



AVIATION LAW SECTION

STATE BAR *of* TEXAS



Ethics in the Ether:

Select Aviation Ethical Conundrums

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#1 - RETENTION OF COUNSEL

Stage 1:

- ▶ Aviation incident occurs
- ▶ In-house counsel identifies three potential firms to represent them in litigation
- ▶ **BASIC** Facts revealed:
 - ▶ retention relates to the accident
 - ▶ the identity of the insurer



Stage 2:

- ▶ In-house counsel provides a packet to each of the three proposed firms
- ▶ Includes:
 - ▶ internal investigatory information
 - ▶ corporate counsel's initial analysis strategy
 - ▶ Litigation/settlement
- ▶ Is this package privileged?

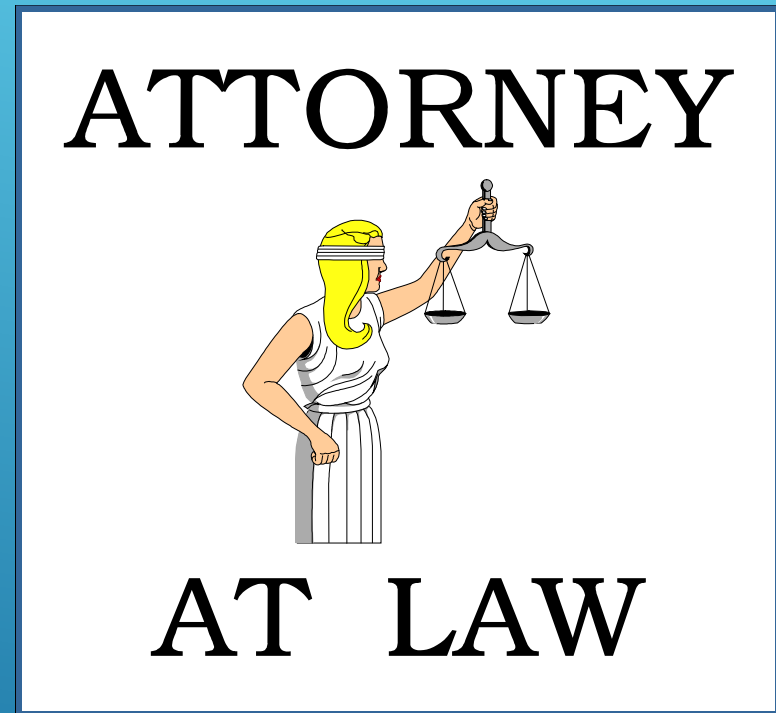
PRIVILEGED INFORMATION



RULE 1.18 DUTIES TO PROSPECTIVE CLIENTS

(a) “A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

(c) “A lawyer shall not represent a client with interest materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.”



Stage 3:

- ▶ A law firm is chosen
- ▶ When litigation is initiated against multiple defendants, one of the law firms not chosen appears on behalf of co-defendants. Is this representation precluded because of receipt of the “fact packet”?



