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**PROGRAM MATERIALS**  
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## **Order in the Court: Ethical Interaction With Judges**

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# **Legal Ethics**

## **Order in the Court Ethical Interaction With Judges**

**Wendy L. Patrick, JD, PhD**

# Blurred Lines



# ABA Rule 1.1 Competence

- ☐ A lawyer shall provide competent representation to a client.
- ☐ Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.



# ABA Rule 1.3 Diligence

- ☐ A lawyer shall act with reasonable diligence and promptness in representing a client.

## ABA Rule 1.3 [1]

- ☐ A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.

# ABA Rule 1.3 [1]

- ☐ The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

# ABA Rule 1.2, Scope of Representation and Allocation of Authority

Lawyer shall abide by client's decision re objectives of representation, and per 1.4 shall consult w/ client re means by which they are pursued.

Criminal case: abide by client's decision re plea, whether to waive jury trial, and whether client will testify.

# ABA Rule 1.3 Diligence

- ☐ A lawyer shall act with reasonable diligence and promptness in representing a client.
- ☐ [2] A lawyer's work load must be controlled so that each matter can be handled competently.
- ☐ [3] Perhaps no professional shortcoming is more widely resented than procrastination.

# People v. Pigage (CA)

- ❑ -I'm still going to argue it, with all due respect.  
The court: In the face of my ordering you not to?
- ❑ Prosecutor -Yes.
- ❑ The court: I think that's unwise.
- ❑ Prosecutor: I have cases to back me up in this one .  
... by limiting me from arguing something the  
Court of Appeal says I can argue is — I don't want  
to say a bad ruling. I do mean with all due respect.

# People v. Pigage (CA)

The Attorney General argues [the prosecutor's] legal position was "right." However, the correctness of the court's decision is not the issue.-It is the imperative duty of an attorney to respectfully yield to the rulings of the court, *whether right or wrong*.

# People v. Pigage (CA)

- ❑ We find no basis for a reversal. However, [the] conduct does warrant public condemnation. His complete disrespect for the court's authority, repeated threats to disobey a court order, and subsequent violation of that order, offend our sense of the court's inherent dignity. We publish this case because neither the prosecutor nor the Attorney General seemed to understand that [the] actions constitute attorney misconduct.



# SF Public Defender Suspended (September 2021)

- ❑ Stating court “had no backbone”
- ❑ Refusing to let go of client to let him be remanded in violation of BP 6103

# “Motion for an Honest and Honorable Court” (AZ)

- ❑ “dishonorable” “brainless coward”-- not 8.2(a) violation, b/c terms do not have “specific, well-defined meanings”
- ❑ But 8.4(d), 3.5(d), 3.1, and 4.4(a): no substantial purpose other than to embarrass and burden the judges

# “Motion for an Honest and Honorable Court” (AZ)

- ❑ Medical defense not accepted: Court found that actions may not have been fully intentional, but violations were knowing
- ❑ 6 mo suspension imposed

# ABA Rule 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.

# ABA Rule 3.1 Meritorious Claims and Contentions

- ☐ 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.

# **ABA Rule 3.5**

## **Impartiality and Decorum of the Tribunal**

- ❑ A lawyer shall not (d) engage in conduct intended to disrupt a tribunal.

# **ABA Rule 3.5 [4]**

## **Impartiality and Decorum of the Tribunal**

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.

# **ABA Rule 3.5 [5]**

## **Impartiality and Decorum of the Tribunal**

- ❑ [5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).



# Body Language in the Courtroom



- ❑ Obscene gesture held to be “a purposeful act of disrespect and an affront to the dignity of the court. As such, it rises to the level of criminal contempt”
- ❑ Sanction: 90 days in jail



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**CJEO Formal Opinion 2021-018**

*[Issued December 15, 2021]*

**PROVIDING FEEDBACK ON ATTORNEY COURTROOM  
PERFORMANCE**

# CJEO Formal Opinion 2021-018

- While the Code of Judicial Ethics does not specifically prohibit judicial officers from providing feedback on courtroom performance to appearing attorneys or their supervisors, there are several canon restrictions and ethical risks that must be taken into account.

# CJEO Formal Opinion 2021-018

- When providing feedback on courtroom performance, a judicial officer may not: (1) engage in prohibited ex parte communications (canon 3B(7));

# CJEO Formal Opinion 2021-018

- ❑ (2) make a public comment on a pending proceeding or nonpublic comment that may interfere with a fair trial or hearing (canon 3B(9)); (3) create an appearance of favor or bias (canons 1, 2, and 2A);

# CJEO Formal Opinion 2021-018

- ▣ (4) suggest that anyone is in a special position to influence the judicial officer (canon 2B(1)); or (5) engage in coaching by advising on tactics or strategies that give one side an advantage in litigation or by providing legal advice (canon 4G).

# Old School Courtroom Dynamics



# Candor in the Courtroom





# Model Rule 3.3

## Candor in the Courtroom

A lawyer shall not knowingly:

(a)(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;

# Model Rule 3.3

## Candor in the Courtroom

A lawyer shall not knowingly:

- (a)(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.

