

BIG E....little e: ETHICS AND THE TRIAL LAWYER

IADC TRIAL ACADEMY

AUGUST 5, 2015

MARK S. OLSON

OPPENHEIMER WOLFF & DONNELLY

THE GLASS OVENWARE COMPANY

TO: MR. SHARP
DATED: APRIL 19, 2008
FROM: MS. SERVICE
RE: GLASS OVENWARE

We had one complaint about six months ago about a piece of the old glass ovenware breaking as the customer took it out of the oven. It was no big deal -- the dish cracked along one side and we sent a replacement. I was reminded of the incident yesterday, however, when I read an article in Glass Science Magazine about flaws in heat tempered glass which can cause cracking or something, especially in older glass products. It made me wonder whether we might have a design defect in our glass ovenware products throughout the product line. Should we follow up?

GLASS OVENWARE PROBLEM

INJURIES = burns

ACCIDENTS = few

WORST CASE = explosion

Only people likely to be hurt are
housewives and they come cheap!

RECALL = \$\$\$\$!!

Not worth the trouble.

THE ACCIDENT

THE LAWSUIT

THE 30(b)(6) DEPOSITION NOTICE ARRIVES

ANATOMY OF A MURDER



THE VERDICT



- Who coined the term “horse shedding” when used in the context of witness preparation?
- A. Benjamin Franklin
- B. Mark Twain
- C. James Fenimore Cooper
- D. Abraham Lincoln

ANATOMY OF A MURDER

- This lawyer ethically counseled his client?
- 1. Yes
- 2. No
- 3. Yes, but only because the charge was 1st Degree murder

THE VERDICT

- This lawyer, and his high powered defense team, ethically prepared this doctor for his testimony.
- 1. Yes
- 2. No
- 3. Maybe

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

1.(a) A lawyer shall not knowingly:

- a. (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;

- c. (3) offer evidence that the lawyer knows to be false

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice

EXAMPLES THAT CLEARLY CROSS LINE

- KNOWING A FACT, YOU ASK THE WITNESS TO
MAKE A STATEMENT CONTRARY TO THAT FACT
- TO LIE

EXAMPLES THAT CLEARLY CROSS LINE

- KNOWING A FACT, YOU ADVISE THE WITNESS OF THE CONSEQUENCES OF THAT FACT, AND ALLOW THE WITNESS TO TESTIFY CONTRARY TO THAT FACT

EXAMPLES THAT CLEARLY CROSS LINE

- NOT KNOWING WHETHER THE LIGHT WAS RED OR GREEN, YOU ADVISE A WITNESS WHO HAS TOLD YOU HE/SHE DIDN'T SEE THE LIGHT OF THE CONSEQUENCES OF A RED LIGHT, AND ALLOW HIM/HER TO TESTIFY THAT THE LIGHT WAS GREEN

EXAMPLES THAT CLEARLY CROSS LINE

- SUGGESTING THAT THE WITNESS TESTIFY TO ANYTHING WHERE THE WITNESS HAS TOLD YOU HE/SHE DOESN'T KNOW OF OR JUST CAN'T REMEMBER

EXAMPLES THAT CLEARLY CROSS LINE

- BY WORDS OR SUGGESTION, CANNOT TELL A WITNESS WHAT HE/SHE NEEDS TO SAY TO GET FAVORABLE TREATMENT

IN PRACTICE:

- TRUTHFUL TESTIMONY FAVORABLE TO CLIENT
- MAY DISCUSS THE ROLE OF THE WITNESS AND EFFECTIVE COURTROOM DEMEANOR
- DISCUSS RECOLLECTION AND PROBABLE TESTIMONY

IN PRACTICE:

- REVEAL OTHER EXPECTED TESTIMONY UNDER APPROPRIATE CIRCUMSTANCE
- APPLICABILITY OF LAW TO FACTS
- REVIEW DOCUMENTS

IN PRACTICE:

- DISCUSS LINES OF PROBABLE CROSS
- MAY SUGGEST WORD CHOICE TO MAKE MEANING CLEAR

SELF-MONITORING - HOW DOES THE ETHICAL LAWYER KEEP FROM INFLUENCING MEANING OR CONTRIBUTING TO THE PRESENTATION OF FALSE TESTIMONY

- WHY ARE YOU “COACHING”?
- ARE YOUR QUESTIONS LEADING OR OPEN ENDED?
- IS THE WITNESS STRUGGLING WITH MEMORY?

SELF-MONITORING - HOW DOES THE ETHICAL LAWYER KEEP FROM INFLUENCING MEANING OR CONTRIBUTING TO THE PRESENTATION OF FALSE TESTIMONY

- ARE THERE WAYS TO REFRESH MEMORY THAT ARE LESS LIKELY TO IMBED THE LAWYER'S SUGGESTIONS OR COMMENTS?
- ARE THE WITNESS' STATEMENTS INCORPORATING INFORMATION FROM YOUR QUESTIONS IN THEIR ANSWERS?

