

Teaching Syllabus

Code of Pretrial and Trial Conduct



AMERICAN COLLEGE
OF TRIAL LAWYERS



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pleasure and charm in the
illustrious company of our
contemporaries and take the
keenest delight in exalting
our friendships.”**

*– Hon. Emil Gumpert,
Chancellor-Founder, ACTL*



AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers is composed of Fellows who represent the best of the trial bar in the United States and Canada. Founded in 1950, the College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. Through its Board of Regents, the General Committees and its State and Province Committees, the College engages in a wide variety of activities to further those purposes.

Fellowship is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Fellows are selected from among advocates who represent plaintiffs or defendants in civil proceedings of all types, as well as prosecutors and criminal defense lawyers. There are more than 5,800 Fellows of the College, including Judicial Fellows elected before ascending to the bench and Honorary Fellows, who have attained eminence in the highest ranks of the judiciary, the legal profession or public service.



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Preface

This syllabus and accompanying videos were prepared by subcommittees of the American College of Trial Lawyers' Legal Ethics and Professionalism Committee. They are intended for use by Fellows presenting litigation ethics and professionalism issues in CLE settings and to law students.

The syllabus and videos are an outgrowth of the American College of Trial Lawyers' *Code of Pretrial and Trial Conduct* (ACTL Code). The ACTL Code was approved by the ACTL Board of Regents in 2009. The goal of the ACTL Code is aspirational—an attempt to set forth the “best practices” of ethical and professional conduct rather than a set of minimum standards. The ACTL Code contains a Message from the Chief Justice of the United States. Chief Justice John Roberts captures the essence of the ACTL Code in these words:

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged *Code of Pretrial and Trial Conduct*. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, “An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.

The Program

The materials in this syllabus and accompanying videos are presented as a guide, not a script. The ACTL recognizes that resolution of some of the problems in the syllabus and videos is subject to legitimate debate. It is anticipated that each presentation will be tailored to the presenter's experience, the audience, and the locale. We also hope that the audience will be encouraged to participate in a dialogue.

These materials can be used by one presenter. However, a panel of Fellows, including Judicial Fellows, would offer a mix of experience and perspectives.

A presentation of all of the videos and material in this syllabus would take many hours. Therefore, in a presentation of one or two hours, the presenter will need to select the materials most appropriate for that setting.

The order in which the problems are presented and discussed is unimportant. The presenter can group problems of interest together or select an example from a specific area and focus upon only one problem in that area.

We have provided citations to the ABA Model Rules, which form the basis of most states' ethical rules, and the ABA Model Code of Judicial Conduct. Citations are also provided to the American College of Trial Lawyers' *Code of Pretrial and Trial Conduct*. These citations are noted as: Model Rules, Model Code Rules and ACTL Code, respectively. The presenter may wish to consider also including slides or references to applicable state codes or rules.

Canadian users should consult codes of professional conduct in force in the appropriate province and the Code of Ethics promulgated by the Canadian Bar Association. The American College of Trial Lawyers' *Canadian Code of Pretrial Conduct* and *Canadian Code of Trial Conduct* should also be considered where relevant considerations differ between the USA and Canada.

One purpose of these materials is to familiarize students and lawyers with the American College of Trial Lawyers and its *Code of Pretrial and Trial Conduct*. Where appropriate, the syllabus distinguishes between the minimum requirements of the Model Rules and the aspirational "best practices" of the ACTL Code. Accordingly, we suggest that presenters consider distributing copies of the ACTL *Code of Pretrial and Trial Conduct* at each presentation.

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This syllabus accompanies the *Code of Pretrial and Trial Conduct* video and is used as a teaching aid.

Approved by the Board of Regents October 2011

American College of Trial Lawyers Code of Pretrial and Trial Conduct Teaching Syllabus

Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

A lawyer must in all professional conduct be honest, candid and fair.

A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.

A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

ACTL Code, p. 3.

Problem 1

A significant client of the law firm of which you are senior partner, who is also a friend, is served with a complaint in which the plaintiff seeks money owed. The client tells you he owes the money and has no defense to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall and to delay judgment until he can get his affairs in order.

Discussion of Problem 1

Model Rule 3.1 provides: 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, . . ." (*emphasis added*)

Model Rule 3.2 provides: Expediting Litigation

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

The ABA comment for **Model Rule 3.2** can be viewed as expressing a near absolute tone. It condemns conduct not “having some substantial purpose other than delay,” prohibits delay “for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose,” and offers no specific discussion of any circumstances in which it recognizes the interests of a client in delaying proceedings. Indeed, the ABA comment expressly states that “financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client”

1 Hazard & Hodes, The Law of Lawyering, § 28.3 (3d ed.) expresses the view that a client’s desire for delay is entitled to no weight in assessing the propriety of the lawyer’s conduct.

