Advocacy Ethics: Avoiding the Minefields

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Prof. Peter Margulies,

Roger Williams University School of Law

The Framework: ABA Model Rules; FRCP Rule 11; Inherent Power of Court; Ct. Admonitions

- ABA Model Rule 3.1:
- Bar on frivolous claims and defenses
- Permitted: “good faith argument” for changing law
- Rule 3.3: “Candor toward the tribunal”
- No *knowing* “false statement of law or fact”
- Must disclose directly adverse legal authority (statute, regulation, case law)
- During proceeding, must correct any prior statement that lawyer *now knows* to be false
- Rule: 4.1: No *knowing* misrepresentation to third party

Framework II: FRCP Rule 11

- Based on reasonable inquiry: No frivolous claims or defenses apart from good-faith change in law (e.g., pre-*Brown v. Bd. of* Educ., ending racial segregation, seeking overruling of *Plessy v. Ferguson*)
- No factual claims w/o evidentiary support or reasonable chance of support
- Court and/or party seeking sanctions must provide notice:
- Party seeking sanctions must serve motion 21 days before filing (notice)
- During 21 days, counsel can cure violation—"safe harbor" provision
- Court on its own motion: notice is more flexible
- *Ex parte* request (no other party): > standard of care since ct. relies

Inherent Power I

- Chambers v. NASCO, Inc., 501 U.S. 32 (1991):
- In *NASCO*, counsel deceived court in contract action concerning sale of radio station
- To avoid selling radio station per contract, seller had engaged in sham transactions with lawyer's help
- Lawyer did not disclose these transactions to the court

Inherent Power II

- Held in *NASCO*: Court has inherent power to ensure integrity of its proceedings.
- Misconduct by lawyer or party directing lawyer undermines integrity
- In *NASCO*, sham transactions that seller directed lawyer to execute undermined court's ability to provide relief to buyer in contract action
- Rule 11 did not implicitly preempt traditional inherent power
- Court ordered seller to pay $1 million for buyer's attorney's fees
- No safe harbor; misconduct can trigger sanctions with minimal notice (although misconduct in *NASCO* included multiple episodes)

Judicial Admonitions

- Written admonition by court (specific criticism naming lawyer) may require notice and appellate review
- Even without a financial penalty, a written admonition is very serious
- It can affect the lawyer's reputation
- As Magistrate Judge Sullivan noted earlier: In the long run, a lawyer's reputation is central
- More informal criticism may not require notice or judicial review—but it *still affects the lawyer's reputation*

Telegraphing the Takeaway I

- Ethics can be a minefield; take a watchful "360^{0} view" of ethics in advocacy, not an "ostrich" view (hiding your head in the sand) *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011)
- Be aware of each ethics risk: the ABA Model Rules/state rules; FRCP 11; inherent power, and judicial admonitions.
- Know and comply with the *most demanding rule*—the rule with the least room for error

