

ETHICS IN THE COURTROOM



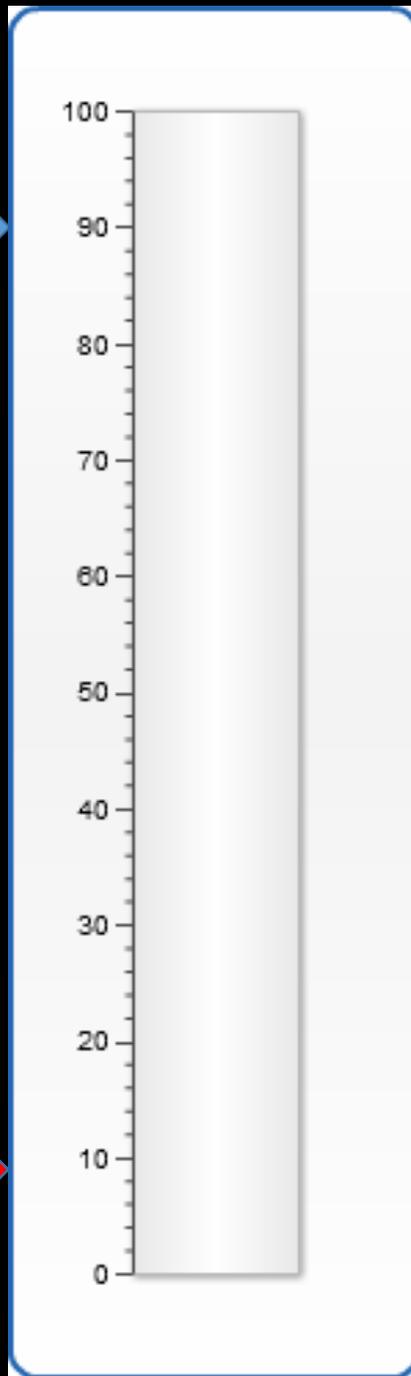
Judge Roy B. Ferguson
394th Judicial District Court

2019 Advanced Evidence and Discovery Conference

What is an “Ethical Code?”

Ethical Code: A system of rules based upon generally accepted moral principles of right and wrong.

ATTORNEY CONDUCT SCALE

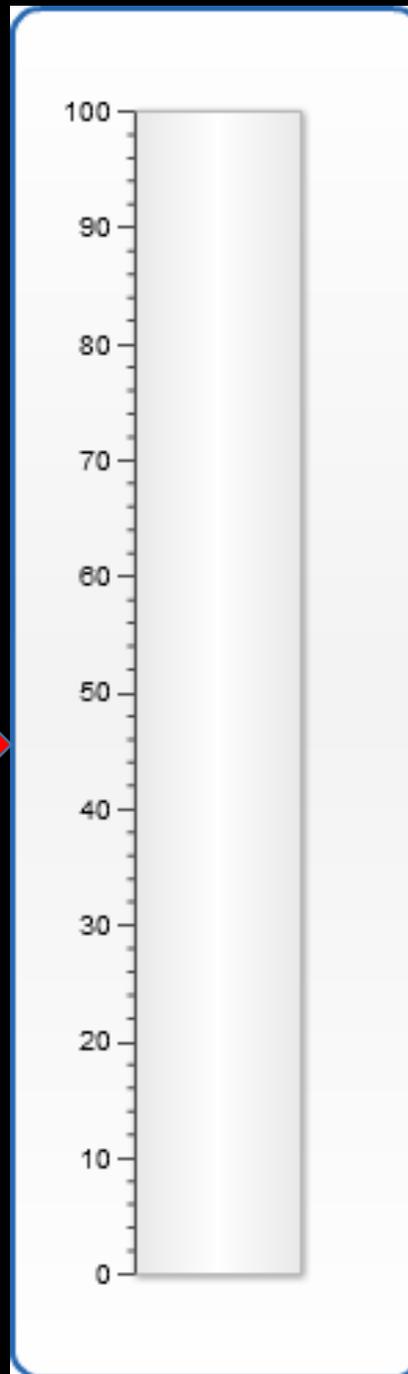


Lawyer's Creed

**ATTORNEY
CONDUCT SCALE**



Disciplinary Rules



Who runs the show?