Model Rule 4.4(a) provides:

“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, . . .”

This prohibition is also found in **Section 106 of the Restatement (Third), The Law Governing Lawyers**.

In this problem, the aspirational nature of the ACTL Code is apparent in its call for **“prompt, efficient, ethical, fair and just disposition of litigation.”** The legitimate interests of the client to buy time to get his affairs in order may conflict with this goal. The key determination is whether the lawyer is really pursuing legitimate interests of the client or simply frustrating the fair and prompt disposition of justice. The thoughtful resolution of this question is what the drafters of the ACTL Code are seeking from each trial lawyer.

Problem 2

You are consulted by two brothers, ages 23 and 24, who look very much alike. They were at a club recently and were repeatedly harassed by a drunken stranger. Craig, a third year law student with a federal clerkship pending, threw an empty beer bottle at

the man just before closing. It struck him on the temple and caused him to fall against a chair. He died from his injuries five days later and the police charged Craig with manslaughter. The bar was dimly lit and identification of the person who threw the beer bottle will be an issue. Craig's brother Frank, who has bounced around from job to job, is currently unemployed. He has a record for a youthful indiscretion and wants to plead guilty to the crime so that the charge against his brother will be dismissed.

How do you advise the brothers? Can you represent either?

Discussion of Problem 2

This problem implicates a number of provisions in the ABA Model Rules. The first question is whether the lawyer can represent both brothers. At first blush, **Model Rule 1.7(a)** seems applicable. It prohibits a lawyer from representing a client if the representation of the client will be directly adverse to another client, unless (a) the lawyer reasonably believes the representation will not adversely affect the relationship with the client and (b) each client consents after consultation. Here, because the brothers are in agreement as to the proper course, their interests do not appear to be directly adverse. The real issue for the lawyer is raised by **Model Rule 1.7(b)**. A lawyer who considers seeking a client's waiver must make a judgment whether a reasonable lawyer would do so. Here, a reasonable lawyer would not seek a waiver but rather would try to convince Frank not to plead guilty to a charge of which he is factually innocent. If one lawyer represented both brothers, their desire to have Frank take the rap would materially conflict with the lawyer's responsibility to Frank and thus run afoul of **Model Rule 1.7(b)**. Because Frank is innocent and could prove that by implicating Craig, it would be unreasonable for his lawyer to believe that his representation of Frank would not be adversely affected by his also representing Craig. **Model Rule 1.7(b)**. A reasonable lawyer would conclude that the brothers should not agree to a joint representation under the circumstances, and the lawyer therefore cannot properly solicit their consent under **Model Rule 1.7(b)(2)**. Criminal cases in which a lawyer may properly represent codefendants are rare.

If Frank makes a false statement to the tribunal in connection with his guilty plea, which of course the lawyer will know is false given the facts here, **Model Rule 3.3** is implicated. Under **Model Rule 3.3(a)**, a lawyer cannot offer evidence that the lawyer knows to be false. If the lawyer learns of the falsity later, but before the conclusion

of the proceedings, the lawyer must take reasonable remedial measures including disclosure to the tribunal. **Section 120 Restatement (Third), The Law Governing Lawyers** has similar language. Under **Model Rule 3.3(b)**, a lawyer who knows a person intends to engage, is engaging or has engaged in fraudulent conduct in a proceeding has a duty to take remedial measures, including disclosure.

Since a client has the absolute right to testify in a criminal proceeding, Rule 3.3 presents a dilemma for the lawyer. He can't present false testimony but his client has a right to testify. The key is whether the lawyer knows that the testimony is false. Many criminal defense lawyers will take the easy way out and claim they do not know that the testimony is false. This problem takes that claim away from the lawyer. This is handled in some jurisdictions by having the lawyer merely present his client for narrative testimony, without asking questions, thereby implying that he believes the testimony to be false. In a typical plea, questions come from the Court, but the lawyer is still participating in presenting false testimony. In several jurisdictions, the lawyer is required to communicate to the Court his non-participation in his client's answers to the Court's questions. A lawyer must also refuse to sign a statement acknowledging the truth of facts that are known to be false, such as a factual resume incident to a plea that contains false statements.

Model Rule 1.2 requires a lawyer to abide by the client's decision as to whether to plead guilty and whether to testify in a criminal case. In ABA Formal opinion 98-412 (1998), the ABA Committee on Ethics and Professional Responsibility concluded that a lawyer who knows his or her client will present false information must withdraw or disclose the falsity to the court. The potential obligation to disclose prospective perjury is a sufficient reason not to go forward when one knows that the client intends to lie.

