

THE REVIEW OF  
**SECURITIES & COMMODITIES  
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 56 No. 15 September 13, 2023

## ETHICAL ISSUES ARISING FROM CLIENT DEPOSITION PERJURY

*When a lawyer knows that a client is lying during sworn deposition testimony, ethical rules suggest that the lawyer should take a break from the deposition and remonstrate with the client. But what does a lawyer do when court rules prohibit the lawyer from conferring with the client mid-deposition?*

By Matthew A. Schwartz and Aaron J. Blake \*

Lawyers should prepare clients for depositions, including by explaining the extreme importance of answering all questions truthfully. But no amount of preparation can prevent a client from lying under oath if the client is determined to do so. Ethical rules provide that a lawyer should take a break in the deposition and forcefully instruct a lying witness to cease the witness's perjury and to correct the prior testimony.<sup>1</sup> That ethical guidance, however, sometimes conflicts with court rules in certain jurisdictions that prohibit lawyers from engaging in mid-deposition conferences with their clients. This article addresses this conflict, first by describing the remedial measures recommended by the ABA and a leading treatise on depositions, next by discussing the reasoning that animates rules prohibiting mid-deposition conferences, and finally by recommending which actions lawyers should consider to

remedy client deposition perjury in jurisdictions that prohibit mid-deposition conferences.<sup>2</sup>

### THE DUTY OF CANDOR

The requirement that a lawyer take reasonable measures to remedy client perjury derives from the lawyer's duty of candor to the tribunal. The comments to the Model Rules, Formal Opinions by the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee"), and a leading deposition treatise all agree that those remedial measures should include a conference with the client.

---

<sup>1</sup> Unless otherwise specified, this article refers to the ABA Model Rules ("Model Rules"). Each jurisdiction has its own ethical rules, which may differ slightly from the rules discussed in this article. Attorneys should exercise caution in this area.

---

<sup>2</sup> This article assumes, for purposes of discussion, that the lawyer has actual knowledge of the client's false testimony and that the false testimony concerns a material fact, which are prerequisites to a lawyer's duty to disclose client perjury. Henry L. Hecht, *Effective Depositions* 589 (2d ed. 2010); see also Model Rules of Pro. Conduct r. 3.3(b) (limiting the disclosure obligation of lawyers to situations in which they "know[] that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct").

---

\* MATTHEW A. SCHWARTZ is a partner and AARON J. BLAKE is an associate in the Litigation Group at Sullivan & Cromwell LLP in New York, NY. Their e-mail addresses are [schwartzmatthew@sullcrom.com](mailto:schwartzmatthew@sullcrom.com) and [blakea@sullcrom.com](mailto:blakea@sullcrom.com).

---

### INSIDE THIS ISSUE

● **KEY REGULATORY AND COMPLIANCE CONSIDERATIONS FOR SMALL AND REGIONAL BROKER/DEALERS, Page 223**