

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 122-0803	MPC 89-0703
	)		MPC 90-0703
	)		MPC 87-0703

**DR. CHASE’S REPLY MEMORANDUM IN SUPPORT OF
HIS MOTION FOR JUDGMENT AND FOR DISMISSAL**

Respondent, Dr. David S. Chase, submits the following reply memorandum in support of his Motion for Judgment as a Matter of Law and his request for dismissal based on the State’s misconduct.

I. Introduction.

In responding to Dr. Chase’s Motion for Judgment as a Matter of Law, the State impermissibly ignores much of the testimony presented by its own witnesses during its own case-in-chief. The State cannot disavow large portions of its evidence simply because that evidence does not support the charges. When the Board considers *all* of the State’s evidence, even viewing it in the light most favorable to the State, no reasonable person could conclude that the State has proven its allegations by a preponderance.

Dr. Chase has also asked the Board to dismiss this case based on the State’s failure to disclose the numerous material errors in the expert opinion of Dr. Morhun, on which Dr. Chase’s summary suspension, and therefore this entire proceeding, was based. In response, the State does not deny that it has known for over two years that the summary suspension was improperly founded on false expert testimony. In fact, the State does not address its patent misconduct at all, perhaps hoping that this Board, too, will ignore it. Instead, the State takes the perverse position

that its failure to acknowledge and retract Dr. Morhun's false statements is somehow excused by the fact that, by the time their falsity became known to the State in 2004, this Board had already reversed Dr. Chase's summary suspension because another of the State's summary suspension affidavits---that of former technician Amy Landry---was falsified. The State's cavalier attitude regarding its ethical and legal duties to this tribunal is discouraging and dangerous. The Board must register its strong disapproval of the State's lack of candor or contrition. It must dismiss the charges against Dr. Chase.

II. Discussion

A. The State Has Violated Its Ethical And Legal Duties To This Board.

In his Motion, Dr. Chase demonstrated that the State has known for 2 ½ years that the expert opinion of Dr. Morhun, submitted to this Board as the primary support for the State's Summary Suspension Motion, contained numerous and material false statements. In its Opposition, the State does not deny that fact. Nor can it. Assistant Attorney General Joe Winn attended the August 6, 2004 deposition at which Dr. Morhun admitted that he had been wrong when he concluded in his report that: (1) Dr. Chase had not refracted Ms. Nordstrom; (2) Dr. Chase did not prescribe a new pair of glasses for Ms. Nordstrom; and (3) Ms. Nordstrom's vision would have benefited from a simple glasses change. (8/6/04 Deposition of Dr. Patrick Morhun at 109-112; 117, excerpts of which are attached hereto as Ex. A.) At that deposition, Dr. Morhun also conceded that his opinion was based on an incomplete set of medical records faxed to him by Board investigator Phil Ciotti and that he needed to review the complete file before providing an accurate opinion. (*Id.* at 103-05.) He admitted that his opinion would have been entirely different if Ms. Nordstrom had told him of the visual complaints that she now admits she

reported to Dr. Chase and his staff, stating, “*That changes everything.*”¹ (*Id.* at 121-22 (emphasis added).)

Knowing all of this, the State, the Board’s investigator, and Dr. Morhun did nothing to correct Dr. Morhun’s false statements. Instead, they attempted to prevent the Respondent from bringing the falsities to the Board’s attention, strenuously objecting when Dr. Chase’s lawyers raised them at the hearing. When allowed to testify over the State’s objection, Dr. Morhun stated that “the circumstances around the suspension of [Dr. Chase’s] license with the faxing irregularities and the errors in interpreting his chart did not give him a fair shake.” (12/4/07 Hearing Tr. at 216.)

The State does not dispute a single one of these facts. Instead, it asserts only that it “did not falsify evidence in [the] summary suspension hearing.” (Opposition at 3.) The State’s argument is entirely beside the point. The State had a straightforward ethical and legal duty to correct the false information it previously provided to this Board as soon as its falsity became known. The Vermont Rules of Professional Conduct speak directly to this point and could not be more clear: “*If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.*”² Vermont Rule of Professional Conduct 3.3(a)(4), “Candor Toward The Tribunal” (attached hereto as Ex. B). The Comments to the Model Rules of Professional Conduct, on which Vermont’s Rules are based, teach that “reasonable remedial measures” include, at the very least, withdrawing and correcting the false statement. Model Rules of Professional Conduct, 3.3 cmt. 10. This common-sense rule has

¹ Ms. Nordstrom has testified, both at this hearing and on two prior occasions, that the Board’s investigator instructed her not to report any symptoms, past or present, to Dr. Morhun.

² As a physician licensed by this Board and required to exhibit professional conduct, Dr. Morhun, too, had a clear obligation—both to the Board and to his fellow physician—to come forward and disclose the falsity of his prior testimony as soon as the falsity was pointed out to him. Sadly, he, too, sat silently by as Dr. Chase’s career was ruined.

been enforced by courts and professional conduct boards around the country. *See, e.g., Idaho State Bar v. Warrick*, 44 P.3d 1141 (Idaho 2002); *In re: Zotaley*, 546 N.W.2d 16 (Minn. 1996); *In re Mack*, 519 N.W. 2d 900 (Minn. 1994); *Sierra Glass & Mirror v. Viking Indust., Inc.*, 808 P.2d 512 (Nev. 1991).

