

Legal Ethics

Lecture 15

Prof. Howard Leib

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Ethical Problems in Litigation

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ABA Model Guidelines for the Utilization of Paralegal Services

- Guideline 1: A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.
- Guideline 2: Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.



ABA Model Guidelines for the Utilization of Paralegal Services

- Guideline 3: A lawyer may not delegate to a paralegal:
 - (A) Responsibility for establishing an attorney-client relationship.
 - (B) Responsibility for establishing the amount of a fee to be charged for a legal service.
 - (C) Responsibility for a legal opinion rendered to a client.
- Guideline 4: A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.



ABA Model Guidelines for the Utilization of Paralegal Services

- Guideline 5: A lawyer may identify paralegals by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.
- Guideline 6: A lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.
- Guideline 7: A lawyer should take reasonable measures to prevent conflicts of interest resulting from a paralegal's other employment or interests.
- Guideline 8: A lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services.



ABA Model Guidelines for the Utilization of Paralegal Services

- Guideline 9: A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that work to a law practice, but the paralegal's compensation may not be contingent, by advance agreement, upon the outcome of a particular case or class of cases.
- Guideline 10: A lawyer who employs a paralegal should facilitate the paralegal's participation in appropriate continuing education and pro bono publico activities.



The Decision To File A Civil Suit

Problem #23 - Facts

- Your client is a producer of a large assortment of California wines.
- Many of its wines do not “travel well” from California to their destination and have a short bottle life.
- In order to enable the wines to travel better and maintain their quality for a longer period of time, your client uses a unique process that places a small amount of a chemical substance into each bottle.
- Recent testing of that substance suggests that when large amounts of the substance are consumed by rats, a statistically significant number of rats contract cancer of the throat.
- Assume that under an applicable provision of the Food and Drug Act, if the Food and Drug Administration (FDA) determines that any substance consumed in any amount by man or animal causes cancer, the FDA must ban the substance.



The Decision To File A Civil Suit

Problem #23 - Facts

- Some reputable scientists fully support the very conservative approach taken by the Food and Drug Act; others do not.
- Your client tells you that it is imperative that the FDA delay banning his wines, because he believes he would likely go bankrupt if he could not sell the thousands of cases he has already shipped out.
- The food and drug laws do not provide for any compensation for your client, and the chances of Congress passing a private bill for your client are remote.
- Moreover, he tells you that the shelf life of his wine is only six months (that is, within six months, over 95% of the wine he had shipped will have been sold to consumers by the liquor stores and removed from the shelves).
- The new wines that he is producing will not contain substances that have been found to be carcinogenic.



The Decision To File A Civil Suit

Problem #23 - Facts

- You plan to file suit attacking the factual basis for the FDA order in this case and the constitutionality of the Food and Drug Act provision.
- You know that court dockets are so crowded that such a suit is likely to delay the effectiveness of the FDA's order banning the wines.
- Several years ago, however, your circuit upheld the law against just such a constitutional attack.



The Decision to File a Civil Suit

Ethical Standards Governing the Filing of a Civil Action



- **A1. Do the Model Rules tell you whether or not it is proper to file suit in this case? Is the fact that the delay obtained by such a suit might serve to save the client from bankruptcy the only relevant concern?**
- The basis of the suit must only be “not frivolous”.
 - Rule 3.1 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- Here, although delay is the real motive, the case is weak but not substantively baseless.





