CANDOR TOWARD THE COURT: HOW MUCH EVIDENCE MUST AN ATTORNEY HAVE THAT THE CLIENT HAS DONE A WRONGFUL OR ILLEGAL ACT?

While most lawyers and a few clients know that the duty of “Candor Toward the Tribunal” supersedes the duty of “Client Confidentiality,” few understand the evidentiary requirements which trigger the mandatory application of Model Rule 3.3(a)(2). The Rule states, “A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.” “Knowingly” is defined in the Terminology section of the Model Rules as denoting actual knowledge, where a person’s knowledge may be inferred from the circumstances. The requirement of actual knowledge means that violations will be difficult to prove. The Comments following Rule 3.3 provide only the following guidance to subpart (a)(2): “There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” This Article reviews recent case law in an attempt to sketch the boundaries of circumstances which trigger application of the Rule of Candor.

I. “COURT FIRST, CLIENT SECOND”

Professors Hazard and Hodes, authors of the preeminent handbook on the Model Rules, describe Rule 3.3(a)(2) as the duty of a lawyer to disclose when silence would be tantamount to corroborating or concealing a client’s crime or fraud. The rationale behind the Rule of Candor is “to

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) (1994).
2. Id.
3. See id., at Preface.
5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 2 (1994).
6. A historical rationale for the Rule of “Candor Toward the Tribunal” is succinctly described under the heading, “Court First, Client Second” in ABA/BNA, Candor Towards Tribunals, Lawyers' Manual on Professional Conduct (1995); contra MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM ch. 3 (1975) (arguing that the Rule of “Client Confidentiality” is supreme).
7. See HAZARD, supra note 4, at 351-52. Professor Hazard was a reporter

307
protect the integrity of the decision-making process," i.e., professional responsibility requires "zealousness within the bounds of the law."  

Hazard and Hodes provide examples which illustrate when Rule 3.3(a)(2) is triggered by client misconduct (as opposed to other subparts of Rule 3.3(a), which are triggered by the misconduct of lawyers). The example highlighted for the criminal context concerns a defendant's sentencing hearing for a conviction of a minor crime: if the defendant provides a false statement when the judge asks about his prior criminal record, then the lawyer has an affirmative duty under Rule 3.3(a)(2) to correct it; yet, if the judge merely assumes the defendant has no prior record, then the lawyer has no duty to correct the court's misperception because the client has done nothing wrong—the lawyer is, therefore, bound by Client Confidentiality under Rule 1.6 to remain silent. The civil context, a lawyer is bound to disclose to the court when he later learns that a client has presented an incomplete or wrong answer during discovery.  

ABA Ethical Opinion 87-353 highlights the major policy change reflected by Rule 3.3. It explains that Rule 3.3(a)(2) is different from aiding and abetting or subornation of perjury because disclosure is required when the lawyer learns of the fraud or crime after-the-fact. The crimes of aiding and abetting or subornation presuppose that the lawyer had actual knowledge of the client's fraud beforehand. Opinion 87-353 also distinguishes a client's continuing fraud from his past crimes. A client's past crimes are completely protected by the rule on Confidentiality. Yet, a lawyer must disclose to the court crimes or frauds committed by the client during the proceedings, but only if the lawyer learns of it prior to the conclusion of the proceedings—after final judgment, the client's actions are completely protected past crimes. Finally, the Opinion emphasizes that the application of Rule 3.3(a)(2) is "strictly limited" to when a lawyer knows that the client has committed a fraud or crime.

8. Id. at 347.
9. See id. at 361-362.
10. See id.
12. See id.
13. See id.
In *Nix v. Whiteside*, the Supreme Court upheld state mandatory disclosure requirements for lawyers, when a defendant plans perjurious testimony, as not violative of the Sixth Amendment right to counsel. In *Nix*, the defendant repeatedly told his lawyer prior to trial that he had not seen a gun in the victim's hand, but during trial preparation, the defendant indicated that he would tell the jury he saw "something metallic" in the victim's hand. His attorney successfully averted the perjury by threatening to expose the defendant's lie to the court and to withdraw. The Court held that such "threats" are entirely consistent with the nature of a trial as a search for truth, and under such circumstances overrides client confidentiality. Implicit in the Court's denial of the petitioner's claim is that the same reasoning would apply to frauds committed by clients where the lawyer learned about them after-the-fact.

