Officer of the Court

She often wondered whether counsel in private practice fully appreciated the advantage they had. They were free to accept or reject new clients. To be sure, the bar had an obligation to provide representation for everyone, but in private practice it wasn’t any given lawyer’s responsibility. Not so for Bobbi. Or for any of her colleagues. They all worked for the Massachusetts Defenders, in Boston. Except for misdemeanor cases, all criminal defendants who could not afford counsel (93 percent at last count) were sent to their agency. And despite Massachusetts Defenders’ woefully inadequate funding, the agency somehow handled them all. Not the best defense; not even one that could pass Constitutional muster if judges were willing to be courageous in their interpretation of the Sixth Amendment’s requirements; but the best that could be provided by a hard-working, well-trained, and dedicated (one had to be dedicated to endure these conditions) lawyer who, given her other obligations, was determined to do her all for each defendant the Chief assigned to her.

Which, of course, was the point of Bobbi’s current gripe. She did not pick her clients; her clients did not pick her. The “match” was made by Chief Counsel Raymond Rotko, who prided himself on getting the most from his beleaguered staff. Rotko had been chief counsel for fourteen years. His view was that the job had only two requirements—a constant search for funding, and a tenacious effort to keep morale high. The latter he accomplished through his
ineffable good humor, his raucous laugh (which was enhanced by his substantial girth), his gift for practical jokes (the time Rotko had “created” a defendant for his first assistant to defend was legendary in the office), and his willingness to accept assignments on the same bases as his staff. So, Bobbi had no one to blame, only the often-discouraging results to endure.

This was never more true than in the case of her most recent client, Luke Garrett. The minute Bobbi met him she knew this would be no ordinary defense. She remembered well how their first meeting took place. Garrett came to the office. That in itself was unusual. Massachusetts Defenders’ typical client could not make bail and, consequently, endless hours of lawyer time were wasted traveling from the dingy office down the street from the state courthouse to the Nashua Street Jail five T-stops away on the red line.

She first saw him as she ran down the stairs to grab her standard lunch—a Coke and a pack of peanut butter crackers—at Louie’s. He was laboring his way up. Though the Massachusetts Defenders’ offices were on the third floor, only the physically disabled were forced to endure the wait for the pre-World War I building’s lone elevator to make its twenty-minute round trip, guided by Morris Finkle, who Bobbi was sure had been a senior citizen when the building was first built in 1918. Bobbi wondered whether the Hildebrand Building had the last elevator operator in Boston.

Of course, at the time, she didn’t know either her new client’s identity or that he was coming to see her. After all, a constant stream of clients, relatives, friends, and messengers (unlike at Brahmin State Street firms, totally indistinguishable from one another) traversed that stairway each day. But he did catch her eye because his dress was bizarre. He looked as if he had just walked off a movie set. That’s the only place today one could find a man wearing black boots, an ivory suit, a flame-red shirt, a black tie, the whole ensemble surmounted by a white Panama hat. She half-expected to find Elliot Ness following him up the stairs in hot pursuit. She did wonder who the unusual man was as she crossed busy Boylston Street to receive Louie’s always cheerful greeting, “How’s my favorite girl lawyer? Why don’cha take the time to enjoy some of my homemade chowda’? You’re always so busy. Relax. Relax. Those bums will get what they deserve.”

By the time she returned, Gladys, the longtime receptionist, had apparently dispatched the new visitor from the enormous waiting
room. Bobbi returned to her desk, an oversized, badly chipped wooden affair that overwhelmed her cubicle of an office whose solitary window, not cleaned in years, yielded a bird’s-eye view of the dumpsters that lined the alley behind the next office building. The dirty window really made no difference—sunlight never managed to work its way into the canyon created by the surrounding buildings. Private lawyers in skyscrapers like the John Hancock Tower just didn’t appreciate the benefits they enjoyed, not in terms of their high salaries, but in amenities like sunlight and views. But Bobbi took a small consolation that neither her rich contemporaries from her class at Boston College School of Law (’85) nor she had enough time to really enjoy such benefits anyway.

She had just turned to the Ferguson file when she suddenly found the Chief literally occupying her doorway, flashing his engaging grin and cheerfully greeting his colleague of seven years.

“You gotta see the guy in my office,” Rotko began.

“Wait, don’t tell me. Al Capone’s brother,” Bobbi interjected.

“How did ya know?” asked Rotko.

“I saw him trying to negotiate the stairs.”

“I think this one’s for you. Three counts of extortion; one count of loan-sharking.”

“How can you say that? I’ve never done a case like that,” Bobbi protested.

