2016 WL 3090589
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal,
Second District, Division 6, California.

IN RE Douglas J. CRAWFORD, on Contempt.

2d Civil No. B270705
|
Filed May 24, 2016

Attorneys and Law Firms

Douglas J. Crawford, in pro. per., for Plaintiff and Appellant.

Opinion

GILBERT, P.J.

*1 THE COURT:
These contempt proceedings arise from a petition for rehearing filed by attorney Douglas J. Crawford. On March 8, 2016, we issued an order to show cause why Crawford should not be adjudged guilty of two counts of contempt and punished for (1) impugning the integrity of this court, and (2) falsely stating under penalty of perjury that the justices of this court accepted a bribe. (Code Civ. Proc., § 1209 et seq.)

We find Crawford guilty of one count of direct contempt. We fine him $1,000. We refer Crawford to the State Bar for investigation and, if appropriate, the imposition of disciplinary sanctions. (Bus. & Prof.Code, § 6086.7.)

FACTS

Crawford represented himself in an action against JPMorgan Chase Bank, N.A. (Chase). Prior to a deposition in the case, Crawford threatened opposing counsel with pepper spray and a stun gun. Chase moved for terminating sanctions. Crawford filed an opposition that was openly contemptuous of the trial court. The trial court granted Chase's motion for terminating sanctions. Crawford appealed. We affirmed. (*Crawford v. JPMorgan Chase, N.A.* (2015) 242 Cal.App.4th 1265.)

Crawford filed a verified petition for rehearing. The statements quoted below are from that petition:

Count I: Impugning the Integrity of the Court

1. "Purposefully misspelling the name of a deceased individual, who was the victim of a crime shortly before her death, is truly appalling, disgusting and shocks one's consciousness especially taking into consideration the Court's opening footnote, but the Grandads of Anarchy did not stop their defiling, despicable conduct there." (Petn., p. 3.)

2. "In its ridiculous, Chase-driven opinion, the Grandads of Anarchy state on page 2: 'Chase rescinded the annuity, but Crawford complains that Chase failed to reimburse him $2000 in lost interest.' In any other situation, the Court factual inaccuracies would be laughable, but given their purposefully misstating of the facts and bastardizing California law, it is further evidence of their endless corruption, bias and senility." (Petn., pp. 3–4.)

3. "The Grandads of Anarchy current bastard version of the actual facts fully demonstrate just how far they are up Chase's bum and helps to explain the origin of their fecal stained opinion." (Petn., p. 5.)

4. "More importantly, and glaringly absent from these feeble-minded, nincom*poops* colored opinion is the undisputed fact that Petitioner served numerous Deposition Subpoenas, on all the same deponents, Kohli, Davis, Chase & Griffin, demanding that they appear for their deposition at an entirely different location (Ventura Majestic Theater, 26 S. Chestnut Ave, Ventura) that would allow for them to bring security to waylay their feigned concerns." (Petn., p. 6.)

5. "Senility, selective Chase-favored memory and corruption are persistent traits of these Grandads of Anarchy making it difficult to determine which one

is in play at any given time." (Petn., p. 6.)

6. "Disgustingly, these Grandads of Anarchy write in their Chase-slanted opinion: 'Crawford's petition referenced the Oklahoma City and Boston bombings.' The Court's factually unsupported statement truly crystalizes their myopic position because the Boston bombings had not even occurred yet when Petitioner wrote the allegedly prophetic, recited passage!" (Petn., pp. 6–7.)

***2** 7. "Desperate to appease their master, these corrupt, pathetic, low-life scum of human refuse stoop to an all-time low by actually fabricating disparaging facts off the dismembered bodies of completely unrelated individuals to further Chase's position. Possibly, if GOA Gilbert and his senile brethren actually spent more time reading the briefs of the appealing parties and California precedent rather then opining on his egocentric blog of the inane, all or some of the aforementioned errors would not even happen?" (Petn., p. 7.)

8. "As Petitioner clearly stated in his Reply Brief, Petitioner would not have appealed the Superior Court's ruling if he had known the Second Appellate District, Division Six only had three crusty, old corrupt codgers for adjudicators whose only present benefit is a resounding argument for the institution of a mandatory retirement age for Justices of the Appellate Divisions. Bullying, elder abuse and judicial corruption all share a commonality of an ability to continue unabated because no one possesses the fortitude or courage to speak up and do something about it." (Petn., p. 8.)

9. "Akin to Chase's lap dog in Superior Court, Vincent O'Neill, these Grandads of Anarchy digest the waste expelled by their golden goose, Walter J.R. Traver ('Traver'), blindly and without question completely ignoring the truth—Petitioner never pointed pepper spray or a stun gun at Walter J.R. Traver." (Petn., p. 8.)

