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Going to Trial

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Advocating "Truth" at Trial

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"To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true."

– Aristotle

Ethical trial work encompasses nearly the entire body of legal ethics and ethical rules. Trials present especially difficult challenges because the lawyer does not get to parse through ethical dilemmas in the deliberate and detached comfort of a law office or library. He or she must instead face them under the intense pressure of litigation combat, where quick instincts often rule the moment. Another difficulty is that the black letter rules leave vast areas where lawyers can (and do) disagree about what is and what is not ethically appropriate.

Ideas about trial lawyer ethics could fill a book; such ideas already fill at least chapters in books. *See, e.g.*, Peter Murray, Basic Trial Advocacy, ch. 3 (2003). For this short article, let's focus on "advocating truth."

The Trial Lawyer's Truth Dilemma

As a young associate lawyer in Arizona, I once faced a situation where I seriously doubted the truth of what my client was saying. I could not prove he was lying, and the story he told was at least possible, but it seemed so strange I could hardly believe it. I expressed my doubts to my supervising partner. I don't recall his exact words, but his message was, in essence, "Keith, it is not your job to advocate against our client. It is your job to advocate for our client." We ended up winning the case. I hoped then and I still hope that the facts I advocated were true!

Every experienced trial lawyer has faced this dilemma. As lawyers, we have a solemn obligation to zealously advocate for our clients. *See, e.g.*, Utah R. Prof. Cond., pmbl. [2] ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* R. 1.3, cmt. [1] ("A lawyer must act with commitment and dedication to the interests of the client and with a zeal in advocacy upon the client's behalf.").

This advocacy role is critical because competing versions of "truth" lay at the foundation of our adversary system.

> Advocacy is the most familiar and probably the most ancient of lawyers' roles. The adversary system is characterized by independent and contentious presentation of evidence and legal argument to establish a version of the events and a characterization of law that is favorable to the advocate's client. It is thought that through such advocacy the natural human tendency of a deciding judge or jury to arrive too quickly at decision can be avoided.

Restatement (Third) of the Law Governing Lawyers, ch. 7, Introductory Note (2000).

In a lawyer's zeal to advocate facts and law in a light most favorable to the client – in other words, to *win* the case – does the lawyer have any duty to the concept of *objective truth*? Or is the trial lawyer free (or perhaps even duty-bound) to present anything he or she can get away with, leaving it to the skill of the opposing lawyer to uncover any falsehood?

Some Black Letter Rules

One black (or at least gray) letter rule is found in Utah Rule of Professional Conduct 3.1. Under that rule, a lawyer can ethically advocate any position so long as there is a basis in law and fact for doing so that is not frivolous. But lawyers must actively "inform themselves about the facts of their clients' cases and the applicable law" and "determine that they can make good faith arguments in support of their clients' positions." Utah R. Prof. Cond. 3.1, cmt. [2].

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The most pertinent rule is Rule 3.3. It uses three important standards: "knowing," "reckless," and "reasonably believes." With respect to the presentation of facts, the rule states, in part:

> (a) A lawyer shall not ***knowingly*** or ***recklessly***:
>
> (a)(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. . . .
>
> (b) A lawyer *shall not 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***.

Utah R. Prof. Cond. 3.3 (emphases added).

Notably, the use of a "reckless" standard in Rule 3.3(a) differs from the ABA rule. It was added after the Utah Supreme Court held that the former rule's plain language required actual knowledge before an attorney could be found to have violated the rule. *See In re Larsen*, 2016 UT 26, ¶¶ 24–27, 379 P.3d 1209. Under the current version of Utah's Rule 3.3, a lawyer violates the rule if he or she knowingly or recklessly makes a false statement of fact to a court. "Reckless" denotes a "conscious indifference to the truth." Utah R. Prof. Cond. 1.0(o).

Thus, you cannot knowingly make a false statement of fact to a judge or jury, and you cannot be consciously indifferent about statements of fact you make that turn out to be untrue. To do any of this violates the rule.

Similarly, you cannot offer evidence (through a witness or otherwise) that you "know" is false. If your client or a witness you call at trial offers evidence that you come to "know" is false, you have to take corrective action. This includes, if necessary, informing the tribunal of the false evidence.

If you "know" that your client or witness intends to present false testimony, you must refuse to offer the false evidence. You may call the witness to testify, but you may not elicit or otherwise permit the witness to present the testimony you know is false. *See id*. R. 3.3, cmt. [6].

What if you don't "know" the evidence is false but you "reasonably believe" it is false? Rule 3.3(b) leaves room for the civil trial lawyer to exercise his or her best judgment. It does not directly prohibit the lawyer from presenting the evidence. On the other hand, by expressly stating that the lawyer "may refuse to offer [the] evidence," it provides a disciplinary safe harbor for the trial lawyer who elects not to present evidence he or she reasonably believes is false. Comment [8] to Rule 3.3 advises, "Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." Ultimately, your personal barometer may the best available guide – and usually the only guide in the midst of trial.

In any *ex parte* proceeding, the lawyer has less advocatory leeway and must "inform the tribunal of all material facts known to the lawyer," whether or not the facts are adverse. *Id*. R. 3.3(e). On the other hand, a criminal defense lawyer may be afforded some additional leeway. Criminal lawyers are permitted to defend a matter so as to require the government to prove every element of a crime. *Id*. R. 3.1. Rule 3.3(b) at least implies that a criminal defense lawyer should allow his client to present evidence the lawyer reasonably believes is false. A comment to Utah's Rule 3.3 acknowledges that some jurisdictions require criminal defense counsel to allow clients to provide narrative testimony, even when the lawyer "knows" all or part of the narrative is false. *Id*. R. 3.3, cmt. [7].

Conclusion

Perhaps Aristotle thought he had figured out the meaning of "truth." But Aristotle was not a lawyer, and he was certainly not a trial lawyer. Zealously advocating truth at trial is a very nuanced endeavor. In general, lawyers cannot *knowingly* or *recklessly* make false statements of fact at trial, they may not *knowingly* present false evidence, and they must use judgment if they *reasonably believe* the evidence is false.

These can be tough decisions to make on the fly, in the heat of battle. The best thing a trial lawyer can do to prepare to make sound decisions at trial is to study and practice ethical conduct day in and day out, long before the trial begins.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.