“Neither has anyone else in the office. When was the last time we had an organized-crime case? Before my time, I’ll tell you that,” Rotko opined.

“Those guys always have their own lawyers. They could never meet our qualifications. I’ll bet this guy doesn’t either. That suit must’ve cost a thousand dollars!” said Bobbi.

“That’s your first assignment. I told him that before you did one hour of defense work you would check out his assets, income, whatever. But I’ll warn you. He insists he’s eligible. And he wasn’t pleasant about it. Something about how these programs shouldn’t be limited to niggers and spics.”

Bobbi winced at the last. Racism wasn’t new to her, but she remained shocked at the hostility Massachusetts Defenders’ funding requests encountered, in part, because legal aid lawyers “got guilty people off” and, in part, because almost 90 percent of Massachusetts Defenders’ clientele was African-American or His-
panic. No one said it, of course, but the underlying tension was there.

Rotko didn’t give Bobbi a chance to protest. “I’ll bring him right into the conference room. That way you can get started.”

Their first formal meeting went badly enough, though it hardly portended how things would end up. Garrett didn’t even introduce himself as Bobbi walked in, pleasantly offered her hand and said, “I’m glad to meet you. I’m Roberta Feldman. Deputy Chief, Felonies. The Chief asked me to help you. I’m looking forward to this assignment. But first . . .”

Garrett angrily interrupted. “Don’t start on me about your eligibility requirements. I filled out the questionnaire. I more than qualify. I have tax returns to prove it. Nothing but debt and I’ve been unemployed since my brother-in-law, the bastard, closed his truckin’ company. Moved to Lauderdale.”

“But look at your clothes,” Bobbi stammered, “your watch.” She had never had a client so opulently attired.

“It’s all I own. Gotta maintain my self-respect. But my assets are minus, in da stratosphere. I know if I was one of dem brothers with gold chains and a backwards baseball cap, you wouldn’t even be asking these questions, so jus’ lay off and let’s get started on my defense. This is a bum rap and you’re gonna beat it for me. Or else.”

*Or else what?* she thought as she tried to gather her composure. This was a live one, all right. Nothing had prepared her for the encounter. But thoughts of challenging his eligibility by herself quickly evaporated. That could wait another day.

The next half hour took her through a Damon Runyon world populated with people whose nicknames rivaled those in the reruns of *The Untouchables*. This guy was like a caricature of an underworld figure; he was also obviously bright, in his own way articulate, and determined.

The charges were a frame-up. He had never extorted money from anyone. Since he had been convicted years ago for running numbers, that encounter with the law set him straight. Never again would he be foolish enough to do anything that wasn’t legit. His accuser was a two-bit hood who was still smarting because Garrett’s brother-in-law outbid him on the hauling contract two years ago. The company was sold, his brother-in-law was fishing for marlin, and Tony the Dweeb was still trying to get even. Cooked up this story about threats. Dweeb’s word against his. He
had plenty of friends who would testify—to his character, to Dweeb’s unsavory background, to the fact that Dweeb was repaying an old loan when he paid the $25,000 at McSorley’s bar last month. How the hell did he know the cops were recording the whole thing? He had said some rough things, but the money had been owed a long time and $25,000 wasn’t even the full amount.

Bobbi was so shocked by the recording revelation, she let Garrett run on. Finally she interrupted. “They recorded the payoff?”

“It’s no payoff, sweetheart, it’s a loan repayment.”

“But it’s on film. What did you say?”

“I don’t remember. I’m sure it wasn’t pretty. The guy’s a creep. The whole thing was a set up. The cops probably wrote it in a script.”

“So it was a loan. How do we prove that? I hope you’ve got a note.”

“Well, not exactly. But I’m sure someone was there when I gave him the cash.”

“You gave him cash?”

“Sure. I always deal in cash. My dad saw his money lost in the Brookline Bank back in 1936. Taught me always to use cash. I loaned him cash; he paid me back in cash.”

“So where’s the proof?”

“Well, honey, I’ve got the notebook. I’ll bring it next time we meet. I use a code but I’ll show you Dweeb’s initials. That’s all I got. That’s all I ever get. That’s enough for me.”

“Let’s hope it is for a jury.”

“So, we’re gonna win, right? A perfect defense, right? Why don’t you and I go celebrate early? It’s on me,” he offered, then added, “if I could only afford it.” As he spoke, Garrett reached across and laid his palm across Bobbi’s knee. Then as she froze in horror, he started moving it up her thigh.

