Ethics 2023

Refresher on Ethics of Trial Work in a Courtroom

CLIFFORD LAW OFFICES®
CONTINUING LEGAL EDUCATION PROGRAM

Hypothetical One

Judge Gavel is presiding over a high-profile criminal case. John Star, a famous singer/songwriter, is charged with felony drug possession and aggravated battery, stemming from a brawl at a downtown club. John Star claims self-defense and denies possessing drugs.

A jury trial commences, and the jury is eventually sequestered based on the unusual amount of publicity and attention these charges have garnered. After a two-week trial, the jury returns a not guilty verdict on all counts.

Reaction to the verdict ranges from outrage to celebration. The media coverage blames the jurors for not doing their job and blames the judge for failing to reign in the pretrial publicity.

Hypothetical One

After the verdict is returned, Judge Gavel's law clerk posts an article on social media that criticizes the jurors for returning a not guilty verdict, along with the acronym, "SMH" (shaking my head).

Judge Gavel "likes" the news article posted by his clerk. He then posts an article criticizing his decision not to immediately sequester the jury, along with his comment "Sequestering doesn't fix stupid."

The prosecutor shares Judge Gavel's post and comments "so true."

Hypothetical One

Is Judge Gavel responsible for his clerk's posts?

Has Judge Gavel violated the Judicial Code?

Has the prosecutor violated any of the Rules of Professional Conduct?

Hypothetical Two

During a criminal jury trial, Defendant Dave is charged with felony aggravated unlawful use of a weapon. The jury congregates in the jury room, which is just outside and adjacent to the courtroom. Before opening statements, and while the jury is still in the jury room, Defendant Dave has an extremely loud outburst in court, angrily yelling at the top of his lungs at the judge, the lawyers, and all the courtroom staff present in the courtroom voicing his observations of the injustice of the courtroom and the criminal justice system generally.

Hypothetical Two

Judge Jordan in her chambers, with the lawyers present, questions the sheriffs who have been assigned to maintain the custody and safety of the jurors, as to whether any jurors overheard Dave Defendant's actions in court. Before the deputies could answer, Judge Jordan says she'd rather not know and makes a silent motion to the deputies in which Judge Jordan puts her hand over her mouth. Judge Jordan then proceeds to inform all counsel of record and her courtroom staff that she would acknowledge the outburst for the jury but tell the jurors it was an unrelated party who was yelling. Judge Jordan does not ask for input of counsel of record at all, and motions for all parties to head back to the courtroom to bring in the jury and commence opening statements.

Hypothetical Two

A) Is defense counsel required to confer with client about how to proceed?

B) Do any counsel of record owe any duties to the jury as a whole about the judge's announced course of action?

C) Do any witnesses who may have also overheard the courtroom incident have a duty to report to the court what they heard?

D) Would counsel of record be required to report Judge Jordan to the Judicial Inquiry Board for conduct they witnessed?

Hypothetical Three

Fred Flintstone is an Illinois lawyer. He is representing a long-time client in a proceeding where the client is seeking damages for a breach of a contract. The litigation had been acrimonious and Fred and opposing counsel have been attacking each other during the full course of the action. During an in-person judicial proceeding, Fred turns to his opponent and says, “You, Madam, are a worthless piece of intestinal material.”

Hypothetical Three

Even though this comment may not reflect courtroom civility, can Fred make this comment under the First Amendment?

Can Fred make this comment to an acrimonious opposing counsel's face in court without the court reporter present?

What if Fred's paralegal, who always accompanies Fred to court, actually made the comment to opposing counsel? **Can the attorney be held responsible for his paralegal's words/conduct?**

Hypothetical Three

What if Fred had said to opposing counsel, “If I were you, I would tread very lightly. There is a Second Amendment you know, and just because weapons are not allowed in a courthouse, doesn’t mean that they can’t be brought into the parking lot where your car is parked.”

Any ethical violations here?

Hypothetical Four

A homicide trial is about to begin as the judge circulates the *voir dire* responses to questions asked of the panel. As the prosecutor asks questions, her co-prosecutor searches for relevant information on her laptop that may not have been disclosed.

Though juror #4 responded that he has never been charged with a crime involving firearms, the co-prosecutor found a newspaper article reporting that he was charged as a juvenile in the killing of his mother.

In open court, the prosecutor states that she has proof that juror #4 was served time in juvenile detention for the killing of his mother, as well as subsequent non-firearm-related crimes.

Juror #4 admits in open court that, yes, he had killed his mother. He tells the court he thought that period of his life was over and had no relevance here.

Hypothetical Four

Can the co-prosecutor find outside information, not readily available to the parties, to supplement their information during questioning of the voir dire?

Upon discovery of information that may be relevant in a homicide case regarding juror #4's prior use of illegal weapons, did the prosecutor properly handle the matter in open court?

Hypothetical Five

Lawyer Lauren is a member and shareholder in a firm of 2 other shareholders, and 7 other non-shareholder attorneys. Lawyer Lauren and her firm represent the plaintiff in a breach of contract action before Judge Justice, which has been pending for multiple years due to discovery delays, a global pandemic, and the defendant's retention of new counsel.

Trial is next week and Lawyer Lauren has just learned that Judge Justice had a sexual relationship 10 years ago with Lawyer Lost, one of Lawyer Lauren's law partners. Lawyer Lost has never been involved in the litigation, with the sole exception of bringing the client to their firm, long before the action was filed and Judge Justice assigned.

You know Judge Justice to generally be resistant to delays in this case given its long pendency. Having had multiple trial dates already set and reset repeatedly, Judge Justice is eager to move this matter along.

Hypothetical Five

A. Upon learning this, does Lawyer Lauren have an obligation to:

1. inform her client of what she's learned about this prior relationship?
2. notify Judge Justice of what she's learned?
3. notify opposing counsel?
4. stay silent on the issue given Lawyer Lost's lack of involvement in the litigation?

Hypothetical Five

B) Does the fact that Judge Justice does not appear to know that Lawyer Lost is a partner/shareholder at Lawyer Lauren's law firm relieve Lawyer Lauren from or change any of the above obligations?

C) If a conflict of interest exists as between the law firm and its client as a result of this past relationship, are these conflicts waivable?

Hypothetical Five

D) If not, what options are available to the firm?

1. Withdrawal.
2. Divesture of fees paid/earned from work on action.
3. Other?

Hypothetical Six

Judge Gavel runs a civil call. Jennifer Partner and Robert Associate appear for the plaintiff on an employment discrimination case for a routine status. Also present is attorney Mary Defense for the defendant.

The case has been assigned to Judge Gavel for over a year and the parties had previously conducted a pretrial settlement conference with the judge. The Judge and parties share some small talk before discussing scheduling a final settlement conference.

Judge Gavel notices Jennifer Partner seems confused and unfamiliar with the case despite the multiple appearances and prior settlement conference. The parties prepare an agreed order and ask to approach. The Judge smells alcohol on the Jennifer Partner's breath.

Hypothetical Six

Does Robert Associate have a duty to:

A) Confront Jennifer Partner and ask her if alcohol was part of breakfast?

B) Call the confidential hotline of the Lawyers Assistance Program (LAP)?

C) Tell Judge Gavel?

D) Do anything? Robert Associate isn't Jennifer Partner's babysitter and she has plenty of staff surrounding her who know her behavior better. Perhaps this was an exception.

Hypothetical Seven

Betty Rubble has filed a motion to disqualify opposing counsel due to a conflict of interest. Betty's opponent represented Betty's client more than a decade ago and has performed no legal services for the former client since then. The judge has ruled that the older matter and the present action are not substantially related and declines to disqualify counsel. Betty looks at the judge and says, "You are so wrong, but I guess that is why God created appellate courts."

Hypothetical Seven

Is Betty's comment proper inasmuch as she is giving the judge notice that she intends to appeal?

Hypothetical Seven

Betty is still upset that the judge denied her motion to disqualify opposing counsel. As a result, Betty lodges a complaint against the judge with the Judicial Inquiry Board (JIB). At the next court session, Betty argues that the judge must enter an order of recusal because, in light of the complaint, the judge, “can no longer be impartial.”

Is Betty’s route the proper way to resolve this matter?

Hypothetical Seven

Betty's client sends the Judge a letter that is delivered to the judge's chambers. The judge started reading the letter before the judge realized that the letter was written by a party litigant. The letter reads in part, "My lawyer told me that she needed me to pay her $20,000 so that she could pay you money to rule in my favor. I gave her the cash. I found out that she spent the money at a casino."

Hypothetical Seven

What should the judge do with this information?

a) Immediately recusal one's self.

b) Immediately report the attorney to the ARDC without further proof.

c) Immediately call in the attorney and ask for an explanation in chambers.

d) Immediately call the parties for an emergency motion to get to the bottom of it.

e) Do nothing. This letter obviously was not meant for the judge.

Hypothetical Seven

The judge is concerned about Betty's entire course of conduct. As a result, the judge pays a visit to the division's chief judge. The Chief hears about Betty's course of conduct and says, "It ain't easy being a judge. Why don't you just toughen up and live with this instead of bothering me."

Hypothetical Seven

Should a Chief Judge get involved in a case when a judge is uncertain or is that what judicial mentors are for?

a) **Chief Judge needs to get involved.**

b) **Chief Judge has a lot to do and couldn't possibly get involved in every case that may be difficult.**

Hypothetical Eight

The judge has scheduled a remote hearing in s breach of contract case. All of the lawyers and counsel are required to attend the session via Zoom. After the case is called, the judge notices that Plaintiff's Counsel, Marge Simpson, is not present. This is the third remote session that the court has held in the case. In the two prior instances, Marge has been an hour late for each session. On each of those occasions, Marge informed the court that she is not technically savvy and that it takes her a long time to figure out how to access the Zoom platform.

Hypothetical Eight

Is Marge's comment subject to discipline?

Hypothetical Eight

Marge finally shows up, but this time she is only five minutes late. Instead of a live feed camera, Marge is using a filter that is displaying a picture of Ruth Bader Ginsburg. When the judge asks Marge to take down the photograph and turn on her camera, Marge says, “This is remote. You just need to hear me, not see me.” When the judge threatens to hold Marge in contempt, Marge says, “Judge, the real reason that I don’t want to turn my camera on is because I never wear clothing in my home law office.”

Hypothetical Eight

Is Marge's speech/conduct protected?

What if Marge offered to post her firm's logo or a screen simply with her name. **Can the judge require Marge to appear in person on a live camera feed hearing?**

Hypothetical Nine

Luis Lawyer represents Carolina Client in her divorce. Carolina fired her previous two lawyers and Luis Lawyer is the third to take on the matter. After working with Luis for approximately one year, Carolina Client decided to terminate his services. She has directed Luis to take no further action on the matter, and after informing him of that, stopped communicating with him.

Luis Lawyer moved the court to withdraw from Carolina Client's case, which was denied. In doing so, Judge Jones cited the long line of dismissed lawyers on her behalf, the ongoing discovery, myriad discovery-related motions set for hearing, and the court's belief that Carolina Client's decision to terminate Luis Lawyer was nothing more than another delay tactic.

