Honesty Toward Your Adversary

Fairness is Somewhat Akin to Candor and Should Be Carefully Considered

How candid do you have to be in dealing with opposing counsel? The Pennsylvania Rules of Professional Conduct set forth a group of "shall nots" in 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 assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying, and

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

Some are obvious. A lawyer can't pay a fact witness a fee for testifying, and cannot pay an expert witness a contingent fee. A lawyer can advance a client or witness some out-of-pocket costs for attendance at meetings, depositions, medical exams and the like, but cannot pay lost wages or living expenses.

Of course, a lawyer cannot conceal, alter or destroy evidence, or counsel or assist a client in doing so. Besides the civil or disciplinary ramifications, it may constitute a criminal act.

When a lawyer argues a position to a trier of fact, the lawyer cannot give his opinion of a witness's credibility, but may advocate based upon the facts presented. Guidance Committee opinions have said that a lawyer must disclose the death of a client to adverse counsel or an adjustor, particularly if involved in settlement discussions, and especially if future medicals or lost wages are being claimed.

A lawyer cannot lie or misrepresent a fact to adverse counsel. Within the bounds of zealous advocacy, a lawyer may argue the client's position in a case, may highlight the favorable facts and inferences, and downplay or omit the unfavorable ones, but otherwise must tell the truth.

If a lawyer learns that something presented to opposing counsel is not accurate, such as a mathematical calculation, the lawyer must correct it if it is relevant to the case going forward.

If a lawyer receives an inadvertent communication (i.e., fax, e-mail or letter) from adverse counsel, meant for that counsel's client or a third party, Rule 4.4(b) requires the lawyer to notify the sender promptly. Whether the lawyer uses the communication, or shares it with the lawyer's client, is not stated, and is therefore left up to the lawyer, but note that the ABA Model Rules, and the disciplinary rules in other states, prohibit use and/or sharing.

In short, the "fairness" toward adverse counsel is somewhat akin to the "candor" required toward the court under Rule 3.3, and should be carefully considered at all times. ■

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