"Your Ethical Obligations When You Believe that Your Client is Lying to You"

Featuring: Stephen H. Kline

This course will explore an attorney's obligations to the court and counsel when the attorney has reason to believe that a client is being untruthful. It examines the interplay between Rule 1.6 (Confidentiality of Information) and Rule 3.3 (Candor Toward the Tribunal) of the Wyoming Rules of Professional Conduct.

December 19, 2013
Noon to 1:00 p.m.
(1 Hour CLE Credit)

Phone Dial-in Instructions

The call is scheduled for one hour beginning at 12:00 Noon Mountain Time. Syllabus materials follow.

To participate in the conference call seminar:

1. Dial 1-800-364-2312. You may call in as early as 11:50 a.m. but no earlier. (The call will not be recognized until 11:50 a.m.)

2. You will be asked for the pass code or participant pin - key in 307-864-9450, followed by # sign.

3. If you have problems entering your pin to join the call, remain on the line and an operator will add you to the call. If you have trouble once you have been conferenced-in, press *0 (star zero) and an operator will help you or call the WTLA office - (307) 635-0820.

** To help with background noise we will mute participants' phone lines (You will hear the speaker but no one on the call will hear noises from your office). To ask a question, the unmute/mute toggle is *6. After asking your question, be sure to mute your line again by pressing *6.
About Your Speaker

Stephen H. Kline practices in Cheyenne Wyoming with Kline Law Office, P.C. He has specialized in civil litigation since 1979, including employment, personal injury, insurance and commercial litigation. Mr. Kline has been a past national delegate from Wyoming to the American Association for Justice and the American Board of Trial Advocates. He was the 2008 president of the Wyoming Chapter of the American Board of Trial Advocates and is Past President of the Wyoming Trial Lawyers Association. His recognitions include being named in the “Best Lawyers in America” and the Rocky Mountain region’s “Super Lawyers”. He is a frequent speaker on issues surrounding litigation and on topics of interest to all lawyers.
Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law.
contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer and, each lawyer assumes joint responsibility for the representation;

(2) the client is informed of the arrangement; and

(3) the total fee is reasonable.

(f) A lawyer shall not pay or receive a fee or commission solely for referring a case to another lawyer.

Comment. - Reasonableness of Fee and Expenses. [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other
expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Bases or Rate of Fee. [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters. See the Rules Governing Contingent Fees for Members of the Wyoming State Bar.

Terms of Payment. [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not
exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Prohibited Contingent Fees. [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee. [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees. [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

History: Amended April 11, 2006, effective July 1, 2006
Rule term

Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confidential information" is information provided by the client or relating to the client which is not otherwise available to the public.

(c) "Confirmed in writing" when used in reference to the informed decision of a person, denotes an informed decision that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming the oral informed decision. See paragraph (f) for the definition of "informed decision." If it is not feasible to obtain or transmit the writing at the time the person makes an informed decision, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction.

(f) "Informed decision" denotes the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "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.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or 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 interest in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, telegraphy, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and added or adopted by a person with the intent to sign the writing.
RULES OF PROFESSIONAL CONDUCT

Rule 1.6

is between a referring lawyer and a trial specialist. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (e) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees. [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

(Amended April 11, 2006, effective July 1, 2006.)

Contingency fees. — Where the matter was before the court upon a “Report and Recommendation to the Wyoming Supreme Court,” by the Board of Professional Responsibility for the Wyoming State Bar, the attorney violated Wyo. R. Prof. Conduct 1.5(a) by including paralegal time for legal services which should be generally covered by the contingency percentage. Bd. of Prof’l Responsibility v. Fulton, 133 P.3d 514 (Wyo. 2006).

Client Funds. — Where the matter was before the court upon a “Report and Recommendation to the Wyoming Supreme Court,” by the Board of Professional Responsibility for the Wyoming State Bar, the attorney violated Wyo. R. Prof. Conduct 1.15 and 1.4 by failing to respond to a client’s requests for information regarding the purchase of the certificate of deposit. Bd. of Prof’l Responsibility v. Fulton, 135 P.3d 514 (Wyo. 2006).

Attorney improperly charged personal expenses for airfare, hotels, rental cars, meals and other travel-related expenses to the firm, representing that such expenses related to cases upon which the attorney was working for clients or for client development purposes; the attorney agreed that his conduct violated Wyo. R. Prof. Conduct 1.5(a), 4.2, and 8.4(c), and agreed that disbarment was the appropriate sanction for his conduct. Bd. of Prof’l Responsibility v. Schneebeck, 2013 Wyo. LEXIS 24 (Wyo. 2013).


— Attorneys at law: fee collection practices as ground for disciplinary action, 91 ALR3d 683.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

Propaid legal services plans, 93 ALR3d 199.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 69 ALR4th 207.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 56 ALR4th 107.

Method of calculating attorneys’ fees awarded in common fund or common benefit cases — state cases, 56 ALR4th 107.

Validity and enforceability of express fee—splitting agreements between attorneys, 11 ALR 6th 557.

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client makes an informed decision, 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;
(2) to secure legal advice about the lawyer’s compliance with these Rules;
Contingency fees - Where the matter was before the court upon a "Report and Recommendation to the Wyoming Supreme Court," by the Board of Professional Responsibility for the Wyoming State Bar, the attorney violated Wyo. R. Prof. Conduct 1.5(a) by including paralegal time for legal services which should be generally covered by the contingency percentage. Bd. of Prof'l Responsibility v. Fulton, 133 P.3d 514 (Wyo. 2006).