Although the State appears to believe that it is somehow less unethical to fail to correct a false statement than it is to affirmatively make one, these sins of commission and omission are addressed in the very same sentence of Rule 3.3. *See Vermont Rule of Professional Conduct 3.3(a); see also Model Rule of Professional Conduct 3.3(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.”) The State’s failure to correct Dr. Morhun’s known false statements, and the State’s affirmative efforts to prevent those falsities from coming to light, constitute as great a breach of the duty of candor, and present as great a threat to the integrity of this disciplinary process, as does the making of known false statements.

The State next suggests that the Board has considered and rejected Dr. Chase’s arguments on this score in the past. The State’s position is disingenuous in the extreme. The State has attempted at every turn to prevent this Board from even considering Dr. Chase’s claims of prosecutorial misconduct. Prior to the hearing, each time Dr. Chase raised his concerns, the State argued that the Board should refuse to hear his arguments until the final hearing. The Board rejected Dr. Chase’s efforts to dismiss this case prior to the hearing on this basis, ruling: “At the administrative hearing, Respondent will have full opportunity to call witnesses, present evidence, and present argument on all issues in this matter.” (3/31/04 Order at 2.) Yet, at that hearing, the State objected strenuously to the Respondent’s cross-examination regarding Dr. Morhun’s expert report, arguing that it was irrelevant. (12/4/06 Hearing Tr. at 181-84.) As a

result of the State's pre-hearing objections, the Board had not heard or considered any evidence of Dr. Morhun's false expert report until he testified on December 18, 2006.

The State next argues that the Board should ignore any "irregularities" in the summary suspension proceeding because they "have already been remedied by the Board when it rescinded the summary suspension." (Opposition at 3.) This argument borders on the delusional. The Board has not, and cannot, ever remedy the harm done to Dr. Chase and his family by the summary suspension. That suspension immediately and permanently ended Dr. Chase's distinguished 35 year career. It provoked all but one of the 11 complaining witnesses to file their complaints with this Board, even though none of those 10 patients previously believed that they had been mistreated by Dr. Chase.³ It spawned a federal criminal investigation and trial that ended with Dr. Chase's total acquittal. It produced over 20 civil malpractice cases, including a putative class action brought by Ms. Salatino. The State, the federal government, and the plaintiffs' lawyers have all used the publicity generated by the summary suspension to their own advantage. Dr. Chase and his family have spent the last 3 ½ years living with the devastating consequences of the State's actions. The Board's decision to lift the summary suspension eight months later, while proper, did nothing to remedy these injuries. The State's argument to the contrary evidences a profound disregard for the rights and the lives of the physicians this Board regulates.

The State's argument also disregards prevailing law, which unsurprisingly holds that a lawyer's duty to correct false statements does not evaporate simply because he has already won, or even lost, his case. It extends even beyond the verdict. In *In re Zotaley*, 546 N.W.2d 16 (Minn. 1996), the Minnesota Supreme Court rejected exactly the argument the State makes here.

³ Indeed, Ms. Lang and Ms. Salatino were so happy with their cataract surgeries that they agreed to speak positively about the surgical experience with other patients. (See Resp. Exs. 694, 719.)

In that case, a lawyer failed to disclose the fraudulent source of a document submitted to an arbitrator. The case ultimately settled, and the lawyer argued that his failure to disclose the source of the document was rendered moot by the settlement. The court disagreed, holding that Rule 3.3 “*would be subverted if compliance with the rule depends on the fortuity of the ultimate resolution of the case, be it settlement, an arbitrator’s decision, or court order.*” *Id.* at 20 (emphasis added). The lawyer had a duty to take remedial measures to inform the arbitrator of the source of the document “[r]egardless of the outcome of the case.” *Id.*

The irony of the State’s actions runs deep. The State is accusing Dr. Chase of violating the rules governing his profession, and it is asking the Board to permanently suspend his medical license as a result. At the same time, the State’s lawyer is violating the rules governing his own profession in order to advantage his case, but he is asking this Board to look the other way. The Board should honor neither of the State’s hypocritical requests, and should communicate its strong disapproval of the State’s lack of candor. It should dismiss the charges against Dr. Chase. *See, e.g., Government of the Virgin Islands v. Fahie*, 419 F.3d 249, 254-55 (3d Cir. 2005) (dismissal appropriate remedy for government misconduct); *United States v. Osorio*, 929 F.2d 753, 760 (1st Cir. 1991) (same); *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975) (same).

