

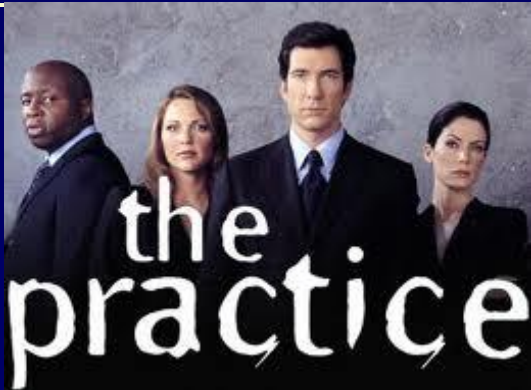
Avoiding Frivolous and Bad Faith Claims and Issues

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**18th Annual Louisiana Judicial
Conference/National Bar Association
Annual Meeting and CLE
February 12, 2016**

**DOES HOLLYWOOD HAVE
IT RIGHT?**

ARE THE IMAGES SEEN ON TELEVISION AN ACCURATE REPRESENTATION OF OUR PROFESSION?



Challenge: To Be or Not to Be...Scandalous





**Unfortunately, opposing
counsel is usually the last to
know that there is nothing
“good” about his/her
professionalism.**

Bad Habits = Poor Examples of Professionalism



Louisiana Rules of Professional Conduct

RULE 1.1

COMPETENCE

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



RULE 1.4

COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

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. 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.



Rule 3.3

CANDOR TOWARDS A 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.....

(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.

Rule 8.4

MISCONDUCT



It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Rule 8.4

MISCONDUCT

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

“Adversarial” is the Name of the Game



Gladiator or Glorified Loser?

Olivia Pope and Associates are expanding their practice to handle bad faith cases in Louisiana based on the recent string of large sum jury verdicts reported by LAJ. Harrison "Hit 'Em Hard" Wright, although he has never handled a bad faith case or practiced before a Louisiana Court, jumps at the chance to move to Louisiana right before Mardi Gras. Right away, he declares himself the new "Gladiator" of Louisiana and he's determined to make a name for himself.

Gladiator or Glorified Loser?

During his first case, he has a bad experience with an insurer, but he was successful at trial winning a \$2.5 million bad faith judgment. As a result, his clients have tripled in the past six (6) months, but he does not have time to fully investigate their grounds for suit. Although each case is different, they all involve the same kind of defendants, he files suit before the prescription date and decides to worry about the fine details later. He feels obligated to make bad faith allegations pursuant to La. R.S. 22:1892 and 22:1973 in all petitions to fulfill the firm's reputation for effective "Plan B Litigation" and because of his bad experience.

Gladiator or Glorified Loser?

He does not advise his clients of these minor details or his bad experience because he knows what is best for them. Also, he promised million dollar judgments in these cases so he had to do what it takes to make this happen. A few days ago, he received a letter from the defense attorney in each case advising that they were on to his "Television Tactics". They requested that he dismiss the bad faith claims immediately or face sanctions. Olivia steps in to handle the situation.

Is Harrison out to champion his clients rights or his own? Are his actions in violation of any Rules of Professional Conduct?

Answer



■ Violated Rule 1.4

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

Answer

- **Violated 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...”

- **Violated Rule 8.4**

- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
-



Enough is Enough!

Analisse Keating, the renowned criminal attorney, files suit against her client, Never Satisfied, for defamation and breach of contract. Attorney Keating has represented Never Satisfied in several lawsuits before and even after Never Satisfied filed complaints with ODC, mostly over legal fees. Client loyalty means a lot to her. Three (3) prior complaints were dismissed by ODC against Ms. Keating. Unfortunately, Ms. Keating had enough, decided to clear her name and filed suit because of the unfounded ODC complaints. Never Satisfied filed exceptions asserting the defense of immunity pursuant to Supreme Court Rule XIX, § 12(A). The trial court granted a Motion to Dismiss Attorney Keating's defamation claims based on complaints to the disciplinary board, including the appeal to the Supreme Court. The parties attempted to mediate the matter but were unsuccessful.

Enough is Enough!