As she pushed him away, a feeling of revulsion translated itself into a churning stomach, and Bobbi replied, “I should think not. I’m your lawyer, not a date. We’re going to keep this strictly professional. And I don’t know whether we’re gonna win or not. That depends on how well we do developing your defense—and how well you do, Mr. Garrett, in keeping your hands to yourself. Have I made myself clear?”

“Sure, honey. I was just being friendly. I didn’t know I was going to have a lady lawyer. It does make things different.”

“Not for this ‘lady lawyer,’ Mr. Garrett. Now, we’ll meet one week from today. Same time. Bring the notebook and we’ll talk
about your witnesses." She rose hastily, too anxious to have this meeting end. She knew she should spend more time now, but with her concerns regarding Garrett's eligibility, his unusual story, and his unwelcome advances, she couldn't get rid of him fast enough. Maybe this latest incident would convince the Chief to take this one on himself.

When she was certain he had exited through the stairwell, Bobbi raced into Rotko's office. But the more arguments she made in favor of a switch, the more hardened the boss became. "If we were in the business of representing nice people, we would be working for the Support Center for Child Advocates. Nasty people deserve representation too and you're the best we've got." The flattery always did get to her. She knew he meant it and that he was manipulating her. But she already hated this guy Garrett and familiarity was not going to breed anything but contempt.

Two nights later she was sitting at her favorite neighborhood restaurant, the Sedona Cafe, a trendy southwestern bistro which had opened last year. Bobbi was dining with her current beau, Bob Bermant (Bob and Bobbi was a bit much), an engineer with Wang Laboratories. They had met in college, but had only been dating for the last three months, having re-met at their tenth reunion. A weekend trip to Truro was the subject of their pleasant banter when, out of the blue, a young man pulled up a chair to join them. He was extremely well-dressed. His double-breasted blue blazer was of the quality Bob Bermant only dreamed of owning. His shirt, with its wide stripes, spoke of English excellence. He affected a bow tie, and a matching handkerchief jauntily emerged from his breast pocket.

Without even introducing himself, he started. "Pardon my rudeness. If this weren't so important I wouldn't have barged in on you this way. But Ms. . . ."

"Feldman," Bobbi interjected.

"Yeah, Feldman. Luke only told me Bobbi. Feldman. I'll have to tell him. Yeah, he thought you were Jewish. Anyway, Bobbi, I know you're gonna do a great job for Luke. You know how important this is. I just wanted you to know if you need any money, to pay . . . to pay whatever, you should give me a call. Whatever we gotta pay I want ya to know, I'll help my Uncle Luke. So just give me a call." With that the unnamed visitor handed her a business card and, as an afterthought, he turned around again and dropped
a hundred-dollar bill on their table. "To pay for dinner," he explained as he hurried away.

By the time the startled Bobbi could recover her composure to give the stranger back his money, he was gone. Bobbi returned to her table to find Bob studying the card. It was fake parchment with cheap raised letters. The name "Mike di Simone" appeared above "International Management Corporation" and an 800 number. No address.

"What the . . .," started Bobbi. "Now what? How did that guy find us? Did he follow me here? Am I being spied on? And what does he mean offering me money? To do what? Buy him a jury? If that guy's got money, why is he coming to Legal Aid? Why doesn't he have one of the Court Street regulars? Am I allowed to be upset or what?" By now Bobbi was almost screaming.

Bob was not helpful. He didn't even understand why any of Bobbi's clients were entitled to counsel. They should all be in jail and anything Bobbi did to slow down that process was not socially responsible behavior. But this incident only reinforced his dream that—with Wang on a downhill slide—they should both move to Vermont and open a country inn.

Dreams like that did nothing to revive the romance of the evening. Bobbi couldn't focus, the food tasted like straw, and images of Garrett's outlandish outfit, his hand on her knee, and the hundred-dollar bill landing on the table crowded out her attempt to make sense of all of this. The Chief had to do something and she could not wait until the next morning to talk to him.

But again her importuning was met with the Chief's obstinance and flattery. As the challenge of the representation increased, the Chief's resolve to have Bobbi prove her mettle soared. As Bobbi recounted the story, the Chief could find nothing improper in what had happened. It was Bobbi's gloss on the conversation that suggested illegality. Bobbi would simply have to discuss these new events with her client when they next met.

"Roberta, I'd like ya to meet my buddy, Al. Al, dis is the girl lawyer I told ya about." So opened Roberta's second meeting with Luke. Roberta's client showed up an hour late and, without warning, came accompanied by this associate.