Under **Model Rule 2.1**, the lawyer must exercise independent professional judgment and render candid advice, for which he may refer to legal as well as moral and social factors. Through the exercise of this duty, the lawyer may succeed in dissuading his client from participating in the false confession.

The ACTL Code asks lawyers to be "**honest, candid and fair**" (ACTL Code, p. 3) in all professional conduct. Although all clients are entitled to representation of their legitimate interests there are no such interests at stake in the problem. Craig committed the crime and Frank wants to take the blame. Helping them to

accomplish this would not be acting honestly and would be contrary to the “fair and just disposition” of the case. The goal of the lawyer here should be to convince the brothers to abandon this plan to defraud the court. Declining representation without attempting to dissuade the brothers might simply transfer the problem to another lawyer.

Obligations to Clients

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer’s learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

ACTL Code, p. 3.

Problem 3

You undertake the representation of Peter in a divorce action. During the representation Peter acquires information suggesting that the couple’s teen-aged daughter was fathered by someone else. Peter demands a paternity test. Your jurisdiction permits a husband to challenge parentage of a child born during the marriage if non-paternity can be established by clear and convincing evidence, including genetic testing. Your wife is outraged that Peter is seeking to challenge his relationship with the child and your partners fear the position being asserted will damage the firm’s reputation. Your daughter goes to the same school as Peter’s daughter and they are friends. You are personally conflicted over Peter’s position.

Should you withdraw from the representation? Does it make any difference if you learned of the paternity issue before agreeing to undertake the representation?

Discussion of Problem 3

Model Rule 1.16(b)(4) provides that a lawyer may withdraw from representing a client “if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

The ACTL Code provides that it is not only the lawyer's right but also the lawyer's duty to employ **"all appropriate means within the law to protect and enforce legitimate interests of a client;"** to **"never be influenced directly or indirectly by any consideration of self-interest;"** and to **"undertake unpopular causes if necessary to ensure justice."** ACTL Code, p. 3.

Under the Model Rules, an attorney would likely not create an ethical problem by withdrawing. The ACTL Code would suggest that unless the attorney could not effectively represent Peter because of the personal conflict the representation should continue.

If the attorney learned of the paternity issue before undertaking the representation, the ACTL Code is less clear. The ACTL Code recognizes that **"(i)t is the right of a lawyer to accept employment in a civil case . . ."** and provides that **"the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position."** ACTL Code, p. 3. On the other hand, the ACTL Code imposes an **"obligation to undertake unpopular causes,"** where necessary to **"ensure justice."** Query whether vindicating the client's position in this case is **"necessary to ensure justice."**

Obligations to Colleagues

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

ACTL Code, p. 4.

Problem 4

Days before trial is to begin, opposing counsel calls to ask if you have the telephone number or address of a third-party witness who has moved since his deposition. The witness' deposition testimony was unfavorable but not fatal to your client's case. Opposing counsel is concerned the Court may not permit use of the deposition at trial. You have the requested information.

Do you provide it? What if the witness' testimony would seriously damage your client's case? Should you discuss the request with your client before responding to opposing counsel?

Discussion of Problem 4

Model Rule 3.4(a) provides that a lawyer shall not “unlawfully obstruct another party’s access to evidence.” The annotation to **Model Rule 3.4(a)** indicates, however, that the rule “does not impose a duty to volunteer all relevant information.”

The ACTL Code instructs that a “**a lawyer should be cooperative with other counsel while zealously representing the client.**” The ACTL Code, at subparagraph (d), also provides that “**the lawyer, not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client’s rights.**” ACTL Code, p. 4.

A defensible answer under the ACTL Code would be to refuse to provide the information on the basis that to do so would prejudice the client’s rights. The answer, however, may be affected by other considerations including the degree of cooperation of opposing counsel in sharing information without formal discovery requests during this or other proceedings.

The greater the likelihood the testimony would seriously damage the client’s case, the stronger the case can be made for placing a higher priority on the obligations to the client than the obligation to be cooperative with other counsel.

With respect to consulting with the client before responding to opposing counsel, the Model Rules provide that an attorney must “abide by a client’s decisions concerning the objectives of representation” and “consult with the client as to the means by which they are to be pursued.” **Model Rules 1.2(a)** and **1.4(a)(2)**. The annotation to **Model Rule 1.2** acknowledges that the scope of the client’s authority regarding “means” is “not entirely clear.”

The ACTL Code requires “**undivided allegiance, good counsel and candor**” be afforded a client. **ACTL Code, p. 3**. Whether to discuss the matter in advance with the client will likely be decided on a case by case basis involving many factors including the client’s past degree of involvement in the conduct of the litigation.