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Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 ALR3d 690.

Prepaid legal services plans, 93 ALR3d 199.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 53 ALR5th 287.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 56 ALR5th 1.

Method of calculating attorneys' fees awarded in common fund or common benefit cases - state cases, 56 ALR5th 107.

Validity and enforceability of express fee - splitting agreements between attorneys, 11 ALR 6th 587.

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(3) 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;

(4) to comply with other law or a court order; or

(5) to protect the best interests of an individual when the lawyer has been appointed to act as a guardian ad litem.

Comment. — (1) The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

(2) The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

(3) Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(4) This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

(5) A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed decision, the lawyer must not reveal confidential information relating to the representation. See Rule 1.0(b) for the definition of confidential information and Rule 1.0(f) for the definition of informed decision. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(6) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in these rules. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

(7) Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to
Rule 1.6

Authorized Disclosure. Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to “counsel or assist” criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such criminal acts. The lawyer may make a disclosure in order to prevent the criminal act which the lawyer reasonably believes is intended by the client. It is very difficult for a lawyer to “know” when such a purpose will actually be carried out for the client may have a change of mind.

Fourth, a lawyer appointed to act as a guardian ad litem represents the best interests of that individual, not the individual. As stated in paragraph (b)(5), the lawyer has professional discretion to reveal information in order to protect the individual's best interests. Any such disclosure should be no greater than that which the lawyer reasonably believes necessary to protect the individual's best interests.

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)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's
right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[16] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[17] Other law may require that a lawyer disclose information about a client. See Wyoming Statute Sections 14-3-205 and 35-20-103. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[18] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent an informed decision of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[19] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[20] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 5.1 and 5.3. Rule 3.3, conversely, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal. [21] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(b)(1). After withdrawal the lawyer is
required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[22] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

Acting Competently to Preserve Confidentiality. [23] A lawyer must act competently to safeguard confidential information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[24] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may make an informed decision to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client. [25] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

(Revised February 14, 2002, effective April 1, 2002; amended April 11, 2006, effective July 1, 2006; amended June 28, 2011, effective October 1, 2011.)

When lawyer-client conversations not confidential.—The confidentiality of conversations with counsel is not protected where the statements or communications made to the lawyer are made in the furtherance of criminal endeavor, as, for example, when the lawyer is a victim of threats against his family and property. Hodgkinson v. State, 694 P.2d 33 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

See not barred when client also discloses information.—While an attorney may not disclose confidences and secrets of his client with impunity and still expect to recover his fees, recovery is not barred where the client himself reveals the same information that his attorney subsequently reveals and where the client's disclosure results in an affidavit duplicative of one filed by the attorney. Burk v. Burzynski, 872 P.2d 419 (Wyo. 1988).

Civil liability for breach of fiduciary duty.—The fiduciary duties of confidentiality and loyalty an attorney owes to a former client embodied in Rules 1.6 and 1.9 are a codification of the common law, and a breach of those fiduciary duties owed to former clients gives rise to potential civil liability to the former client within the framework of a legal malpractice action. Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002).


Law reviews.—For comment, "Protecting Our Children in Custody Cases: The Wyoming Legislature Should Create an Attorney/Guardian Ad Litem Who Represents the Best Inter-
Rule 3.1. Meritorious claims and contentions.

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(c) The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Comment. — (1) The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

(2) The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

(3) The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

(Amended April 11, 2006, effective July 1, 2006.)

Counsel breaches duty where his statements dehumanize his client. — Where counsel's statements had the effect of dehumanizing the defendant and accentuated the negative aspects of his client, counsel's separation of himself from client in this manner was a breach of counsel's duty of loyalty. Osborn v. Schillinger, 629 F. Supp. 610 (D. Wyo. 1986), aff'd, 881 F.2d 612 (10th Cir. 1989).

Knowing signing of inaccurate discovery disclosures. — Wyoming Board of Professional Responsibility recommended as the appropriate sanctions for an attorney's violations of the Wyoming Rules of Professional Conduct a public censure and payment of the administrative fee and costs where the Board found that: (1) the attorney violated Wyo. R. Prof. Conduct 3.1(c) by signing Rule 26 disclosures when he knew that the information contained therein was not accurate and was not well grounded in fact, as it failed to disclose existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action; or to indemnify or reimburse for payments made to satisfy a judgment as required by Wyo. R. Civ. P. 26(a)(1)(D), (e); (2) the attorney violated Wyo. R. Prof. Conduct 3.4(c) by knowingly failing to disclose the existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment as required by Rule 26(a)(1)(D); and (3) the attorney violated Wyo. R. Prof. Conduct 8.4(a), (c), (d) by knowingly failing to disclose existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made.
Rule 3.3. Candor toward the tribunal.

(a) 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

(3) offer evidence that the 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. 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.

(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.

(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.

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

Comment. — (1) This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (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.

(2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer. [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also, the Comment to Rule 8.4(b).

Knowingly False Legal Argument. [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not
required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering False Evidence. [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[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.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If required by law, counsel may present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also, Comment (8).

[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).

Refusing to Offer Proof Believed to Be False. [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. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. 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. See also, Comment (7).

Remedial Measures. [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. On, 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. 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.