Luke remained resplendent, though the red shirt had been replaced with a French Blue number that looked like silk. Al wore a gray V-neck T-shirt which exposed both a gold chain and super-
abundant chest hair. Over that he wore a satin jacket, cherry-red, with the words “Lynn Lanes Bowling All Stars” embroidered in white on the back. Al was shorter than Luke and wiry. Bobbi immediately noticed his unwillingness to look her in the eye. She kept thinking, every time she looked his way, what was so intriguing about her right shoulder? Had it been winter she would have worried about dandruff.

“I brought Al along to help you defend da case.”

“What do you mean, Mr. Garrett?” Bobbi innocently asked as she invited the two of them to be seated in the same conference room they had occupied one week earlier.

“Well, you were worried about the loan to the Dweeb. Al can testify all about it.”

“Were you there, Mr., Mr. . . .”

“Ranieri, Bobbi,” he said all too familiarly. “My last name is Ranieri, but everyone calls me Al.”

“What was your involvement in the loan to the Dweeb, Mr. Ranieri?”

“Whatever you want it to be,” Garrett interjected. “Al’s a very good friend. He’s promised to help us anyway you need him.”

“But, was he there when you made the loan?” Bobbi asked Garrett.

“If it’s important, he was there,” Garrett answered.

“What does that mean?” Turning to Ranieri, Bobbi asked, “Were you present when the loan was made?”

“I don’t remember. Luke makes so many loans. But I know how these things work and if the Dweeb is saying he don’t owe Luke the money, that’s a lie. I’ll just say I was there. Then it’ll be da two of us against him. You’ll win the case, mebbe get another free dinner or two, and Luke’ll beat da rap.”

“I can’t believe this, Mr. Garrett.” Bobbi was virtually shrieking. “I haven’t even had a chance to discuss your friend in the blue blazer and now you bring in a friend to lie. I’m a lawyer. I can’t put a witness on the stand who’s making up his testimony as he goes.”

“You mean I shouldn’t ’ve told ya? I thought you wanted to help me and I heard ya say last week ‘no surprises.’ Why don’t we start all over again. Now that Al knows the rules, he’ll know what to tell you.”

“That just won’t do. Mr. Ranieri, why don’t you wait outside while Mr. Garrett and I chat about his case.”
Bobbi spent the next hour alone with her client. He showed no remorse for the restaurant interruption. His friend Mike just wanted to be helpful. In any event it had been a loan. For the Dweeb to get even for that contract by welshing, then blabbing to the police was the crime. Garrett showed Bobbi his notebook, as neat as Garrett was impeccably dressed. Sure enough, there was a loan entry with the Dweeb’s initials, though the sum was not $25,000—it was only $10,000 three years ago.

“I’m just like da VISA folks. I charge five percent per month,” was Garrett’s response when Bobbi inquired how he got from $10,000 to $25,000. “No compounding; just simple interest. Figger it out and you’ll see $25,000 isn’t even the payoff amount.”

“But isn’t that an illegal rate?” Bobbi asked.

“Not where I come from. He’s lucky, with his credit, he got a loan at all.”

Bobbi closed the meeting by promising to research the legal issues before the trial now scheduled to begin in four weeks. She was confident that if she could just stop Garrett from “helping himself,” she could mount a vigorous defense. But Garrett was irrepresible, rejecting out of hand her suggestion that he change his wardrobe to something more conservative for the day of the trial.

As she spent hours in the library researching the intricacies of the law of usury and extortion, missing a date with Robert in the process, she wondered what drove her to this level of dedication. She couldn’t stand Garrett and was sure he deserved to be locked up—if not for this charge then certainly for something. But her professional pride still motivated her to get this guy off. Justice was in the hands of the jury; her job was to do her best, even for a character as unsavory as Garrett.

The day of the trial started off inauspiciously. Garrett was sporting a new outfit, but it was as outlandish as the earlier ones. He now looked like a cream-colored loan shark, and his striking broad-brimmed fedora only reinforced that image. But that proved to be the low point of Bobbi’s day. Garrett agreed to leave the hat behind and he struck the pose of an oversized choirboy as he sat intently beside Bobbi. The prosecution only called the Dweeb, who apparently had resisted any efforts to dress him up or change his attitude. His all-black garb subliminally created a contest between good and evil. And there was no avoiding the monstrous chip on his shoulder.
Bobbi’s initial reaction was that these guys deserved each other. She assumed that the prosecution had not made a judgment about which one was more culpable. Rather, they had undoubtedly simply seized this opportunity to get one of these creeps off the street. None of that could detract from Bobbi’s delight with her cross-examination of the Dweeb. She barely had to scratch the surface to elicit his hostility. She forced Dweeb to admit he had loaned money to others at rates as high as ten percent, by fooling the Dweeb into thinking she had two witnesses who would so testify and, though she had more difficulty getting Dweeb off the story that Garrett’s threats had something to do with stolen customers for the hauling business, she did get him to admit he had borrowed $10,000 from Garrett three years ago. While Bobbi doubted the jury was prepared to condone Garrett’s hostile threats, recorded so graphically through the peephole at McSorley’s, with that final admission Bobbi thought she was home free. How could the jury convict a guy who charged five percent monthly interest when his “victim” admitted he charged others ten percent?

