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THE GOOD GUY ACTUALLY DOES WIN

*Justice Marilyn S. Kite**

> *There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.*[1]

HOW COMPLIANCE WITH ETHICAL RULES PAYS

We all know the old saying "good guys finish last." Well, my observation after twenty-five years of practicing law and almost ten years of serving on the bench, is that just the opposite is true in the context of the legal profession. I would like to think that is so because the purpose of our adversarial system is justice for all. And if that is our purpose, following ethical rules that require honesty, diligence, and competence should result in achieving success, both for the client of the moment and the attorney over the long term. Before you scoff or conclude I am hopelessly naive, let me share with you some experiences that prove my point.

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[1] Abraham Lincoln, Notes for a Law Lecture (circa July 1850), *in* THE WIT AND WISDOM OF ABRAHAM LINCOLN AS REFLECTED IN HIS BRIEFER LETTERS 29, 32 (H. Jack Lang ed., Stackpole Books 2006) (1941).

Although lawyers have a never-ending list of rules with which we must comply, perhaps those most important to our ultimate success are contained in the Rules of Professional Conduct.[2] For the most part, those rules are intuitive and grounded in principles of common sense. Compliance with the details of the rules requires careful study by practicing lawyers. However, you can hardly go wrong if you simply behave in the practice of law the same way your mother told you to live your life—honestly, diligently and with concern for others. Every day we see evidence that when lawyers do that, both the lawyers and the clients benefit, and when they don't, the reverse is equally true.

I. HONESTY

Candor Toward the Tribunal—Rule 3.3

Not surprisingly, the Rules of Professional Conduct prohibit attorneys from making false statements to the court.[3] We do not often see lawyers intentionally providing to the court false factual statements related to the actual dispute at issue. However, it deserves mention that the rule also prohibits false factual statements about procedural matters, such as reasons for extension of deadlines, details of communication with opposing counsel, and the status of discovery efforts.[4]

Lawyers all too often forget that prohibition includes false statements of *law*, as well as fact. Specifically, a lawyer shall not knowingly fail to disclose "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."[5]

Understandably, a lawyer may fear the prospect of including adverse legal authority in pleadings filed on a client's behalf. Experience both as a practicing lawyer and a member of the judiciary has shown me that, not only is there nothing to fear, but lawyers should look upon that adverse authority, especially if not cited by the opponent, as an opportunity to hone their argument and encourage the court toward their interpretation, as well as to gain the respect of the tribunal. After all, isn't it likely the court will discover the authority on its own, or even worse, be subject to a reversal because the attorney failed to do his or her job of fully educating the court on the legal issue at stake? One need only imagine how the client's fortunes might be affected in either case.

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[2] WYO. RULES OF PROF'L CONDUCT (2009); MODEL RULES OF PROF'L CONDUCT (2009).

[3] WYO. RULES OF PROF'L CONDUCT R. 3.3; MODEL RULES OF PROF'L CONDUCT R. 3.3.

[4] *See* WYO. RULES OF PROF'L CONDUCT R. 3.3(a)(1); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1).

[5] WYO. RULES OF PROF'L CONDUCT R. 3.3(a)(2); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).

A good example of the proper approach was provided by the Wyoming Attorney General's office in *Smith v. State*.[6] The defendant in *Smith* argued that his Fifth Amendment right against self-incrimination was violated when the prosecutor referenced the defendant's refusal to submit to DNA testing during the investigation of a cold case.[7] The defendant argued the prosecution used his refusal as tantamount to a statement of guilt. The state provided substantial authority to refute the defendant's argument that appeared to be determinative of the issue. However, the attorneys for the state did not stop there. Instead, they anticipated, even though the defendant did not raise the issue, that the court might be concerned the comment on the defendant's refusal violated a different constitutional protection, that of the Fourth Amendment right to be free of unreasonable search and seizure.[8] As a consequence, the state provided the court with authority concerning the Fourth Amendment issue and distinguished it from the case in point.[9] While it is possible that in the course of considering the case, the court may not have discovered the Fourth Amendment issue, it is more likely it would have done so. Had it not been for the state's attorney confronting the issue, the court would not have had the benefit of the state attorney's artful distinction of the authority from the defendant's case. Without question, that action by the state's attorney not only furthered the client's interest in having the conviction affirmed, but increased the credibility of the attorneys involved, which could only assist them in future cases before the court. This is a perfect example of how following the ethical rules, or even arguably, going beyond what was required by those rules, helped the attorneys succeed, for both the client and themselves.