During the course of mediation, Never Satisfied's insurer requested the following:

"Both parties agree to execute a Release Agreement which will prevent them from ever bringing any further disciplinary complaints or lawsuits [arising out of or in any way connected with Keating's representation of Never Satisfied over the past ten years. Keating will receive payment of \$ 3,000.00. Never Satisfied will agree that if he defames Keating in the future, and he successfully prosecutes to final judgment a claim for that defamation, Never Satisfied will pay her, in addition to the actual damage award, a penalty of \$ 15,000 plus reasonable attorney's fees."

Ms. Keating sent a settlement letter adopting this provision, but she also asked for \$15,000 plus attorney fees, costs in addition to a final collectible judgment against Never Satisfied she may received from defamation lawsuit.

Enough is Enough!

ODC filed one count of formal charges against Analisse Keating. What basis, pursuant to the Rules of Professional Conduct, does ODC have to pursue these charges? Is ODC's loyalty misplaced?

Answer



- Based on actual case of In re Raspanti, 2008-0954 (La. 03/17/09), 8 So. 3d 526, 527
- **Violated Rules 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.

Answer

- Violated Rules 8.4(a), and 8.4(d)
 - (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (d) Engage in conduct that is prejudicial to the administration of justice;



Answer

- Violated Rule XIX, § 12(A) which grants immunity in civil suits for communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings
- Also violated Rule 3.1
- Respondent's retaliatory actions threatened to undermine the disciplinary system.
- The board determined that the appropriate sanction was only public reprimand/court costs.



The Good Faith Advocates?

Alicia Florrick has been defending a national tech firm for the past five (5) years. To date, the most heated battles have been over eDiscovery. Cary Vengeful accuses Alicia's client of being a "habitual hoarder" of discoverable information that she refuses to voluntarily produce, despite his timely requests. Alicia's clients like her "Make Them Work For It" approach, so she tells her paralegal to object to all discovery requests. When she goes to Court, she tells the Judge that Mr. Vengeful's discovery requests are vague and ambiguous and the hearing was necessary to clarify these issues. The Court is aware that Mrs. Florrick usually produces the requested documents the same day of the discovery hearing, but only after being ordered by the Court to do so. However, she never enforces sanctions. Mrs. Florrick thinks Mr. Vengeful is lazy, so she issues subpoenas to his client on a quarterly basis to harass him and keep her billable hours up.

The Good Faith Advocates?

Surprisingly, Mr. Vengeful files a Motion for Sanctions with every Motion to Compel to keep Alicia on her toes too. He usually continues or withdraws his Motion for Sanctions after the Court rules in his favor. However, he has filed two (2) ODC complaints with hopes that this will stall Alicia's investigation of his client's wrongful termination allegations. Trial begins in 30 days and Alicia asks for a continuance alleging that Mr. Vengeful has been hiding a report that will exonerate her client. Alicia already has the report, but Mr. Vengeful does not know this. She also knows the report will not exonerate her client, but may actually cause them to be found guilty. Truthfully, she can care less because she needs time to investigate her husband's relationship with Ramona, the staff advisor, before the election.

Does Alicia's tactics constitute bad faith or great defense strategy? Are Mr. Vengeful's actions warranted and supported by the Rules of Professional Conduct?

Answer

■ Violation of Rule 3.3:

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...”



Answer



- Violated Rule 8.4
(c) and (d)
 - (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - (d) Engage in conduct that is prejudicial to the administration of justice.

How Fatal are Favors?

It is well known that Judge Verna Thornton, is one of Olivia Pope's mentors. Before she was appointed to the bench, she was a partner at Friend, Four & Life Law Firm. Quinn, one of Olivia's Gladiators, is on trial for seven (7) murders and is facing the death penalty in Louisiana. Based on jurisprudence, Quinn's chances of beating the murder charges are very unlikely. Olivia calls in a favor to Judge Thornton. Judge Thornton then calls her former law partner and fellow colleague in the same court, Judge John Four. Judge Four is the presiding Judge over Quinn's criminal trial.



How Fatal are Favors?

She wants to offer her assistance with the criminal issues since this is her area of expertise. She also asks him to consider granting a Motion for an Acquittal only if he thinks its supported by the law and as a favor to her mentee, Olivia.

Judge Four tells Judge Thornton over the telephone that he can make no such promises as such a request is unheard in Louisiana and unethical. The next day when the Defendant moves for an acquittal, Judge Four grants the Motion and reads his Reasons for Judgment on the record in open court which takes over 30 minutes.

How Fatal are Favors?

