

## SELECTIONS FROM TEXAS RULES

### TEXAS RULE OF EVIDENCE 503. LAWYER-CLIENT PRIVILEGE

**(a) Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A "representative of the client" is (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

**(b) Rules of Privilege.**

(1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

**(c) Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

**(d) Exceptions.** There is no privilege under this rule:

(1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document attested by a lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

# TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

## TERMINOLOGY

**Adjudicatory Official** denotes a person who serves on a Tribunal.

**Adjudicatory Proceeding** denotes the consideration of a matter by a Tribunal.

**Belief or Believes** denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

**Competent or Competence** denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

**Consult or Consultation** denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

**Firm or Law firm** denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

**Fitness** denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

**Fraud or Fraudulent** denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

**Knowingly, Known, or Knows** denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

**Law firm:** See Firm.

**Partner** denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

**Person** includes a legal entity as well as an individual.

**Reasonable or Reasonably** when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

**Reasonable belief or Reasonably believes** when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

**Should know** when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

**Substantial** when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

**Tribunal** denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

## **SELECTED RULES**

### **1.05 Confidentiality of Information**

**(a)** Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

**(b)** Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

**(1)** Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

**(2)** Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

**(3)** Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

**(4)** Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

**(c)** A lawyer may reveal confidential information:

**(1)** When the lawyer has been expressly authorized to do so in order to carry out the representation.

**(2)** When the client consents after consultation.

**(3)** To the client, the clients representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client.

**(4)** When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

**(5)** To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

**(6)** To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

**(7)** When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

**(8)** To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

**(d)** A lawyer also may reveal unprivileged client information.

**(1)** When impliedly authorized to do so in order to carry out the representation.

**(2)** When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

**(e)** When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

**(f)** A lawyer shall reveal confidential information when required to do so by Rule 3.03(a) (2), 3.03(b), or by Rule 4.01(b).

**Comment:**

### **Confidentiality Generally**

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

2. Subject to the mandatory disclosure requirements of paragraphs (e) and (f) the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of

the client. This principle involves an ethical obligation not to use the information to the detriment of the client or for the benefit of the lawyer or a third person. In regard to an evaluation of a matter affecting a client for use by a third person, see Rule 2.02.

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

4. Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general fiduciary principles of agency.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

### **Disclosure for Benefit of Client**

6. A lawyer may be expressly authorized to make disclosures to carry out the representation and generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not 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. The effect of Rule 1.05 is to require the lawyer to invoke, for the client, the attorney-client privilege when applicable; but if the court improperly denies the privilege, under paragraph (c)(4) the lawyer may testify as ordered by the court or may test the ruling as permitted by Rule 3.04(d).

7. In the course of a firm's practice, lawyers may disclose to each other and to appropriate employees information relating to a client, unless the client has instructed that particular information be confined to specified lawyers. Sub-paragraphs (b)(1) and (c)(3) continue these practices concerning disclosure of confidential information within the firm.

## Use of Information

8. Following sound principles of agency law, sub-paragraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client. The duty not to misuse client information continues after the client-lawyer relationship has terminated. Therefore, the lawyer is forbidden by sub-paragraph (b)(3) to use, in absence of the client's informed consent, confidential information of the former client to the client's disadvantage, unless the information is generally known.

## Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the clients information usually unprivileged information even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05> thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below.

10. Rule 5.03 (d)(l) Texas Rules of Civil Evidence (Tex. R. Civ. Evid.), and Rule 5.03(d)(1), Texas Rules of Criminal Evidence (Tex R. Crim. Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyers conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to that Rule there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a clients criminal or fraudulent conduct, and sub-paragraph (c)(4) permits doing so. A lawyers duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01(a). See also paragraph (f).

12. 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 1.02(c), because to counsel or assist criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex. R. Civ. Evid. Rule 5.03(d)(1), and Tex. R. Crim. Evid. 5.03(d)(1), however, rarely will such information be privileged.

**13.** Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (e) and Comments 18-20.

**14.** The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

**15.** A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

**16.** If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.

## **Client Under a Disability**

**17.** In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyers revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03.

## **Mandatory Disclosure Adverse to Client**

**18.** Rule 1.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when death or serious bodily harm is likely to result, a lawyers obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02 (d) and (e).

**19.** Because it is very difficult for a lawyer to know when a client's criminal or fraudulent purpose actually will be carried out, the lawyer is required by paragraph (e) to act only if the lawyer has information clearly establishing the likelihood of such acts and consequences. If the information shows clearly that the client's contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (c) (7). See also paragraph (f); Rule 1.02 (d) and (e); and Rule 3.03 (b) and (c).

**20.** Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyers conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyers affirmative duty to act on how the situation reasonably appears to the lawyer, while that imposed by paragraph (f) arises only when a lawyer knows that the lawyers services have been misused by the client. See also Rule 3.03(b).