[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(c). 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.

Preserving Integrity of Adjudicative Process. [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Constitutional Issues. [13] The general rule - that an advocate must reveal the existence of perjury with respect to a material fact, even that of a client - applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation. [14] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. 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.

Ex Parte Proceedings. [15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal. [16] Normally, a lawyer’s compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer’s compliance with this Rule’s
duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

(Amended April 11, 2006, effective July 1, 2006.)

Ethical to advise court of defendant's untruths. — Where the defendant, on advice of counsel, wished to exercise his constitutional right to testify in his own defense and where, at the same time, counsel had reason to believe, based upon his experience with the defendant, that some of the testimony counsel would elicit upon his examination of the defendant would be false, then the situation presented counsel with a difficult dilemma, so that his ex parte discussion with the court, during which he expressed concern that the defendant's testimony would include untruths, was not a violation of his ethical duty nor evidence of a conflict of interest. United States v. Litchfield, 869 P.2d 1614 (10th Cir. 1992).

Public censure appropriate for alteration of documents. — Where an attorney altered dates on documents filed with the court, and notarized a document with a false date, public censure was appropriate discipline. Board of Professional Responsibility v. McLeod, 804 P.2d 42 (Wyo. 1991).

Default judgment not an appropriate sanction for a change in testimony. — After plaintiff employee sustained personal injuries at work, he filed a co-employee liability action against defendants, the company's owner, the general construction superintendent, and the project superintendent; the first trial resulted in a mistrial due to certain comments made by plaintiff's counsel during opening statements about the project superintendent's change in testimony. The trial court acted within its discretion by ordering plaintiff to pay jury costs as a sanction; because the change in testimony was sufficiently presented to the jury, the trial court did not abuse its discretion by refusing to order a default judgment as a sanction under this rule. Dollarhide v. Bankcroft, 293 P.3d 1169 (Wyo. 2013).


— Attorney's misrepresentation to court of his state of health or other personal matter in seeking trial delay as ground for disciplinary action, 61 ALR4th 1216.

— Imposition of sanctions upon attorneys or parties for misconduct or misrepresentation of authorities, 63 ALR4th 1199.

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.

(b) false 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;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) 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, 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

(f) 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 of another 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.
Rule 3.4  

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 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.

[3] With regard to paragraph (b), it is not improper to pay a witness's 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.

[4] Paragraph (e) does not prohibit a lawyer, in opening and closing statements, from commenting on what the evidence shows about the credibility of a witness. Applicable case law may prohibit an attorney from vouching for the credibility of a witness.

[5] Paragraph (f) 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.

(Amended April 11, 2006, effective July 1, 2006.)

Suspension. — Attorney agreed to suspension for violating Wyo. R. Prof. Conduct 1.3, 1.4, 3.2, and 3.4(c) because the attorney knowingly failed to perform services for his clients that could have injured them and he violated court orders that potentially injured or interfered with his client, a party or a legal proceeding. The attorney failed to appear at certain court hearings, failed to provide discovery, failed to file appropriate documents for his clients, and failed to communicate with his clients. Bd. of Prof'l Responsibility v. Cannon, 189 P.3d 887 (Wyo. 2008).

Public censure. — Attorney was publicly censured for violating Wyo. R. Prof. Conduct 3.4(d) where, in response to a written discovery request, he had failed to reveal the existence of a rerecorded audiotape of statements made by a defendant in a defamation case that had originally been recorded by a third party. Bd. of Prof'l Responsibility v. Chapman, 150 P.3d 182 (Wyo. 2007).

Counsel obligated to disclose letter indicating he took sides in prior joint representation. — Party's counsel owed a duty of candor and fairness to disclose to opposing counsel and the court a prior letter written by him that clearly indicated he had taken sides between the parties he jointly represented in a prior lawsuit, which parties were now plaintiffs and defendants in the instant lawsuit. Kath v. Western Media, Inc., 684 P.2d 98 (Wyo. 1984).

Failure to comply with discovery disclosure requirements. — Wyoming Board of Professional Responsibility recommended as the appropriate sanctions for an attorney's violations of the Wyoming Rules of Professional Conduct a public censure and payment of the administrative fee and costs where the Board found that: (1) the attorney violated Wyo. R. Prof. Conduct 3.4(c) by knowingly failing to disclose the existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy a judgment as required by Wyo. R. Civ. P. 26(a)(1)(D); (2) the attorney violated Wyo. R. Prof. Conduct 3.1(c) by signing Rule 26 disclosures when he knew that the information contained therein was not accurate and was not well grounded in fact, as it failed to disclose existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment as required by Rule 26(a)(1)(D); and (3) the attorney violated Wyo. R. Prof. Conduct 8.4(a), (c), (d) by knowingly failing to disclose...

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.

Comment. — [1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with honesty and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

(Amended April 11, 2006, effective July 1, 2006.)

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment. — [1] A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact. [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client. [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
Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) knowingly employ or continue to employ or contract with any person in the practice of law who has been disbarred or is under suspension from the practice of law by any jurisdiction, or is on disability inactive status by any jurisdiction. The prohibition of this rule extends to the employment of or contracting for the services of such disbarred or suspended person in any position or capacity (including but not limited to as an employee, independent contractor, paralegal, secretary, investigator or consultant) which is directly or indirectly related to the practice of law as defined by Rule 11(a) of the Rules of the Supreme Court of Wyoming providing for the Organization and Government of the Bar Association and Attorneys at Law of the State of Wyoming, whether or not compensation is paid.

