Ethical Issues at Trial

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Attorneys are under tremendous pressure to win at trial. Victory can mean financial reward, approval from clients and colleagues, and emotional highs. A loss at trial—right or wrong—can lead to feelings of shame or embarrassment, financial worry, and any number of negative outcomes for the client, depending on the nature of the case.

Nevertheless, attorneys must follow the RPCs in spite of the stress and pressures of trial to win. This module will explore a few scenarios at trial that can test a lawyer's ethical compass.

Please note that these examples are intended to stimulate discussion. They should not be taken or considered as ethical or legal advice, nor should you consider me to be an expert in the area of attorney ethics. I am a primarily personal injury lawyer who occasionally works criminal cases. Like you, I must grapple with the realities of interactions with other lawyers, the court, and my clients, and try to steer the ship safely through the obstacles presented by each individual case. Like you, I must rely on my own good judgment where the RPC's do not explicitly compel a certain course of action. My hope is that sharing my experiences will help you consider what you might do if a similar situation arises.

“Can we borrow your computer?”

There is no ethical rule saying that opposing lawyers need to be outright friendly—but there are a lot of practical reasons to play nice with the other side. Sometimes lawyers choose to do things at trial like share technology for presenting evidence. There is no reason not to be courteous and cooperative with the other side—so long as it doesn’t prejudice your client. It makes your highly stressful job a bit less confrontational, and can take the edge off having candid discussions with opposing counsel, which can lead to more efficient settlement discussions.

But where does one cross the line between professional courtesy and duty to represent the interests of the client?

A scenario I encountered several years ago was in a criminal trial where the prosecuting lawyer had a piece of video that she intended to play for the jury. This evidence was ostensibly going to be used to convict my client.[1] The prosecutor encountered technical difficulties on her laptop and could not play the video. She turned to me and my co-counsel and asked: “can we borrow your computer”?

My initial reaction was to try and help a fellow person who is asking for help. But as an advocate for my client, how could I ethically facilitate the presentation of evidence that could lead to his conviction? Wouldn’t that prejudice my client, to whom I owe an especially high duty of zealous representation as a criminal defendant?

[1] To this day I have not seen the video. It was never disclosed prior to trial despite requests for its production. And the judge denied our motion to exclude the video because of the non-disclosure.

Fortunately for me, my co-counsel spoke up and politely informed her that we would not be assisting her in presenting evidence that she could not herself present. That, he said, would be in direct conflict with our client's interests. He also reminded her that the burden of proof is hers alone, and that we are not required to help the State put on its case.

Looking back, I am thankful for the instinctual judgment my co-counsel showed. I might have made a mistake had he not jumped in. Opposing lawyers are people too and should be treated with respect and professionalism. But my gut reaction would have hurt my client's case if I had acted on it.

Its easy to imagine a scenario that is different, where cooperation is not going to prejudice a client. For example, I believe even in a criminal setting that lawyers can share the same overhead projector to put documentary evidence up for the jury to see. Small acts of cooperation can such as that can help build credibility with the judge, the jury, and the opposing counsel. But as advocates, we must remember that our ultimate duty is to our clients, and we must always see their interests protected.

RPC 1.3 (diligence)

RPC 3.4 (fairness to opposing party)

"An offer you can't refuse (to tell your client)"

Settlement offers can potentially put lawyers and clients into conflict of interest positions at trial. Some years ago, our firm co-counseled on a 42 U.S.C. §1983 police

misconduct case. Liability was strong, as the conduct was captured on film and involved minor plaintiffs. Damages, however, were strongly contested.

Our firm was put into a difficult position when, after the jury awarded damages for the plaintiff, and we petitioned for attorney fees, the defense made a settlement offer. The offer was less than we thought we could get from the court in fees, but would have meant more money for the client, since the settlement offer did not specify separate amounts for damages and attorney fees.

