ETHICAL CONSIDERATIONS WHEN CLIENTS WANT TO (OR DID) TESTIFY

Thomas E. Spahn

DISCUSSION OVERVIEW

Note: Only the hypotheticals are reproduced in this book. The hypos with Mr. Spahn's thorough analyses are available at the following link: http://vae.fd.org/content/training.

Hypo 1: Clients' intent to provide false testimony

Hypo 2: Lawyers' decision to remain willfully ignorant of their clients' guilt or innocence

Hypo 3: Lawyers' level of knowledge required to report clients' false testimony

Hypo 4: Lawyers learning of clients' fraud on tribunals that occurred before the representation

Hypo 5: Lawyers learning before proceedings have ended of clients' fraud on tribunals during the representation

Hypo 6: Lawyers learning after proceedings have ended of clients' fraud on tribunals during the representation

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Hypo 8: Lawyers learning after the representation has ended of clients' fraud on tribunals after the representation (on successor counsel's watch)

FRANK DUNHAM FEDERAL CRIMINAL DEFENSE CONFERENCE

Charlottesville, VA
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Ethical Considerations When Clients Want to (or Did) Testify

Hypotheticals

Thomas E. Spahn
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Hypothetical 1

As a criminal defense lawyer, you occasionally have to wrestle with tough issues that your civil litigation colleagues rarely face. This morning, your client told you that he wants to testify at his murder trial starting later this week. You tried to talk him out of it, because there is damaging evidence about his whereabouts at a key time. Your client quickly dismissed your worry, telling you that he had "no choice" but to lie about where he was at that time. You tried to talk him out of that too, but without success.

What do you do?

(A) Use the "narrative" approach, under which you put your client on the stand and ask him to offer testimony -- without asking specific questions and without referring to his testimony in your closing argument?

(B) Put your client on the stand to testify, but advise the court if he carries through on his threat to lie?

(C) Directly examine your client as if he were telling the truth, and rely on his testimony in your closing -- even though you know he has lied?

Hypothetical 2

Having dealt with several agonizing dilemmas in representing previous criminal clients, you want to avoid any uncertainty in representing your current client in defending against an armed robbery charge. During your first meeting with the client, he asks "Do you want me to tell you whether I did it or not?"

Should you tell your client that you want to know whether he committed the armed robbery?

YES NO

Hypothetical 3

You are defending a client accused of a burglary in Charlotte. She had always been hesitant to give you what seems like a "straight story" about where she was when the burglary occurred. This morning, she told you that she intended to testify that she was in Dallas when the burglary occurred -- but cannot point to any alibi witnesses, or any paperwork that shows she was in Dallas. You know from other witnesses that your client was in Charlotte the morning and the evening of the day the burglary occurred. Your check of airline schedules does not explain how she could have been in Charlotte early and late that day, but in Dallas when the burglary occurred. You wonder what level of knowledge triggers your duties to avoid putting on false testimony.

What level of knowledge triggers the lawyers' ethics duties that arise if a client intends to testify falsely?

(A) Suspicion.

(B) Reasonable certainty.

(C) Actual knowledge from clients' explicitly stated intent.

Hypothetical 4

You met early this morning with a prospective new client. He told you that a few weeks ago he won a million dollar verdict in a personal injury case in which another local lawyer represented him. But now he is worried that someone might discover why he won -- he deliberately lied on the stand about several important matters during the trial.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

Hypothetical 5

You met late this morning with one of your clients. You had successfully represented her earlier this week in a small breach of contract case. She told you that her conscience has been bothering her ever since the trial ended. To your surprise, your client then confessed to deliberately lying on the stand during the trial you just won.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

Hypothetical 6

You met over lunch today with one of your clients. You had invited her to toast an important date -- yesterday was the last day the defendant could have appealed a $10 million verdict you had obtained for your client after a lengthy jury trial. After a few too many toasts, your client said: "What makes this day so sweet is that no one -- not even you -- suspected that most of my testimony was a lie."