10. "What this fecal-stained Court also fails to mention is...." (Petn., p. 9.)

11. "What these disgusting old, white corrupt Justices fail to care one iota about is the helpless deposition reporter named Gina M. Currie that would have been the one killed by 'John Doe's' bullet. In a room with three attorneys (Davis, Traver & Petitioner), one elder abusing criminal (Kohli) and a cancer survivor, the beautiful and effervescent deposition reporter, Gina M. Currie, any inadvertently discharged bullet would have hit Ms. Currie." (Petn., p. 10.)

12. "Please explain, GOA Gilbert, Yegan and Perren, when did the Court abandoned the legal concept of stare decisis and how can that be reconciled with this decision based on *Del Junco v. Hufnagel* ? Do certain California cases simply not apply to J.P. Morgan Chase and their confederates?" (Petn., p. 12.)

13. "Chase puppets and Grandads of Anarchy Gilbert, Yegan and Perren do not even have the mental capacity or human decency to take the time or care necessary to spell the decedent and victim of Chase's financial elder abuse name correctly ('N–I–N–O–N,' pronounced 'knee—non'), let alone record her correct age in which she passed or accurately or without bias or prejudice recite the underlying facts of the present case correctly because they simply cannot be bothered with such trivial matters when any appeal involves a lowly self-represented litigant. According to the 'substance' of this stench-laden opinion, Petitioner is only entitled to nigger justice." (Petn., p. 16 [fn. omitted].)

14. "Truth be told, one Justice Yegan or Perren, as clearly evidenced at oral argument, does not even know what year it is or what day of the week and Gilbert is covering for him out of a sense of loyalty." (Petn., p. 16, fn.2.)

15. "How or why would anyone ever possibly seek refuge or relief from these corrupt, senile and morally bankrupt individuals, who callously invoke the horrific Boston Marathon bombing tragedy to factually support their legally unsubstantiated position all to appease their Corporate overlord? The proof of such a frivolous contention is this indigestible shit pudding defecated by GOA's Gilbert, Yegan and Perren masquerading as a legal analysis." (Petn., pp. 16–17.)

***3** 16. "Intentional or not (intentional), this reviewing Court fails to understand or comprehend the legal distinction between the words 'sanction,' 'contempt' and 'forfeiture,' as they apply to Petitioner's institution of several Small Claims actions against multiple deponents for their non-appearance pursuant to CCP § 1992. Their careless, interchangeable use of these legally distinct words, combined with their lack of understanding their distinction definitions, results in a complete mockery of statutory interpretation, legal analysis

and legislative intent behind the enactment of CCP § 1992, Small Claims Court and the institution of contempt proceedings, all for the benefit of their master, J.P. Morgan Chase." (Petn., p. 17.)

17. "Additionally, statute of limitations for the institution of 'contempt' proceedings for failure to comply with a Deposition Subpoena is strictly limited to the time in which the Court can order compliance, as set forth by CCP § 1209, or effectively, until the unlimited civil case has ended. The foregoing is called 'legal analysis,' something completely foreign to these feeble minded Chase cohorts." (Petn., p. 19.)

18. "Kohli, Davis, Griffin and Chase have, literally, given the Court the one finger salute by failing to attend their noticed depositions and, because of this Reviewing Court's perverted bias, prejudice and unquestionable alliance to them, this corrupt tribunal thanks them for their middle finger acknowledgment. What is more obvious, distressing and disgusting is the undisputable fact that if the roles were reversed and it was Chase that had filed a CCP § 1992 action against Petitioner, the result would be entirely different without discussion." (Petn., p. 21.)

19. "These senile GOA's state in the present case: 'Acuna stands for nothing more than a different department of the superior court has no jurisdiction over a case original brought in small claims court'. The plain language of Acuna v. Gunderson Chevrolet, Inc. (1993) 19 Cal.App.4th 1467 could not be farther away from the Court's contention, as well as the Court analysis of the same proposition." (Petn., p. 23.)

20. "In short, Petitioner readily acknowledges that this Appellate Court has the ability to do whatever it wants regardless of statutory law, stare decisis and legal logic in its concerted effort to satiate its Puppet Master, J.P. Morgan Chase, despite the contempt and derision for the law that these adjudicators breed. In that vein, Petitioner respectfully requests this Court to instruct the lower Court and Small Claims Court on how to dispose of the currently pending Small Claims actions." (Petn., p. 26.)

