

**Liar, Liar:
What to do When Your Client Lies**

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I. Background

- A. Rules. Several ethics rules prevent lawyers from allowing clients to perpetrate frauds on other parties.
1. Rule 1.2(d) – “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . .
 2. Rule 3.1 – prohibition on bringing frivolous claims.
 3. Rule 3.3(a)(1), 3.3(a)(3), 3.3(b) – requirement to disclose false evidence to a tribunal.
 4. Rule 3.4(b) – prohibition on counseling or assisting a witness to testify falsely.
 5. Rule 4.1 – “a lawyer shall not knowingly make a false statement of fact or law.”
 6. Rule 8.4(c) – prohibiting a lawyer from engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation.”
- B. Policy: Duty to Client vs. Duty to the Judicial System
1. A lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3 supersedes the lawyer's responsibility to keep client confidences under Rule 1.6. *See* ABA Formal Op. 87-353 (1987).
 2. “Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process . . . “ Rule 3.3, cmt. 12.
 3. “The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.” Rule 3.3, cmt. 11.
 4. “Unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.” Rule 3.3, cmt. 11.

C. Practical Concerns.

1. Although a lawyer is required to be truthful to a client and in the course of representing that client (*see* Rules 4.1 and 8.4(c), Model Rules of Professional Conduct (MRPC)), a client does not have an obligation to be truthful to his or her lawyer.
2. Clients may be less than 100% truthful for a variety of reasons:
 - a) Lack of trust (lawyer may use or disclose harmful facts).
 - b) Need to remain consistent with lies that have already been told to others.
 - c) Inability to face actual facts.
 - d) Covering up others' misconduct.
 - e) The client perceives a lie as a quicker way to resolve a matter.
 - f) Some people are just prone to lying.

D. Knowledge.

1. A lawyer may not ignore what is plainly apparent, e.g. by not reading a document.
2. Knowledge may be inferred from the circumstances. Rule 3.3, cmt. 8.
But,
3. Actual knowledge does not include unknown information, "even if a reasonable lawyer would have discovered it through inquiry."
Restatement, § 120, cmt. c.
4. *See Jiminez v. Madison Area Tech. College*, 2001 U.S. Dist. Lexis 25077, at *16 (W.D.Wis. Aug. 21, 2001), discussed below.

II. **When a Client Lies to You**

A. Duty to Investigate

1. A lawyer has a duty to investigate the facts of a client's case to determine whether there is a proper basis for bringing or defending a claim. *See* Rule 3.1, cmt. 2.
2. Where a matter is urgent, or a statute of limitations is about to expire, or evidence about to be destroyed, a lawyer may act solely upon the facts described by the client without additional investigation. *See* Center for Professional Responsibility, *Annotated Rules of Professional Conduct*, at 313 (7th Ed. 2011).

3. *Example.* Client brings lawyer over a dozen “smoking gun” documents showing that her employers were discriminating against the Client on the basis of her ethnicity. The Client had laminated the documents “to prevent them from being stolen.” Even though the documents appeared false on their face, and the lawyer had other evidence that the client was prone to dishonesty, the lawyer filed a discrimination lawsuit against the employer in Federal court and persisted through a Rule 11 motion. The Federal court dismissed the case and imposed sanctions, stating it was “wholly unreasonable and [*16] negligent for Nunnery not to undertake extensive inquiry of his client and her story.” *Jiminez v. Madison Area Tech. College*, 2001 U.S. Dist. Lexis 25077, at *16 (W.D.Wis. Aug. 21, 2001), *aff’d* 321 F.3d 652 (7th Cir. 2003).

a) A lawyer should take circumstantial evidence into account and rely on his or her own common sense. As stated by the court in *Jiminez*:

[Lawyer] must have realized how unusual it is to find a written admission of sexual harassment or ethnic origin discrimination in any case; to find many such admissions is completely implausible. It is unlikely that persons holding professional jobs in human relations or in the union would make the statements attributed to them in the communications; it is even more unlikely that they would document their discriminatory statements in writing. It would be a geometric increase of unlikelihood to think that professionals would not only make discriminatory statements and document them but that all of them would make precisely the same kind of ungrammatical discriminatory statements and incorporate those statements into communications that are otherwise clearly written, professional in tone and content and grammatically correct. Add to this the peculiarity of the writers focusing on plaintiff’s language deficiencies when she has none and the inconsistencies in the email days and dates and one is left with nothing but suspicions about the legitimacy of the documents.