(Adopted April 11, 2006, effective July 1, 2006.)
Rule 8.4

Comment. [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer; director or manager of a corporation or other organization.

(Amended February 7, 1997, effective April 23, 1997; amended April 11, 2006, effective July 1, 2006.)

Public censure appropriate for alteration of documents. — Where an attorney altered dates on documents filed with the court, and notarized a document with a false date, public censure was appropriate discipline. Board of Professional Responsibility v. McLeod, 804 P.2d 42 (Wyo. 1991).

Public censure appropriate for misleading client regarding billing. — Attorney received a public censure for a violation of Wyo. R. Prof. Conduct 8.4(c) where the attorney hired an independent associate counsel to work on an appellate brief; the attorney paid the associate $85 per hour, but then charged the client his fee of $250 without telling the client that he did not personally perform the work. Bd. of Prof'l Responsibility v. Mulligan, 162 P.3d 468 (Wyo. 2007).

Felons committed while practicing law warrant disbarment. — The conviction of five felonies arising from activities pursued in the practice of law, which conduct involved the preparation and use of forged instruments as trial evidence, warranted disbarment. Board of Professional Responsibility v. Neilson, 816 P.2d 120 (Wyo. 1991).

The conviction of three felonies arising from activities pursued in the practice of law, which conduct involved the misapplication of funds,造成了司法不公，构成了对法律实施的阻碍。Bd. of Prof'l Responsibility v. Fulton, 183 P.3d 514 (Wyo. 2008).

Attorney was suspended from the practice of law for 18 months where he violated Wyo. R. Prof. Conduct 8.4(b) by engaging in criminal conduct, aiding and abetting delivery of a controlled substance. In re Ingritm, 239 P.3d 647 (Wyo. 2010).

Disbarment for conspiracy to manufacture a controlled substance. — Suspended
attorney violated Wyo. R. Prof. Conduct 8.4(b) and was disbarred after he agreed to plead guilty to conspiracy to manufacture a controlled substance in violation of Wyo. Stat. Ann. §§ 36-7-1069(a)(X) and 36-7-1061(a)(X) and being sentenced to five to eight years in the Wyoming State Penitentiary. The board of professional responsibility was ordered to issue a press release consistent with that contained in the board's report and recommendation for disbarment and the attorney was ordered to pay costs. Bd. of Prof'l Responsibility v. Strand, 143 P.3d 361 (Wyo. 2006).

Wyoming Board of Professional Responsibility recommended that an attorney be disbarred for violating Wyo. R. Prof. Conduct 8.4(b) where he was convicted of using controlled substances, he had continued to use those substances contrary to a sentence on an earlier DUI charge, and he had attempted to foil drug tests by using someone else's urine. Bd. of Prof'l Responsibility v. Albanese, 145 P.3d 464 (Wyo. 2006).

False accusations against judge. — State Bar's Board of Professional Responsibility proved that an attorney violated the Rules of Professional Conduct by clear and convincing evidence, at least insofar as they related to the attorney's false allegation that a judge participated in improper ex parte communications with opposing counsel; attorney was ordered suspended from the practice of law for two months. Williams v. State, ex rel. Wyo. Workers' Safety & Comp. Div. (In re Worker's Compensation Claim), 205 P.3d 1024 (Wyo. 2009).

Knowing failure to provide required discovery disclosures. — Wyoming Board of Professional Responsibility recommended as the appropriate sanctions for an attorney's violations of the Wyoming Rules of Professional Conduct a public censure and payment of the administrative fee and costs where the Board found that: (1) the attorney violated Wyo. R. Prof. Conduct 3.4(c) by knowingly failing to disclose the existence of insurance that might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment as required by Rule 26(a)(1)(D), (e). In re Stith, — P.3d —, 2011 Wyo. LEXIS 72 (Wyo. Feb. 4, 2011).

Misconduct not found. — Attorney who had been convicted of conspiracy to commit sales of unregistered securities was found not to have committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer. Nor did he engage in dishonesty, fraud, or deceit; hence, he did not engage in misconduct under Wyo. R. Prof. Conduct 8.4. Bd. of Prof'l Responsibility v. Elsom, 187 P.3d 358 (Wyo. 2008).


Attorney's conviction in foreign or federal jurisdiction as ground for disciplinary action against attorney, 95 ALR3d 850.

False accusations against judge. — Attorney's verbal abuse of another attorney as basis for disciplinary action, 87 ALR3d 361.

Method employed in collecting debt due client as ground for disciplinary action against attorney, 99 ALR3d 288.

Adequacy of defense counsel's representation of criminal client regarding argument, 8 ALR4th 16.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 8 ALR4th 1208.

Adequacy of defense counsel's representation of criminal client regarding hypnotism and truth tests, 9 ALR4th 354.

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney — modern cases, 37 ALR4th 646.

Internal disability of attorney as ground for disciplining attorney, 84 ALR4th 1238.

Sexual misconduct as ground for disciplining attorney or judge, 43 ALR4th 1062.

Adequacy of defense counsel's representation of criminal client regarding hypocrisy and truth tests, 9 ALR4th 354.

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney — modern cases, 37 ALR4th 646.

