New York Committee determined that while New York's statutory attorney-client privilege limited the available remedial measures under New York's version of Colo.RPC 3.3, that limitation applied only to the *introduction* of protected information *into evidence* and did not prohibit non-evidentiary disclosures in compliance with New York Rule 3.3. Moreover, at least one commentator supports this approach:

When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary form, namely sharing the information with the appropriate person or authority. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.²²

Two state appellate court decisions also support this approach they address permissive disclosures under those states' versions of Colo.RPC 1.6(b), rather than mandatory disclosures under their versions of Colo.RPC 3.3. In *Purcell v. District Attorney*,²³ Purcell's client had received a court order requiring his eviction from his apartment, which was located in the same building where the client had recently been discharged as a maintenance man. The client made statements to Purcell that Purcell believed constituted threats of criminal

activity by the client. Purcell deemed the threats to be serious and, acting in reliance upon Massachusetts's version of Colo.RPC 1.6 (b), exercised his professional discretion to make disclosure to law enforcement authorities. Acting on that disclosure, constables (accompanied by the police) went to the apartment to evict the client, found incendiary devices, and arrested the client for attempted arson. At the client's trial, the district attorney subpoenaed Purcell to testify against his former client regarding the statements made by the client to Purcell. The trial court rejected the client's assertion of the attorney-client privilege and ordered Purcell to testify against his former client. The Massachusetts Supreme Judicial Court reversed, holding that "the fact that the disciplinary code permitted Purcell to make the disclosure tells us nothing about the admissibility of the information that Purcell disclosed. . . ."²⁴

A similar result was reached in *Kleinfeld v. State*²⁵ where the defendant in a murder case made inculpatory statements to his lawyer in connection with a separate civil case. At the murder trial, the statements were admitted over objection, and the client was convicted of murder. The Florida appellate court held that because the requirements of the attorney-client privilege had been met, it was error to admit the lawyer's testimony. The court went on to note that the existence of an ethical rule that permits a lawyer to reveal a confidence under certain circumstances does not modify the evidence code, which governs the admissibility of evidence at trial.²⁶

For all of these reasons, the Committee concludes that, if reasonable remedial measures necessitate disclosure, Colo.RPC 3.3 requires a lawyer to make disclosure to the tribunal, even if such disclosure includes information that is or may be protected by the attorney-client privilege and even if the client does not consent to the disclosure. However, the Committee again emphasizes that disclosure of privileged information always must be limited to that information which is reasonably necessary to apprise the tribunal of the problem.²⁷ There are few, if any, circumstances in which the lawyer properly would be required or permitted to expressly disclose the source of the privileged information or any other details of the privileged communication. Once the required disclosure is made to the tribunal, the lawyer should take appropriate efforts to resist further efforts by the tribunal to compel additional disclosures. In addition, the lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction or disclosure of privileged information, including information previously disclosed pursuant to Colo.RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of privileged communications.²⁸

V. Correction of Misstatements Made by the Lawyer to the Tribunal

A lawyer must not knowingly make false statements of material fact or law to a tribunal. Colo.RPC 3.3(a)(1). If the lawyer makes a material factual statement believing it to be true, and later discovers that the representation was false, reasonable remedial measures may include correction of the lawyer's own misstatement. The same issues and potential conflicts of interest under Colo.RPC 1.7 that can arise when the client or other witness called by the lawyer testifies falsely, discussed in detail above, can arise when the lawyer made the false statement.

Illustrations²⁹

Illustration 1. In a proceeding regarding title to property, Client delivers to Lawyer a deed that is material to the dispute. A variety of circumstances cause Lawyer to question the authenticity of the deed. Lawyer requests and Client gives permission to have the deed examined by a document examiner. The document examiner concludes that the document is a forgery because the ink and paper used did not exist on the date borne by the deed. Lawyer approaches Client with this information and Client confesses that the deed is false but insists that Lawyer nevertheless use the evidence. Under these facts, Lawyer "knows" that the evidence is false—not only did the document examiner unequivocally determine it was not genuine, but Client admitted the document was false. Lawyer may not offer the evidence and if Lawyer discovers its falsity after it is offered, Lawyer must take reasonable remedial measures.

