



BOYAR & MILLER

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Lawyers and the Obligation Not to Lie

South Texas College of Law
Just Ethics Continuing Legal Education

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LAWYERS AND THE OBLIGATION NOT TO LIE



When Does the Duty of Candor Apply?

- Interactions with your client
- Interactions with opposing counsel
- Interactions with courts and other legal tribunals



When Does the Duty of Candor Apply?

- Settlement Negotiations
- Discovery
- Interactions with Third Parties



Overview of Presentation

- Sources of Ethical Obligations
- Primary Areas of Relevance
- Specific Rules to Know and Follow
- Surprising Things You May Not Know



Sources of Ethical Obligations Regarding Candor: What you Should Know

- Texas Disciplinary Rules of Professional Conduct
- Texas Lawyers' Creed
- State and Federal Rules of Civil Procedure
- Case Law

Sources of Ethical Obligations Regarding Candor: What You May Not Know

- Substantive Legislation
- Texas Penal Code
- Texas Government Code

A Lawyer's General Responsibilities under the Disciplinary Rules

- To maintain the highest standards of ethical conduct.
- To zealously assert the client's position under the rules of the adversary system.

A Lawyer's General Responsibilities under the Disciplinary Rules

- As negotiator, to achieve a result advantageous to the client but consistent with requirements of honest dealing with others.
- To zealously pursue the client's interests within the bounds of the law.

Texas Disciplinary Rules of Professional Conduct

- Six Disciplinary Rules and the Preamble to the Disciplinary Rules Apply or Are Affected by the Duty of Candor and a Lawyer's Duty Not to Lie

Texas Disciplinary Rules of Professional Conduct

Rule 1.02: Scope and Objectives of Representation

- A lawyer cannot assist a client to engage in conduct that the lawyer knows is criminal or fraudulent.

Texas Disciplinary Rules of Professional Conduct

- Rule 1.15: Declining or Terminating Representation
- Rule 3.01: Meritorious Claims and Contentions
 - A lawyer cannot present frivolous claims or knowingly present false evidence.

Texas Disciplinary Rules of Professional Conduct

- Rule 3.03: Candor Toward the Tribunal
 - A lawyer may not lie to a tribunal or fail to disclose information with the purpose of knowingly misleading the tribunal.

Texas Disciplinary Rules of Professional Conduct

Rule 3.04: Fairness in Adjudicatory Proceedings

- A lawyer may not obstruct access to evidence or falsify evidence.

Texas Disciplinary Rules of Professional Conduct

Rule 4.01: Truthfulness in Statements to Others

- A lawyer may not make knowingly misstatements of facts or knowingly mislead others.

Main Areas Where Duty of Candor Affects a Lawyers Job

- Presenting Claims to Tribunals (Court, Arbitrator, Mediator, etc.)
- Discovery
- Presenting Evidence and Witnesses
- Negotiations (Settlement, Closing, etc.)

Presenting Claims: What You Should Know

- A lawyer may not bring a frivolous claim or defend a claim on a frivolous basis.
- A lawyer may not file knowingly false claims or defenses.
- A lawyer may not base a claim or defense on facts which he knows are false.
- But...

Presenting Claims: What You Should Know

- This Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure.

(Disciplinary Rule 3.01 Meritorious Claims and Contentions, TRCP 13, FRCP 11)

Presenting Claims: What You Should Know

- A lawyer for a defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may defend the proceeding as to require that every element of the case be established.

(Disciplinary Rule 3.01 Meritorious Claims and Contentions, TRCP 13, FRCP 11)

Presenting Claims: What You May Not Know

- A filing or assertion is also frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person.

(Comments to Disciplinary Rule 3.01)

Presenting Claims: What You Should Know

A LAWYER CANNOT KNOWINGLY

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; or
- (3) offer or use evidence that the lawyer knows to be false.

(Disciplinary Rule 3.03 Candor Toward the Tribunal)

Presenting Claims: What You May Not Know...

A LAWYER CANNOT KNOWINGLY

- (1) in an ex parte proceeding, 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; or

(Disciplinary rule 3.03 Candor toward the Tribunal)

Presenting Claims: What You May Not Know...

