

Colo. R. Prof'l. Cond. 3.4

Rule 3.4 - Fairness to Opposing Party, Counsel, and LLPs

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RPC 3.4

Entire Appendix repealed and readopted April 12, 2007, effective 1/1/2008; amended and adopted by the Court, En Banc, effective 11/16/2023.

COMMENT

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

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

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

[3] With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. See Rule 16, Colorado Rules of Criminal Procedure.

*ANNOTATION Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). Annotator's note. Rule 3.4 is similar to Rule 3.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. Expressions of personal opinion, personal knowledge, or inflammatory comments violate ethical standards. A prosecutor cannot communicate his or her opinion on the truth or falsity of witness testimony during final argument. The use of any form of the word "lie" is improper. However, an attorney may argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness's testimony. *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005); *Crider v. People*, 186 P.3d 39 (Colo. 2008). Attorney violated section (c) when he knowingly violated orders of Colorado supreme court suspending him from practice of law for failing to comply with continuing legal education (CLE) requirements and for failing to pay attorney registration fees. *People v. Swarts*, 239 P.3d 441 (Colo. O.P.D.J. 2010). Thirty-day suspension, petition for reinstatement requirement, and requirement of payment of costs of prior disciplinary proceedings justified where aggravating factors include attorney's previous public censure, refusal to acknowledge the wrongfulness of his conduct, substantial experience in the practice of law, and indifference to making restitution. *In re Bauder*, 980 P.2d 507 (Colo. 1999). Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for \$816,613. *People v. Clark*, 927 P.2d 838 (Colo. 1996). Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion, without regard to whether this debt was subsequently discharged in attorney's bankruptcy proceedings. *People v. Huntzinger*, 967 P.2d 160 (Colo. 1998). Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. *People v. Trogani*, 203 P.3d 643 (Colo. O.P.D.J. 2008). Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. *In re Roose*, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003). Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney failed to comply with court orders applicable to his child support payments until after contempt citation was issued and attorney was ordered to report to jail to begin serving his sentence, and also committed numerous other violations consisting of knowingly commingling and misappropriating clients' funds, and neglecting multiple cases*

resulting in the entry of default judgments against attorney's clients. People v. Gonzalez, 967 P.2d 156 (Colo. 1998). Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. 2008); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011); People v. Duggan, 282 P.3d 534 (Colo. O.P.D.J. 2012). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Singer, 955 P.2d 1005 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011). Cases Decided Under Former DR 7-104. Rule held inapplicable to district attorney's communications with defendant when communications are unrelated to pending charges for which defendant had retained counsel. People v. Hyun Soo Son, 723 P.2d 1337 (Colo. 1986). Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Zinn, 746 P.2d 970 (Colo. 1987). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995). Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981).