When Bobbi finished her summation she was convinced this one would go onto her rather lean victory list. Garrett was hardly her most deserving acquittal, but she knew Rotko would be proud of her performance, although she was also sure she would get a big “I told you so,” based on her earlier attempts to get out of the case. And Bobbi took no particular pleasure from watching her client’s smug look as they both deliciously contemplated a quick verdict.

When hours passed, Bobbi’s confidence level evaporated. More important, Garrett became impossible. His nervousness no longer hidden, his face turned crimson and he started muttering threats of what he might do if the jury did not acquit. Tensions had reached a fever pitch when word came that the jury was back. As usual, the jury members avoided eye contact as they filed in. Bobbi found this moment the most dreadful in the practice of law. Like waiting to find out whether you passed the bar exam, the die was already cast; you just didn’t know the result. Also like the bar exam, the delight of victory bore no comparison to the agony of defeat. The former lasted ’til your next client interview; the latter remained with you for years. Bobbi could still remember as if yesterday the first “Guilty” proclaimed by a jury foreman.

The judge turned to the foreman now. “Ladies and gentlemen of the jury, I understand you have reached a verdict. Since there
are four counts, I will ask you your verdict as to each. Count One, extortion."

"Not guilty, Your Honor," the foreman intoned.
"Count Two, extortion."
"Not guilty." Bobbi’s heart leaped and she saw a smile cross her client’s face.
"Count Three, extortion."
"Not guilty." Bobbi’s excitement was manifest. She could feel her face flush.
"Count Four, loansharking."
Bobbi held her breath. The foreman hesitated, "Guilty, Your Honor."
"Do you all so vote?" the judge asked.
All eight jurors nodded affirmatively. Bobbi’s heart sank. But her disappointment soon became fear as her client turned menacing, literally screaming, threatening bodily harm on the judge, the jury, and his counsel. "This is a disgrace! The Dweeb should be in jail! All those niggers walk free and I am found guilty. This will not stand! I’ll get even." His outburst prompted a cautionary move by the court officers but when it became clear he was just venting, they backed off and Garrett returned to his seat.
The judge thanked the jury, excused them, and then turned to address the defendant. "Mr. Garrett, the jury has found you guilty on one count of loansharking. I know your lawyer will have post-trial motions. A pre-sentencing report also must be prepared. I will schedule the sentencing for six weeks from today and, Mr. Garrett, assuming your little outburst is the last any of us hear of your getting even, I will let you remain free on your present bail until then. This court is adjourned."
Bobbi gathered her materials and walked out of the courtroom slowly. Garrett remained quietly incensed and his anger was fanned by the outrage of Al, who had sat in the front row during the entire proceeding. "You shoulda let me testify. Then Luke would’ve been walking free now. There’s no justice but you made a big mistake not lettin’ me tell the jury how it really is."
Bobbi considered responding that Al couldn’t help with the loansharking count. Garrett admitted he charged five percent per month. Bobbi’s unusual equitable estoppel argument just hadn’t worked. But she decided why bother. Instead, she turned to both of them, thinking what an odd pair they made, and gave a short speech. "I am truly sorry with the verdict. We gave it our all. The
jury just wasn’t buying. But we won on the three more serious counts. Now we must file our motions and concentrate on the sentencing phase. With any luck maybe His Honor will give you probation. Let’s meet in two weeks to regroup. Meanwhile, again, I’m so sorry, Mr. Garrett.”

Garrett’s fists and jaw remained clenched during the entire speech. He then rejected her outstretched hand, said nothing to Bobbi and addressed his remarks to Al. “Let’s get outta here. I should’ve had a guy represent me. Girls can’t be lawyers. Damn spic drug dealers walk and I get convicted.” With that he turned his heel and stormed out of the courtroom.

