

B. Candor With the Court

Virginia Rule of Professional Conduct 3.3. Candor Toward The Tribunal

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

1) make a false statement of fact or law to a tribunal;

As an advocate, you are to present your client's case with persuasive force, and while such duty is qualified by the duty of candor to the court, an advocate does not vouch for the evidence submitted in the case. It is the duty of the court to assess its probative value. (Annotation #1). An advocate is responsible for the pleadings and the signature of the attorney constitutes a certification that the attorney believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. But the attorney is not required to have personal knowledge of the matters asserted in the pleadings.

Annotation #2.

(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;

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. Annotation #4,

(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. The annotations (10 & 11) to the Rule provide guidance for the required remedial measures.

i. First 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.

ii. If that fails, and withdrawal from the representation is not permitted or will not undo the effect of the false evidence, disclose to the court only what 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.

iii. Except in the defense of a criminal accused, 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 a sense of betrayal, loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court. If at the request of the client the lawyer remains silent, the client could in effect coerce the lawyer into being a party to fraud on the court.

(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..., 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 (Confidentiality).

As an officer of the court it is axiomatic that attorneys must demonstrate candor with the court at all times. The rare circumstance will most frequently arise when attempting to navigate around client confidences which you believe are false, and when arguing a motion to withdraw as counsel.

The following annotations are instructive:

[5] If false evidence is offered by a person NOT THE CLIENT, the lawyer MUST REFUSE TO OFFER IT REGARDLESS OF THE CLIENT'S WISH.

[6] When false evidence is offered BY THE CLIENT, 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 lawyer cannot convince the client to agree, THE LAWYER MUST TAKE REASONABLE REMEDIAL MEASURES. .

[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 AT TRIAL.

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 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.

Perjury by a Criminal Defendant (annotation 13)

The most difficult situation 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.

The ultimate resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. 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).

Sanctions and Disbarment for Severe Violations

The case of Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013); Lester v. Allied Concrete Co., 80 Va. Cir. 454, 2010 Va. Cir. LEXIS 153 (Charlottesville June 28, 2010) and Lester v. Allied Concrete Co., 83 Va. Cir. 308, 2011 Va. Cir. LEXIS 245 (Charlottesville Sept. 6, 2011) shows what can happen to an excellent lawyer who loses sight of these rules.

Lester's attorney filed a wrongful death case after Lester's wife was killed by a reckless trucker. During discovery the defense learned Lester had posted photos of himself partying or otherwise engaging in activity inconsistent with a grieving widower. When first requested in discovery, Lester's attorney objected to production arguing the defendant had hacked into the client's Facebook page. This was false. It was then discovered that the attorney asked his secretary to call Lester to "clean up" his social media, and at least one email between Lester and his lawyer's secretary confirmed the instructions, which resulted in photographs being deleted. When the defendant requested the emails in discovery, a request which was compelled by the court, the attorney omitted the email from his firm instructing Lester to "clean up" his Facebook page. When the omission was discovered, the attorney then attempted to blame it on his secretary. Eventually Lester's attorney admitted he was behind the efforts to deceive the court. Monetary sanctions exceeding \$500,000 were imposed on the attorney, who also lost his license to practice law for a significant number of years.