Attorney or client?

THE OATH OF ATTORNEY

The person will:

1. Support the constitutions of the United States and of this state;
2. Honestly demean oneself in the practice of law;
3. Discharge the attorney's duty to the attorney's client to the best of the attorney's ability; and
4. Conduct oneself with integrity and civility in dealing and communicating with the court and all parties.

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Who runs the show?

TDRPC 1.02(a) Scope and Objective of Representation:

A lawyer shall abide by a client's Decisions ... concerning the **objectives and general methods** of representation.

Comment 1: The client has the ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation.

Who runs the show?

TDRCP 3.01. Comment 1:

The advocate has a duty to use legal procedure **for the fullest benefit of the client's cause**, but also a duty **not to abuse legal procedure**. The law, both procedural and substantive, affects the limits within which an advocate may proceed. Likewise, these Rules impose limitations on the types of actions that a lawyer may take on behalf of his client.

Who runs the show?

Comment 1 (cont):

“A client also has a right to **CONSULT WITH THE LAWYER** about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client's objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.”

Who runs the show?

TDRPC 1.02(a) Scope and Objective of Representation:

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the object

SHALL ABIDE

concerning
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TDRCP 3.01, Comment 1:

“A client also has a right to **CONSULT WITH THE LAWYER** about the **general methods** to be used in pursuing these objectives. The lawyer should assume the client's objectives broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.”

SHOULD ASSUME

TDRCP 3.01:

A lawyer **shall not** bring or defend a proceeding, or assert or **controvert an issue** therein, unless the lawyer **reasonably believes** that there is a basis for doing so that **is not frivolous**.

WITHDRAWAL

TRDPC 1.15 Declining or Terminating Representation

(b) [A] lawyer shall not withdraw from representing a client unless:

(4) a client insists upon pursuing an objective that the lawyer considers **repugnant** or **imprudent** or with which the lawyer has **fundamental disagreement**.

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Repugnant: offensive, disgusting, or distasteful.

Imprudent: unwise.

Fundamental disagreement: ???

TELLING THE TRUTH

TRUE OR FALSE?

IT IS THE LAWYER'S MORAL

FALSE

THE COURTROOM.

TELLING THE TRUTH

TRDPC 3.03 and 4.01

Truthfulness in Statements to Tribunals, and to Others

In the course of representing a client a lawyer shall not knowingly:

(a)(1) **make a false statement of material fact or law** to a third person or tribunal; or

(a)(2) **fail to disclose a material fact** to a third person when disclosure is necessary to avoid making the lawyer a party to a **criminal act** or knowingly assisting a **fraudulent act** perpetrated by a client.

TELLING THE TRUTH

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TELLING THE TRUTH

TRDPC 3.03, Comment 15:

A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false.

That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client.

Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value.

A lawyer's obligations [to withhold] are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

<INITIATING RANT>

Opinion 504:

- When any false statement made by client – EVEN ON CROSS – lawyer **MUST** direct client to correct, and if refused lawyer must disclose.
- Describes Comment 13 to Rule 3.03 as stating that when false evidence offered by client on cross, lawyer **MAY** disclose and correct.
- Comment 13 ACTUALLY indicates that lawyer **SHALL NOT** disclose.
- When false evidence offered by other side's witness (other than your client), lawyer **CANNOT** disclose and correct.
- Remaining silent about false evidence and getting a remedy your client isn't actually entitled to as a result is not "use." (even when burden of proof is on the client.)

Opinion redefines "criminal or fraudulent act" to simply be a "false statement."