Suppose instead that the document examiner determines that the deed probably is not genuine but cannot rule out the possibility that the deed is, in fact, genuine. When Lawyer confronts Client with this information, Client absolutely maintains that the deed is genuine. Under these circumstances, Lawyer does not “know” that the deed is false and reasonable remedial measures are neither required nor permitted. However, under Colo.RPC 3.3(a)(3), if Lawyer reasonably believes (but does not know) that the deed is false, Lawyer may refuse to offer the evidence.³⁰

Illustration 2. Lawyer represents Client in a dissolution of marriage proceeding. Under the applicable procedural rules, each party must make comprehensive disclosure, under oath, of their financial assets. Lawyer files with the court the client’s financial affidavit without knowledge that any of the information contained in the affidavit is false. After submission of Client’s affidavit, Client advises Lawyer that the values ascribed to certain assets are incorrect. Assume that the value of the asset as originally disclosed was \$10,000 and Client now tells the lawyer that the real value is \$15,000. Assume further that the marital estate is \$5 million. The \$5000 differential in the value of the piece of property probably is not material in relation to the controversy. Suppose, however, that the total marital estate is \$20,000. In that context, a \$5000 differential probably is material and would require Lawyer to take reasonable remedial measures under Colo.RPC 3.3.

Illustration 3. Lawyer represents Client in a civil litigation or arbitration proceeding. During the course of preparing Client’s anticipated testimony, Lawyer learns from Client that material testimony that Client intends to give is false. Given that source, Lawyer “knows” that the testimony will be false, within the meaning of Colo.RPC 1.0(f). Lawyer must confidentially remonstrate with Client and attempt to convince Client not to testify falsely. If Client insists upon presenting the false evidence, Lawyer must, before the false testimony is given, move to withdraw from the representation pursuant to Colo. RPC 1.16(a)(1), and in compliance with the rules of the tribunal. If the tribunal permits Lawyer’s withdrawal prior to the presentation of the false testimony, Lawyer has fully satisfied his or her ethical responsibilities under Colo. RPC 3.3. In the event that the tribunal either denies the motion to withdraw or does not rule upon the motion prior to the admission of the false testimony, Lawyer is prohibited from participating, in any manner, in the admission of the evidence. (Lawyer is not prohibited from participating in the admission of other evidence or testimony that the lawyer does not know is false.) If the evidence is, in fact, admitted before the tribunal, despite all of the efforts by Lawyer to prevent its admission, Lawyer has the duties described in Illustration 4, below.

Illustration 4. Lawyer represents Client in a civil litigation or arbitration proceeding. Lawyer calls Client to testify. After the completion of Client’s testimony, but before the conclusion of the proceeding (see Colo.RPC 3.3(c) & cmt. [13]), Client tells Lawyer that he testified falsely on matters that were material to the proceeding. What are Lawyer’s responsibilities in these circumstances? First, Lawyer must remonstrate with Client, attempting to persuade Client that the best course of action is for Client to authorize Lawyer to withdraw the evidence or otherwise disclose sufficient information to the tribunal to undo the effect of the false prior testimony. Lawyer must make clear to Client that Lawyer has an ethical duty to make disclosure to the tribunal even if Client refuses consent. If Client refuses to give such consent and even if Client purports to prohibit Lawyer from making disclosure to the tribunal, Lawyer must move to withdraw from the representation pursuant to Colo.RPC 1.16(a)(1), because of the conflicts created between Lawyer and Client.

But in the circumstances where material testimony that Lawyer knows is false has already been presented to the tribunal, withdrawal from the representation is not sufficient because it does not undo the effect of the false evidence. Accordingly, Lawyer must either withdraw the evidence with the consent of the tribunal or make sufficient disclosure to the tribunal to undo the effect of the false evidence. A statement made by Lawyer to the tribunal to the effect that specific evidence is false or unreliable should be sufficient to meet Lawyer’s ethical obligations in this regard. Indeed, Lawyer should not disclose any information beyond that which is necessary to apprise the tribunal of the false evidence. The tribunal will likely want more information from Lawyer, specifically, the basis for Lawyer’s disclosure to the tribunal. The tribunal also may demand that Lawyer disclose the true facts. In response to such inquiries and to the extent that the information necessary to respond to the tribunal’s questions is subject to the attorney-client privilege (or any other privilege recognized

by the applicable law), Lawyer should respectfully decline to provide additional information to the tribunal, on authority of the attorney-client (or other) privilege. In this situation, of course, the tribunal may directly examine Client, subject to Client's rights against self-incrimination.

