

The Storm II: Remain Calm and Carry On

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Examples of Symptoms and Possible Causes

<i>If you observe:</i>	<i>It may represent, for example:</i>
Pattern of not returning calls, meeting deadlines, missing appointments/appearances	<ul style="list-style-type: none"> → Alcohol/Drug effect on functioning → Depression → Attention Deficit Disorder → Cognitive Deficit → Anxious or Phobic Avoidance → Compulsive Gambling
Hostile or otherwise inappropriate behavior in professional situation	<ul style="list-style-type: none"> → Paranoid Psychosis → Alcoholism → Domestic tensions at boiling point → Impulse (anger) Control Disorder → Post-traumatic Stress Disorder → Personality Disorder
Poor record-keeping, accounting Inappropriate IOLTA management	<ul style="list-style-type: none"> → Attention Deficit Disorder → Depression → Substance-related impairment → Poor time or stress management
Change in appearance/hygiene	<ul style="list-style-type: none"> → Depression → Schizophrenia → Alcohol/Drug Abuse → Untreated medical problem → Eating Disorder

Filing a Petition for an “Incompetent” Person The Who and The How

By Jacob T. Simon
Liss Law, LLC, Brookline, Mass.

Nothing in the bankruptcy code requires that a debtor be of sound mind, or even that she be an adult. Cases decided under the bankruptcy code support or at least assume that infants and other incompetents are eligible for voluntary bankruptcy relief. *In re Kjellsen*, 53 F.3d 944, 946 (8th Cir. 1995). The purpose of Fed. R. Bankr. P. 1004.1 is to permit the next friend of an incompetent person to act expeditiously, particularly where no guardian had been appointed for debtor, in order to protect the incompetent’s interests. *In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006).

Fed. R. Bankr. P. 1004.1 provides [in part]:

If an infant or incompetent person has a representative, including a general guardian...the representative may file a voluntary petition on behalf of the infant or incompetent person.¹ An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by *next friend* or *guardian ad litem*. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor. [Emphasis added].

I. Who May File?

A. Guardian and Conservator

If an incompetent person has a representative such as a guardian, committee, or a conservator, a voluntary bankruptcy petition may be filed on their behalf. Courts are divided on the issue of whether a guardian needs “explicit” authorization in order to file a bankruptcy petition on behalf of the incompetent debtor. There is little case law on the matter but at least one court determined that a guardian may file a bankruptcy petition without the explicit authorization of the appointing court. *In re Hall*, 188 B.R. 476, 483 (Bankr. D.Mass. 1995).

¹ Compare to Bankruptcy Rule 1016, which authorizes the continuation of a bankruptcy case when a debtor becomes incompetent *during* administration of the case. *In re Murray*, 199 B.R. 165, 170 (Bankr. M.D. Tenn. 1996) [emphasis added].

However, where the minor or incompetent does not have a guardian, trustee, conservator or next friend, the court has the discretion to appoint or to refuse to appoint a guardian ad litem. The determination of incompetency is made by reference to state law:

Because there is no federal law dealing with the determination of mental incompetency in the sense of management of an individual's personal and business affairs ..., and since this has traditionally been an area left to the various state laws, ... it would be appropriate to look to the laws of ... the state of the Debtor's present domicile for guidance ...

In re San Miguel Sandoval, 327 B.R. 493 (B.A.P. 1st Cir. 2005)(citing *In re Moss*, 239 B.R. 537, 539 (Bankr. W.D.Mo. 1999); *In re Moody*, 105 B.R. 368, 371 (S.D. Tex. 1989).

Additionally, the court may use equitable powers for the continuance of a case should a debtor become incompetent after filing. See, e.g., *In re Moss*, 239 B.R. 537 (Bankr. W.D. Mo. 1999)(court appointed limited guardian for pro se debtor during pendency of bankruptcy case).

B. Next Friend

The first two sentences of Rule 1004.1 address the steps to be taken before filing a bankruptcy petition for an infant or incompetent person: Such person may file a petition through a “representative”, which is described as a general guardian, committee, conservator or similar fiduciary. If such person has no duly appointed representative, such person may file bankruptcy through a “next friend”.