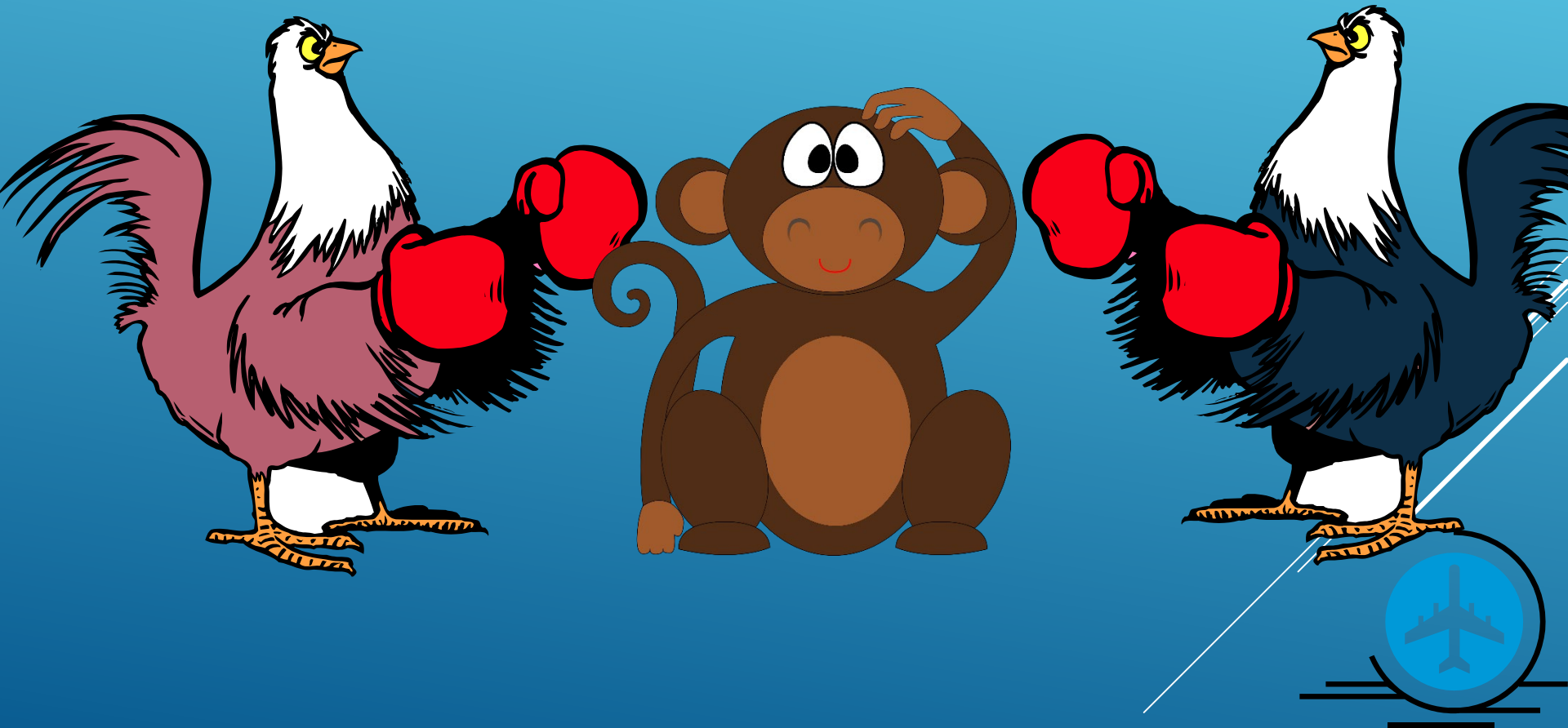
RESTATEMENT OF LAW GOVERNING LAWYERS § 121

► Conflict of Interest:

“A substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”



#2 “Monkey in the Middle” Insured versus Insurer and the counsel -”

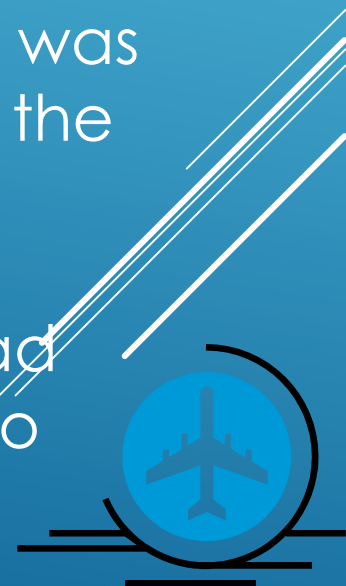


Insurance Counsel's Dilemma: Serving Two Masters



❖ Overlap of Coverage and Substantive Issues

1. Hardsell, insured by Push-Pull Insurance Co. (PPI), manufactures turbine discs.
2. Turbine disc serial number 1121 malfunctioned and led to an aviation accident.
3. Internal investigation reveals that the failure was due to Hardsell's improper-shot peening of the discs forged alloy blades.
4. Further investigation reveals that Hardsell had knowledge of the faulty disc and elected to defer recall until after the PPI policy was renewed.



