

27 NCAC 02 RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (1) 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;
- (2) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;
- (3) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;
- (4) in pretrial procedure,
 - (a) make a frivolous discovery request,
 - (b) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or
 - (c) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;
- (5) 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, ask an irrelevant question that is intended to degrade 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; or
- (6) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (a) the person is a relative or a managerial employee or other agent of a client; and
 - (b) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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 in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions 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.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of

harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, *Terminology*, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[7] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. *See also* Rule 4.2.

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