In one of the few bankruptcy cases to address the issue of the next friend, the court held that the underlying purpose of F.R.Civ.P. 17(c) is to permit someone, the next friend of an incompetent, to act expeditiously, particularly where a guardian has not been appointed, in order to protect the interests of the incompetent.²

Rule 1004.1 and 11 U.S.C. §105(a) authorize the court to appoint a next friend to act on the debtor’s behalf. A next friend need not be an attorney. When considering the appointment of a next friend the court will weigh heavily whether the person is a close family member and whether they have a close working knowledge of the incompetent’s financial dealings. The fact that the person seeking appointment as next friend is the debtor’s spouse or other close relative who might have an interest in the debtor's financial affairs will not necessarily be a basis for denying the request.

² *In re Zawisza*, 73 B.R. 929, 935 (Bankr. E.D. Pa. 1987).

Rule 1004.1 affords the court wide discretion to “make any other order to protect” an incompetent debtor.³

C. Bankruptcy Court Appointed Guardian

The issue of whether a guardian ad litem may be appointed by a bankruptcy court during the pendency of a case is almost entirely devoid of case law. But in a recent case filed by a pro se debtor, a bankruptcy court *sua sponte* appointed a local bankruptcy attorney as guardian ad litem.⁴ The court authorized the attorney “to render all necessary and appropriate services required.”

Bankruptcy courts and trustees must also consider the issue of how to proceed where a seemingly clear-minded debtor becomes incompetent post filing. In *Moss*, a pro se debtor began to exhibit bizarre and irrational behavior⁵ shortly after filing the bankruptcy petition.⁶ The court appointed a limited guardian ad litem for the limited purpose of handling matters related to the bankruptcy estate.⁷ The court held that appointing a limited guardian was appropriate because the debtor’s failure to cooperate was attributable to her mental state, rather than of a disregard of the court. The court reasoned that a limited guardian would protect the debtor, conserve judicial resources, and facilitate judicial economy.

A court-appointed guardian may file a voluntary bankruptcy petition on behalf of an incompetent person if the guardian is authorized to do so. In such a case, the signature of the actual debtor would not be required.⁸

³ Rule 1004.1 specifically addresses the issue of a Debtor becoming incompetent *after* the petition is filed. In such a case, the court “shall” appoint a guardian ad litem the Debtor who does not otherwise have representation.

⁴“Upon consideration of: (1) the proceedings in this Chapter 13 case; (2) the Debtor’s prior Chapter 13 cases, Case No. 12-19190-JNF and 12-16148-JNF; (3) Case No. 12-13973-FJB, a purported Chapter 13 petition executed by the Debtor on behalf of “The Estate of Robert J. Jeffress, Died 11/29/1989” which was dismissed on June 7, 2012; and (4) the Debtor’s statements at the hearings conducted on January 17 and January 24, 2013 and it appearing that the Debtor is not represented in this case, the Court finds that the Debtor is in need of representation in this case to protect Debtor and the estate.” *In re Blakely*, No. 13-10035 (Bankr. Mass. January 29, 2013)(order appointing guardian ad litem).

⁵Debtor submitted a forged doctor’s note stating that she was suffering from symptoms of multiple sclerosis and later filed a declaration that she had died of a brain aneurysm, among other things.

⁶ *Moss*, 239 B.R. at 538.

⁷ The court grounded its authority to appoint a limited guardian ad litem in its equitable powers granted by 11 U.S.C. §105.

⁸ It is an act of fraud for a guardian to sign the petition with Debtor’s name only. Instead, the signature should clearly identify the guardian, such as: *John Smith, through Jane Smith*.