Given the constitutionality of mandatory disclosure requirements, the crucial question for practitioners becomes: what evidence supports sufficient "knowledge" prompting mandatory disclosure of a client's recent fraud perpetrated upon the court? The following discussion attempts to delineate the contours of the evidentiary requirement for knowledge with examples of various circumstances handled by courts.

II. CLIENT ADMISSION

Obviously, a client's admission is sufficient evidence of a lawyer's knowledge. In *Plunkett v. State*, a Texas court held that a lawyer was obligated to inform the court upon his reasonable belief in his client's statement one day before trial that "three jurors had been bought and paid for." In *Malautea v. Suzuki Motor Co.*, the Eleventh Circuit affirmed a directed verdict against a defendant corporation and sanc-

15. *See id.* Planned perjury is analyzed under subpart (4) of Model Rule 3.3(a): if the lawyer knows in advance of a client's intention to lie during pending litigation, then allowing the client to do it constitutes professional misconduct by the lawyer.
17. *See id.* at 161.
18. *See id.* at 171.
21. *Id.*
22. 987 F.2d 1536 (11th Cir. 1993).
tions against its lawyers for continual willful withholding of discoverable information on damaging Samurai "roll-over" data, which Suzuki's counsel admitted knowing about at least two years prior to the request. In *In re Mack*, the Minnesota Supreme Court extended a lawyer's suspension for an additional twenty-three months for failing to inform the trial court of his client's later admitting to lying in a deposition about a dispositive issue.

In *Bersani v. Bersani*, a Connecticut court compelled a lawyer to disclose the location of the children in a custody dispute because the parent in contempt had informed her lawyer of their whereabouts. In dicta, the Iowa appellate court reminded counsel in the decision of *In re Marriage of Williams* that, in a marital dissolution case, lawyers had a responsibility to assure client compliance in reporting all assets. In *Williams*, the client had continued to sell assets and to repeatedly deny having any records after transferring both assets and file cabinets to his lawyer.

In *Disciplinary Proceedings Against Sieg*, the Wisconsin Supreme Court suspended a lawyer for thirty days because he failed to inform the court of his client's use of a false identity for traffic violations when his client told him about it soon after the judgment was entered, but before the client received notification of his required attendance at traffic school. In comparison, the Maryland Supreme Court found, in *Attorney Grievance Commission v. Rohrback*, that the lawyer had committed no ethical violation when he did not volunteer his client's additional DUI under a false identity during trial because the judge did not specifically ask, nor did the defendant voluntarily provide such information. However, the Maryland court warned the lawyer that he came "perilously close" to assisting the client's fraud when he failed to correct the client's name during the bail hearing for the second DUI under the false identi-

23. See id.
24. 519 N.W.2d 900 (Minn. 1994).
25. See id.
27. See id. Cf. infra text accompanying note 53.
29. See id.
30. 515 N.W.2d 694 (Wis. 1994).
31. See id. Cf. infra text accompanying note 63.
33. See id at 497.
ty.\textsuperscript{34} The court found the evidence insufficient because the client appeared side-by-side with the bondsman at the hearing; the lawyer, who was in the room at the time, was some distance away and did not take part in the discussion before the judge.\textsuperscript{35}

All of these cases are consistent with a strict application of Rule 3.3(a)(2). Yet, once leaving the realm of a reasonable belief in the truth of a client’s admission, a lawyer’s duty to disclose becomes less certain.