Bobbi was beside herself. Garrett in defeat was even less attractive than Garrett before trial. No “thank you.” No understanding. Just insults. And threats. Returning to the office and up the three flights of stairs, she related the day’s events to Rotko, who did thank her, congratulated her on the not-guilty verdicts, and urged her to dedicate herself to the sentencing, gleefully reminding her how, once she gained some distance from Garrett, she would certainly add to her storehouse of colorful professional anecdotes. Rotko always seemed able to find something upbeat, even in the most dismaying of situations.

However, Bobbi’s view became more depressed when quick research revealed that under the Massachusetts recidivist statute, the judge was required to give Garrett a three-year sentence. Loansharking alone could have resulted in probation. But Garrett had a prior numbers conviction. In that case, the guidelines established a nondiscretionary minimum. Whatever Bobbi did, it was inevitable that Garrett would be sentenced to a thirty-six-month sojourn at Walpole. How she regretted ever having mentioned probation in her conversation with Garrett.

Bobbi figured she better go through the motions nonetheless. She had Luke Garrett in for still one more meeting. As much as she loathed him, it was going to be easier to deal with his anger at the sentencing if they were prepared.

Whatever effect their last conversation had on Garrett’s psyche, it left his outlandish clothing style intact. Now it was a purple suit, a lavender shirt, and suede shoes to match. Luke greeted her more warmly than she anticipated and the preparation session generated genuine enthusiasm, so long as Bobbi sublimated the minimum sentence requirement. They discussed arguments Bobbi could make in mitigation, a speech Luke would deliver that
would strike the right balance between remorse and justification, and several character witnesses including Monsignor Archibald, the diocesan ecclesiastical lawyer who had known Luke’s family for years.

Bobbi was even more enthusiastic at the sentencing hearing itself. She was struck once again by her ability to generate significant advocacy skills in spite of her antipathy toward this client. He was an ingrate, a sexist, undoubtedly ineligible for her services, a loan shark, a racist, perhaps someone willing to pay bribes, and otherwise despicable, yet she was fighting for his release, even though she knew the effort had to be unavailing.

The judge listened intently as Bobbi again argued (to a more receptive audience, she hoped), that to sentence harshly a man whose victim had charged rates double the rate he had been charged made little sense. Luke’s speech, while hardly a model of contrition, did support the proposition that Luke was chastened by this experience and prepared to accept an alternative sentence of community service. When Luke described how he would gladly work at My Brother’s House, a local shelter, Bobbi was secretly convulsed by the image of this dandy serving soup, but only for a moment because she remembered that this was all a futile act. The appearance of the Monsignor, bedecked in his flowing purple robes, also made a positive impression, particularly as he portrayed the Garrett family as pillars of their parish church.

After the presentation, the judge stared intently for the longest time. She shuffled the papers in front of her, kneaded her forehead, rubbed her eyes, and held a short side-bar conference with her clerk. She then launched into her speech.

“Mr. Garrett, I have wrestled with the proper sentence for a long time. On the one hand I find your conduct reprehensible. The thought that you charged interest at five percent per month in blatant disregard of our usury laws sickens me. It is just such transactions that lead to the sort of violence we saw so graphically displayed on our monitors as the tape of your McSorley encounter was played. On the other hand, your victim himself admittedly engages in similar conduct. For you to go to jail while an admitted loan shark goes free because he succeeded in putting you in jail forces me to play God in a way that makes me feel the judiciary is being badly used. I am deeply troubled by the prosecutor’s conduct in this case. If they hadn’t set this one up we might have been sentencing Mr. Dweeb today, instead of you. I recognize that law
enforcement officials are not required to prosecute all felons and there is no doctrine in the criminal law of voluntary assumption of the risk, but fortunately I am able to take such factors into consideration when I impose my sentence. Particularly in this case, where because you have no prior conviction, I am required to impose no minimum sentence, I plan to exercise my discretion to the fullest . . . ."

Bobbi thought she had been listening intently, but perhaps her mind had wandered because as the judge intoned the words “no prior conviction,” she was as startled as if she had been awakened in the middle of a night by a phony phone call. No prior conviction, she thought. Where did she get that idea? Her mind was trying to pay attention to the judge’s continuing discussion, but the truth was that while the words “monsignor” and “parish” were heard, Bobbi was suddenly gripped with a level of anxiety she had rarely, if ever, experienced.

The judge was wrong. Luke had a prior conviction. She realized now that she had actually taken some small comfort that despite the fact that she knew she had done everything for this scoundrel, his prior conviction meant he would be behind bars for three years. But somehow the judge had it all wrong. Was it something Bobbi had said? No, it couldn’t be; she had purposely avoided the subject of Garrett’s prior record. Had the prosecutor made the mistake? Bobbi couldn’t remember anything from the prosecutor’s sentencing argument other than the colorful vocabulary: hyster, thug, underworld figure, mobster.

