

Vermont Rules of Professional Conduct
Rule 3.4 – Fairness to Opposing Party and Counsel

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*This unofficial version was last updated on **November 14, 2022.***

Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- *Rule 3.4 was last amended in 2009.*

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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

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

(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 or other 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.

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. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

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

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.4 is changed by the elimination of language limiting to civil cases the exception in Rule 3.4(f) to the prohibition against advising a nonclient to refrain from giving information to another party. This limitation, not found in the original or amended Model Rule, was adopted in the 1999 Vermont Rule out of concern for its effect in criminal proceedings. Though the limitation has been eliminated as too inflexible, the warning set forth in the 1999 Reporter's Notes to V.R.P.C. 3.4 is still pertinent: In a criminal case, "Lawyers should be mindful of the risk that action permitted by this rule in a civil case might constitute obstruction of justice under applicable law. Cf. V.R.Cr.P. 16.2(a)."

The Comment to V.R.P.C. 3.4 is amended to conform to the changes in the Comment to Model Rule 3.4. The ABA Reporter's Explanation is as follows:

COMMENT:

[1] Language has been added to alert lawyers to the law governing possession of physical evidence of client crimes.

Reporter's Notes

This rule carries forward many of the Vermont Code prohibitions regarding falsifying evidence and counseling disobedience of court orders. It differs from the Vermont Code by adding a new provision prohibiting lawyers from making frivolous discovery requests or failing to comply with proper discovery requests. It also differs by adding language explicitly prohibiting lawyers from requesting nonclients to refrain from giving relevant information to other parties, unless specific conditions are met. Lawyers should be mindful of the risk that action permitted by this rule in a civil case might constitute obstruction of justice under applicable law. Cf. V.R.Cr.P. 16.2(a).