21. "This is a case of political retribution of Biblical proportions. Judge O'Neill took great offense when Petitioner ran against Judge O'Neill's former BFF, Superior Court Judge Ronald S. Prager, who O'Neill and Prager established their life-long friendship from their time together at the California Attorney General's Office. Corrupt O'Neill took umbrage when Petitioner called Judge Ronald S. Prager 'the most corrupt judge in San Diego County' based on Prager's outlandish ruling in the San Diego Convention Center reverse tax expansion project. [¶] In a truly, modern day, twisted and demented Cain and Abel plot of retaliation concocted by Traver and O'Neill, O'Neill literally Ordered Petitioner and his little brother to appear in the direct line of fire from an attorney, Walter J.R. Traver, who had a well-documented history of mental instability, unprofessional conduct, sadistic behavior and a propensity for resolving disputes through the use of a firearm. Attachment 1. Had this Court bothered to do a peppercorn more than its current form of nigger justice, the Court would have found the Court transcripts replete with inappropriate, prejudicial and hateful comments by Chase's lap dog O'Neill directed towards Petitioner and irrational behavior from Traver. [¶] When viewed in the light of day, only a child has the courage to truthfully describe the present spectacle of three shrived-up old men prancing around on their Chase high-horse completely devoid of any article of covering. Whether our government is described as an oligopoly or capitalistically based, the result of corporate governance is the same." (Petn., p. 27.)

4** 22. "When individuals have to lie, cheat, threat, fabricate and distort the truth to win, as herein, it is a vacuous victory and truly the highest compliment. The cost, however, is that these three corrupt politicians ***spawn anarchy to the populace with their genuine lack of respect for the law specifically, and flaccid respect for humanity, in general, and to those Grandads of Anarchy, I, Douglas J. Crawford *Respectfully* submit[.]" (Petn., pp. 28–29.)

Count 2: Falsely Stating the Appellate Justices Accepted a Bribe

1. "This Court's opinion, fraught with Chase-colored errors, fully demonstrates the marriage of senility and judicial corruption[.] As plainly stated in Petitioner Douglas J. Crawford's ('Petitioner') Reply Brief, Petitioner never had any faith that the three senior 'retired' *(in)* Justices would ever perform their job in accordance the laws of the State of California, but, rather, Petitioner knew that these senile adjudicators would do whatever Respondent J.P. Morgan Chase Bank et. al. told them to do. However, these corrupt, *Grandads of Anarchy,* Gilbert, Yegan and Perren, have stooped to a new, all time low with their blatant Chase-colored errors of fact and law that demonstrate their truly beautiful marriage of senility with corruption by their tentatively 'published' Corporate-driven opinion."

(Petn., p. 2 [fn. omitted].)

2. "Grandads of Anarchy, Gilbert, Yegan and Perren, are only going to temporarily 'publish' this opinion and after they erroneously believe that it has caused enough pubic fervor, the opinion will no longer be certified for publication, per Chase playbook." (Petn., p. 2, fn.1.)

3. "The errors contained within the Courts opinion are so obvious, vast and plentiful one has to laugh and wonder out loud just how much the Grandads of Anarchy were bribed by J.P. Morgan Chase to crap out the current abomination disguised fecal legal matter." (Petn., p. 2.)

4. "... The only question left outstanding is "*how much* ", dear, old Grandads of Anarchy, did Chase pay you to write this fiction-based fecal opinion?" (Petn., p. 12.)

5. "Our society has progressed little ... from the company-owned coal towns of old where the serfs lived in company-owned shacks, worked at company-owned mines, shopped at the company stores, were paid in company script and disputes were presided over by company beholden cronies. Only the names have changed because our homes are financed by J.P. Morgan Chase Bank loans, our clothes and sustenance are bought with J.P. Morgan Chase credit along with our vehicles, boats, jet skis and we are actually paid in Chase script with the unfortunate consequence that our dispute resolution system being governed by corrupt politicians beholden to J.P. Morgan Chase, as present herein." (Petn., p. 28, fn.omitted.)

6. "Petitioner takes it all as the highest compliment. This case was never going to a trial because it would have put J.P. Morgan Chase out of business and to ensure that would never happen, Traver threatened Petitioner, in writing, and when that wouldn't work, Traver hired an unknown gunman to point a loaded firearm at Petitioner and when that wouldn't work, Traver committed perjury and bribed various Superior Court judges to rule in his favor and finally, Traver and company bribed these three corrupt politicians to ignore all current California law, manipulate the facts and go so far as to actually fabricated facts off the deaths and horrific injuries of the victims of the Boston Marathon bombings. All that effort to cheat Petitioner Douglas J. Crawford out of a pittance sum of Chase script is an indirect compliment to Petitioner." (Petn., p. 28.)

