Advanced Ethical Issues in Condemnation

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- "More is expected of lawyers than mere compliance with the minimum requirements of [the Code of Professional Responsibility.] The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of [that standard.]" *Gunter v. Virginia State Bar*, 238 Va. 617, 622, 385 S.E.2d 597, 600 (1989).
- "It follows that conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful." *Id*. If the Virginia State Bar determines that an attorney has violated a rule of ethics, it will select an appropriate disciplinary action, which may range from a private reprimand to revocation of the attorney's license.
- "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers." *Va. Rules of Professional Conduct, Preamble*.

A. Communication with Government Officials

- There is no Virginia Rule of Professional Conduct specifically addressing communication with government officials.
- Rule 4.2 is the basic rule on Communications with Persons Represented by Counsel – "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."
- However, this rule has been held to apply only in "an antagonistic or adversarial context" and has been held inapplicable in cases where one is petitioning a

legislative body. Standing Comm. On Legal Ethics, LE Op. 529 (1983). So, for instance, it would not be improper in such a case for an attorney to directly contact a member of the county board of supervisors although the attorney knows that the board is represented by the county attorney. *Id*.

- LE Op. 777 provides that it is unethical for an attorney representing a party in litigation against a county board of supervisors to directly contact a board member regarding the litigation. However, it is not unethical for such attorney to contact other county employees "if such persons are fact witnesses not charged with the responsibility of executing board policy." Standing Comm. On Legal Ethics, LE Op. 777, citing *Upjohn Corporation v. United States*, 449 U.S. 383, 101 S. Ct. 667 (1981).
- On this basis, the Committee has held that where a statutory provision, such as FOIA, authorizes contact with a government agency, and because information generally available to the public is not confidential and would not be protected by the attorney-client relationship, it is not improper for an attorney representing a party in opposition to the agency in litigation to contact the government agency in order to obtain such information, including pamphlets, literature, product information, etc. Standing Comm. On Legal Ethics, LE Op. 1504 (1994). So even where a state agency was represented by the attorney general in litigation against a party, the attorney for the individual party could contact the state agency directly to request information under FOIA. *Id*.
- It is still advisable to provide the government official's attorney with contemporaneous notice of the communication.
- On a related note, it was determined that it was not improper for an attorney for the Commonwealth's Highway Department to prepare the deed and close the transaction for acquisition of private property for highway use, subject to the government attorney

> expressly advising the adverse private property owner that the government attorney did not represent the private property owner and that the owner had the option of hiring independent counsel to review the deed. Standing Comm. On Legal Ethics, LE Op. 228 (1973).

B. Communication with Unrepresented Parties

- Condemnation cases quite often involve parties who are not represented by independent counsel.
- The first step is to clearly determine whether the party has retained any counsel. This can be accomplished by simply asking the party a direct question. Once it has been established that the party is unrepresented, the attorney should refer to Rule 4.3 of the *Virginia Rules of Professional Conduct*, which covers interactions with unrepresented parties:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
> (a) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

- Rule 4.3's Comment [1] may seem pretty basic to most lawyers, but we must remember that an unrepresented party who is inexperienced in legal matters may assume a lawyer is disinterested, even though representing another party. Therefore, in order to comply with the Rules, it may be necessary to remind an unrepresented party multiple times that you represent your client, not the unrepresented party. So it is important to assess the unrepresented party's level of apparent sophistication and apparent experience in legal matters and keep reminding them, if necessary, of your role.

- An attorney representing a seller in a real estate closing has an affirmative obligation to advise the buyer that the attorney represents only the seller. Standing Comm. On Legal Ethics, LE Op. 747 (1985).
- However, an attorney is not obligated to go beyond the affirmative obligation to disclose to an unrepresented party the limits of his representation. The Committee has held that the prior Disciplinary Rules did not create an affirmative duty on the attorney to advise an unrepresented party of the right to secure independent counsel. Standing Comm. On Legal Ethics, LE Op. 1436 (1991). And although Rule 4.3(a) does not appear to require such action of the attorney either, it is clearly "best practice" to advise the unrepresented party of such right.
- The Virginia State Bar's Standing Committee on Legal Ethics has opined (on multiple occasions) that "in certain circumstances it is not improper for an attorney to prepare certain documents for use by an adverse party so long as such preparation is limited to an administerial function." Standing Comm. On Legal Ethics, LE Op. 1344 (1990).
- "In each of those circumstances, however, the [C]ommittee found it to be imperative that the attorney providing those documents (a) refrain from offering any advice to the unrepresented party except the advice to consult with counsel, and (b) inform the unrepresented party that the attorney represents the interest of his client which may be adverse to those of the unrepresented party." Standing Comm. On Legal Ethics, LE Op. 1464 (1992).
- For instance, the Committee found it not improper for a seller's attorney in a real estate transaction where the buyer was unrepresented by counsel to prepare a general warranty deed and deed of trust for his client without conducting a title examination, on the condition that the seller's attorney made clear to the buyer that the seller's attorney did not represent the buyer. Standing Comm. On Legal Ethics, LE Op. 238 (1974).