Internal disability of attorney as ground for disciplining attorney, 84 ALR4th 1238.

Sexual misconduct as ground for disciplining attorney or judge, 43 ALR4th 1062.

Legal malpractice in handling or defending medical malpractice claim, 78 ALR4th 725.

Soliciting client to commit illegal or immoral act as ground for discipline of attorney, 85 ALR4th 697.

Misconduct involving intoxication as ground for disciplinary action against attorney, 1 ALR6th 874.

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 ALR5th 597.

239 P.3d 1168
Supreme Court of Wyoming.

Jack DOLLARHIDE, Appellant (Plaintiff),
v.
Scott BANCROFT, Murray Shattuck, and
Michael Johnson, Appellees (Defendants).


Synopsis
Background: Injured worker brought action against employer, employer's owner, employer's general construction superintendent and employer's construction project superintendent. The District Court, Teton County, Nancy J. Guthrie, J., granted defendants' motion to dismiss for lack of prosecution, and worker appealed. The Supreme Court, 193 P.3d 223, reversed and remanded. On remand, after first trial ended in mistrial, the District Court denied worker's motion for entry of default, entered judgment on jury's verdict in favor of employer, owner, and general construction superintendent, and assessed costs. Worker appealed.

Holdings: The Supreme Court, Voigt, J., held that:

[1] comments by injured worker's attorney during opening statements suggesting trial court had found worker to have valid case warranted mistrial;

[2] order that injured worker pay county $2,235.45 for jury costs associated with mistrial was not abuse of discretion; and

[3] denial of injured worker's request for entry of default against employer, owner, and general construction superintendent in view of perjury committed by project superintendent during initial deposition was not abuse of discretion.

Affirmed.

Attorneys and Law Firms

*1169 Representing Appellant: Weston W. Reeves and Anna M. Reeves Olson of Park Street Law Office, Casper, Wyoming. Argument by Ms. Reeves Olson and Mr. Reeves.


Before KITE, C.J., and GOLDEN, HILL, VOIGT, and BURKE, JJ.

Opinion

VOIGT, Justice.

[1] On August 3, 2001, while employed as a carpenter by Bancroft Construction, Inc., in Teton County, Wyoming, Jack Dollarhide (Dollarhide) was injured when the raised wooden platform upon which he was standing crashed to the ground. Dollarhide obtained benefits from the Wyoming Worker's Compensation fund, but also filed a co-employee liability action against Scott Bancroft (Bancroft), the owner of the company, and Murray Shattuck (Shattuck), the company's general construction superintendent. That action subsequently was consolidated with a similar action filed by Dollarhide against Michael Johnson (Johnson), the company's project superintendent. ¹

[2] After considerable delay, the first trial resulted in a mistrial due to certain comments made by Dollarhide's counsel during opening statements. The second trial resulted in a jury verdict in favor of Bancroft, Shattuck, and Johnson. In this appeal, *1170 Dollarhide challenges the granting of the mistrial and assessment of costs resulting therefrom, and the denial of his motion for entry of default based upon a pretrial change in Johnson's testimony. Finding no error, we affirm.

ISSUES

[1] Did the district court abuse its discretion in granting Bancroft's motion for mistrial and assessing costs against Dollarhide?

2. Did the district court abuse its discretion in denying Dollarhide's motion for entry of default?
STANDARD OF REVIEW


In determining whether there has been an abuse of discretion, we focus on the "reasonableness of the choice made by the trial court." Vaughn, 962 P.2d 149, 151 (Wyo.1998). If the trial court could reasonably conclude as it did and the ruling is one based on sound judgment with regard to what is right under the circumstances, it will not be disturbed absent a showing that some facet of the ruling is arbitrary or capricious. Jordan v. Brackin, 992 P.2d 1096, 1098 (Wyo.1999).

FACTS

On August 3, 2001, Dollarhide was working for the company building a residence in Teton County. At some point on that date, he and another employee got onto a wooden platform fitted with guardrails, which platform—sometimes called a "man-basket"—was then raised approximately twelve to fifteen feet in the air on the tines of a forklift so the men could attach two beams to the ceiling. The man-basket came apart, and both men fell to the ground, with Dollarhide receiving serious injuries. These basic facts are not in dispute.

Dollarhide sued Bancroft, the company's owner, and Shattuck, the company's general construction superintendent. Later, that lawsuit was consolidated with his separate suit against Johnson, the project superintendent. The gist of the cause of action against all three men was that they acted intentionally or in willful and wanton disregard of the known and obvious risks presented by elevating workers off the ground on a flimsy wooden platform. This being the central issue of the case, the two focal questions became whether such was the company practice, and if so, what each man knew about the practice prior to the accident.

In their Answers to Dollarhide's Complaints, Bancroft, Shattuck, and Johnson generally denied the allegations, and specifically denied that Dollarhide was directed to use the man-basket. More significantly, in support of a Motion for Summary Judgment, Bancroft and Shattuck relied upon their own affidavits, and Johnson's affidavit, to set forth, inter alia, the following "facts":

1. Before work began on the day of the accident, Johnson instructed the workers to use scaffolding to install the beams, and the workers verbally acknowledged such instruction.

2. Scaffolding was present at the job site for such purpose.

3. During Johnson's temporary absence from the job site, the workers decided on their own to use the wooden man-basket.

4. Neither Bancroft nor Shattuck was physically present at the job site on the date Dollarhide was injured, and neither man had any knowledge prior to the accident that company employees would use the wooden platform in the manner it was used.