D. By Power of Attorney

Pursuant to Fed. R. Bankr. P. 9010(a), a debtor may appear and "perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy." It is well-settled that an attorney-in-fact may commence a bankruptcy case in appropriate circumstances.⁹

Although many courts have held that a bankruptcy case may be commenced through an attorney-in-fact, it remains a risky option.¹⁰ Specifically, an attorney-in-fact may commence a bankruptcy case on behalf of a debtor so long as certain conditions are met:

- a. The debtor is qualified under 11 U.S.C. §109;
- b. The commencing of the case is authorized by the power of attorney;
- c. Commencing the case does not constitute the practice of law.¹¹

At least one court requires the following action on the part of the attorney in fact to insure that the petition is properly filed:

- a. The petition and other documents filed in the case must be executed by the attorney in fact in a manner which reflects the representative capacity of the attorney in fact.
- b. A copy of the power of attorney must be filed with the petition.
- c. The attorney in fact must attend the 341 meeting of creditors.
- d. The attorney in fact must file the current address for the Debtor.¹²

There are few cases concerning the signature of a non-debtor on a bankruptcy petition and schedules. But they are unanimous in that they require the written power of attorney to be broad enough or specific enough to authorize the filing.¹³ A number of courts have held that as long as the power of attorney includes the "general authority to litigate" then the attorney in fact has the authority to commence a bankruptcy case.¹⁴ However, some

⁹ *In re Curtis*, 262 B.R. 619, 622 (Bankr. D.Vt. 2001).

¹⁰ *See In re Woods*, 248 B.R. 322 (Bankr. W.D. Tenn. 2000)(cause for dismissal where chapter 13 petition filed on behalf of debtor-ward was not authorized either by conservatorship court or by conservator).

¹¹ *Id.*

¹² *Hurt*, 234 B.R. at 2-3.

¹³ *In re Eicholz*, 310 B.R. 203, 207 (Bankr. W.D.Wash. 2004)

¹⁴ *Id.*

courts have held that the power of attorney must *expressly* authorize the filing of a bankruptcy [emphasis added]¹⁵.

II. How Do I Protect My Client?

Securing guardianship and conservatorship for a mentally incompetent client *before* the bankruptcy filing is the clearest way to ensure a painless bankruptcy. In the event that a petition must be filed quickly and you are unsure whether your potential client is competent, it is a good precaution to have both a next friend *and* the debtor sign the petition and schedules.

Federal Rule of Civil Procedure 17 is applicable to adversary proceedings in bankruptcy cases through Federal Rule of Bankruptcy Procedure 7017.¹⁶ Specifically, Rule 17(c) indicates a recognition of the value of independent representation on behalf of persons not in a position to protect their own interests.¹⁷

The appointment of a next friend is usually accomplished by motion filed simultaneously with the petition.¹⁸ Absent an appointment of conservator for the debtor, there is the obvious potential for abuse. At a minimum most courts will require that the motion is accompanied by a power of attorney, a declaration from the person seeking to be appointed, and an explanation to the court that granting such a motion is in the best interest of the debtor.

¹⁵ See *In re Brown*, 163 B.R. 596, 598 (Bankr.N.D.Fla.1993)(power of attorney must expressly authorize the filing of bankruptcy); *In re Gridley*, 131 B.R. 447, 449 (Bankr. D.S.D. 1991)(allowing filing where power of attorney contained specific provision authorizing attorney-in-fact to file); *In re Smith*, 115 B.R. 84 (Bankr. E.D. Va. 1990)(spouse of incapacitated debtor could not file bankruptcy petition by virtue of power of attorney, but court-appointed guardian with specific authorization could file).

¹⁶ Fed. R. Bankr. P. 7017.

¹⁷ Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy – Is this Notice Really Necessary?*, 49 Wayne L. Rev. 885, 916 (2004).