B. The State’s Evidence Does Not Meet Its Standard Of Proof.

The State correctly notes that, in ruling on Respondent’s Motion for Judgment, the Board must assess *all* of the State’s evidence in the light most favorable to the State, drawing all *reasonable* inferences in the State’s favor. It then proceeds to ignore much of the evidence contained in its own exhibits and provided by its own witnesses and asks the Board to reach

unreasonable and illogical conclusions. When the Board views all of the State's evidence, rather than just selected portions, it cannot reasonably conclude that the State has proven its charges.

1. The State Ignores The Symptoms That Its Witnesses Admitted Reporting To Dr. Chase.

Time and again, the State contends that the complaining witnesses had no visual symptoms when they were examined by Dr. Chase. This assertion is contradicted by the complaining witnesses themselves, each of whom admitted to experiencing and reporting visual symptoms at the time Dr. Chase treated them. For instance, in its Opposition, the State claims that Ms. Nordstrom "saw fine" when she was examined by Dr. Chase. It totally ignores Ms. Nordstrom's sworn testimony, during which she freely admitted that she complained to Dr. Chase's staff of blurry vision and difficulty driving at night, as recorded in her chart. (Nordstrom at 46; 501-HN-1-1.) Similarly, the State contends that Ms. Salatino "felt she was seeing fine" when she saw Dr. Chase. It declines to mention that Ms. Salatino made a host of visual complaints, including but not limited to problems seeing traffic signs and steps and being bothered by glare, hazy vision, and dim light. (Salatino at 42-43; Ex. 501-JS-1-13, 19, 47.) In a particularly egregious example, the State asks this Board to conclude that Ms. Grigas must have been seeing well when she saw Dr. Chase because she was "routinely driving between Vermont and New Hampshire." (Opposition at 18.) Of course, Ms. Grigas reported that she had been experiencing more and more visual difficulty when making that very trip and had discussed that difficulty with Dr. Chase. (Grigas at 168-69.) As pointed out in Dr. Chase's Motion, every patient confirmed that he or she was experiencing visual symptoms when examined by Dr. Chase. (Motion at 11-12.)

Neither the State nor the Board can simply ignore large portions of the testimony presented by the State's own witnesses. When their testimony is viewed in its entirety and in the

light most favorable to the State, it supports only one conclusion: All eleven complaining patients were suffering visual symptoms at the time Dr. Chase treated them.

2. The State Has Introduced No Evidence That Dilated Refractions Produce Worse Visual Acuity Scores.

Throughout its Opposition, the State calls into question the validity of Dr. Chase's Snellen vision scores because some of them were recorded when the patients' eyes were re-refracted after dilation. There is no question that a patient's Snellen vision can fall with dilation if they are *not* re-refracted. However, when asked, two of the State's very own physician witnesses admitted that a patient's Snellen visual acuity score should not be affected by dilation, as long as the patient is re-refracted. Dr. Irwin testified that if a doctor re-refracts a patient after dilation, the patient should see about as well at distance as she did prior to dilation. (Irwin at 240.) Dr. Morhun agreed, assuming the patient did not have irregular astigmatism.⁴ (Morhun at 100.) It is undisputed that Dr. Chase always re-refracted his patients himself after dilation. Far from supporting the State's position that it was illegitimate for Dr. Chase to measure and record his patients' post-dilation best corrected visual acuity, the State's own evidence supports the conclusion that Dr. Chase's practice was perfectly appropriate.

3. The State Has Introduced No Evidence That Dr. Chase's Practice Of Charting His Patients CST With BAT Results Violated A Standard Of Care.

Much of the State's Opposition is devoted to arguing that Dr. Chase acted unprofessionally when he recorded his patients' CST with BAT results next to the "V" in his medical charts. This argument suffers from two fatal deficiencies. First, the State's Superseding Specification of Charges does not allege that Dr. Chase acted unprofessionally in recording his patients' functional vision next to the "V" in his charts. Second, the State has introduced

⁴ The State has not suggested, must less proven, that any patient's post-dilation refraction and Snellen score

absolutely no evidence of any charting standard of care that would prohibit Dr. Chase from doing so. Indeed, it has not even asked its own experts to review Dr. Chase's charts, much less to opine whether his charting practices met the applicable standard of care. In short, there is absolutely no charge and no evidence that Dr. Chase's decision to place his patients' CST with BAT scores at the top of his charts was improper.

4. The State Asks This Court To Adopt A Patently Unreasonable Interpretation Of "Second Opinion Given."

For each of the 10 patients to whom Dr. Chase recommended cataract surgery, his scribes used the shorthand notation "second opinion given" in the patient's chart. The State contends that this notation constitutes unprofessional conduct because none of the patients was actually given a second opinion during the course of his or her exam with Dr. Chase. However, the State has introduced no evidence that Dr. Chase or his scribes intended to indicate that his cataract patients were actually given a second opinion by the same physician who provided the initial diagnosis. Indeed, the allegation makes no sense. No physician can provide his patient with both a first and a second opinion. Most importantly, the State has not identified a single patient, technician, scribe, or physician who interpreted this shorthand notation in the way the State attempts to construe it. Yet, it asks this Board to adopt its nonsensical and unreasonable interpretation. Consistent with the standard of review, which allows the Board to draw only reasonable conclusions from the State's evidence, the Board must reject the State's fanciful argument.