Tentative Takeaway II

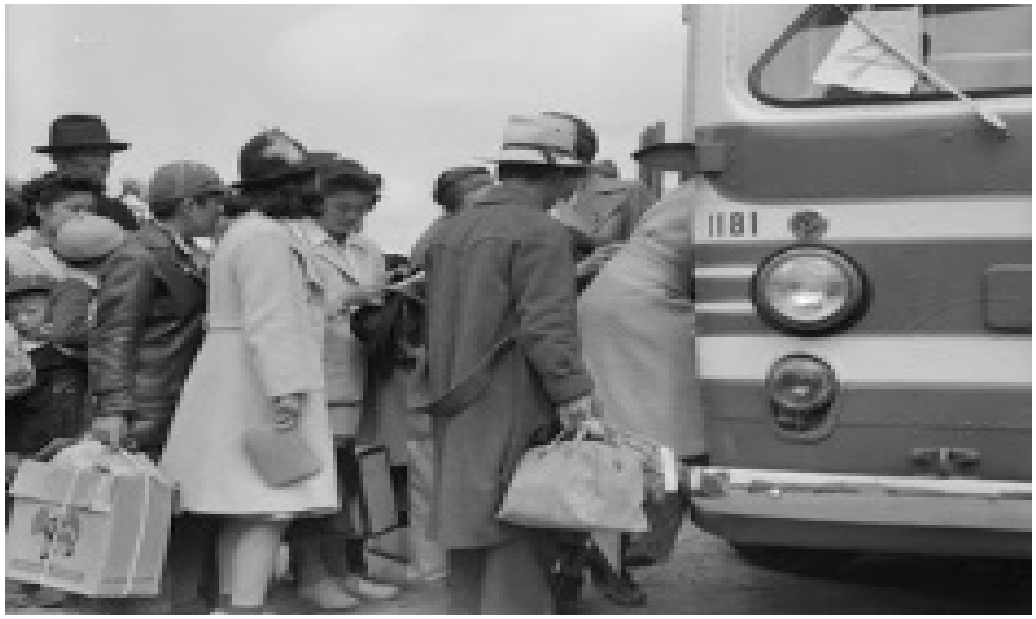
- Examples of differences:
- Model Rules 3.1, 3.3, 4.1 & 8.2 require proof the lawyer *knowingly* misrepresented facts or law; good faith (lack of knowledge) is a defense
- FRCP 11 has a higher standard: the lawyer must reasonably inquire about truth of statements; mere lack of knowledge isn't a defense; so *always* conduct a reasonable inquiry
- Don't count on a "safe harbor" of notice to cure deceptive statements: in egregious cases, court can use, 1) Rule 11 on its own motion, or 2) inherent power, to sanction without providing notice *or* chance to cure

Lack of Candor in History: Dep't of Justice & WW II Detention of Japanese-Americans

- Korematsu v. United States (1944):

After Pearl Harbor attack by Japan, U.S. entered World War II

Many white West Coast residents had unfounded fears re loyalty of Japanese-American, stoked by historic prejudice.



Korematsu II

- Army General John DeWitt wrote false report expressing concern about Japanese-Americans' loyalty
- Result of this fear: forced evacuation, followed by internment of Japanese-Americans, including children, in camps far from home
- When Japanese-Americans challenged the internment policy, the Justice Department (DOJ) did not disavow the report or mention U.S. Navy report finding Japanese-Americans were loyal
- DOJ lawyers wrote a cryptic footnote: "The U.S. relies on the DeWitt Report only for matters cited in the U.S. brief."

Korematsu III

- SCOTUS upheld the forced evacuation, despite the lack of evidence of Japanese-American disloyalty
- In 1983, fed. ct. vacated convictions, citing DOJ lack of candor
- In 2011, Acting Solicitor General Neal Katyal confessed error
- Ironically, Katyal as a private lawyer represented challengers to President Trump's travel ban (aka "Muslim ban"), which was based on fear of Muslim immigrants to U.S.
- SCOTUS upheld travel ban in 2018, but in its decision overruled *Korematsu* (to counter Justice Sotomayor, who had compared travel ban to WW II internment policy)

Example: Citing adverse authority

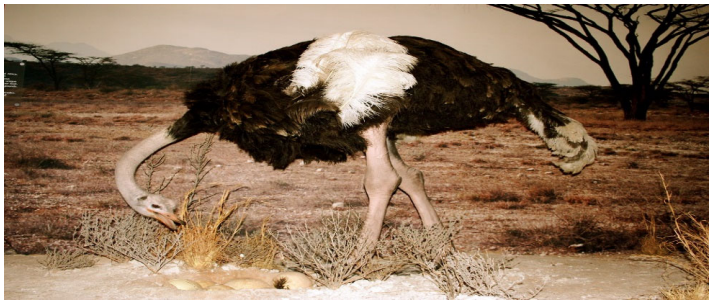
- Ostrich not taking watchful role – especially if counsel showing lack of candor participated in earlier case counsel now claims they don't know
- Sometimes not sanctioned formally—often court feels losing is enough – but courts discuss counsel in negative terms, which affects reputation (see Magistrate Judge Sullivan's remarks)

Deeper Dive on Ethics: Current Examples

- *Gonzalez-Servin* (7th Cir. 2011) (Posner, J.): Two cases in one on citing relevant adverse precedent:
- 1) Lawsuit against tire manufacturers; precedent required removal to Argentina under *forum non conveniens* (FNC); in contesting removal, counsel for plaintiffs didn't cite relevant precedent, even after defendants repeatedly cited case
- 2) People w/ hemophilia who got HIV due to blood transfusions challenged FNC removal to Israel—plaintiffs cited adverse precedent but gave inaccurate account of facts