***5** We denied the petition for rehearing. Crawford petitioned our Supreme Court for review. The Supreme Court denied the petition for review on February 24, 2016. We delayed issuing the instant order to show cause while Crawford's petition for review was pending so as to avoid interfering with the review process.

DISCUSSION

A direct contempt "is committed in the immediate view and presence of the court, or of the judge at chambers...." (Code Civ. Proc. § 1211, subd. (a).) An attorney commits a direct contempt when he impugns the integrity of the court in a document filed with the court. (*In re Koven* (2005) 134 Cal.App.4th 262, 271.) An act of contempt is punishable by fine not exceeding $1,000, or by imprisonment not exceeding five days, or both. (Code Civ. Proc., § 1218, subd. (a).) " 'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [Citation.] 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.' " (*In re Ciraolo* (1969) 70 Cal.2d 389, 394–395.)

Here Crawford's petition for rehearing is contemptuous on its face. The petition refers to the justices of the court as the "Grandads of Anarchy." It calls the justices "senile" and "corrupt, pathetic, low-life scum of human refuse." These are just a few of the contemptuous remarks throughout the petition. In addition to these contemptuous remarks, the petition accuses this court of a crime: accepting a bribe. (See Pen.Code, § 68.) This accusation made under penalty of perjury is false and subject to criminal prosecution. We express no opinion whether the appropriate prosecuting agency should take such action.

Crawford's answer to our order to show cause contains an apology. The apology is insufficient to purge Crawford of contempt: Crawford is an experienced attorney; the charges are false, lacking any support whatsoever; the tone of the petition for rehearing is spiteful and malicious; Crawford's statements were not made in the heat of a courtroom battle, but were deliberately made in a petition for rehearing; and Crawford also impugned the integrity of the trial court in his motion to disqualify the trial judge. (See *In re Koven, supra,* 134 Cal.App.4th at pp. 274–275.)

We also take into consideration his statement: "I am

currently undergoing intensive treatment for various underlying issues that are clearly evident in the Petition for Rehearing and would like to continue that treatment unabated, which I submit to explain why I am not submitting my apologies to the Court personally."

Crawford argues that the contemptuous statements made in his petition for rehearing constitute a continuous course of conduct. He concludes that pursuant to Penal Code section 654, he can be punished for only one count of contempt. We need not decide the matter. Punishment for a single count of contempt will suffice.

DISPOSITION

We find Douglas J. Crawford guilty of one count of direct criminal contempt of this court. He is ordered to pay a fine of $1,000, payable in the clerk's office of this court within 60 days after this decision becomes final for all purposes. Pursuant to Business and Professions Code section 6086.7, the clerk of this court is directed to forward to the State Bar a copy of this judgment of contempt. Upon the finality of judgment, the clerk shall issue the remittiturs in Case No. B257412.

We concur:

YEGAN, J.

PERREN, J.

All Citations

Not Reported in Cal.Rptr.3d, 2016 WL 3090589

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2010 WL 4853306
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

Lori McKINNEY, Plaintiff,
v.
Judy HALLER, Defendant.

Civil Action No. 1:09cv1343.
|
Nov. 17, 2010.

Attorneys and Law Firms

Ernest Paul Francis, Ernest P. Francis Ltd, Arlington, VA, for Plaintiff.

Aaron Samuel Book, Webster Book LLP, Alexandria, VA, for Defendant.

MEMORANDUM ORDER

GERALD BRUCE LEE, District Judge.

***1** THIS MATTER is before the Court on Defendant Judy Haller's Motion for Summary Judgment. (Dkt. No. 71.) This case concerns Defendant's alleged unauthorized access to Plaintiff Lori McKinney's credit report.

There is one issue before the Court. The issue is whether the Court should grant Defendant's motion for summary judgment regarding Plaintiff McKinney's claims under the Fair Credit Report Act (FCRA) when her claim is based on (1) a third party's declaration that a Defendant accessed Plaintiff's credit report, (2) uncertified business records, and (3) a custodian's deposition denying Defendant's access of the credit report ? The Court holds that Plaintiff cannot establish the material element of obtainment under the FCRA because (1) Plaintiff's evidence is hearsay unrecognized by any exception or exemption, making the evidence inadmissible in a court of law; and (2) Plaintiff's deposition of a custodian of records established affirmatively that Defendant did not access Plaintiff's credit report. Accordingly, the Court grants Defendant's motion, and the issue will be discussed below.

I. BACKGROUND

The allegations are as follows, and should be viewed in the light most favorable to the nonmoving party. On March 6, 2007, Defendant Haller allegedly used her work computer to obtain Plaintiff's consumer credit file from Equifax. According to the Amended Complaint, Ms. Haller obtained Plaintiff's consumer credit file on behalf of the Villalvas, who provided Ms. Haller with Plaintiff's name, address, and social security number.

