Rule 3.4: Fairness to Opposing Party and Counsel

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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) Knowingly or intentionally falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly or intentionally 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, knowingly or intentionally make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, knowingly or intentionally 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) Present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter.

Supreme Court Commentary

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[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.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(3.4) Fairness to opposing party and counsel

A lawyer shall not:

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

(c) ~~Knowingly or intentionally~~ 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~~ in pretrial procedure, ~~knowingly or intentionally~~ make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) ~~In~~ in trial, ~~knowingly or intentionally~~ 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) ~~Present~~ present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter~~.~~ ;or

(g) 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.

~~Supreme Court Commentary~~ Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

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

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 (g) permits a lawyer to request relatives or employees or other agents of a client to refrain from giving information to another party. Such persons may identify their interests with those of the client. Caveat Rules 1.13(f), 4.2, and 4.3. The lawyer must reasonably believe that the person's interests will not be adversely affected by compliance with the request. The Rule does not require that the lawyer know or ascertain the person's interest, but any such knowledge, communication, or other information available to the lawyer may suggest that such a belief is not reasonable. See Rule 1.0 (a), (f), (h), (i), and (j). A request that a person refrain from giving information to prosecutors or law enforcement and regulatory officials will almost never be proper, because that person could violate the law or otherwise be adversely affected by a lack of cooperation with such persons, and such a request might involve the lawyer's violations of other provisions of these Rules and other law. A request in a civil matter may or may not be proper under the Rule, depending upon the person's interests in the matter, if any, and upon what a lawyer would reasonably believe in the circumstances.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 3.4 conforms the text of the Rule to the MR in paragraphs (b), (c), (d), and (e); retains current KRPC paragraph (f) on threatening criminal or disciplinary charges; adds paragraph (g), adopts MR 3.4 changes to Comment [2]; and replaces MR Comment [4] with Committee drafted Comment [4].

(a) The current KRPC 3.4 contains "knowingly or intentionally" language in paragraphs (b), (c), (d), and (e), whereas the proposed MR has a "knowingly" standard only in (c). Deleting "knowingly or intentionally" from (b), (d), and (e); and "intentionally" from (c) strengthens the Rule and makes its enforcement less problematic.

(b) Proposed KRPC 3.4(g) is MR 3.4(f) and was not adopted by the Supreme Court in 1990. Whether this was because it was not recommended to the Court or the Court had some objection to it is not known. The Committee believes that the proposed (g) is important and should be part of proposed KRPC 3.4. It correctly informs lawyers on a sensitive matter where there is currently an absence of guidance.

(2) The ABA Reporter's Explanation of Changes to Comment [2] of Rule 3.4 expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 3.4**

COMMENT:

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

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The only significant variance from the MR is paragraph 3.4(f) prohibiting threats to gain an advantage in a civil or criminal matter. Some states that dropped this prohibition when adopting a version of the MR have since reinstated it. Other states have taken the position that this prohibition applies even if not expressed in Rules of Professional Conduct. The Committee believes that the prohibition is warranted by the experience of its validity and that it should remain in KRPC 3.4.

Dissent and Committee Response

Committee members John T. Ballantine, Janet P. Jakubowicz, Olu A. Stevens, and Sheldon G. Gilman dissent from the Committee's recommendation to adopt Rule 3.4 (g). Their dissenting opinion is inserted here for consideration by the reviewing authorities. The results of the Committee's consideration of this dissent follow the opinion.

We dissent from the Committee action of including subparagraph (g) in proposed Rule 3.4. It is a new Rule which dramatically changes existing practice in a litigation context and creates a direct conflict with the attorney's duty of competently representing his/her client. SCR 3.130(1.1) and Supreme Court Commentary thereto. Subparagraph (g) does

not permit the attorney to misrepresent the truth or ask a client or witness to do so; the attorney must still tell the witness and the client that he/she must truthfully answer all questions put to them, but now cannot tell them that they need not voluntarily give information not asked for. We previously voiced our objection to (g), but were overruled by the vote of the Committee.

We also dissent from Comment [4]. When the Comment was first discussed at a Committee meeting objection to its language was made because it misrepresented the true impact of the proposed rule. Although Rule 3.4(g) says that "A lawyer SHALL NOT..." (emphasis supplied) request a person to refrain from voluntarily giving information..., Comment [4] benignly states that (g) "PERMITS" (emphasis supplied) a lawyer to request certain narrowly defined groups of people to so refrain, instead of focusing on the prohibitive language of this entirely new ethical rule in Kentucky.

Committee Consideration of the Dissent to its Recommendation: Proposed Rule 3.4(g) was first included in the 1983 version of the MR. The Restatement of the Law Governing Lawyers (Restatement of the Law Third 2000) Section 116 (4) adopts MR 3.4(g) in the following language:

> (4) A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party unless:
>
> (a) the person is the lawyer's client in the matter; or
>
> (b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interest.

A majority of the Committee concluded that fairness to both the opposing party and counsel as well as to persons whose interests may be adversely affected by refraining from giving information to an opposing party in the absence of compulsory process tips the balance of interests to be protected in favor of adopting Rule 3.4(g).

Adopted by the Court with the following change to proposed 3.4(g)(1): substitute for

"*relative or employee or other agent of the client"* the following: *"relative or agent who supervises, directs or regularly consults with the client with respect to the matter."*. Order 2009-05, eff 7-15-09.