



ETHICS/CIVILITY/PROFESSIONALISM PRESENTATION

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BY

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I

Introduction

"Right is right, and wrong is wrong, and a body ain't got no business doing wrong when he ain't ignorant and knows better."

Mark Twain

Unquestionably, most lawyers at least aspire to be constantly and consistently civil to other members of the bar, the Courts, and others. This presumed aspiration is manifestly missing, however, when a lawyer habitually violates the Virginia Rules of Professional Conduct (hereinafter "the rules of professionalism") It remains incumbent on each of us, individually and collectively, to perpetually guard against the reciprocity of practices that fall short of ethical, civil, and professional conduct.

II

ETHICS AND PROFESSIONALISM

Professionalism is a much broader concept than legal ethics--professionalism includes *not only civility* among members of the bench and bar, but also competency, integrity, respect for the rule of law . . . and conduct by members of the legal profession that exceeds the minimum ethical requirement. Ethics are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs.

Justice Douglas S. Lang & Haleigh Jones, *Can Courts Require Civil Conduct?*, 6 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 222 (2016).¹ (Emphasis in the original).

General Principles

Under legislative directive, the Supreme Court of Virginia promulgated rules of professionalism in connection with the court's mandate to regulate the practice of law. See Va. Code § 54.1-3909. ("The Supreme Court may promulgate rules and regulations . . . Prescribing a code of ethics governing the professional conduct of attorneys . . ."). The Preamble to the rules of professionalism states that "These Rules apply to all lawyers, whether practicing in the private or the public sector."

Rule 3.1 of the Court's rules of professionalism states that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."²

¹ <https://commons.stmarytx.edu/lmej/vol16/iss2/2>

² Virginia Code § 8.01-271.1 does not apply to proceedings before the Commission. *Eliason v. Stellute*, 78 O.I.C. 80, 84 (1999). On the other hand, Rule 3.1 plainly governs workers' compensation lawyers, and adherence to Code § 8.01-271.1 is generally advisable and specifically applicable to appellate proceedings. Pursuant to § 8.01-271.1(B):

The signature of an attorney . . . constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, [and] (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it . . . is warranted by existing law. . . .

Rule 3.3 states "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal" or "offer evidence that the lawyer knows to be false."

Rule 3.4(d) plainly and unequivocally states that "A lawyer shall not . . . Knowingly disobey . . . a standing rule." This command is not subject to interpretation; instead, the command means what its words clearly state. *Cf. Doss v. Jamco, Inc.*, 254 Va. 362, 370 (1997) ("The province of construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation.") (quoting *Winston v. City of Richmond*, 196 Va. 403, 407-08 (1954)).

Rule 3.4(g) states that "A lawyer shall not . . . Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings."

Comment 3a to Rule 3.4 states that "The legal system depends upon voluntary compliance with court rules and rulings in order to function

(Emphasis added). See also *Klockner Pentaplast of America v. Miller*, Record No. 1348-20-2 (Va. Ct. App. July 27, 2021): "under Code 8.01-271.1[B], an assertion not involving a request for the modification of existing law requires only that a litigant present an argument that is 'well grounded in fact' and 'warranted by existing law.' "

effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings."

Rule 4.1(a) states that "in the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law." Would this include a defense lawyer who falsely claims to have a ceiling on settlement authority or a claimant's lawyer who falsely claims to have a floor on settlement authority?

In addition, § 65.2-201(A), Code of Virginia, 1950, as amended, affords the Workers' Compensation Commission the statutory authority to "make rules and regulations for carrying out the provisions of" the Virginia Workers' Compensation Act. Those rules serve as a backdrop for the following discussion of ethics and professionalism.

III

Ignoring the Rules

Commission Rule 1.1: Employee's Original Claims

Rule 1.1 of the Rules of the Commission states that an employee's original claim "should set forth" the "nature of injury or occupational disease," the "benefits sought," i.e., temporary total, temporary partial, etc., and the "periods of disability, if appropriate." Notwithstanding this clear directive and the existence of known or knowable facts, claims are often filed asserting

entitlement to both temporary total disability and temporary partial disability for the same open-ended periods. While such filing suffices to give the employer notice of the claim, it falls short of meeting the spirit of Rule 4.1 of the rules of professionalism requiring truthfulness in statements to others. "Fidelity to the Rule mandating that pleadings be filed in good faith . . . dictates that allegations of indemnity entitlement be premised upon a good faith belief that . . . wage loss exists for which the employer owes compensation." *Weaver v. Suffolk, City of*, JCN VA00001444326 (Mar. 12, 2021).