5. The State Has Failed To Demonstrate That The Complaining Patients Did Not Meet The AAO's Standard For Cataract Surgery.

In the end, the State's evidence has shown that other physicians disagree with Dr. Chase's decisions to offer the complaining patients cataract surgery. It has not, however, begun

was compromised by irregular astigmatism.

to demonstrate that Dr. Chase's decisions were unprofessional. To the contrary, all of Dr. Chase's recommendations met the standard of care as defined by the American Academy of Ophthalmology.

As discussed in Respondent's Motion, with the exception of Ms. Nordstrom, it is undisputed that each patient had cataracts. Even with respect to Ms. Nordstrom, Dr. Morhun ultimately admitted that, based on the incomplete information he was given, he could not rule out the possibility that she had a transient metabolic cataract. (Morhun at 213.) Each patient also came to Dr. Chase complaining of visual symptoms that were reasonably attributable to those cataracts. The significance of each patient's visual symptoms was confirmed by Dr. Chase's CST with BAT, which the American Academy of Ophthalmology acknowledges to be a "more comprehensive measure" of visual function than Snellen visual acuity. (Ex. 503B.) No other physician performed this important, but time-consuming and uncompensated, test. The State has introduced no evidence that a mere glasses change, or any other treatment, would have resolved any of the patients' visual symptoms. Each surgical candidate was offered an extensive informed consent presentation that emphasized the elective nature of the surgery. Three patients chose to proceed with surgery, acknowledging in writing that they had concluded that their visual symptoms were significant. All three had excellent surgical outcomes, and none of the State's physicians has opined that those surgeries were unnecessary. Eight patients decided that they could continue to live with their symptoms and therefore opted against surgery, demonstrating the effectiveness of Dr. Chase's informed consent process. The State's evidence that other physicians did not recommend surgery to these patients, or that the patients felt they were seeing well enough to get by without surgery, does nothing to change these undisputed

facts. The State cannot, therefore, prevail on its central claim that Dr. Chase recommended or performed unnecessary cataract surgery.

III. Conclusion.

For the foregoing reasons, the Board should dismiss the Superceding Specification of Charges based on the State's misconduct or, in the alternative, grant judgment in favor of Respondent because the State has failed to meet its burden of proof during its case-in-chief.

Dated at Burlington, Vermont, this 29th day of January, 2007.

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STATE OF VERMONT
MEDICAL PRACTICE BOARD

IN RE: DAVID S. CHASE
VOLUME II

DEPOSITION OF PATRICK J. MORHUN, M.D.,
taken on behalf of Dr. Chase at Lebanon, New Hampshire,
on August 6, 2004 before Cynthia Foster, RDR, CSR No.
16, a Certified Shorthand Reporter within and for the
State of New Hampshire.

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Cynthia Foster, RDR
Registered Diplomate Reporter

PATRICK MORHUN, M.D., DULY SWORN
DIRECT EXAMINATION

COPY

BY MR. MILLER:

Q Good afternoon, Dr. Morhun.

A Hello.

Q We're here this afternoon for a continuation of
the deposition we commenced a week and a half or
so ago. And I'm going to start just by following
up on some of the questions that I asked you when
we last met before we go on to new topics.

We spent a lot of time toward the end of the
deposition talking about the standard for when
cataract surgery is appropriate for an individual
patient. Do you recall that?

A Yes. I do. Can I add one thing?

Q Sure.

A Okay. I just received an e-mail of the transcript
of the previous deposition late last night and I
was reviewing it but I only got up to page 124 out
of the whole document so what happened exactly at
the end of the last deposition, I haven't had a
chance to review but I'll be very happy to answer
your questions.

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Q We were talking about the AAO standard for when
cataract surgery is appropriate?

A Yes.

Q Would you agree that the question of when cataract
surgery is appropriate for a particular patient
depends in large part on the subjective symptoms
experienced by the patient himself or herself?

A Yes.

Q I never asked you why you came to Lebanon to
practice. How did you find your way here?

A The hospital recruited me to come.

Q From Jules Stein?

A Yes. I had a headhunter looking for opportunities
for me.

Q What sort of opportunities did you have that
headhunter looking for?

A Practice opportunities across the country where I
could concentrate on cataract surgery.

Q Did you focus on rural as opposed to urban areas?

A I focused on areas where there was a need for the
services of a cataract surgeon.

Q What was the name of the headhunting firm that you
used?