Hypothetical Nine

After denying Luis Lawyer's motion, Judge Jones continued the case and instructed Carolina Client and Luis Lawyer to resolve their issues in order to proceed with the pending motions. Despite that, Carolina Client has remained entirely nonresponsive to Luis Lawyer and has now *sua sponte* filed several *pro se* motions, none of which Luis Lawyer was aware.

Hypothetical Nine

A) Is Judge Jones's denial of Luis Lawyer's motion permissible?

B) What should Luis Lawyer do?
   1. File a Motion to Reconsider Judge Jones's order
   2. Follow Carolina Client's instructions to cease work on her file
   3. Continue the representation as ordered by Judge Jones
   4. Tell Judge Jones that Carolina Client requires a psychological examination before the Court proceeds any further.

Hypothetical Ten

Judge Jordan and her staff maintain an email account known as a "proposed order mailbox," for the purposes of receiving proposed orders from parties before the court.

A case involving the alleged wiretapping of an ex-husband's email communications is before Judge Jordan. She recently denied Plaintiff's request to extend discovery so that Plaintiff could depose an additional witness. In response to this order, Plaintiff's counsel sent the following emails to the "proposed order mailbox:"

Hypothetical Ten

- “You are violating my client’s rights by truncating discovery deadlines and helping Defendant to escape punishment for wrongs he committed!”

- “I’m sickened by this Order and outraged by the miscarriage of justice!!!”

- “The more I read this order, again and again, I am sick to my stomach, and I get filled with anger and disgust over this ‘fraudulent’ order by this court.”

Hypothetical Ten

Are these statements protected under the First Amendment?

Should the lawyer be disciplined?

Hypothetical Ten

If discipline is appropriate, what sanction should be issued?

A) Disbarment

B) Lengthy suspension of law license

C) Apology to the court

D) Anger management classes

E) A, C and D

F) B, C, and D

G) No discipline is warranted.

Would it make a difference if Judge Jordan asked Plaintiff's Counsel to stop communicating through the proposed order mailbox and she continued to do so?

Hypothetical Eleven

A local nonprofit organization that provides legal services to those with mental health needs just opened a new large office into which it expects to grow in the next several years. Currently, there is extra space available and its Executive Director, Leroy Lawyer, is worried about meeting rising bills until full funding for the space is in place.

Leroy learns that the niece of one of the nonprofit board members, Thelma Therapist, is looking for an office from which to run her mental health counseling practice. Leroy rents space to Thelma, who has no affiliation with the nonprofit organization.

Hypothetical Eleven

After a few weeks into the arrangement, one of Thelma's patients is sent a bill for Thelma's services. The patient hires an attorney to sue Thelma and Leroy Lawyer's organization, claiming the counseling was part of the services provided by the organization.

Did Leroy Lawyer violate any ethical rules by allowing Thelma Therapist to open her for-profit counseling center in a nonprofit legal organization's place of business?

Hypothetical Twelve

Plaintiffs' firm is handling a highly complex matter that involves alleged wrongful conduct by corporate executives. Plaintiffs have asked defendant corporation for a variety of documents. After many motions and months later, defendant corporation delivers to plaintiffs' counsel more than 100 boxes of materials and zip drives that include thousands of emails that may or may not be relevant.

Plaintiffs goes into court on a motion asking the court to order a discovery conference for the parties to narrow some of these documents. Defendant corporation objects and argues that it has complied with the request even though millions of pages are involved.

What should the court do?

Hypothetical Twelve

The court should:

A) Deny Plaintiffs' motion – defendant produced everything they asked for without objecting to the burden or scope of Plaintiffs' requests

B) Grant plaintiff's motion and order the parties to meet and confer to ensure that the proper documents are discovered

C) Order defendant corporation to purchase a software program that is amenable to the needs of the plaintiff's requests

D) Tell the parties that either they figure out what to do or you will dismiss the matter because courts don't have time for micro-managing

Hypothetical Thirteen

Defendant doctor gives a deposition in a medical negligence case. On cross, he testifies as to subsequent discussions he had with hospital administrators regarding the internal studies done by the hospital on the risks of the procedure at issue in the case.

The parties take a break and upon returning, defendant doctor testifies that, actually, he did not document those internal discussions because they were confidential.

Plaintiff's counsel then examines the defendant doctor regarding those internal discussions. Defendant doctor's counsel objects on the grounds of attorney-client privilege.

Has defense engaged in unethical conduct?

Code of Judicial Conduct (CJC) – Preamble and Scope

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of judges with integrity, will interpret and apply the law. Thus, the judiciary plays a central role in preserving justice and the rule of law. Inherent in the Rules contained in the Code of Judicial Conduct (Code) are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

Code of Judicial Conduct (CJC) – Preamble and Scope

[4] The Code governs a judge's personal and judicial activities conducted in person, on paper, and by telephone or other electronic means. **A violation of the Code may occur when a judge uses the internet, including social networking sites, to post comments or other materials such as links to websites, articles, or comments authored by others, photographs, cartoons, jokes, or any other words or images that convey information or opinion**.

Violations may occur even if a judge's distribution of a communication is restricted to family and friends and is not accessible to the public. Judges must carefully monitor their social media accounts to ensure that no communication can be reasonably interpreted as suggesting a bias or prejudice, an *ex parte* communication, the misuse of judicial power or prestige, a violation of restrictions on charitable, financial, or political activities, a comment on a pending or impending case, a basis for disqualification, or an absence of judicial independence, impartiality, integrity, or competence.

CJC Rule 1.2 – Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary and shall avoid impropriety* and the appearance of impropriety.

COMMENT [1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

COMMENT [2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

CJC Rule 2.2 – Impartiality and Fairness

A judge shall uphold and apply the law* and shall perform all duties of judicial office fairly and impartially.

COMMENT [1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

CJC Rule 2.3 – Bias, Prejudice and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, pregnancy, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

CJC Rule 2.3 – Bias, Prejudice and Harassment

COMMENT [1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

COMMENT [2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

CJC Rule 2.8 – Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

CJC Rule 2.8 – Decorum, Demeanor, and Communication with Jurors

COMMENT [2] Commending or criticizing jurors for their verdict, including on social media or social networking platforms may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

COMMENT [3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, or other persons who are not participants in the proceeding and communications made on social or posted on social media or social networking platforms. A judge must make reasonable efforts to ensure that law clerks, court staff, court officials and others under the judge's direction and control do not violate this Rule.

CJC Rule 2.9 – *Ex Parte* Communications

(B) If a judge inadvertently received an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

CJC Rule 2.10 – Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement about a matter pending* or impending* in any court.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

CJC Rule 2.10 – Judicial Statements on Pending and Impending Cases

COMMENT [1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

COMMENT [3] Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter. The Rule does not prohibit a judge from responding to allegations concerning the judge's conduct in a proceeding that is not pending or impending in any court.

COMMENT [4] Judges who are active on social media or social networking platforms should understand how their comments in these forums might be considered "public" statements implicating this Rule. Judges should be aware of the nature and efficacy of privacy settings offered by social media or social networking platforms.

CJC Rule 2.11 – Disqualification

(A) A judge shall be disqualified in any proceedings in which the judge's impartiality might reasonably be questioned, including, but not limited to, the following circumstances:

1. The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of facts that are in dispute in the proceeding.

Comment [1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned…For example, the participation in a matter involving a person with whom the judge has an intimate relationship or a member of the judge's staff may require disqualification.

CJC Rule 2.12 – Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

CJC Rule 2.14 – Disability and Impairment

A judge having knowledge that the performance of a lawyer or another judge is impaired by drugs or alcohol or by a mental, emotional, or physical condition shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment [1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system.

[3] A judge having reliable information that does not rise to the level of knowledge that the performance of a lawyer or another judge is impaired by drugs, alcohol, or other condition may take appropriate action.

CJC Rule 2.15 – Responding to Judicial and Lawyer Misconduct

(A) A judge knowing* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the Illinois Judicial Inquiry Board.

(B) A judge knowing that a lawyer has committed a violation of the Illinois Rules of Professional Conduct of 2010 that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Illinois Attorney Registration and Disciplinary Commission (ARDC).

(C) A judge knowing that another judge has committed a violation of this Code that does not raise a substantial question regarding honesty, trustworthiness, or fitness of a judge shall take appropriate action.

CJC Rule 2.15 – Responding to Judicial and Lawyer Misconduct

(D) A judge knowing that a lawyer has committed a violation of the Illinois Rules of Professional Conduct of 2010 (Ill. S. Ct. Rs., art. VIII) that does not raise a substantial question regarding honesty, trustworthiness, or fitness of a lawyer shall take appropriate action.

CJC Rule 2.15 – Responding to Judicial and Lawyer Misconduct

(E) The following provisions apply to judicial mentoring:

(1) Acts of a judge in mentoring a new judge pursuant to M.R. 14618

(Administrative Order of February 6, 1998, as amended June 5, 2000) and in the discharge of disciplinary responsibilities required or permitted by Canon 3 or the Illinois Rules of Professional Conduct of 2010 are part of a judge's judicial duties and shall be absolutely privileged.

(2) Except as otherwise required by the Illinois Supreme Court Rules, information pertaining to the new judge's performance that is obtained by the mentor in the course of the formal mentoring relationship shall be held in confidence by the mentor.

CJC Rule 2.15 – Responding to Judicial and Lawyer Misconduct

COMMENT [1] A judge having knowledge of misconduct committed by another judge or an attorney must take appropriate action to address the misconduct. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

CJC Rule 2.15 – Responding to Judicial and Lawyer Misconduct

COMMENT [2] A judge having knowledge of a violation of the Code or the Illinois Rules of Professional Conduct of 2010 that does not raise a substantial question regarding honesty, trustworthiness, or fitness of a judge or lawyer, respectively, is required to take appropriate action under paragraphs (C) or (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Illinois Rules of Professional Conduct of 2010 may include but are not limited to communicating directly with the lawyer who may have committed the violation when communicating is consistent with Rule 2.9 (“Ex Parte Communications”) and other provisions of this Code, initiating contempt proceedings, or reporting the suspected violation to the appropriate authority. In both cases, the Rule does not preclude a judge from taking or initiating more than a single appropriate disciplinary measure.

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 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

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

(4) to secure legal advice about the lawyer's compliance with these Rules;

(6) to comply with other law or a court order;

Comment: Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated.

IRPC 1.10: Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is **based on a personal interest** of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

IRPC 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, **a lawyer shall continue representation notwithstanding good cause for terminating the representation**.

IRPC 3.3: Candor Toward the Tribunal

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, **a lawyer shall continue representation notwithstanding good cause for terminating the representation**.

IRPC 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;

IRPC 4.4: Respect for Rights of Third Persons

(a) 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, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

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.

Comment [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

IRPC 7.2: Advertising

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

> (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
>
> > (i) the reciprocal referral agreement is not exclusive, and
> > (ii) the client is informed of the existence and nature of the agreement.

IRPC 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

Comment [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. See *In re Himmel*, 125 Ill. 2d 531 (1988).

IRPC 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.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

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

***

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

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.

S. Ct. Rule 45 – Remote Appearances in Circuit Court Proceedings

(a) Definitions.

(1) The terms “remote” or “remotely” mean the participation of all or some case participants in a court proceeding by telephone, video conference, or other electronic means. Except as otherwise specifically provided in this rule, a remote appearance or court proceeding shall be equivalent to an in-person appearance or court proceeding for all purposes.