Settlement offers must be communicated to a client.[2] And it is the lawyer's duty to explain to the client the effects of accepting a settlement offer. So what do you do when a settlement offer has the effect of increasing the award to the client, and reducing your expected attorney fees?

Carefully drafting your representation agreement is a good first step toward avoiding conflict of interest scenarios such as this one. One of the main purposes of a contingent fee agreement is to *align the interests* of the client and the lawyer. This can be done in a number of ways, and this author does not intend to suggest any course of conduct over the other. Some fee agreements provide that the lawyer is entitled to a set percentage of all monies recovered, including attorney fees. This is perhaps the simplest way to avoid the kind of conflict described here. But it will not always be the most *fair* way to divide the monies earned.

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[2] As with all rules, there are some exceptions to this—for example there are times when a client instructs a lawyer to "reject all offers below $X-amount."

Civil Rights, insurance bad faith, vulnerable adult abuse, and other causes of action that give rise to awards of attorney fees are intended to encourage lawyers to take cases that otherwise would not be financially feasible. So, if a lawyer takes such a case, earns a nominal amount in damages, and then is only entitled to 1/3 of his or her attorney fees, that may defeat the purpose of the statutory fee awards.

Ultimately attorney fee awards must be *reasonable*, and it is up to every lawyer to charge an amount that is fair given the facts and circumstances of each case. A good client relationship, built on trust and communication, will make conversations during and after trial about attorney fees smoother. As with all conflict of interest scenarios, informed consent in writing is a must when dealing with issues such as these.

RPC 1.2 (scope of representation and allocation of authority between client and lawyer)

RPC 1.4 (communication)

RPC 1.5 (fees)

“I’ve never seen this before your honor!”

‘Trial by ambush’ is not the way things are supposed to be done in civil or criminal courts in Washington. Parties have a responsibility to disclose documents and information in a timely manner. The requirement for disclosure varies depending on the type of case and court. For example a criminal prosecuting attorney’s duties are different from those of a civil defendant. But in most cases, evidence that one intends to use at trial needs to have been disclosed beforehand, absent some form of explanation.

A common occurrence at trial is a document or witness is produced that one side claims was never disclosed beforehand. The court has authority to decide whether to admit or exclude evidence that should have been disclosed sooner, but wasn't. The court can allow the evidence to be introduced, but grant the party against whom it will be used some form of relief, such as leave to take a deposition, a continuance, or some other measure. In extreme cases, the court can sanction the offending party with monetary penalties, exclusion of evidence, or even striking portions of an answer or affirmative defense. *See e.g. Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009).

The *Magana* case is an extreme example where the court found willful violations against the defendant, who didn't search for and produce evidence of other, similar incidents in response to discovery requests.

More typically, things are lost in the shuffle, or a party believes something wasn't disclosed, when it actually was. Clerical/staff errors can also occur, leaving lawyers to explain to the court why evidence wasn't produced to the other side.

Attorneys at trial sometimes tell the court incredulously "We have never seen this before!" or otherwise state that evidence wasn't disclosed previously. Lawyers should take care when making statements such as these, because if proven untrue, it can harm credibility. Instead, one could say something along the lines of: "I'm not sure I recognize this. Can we have a moment to see if this has been disclosed?"

When speaking to the court in trial, lawyers can sometimes make mistakes. It is an ethical obligation, and also just good practice, to correct any factual mistakes, or errors in communicating the law to the judge.

Trial is chaos. There are dozens of things to think about, and yet one must also be present and alert. When the pressure is on, the only thing a lawyer has to fall back on is his/her organization. From the moment we take a case, I like to:

- Bates number everything before we send it to the other side, even pre-filing
- Keep a spreadsheet listing bates numbers of everything we send to the other side, and the date it was sent
- Track all documents received from opposing counsel in discovery in the same way

If you track this information and have access to it at rial, it is easy to unwind statements such as “they never gave this to us” and it’s easy to avoid saying something similar and then later having to walk it back.

RPC 3.4 (fairness to opposing party)

RPC 3.3 (candor toward the tribunal)