



# ISBA Professional Conduct Advisory Opinion

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## Opinion No. 16-02 June 2016

- Subject:** Court Obligations; Frivolous Arguments; Reporting Lawyer Misconduct
- Digest:** A lawyer may not withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.
- References:** *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10<sup>th</sup> ed., 2014).  
*Walls v. Bowersox*, 151 F.3d 827 (8<sup>th</sup> Cir. 1998)  
*U.S. v. Day*, 969 F.2d 39, 46 n.9 (3<sup>rd</sup> Cir. 1992)  
*In re Smith*, 168 Ill.2d 269 (1995)  
*In re Winthrop*, 219 Ill.2d. 526 (2006)  
*In re Karavidas*, 2013 IL 115767  
*In the Matter of Grammer*, No. 04-SH-119 (Hearing Board, August 25, 2005) approved and confirmed M.R. 20521 (January 13, 2006).  
*Skolnick v. Altheimer & Gray*, 191 Ill.2d 214 (2000).  
Illinois Rule of Professional Conduct 8.4(d)  
Illinois Rule of Professional Conduct 3.3(a)(1)  
Illinois Rule of Professional Conduct 8.3(a)

Lawyer is a criminal defense attorney representing a client whom Lawyer believes is guilty of a lesser charged offense but also likely the primary charged offense. Lawyer presents a motion to the court to give a certain jury instruction citing case A as authority for the motion. The

Prosecutor opposes the motion. In conducting further research on the motion, Lawyer identifies case B which is non-distinguishable and binding on the court and which requires the court to give Lawyer's proposed instruction. Case B also holds that it is reversible error for the court not to give the proposed instruction. Lawyer contemplates not informing the court of case B knowing that if the court does not grant Lawyer's motion it will have committed reversible error. Lawyer seeks opinions of other lawyers on the contemplated strategy on internet lawyer discussion groups.

## **QUESTIONS**

1. Does Lawyer violate the Rules of Professional Conduct by failing to inform the court of case B?
2. Do lawyers reading Lawyer's proposed trial strategy on the online discussion group have a duty to report Lawyer to the appropriate disciplinary agency?

## **ANALYSIS**

### **1. Disclosure of Controlling Authority**

The conduct contemplated by Lawyer is a form of "sandbagging." Black's Legal Dictionary defines it as: "the act or practice of a trial lawyer remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem." *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10<sup>th</sup> ed., 2014). Although beyond the scope of this Committee's analysis, sandbagging as a substantive trial strategy has been criticized as unreasonable and appears to be ineffective in any case. *See Walls v. Bowersox*, 151 F.3d 827 (8<sup>th</sup> Cir. 1998)(Commenting on counsel's trial strategy of acting such as to provide the defendant with a claim of ineffective assistance of counsel on review, the court noted "We add that any type of "sandbagging" is 'not only unethical, but usually bad strategy as well'" *citing U.S. v. Day*, 969 F.2d 39, 46 n.9 (3<sup>rd</sup> Cir. 1992)). Nevertheless, the Committee takes no position on whether Lawyer's contemplated strategy would be successful.

As a matter of professional responsibility, the proposed trial strategy as described in the facts above is improper.

#### **A. RPC 8.4**

Illinois Rule of Professional Conduct 8.4(d) provides:

#### **"Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

- (d) engage in conduct that is prejudicial to the administration of justice.

..."

The Illinois Supreme Court has said that the practice of law is a public trust and lawyers are trustees of that system. *In re Smith*, 168 Ill.2d 269 (1995). As part of that system, lawyers owe a duty to assist the court in administering justice and in arriving at correct conclusions. *Id.* at 287; *In re Winthrop*, 219 Ill.2d. 526 (2006)(“a lawyer’s high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions.”).

The lawyer’s obligation to assist the court in administering justice is expressed, in part, in IRPC 8.4(d). The Court has long noted that a lawyer violates IRPC 8.4(d) (or its predecessors) when he or she undermines the judicial process, such as having an effect on the outcome of a case (*In re Karavidas*, 2013 IL 115767 [P87 – 97]); failing to aid the court in expeditiously considering and disposing of cases (*In re Smith*, 168 Ill.2d at 287); or causing additional proceedings or delaying resolution of a case (*In the Matter of Grammer*, No. 04-SH-119 (Hearing Board, August 25, 2005 approved and confirmed M.R. 20521 (January 13, 2006)).