(b) General Provisions.

(1) A judge presiding over a case in which the option to appear remotely without any advance approval is permitted may, in the exercise of the judge’s discretion, require a case participant to attend a court proceeding in person for reasons particular to the specific case, including the failure of a case participant to follow applicable standards of decorum. When exercising such discretion, the judge shall inform case participants on the record if they are required to attend a future court proceeding in person.

Additional Sources

- 98-CC-2 *In re Goshgaria*, regarding a judge's comment that the jury was stupid because of its not-guilty verdict
- 02-CC-1, *In re Golniewicz*, where the judge was dissatisfied with the jury's verdict
- *In re Matter of Nejla K. Lane*, Commission No. 2019PR00074 (decided January 17, 2023)
- ABA Formal Opinion 503 (issued November 2, 2022)

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August 19, 2022

Cook County Circuit Court YouTube account disabled

By Grace Barbic
gbarbic@lawbulletinmedia.com

The Office of the Chief Judge for the Circuit Court of Cook County announced Friday that its YouTube account has been disabled because of "unspecified violations" of YouTube Community Guidelines, according to a news release.

The YouTube account is used to provide public access to court proceedings.

The chief judge's office has filed an appeal of the decision with YouTube, but until the account is reestablished, the press and public can attend Cook County Circuit Court proceedings in person at the time and date of the scheduled hearing.

The office has been told to expect a response to its appeal within two business days, according to the news release. It said it was notified by Google early Friday morning about the account.

When trying to access the YouTube account, an error message reads "this account has been terminated due to multiple or severe violations of YouTube's policy against spam, deceptive practices, and misleading content or other Terms of Service violations."

The chief judge's office said it is "not aware of any particular instance that would have precipitated the action, but understands that court proceedings are sometimes graphic in nature and not suitable for all audiences."

January 31, 2017

PRACTICE POINTS

Document Production: Burying Responsive Documents Earns $10,000 Sanction

A reminder to litigation attorneys that courts do not look favorably on parties that dump documents.

By Andrew J. Felser

Share:

Is a document dump worth the risk? A New York Court recently noted that it is discovery abuse to bury your opponent in an avalanche of documents of which only a fraction is relevant. *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 42 N.Y.S. 3d 823 (N.Y. App. Div. 2016). In this legal-malpractice case, the plaintiff produced more than 30,000 documents. The responsive documents were "imbedded in large amounts of otherwise irrelevant documents." The court ordered the plaintiff to put the documents in an electronically searchable format and to organize them in the order requested by the defendants. After the plaintiff complied in part only, the court imposed a $10,000 fine (payable to the defendants). The court afforded the plaintiff an extension to cure its noncompliance and declined to dismiss the action as a sanction.

This case is a reminder to litigation attorneys that courts do not look favorably on parties that dump documents.

Andrew J. Felser is with Felser, P.C., in Denver, Colorado.

American Bar Association
/content/aba-cms-dotorg/en/groups/litigation/committees/pretrial-practice-discovery/practice/2017/document-production-burying-responsive-documents-earns-10000-sanction

June 18, 2021

Document Review: 6 Tips For A More Efficient Process

Jeffrey Wolff

ZyLAB

It is no secret or surprise to anyone in the legal profession that document review takes up the bulk of the time, effort, and costs surrounding litigation. As the cost associated with litigation continues to rise across the United States, the need for document review to become more efficient has been at the forefront of many legal minds for well over a decade.

The case for tool-assisted solutions is obvious, and one that hardly needs any more explaining at this stage: in 2012, the RAND Corporation published a research brief that concluded that document review by itself absorbed about 73% of the cost associated with litigation, while also signaling that bringing labor cost down wasn't a realistic option: "The rates paid to [project attorneys] may well have bottomed out, with further reductions of any significant size unlikely. Some companies have turned to LPOs with access to lawyers in other countries (...) but this practice may raise concerns about information security, oversight, maintaining attorney-client privilege, and logistics" (page 2).

In addition to labor costs being an unlikely source of cost reduction, RAND also notes that human reviewer speed has simply reached its apex. Even lawyers with relevant expertise and knowledge top out at roughly 100 documents per hour, a pace they reached decades ago. In 2018, LawGeex, an AI-assisted contract review tool, pitted 20 corporate lawyers against their solution. The results were telling, with the AI reaching a higher accuracy level than the lawyers (94% to an 85% average). More importantly was the time save, however: the lawyers did the job, on average, in 92 minutes (times ranging from 51 to 156 minutes). The AI did the same job at a better accuracy level in just 26 seconds.

Contents:

The document review process

With the above in mind, the continued rise of eDiscovery tools and technology-assisted review solutions is hardly surprising. Review is typically done by some combination of manual and tool-assisted labor. A 2011 study accurately sums up the balance that must be struck between human and artificial intelligence: "[Document review] requires both the ability to perform routine repetitive tasks in an accurate and timely manner as well as the ability to apply human judgment, reasoning and making fine distinctions about complex matters. (...) The recommended approach to achieve greater accuracy and efficiency is to allocate tasks between humans and computers that play to their respective strengths rather than to their respective weaknesses" (Page 14).

At its core, document review is a culling operation, preparing for production the evidence that a party involved in litigation must disclose under the Federal Rules of Civil Procedure. The initial search for documents typically yields a large amount of potentially responsive (or relevant) documents, the task for document review is to go through these potential sources of evidence and separate what should and should not be disclosed.

During the review process the original batch of search results is reviewed and split into two:

- Responsive documents that are relevant to the matter at hand;
- Non-responsive documents that are not.

This part is simple enough: irrelevant documents are withheld, while relevant documents move on to the next stage, which is to determine if privilege or confidentiality rules apply.

- Privileged – Parties are not obligated to disclose documents subject to attorney-client privilege, the work-product doctrine, or other rules and laws relating to privacy and confidentiality.
- Confidentiality – Outside of legal confidentiality limitations, parties are also not obligated to disclose documents that reveal trade secrets or confidential/proprietary information.

If a responsive document turns out to contain privileged or confidential information (and that privilege or confidentiality has not been waived or otherwise addressed), that document ne (and should not) be disclosed. If privilege or confidentiality-related rules do not apply, the

document must be produced. The next step is to determine whether or not the privileged or confidential information can be redacted or not.

If the privileged or confidential information can be redacted, then the information that needs to be withheld should be, while the rest of the document is left intact. Following this operation, the document must be marked as 'redacted' and disclosed. In cases where redaction isn't feasible, then the document should be marked as 'privileged' and be withheld. Simple enough, but proper redaction is a key element to ensuring privilege remains intact, confidentiality protected and potential damage to the cause avoided.

In essence, that is what document review is: a culling operation where legal professionals and AI-based tools go through a massive amount of information to see what is and isn't relevant, and which parts of the relevant bits must be disclosed.

The challenges of Document Review

In many ways, the challenges of document review all boil down to a single factor: getting it wrong. In a vacuum, reviewing a vast set of documents and making the appropriate decisions with regards to relevance and privilege is challenging already. Litigation isn't a vacuum however, it's a pressure cooker. The window between the start of litigation and initial disclosures has narrowed significantly (from 120 to 90 days), coupled with a continuing growth in data generated (or documents to review) means that document review is in a constant state of having to do more work in less time.

As much as it may seem the obvious conclusion, the holy grail for document review isn't to make it cheaper. Rather, efficiency is. In light of this, rather than looking at how to reduce the costs of legal review, let's look at how you can create a more efficient legal review process.

6 tips for a more efficient legal document review process

1. Plan ahead & mind the details

There truly is no way to properly emphasize how important it is for legal teams to have playbooks and protocols ready to go. Once the ball gets rolling, there is simply too much to do and not enough time to fuss about planning ahead properly. However, when it comes to document review, where the details matter greatly and the process is too complicated to reliably generate the desired results without a solid playbook informing your decisions.

A playbook should contain a standardized schedule that starts whenever litigation can reas[illegible] be expected. Reasonable expectation of litigation is the point when legal teams must start preserving evidence through legal holds according to FRCP 37(e). The playbook should als[illegible]

provide an overview of the responsibilities of every team member involved, as well as a standardized list of tags to use when coding documents following review.

2. Standardization is your friend

As mentioned above, the time allowance on initial disclosure and discovery requests is very limited and deadlines very tight. At the same time, those deadlines are pretty much set in stone, which means they are predictable. Typically, even if the individuals vary (wildly) on a case-by-case basis, the steps involved don't: this is why playbooks are a useable tool in the first place. Using templates and automation to play into the predictable nature of the process can be a big time saver and help ensure consistency.

For the review process itself, having a consistent process of collecting data helps speed collection. It also reduces the amount of confusion that may occur around the collection process, since everybody involved in it will know exactly what goes out since communications are standardized.

3. Reviewing the review team

By reviewing the review team, we're not talking about second- or third-level reviews (yet): review teams should be built for productivity. The task of performing document review requires a skill set that mixes project management, legal expertise, subject matter expertise, and technological skill.

In addition to those measurable skills, there are also intangibles such as the reviewer being able to deal well with stress, being a good communicator, and being detail-oriented. All of these are important for a member of the review team to have.

When the chips are down, the people in a review team are the ones who operate the technology and execute the process detailed in the playbooks and plans. Making sure those people are the right ones is vital.

4. Doing more in-house, carefully

The document review as discussed here is considered a first-level document review, with the second and third level taking place after initial disclosures to get a sense of what can be used for or against in court (second level) and to ensure that the evidence produced can be found again later if needed (third level).

In that first level, the balance between work done by in-house or external counsel varies between organizations (and even from case to case at times). From a cost reduction point of view, th more work that can be done in-house, the better. At the same time, it is paramount that th

quality of the work does not suffer: if the in-house team is unable to handle a more detailed and fine-toothed culling operation, then it makes no sense to ask them to do so.

Equipping the in-house review team with the right people, proper processes and adequate tools should help them to take a growing role in the process. By periodically evaluating the performance of the team and the disparities between the dataset sent to external counsel and the final production, you can readjust the balance between the in-house and external counsel responsibilities when it comes to document review.

5. Get the right tools for the job

Tools are unavoidable when it comes to document review nowadays, and it's been that way for decades now. As we noted earlier, the amount of data is growing at a terrifying pace, human review speed has reached its apex, and the time allowed to perform review is being reduced rather than expanded. Invariably, tools are needed to make up the difference.

Getting a tool that provides an end-to-end solution for document review can make a difference when it comes to achieving the desired result in a case. Modern-day solutions offer a wide range of applications of Artificial Intelligence and dynamic reporting. Automated classification and tagging speeds up parts of the review process tremendously, enabling legal teams to be more effective and efficient with the limited time they are given.

6. Make sure you get the most out of your tools

The final point here is to emphasize that no matter how perfect a solution may be, it can only ever be as good as the people that use it and the process it is part of. Assuming the first two parts are in place, the search for the right solution should very much consider the user-friendliness of a tool. Having a tool is one thing, having a solution another: for document review, only a tool that the review team can easily use to achieve results can actually be called a solution.

