UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF FELD ENTERTAINMENT, INC.'S
MOTION TO STRIKE INSUFFICIENT DEFENSES

EXHIBIT 3

Rule 3.4—Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6;

(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 efforts 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;

(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

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) Peremptorily strike jurors for any reason prohibited by law.

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. To the extent clients are involved in the effort to comply with discovery requests, the lawyer's obligations are to pursue reasonable efforts to assure that documents and other information subject to proper discovery requests are produced. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or a proceeding whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Paragraph (a) permits, but does not require, the lawyer to accept physical evidence (including the instruments or proceeds of crime) from the client or any other person. Such receipt is, as stated in paragraph (a), subject to other provisions of law and the limitations imposed by paragraph (a) with respect to obstruction of access, alteration, destruction, or concealment, and subject also to the requirements of paragraph (a) with respect to return of property to its rightful owner, and to the obligation to comply with subpoenas and discovery requests. The term "evidence" includes any document or physical object that the lawyer reasonably should know may be the subject of discovery or subpoena in any pending or imminent litigation. *See* D.C. Bar Legal Ethics Committee Opinion No. 119 (test is whether destruction of document is directed at concrete litigation that is either pending or almost certain to be filed).

[4] A lawyer should ascertain that the lawyer's handling of documents or other physical objects does not violate any other law. Federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by the ethical rule set forth in paragraph (a). *See, e.g.,* 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (obstruction of criminal investigations). And it is a crime in the District of Columbia for one who knows or has reason to know that an official proceeding has begun or is likely to be instituted to alter, destroy, or conceal a document with intent to impair its integrity or availability for use in the proceeding. D.C. Code § 22-723 (2001). Finally, some discovery rules having the force of law may prohibit the destruction of documents and other material even if litigation is not pending or imminent. This rule does not set forth the scope of a lawyer's responsibilities under all applicable laws. It merely imposes on the lawyer an ethical duty to make reasonable efforts to comply fully with those laws. The provisions of paragraph (a) prohibit a lawyer from obstructing another party's access to evidence, and from altering, destroying, or concealing evidence. These prohibitions may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates criminal provisions or court rules. Thus, the alteration of evidence by a lawyer, whether or not such conduct violates criminal law or court rules, constitutes a violation of paragraph (a).

[5] Because of the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's informed consent. In some cases, the Office of Bar Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences. However, Bar Counsel may refuse to accept evidence; thus lawyers should keep the following in mind before accepting evidence from a client, and should discuss with Bar Counsel's office the procedures that may be

with Bar Counsel's office the procedures that may be employed in particular circumstances.

[6] First, if the evidence received from the client is subpoenaed or otherwise requested through the discovery process while held by the lawyer, the lawyer will be obligated to deliver the evidence directly to the appropriate persons, unless there is a basis for objecting to the discovery request or moving to quash the subpoena. A lawyer should therefore advise the client of the risk that evidence may be subject to subpoena or discovery, and of the lawyer's duty to turn the evidence over in that event, before accepting it from the client.

[7] Second, if the lawyer has received physical evidence belonging to the client, for purposes of examination or testing, the lawyer may later return the property to the client pursuant to Rule 1.15, provided that the evidence has not been subpoenaed. The lawyer may not be justified in returning to a client physical evidence the possession of which by the client would be *per se* illegal, such as certain drugs and weapons. And if it is reasonably apparent that the evidence is not the client's property, the lawyer may not retain the evidence or return it to the client. Instead, the lawyer must, under paragraph (a), make a good-faith effort to return the evidence to its owner. Rule 3.4(a) makes this duty subject to Rule 1.6. Rules 1.6(c), (d) and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. If such circumstances exist, the lawyer may, but is not required to, reveal information otherwise protected by Rule 1.6 as part of a good-faith effort to preserve the evidence and return it to the owner pursuant to Rule 3.4(a).

[8] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate a witness for loss of time in preparing to testify, in attending, or in testifying. A fee for the services of a witness who will be proffered as an expert may be made contingent on the outcome of the litigation, provided, however, that the fee, while conditioned on recovery, shall not be a percentage of the recovery.

[9] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. *See also* Rule 4.2.

[10] Paragraph (g) prohibits any lawyer from exercising peremptory challenges to prospective jurors on any impermissible ground. Impermissible grounds include race, sex, and other factors that have been determined in binding judicial decisions to be discriminatory in jury selection.

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