II. DILIGENCE

Balancing Rule 3.4—Fairness to Opponent and Rule 1.3—Diligence

Perhaps the most difficult balance lawyers must maintain is their obligation to zealously represent their client, while at the same time complying with the requirement that they treat their adversaries with fairness. Rule 1.3 is interesting because it contains much more in the comments than it does in the one sentence of the rule:

> *Rule 1.3. Diligence*
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> A lawyer shall act with reasonable diligence and promptness in representing a client.[10]

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[6] 199 P.3d 1052 (Wyo. 2009).

[7] *Id.* at 1059.

[8] *Id.* at 1061 n.1.

[9] *Id.*

[10] WYO. RULES OF PROF'L CONDUCT R. 1.3; MODEL RULES OF PROF'L CONDUCT R. 1.3.

In the comments, we learn that while lawyers must act with "commitment," "dedication," and "zeal," they are not expected to "press every advantage that might be realized for a client" and are expected to use professional discretion in determining how to pursue achieving the client's objective.[11] Finding the right balance between diligence and fairness is much easier in theory than in practice.

Lawyers often face the situation where they must choose between accommodating their opposing counsel's request for an extension of a deadline and their client's desire to "stick it to" the opposing party. While it may sound trite, this is actually an area in which lawyers can further their client's interest by cooperating with their opponents' reasonable requests for accommodation. Human nature dictates that a person is more likely to cooperate with you if, in fact, you have been cooperative with them. There will, without doubt, be times when an individual lawyer is in desperate need of an extension on the client's behalf and if that lawyer has been reasonable in the past, opposing counsel will likely feel the need to return the favor. On occasion, every lawyer has encountered or will encounter a client who wants to fight every step of the way and to inflict as much pain on the opponent as the rules will allow. That is when your persuasive talents will be tested. You need to convince your client that it is in his or her self-interest to be accommodating, within reason; if you are unsuccessful, you will have to decide whether to exercise that "professional discretion" and do the right thing in spite of your client's immediate concern.

I am reminded, somewhat painfully, of an experience I had in my first year of practice with an accommodation that I will never forget and that engrained in me the instinct to return that favor to others. As an assistant attorney general, I represented the Environmental Quality Council in its first appeal to the Wyoming Supreme Court.[12] I worked diligently on the appellee's brief, having read the rules carefully and calculated the filing deadline with precision.[13] I finished the brief and made all eight copies a day ahead of time. In an abundance of caution, I called the clerk of the Supreme Court to let her know I was going to file a day early. To my horror, she pleasantly informed me that the brief should have been filed five days earlier! Don't ask how I could have made that mistake; I just did in spite of acting "diligently." In a trembling voice, I asked if there was any possibility of filing the brief late and she said there was *if* my opposing counsel did not object. With sweaty hands, I placed a call to Don Jones, city attorney for the Town of Torrington, and explained to him my predicament. Obviously, he could have gained a tactical advantage if the case would have proceeded absent a brief

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[11] WYO. RULES OF PROF'L CONDUCT R. 1.3 cmt. 1; MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

[12] Town of Torrington v. Envtl. Quality Council, 557 P.2d 1143 (Wyo. 1976).

[13] *See generally* WYO. R. APP. P. 7.06 (providing for filing deadlines); WYO. RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (discussing timeliness as part of the duty of diligence); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (2009) (discussing timeliness as part of the duty of diligence).

from the appellee. Without hesitation, he calmly agreed to an extension and I saw my career return from the dead. I have never, ever forgotten that exercise of professional discretion. While my client ultimately prevailed, I have no doubt that many, many clients of Don Jones benefited over the years from the desire of his colleagues to treat him as they had been treated, despite how badly a particular client may have wanted to stick it to the opponent.