In addition to user-friendliness, user support is invaluable. Although every eDiscovery vendor builds their solution knowing the stakes for its users, even the strongest links in the chain will break down at times. Having the proper support available from a vendor to address such issues is crucial. When deciding on which eDiscovery solution vendors to consider, make use of resources such as Gartner Peer Insights or G2.

Conclusion: Reach better outcomes for Document Review

By virtue of being such a large time sink for most legal departments, document review is nearly always at or near the top of the list of potential avenues for improvement of legal departme

performance. In most cases, the solution is a combination of procedural improvements, tool selection, and reviewer skill.

Striking the right balance between those three factors is no easy feat: no two litigation matters are the same, and the rules within which to operate, and the technology available, are subject to change. Nevertheless, having the proper tools in the hands of the right people in the context of a robust process will lead to better legal outcomes than would otherwise be the case.

[View source.]

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Ethics Lessons From The Alex Jones Discovery Debacle

By **Hilary Gerzhoy, Julienne Pasichow and Grace Wynn** (August 5, 2022, 6:31 PM EDT)

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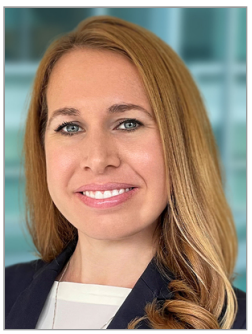

Grace Wynn

In the most explosive courtroom drama to unfold on video in recent memory, Alex Jones — the infamous right-wing conspiracy theorist — was confronted last Wednesday with a cache of his own texts and emails while taking the stand in the latest defamation case brought by the families of the victims in the 2012 Sandy Hook Elementary School shooting.[1]

Jones, the owner of InfoWars, a website that peddles conspiracy theories, gun paraphernalia and medicinal supplements, is on trial to determine damages after a Texas state court judge issued a default judgment finding him guilty of defamation and intentional infliction of emotional distress after he repeatedly claimed that the massacre was a hoax.[2]

On Thursday, the jury **awarded** the families $4.1 million in compensatory damages in Heslin v. Jones. On Friday, the jury **awarded** the families $45.2 million in punitive damages.[3]

After Jones claimed during discovery that he searched for "Sandy Hook" in his text messages and found none,[4] the plaintiffs' lawyer cross-examined Jones, asking:

> Mr. Jones, did you know that 12 days ago your attorneys messed up and sent me an entire digital copy of your entire cellphone with every text message you've sent for the past two years, and when informed did not take any steps to identify it as privileged or protected in any way and as of two days ago it fell free and clear into my possession and that is how I know you lied to me when you said you didn't have text messages about Sandy Hook? Did you know that?[5]

Most news sources believe that Jones' lawyer — Andino Reynal, a well-credentialed former assistant U.S. attorney, and the 11th lawyer to represent Jones[6] — made a mistake of mind-boggling proportions by accidentally producing the entire contents of his client's phone and then failing to claw back any portion of it.

Two weeks before the trial — and well after the discovery deadline — Reynal's legal assistant sent the plaintiffs' counsel a Dropbox link containing a supplemental production.[7] Instead, the plaintiffs' counsel received two years of Jones' cellphone records.

The plaintiffs' counsel alerted Reynal of the apparent mishap, to which Reynal replied, "Please disregard." He stated that he would work to prepare a new link, but he never did.[8] The U.S. House of Representatives Jan. 6 committee is already seeking the records.

In court on Thursday, Reynal said he had intended to send a narrower subset of messages[9] and asked the court to declare a mistrial for his blunder, which the court declined.[10]

Even if the initial production was in error, Reynal repeatedly failed to implement a series of available

actions that could have remediated it.

For example, Reynal could have attempted to claw back the inadvertently produced documents once he became aware of it pursuant to Texas law,[11] assert privilege over any subset of the documents, produce the supplemental link he promised, tell his client about his mistake before Jones took the stand, and, once the material was introduced during cross-examination, object, ask for a sidebar, attempt to get the jury removed, make an oral motion, or request a continuance. He did none.

Once Reynal realized that the link contained the plaintiffs' medical records — prompting Connecticut's Waterbury District Superior Court to investigate whether Reynal should be disciplined for impermissibly disclosing medical files he shouldn't have had access to[12] — why did he take no actions pursuant to the protective order? The initial botched production is one thing, sitting on your hands and forgoing all potential cleanup is another.

More broadly, what can this debacle teach lawyers about the potential pitfalls of discovery and their professional responsibilities throughout the process? Below, we detail a lawyer's ethical obligations in discovery, provide notable examples of the severe sanctions available for discovery violations, and provide practical guidance for how to comply with your discovery duties.

The Alex Jones Discovery Battles

The four defamation suits against Jones have been fraught with discovery disputes. Despite orders from the Travis County District Court in Texas and Waterbury District Superior Court in Connecticut, Jones repeatedly failed to produce documents and testimony.[13]

In January 2019, Judge Barbara Bellis of the Waterbury District Superior Court ordered Jones to disclose documents regarding the Sandy Hook shooting and the business operations of InfoWars.[14] Jones ignored the order.

In December 2019, Judge Scott Jenkins of the Travis County District Court held Jones in contempt and imposed sanctions for Jones' failure to provide documents and witnesses pursuant to an October 2019 discovery order.[15]

Jones repeatedly refused to comply with discovery orders issued by Judge Maya Guerra Gamble of the Travis County District Court.[16]

This blatant shirking of his discovery obligations under three different judges resulted in default judgment against Jones in all four cases.[17]

The Ethics Rules Governing Discovery

To avoid Reynal's mistake, step one is to understand one's obligations under the ethics rules governing discovery.[18]

There are six principal rules of professional conduct that govern discovery. The most basic is the American Bar Association's Model Rule 1.1, which mandates that lawyers provide competent representation.

Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[19] Part of that duty is a requirement that a lawyer stay "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[20]

In other words, producing an entire cellphone in discovery because you do not understand how to segregate Dropbox links, perform keyword searches or apply redactions is a clear Rule 1.1 violation.

Courts have sanctioned lawyers for grossly negligent conduct for failing to thoroughly search electronically stored information, or ESI.[21] In a 2015 opinion, the State Bar of California Committee on Professional Responsibility and Conduct outlined nine tasks attorneys must be able to do to ethically represent a client in a matter involving e-discovery.[22]

Moreover, Rule 3.3 forbids a lawyer from knowingly making a false statement of fact to a tribunal, and from failing to correct a false statement of material fact previously made.[23] If you do not understand how to collect and produce ESI, you are handicapped in your ability to respond to a court's questions about the thoroughness of your searches or the sufficiency of your productions.

Rule 3.4 addresses the heart of a lawyer's discovery obligations. It forbids, among other things, a lawyer from obstructing another party's access to evidence,[24] engaging in spoliation,[25] falsifying evidence or assisting a witness in falsely testifying,[26] and making frivolous discovery requests or failing to make a "reasonably diligent effort to comply with a legally proper discovery request."[27]

Rule 3.4 takes a commonsense approach, noting that our adversary system operates only when evidence is "marshalled competitively by the contending parties."[28] That fair competition can only exist where there are prohibitions against "destruction or concealment of evidence" and "obstructive tactics in discovery procedure."[29]

Nor can shelter be found by outsourcing discovery to vendors, contract attorneys, junior associates or, in Reynal's case, your legal assistant. Rule 5.1 requires that you make "reasonable efforts to ensure" that the lawyers whom you supervise are acting in conformity with the rules.[30] Rule 5.3 mandates the same for nonlawyers you supervise.[31] Failure to do either exposes you to discipline.

Finally, Rule 1.6 requires that a lawyer make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[32] Producing a wholesale, unreviewed cellphone data file is likely to be a Rule 1.6 violation.

The Severe Sanctions Available for Discovery Violations

The plaintiffs' counsel in Heslin v. Jones repeatedly referenced malpractice in the final hearing on Reynal's emergency motion to protect the inadvertently produced cellphone data files.[33] Attorneys often wrongly believe that discovery violations cannot, on their own, form a sufficient basis for bar discipline.

In a 2012 disciplinary proceeding, In re: Disciplinary Proceeding Against McGrath, the Washington Supreme Court made clear that discipline can, and should, be imposed for severe discovery misconduct.[34]

There, an attorney faced discipline for failing to respond to discovery and improperly certifying that he had made a reasonable inquiry into the accuracy of the information he provided.[35] While the attorney admitted the deficiency of his discovery responses, he argued that there is a "long standing public policy that where there are alleged discovery violations and those matters have been litigated to not re-litigate them again in the disciplinary system."[36]

The court found no such impediment and suspended the attorney for 18 months.[37] The court encouraged judges to "file grievances if they feel their best efforts to achieve compliance with discovery orders are insufficient or if they believe a lawyer fails to understand discovery obligations."[38]

Attorneys can also saddle their clients with huge sanctions when they ignore their discovery obligations.

In Qualcomm v. Broadcom, a case from the late 2000s, the plaintiff was found to have withheld "tens of thousands of emails" and then to have used the "lack of access to the suppressed evidence to repeatedly and falsely aver that there was 'no evidence'" to support its opponent's claims.[39] The U.S. District Court for the Southern District of California referred the six lead attorneys to the California Bar for discipline and ordered the plaintiff to pay $8.5 million in sanctions.[40]

Nor is failure to understand the discovery process a defense.

In a 2021 case, DR Distributors LLC v. 21 Century Smoking Inc., the U.S. District Court for the Northern District of Illinois considered an attorney's failure to timely produce ESI.[41] While the court credited the attorney's unintentional-error defense, it held that "a reasonable understanding of ESI and the law relating to identifying, preserving, collecting, and producing ESI" are required.[42]

Accordingly, the court ordered a bevy of sanctions.[43]

The Malpractice Case

Was Reynal's blunder enough for a viable malpractice claim? While states have slightly different formulations, the recipe for a legal malpractice claim is standard: (1) there was an attorney-client relationship; (2) the defendant-lawyer was negligent; (3) the defendant-lawyer's negligence was the proximate cause of the claimed injury; and (4) that plaintiff suffered actual and ascertainable damages.[44]

For good reason, not every mistake is malpractice: As a general matter, lawyers are usually held liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action," as laid out in 2009 by the U.S. District Court for the Eastern District of New York in Law Practice Management Consultants LLC v. M & A Counselors & Fiduciaries LLC.[45]

Establishing proximate causation is a challenge. Courts generally look to the plaintiff to establish that, but for the attorney's conduct, the client would have prevailed in the underlying matter.[46]

As Jones' attorney, Reynal owed Jones a duty of care to "perform the [legal] services with reasonable care, skill, expedience, and faithfulness," according to a 1987 decision by Texas' Third District Court of Appeals in Zidell v. Bird.[47] And according to a 2004 Texas Supreme Court decision in Alexander v. Turtur & Associates Inc., Reynal needed to "exercise ordinary care in preparing, managing, and presenting litigation."[48]

It is difficult to say whether Jones would have prevailed but for Reynal's bizarre mistake. Most likely, Jones' case was doomed from the get-go, not only due to the evidence, but also by his inexplicable behavior outside the courtroom.

Not only did Jones publicly disparage the jurors as "extremely blue collar folks" who "don't know what planet they're on," he also aired a photo of the judge engulfed in flames.[49] It remains to be seen if Jones sues Reynal for malpractice. Should he do so and Reynal is found liable, he could be facing a multimillion-dollar judgment.

