NEW HAMPSHIRE BAR ASSOCIATION

False Testimony by a Non-Client Witness

Ethics Committee Opinion #2025-26/01

ABSTRACT

When a lawyer knows that a non-client witness has testified falsely, the lawyer had a duty to take reasonable remedial measures notwithstanding the duty of confidentiality. If the lawyer learns of the falsity after the conclusion of the testimony but before the proceeding is concluded, and if the testimony was material, then the lawyer still had a duty to take reasonable remedial measures to correct the false testimony. In deciding whether the lawyer knows the testimony is false, the lawyer should use a "firm basis in objective fact" test recognizing that knowledge may be inferred from the circumstances.

ANNOTATIONS:

- A lawyer has an important duty to not offer false testimony and to take remedial action if the lawyer learns that false testimony has been presented. N.H. R. Prof. Cond. 3.3.
- The duty only applies when the lawyer "knows" the testimony is false. N.H. Rs. Prof. Cond. 3.3(a)(1), 3.3(a)(3).
- Knowledge may be inferred from the circumstances, but the duty is not implicated by a mere suspicion or even a personal belief, short of actual knowledge, that the witness's testimony is false. N.H. R. Prof. Cond. 3.3 2004 ABA Model Comment [8]; N.H. R. Prof. Cond. 1.0(f).
- When the lawyer learns after the fact that testimony was false, the duty to take remedial measures only applies if the testimony was "material." N.H. Rs. Prof. Cond. 3.3(a)(1), 3.3(a)(3).
- The duty to not offer false testimony terminates "at the conclusion of the proceeding." N.H. R. Prof. Cond. 3.3(d); 2004 ABA Model Code Comment [10].

OPINION

Question Presented to the Committee

I called a witness to testify at a hearing. The witness is not my client. I had interviewed the witness before the hearing. At the hearing the witness testified differently than I expected. I think the witness lied at the hearing. What are my obligations?

Discussion

Generally, a lawyer has an important duty to not offer false testimony and to take remedial action if the lawyer learns that false testimony has been presented. N.H. R. Prof. Cond. 3.3. The New Hampshire Supreme Court has repeatedly emphasized lawyers' duties of honesty and integrity. *See, e.g., Saloman's Case*, 171 N.H. 694, 706 (2019). The duty of candor to the court is so

important that it takes precedence over the duty of confidentiality to the client. N.H. R. Prof. Cond. 3.3(d). Nonetheless, there are important limitations on the duty of candor. The duty only applies when the lawyer "knows" the testimony is false. N.H. Rs. Prof. Cond. 3.3(a)(1), 3.3(a)(3). Knowledge may be inferred from the circumstances, but the duty is not implicated by a mere suspicion or even a personal belief, short of actual knowledge, that the witness's testimony is false. N.H. R. Prof. Cond. 3.3 2004 ABA Model Comment [8]; N.H. R. Prof. Cond. 1.0(f). In addition, when the lawyer learns after the fact that testimony was false, the duty to take remedial measures only applies if the testimony was "material." N.H. Rs. Prof. Cond. 3.3(a)(1), 3.3(a)(3). Finally, the duty ends "at the conclusion of the proceeding." N.H. R. Prof. Cond. 3.3(d); 2004 ABA Model Code Comment [10].

A Lawyer May Not Knowingly Offer False Evidence.

All attorneys in New Hampshire take an oath, pursuant to RSA 311:6, swearing or affirming that they "will do no falsehood, nor consent that any be done in the court, and if [they] know of any, that [they] will give knowledge thereof to the justices of the court, or some of them, that it may be reformed[.]" RSA 311:6. *See also Kalil's Case*, 146 N.H. 466, 467 (2011) (noting that every lawyer admitted to practice in the state takes an oath that has been required for more than 150 years and that the lawyer in question "failed to honor this obligation" by lying to judge); *Ricker's Petition*, 66 N.H. 207, 236-37, 240 (1890) (observing that attorneys are a class of individuals "to whose diligence, integrity, ability, and honor much is necessarily confided" and, therefore, whose "honesty, probity, and good demeanor" is ensured by oath).

The New Hampshire Supreme Court has explained, therefore, that the "privilege of practicing law does not come without the concomitant responsibility of truth, candor and honesty." *Basbanes' Case*, 141 N.H. 1, 7 (1995) (quotation and citation omitted). "[B]ecause 'no single transgression reflects more negatively on the legal profession than a lie,' attorney misconduct involving dishonesty also justifies disbarment." *Nardi's Case*, 142 N.H. 602, 606 (1998) (quoting *Budnitz' Case*, 139 N.H. 489, 492 (1995)). *See also Basbanes' Case*, 147 N.H. at 1-2 (ordering attorney disbarred for presenting false testimony to marital master in client's divorce proceeding). "Intentionally assisting in the promulgation of false answers is…inherently dishonest." *Feld's Case*, 149 N.H. 19, 29 (2002). In "cases involving dishonesty, a lawyer must admit to his professional misconduct to truly demonstrate remorse." *Id.* at 30.

