New Lawyer Program

KENTUCKY BAR ASSOCIATION

Attorney's Duty to the Court

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I. SCR 3.130 – KNOW THESE BY HEART. HERE ARE A FEW HIGHLIGHTS:

A. SCR 3.130(3.3) Candor toward the 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 published 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 a lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of the defendant in a criminal matter, that the lawyer reasonably believes is 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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

B. SCR 3.130(3.5) Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate *ex parte* with such a person as to the merits of the cause except as permitted by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law, local rule or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

C. SCR 3.130(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 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;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(e) knowingly assist a judge or judicial officer in conduct that is in violation of applicable Rules of Judicial Conduct or other law.

D. SCR 3.130(8.2) Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its trust 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.

(b) A lawyer who is a candidate for a judicial office shall comply with applicable provisions of the Code of Judicial Conduct.

II. ETHICS OPINIONS

These are available online. Don't forget there is a hotline available, too.

A. A lawyer may not share a secretary, office space, library, or waiting room with a sitting judge. KBA Ethics Opinion E-187 (1978).

B. A lawyer may not provide loans or gifts to a judge for whom the lawyer practices. A lawyer may extend "ordinary social hospitality" to a judge before whom a lawyer practices. As a matter of ethics, a lawyer may make a contribution to a judicial campaign in a manner consistent with Canon 7 of the Code of Judicial Conduct. KBA Ethics Opinion E-351 (1992).

III. MORE ON MISLEADING LEGAL ARGUMENTS/PERJURY/FALSE STATEMENTS

A. Misleading Arguments: **DO NOT DO IT**

1. Legal argument based upon a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer must recognize the existence of pertinent legal authority.

2. If a lawyer knows proffered testimony is false, the lawyer must refuse to offer it regardless of the client's wishes.

3. A lawyer is responsible for pleadings and other documents prepared for litigation but is not usually required to have personal knowledge of matters stated therein (*see* Rule 11, *infra*).

4. However, a statement purporting to be in the lawyer's own knowledge, as an affidavit by the lawyer or a statement in open court, may be made properly only when the lawyer knows the assertion to be true.

B. Perjury by Criminal Defendant

Legal scholars disagree on the lawyer's duties when he or she knows that a criminal defendant intends to offer false testimony. Ideally, the lawyer should withdraw but that is not always allowed. Three resolutions to this dilemma have been proposed:

1. Permit the accused to testify by narrative without guidance through the lawyer's questioning.

2. The advocate is entirely excused from the duty to reveal perjury if the perjury is that of his or her client.

3. A lawyer would be required to reveal the client's perjury if necessary to rectify the situation.

4. Remedial measures.

If the perjured testimony has already been offered, the attorney must first ask the client to withdraw the information. If withdrawal will not remedy the situation or is impossible, the attorney should make disclosure to the court.

5. Duration of obligation.

The conclusion of a proceeding is a reasonably definite point for the termination of the obligation to rectify the presentation of false evidence.

IV. *EX PARTE* PROCEEDINGS

Ordinarily an advocate has the limited responsibility for presenting only one side of a matter. However, in *ex parte* proceedings, the lawyer for the represented party has the duty to make disclosures of material fact known to the lawyer and that the lawyer reasonably believes are necessary to make an informed proceeding.

V. PRACTICAL CONSIDERATIONS – COURTESY TOWARD THE COURT

A. A lawyer should speak and write courteously and respectfully in all communications with the court.

B. A lawyer appearing in court should present a neat and tasteful appearance so that neither disrespect nor discourtesy will be implied.

C. Practice punctuality for court, co-counsel, and client. Where delay is inevitable, communication with the court should be made. A lawyer should promptly notify the court and all parties of any delays, cancellations, or continuances.

D. A lawyer should be acquainted with and observe all local rules.

E. A lawyer should, at all times, avoid visual or verbal displays of temper or imprudence.

F. A lawyer should stand when addressing the court. A lawyer should, at all times, conduct and demean him or herself with dignity.

G. A lawyer should never go behind the judge's bench.

H. A lawyer should turn off their cell phone or have all notifications and sound set to silent if the phone is left on while in court.

I. A lawyer should not allow clients or other witnesses to bring children into court.

J. A lawyer should thank judges for their time where appropriate.

K. A lawyer should work out discovery requests without requesting the court's intervention.

VI. THINGS TO KEEP IN MIND WHEN YOU'RE IN THE COURTROOM: PRACTICAL POINTERS ON WORKING WELL WITH THE COURTS

A. Common Courtesy

Common courtesy is so easy, yet so often disregarded. The importance of starting out and keeping the habit of good manners cannot be emphasized enough. Judges appreciate and expect punctuality from professionals. Do not be that one lawyer in the local bar who is always late or forgets court all together, precipitating a manhunt by court staff. Turn your cell phones and mobile devices off while in court. Introduce yourself on the record relentlessly, even if you are sure the judge knows your name. It doesn't hurt to remind the judge, and a tape recorder does not know your name unless you state it.