Practical Tips

How does one avoid discovery sanctions and accompanying discipline?

The first step is to invest time in understanding the e-discovery process. That requires not only that you understand how and where your client stores relevant information but also how to get a device imaged, identify custodians, apply search terms and redactions, and — importantly — send the appropriate Dropbox link.

While document review and productions tend to fall on the shoulders of younger lawyers, senior lawyers are responsible for supervising their direct reports. Effective supervision requires some technical know-how.

When on the precipice of litigation, step one is to issue a litigation hold. Competent, compliant representation requires that a litigation hold adequately addresses the world of ESI. For example, a litigation hold that fails to include WhatsApp messages for a client who uses WhatsApp would be insufficient.

After a litigation hold is in place, agree on a protective order, clawback agreement and a Federal Rule of Evidence 502(d) order, each of which provides an additional layer of protection.[50]

Finally, if you do get sanctioned by a court for a discovery violation, consider whether you need to inform any disciplinary body. State bars require that you inform them of any professional discipline you have received in another jurisdiction.[51] While California,[52] New York,[53] and the District of Columbia[54] all hold that you do not need to inform the state bar of a discovery sanction, every jurisdiction is a law onto itself, so check your local rules.

The Alex Jones discovery debacle is one for the books, and will no doubt be taught in legal ethics courses for years to come. For a lawyer wishing to avoid Reynal's fate, review the ethics rules, follow discovery orders and deadlines, and, most importantly, when you realize a mistake, take every available step to ameliorate any damage.

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Julienne Pasichow is an associate at the firm.

Grace Wynn is an associate at the firm.

[1] Heslin v. Jones, Case No. D-1-GN-18-001835 (Tex. 261st District Court, Travis Cnty, filed Apr. 16, 2018).

[2] Madeleine Carlisle, 'Do You Know What Perjury Is?' Lawyer Alleges Alex Jones Lied in Sandy Hook Case, Time (Aug. 3, 2022), https://time.com/6203416/alex-jones-sandy-hook-trial-perjury/; see also Jack Karp, Alex Jones Loses Sandy Hook Parents' Defamation Cases, Law360 (Oct. 1, 2021), https://www.law360.com/articles/1427332/alex-jones-loses-sandy-hook-parents-defamation-cases.

[3] Christine DeRosa, Jury Says Alex Jones Must Pay $4.1M In Sandy Hook Case, Law360 (Aug. 4, 2022), ("DeRosa Article"), https://www.law360.com/articles/1518247; Jack Queen, Jury awards $45.2 million in punitive damages in Alex Jones Sandy Hook trial (Aug. 5, 2022), https://www.reuters.com/business/media-telecom/jury-alex-jones-defamation-case-begin-deliberations-punitive-damages-2022-08-05/.

[4] Justin Wise, Alex Jones Attorney Blunder 'Dead on Arrival' in Any Appeal, Bloomberg Law (Aug. 4, 2022), https://news.bloomberglaw.com/us-law-week/alex-jones-attorney-blunder-wont-help-talk-show-host-on-appeal.

[5] DeRosa Article, https://www.law360.com/articles/1518247.

[6] Reynal entered the Jones case after his client had already lost the case in a default judgment, following Jones' repeated failure to comply with discovery requests. Only the amount of damages was left for the jury. Dan Solomon, The Lawyers in the Alex Jones Trial Nearly Came to Blows, Texas Monthly (Aug. 2, 2022), https://www.texasmonthly.com/news-politics/alex-jones-trial-lawyers/.

[7] Law&Crime Network, Alex Jones Defense Files Emergency Motion, YouTube (Aug. 4, 2022), https://youtu.be/dKbAmNwbiMk.

[8] Pursuant to Texas Rule of Civil Procedure 193.3(d), Reynal had ten days to "amend[] the response, identify[] the material or information produced and stat[e] the privilege asserted." Tex. R. Civ. P. 193.3(d). Simply saying, "please disregard" is legally insufficient.

[9] Justine Wise, Alex Jones Attorney Blunder 'Dead on Arrival' in Any Appeal (2), Bloomberg Law (Aug. 4, 2022), https://news.bloomberglaw.com/us-law-week/alex-jones-attorney-blunder-wont-help-talk-show-host-on-appeal. While Reynal claimed on Thursday that the production was in error, his re-direct suggests otherwise. Reynal asked Jones, "You trusted your lawyers to produce the relevant documents?" To which Jones responded, "Yes." Law&Crime Network, Alex Jones Testifies in the Sandy Hook Defamation Trial (Part Two), YouTube (Aug. 3, 2022), https://www.youtube.com/watch?v=qhtz_6JKSh8 at 2:17:21; Christine DeRosa, Jones Faces Own Texts Before Jury Gets Sandy Hook Case, Law360 (Aug. 3, 2022), https://www.law360.com/media/articles/1517865?utm_source=rss&utm_medium=rss&utm_campaign=section?copied=1?copied=1. Reynal then inexplicably reiterated, "You trusted us to do a good job and turn over what we needed to turn over?"

Jones replied, "Yes." Law&Crime Network, Alex Jones Testifies in the Sandy Hook Defamation Trial (Part Two), YouTube (Aug. 3, 2022), https://www.youtube.com/watch?v=qhtz_6JKSh8 at 2:17:21. If the entire cell phone production was a mistake, getting your client to admit on re-direct that you only produced what was necessary is a puzzling strategy.

[10] Alison Durkee, Alex Jones Trial: Judge Denies Request For Mistrial After Jones' Attorney Mistakenly Sends Texts To Opposing Counsel, Forbes (Aug. 4, 2022) https://www.forbes.com/sites/alisondurkee/2022/08/04/alex-jones-trial-judge-denies-request-for-mistrial-after-his-attorney-mistakenly-sends-texts-to-opposing-counsel/?sh=3346ded7a272 ("The judge rejected Reynal's request to retract all the documents that were mistakenly sent to opposing counsel, but did say she ordered any messages containing medical information to be destroyed and allowed Reynal to go through and identify individual documents within the tranche that could be marked confidential.").

[11] Tex. R. Civ. P. 193.3(d) ("A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, any party who has obtained the specific material or information must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.").

[12] On August 4, 2022, the Waterbury District Superior Court ordered Reynal to appear in person on August 17, 2022 for a hearing to determine whether he should be referred to disciplinary authorities or subjected to the court's discipline for his apparently inadvertent disclosure of plaintiffs' medical records. The records were inexplicably present in the Dropbox that Reynal provided to plaintiffs' counsel along with digital copy of Jones' cell phone. See https://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=23286542.

[13] Elizabeth Williamson, Alex Jones Loses by Default in Remaining Sandy Hook Defamation Suits, N.Y. Times (Nov. 15, 2021), https://www.nytimes.com/2021/11/15/us/politics/alex-jones-sandy-hook.html. Jones unsuccessfully argued that his "right to free speech" protected him from compelled disclosure.

[14] Jacey Fortin, Documents to Sandy Hook Families, Judge Rules, N.Y. Times (Jan. 12, 2019), https://www.nytimes.com/2019/01/12/us/alex-jones-infowars-lawsuit.html.

[15] Order on Pl.'s Mot. for Default J., Heslin v. Jones, No. D-1-GN-18-001835 (Tex. Dist. Sep. 27, 2021), available at https://infowarslawsuit.com/wp-content/uploads/2021/10/September-27-2021-Court-Order-on-Motion-for-Default-Judgement.pdf.

[16] Christine Hauser, Alex Jones Loses by Default in Sandy Hook Defamation Lawsuits, N.Y. Times (Oct. 1, 2021), https://www.nytimes.com/2021/10/01/us/alex-jones-lawsuit-sandy-hook.html.

[17] Daniel Victor, What to Know About the Alex Jones Defamation Trial, N.Y. Times (Aug. 4, 2022), https://www.nytimes.com/article/alex-jones-trial.html... Judge Gamble referenced Jones' "bad faith approach to litigation," noting that "an escalating series of judicial admonishments, monetary penalties, and non-dispositive sanctions [had] all been ineffective at deterring the abuse," leaving her with no recourse, other than to issue a default judgment. Order on Pl.'s Mot. to Compel and Mot. for Sanctions, Pozner v. Jones, No. D-1-GN-18-001842 (Tex. Dist. Sep. 27, 2021), available at https://www.documentcloud.org/documents/21074090-pozner-judgment. Judge Bellis characterized Jones' as having "callous disregard" for the discovery process through his "obstructive conduct." Reis Thebault, Alex Jones must pay damages to Sandy Hook families in another defamation case, judge rules, Wash. Post (Nov. 15, 2021), https://www.washingtonpost.com/nation/2021/11/15/alex-jones-sandy-hook-defamation-lawsuit/.

[18] When appearing in federal court, parties are bound by Federal Rule of Civil Procedure 26, which prescribes general discovery practices. Fed. R. Civ. P. 26. Many courts have local rules requiring counsel to exchange each party's electronic sources and details regarding any potentially relevant ESI at the outset of the case, among other information. See, e.g., N.D. Ill. Pat. R. ESI 1.1–2.6. Under

Rule 26(f)(3), parties are obligated to address the scope of electronic discovery during the Rule 26(f) conference. Fed. R. Civ. P. 26(f)(3). A lawyer cannot competently represent a client in federal court without having a fundamental understanding of the client's electronic infrastructure. Rule 26(b)(1) sets forth the proportionality standard that narrows the scope of discovery. Fed. R. Civ. P. 26(b)(1). Parties may seek discovery regarding any nonprivileged matter relevant to the claims in the case and "proportional to the needs of the case." Id. Implementation of that rule requires that lawyers understand the cost and burden that a client would incur in connection with responding to document requests. Without this information, objections to discovery requests on proportionality grounds could be waived. Fed. R. Civ. P. 26(a)(3)(B). Pursuant to Rule 37, parties may move for an order compelling disclosure or discovery, as well as sanctions for refusal to obey a discovery order. Fed. R. Civ. P. 37.

[19] Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2020).

[20] Model Rules of Pro. Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2020).

[21] Phoenix Four, Inc. v. Strategic Resources Corp., 2006 WL 1409413 (S.D.N.Y. 2006) (counsel acted with gross negligence for failing to conduct thorough search for ESI sources); see also Zubulake v. UBS Warburg, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched").

[22] The State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct, Formal Op. 2015-193 (2015) (listing the following nine areas a lawyer must be able to perform: "Initially assess e-discovery needs and issues; Implement or cause to implement appropriate electronically stored information (ESI) preservation procedures; Analyze and understand a client's ESI systems and storage; Advise the client on available options for collection and preservation of ESI; Identify custodians of potentially relevant ESI; Engage in a competent and meaningful meet-and-confer with opposing counsel concerning an e-discovery plan; Perform data searches; Collect responsive ESI in a manner that preserves the integrity of that ESI; and Produce responsive nonprivileged ESI in a recognized and appropriate manner.").

[23] Model Rules of Pro. Conduct r. 3.3(a)(1) (Am. Bar Ass'n 2020).

[24] Model Rules of Pro. Conduct r. 3.4(a) (Am. Bar Ass'n 2020).

[25] Model Rules of Pro. Conduct r. 3.4(a) (Am. Bar Ass'n 2020).

