

# Supreme Court of Florida

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No. 74,699

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THE FLORIDA BAR

RE: AMENDMENTS TO THE RULES  
REGULATING THE FLORIDA BAR  
(PERJURED TESTIMONY)

[March 8, 1991]

PER CURIAM.

Pursuant to article V, section 15, of the Florida Constitution, we review proposed changes in the Rules Regulating the Florida Bar.

The Board of Governors of the Florida Bar has submitted a revision of rule 4-3.3 of the Rules Regulating the Florida Bar, which would change a lawyer's duties and obligations concerning a client who wishes to present or has presented perjured testimony.

While the issue of perjured testimony has been aired prominently in recent years, only one response was filed to the petition following its publication in The Florida Bar News. Attorney John W. Douglass of Fort Lauderdale is concerned with section (a)(4) of the proposed rule, which says a lawyer shall not knowingly:

Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony which he knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Mr. Douglass argues that rule 4-3.3(a)(4) should be altered to read "learns or reasonably should have learned" rather than "comes to know." The danger, Mr. Douglass contends, is that unscrupulous lawyers can easily avoid the strictures of the rule simply by refusing to check out the story the client plans to tell.

There was some support for this position among members of the Board of Governors. In fact, the special Bar committee appointed in 1987 to study the issue recommended wording similar to that offered by Mr. Douglass. The Board, however, rejected the suggestion, and we are inclined to follow the Board's advice.

While there is some appeal in Mr. Douglass' position, there is a strong countervailing argument. There are few lawyers

who have not had the experience of wondering whether some clients were being entirely candid. Yet, the fact that the client's version of events differs from that of many others does not mean that the client is lying. The loyalty owed to the client demands that a lawyer accept the client's statement of facts until such time as it becomes apparent that the client is not telling the truth. It would be unfair to subject an otherwise ethical lawyer to discipline for failing to exhaust all avenues of discovering the truth of the client's version of the facts. Moreover, regardless of how the rule is worded, its success will ultimately depend upon the sensitivity of lawyers to perceive and to respect the fine line between the obligations of an advocate and the duty to prevent the perpetration of a fraud. We are confident that the lawyers of Florida will be responsive to the spirit as well as the language of the rule.

Thus, we approve the proposed rule **4-3.3**, which is attached to this opinion. The rule shall become effective upon the filing of this opinion.

It is so ordered.

EHRlich, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, J.J., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED. THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS RULE.

1 4-3.3 Candor toward the tribunal.

2 (a) A lawyer shall not knowingly:

3 (1) Make a false statement of material fact or law to a  
4 tribunal;

5 (2) Fail to disclose a material fact to a tribunal when  
6 disclosure is necessary to avoid assisting a criminal or fraudulent  
7 act by the client;

8 (3) Fail to disclose to the tribunal legal authority in  
9 the controlling jurisdiction known to the lawyer to be directly  
10 adverse to the position of the client and not disclosed by opposing  
11 counsel; or

12 ~~(4) Offer evidence that the lawyer knows to be false.~~  
13 ~~If a lawyer has offered material evidence and comes to know of its~~  
14 ~~falsity, the lawyer shall take reasonable remedial measures.~~

15 (4) Permit any witness, including a criminal defendant,  
16 to offer testimony or other evidence that the lawyer knows to be

17 false. A lawyer may not offer testimony which he knows to be false  
18 in the form of a narrative unless so ordered by the tribunal. If a  
19 lawyer has offered material evidence and thereafter comes to know of  
20 its falsity, the lawyer shall take reasonable remedial measures.

21 (b) The duties stated in paragraph (a) continue beyond the  
22 conclusion of the proceeding and apply even if compliance requires  
23 disclosure of information otherwise protected by rule 4-1.6.

24 (c) A lawyer may refuse to offer evidence that the lawyer  
25 reasonably believes is false.

26 (d) In an ex parte proceeding a lawyer shall inform the  
27 tribunal of all material facts known to the lawyer which will enable  
28 the tribunal to make an informed decision, whether or not the facts  
29 are adverse.