¹⁸ F.R. Civ. P. 17(c) gives the court wide authority to fashion such an order as it deems necessary for the protection of the incompetent. *In re Zawisza*, 73 B.R. 929 (Bankr. E.D. Pa. 1987). That purpose is served in the case *sub judice*, where the Debtor's interests could be prejudiced if a bankruptcy petition could not be filed except by a duly-appointed guardian, as the appointment of a guardian is a process which could take some time, especially since no such proceeding has transpired to date. The activities precipitated by the filing of any federal law suit rarely await the possibly ponderous process of the appointment of guardian. This is particularly true of this case, as in many bankruptcies, where timing is apparently significant. *Id.* at 935-936.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: John Smith,
Debtor

Case No. 11-64225
Chapter 13

**MOTION TO ALLOW JANE SMITH TO REPRESENT DEBTOR AS
GUARDIAN AND NEXT FRIEND**

NOW COMES JANE SMITH (“Movant”), and moves this Court to enter an Order allowing her to act in the stead of Debtor, John Smith. In support of this motion, Movant states the following:

1. On January 25, 2011, Movant filed this chapter 13 bankruptcy petition on behalf of Debtor.
2. Prior to his complete disability, Debtor executed a power of attorney, appointing his wife, Jane Smith, as his attorney in fact. *Exhibit A. (Filed under seal pending impoundment order).*
3. Movant and John Smith have been married for 45 years.
4. Movant has been handling Debtor’s financial affairs for the past several years.
5. Debtor is suffering from advanced dementia¹, and as incapable of making informed decisions with respect to finances.
6. Movant states that failure to appoint a guardian in this matter would create an unreasonable risk to the Debtor’s health and welfare, and to the bankruptcy estate.
7. Those findings are supported by statements from Debtor’s physician. *Exhibit B. (Filed under seal pending impoundment order).*

WHEREFORE, Movant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted:
John Smith, through Jane Smith
By counsel,

Dated: January 25, 2011

/s/ Jacob T. Simon

¹ Avoid disclosure of any specific information relating to Debtor’s medical condition. Filing a public document that has personal medical information may be a violation of HIPAA privacy rules.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: John Smith,
Debtor

Case No. 11-64225
Chapter 13

MOTION TO WAIVE CREDIT COUNSELING REQUIREMENT FOR DEBTOR

NOW COMES JANE SMITH (“Movant”), and respectfully moves this Court to waive Debtor’s credit counseling. In support of this motion, Movant states the following:

1. This chapter 13 case was filed on January 25, 2011.
2. The requirement for credit counseling under §109(h)(1) of the Bankruptcy Code does not apply to a Debtor whom the court determines to be unable to comply with those requirements because of disability.
3. Debtor is incapacitated and disabled, as defined in §109(h)(4).
4. Debtor is incapable of making informed decisions with respect to finances.
5. Those findings are supported by statements from Debtor’s physician.
6. Movant has and continues to manage her husband’s financial matters.

WHEREFORE, Movant respectfully requests that this Court grant this motion to waive the credit counseling requirement and to grant any other relief deemed proper.

Respectfully submitted:
John Smith, through Jane Smith
By counsel,

Dated: January 25, 2011

/s/ Jacob T. Simon

MAINE RULES OF PROFESSIONAL CONDUCT

1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Subject to the Rules with respect to Declining or Terminating Representation (Rule 1.16), a lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation. If, after consultation, the client consents, an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding. A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto that is filed with the court, may not thereafter limit representation as provided in this rule, without leave of court.

(d) A lawyer, who under the auspices of a non-profit organization or a court-annexed program provides limited representation to a client without expectation of either the lawyer or the client that the lawyer will provide continuing representation in the matter, is subject to the requirements of Rules 1.7, 1.9, 1.10 and 1.11 only if the lawyer is aware that the representation of the client involves a conflict-of-interest.

(e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitations set forth in the Maine Rules of Professional Conduct, or other law with respect to lawyers' conduct, when the lawyer knows that the client expects assistance not permitted by the Maine Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

1.6 Confidentiality of Information

(a) A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain substantial bodily harm or death;
- (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 professional obligations;
- (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.

(c) Before revealing information under paragraph (b) (1), (2), or (3), the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer's ability to reveal information and the consequences thereof. Before revealing information under paragraph (b)(5) or (6), in controversies in which the client is not a complainant or a party, the lawyer must, if feasible, make a good faith effort to provide the client with reasonable notice of the intended disclosure.

(d) As used in Rule 1.6, “confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information relating

to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.

