

McGUIREWOODS

# Litigation Ethics: Key Issues

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# Ethics: Basic Themes

- Ethics is not professionalism
- Ethics is not intuitive
- Ethics is not universal
- Ethics is not timeless

# Litigation Ethics: Basic Themes

- Outcome or process focus?
- Differing rules
- Evolving rules
- Mismatch between rules and court approach

# Choice of Law

“In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”

ABA Model Rule 8.5(b).

# Communications About Cases

“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

ABA Model Rule 3.6(a).

# Communications About Judges

“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

ABA Model Rule 8.2(a).

# Communications: Threats

- Rule 1.2 (entitled “Scope of Representation and Allocation of Authority Between Client and Lawyer”): Ohio Rule 1.2(e).
- Rule 3.4 (entitled “Fairness to Opposing Party and Counsel”): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).
- Rule 4.4 (entitled “Respect for Rights of Third Persons”): Tennessee Rule 4.4(a)(2).
- Rule 8.4 (entitled “Misconduct”): D.C. Rule 8.4(g); Illinois Rule 8.4(g).
- California Rule 3.10; Texas Rule 4.04(b).

# Communications: Inadvertent Transmission

“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

ABA Model Rule 4.4(b).

“Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent.”

ABA Model Rule 4.4 cmt. [3].

# Communications: Metadata

- State legal ethics opinions
- State characterizations

# Discovery: Tape Recording

- ABA LEO 337 (8/10/74) (“The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.”).
- ABA LEO 422 (6/24/01) (“[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.”).

# Discovery: Deception

- Social media
- Socially worthwhile deception
- Commercial deception

# Witnesses: Paying Fact Witnesses

“A lawyer shall not: . . . offer an inducement to a witness that is prohibited by law.”

ABA Model Rule 3.4(b).

“With regarding 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.”

ABA Model Rule 3.4 cmt. [3].

# Witnesses: Preparing Testimony

“A lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false.”

ABA Model Rule 3.3(a)(3).

“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.”

ABA Model Rule 3.3 cmt. [8].

# Witnesses: Correcting False Testimony

“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.”

ABA Model Rule 3.3(a)(3).

“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.”

ABA Model Rule 3.3(c).

# Pleadings: Claims Subject to Affirmative Defenses

ABA LEO 387 (9/26/94) (“We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter.”).

# Pleadings: Ghostwriting

ABA Informal LEO 1414 (6/6/78) (“Extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.”).

ABA LEO 446 (5/5/07) (“In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.”).

# Duty to Inform Courts: Facts

“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.”

ABA Model Rule 4.1 cmt. [1].

“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.”

ABA Model Rule 3.3 cmt. [14].

# Duty to Inform Courts: Law

“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.”

ABA Model Rule 3.3(a)(2).