The Decision to File a Civil Suit

The Ethical Status of Delay as a Litigation Tactic

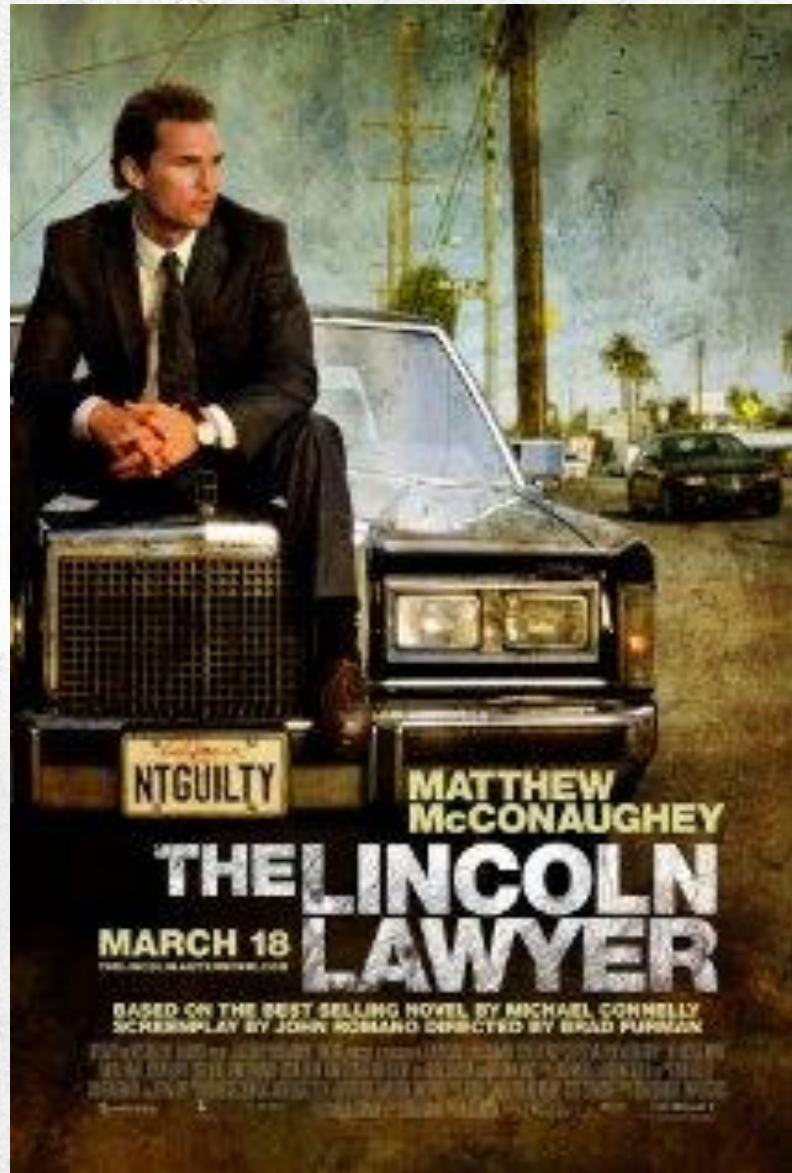
- **B1. Does Model Rule 3.2 establish a different ethical standard for the use of litigation? Is its key principle that a lawyer must “expedite” resolution? Is the rule focused on inefficient use of court time?**
- Rule 3.2 and its comments seem to prohibit *improper* delay.
 - Rule 3.2 A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
 - Comment 1 - ...Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.
- Comment 1 also permits seeking a delay for “personal reasons”, but lawyer convenience is said generally not to be a valid basis for delay.



The Lincoln Lawyer (2011)

M_LincolnLaw_01

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The Decision to File a Civil Suit

Consideration of ADR Alternatives

- **D1. Do you have an obligation to propose nonlitigation alternatives to your client, the wine producer?**
- **D2. Why are there special rules restricting lawyers who act as third party neutrals that do not apply to non-lawyers who occupy the same role?**
- Lawyers have unique ethical issues surrounding the potential for confusion about the nature of the lawyer's role (advocate vs. neutral).
 - Rule 2.4(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.



Wedding Crashers (2005)

M_Crashers_01



Litigation Tactics

Problem #24 - Facts

- Hugh Martin, one of the most famous insurance defense lawyers in San Francisco, defends clients of many of the largest insurance companies in the United States.
- His firm's office overlooks the bay and occupies an entire floor of the Transamerica building. Yet despite his luxurious office and income to match, Martin cuts a different figure in court.
- He dresses in baggy tweed jackets with elbow patches, his shirts have badly frayed sleeves, and his unpolished shoes have very worn heels and soles.
- While he is a dapper figure outside of the courtroom with his custom suits and handmade cigars, he justifies his shabby attire and country lawyer act in the halls of justice as an effort to win sympathy from the juries while helping insurance companies avoid large tort judgments.
- Martin confides to his young associates that they should avoid choosing younger jurors because of their "social worker, do-gooder mentality."



Litigation Tactics

Problem #24 - Facts

- He also advises: “Try to pick a jury with racial and class differences; by exploiting and encouraging dissension you create disunity; a disunified jury rarely grants large awards.”
- In one lecture to new associates in his firm he explained:
 - “You have to use your ingenuity and use all the tricks of the trade to win for the defense and a large tort claim. If you see that you can exploit an opposing witness’s emotional weakness to make him seem uncertain about a fact, don’t hesitate to do so even if the fact is true. The client doesn’t pay for justice. It pays for victory.”
- Martin also trains his associates to impose costs upon opposing parties and counsel.
- “Be sure to schedule depositions at the most unfavorable times and in remote places. We can teach opponents a lesson that we will go to all ends to prevail in litigation.”
- In a case that Martin likes to brag about, he defended a manufacturing concern charged with the negligent death of the wife of a middle-aged worker.