1.6 Confidentiality of Information

(a) A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:

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

(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 professional obligations;

(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.

(c) Before revealing information under paragraph (b) (1), (2), or (3), the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer’s ability to reveal information and the consequences thereof. Before revealing information under paragraph (b)(5) or (6), in controversies in which the client is not a complainant or a party, the lawyer must, if feasible, make a good faith effort to provide the client with reasonable notice of the intended disclosure.

(d) As used in Rule 1.6, “confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information relating

to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.

1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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;

(3) offer evidence that is 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 that the lawyer reasonably believes is false, except a lawyer in a criminal matter may not refuse to offer the testimony of a defendant, unless the lawyer knows from the defendant that such testimony 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.

3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a tribunal in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a tribunal in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

MASSACHUSETTS RULE OF CONDUCT

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3 (e);
- (3) 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
- (4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3 (e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such

a course is unlawful, will have substantial adverse consequences, and should not be followed. If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation; if the lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] 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).

Special Meaning of "Assistance"

[2A] Comment 3 to Rule 4.1 states the general rule that the word "assisting" refers to that level of assistance that would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. However,

the concept of assisting has a special meaning in Rule 3.3 because it deals with a lawyer's conduct before a tribunal. The term assisting in Rule 3.3 is not limited to conduct that makes the lawyer liable as an aider, abettor or joint tortfeasor. Rule 3.3(a) is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against the contamination of the judicial process. Thus, for example, a lawyer who knows that a client has committed fraud on a tribunal and has refused to rectify it must disclose that fraud to avoid assisting the client's fraudulent act.

Misleading Legal Argument

[3] 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)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which 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.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, an advocate must disclose, if necessary to rectify the situation, the existence of the client's deception to the court or to the other party. The lawyer's obligation to disclose also extends to material evidence given by others on behalf of the client. Such a disclosure 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.

Perjury by a Criminal Defendant

[7] In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. While there has been intense debate over a lawyer's duty in such situations in criminal cases, this rule proposes to

accommodate these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial.

[8] In such cases, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjurally. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application *ex parte* before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard *in camera*, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded.

[9] Once the trial has begun, the lawyer may seek to withdraw from the representation but no longer has an obligation to withdraw if the lawyer reasonably believes that to do so would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury.

[10] In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

[11] Reserved.

[12] Reserved.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. Whether constitutional requirements affect the resolution of this issue is beyond the scope of these comments.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like.

[16] When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Corresponding ABA Model Rule. Identical in (a) to (d) to Model Rule 3.3 except in (a) (2) and (4); in (b) phrase "including all appeals" added; (e) new.

Corresponding Former Massachusetts Rule. DR 7-102, DR 7-106 (B), S.J.C. Rule 3:08, PF 12, DF 13.

RHODE ISLAND RULE OF CONDUCT

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) 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. (As adopted by the court on February 16, 2007, eff. April 15, 2007.)

COMMENTARY

- [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.

Jeffrey Fortgang, PhD
LCL

SOME SIGNS OF BEHAVIORAL PROBLEMS

- Note, but do not diagnose
- Pattern, not single instance

CHANGES IN APPEARANCE/HEALTH	CHANGES IN ROUTINE	CHANGES IN INTERPERSONAL BEHAVIOR
<ul style="list-style-type: none"> • Deteriorated Hygiene • Disheveled • Bruises • More cologne, breath mints • Odor of alcohol or mj • Signif weight loss, not eating • Signs of sleep deprivation • Pupils notably dilated or constricted 	<ul style="list-style-type: none"> • Attendance often late • Attendance erratic • Greatly increased or decreased hours • More isolated on the job • Not returning calls • Work is uncharacteristically sloppy or late. 	<ul style="list-style-type: none"> • More irritable/angry or spacey • More prone to tears • More forgetful • Less physically coordinated, more accidents • Mood varies a lot, even in 1 day • Speech <ul style="list-style-type: none"> ○ Tempo ○ Slurred ○ Not making sense ○ More paranoid • New sinus problems • Making excuses for work not completed.