Rule 1.8: Discovery

Rule 1.8 of the Rules of the Commission governs discovery.

Rule 1.8(H) states that "Answers under oath to each interrogatory are to be filed within 21 days after service."

Rule 1.8(I) states that "A party is required to respond within 30 days [to a request for admission] or be subject to compliance under Rule 1.8(K) or sanctions under Rule 1.12."

Rule 1.8(G) provides for oral or written depositions "of any person, including a party." Depositions are typically scheduled at a time and location mutually agreed upon by the parties. While the parties must be mindful of the opposing counsel's calendar, depositions are subject to the provisions of

rules of professionalism relating to the failure to avoid the disruption of proceedings.

The rules of professionalism promulgated by the Supreme Court also address discovery.

Rule 3.4(e) states that "A lawyer shall not . . . fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Rule 3.4(g) states that "A lawyer shall not . . . Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings."

Would a lawyer commit an ethical violation whenever he refuses to respond to discovery requests unless and until the Commission enters an order compelling such responses?

Rule 4.2: Medical Reports

Commission Rule 4.2 requires that "each party . . . promptly provide the other parties with copies of any medical records they receive as they receive them." (Emphasis added). After a hearing request has been filed, the parties shall file with the Commission only medical records that are related to the hearing request." Id. "A party is not required to file copies of medical records that another party has already filed." Id. By Order effective

July 1, 2013, the Commission has identified medical records that are not to be filed with the Commission.

The temporarily withholding or delay in producing medical records to the opposing party is a violation of an "established rule of procedure or of evidence . . . disruptive of the proceedings" and clearly an action undertaken "to harass or maliciously injure another." (Rules of Professional Conduct, Rule 3.4). Arguments that the delay in production is a by-product of the excess of medical records received in today's environment does not negate the violation.

Rule 3: Posthearing Procedures

Assume a workers' compensation lawyer files a written statement which asserts a legal position despite the facts that (i) existing law (i.e., a review decision of the Commission) is plainly to the contrary of the legal position and (ii) the statement "fails to disclose . . . controlling legal authority . . . known . . . to be adverse to the position of the client and not disclosed by opposing counsel." Rule 3.3. This conduct violates the rules of professionalism.

A lawyer cannot seek the extension, modification, or reversal of existing law in good faith if he fails to cite and discuss existing law. Moreover, ignorance of existing law is no defense. Rule 3.1's endorsement of a good-

faith challenge to existing law implicitly means that a lawyer must first research and become familiar with existing law on the legal question at issue. Further support for this conclusion is evident in a statement in the "Virginia Code Comparison" discussion at the foot of Rule 3.1, to wit: "[T]he test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer 'knows or when it is obvious' that the litigation is frivolous." (Emphasis added).

Presumably a Virginia workers' compensation lawyer will not be heard to dispute that review decisions of the Commission constitute "existing law" in the realm of Virginia workers' compensation jurisprudence.

Mediation of a Compromise Settlement

Mediation is voluntary on the part of all parties, and the Commission has not adopted a formal, numbered rule related to the process. Even so, ethical (as well as moral) considerations offer guidance regarding the process, beginning with "the parties' willingness to mediate in good faith." Mediation Services, [https:// workcomp.virginia.gov/content/mediation-services](https://workcomp.virginia.gov/content/mediation-services).

"The request for mediation of compromise settlement must stipulate that all parties are in agreement and plan to come prepared to mediate, which includes settlement authority." Id.

"As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." Preamble: A Lawyer's Responsibilities, *Professional Guidelines*, Virginia State Bar.

Thus "good faith" mediation requires that on the mediation date:

- Defense counsel have settlement authority in hand or immediately available, and
- Claimant's counsel presents a settlement demand consistent with any prior demands or discussion.

Rules of Professional Conduct 3.3 and 4.1(a)

The allegation that a lawyer has made an intentional misrepresentation to a judicial tribunal is very serious. The same is true of an allegation that a lawyer has perpetrated a fraud on a judicial tribunal.

In *Sonnie v. Holland Family Properties LLC*, JCN VA00000896329 (Sept. 22, 2020), "[Lawyer A], counsel for the defendants, filed an Employer's Application for Hearing alleging that the claimant failed to secure [its] consent before settling [his] third-party claim," while "[Lawyer B], representing the claimant, responded that the defendants had consented to the settlement." Although primarily focused on the application of Rule 3.7 of the *Virginia Rules of Professional Conduct* prohibiting "attorneys from serving as an advocate in an adversarial proceeding where the lawyer was likely to be a necessary

witness," the interlocutory review opinion by Commissioner Newman offered a "tempered word of caution," stating:

All of the attorneys at issue have substantial histories of zealous advocacy on behalf of clients before the Commission. However, it will not be your skills as advocates, but your veracity as witnesses, that will dictate the outcome of the pending application. The issue as framed in the filings pits the word of counsel on one side against the word of counsel on the other. If forced to render a decision, the Commission will be placed in the difficult decision of weighing competing testimony from those we see regularly and from whom we expect unflinching fidelity to truth. Counsel should recognize the potential that deciding this case will compel the Commission to conclude that someone has compromised that fidelity.