Obligations to the Court

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

ACTL Code, p. 4.

Problem 5

You are a member of an exclusive golf club with a highly rated golf course. A judge before whom you regularly appear and with whom you have a case currently pending is an avid golfer but lacks the financial means to join a private club and primarily plays public courses. The judge has commented in passing that he would enjoy the opportunity to play your course.

Should you invite him? Query whether the same conclusion would apply if the judge reimbursed the attorney for the guest fees or for the guest fees, food and drink? Would the same concern exist if you had no active cases pending before the judge? What if the judge was a long time personal or family friend or former colleague?

Discussion of Problem 5

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge “by means prohibited by law.” The annotation to **Model Rule 3.5** indicates that gifts that constitute “ordinary social hospitality” are generally permissible although gifts intended to influence the judge are not permitted.

The ACTL Code provides that “(i)n social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety.” **ACTL Code, p. 5.** In situations where an action is ongoing, and particularly if a decision on motions or a judgment is pending, extending an invitation under the circumstances in the hypothetical would likely create an appearance of impropriety.

If active cases were pending before the judge, the appearance of impropriety would remain even when the judge reimburses the costs. Where no active cases

are pending with the judge, the appearance of impropriety would be minimal. The existence of a long-standing personal relationship with the judge would lessen concerns about the invitation being intended to influence the judge but, depending upon the status of the litigation, concerns about an appearance of impropriety must be considered.

In considering this problem, reference should also be made to multiple provisions in the Model Code of Judicial Conduct. For example, **Model Code Rule 1.2** provides:

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.

Similarly, **Model Code Rule 3.1(c)** admonishes judges not to participate “in activities that would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality” and **Model Code Rule 3.13(a)** provides that a judge should not accept gifts “or other things of value, if acceptance . . . would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.” **Model Code Rule 3.13(b)(3)**, however, permits acceptance of “ordinary social hospitality.” As noted in the comments to Model Code Rule 3.13, the rules focus on the risk that the benefit “might be viewed as intended to influence the judge’s decision in a case.” The prohibition against accepting, or under **Model Code Rule 3.13(c)** the obligation to report, the benefit is a function of the degree of that risk.

Obligations to the System of Justice

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

Problem 6

You represent a defendant in a complex litigation which has just begun. For internal budgeting purposes, you have advised your management committee to anticipate that the litigation will require the services of multiple attorneys and will likely generate six figure fees over each of the next few years. Your client believes that an aggressive defense will cause the plaintiff to abandon its claims and has instructed you not to

pursue settlement discussions. Based upon your initial analysis of the case and prior experience with opposing counsel, you believe an early mediation or neutral case evaluation would likely result in a settlement.

Should you encourage and seek permission from your client to propose early alternative dispute resolution procedures? What if the opposing party initiates a request for mediation? What if the Court requests that the parties mediate?

Discussion of Problem 6

The Model Rules do not address a lawyer's obligation to encourage use of alternative dispute resolution. The ACTL Code, while recognizing that a lawyer should never be reluctant to take a case to trial, directs lawyers to **"educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation."** ACTL Code, p. 6.

While the decision is ultimately up to the client, under the facts of the hypothetical an early ADR effort would appear to be in the client's best interest. The spirit, if not the letter of the ACTL Code, would suggest that an effort should be made to encourage the client to authorize pursuit of ADR.

The impact of an early settlement on the firm's revenues should never be a factor in advising the client on his or her options. **Obligations to Clients—Fidelity to the Client's Interests. ACTL Code, p. 3; Model Rule 1.7, Comment 10**—"The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."

If the opposing party initiates the request for mediation, the Model Rules and the ACTL Code would require that the client be advised of the request. If mediation appeared to be in the client's best interest, the ACTL Code would counsel in favor of encouraging the client to agree. If the Court requests (rather than orders) that the parties mediate, in most cases the client's best interest would likely be served by encouraging compliance, although the decision remains with the client.

Motions and Pretrial Procedure

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

ACTL Code, p. 6.

Problem 7

You represent Bill who is being sued by Joe, a former partner, over the break up of their partnership – Bill and Joe’s Famous Hot Dogs. There is a vast amount of personal hostility between the former partners. Additionally, the opposing lawyer, Alan Sims, is not one of your favorite opponents--he is quick tempered and has a reputation for not always telling the truth. In past litigation with Alan, he has misrepresented to the court “agreements” reached during phone conversations with you.