<END RANT>

TELLING THE TRUTH

TRDPC 3.03.

(a)(3) in an ex parte proceeding, a lawyer shall not fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision

(a)(4) a lawyer shall not fail to disclose to the tribunal authority
(1) in the controlling jurisdiction (2) known to the lawyer to be
(3) directly adverse to the position of the client and (4) not
disclosed by opposing counsel

CORRECTING LIES

TRDPC 3.03

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties ... continue until remedial legal measures are no longer reasonably possible.

CORRECTING LIES

TRDPC 3.03

Comment 13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination, but who offered false testimony or other evidence **during examination by another party**. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

CORRECTING LIES

TRDPC 3.04(a)

A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

CORRECTING LIES

Hypothetical:

You receive an interrogatory and a request for production regarding private Facebook messages between your client and the opposite sex. Your client refuses to produce any, and admits to you having an e-affair with a local married politician. The client directs you not to disclose the affair or the existence of the messages.

CORRECTING LIES

Hypothetical:

Is it confidential information? YES, under Rule 1.05.

Is it privileged information? YES, it came from your client.

Must you affirmatively disclose the truth? No.

- 3.03(a)(2) – failure to disclose, doesn't apply because the omission itself doesn't constitute a crime or fraud.
- 3.03(a)(3) – doesn't apply to privileged facts, which this is.
- 3.03(b) doesn't apply, because false evidence wasn't actually offered.

Can you disclose the truth? No.

- Client forbids disclosure, not past or future crime or fraud, withholding is not "unlawful."

CORRECTING LIES

Hypothetical:

Can you send a sworn interrogatory response that says, "None exist?"

No.

4.01(a)(1) doesn't apply, because the lawyer didn't make the false statement, the client did.

4.01(a)(2) doesn't apply because there's no need to disclose the truth unless the client has committed the crime or fraud.

However, 1.02 prohibits the lawyer from assisting the client in the lie. Lying under oath on interrogatories could constitute the crime of perjury.

CORRECTING LIES

Hypothetical:

Can you send a response to the request for production that says, "None exist?"

No.

4.01(a)(1) prohibits the false response because it would be the lawyer's false statement of fact, not the client's.

CORRECTING LIES

Hypothetical:

Can you send a response to request for production without mentioning or producing the documents?

Yes.

Lawyer has no responsive documents to produce.

4.01(a)(1) doesn't apply because no false statement was actually made.

4.01(a)(2) and 1.02(c) don't apply because no fraud or crime.

CORRECTING LIES

Hypothetical:

On your direct examination, even though you didn't ask, your client blurts out that she hasn't sent sexually charged messages to any other men. Must you speak out? YES.

3.03 applies because the false evidence came in through your witness.

3.03(a)(5) prohibits an attorney from offering or using evidence known to be false.

3.03(b) requires you to privately confer with client and attempt to convince client to retract the testimony. If client refuses to do so, you must take remedial measures, including disclosing the truth to the tribunal.

1.05(c)(4) permits you to disclose the confidential information in order to comply with the obligation under 3.03(b).

CORRECTING LIES

Hypothetical:

In trial, opposing counsel asks client on cross whether she sent sexually-charged messages to any other men. Client says, "No." Must you speak out? **Maybe.**

3.03(b) and 3.04(b) don't apply, Lawyer didn't offer the false evidence, so he isn't a party to a crime or participating in fraud. Comment 13 expressly excludes this situation from the obligations under 3.03.

1.02 shouldn't apply because the lawyer wasn't a part of the crime or fraud.

BUT Ethics Opinion 504 says YES, so...

CORRECTING LIES

Hypothetical:

In trial, opposing counsel asks client on cross whether she sent sexually-charged messages to any other men. Client says, "No." Must you speak out? Maybe.

Ethics Opinion 504 greatly expands the rule.

Opinion acknowledges, misstates and disregards Comment 13.