Ms. Haller conducted business with Ms. Villalva for a number of years. Ms. Villalva was a real estate agent, and Ms. Haller obtained credit files of potential clients of real estate agents to determine if prospective buyers would be able to obtain financing to purchase homes. Ms. Haller provided Plaintiff's credit file to the Villalvas after she obtained it from Equifax.

On December 6, 2007, Plaintiff discovered an American Home Mortgage ("AHM") inquiry on her credit report. She contacted AHM regarding the inquiry and discovered that the inquiry had been made by Ms. Haller, who was an employee of AHM at the time the inquiry was made. Ms. Haller later stated to Mr. Frederick Schaefer, a third party, that she was the only one who could have obtained Plaintiff's consumer credit file because she was the only person in AHM's Alexandria office who had the password necessary to make the inquiry.

On December 4, 2009, Plaintiff filed a Complaint against Defendants in this Court and amended the Complaint on March 15, 2010 to three counts. This Court granted Defendant's motion to dismiss on the third count, but denied the two motions regarding the FCRA. Plaintiff sent Defendant Haller a request for admission in July 2010; Ms. Haller's counsel failed to respond. On September 17, 2010, Magistrate Judge Theresa Buchanan granted Defendant's motion to file a late response. Plaintiff objected to Judge Buchanan's ruling; the Court affirmed her decision.

***2** On October 12, 2010, Plaintiff voluntarily dismissed the Villalvas from the action; only Ms. Haller remains.

The Court also granted leave for Plaintiff's counsel to depose a custodian of records.

Movant argues that Ms. McKinney is unable to meet her burden under the FCRA because she cannot produce admissible evidence showing that her credit report was obtained in March 2007. Movant stresses that if Ms. McKinney cannot establish that the Defendants obtained her credit report, she cannot prove all elements essential to an FCRA claim. Nonmovant contends that there is a genuine issue of fact as to whether Defendant obtained her credit report.

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247–48. A "material fact" is a fact that might affect the outcome of a party's case. *Id.* at 248;*JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir.2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248;*Hooven–Lewis v. Caldera,* 249 F.3d 259, 265 (4th Cir.2001). A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson,* 477 U.S. at 248. Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

III. ANALYSIS

The Court grants Defendant's motion for summary judgment because Plaintiff cannot establish all of the elements of an FCRA claim. To prove liability under 15 U.S.C. § 1681n (2006),[1] the plaintiff has the burden of establishing the following five elements: (1) plaintiff is a consumer; (2) the reporting service is a consumer reporting agency; (3) the communication from the reporting service to the defendant was a consumer report; (4) at the time of obtaining the report, either (a) the report was obtained through false pretenses, or (b) defendant knew the FCRA's requirements; AND knowledge of noncompliance under the Act; and (5) the actual purpose for which the report was obtained was improper without the consent of the consumer. 44 Am.Jur.3d *Proof of Facts* § 36 (2010).

***3** Construing the facts in the light most favorable to Plaintiff, Ms. McKinney can likely establish four elements of an FRCA claim because (1) she is a consumer, (2) the reporting service is a consumer reporting agency, (3) the communication was a consumer report, and (4) the purpose of obtaining the report was improper.[2] This being said, Plaintiff does not have admissible evidence regarding the fourth element of a claim under § 1681n or § 1681*o*, obtainment.[3] Plaintiff fails to establish obtainment because because (1) Mr. Schaefer's statements are hearsay unrecognized by any exception or exemption, making the evidence inadmissible in a court of law; (2) Plaintiff's screenshots are inadmissible business records; and (3) Plaintiff's deposition of a custodian of records established affirmatively that Defendant did not access Plaintiff's credit report. Each issue will be discussed in turn.

A. Mr. Schaefer's Statements

Plaintiff cannot establish obtainment through Mr. Schaefer's statements because Mr. Schaefer's statements are hearsay. According to the Federal Rules of Evidence, hearsay is inadmissible at trial, unless recognized under a statutory exception. FED.R.EVID. 802. Here, Plaintiff proffers Schaefer's sworn statement that Defendant Haller notified him that Ms. Haller was the sole person who could have accessed the report in July 2009. Such a statement is inadmissible because it is an out-of-court statement being offered for its truth—that Ms. Haller actually accessed the report. As hearsay, the statement may not be used to defeat a summary judgment motion because it is inadmissible at trial.

