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;

(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 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. 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] *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] 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.

VIRGINIA CODE COMPARISON

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that "[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact."

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that "[i]n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part."

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use perjured

testimony or false evidence." DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the "remedial measures" referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the *Virginia Code* to paragraph (c).

Paragraph (d) is identical to DR 7-102(B).

COMMITTEE COMMENTARY

The Committee generally adopted the *ABA Model Rule*, but it deleted the word "material" from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word "directly," preceding "adverse" was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word "directly" from the paragraph in the belief that the limiting

effect of that term could seriously dilute the paragraph's meaning.

The Committee determined to retain the obligation to report a non-client's fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

The amendments effective December 1, 2016, deleted "…, subject to Rule 1.6" at the end of paragraph (a)(2); rewrote the second half of paragraph (d) to read "…upon *the* tribunal *in a proceeding in which the lawyer is representing a client* shall promptly reveal the fraud to the tribunal."; added paragraph (e); deleted the phrase from Comment [6] "Upon ascertaining that material evidence is false" and replaced it with "*If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false*"; deleted Comments "[7 – 9] *ABA Model Rule* Comments not adopted."; added Comments [7], [8], and [9]; removed the language "*ABA Model Rule* Comments not adopted" from Comment [10] and added the remainder of the comment; changed "cooperate" to "cooperate*s*" in Comment [11]; and added "*Duration of Obligation*" before adding new Comment [15].

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense,

delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled 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.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that

it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

[4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.

[5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

[6] Paragraph (j) deals with conduct that could harass or maliciously injure

another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

[7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers

interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-25 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt

them to do otherwise."

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

> In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from "participat[ing] in presenting" criminal charges and therefore may freely offer

advice to the client about the client's rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

COMMITTEE COMMENTARY

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule* 3.4 in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted—something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule's* Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word "appropriate" preceding "steps."

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to "participate in presenting." This deletion allows a lawyer to offer advice to the client about the client's rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

The amendments effective January 1, 2004, added present paragraph (g) and redesignated former paragraphs (g) through (i) as present paragraphs (h) through (j).