

# Legal Profession

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## **M&F3rd Chapter 8**

Lawyer Interests and Compliance with other law

**Notes, Slide Text, Optional Readings**

### **Securing Legal Advice**

#### **Model Rule 1.6(b)(4)**

When uncertain about their legal or ethical obligations, lawyers must seek advice about how to proceed and must be able to disclose enough confidential information to get a second ethical opinion.

So Rule 1.6 adds a specific exception:

A lawyer may reveal information relating to the representation of a client to ... to secure legal advice about the lawyer's compliance with these Rules;

Comment 9, elaborates:

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[ABA Formal Op. 98-411](#) also deals with lawyers seeking ethical advice from other lawyers and recommends a hypothetical format:

Hypothetical or anonymous consultations thus are favored where possible. The consulting lawyer is impliedly authorized to disclose certain information relating to the representation without client consent, but may not disclose information that is protected by the attorney-client privilege or that would otherwise prejudice the client. No client-lawyer relationship between the consulting lawyer's client and the consulted lawyer arises as a result of the consultation, but the consulted lawyer may be obligated to protect the confidentiality of the information disclosed to the extent that she expressly or implicitly agrees to do so or to the extent that such obligation is imposed by law

The same precautions apply when lawyers are asked questions at a dinner party or during a presentation. A person asks, "I have a cousin who needs to know if ..." Lawyer should respond: "Your cousin will need a lawyer to look at his specific situation, but let's say that Paul Person has a cousin named Casey and Casey needs to know if ..."

## **Lawyer Self-Defense**

### **Model Rule 1.6(b)(5)**

A lawyer may reveal information relating to the representation of a client to ... 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.

How nice that a specific exception protects lawyers and their interests, while often no such exception exists to protect innocent third parties (for example, an innocent person in jail for a crime your client admits to committing).

As with other exceptions, lawyers may disclose just enough confidential client information to establish the claim or defense.

## **RLGL 63**

### **Using or Disclosing Information When Required by Law**

A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see 62), unless disclosure would serve the client's interest (see 61).

The duty follows from the general requirement that the lawyer safeguard such information (see 60) and act competently in advancing the client's objectives (see 16(1)).

The duty to object arises when a nonfrivolous argument (see 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see 86(1)(b)), the work-product immunity (see 87), or a ground such as the irrelevance of the information or its character as hearsay.

### [RLGL 63 Using or Disclosing Information When Required by Law](#)

## **Fairness**

### **Model Rule 3.4(a)**

#### Fairness To Opposing Party and Counsel

A lawyer shall not ... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

### **Model Rule 3.4(f)**

#### Fairness To Opposing Party and Counsel

A lawyer shall not ... request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and
2. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**RLGL 119****Physical Evidence of a Client Crime**

With respect to physical evidence of a client crime, a lawyer:

1. may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but
2. following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them.

[RLGL 119 Physical Evidence of a Client Crime](#)

**Candor Toward The Tribunal****Model Rule 3.3(a)****Candor Toward The Tribunal**

A lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

Model Rule 3.3(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Candor to the TRIBUNAL (Rule 3.3) versus Candor to THIRD PERSONS (Rule 4.1) "Known to the lawyer" (actual knowledge NOT a reasonable person or reasonable lawyer).

**"Knowingly," "Known," or "Knows"****Model Rule 1.0 Terminology**

- "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

- “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.

### **Model Rule 3.9**

#### **What is a tribunal?**

Rule 1.0 (m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

#### **Advocate In Nonadjudicative Proceedings**

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

#### **Comments:**

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer’s client is presenting evidence or argument.

It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client’s compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client’s affairs conducted by government investigators or examiners.

Representation in such matters is governed by Rules 4.1 through 4.4.

### **Model Rule 3.3(a)(3)**

#### **Candor Toward Tribunal**

Comment [13]; RLGL 120

A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false &...; A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

### **Model Rules & Client Perjury**

Client has the absolute right to take the stand and testify under oath. Client advises he will be lying on the stand. Now what?

Your duty of candor to the tribunal now conflicts with your duty to keep your client's confidences.

Monroe Freedman's describes this as a "trilemma":

- The need to know facts (competence, diligence);
- The obligation to keep them confidential;
- The duty not to mislead the court.

Or, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

As M&F put it:

Shrewd street-wise defendants simply won't tell their lawyers the whole truth if the penalty for doing so is not being able to use perjured evidence.

Some criminal lawyers claim that they don't want to know too much about the guilt or innocence of their clients. Either way, the defense lawyer must force the prosecutors to prove their case beyond a reasonable doubt.

But as the ABA Standards Relating to the Defense Function advise:

An adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial.

Monroe Freedman does not advocate suborning perjury, but that may be the natural result of his proposal.

### **Freedman Makes Valid Arguments**

Too much to expect a human being facing prison not to "try anything" to escape it. Then we solve the problem by punishing the client by taking away the lawyer? Criticism of "narrative solution": "the [old] standards reject . . . informing the judge, but then propose a solution that . . . succeeds in informing not only the judge but the jury as well."