CRITICAL DOCUMENTS

- ▶ 1 Dec. 2017 – Product Integrity Board: “Serious Metallurgical Deficiencies”
- ▶ 3 Dec. 2017 – Memo recommending recall
- ▶ 7 Dec. 2017 – Director of Risk Management “defers” “Action Item” until after policy renewal



“PUSH-PULL INSURANCE”


- ▶ The HARDSELL policy contains the following exclusion:
- ▶ **“WE WILL NOT INSURE:** Any loss arising from the intentional conduct of the insured that materially increases the risk to PPI and is deliberately withheld from PPI.”




MODEL RULE 1.2(A)

- ▶ “...a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.”


THE LAWYER'S DILEMMA

- ▶ Client does not want Dec. 7th memo reported and asserts privilege
 - ▶ Lawyer's true "client" is the insured.
 - ▶ Insurer has the right to control the defense
 - ▶ Lawyer must report to insurer
 - ▶ Lawyer must protect client privileges and Confidences (Rule 1.6)
- 

DOES IT MATTER IF?

- ▶ The litigation is only at the investigation stage?
 - ▶ The Dec. 7th memorandum is subject to a served but not yet due discovery request?
 - ▶ The Dec. 7th memorandum is subject to a served discovery request that is past due?
 - ▶ Depositions are looming with the memo still undisclosed?
- 

#3: FALSE EVIDENCE

- ▶ What is the duty of a lawyer with respect to false evidence?
 - ▶ A document is created to cure a critical training deficiency?
 - ▶ Does it matter?
 - ▶ Is destruction enough?
 - ▶ Does this cure, or does lawyer have duty to disclose falsity?
 - ▶ Does timing matter?
- 

▶ You represent Safety Flight Training Worldwide (“SFT”). In the course of your investigation you request the training records for Stephen Cary.

▶ Cary is critical actor and PIC for the accident aircraft



- You discover Stephen never completed his training although records indicate he did
- The Director of Training is about to be deposed and will falsely report that Stephen completed his training.



RULE 3.3 – CONDUCT BEFORE A 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.



RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

Model Rule 3.4 prohibits an attorney from:

- ▶ suppressing any evidence that the lawyer or the client has a legal obligation to reveal or produce;
- ▶ concealing or knowingly failing to disclose that which the lawyer is required by law to reveal;
- ▶ knowingly using perjured testimony or false evidence.



4

“Please Fall on this Side of the Line”

Improper(?) Attorney Influence

Plaintiff Allan Tripp, fell on a slippery substance while entering Terminal 3, the Worldwide Airways terminal in Calamityville Airport, New York.

Plaintiff engaged local firm, BEGGS & SCETTLES, to handle his claim.

William Beggs: Little experience in aviation or claims against municipalities About a year after the accident, Beggs dispatched a claim letter to Worldwide and Calamityville demanding US\$1 Million in damages.

In response, Calamityville’s corporate counsel declined the claim, citing lack of timely notice of claim (90-days). Worldwide’s counsel responded that they were investigating the claim and requested medical information and other informal discovery.

The incident report from the local police describes the area of the fall as “dry and clear” with no specifics as to location other than “Terminal 1, Door 1”

Plaintiff’s initial recollection, as reported to counsel Beggs, is that the slippery substance was just outside the airport door, and he fell inside. When the police arrived, plaintiff was sitting in a nearby waiting area.



Slip and Fall (Continued)

Beggs set a meeting with his client and advises him as follows:

The correct party to sue depends upon the location of the slippery substance. If it was outside the door, it's Calamityville's fault, and we should sue them. If the slippery stuff was inside the terminal, then it's the airline's fault, and we should sue them.

