

# Ethics: Things Lawyers Say that Get them into Trouble:

## Truth, Candor and Misconduct

**Presenter:**

Hon. Martin Mitchell

Adjunct Associate Professor of Law

Washington College of Law

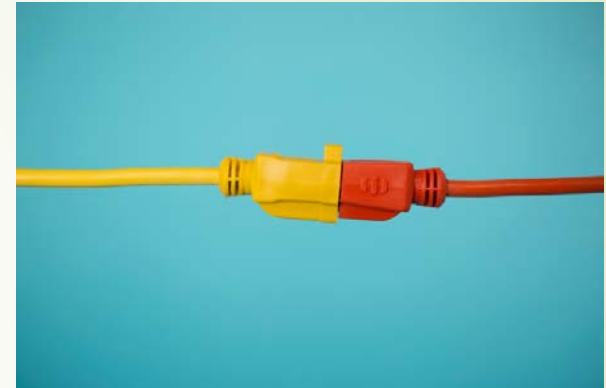
# Disclaimer 1: Caveat Emptor

*Disclaimer: The views in this presentation are those of the author and do not necessarily reflect the official policy or position of the Department of Veterans Affairs (VA), the Department of Defense (DOD), or the United States Government (USG).*

## Disclaimer 2: NOT AN OGE or Hatch Act briefing

There are limits on political activity for all federal executive branch employees. Today's training is focused on Bar Rules of Professional Conduct and does not address these limitations

For any questions related to your status as a federal government employee, please consult your local OGE ethics official.





# Disclaimer 3: Not a Financial Disclosure Lecture

Although Ethics rules may be a factor with financial disclosures

And

It may be an ethics violation to NOT disclose

This lecture is not focused on the financial disclosure requirements

# Why are we here?

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- Identify susceptibility as it pertains to ethical rules of truth, candor and misconduct.
- Recognize personal and professional ethical vulnerabilities through analysis of practical hypothetical exercises.
- Identify the Codes of Conduct for US Judges and Judicial employees and other resources to answer ethical questions that arise in both your professional and private life.

# How much Humor?

"A lesson taught with humor is a lesson retained."

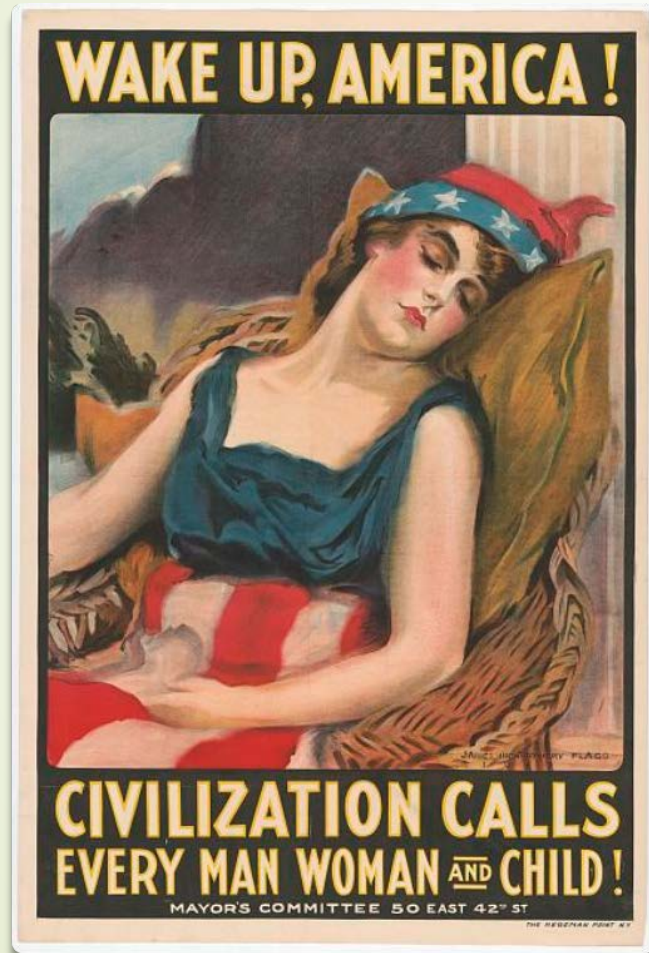
But Also:

"It is an immutable and universal rule that judges are not as funny as they think they are. If someone laughs at a judge's joke, there is a decent chance that the laughter was dictated by the courtroom's power dynamic and not by a genuine belief that the joke was funny."