Id. At *16 - *17.

b) The Wisconsin Supreme Court later suspended the lawyer for two months, finding a violation of Rule 1.1, competency, and misconduct in several other cases. *In re Nunnery*, 725 N.W.2d 613 (Wis. 2007).

B. Lawyer's Choices

1. *Minor lies.* A lawyer who perceives that the client is not being completely truthful, but not to the extent that the lawyer will be unable to pursue the client's claims, should discuss:
 - a) How candor helps the client prepare the client's case.
 - b) What the lawyer does to protect the client's confidential information.
 - c) The client's rights if the lawyer should improperly disclose confidential information.
 - d) Possible conflicts that could arise later when contradictory facts are revealed.

2. *Major Lies.*
 - a) A lawyer is not required to withdraw simply because a client lies. However, the client's untruthfulness regarding key matters in the case will likely lead to the lawyer's withdrawal at a minimum, with worse consequences for the client.
 - b) Rule 1.16 provides broad justifications for a lawyer to withdraw from representing a client, including:
 - (1) Any time "withdrawal can be accomplished without material adverse effect on the interests of the client." Rule 1.16(b)(1);
 - (2) The client has used or is using the lawyer's services to engage in fraud, Rule 1.16(b)(2) and (b)(3);
 - (3) The client "insists on taking action that the lawyer considers repugnant," Rule 1.16(b)(4);
 - (4) The client "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services" and has been given reasonable warning that the lawyer will withdraw, Rule 1.16(b)(5);
 - (5) The client makes the representation "unreasonably difficult," Rule 1.16(b)(6); or
 - (6) Other good cause for withdrawal exists. Rule 1.16(b)(7).
 - c) If the lawyer withdraws because the client is not being truthful and the matter has not been commenced, then the lawyer would be bound to maintain the confidentiality of the client's

information, including the client's lack of truthfulness, except to the extent the lawyer believes that the client intends to commit a fraud, in which case the lawyer may choose to disclose information to the client's next lawyer or others who may be affected by the intended fraud. *See* Rule 1.6(b)(4) (permissive disclosure of confidentiality).

3. A lawyer cannot use the attorney-client privilege as a shield against the lawyer's own perpetuation of the client's lies. *See State v. Casby*, 348 N.W.2d 736 (Minn. 1984) (attorney convicted of misdemeanor for continuing client's lie about his correct identity); *In re Casby*, 355 N.W.2d 704 (Minn. 1984) (stipulating to public reprimand for misdemeanor conviction).
 - a) Hypothetical: Client homeowner seeks lawyer's representation in defense against Guest who was injured on Homeowner's property. Lawyer suspects claim is fraudulent. While lawyer is weighing whether to disclose to insurer the lawyer's concern about his client's role in the fraud, the Guest suddenly dismisses his claim with prejudice. Does the lawyer need to disclose anything to the insurer?

No. Not clear what lawyer "knew." In any event, the objective the lawyer would have sought has been achieved, no party harmed, no evidence of actual deception. Lawyer's suspicions are confidential and cannot be disclosed to insurer.

III. When a Client Lies During Litigation

A. Lawyer's Duty.

1. Lawyers are prohibited from making a false statement of fact to a tribunal. Rule 3.3(a)(1). Only false statements of *material* fact, however, have to be corrected.
2. Lawyers may not knowingly offer false evidence. Rule 3.3(a)(3). If evidence the lawyer thought was true turns out to be false, the lawyer must take remedial measures.
3. If a lawyer represents a client in an "adjudicative proceeding" and "knows" that "a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures" including disclosure to the tribunal if necessary. Rule 3.3(b).

- a) Not clear what a lawyer's duties are if she withdraws because she knows that the client intends to commit perjury, but the perjury has not yet occurred. The rule refers to "a lawyer who represents a client" but taken as a whole suggests that it is designed to prevent clients from evading their lawyer's efforts to prevent the perjury by withdrawing.

B. Pretrial Proceedings.

1. Rule 3.3 applies to pretrial litigation as well as proceedings before a tribunal. ABA Formal Op. 93-376 (Aug. 6, 1993); NYCLA Comm. on Prof. Ethics Formal Op. 741 (Mar. 1, 2010).
2. Even before any discovery is filed with or used in court, "there is potential ongoing reliance upon their content which would be outcome determinative, resulting in an inevitable deception of the other side and a subversion of the truth finding process which the adversary system is designed to implement." ABA Op. 93-376, *citing Kath v. Western Media, Inc.*, 684 P.2d 98, 101 (Wyo. 1984) (letter contradicting testimony of a key witness should have been disclosed to opposing counsel in connection with settlement negotiations); *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F.Supp. 507, 509 (1983) (fact that client had died should have been disclosed to opposing counsel in pretrial settlement negotiations).