Plaintiff also proffers Schaefer's declaration that AMH informed both him and the Plaintiff that Ms. Haller was the person who accessed the credit report. This is double hearsay because (1) Schaefer is asserting that AHM told him that Ms. Haller received the information, and (2) Schaefer is repeating the AHM statement in the context of a previous conversation with Ms. Haller. As hearsay, both of Schaefer's statements are inadmissible in Court, and Plaintiff may not use them to defeat summary judgment.

b. The Screenshots of Defendant's Credit Report

Plaintiff cannot establish obtainment through screenshots of her credit report because the proffered screenshots are inadmissible evidence unrecognized by an exception. Assuming that these screenshots suffice as business records, such records would require proper authentication by a custodian or other qualified person. FED.R.EVID. 803(6), 902(11)-(12). In this case, Plaintiff, as a consumer, is unqualified to certify the records because (1) she does not have the knowledge required to determine who accessed her records; (2) she cannot determine whether such queries are regularly conducted activity; and (3) she cannot affirmatively establish that the records were a regular practice of the credit agency. Furthermore, this only establishes that AMNH accessed Defendant's report, not that Defendant herself obtained it. Hence, Plaintiff may not use the screenshots to defeat summary judgment.

c. Plaintiff's deposition of AMH Custodian

***4** Lastly, Plaintiff cannot establish obtainment because an AMH custodian of records affirmatively established that Defendant did not access the records. On October 18, 2010, Plaintiff obtained leave of court to conduct a deposition of a custodian of records at AMH. Plaintiff deposed her on October 21, 2010. The custodian declared that Defendant Haller did not obtain the credit report. Defendant's counsel asked the custodian whether Judy Haller obtained Plaintiff's credit report, to which the custodian replied, "a credit report was not ordered for Ms. McKinney." (Eileen Wanerka Dep. 25:3–20, 33:3–14, 34:10–24.)[4] Hence, Plaintiff cannot prove that Defendant obtained Plaintiff's credit report because the custodian specifically stated that Defendant did not access it.

There is no genuine dispute of fact regarding the fourth element of an FCRA claim, obtainment. Without the fourth element, Plaintiff cannot sustain her claims under the FCRA, and a reasonable jury would be unable to conclude that Defendant is liable under the statute. Accordingly, Defendant's motion for summary judgment is granted.

IV. CONCLUSION

The Court should grant Defendant's motion for summary judgment because Plaintiff is unable to meet her burden under the FCRA. Plaintiff cannot provide sufficient evidence to the material fact of obtainment. If Plaintiff cannot prove that her credit report was accessed, she cannot meet the requirements of the fourth element of an FCRA claim. Defeating Defendant's motion for summary judgment would require that Plaintiff prove a triable issue in regard to every element to the claim, which Plaintiff is unable to accomplish. Thus, without admissible evidence establishing the fourth element, there is no genuine, triable issue as to whether Plaintiff can establish either a § 1681n or § 1681*o* claim. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Dkt. No. 71) is GRANTED. It is

FURTHER ORDERED that Defendant's Motion in Limine (Dkt. No. 106) is DENIED AS MOOT. It is

FURTHER ORDERED that Plaintiff's Motion to Strike Part of Declaration and Deposition Testimony (Dkt. No. 116) is DENIED AS MOOT. It is

FURTHER ORDERED that Defendant's Motion to Strike Paragraphs 5, 6, and 7 of Lori McKinney's Declaration Submitted in Opposition to Motion for Summary Judgment (Dkt. No 119) is DENIED AS MOOT.

The Clerk is directed to forward a copy of this Order to counsel of record.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4853306

Footnotes

1 Plaintiff makes two claims under the FCRA, § 1681n and § 1681***o***. The only distinction between the two claims is that § n has an intentional mens rea, while § o is a negligent standard. Plaintiff fails to meet the standard for either section because she cannot prove the material fact of obtainment, which is an element for liability under both sections.

2 It is unlikely that Plaintiff can establish improper purpose. This being said, if the Defendant accessed the report, she would likely have no legitimate purpose in having it. For purposes of summary judgment, this fact will be assumed.

3 The parties use the term "access," while this memorandum uses the term "obtainment." There is no functional difference.

4 Plaintiff has moved to strike the cited sections of the custodian's deposition because the custodian refers to unadmitted evidence. Even assuming that the deposition is inadmissible, the previous two sections establish that Plaintiff cannot meet her burden under the summary judgment standard.

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ATTACHMENT 5

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Advocate

Rules of Prof.Conduct Rule 3.1

RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

Currentness

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Credits

[Adopted effective January 1, 2000.]