III. MERE SUSPICION

Generally, a lawyer’s mere suspicion of a client’s fraud is not sufficient knowledge to invoke the Rule of Candor.\textsuperscript{36} In \textit{United States ex. rel. Wilcox v. Johnson},\textsuperscript{37} the Third Circuit granted habeas corpus relief to a defendant whose lawyer threatened withdrawal based on “a mere unsubstantiated opinion” that the defendant’s false alibi was perjured.\textsuperscript{38} In \textit{Wilcox}, the defendant had not confessed his perjury, nor was there any other evidence.\textsuperscript{39} In dicta, the California Supreme Court noted in \textit{People v. Cox}\textsuperscript{40} that a lawyer had the duty to report matters threatening the security of court proceedings only if based on fact and not mere rumor or innuendo by bailiffs concerning “some possibility” of an escape attempt by the defendant.\textsuperscript{41} Without something more than suspicion, disclosure to the court would completely undermine the lawyer’s basic responsibility of zealous advocacy for the client—the cornerstone of the adversarial nature of American jurisprudence.

In contrast, the Oklahoma Court of Criminal Appeals held, in \textit{Cooper v. Oklahoma},\textsuperscript{42} that it was no error for a court-appointed lawyer to disclose his “impressions” to the judge regarding his client “faking” in-
competency. His client was convicted of capital murder after being found competent to stand trial, despite the defendant being uncommunicative with his counsel. On its face, this appears to be grossly insufficient evidence, if not court-sanctioned violations of the professional duties of zealous advocacy, avoiding conflict of interest and maintaining client confidentiality. The lawyer was unqualified to make an assessment of his client’s competency and had no basis for his conclusion—at the ultimate cost of the defendant’s right to due process. Obviously, death is too late to determine a defendant’s competency.

Yet, in the context of a fiduciary relationship, suspicion may be sufficient knowledge to trigger application of Rule 3.3(a)(2). In the decision of In re Estate of Devoy, an Illinois appellate court denied payment of attorney’s fees to a lawyer who failed to inform the court of his suspicions concerning the suitability of the administrator of a deceased’s estate. The administrator, who was the lawyer’s client, had destroyed a copy of the deceased’s will at the lawyer’s office, thereby seemingly introducing a conflict of interest because of the administrator’s inheritance rights as a second cousin of the deceased. In In re Wilde Horse Enterprises, a United States Bankruptcy Court denied fees and forbade a lawyer from further practicing bankruptcy law when she failed to inquire into the personal collusive relationship between the debtor-seller and a buyer; thus, the lawyer’s silence effectively “sponsored” the fraud. The nature of the fiduciary relationship in these situations warrants a lesser evidentiary showing of knowledge because the court’s role is more active in protecting the property interests of absent parties.

Exclusive of fiduciary relationships, when a lawyer does become suspicious of a client’s perpetration of a crime or fraud upon the court, do courts then find a duty to investigate implicit in the Rule of Candor?

43. See id at 312.
44. See id.
46. See id at 1343.
47. See id.
49. See id at 846-47.
IV. DUTY TO INVESTIGATE

In the decision of In re Grand Jury Subpoena (Legal Services Center), the Massachusetts' district court explicitly held that a lawyer is not obligated to undertake an independent determination before advancing a client's position absent obvious indications of client fraud. In Legal Services, the government was attempting to obtain confidential attorney work-product of lawyers representing Nigerian nationalists accused of "sham" marriages. The government hoped to indict the lawyers for "turning a blind eye" to indications of fraud used to circumvent immigration laws. The prosecutor apparently forgot that the integrity of the judicial decision-making process begins with zealous advocacy, which demands that a lawyer presume a client's assertions are true, until faced with clear evidence to the contrary. Second-guessing the client is fundamentally inconsistent with this obligation.

In a similar manner, the Supreme Court of Alaska, in In the Matter of Mendel, vacated contempt orders against a lawyer who properly asserted Attorney-Client privilege, when asked during a court deposition about the whereabouts of her client's children, because the lawyer knew nothing. The lawyer's representation involved challenging the validity of a court order on child custody, and the lawyer was quite candid that she purposely did not ask her client where the children were. The court made no intimations that the lawyer should have asked such information, even though the parent was in willful violation of a custody order. To impose a duty to investigate in such circumstances would serve no purpose consistent with Rule 3.3 and yet leave such clients effectively without representation.