[26] Model Rules of Pro. Conduct r. 3.4(b) (Am. Bar Ass'n 2020).

[27] Model Rules of Pro. Conduct r. 3.4(d) (Am. Bar Ass'n 2020).

[28] Model Rules of Pro. Conduct r. 3.4 cmt. 1 (Am. Bar Ass'n 2020).

[29] Model Rules of Pro. Conduct r. 3.4 cmt. 1 (Am. Bar Ass'n 2020).

[30] Model Rules of Pro. Conduct r. 5.1(b) (Am. Bar Ass'n 2020).

[31] Model Rules of Pro. Conduct r. 5.3(b) (Am. Bar Ass'n 2020); see also N.Y.C. Assn. B. Comm. Prof. Jud. Eth., Formal Op. 2006-3 (2006) (addressing outsourcing of legal support services, such as document review).

[32] Model Rules of Pro. Conduct r. 1.6(c) (Am. Bar Ass'n 2020).

[33] On Thursday, Reynal asked the judge to consider the emergency protection motion that he had submitted earlier that morning to protect the items included in the apparently inadvertent disclosure of Jones' entire cell phone and, unbelievably, plaintiffs' medical records. While initially Reynal admitted his mistake, he then proceeded to blame plaintiffs' counsel's disregard of his own "please disregard message" following the disclosure, lamenting, "I hate to be put in this position by the conduct of plaintiffs' counsel." Mark Bankston, plaintiffs' counsel, then responded, arguing that there were steps that Reynal could have taken to retroactively protect the disclosed information, yet he did

nothing. Under Texas Rule of Civil Procedure 193.3(d), within 10 days of the inadvertent disclosure, Reynal could have identified specific material or information produced and stated the basis for privilege. And yet, Reynal not only failed to take this step, but also failed to provide a replacement link to provide Bankston with the discoverable material that he was obligated to produce. Judge Guerra Gramble was unmoved by Reynal's pleas for leniency despite his disregard for the discovery rule, and denied the emergency protection motion. She noted that this holding was underscored by the fact that the discoverable materials should have been disclosed at least a year ago, and there was no basis for providing an additional 10-day period for Reynal to undertake the review for privileged materials that he should have taken immediately following the disclosure. Law&Crime Network, Alex Jones Defense Files Emergency Motion, YouTube (Aug 4, 2022), https://www.youtube.com/watch?v=dKbAmNwbiMk.

[34] See In re Disciplinary Proceeding Against McGrath, 280 P.3d 1091 (Wash. 2012).

[35] See id. at 1093.

[36] Id. at 1097 (citation omitted).

[37] See id. at 1102.

[38] Id. at 1098.

[39] Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932, at 6 (S.D. Cal. 2008), vacated in part, 2008 WL 638108 (S.D. Cal. 2008).

[40] The Court placed a large portion of the blame on counsel, finding that they had failed to adequately supervise the production. Id. at 20. While counsel for plaintiff ultimately managed to show that their client had mislead them, this opinion underscores the high dollar values that can be attached to discovery sanctions. See Qualcomm Inc. v. Broadcom Corp., 2010 WL 1336937, at 7 (S.D. Cal. 2010).

[41] DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839 (N.D. Ill. 2021).

[42] Id. at 866.

[43] Id. at 863.

[44] Stonewell Corp. v. Conestoga Title Ins. Co., 678 F. Supp. 2d 203 (S.D.N.Y. 2010); compare with In re Irwin, 325 B.R. 22 (Bankr. M.D. Fla. 2005) ("Under Florida law, the three elements of cause of action for legal malpractice are as follows: (1) attorney's employment; (2) attorney's neglect of a reasonable duty; and (3) redressable harm, i.e., loss to client that was proximately caused by attorney's negligence."); Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 117 (Tex. 2004) (To prevail on a legal malpractice claim, a plaintiff must show "that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred.").

[45] L. Prac. Mgmt. Consultants, LLC v. M & A Couns. & Fiduciaries, LLC, 599 F. Supp. 2d 355, 359 (E.D.N.Y. 2009).

[46] Bryant v. Silverman, 284 F. Supp. 3d 458, 474 (S.D.N.Y. 2018).

[47] Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App. 1985).

[48] Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 119 (Tex. 2004). The fact that Jones was not aware of the inadvertent disclosure until he was under cross examination makes the catastrophic mistake all the more damaging.

[49] Elizabeth Williamson, Alex Jones Loses by Default in Remaining Sandy Hook Defamation Suits, N.Y. Times (Nov. 15, 2021), https://www.nytimes.com/2022/08/03/us/politics/alex-jones-trial-sandy-hook.html.

[50] Federal Rule of Evidence 502(d) provides that a federal court may order that a privilege is not waived "by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding. Keep in mind that a clawback agreement that does not comport with the explicit requirements of Federal Rule of Evidence 502(b) may not be enforceable. See, e.g., irth Solutions, LLC v. Windstream Communications, LLC , 2018 WL 575911 (S.D. Ohio 2018) (holding that pursuant to Federal Rule of Evidence 502(b), the defendant had waived its attorney-client privilege by producing privileged documents to plaintiff's counsel notwithstanding that the parties had a clawback agreement. Defendant's counsel argued that the parties' clawback agreement should supersede the requirements of 502(b), which avoids waiver only upon an 'inadvertent' disclosure. The district court disagreed.). Fed. R. Evid. Rule 502(e) provides that an agreement between the parties on the effect of disclosure in a federal proceeding is also binding on other proceedings, if incorporated into a court order. Fed. R. Evid. 502(e).

[51] For example, D.C.'s Rule is housed in Rule XI, Section 11 and requires that "any attorney subject to the disciplinary jurisdiction of this Court, upon being subjected to professional disciplinary action by another disciplining court, shall promptly inform Disciplinary Counsel of such action in writing." D.C. Bar Rule XI § 11(b).

[52] In California, a lawyer must report to the California State Bar "the imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery…" Cal. Bus. & Prof. Code § 6068(o)(3) (2019).

[53] Luscier v. Risinger Brothers Transfer, Inc. , 2015 WL 5638063, at 14 (S.D.N.Y. 2015) (sanctioning an attorney but noting that sanctions were not attorney discipline and that the attorney's conduct was "likely to cause a disciplinary body to act").

[54] See In re Liang-Houh Shieh , 738 A.2d 814, (D.C. Ct. App. 1999) (noting that unlike California, D.C. does not have a reporting requirement for ''failing to report [to the Bar] substantial sanctions" and citing Cal. Bus. Prof. Code § 6068(o)(3)).

THE NATIONAL LAW JOURNAL

NEWS

'Extreme Behavior': A Judge Pulls Out a Gun in Court. It's Sparked a Debate on Recusal Procedures.

While an armed judge can be intimidating, asking a jurist to recuse themselves after failing to acknowledge conflicts can be just as chilling.

July 20, 2022 at 01:16 PM

Judicial Ethics

Brad Kutner

What You Need to Know

- A West Virginia Judge pulled out a gun following a tense hearing for a motion to recuse himself.
- While the story made headlines over the weekend, the issue of judges' taking offense to recusal requests is as old as the nation's judicial system itself.
- Finding a balance between acknowledging bias in judges and delegitimizing the court has stymied reform.

Lawyers often feel reluctant to pursue recusal requests for fear of angering a judge, especially if the request fails, but rarely has it ended in a judge pulling a pistol out in court.

When Michelman & Robinson managing partner Lauren Varnado appeared before Judge David Hummel in West Virginia's New Martinsville City Circuit Court, she encountered both.

"I've never seen a gun in a courtroom outside of bailiffs," she said, calling the interaction, which has since gone viral, "insane, extreme behavior."

The incident, which started with a motion to recuse Hummel due to conflicts of interest, has sparked renewed questions about what such motions require and how the recusal system's lack of an independent arbiter can harm the judicial process.

According to Varnado, when she got involved in an oil and gas lease royalties dispute, the first judge recused himself due to personal connections to such leases. So when Hummel was assigned the case, she and her team opened the same inquiry and found similar conflicts of interest.

When she submitted a motion to recuse Hummel, it triggered a process that sent the request to Supreme Court of Appeals of West Virginia Chief Justice Evan Jenkins. Instead of ruling on the issue from there, Jenkins ordered a hearing before Hummel himself to create a record the justice could then rule on.

"Having to argue to that judge's face about matters that, for whatever reason he did not disclose, is very intimidating and there's no doubt in my mind it chills other attorneys from coming forward," Varnado said.

Jenkins denied the motion and the case continued with Hummel.

Unrelated threats from locals about the dispute—linked to a reduction in royalties from a decade ago—led to Varnado to hire security when she traveled to the rural town. But when she appeared for a hearing Hummel refused to let her security detail in the courtroom.

Then, according to multiple news reports, things got really weird.

Hummel told Varnado she didn't need security because he had "lots of guns" of his own. He then pulled a pistol out from under his robe and rested it on the bench. The hearing continued with the gun pointed at Varnado and her colleagues.

Hummel denied to the press that he had a gun, and then rolled back that claim. A complaint was filed with the West Virginia Judicial Investigation Commission, a process that is ongoing.

Hummel did not respond to a request for comment.

"I hope the judge gets help," said Varnado on how she'd like to see the situation get resolved, but her fight for a judge's recusal is an issue court reform advocates have focused on for years: ensuring an impartial recusal process.

"The judge mentioned our unsuccessful motion to disqualify in most if not every proceeding," she said, noting the tension stemming from the recusal request hung over the litigation through the subsequent trial.

According to researchers, she's right about the impact recusal motions can have on trials.

According to a 2016 report from the Brennan Center for Justice, court systems that allow judges to handle their own recusal requests lead to concerns about how those motions will impact a case, leading to less motions to recuse because of the tension such requests can create.

"Judges can take the recusal request very personally and lawyers don't want that to be used against their client," said Douglas Keith, counsel in the judiciary program at Brennan Center. The recusal report notes more than 30 states have rules which allow for judges to rule on their own recusal, and it's often associated with negative benefits for lawyers.

The history of judicial recusal is as old as the court system itself according to Indiana University School of Law Professor Charles Geyh. Under English common law, Geyh said, a judge's lack of bias was considered "ironclad."

"It would undermine the integrity of the judiciary to entertain such questions," he said.

The first time the courts grappled with conflicts of interest was in 1609 after it was found a judge was ruling on cases he himself was involved in, paying himself with court fines he'd impose.

"We came to the epiphany that judges are human beings with biases we ought to be attuned too," Geyh said.

By the 1970s, Congress, states and the American Bar Association stepped in and set their own rules for recusal, creating a new standard for "when a judge's impartiality might reasonably be questioned."

About 40 years later the U.S. Supreme Court took up the issue in a case where a state Supreme Court judge received campaign donations from a donor who was involved in a dispute where the judge cast a tie-breaking vote in their favor.

The high court's majority found the unique circumstances required a new standard for recusal, one where the due process clause could be invoked if a conflict was so heinous. But in a dissenting opinion, Chief Justice John Roberts Jr. wrote that would expose judge's to more recusal motions.

Geyh was sympathetic to Roberts' concerns, but disagreed. He thinks courts can and should develop systems that not only allow for more recusal motions using independent arbitrators, but also a process to sanction those who abuse the system.