The Rules of Professional Conduct state that a "lawyer shall not knowingly…offer evidence that the lawyer knows to be false[.]" N.H. R. Prof. Cond. 3.3(a)(3). *See also Bruzga's Case*, 145 N.H. 62, 67 (2000) ("Rule 3.3(a)(3) prohibits a lawyer from 'knowingly . . . offering evidence that the lawyer knows to be false.'"); *Young's Case*, 154 N.H. 359, 365 (2006). *See generally* N.H. R. Prof. Cond. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyers knows is…fraudulent…"). If a lawyer calls a witness who "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." N.H. R. Prof. Cond. 3.3(a)(3). "A lawyer may refuse to offer evidence…that the lawyer reasonably believes is false." *Id.* These duties take precedence over the duty of confidentiality in Rule 1.6. N.H. R. Prof. Cond. 3.3(d).

Similarly, Rule 3.4 requires that a "lawyer shall not falsify evidence, counsel or assist a witness to testify falsely." N.H. R. Prof. Cond. 3.4(b). It is irrelevant whether the witness is ultimately

indicted for perjury. *See Feld's Case*, 149 N.H. at 24-25 (lawyer "violated Rule 3.4(b) by assisting his client in providing false testimony" and noting that "Rule 3.4(b) contains no materiality requirement," unlike the perjury statute). It is professional misconduct for an attorney to violate or attempt to violate the Rules of Professional Conduct, including by engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" N.H. Rs. Prof. Cond. 8.4(a), 8.4(c).

The United States Supreme Court has similarly stated that "there is no right whatever – constitutional or otherwise – for a defendant to use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Furthermore, counsel's "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," and although "counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166.

The American Bar Association's 2004 Commentary to its Model Rules provide further clarification as to the scope of an attorney's obligations regarding false witness testimony. These comments matter because, while not binding, the New Hampshire Supreme Court has looked at them for guidance. *See, e.g.*, *State v. Collins*, 2024 N.H. 7, ¶ 16; *State v. Newton*, 175 N.H. 279, 289-290 (2022); *Clauson's Case*, 164 N.H. 183 (2012). The American Bar Association's 2004 Commentary to Model Rule 3.3 explains that,

> Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence….

N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [5]. Unlike the far more complicated situation where a criminal defendant wants to testify and the lawyer knows the defendant will lie, a lawyer cannot knowingly have a non-client witness testify falsely. The issues which arise with respect to a criminal defendant's constitutional rights do not arise when the person providing false testimony is a non-party witness.

However, anticipated false testimony by a witness does not mean that the witness is entirely barred from testifying. As Comment [6] explains,

> …If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [6]. Thus, if a lawyer knows a witness will testify falsely on some things but not others, the lawyer can still call the witness to testify but can only elicit testimony that the lawyer does not know to be false.

The Prohibition Only Applies When the Lawyer "Knows" the Testimony Is False.

The most difficult and important question in this context is whether the lawyer "knows"

testimony is false. The question is not whether the lawyer suspects or even reasonably believes that the testimony is false. The question is whether the lawyer knows the testimony is false. Comment [8] adds,

> The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [8]. The critical distinction is between testimony the lawyer "knows" to be false and testimony the lawyer "reasonably believes to be false." The lawyer's subjective belief, even the lawyer's reasonable subjective belief, does not alone establish that the lawyer "knows" the testimony is false. Where the lawyer reasonably believes that a witness will testify falsely but does not "know" that the witness will testify falsely, Comment [8] suggests that the lawyer should resolve doubts in favor of the client. *Id.*