30 Comment:

31 The advocate's task is to present the client's case with  
32 persuasive force. Performance of that duty while maintaining  
33 confidences of the client is qualified by the advocate's duty of  
34 candor to the tribunal. However, an advocate does not vouch for the  
35 evidence submitted in a cause; the tribunal is responsible for  
36 assessing its probative value.

37 Representations by a lawyer

38 An advocate is responsible for pleadings and other documents  
39 prepared for litigation, but is usually not required to have  
40 personal knowledge of matters asserted therein, for litigation  
41 documents ordinarily present assertions by the client, or by someone  
42 on the client's behalf, and not assertions by the lawyer. Compare

43 rule 4-3.1. However, an assertion purporting to be on the lawyer's  
44 **own** knowledge, as in an affidavit by the lawyer or in a statement in  
45 open court, may properly be made only when the lawyer knows the  
46 assertion is true or believes it to be true on the basis of a  
47 reasonably diligent inquiry. There are circumstances where failure  
48 to make a disclosure is the equivalent of an affirmative  
49 misrepresentation. The obligation prescribed in rule 4-1.2(d) not  
50 to counsel a client to commit or assist the client in committing a  
51 fraud applies in litigation. Regarding compliance with rule  
52 4-1.2(d), see the comment to that rule. See also the comment to  
53 rule 4-8.4(b).

54 Misleading legal argument

55         Legal argument based on a knowingly false representation of  
56 law constitutes dishonesty toward the tribunal. A lawyer is not  
57 required to make a disinterested exposition of the law, but must  
58 recognize the existence of pertinent legal authorities. Furthermore,  
59 as stated in paragraph (a)(3), an advocate has a duty to disclose  
60 directly adverse authority in the controlling jurisdiction which has  
61 not been disclosed by the opposing party. The underlying concept is  
62 that legal argument is a discussion seeking to determine the legal  
63 premises properly applicable to the case.

64 False evidence

65         When evidence that a lawyer knows to be false is provided by  
66 a person who is not the client, the lawyer must refuse to offer it  
67 regardless of the client's wishes.

68           When false evidence is offered by the client, however, a  
69 conflict may arise between the lawyer's duty to keep the client's  
70 revelations confidential and the duty of candor to the court. Upon  
71 ascertaining that material evidence is false, the lawyer should seek  
72 to persuade the client that the evidence should not be offered or,  
73 if it has been offered, that its false character should immediately  
74 be disclosed. If the persuasion is ineffective, the lawyer must  
75 take reasonable remedial measures.

76           Except in the defense of a criminal accused, the rule  
77 generally recognized is that, if necessary to rectify the situation,  
78 an advocate must disclose the existence of the client's deception to  
79 the court or to the other party. Such a disclosure can result in  
80 grave consequences to the client, including not only a sense of  
81 betrayal but also loss of the case and perhaps a prosecution for  
82 perjury. But the alternative is that the lawyer cooperate in  
83 deceiving the court, thereby subverting the truth-finding process  
84 which the adversary system is designed to implement. See rule  
85 **4-1.2(d)**. Furthermore, unless it is clearly understood that the  
86 lawyer will act upon the duty to disclose the existence of false  
87 evidence the client can simply reject the lawyer's advice to reveal  
88 the false evidence and insist that the lawyer keep silent. Thus,  
89 the client could in effect coerce the lawyer into being a party to  
90 fraud on the court.

91 Perjury by a criminal defendant

92           Whether an advocate for a criminally accused has the same  
93 duty of disclosure has been intensely debated. While it is agreed  
94 that the lawyer should seek to persuade the client to refrain from

95 perjurious testimony, there has been dispute concerning the lawyer's  
96 duty when that persuasion fails. If the confrontation with the  
97 client occurs before trial, the lawyer ordinarily can withdraw.  
98 Withdrawal before trial may not be possible if trial is imminent, if  
99 the confrontation with the client does not take place until the  
100 trial itself, or if no other counsel is available.

101 The most difficult situation, therefore, arises in a criminal  
102 case where the accused insists on testifying when the lawyer knows  
103 that the testimony is perjurious. The lawyer's effort to rectify  
104 the situation can increase the likelihood of the client's being  
105 convicted as well as opening the possibility of a prosecution for  
106 perjury. On the other hand, if the lawyer does not exercise control  
107 over the proof, the lawyer participates, although in a merely  
108 passive way, in deception of the court.