"You need to police your disqualification process," he said, noting in the more than a decade since the SCOTUS decision he's seen no wave of frivolous recusal motions. "Over disqualification can impact public confidence, but that's not what we're dealing with here."

And Geyh said what happened to Varnado was "exhibit A," in the case for why the recusal process needs amending.

"Judges get angry about it," he said. "And cases will still be before the same judge, but now he's pissed off."

Varnado said Hummel's failure to disclose the potential conflict of interest early on could have avoided the incident entirely.

"There's nothing wrong with owning oil and gas, full disclosure takes the sting out of it," she said. "I don't have concerns about your ability to preside as long as you put it out there."

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 503 **November 2, 2022**

"Reply All" in Electronic Communications

In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. Alternatively, lawyers may communicate in advance to receiving counsel that they do not consent to receiving counsel replying all, which would override the presumption of implied consent.

I. Introduction

Lawyers now commonly use electronic communications like email and text messaging in their law practice.[1] Subject to handling, security, and maintenance considerations beyond this opinion's scope,[2] the Model Rules permit these forms of electronic communication. This permissible communication extends to communications with counsel representing another person in the matter.

Under Rule 4.2 of the ABA Model Rules of Professional Conduct, in representing a client, a lawyer may not "communicate" about the subject of the representation with a represented person absent the consent of that person's lawyer, unless the law or court order authorizes the communication.[3]

When a lawyer ("sending lawyer") copies the lawyer's client on an electronic communication to counsel representing another person in the matter ("receiving counsel"), the sending lawyer creates a group communication.[4] This group communication raises questions under the "no contact" rule because of the possibility that the receiving counsel will reply all, which of course will be delivered to the sending lawyer's client. This opinion addresses the question of whether sending lawyers, by copying their clients on electronic communications to receiving counsel, *impliedly* consent to the receiving counsel's "reply all" response.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021) (discussing ethical considerations in virtual law practice); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (discussing lawyers' obligations in response to data breaches); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (discussing reasonable security precautions when communicating through email).

[3] The authorized-by-law exception is not the focus of this opinion.

[4] Throughout this opinion, the lawyer who sends the electronic communication is referred to as the "sending lawyer." The lawyer who represents another person in the matter and who receives the communication on which the sending lawyer's client is copied is referred to as the "receiving counsel."

Several states have answered this question in the negative, concluding that sending lawyers have *not* impliedly consented to the reply all communication with their clients. Although these states conclude that consent may not be implied solely because the sending lawyer copied the client on the email to receiving counsel, they also generally concede that consent may be implied from a variety of circumstances beyond simply having copied the client on a particular email.[5] This variety of circumstances, however, muddies the interpretation of the Rule, making it difficult for receiving counsel to discern the proper course of action or leaving room for disputes.

II. Copying a Client on Emails and Texts Is Implied Consent to a Reply All Response

We conclude that given the nature of the lawyer-initiated group electronic communication, a sending lawyer impliedly consents to receiving counsel's "reply all" response that includes the sending lawyer's client, subject to certain exceptions discussed below. Several reasons support this conclusion, and we think that this interpretation will provide a brighter and fairer line for lawyers who send and receive group emails or text messages.

First, Model Rule 4.2 permits lawyers to communicate about the subject of the representation with a represented person with the "consent" of that person's lawyer. Consent for purposes of Rule 4.2 may be implied; it need not be express.[6] Similar to adding the client to a videoconference or telephone call with another counsel or inviting the client to an in-person meeting with another counsel, a sending lawyer who includes the client on electronic communications to receiving counsel generally impliedly consents to receiving counsel "replying all" to that communication.[7] The sending lawyer has chosen to give receiving counsel the impression that replying to all copied on the email or text is permissible and perhaps even encouraged. Thus, this situation is not one in

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[5] *See, e.g.*, Wa. State Bar Ass'n Advisory Op. 202201 (2022); S.C. Bar Advisory Op. 18-04 (2018). For a list of the factors bearing on implied consent, *see* Cal. Standing Comm. on Prof'l Responsibility & Conduct Formal Op. 2011-181 ("Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.").

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. j (2000) ("[A] lawyer . . . may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.").

[7] *See, e.g.*, N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread."); *see also* Va. Legal Ethics Op. 1897 (2022) ("A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel."); N.Y.C. Bar Formal Ethics Op. 2022-3 (similar).

which the receiving counsel is overreaching or attempting to pry into confidential lawyer-client communications, the prevention of which are the primary purposes behind Model Rule 4.2.[8]

This conclusion also flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context,[9] and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response. To be sure, the sending lawyer's implied consent should not be stretched past the point of reason.[10] Unless otherwise explicitly agreed, the consent covers only the specific topics in the initial email; the receiving counsel cannot reasonably infer that such email opens the door to copy the sending lawyer's client on unrelated topics.[11]

Second, we think that placing the burden on the initiator – the sending lawyer – is the fairest and most efficient allocation of any burdens. The sending lawyer should be responsible for the decision to include the sending lawyer's client in the electronic communication, rather than placing the onus on the receiving counsel to determine whether the sending lawyer has consented to a communication with the sending lawyer's client. Moreover, in a group email or text with an extensive list of recipients, the receiving counsel may not realize that one of the recipients is the sending lawyer's client.[12] We see no reason to shift the burden to the receiving counsel, when the sending lawyer decided to include the client on the group communication in the first instance.

Furthermore, resolving the issue is simpler for the sending lawyer. If the sending lawyer would like to avoid implying consent when copying the client on the electronic communication, the sending lawyer should separately forward the email or text to the client. Indeed, we think this practice is generally the better one. By copying their clients on emails and texts to receiving counsel, sending lawyers risk an imprudent reply all from their clients. Email and text messaging replies are often generated quickly, and the client may reply hastily with sensitive or compromising information.[13] Thus, the better practice is not to copy the client on an email or text to receiving

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[8] Model Rules of Prof'l Conduct R. 4.2 cmt. [1].

[9] *See* Model Rules of Prof'l Conduct R. 1.1, cmt. [8] ("To maintain the requisite level of knowledge and skill, a lawyer should keep abreast of the changes in law and its practice, including the benefits and risks of relevant technology[.]").

[10] *Cf.* Model Rules of Prof'l Conduct, Scope [14] ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.").

[11] *See also* Va. Legal Ethics Op. 1897 (2022) ("The reply must not exceed the scope of the email to which the lawyer is responding . . . as the sending lawyer's choice to use 'cc' does not authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email."); N.Y.C. Bar Ethics Op. 2022-3 ("Where an attorney sends an email copying their client, such communication gives implied consent for other counsel to reply all on the same subject within a reasonable time thereafter.").

[12] *See* N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("[M]any emails have numerous recipients and it is not always clear that a represented client is among the names in the 'to' and 'cc' lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.").

[13] *See, e.g.*, N.Y.C. Bar Ethics Op. 2022-3 (discussing the lawyer competence and client risk issues arising when lawyers copy their clients on emails to opposing counsel).

counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client.[14]

III. The Presumption of Implied Consent to Reply All Communications Is Not Absolute

The presumption of implied consent to reply all communications may be overcome. We highlight several common examples to guide lawyers.

First, an express oral or written remark informing receiving counsel that the sending lawyer does not consent to a reply all communication would override the presumption of implied consent. Thus, lawyers who do not wish for their client to receive a "reply all" communication should communicate that fact in advance to receiving counsel, preferably in writing.[15] This communication should be prominent; lawyers who simply insert this preference in a long list of boilerplate disclaimers in their email signature area run the risk of the receiving counsel missing it. Although such disclaimers are better than nothing, a more effective approach would be to inform the receiving counsel - at the beginning of the email or in an earlier, separate communication - that including the client in the communication does not signify consent (or as noted above, not copy the client at all).

Second, the presumption applies only to emails or similar group electronic communications, such as text messaging, which the lawyer initiates. It does not apply to other forms of communication, such as a traditional letter printed on paper and mailed. Implied consent relies on the circumstances, including the group nature and other norms of the electronic communications at issue. For paper communications, a different set of norms currently exists. There is no prevailing custom indicating that by copying a client on a traditional paper letter, the sending lawyer has impliedly consented to the receiving counsel sending a copy of the responsive letter to the sending lawyer's client. Accordingly, receiving counsel generally should not infer consent and reply to the letter with a copy to the sending lawyer's client simply because the sending lawyer copied that lawyer's client on a traditional paper letter. The sending lawyer, as a matter of prudence, should consider forwarding the letter separately, instead of copying the client, but failing to do so does not itself provide implied consent to the receiving counsel to copy the sending lawyer's client on a responsive letter. In sum, although Model Rule 4.2 applies equally to electronic and paper communications, only in group emails or text messages does copying the client convey implied consent for the receiving counsel to reply all to the communication.

Finally, although the act of "replying all" is generally permitted under Model Rule 4.2, other Model Rules restrict the content of that reply.[16]

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[14] A separate forward is safer than "bcc'ing" the client because in certain email systems, the client's reply all to that email would still reach the receiving counsel.

[15] As in many other areas of professional responsibility and the law generally, written communications are advisable because they create an accurate record and help to prevent misunderstandings. Moreover, to avoid implied consent, an oral statement of course would need to be made in advance of the email communication at issue.

[16] *See, e.g.*, Model Rules of Prof'l Conduct R. 4.4(a) cmt. [1] (prohibiting "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"); Model Rules of Prof'l Conduct R. 4.4(b)

IV. Conclusion

Absent special circumstances, lawyers who copy their clients on emails or other forms of electronic communication to counsel representing another person in the matter impliedly consent to a "reply all" response from the receiving counsel. Accordingly, the reply all communication would not violate Model Rule 4.2. Lawyers who would like to avoid consenting to such communication should forward the email or text to the client separately or inform the receiving counsel in advance that including the client on the electronic communication does not constitute consent to a reply all communication.

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cmt. [2] ("If a lawyer knows or reasonably should know that [an email] was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures."); Model Rules of Prof'l Conduct R. 8.4(c) (prohibiting counsel from making misrepresentations).

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Serving the profession since 1854

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Illinois Supreme Court adopts new Code of Judicial Conduct

By Grace Barbic
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The Illinois Supreme Court has adopted a new Illinois Code of Judicial Conduct — providing guidance for social media use and changes to required financial disclosures — in the first "top to bottom" update of the code in 50 years.

The Code of Judicial Conduct contains the ethics rules governing the behavior of all state court judges in Illinois, as well as candidates for judicial office.

The new code is based on the current American Bar Association Model Code of Judicial Conduct that came out in 2007 and was revised in 2010. About 37 states already base their Codes of Judicial Conduct on the current ABA Model Code.

Illinois Judicial Ethics Committee Chair Steven F. Pflaum called the update "long overdue." It was announced Friday and is effective Jan. 1, 2023.

The code of conduct was developed and submitted to the Supreme Court for approval by the joint committee of the Illinois Judges Association, Illinois State Bar Association and Chicago Bar Association.

The vice chair is retired Judge Raymond P. McKoski of the University of Illinois Chicago School of Law.

Pflaum, of Neal, Gerber & Eisenberg LLP, said the new code is "not revolutionary, but it is evolutionary" because it updates and modernizes rules that have seen only minor updates over the years.

