

Selected Ethical Issues for Trial Lawyers

By Guy O. Kornblum

Facing ethical issues in “trial work” is nearly an everyday occurrence. Investigating a client’s cases, meeting with and interviewing witnesses, preparing a client for testimony, negotiating a client’s case, appearing at mediation and before the court in hearings and at trial all involve ethical dilemmas that we are bound to confront. So decisions have to be made to avoid violating the ethical requirements which govern our efforts on behalf of our clients.

What I have included in this article are just some of the basic considerations for ethical dilemmas which we likely will face and the general ethical principles that guide us. These principles distinguish our profession from others where the “rules” are not so well defined. In some areas

there is wide latitude which requires sound professional judgment to avoid ethical misconduct. In some areas the rules are clearly restrictive.

The general ethical principle guiding our profession is found in Business and Professions Code section 6106 which provides that lawyer may be disciplined “for a commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise.”

In this article I will discuss six areas that are commonly faced in our civil litigation practice.

Issues re Soliciting and “Signing Up” Clients

Marketing a lawyer’s services in this era of permissive advertising is challenging for all of us. The “open door” invites abuses. It is easy to cross the line of what is impermissible by overly “puffing” credentials, case successes, and client satisfaction. But here are the basics.

Under Rule 7.1 of the California Rules of Professional Conduct, advertising must not involve “false, misleading or deceptive” communications.¹ This rule emphasizes that all representations made in legal advertising should accurately reflect the factual and legal circumstances of the services provided and the results achieved. The U.S. Supreme Court has held that lawyer advertising is protected commercial speech but may be subject to reasonable restrictions. (See *Bates v. State Bar of*

Arizona (1977) 433 U.S. 350, 383-84.) While it may seem obvious that advertising may not mislead, the limitations on lawyer statements for promotional purposes may not be considered misleading in other advertising contexts but may be misleading in the legal context. (See *Edenfield v. Fane* (1993) 507 U.S. 761, 774-76.)

The basic principle is to avoid misleading the public as to competence, credentials, experience or results relating to a lawyer or the firm. A lawyer may advertise specialized areas of practice but may not purport to be a “certified specialist” unless the lawyer holds a certificate issued by the Board of Legal Specialization or another entity accredited by the State Bar Rule 1-400(D)(6).

The State Bar Act also prohibits specific types of communication such as any guarantee, warranty, or suggestion that the lawyer can obtain quick settlements. (Cal. Bus. & Prof. Code § 6157.2(a), (b).) It restricts advertising methods such as impersonations and dramatizations. (*Id.* § 6157.2(c).) An advertisement stating the lawyer will represent the client on a contingency fee basis is also prohibited if it fails to mention that the client will be responsible for costs. (*Id.*)

If an advertisement in electronic media conveys a result in a specific case, the advertisement must state either: (1) the factual and legal circumstances that justify the result, including the basis for liability and the nature of injury or damage sustained, or (2) the result was dependent on the facts of the case, and results will differ. (*Id.* § 6158.3.²)



Guy O. Kornblum is the principal in Guy O. Kornblum, APLC, with offices in the San Francisco Bay area, where Mr. Kornblum has practiced for over 45 years. He is Certified in Civil Trial Law by the National Board of Trial Advocacy. He has

been trying civil cases his entire career and has taught at UC Law San Francisco (Hastings). Once on the defense side, he has been a plaintiff’s lawyer for the past 25 years. He also is an expert witness in insurance claims and legal malpractice cases. His firm handles a wide variety of civil cases, especially challenging personal injury and insurance related cases. kornblumlaw.com/



Most of us cannot afford the expensive tv and radio campaigns we routinely see or hear, so we look to other ways to get the word out about the legal services. Whatever the medium you use, consider these basic rules which we must follow to avoid ethical violations.

Issues re Preparation of Your Client for Testimony

The difference here is between hearing what is “said” and “saying” what is heard. It is a separation of assisting the witness to tell an accurate story versus coaching the witness to tell a favorable story. You should know the difference.

To avoid “putting words in my client’s mouth,” I “unpack” the witness first. Use the words and questions that urge your client to tell the story – in their own words. “Tell me about ...” or “Then what happened?” I avoid suggesting any answer to the question, e.g. “Did Mr. X tell you ...?” (suggesting in the question what you hope to hear rather than what your client has to say).

The principal applicable here was stated in the recent ABA Formal Opinion 508 (adopted Aug. 5, 2023) which provides:

A lawyer’s role in preparing a witness to testify and providing testimonial guidance is not only an accepted

professional function; it is considered an essential tactical component of a lawyer’s advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct governing the client-lawyer relationship and a lawyer’s duties as an advisor, the failure adequately to prepare a witness would in many situations be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously “coach” witnesses in new and ethically problematic ways.

So, the rule is broadly permissible and in practice subject to abuses resulting in coaching, horse shedding, or sandpapering³ the client (and even witnesses) into a version that is helpful to a client’s cause rather than truthful. It is the difference between helping your client who may have difficulty telling the story and relating the

facts, in contrast to “feeding” the story to a client. As lawyers we should know the difference, but there are violations by those who cross the line.⁴ So, know the limits and stay within them.