109 ~~Three (3) resolutions of this dilemma have been proposed.~~  
110 ~~One is to permit the accused to testify by a narrative without~~  
111 ~~guidance through the lawyer's questioning. This compromises both~~  
112 ~~competing principles, it exempts the lawyer from the duty to~~  
113 ~~disclose false evidence but subjects the client to an implicit~~  
114 ~~disclosure of information imparted to counsel. Another suggested~~  
115 ~~resolution, of relatively recent origin, is that the advocate be~~  
116 ~~entirely excused from the duty to reveal perjury if the perjury is~~  
117 ~~that of the client. This is a coherent solution but makes the~~  
118 ~~advocate a knowing instrument of perjury.~~

119 The third resolution of the dilemma is that the lawyer must  
120 reveal the client's perjury if necessary to rectify the situation.  
121 A criminal accused has a right to the assistance of an advocate, a  
122 right to testify and a right of confidential communication with



123 counsel. However, an accused should not have a right to assistance  
124 of counsel in committing perjury. Furthermore, an advocate has an  
125 obligation, not only in professional ethics but under the law as  
126 well, to avoid implication in the commission of perjury or other  
127 falsification of evidence. See rule ~~4-1.2(d)~~.

128 Remedial measures

129 If perjured testimony or false evidence has been offered, the  
130 advocate's proper course ordinarily is to remonstrate with the  
131 client confidentially. If that fails, the advocate should seek to  
132 withdraw if that will remedy the situation. Subject to the caveat  
133 expressed in the next section of this comment, & if withdrawal will  
134 not remedy the situation or is impossible ~~and the~~ advocate  
135 determines that disclosure is the only measure that will avert a  
136 fraud on the court, the advocate should make disclosure to the  
137 court. It is for the court then to determine what should be  
138 done--making a statement about the matter to the trier of fact,  
139 ordering a mistrial, or perhaps nothing. If the false testimony was  
140 that of the client, the client may controvert the lawyer's version  
141 of their communication when the lawyer discloses the situation to  
142 the court. If there is an issue whether the client has committed  
143 perjury, the lawyer cannot represent the client in resolution of the  
144 issue and a mistrial may be unavoidable. An unscrupulous client  
145 might in this way attempt to produce a series of mistrials and thus  
146 escape prosecution. However, a second such encounter could be  
147 construed as a deliberate abuse of the right to counsel and as such  
148 a waiver of the right to further representation.

149 Constitutional requirements

150 The general rule--that an advocate must disclose the  
151 existence of perjury with respect to a material fact, even that of a  
152 client--applies to defense counsel in criminal cases, as well as in  
153 other instances. However, the definition of the lawyer's ethical  
154 duty in such a situation may be qualified by constitutional  
155 provisions for due process and the right to counsel in criminal  
156 cases.

157 Refusing to offer proof believed to be false

158 Generally speaking, a lawyer has authority to refuse to offer  
159 testimony or other proof that the lawyer believes is untrustworthy.  
160 Offering such proof may reflect adversely on the lawyer's ability to  
161 discriminate in the quality of evidence and thus impair the lawyer's  
162 effectiveness as an advocate. In criminal cases, however, a lawyer  
163 may, in some jurisdictions, be denied this authority by  
164 constitutional requirements governing the right to counsel.

165 A lawyer may not assist his client or any witness in offering  
166 false testimony or other false evidence, nor may the lawyer permit  
167 his client or any other witness to testify falsely in the narrative  
168 form unless ordered to do so by the tribunal. If a lawyer knows  
169 that his client intends to commit perjury, the lawyer's first duty  
170 is to attempt to convince the client to testify truthfully. If the  
171 client still insists on committing perjury the lawyer must threaten  
172 to disclose the client's intent to commit perjury to the judge. If  
173 the threat of disclosure does not successfully convince the client  
174 to testify truthfully, the lawyer must disclose the fact that his

175 client intends to lie to the tribunal and, per 4-1.6, information  
176 sufficient to prevent the commission of the crime of perjury.

177 The lawyer's duty not to assist witnesses, including his own  
178 client, in offering false evidence stems from the Rules of  
179 Professional Conduct, Florida statutes and caselaw.