Editors' Notes

COMMENT

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

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Virginia Code Comparison

Rule 3.1 is similar to DR7-102(A)(1), but with three differences. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an

extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

Committee Commentary

Although Rule 3.1 is similar in substance to existing *Virginia Code* provisions, the Committee concluded that the objective standard of the *ABA Model Rule* was preferable and more closely paralleled Section 8.01-271.1 of the *Code of Virginia*, dealing with lawyer sanctions.

Rules of Prof. Conduct Rule 3.1, VA R S CT PT 6 § 2 RPC Rule 3.1
Current with amendments received through June 1, 2016.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Enacted LegislationAmended by 2016 VIRGINIA COURT ORDER 0009 (C.O. 0009),

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Advocate

Rules of Prof.Conduct Rule 3.3

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

(c) 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.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Credits
[Adopted effective January 1, 2000.]

Editors' Notes

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.

[2] *ABA Model Rule* Comment not adopted.

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, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, 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(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), *see* the Comment to that Rule. *See also* the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. 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 controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

[5] 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.

[6] 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.

[7-9] *ABA Model Rule* Comments not adopted.

Remedial Measures

[10] *ABA Model Rule* Comments not adopted.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. 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(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[12] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

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 an 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. For purposes of this Rule, *ex parte* proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.

Virginia Code Comparison

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that "[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact."

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that "[i]n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part."

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use perjured testimony or false evidence." DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the "remedial measures" referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the *Virginia Code* to paragraph (c).

Paragraph (d) is identical to DR 7-102(B).

Committee Commentary

The Committee generally adopted the *ABA Model Rule*, but it deleted the word "material" from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word "directly," preceding "adverse" was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word "directly" from the paragraph in the belief that the limiting effect of that term could seriously dilute the paragraph's meaning.

The Committee determined to retain the obligation to report a non-client's fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

Rules of Prof. Conduct Rule 3.3, VA R S CT PT 6 § 2 RPC Rule 3.3
Current with amendments received through June 1, 2016.

End of Document

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Advocate

Rules of Prof.Conduct Rule 3.4

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

Currentness

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery

request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Credits

[Adopted effective January 1, 2000. Amended effective January 1, 2004.]

Editors' Notes

COMMENT

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

[4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.

[5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

[6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

[7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should

be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

Virginia Code Comparison

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-25 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from "participat[ing] in presenting" criminal charges and therefore may freely offer advice to the client about the client's rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

Committee Commentary

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule* 3.4 in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted--something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule's* Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word "appropriate" preceding "steps."

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to "participate in presenting." This deletion allows a lawyer to offer advice to the client about the client's rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

Rules of Prof. Conduct Rule 3.4, VA R S CT PT 6 § 2 RPC Rule 3.4
Current with amendments received through June 1, 2016.

End of Document

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Transactions with Persons Other than Clients

Rules of Prof.Conduct Rule 4.1

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

Currentness

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Credits
[Adopted effective January 1, 2000.]

Editors' Notes

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

Statements of Fact

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

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure is governed by Rule 1.6.

Virginia Code Comparison

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated, "[I]n his representation of a client, a lawyer shall not ... [k]nowingly make a false statement of law or fact."

With regard to paragraph (b), DR 7-102(A)(3) provided, "In his representation of a client, a lawyer shall not ... [c]onceal or knowingly fail to disclose that which he is required by law to reveal."

Committee Commentary

The Committee deleted the *ABA Model Rule's* references to a "third person" in the belief that such language merely confused the Rule. Additionally, the Committee deleted the word "material" preceding "fact or law" from paragraph (a) to make it more closely parallel DR 7-102(A)(5). The word "material" was similarly deleted from paragraph (b) as it appears somewhat redundant. Finally, the modified Comment expands the coverage of the Rule to constructive misrepresentation--i.e., the knowing failure of a lawyer to correct a material misrepresentation by the client or by someone on behalf of the client.

Rules of Prof. Conduct Rule 4.1, VA R S CT PT 6 § 2 RPC Rule 4.1
Current with amendments received through June 1, 2016.

End of Document

Rule 4.3

Dealing With Unrepresented Persons

- **(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.**
- **(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.**

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Virginia Code Comparison

Paragraph (a) is identical to DR 7-103(B) and paragraph (b) is similar to DR 7-103(A)(2).

Committee Commentary

The *Virginia Code* had deviated from the *ABA Model Code* by using the language of *ABA Model Rule* 4.3(a) as DR 7-103(B). This provision continues unchanged in Rule 4.3.

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Transactions with Persons Other than Clients

Rules of Prof.Conduct Rule 4.4

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

Currentness

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Credits

[Adopted effective January 1, 2000.]