As if this experience was not enough to convince me of the wisdom of the Golden Rule in the practice of law, I had another opportunity to benefit from the professionalism of Wyoming attorneys later in my career. For this story, I will leave out the names of the parties involved to protect the guilty . . . that would be my partner and me! In a hotly contested case before a state agency, our Fortune 500 client had refused to produce certain internal corporate information on the grounds that the requested documents contained trade secrets. The information was highly sensitive and had the potential to affect the client's competitive position in the industry. After appealing the matter all the way up the chain of command to the board of directors, we received the explicit direction not to produce the information. Unfortunately, we had prepared a draft response to the agency in anticipation of the client ultimately agreeing to produce the data, and as a result of an internal miscommunication in our office, the wrong response was filed and the beans were spilled! When we discovered our monumental mistake, there was nothing for us to do but throw ourselves on the mercy of opposing counsel. After several very tense hours, we were informed that she and her client had agreed to return the response unopened. Now, that was professionalism. I never had the opportunity to return the favor, but I know that I would if I ever found myself in that position. I would like to think that the relationship we had with opposing counsel in that case affected her willingness to accommodate us. If so, the Golden Rule certainly worked in our favor and ultimately, worked in our client's favor, in a very difficult situation.

This conundrum of balancing diligence with fairness becomes more difficult if the attorney's action may directly affect the outcome for the client. How far does the duty of fairness to the opposition go? If attorneys see an opportunity to obtain a default judgment or to defeat an opponent's claim without acting dishonestly, but simply by not volunteering information, should they do so?

The Wyoming Supreme Court has made it clear that an attorney has no duty to the opposing party if he simply remains silent when a request for information is received. In *Halberstam v. Cokeley*, counsel for the plaintiff received an inquiry from defendant's counsel about whether and when the out-of-state defendant was served in a lawsuit over a real estate contract.[14] When plaintiff's counsel did not

[14] 872 P.2d 109, 110 (Wyo. 1994).

respond, defendant's counsel assumed service had not occurred and, consequently, failed to file a timely answer, which led to a default judgment.[15] The court held:

> Essentially, the Halberstams are arguing that Cohen owed them a duty because Cohen did not tell them that he would not inform them after he was asked to do so. An attorney is an advocate whose duty is to zealously represent his client to the best of his ability. An attorney's duties are to his client not to the adverse party. Moore was the Halberstams' lawyer, not Cohen. Cohen never stated that he would inform Moore when service was made. We will not imply a duty upon an opposing attorney simply based upon his silence to a request.[16]

Ask yourself whether the plaintiff's attorney was acting "fairly" when he chose not to respond to the defendant's attorney's request. He had no obligation to do so under any rule. Certainly, the defendant had the ability to obtain the answer directly from his own client. In fact, would it not be reasonable to assume that such communication with the client would occur? Consequently, it is not surprising that the court determined a duty is not created merely by a request for information to be voluntarily produced.[17]

An attorney faces a different proposition when one party fails to answer an interrogatory or uses the discovery process in a fashion to avoid providing information that may be required for the opposing party to protect its rights in a timely fashion. A series of Wyoming cases in the area of governmental claims have shown that providing a "zealous" defense may include withholding jurisdictional objections to a claim against a governmental entity, resulting in the claimant missing the statute of limitations, thus relieving the governmental entity of liability.[18] One may legitimately argue that it is not the responsibility of the government's counsel to inform the plaintiff's counsel that the claim is defective in time to allow an amendment to cure the defect, and a jurisdictional defect can be raised at any time. In fact, Rule 1.3 may be read to require an attorney to raise such an objection in order to provide diligent representation.[19] However, the question is quite different if the defendant refuses to answer an explicit interrogatory about the basis for an allegation that the claim is defective,

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[15] *Id.*

[16] *Id.* at 112 (citing Sowerwine v. Nielson, 671 P.2d 295, 303 (Wyo. 1983)).

[17] *See id*.

[18] *See* Gose v. City of Douglas, 218 P.3d 945 (Wyo. 2009); McCann v. City of Cody, 210 P.3d 1078 (Wyo. 2009); Lavatai v. State, 121 P.3d 121 (Wyo. 2005).

[19] *See* WYO. RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009) ("[A] lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009) ("[A] lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

thus requiring the plaintiff to file motions to compel or take other action to force an answer, and, in the meantime, the statute of limitations for filing a valid claim expires.

Rule 3.1—Meritorious Claims and Contentions and Rule 3.2—Expediting Litigation

Attorneys are often faced with clients who are emotionally invested in their case, are not capable of making rational legal judgments, and want their attorneys to "slash and burn" the opposition. In those situations, the attorney's skill as counselor, as opposed to advocate, is tested. Tension can exist between a client's desired litigation strategy and the admonition of the rules of conduct, such as Rule 3.1, Meritorious Claims and Contentions, and Rule 3.2, Expediting Litigation:

> *Rule 3.1. Meritorious Claims and Contentions*
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> (a) 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.
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> (b) 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.
>
> (c) The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[20]
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> *Rule 3.2. Expediting Litigation*
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> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.[21]

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[20] WYO. RULES OF PROF'L CONDUCT R. 3.1; *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1.