The trial has been scheduled by Judge Jolly. Judge Jolly has a practice of postponing trial settings only if all parties consent to the continuance. Alan has requested your consent to continue the trial. Bill has made it clear that he does not want you to voluntarily agree to any procedural requests made on behalf of Joe. Bill also insists on attending all hearings and knows of the current trial setting. Under which of the following situations should you consent to the continuance?

- 1. Alan is requesting the continuance for personal reasons related to an illness in the family. He is a solo practitioner. A continuance will not adversely affect your ability to defend the case.*
- 2. Alan is requesting the continuance for personal reasons related to an illness in the family. He is in a large firm and has partners who can cover for him. If he does not attend the trial, it will require time, effort and expense to Joe in order to adequately prepare the partner to handle the case. A continuance will not adversely affect your ability to defend the case.*

3. *Alan is requesting the continuance, but gives no reason other than that he “needs it as a favor”. You strongly suspect that he has gotten behind on his preparation and simply wants more time to prepare. You also know from prior experiences that he will ultimately be prepared, but will have to work some late nights to do so. A continuance will not adversely affect your ability to defend the case.*
4. *Alan is requesting the continuance but gives no reason other than that he “needs it as a favor”. You strongly suspect that he wishes to attend a sporting event out of town. A continuance will not adversely affect your ability to defend the case.*
5. *Alan is requesting the continuance and you know that he has not secured affidavits from experts that are necessary to defeat your Motion for Partial Summary Judgment, which will be argued prior to the trial. You also believe that, given enough time, Alan will be able to find experts who will provide the necessary affidavits.*

Discussion of Problem 7

Model Rule 3.2, “Expediting Litigation”, provides little help. It reads: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” The comment to Model Rule 3.2 gives some guidance:

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Notably, this Model Rule and comment focus on the propriety of seeking postponement of an event. While the Model Rules contemplate that Alan may seek

a continuance of the hearing for personal reasons, it does not address how you should respond to the request. Under these standards, refusal to agree to Alan's request under any of the five scenarios does not violate the Model Rules.

The ACTL Code provides for a different response:

A lawyer should seek to reschedule an event only if there is a legitimate reason for doing so and not for improper tactical reasons. A lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client's legitimate interests would be adversely affected.

ACTL Code, p. 6.

As we move through situations 1-5 above, the justifications for denying Alan's request for continuance increase. Under the guidelines of the ACTL Code, it is clear that consent should be granted in situation 1. Just as clearly, consent should be withheld in situation 5. Discuss whether consent should be given or withheld under situations 2, 3 and 4.

Problem 8

You represent Bill who is being sued by Joe, a former partner, over the breakup of their partnership –Bill and Joe's Famous Hot Dogs. Bill and Joe are no longer close friends, but each views the case as a part of "doing business" and there is no personal animosity. Bill believes that his defense is bullet proof and he wants the case to move as quickly as possible so that he can "win it and get it behind me". Your opposing counsel, George Jones, commands the highest respect by the members of your local bar in terms of both ability and integrity. George is a member of Megafirm, LLP and has several younger lawyers who assist him in preparation of his cases. However, George is very "hands on" and insists on participating in the most significant depositions and hearings. You know from past experience that George will inevitably request that some depositions and hearings be rescheduled because of conflicts that will develop in his schedule.

Bill tells you to grant no continuances or extensions of time on discovery. How do you counsel him?

Discussion of Problem 8

As in problem 7, the Model Rules simply don't address the subject of professionalism in dealing with requests for continuances, etc. by opposing counsel. However, the ACTL Code says as follows:

Scheduling pretrial events and granting requests for extensions of time are properly within the discretion of the lawyer unless the client's interests would be adversely affected. A lawyer should counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court. A lawyer should not use the client's decision on scheduling as justification for the lawyer's position unless the clients' legitimate interests are affected.

ACTL Code, p. 7.

Discovery

A lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.

During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, to harass the questioner or to disrupt the search for facts or evidence germane to the case.

ACTL Code, pp. 9–10 ("Discovery").

Problem 9

In a legal-malpractice action, the plaintiff is Lilliquist Foundation, a not-for-profit corporation that owns and operates an alcohol-and-drug rehabilitation center. It originally owned the center jointly with Enriching Lives Foundation and St. Mary's Hospital. St. Mary's withdrew as an owner, and the ownership was restructured between Lilliquist Foundation and Enriching Lives Foundation. The defendant is Allen, Baker and Cole ("ABC"), the law firm that represented Lilliquist Foundation in the restructuring. Lilliquist Foundation contends that ABC breached its duty of loyalty to it by concealing

a concurrent lawyer-client relationship with Enriching Lives Foundation in unrelated matters and favored the latter's interests in documenting the restructuring.

