“Unprofessionalism in the Profession”

You know it when you see it – But what can you do about it?

“So, in closing: my opposing counsel is a very bad, bad man.”

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A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.
Hypothetical 1(A): A Shocking Discovery

- In opposition to your motion for summary judgment, your opponent files his client’s affidavit in an effort to raise a fact issue.

- After comparing the signature on the Affidavit with other signatures you have from the party-opponent, you believe that the Affidavit contains a forged signature.

- A handwriting expert you subsequently retain confirms that (1) the signature on the Affidavit is a forgery; (2) the notary signature is a forgery; (3) several other Affidavits that had been filed with the Court contained forged party and notary signatures; and (4) in all likelihood, the forged signatures were made by the same person – your opposing counsel!
Applicable Texas Disciplinary Rules
(and Model Rules)

Rule 3.03(a) A lawyer shall not knowingly: . . . . (5) offer or use evidence that the lawyer knows to be false.
   (ABA Model Rule 3.3(a)(3))

Rule 3.04(b) A lawyer shall not: . . . falsify evidence . . . .
   (ABA Model Rule 3.4(b))

Rule 8.03(a) A lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.
   (ABA Model Rule 8.3(a))
Hypothetical 1(B): A Shocking Discovery

• In opposition to your opponent’s motion for summary judgment, you file an Affidavit in an effort to raise a fact issue. The Affidavit is written and signed by your company representative. Based on the Affidavit, the court denies the motion for summary judgment.

• Nine months later and on the eve of trial, you learn for the first time that information included in the Affidavit is false.
Hypothetical 2: “Did he really just ask that question?”

- You are defending a breach of contract case in which a vendor is claiming your corporate client owes money for unpaid invoices.
- It is day 3 of the jury trial.
- During cross-examination of an employee from your client’s accounting department, opposing counsel asks: “Isn’t it true that the CEO of the company has been having an affair with your co-worker?”
- The alleged affair has nothing to do with the case.
Applicable Texas Disciplinary Rules (and Model Rules)

Rule 3.04(c)(2) A lawyer shall not: . . state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence. . . .

(ABA Model Rule 3.4(e))
Preserving Error for Appeal

1. Object, promptly (if overruled, error is preserved).

2. Request an instruction to disregard (if denied, error is preserved).

3. Some court cases suggest a motion to strike is also necessary (if denied, error is preserved).

Hypothetical 3: “What settlement offer?"

• Shortly after a lawsuit is filed, your client authorizes you to make a written settlement offer to the plaintiff.

• In accordance with your client’s wishes, you send the written offer to the opposing counsel. When you do not receive a timely response, you ask the status. Your opposing counsel tells you that the offer is rejected.

• More than a year later, during the deposition of the plaintiff, you learn that the settlement offer was never communicated by plaintiff’s counsel to her client.
Applicable Texas Disciplinary Rules (and Model Rules)

Rule 1.03(b)  A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(ABA Model Rule 1.4(b))

Cmt. 1: A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.
Hypothetical 4: Truthful Negotiations?

- During settlement negotiations with the IRS regarding a tax dispute, you (as the attorney for the taxpayer) tell the IRS that your company is willing to pay no more than 25% of the proposed assessment.

- In fact, you are authorized to settle the case for up to 50% of the proposed assessment in order to avoid litigation.
Applicable Texas Disciplinary Rules
(and Model Rules)

Rule 4.01 In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person ....

(ABA Model Rule 4.1)

Cmt. 1: This rule refers to material facts (or omissions). “Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, ... under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. ....”
Hypothetical 5(A): The Abusive Deposition

During a contentious deposition of a non-party witness, the opposing counsel repeatedly asks the witness about his knowledge of a particular document. The witness testifies he has general knowledge about the document, but has not seen the document in years.

The opposing counsel never shows the deponent the document.

Upon repeated questioning about the content of the document, the witness continues to give the same answer, “I do not recall.”

The opposing counsel then asks whether the witness recalled the contents of the document “when he was sitting in his attorney’s office.”

The opposing counsel reminds the witness more than once that the witness is under oath and, “the Judge is going to make you come back here to answer my questions.”

The opposing counsel goes even further and asks the witness, “Do you know what woodshedding is?”
Texas Rules of Civil Procedure

Rule 199.5(d)  The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness.

199.5(f)  An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to . . . protect a witness from an abusive question . . ., or secure a ruling pursuant to paragraph (g).

199.5(g)  If . . . the deposition is being conducted . . . in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.
Hypothetical 5(B): The Abusive Deposition

• During a contentious deposition of a party witness, the opposing counsel defending the deposition repeatedly disrupts the flow of the deposition by constantly objecting to the form of the question, suggesting answers to the witness by making “speaking” objections and clarifying questions posed by opposing counsel.
Hypothetical 6(A): How Relevant Is that Case, Really?

- You have filed a Rule 12(b)(6) Motion to Dismiss a class action suit.

- Your Opposing Counsel files her Response in Opposition to the Motion and cites numerous cases, including one or two that look to be particularly bad for your client’s position.

- In connection with preparation of your Reply brief, you look up each of your opponent’s cited cases, and, lo and behold, the particularly “bad” cases not only do not stand for the proposition(s) for which they were cited, they appear to have been quite deliberately taken out of context and manipulated with improper use of ellipses and brackets in parenthetical descriptions of the cases holdings.
Hypothetical 6(B): How Relevant Is that Case…Now?

- You have cited a great case in your Rule 12(b)(6) Motion to Dismiss a class action suit pending in the Northern District of California.

- Plaintiffs have filed their response and have not distinguished your great case.

- When you are drafting your Reply, you learn that, since the time you drafted your motion, your great case has been expressly rejected by another district court in the Northern District of California, on the same grounds upon which you relied in your brief.
Applicable Model Rules

ABA Model Rule 3.3: A lawyer shall not knowingly 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; or, 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
Hypothetical 7(A): Deal Breakers?

• Your company is conducting due diligence in connection with the possible acquisition of a foreign business. Teams are formed to conduct the due diligence on the target company’s financials, legal compliance, cultural issues, and other aspects of its business. One or more of the teams submits a report raising certain red flags.

• What steps do you take to address the red flags before proceeding with the acquisition?

• What ethical obligations, if any, does the foreign business have to your company?
Hypothetical 7(B): Deal Breakers?

- Following your company’s acquisition of a foreign business (and having conducted reasonable due diligence before closing), it is discovered that the foreign business was engaged in serious fraudulent and illegal activity, including bribing foreign officials to win government contracts.

- Your company now wants to unload this newly acquired hot potato.

- What ethical considerations come into play in your efforts to divest this business?
A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.
“There is a big difference between what one has a right to do and what is right to do.”

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