5. Neither Bancroft nor Shattuck were ever advised by any employee that a dangerous condition existed because employees were using the wooden platform in the manner it was used.
6. In addition to the above statements, Johnson also specifically swore in his affidavit that the wooden platform was never intended to be used as it was being used when Dollarhide was injured, but was constructed for the sole purpose of transporting tools at the job site.

¶ 8] This version of events had one central theme: it was not company policy or practice to use the wooden platform as a "man-basket," and Dollarhide was not authorized or instructed to use it in that manner. The defendants perpetuated this theme in affidavits, depositions, and other discovery responses. In support of his own Motion for Summary Judgment after he was brought in as a defendant, Johnson presented the same defense, and utilized many of the same discovery documents. In his deposition taken in 2008, he repeated the statements he made in his 2005 affidavit; that is, he claimed that not only had he not instructed Dollarhide to use the wooden platform as a man-lift, he had never seen any company employees elevated in a wooden platform.

¶ 9] Without opining as to fault, we will simply say that the tortuous pretrial progress of this case is not a model to be followed. The incident occurred on August 3, 2001. The first Complaint was filed on August 29, 2003. The discovery process, dispositive motions, changes in legal representation, a dismissal for failure to prosecute, and an appeal to this court caused considerable delay in getting to trial. See Dollarhide v. Bancroft, 2008 WY 113, 193 P.3d 223 (Wy.2008) (reversal of the dismissal). Finally, the final pretrial conference was scheduled for April 20, 2009, and the trial was scheduled to begin on May 18, 2009.

¶ 10] Just prior to the pretrial conference, the events that gave rise to the case in its present posture began to unfold. Citing "professional considerations" and Rule 1.16(a)(1) of the Wyoming Rules of Professional Conduct for Attorneys at Law, the defendants' attorneys moved on April 16, 2009, to be allowed to withdraw from the case. That motion was granted, and several new lawyers appeared separately for the three defendants. The trial was reset for August 10, 2009. On May 26, 2009, Johnson's new counsel sent a "correction page" to all counsel and to the court reporter who had reported Johnson's deposition eleven months earlier. Set out below is Johnson's original deposition testimony, along with the change made to each pertinent answer:

Q. During the time that you worked for Bancroft Construction, did they—did you ever observe Bancroft use a wooden platform to raise workers up in the air to work?

*1172 A. No. [Changed to: "Yes, workers used wooden platforms."]

Q. Never?

A. Never. [Changed to: "Bancroft Construction used wooden platforms on several occasions."]

Q. Not on any of the jobs that you worked on?

A. While I was there, no. [Changed to: "I did witness the usage [sic] of wooden platforms."]

Q. Okay. Did you ever see or observe any Bancroft employees be raised up by a forklift in a steel or metal basket to work?

A. Yes.

Q. Okay. But never in a wooden or on a wooden platform or wooden pallet or anything like that?

A. No. [Changed to: "Yes. Wooden platform."]

Q. Sure. Would it be fair to say that you never observed any Bancroft employees working aboveground from a forklift, unless they were in a metal basket?

A. Correct. [Changed to: "Not correct. Wooden platforms were used to work from."]

¶ 11] This dramatic change in Johnson's testimony concerning the primary issue of the case caused Johnson's deposition to be re-opened on June 22, 2009. During the deposition, Johnson testified that, a few weeks before his original attorneys withdrew from the case, he had a conversation with them about changing his prior deposition testimony. In addition, during a break in the deposition, Johnson's attorney presented to Dollarhide's attorney a packet of previously undisclosed photographs, some of which were taken at the job site in 2001 by the project architect, and which show the wooden man-basket that had collapsed. Johnson's original attorneys had received the photographs from the architect at approximately the same time that they discussed with Johnson changing his deposition testimony.
The jury trial began on August 10, 2009. That afternoon, in his opening statement to the jury, Dollarhide’s counsel made the following comments following a lengthy statement about Bancroft Construction’s use of wooden man-baskets and Johnson’s change in testimony:

Let me tell you why this is so serious. In 2005 Shattuck and Bancroft filed their statements and copies of their Depositions with Judge Guthrie and on the basis of their sworn testimony told her throw the case out, she didn’t do it. And in 2008 Michael Johnson with copies —filed a motion with copies of his affidavit, his answers to interrogatories, his 2008 deposition, depositions of Shattuck and Bancroft, all of which say [Dollarhide(, it’s your fault, you didn’t do what we told you to do and asked Judge Guthrie to throw the case out, she didn’t do it.

Michael Johnson retracted his testimony only after he learned that carpenters who worked on his crew were going to be willing to come forward and say that ain’t so. And the question I’m going to ask him, which he can think about tonight, if Judge Guthrie had thrown the case out saying the unanimous evidence is [Dollarhide( screwed up would you have told anybody, Mr. Johnson, that a ruling was based on your lie? That’s the question to which I want to get an answer in this case.

(Emphasis added.)