ABC took the deposition of John Lilliquist, a founder and principal figure in Lilliquist Foundation. After the deposition, Mr. Lilliquist submitted an errata sheet containing several substantive changes, whereupon ABC reopened the deposition to inquire further. We pick up with questioning by ABC's counsel on the reopened deposition.

Q: You see in the transcript of your earlier deposition, the question to you is, "During all these discussions that we've looked at, is it accurate to say that you at no time ever retained counsel to be involved in the discussions concerning St. Mary's?" And your answer was, "I do not recall employing counsel to assist me in these matters."

PLAINTIFF'S COUNSEL: I would object unless you go back to page 180 where the thing begins to discuss the subject matter so that the witness has some basis for the subject matter itself. And that begins at line 14 of page 180 where there is this discourse that you began and then which culminated in page 182. I mean, I just think it's unfair of the witness.

Q: Mr. Lilliquist, with your counsel's objection on the record, I want you to take a look at the question and the answer I just read. And you can tell me what caused you, having read this question and answer, to want to make a change?

PLAINTIFF'S COUNSEL: This is, of course, impermissible in court where you ask somebody a question and only give them part of the deposition. It's impermissible. I object to it. You can answer.

A: I can't answer because I can't reconstruct this out of the context of the rest of the discussion.

Discussion of Problem 9

1. Were any of Plaintiff's counsel's objections unethical? Ethical but unprofessional?

The Model Rules prohibit a lawyer from "unlawfully" obstructing another's access to evidence. **Model Rule 3.4(a)**. Cf. Restatement (Third) of Law Governing Lawyers

§ 116(2) (“A lawyer may not *unlawfully* obstruct another party’s access to a witness.” (Emphasis added.)) Assume that none of the objections was “unlawful.” Does that mean that they were professionally appropriate?

The ACTL Code provides the following:

During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, ... or to disrupt the search for facts or evidence germane to the case.

ACTL Code, pp. 9.

Plaintiff’s counsel’s objections appear to be designed to communicate a message to the witness (the success of which the witness’s response clearly reflects). As such, they are inconsistent with the standards adopted in the ACTL Code. In addition, the rules of civil procedure or local rules of court in some jurisdictions expressly prohibit speaking objections. Objections 1 and 2 likely would be considered speaking objections and, thus, in violation of a rule of the applicable jurisdiction. If so, they could constitute a violation of the ethical prohibition against knowingly disobeying an obligation under the rules of a tribunal. See **Model Rule 3.4(c)**.

2. What, if any, professionally appropriate objections could Plaintiff’s counsel have made?

While a speaking objection designed to communicate with the witness is improper, a concern that a statement is being taken out of context is legitimate. See, e.g., Rule 106, Federal Rules of Evidence. Thus, an objection to the form of the question (such as “confusing”), the sole purpose of which is to preserve the objection for trial, would be appropriate. Query whether the Plaintiff’s counsel could properly object and also ask that the witness be permitted to read the entire relevant portion of the transcript. Does that improperly communicate a message to the witness?

Problem 10

Continuing in the same deposition:

Q: Mr. Lilliquist, I call your attention to the following question and answer in your earlier deposition. Question: “What facts can you point to that would lead

one reasonably to believe that Allen, Baker & Cole was representing Enriching Lives Foundation after the Center was formed?" And your answer was, "I can't identify any facts." Do you see that?

A: Yes.

Q: Then on your errata sheet, you deleted "I can't identify any facts" and substituted "The fact that Enriching Lives was given half of our assets without our being informed of it." Right?

A: Yes.

Q: So, explain to me how, after St. Mary's withdrew, Enriching Lives Foundation was given half of Lilliquist Foundation interest?

A: After St. Mary's withdrew, there were two partners left, Enriching Lives Foundation and Lilliquist Foundation. With only two partners, the maximum share that Enriching Lives was going to get or was entitled to was certainly no more than 50 percent.

Q: Okay. How much did they get?

A: 50 percent.

Q: So, they got exactly the maximum amount they were entitled to, correct?

PLAINTIFF'S COUNSEL: Don't answer the question. It has nothing to do with the errata sheet.

Q: Mr. Lilliquist, when St. Mary's withdrew and Enriching Lives and Lilliquist remained, I am trying to understand your answer which is that the Lilliquist Foundation gave up 50 percent of its interest. I am just trying to make sure I understand why you made that change. Explain to me how Lilliquist Foundation gave up 50 percent of its interest when it was a one-third owner.

PLAINTIFF'S COUNSEL: Don't answer the question. The errata sheet speaks to it. They must have been representing Enriching Lives, that's what it says, when they gave away 50 percent. If you want to ask him questions on the errata sheet, that's fine. But what you have done is spin this into a deposition.

