



Views from the Bench: Effective and Ethical Advocacy in Federal Court

Session Title: Litigation Ethics in Federal Court

Presented by: Hon. Thomas Kleeh, United States District Court, Northern District of West Virginia

I. Ethical Considerations of Litigating in Federal Court

A. Competence

ABA Model Rule of Professional Conduct 1.1:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. Diligence

ABA Model Rule of Professional Conduct 1.3:

A lawyer shall act with reasonable diligence and promptness in representing a client.

C. Meritorious Claims and Defenses

ABA Model Rule of Professional Conduct 3.1:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

D. Expediting Litigation

ABA Model Rule of Professional Conduct 3.2:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

E. Candor Toward the Tribunal

ABA Model Rule of Professional Conduct 3.3:

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.*

F. Trial Publicity

ABA Model Rule of Professional Conduct 3.6:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

II. Practical Advice

- Be prepared to write more!
 - Scheduling orders
 - Local Rules
 - Judicial Whims
- Your writing is important!
 - Cite the current law
 - Cite the law accurately
 - Proper citations to the record

- Get to the point – someone reads what is filed.
 - Be concise
 - Don't bury your best arguments
 - Don't bother with a lengthy explanation of the standard
 - Unless there is a quirk
- Skip weak arguments
 - Be careful of citing to “rogue” authorities
 - Avoid relying on “sketchy” facts
 - Concede when necessary
- Motion practice is significant
 - Important questions can be decided on the briefs
 - Sometimes oral argument is necessary
 - Procedural considerations are often the focus
 - Referrals to the Magistrate Judge
- Oral argument is important
 - Can have an impact on the decision
 - Be prepared – oral argument can occur at any time
 - Assume the Court has read everything – don't read your briefs back to the Court
 - For the court reporter's benefit:
 - Speak slowly and clearly
 - Spell names and technical terms
 - One at a time
- Experts
 - Know the standards and burdens
 - Heavy motions practice
 - Expect an evidentiary hearing
- Orders – read them!
 - Orders contain important information, some of which can wreck your case!
 - Remember the local rules – they are neither guidelines or suggestions
- Sufficiency of Complaints
 - Remember *Twombly* and *Iqbal*
 - Be sure to include enough factual background
 - Avoid the temptation to cut and paste the bare elements
- Trial
 - Record trial dates in pen, not pencil
 - Be the least memorable lawyer in the room
 - Get to the point!
 - Jurors get more than they are given credit
 - Be nice