-*In re Kwan*, 443 P.3d 1228 (Utah 2019)



# Wake Up!



"The great enemy of the truth is very often not the lie, deliberate, contrived and dishonest, but the myth, persistent, persuasive and unrealistic." ~ John F. Kennedy

# Sources of Law

- ← State Bar rules
- ← State Bar disciplinary decisions and advisory opinions
- ← Code of Conduct for US Judges
- ← Case Law



## DC Bar Rule 1.6: Confidentiality of Information

- (a) Except when permitted under paragraph (c), (d), or (e), **a lawyer shall not knowingly:**
  - (1) reveal a confidence or secret of the lawyer's client;
  - (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
  - (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person

# DC Bar Rule 3.3: Candor to 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, unless correction would require disclosure of information that is prohibited by Rule 1.6;

(2) Counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client; or

(4) Offer evidence that the lawyer knows to be false, except as provided in paragraph (b). 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.

## DC Bar Rule 4.1: Truthfulness in Statements to Others

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

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

## DC Bar Rule 8.4: Misconduct

It is **professional misconduct** for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) **Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;**
- (c) **Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;**
- (d) Engage in conduct that seriously interferes with the administration of justice;
- (e) State or imply an ability to influence improperly a government agency or official;
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

# Code of Conduct for US Judges

- ← Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
- ← Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
- ← Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
- ← Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office
- ← Canon 5: A Judge Should Refrain from Political Activity



# US Courts: Code of Conduct for Judicial Employees

- ◀ Canon 1: A Judicial Employee Should Uphold the **Integrity and Independence** of the Judiciary and of the Judicial Employee's Office
- ◀ Canon 2: A Judicial Employee Should **Avoid Impropriety** and the Appearance of Impropriety in All Activities
- ◀ Canon 3: A Judicial Employee Should **Adhere to Appropriate Standards** in Performing the Duties of the Office
- ◀ Canon 4: In Engaging in Outside Activities, a Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should **Avoid the Appearance of Impropriety**, and Should Comply with Disclosure Requirements



# Not an Ostrich



# Who are you?

- ◀ Criminal Defense Attorney learns that Client is using an alias
- ◀ Poll Question: Does it matter when the Attorney learns this information?
  - ◀ Yes
  - ◀ No

# You are who?

- ◀ Criminal Defense Attorney learns that Client is using an alias
  - ◀ Attorney learns this at initial consultation
    - ◀ Decline Representation unless Client agrees to correct record
  - ◀ Attorney learns of alias after representation has begun
    - ◀ Inform Client that Attorney cannot assist in misleading the court
    - ◀ Persuade Client to disclose that it is an alias
    - ◀ Move to withdraw if client will not correct the record
- ◀ Does not apply if court is on notice that it is a likely false name – “J. Doe” or record shows that Client has used multiple names

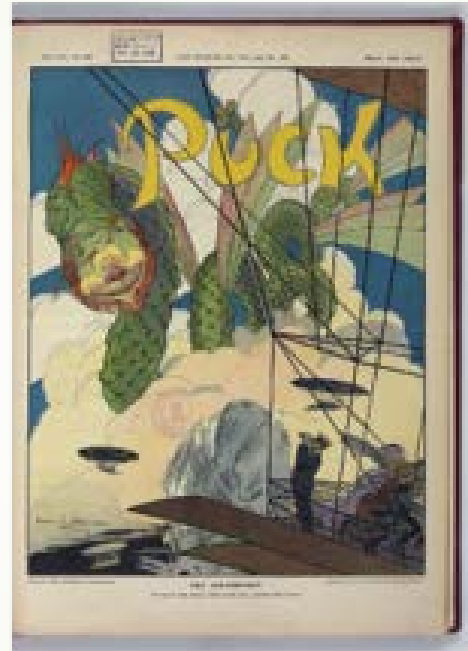
# Where are you?



