

Alabama Rules of Professional Conduct

Advocate

Rule 3.4.

Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) 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;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

(d) 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 the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(2) The person may be required by law to refrain from disclosing the information; or

(3) The information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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.

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 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.

With regard to paragraph (b), it is not improper to pay a witness' expenses 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.

Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Comparison with Former Alabama Code of Professional Responsibility

With regard to paragraph (a), DR 7-109(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that a lawyer "shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness" DR 7-106(B)(3) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(C) provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case." EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (c) is substantially similar to DR 7-106(A), which provided that a lawyer "shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

With regard to paragraph (d), DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented ... other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

Paragraph (d)(2) permits a lawyer to advise third parties that they may be required by law to refrain from disclosure, such as under statutes regulating grand jury secrecy or providing for the protection of trade secrets. The lawyer may, on behalf of a client, urge others to abide by secrecy restrictions imposed by law.

Paragraph (d)(3) permits a lawyer, such as a prosecutor, to urge third parties not to disclose covert law enforcement investigations such as operations by undercover agents, stings, and the like. This Rule is limited to investigations in process, and the lawyer should make no effort to prevent disclosure of relevant information to those who have been accused of a crime as a result of the covert investigation.