[21] WYO. RULES OF PROF'L CONDUCT R. 3.2; MODEL RULES OF PROF'L CONDUCT R. 3.2.

Lawyers must work to convince their clients that, in the long run, working professionally within the rules will inure to their benefit, but that can be extremely difficult in the face of opponents who are not so restrained. Attorneys must find for themselves that point at which they are personally comfortable both complying with the letter and the spirit of the rules and, at the same time, fully and faithfully furthering their client's interests.

Most judges are loath to intervene in the seemingly endless disputes between parties regarding discovery and pretrial procedures. However, when clear violations of the rules occur, courts can, sometimes reluctantly, utilize their authority to impose sanctions. A review of Wyoming cases discloses the type of behavior that can cause a court to require that the offending party bear at least some of the cost incurred by the other party as a result of a disregard of the Rules of Professional Conduct.[22]

For example, Rule 10.5 of the Wyoming Rules of Appellate Procedure allows the court to require a party who files a frivolous appeal to pay costs and attorneys' fees incurred by the opposing party.[23] Normally, no sanctions are imposed in appeals of discretionary rulings because there are usually legitimately competing arguments entitled to consideration by the court. However, when it appears to the appellate court that one side is unduly unreasonable and essentially is abusing the legal process, sanctions may be imposed.[24]

Many of the cases where sanctions have been imposed involve domestic relations and child custody cases in which emotions, rather than a bona fide legal issue, can be the driving force behind the litigation. In *G.G.V. v. J.L.R.*, the Wyoming Supreme Court was obviously convinced that the mother's behavior purposefully frustrated and delayed the process, stating:

> In this instance, we find that there was no reasonable cause for Mother's appeal. The district court's ruling was discretionary. However, even the incomplete record, brought to this Court by Mother, supports a conclusion that it would have been an abuse of discretion for the district court to have done anything other than that which it did, and that Mother's pursuit of this appeal

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[22] Montoya v. Montoya, 125 P.3d 265 (Wyo. 2005) (imposing sanctions for failure to provide a record preventing meaningful appellate review and failure to present a legal justification for appeal); G.G.V. v. J.L.R., 39 P.3d 1066 (Wyo. 2002) (imposing sanctions for purposeful frustration of proceedings); Meyer v. Rodenbaugh, 982 P.2d 1242 (Wyo. 1999) (imposing sanctions for appeal brought in abuse of the legal process); Phifer v. Phifer, 845 P.2d 384 (Wyo. 1993) (imposing sanctions for appeal without factual or legal justification); Manners v. Manners, 706 P.2d 671 (Wyo. 1985) (imposing sanctions for appeal without factual or legal justification).

[23] WYO. R. APP. P. 10.5.

[24] *Meyer*, 982 P.2d at 1245–46.

> was yet another example of her efforts to unnecessarily prolong the proceedings, as well as increase the cost of the proceedings. Further, the record supports a conclusion that Mother acted knowingly and with a fairly complete understanding of the delays and disruptions she could cause to the stability of Child's life, to Father, and to the courts.[25]

Similarly, the Wyoming Supreme Court imposed sanctions in *Phifer v. Phifer* and *Manners v. Manners*, when one parent frivolously appealed in order to, without factual or legal justification, avoid or reduce child support payments.[26] Sanctions may also be appropriate when the appellant fails to provide a record in a divorce case, which prevents a meaningful review; to allow meaningful review on appeal; and fails to support his or her cause with cogent argument and legal authority.[27]

Attorneys should beware of making unfounded legal claims in an effort to provide "zealous" representation. Rule 3.1(a) makes it clear that lawyers must not "assert an issue unless there is a basis in law and fact for doing so that is not frivolous."[28] Even if a frivolous argument is ultimately withdrawn, if that withdrawal is so late in the proceeding that opposing parties have unnecessarily incurred costs in countering the frivolous argument, sanctions may be warranted.[29] Irrespective of whether sanctions are warranted, unsubstantiated legal or factual arguments do nothing to further the client's interests or the attorney's reputation for credibility.