IV

CIVILITY

Civility is the hallmark of a professional. That term was clearly described by Justice Anthony Kennedy in these words. "[Civility . . .] is not some bumper-sticker slogan, 'Have you hugged your adversary today?' Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.

Dallas Bar Association Day of Civility, August 8, 2016, quoting Justice Anthony Kennedy, 1997 Speech, ABA Annual Meeting.³

³ <https://texaslawbook.net/wp-content/2016-07-18-SIGNED-CIVILITY-LETTER-FINAL-7-25-16.pdf> (texaslawbook.net)

General Principles

Rule 3.4(j) states that "A lawyer shall not . . . assert a position, conduct a defense, . . . or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Comment 8 to Rule 3.4 states that "A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system."

Engaging in Ad Hominem Attacks

Taboada v. Daly Seven, Inc., 272 Va. 211 (2006), addresses a violation of Va. Code § 8.01-271.1, not Rule 3.4(j). Still, the decision offers important lessons regarding the application of the rule.

Taboada arose from a petition for rehearing that a lawyer filed following the Supreme Court's decision adverse to the lawyer's client. *Id.*, 272 Va. at 213. The Supreme Court described language in the petition as follows:

[Lawyer] made numerous assertions in the petition for rehearing regarding this Court's opinion. [Lawyer] described this Court's opinion as "irrational and discriminatory" and "irrational at its core." He wrote that the Court's opinion makes "an incredible assertion" and "mischaracterizes its prior case law." [Lawyer] stated: "George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to

reach such an absurd result." [Lawyer] argued in the petition that this Court's opinion "demonstrates so graphically the absence of logic and common sense."

[Lawyer] wrote in boldface type that "Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence." [Lawyer] also included the following statement in the petition: "[I]f you attack the King, kill the King; otherwise, the King will kill you."

Id. at 213-14.

The Supreme Court noted that § 8.01-271.1 states as follows: "The signature of an attorney or party [to a pleading, motion, or other paper] constitutes a certificate by him that . . . (iii) *it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*" *Taboada*, 272 Va. at 215. (Emphasis in original). The high court described its task as follows: "In determining whether the petition for rehearing was interposed for an improper purpose, this Court must apply an objective standard of reasonableness." *Id.* A unanimous court found such an improper purpose:

[T]his Court is compelled to conclude that [Lawyer] interposed the petition for rehearing for an improper purpose which was to ridicule and deride the Court by the repeated use of intemperate language to express his displeasure with the Court's opinion. His use of intemperate phrases — "Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged

from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence," and "[I]f you attack the King, kill the King; otherwise, the King will kill you," — serves no objective purpose that would assist this Court in its determination whether to grant the petition for rehearing that he had filed. Ridicule and derision of the Court in this context is an improper purpose within the meaning of clause (iii) in Code § 8.01-271.1.

Taboada at 215-16.

Again, Rule 3.4(j) states that "A lawyer shall not . . . assert a position, conduct a defense, . . . or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." (Emphasis added). Unsupportable assertions that a Court's opinion is "irrational," "discriminatory," "incredible," "absurd," etc. serve no purpose but harassment, delay, and increased litigation costs.

Further, "a lawyer should not behave in an offensive, derogatory or discourteous manner even when his or her client so desires," but should advise the client, if necessary, that "civility and courtesy are not signs of weakness." *Ethics, Professionalism, and Civility Guidelines*, Association of Business and Trial Lawyers. (Los Angeles, Northern California, Orange County, San Diego, San Joaquin Chapters)⁴

⁴ <https://abtl.org/ethics-professionalism-and-civility-guidelines>.

Conclusion

The ethical rules that govern Virginia lawyers are called the Virginia Rules of Professional Conduct. (Emphasis added). A conscientious professional knows the rules of conduct that govern his or her calling and willingly abides by them. Some may see this position as naïve. Such cynicism is unacceptable, especially in a profession that is inclined to see itself in noble terms. Habitual disregard of plain prohibitions in the rules of professionalism is neither professional, ethical, or civil.