In the scenario presented above, Lawyer’s conduct, if successful, will have an effect on the outcome of the case. Indeed, through Lawyer’s strategy of failing to apprise the tribunal of controlling authority, it is Lawyer’s intent to establish reversible error and compel additional judicial proceedings thereby extending the ultimate resolution of the case. Accordingly, Lawyer’s proposed course of conduct, if carried out and successful, will violate RPC 8.4(d) and is improper.

B. IRPC 3.3

Illinois Rule of Professional Conduct (“IRPC”) 3.3 provides:

**“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;

...”

The Court’s pronouncements in *In re Smith* and *In re Winthrop* noted above about a lawyer’s obligation to assist a court in arriving at correct decisions, are mirrored in this Rule’s Comments. IRPC 3.3, Comment [4] explains that the purpose behind this prohibition “is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.” IRPC 3.3, Comment [4]. Only after a tribunal is armed with a correct statement of the law can it render appropriate and legitimate legal decisions.

In assisting a court in rendering correct legal decisions, a lawyer’s obligations when appearing before a tribunal are clear. RPC 3.3, Comment [2] provides “[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows is false.” Further, Comment [4] similarly provides that “a lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal

authorities...” These Comments, as well as the case law cited above, point to the foundational importance of lawyers candidly and truthfully advising the tribunal on the applicable law.

But if Lawyer fails to identify the controlling law to the court, either in oral argument or failing in some fashion to amend the written motion, has Lawyer made a “false statement of law” in violation of IRPC 3.3(a)(1)? After all, the law that Lawyer is relying upon does support the same outcome as the controlling law has made conclusive. Nevertheless, such a fine distinction does not insulate Lawyer. The plain meaning of “false” is: (1) “not real or genuine;” or “not true or accurate; especially: deliberately untrue: done or said to fool or deceive someone.” Meriam-Webster, [www.merriam-webster.com](http://www.merriam-webster.com) (last visited April 13, 2016). Regardless of whether the law relied upon by Lawyer supports or is consistent with Lawyer’s arguments, the law cited is not an accurate statement of the existing law. Furthermore, Lawyer knows the law cited is not accurate or controlling and Lawyer’s failure to cite it is specifically designed to deceive the court. Finally, as noted above, the overriding purpose of 3.3(a)(1), is to ensure that a lawyer assists the court in rendering correct decisions. If Lawyer fails to advise the court of the controlling law, the purpose of IRPC 3.3(a)(1) is frustrated. Accordingly, the Committee believes Lawyer will violate IRPC 3.3(a)(1) if Lawyer does not disclose the controlling authority.

In reaching this conclusion, the Committee wants to make clear that it is not opining on a situation where a lawyer fails to find controlling law or who does not cite such authority because he or she believes in good faith it is distinguishable or otherwise not applicable.

## **2. Reporting Obligations**

Lawyer has sought advice on his proposed trial strategy by posting it on an internet lawyer discussion group. Lawyer asks whether lawyers *reading* the posting have any obligation to report Lawyer for the proposed trial strategy.

IRPC 8.3 provides in relevant part:

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

As described in ISBA Advisory Opinion 12-15, the use of online discussion groups is not improper and can be a useful educational resource for lawyers. Nevertheless, as described in that Opinion, there are ethical issues that a user must be mindful of, including most significantly the prohibitions on revealing confidential client information.

In the scenario presented in this Opinion, a lawyer reading about Lawyer’s proposed strategy clearly has no duty to report Lawyer for his or her proposed trial strategy. The duty to report under IRPC 8.3 is triggered by knowledge of certain conduct. Knowledge is defined in the RPC as “actual knowledge of the fact in question.” RPC 1.0(f). The Illinois Supreme Court has further explained that in the context of Rule 8.3, this means something more than “a mere suspicion” but less than “absolute certainty.” *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214 (2000). Merely reading (or responding to) a question about the propriety of contemplated conduct does not vest the reader with any knowledge about whether the contemplated conduct is

(or has been) engaged in. Whether Lawyer might ultimately carry out the contemplated conduct is speculation on the part of a reader. Furthermore, as a matter of policy, imposing a reporting requirement for posting or reading an ethical inquiry on an online discussion group would be a chilling effect on the use of such online discussion groups and defeat their usefulness as a means to improve the professional competence and conduct of lawyers. Accordingly, a lawyer reading Lawyer's proposed trial strategy on an online discussion group has no duty to report Lawyer under RPC 8.3.

### **CONCLUSION**

Lawyer may not knowingly withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.

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**Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.**

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