Opinion equates "fraudulent" and "criminal" with "false."

PLAY IT SAFE! Confer privately with client and encourage correction. If refused, move to withdraw under 1.15(b)(4) without disclosing details. And remember, you can withdraw even though it would have a materially adverse effect on the client.

CORRECTING LIES

Hypothetical:

After a heated discovery hearing, the judge enters an order compelling your client's production of the information. Client refuses. Must you tell the court? Yes (Rule and Comment conflict).

3.04(d). A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal **except for an open refusal** based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

1.05(c)(4) requires a lawyer to reveal conf. info when necessary to comply with a court order.

Comment 6: Paragraph (d) prohibits the practice of a lawyer not disclosing a client's actual or intended noncompliance with a standing rule or particular ruling of an adjudicatory body or official to other concerned entities. It provides instead that **a lawyer must openly acknowledge the client's noncompliance.**

CORRECTING LIES

Hypothetical:

During trial, your client testifies on direct that she did not have sexual contact with another man during her marriage. A year after the divorce case is over, another man comes to your office with proof that he was having a sexual relationship with your client during her prior marriage. What must you do?

Contact opposing counsel and disclose the truth... *and contact your carrier.*

3.03(b) and (c) require that so long as something can be done, attorney must go back and correct false material information offered or used.

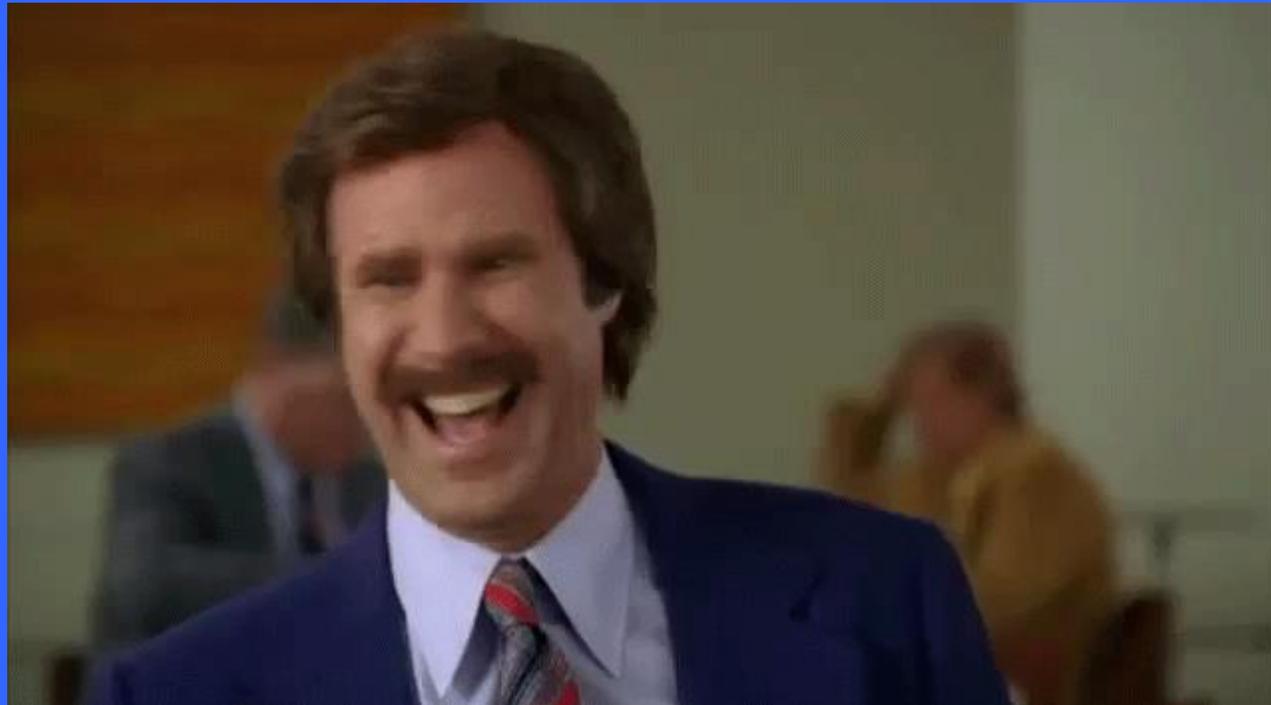
Comment 7: If client won't fix it, you have to.

