

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
PO-21-2**

**Posted for Comment February 26, 2021**

**QUESTION PRESENTED**

Does a lawyer have a duty under the Texas Disciplinary Rules of Professional Conduct to correct false statements made by his client in response to questioning by the opposing party's counsel during a deposition?

**STATEMENT OF FACTS**

A lawyer represented an individual defendant in a case arising from a car crash. A key issue in the case was whether the defendant-driver was looking down at his cell phone when the crash occurred. In an early meeting with his lawyer, the defendant admitted that he had been looking down at his phone when the accident happened but argued that the crash was the plaintiff's fault because the plaintiff was driving erratically. When the plaintiff asked for the defendant's deposition, the defendant's lawyer counseled his client to testify truthfully if asked about whether he had been looking at his phone. The defendant agreed to do so.

But during the deposition, in response to questions by the opposing lawyer, the defendant lied, testifying that he was not looking at his phone at the time of the crash. At the next break, the defendant's lawyer urged the client to correct the falsehood, but the client refused and instructed his lawyer to remain silent and do nothing to correct the falsehood. The lawyer returned to the deposition, and the issue did not come up again. When the plaintiff's lawyer passed the witness, the defendant's lawyer declined to ask any questions.

**DISCUSSION**

Questions such as this "present very difficult issues" because the Texas Disciplinary Rules of Professional Conduct "attempt to balance, on the one hand, a lawyer's duty of candor to the court and, on the other hand, a lawyer's duty of loyalty to and zealotness on behalf of a client, along with a duty to maintain confidential client information." Professional Ethics Committee Opinion 504 (August 1994); *see also* Comment 1 to Rule 3.03. Balancing these competing obligations is often a fact-specific inquiry. Opinion 504.

Rule 3.03 provides some baseline duties in this balance between a lawyer's duty of candor to the tribunal and his duties to the client. It states:

“(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; [or]

...

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.”

In addition to providing standards of conduct for Texas lawyers, this Rule serves as an exception to the duty to maintain client confidentiality under Rule 1.05, and, in certain circumstances, may require the lawyer to undertake “reasonable remedial measures” to correct false statements, “including disclosure of the true facts.” Rule 3.03(b); *see also* Rule 1.05(f); Opinion 504.

Under the facts above, Rule 3.03(a)(1) is not implicated. The defendant’s lawyer has not knowingly made any false statement of fact or law—only the client has lied.

Rule 3.03(a)(5) is also not implicated as long as the lawyer does not offer or use the false deposition testimony (by submitting the deposition testimony as summary judgment evidence, for instance). In addressing Rule 3.03(a)(5), comment 13 offers some guidance that appears to be relevant in this situation, providing that:

“A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of the obligation imposed by paragraphs (a)(5) and (b) of this rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client’s case, however, would violate paragraph (a)(5).”

Especially in light of comment 13, the lawyer did not violate Rule 3.03(a)(5) on these facts, assuming he does not attempt to use or offer the testimony as summary judgment evidence, at a hearing, during a trial, or at any other time. Here, the false testimony was elicited by opposing counsel while he was cross-examining the defendant in a deposition that the opposing counsel had noticed. The defendant's lawyer did not question his client during the deposition. Nor will he thereafter. This Committee has previously interpreted comment 13 to say that silence by a lawyer when the client lies on cross-examination "should not be deemed to be 'use' of false testimony under . . . Rule 3.03(a)(5)." Opinion 504.

So that leaves Rule 3.03(a)(2), which provides that a lawyer shall not knowingly "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act." This Committee has not previously examined whether a lawyer's silence in these circumstances would amount to "assisting a criminal or fraudulent act." But, based in part on the expectations created by comment 13, the Committee believes that, under the Rules as currently drafted, the lawyer's silence under these circumstances is not a violation of Rule 3.03(a)(2).

Ethics opinions in other jurisdictions are divided on whether a lawyer's silence in the face of cross-examination perjury constitutes "assisting" a criminal or fraudulent act. *Compare* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-376 at 5 (1993) ("The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests") (concluding that, even though the lawyer was not aware of her client's perjury until after the perjury occurred, once the lawyer learned of the perjury, her "[c]ontinued participation . . . in the matter without rectification or disclosure would assist the client in committing a crime or fraud" in violation of the version of ABA Model Rule 3.3(a)(2) that was in effect at the time) *with* Philadelphia Bar Association Prof'l Guidance Comm., Ethics Op. 95-3 (1995) ("Despite the laudable purpose underlying the ABA Opinion, this Committee believes that such a broad view of the term *assistance* fails to adhere to the plain meaning of the Rule. In the view of this Committee, silence and inaction do not amount to *assistance* . . .").

This Committee agrees with the latter view that "assisting" a client's criminal or fraudulent act under Rule 3.03(a)(2) requires more than mere silence or inaction. Although the term "assisting" is not defined in the Rules, the ordinary legal meaning of that term implies some kind of affirmative and knowing participation in the client's lie. By way of example, "assisting" crimes generally require proof that the defendant solicited, encouraged, directed, aided, or attempted to aid another person in the commission of the offense. *See* TEX. PENAL CODE § 7.02(a)(2); *see also* *Rodriguez v. MumboJumbo, L.L.C.*, 347 S.W.3d 924 (Tex. App.—Dallas 2011, no pet.). In *Rodriguez*, the trial court awarded sanctions against a lawyer solely on the ground that the lawyer had wrongfully accused opposing counsel of suborning perjury. *Id.* at 926. The only conduct that the lawyer attributed to opposing counsel was "that they had 'not sought to clarify or pull back the testimony' at issue." *Id.* at 927. "For subornation of perjury to occur, the suborner must act with the intent to promote or assist the witness in providing false testimony." *Id.* "One does not suborn perjury merely because one knows it has occurred and fails to disclose it." *Id.* In other words, a lawyer's failure to "clarify or pull back" a client's false testimony is

not the same as promoting or assisting a client in providing false testimony as required for the crime of suborning perjury. In the same way, this Committee concludes that a lawyer does not “assist” in his client’s false testimony under Rule 3.03(a)(2) by passively witnessing that testimony on cross-examination. Comment 13 is consistent with this interpretation of Rule 3.03(a)(2).