Olivia is very appreciate of Judge Thornton's assistance and agrees to allow the Judge to use her name when she checks into the hospital for chemotherapy in secret. Judge Thornton cancels all trials for the month at the last minute rather than ask the Supreme Court for another judge to cover her cases. Her colleagues thinks she is on vacation.



How Fatal are Favors?

Has Judge Thornton crossed the professional line with Olivia? Judge Four? Have any Codes of Judicial Conduct been possibly violated by the Judges?



Answer

Rule 8.4

MISCONDUCT

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

ANSWER

CANON 1

A Judge Shall Uphold the Integrity and Independence of the Judiciary

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved....As a necessary corollary, the judge must be protected in the exercise of judicial independence."

-Louisiana Code of Judicial Conduct



ANSWER

CANON 2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities

"A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge...."



ANSWER

CANON 3

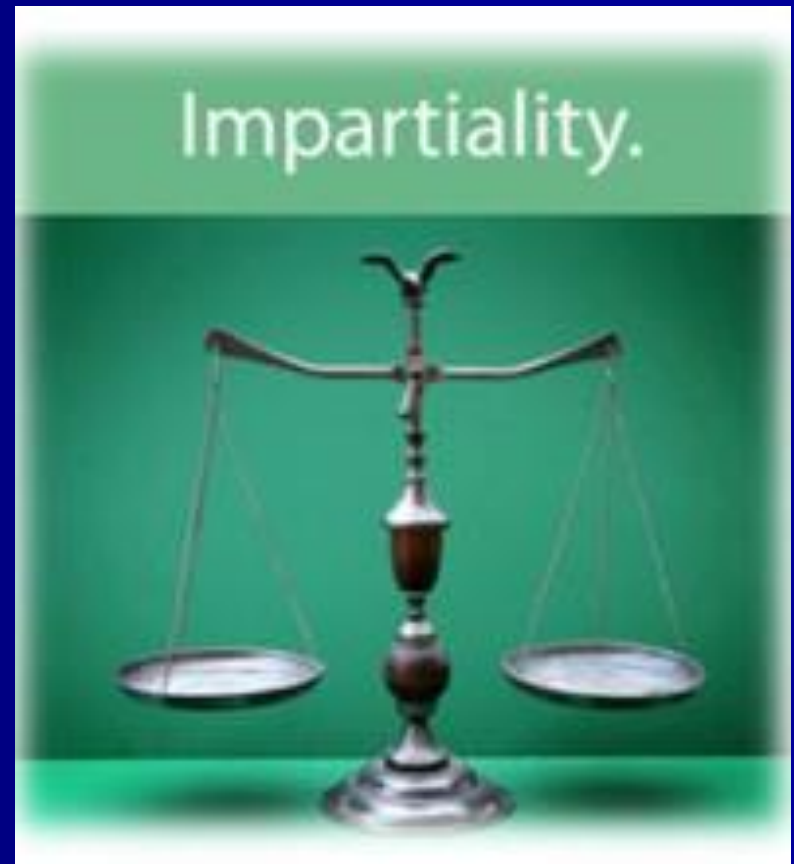
A Judge Shall Perform the Duties of Office Impartially and Diligently

"A. Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers,

(4) A judge shall perform judicial duties without bias or prejudice."



More Examples of Bad Faith/Frivolous Actions

- Police report altered by attorney to avoid prescription and filed frivolous lawsuit based on false report. Dubois v. Brown, 2001-0816 (La. App. 1 Cir 05/10/02), 818 So. 2d 864
- Filing of multiple Motions to Recuse various judges without evidence of any bias by judges was held to be frivolous and trial court judgment was affirmed. Gray v. Gray, 2013-1953 (La. App. 1 Cir 06/06/14)
- Lawsuit filed only as a means of harassment of attorney and client was found frivolous matter. Cloud v. Barnes, 47764 (La. App. 2 Cir 04/17/13), 116 So. 3d 67, 75
- Where Court found that plaintiff's reasons for her filing discrimination lawsuit were "sincere, and her actions were not for an improper purpose", the lawsuit not frivolous and sanctions were not allowed. S. Ingenuity, Inc. v. Benjamin, 2002-1426 (La. App. 3 Cir 04/22/03), 854 So. 2d 876, 877-80

Wear Your White Hat with Pride!

**You can maintain the
highest level of
professionalism and still
win!**