What difference did any of that make? The question was, what should she do now? Her client was about to walk out of this courtroom, convicted and given probation. But that was all based on a mistake of fact, a mistake by the judge. Should she correct the judge’s error? Was she obliged to? She knew she hadn’t misled the judge. She wondered if her client had something to do with this. After the incident at the Sedona Cafe, Bobbi wouldn’t put anything past Luke and his henchmen. But she certainly didn’t know or have any reason to believe that was so. And the prosecutor hadn’t corrected the judge when she made that statement. So the prosecutor must also think this is Garrett’s first conviction.

But it was wrong to let the judge decide the sentence based on incorrect information. What if she found out later? Bobbi had a whole career in front of her dealing with Judge Greenspan. Would she ever trust Bobbi again if she realized that Bobbi stood silent
when she knew the judge made a factual mistake? This was not a question of advocacy but of a fact one could look up.

On the other hand, it was Garrett who told her about the conviction. Even if it was a matter of public record, she knew from the ethics course she took from Dean Coquette at law school that it was still confidential—unlike the old model code which only proscribed the disclosure of secrets or that which was detrimental or embarrassing to the client. Maybe that didn’t make any difference here since there was no doubt the disclosure of the prior conviction had to be detrimental to Garrett. This disclosure could be the definition of detrimental. Bobbi could not even imagine the wrath of her client if she stood at this moment and disclosed the prior conviction.

Her head was a collision site for these competing ideas. Her temples throbbed. Her hands turned icy cold and a dizziness overcame her. She could not focus on the judge as she continued to discuss her sentencing thought process. But by now, from the phrases she picked up—helping the homeless, learning a lesson, getting a second chance—she knew what the judge was about to decree.

The thoughts of three rigorous years with the Jesuits; the pride of her father the day she was admitted to the bar; the concept of being an officer of the court all overwhelmed her. Suddenly she rose, almost involuntarily, literally in a fog, and interrupted, “Your Honor, you’ll pardon my remarks, but I cannot let the proceeding draw to a close without bringing to the court’s attention an error . . . .”

Judge Greenspan was not happy. “Ms. Feldman, the matter is closed. You had your time for oral argument. I think I was more than indulgent. Just be seated.”

“But, Your Honor, with all due respect, when you stated that Mr. Garrett had no prior record, that was incorrect. I believe I have an obligation to bring this to Your Honor’s attention.”

“A prior conviction? How could that be? The record shows no such thing. And if that were so, I would lose all discretion. Our recidivist statute is quite clear. A minimum of thirty-six months for the second conviction. Ms. Feldman, we must check this out. I will take a short recess while the prosecutor undertakes an inquiry. We will resume the hearing in thirty minutes.”

The half hour couldn’t have lasted longer even if someone had been reading from a deposition transcript. But it was not as bor-
ing, although Bobbi would have welcomed boring. Instead she was pummelled by a fusillade of invective as Garrett went wild, making threats that made his earlier aggressive behavior look mild by comparison. Garrett simply could not understand, and no amount of explanation on Bobbi’s part could justify, how she had disclosed his prior conviction just when he was about to “serve soup” for a few weeks. Now he was on the way to Walpole, not because of the prosecutor, but because of his lawyer. “Just when I had everything under control,” Garrett spoke through clenched teeth, “my own lawyer screws everything up. There’ll be hell to pay for this one.”

Only Judge Greenspan’s return could end the verbal abuse, or at least reduce it to Garrett’s muttering under his breath. The judge began, “Ms. Feldman, you have acted in the highest honor of the profession. You are quite right that Mr. Garrett had a prior conviction, though for some reason, the standard computer check does not elicit that information. Quite fishy actually—that system usually works flawlessly. We sent someone down to the old hard-copy filing room where the file was found. Six months for illegal gambling. Seems your client was running numbers in the South End. Imagine, the court was about to let this man walk, because of an error of fact. And you, Ms. Feldman, saved us from the embarrassment of making the wrong decision. The court will always remember your candor. You have given new meaning to the title, ‘officer of the court.’ I will make sure Chief Rotko hears from me.

“Now Mr. Garrett, as you recognize, my hands are tied. Thirty-six months is the minimum sentence I can impose. With good behavior, you should serve half. I know you must be disappointed, but don’t be angry with your lawyer. She just accelerated what I am sure would have happened anyway. Sooner or later, we would have discovered this little error and been required to resentence you anyway. She simply was fulfilling her obligations to this court. If you plan an appeal, I will reset bail at $500,000 for the completion of all post-trial proceedings. This court stands adjourned, . . . oh, and Ms. Feldman, thank you again.”