# You are where?

- ← Client on bail tells criminal law attorney they have left the state and are not coming back
  - ← "Jumping bail" – the willful failure to appear for court is a crime
  - ← Prior to required Court appearance
    - ← No duty to report client is out of state
    - ← Absent special circumstances
  - ← At Court Appearance
    - ← Duty of Candor to Tribunal
    - ← Balanced w/Duty of Confidential Information

# Tell Me a Story





# Perjury?

- ← Client tells Attorney that Client intends to lie in upcoming criminal trial
- ← Poll:
- ← What should Attorney do first?
  - ← Take a quick vacation and “accidentally” leave cellphone at home
  - ← Fake an injury in order to be excused from court
  - ← Advise client not to present perjury and lawyer will need to reveal
  - ← Can anyone really know the truth – isn't it all shadows on the wall

## Perjury- they *still* would not listen

- ← Client tells Attorney that Client intends to lie in upcoming criminal trial
- ← Attorney advises Client and warns Attorney will need to inform court
- ← Client insists on testifying falsely
- ← Attorney knows the Client will lie on the stand
- ← Poll: Now What?
  - ← Disclose to the Court about the False Testimony
  - ← Move to withdraw from representation
  - ← If ordered by Court to do so continue to represent client
  - ← All of the above

# It was true when I said it...

- ← Attorney represents Client during bankruptcy proceeding
- ← Files a list of debts & assets, required to update w/changes w/in 180 days
- ← Court enters bankruptcy order and attorney closes the case
- ← Client receives valuable inheritance 167 days later
  - ← Attorney finds out at 195 days
  - ← Attorney advises former client to update Bankruptcy Court
  - ← Client refuses to make updated disclosure, says he didn't know and it's too late

What is Attorney's requirement?

# Was it true when I said it?

- What is Attorney's requirement?
  - Send an anonymous letter to the Court
  - File a lien against the Client's property until disclosure happens
  - It's a former client who made a mistake, no duty to disclose
  - Make the client agree not to sell the property until after you retire

# Dirty Deeds Done Dirt Cheap

- Attorney A represents a house flipper (HF)
- Attorney A helps HF buy a house from Old Owner (OO) and is now reselling it w/in 30 days to New Owner (NO)
- New Owner hires Attorney B to help w/house deal
- Attorney B realizes Attorney A/HF have not filed deed and instead are swapping out first page to make it look like NO bought house from OO

What should Attorney B do?

# Dirty Deeds Done Dirtier and Cheaper

- What should Attorney B do?
  - Client wants the house and is getting the house so no problem
  - Use knowledge of Attorney A's ethics problems to negotiate a better deal
  - Refuse to be involved in real estate fraud and report Attorney A to the bar
  - Ask for more referrals from Attorney A/HF – they have a booming business



# A Matter of Perception



The Johnstown calamity. A slightly damaged house

# It wasn't my fault (but it really was)

- ▶ Client's case before the US Court of Appeals for Veteran's Claims is dismissed for failure to prosecute
- ▶ Attorney tells client that the Court denied claim finding it had "no merit"
- ▶ Client files complaint at Court
- ▶ Court looks into matter and finds two more cases were dismissed due to missed deadlines by the Attorney
- ▶ Veterans with new counsel are able to reinstate claims
- ▶ Attorney apologies, blames legal secretary and has fixed office problems

What now?

# It Really Was My Fault

- What should the bar ethics resolution be?
  - Veteran's claim is reinstated, so no harm= no foul
  - It's just a claims processing rule so it can't be an ethics violation
  - Attorney's action amounted to misconduct; suspension or disbarment
  - Attorney apologized so it's all good now

# Don't drive and text (and lie)

- Attorney is a Lt Col in US Army Reserve (selected for promotion to Colonel)
- After a social gathering is driving home and hits a pedestrian killing him
- Attorney does not make any apology to the family
- Attorney denies to law enforcement that he was on his cellphone or outside lane of traffic
- Law enforcement determines both he was on his cellphone while driving but not at time of accident and he was outside his lane at time of accident
- Attorney is convicted of misdemeanors (and impeached)

Is this also an ethics violation?

# Can an Attorney secretly record calls?

- Scenario:
- Husband/Attorney suspects spouse of having an affair.
- Hires a private investigator and tells PI to install recording devices on phones in the home
- Records conversation wife has with her attorneys about pending divorce
- Husband/Attorney is charged w/illegal wiretap but acquitted

Did Husband Attorney act unethically?



# Secretly Recorded Calls?

- ▶ Context:
  - ▶ Permissible for attorneys who advise law enforcement to provide legal advice on authorized wiretaps, recorded conversations, etc.
  - ▶ Permissible for attorneys in systemic discrimination cases to have testers secretly record conversations (if otherwise allowed by law)
  - ▶ Both of the above scenarios involve attorneys advising investigators to engage in deception and secret recordings
- ▶ So, did the Husband Attorney act unethically?
  - ▶ Yes
  - ▶ No



# Questions?

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[mmitchel@american.edu](mailto:mmitchel@american.edu)

Always looking for Mock Trial/Moot Court  
volunteers

