

Ethics 2021

Legal Ethics and Professionalism of Your Favorite TV Show, Yada, Yada

Clifford Law Offices



1) Preparing a Witness to Testify, Continued

Although these two non-lawyers have gone over the top in concocting testimony to be presented under oath, what is a lawyer's duty in preparing a witness for deposition or trial, if the lawyer knows that false testimony will be presented, but is key to winning the case?

- A) Tell your client that he/she cannot testify because you know it involves falsehoods.
- B) Withdraw from representation of the client so as not to prejudice his/her case and allow the client to seek other counsel.
- C) Inform your client of the potential penalties of perjury and then move forward with the trial.
- D) None of the above.



2) Representing a Deceitful Client

The lawyer agrees to defend a woman in a murder trial. The client alleges she killed the victim in self defense after he tried to rape her.

Near the close of trial, the lawyer discovers that the client had purchased then destroyed a neighbor's video which showed the client and victim kissing in her hallway the night of the shooting, after which the victim entered the client's apartment.



2) Representing a Deceitful Client, Continued

Should the lawyer have reported the existence of this information, or is it protected by the attorney-client privilege?

- A) The lawyer needs to report any and all information to the court or the prosecutor.
- B) No, the lawyer doesn't need to do the prosecutor's homework.
- C) The attorney-client privilege protects this information and the lawyer is under no duty to say anything.
- D) Since the video was destroyed, there is no duty to report evidence that doesn't exist.



2) Representing a Deceitful Client, Continued

What should the lawyer have done as he faced closing argument?

- A) Say nothing about the information; a lawyer is required to zealously represent his client to the end.
- B) Say nothing about the information and recuse himself from the proceedings.
- C) Recuse himself from the proceedings and advise the court of the information.



When did the lawyer go too far in his cross - examination?

- A) When he stood too close to the witness box.
- B) When he accused the witness of taking a “kickback” on the expert’s fee without specific proof.
- C) When he accused the witness of not being “an honest man” and “concealing his assets in hidden bank accounts.”
- D) When he asked the court for permission to freeze the witness’ life insurance proceeds before the witness dies.
- E) All of the above.
- F) None of the above; the lawyer did not go too far, provided he was unaware of the witness’ physical state.



Did the lawyer's behavior violate the Illinois Rules of Professional Conduct?

- A) No, the lawyer used his knowledge of opposing counsel's Achilles' heel to gain a tactical advantage in his client's case.
- B) No, ABA Model Rule 8.4(g) prohibiting a lawyer from engaging in harassing or discriminating behavior has not been adopted in Illinois.
- C) No, IRPC 8.4(j), prohibiting a lawyer from engaging in discriminating behavior, does not extend to opposing counsel.
- D) Yes, IRPC 8.4(j) applies to all professional conduct.



A. Yes or No?

Did the conversation between the lawyer and the undisclosed client create a binding attorney/client relationship?



B. Yes or No?

Assuming that a binding attorney-client relationship was created, did the fee agreement satisfy the requirements under IRPC 1.5?



A. Yes or No?

The lawyer's actions of faking to save the billboard worker violated IRPC 7.1, which states that all communications concerning a lawyer's services must not be misleading.



B. Yes or No?

Did the provocative advertisements seeming to encourage couples to seek a divorce violate IRPC 7.1?



C. Principles of Professionalism

Ethics rules aside, does this billboard violate principles of professionalism that should:

- a. demonstrate respect for the legal system?
- b. further the public's understanding of and confidence in the rule of law?
- c. maintain a professional, courteous and civil attitude toward all persons involved in the legal system?
- d. All of the above.



A. Yes or No?

Did the witness, an Assistant District Attorney, violate ethical obligations in keeping a “performance incentive chart?”



B. Yes or No?

In Illinois, would a fellow lawyer with knowledge of such a “performance incentive chart,” have a duty to report this conduct to the ARDC?



A. Yes or No?

While at a bar association event, the lawyer gained knowledge of the judge's pending divorce; was it proper to use this knowledge in asking for the judge's recusal?



B. Yes or No?

If the lawyer learned of the judge's pending divorce because they are Facebook friends, would that need to be disclosed to opposing counsel?



A. Is it appropriate to create an attorney -client relationship in order to protect confidential information that may be damaging to the lawyer or client?

No; this is a sham attorney-client relationship.

Yes; why the relationship was formed is irrelevant, provided the relationship otherwise meets the requirements under the IRPC.



11) Lawyer's Familiarity with Technology, Continued

This clip shows the prosecutors going to the judge to ensure that she understands the importance of their motions because they involve shutting down the cell phones of reported gang members who are allegedly killing people and making the streets of Chicago unsafe.

Question: Should experts be involved in justifying this type of measure or should lawyers be sufficient to argue motions relying on technological issues?



A. Experts or Lawyers?

Yes; when technological issues are involved, experts are always necessary to help a judge decide a case.

No; when there is a greater purpose such as public health and safety, experts aren't necessary.

Neither; the judge can do outside research or rely on the parties' briefs and argument.



IRPC 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.

Comment: Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.



IRPC 1.5– Fees

- a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.



IRPC 1.5– Fees, Continued

- b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Comment: Basis or Rate of Fee

[2] Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.



IRPC 3.1 – Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.



IRPC 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.



IRPC3.4 – 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.



IRPC 3.5– Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.



IRPC3.8 – Special Responsibilities of a Prosecutor

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;



IRPC 7.1– Communications Concerning a Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.



IRPC 7.3– Solicitation of Clients

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) Has a family, closer personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment; or
 - (3) the solicitation seeks representation of the respondent in a case brought under any law providing for an *ex parte* protective order for personal protection when the solicitation is made prior to the respondent having been served with the order.



IRPC 7.3, Continued

- c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

- d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.



IRPC 8.4(j)– Misconduct

It is professional misconduct for a lawyer to:

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.



ABA Model Rule of Professional Conduct

8.4(g) – Misconduct

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.



FRE611 – Mode and Order of Examining Witnesses and Presenting Evidence

- a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- 1) Make those procedures effective for determining the truth;
 - 2) Avoid wasting time; and
 - 3) Protect witnesses from harassment or undue embarrassment.





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Tel: (312) 899-9090

Fax: (312) 251-1160

www.cliffordlaw.com

120 North LaSalle Street

31st Floor, Chicago, Illinois 60602

