




Dealing with Dishonesty: Ethical Obligations when Clients or Witnesses are Dishonest



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Rule 1.2(d): Scope of Representation

- **Rule 1.2(d):** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- **Comment [10]:** Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Rule 1.2(d) (cont'd)

- **Comment [11]:** When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. ***See Rule 1.16(a).*** In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 4.1.*

Rule 1.16: Declining or terminating representation

Rule 1.16(a): Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law . . .

Rule 1.16(c): A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Uniform District Court Rule 102: Appearance and Withdrawal of Counsel

Rule 102(c): Counsel will not be permitted to withdraw from a case except upon court order. Except in the case of extraordinary circumstances, the court shall condition withdrawal of counsel upon the substitution of other counsel by written appearance. ***

See Byrd v. Byrd, 78 P.3d 671 (Wyo. 2003) (District court did not commit reversible error in allowing a husband's counsel to withdraw eight business days before trial because counsel's request to withdraw was based on specific facts that showed the husband's failure to cooperate and his obstruction of an order progression of the divorce action).

Rule 1.2(d) (cont'd)

- **Comment [11]:** When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. ***See Rule 4.1.***

Rule 4.1: Truthfulness in Statements to Others

- **In the course of representing a client a lawyer shall not knowingly: *** (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.**
- **Comment [3]:** Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by **Rule 1.6.**

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer **may** reveal such information to the extent the lawyer **reasonably believes necessary**:
 - (1) to prevent the client from committing a **criminal act**;

Rule 1.6 Confidentiality of Information (cont'd)

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- [New] **(2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury** to the financial interests or property of another **and in furtherance of which the client has used or is using the lawyer's services**
- **Comment [6]:** *** Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Rule 1.6 Confidentiality of Information (cont'd)

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- [New] **(3) to prevent, mitigate or rectify substantial injury** to the financial interests or property of another **that is reasonably certain to result or has resulted** from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services
- **Comment [7]:** Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.

Rule 1.2(d) Recap

If you discover your client is engaged in criminal or fraudulent conduct:

- You must withdraw (Rule 1.2(d), comment [11]; Rule 1.16).
- If you can avoid assisting in a client's fraud only by disclosing a material fact, you must do so unless disclosure is prohibited by Rule 1.6. (Rule 4.1). Rule 1.6 authorizes disclosure to:
 - Prevent a client from committing a criminal act;
 - Prevent a client from committing a crime/fraud in furtherance of which a client has used the lawyer's services
 - Prevent, mitigate or rectify substantial injury that is reasonably certain to or has resulted from the client's commission of a crime/fraud

Rule 3.3: Candor Toward the Tribunal

Rule 3.3(a)(3):

- A lawyer shall not knowingly offer evidence that a lawyer knows to be false.
- If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- Comment [1]: Rule 3(a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- Comment [2]: A lawyer must not allow the tribunal to be misled by evidence that the lawyer knows to be false.

Rule 3.3: Candor Toward the Tribunal (cont'd)

- **Rule 3.3(b):** A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- **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.
- **Comment [13]:** 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.

Rule 3.3: What's a Lawyer To Do?

- **Comment [6]:** If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.
- If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.
- If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

Rule 3.3: What's a Lawyer To Do?

- **Comment [8]:** The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false.
- A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.
- A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(g).
- Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Rule 3.3: What's a Lawyer To Do?

- **Comment [9]:** Although paragraph (a)(3) 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 believes is false.
- 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.

Rule 3.3: What are Remedial Measures?

- **Comment [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 called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer.
- In such situations 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.

Rule 3.3: What are Remedial Measures?

- 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 -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Rule 3.3: Policy considerations

- **Comment [11]:** The disclosure of a client's false testimony 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 cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(d).
- 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.

Other Rules re: False Testimony

- **Rule 3.4(b):** A lawyer shall not counsel or assist a witness to testify falsely.
- **Rule 3.9:** A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding *** shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Rule 3.3 Recap

- A lawyer **must** refuse to offer evidence the lawyer knows to be false.
- A lawyer **may** refuse to offer evidence the lawyer reasonably believes to be false, except in criminal cases.
- What to do when confronted with false evidence:
 - Remonstrate with client
 - Advise client of lawyer's duty to the court
 - Seek client's cooperation in correcting false statement
- If withdrawal is not permitted, or if withdrawal won't undo the effect of the false evidence, make such disclosure as is necessary even if doing so requires disclosure of information otherwise protected by Rule 1.6



Questions About Professional Responsibility Issues?

Call the Wyoming State Bar's

Ethics Hotline

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