And get ready for the grievance and malpractice claim.

COMMENTS ≠ RULES

TRDPC 1.01, Comment 7.

“A lawyer who acts in good faith is not subject to discipline.”



NO CHEATING

TRDPC 3.04(c)(1)

A lawyer shall not **habitually** violate an established rule of procedure or of evidence[.]

PERSONAL OPINION

TRDPC 3.04(c)

(2) ... assert **personal knowledge** of facts in issue except when testifying as a witness[.]

(3) state a **personal opinion** as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]

Self-Represented Litigants

TRDPC 3.04(c). A LAWYER SHALL NOT:

- (1) habitually violate an established rule of procedure or of evidence;
- (2) state or allude to any matter that the lawyer does not reasonably believe is **relevant** to such proceeding or that will not be supported by **admissible evidence**, or assert personal knowledge of facts in issue except when testifying as a witness[.]

TACTICAL DELAY

TRDPC 3.01

A lawyer shall not assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

TRDPC 3.02

Minimizing the Burdens and Delays of Litigation. In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Texas Lawyer's Creed, Sec.II.2.

I will endeavor to achieve my client's lawful objections ... as quickly and economically as possible.

TEN TIPS TO TAKE TO HEART

1. Win because of the truth, not in spite of it.
2. Don't rewrite history.
3. Reign in the rhetoric
4. Remember your audience.
5. Don't be a diva.
6. Follow the evidence.
7. It's not about you.
8. Pick your battles.
9. Don't waste everyone's time.
10. Don't be like Clarence Darrow.

Legal Community and Mental Health

ABA Commission on Lawyer Assistance Programs
and the Hazelden Betty Ford Foundation

- Evaluated 13,000 judges and lawyers in the United States
- Respondents took the primary screening test employed by the W.H.O.

28% reported experiencing depression.

19% reported experiencing anxiety.

23% reported work related stress.

Legal Community and Dependency

- 21% of judges and lawyers have a problem with alcohol abuse.
- 36% are “problem drinkers.”

OVER ONE-THIRD OF JUDGES AND LAWYERS HAVE A DRINKING PROBLEM.

The American Psychological Association

- Lawyers are 3.6 times more likely to suffer from depression than non-lawyers.
- 40% of law students suffer from depression.
- 96% of law students suffer stress – significantly more than reported by medical students, and *double* that of all graduate students
- Stress leads to depression. Depression leads to substance abuse.
- Lawyers are the most frequently depressed occupational group.

Comparison with General Population

GENERAL POPULATION

6.8% Adult
alcoholism rate

6.7% suffer
depression per year

18.1% experience
anxiety

LEGAL COMMUNITY

36% Alcoholism
Rate

28% suffer
depression

19% experience
anxiety

Suicide

- 13.4 per 100,000 in general population commit suicide
- 15% of people with depression commit suicide, and lawyers are 3.6 times more likely to suffer depression than the general population.
- In a study in N.C., 37% of lawyers report suffering from depression, and 30% of those admit to suicidal ideations.

11.5% of lawyers reported having suicidal thoughts during their legal career

Compassion Fatigue

Symptoms:

- Hopelessness
- Decrease in experiences of pleasure
- Constant stress and anxiety
- Sleeplessness or nightmares
- Pervasive negative attitude

Effects:

- Lessening of compassion
- Decrease in productivity
- Inability to focus
- The development of new feelings of incompetency
- Self-doubt