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Ethics in Civil Litigation: Depositions to Trial and Beyond

State v. Brandt

393 S.C. 526, 713 S.E.2d 591 (2011)

- Client produced a third party letter that was key evidence, introduced it in expert's deposition
- Defendant claimed document was fraudulent
- Letter printed on a type of paper not developed until 5 years after letter, did not contain watermark, and had other inconsistencies with third party's documents
- Civil and Criminal Contempt – Forgery Conviction

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False Testimony or Documents
Rule 3.3(a)(3)

"A lawyer shall not knowingly … offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Rule 3.3(a)(3) Illinois Rules of Professional Conduct of 2010

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Before it is offered

- Know of the falsity – no choice – must refuse to offer the evidence “regardless of the client’s wishes” (Comment 5)
- Reasonably believe the evidence is false – choice - “may refuse to offer” or may offer (Comment 8)

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Before it is offered - Testimony

- Know client intends to testify falsely
  - try to persuade the client not to
  - If persuasion does not work and you continue to represent the client, you must refuse to offer the false testimony
  - If only a portion of the testimony is false, you may call the witness, “but may not elicit or otherwise permit” the false testimony (Comment 6)

After Introduced

- Discover (or realize) Falsity
  - Must Take Reasonable Remedial Measures (Comment 10)
    - "[R]emonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence"
    - "If that fails [and] if withdrawal . . . is not permitted or will not undo the effect of the false evidence, the advocate must make disclosure to the tribunal"
    - Implies that withdrawal or correction does not have to come with an explanation

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After Introduced

- Develop a reasonable belief of falsity
  - Still have a choice?
    - The rule only says you may refuse to offer on a reasonable belief
    - The rule's requirement for remedial measures only applies when the lawyer knows the evidence offered is false
    - The comments are silent

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Withdrawal

- Comment 15
  - Not normally required to comply with duty of candor to the tribunal, but
  - May be required by Rule 1.16(a) to seek permission to withdraw due to the deterioration of the attorney client relationship brought about by the remedial measures

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Duration of Duty

- Duty ends with the end of the case (Comment 13)
  - Case ends when a final judgment "has been affirmed on appeal or the time for review has passed"

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Duty to move from suspicion to reasonable belief to knowledge?

- Definitions, Rule 1.0:
  - Knows: actual knowledge, "may be inferred from circumstances"
  - Reasonably believes: "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable," "may be inferred from circumstances"
  - Reasonably should know: "a lawyer of reasonable prudence and competence would ascertain the matter in question" [This term is not used in Rule 3.3]
  - Reasonable: "When used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer"

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Duty to move from suspicion to reasonable belief to knowledge?

- Any duty to investigate?
- Apparently none if lawyer does not know of falsehood
  - Resolve doubts in favor of the client
  - but cannot ignore obvious falsehood (Comment 8)
  - Knowledge can be inferred from evidence

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So do you really have a choice about evidence you reasonably believe is false?

Rule 3.1 – Meritorious Claims and Contentions requires a good faith basis in law and fact

- Comment 2 says lawyers "must inform themselves about the facts of their clients' cases"

Rule 1.3 – Diligence: "A lawyer shall act with reasonable diligence and promptness in representing a client."

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So do you really have a choice about evidence you reasonably believe is false?

- Perhaps the rule gives you an out:

  The language of the rule says you may refuse to offer the evidence you reasonably believe is false

  Only the comment says you must resolve doubts in favor of your client

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OTHER AUTHORITIES

- ABA Formal Opinion 93-376 --The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests

- ABA Formal Opinion 87-353 -- Lawyer's Responsibility With Relation To Client Perjury

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Witness Preparation – The Lecture

- The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad.

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The Lecture - continued

- Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. “Who, me? I didn't tell him what to say,” the lawyer can later comfort himself. “I merely explained the law, see.” It is a good practice to scowl and shrug here and add virtuously: “That's my duty, isn't it?”

  – ROBERT TRAVER, ANATOMY OF A MURDER

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Witness Preparation – Don’ts

- Rule 8.4 - “It is professional misconduct for a lawyer to…
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation
  - (d) engage in conduct that is prejudicial to the administration of justice”
- “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ” Rule 1.2(d)

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Witness Preparation – Dos

- “but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law” Rule 1.2(d)
- “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation” Rule 1.4(d)

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Witness Preparation – Dos

- Rule 1.3 - “A lawyer shall act with reasonable diligence and promptness in representing a client”
  - Comment 1 – “A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor”

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Witness Preparation - Mays

- Restatement 3d Law Governing Lawyers § 116(1) – "A lawyer may interview a witness for the purpose of preparing the witness to testify"

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Witness Preparation - Mays

- Comment b - In preparing a witness to testify, a lawyer may:
  - "reveal[] to the witness other testimony or evidence that will be presented and ask[] the witness to reconsider the witness's recollection or recounting of events in that light"
  - "discuss[] the applicability of law to the events in issue"

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Witness Preparation - Mays

- Comment b - In preparing a witness to testify, a lawyer may:

.....