1 and then I think I got a call, I'm going to guess,
 2 I got a phone call on a Friday and I think I wrote
 3 this letter on a Sunday. I'm not sure if we know
 4 when July 18th of '03 was.
 5 Q It was a Friday.
 6 A It was a Friday.
 7 Q I'm going to show you what we've marked as
 8 Deposition Exhibit 2 B. Do you recognize that as
 9 the first letter that you sent to Mr. Ciotti
 10 regarding Ms. Nordstrom?
 11 A If I can look back at the notes here. Yes.
 12 Q Looking at that letter, it states I will be
 13 reviewing the chart of the named patient for you.
 14 Is it your conclusion then that at the time you
 15 wrote that letter you had not yet reviewed Ms.
 16 Nordstrom's chart from Dr. Chase?
 17 A I believe so. I believe what may have happened
 18 then is that would be correct. I know for a fact
 19 as I had mentioned that I did not have any of Dr.
 20 Chase's notes when I saw the patient for the first
 21 time.
 22 Q But you had nonetheless formed an opinion that she
 23 was quote, not a candidate for cataract extraction

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1 A Yes.
 2 Q And it looks to me like they came through the
 3 wrong way on the fax machine such that they are
 4 oriented vertically on a horizontal piece of paper
 5 as it were?
 6 A It looks that way.
 7 Q Did you make any effort to make sure that you got
 8 the whole chart rather than a chart with the
 9 bottom cut off?
 10 A No.
 11 Q I'm going to take these and we're going to mark a
 12 copy after we're done as Exhibit 4 B the fax you
 13 received from Phil Ciotti containing Dr. Chase's
 14 medical charts. Did you realize at the time that
 15 the bottoms of these pages were cut off by the fax
 16 machine?
 17 A No. I didn't realize that until you just
 18 mentioned it.
 19 Q So in fact you've never had a full copy of Dr.
 20 Chase's medical chart from Ms. Nordstrom, is that
 21 right?
 22 A I believe that's all I have received.
 23 Q You haven't received a hard copy in the mail or

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1 at this time, is that right?
 2 A Yes. And can I add something about the dates of
 3 this? Is July 16th the Friday?
 4 Q That's a Wednesday.
 5 A That's a Wednesday. Sorry.
 6 Q Do you remember what response you received to this
 7 letter to Mr. Ciotti?
 8 A I can't recall the exact details of the
 9 conversation but I would guess that it was
 10 communicated to me that the patient had cataract
 11 surgery recommended by another doctor. And then I
 12 was asked at that point to review the notes of the
 13 other doctor.
 14 Q And then Phil Ciotti faxed you down some medical
 15 records regarding Ms. Nordstrom, correct?
 16 A It looks like July 15th of 2003.
 17 Q So you had received but not yet reviewed the
 18 records when you wrote that letter on July 16th,
 19 is that right?
 20 A I don't know the answer to that question.
 21 Q I see you flipped open Ms. Nordstrom's original
 22 medical chart to the Chase files that Phil Ciotti
 23 faxed down to you; is that right?

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1 through some other means?
 2 A I don't believe so. If I did it would be in that
 3 file.
 4 Q Because you did receive a subpoena asking you to
 5 bring your entire file on this and you complied
 6 with that, right?
 7 MR. WINN: He has not received any subpoena.
 8 MR. MILLER: So the one that I sent to you
 9 and asked you to accept service for and you didn't
 10 respond?
 11 MR. WINN: Right.
 12 MR. MILLER: Oh, Joe, that's really good
 13 practice. I'll keep that in mind in the future.
 14 Q I'm going to show you what we've marked as Morhun
 15 Deposition Exhibit 3 B. Is that the letter,
 16 followup letter that you sent to Mr. Ciotti?
 17 A Yes.
 18 Q Let's walk through this. Says that you had the
 19 clinical notes of Dr. Chase and we've identified
 20 those as the faxed documents that are in your
 21 original file, correct?
 22 A Yes.
 23 Q Did you ask Mr. Ciotti if you had the complaint

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1 file or did you just take what he had given you as
 2 on its face?
 3 A I assumed that he had provided the complete file.
 4 Q You'd want to make sure you had the complete file
 5 before you rendered this sort of opinion you
 6 rendered in your letter, wouldn't you?
 7 A I assumed I had the complete file.
 8 Q And you would want the complete file before you
 9 rendered this sort of opinion that you rendered in
 10 this letter, wouldn't you?
 11 A The opinion that Ms. Nordstrom was not a candidate
 12 for cataract surgery would be one that I would
 13 render with or without any extra notes.
 14 Q But this letter contains a lot of opinions and
 15 interpretations of Dr. Chase's medical chart,
 16 correct?
 17 A Yes, it does.
 18 Q And you would want to make sure you had his
 19 complete chart before you were able to give an
 20 accurate interpretation of those charts, wouldn't
 21 you?
 22 A I would want to make sure that, I think that
 23 sounds reasonable, yes, but I would want to make

1 A I can see there's a word.
 2 Q Do you see what it says --
 3 A Right now I cannot.
 4 Q On this faxed copy at least you can't tell what
 5 that means, what it says?
 6 A Could I see the --
 7 Q Yes.
 8 A No. I can't tell what that says.
 9 Q If you had to give your best guess as to what it
 10 says what would you say?
 11 A Looking now I may say Snellen.
 12 Q Did you try to interpret what that said when you
 13 first reviewed these charts?
 14 A I tried to the best of my ability to interpret the
 15 records.
 16 Q And you're saying that when you first looked at
 17 these you couldn't understand what that said,
 18 right?
 19 A That's right. And in fact, being written on a
 20 chart in that on a contrast sensitivity piece of
 21 paper and sort of being written in that position
 22 where it's not, it's just not clear to me what
 23 that is, what that's indicating from the medical