Rule 3.8—Special Responsibilities of a Prosecutor

Rule 3.8 of the Rules of Professional Conduct calls particular attention to the unique role prosecuting attorneys have in our judicial system and admonishes them to exercise restraint in prosecuting charges, respect the defendant's right to counsel, disclose exculpatory evidence to the defense, and refrain from making public comments on pending cases.[30] In addition to compliance with those specific requirements, prosecutors must guard against overzealous representation of the state or risk a different kind of sanction: reversal of the conviction they so fervently sought. Reversal of a conviction will only occur when the court

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[25] 39 P.3d at 1076 (citing Stadtfeld v. Stadtfeld, 920 P.2d 662, 664 (Wyo. 1996); Barnes v. Barnes, 998 P.2d 942, 946 (Wyo. 2000); Basolo v. Gose, 994 P.2d 968 (Wyo. 2000)).

[26] *Phifer*, 845 P.2d 384; *Manners*, 706 P.2d 671.

[27] *Montoya*, 125 P.3d at 268–69.

[28] WYO. RULES OF PROF'L CONDUCT R. 3.1(a) (2009).

[29] Budd-Falen Law Offices, P.C. v. Rocky Mt. Recovery, Inc., 114 P.3d 1284, 1291 (Wyo. 2005).

[30] WYO. RULES OF PROF'L CONDUCT R. 3.8; MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

determines that without the prosecutorial misconduct, the jury may have reached a different verdict and reversal is necessary to avoid a miscarriage of justice.[31] That standard was met in *Strange v. State*, where the "prosecutor repeatedly committed misconduct by seeking a conviction based upon community protection from the drug problem, rather than a conviction based upon the evidence";[32] in *Seymore v. State*, where the prosecutor told the jury "that [he] believed the appellant was guilty, that the appellant had a duty to bring in any exculpatory evidence, and that the jury had a duty to convict the appellant";[33] and in *Earll v. State*, where "[n]ot only did the prosecutor misrepresent to the jury, as sworn testimony before the court, the testimony of the accused's trusted girlfriend in an effort to impeach the accused's testimony, but the prosecutor also declared to the jury the prosecutor's personal knowledge of that trusted girlfriend's sworn testimony."[34] In *Capshaw v. State*, detailed reference by the prosecutor to uncharged misconduct, the admissibility of which the court had not yet ruled, constituted "prosecutorial brinkmanship which is contrary to the ordered process envisioned in *Vigil* [*v. State*] and is inconsistent with the prosecutor's ethical obligation to further the ends of justice."[35] However, the reference did not result in reversal.[36] Reversal of a criminal conviction is not a punishment of the prosecutor, but an effort to ensure the accused a fair trial. However, it is certainly a result that is not desired by the prosecutor.

Because prosecutors play a unique role in the criminal justice system, the rules impose even greater ethical obligations on them.[37] While Rule 3.6 prohibits all lawyers from making extrajudicial statements that may become public concerning a pending matter, Rule 3.8 imposes an additional and specific requirement on prosecutors to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[38] In *Board of Professional Responsibility v. Murray*, a prosecutor was publicly censured

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[31] Moe v. State, 110 P.3d 1206, 1212 (Wyo. 2005).

[32] 195 P.3d 1041, 1048 (Wyo. 2008).

[33] 152 P.3d 401, 411 (Wyo. 2007).

[34] 29 P.3d 787, 791 (Wyo. 2001).

[35] 11 P.3d 905, 909 (Wyo. 2000); *accord* Vigil v. State, 926 P.2d 351, 357 (Wyo. 1996) (setting forth the test for the admissibility of evidence of prior bad acts under WYO. R. EVID. 404(b)).

[36] *Capshaw*, 11 P.3d at 914.

[37] WYO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009) (discussing the general role of prosecutors and particularly stating, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

[38] *Compare* WYO. RULES OF PROF'L CONDUCT R. 3.8(e), *and* MODEL RULES OF PROF'L CONDUCT R. 3.8(f), *with* WYO. RULES OF PROF'L CONDUCT R. 3.6, *and* MODEL RULES OF PROF'L CONDUCT R. 3.6.

for making derogatory statements about a defendant and a discharged juror after a mistrial.[39] That particular infraction also resulted in the exclusion of the prosecutor from the retrial of the case and a change of venue.[40]

Even without an issue being raised by opposing counsel, the courts also have an independent duty to report observed violations of the ethical rules by any attorney, including prosecutors. In *Haynes v. State*, the court stated:

> Should we continue to see cases in which a prosecutor improperly informs the jury of the consequences of a verdict of not guilty by reason of mental illness, we will consider referral of the matter to the Board of Professional Responsibility as is our responsibility under Cannon 3(D) of the Code of Judicial Conduct and we remind district judges of their same responsibility.[41]

A review of the facts in most of the cases where prosecutorial misconduct is found to have occurred demonstrates that the offending actions of the prosecutor were not necessary in order to obtain a conviction. Those improper actions appear quite clearly to be the result of overzealous attorneys, perhaps in the heat of the battle, losing sight of their ethical obligations in their effort to win at any cost. In the end, that kind of behavior damages the client's cause, as well as the judicial system itself. In a concurring opinion in *Hatch v. State Farm Fire & Casualty Co.*, Judge O'Brien commented upon that phenomenon:

> In spite of considerable rhetoric to the contrary, trials, particularly jury trials, are imperfect engines of justice. For routine cases the trial process works reasonably well; it yields rough justice within such practical and financial constraints as we are willing to abide. However, experience teaches that as cases approach the margins the trial machinery frequently sputters and oftentimes fails. Marginal cases include those with highly technical, complex or convoluted facts. A trial is not a didactic paradigm and, given the limits of time, resources and procedure, extremely intricate matters are sometimes beyond the ken of a judge or jury. Other cases are on the margin because they involve celebrity participants, severe consequences, extreme or peculiar circumstances, inordinate media attention or highly emotional issues. As to the latter the magnifying glass of close scrutiny and

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[39] 143 P.3d 353, 358–59 (Wyo. 2006).

[40] *Id.* at 356.

[41] 186 P.3d 1204, 1212 n.2 (Wyo. 2008) (citing United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984); Suarez v. State, 481 So.2d 1201, 1206 (Fla. 1985); AIG Haw. Ins. Co. v. Bateman, 923 P.2d 395, 402 (Haw. 1996); Gonzalez v. State, 768 S.W.2d 471, 473 (Tex. Ct. App. 1989)).

> the attendant hype are simply inevitable consequences of a free society with open institutions. Without radical change in our approach to the trial process we have no choice but to accept imperfections, inconsistencies, and even occasional injustice. But an ominous problem emerges, one that is not the necessary product of confounding facts or unveiled process.
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> A trial should be a rational exercise, not an emotional experience. When counsel intentionally drives an otherwise routine case to the margins by infecting the trial with personal issues or by purposefully seeking to supercharge emotions, alert observers quickly recognize that the object is not justice, but victory. The ethical obligation to zealously serve client interests is tempered by the opposing, but no less imposing, obligation to act within the limits of the law—not merely the letter, but also the spirit, of the law. Any failure to appropriately and consistently measure duty to clients against duty to the profession perpetuates the "hired gun" image some lawyers cultivate and we all must live with. Worse, it sustains a popularly held misconception that our professional ethic accepts the notions that success justifies, and occasionally necessitates, excessive zeal and that the cost of victory is irrelevant. Finally, such conduct reinforces the stereotype of the avaricious plaintiff spurred to trial by even more venal attorneys. When a case is measured, not by the merit of the cause, the quality of the evidence, or the logic of the arguments, but by the level of invective, something is amiss. A trial then becomes an ordeal which is neither dignified nor appropriate and, predictably, the result reflects the performance; the process is demeaned, as are the participants.[42]

Finding the proper balance between diligent, zealous representation of the client and fairness to the opponent is often very difficult and demands a thorough understanding of the applicable procedural and substantive law and an examination of one's own conscience. Often, the right path is not found explicitly in the Rules of Professional Conduct. As noted by author Joseph G. Allegretti, "the best check upon the excesses of litigation is not the rules of the profession or even judicial oversight, but the values and character of individual lawyers."[43] It is safe to say that attorneys who strive to comply with both will benefit themselves as well as their clients in the long run.

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[42] 930 P.2d 382, 398 (Wyo. 1997) (O'Brien, J., concurring).

[43] JOSEPH G. ALLEGETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 100 (Paulist Press 1996).

