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So You Got Sued

What's Next: Best practices, ethical obligations, and pitfalls to avoid when served with a lawsuit.

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What's Next: Best practices, ethics obligations, and ethical pitfalls to avoid when served with a lawsuit.

I. Introduction

Facing and defending a lawsuit is a reality in the practice of school law. The plaintiff (or Petitioner, in Federal Court) may be a parent, third-party organization, vendor, or employee. Lawsuits may be frivolous, or they may be complex. Regardless of the legal merits of the underlying claims, all lawsuits should be handled with respect and gravitas and in compliance with Ethics rules and guidelines.

This paper and accompanying presentation provide (1) an overview of relevant ethics rules and standards, (2) an analysis of the bounds of zealous advocacy, and (3) Insider's tips and tricks on how to handle a lawsuit in a manner that ensures success for the client, promotes professionalism and civility in the practice of law, and fortifies the lawyer's professional reputation.

II. Ethics Rules and Standards

A. Texas Lawyers Creed

The Texas Lawyer's Creed provides an essential starting point for understanding the ethics expected to be exhibited by Texas lawyers. The Lawyer's Creed was developed in the late 1980s in part due to the rise of "Rambo Litigation", which simply put, describes a type of litigation wherein the practitioner uses war-like and "dirty" tactics in the litigation process in order to secure the success of his or her case. In 1989, the Supreme Court Professionalism Committee developed the Texas Lawyer's Creed, which was intended to be a "definitive statement of professionalism for Texas Lawyers."

The Creed is not a legally binding document and has no enforcement mechanism. However, the Creed serves as a reminder and declaration of the ethical and professional standards of practice Texas lawyers should aspire to.

B. Texas Disciplinary Rules of Professional Conduct

The primary source for guidelines and rules of ethics in Texas is the Texas Disciplinary Rules of Professional Conduct.¹ Violations of the Texas Disciplinary Rules of Professional Conduct are handled in accordance with the Texas Rules of Disciplinary Procedure.² A failure by a lawyer to abide by the standards and rules set forth in the Texas Disciplinary Rules of Professional Conduct subjects the lawyer to disciplinary action, which may include sanctions,

¹ Texas Disciplinary Rules of Professional Conduct may be accessed at:

<https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm>

² Texas Rules of Disciplinary procedure may be accessed at:

<https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=25766>

suspension, and revocation of the legal license. The Texas Rules of Professional Conduct set forth the minimum standards of practice for Texas lawyers and conduct that controverts the rules is considered a violation that could subject the lawyer to discipline. A violation of the Texas Disciplinary Rules of Professional Conduct is not in itself defacto proof of malpractice. Even though the Texas Disciplinary Rules of Professional Conduct do not create an automatic cause of action, they are frequently cited in malpractice cases when evaluating whether the appropriate standards for professional conduct have been observed.

C. Texas State Bar – New Lawyers Oath

The State Bar of Texas requires all new lawyers to take an oath when receiving a Texas law license.³ The Oath states that the new lawyer will conduct him or herself “with integrity and civility.”⁴ The Oath does not expand on these definitions or provide other instruction. However, the Oath serves as a powerful reminder to new lawyers that being sworn into the State Bar of Texas is accompanied by a professional commitment to integrity and civility in *all* communications with the Court and parties.

III. How Zealous is “Too Zealous”?

Lawyers have an ethical duty to zealously advocate for their client. The oft quoted notion of zealous representation is derived from the Texas Disciplinary Rules of Professional Conduct, which state that in the adversarial process, a lawyer is an advocate who “zealously asserts” the client’s position and should “zealously pursue” client’s interests (*See* Tex. Disciplinary R. Prof. Conduct, Preamble; *see also* Tex. Disciplinary R. Prof. Conduct R. 1.01). Relying solely on this broad language, it appears that the duty to zealously advocate is boundless. Consequently, lawyers often use this language to justify conduct that would otherwise violate ethical duties.

One of the biggest areas of perplexity for lawyers is determining the bounds of zealous advocacy. This confusion is not without cause; the Texas Disciplinary Rules of Professional Conduct do not provide specific instructions on how “zeal” can be ethically exhibited and there is neither a definition for the phrase “zeal” in the Rules. Further, the rhetoric surrounding zealous advocacy in the Texas Disciplinary Rules of Professional Conduct is quite strong. According to the rules, “zealously” advocating for a client is a matter not only of ethical obligation, but also a professional moral:

“a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. **A lawyer should feel a moral of professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer.**” (Comment, Rule 1.01 Competent and Diligent Representation) (emphasis my own).

³ State Bar of Texas New Lawyers Oath may be accessed at:
https://www.texasbar.com/AM/Template.cfm?Section=New_Lawyer_Forms_and_Fees1&Template=/CM/ContentDisplay.cfm&ContentID=29062

Also available as part of the eCourse

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