C. Remonstrating.

1. Counsel the client in private not to present false evidence or to correct false evidence already presented. Rule 3.3, cmt. 5; *See* Restatement (Third), the Law Governing Lawyers, § 120, cmt. g.
 - a) Balance firmness with retaining client's trust in lawyer's loyalty.
 - b) Inform client of lawyer's duty not to offer false evidence.
 - c) Client's intransigence may force lawyer to take remedial measures.

D. Remedial Steps. The Restatement §120, cmt. h, provides a series of possible remedial measures a lawyer can take when he or she becomes aware that the client is lying:

1. If client or other witness is testifying falsely, ask for recess to talk about their testimony.
2. Move to strike or withdraw evidence;

3. If falsity comes to attorney's attention after witness has completed testimony, move to recall the witness.
4. Directly inform court or opposing party of falsity.
5. If client fires lawyer, may have to disclose falsity to successor counsel
See also Rule 3.3, cmt. 10.
6. *Withdrawal.* Rule 3.3, cmt. 10, suggests that withdrawal may have some remedial effect. In actuality, although withdrawal may become necessary because of the falsity and the client's refusal to correct it, withdrawal is not by itself likely to remedy the fact that false evidence has already been presented. *See* Rule 3.3, cmt. 15; ABA Op. 87-353.
7. *Timing.* Duty continues after end of matter. *Office of Disciplinary Counsel v. Heffernan*, 569 N.E.2d 1027 (Ohio 1991), *cert. denied* 112 S.Ct. 191 (1991) (suspending lawyer for failing to disclose fraud (client's misrepresentation of his true identify) which lawyer learned of two months after court hearing and end of representation).
 - a) *Example.* Lawyer represents Father in temporary hearing regarding custody of children. Mother puts in issue Father's use of methamphetamine. Lawyer submits Father's affidavit to court in lieu of testimony, in which Father says he does not use. Father does not get temporary custody. After hearing, Lawyer has Father take drug test (hair follicle analysis), which shows drug use. Father admits to Lawyer that he used drugs; Lawyer withdraws. Does Lawyer have obligation to disclose false affidavit to court?

Yes. Lawyer's services were used to submit false testimony, and falsity is material. Lawyer must remonstrate with client first, but ultimately disclose to court.
8. *Deposition Transcripts.* Can a witness change his or her testimony after the deposition but prior to the expiration of the 30-day period for review? Rule 30(e)(1)(B), Fed. R. Civ. Proc, contemplates a witness making "changes in form or substance" in reviewing the deposition.
 - a) *Accord* ABA Formal Op. 93-376 ("incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal.").

- E. Example – *In re Mack*. Client’s daughter was in a car accident on July 21, 1990. Unfortunately, the policy premium was due a month earlier and the insurer had not received it by the time of the accident, so the insurer denied coverage. *In re Mack*, 519 N.W.2d 900, 901 (Minn. 1994).
1. Attorney Mack filed a declaratory action in September 1990 against the insurer and attached 2 documents to the complaint: a check dated June 13, 1990, that cleared the payor’s account on July 31, 1990, and a renewal notice with a handwritten notation “Pd. 6/13/90 ck # 8440.”
 2. At the Client’s deposition, she testified that she mailed the check on June 13 (2 days before the premium was due) and made the handwritten note on the renewal notice. There was no check register and the client testifies that her family pulls checks from the checkbook out of number sequence.
 3. About 9 months later, Client tells Mack she lied in her deposition, that she wrote the check several days after the accident and “left it in an inconspicuous spot in the post office,” hoping to blame the post office for the delay. She also said that there really was a different check that had been mailed on June 13 but had been lost. Mack took no action on Client’s behalf.
 4. Meanwhile, in October 1990 Mack in suspended for previous ethics violations. Mack turns the case over to another lawyer, they discuss the false statement and agree it should be disclosed on direct examination at trial. Nevertheless, the new lawyer referred to the check in his opening statement, and the Client testified falsely on direct examination. On cross-examination, the truth came out.
 5. The Court found that “Mack's silence was tantamount to acquiescence to the deception” and violated Rules 3.3(a) and 8.4(d) (conduct prejudicial to the administration of justice). *Id.* at 902. The Court added another year to Mack’s suspension.
 6. *Life Imitates Art*. The facts of *Mack* are strikingly similar to the hypothetical discussed in ABA Formal Op. 93-376 (Aug. 6, 1993) except that in the hypothetical in the ABA opinion, it was the claims agent who lied about the receipt of the insured’s otherwise timely premium payment, and discloses it to his lawyer after the fact.
 7. *See also In re Zotaley*, 546 N.W.2d 16 (Minn. 1996) (disciplining lawyer for failing to take remedial action after learning arbitrator relied upon false evidence in decision); *In re Jagiela*, 517 N.W.2d 333 (Minn. 1994)

