NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion # 1994-95/5
Candor to Tribunal: Use of Questionable
Evidence for the Purpose of Impeachment
February 16, 1995

RULE REFERENCES:	SUBJECTS:
*Rule 3.3	Candor Toward Tribunal
*Rule 3.3(a)	Criminal Representation
*Rule 3.3(c)	Knowledge Knowing
Scope	Trial Conduct
Terminology	Witnesses

ANNOTATIONS:

An attorney is prohibited from offering evidence in a trial that is known by the attorney to be false, whether or not the evidence was produced by the client or a third party (Rule 3.3(a)(3); Rule 3.3, ABA Model Code Comments, "False Evidence").

The determination as to whether the attorney "knows" evidence to be false must be made by the attorney who has a full understanding of the surrounding facts and circumstances and may better evaluate his or her certainty of the falsity of the evidence. (Rule 3.3(a)(3); Rule 3.3, ABA Model Code Comments, "False Evidence;" ABA Model Code Comments, "Terminology").

It is ethically permissible for an attorney to offer knowingly false evidence for the sole purpose of impeachment, provided that the evidence itself is authentic. (Rule 3.3(a)(3)).

QUESTIONS:

I. Is an affidavit of an alleged victim of a crime which contradicts a statement made by a criminal defendant to his attorney evidence the attorney "knows to be false?”

II. Is it ethically permissible for an attorney to offer knowingly false evidence for the sole purpose of impeachment?

FACTS:

The inquiring attorney represents a criminal defendant in a second-degree assault case.1 The prosecution claims that in March 1992, the defendant assaulted his wife and broke her wrist.

Through the process of discovery, the attorney learned that in September 1992, the wife provided her counselor with a statement which indicates that she was assaulted by defendant on four separate occasions. The statement does not mention the alleged incident in March 1992. In July 1993, the wife signed an affidavit in which she contradicts her 1992 statement and confesses that she made the 1992 statement under pressure by her counselor.

The attorney would like to use the affidavit at trial, not as evidence of defendant’s innocence, but to impeach the testimony of the wife. The attorney, however, has received information that causes him to question the validity of certain statements the wife made in the 1993 affidavit. The attorney is concerned that he will violate his obligation of candor to the court if he uses the affidavit to impeach the wife.

RESPONSE:

I. Evidence "Known" to Be False.

Rule 3.3 imposes a duty of candor on an attorney appearing before a tribunal in a court of law or adjudicative proceeding. Rule 3.3(a)(3) provides, in pertinent part, "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false." If, on the other hand, the lawyer "reasonably believes" the evidence to be false, the lawyer has discretion as to whether or not to use the evidence. See N.H. Rule Prof. Conduct 3.3(c).

The Terminology section of the ABA Model Code Comments defines "Knowingly," "Known" or "Knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[2] It has been held that under Model Rule 3.3(c), a lawyer's s "knowledge" of a defendant's intended perjury must be based on an independent investigation of the facts or on distinct statements by the defendant. See, e.g., Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), rev'd on other grounds. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988 (1986); Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977)(1awwer must have a firm factual basis for believing client will perjure himself); Lawyer's Manual on Professional Conduct 61:408(1987). Mere suspicion or inconsistent statements by the defendant alone are insufficient to constitute knowledge of the falsity of the defendant's testimony. See Whiteside, 744 F.9d at 1328 (citing Butler v. United States, 404 A.2d at 850-51; Johnson v. United States, 404 A.2d at 164; Commonwealth v. Wolfe, 447 A.2d at 310); see also Rieger. Client Perjury: A Proposed Resolution n of the Constitutional and Ethical Issues. 70 Minn. L. Rev. 121, 149 (1985); ABA Formal Opinion 87-353 (4 /20/87) (lawyer should know that the client intends to commit perjury from the client's stated intention and not based on mere suspicion); ABA Formal Opinion 314 (l965) (lawyer should disclose client confidences if the lawyer or is convinced "beyond a reasonable doubt" that a crime will be committed).

Although Rule 3.3(a) allows lawyers to give their clients the benefit of the doubt with respect to the truth or falsity of evidence, the rule does not permit lawyers to practice deliberate self-deception or deliberately evade knowledge. See Hazard and Hodes. The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (Supp. 1994). "If the circumstances are such that only 'brute rationalization' would allow a lawyer to convince himself that he does not 'know' that an occasion for application of Rule 3.3(a) is at hand, a disciplinary authority can infer that he did know." Id. (citing M. Freedman, Lawyer's Ethics in an Adversary System 73 (1975); J. Noonan, The Purposes of Advocacy and the Limits of Confidentiality. 64 Mich. L. Rev. 1485, 1488 (l966)).