Failure to cite or distinguish adverse cases II

- Judge Posner in *Gonzalez-Servin* included picture of an ostrich hiding its head in the sand (like this) w/ note: "poor example" of lawyer as officer of the court



- Inference of incompetence and possible dishonesty; worse if counsel was counsel in earlier precedent—how can lawyer forget their own case?
- No sanction, but Posner's mockery (and counsel's loss of case) was a devastating blow to lawyer's reputation

Rule 11 Examples: Frivolity

- *Odom v. Syracuse City Sch. Dist.*, 2020 U.S. Dist. Lexis 60858 (N.D.N.Y. Apr. 7, 2020): sexual harassment lawsuit
- Lawyer filed fed. case after losing state case based on largely identical arguments
- Ignored "basic" preclusion doctrines such as *res judicata* and collateral estoppel
- Papers were sloppy; the only good part counsel plagiarized from NY state court opinion
- Sanction: paying other side's attorney's fees

Frivolity and unsupported claims re attorney's fees

- *Ark. Teacher Ret. Sys. v. State St. Corp.*, 24 F.4th 55 (1st Cir. 2022):
- Several law firms filed suit re overcharging by financial firm; sought fees
- Stakes were high; in initial district court fee decision, lawyers got $75 million: 25% of $300 million settlement
- Takeaway on sanctions that cut over $1 million from fee award: 1) fee request was *ex parte;* defendant financial firm had agreed to overall settlement and was then out of case
- 2) 1st Cir. took flexible view of notice to lawyers of sanctions, when court acted *sua sponte* (on the court's own motion)
- 3) Mere informal criticism by trial ct. not subject to judicial review

Attorney's Fees II

- *Arkansas Teachers'*: Multiple problems for plaintiffs' lawyers, including prominent firm Lieff, Cabraser, prior to filing fee request:
- Double-counting hours of same contract attorney (e.g., if one firm contracted w/ outside lawyer to work 20 hours on the case, *each* of three plaintiffs' law firms sought fees for the *full* 20 hours).
- Plaintiffs lawyers sought $4.1 million paid to shady Texas lawyer to encourage Ark. officials to retain firms; Tex. lawyer did "considerable favors" for Ark. officials
- Firms claimed request for 25% fee award was "**right in line**" with study, but study showed median < 20% (difference: $15 mill.)

Attorney's Fees III

- Boston *Globe* published story about these problems after ct. granted fee request (avoid story in the *Globe* about your fees)
- Trial ct. appointed special master and amicus
- Since fee request was *ex parte*, Lieff Cabraser firm had higher duty
- Lieff "materially misleading" in stating 25% award was "right in line" with study (even tho' Lieff attached full study)
- 1st Cir. reduced award to Lieff by over $1 million
- Lieff had ample notice when trial ct. named spec. master
- Trial court criticism of Lieff not subject to app. review

Frivolous and unsupported claims in 2020 election litigation

- Disclaimer: Examples show how courts read Rule 11 & ethics rules such as 3.3, 4.1, and 8.4; not intended to promote partisan political view.
- *O'Rourke v. Dominion Voting Sys., Inc.*, 552 F. Supp. 3d 1168 (D. Colo. 2021): plaintiffs asserting election fraud claimed standing to represent *all* U.S. voters and jurisdiction *in Colorado* to sue election officials of any and all states (e.g., Pa.)
- Court found that plaintiffs lacked such sweeping standing and Colorado lacked jurisdiction over state officials in other states
- Furthermore, flaws in these legal claims would be "obvious to a first-year civil procedure student“

2020 Election II: *O'Rourke*, cont.

- On fraud, evidence was "conclusory statements" and beliefs based on "rumors, innuendo, and questionable media reports“
- Counsel failed to engage in reasonable inquiry prior to filing case
- That inquiry could have included consulting with experts on election fraud; instead of reliance on inaccurate social media, reas. inquiry required "talking to actual human beings“
- Plaintiffs in *O'Rourke* had ample time to conduct such inquiry, since they sought damages, not injunction; no emergency cited
- Sanctions imposed under Rule 11, 28 U.S.C. 1927, and inherent power

Election 2020 III: Rudy Giuliani—Did NY Court Go Too Far?