SELF-MONITORING - HOW DOES THE ETHICAL LAWYER
KEEP FROM INFLUENCING MEANING OR
CONTRIBUTING TO THE PRESENTATION OF FALSE
TESTIMONY

- BEWARE OF THE WITNESS WHO SAYS: WHAT
DO YOU WANT ME TO SAY?

THE DEPOSITION



- At the end of the deposition, what steps, if any, would you take?
- A. Reserve the right for Mr. Sharp to read and sign the deposition.
- B. Tell Mr. Sharp that if he does not change his testimony to the truth, you are going to tell his boss, the Company's CEO, about this incident and that Mr. Sharp could be disciplined or even lose his job.
- C. Tell the CEO about the situation.
- D. I would to all 3 things in A – C.
- E. Withdraw from the case.

WHO IS MY CLIENT?

- During the course of the deposition prep meeting, Mr. Sharp asks you if you are his lawyer. He also asks you if what he says to you in the meeting is confidential and will not be disclosed by you to anyone, either inside or outside of Glass Ovenware Co.

- It is proper and ethical to tell Mr. Sharp:
- 1. I'm hired to represent the Company and will be representing you in your deposition.
- 2. Whatever you tell me in this meeting is protected by the attorney-client privilege.
- 3. If you are concerned about my representation of you, you can always hire your own lawyer at your own expense.
- 4. If I learn of important facts from you, I may share them with the CEO.

CLASS ACTION



- Assuming that Maggie knew that the witness was a truthful witness, did she engage in any conduct that violated any ethical rules by continuing her line of cross-examination?
- A. Yes
- B. No
- C. It depends on how much money is at stake.
- D. There is no ethical boundary to worry about.
- E. I don't know.

RULE 4.4(a): RESPECT FOR THE RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person. . . .

COMMENT TO RULE 1.3

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

You have been with Maggie in the deposition and at the end of the deposition, you and Maggie leave the room for a couple of minutes.

As you are about to walk back into the deposition room you see the plaintiff crumple up a piece of paper from a legal pad and throw it into the trash can in the corner of the room. Plaintiff's counsel and his client then leave the room.

If I represent the Defendant, I would:

1. Ignore the crumpled up piece of paper in the trash can.
2. Go over to the trash can and pick out the crumpled up piece of paper and read it.
3. It depends on whose office I'm in for the deposition.
4. It depends on what's on the piece of paper.

THE MEDIATION SESSIONS

- Prior to starting the negotiating session, your client tells you that he is willing to offer as much as \$6.5 million to settle the case but that he'd like to get it settled for “as little as possible.”

Late in the day, the mediator asks you what your client's "bottom line" is in terms of the amount he is willing to pay to settle the case. You answer:
"\$4.75 Million."

- The Lawyer's Response to the Mediator is conduct that is:
 - A. Ethical
 - B. Unethical
 - C. It Depends

Suppose that instead of a private mediation session, this is a court-ordered mediation session before a U.S. Magistrate Judge.....

- In response to the same question, I would tell the Magistrate:
- 1. \$4.75 Million
- 2. \$6.0 Million
- 3. I'd refuse to answer the question.
- 4. I'd tell the Magistrate that it is "none of your business what my client's bottom line is".
- 5. I'd dance a bit.

During the course of a mediation with the federal magistrate judge, the judge asks you whether your client is willing to pay any more money to resolve the case. You know that your client is willing to pay another \$100,000 to resolve this case but you believe that the plaintiff is very close to taking the money offered.

1. It is acceptable for you to tell the judge “no”.
2. It is acceptable for you to tell the judge you don’t know but doubt they will pay any more.
3. It is acceptable for you to tell the judge you don’t know.
4. You cannot answer the judge without express permission from your client.
5. You must tell the judge “yes”----- that your client is willing to pay more money

RULE 4.1

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.

SETTLEMENT TERMS

Besides the money involved, the client tells you that he will insist on the following 4 settlement terms and will not agree to any settlement if these terms are not agreed to by Plaintiff's counsel.

- 1. Court file must be “sealed” and the terms of the settlement must be “secret”.
- 2. Plaintiff’s counsel must agree to return all discovery materials and may not retain any copies.
- 3. Plaintiff’s counsel must agree to not represent any new clients in similar cases against Glass Ovenware Co.
- 4. The expert witnesses lined up by Plaintiff’s counsel must agree not to testify in any future similar cases.

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....;
-
- (f) request a person other than a client from voluntarily giving relevant information to another party unless.....

RULE 3.4 (con't)

- (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.