Discussion of Problem 10

1. Were any of Plaintiff's counsel's objections unethical? Ethical but unprofessional?

Much the same analysis applicable to Problem 1 applies here as well. Although counsel's objections, perhaps, did not violate an ethical rule, they were designed to obstruct the questioning. As such, they were inconsistent with the profession's traditional values of distaste for sharp practice and unnecessarily aggressive behavior, and the ACTL Code provision cited in the discussion of Problem 9 applies.

2. What, if any, professionally appropriate objections could Plaintiff's counsel have made?

Probably none or at most, perhaps, some type of objection to the form of the question. Instructing the witness not to answer clearly was unprofessional. (Here, too, the rules of civil procedure or local rules of court in some jurisdictions expressly limit the circumstances in which a lawyer may instruct a witness on deposition not to answer a question. *Cf.* Fed. R. Civ. P. 30(c)(2). Counsel's objections almost certainly run afoul of such a rule and, as such, could constitute a violation of the ethical prohibition against knowingly disobeying an obligation under the rules of a tribunal. See **Model Rule 3.4 (c)**).

Problem 11

In the same case ABC took the deposition of Michael Lilliquist, the son of founder John Lilliquist and himself a principal figure in Lilliquist Foundation. The deposition was adjourned before being completed and is being resumed several weeks later. We pick up with questioning by ABC's counsel.

Q: So you knew that when St. Mary's withdrew, the Center would have two equal owner-members, correct?

A: Correct.

Q: I want to show you Exhibit 133, which is a copy of minutes of a meeting of Enriching Lives Foundation's board of trustees and which was marked during your last deposition, and ask you to turn to the second page, which has a Bates stamp HAZ 08394. Do you see that, sir?

A: Yes.

Q: *This is a discussion about the restructuring resulting from St. Mary's withdrawal, correct?*

A: Correct.

Q: *And it recites that you stated that the one-page summary prepared by staff for the board's review was well-stated, right?*

A: Yes.

Q: *And at the first installment of your deposition, we did not have the one-page summary that's referenced here, so we're going to mark that summary as our next exhibit, Exhibit 195. And I'm going to ask you some questions about it.*

PLAINTIFF'S COUNSEL: *Wait a second. Why didn't we have it? I have a right to know. This was never produced to me. I want to adjourn the deposition so the witness can read this. It doesn't have a Bates number on it, it's never been produced, you're flashing it out here for the first time. I have a right to discuss this with the witness. We're not going to proceed further until that occurs.*

Discussion of Problem 11

Note that Plaintiff's counsel did not contend that ABC had, in fact, wrongfully omitted the document from a response to a specific request for production; instead, counsel asserted a supposed right to have the witness review the document *and discuss it with him*. What would be the purpose of such a discussion? To tailor the witness's testimony in some fashion? To ensure that the witness "understood" the ramifications of the document? If not, what? If the witness were to testify to questions about the document in a manner that counsel believed evidenced confusion, counsel could address it on cross-examination. In addition, the witness would have the opportunity to correct any errors in his testimony on an errata sheet. In any event, trying to protect one's witness does not justify obstructing the truth-seeking process.

Assume, alternatively, that the document was clearly or even arguably the subject of a document request. Under those circumstances, would Plaintiff's counsel be justified in instructing the witness not to answer and moving to limit the deposition under

Fed. R. Civ. P. 30(d)(3) on the grounds that the deposition was being conducted in bad faith because the document should have been produced in discovery?

What if the Defendant's counsel offered to allow the witness ample time to review the document without discussion with Plaintiff's counsel? Would Plaintiff's counsel still be justified in terminating the deposition?

Trial

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness, and courtesy of the trial process.

ACTL Code, p. 12.

Problem 12

During voir dire, in a personal injury case, defense counsel asked a member of the venire (1) whether he had ever suffered a personal injury in an accident and, (2) whether he had ever filed a lawsuit. The venire member responded to both questions in the negative. Based on an examination of court records, defense counsel already knew that the venire member had filed an action seeking damages for personal injuries allegedly suffered in an accident and had received a substantial jury verdict at trial. Defense counsel decided to use available peremptory strikes on other members of the venire and did not strike the venire member who filed a personal injury lawsuit.

The jury returned a substantial verdict for plaintiff. In a post trial motion, must defense counsel disclose that they already knew of the venire member's injuries and lawsuit at the time they asked the question during voir dire? Should defense counsel have revealed to the judge the falsehood as soon as it occurred during voir dire? Do they have a duty to self-report a violation of Model Rule 3.3?