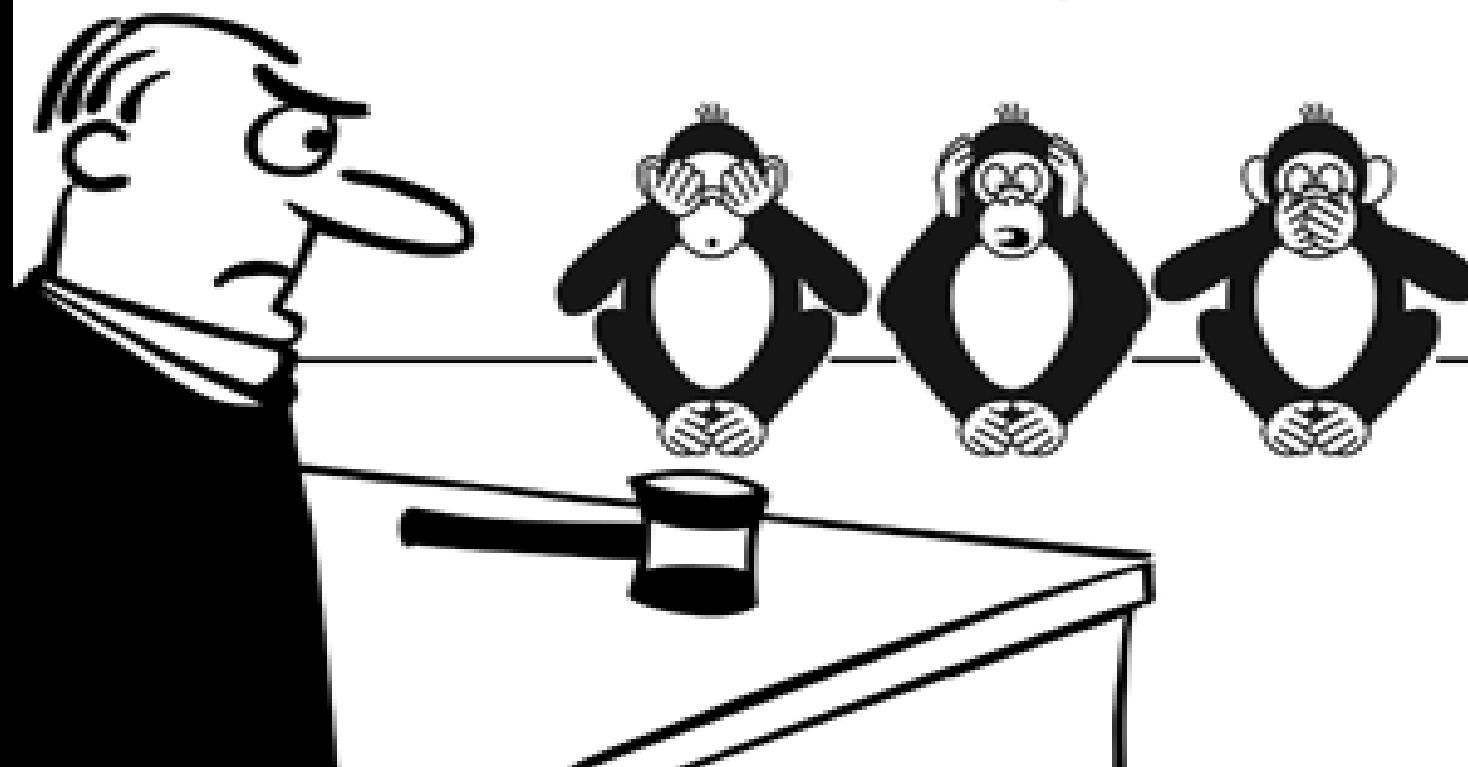
A LAWYER CANNOT KNOWINGLY

(2) fail to disclose to the tribunal 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.

(Disciplinary rule 3.03 Candor toward the Tribunal)



Stonewalling discovery? Us?



Discovery Obligations: What You Should Know

- A lawyer may not abuse the discovery process in seeking, making, or resisting discovery.
- A lawyer may not send any discovery request that is frivolous, harassing or oppressive.
- A lawyer may not send a discovery response or objection that is frivolous or made for purposes of delay.

Discovery Obligations: What You May Not Know...

PRACTICE TIP: AVOIDING FRIVOLOUS RESPONSES AND OBJECTIONS

- Even though the phrase “overly broad” is commonly used in response to discovery requests, the term has never been defined by the Texas Supreme Court.

(See *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995); *In re Shipmon*, 68 S.W.3d 815 (Tex.App.—Amarillo 2001, no pet.)



Discovery Obligations: What You May Not Know...

PRACTICE TIP: AVOIDING FRIVOLOUS RESPONSES AND OBJECTIONS

- When responding to discovery requests, a good practice is to state the reasons supporting the objection as overly broad such as by stating that the request is over broad as to time, scope, place, or subject matter.

(See *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995); *In re Shipmon*, 68 S.W.3d 815 (Tex.App.—Amarillo 2001, no pet.)



Discovery: What You Should Know

- A lawyer cannot obstruct another party's access to evidence.
- A lawyer cannot destroy or alter evidence.
- A lawyer cannot assist in or encourage the destruction or alteration of evidence.

(Rule 3.04 Fairness in Adjudicatory Proceedings, TRCP 215.3)

Discovery: What You Should Know

DISCOVERY VIOLATIONS CAN
RESULT IN SANCTIONS

(TRCP 215.3)



Discovery: What You May Not Know

Discovery Sanctions can include:

COMMUNITY SERVICE

Hill and Griffith Co. v. Bryant, 139 S.W.3d 688, 698 (Tex. App.—Tyler 2004, pet. denied) (holding that community service was intended to persuade attorneys “to be careful not to take actions that are contrary to the liberal spirit with which they are to view all discovery requests.”)

See also *Braden v. South Main Bank*, 837 S.W.2d 733, 740 (Tex. App.—Houston [14th Dist.] 1992, writ denied)



Discovery: What You May Not Know

CONTEMPT OF COURT

- An attorney may be fined or imprisoned by any court for misbehavior or for contempt of the court.



Tex. Gov't Code Ann. § 82.061 (Vernon 1998).

Discovery: What You May Not Know

DISCOVERY VIOLATIONS CAN BE FELONIES

- It is illegal to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

(Tex. Pen. Code, §§37.09(a)(1), 37.10(a)(3). See also 18 U.S.C. §§1501-1515)

- Falsifying evidence is also generally a criminal offense.

(Tex. Pen. Code. §§37.09(a)(2), 37.10 (a)(1), (2))

Presenting Evidence and Witnesses



Presenting Evidence and Witnesses: What you should know

A lawyer may not present false evidence
or testimony

Presenting Evidence: What You May Not Know...

- **WHAT IF EVIDENCE PRESENTED TURNS OUT TO BE FALSE?**
 - Must make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence.
 - If unsuccessful, the lawyer must take reasonable remedial measures, including the disclosure of the true facts.
 - Duty to remediate continues until no longer reasonably possible

(Disciplinary Rule 3.03 Candor Toward the Tribunal)

Declining or Terminating Representation

- A lawyer must decline to represent a client or must withdraw when:
 - the representation will result in a violation of the rules of professional conduct, or other law



Love Appellate...

*"I thought I was guilty until my
lawyer straightened me out on that."*



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