  - "review[] the factual context into which the witness's observations or opinions will fit"

  - "suggest choice of words that might be employed to make the witness's meaning clear"

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Witness Preparation – Must?

- "There are lawyers who refuse to woodshed witnesses at all ... Their clients most often are referred to as 'appellants.'"

- It's "probably unethical to fail to prepare a witness"

David H. Berg, Preparing Witnesses, 13 No. 2 LITIG. 13, 14 (1987)

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Authority Directly Adverse: Rule 3.3(a)(2)

- "A lawyer shall not knowingly … 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"

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The Controlling Jurisdiction

- Appellate jurisdictions that would be controlling on your court
  - Regardless of whether the adverse case is itself being appealed

- Equivalent court?

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Directly Adverse To The Position Of The Client

- Directly adverse does not mean controlling authority

- Standard from ABA Formal Opinion 280:
  - "Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case?"
  - "Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him?"

Directly Adverse To The Position Of The Client

- Standard from ABA Formal Opinion 280 (cont'd):
  - "Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?"
  - "We would not confine the Opinion to 'controlling authorities' -- i.e., those decisive of the pending case -- but...would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case."

Directly Adverse To The Position Of The Client

- Factually distinguishable is not enough to avoid duty to disclose
- That the adverse authority is dicta does not excuse disclosure
- When there is little authority on an issue, such as interpretation of a young statute, the duty to disclose may be broader
- “A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions” ABA Formal Opinion 280

Directly Adverse To The Position Of The Client

- Disclosing the authority is not an admission that the authority is dispositive
  - A lawyer may challenge the soundness of the other decision, attempt to distinguish it from the case at bar, or present other reasons why the court should not follow or even be influenced by it

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Directly Adverse To The Position Of The Client

- Statute of Limitations

No duty to disclose that it has run

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Not Disclosed By Opposing Counsel

- The Dilemma – raise it in initial briefing or oral argument or hope opposing counsel finds it

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Known To The Lawyer

- Rule 1.0 - Known: actual knowledge, “may be inferred from the circumstances”
- Rule 1.1 - “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
  - If a case is directly adverse to your client’s position and you don’t know about it, are you in compliance with Rule 1.1?
  - If your defense to a rule to show cause is that you did not know about the case, have you admitted incompetence?

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When to disclose Adverse Authority

- If known while arguing – while arguing
  - If no oral argument is expected, better brief it
- If issued after an order that is not a final, appealable decision – promptly
- The duty of disclosure continues to “the conclusion of the proceeding” Rule 3.3 comment 13

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Other Authorities

- ABA Informal Opinion 84-1505 -- Duty to Disclose Adverse Legal Authority

- ABA Formal Opinion 94-387 -- Disclosure to Opposing Party and Court that Statute of Limitations has Run

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Inadvertent Receipt of Documents

Rule 4.4(b) requires:

> "A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender."

- Duty to promptly notify opposing party or their lawyer of documents lawyer knows were mistakenly sent or produced.

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“Document”

- Includes e-mail or other electronic modes of transmission
- ABA Ethics 20/20 Proposed Rule 4.4(b) - Adds receipt of “electronically stored information” to type of information that if lawyer knows (or reasonably believes) was inadvertently sent, lawyer should promptly notify the sender
- Metadata - Lawyer receiving the electronic document can mine it for any metadata under Rule 4.4(b) - ABA Formal Op 06-442 (August 2006).
  - Although several state bars have since issued opinions concluding otherwise, including Alabama, Arizona, Florida, Maine, New Hampshire, and New York

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- Rule doesn't require the receiving lawyer to:
  - refrain from examining or using the document, or
  - return, destroy or sequester the document, as the Sender might request.

See Comment [2] to Rule 4.4.

- Need to look to other applicable law
  - a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-ordered sanctions, including disqualification and evidence-preclusion. *See* Comments [2]-[3] to Rule 4.4.