If the tribunal persists and orders Lawyer to disclose additional information, Lawyer must consider whether seeking a stay of such order to permit a judicial challenge to the tribunal's order would be appropriate. If the tribunal refuses to grant a stay and orders immediate disclosure, and the tribunal has contempt power, Lawyer may comply with the tribunal's order even if Lawyer believes the order is erroneous.³¹ If Lawyer believes in good faith that the tribunal's order is erroneous or improper, Lawyer may ethically, respectfully and openly decline to obey the order solely for the purpose of seeking prompt review by a higher tribunal. However, Lawyer must be prepared to suffer the consequences of a finding of contempt.³²

NOTES

1. This opinion does not address other duties of candor that apply in civil proceedings, including the duty to disclose legal authority in the controlling jurisdiction that is directly adverse to the client's position, the duty to take reasonable remedial measures to address criminal or fraudulent conduct by persons related to the proceeding, and the duty in an ex parte proceeding to disclose all material facts to the court. *See* Colo. RPC 3.3(a)(2), (b) & (d).

2. 202 P.3d 1186, 1202 (Colo. 2009).

3. *Id.* (emphasis in original)

4. Colo. RPC 1.16 provides that grounds for withdrawal include circumstances where "the representation will result in violation of the Rules of Professional Conduct."

5. The Committee understands the term "false" as used in Colo. RPC 3.3 to mean objective falsity. For example, if the lawyer knows, within the meaning of Colo. RPC 1.0(f), that the traffic light was red at the time of the collision, and if the fact at issue is whether the light was red or green (not the subjective state of mind of the witness), the fact that the client's testimony that it was green was given honestly and in good faith is irrelevant to the lawyer's duty of candor under Colo. RPC 3.3. Of course, if the client honestly believes and testifies that the traffic light was green, that information may well prevent the lawyer from having "knowledge" that it was red, but if the Colo. RPC 1.0(f) threshold is passed and the lawyer, through other evidence, "knows" that the light was red, the lawyer's duty of candor is not suspended because of the client's good faith beliefs. *See Liggett v. People*, 135 P.3d 725 (Colo. 2006) (discussing numerous alternative explanations for evidentiary discrepancies and conflicts in testimony that do not involve "lying": differences in opinion, lapses or inaccuracies in memory, differences in perception, a misunderstanding, or any other number of wholly innocent explanations for discrepancies between two witnesses' testimony).

6. *See* C.R.S. § 18-8-502 (2010) (Colorado's criminal perjury statute).

7. It is readily apparent what is meant when the lawyer may not elicit the testimony, but the phrase "or otherwise permit the witness to present the testimony" is less clear. The phrase appears in Comment [6] to Colo. RPC 3.3, but no further guidance is provided in either the Colorado Rule or in American Bar Association (ABA) Model Rule 3.3. Under a reasonable interpretation of this phrase, if the lawyer is examining the witness in a way to avoid eliciting any testimony that the lawyer knows to be false, but the witness blurts out known false testimony, the lawyer should attempt to stop the witness from giving the false testimony. On the other hand, if the adverse lawyer is examining the witness and the witness offers testimony that the lawyer

knows to be false, it might not be possible for the lawyer to prevent the witness from presenting the false testimony. In this latter situation, if the lawyer cannot “prevent” the witness from presenting false evidence in response to cross-examination by the adverse lawyer, the lawyer must take remedial measures to correct the false evidence then presented. Colo. RPC 3.3, cmt. [10]; *see* “Correcting False Evidence Already Presented – Remedial Measures,” below.