New Hampshire Rule of Professional Conduct 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question" and "a person's knowledge may be inferred from the circumstances." The New Hampshire Supreme Court has only once mentioned Rule 1.0(f) and what constitutes "knowingly" in the attorney context. *See Mesmer's Case*, 173 N.H. 96, 106 (2020). The lawyer had repeatedly lied to his client, opposing counsel, and the court about various pleadings. *Id.* at 98-104. The lawyer claimed he was "unable to 'knowingly' make false statements to the court" because of his sleep apnea. *Id.* at 104-05. The Supreme Court looked at the "extensive circumstantial evidence" in the lawyer's emails and admissions, and his failure to conduct "a simple review of the docket or a call to the court" to conclude that the lawyer's misrepresentations were made "knowingly" and in violation of Rule 3.3. *Id.* at 107-08. However, besides looking at the circumstantial evidence in the case, the Court did not address the precise standard for when a lawyer "knows" something to be false. Importantly, the Court appeared to apply an "objective fact standard" by looking at the external facts available and not the subjective understanding (reasonable basis) of the lawyer. Other courts have struggled with the issue. *See, e.g., State v. Chambers*, 994 A.2d 1248, 1259 n. 13 (Conn. 2010) (collecting cases and surveying the literature); *People v. Calhoun*, 815 N.E.2d 492, 502 (Ill. 2004) (describing five different tests used by state and federal courts).

Considering our Court's emphasis on the duty of candor and the analysis in *Mesmer's Case*, the best standard for New Hampshire lawyers to use may be the "firm basis in objective fact" standard, which has been adopted in Massachusetts and other jurisdictions, including state and federal courts. *See Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1248 (Mass. 2003); *People v. Riel*, 998 P.2d 969 (Cal. 2000); *Chambers*, 994 A.2d at 1259 n.13; *Brown v. Commonwealth*, 226 S.W.3d 74, 81-85 (Ky. 2007); *Calhoun*, 815 N.E.2d at 502-05; *State v. Abdullah*, 348 P.3d 1, 129 (Idaho 2015); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977); *United States v. Long*, 857 F.2d 436, 445-46 (8th Cir. 1988); *Lord v. Wood*, 184 F.3d 1083, 1095 n.9 (9th Cir. 1999).

A "firm factual basis standard" is also the standard that the *Restatement of the Law Governing*

Lawyers recommends. As it explains:

> A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document. A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of the Law Governing Lawyers § 120 cmt. c. (2000) (citation omitted).

The Lawyer Has a Duty to Take Remedial Measures If the Lawyer Knows False Testimony Has Been Offered.

Finally, under Rule 3.3(a)(3), when a lawyer "has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

> …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 lawyer 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.

N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [10].

Importantly, when the lawyer learns after the fact that false testimony was offered, Rules 3.3(a)(1) and (3) limit the duty to take remedial action to circumstances where the evidence was "material." Evidence is "'material only if there is a reasonable probability that' disclosure of the evidence will produce a different result in the proceeding." *State v. Girard*, 173 N.H. 619, 628-29 (2020) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *Porter v. Coco*, 154 N.H. 353, 356 (2006) ("An issue of fact is material if it affects the outcome of the litigation.") (quotation and citation omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Girard*, 173 N.H. at 629 (quoting *Bagley*, 473 U.S. at 682). *See also State v. Yates*, 137 N.H. 495, 503 (1993) (Thayer, J., dissenting).

In addition, the duty to take remedial action "continue[s] to the conclusion of the proceeding." N.H. R. Prof. Cond. 3.3(d). The New Hampshire Supreme Court has never addressed what counts as the "conclusion of the proceeding." The Commentary to Rule 3.3 explains that

> 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.

N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [13]. *See also Holden v. Blevins*, 837 A.2d 1053, 1057 (Md. App. 2003) (holding that "a 'proceeding' has not concluded until the appeal rights of every party to that proceeding have been exhausted, including the right to petition…for *certiorari*") (quotation and citation omitted); N.H. Super. Ct. R. 46(c)(2) (rules governing final judgments in civil cases). Thus, for example, if a final judgment has been rendered in the case and the deadlines for any appeal have passed, the duty to correct false testimony no longer applies.

The New Hampshire Supreme Court, in *State v. Newton*, 175 N.H. 279 (2022), explained that while N.H. R. Prof. Cond. 3.3 requires that a lawyer not knowingly offer evidence that the lawyer knows to be false and requires the lawyer to take reasonable remedial measures if false material is presented, "there is no requirement that a disclosure necessary to remedy the false testimony be a specific form of evidence." *Id.* at 289. The Court embraced Comment [10], finding that the lawyer's proper course would be "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 withdrawal or correction of the false statement of evidence." *Id.* at 289-90 (quoting N.H. R. Prof. Cond. 3.3 2004 ABA Model Code Comment [10]). The New Hampshire Bar Association Ethics Committee has also issued an advisory opinion on the topic. *See* Advisory Opinion #2008-09/03, Remedial Measures Under Rule 3.3. This Ethics Opinion focuses on the duty of the lawyer to make a disclosure to the court when the lawyer discovers that false testimony has been offered. The attorney is to try to convince the client to explain the discrepancy, admit error, or otherwise correct the apparent falsehood. If the client is unwilling to do so, the attorney is under an ethical duty to disclose the falsity to the tribunal.