Editors' Notes

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Virginia Code Comparison

Rule 4.4 has no direct counterpart in the *Virginia Code*. DR 7-105(C)(2) provided that a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provided that a lawyer shall not "take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-107(C) provided that "[a]fter discharge of the jury ... the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror ..." DR 7-107(D) provided that a lawyer "shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror."

Committee Commentary

The Committee adopted this Rule, for which there was no specific corresponding Disciplinary Rule, as a reminder that there is some limitation placed upon activities for which "zealous representation" might be offered as an excuse. For the same reason, the Committee deleted the word "substantial" from the *ABA Model Rules* provision.

Rules of Prof. Conduct Rule 4.4, VA R S CT PT 6 § 2 RPC Rule 4.4
Current with amendments received through June 1, 2016.

End of Document

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Maintaining the Integrity of the Profession

Rules of Prof.Conduct Rule 8.2

RULE 8.2. JUDICIAL OFFICIALS

Currentness

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

Credits

[Adopted effective January 1, 2000.]

Editors' Notes

COMMENT

[1] False statements by a lawyer concerning the qualifications or integrity of a judge can unfairly undermine public confidence in the administration of justice. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Virginia Code Comparison

There was no direct counterpart to Rule 8.2 in the *Virginia Code*. EC 8-6 stated: "While a lawyer as a citizen has a right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."

Committee Commentary

The Committee adopted this Rule because it addressed a subject not explicitly addressed by the *Virginia Code*. However, the Committee deleted *ABA Model Rule* language which brought candidates for judicial office under the protection of this Rule and which required such candidates to abide by applicable provisions of the *Virginia Code*--concluding that such requirements and protections were neither necessary nor advisable for lawyers who are being considered for judicial office. While the dignity of courts and the attendant requirement that judicial officials be treated with respect acts as a restraint on lawyer criticism of those officials, the Committee concluded that to extend this Rule to those being considered for judicial office might have a chilling effect on free discussion of judicial candidates' qualifications.

RULE 8.2. JUDICIAL OFFICIALS, VA R S CT PT 6 § 2 RPC Rule 8.2

Rules of Prof. Conduct Rule 8.2, VA R S CT PT 6 § 2 RPC Rule 8.2
Current with amendments received through June 1, 2016.

End of Document

West's Annotated Code of Virginia
Rules of the Supreme Court of Virginia
Part Six. Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Maintaining the Integrity of the Profession

Rules of Prof.Conduct Rule 8.4

RULE 8.4. MISCONDUCT

Currentness

It is professional misconduct for a lawyer to:

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

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

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

Credits
[Adopted effective January 1, 2000. Amended effective March 25, 2003.]

Editors' Notes

COMMENT

[1] *ABA Model Rule* Comment not adopted.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery

and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] *ABA Model Rule* Comment not adopted.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law. *See* also Rule 3.1, Rule 3.4(d).

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

Virginia Code Comparison

With regard to paragraphs (a) through (c), DR 1-102(A) provided that a lawyer shall not:

(1) Violate a Disciplinary Rule or knowingly aid another to do so.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

Paragraph (d) is substantially the same as DR 9-101(C).

There was no direct counterpart to paragraph (e) in the Disciplinary Rules of the *Virginia Code*. EC 7-31 stated in part that "[a] lawyer ... is never justified in making a gift or a loan to a [judicial officer] under circumstances which might give the appearance that the gift or loan is made to influence official action." EC 9-1 stated that a lawyer "should promote public confidence in our [legal] system and in the legal profession."

Committee Commentary

Much of this Rule parallels provisions of the Disciplinary Rules of the *Virginia Code*. Paragraph (e), however, sets forth a prohibition not in the *Virginia Code*, and the Committee believed it is an appropriate addition.

Rules of Prof. Conduct Rule 8.4, VA R S CT PT 6 § 2 RPC Rule 8.4

RULE 8.4. MISCONDUCT, VA R S CT PT 6 § 2 RPC Rule 8.4

Current with amendments received through June 1, 2016.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 7. Civil Actions; Commencement, Pleadings, and Motions (Refs & Annos)
Article 2. Pleadings Generally (Refs & Annos)

VA Code Ann. § 8.01-271.1

§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions

Effective: July 1, 2008

Currentness

Except as otherwise provided in §§ 16.1-260 and 63.2-1901, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

Credits

Acts 1987, c. 259; Acts 1987, c. 682; Acts 1998, c. 596. Amended by Acts 2008, c. 136; Acts 2008, c. 845.

Notes of Decisions (115)

VA Code Ann. § 8.01-271.1, VA ST § 8.01-271.1
Current through End of the 2016 Reg. Sess.

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