No defense attorney objected to these comments at the time they were made, but before defense opening statements began, Bancroft’s counsel moved for a mistrial based, among other things, on the contention that these comments “suggested to the jury that you [Judge Guthrie] think that it’s a good lawsuit and they should too.” The following morning, after allowing counsel to argue the matter, the district court granted the mistrial motion, concluding that the prejudice resulting from the statement could not be overcome with a curative instruction. On August 24, 2009, Bancroft filed a Motion for Sanctions based upon the mistrial. Bancroft sought $7,883.75 for expenses related to the aborted trial. On the following day, the district court entered an order taking the motion under advisement pending resetting and completion of the jury trial.

The second trial began on August 31, 2009, and on September 8, 2009, the jury returned a verdict in favor of the defendants. That verdict is not the subject of this appeal. Rather, in addition to the grant of a mistrial and the denial of a default, Dollarhide appeals the district court’s resolution of the parties’ motions for sanctions. On November 13, 2009, the district court entered an order entitled “Re-Entry of Judgment, Award of Costs, and Order on Motions for Sanctions.” After consideration of the parties’ conduct throughout the pretrial and trial proceedings, and consideration of the verdict, the district court ordered as follows:

1. Dollarhide was to pay Teton County $2,235.45 for jury costs attributable to the mistrial.
2. The defendants were to pay Dollarhide $450.78 for the costs of the trial continuance occasioned by the change in defense counsel.
3. Dollarhide was ordered to pay Bancroft $2,844.47, Shattuck $778.18, and Johnson $3,537.42 as costs resulting from the defense verdict in the second trial.
4. Dollarhide was awarded nothing as a result of Johnson’s perjured testimony, and the defendants were awarded nothing as a result of the mistrial.

DISCUSSION

Did the district court abuse its discretion in granting Bancroft’s motion for mistrial and assessing costs against Dollarhide?

The gravamen of the mistrial motion, as well as the district court’s rationale for granting the motion, was that Dollarhide’s counsel had irrevocably tainted the jury by

2010 WY 126

telling it, in effect, that Judge Guthrie had found Dollarhide to have a valid case against the defendants. The reason that we must affirm the district court is that it is impossible to show that the mistrial decision was unreasonable or arbitrary or capricious under these circumstances. While it is the law that "[g]ranting a mistrial is an extreme and drastic remedy that should be resorted to only in the face of an error so prejudicial that justice could not be served by proceeding with trial[,]" it is also the law that "[t]he trial court is also in the best position to assess the prejudicial impact of such error." Warner v. State, 897 P.2d 472, 474 (Wyo.1995); see also Martin v. State, 2007 WY 2, ¶ 19, 149 P.3d 707, 712 (Wyo.2007). We are in no position to second-guess the trial court's on-site, real-time assessment.5 Dollarhide argues that, "even if the statement was improper, it could have been cured by an instruction." Obviously, we also are in no position to test the accuracy of that assumption.

5 Although not exactly the same, the facts of this case are similar to the facts in State Farm Mutual Auto. Insurance Co. v. Resnick, 636 So.2d 75 (FlaDist.Ct.App.3d Dist.1994), where the appellate court reversed the trial court's denial of a mistrial motion where the plaintiff's counsel during opening statement told the jury that "the judge has already determined that [the defendant] didn't have [proof of delivery of a "1174 notice." Id. at 76. In reversing, the appellate court concluded that

the remarks by [plaintiff's] counsel were such that an objection and instructions to disregard them could not cure the resulting prejudice. The trial judge is the dominant figure responsible for the management, direction, and control of the proceedings. In the adversary system, the jury looks to the trial judge for guidance. A comment of this nature, made at the beginning of the proceedings, can have a marked tendency to influence a jury in its analysis of the issue. We find the harm engendered by the comment made during opening statement is sufficiently pervasive and prejudicial to negate any curative value the judge's subsequent instructions might have had. 

[1] At 77 (internal citations omitted). The same can be said of the case sub judice.

[9] As mentioned above, we also review the award or denial of costs and sanctions after a mistrial for an abuse of discretion. See supra ¶ 4. In the instant case, the district court ordered Dollarhide to pay $2,235.45 to Teton County for the jury costs attributable to the mistrial, but it denied the defendants' request for costs and attorney's fees in the amount of $29,044.31, likewise attributable to the mistrial. U.R.D.C. 503(b) provides as follows:

(b) When a mistrial is caused by any party, the court may order that the party, or parties, reimburse the proper fund for fees and mileage paid to the witnesses, jurors and bailiffs for their attendance.

In other words, the district court clearly had the authority to order Dollarhide to pay the jury costs. As to sanctions, Dollarhide certainly has no complaint that the district court did not also order him to pay the $29,044.31 sought by the defendants for his having caused the mistrial. Under these circumstances, we would be hard-pressed to find the district court's assessment to be unreasonable, arbitrary, or capricious. As with the mistrial decision itself, the decision as to costs is a matter for the trial court's discretion. We see no abuse of that discretion here.

Did the district court abuse its discretion in denying Dollarhide's motion for entry of default?

[10] After the mistrial brought an end to the first trial, and before the second trial started, Dollarhide filed a motion requesting, among other things, that the district court enter a default against the defendants on the issue of liability because of the last-minute change in Johnson's testimony. The district court took the motion under advisement until after the second trial. In its post-trial Re—Entry of Judgment, Award of Costs, and Order on Motions for Sanctions, the district court found that Johnson had admitted perjury and had changed his testimony, but that neither Bancroft nor Shattuck ever admitted perjury or changed his testimony. In regard to the latter two defendants, the district court stated:

However, it is difficult for the Court to comprehend that the owner and

The court then concluded that either Johnson alone, or in concert with the other defendants "perpetrated a fraud on the Court since 2005 with the false testimony that wooden platforms were not used as man-baskets on Bancroft construction sites." In the end, the district court resolved its apparent indecision as to the culpability of Bancroft and Shattuck by sanctioning all three defendants for the "fraud on the Court." The sanction was the denial to the defendants of their costs and attorneys' fees in the amount of $29,044.31.