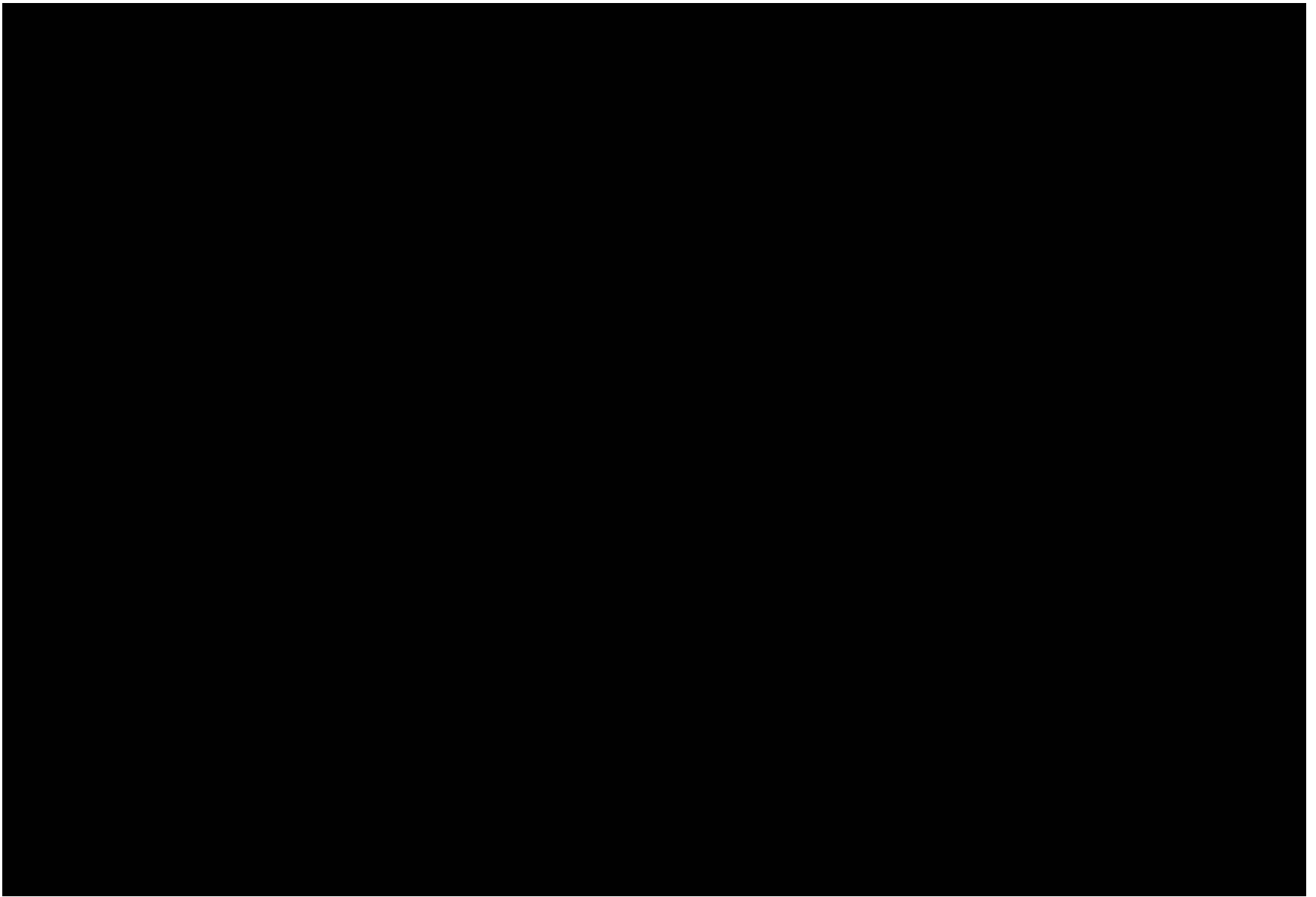
RULE 5.6(b)

- A lawyer shall not participate in offering or making:
 - (a).....
 - (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

- What about if you suggest to Plaintiff's counsel that your client would like to hire both the experts and Plaintiff's counsel as consultants for \$50,000 a year each for a period of five years.
- Does this proposal violate any ethical rules?
- 1. Yes
- 2. No
- 3. I don't know.

**THE CASE IS GOING
TO TRIAL IN 5
WEEKS**

SOCIAL MEDIA



Assuming that the lawyer's legal assistant proceeds to log on to the prospective juror's Facebook page which is not "friend protected" and makes notes about the available information, has the lawyer engaged in any conduct that violates any ethical rules?

- A. Yes
- B. No
- C. I don't know.

If the prospective juror's Facebook page is "friend protected" and the legal assistant requests permission to be the juror's "friend", using her own truthful identity and home e-mail address, and is permitted access to the prospective juror's "private" Facebook pages, has the legal assistant or her boss, the supervising attorney, engaged in any conduct in violation of any ethical rules?

- A. Yes
- B. No
- C. I don't know.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
 - (c) A lawyer shall be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) The lawyer orders, or with the knowledge of the specific conduct, ratifies the conduct involved.....

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice

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;.....

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

THE IME

RULE 1.6

...a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client.

RULE 1.6(b): A Lawyer May Reveal:

(1).....

(2).....

(3) the intention of a client to commit a crime and the information necessary to prevent a crime;

(4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;



Do you have an ethical obligation to your client to advise them that the plaintiff is terminally ill from a condition unrelated to the accident?

1. Yes

2. No.



Do you have an ethical obligation to tell the plaintiff or her lawyer of her condition?

1. Yes

2. No.

RULE 1.6(b)

“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;...”

PRACTICE POINTERS

QUESTIONS