Garrett was livid. The vein in his forehead was so prominent Bobbi was afraid he would have a stroke. “You suck up to the judge and I go to jail. You’re not my lawyer. You’re some double-crossing scoundrel. The lowest form of life would not send a man to jail to pick up some ass-kissing points from the court. I hope you’re proud of yourself, lady lawyer, because you ain’t heard the
last from me. But for starters, you’re fired. I want a real lawyer, not some turncoat liver-bellied girl. They would’ve never discovered that conviction. We had it buried forever. Until you, my lawyer, screws it up. But I’m done with you now. We know how to get even. You ain’t heard the last from Luke Garrett. You ain’t heard the last. Now outta my way. I can’t even stand to look at you.”

Bobbi was numb. The kind words of the judge were a distant memory—empty and without comfort. Luke had it right. She should never have disclosed the conviction. What possessed her?

But the pain was just beginning. While the lawyers in her office and in the Boston legal community debated the correctness of Bobbi’s decision, that discussion did not forestall the complaint from the disciplinary authorities and, two days later, the lawsuit Garrett v. Massachusetts Public Defenders & Roberta Feldman.

Nothing, not even the concept of officer of the court, could assuage her feelings. She had betrayed her client for some ephemeral principle that had no meaning. The only thing that had meaning was Luke Garrett spending eighteen months he didn’t need to spend in Walpole, because of something his own lawyer had done, something Bobbi was ready to acknowledge she was not required to do, something the disciplinary board would probably conclude she was barred from doing.
RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, 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 information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) 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; or
(6) to comply with other law or a court order.

COMMENT

[1] 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.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. 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.

[3] 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 professional ethics. 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.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] 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

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited
circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] 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)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] 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)(5) 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.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

[12] Other law may require that a lawyer disclose information about a client. 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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] 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 informed consent 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)(6) permits the lawyer to comply with the court's order.
[14] 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.

[15] 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), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard 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.

[17] 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 give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] 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.
RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, 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 information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing:

   (i) a crime; or

   (ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services, provided that the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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; or

(6) as permitted or required to comply with these Rules, other law or a court order.
Comment

[1] 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 to not 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.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. 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 maze of law 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.

[3] 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 professional ethics. 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.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[4A] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.
Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit the 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

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening disease or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing any a crime, or a fraud as defined in Rule 1.0(d) that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the
affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[8A] Before using or disclosing confidential information under paragraph (b)(3), the lawyer should, if practicable, inform the client of the lawyer's ability to use or disclose information as provided in this Rule and the consequences thereof. The exercise of the lawyer's discretion should be guided by the potential for rectification of the consequences of the client's criminal or fraudulent conduct, and not considerations relating to the lawyer's personal interests or professional reputation.

[9] 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)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] 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)(5) 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.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

[12] Other law may require that a lawyer disclose information about a client. 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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] 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 informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous 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)(6) permits the lawyer to comply with the court's order.

[14] 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.

[15] 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), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

**Acting Competently to Preserve Confidentiality**

[16] A lawyer must act competently to safeguard 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.

[17] 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 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 give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

**Former Client:**

[18] 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.
(b)(6) permits the lawyer to comply with the court's order.
[14] 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.

[15] 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), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

**Acting Competently to Preserve Confidentiality**

[16] A lawyer must act competently to safeguard 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.

[17] 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 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 give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

**Former Client:**

[18] 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.
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(m) 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).

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 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. In some jurisdictions, however, courts have required counsel to 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 [9].

[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(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only 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 reasonably 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. Or, 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(d). 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.

Duration of Obligation

[13] 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

[14] 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

[15] 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.
Rule 3.3—Adopted ABA version with changes on 2/20/04

ADVOCATE

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.

(4) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.
(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 1.6(m) 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).

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 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. In some jurisdictions, however, courts have required counsel to 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 [9].

[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(f). Thus, although ordinarily, a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious known falsehoods.

[9] Although paragraph (a)(3) only 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 reasonably 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]. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel. 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. Or, 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(d). 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.

**Duration of Obligation**

[13] 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. In certain circumstances, after the conclusion of the proceeding, a lawyer still has the discretion to rectify the effects of false evidence or false statements of law and fact. See Rules 1.6 and 4.1.

**Ex Parte Proceedings**

[14] 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**

[15] 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.