

Considerations for Legal Ethics: “When my Picker Ain’t Picking” and Other Tales from the Farm

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**MY PICKER AIN'T PICKIN'
AND OTHER TALES FROM THE FARM**

BY

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I have been asked to give a presentation on ethics. We all know that the only real ethics rule is “Do Unto Others As You Would Have Them Do Unto You”. Lawyers, however, as did the Pharisees and the Sadducees, had to embellish on that simple formula. Arkansas has established thirteen responsibilities and eight rules with numerous subsections under each rule. I will attempt to give some life to some of those rules under the scenarios presented below.

RULES AND RESPONSIBILITIES TO BE APPLIED.

As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. (Preamble, Arkansas Rules of Professional Conduct)

Rule 1.6. Confidentiality of information.

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent.

Rule 3.3. Candor toward the tribunal:

A lawyer shall not knowingly make a false statement or fail to correct a false statement of fact or law to a tribunal or offer evidence that the lawyer knows to be false;

A lawyer shall take reasonable remedial measures to prevent his client from engaging in fraudulent conduct related to the proceedings.

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not unlawfully obstruct another party’s access to evidence or conceal a document or other material having potential evidentiary value;

A lawyer shall not falsify evidence or assist a witness to testify falsely.

Rule 4.1. Truthfulness in statements to others:

A lawyer shall not knowingly make a false statement of a material fact to a third party

SCENARIO I:

MY PICKER AIN'T PICKIN'

Top Grower comes into your office and tells you his cotton picker ain't pickin'. He purchased his new \$650,000 picker in August. He takes it to the field in middle of October to begin picking his cotton crop. The picker runs a couple of hours and stops. He calls is local dealer, who sends out its service people. They don't know what's wrong and take it into the shop. A week later the dealer returns the picker to Top Grower, who cranks it up and begins picking cotton. Within an hour the picker stops picking. This fact pattern is repeated several more times to the point that the picker is out of action until late November, when it is finally repaired. By then, rains have set in and most of the cotton crop is on the ground. Top Grower has been pleading with dealer since the second break-down to supply him with another picker. Lawsuit ensues. Depositions are taken. Parties agree to meet and attempt settlement. Settlement negotiations are going great for Top Grower. Offer is made to settle. You take Top Grower into room to finalize settlement and during discussion Top Grower tells you that he had another old picker in his shop that he never used during the break-downs. He has never been asked about additional picker in his possession.

Do you reveal this development to opposing counsel?

Do you go back and settle and get out of Dodge?

Do you end settlement negotiations and let matter go to trial?

How do you instruct client to answer if he is asked about a second picker?

Do you act differently if your client has stated in deposition that he did not have a second picker?

SCENARIO II

THE EMANATIONS FROM THE BARN ARE OMINOUS

Hog Man raises hogs from piglets to porkers. Those little pigs get the best food. Hog Man has gotten his little piggies up to large porkers and it is time for them to make their journey to the abattoir. Off they go to Iowa in a nice big limo eighteen wheeler. On the way those big ol' juicy hogs are intercepted by the FDA and placed in a holding pen in Iowa with other hogs and no water. This is a stressful situation and hogs don't like stress. The FDA calls Hog Man and says that the nice pig porkers have eaten grain contaminated with dioxin. He can either come and get his hogs or the FSA is going to execute them.

Hog Man decides to bring them home knowing that they may have picked up diseases from the other hogs.

The hogs are returned and placed back in the confinement house. The hogs have lost a lot of weight because of stress and heat. They look pitiful. Sure enough those hogs and other hogs in the facility begin to die.

Meanwhile, FDA calls Hog Man and says that FDA tested three of his hogs and there was no dioxin found. (True is, dioxin is not assimilated into the meat of a hog and it turns out that the grain Hog Man bought was not contaminated.)

Hog Man is mad and despondent. He comes to you to get satisfaction. He tells you that the company that provided him the food never notified him that the company was under investigation for selling dioxin contaminated food.

You are also righteously indignant and you sue the granery. You enter negotiations with no luck. A trial is had. During your trial preparation you become aware that on the day Hog Man shipped his porkers and prior to him loading the hogs he had a visit from an agent of the FDA advising him that there was a possibility that his hogs had been contaminated with dioxin because grain purchased from the granery during the time he had purchased grain had been found to contain unacceptable levels of dioxin.

Hog Man never told you that. Granery lawyers never directly asked Hog Man if the FDA had made him aware of the possibility of dioxin contamination prior to shipment.

Your theory of liability is constructive fraud. In other words, this whole case is about notice.

Do you reveal this development to opposing counsel?

What do you tell Hog Man if he is asked about receiving notice from the FDA?

Do you even mention to Hog Man what you have found out about the FDA visit?

Would your action change if Hog Man had answered in deposition that he had not been visited by the FDA?

Would your action change if Hog Man told you he had forgotten about the visit because his hogs had already been moved to the shipping pen, the truck was on premises, and it was not economically feasible to delay shipping?

SCENARIO III

CAN I HAVE THE LAND AND PLOW IT TOO

Plowboy has the opportunity to buy an interest in a 40 acre tract next to his farming operation. He is told he is buying a 75% interest in the 40 acres. He likes the deal and purchases the land. He then retains you to partition the 40 acres. You file suit for partition and name the owners of the 25% interest as defendants and obtain proper service. There is no response from the defendants and you begin to prepare an order for partition. You do another search of the title just to make sure you have your facts straight when you discover that the person who claimed to have a three-fourths interest only had a 68.25% interest. Your research reveals that the seller did not purchase the interest of one of his siblings. The family claims to have lost tract of the sibling and seller says he has claimed the land as his for twenty years.

Do you present the order to the judge for signature just like you filed the complaint?

Do you inform the Court of what you have filed and ask for guidance?

Do you file an amended complaint and publish notice for the missing heir?

Do you make a concerted effort to locate the lost sibling or his heirs or do you simply take the word of the seller that sibling has not been heard from in over 20 years?

Rule 3.3 Candor Toward The Tribunal

(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;

(2) 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

(3) 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.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3 Candor Toward The Tribunal - Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to

the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, 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).

Legal Argument

[4] 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)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that 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.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or

statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. 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. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate 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, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony 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.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in 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.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

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

Rule 3.4 Fairness To Opposing Party And Counsel - Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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 a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] 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.

Rule 4.1 Truthfulness In Statements To Others

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

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.1 Truthfulness In Statements To Others - Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

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

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.