Litigation Tactics

Problem #24 - Facts

- All during the trial Martin had his attractive secretary sit in the courtroom.
- Then, according to plan, Martin had his secretary — just before closing arguments, during a short break in the proceedings when the plaintiff's lawyer's back was turned — ask the plaintiff-widower the time; she smiled at his response, patted him on the head, and then left.
- The three older members of the jury looked with icy stares at the plaintiff and five hours later the jury returned a verdict for the defense.
- One or more of the jurors mistakenly assumed that Martin's secretary was the plaintiff's new wife.
- Martin justifies these and similar practices (he calls them "tricks") as necessary to counteract what he considers the unfair advantage of the plaintiff's lawyer in winning verdicts because of sympathy and other reasons not connected with the merits of the case.





Litigation Tactics

The Line Between Creative Lawyering and Deception

- **A3. When Martin cross-examines a truthful witness, may he properly try to get that witness to express uncertainty about something that Martin knows to be true?**
- This is a tough call about which the ABA has offered few helpful answers.
 - Rule 4.4(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.
- On the other hand, other standards provide that “[d]efense counsel’s belief or knowledge that the witness is telling the truth does not preclude cross-examination.”





Litigation Tactics

Using Deception in the Search for Truth

- **B1. May a lawyer ever use deception as a way to bring out the truth in court?**
- Not directly.
 - Rule 3.3(a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- May a lawyer use deception to expose questionable testimony from a witness?
 - Expert testimony (classic car example)
 - Eyewitness testimony
- The Rules forbid the lawyer to lie, but seem to allow some flexibility for exposing the lies of others
- “Parlor tricks” are dangerous



Quick Quiz

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End Of Class Review Quiz

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**THE
BIG
QUIZ**

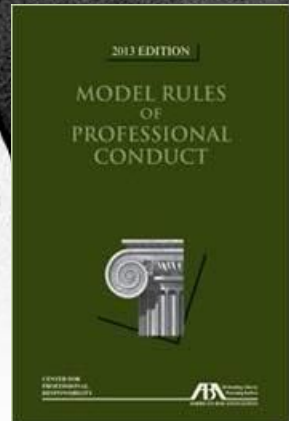




MRPC 2.4

Lawyer Serving As Third Party Neutral

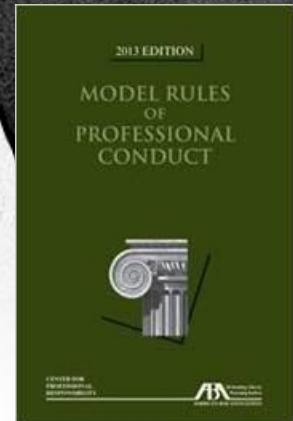
- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.



MRPC 3.1

Meritorious Claims And Contentions

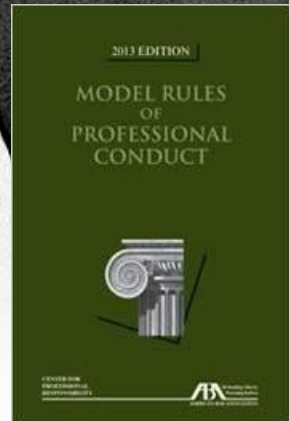
- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal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



MRPC 3.2

Expediting Litigation

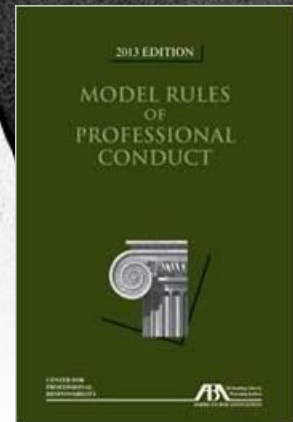
- A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.



MRPC 3.3

Candor Toward The Tribunal

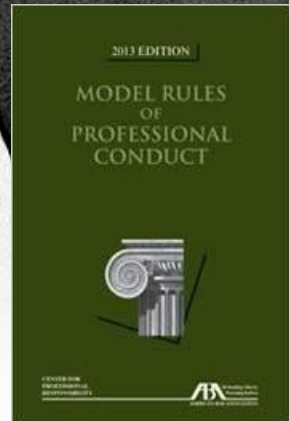
- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.



MRPC 3.3

Candor Toward The Tribunal

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.



MRPC 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.
- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