1 sure that I referred in my letter exactly to what
 2 I was talking about. And I indicated that the
 3 documents I was commenting on were received by
 4 fax.
 5 Q You indicate in your letter that the first page
 6 that you received from Mr. Ciotti was a standard
 7 acuity and contrast acuity form; is that right?
 8 A That's what I said in the letter, yes.
 9 Q Are you referring to the document that you've
 10 opened the chart to here?
 11 A Yes. Where it's highlighted standard acuity/
 12 contrast acuity.
 13 Q I'm going to put just in the upper corner a
 14 backwards one, a 1 on this, okay, and circle it so
 15 on page 1, you indicate at the top that there's a
 16 vision of 20/30 and 20/50 plus 2 and you indicate
 17 that it may be a contrast vision, is that right?
 18 A Yes.
 19 Q Why did you indicate that it may be a contrast
 20 vision?
 21 A Because it's written in the chart under standard
 22 acuity/contrast acuity.
 23 Q Can you see the word that's written above that?

1 record.
 2 Q Did you pick up the phone and call Dr. Chase and
 3 ask him what it meant?
 4 A No. I did not.
 5 Q Why not?
 6 A I understood my job was to review these faxed
 7 documents and not to call another doctor.
 8 Q You understood you weren't supposed to get in
 9 contact with Dr. Chase about what you were doing
 10 here?
 11 A No. I was never told that.
 12 Q But you understood you weren't supposed to call
 13 him?
 14 A No. That was never communicated to me that I
 15 should not call Dr. Chase.
 16 Q Normally if you're reviewing a doctor's chart and
 17 you didn't understand what something meant, and
 18 you needed to what would you do?
 19 A I think it's reasonable to call the doctor except
 20 under the circumstances where the Medical Board is
 21 asking you to respond in a timely fashion to your
 22 statement of what a faxed record looks like.
 23 Q Highly unusual circumstances, right?

1 A Yes.

2 Q You write in the third paragraph of your letter
3 that it appears that Dr. Chase did not try to
4 improve the vision by changing spectacle glasses
5 but he may have only recommended surgery for the
6 patient. Do you see that?

7 A Yes.

8 Q On what did you base that conclusion?

9 A Can we go to the page that's the telephone record
10 for Helena Nordstrom, case 10718, is that the page
11 we're looking at? This looks like the telephone
12 record. I'm not sure what she said, the exact
13 words, hold off until she makes a decision about
14 cataract surgery. Do you think you can help me
15 find that?

16 Q I'm actually not interested in that right now.
17 I'm looking at the sentence it appears that Dr.
18 Chase did not try to improve the vision by
19 changing spectacle glasses?

20 A I do.

21 Q On what did you base that conclusion?

22 A I'd like to if I could find where exactly I was in
23 this series of faxed documents I might be able to

1 Q How did you conclude from that that they didn't
2 try to improve the vision through spectacle
3 correction?

4 A Because a prescription was not issued by Dr. Chase
5 on that visit.

6 Q It's not right to say that he did not try to
7 improve the vision by changing spectacle glasses,
8 is it? You're looking at a refraction?

9 A I would agree with your statement.

10 Q You state later in that paragraph at the very
11 least the surgeon needs to know what the patient's
12 best corrected vision is with an in-office trial
13 of spectacles in a trial frame or phoropter or
14 other vision measuring device. Do you see that at
15 the bottom of the first page of your letter of
16 July 18th? Yes?

17 A Yes.

18 Q You see Dr. Chase's office performed a manifest
19 refraction over the patient's current glasses,
20 correct?

21 A I see that that's what the notes indicate. Yes.

22 Q And if those notes are right and those notes are
23 what you had in front of you at the time you wrote

1 more easily answer to that. So it may be where if
2 I can refer to the page titled initial eye
3 examination.

4 Q Yes.

5 A At the bottom where Dr. Chase or someone has
6 performed a manifest refraction over own RX, and
7 where they stated no significant improvement, but
8 we see that the prescription that the patient was
9 wearing was significantly different from the
10 prescription that I arrived at.

11 Q Here's my question. You said it appears that Dr.
12 Chase did not try to improve the vision by
13 changing spectacle glasses?

14 A Yes.

15 Q Yet you just pointed me to a refraction on the
16 chart and a notation that says there is no
17 significant improvement.

18 A Right.

19 Q How can you conclude from that that he didn't try
20 to improve vision through spectacles? In fact
21 those words are highlighted blue in your copy of
22 the chart?

23 A Yes. Where it says no significant improvement.

1 this letter, correct?

2 A Yes.

3 Q Then the surgeon in this case, Dr. Chase's office
4 did attempt to determine through a trial frame or
5 phoropter what the patient's best corrected vision
6 was?