## **Withdrawal**

**21.** 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 1.15(a)(I). After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05. However, the lawyer's duties of disclosure under paragraph (e) of the Rule, insofar as such duties are mandatory, do not survive the end of the relationship even though disclosure remains permissible under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

## **Other Rules**

**22.** Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

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### **1.06 Conflict of Interest: General Rule**

**(a)** A lawyer shall not represent opposing parties to the same litigation.

**(b)** In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

**(1)** involves a substantially related matter in which that persons interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

**(2)** reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyers or law firms own interests.

**(c)** A lawyer may represent a client in the circumstances described in (b) if:

**(1)** the lawyer reasonably believes the representation of each client will not be materially affected; and

**(2)** each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

**(d)** A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

**(e)** If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

**(f)** If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

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### **1.15 Declining or Terminating Representation**

**(a)** A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:

- (1)** the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
- (2)** the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or
- (3)** the lawyer is discharged, with or without good cause.

**(b)** Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

- (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 may be criminal or fraudulent;
- (3)** the client has used the lawyer's services to perpetrate a crime or fraud;
- (4)** a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
- (5)** the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's

fee as agreed, 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) 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 clients 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 payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

**Comment:**

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest. See generally Rules 1.01, 1.06, 1.07, 1.08, and 1.09. Having accepted the representation, a lawyer normally should endeavor to handle the matter to completion. Nevertheless, in certain situations the lawyer must terminate the representation and in certain other situations the lawyer is permitted to withdraw.

**Mandatory Withdrawal**

2. A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1); cf. Rules 1.02, 3.01, 3.02, 3.03, 3.04, 3.08, 4.01, and 8.04. Similarly, paragraph (a)(l) of this Rule requires a lawyer to withdraw from employment when the lawyer knows that the employment will result in a violation of a rule 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 have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation. Cf. Rule 1.02(c) and (d).

3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See also Rule 6.01. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The tribunal may wish 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. See also Rule 1.06(e).

### **Discharge**

4. A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services, and paragraph (a) of this Rule requires that the discharged lawyer withdraw. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

5. Whether a client can discharge an appointed counsel depends on the applicable law. A client seeking to do so should be given full explanation of the consequences. In some instances the consequences may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

### **Mentally Incompetent Client**

6. If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer (see paragraphs 11 and 12 of Comment to Rule 1.02), and in any event the discharge may be seriously adverse to the clients interests. The lawyer should make special effort to help the incompetent client consider the consequences (see paragraph 5 of Comment to Rule 1.03) and in some situations may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.02(e).

### **Optional Withdrawal**

7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional 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. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyers withdrawal is mandated by paragraph (a)(I). Withdrawal is also permitted if the lawyer's services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, 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.

**8.** Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

### **Assisting the Client Upon Withdrawal**

**9.** In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

**10.** Other rules, in addition to Rule 1.15, require or suggest withdrawal in certain situations. See Rules 1.01, 1.05 Comment 22, 1.06(e) and 1.07(c), 1.11(c), 1.12(d), and 3.08(a).

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### **3.03 Candor Toward the Tribunal**

**(a)** A lawyer shall not knowingly:

- (1) make a false statement of material 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;
- (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
- (4) fail to disclose to the tribunal 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
- (5) offer or use evidence that the lawyer knows to be false.

**(b)** If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

**(c)** The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

## **Comment:**

1. The advocates task is to present the clients 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.

## **Factual Representations by Lawyer**

2. 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 3.01. However, an assertion purporting to be on the lawyers own knowledge, as in an affidavit by the lawyer or a representation of fact 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 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02 and 8.04(a).

## **Misleading Legal Argument**

3. 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 should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which 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.

## **Ex Parte Proceedings**

4. 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 unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.

## **Anticipated False Evidence**

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes. As to a lawyer's right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

6. If the request to place false testimony or other material into evidence came from the lawyer's client, the lawyer also would be justified in seeking to withdraw from the case. See Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that Rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

## **Past False Evidence**

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer's duty to keep the client's revelations confidential and the lawyer's duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.

8. When a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g). Such a disclosure can result in grave consequences

9. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering

perjurious testimony or other false evidence, 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.

**10.** The proper resolution of the lawyer's dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer's resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, 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.

**11.** 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 is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

**12.** The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take a reasonable remedial measure which may include revealing the client's perjury. 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.

### **False Evidence Not Introduced by the Lawyer**

**13.** A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination, but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of

obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

### **Duration of Obligation**

**14.** The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.

### **Refusing to Offer Proof Believed to be False**

**15.** A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer's obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

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## **4.01 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

### **Comment:**

#### **False Statements of Fact**

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions,

the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

2. A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead. As to a lawyer's duty to decline or terminate representation in such situations, see Rule 1.15.

### **Failure to Disclose A Material Fact**

3. Paragraph (b) of this Rule also relates only to failures to disclose material facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

4. When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be necessary only if the lawyer's attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.05.

### **Fraud by a Client**

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. See Rule 1.02(c).

6. This rule governs a lawyer's conduct during the course of representing a client. If the lawyer has terminated representation prior to learning of a client's intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply. See Fraud under TERMINOLOGY.