

2019 Labor and Employment Law Conference
Ethics Presentation
Thursday – February 21 (12:15 - 1:45 p.m.)

Speakers

- Hon. Gustavo A. Gelpí, Chief Judge, United States District Court for the District of Puerto Rico; FBA Past National President
- TJ McGrath, General Counsel, Congressional Budget Office, United States Congress

Learning Objectives

The panel will provide professional responsibility and ethics training that practitioners use every day. With the use of fact patterns, panelists will walk through the rules and responsibilities of practicing lawyers and discuss real situations in which ethical dilemmas arise.

- Attendees will enhance their understanding of the Model Rules of Professional Conduct and the Federal Rules for Civil Procedure as applied to a complex situation.
- Attendees will understand the sham affidavit rule, the exceptions to it, and under what circumstances such an affidavit may be considered.
- Attendees will leave with tools to make sound ethical decisions.

Ethics Scenario 1

Automatic Disclosures

JK sues her employer in federal court for religious discrimination under Title VII. In the answer to the complaint employer raises as a defense that it does not have the requisite number of employees required for the statute to apply. During discovery employer provides payroll records for all of its employees during the period in question. Subsequently, employer files a motion to dismiss. The court, following an evidentiary hearing grants the motion and enters judgment against plaintiff.

Several months later, employer finds three payroll records of additional employees and provides them to you. Had these been included in discovery plaintiff would have been able to meet the threshold requirement.

As counsel:

- 1) You need not inform the opposing party not court since judgement is now final
- 2) You must immediately inform the opposing party and court
- 3) You cannot inform the opposing party nor court since your client provided the documents under the attorney-client relationship
- 4) You have discretion to decide whether to inform the opposing party and court

Panel will discuss the application of the Rules to the fact pattern presented, consider varying facts that may lead to different results, and contemplate whether the attorney's position within the firm would alter the outcome.

Federal Rules of Civil Procedure (see attached document):

- Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
- Rule 26. Duty to Disclose; General Provisions Governing Discovery

ABA Model Rules:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal 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; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or 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; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Ethics Scenario 2

Summary Judgment Practice

During the discovery process JK is deposed. When inquired about the basis of her religious discrimination claim she answers the following under oath. First, that her supervisor rejected her repeated written applications for a promotion. Second, that all promotions during her employment were given to male staff employees. These answers are consistent with the allegations in the complaint, as well as JK's answers to interrogatories.

In its summary judgment motion employer posits that no genuine issues of material fact exist regarding JK's assertions. First, it notes that JK's personnel file does not contain any written promotion applications. Second, it notes that of the three promotions made during JK's employment two were made to women, while that of a male employee was made during JK's first week at work.

Along with her motion opposing summary judgment, JK presents a statement under penalty of perjury. In the same, JK asserts for the first time that she asked the manager verbally about a promotion, and that he responded "I won't consider you. The next promotion must go to a male employee because we value loyalty and never get pregnant".

As counsel:

- 1) You cannot submit the statement because it is based on matters not disclosed during discovery
- 2) You can submit the statement because it is necessary to overcome the entry of summary judgment
- 3) You can submit the statement, but only if you reasonably are able to explain on behalf of JK why this new information is being provided now
- 4) You have an obligation to prepare the statement for JK given that her original allegations thus far fail

Panel will review the sham affidavit doctrine [a party cannot create an issue of material fact by an affidavit that contradicts prior deposition testimony] and its application to the fact pattern presented. Jurisdictions are split on this issue. In federal practice this doctrine is applied sparingly and only invoked if there is an inherent inconsistency between the prior testimony and new affidavit that can be articulate. The panel will consider what explanations might be considered reasonable to permit the affidavit.