"Even in the now 12 years since the ABA last updated its model code, social media has really come to the forefront and has provided a frequent source of inquiries from judges," Pflaum said. "It's also frankly not just in Illinois, but nationally … an area in which judges often misstep."

That is why the committee wanted to explicitly address social media along with the relevant rules, he said.

The update makes clear that judges cannot post or repost articles on social media that could make them appear biased. It also delves into "likes" and "comments" and how judges activity on social media may be perceived by the public, among other guidelines.

Another major update to the code addresses financial disclosure.

The new code replaces an old Declaration of Economic Interests with a new Declaration "designed to provide the public with increased assurance that judges will avoid participating in cases in which they or their close family members have a significant financial interest," according to the code.

Pflaum said the old declaration was difficult to understand, while the overall goal of the new code is clarity and consistency.

"The key to any good ethics code is clarity," he said. "You want the people subject to the code to be able to understand, with a high degree of assurance and clarity, what their obligations are. And I think our new code does that quite well."

Pflaum also noted the new code significantly strengthens provisions relating to sexual harassment and discrimination.

He said it broadens the categories of discrimination to go beyond racial and religious discrimination to include gender, gender orientation and disability.

"The Illinois Supreme Court is committed to promoting the highest ethical behavior by judges in our state," Chief Justice Anne M. Burke said in a news release.

"The Court's promulgation of a new, modern Code of Judicial Conduct will further that objective by providing judges with clear guidance regarding their ethical responsibilities both on and off the bench. The product of years of careful study, the new Code will serve the citizens of our state well for many years to come."

While the process was a "long haul" that took several years and thousands of hours of going over every word in every rule, Pflaum said they were "more interested in getting this right, than in expediting it."

Between now and the effective date of the new code, there will likely be a series of programs throughout the state put on by different organizations to educate judges on the changes.

Pflaum noted the court has its Judicial College, which is responsible for training, that he believes will take a leading role in helping everyone get up to speed on the new rules.

The new 56-page Illinois Code of Judicial Conduct can be read in full here.

February 24, 2020

TOP STORY

Judicial Bias May Implicate Lawyer's Ethical Obligations

Preemptive ruling raises questions regarding competent representation duty

By Kelso L. Anderson

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A judge's expression of bias toward a litigant necessarily implicates judicial canons prohibiting such conduct. But, according to ABA Section of Litigation leaders, such conduct should also prompt counsel for the affected litigant to consider his or her ethical obligations to act competently and diligently toward representing the client. Section of Litigation leaders cite the decision *Real State Golden Investments, Inc. v. Larraín* as a cautionary tale in this regard.

Broken scales of justice

iStockphoto by Getty Images

A Clear Example of Judicial Bias

In a per curiam ruling, a Florida appellate court in *Real State Golden* granted the petitioners' writ of prohibition seeking to disqualify a trial judge after the judge made comments during oral arguments on a motion to intervene. During the hearing, the trial judge had preemptively denied a motion to stay the pleadings, despite the fact that the petitioners had not filed or even suggested they would file such a motion. The exchange between the trial court and counsel for the petitioners went as follows:

> **Court:** So, it's denied and Motion to Stay, denied.
> **Counsel:** There was no Motion for Stay.

> **Court:** There will be. You're going to appeal this, right?
> **Counsel:** Probably.
> **Court:** Okay. So, I mean, I expect it because everything gets appealed.
> **Counsel:** Correct.
> **Court:** For this case, anyway.
> **Counsel:** You know, Your Honor, there has only been one appeal so far in this six-year case.
> **Court:** Okay. Maybe I am thinking of other cases.
> **Counsel:** I think so.
> **Court:** Again, I get a lot of appeals. But then again, this is a very litigious world. Okay. If there is an appeal, I don't think there's a reasonable chance of success on appeal now that we have conducted this full analysis and identified the different issues and different claims and claims for a positive relief, not just defenses. So, draft up an order and we'll see what happens.

Expression of Bias Violates Judicial Canons

The petitioners sought to disqualify the trial judge based on the foregoing exchange. Concluding that the petitioners had an "objectively reasonable fear they would not receive a fair trial," the appellate court quoted law for the proposition that "a judge's announced policy or predisposition to rule in a particular manner is grounds for disqualification." The court also cited law for the principle that a judge may not pre-judge a case though he or she may "form mental impressions and opinions during the course of the case." Finally, the court concluded that recusal is proper where a trial judge expressed judicial bias, as here.

In addition to violating the foregoing laws and principles cited by the court, Section leaders conclude that the trial court also violated judicial canons. "ABA Model Code of Judicial Conduct applies to all full-time judges," observes John M. Barkett, Miami, FL, cochair of the Section's Ethics & Professionalism Committee. Among the judicial canons violated by the trial judge are Model Code of Judicial Conduct Rules 1.2, 2.2, and 2.3, Barkett notes. "The disposition of a motion that has not yet been filed is the paradigm of judicial bias and prejudice," he concludes.

Agreeing with Barkett that Rules 1.2, 2.2, and 2.3 were violated in *Real State Golden*, Jeanne M. Huey, Dallas, TX, cochair of the Web Content Subcommittee of the Section's Ethics & Professionalism Committee, reminds attorneys that "it is not always improper for a judge to talk about case management with counsel." Here, however, the trial judge "abandoned the neutrality required by his office to make rulings only on what is before him," Huey observes.

Counsel's Ethical Obligations Triggered

In addition to violating ensconced legal rules and principles, the judge's conduct required counsel for the aggrieved litigant to consider counsel's ethical obligations to the aggrieved client, according to Huey. Model Rules of Professional Conduct Rule 1.1 and 1.3—which require a lawyer to represent his or her client competently and diligently—were triggered by the judge's conduct, Huey says. She opines that the trial court's message to counsel from its ruling was that the "fix was in" against counsel's client, "so don't bother doing your job since it will come to naught."

Huey emphasizes that "if the lawyer is intimidated into inaction by this kind of judicial misconduct, they may be robbing the client of the client's right to competent and diligent representation under ABA Model Rules 1.1 and 1.3. A lawyer's duty of competence and diligence is magnified in situations of judicial misconduct because of the significant risk of harm to the client and even the public," she says.

Huey advises lawyers to consider a three-pronged approach to dealing with potential judicial misconduct: (1) know the rules concerning remedies for judicial misconduct in the courts in which one practices; (2) do not wait for judicial misconduct to occur before learning the appellate or recusal process in the jurisdictions in which one practices; and (3) ensure any questionable conduct by the judge is on the record.

Kelso L. Anderson is an associate editor for Litigation News.

Hashtags: #judicialmisconduct #ethics #recusal #judicialbias #disqualification #judicialcanons

Related Resources

- *State v. Dixon*, 217 So. 3d 1115 (Fl. Dist. Ct. App. 2017).
- *Gonzales v. Goldstein*, 633 So. 2d 1183 (Fl. Dist. Ct. App. 1994).

TIME FOR A REFRESH

Proper ethics are paramount during trial work

By BOB CLIFFORD

In March, a jury in Tallahassee, Florida, determined 3M fraudulently and negligently misrepresented information about its earplugs and found that it was responsible for the hearing loss of a U.S. Army National Guardsman.

The court held in the bellwether case of *Wilkerson v. 3M, et. al.*, 7:20-cv-00035, U.S. Dist. Ct. N.D. Fl. that 3M's motion for a new trial was predicated on an objection that should have been presented during trial. "The court and the parties spent an extraordinary amount of time finalizing the jury instructions and verdict form," U.S. District Court Judge M. Casey Rodgers ruled. "There were multiple drafts, multiple briefs on specific objections, documents memorializing preserved objections, two separate orders on the parties' objections and an extensive charge conference that went well into the night … the defendants failed to raise this issue before the jury was dismissed, and thus they cannot raise it now."

The multidistrict litigation was created in April 2019. It includes cases brought by hundreds of thousands of military veterans and service members. The cases allege 3M and its subsidiary, Aearo Technologies LLC, supplied defective CAEv2 earplugs to the military. Was the defendant's trial strategy here intentional?

Just like Tallahassee, Chicago and the country struggle to get back to pre-pandemic trial levels. It is an appropriate time for lawyers to review some of the Rules of Professional Conduct as they move to in-person trials.

PROPER CONDUCT

Too often during Zoom proceedings, stories of lawyers' inappropriate decorum have been reported – from lawyers clandestinely coaching witnesses to one Michigan attorney angrily displaying the middle finger and being sanctioned $3,000 by an appellate court.

It boils down to every client being accorded due process with lawyers maintaining ethics and professionalism in the courtroom. If not, misconduct can lead to a malpractice claim.

Discovery practice can lead to some serious sanctions. One example of a sanctionable offense is document dumping. When an influx of documents is available, some parties have submitted more documents than necessary in an attempt to bury critical or pertinent information. Courts don't look favorably upon this practice. For example, a New York court fined a law firm $10,000 for responsive documents being "imbedded in large amounts of otherwise irrelevant documents." The court ordered the plaintiff to put the documents in an electronically searchable format and to organize them in the order requested by the defendants.

The Illinois Rules of Professional Conduct include a level of competence in electronic technology. "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 …" (Rule 1.1, Comment 8).

Spoliation of evidence can spark a malpractice claim. U.S. District Court Judge Edgardo Ramos allowed breach of contract and malpractice claims against a law firm accused by its former client of failing to adequately advise them against destroying evidence. There, the client had no preservation policy in place, relevant documents were discarded and relevant files were reused as scrap paper in an effort to support recycling. The plaintiff entered into a $2.5 million settlement in the underlying lawsuit, then sued its attorneys for malpractice, alleging the firm failed to issue a litigation hold and failed to properly oversee the company's compliance with its discovery obligations. The court held the responsibility to preserve evidence "runs first to counsel." In denying the law firm's motion for summary judgment, the court held the failure to do so "falls below the ordinary and reasonable skill possessed by members of the legal bar."

LEARN MORE

Clifford Law Offices will host a free two-hour ethics program to help Illinois attorneys get back in the saddle as courtrooms reopen. "Refresher on Ethics of Trial Work in a Courtroom" is scheduled to take place from 2:30 to 4:30 p.m. Thursday, Feb. 16 (register at www.cliffordlaw.com).

The panel, which I will be moderating, will discuss hypotheticals that impact lawyers in the courtroom. It will feature James Grogan, adjunct ethics professor at Loyola University College of Law and former ARDC deputy administrator and chief counsel; Christopher Heredia, CNA risk control consulting director and former ARDC litigation counsel; and 7th Judicial Circuit Court Judge April G. Troemper, who is a member of the Illinois Judicial Ethics Committee.

From discovery issues to closing arguments, hypotheticals will be presented at various pre-trial, trial and post-trial stages with attendees answering polling questions on best practices. As of Jan. 1, the Illinois Supreme Court enacted an updated Illinois Code of Judicial Conduct for the first time in almost two decades. The code is currently in line with national standards, having addressed the use of social media and other technology that didn't exist when it was last majorly updated in 1993. How some of these rules fit with trial lawyers in a courtroom will be discussed.

It's time to pause and decide if you need to brush up on trial skills. The COVID-19 pandemic took its toll on many people in different ways. It's important that clients don't also witness its effects after waiting for an in-person trial. CL

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