(suspending lawyer who helped draft a backdated agreement, gave it to opposing counsel and bankruptcy court, and failed to correct false statements in deposition testimony regarding the date of the document).

F. Example 2 – *Breezevale Limited v. Dickenson*, 879 A.2d 957 (D.C. 2005).

1. In the midst of pretrial preparation of a contract lawsuit between two corporations, a Breezevale employee discloses to Breezevale’s counsel that she intended to testify in her deposition that she had personally forged documents (spreadsheets and offer letters) related to the contract with the opposing party, as she was instructed to do by her superiors. The lawyers did not immediately notify their client, and even after the client found out, the lawyers went ahead with their plan to let the employee testify regarding her wrongful conduct.
 - a) Note that the lawyers’ motivation was admirable, but that they failed to remonstrate with their client, which later formed the basis for a viable malpractice claim.
2. The contract claim settled for a paltry sum. Breezevale then sued its lawyers for malpractice, alleging that the lawyers failed to investigate the employee’s story, through which they would have discovered that she was lying.
3. During a seven-week trial, Breezevale persists in saying the documents were genuine. The jury finds that they were forgeries but nevertheless finds in favor of Breezevale on the malpractice claim, to the tune of \$3.4 million.
4. The court granted JNOV for the lawyers and found in favor of the lawyers on their bad faith litigation claim: Breezevale had insisted, falsely, throughout the trial that the documents were genuine. The judge awarded the lawyers \$4 million in fees and costs and \$1 million in punitive damages, which were reversed on appeal. On remand, the lower court’s rationale changed from JNOV to “the ultimate sanction” of dismissal of Breezevale’s lawsuit.

IV. Special Situations.

A. False evidence by opposing witness.

1. No duty to correct, as long as the attorney does not reinforce the false evidence or statements in any way, including arguing the false evidence

to the fact finder. Restatement (Third), the Law Governing Lawyers, §120, cmt. e.

2. Example: Lawyer takes deposition of opposing witness, who testifies about evidence against Lawyer's client, but which lawyer knows is false. Without any further affirmative reliance on the deposition, the case settles; the Lawyer has not disclosed her belief that the deposition testimony was false. According to the Restatement, the Lawyer did not violate Rule 3.4(b). Rest., §120, cmt. e, Illus. 4.

B. Criminal Defendants. In criminal cases, the lawyer's duty to prevent a client from testifying falsely may come into conflict with the client's Constitutional right to testify at trial.

1. *Traditional approach*. Several courts have found it acceptable, when a lawyer had a client whom the lawyer thought would testify falsely but who insisted on testifying, for the lawyer to allow the client to testify in a narrative format. See Center for Professional Responsibility, *Annotated Rules of Professional Conduct*, at 341 (5th Ed. 2003), citing *People v. Jennings*, 83 Cal. Rptr.2d 33 (Ct. App. 1999); *People v. DePallo*, 729 N.Y.S.2d 649 (2001).
 - a) Unusual format likely tips off opposing counsel and court, but perhaps not jury.
2. *Narrative disfavored*. In *Nix v. Whiteside*, 475 U.S. 157 (1986), the Supreme Court held that a lawyer's conduct did not meet the ineffective assistance of counsel standard when the lawyer refused to allow a client to testify falsely at trial. The Court stated in dicta that a lawyer who allows a client to testify in the narrative, while knowing that the client intends to commit perjury, violates the lawyer's duty of candor. The ABA agreed in Formal Op. 87-353 (1987).
3. A comment to Rule 3.3 applies the rule equally to defense counsel in criminal cases. Rule 3.3, cmt. 7. If a lawyer "reasonably believes" but does not "know" that the client's testimony will be false, the lawyer may allow the client to testify. Rule 3.3, cmt. 9.