# Model Rule 4.1

## Truthfulness in Statements

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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

# **Model Rule 4.4**

## **Respect for Rights of 3<sup>rd</sup> Person**

(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.

# ABA Rule 3.4 Fairness to Opposing Party and Counsel

- ☐ A lawyer shall not: “(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . . or counsel or assist another person to do any such act.”

# Bench Bashing



# CA Rule 8.2

## Judicial Officials

- ☐ (a) A lawyer shall not make a statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

# CA Rule 8.2 Judicial Officials

## Comment

- ☐ To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. (See Bus. & Prof. Code 6068(b))



# ABA Rule 8.2

## Judicial Officials

- ❑ (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

# ABA Rule 8.2 Judicial And Legal Officials

- ☐ [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

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- ☐ [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

# Motion for Change of Judge (Ind. 2013)

- ❑ Limits on professional speech by attorneys are not coextensive with limits of 1<sup>st</sup> Amendm
- ❑ Objective test, includes supporting documents
- ❑ “Actual malice” in defamation is subjective
- ❑ No violation—no evidence of bad faith

# Prosecutor's Statements (Ind.)

- ❑ Her arrogance is exceeded only by her ignorance
- ❑ She doesn't have any comprehension of what's going on with respect to those cases and she refuses to learn
- ❑ Public reprimand

# Out of Court Venting

- ❑ After court, the attorney tells a television reporter the judge's latest ruling was “boneheaded.”
- ❑ Back at the office, the attorney calls the judge a “buffoon.”

# Out of Court Venting

- ☐ A lawyer tells a television audience an appellate judge who reversed a conviction was “disingenuous.”

# The Post-Outburst Purge

- ❑ Counsel's characterization, in his brief, of court order as being “without precedent in judicial annals”, and as an “opera bouffe”, and as a “most covetous and wholly unwarranted usurpation of power” was highly disrespectful to court and judge . . .



# The Post-Outburst Purge

- ❑ But counsel was permitted to purge himself by a frank disavowal to be disrespectful.
- ❑ *First Nat. Bank of Auburn v. Superior Court of Lassen County* (App. 1909)

# Pushing the Limits (CA 1948)

- ▣ An advocate may combat and contest strongly any adverse view of judge expressed during argument, object to and protest against any course taken by judge which advocate thinks irregular or detrimental to client's interests . . .

# Pushing the Limits (CA 1948)

- ❑ Judges may not punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements.
- ❑ If words used by counsel are respectful and pertinent to matter before court, judge must first warn attorney that tone and facial expressions are offensive and tend to interrupt due course of proceeding, before proceeding to contempt.

# Responding to Judicial Misconduct



# **ABA Rule 3.5 [4]**

## **Impartiality and Decorum of the Tribunal**

A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

# **ABA Rule 3.5 [4]**

## **Impartiality and Decorum of the Tribunal**

An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

# **JUDICIAL POWER TO ENFORCE UNCIVILITY**



# Creative Sanctions

Placing lawyer in holding cell “until he improved his manners”  
(Texas)





# Ordering Attorney Into Custody

Judge told Deputy Pub Def to sit down. "Is there something you want to say, or do you want to go into custody?"

When DPD said he wanted to highlight that Wilborn is innocent at this stage, judge said: "No kidding. I get that. Sit down."

# Ordering Attorney Into Custody

Judge: "Counsel, if you don't knock —" then ordered him taken into custody before finishing his sentence.

"Rolling your eyes, throwing your hands in the air, acting like I'm some kind of idiot gets you locked up for contempt."

# Civil Liability



# *Standing Committee on Discipline v. Yagman (9<sup>th</sup> Cir. 1995)*

- ❑ Alleged J anti-Semitism
- ❑ Drunk on the bench
- ❑ Ignorant, dishonest, ill-tempered, bully
- ❑ The worst judge in the central district
- ❑ Sub-standard human

# *Standing Committee on Discipline v. Yagman (9<sup>th</sup> Cir. 1995)*

- ❑ “If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover.”

# *Standing Committee on Discipline v. Yagman (9<sup>th</sup> Cir. 1995)*

- ❑ Suspension reversed: Yagman found constitutionally immune from sanctions  
Rhetorical hyperbole, language used loosely and figuratively
- ❑ Statements of opinion

## *Standing Committee on Discipline v. Yagman (9<sup>th</sup> Cir. 1995)*

- ❑ Statement that judge was “dishonest,” viewed in context of D’s other “lusty and imaginative expressions,” was not a fact capable of objective verification
- ❑ Statements did not pose a clear and present danger to the functioning of the courts

# Courtroom Attire





# Courtroom Exhibitionism

## People v. Rainey, 1964

❑ Parading a freakish hat before a jury could only be characterized as pure exhibitionism



# Turbans in the Courtroom

- ❑ *Jensen v. Superior Court of San Diego* (1984): Test is whether it “interferes with courtroom decorum by disrupting justice, i.e., whether it tends to cause disorder or interfere with or impede the functioning of the court.”

# Ethics and Professionalism



# **Legal Ethics**

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