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

Hypothetical 7

You met this afternoon with one of your clients. You thought he might be coming to give you a gift or otherwise thank you for representing him in a case that settled very favorably earlier this week. Instead, he apparently wanted to gloat over your initial pessimistic view of the case. He told you that you might have been right about the law, but that you had underestimated his ability to make up facts that he testified about at his deposition. When you asked him what he meant, he surprised you by saying that most of his deposition testimony resulting in the favorable settlement was a lie.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

Hypothetical 8

After a long and stressful day, you turned on the local news after dinner. The lead story described a $10 million personal injury plaintiff's verdict for one of your former clients. You had only represented her for a short time, and had withdrawn before you filed a lawsuit -- because she had told you that she intended to fake paralysis to increase her damages. The news story showed her leaving the courthouse in a wheelchair and quoted her statement that she was happy the defendant had to pay such a large amount for having caused her paralyzing accident.

What do you do?

(A) You must disclose your former client's fraud on the tribunal.

(B) You may disclose your former client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your former client's fraud on the tribunal, unless your client consents.

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
SUPREME COURT RULES PART 6, § II,
RULES OF PROFESSIONAL CONDUCT 1.6 AND 3.3

PETITION OF THE VIRGINIA STATE BAR

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of amendments to Rules of Professional Conduct 1.6 and 3.3, Part 6, § II, Rules of Virginia Supreme Court, as set forth below. The proposed amendments were approved by a vote of 52 to 7 by the Council of the Virginia State Bar on June 16, 2016 (Record, Page 36).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to Rules of Professional Conduct 1.6 and 3.3. These rule amendments address a lawyer's duties of confidentiality

under Rule 1.6 and duties of candor to the court under Rule 3.3, and remedy the internal inconsistency of the Rules in addressing a client's stated intent to commit perjury, while maintaining the lawyer's duty to take steps to prevent false evidence, the prohibition on participating in the presentation of false evidence, and duty to take remedial steps if false evidence is presented. In all regards, the proposed amendments seek to balance the lawyer's duty of confidentiality with the competing interests that either compel or permit a lawyer to disclose otherwise confidential information.

As approved by Council, the proposed rule amendments would:

1. Remove client perjury from being addressed both as a duty of disclosure under Rule 1.6 and as a separate duty under Rule 3.3 and address the issue solely under Rule 3.3;
2. Reinforce the duties of candor with additional comments under Rule 3.3 to provide additional guidance when lawyers face the challenges

presented by a client's potential false testimony;

3. Clarify that a lawyer's duty to disclose a client's intent to commit a crime applies to a stated intent to commit a crime that would involve death, bodily injury, or a substantial financial injury to another;

4. Permit, but not require, a lawyer to disclose information in order to prevent death or serious bodily injury to another; and

5. Establish that a lawyer's duty to disclose information regarding false evidence applies throughout the course of any legal proceeding but does not apply to stale evidence regarding a fully concluded matter.

6. Clarify that the lawyer only has a duty to reveal a third party's fraud upon a tribunal when that fraud occurs in the course of a proceeding in which the lawyer is representing a client.

In addressing the thorny issues surrounding a client's potential perjury, the amendments are intended

to clarify a lawyer's obligations when a client discloses his or her intent to commit perjury well in advance of trial, when the lawyer can withdraw from the representation before the client's intended perjury occurs. Under the current version of Rule 1.6(c)(1), the lawyer may arguably be required to report the client's intention to commit perjury once that intention is expressed, even if that occurs long before trial, and thus might preclude more appropriate steps. This interpretation of the rule, however, is inconsistent with the comments to Rule 3.3 that specifically address the issue of client perjury, and indicate that, where a confrontation over the client's intended perjury occurs before trial, "the lawyer ordinarily can withdraw." Rule 3.3 Comment [12].

The Committee's effort to reconcile Rules 1.6 and 3.3 as they apply to a client's stated intent to commit perjury resulted from an inquiry by a member of the bar who was defending a client charged with the crime of shoplifting. The store's security police stopped the client and told her that her shoplifting had been

captured on surveillance cameras operated by the store. The client gave a statement to the security officers and her lawyer acknowledging the theft but later changed her statement, denying that she had taken the merchandise, once she learned that the department store could not produce the video recording. The client told her lawyer that she intended to testify that she did not take anything from the store. After warning the client that perjury is a crime, and that unless she abandoned her intent to commit perjury the lawyer would have to withdraw from representation and inform the court that the client intended to commit perjury, the client discharged the lawyer. The lawyer sought an informal ethics opinion as to what his post-discharge ethical duties were at this point. Under Rule 3.3, the Committee believed that the lawyer had a duty to move to withdraw, that the lawyer was not necessarily required to inform the court that the reason for the motion to withdraw was the client's stated intent to commit perjury; and, that if permitted to withdraw, the lawyer would have discharged fully his ethical

obligations under these circumstances.