III. INTEGRITY OF THE JUDICIAL PROCESS

Rule 8.2(a) and Rule 8.4(d)

Lawyers have a unique responsibility to respect and enhance the judicial process. The Preamble to the Rules of Professional Conduct states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[44] In addition to fulfilling their duties to their clients, lawyers should "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."[45] Often, in order to do their job, lawyers must challenge official action, argue that individual judges have erred, and seek to right the wrong their clients may have endured at the hands of the government. However, that does not mean that lawyers can or should launch personal attacks against individual judges, insult opposing counsel, or denigrate the judicial process. This is another area in which common sense will tell you that good guys do finish first. Is it surprising when lawyers who show judges respect are, in turn, treated with respect? This does not mean lawyers should be expected to be sycophants, simply that they show respect to the individual who is currently holding the office of a judge and to the judicial process that is provided by our constitutions.

All too often, we see pleadings filed in which insults are hurled at opposing parties or derogatory statements are made about the competence or integrity of judicial officers. Those pleadings do nothing to advance the interests of the client and most certainly undermine the persuasiveness of the author. Recently, the Wyoming Supreme Court, on its own motion, demonstrated that fact by striking an offensive brief. The court stated:

> In their brief, the Appellants repeatedly criticize, with disrespectful language, the district court judge who entered the "Order Granting Defendant's Converted Motion for Summary Judgment." Appellants also criticize, with disrespectful language, the district court judge who formerly presided in this matter. In addition, Appellants criticize this Court, although those criticisms pale in comparison to the repeated criticisms of said district court judges. Leaving no stone unturned, Appellants also use their brief as a forum to cast aspersions at the Federal District Court judge who presided over Appellants' federal case.

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[44] WYO. RULES OF PROF'L CONDUCT Preamble § 1 (2009); MODEL RULES OF PROF'L CONDUCT Preamble § 1 (2009).

[45] WYO. RULES OF PROF'L CONDUCT Preamble § 5; MODEL RULES OF PROF'L CONDUCT Preamble § 5.

> In addition, Appellants include innuendo about the potential for bribing judges. Last but not least, the Appellants criticize the members of a particular religion.
>
> While this Court, like any court, must not be oversensitive to criticism, Appellants' repeated use of disrespectful language goes beyond the bounds of what this Court can be expected to tolerate. This Court concludes that Appellants' brief must be stricken from this Court's file. This Court further concludes that the district court's "Order Granting Defendant's Converted Motion for Summary Judgment" should be summarily affirmed.[46]

The court noted that it had followed the practice of striking offensive pleadings for over one hundred years, and that practice is also followed by the majority of state and federal courts.[47] Although we are not often faced with a case where it is necessary to strike a pleading to sanction offensive conduct, sadly, we see with some frequency a lesser level of acrimony that most certainly detracts from attorneys' efforts to further their clients' interests.

Rule 8.2(a) prohibits lawyers from making statements "that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."[48] This rule was applied in *Board of Professional Responsibility, Wyoming State Bar v. Davidson*.[49] The Board found that the attorney had made allegations in a motion that a judge had engaged in ex parte communication with opposing counsel with reckless disregard of the truth of that allegation.[50] The court held that recklessness in this context is judged by an objective standard: in other words, whether a reasonable attorney would have made the statements, not whether this particular attorney knew these statements to be false.[51] The clear and convincing evidence before the Board established that the statement was untrue and the attorney made no investigation into whether the ex parte communication had actually occurred.[52] The Court also noted that Rule of Civil Procedure 11(b) and Rule of

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[46] Gose v. City of Douglas, 218 P.3d 945, 947 (Wyo. 2009).

[47] *Id.* at 946 (citing *In re* Stone, 305 P.2d 777, 786 (Wyo. 1957); Eggart v. Dunning, 89 P. 1022, 1024 (Wyo. 1907)).

[48] WYO. RULES OF PROF'L CONDUCT R. 8.2(a); MODEL RULES OF PROF'L CONDUCT R. 8.2(a).

[49] 205 P.3d 1008 (Wyo. 2009).

[50] *Id.* at 1011.

[51] *Id.* at 1014.

[52] *Id.* at 1010–11.