- Rudy Giuliani, ex-U.S. Attorney for S.D.N.Y. and NYC mayor during 9/11, became Trump advisor and major figure in 2020 election cases
- Three kinds of statements:
- 1) In court
- 2) Public outlets such as radio *during* litigation
- 3) In public, after courts issued final rulings ending litigation
- Court found all three problematic

Election IV: Giuliani, cont.

- Rules at issue: 3.3 (candor), 4.1 (misleading 3d parties); 8.4(c) (dishonesty); [all 3 require knowledge]; 8.4(h) (NY-only rule) (conduct that reflects adversely on fitness as lawyer)
- Giuliani's claims triggering temporary suspension:
- 1) "Plaintiffs are claiming election was fraudulent" (brief also argued this)
- Giuliani's problem: Fraud claim had been *deleted* from complaint
- Held: 3.3 violation; Court inferred that Giuliani knew complaint did not include fraud, but said it anyway, thus sowing confusion and wasting court's time

Election V: Giuliani, cont.

- Other claims out of court: 1) In Pa., more absentee ballots returned and counted than originally issued (demonstrably false)
- 2) Dead people voted in Philadelphia, including former heavyweight champion Joe Frazier (shown here w/ Muhammad Ali):

(This claim also false; dead Frazier removed from rolls in timely fashion)

- True facts readily discoverable; court inferred knowledge).

Election VI: Problems w/ Giuliani Ruling

- 3.3 point: Argument that Giuliani deceived court in election case is flawed
- Deception must be “material,” i.e., must matter to the outcome
- In adversary system, opposing counsel would correct the record
- Giuliani’s actions indicate incompetence (and possibly fitness to practice under 8.4(h)), but not deception since no one was deceived
- Public statements: out of court; in political realm, where 1st Amend. protects outlandish and inaccurate claims; 4.1 doesn’t apply
- Takeaway: Lawyer at risk if statements are demonstrably false

Limits to Liability: Preserving Space for Advocacy

- *Young v. City of Providence*, 404 F.3d 33 (1st Cir. 2005) (facts: civil rights claim; Providence police officers called to scene of late-night disturbance outside club; shot off-duty officer emerging from club)
- Officers called to scene were white; off-duty officer (Young) was Black
- Lawyers for Young's mother/estate wished to use diagram in opening statement; defense objected to diagram on grounds that it was wrong on location of cars including car whose driver caused disturbance
- Trial judge ruled that plaintiff's lawyers could use diagram in opening only if they agreed to stipulation (joint statement of parties) that diagram was partly wrong

Limits to Liability II

- Plaintiff's counsel claimed in motion to vacate stipulation that they were "informed by the Court that [they] … *had to agree* with" proposed stipulation and therefore "*had no choice*" but to agree
- Trial judge read this as inaccurate and sanctionable claim that judge had coerced the plaintiff to agree to the stipulation
- The court can encourage parties to agree, but lacks the power to coerce agreement
- So if counsel had really said court had tried to force them, counsel would be claiming that court severely overstepped its authority

Limits to Liability III

- 1st Cir. in *Young*: Assessing inaccuracy requires viewing claims in context; in context counsel merely said judge had ruled plaintiff could only use diagram in opening w/ stipulation that diagram was partially wrong (since use w/o stip. could confuse jury)
- That ruling put plaintiff in difficult spot, because counsel wanted to use the diagram in the opening to frame the case effectively—but ruling wasn't coercion *per se*
- In other words, counsel just claimed that the judge forced them to make a tough choice; that was a narrow & accurate claim
- Judge's broader reading was abuse of discretion

Other Examples of Sanctionable (or Non-Sanctionable) Advocacy?

- (Open to comments by all workshop participants)

Final Takeaways

- To avoid minefields, adopt watchful "360^{o} view" of ethics in advocacy, not an "ostrich" view
- Know and avoid each ethics risk: ABA Model Rules/state rules; FRCP 11; inherent power, 28 U.S.C. 1927, and judicial admonitions/informal criticisms.
- Always comply with the *most demanding rule*—the rule that expects the most from the advocate
- That's the best way to defuse ethics minefields and keep your reputation intact.

Q & A