180 Rule 4-1.2(d) prohibits the lawyer from assisting a client in  
181 conduct that the lawyer knows or reasonably should know is criminal  
182 or fraudulent.

183 Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or  
184 assisting a witness to testify falsely.

185 Rule 4-8.4(a) prohibits the lawyer from violating the Rules  
186 of Professional Conduct or knowingly assisting another to do so.

187 Rule 4-8.4(b) prohibits a lawyer from committing a criminal  
188 act that reflects adversely on the lawyer's honesty,  
189 trustworthiness, or fitness as a lawyer.

190 Rule 4-8.4(c) prohibits a lawyer from engaging in conduct  
191 involving dishonesty, fraud, deceit, or misrepresentation.

192 Rule 4-8.4(d) prohibits a lawyer from engaging in conduct  
193 that is prejudicial to the administration of justice.

194 Rule 4-1.6(b) requires a lawyer to reveal information to the  
195 extent the lawyer reasonably believes necessary to prevent a client  
196 from committing a crime.

197 This rule, 4-3.3(a)(2), requires a lawyer to reveal a  
198 material fact to the tribunal when disclosure is necessary to avoid  
199 assisting a criminal or fraudulent act by the client, and  
200 4-3.3(a)(4) prohibits a lawyer from offering false evidence and  
201 requires the lawyer to take reasonable remedial measures when false  
202 material evidence has been offered.

203 Rule 4-1.16 prohibits a lawyer from representing a client if  
204 the representation will result in a violation of the Rules of  
205 Professional Conduct or law and permits the lawyer to withdraw from  
206 representation if the client persists in a course of action which  
207 the lawyer reasonably believes is criminal or fraudulent or  
208 repugnant or imprudent. Rule 4-1.16(c) recognizes that  
209 notwithstanding good cause for terminating representation of a  
210 client, a lawyer is obliged to continue representation if so ordered  
211 by a tribunal.

212 To permit or assist a client or other witness to testify  
213 falsely is prohibited by Florida Statute 9837.02, which makes  
214 perjury in an official proceeding a felony and by Florida Statute  
215 9777.011, which proscribes aiding, abetting, or counseling  
216 commission of a felony.

217 Florida caselaw prohibits lawyers from presenting false  
218 testimony or evidence. Kneale v. Williams, 30 So.2d 284 (Fla.  
219 1947), states that perpetration of a fraud is outside the scope of  
220 the professional duty of an attorney and no privilege attaches to  
221 communication between attorney and a client with respect to  
222 transactions constituting the making of a false claim or the  
223 perpetration of a fraud. Dodd v. The Florida Bar, 118 So.2d 17  
224 (Fla. 1960), reminds us that "...the courts are...dependent on  
225 members of the bar to...present the true facts of each cause...to  
226 enable the judge or the jury to [decide the facts] to which the law  
227 may be applied. When an attorney...allows false testimony...he...  
228 makes it impossible for the scales [of justice] to balance." See  
229 also, The Florida Bar v. Simons, 391 So.2d 684 (Fla. 1980), and The  
230 Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981).

231           The United States Supreme Court in ~~Nix v. Whiteside~~, 106  
232 S.Ct. 988 (1986), answered in the negative the constitutional issue  
233 of whether it is ineffective assistance of counsel for an attorney  
234 to threaten disclosure of his client's (a criminal defendant)  
235 intention to testify falsely.

236   Ex parte proceedings

237           Ordinarily, an advocate has the limited responsibility of  
238 presenting one side of the matters that a tribunal should consider  
239 in reaching a decision; the conflicting position is expected to be  
240 presented by the opposing party. However, in an ex parte  
241 proceeding, such as an application for a temporary restraining  
242 order, there is no balance of presentation by opposing advocates.  
243 The object of an ex parte proceeding is nevertheless to yield a  
244 substantially just result. The judge has an affirmative  
245 responsibility to accord the absent party just consideration. The  
246 lawyer for the represented party has the correlative duty to make  
247 disclosures of material facts known to the lawyer and that the  
248 lawyer reasonably believes are necessary to an informed decision.

Original Proceeding - Rules Regulating The Florida Bar

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