B. Court Staff

Do not commit the cardinal sin of mistreating deputy clerks, bailiffs, judges' secretaries and the like. Not only do they have their own little ways of getting you back over the next 30 to 40 years, judges will always be made aware of your conduct. Go out of your way to foster a good relationship with these people, as they are the keys to a happy practice. Yes, you know all about *Pennoyer v. Neff*, but they know all kinds of things about the mechanics that you have never been taught. Do not come across as condescending, or you will pay.

C. Pick Your Battles

New lawyers in particular tend to be of a mindset that they have to fight or debate over every minute detail. It is not their fault, as they have been indoctrinated to be such zealots. One of the most important skills you can acquire, and should begin immediately to work toward, is to recognize when not to fight. Filing a venomous response to a motion that offends your sensibilities may feel good, but it may not be a good idea. In trials, some things are clearly objectionable under the rules of evidence, but some things you just let go. The point is, whether you are right or not is largely irrelevant. The question you should ask before doing battle is whether it truly will advance the cause of your client.

D. Be Ethical

It takes some time and effort to gain a reputation as an ethical lawyer, and very little of either to be tagged with the other one. Don't give your colleagues and judges a reason to put the word out (and it will spread like wildfire) that you are unethical, as you will be marked your entire career. Most of your ethical rules are just fancily worded codification of common decency, sort of like the book, *Everything I Know I Learned in Kindergarten*. For instance, if you read SCR 3.130(3.3), it just says don't lie, as SCR 3.130(3.5) says don't cheat.

E. Know the Law

As bright as many are and as all-knowing as some think they are, judges simply do not have every facet of the law and every case committed to memory. Please go to court armed with the knowledge of the law regarding the topic of your appearance. Be able to cite applicable law and hand copies both to the court and opposing counsel. Judges will be grateful, and you may win by default if opposing counsel is unprepared. Judges prefer to hear about Kentucky law, not something from Puerto Rico or the Ninth Circuit. If there is no Kentucky case on point, just say so and argue for the opportunity to make new law and have your name published.

F. Recon

Stop by or make an appointment to meet your judges. They'll know you're human, and you may find they are too. Check with other lawyers or court staff to find out their idiosyncrasies – what really impresses them, or what sets them off. Some judges, for instance, can't stand to be interrupted by a lawyer when it is finally their turn to speak. When you travel to other courts, do the same kind of reconnaissance on the local judges. You may not prevail, but you're sure to get along better.

VII. CONFLICT BETWEEN ZEALOUS REPRESENTATION OF CLIENT AND BEING AN OFFICER OF THE COURT

A. SCR 3.130(3.1) Meritorious Claims and Contentions

> A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis 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 a proceeding as to require that every element of the case be established.

B. An advocate has a duty to use the legal procedure to the fullest benefit of the client's cause, but also a duty not to abuse the legal process. The filing of an action or a defense taken for a client is not frivolous merely because the facts have not been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though a lawyer believes that the client's position ultimately may not prevail. An action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is either unable to make a good faith argument on the merits of the action or to support the action taken in good faith argument for an extension, modification, or reversal of existing law.

C. A lawyer may have legitimate reasons for delay including need for additional time to conduct investigation or locate witnesses, or the client may not be ready due to a medical or emotional factor. This is considered justification for delay. However, a

lawyer may not seek delay to preserve some existing benefit for the client or allow the client to enjoy, use, or control money that he or she ultimately will have to pay to an adverse party.

D. Generally, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law except that he or she may advance such claim or defense if it can be supported by good faith argument for extension, modification, or reversal of existing law.

E. Because the bounds of law are often difficult to ascertain, an attorney may urge any permissible construction of law favorable to a client within the bounds of the law. A lawyer is not justified in asserting a position that is frivolous.

F. A lawyer shall not conceal or fail to disclose that which he or she is required by law to reveal; however, a lawyer may withhold evidence if he or she does so pursuant to some privilege or rule.

VIII. RESPECT THE COURT

Kentucky Bar Association v. Waller, 929 S.W.2d 181 (Ky. 1996)

Attorney disciplinary proceedings were brought against Mr. Waller when he referred to a judge presiding over a case that he was involved with in a derogatory fashion. The Supreme Court held that his statement in court-filed papers that Judge Fuqua was a "lying incompetent ass-hole" violated SCR 3.130(8.2) prohibiting unfounded statements concerning qualifications and integrity of a judge and warranted a six-month suspension from the practice of law.

IX. REFERENCES

A. Jurisdiction and Terms of Kentucky State Courts

B. SCR 3.130(3.3) – Candor toward the Tribunal

C. SCR 3.130(3.5) – Impartiality and Decorum of the Tribunal

D. SCR 3.130(8.2) – Judicial and Legal Officials

E. SCR 3.130(3.1) – Meritorious Claims and Contentions

F. District of Columbia Bar Voluntary Standards of Civility