However, Rule 1.6(c)(1), because of its inclusion of perjury as an intended crime, seems to require the lawyer to report the client's intent to commit perjury, unless the client has abandoned his or her intent, regardless of the stage of the proceedings, and regardless of whether the lawyer successfully withdrew.

RULE 1.6

After consideration of the apparent inconsistency between Rule 1.6(c)(1), requiring immediate disclosure, and the comments to Rule 3.3 that provide that withdrawal is the appropriate remedy when the client's intent is expressed in advance of trial, the Committee concluded that Rule 3.3 expresses a more thorough and practical approach to client perjury, as set out in Comments [12]-[13b]. The Committee therefore has revised Rule 1.6(c)(1) to resolve any confusion arising from its current mandate and to clarify that Rule 3.3 sets out the lawyer's obligations if the client expresses an intent to commit perjury. The Committee determined that 1.6(c)(2) can be deleted in its

entirety, since the lawyer's obligations when a client commits fraud on a tribunal are already thoroughly addressed by Rule 3.3.

The Committee also revised Rule 1.6(c)(1) which mandates a lawyer to disclose certain confidential information to limit its application to crimes that are "reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another," rather than requiring disclosure of a client's intent to commit *any* crime, no matter how minor. Taken literally, current Rule 1.6(c)(1) would require the lawyer to report the client's intent regarding misdemeanor offenses or regulated conduct for which the lawyer and client may disagree about the applicable regulatory requirements. The Committee believes that the revised language better balances the lawyer's duty of confidentiality and loyalty to her client with the lawyer's duty to society.

Similarly, the Committee added a seventh provision to paragraph (b), permitting disclosure when reasonably

necessary to "prevent reasonably certain death or substantial bodily harm." This provision mirrors ABA Model Rule 1.6(b)(1), and permits the lawyer to disclose information about actions by the client or third parties that are reasonably certain to lead to death or substantial bodily harm, even if the harm is not the result of a crime. The Committee revised various comments to the Rule to reflect these changes, including adding Comment [8a] from the ABA Model Rules to elaborate on the disclosure permitted by Rule 1.6(b)(7).[1]

RULE 3.3

Comments to Rule 3.3 were revised and added in order to more thoroughly address the lawyer's obligations in cases of false evidence or testimony, now that Rule 3.3 is clearly established as the sole source of the lawyer's obligations in these situations. The Committee also modified paragraph (d) to clarify that the lawyer only has a duty to reveal a third

[1] After discussion at the Executive Committee meeting on June 15, 2016, the example of environmental harms was removed from the comment because the example of a toxic waste discharge is too problematic to serve as a good example of what a lawyer may permissibly disclose under the proposed rule.

party’s fraud upon a tribunal when that fraud occurs in the course of a proceeding in which the lawyer is representing a client – a lawyer does not have a general obligation to disclose fraud by third parties when the lawyer is not involved in the case at all.

Finally, the Committee added paragraph (e) and accompanying Comment [15], both from the ABA Model Rule, to establish and explain a definite time limit on the lawyer’s duty to disclose and rectify false evidence or false statements made to the court. The rules require, and will continue to require, that if a lawyer knows that a client has committed perjury, the lawyer must report that fact to the court promptly. The proposed change only affects perjury or false evidence that is revealed to the lawyer *after* a final order has been entered and the time for an appeal has expired. While recognizing the laudatory premise underlying the current rule, the Committee concluded that the duty to report should be subject to a sensible time limit on and the conclusion of the proceeding—after a final order has been entered and the time for an appeal has

run—provided a practical and objective framework. The Committee believes that this time limit strikes an appropriate balance by requiring disclosure of the client's perjury when the matter is still before the court and there is the opportunity for effective remedial action, but protecting the client's confidences regarding past conduct once the matter is final.