The Committee cannot determine whether the inquiring attorney "knows" within the meaning of Rule 3.3 that the statements made in the affidavit of the wife are false. The determination as to whether the attorney "knows" the evidence to be false must be made by the attorney who fully understands the surrounding facts and circumstances and can better evaluate the extent of his certainty of the falsity of the affidavit

II. The Use of Knowingly False Evidence for Impeachment Purposes.

In N.H. Op. 1993-94/7 (N. H. Ethics Opinions Annotated (1994)), this Committee decided that pursuant to Rule 3.3(a), an attorney anal not use evidence known to be false to assist a client's criminal defense. The Committee left open the question as to whether under Rule 3.3 an attorney may use knowingly false evidence for the purposes of impeachment only.

In determining the parameters of the limitations imposed on advocates by Rule 3.3, the Committee considers the basic purposes underlying the rule. As the Preamble to the ABA Model Rules of Professional Conduct states: "Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." See Preamble to ABA Model Rules of Professional Conduct, at 10 (quoted in Nix v. Whiteside. 475 U.S. 157 106 S. Ct. 988, 995 n.5 (1986)); see also N.H. Rules of Prof. Conduct, Scope (the Rules of Professional Conduct are rules of reason which should be interpreted with reference to the purposes of legal representation and of the law itself).

Discovery of the truth is the primary function of the court and a fundamental purpose of the adversary system. See, e.g., United States v. Havens, 446 U.S. 620, 626-27 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."). The duty of candor imposed by Rule 3.3 is necessary to further the truth-seeking goals of the adversary process. As one court has noted:

> In our system stem the courts are almost wholly dependent on members of the bar to marshal and present the true facts . . . as to enable the judge or jury to cook the adversary contentions in a crucible and draw off the . . . decisive facts to which the law may be applied. When an attorney adds or allows false testimony . . . he makes impure the product and makes it impossible for the scales to balance. No breach of professional ethics, or of the law, is more harmful to the administration of justice . . . Dodd v. Florida Bar. 118 So. 2d 17, 19 (Fla. 1960).

In the instant case, even assuming that the statements made in the wife's affidavit are known by the inquiring attorney to be false, use of the affidavit to cross-examine the wife would not violate Rule 3.3 and would be consistent with the purposes underlying the rule.[3] Rule 3.3 prohibits an attorney from "offering" false evidence. The attorney would not be "offering" false evidence if, on cross-examination, he uses the wife's prior inconsistent statements in the affidavits to attack her credibility. See N.H. Rule of Evidence 613 (permitting cross-examination of a witness with prior inconsistent

statements). Although the statements made in the affidavit may be "false," the fact that the inconsistent statements exist is not "false." Cross-examination of the wife based on the affidavit would be a valuable aid to the jury in assessing the wife's credibility and would further the fundamental goal of the court to seek the truth.

It is important to note that the attorney would he prohibited from arguing the truth of the affidavit known to be false in an effort to persuade the jury of the client's innocence. Rather, the attorney, consistent with the rules of evidence and the court's instructions, could argue only that the wife's testimony is not credible due to the prior inconsistent statements in the affidavit.

This reasoning is consistent with the reasoning by the United States Supreme Court in Harris v. New York, 401 U.S. 222 (1971), in which the Court held that a defendant's statement inadmissible to establish the prosecution's case in chief may be used to impeach the defendant's credibility. In that case, the Court noted that without the opportunity to impeach a witness with prior inconsistent utterances, the normal function of cross-examination would be impeded. Id. at 225-26; The testimony of the witness would go unchallenged, resulting in the impairment of the integrity of the fact-finding goals of the criminal trial. Id. at 225-26; see also United States v. Havens, 446 U.S. at 627 (holding that illegally-seized evidence may be used to impeach a witness, even though it is inadmissible in the case in chief).

SUMMARY:

For the foregoing reasons, the Committee concludes as follows:

I. The determination as to whether the attorney "knows" evidence to be false must be made by the attorney who fully understands the surrounding facts and circumstances and may better evaluate the extent of his certainty of the falsity of the evidence.

II. It is ethically permissible for an attorney to offer knowingly false evidence for the sole purpose of impeachment, provided that the evidence itself is authentic.

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[1]The facts have been changed by the inquiring attorney in order to protect privileged information

[2]As the Committee noted in its Formal Opinion 1993-94/7, the Committee is uncertain as to whether or not the New Hampshire Supreme Court intended to adopt or approve "Scope" and "Terminology" sections of the ABA Model Rules when it issued its order of January 16, 1986. Regardless, the plain meaning definition of "knows" is consistent with that set forth in the "Terminology" section. See NH Op. 1993-94/7 (NH Ethics Opinions Annotated, Page 5, n .3 (1994)).

[3] The Committee assumes, of course, that the attorney does not "know" that the affidavit itself is a forgery or is otherwise not authentic. See Rule 3.4 (a) and (b) (prohibiting attorneys from falsifying, destroying, or altering evidence).