7 A However, that was done over her existing glasses
8 and it appears, could have been done in a dilated
9 state.

10 Q You don't know, do you?

11 A Well, it's circled cyclo above that which implies
12 by the point someone got to that patient chart
13 that after this point the patient had been
14 dilated.

15 Q Of course applying that same logic to your own
16 charts, we would have assumed that your slit lamp
17 exam was done in a manifest state, correct?

18 A That my split lamp exam was done in a nondilated
19 state. Yes.

20 Q Sorry. You didn't know whether that was done in
21 the dilated or undilated state?

22 A I did not.

23 Q And you didn't call anybody to ask?

1 Q I'd like you to turn to page 3 of 5. About an
 2 inch down from the top it says in fact the record
 3 appears incomplete. I do not see evidence of the
 4 refraction, that is, check for glasses change,
 5 being done by Dr. Chase. Do you see that?
 6 A Yes. I do.
 7 Q Looking at the chart that was faxed to you, that's
 8 just wrong, isn't it?
 9 A It appears in the medical record that there is an
 10 indication of a refraction being done over the
 11 patient's current glasses. That is not an ideal
 12 way to perform a refraction.
 13 Q Here's what you wrote. Here's what you wrote. I
 14 do not see evidence of the refraction (check for
 15 glasses change) being done by Dr. Chase. You were
 16 wrong to write that, weren't you?
 17 A Yes. I was.
 18 Q How could you miss it? It says manifest
 19 refraction and it's written there in the chart?
 20 A I was composing this letter to the best of my
 21 abilities.
 22 Q You note further down that there's a plan for CBC
 23 and a two-hour blood sugar test to be done after

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1 Nordstrom had a diabetic cataract that caused the
 2 symptoms she was complaining of when she saw Dr.
 3 Chase in January but that had resolved by the time
 4 you saw her in June thereby changing the results,
 5 rendering the results of your examination
 6 different than those of Dr. Chase?
 7 A That would be unlikely on the basis of the normal
 8 lens exam when she was seen in my office. And the
 9 fact that there was no history consistent with
 10 having diabetes.
 11 Q Do you know if she ever had the blood sugar test
 12 that Dr. Chase ordered?
 13 A I don't know that.
 14 Q Can you rule out that she had a diabetic cataract
 15 that resolved by the time you saw her?
 16 A In my opinion, had there been a cataract that had
 17 been present at the time she had seen Dr. Chase
 18 that the lens examination on June 30th would have
 19 shown abnormalities and not looked like it did.
 20 The clinical findings in my opinion don't back up
 21 the scenario you're presenting.
 22 Q And the clinical findings you're referring to are
 23 a lack of any residual opacity from what, from the

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1 the patient eats.
 2 A Um-hum. Yes.
 3 Q And that Dr. Chase may have been concerned about
 4 diabetes and this this could have been consistent
 5 with blurry vision, do you see that?
 6 A Yes.
 7 Q Still agree with that?
 8 A I do. And I wrote this letter trying to not,
 9 trying to have a look at the chart with an open
 10 mind.
 11 Q The last paragraph says that it's my opinion that
 12 the examination and recommendation for Dr. Chase
 13 for Helena Nordstrom on January 17th, 2003, fall
 14 below the standard of care expected by an
 15 ophthalmic surgeon, do you see that?
 16 A I do.
 17 Q Does that demonstrate someone who had an open mind
 18 and was taking into account the possibility of a
 19 diabetic cataract?
 20 A Yes. But the conclusion that I've drawn although
 21 unfavorable does not mean that I was, that I had
 22 my mind made up before I started this process.
 23 Q How can you rule out the possibility that Ms.

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1 diabetic cataract that we're positing?
 2 A Yes. And the fact that her corrected vision was
 3 20/15 and that --
 4 Q That corrected vision of 20/15 five months later
 5 is perfectly consistent with a diabetic cataract
 6 that has resolved, is it not?
 7 A I have not seen that.
 8 Q What's inconsistent about, between that and her
 9 having a diabetic cataract that's resolved?
 10 A Her clinical exam where the lens was perfectly
 11 normal.
 12 Q Put that aside from a moment. You said you've
 13 never seen somebody who refracted down to 20/15
 14 after a diabetic cataract had resolved.
 15 A That is a true statement.
 16 Q And why is it necessarily inconsistent with a
 17 diabetic cataract that someone could subsequently
 18 be refracted down to 20/15?
 19 A I have a hard time putting the two aside because
 20 they are so intimately related but I understand
 21 what you're saying.
 22 Q If you understand what I'm saying, answer the
 23 question.