The proposed changes are included below in Section III, with deletions stippled and additions underlined.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendments to Rules 1.6 and 3.3 at its meeting on January 21, 2016 (Record, Page 6). The Virginia State Bar issued a press release dated February 1, 2016, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Record, Page 7). Notice of the proposed amendments was also published in the *Virginia Lawyer*, Vol. 64, page 48 in the February 2016 issue (Record, Page 26); on the bar's website on the

“Proposed Rule Changes” page (Record, Page 15); and in the bar’s E-News on February 1, 2016 (Record, Page 27).

Two comments were received: one from LaBravia J. Jenkins on behalf of the Virginia Association of Commonwealth’s Attorneys, dated February 24, 2016 (Record, Page 29), and one from Cullen D. Seltzer, dated June 1, 2016 (Record, Page 33). James M. McCauley, Ethics Counsel, responded to Ms. Jenkins’s comment by letter dated March 3, 2016 (Record, Page 31).

III. Proposed Rule Change

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.~~.~~;

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned.~~,~~ ~~and~~ However, if the crime involves perjury by the client, ~~that~~ the attorney shall take appropriate remedial measures as required by Rule 3.3~~seek to withdraw as counsel~~; or

~~(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or~~

(~~3~~2)information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

COMMENT

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a

witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients’ interests. An overly strict reading of the duty to protect client information would

render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[6] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific

consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999*.

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information <u>if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or</u>

property of another. ~~Some discretion~~ Caution is ~~involved~~warranted as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind. If the client's intended crime is perjury, the lawyer must look to Rule 3.3(a)(4) rather than paragraph (c)(1).

[8] ~~The lawyer's exercise of discretion requires consideration of~~When considering disclosure under paragraph (b), the lawyer should weigh such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

[8a] Paragraph (b)(7) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Withdrawal

[9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6.

Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope

of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(~~3~~2) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(~~3~~2) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

[15-17] *ABA Model Rule* Comments not adopted.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by

the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

[19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical

obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. *See* Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

> (a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
>
> (b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;
>
> (c) Procedures addressing security measures for access of third parties to stored information;
>
> (d) Procedures for both the backup and storage of firm data and steps to securely erase or

wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

*****

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;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client~~, subject to Rule 1.6~~;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon ~~a~~the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

(e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

COMMENT

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

[2] *ABA Model Rule* Comment not adopted.

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, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification

that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, 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(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), *see* the Comment to that Rule. *See also* the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. 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)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. ~~Upon ascertaining that material evidence is false~~If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

~~[7 -9] *ABA Model Rule* Comments not adopted.~~

[7] *ABA Model Rule* Comment not adopted.

[8] The prohibition against offering false evidence only applies if the lawyer knows the evidence is false. A lawyer's reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact. A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, but the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) 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.

Remedial Measures

[10] ~~*ABA Model Rule* Comments not adopted~~ 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, offers testimony during that proceeding that the lawyer knows to be false. In such situation 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.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure 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 cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(c). 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.

Perjury by a Criminal Defendant

[12] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

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 an 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. For purposes of this Rule, ex parte proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a

demand for disclosure will not constitute a violation of this Rule.

Duration of Obligation

[15] The obligation to rectify false evidence or false statements of law and fact should have a practical time limit. 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.

IV. CONCLUSION

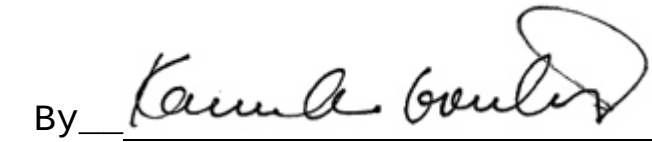
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The amendments to Rules 1.6 and 3.3 were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendments to Rules of Professional Conduct 1.6 and 3.3, Part 6, § II of the Rules of the Virginia Supreme Court for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

By _____
Michael W. Robinson, President



By _____
Karen A. Gould, Executive Director

Dated this 28th day of June, 2016.