  - E.g., Fed. R. Civ. P. 26(b)(5)(B) establishes a protocol for resolving claims of inadvertent disclosure during discovery in a federal lawsuit and imposes specific legal obligations on receiving lawyer; *see also* IL S.Ct.Rule 201(p) and Rule 502(b) to the Illinois Rules of Evidence (eff. 1/1/13)

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Improperly Obtained Documents

- *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 2010)
  - "Despite receiving [flash] drive 'under very, very suspicious circumstances,' the Firm spent in excess of 100 hours reviewing its contents …"
  - Firm obtained improper informational and tactical advantage
  - Firm disqualified
  - Attorney may be required to advise client to consult with criminal defense lawyer

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- *Castellano v. Winthrop*, 27 So.3d 134 (Fla. 2010)
  - Where a lawyer "receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party ... If the client refuses to consent to disclosure, the attorney must withdraw from further representation" (citing Fla. Bar Prof'l Ethics Formal Op. 07-1)

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- Inadvertently-sent documents
  - opposing party must be notified of receipt under Rule 4.4(b)
- Improperly-obtained document
  - the opposing party must be notified prior to review and in order for the receiving lawyer to continue representation under Rules 4.4(a) (improper methods of obtaining evidence); 1.2(d) (assisting a client in criminal or fraudulent conduct); and 8.4 (general misconduct rule)
- Absent notification in either instance, the receiving lawyer is subject to discipline

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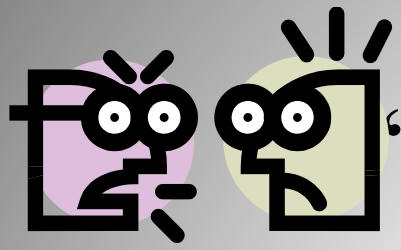

"Incivility" Under the Rules

- "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude [treating others] involved in the legal process with courtesy and respect" Comment [1] to Rule 1.3
- Taking action that merely serves to harass or maliciously injure another (R. 3.1, 3.2 & 3.3)
- Using means "to embarrass, delay or burden" another (R. 4.4); obtaining/obstructing evidence by violating another's rights (R. 3.3, 3.4 & 4.4)
- Conduct "prejudicial to the administration of justice"; discriminatory treatment of others (R. 3.3 & 8.4(d))
- "Bring[ing] the courts or legal profession into disrepute" (Ill. S.Ct.R. 770)

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Cases Prosecuted

Typically involve:

- History of multiple claims of unprofessional behavior;
- Physical harm or serious threats to do so;
- Use of foul or threatening language documented by letter, transcript or other writing;
- Diminished professional objectivity (lawyer took case too personally or was *pro se*); and/or
- Underlying problem of mental or substance impairment.

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In re Marvin Gerstein, M.R. 7626, 91 SH 354 (IL. 1991) (censure)

***

More importantly, as far as I am concerned, in the twenty-six years that I have practiced law, I have never met, in a limited basis, a more despicable self-made piece of dog shit than you. You are a fucking slime-ball and a fucking slime-bag and I piss on your existence. What I want to tell you specifically is to take this letter and jam it up your asshole, resulting in severe paper cuts. You are a used condom of the highest order.

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Suggestions on Ways to Minimize Problem Behavior

- Don’t take it personally; otherwise, you risk becoming part of the problem
- Make a record.
- Don’t involve the judge unless the behavior impairs the administration of justice
- Involve the ARDC or Lawyers Assistance Program (LAP) if there are serious concerns about a lawyer’s mental fitness
- Talk it out with others. *E.g.,* ARDC Ethics Inquiry Program

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Mediation in General

- Florida Rule 10.720 – Mediation Defined
  - "[A] process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process intended to help disputing parties reach a mutually acceptable agreement."
  - Applicable in other states too.

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Non Participating Parties

- Special Rule in Florida (Rule 10.200)
- Mediator has duty to bring to parties' attention "the identity of nonparticipating persons" and the fact that they may be impacted by results of mediation
  - Other insureds, co-employees, shareholders

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Snakes in the Courtroom

The Reptile strategy

- Don Kennan, a successful plaintiff's attorney in Atlanta and David Ball, a jury consultant from Colorado

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The Reptile strategy

Theory:

- (1) subconscious primitive part of the brain can control decision making
- (2) The reptilian part of the brain will always chose safety and survival
- (3) Jurors will instinctively chose to protect their families and communities
- (4) Jurors can be convinced to provide that protection through their verdict.

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The Reptile strategy

- According to this theory, you can predictably win a trial by speaking to, and scaring the pants off the primitive part of jurors' brains.

- Is it ethical?

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Questions?

If you have any, ask Frank.

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