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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am a civil trial lawyer. I have a question about Rule 3.3 Candor to the Tribunal, which says that a lawyer shall not "knowingly" offer evidence that the lawyer knows to be false. On several occasions I have put a client witness on the stand whose testimony seems implausible in some regard, but I couldn't prove it to be false, or have certainty that it was false. It makes me uncomfortable, but then again, sometimes the truth is stranger than fiction. Where is the line here? When do I "know" something to be false rather than just have a doubt or question about it?

A: According to Model Rule 1.0(f) "knowingly," "known," or "knows" denotes "actual knowledge" of the fact in question, not just a question about it, but a person's knowledge may be "inferred from circumstances." Courts have said that this standard requires "objective proof" or "objective circumstances firmly rooted in fact" of falsity for there to be knowledge. *E.g.*, *United States v. Stewart*, 931 F.Supp.2d 1199 (S.D. Fla. 2013) (without objective proof client lying, lawyer possessed no actual knowledge); *Commonwealth v. Leiva*, 146 N.E.3d 1093 (Mass. 2020). The standard is what the lawyer does or did know, not what the lawyer should or should have known. The "inferred from circumstances" part of the definition does not lower the "actual knowledge" standard, it just means that direct evidence of the lawyer's actual knowledge is not required, the surrounding circumstances can establish that the lawyer had actual knowledge.

In your calculus during a case, consider the effect of the objective facts that you are aware of (and perhaps question your client about them). In addition, do not try to avoid knowledge; there are numerous cases that establish that a lawyer may not purposely avoid acquiring actual knowledge, by ignoring or consciously avoiding evidence of falsity. For an interesting discussion of this concept, albeit somewhat inconclusive, *see, e.g., Bennett L. Gershman, Rudolph Giuliani and the Ethics of Bullshit*, 57 Duq. L. Rev. 293 (219).

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.