Issues re Dealing with Independent Witnesses

Here, there is a wide range of situations as witness personalities and their opportunities for accurate testimony and willingness to cooperate will vary. Some may meet willingly, while others are reluctant or refuse to do so.

However, what is said about client preparation applies here. The rules are clear: Any effort to unduly influence an independent witnesses’ testimony is an ethical violation, and because there is no “privilege” which protects your communications with that witness, any unethical efforts are likely to be exposed if opposing counsel takes a comprehensive pre-trial deposition or exposes such at trial.⁵

Issues re Use of “AI” in Research and Briefing

I need to stress here what may be obvious: AI is in its infancy, there is plenty of room for abuse, and as lawyers, self-restraint is the key principle. There are no clear rules

yet as to what the limitations are. The biggest issue I see is that when going to AI databases we have no idea where the AI webpage obtained the information we find unless it is stated. Obviously, if we see something favorable, we cannot just “lift it” and copy it in a brief, motion or demand letter without verifying its accuracy. So that is the first principle of using AI – *verification*.

We cannot rely on just what is presented and there to read. That should seem obvious. That is, in a field that requires accuracy, AI-generated factual inaccuracies can be serious risks for legal professionals. That is why it is critical that we use our professional judgment, knowledge and skill to independently confirm the accuracy of any data provided by an AI tool.

Enough said. You get the message.

Issues re Representations in Mediation

Because of the mediation “privilege” there is plenty of opportunity for abuse in a mediation regarding what is said and what is left unsaid. In a sense, this can be “unchecked” advocacy, leaving the parties to say what they will with the hope that the other side will not verify the information (which calls up a lawyer’s professional duties). The temptations are there for abuse. In my view, there is no room for doubt. Truth in advocacy is required. That does not mean that you must open your file, but it means that you should not allow your opposition to believe something is true that is not or attend with your knowing they are assuming “half-truths.” So where is the line?

First, let’s distinguish between “bluffing” or “posturing” and outright lying or concealment. The former is likely regarded as “good advocacy” while the latter should be professionally unacceptable. Again, you should know the difference.

Second, you have a safety net: the mediator. If you or know or suspect the other side does not know the “truth,” then discuss that with the mediator and

Let’s distinguish between “bluffing” or “posturing” and outright lying or concealment.

consider with that mediator how to approach these circumstances. It may be a question of ethically correcting “the record” or strategizing how to proceed from an advocate’s standpoint. The message here is to let the mediator know what misunderstandings the other side has about the case, why they exist and what to do about it. Most likely, the mediator will want to get accurate facts before the parties to have productive negotiations. It may be that the opposition has not fully investigated, discovered or prepared the case, and it is time to get the cards on the table.

Strategic if not ethical decisions need to be made. But what is clear is that lying and communicating misleading statements are not ethically permitted even under the “confidentiality” protection of the mediation privilege. Plus, full and honest disclosure is likely to lead to a resolution

which is the purpose of attending in the first place!⁶

Issues re Representations to the Court and Counsel

Not telling the truth or allowing the court or opposition to rely on facts or information you know or reasonably believe is not true is professionally – if not ethically – inexcusable. Yes, one can say use “good judgment,” “follow your instincts” or just “do what is right” are good rules of thumb to follow. These might be good basic concepts, but they work only if the lawyer has the foundation underneath them and the developed instincts to know “right” from “not so right.” Alternatives to test the situation include talking to a trusted colleague, calling the State Bar “hotline,” or getting a “second opinion” from an ethics expert just to make sure you do not cross the line. Taking some extra time to make sure you stay within the ethics guidelines makes sense when you are faced with an ethical dilemma that challenges your judgment. ■

¹ See Bus. & Prof. Code 6157,1.

² Certain types of communications are subject to a rebuttable presumption that they are false, misleading, or deceptive. For instance, the State Bar Act establishes a presumptive violation for advertisements in any medium that: (1) describe the ultimate result of a specific case without adequately presenting the facts or law giving rise to the result, and (2) refers to or implies money received by or for a client in a particular case, or to potential monetary recovery for a prospective client. (Cal. Bus. & Prof. Code § 6158.1(a), (c).)

³ See, e.g., J. Gaal and J. DiLorenzo, “Horse-Shedding the Witness: When Does Witness Preparation Cross the Line?” <https://www.bsk.com/uploads/Burton-Award-Article-Horse-Shedding-a-Witness.pdf>

⁴ *Id.*

⁵ C. Pastore, “Ethical Witness Preparation and Unethical Witness Coaching: The ABA Weighs in on the Good, the Bad, and the Ugly,” Mar 2, 2024, <https://lacba.org/?pg=lacba-news&blAction=showEntry&blogEntry=103927>.

⁶ J. Schau, “Secrets and Lies: The Ethics of Mediation Advocacy and Scrabble,” Feb. 27, 2006, <https://mediate.com/secrets-and-lies-the-ethics-of-mediation-advocacy-and-scrabble/#:~:text=When%20confronted%20with%20this%20scenario,falsely%20and%20remove%20all%20doubt!%E2%80%9D>.