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1 A I do not believe that Ms. Nordstrom's findings on
2 my examination were consistent with a patient who
3 had a diabetic cataract causing those symptoms in
4 January.
5 Q And the main basis for that opinion as I
6 understand it is the lack of any residual
7 opacification?
8 A And also that the patient had no complaints on her
9 examination, there were no concerns today, she
10 mentioned that she gets her eyes examined
11 annually. She didn't report to me that she had
12 been seen by another doctor and had been having
13 blurry vision and symptoms six months earlier.
14 The history part of the examination is incomplete.
15 Q And if she had reported to you that she had been
16 having blurry vision in her left eye five or six
17 months earlier that had only existed for 2 to
18 three weeks and that she was having dim vision and
19 having trouble reading, that may well have changed
20 your opinion?
21 A That changes everything. And in fact the
22 credibility of the patient would be a central
23 portion of this case. If the patient had a

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1 completely different history than what I was able
2 to elicit then that could change my
3 recommendations and it's a very important factor.
4 I believed Ms. Nordstrom to be giving me a
5 complete and factual reputation. I meshed that
6 with my clinical examination and I see someone who
7 does not need surgery. You know, the
8 recommendations that you gave me from the American
9 Academy of Ophthalmology specifically, the first
10 thing said that vision does not meet the patient's
11 needs. Clearly this patient's vision was meeting
12 her needs on the basis of the history.
13 Q Do you know if she was instructed by Mr. Ciotti to
14 come in and present as someone without any
15 particular problems?
16 A I don't know that. If she had been, that would be
17 an important piece of information.
18 Q If the result of your physical exam of her eye was
19 unchanged, it was what it was, but she had come in
20 and said to you, Doctor, five months ago I was
21 having blurry vision in my left eye that occurred
22 within a two or three-week period, and I was
23 having dim vision, and I'm having trouble reading,

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1 does that change your opinion as to the likelihood
2 that this was possibly the result of a diabetic
3 cataract that had resolved?
4 A Yes. And in fact I can think of another condition
5 called central serous retinopathy where you might
6 be looking in other parts of the eye like the
7 retina where you could get temporary retinal
8 swelling that can cause a decline in vision.
9 Certainly cataract surgery would not be indicated
10 in that case and certainly a patient with only
11 that as their problem wouldn't have notation of
12 advanced cataract in their medical record. So
13 there's inconsistencies in this case.
14 Q You talk later in your July 18th letter about --
15 I'm going to mispronounce it. Aniseikonia?
16 A Yes.
17 Q Did I pronounce that correctly?
18 A Yes.
19 Q Whenever you perform cataract surgery on a high
20 myop, you run the risk of the patient having
21 aniseikonia that will require a second eye
22 surgery; is that right?
23 A Unless you're aiming to balance the first eye with

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1 the existing prescription in the second eye.
2 Q Which you can try to do?
3 A You can try to do.
4 Q And you say in here that performing surgery on Ms.
5 Nordstrom's left eye would commit her to wearing a
6 contact lens in her right eye or I suppose
7 glasses, is that right, to counterbalance the
8 aniseikonia?
9 A I'm not sure if I, I don't want to overstep what
10 I'm, what, but I did want to mention that it says
11 in the chart it was, the plan was for OS phaco.
12 And that the plan was to consider to set the OD
13 for minus 2. So that would imply that the first
14 eye was not going to be left at a minus 10 so
15 there would be some induced aniseikonia so the
16 idea of a contact lens for that patient until they
17 were ready for the second surgery would be an
18 important consideration as would other refractive
19 surgery but glasses would not be a very appealing
20 option in that situation.
21 Q But contact lenses might, may very well work
22 for --
23 A Contact lens which you would be committed to

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Reporter's Notes

This rule departs from the Vermont Code by prohibiting the assertion of frivolous claims or contentions without regard to whether the lawyer knows or it is obvious that they are frivolous. DR 7-102. This change from a subjective to an objective standard is consistent with Vermont Rule of Civil Procedure 11. Rule 3.1 merges in "frivolous" the concepts of active bad faith in the sense of harassing or malicious action and lack of good faith as in the advancement of an unsupportable argument. Lawyers should be clear that the standard of Rule 11, and that of the present rule, require that the position advanced be both nonfrivolous and in good faith. The rule also adds a provision to the effect that in criminal cases and cases resulting in incarceration, the defense lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for the defense.

Rule 3.2. EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

HISTORY

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or 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 often tolerated by the bench and 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. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Reporter's Notes

This rule goes further than the Vermont Code's mere approval of punctuality. The rule places an affirmative obligation upon the lawyer to make reasonable efforts in the client's interests to expedite litigation.

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;
- (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. If a lawyer has offered material evidence and 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, 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.

HISTORY

Comment

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

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).

Misleading Legal Argument

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

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.

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. 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(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

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.

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.

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.

The other resolution of the dilemma 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(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.

Duration of Obligation

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

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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

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.

Reporter's Notes

This rule maintains the Vermont Code's requirement that if the interests of client and tribunal conflict with regard to candor, the interests of the tribunal prevail. The rule differs from related Code provisions, however, by adding a provision which permits the lawyer to refuse to offer evidence the lawyer reasonably believes to be false. The rule also sets forth a requirement that is not present in the Code: lawyers in ex parte proceedings must inform the tribunal of all material relevant facts whether or not they are adverse.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) 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