Although the Committee does not take lightly the damaging effect that false testimony can have on the judicial process (*see* ABA Opinion 93-376 at 4), the Committee cannot ignore the expectations created by comment 13 to Rule 3.03. A lawyer reading and relying on comment 13 could reasonably believe that he has no obligation to disclose false testimony that he did not encourage, elicit, or use. Unlike the Rules, which “are imperatives, cast in terms of shall or shall not,” the comments to the Rules are “permissive, defining areas in which the lawyer has professional discretion.” *See* Preamble to Rules, paragraph 10. “When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken.” *Id.* While comment 13 is arguably directed to section 3.03(a)(5) alone—not to the lawyer’s separate obligations under section 3.03(a)(2)—the Committee believes that is too fine a distinction on which to impose discipline. *But see* Schuwerk & Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Houston Law Review 232, 266 (October 1990) (stating that comment 13 “does not affect a lawyer’s duties to the tribunal under paragraph (a)(2) of this Rule”).

Unless the comments or the Rules are rewritten to make clear that a lawyer’s silence after cross-examination perjury could constitute “assisting” a criminal or fraudulent act, the Committee believes that Rule 3.03(a)(2) is not violated under the facts above. By way of comparison, ABA Model Rule 3.3(b) specifically provides:

“A lawyer who represents a client in an adjudicative proceeding and who knows that a person intended 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.”

Without similar specific guidance in the Rules to outweigh the expectations created by comment 13, this Committee does not believe that mere silence or inaction in the face of cross-examination perjury violates Rule 3.03(a)(2).

The Committee acknowledges that some of its earlier opinions may suggest otherwise. *See* Opinion 473 (June 1991), Opinion 480 (June 1991), and Opinion 504. But Opinions 473 and 480 do not apparently involve cross-examination perjury and, perhaps for that reason, neither addresses comment 13. Opinion 504 concludes that, on the facts presented, no perjury was committed, and the lawyer was required to remain silent. The opinion does discuss comment 13 after generally stating that a lawyer’s silence in the face of client perjury “will have the effect of corroborating or assisting fraudulent misstatements made by a client” and suggesting that the lawyer must disclose the true facts if the client does not. However, the opinion does not specify whether the “perjury” addressed in these passages occurred on cross-examination or direct examination; if it occurred on direct examination, the mandatory disclosure obligations of Rule 3.03(b) *would* be triggered.

Given comment 13, the Committee believes those opinions must be limited to circumstances in which a client commits perjury on direct examination.

Although Rule 3.03 does not require the lawyer to disclose his client's false testimony when a client commits perjury while being cross-examined by opposing counsel, that does not mean the lawyer should do nothing. As comment 13 states, the lawyer should urge that the false evidence be corrected or withdrawn and should also alert the client to the potential civil and criminal implications of his false testimony. *See* Opinion 504 (noting that, under comment 13, the lawyer "should urge his client to correct or withdraw false evidence given in cross-examination"). If the client still refuses, the lawyer is not obligated to disclose the true facts. He may seek to withdraw in accordance with the Rules, although he is not required to do so. In any event, the lawyer may not use the false deposition testimony to advance the client's case in any way.

This opinion leaves for another day an additional issue potentially implicated by the discussion above: whether Rule 3.03 even applies to false statements made during a deposition. Rule 3.03 is titled "Candor Toward the Tribunal," and depositions are not typically conducted before a "Tribunal" as that term is defined in the Rules. Texas has not adopted comment 1 to the corresponding ABA Model Rule, which states specifically that duties of candor toward the "tribunal" also apply "when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Comment 1 to ABA Model Rule 3.3.

That difference between the Texas Rules and the Model Rules suggests that Texas Rule 4.01 might instead control in the deposition context. Rule 4.01 is titled "Truthfulness in Statements to Others" and is framed in terms of a lawyer's duties "to a third person," which include the opposing party and counsel who observed the deposition or will review the transcript. Ultimately, there is no need to resolve whether Rule 3.03 or Rule 4.01 applies in the deposition context for purposes of the question presented because the result is the same either way. Like Rule 3.03, Rule 4.01 provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client." For the reasons discussed above, a lawyer does not violate Rule 4.01, if it applies, by "assisting" a criminal or fraudulent act by remaining silent in the face of this false deposition testimony that is elicited by opposing counsel on cross-examination.

## CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer does not have a duty to correct intentionally false statements made by his client while being cross-examined by the opposing party's counsel during a deposition. Nevertheless, the lawyer should urge his client to correct the false statements, including by explaining the potential civil and criminal ramifications of false testimony. If the client refuses, the lawyer may (but is not required to) withdraw from the client representation if permitted by the Rules. If the lawyer does not withdraw, he is not required to disclose the true facts but may not use the false deposition testimony in any way to advance the client's case.