8. Generally, the conclusion of the proceeding has occurred when a final judgment has been affirmed on appeal or the time for appeal has expired. *See* Colo. RPC 3.3, cmt. [13].

9. The Arizona opinion states: “The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and not broader than necessary to undo the effect of the tainted evidence.” State Bar of Ariz. Ethics Op. 05-505. *See also* Colo. RPC 3.3, cmt. [10] (the purpose of remedial measures is to “undo the effect of the false evidence”).

10. Perjury in the first degree by a witness can be cured if the false testimony is retracted in the course of the same proceeding in which it was made. C.R.S. § 18-8-508 (2010).

11. Whether a “noisy” withdrawal, in which the motion to withdraw from the representation contains information to apprise the tribunal of the problem, may be sufficient to discharge a lawyer’s obligations to take reasonable remedial measures is beyond the scope of this Opinion. For a comprehensive discussion of the noisy withdrawal concept, *see* Hazard & Hodes, § 9.31 at pp. 9-132 – 9-136.

12. C.R.S. § 13-90-107(1)(b) (2010).

13. Fed. R. Evid. 501.

14. 519 N.W.2d 900 (Minn. 1994).

15. *Id.* at 902.

16. 948 P.2d 1014 (Colo. 1997).

17. *Id.* at 1016.

18. *Id.*

19. 437 B.R. 503 (Banktcy. W.D. Pa. 2010).

21. N.Y. State Bar Assn., Committee on Professional Ethics, Opinion 837 (March 16, 2010).

22. Gregory L. Sisk, Rule 3.3 Candor Toward the Tribunal, 16 Iowa Prac., Lawyer and Judicial Ethics, § 5.6(d)(4)(c) (2009 ed.).

23. 676 N.E.2d 436 (Mass. 1997).

24. *Id.* Although *Purcell* involved the permissive disclosure of information under Massachusetts Rule 1.6, as opposed to the mandatory disclosure under Massachusetts Rule 3.3, the court’s discussion of the differences between the Rules of Professional Conduct and the attorney-client privilege is instructive.

25. 568 So.2d 937, 939-940 (Fla. App. 1990).

26. *Id.* at 939-40.

27. *See* Arizona Ethics Opinion 05-05 (2005), n. 8, *supra*.

28. *See* Colo. RPC 3.3, cmt. [10].

29. These illustrations address the mandatory disclosures required by Colo. RPC 3.3, not the permissive disclosures authorized (but not required) by Colo. RPC 1.6(b).

30. If Lawyer takes this position, contrary to Client's demand, a concurrent conflict of interest under Colo. RPC 1.7(a) will result. Unless the conflict can be and is resolved satisfactorily in accordance with Colo. RPC 1.7(b), the Lawyer must move to withdraw. *See* Colo. RPC 1.16(a)(1).

31. The Restatement takes the position that in circumstances where the only available avenue of appeal or review of an order to disclose requires a finding of contempt against the lawyer, the lawyer "may be warranted in incurring risk of contempt." Section 105, cmt. [e]. *See also* *Maness v. Meyers*, 419 U.S. 449, ___ (1975); *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *State v. Schmidt*, 474 So.2d 899, ___ (Fla. App. 1985). But a lawyer is not required to run the risk of a contempt order. If a tribunal possessing contempt powers orders disclosure, a lawyer will not violate the confidentiality rules (or the rules requiring competent representation) by complying with such an order no matter how ill-advised or wrong such an order may be. Rest., §§ 63, cmt. b, 105, cmt. e; D.C. Bar Opinion 288 (1999). Where the disclosure order entered is by a tribunal that does not have contempt power, the law is less settled. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has opined that a lawyer is not ethically obligated to disobey an arbitration panel's order to disclose ostensibly confidential information, but that a lawyer who is the subject of such an order must promptly advise any clients whose confidences may be required to be disclosed, so that the potentially affected clients may, if they choose to do so, independently pursue any remedies, judicial or otherwise, which may be available to them. PA Eth. Op. 2002 106, 2003 WL 23358338 (Pa. Bar Assoc. Ethics Comm..

32. *See* Colo. RPC 1.2(d), cmt. [12].