That brings us to the nub of Dollarhide's argument—he contends that monetary sanctions are simply insufficient in the face of perjury, especially where that perjury lies at the heart of a "fraud on the court." Dollarhide cites Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) (overruled on other grounds by Standard Oil Co. v. United States, 997, 88 L.Ed. 1250 (1944) (overruled on other grounds by Standard Oil Co. v. United States, 429 U.S. 752, 764-65, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980)). This Court has said that "courts have inherent powers beyond those specified in rules and statutes that are absolutely necessary to the courts' ability to perform the functions for which they were created." Bi–Rite Package, Inc. v. Dist. Court of the Ninth Judicial Dist., 735 P.2d 709, 713 (Wyo.1987). Further, courts are vested with very great and far-reaching power to control their business and proceedings and to enforce their orders and process in conducting the business of a court. Courts must have these very great powers to ensure civility, orderly procedure, respect for the court as an institution and for its orders, and in the end an honest development of the facts of a controversy that will end in a just result.

Id. at 712.

Many courts have recognized that courts possess the inherent authority to strike claims, or to strike answers, or to enter default, as sanctions for severe litigation abuse. See, e.g., Campos v. Correction Officer Smith, 418 F.Supp.2d 277, 279 (W.D.N.Y.2006) (complaint dismissed where plaintiff knowingly presented a falsified exhibit); Vargas v. Feliz, 901 F.Supp. 1572, 1579 (S.D.N.Y.1995) (complaint dismissed where plaintiff fabricated evidence and committed perjury); Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384, 389 (E.D.Cal.1992) (default entered against defendants who submitted fraudulent documents and committed perjury); Aoude, 892 F.2d at 1118 (claim dismissed where plaintiff attached a "bogus" agreement to the complaint); Eppes v. Snowden, 656 F.Supp. 1267, 1279 (E.D.Ky.1986) (answer and counterclaim stricken because defendant submitted backdated documents). Such severe sanctions should be available not just as punishment, but also as a deterrent to others from such conduct. See Pearson v. First NH Mortg. Corp., 200 F.3d 30, 42 n. 7 (1st Cir.1999); Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976).

Note: This text is a natural representation of the document, adhering to the guidelines provided.
and was cross-examined and impeached, allowing the trial to proceed with the jury having knowledge of, and basing its determination on, "the truth." Second, the complicity of Bancroft and Shattuck was surmised by the district court, but evidently not found by the jury, because the jury found in favor of the defendants. And third, the district court did not ignore the alleged misconduct, imposing a sanction of $29,044.31.

[¶ 24] Stated as a positive, the proper exercise of discretion means doing something that is reasonable under the circumstances. We do not reverse unless what was done by the district court was unreasonable. Perhaps the most significant procedural fact of this case is the fact that the false testimony was disclaimed by Johnson prior to trial, thereby allowing Dollarhide to present to the jury not only his view of the truth, but the attempt—admitted at least by one of the defendants—to hide the truth. The district court was satisfied that the change in testimony was sufficiently presented to the jury, and concluded that a default was not appropriate. We do not find that to have been an abuse of the district court's discretion.

CONCLUSION

[¶ 25] The district court did not abuse its discretion in granting the motion for a mistrial, in denying the motion to enter a default, or in its costs and sanctions orders.

[¶ 26] Affirmed.

Parallel Citations

2010 WY 126

Footnotes

1 Wyo. Stat. Ann. § 27-14-104(a) (LexisNexis 2009) provides that the rights and remedies of the Wyoming Worker's Compensation Act are exclusive in certain suits by employees against employers and co-employees, "unless the employees intentionally act to cause physical harm or injury to the injured employee." This Court has equated the concept of "intentionally act to cause physical harm or injury" to the concept of "willful and wanton misconduct." Bertagnolli v. Louderbeck, 2003 WY 50, ¶ 15, 67 P.3d 627, 632 (Wyo.2003).

2 The Court notes that none of the parties' present counsel were involved in the early stages of the case.

3 Bancroft and Shattuck filed a Motion for Summary Judgment on August 5, 2005, and after he was brought into the action, Johnson did the same on August 22, 2008. The former was denied on February 27, 2006, and the latter was denied on October 1, 2008. More will later be said about these motions and orders.

4 Rule 1.16(a)(1) requires a lawyer to withdraw from representation if "the representation will result in violation of the rules of professional conduct or other law[.]"

5 In one sense, once a mistrial has been granted, that issue is moot because that jury has been released and another trial has taken place, meaning that "any determination made at this juncture by this Court would have no practical effect on that outcome." State v. Newman, 2004 WY 41, ¶ 24, 88 P.3d 445, 454 (Wyo.2004). In such case, the only surviving issue may be the assessment of costs or sanctions.

6 Hartford–Empire had obtained a patent, and later won a patent infringement suit, by submitting a fraudulent trade journal to both the patent office and the court. Id. at 240-41, 64 S.Ct. at 998-99.