While not explicitly holding a duty to investigate, the court in United States v. Shaffer Equipment Co. affirmed a Rule 3.3(a)(2) violation against a government lawyer representing the Environmental Protection

51. See id. at 969 (interpreting Massachusetts' adoption of Disciplinary Rule 7-102(B), the precursor to Model Rule 3.3(a)(2)).
52. See id. at 967.
53. See id.
55. See id.
56. See id. at 70.
57. See id. at 74.
58. 11 F.3d 450 (4th Cir. 1993).
Agency (EPA).  The Fourth Circuit found that the lawyer had actual knowledge of an EPA consultant’s fraudulent misrepresentation of credentials when he received information from Rutgers University that the consultant did not have a degree. The consultant had not admitted falsifying his credentials, but merely failed to provide a copy of his diploma as required, which then prompted the lawyer to contact the school. Courts should be careful not to construe this holding as imposing a duty to investigate, absent explicit government regulations to the contrary.

V. OTHER TRIGGERED DISCLOSURES

Some courts are willing to apply Rule 3.3(a)(2) based on circumstantial evidence supporting awareness of a client’s crime or fraud, i.e., the lawyer should have known. For example, in United States v. Del Carpio-Cotrina, a Florida district court found that a lawyer had a duty to inform the court that his client had skipped bond when the defendant’s wife had called the lawyer to say her husband had packed his suitcase and left home for a destination unknown. In rejecting the lawyer’s argument of lack of certainty, the court found the lawyer’s knowledge sufficient with “a firm factual basis and proof beyond a reasonable doubt.”

In People v. Nilsen, a California appellate court noted in dicta that a court-appointed lawyer had the duty to inform the court of his client’s change in financial circumstances if he was aware of the defendant’s receipt of a settlement from a wrongful termination action. There was no evidence that the lawyer had such knowledge, but the court suggested that because the settlement occurred during the lawyer’s representation of the client and because the settlement was apparently reported in newspapers, then “it would not be unlikely that he was aware of it.”

59. See id.
60. See id.
61. See id.
63. See id.
64. Id. at 99.
67. Id. at 818.
In **State v. Cashby**, 68 the Minnesota Supreme Court affirmed a trial court’s finding “beyond a reasonable doubt” that a lawyer had actual knowledge of her client’s use of a false identity on a speeding ticket. 69 The finding was based on circumstantial evidence of the lawyer’s signature on a Release on Recognizance Agreement and a telephone message slip, both of which listed her client’s incorrect name. 70 The defendant was posing as his brother and the lawyer denied knowing anything about her client’s assumed identity: she claimed that she did not notice the first name on the Release Agreement when she signed it, and that she referred to her client during telephone conversations only by his last name, as evidenced by her follow-up correspondence confirming the phone conversations. 71

In **Southern Trenching v. Diago**, 72 a Florida appellate court remanded a $1 million judgment against the defendant because the plaintiff “with the knowledge and connivance of his counsel” deliberately concealed a superseding similar accident involving the same injuries. 73 The only fact supportive of the court’s conclusion of deliberate concealment was the plaintiff’s admission, “They never asked me!” 74 Absent an affirmative act of concealment by the client, the court appears to be requiring the plaintiff to do the defendant’s job, which is directly antithetical to an adversarial decision-making process and beyond the scope of Rule 3.3(a)(2).

**VI. CONCLUSION**

The rule of Candor Toward the Court provides a limited exception to the rule of Client Confidentiality, in order to protect the truth-seeking mission of the judicial process. The relationship between the two Rules is aptly described as “zealousness within the bounds of the law.” Broken into elements, Rule 3.3(a)(2) requires: (1) disclosure by a lawyer; (2) who obtains actual knowledge; (3) after-the-fact; (4) of a client’s perpetration of a fraud or crime; and (5) before the court. Because the nature of our

68. 348 N.W.2d 736, 738 (Minn. 1984).
69. See id.
70. See id.
71. See id.
73. See id.
74. Id. at 1167.
adversarial process rests on Zealous Representation, supported by Client Confidentiality, application of this exception should be narrowly construed, so as to be actionable only when it perverts justice. Any allegations should prove actual knowledge conclusively before sanctioning the lawyer. Counsel cannot and should not be held responsible for proving the opposing party’s case.

V. Lynne Windham