Our Court's approach to an attorney's duties of truth and candor are exemplified by *Feld's Case*. 149 N.H. 19. The Supreme Court's then-Committee on Professional Conduct filed a petition to disbar an attorney for assisting his client in providing false testimony in interrogatories and depositions. *Id.* at 20, 24-28. The Supreme Court agreed that the lawyer repeatedly violated N.H. R. Prof. Cond. 3.4. *Id.* at 25-28. In determining the appropriate sanction, the Court reiterated the holding from *Nardi's Case* that "no single transgression reflects more negatively on the legal profession than a lie." *Feld's Case*, 149 N.H. at 28-29. Furthermore, "[i]ntentionally assisting in the promulgation of false answers is…inherently dishonest." *Id.* at 29. To correct his misconduct, the lawyer, "at the very least, had to bring his misconduct to the attention of [the opposing party] or the court *before* the trial began." *Id.* at 30 (italics in original). A lawyer must act quickly to correct the false testimony because a "good faith remedy for misconduct…must be timely to be mitigating." *Id.* at 29 (citing *Welt's Case*, 136 N.H. 588, 593 (1993)). Thus, in *Feld's Case*, "commensurate with the discipline" the Court has "imposed in cases involving intentional deceit during litigation," the lawyer was suspended from the practice of law for one year. *Id.*

In another instance, in *State v. Yates*, a witness for the prosecution testified to never "having *anything* to do with illegal drugs" even though the witness had a pending indictment for possession of an illegal drug. 137 N.H. at 497 (italics in original). The prosecutor knew about the indictment. *Id.* Accepting the defendant's due process claim, the New Hampshire Supreme Court noted that a "lawyer's duty of candor to the tribunal, N.H. R. Prof. Conduct 3.3(a)(3), is neglected when the prosecutor's office relies on a witness's denial of certain conduct in one case after obtaining an indictment charging the witness with the same conduct in another case." *Yates*, 137 N.H. at 499. The "final responsibility rested with the prosecutor…to bring to the attention of the court and the jury the State's official position that [the witness] was indeed probably involved with illegal drugs, and his testimony to the contrary was probably false." *Id.* at 500 (citation omitted). "The duty to correct false testimony is on the prosecutor, and that duty arises when the false evidence appears." *Id.* (quoting *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988)).

Quite recently, the United States Supreme Court held that a death row prisoner was entitled to a new trial because prosecutors failed to correct a witness's false testimony, despite their constitutional obligation to do so. *Glossip v. Oklahoma*, 604 U.S. 226, 231 (2025). The Court reiterated the holding of *Napue v. Illinois*, 360 U.S. 264 (1959) "a conviction knowingly obtained through use of false evidence violates the Fourteenth Amendment's Due Process Clause." *Glossip*, 604 U.S. at 246 (quotation and citation omitted). Where the prosecution "knowingly solicited false testimony or knowingly allowed it to go uncorrected when it appeared," and the uncorrected evidence was material, the defendant is entitled to a new trial. *Id.* (cleaned up). It was irrelevant that defense counsel knew or should have known about the false evidence, because "the Due Process Clause imposes the responsibility and duty to correct false testimony on representatives of the State, not on defense counsel." *Id.* at 252 (quotation and citation omitted).

Conclusion

Applying the principles set forth above to the question asked, if the lawyer knew the testimony was false when offered, the lawyer had a duty to take reasonable remedial measures notwithstanding the duty of confidentiality. If the lawyer later learned of the falsity of the testimony, and if the testimony was material, and if the proceeding has not concluded, then the lawyer still had a duty to take reasonable remedial measures.

NH RULES OF PROFESSIONAL CONDUCT (in order of appearance):

Rule 3.3

Rule 3.3(d)

Rule 3.3(a)(1)

Rule 3.3(a)(3)

Rule 1.0(f)

Rule 3.3(d)

Rule 1.2(d)

Rule 3.4(b)

Rule 8.4(a)

Rule 8.4(c)

Rule 3.4

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

N.H. Bar Association Ethics Committee, Advisory Op. #2008-09/03, Remedial Measures Under Rule 3.3 (2008).

SUBJECTS:

Knowing
Candor to the tribunal
Remedial measures
Truthfulness in statements to others

By the NHBA Ethics Committee
This opinion was submitted for publication to the NHBA Board of Governors at its November 20, 2025 meeting.