C. Competence

- The duty to provide competent representation exists in every attorney-client relationship. Standing Comm. On Legal Ethics, LE Op. 1791, 2003. There are no

exceptions – the rules apply to lawyers in both the public and private sectors. Standing Comm. On Legal Ethics, LE Op. 1798, 2004.

- Rule 1.1 provides that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- A determination of competence of an attorney to undertake representation includes factors such as the complexity of the matter and issues involved, the general and specialized experience and training of the lawyer, the amount of preparation the attorney can undertake in the matter. See Comment [1] to Rule 1.1.
- It is easy to forget that competence includes basic legal skills such as ability to analyze legal precedent, issue spotting, and legal drafting. See Comment [2] to Rule 1.1.
- Competence also may include the ability to effectively negotiate on behalf of one's client. Negotiation skills are important in condemnation cases where effective negotiation on behalf of one's client may save time and money by resulting in an agreed upon price for the property at issue earlier in the process. See Comment [2a] to Rule 1.1.
- Depending on the matter involved, the competency level required may be that of a general practitioner or may require specialized knowledge.
- A lawyer with no prior experience in what constitutes a new area of law for him, may become competent through study and preparation. The amount of preparation necessary to become competent can be determined in part by "what is at stake" in the controversy. Comment [5] to Rule 1.1.
- And, of course, even where an attorney's practice is limited to a particular field, achieving competence is not a one-time hurdle. Attorneys must maintain competence through CLEs and independent reading and study. Comment [6] to Rule 1.1.
- Being a 'competent' attorney means that the attorney has adequate legal knowledge and skill, thoroughness and preparation, and maintains competence

(i.e., continuing legal education). Standing Comm. On Legal Ethics, LE Op. 1791 (2003). The competence required of a real estate attorney is different than that required by a family law attorney, and thus "discipline for failing to provide competent representation is a matter decided on a case by case basis." *Barrett v. Virginia State Bar ex rel. Second Dist. Committee*, 272 Va. 260, 272, 634 S.E.2d 341, 347 (2006).

- The Committee has stated that the duty of competency centers on the "content of legal services: review and analysis of information, preparation and study of the applicable law and procedure. Standing Comm. On Legal Ethics, LE Op. 1791, 2003. The duty of competency was not violated where an attorney did not meet face-to-face with his client until the first hearing, but rather communicated with the client through various forms of electronic communication. *Id*. The content rather than the method of communication was held to be what mattered. *Id*.
- An important aspect of being a competent attorney in the field of condemnation is selecting appropriate and effective experts for trial, especially the appraiser. When selecting an appraiser, it is ideal to find someone who is local to the disputed property to ensure that the appraiser is familiar with local valuation procedures. Selecting the wrong appraiser can be fatal to your client's case.

D. Candor Toward Tribunal

- Candor toward the tribunal is governed by Rule 3.3 of the *Rules of Professional Conduct* which provides that:

(a) A lawyer shall not knowingly:
   1) make a false statement of 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 by the client, subject to Rule 1.6;
   3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
   4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
(d) A lawyer who receives information clearly establishing that a person other than a client has perpetuated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

- Unique to eminent domain cases, the 'tribunal' may consist of condemnation commissioners who are resident freeholders. VA. CODE ANN. § 25.1-213. This in no way lessens or alters an attorney's duty of candor to the tribunal – the duty of candor is the same as it would be before a court.
- If someone other than the attorney's client commits a fraud upon the tribunal, the attorney shall reveal the fraud to the tribunal. It is mandatory.
- In this sense, what constitutes a "fraud upon a tribunal" though can depend on whether the misrepresentation by a witness is material to the tribunal's opinion or "corrupts the opinion." For instance, although a deposition has been held to constitute a "tribunal" not every misrepresentation by a witness in a deposition would trigger an attorney's duty to report to the tribunal. Where an expert witness lied about his credentials in the course of a deposition and these credentials formed the basis for the expert's opinion which was subsequently used by counsel to negotiate settlement of the case, disclosure would be required "to prevent a judgment from being corrupted by the [witness's] unlawful conduct." Standing Comm. On Legal Ethics, LE Op. 1650 (1995).
- Beyond the most basic rule of not lying to the tribunal, candor to the tribunal can actually become a tricky issue when an attorney discovers that information he received from his client, and presented to the court, is actually false.
- How far must an attorney go to be "candid" with the tribunal under the rules? An attorney has no duty to volunteer to the tribunal that its opinion may be based on factual error where there was no misrepresentation of facts to the tribunal by the attorney or his client and the tribunal "did not recite any erroneous facts in its opinion or to the attorney or his client." Standing Comm. On Legal Ethics, LE Op. 0486, (1982).

- However, in contrast, if an attorney knows a tribunal lacks jurisdiction over a matter brought before it, it is improper for the attorney to merely file a responsive pleading without bringing to the tribunal's attention its lack of jurisdiction. Standing Comm. On Legal Ethics, LE Op. 0194 (1968).