MODEL RULES OF PROFESSIONAL CONDUCT

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

* * *

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

* * *

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends 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.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that rule. See also ~~the~~ Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false—regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will

be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to

implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

* * *

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

HYPOTHETICALS

1. At a local bar association fundraiser you run into your old law school buddy, Sam Socrates, whom you've known for 15 years and who has referred you many clients. Sam pulls you aside and says he got a new family law client yesterday, Carol Crank, who gave him a \$15,000 retainer. You remember Carol well because you represented her for 6 months and withdrew from representing her 2 weeks ago because the client told you she was drug free, which was later contradicted by lab results you received. Sam wants to know why you withdrew. You should:
 - a. Warn him that the client might lie in her upcoming deposition.
 - b. Tell him you discovered your partner had a conflict which required that you withdraw.
 - c. Change the subject.
 - d. Suggest that it was difficult to get a straight story from Carol and that Sam should be careful, but refuse to discuss any particular facts of her case.
2. Paula Chester, a new client, met with you last week to discuss her gender discrimination and sexual harassment claims against 3N corporation. She brought to the initial meeting a retainer check for \$10,000 and a dozen laminated e-mails, letters, and memos containing sexually demeaning language, apologies for offensive sexual comments, and other comments. Your client says she laminated the documents to prevent them from being stolen. After you serve the complaint on 3N, you notice an inconsistency in the dates between two of the documents. Your client says the dates are correct. You should:
 - a. Do nothing because 3N will eventually identify the inconsistency themselves;
 - b. Contact your client's coworkers (non-managerial) to try to corroborate her allegations;
 - c. Call 3N's counsel and let them know that the complaint is based on inaccurate documents;
 - d. Refund the client's money and withdraw without accusing your client of fabricating the documents.

3. You are representing Frank Fingers in a messy partnership dissolution. During his deposition, Frank testifies that he does not recall what the purpose was of a \$15,000 electronic transfer out of a corporate account six months ago. When you return to your office with Frank, he tells you that he transferred the \$15,000 to a shell corporation and used the money to buy his girlfriend in Canada an engagement ring. You should:
 - a. Withdraw from representing Frank and advise him that if he doesn't correct the false testimony he could be charged with perjury.
 - b. Convince Frank to let you insert the correct testimony during the 30 days to "read and sign" the deposition.
 - c. Tell Frank you must withdraw because you are now a witness and may have to testify against him in the future.
 - d. Tell the client that you will not let him testify falsely at trial, but take no further steps for the time being.
4. You are representing Nellie Nissan in an auto accident case. During a caucus with the mediator, the discussion turns to damages. Nellie describes at length to the mediator the pain she experiences when she tries to perform simple household chores, which prevents her from going back to work. The mediator then caucuses with the opposing party for about 45 minutes. During a long chit-chat with Nellie, she tells you how tired she is from raking the leaves out of her garden this past weekend. You may do all of the following except:
 - a. Force Nellie to disclose to the mediator that she can rake leaves.
 - b. Do nothing b/c Nellie did not actually make a false statement to the mediator.
 - c. Do nothing because a mediator is not a tribunal under the rules.
 - d. Stop the mediation w/o explanation and then w/draw from representing Nellie.
5. During your client's testimony at the jury trial of his claims against the seller of his house, you hear your client testify on cross examination that he never noticed any mold on the basement walls until 3 months after he moved in. You are quite certain that your client told you that he had noticed some mold when he first viewed the house, but didn't say anything at the time because it was his wife's dream house and he didn't want to kill the deal. You should:
 - a. Accidentally spill a pitcher of water on yourself and ask for a recess so that you can clean yourself up;
 - b. Wait for re-direct, then elicit the correct testimony from your client based on what he previously told you.

- c. Wait until the day of testimony is over, remonstrate with your client, and on the following day recall your client as a witness.
 - d. Wait until the day of testimony is over, inform opposing counsel that your client lied on the stand, and ask for a continuance so that your client can obtain new counsel.
6. You represented Wendy Willow in her divorce, which went to trial on the division of the parties' assets (no kids). Final judgment was entered a year ago. Last week, Wendy called you to ask about a possible prenup with her fiancé. During the conversation, she mentioned that her mother died recently and now she owns a small parcel of lakeshore property in which her mother had a life estate. The property was not disclosed in the divorce.

What are your obligations?

- a. The information about the lake property is confidential and cannot be disclosed.
- b. You must tell Wendy that you will have to file a motion to reopen her divorce.
- c. You have no obligation regarding the closed divorce but you may not represent her regarding the prenup.
- d. You have no obligation regarding the closed divorce but you must have Wendy sign a waiver of liability before representing her on the prenup.