### When Does A Lawyer “Know” About Perjury?

As the Wisconsin Supreme Court put it in *Wisconsin v. McDowell* (WI. 2004):

Absent the most extraordinary circumstances such knowledge must be based on the client’s expressed admission of intent to testify untruthfully.

According to this school of thought, the lawyer “knows” the client will lie on the stand when the client tells the lawyer beforehand. Everything else is suspicion.

And this is what happened in the mother of all perjury cases:

#### *Nix v. Whiteside* (Sct. 1986)

Defendant Whiteside and some others went to Calvin Love’s apartment looking for drugs. An argument broke out, and Love allegedly told his girlfriend to get “his piece,” and then returned to bed.

According to Whiteside, Love then started to reach under his pillow and made a move toward him.

Fearing for his life, Whiteside stabbed Love in the chest and killed him.

Whiteside was charged with murder. He told his court-appointed lawyer that he stabbed Love because he thought Love was pulling a gun from under his pillow.

After further questioning by his attorney, Whiteside admitted that he had not actually seen a weapon.

No pistol was found on the premises. Whiteside’s lawyer interviewed Whiteside’s companions who were present during the stabbing, and none had seen a gun during the incident.

Whiteside’s lawyer explained to Whiteside that he could claim self-defense even if he had not actually seen a gun, as long as he reasonably believed that a gun was nearby. And Whiteside consistently told his lawyer that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand.

About a week before trial, during preparation for direct examination, Whiteside for the first time told his lawyer that he had seen something “metallic” in Love’s hand. When asked about this, Whiteside responded:

If I don’t say I saw a gun, I’m dead.

Whiteside’s lawyer said that such testimony would be perjury. When Whiteside insisted that he would testify that he saw “something metallic,” his lawyer testified that he warned Whiteside as follows:

[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it... I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.

Whiteside's lawyer also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.

At trial, Whiteside testified he knew Love had a gun and believed Love was reaching for a gun when he acted in self-defense. On cross, Whiteside admitted he had not actually seen a gun.

Whiteside was found guilty of second degree murder, and moved for a new trial claiming he was deprived of a fair trial by his lawyer's warnings not to testify about the gun.

The Supreme Court of Iowa affirmed the conviction and held that the right to counsel does not extend to assisting the client to commit perjury.

The Eighth Circuit Court of Appeals granted Whiteside's petition for a writ of habeas corpus and accepted the findings of the trial judge and the Iowa Supreme Court.

However the Eighth Circuit reasoned that, even though Whiteside had told his lawyer that he intended to commit perjury, Whiteside still had a right to effective assistance of counsel. The lawyer's threat to tell the court about Whiteside's planned perjury violated the attorney's duty to preserve client privilege and also threatened Whiteside's right to effective assistance of counsel.

Citing *Strickland v. Washington*.

**Issue:** If an attorney warns his client that he will inform the court of the client's plan to commit perjury does that violate a defendant's right to effective assistance of counsel under the Sixth Amendment?

**Held:** No. The Supreme Court (9-0) reversed the Eighth Circuit and denied habeas corpus.

In *Strickland*, we held that to obtain relief under the Sixth Amendment, the moving party must establish both serious attorney error and prejudice.

We recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from



taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.

The Court found that Whiteside's lawyer had acted according to accepted norms of professional conduct. Defendant Whiteside had been allowed to testify, and he was only "restricted" or "restrained" from doing so falsely.

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely.

## **No Nuremberg Defense, But ...**

### **Model Rule 5.2**

#### **Responsibilities Of A Subordinate Lawyer**

A lawyer is bound by the Rules ... notwithstanding that the lawyer acted at the direction of another person.

A subordinate lawyer does not violate the Rules ... if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **Model Rule 8.4**

#### **Misconduct**

It is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

engage in conduct that is prejudicial to the administration of justice; You bet. That is the same as open court.

## **Misbehaving Lawyers**

### **Rule 3.5 Comment 5:**

"The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition." See Rule 1.0(m).

MAKE SURE YOUR COURT REPORTER KEEPS TYPING what the idiot lawyer is saying. Don't let opposing counsel stop the court reporter when they are threatening you or your client, or being unreasonable and obtuse.

**Recommended Reading & Viewing**

- [The Toughest Call Lawyer's life changed when he decided to keep a client's confession confidential.](#)
- *The Man Who Wasn't There* (2001 film). The Coen Brothers spin an elaborate neo-noir murder mystery; starring Billy Bob Thornton and Tony Shaloub, as the slimy but likeable lawyer of the "director" variety. Tony Shaloub coaches a witness to tell a story on the stand and compares the notion of "beyond a reasonable doubt" to [Heisenberg's Uncertainty Principle](#). Well, you have to click on Heisenberg to find out where Walter White's nickname comes from in *Breaking Bad*, don't you? ([On reserve in Schmid Law Library](#))