So far, the airline has been much more receptive to our claim, so it would really be better if it happened inside. Not that I'm trying to influence you of course, but I think we'll have a much better time going against the airline, with you as its customer, than against Calamityville, who has no real interest in you. Of course, the facts are the facts, I'm just telling you how the law applies to the facts, whatever they are, which is my job as your lawyer.

And by the way, the camera that should have recorded the incident was inoperative when you fell.

Plaintiff responds, "I'm pretty sure I slipped on something inside, so let's go after the airline."

Plaintiff sues the airline, his counsel alleging "hazard, consisting of a slippery substance inside Terminal One, just inside Door #1."

Counsel repeats this in his Bill of Particulars, and plaintiff recites this version of the accident in his deposition.

Issues:

Should Beggs have taken the case in the first place?

Did Beggs improperly mislead his client?

Did Beggs improperly influence his client to commit perjury?

Rule 1.1 Competence

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

Rule 3.3 Candor Toward the Tribunal (partial)

(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.

Rule 3.4 Fairness to Opposing Party and Counsel (partial)

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;

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.

Maintaining the Integrity of the Profession (partial)

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 is prejudicial to the administration of justice;

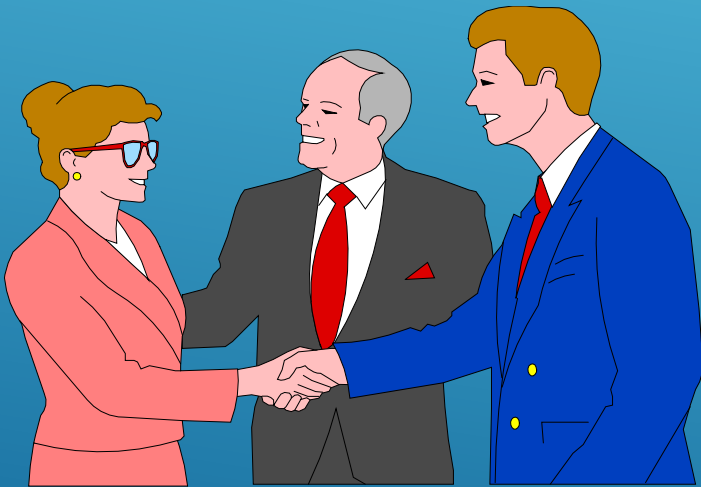
#5 - FORWARD TO MEDIATION!

False
Recommendations
- over the edge?



The Mediator Should Be:

Impartial third party that facilitates communication and negotiation in order to promote voluntary decision-making by the parties to the dispute.



SOME “RULES”:

- ▶ Mediation is a confidential and inadmissible settlement proceeding
- ▶ Mediation confidentiality also applies between participants during “caucus”
- ▶ Mediators should not use unethical means to procure settlement
- ▶ Mediation is impartial
- ▶ Parties have right of self-determination

THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS:

- ▶ “A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experiences, service and fees.”
- ▶ “A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”



MEDIATOR MISREPRESENTATION?

- ▶ In mediation of wrongful death action, plaintiff's demand is at \$ 5 million and defense offer is \$ 1 million. Parties ask mediator to make a recommendation on settlement figure
- ▶ Mediator approaches plaintiff and tells him he views case more favorably to defense
- ▶ Mediator approaches defense and tells them he views case more favorably to plaintiff

When all is said and done:

- ▶ Case settles at \$2.5 million
- ▶ Was the mediator's conduct proper?
- ▶ Model Standard VI(A)(4): “[A] mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”
- ▶ ABA Model Rule 8.4: misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

IN CLOSING

- ▶ Private mediation is largely governed by contract terms
- ▶ Insist on rules and agreement
- ▶ Make sure all in attendance understand bounds of confidentiality
- ▶ Try to procure court order or consent to mediation
- ▶ Close with a written agreement
- ▶ Wear the right hat