Discussion of Problem 12

"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 . . ." **Model Rule 3.3(a)(1).**

Comment (2) to **Model Rule 3.3(a)** makes it clear that an advocate cannot engage in any conduct that undermines the integrity of the adjudicative process. Even though a lawyer has an obligation to present the client's case "with persuasive force," that duty "is qualified by the duty of candor." Moreover, "[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact...."

The filing of a post trial motion based on the failure of a venire member to answer truthfully questions asked in voir dire is at least an implicit representation to the court that the lawyer relied on the answer in deciding not to use a strike. Failure to disclose the attorney's prior knowledge of the juror's injuries would appear to be in conflict with the Model Rules. The ACTL Code yields the same result. A lawyer should not **"make any argument that the lawyer knows is improper."** ACTL Code, p. 13. In addition, the ACTL Code provides under **Qualities of a Trial Lawyer that a lawyer must be honest and candid in all professional conduct.** ACTL Code, p. 3. The filing of a post trial motion under these circumstances would be "improper" and would not be "honest and candid."

The issue of whether the falsehood should have been reported during the voir dire process is addressed by Model Rule 3.3(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." **Model Rule 3.3(b).**

Defense counsel should have revealed the juror's falsehood during voir dire. The longer they wait, the more they can be criticized for failure to reveal the fraud.

As to the issue of reporting a violation to disciplinary authorities, ABA Model Rule 8.3(a), which requires reporting of ethical violations, does not require self-reporting. But some states, such as Ohio, replaced the ABA's language in 8.3(a) of "another lawyer has committed a violation" with language that applies to "any" lawyer. That language, according to the comments, was intended to continue the Ohio requirement of self-reporting of ethical violations. If two lawyers are involved in a violation of 3.3, it could be argued that they have a duty to report each other under the ABA's "another lawyer" version of 8.3. This illustrates the folly of failing to report the falsehood immediately.

Problem 13

After a favorable jury verdict in a personal injury case, but before the expiration of the time to appeal from the judgment entered on that verdict, plaintiff's counsel properly conducted interviews with the jurors, who had been discharged by the court. One juror informed plaintiff's counsel that he had suffered injuries similar to those suffered by plaintiff, but was unsuccessful in the lawsuit he filed. He said that he knew from his own experience how painful and severe plaintiff's injuries were. Defendant's counsel had asked during voir dire whether any member of the venire (1) had suffered a personal injury or (2) had ever filed a lawsuit. The juror's response to each question was negative.

Should plaintiff's counsel report this conversation to the court and defendant's counsel? Should plaintiff's counsel discuss the issue with his client before taking action?

Discussion of Problem 13

"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." **Model Rule 3.3(b)**.

Model Rule 3.3(c) provides that the duties in **Model Rule 3.3(b)** "continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by [**Model Rule 1.6**]." The juror in question has engaged in fraudulent conduct and disclosure to the court and defendant's counsel are "reasonable remedial measures" required by **Model Rule 3.3(b)**. Likewise, under the ACTL Code, a failure to report the juror's conduct "**would undermine the fairness and impartiality of the administration of justice . . .**" **ACTL Code**, p. 12. While an attorney should explain his obligations to the client, the client's wishes cannot control in this situation.

Problem 14

During rebuttal at trial, plaintiff's counsel calls a witness who is president of Ajax Corporation, which is the largest client of the law firm in which defendant's counsel is a partner. Defendant's counsel has worked with the witness in many cases during previous years and also represented the witness personally in some cases. The interests of neither Ajax Corporation nor of the rebuttal witness would be affected by the result of the trial. As a rebuttal witness, the president of Ajax Corporation was not

listed in pretrial disclosures of witnesses.

Is defendant's counsel limited in the cross examination of the rebuttal witness because of the witness's status as a client and officer of a client? Can defendant's counsel or any other member of his firm even cross-examine the witness?

Discussion of Problem 14

A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses.

ACTL Code, p. 11.

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...." **Model Rule 1.6(a)**

". . ., a lawyer shall not represent a client if . . . (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, . . ." **Model Rule 1.7(a)(1) and (2)**. Comment [6] to **Model Rule 1.7** provides that "a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, . . ."

The issues raised in this hypothetical are discussed in depth in *Freivogel on Conflicts* (www.freivogel.com). Under ABA Op. 92-367, Defendant's counsel likely faces a disqualifying conflict absent informed written consent from both clients. Complicating this hypothetical, however, is that the conflict did not appear until the witness was offered in rebuttal at trial. What if the judge would not permit withdrawal at this late stage in the proceedings? Could defendant's counsel proceed with cross-examination if it would not require disclosure of confidential information of Ajax or the witness? What if Ajax nonetheless refuses to consent?



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