Professional Conduct Rule 3.1(c) require that any pleading signed by an attorney is certification of factual support for the allegations contained therein, "formed after an inquiry reasonable under the circumstances."[53]

Two older Wyoming Supreme Court cases contain interesting discussions regarding the balance between the right to free speech under the First Amendment to the United States Constitution and an attorney's obligation to refrain from insulting the judiciary and, thereby, undermining the court system in the eye of the public. In *State Board of Law Examiners v. Spriggs*, the court suspended an attorney because he "circulated a pamphlet attacking this court, and making false, contemptuous and scandalous charges against the court.[54] The pamphlet was issued by the respondent when he was a candidate for nomination to the office of Justice of this court, and one of the members of the Supreme Court was his opponent."[55] The court commented:

> From a reading of the paragraphs quoted, one can only arrive at the opinion and conclusion that the respondent was conducting a deliberate campaign of smearing, condemning and belittling the court before the citizens of the state, the Governor, legislature and law school, and soliciting invitations to speak at bar associations and other groups, for the sole purpose of criticizing and discrediting the court, and all of this, because the court had decided a case against his client and denied a rehearing. Even if the court had erred in its decision, as contended by the respondent, that would not have justified the respondent in going to the extremes he did in this article.
>
> We have learned years ago that a losing litigant almost always believes the court is wrong, and his attorney often has the same opinion. That is natural and to be expected, but this is the first time an attorney has published such a violent attack upon the integrity of this court. If every attorney who is dissatisfied with the decisions of the Supreme Court would go before the public with statements as are above quoted, it would not be long before the courts of this state would be in disrepute and the citizens believe they could not receive a fair, honest and impartial decision in this court.
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> . . . .

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[53] *Id.* at 1010 n.3 (citing WYO. R. CIV. P. 11(b)); *id.* at 1014 n.6 (citing WYO. RULES OF PROF'L CONDUCT R. 3.1(c)).

[54] 155 P.2d 285, 286 (Wyo. 1945).

[55] *Id.*

> The Utah Supreme Court in 1912 had this to say on the subject: "And, as has been repeatedly held, liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and do not license scandal and defamation of courts; that it is the use and not the abuse of free speech that is protected, and that everyone at all times is responsible for an abuse of the privilege; and that an attorney, guilty of such abuse by slandering or scandalizing or defaming a court or judge, is subject to discipline and disbarment."[56]

Later, in *Application of Stone*, the Wyoming Supreme Court charged an attorney with contempt—and found him guilty—for filing documents related to his application for admission to practice that contained attacks on the court and held he was not protected by the constitutionally guaranteed rights to freedom of speech and press.[57] Justice Blume, in a characteristically artful concurring opinion, noted that while courts must be restrained in their findings of contempt, where attacks are so egregious and pervasive, courts must act to preserve their integrity.[58] He recognized attorneys who receive unfavorable rulings may be heard to object, but added:

> There is, perhaps, some common sense in the old adage which we have in the West that a defeated litigant has 24 hours (some say 48) to "cuss" the court, but that he must "shut up" thereafter. It is a crude compromise between freedom of speech and, if we want to keep on being civilized, the respect necessarily due the court.[59]

Lawyers must be aware of the impact their comments on judges and the judicial process can have on their clients or other laymen. The public rightly presumes that lawyers are more knowledgeable about the performance of judges and the effectiveness of our judicial system than those on the outside and, consequently, comments by lawyers regarding judicial officers or the judicial process can have a significant impact on the public's perceptions about our judicial system. It is all too easy to blame unsatisfactory results achieved by an attorney on alleged frailties of the judge or the judicial process, rather than the weaknesses in the case itself. Such disrespectful commentary then is often repeated by others as objective truth.

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[56] *Id.* at 290–91 (quoting *In re* Hilton, 158 P. 691, 696 (Utah 1912) (internal citations omitted)).

[57] 305 P.2d 777, 789 (Wyo. 1957).

[58] *Id.* at 790–91 (Blume, J., concurring).

[59] *Id.* at 792.

It is not difficult in any of these cases to conclude that the approach taken by the offending attorneys did not further their interests or the interests of their clients on the merits of their cases.

In contrast, many effective attorneys challenge judicial decisions directly, provide authority to support their claim of error, and urge reversal without ever maligning the competence or integrity of other judicial officers or the system as a whole. Judges are expected to examine and question precedent and to be willing to correct errors made. They will more likely be persuaded by rational arguments, by evidence in the record, and by legal authority than by personal attacks on opposing counsel or the judge.

CONCLUSION

Lawyers should be encouraged to constantly examine their actions in light of their ethical obligations to the public and to the profession. I do not suggest that the right course of action will always be obvious. The inherent tension between zealous representation and fairness to the opponent can make the "right" decision unclear. However, nothing in the rules should be viewed an excuse for deceitful or duplicitous actions. Lawyers known for their ethical and honest behavior are more likely to succeed for the client of the moment, as well as in their professional careers.