





# Sources of Ethical Rules of Conduct for Construction and Other Attorneys

- Pennsylvania Rules of Professional Conduct
- Pennsylvania Code of Civility for Attorneys
- Pennsylvania Case Law
- Pennsylvania Legal Ethics and Professional Responsibility Committee Advisory Opinions
- Pennsylvania Bar Association Ethics Hotline (800) 932-0311 (ext. 2214)
- ACBA Ethics Hotline (412) 402-6622
- American Arbitration Association Code of Ethics for Arbitrators and for Mediators

# Ethical Issues in Construction Contracting

- Lawyers' duty to check out a client's claim before filing an action.
  - Federal Rules of Civil Procedure
  - Rule 11 – Lawyers have to make a reasonable inquiry to determine that there is evidence supporting their factual allegations.
  - ABA Model Rules of Professional Conduct
  - Rule 3.1 – A lawyer shall not bring or defend a proceeding, or assert an issue therein, unless there is a basis and law and fact for doing so --.
  - Rule 5.1 – Lawyers with supervisory authority over others are to make sure those lawyers act consistently with ethical rules.
- Disclosure in Contractual Agreements
  - Each party must disclose information vital to the construction project. Including site condition. What about clauses that say the contractor has examined the property, or the financial condition of the contracting parties, or their level of experience.
- Proprietary Information
  - Are the parties free to use unique concepts and ideas on other projects?

# Dispute Resolution Clauses in Construction Contracts: Unethical? Unfair? Or Just Life?

- **Owner has the right to elect litigation or arbitration.**
  - Mutuality of consideration and very likely enforceable in commercial contracts.
- **Prime on Prime Clauses.**
  - Makes each prime a third-party beneficiary of the owner's contract with other primes for purposes of resolution of disputes between primes.
- **Architect as Initial Decision Maker.**
  - Architect is paid by the Owner.
  - Do these clauses serve the purpose intended?
  - Owner attorney involvement in “coaching” the Architect's decision?

# Dispute Resolution Clauses in Construction Contracts: Unethical? Unfair? Or Just Life? (cont.)

- **Conflicting dispute resolution forums in Contract Documents.**
  - Architect or engineer prepares the Contract Documents with conflicting forums for dispute resolution. Owner required to arbitrate with professional, but litigates with the Contractor.
  - Attorney for the Design Professional?
  - Attorney for the Owner?
  - Breach of the standard of care for engineer?
  - Can they be circumvented? Not in Pennsylvania. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490 (2016): “Collectively, [those U.S. Supreme Court cases] instruct that the prospect of inefficient, piecemeal litigation proceeding in separate forums is no impediment to the arbitration of arbitrable claims. Indeed, where a plaintiff has multiple disputes with separate defendants arising from the same incident, and only one of those claims is subject to an arbitration agreement, the Court requires, as a matter of law, adjudication in separate forums.”

# Dispute Resolution Clauses in Construction Contracts: Unethical? Unfair? Or Just Life? (cont.)

- **“Hammer” Clauses**

- “In the event of litigation or arbitration arising out of this Contract, the Owner shall be awarded its reasonable attorney’s fees, expert fees and costs as measured by a percentage of the Contractor’s claims, based on the largest amount claimed during the proceeding, as a function of the total amount awarded to the Contractor. By example and for the avoidance of doubt, if the Contractor is awarded 60% of its claim, the Owner shall be awarded 40% of its attorney’s fees, expert fees and costs.”



- Padding the claim/including items you cannot or may not be able to prove.
- Let's make it a big claim and if we settle for 50¢ on the \$1 we win.
- The arbitrator or court will cut out the fat or split the baby.
- Can it be unethical?

# Federal Rule of Civil Procedure 11

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- Certification to the Court by counsel signing the document, among other things
  - Not being presented for any improper purpose
  - Factual contentions have evidentiary support

# Pennsylvania Rule of Civil Procedure 1023.1

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- Certification to the Court by counsel signing the document, among other things
  - Not being presented for any improper purpose
  - Factual contentions have evidentiary support

# Pennsylvania Rules of Professional Conduct

- Rule 3.1: Claims are “meritorious”
- Rule 3.3: Candor Towards the Tribunal
  - a) “A lawyer shall not knowingly”
  - 1) “make a false statement of material fact . . . . to the tribunal . . . .”



- Growing body of law where tribunals are penalizing parties who submit inflated claims
- Certified claims versus non-certified claims
- Federal and state procurement codes
- Legislation introduced in Pennsylvania

# Lead case: *Daewoo Engineering & Construction v. United States*

- Sent shockwaves through the Federal construction bar
- Contractor hired by Federal government to build a 53 mile road around the island of Babeldaob in the Republic of Palau
- Contractor submitted to the USACE a claim for delays and for additional costs because of high humidity, rainy weather and moist soils
- Contractor claimed for \$13.3 million in additional incurred costs and \$50.6 million in future damages
- Both claims were “certified”

# Lead case: *Daewoo Engineering*

- Trial Court found, and the Circuit Court affirmed
  - “evidence” of fraud arose from and during the testimony of plaintiff’s own witnesses, during its case in chief”
  - Daewoo’s project manager testified that the \$50.6 million future damage claim was a “negotiating ploy”
  - Two expert witnesses attributed parts of the report to the other, each refusing to take responsibility
  - Daewoo’s experts failed to check its own books and records and relied on standard equipment rates as opposed to Daewoo’s own rates
  - Daewoo’s expert relied on unsupported and “overly optimistic” productivity estimates

# Lead case: *Daewoo Engineering*

- Result/holding:
  - Violation of the Federal Claims Act (FCA)
  - 726 Violations of the FCA @ \$10,000 per violation = \$7.26 million sanction
  - the \$50.6 million future damage claim was fraudulent and awarded \$50.6 million to the Government
  - Awarded the Government some \$4 million in investigation and litigation costs
  - Serious damage to the reputation and credibility of Daewoo counsel and experts

# Lessons of *Daewoo*

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- Take damage calculation seriously
- Vet the claims
- Do not accept or advocate claims that lack credibility

# Representing Joint Ventures on Construction Projects

- Counsel for the JV commonly selected by the JV partner with greater ownership/authority/control.
- JV counsel, advises/negotiates/prosecutes JV claims against Owner and subs.
- What if disputes evolve between JV partners?
- Can the JV attorney represent one JV partner vis a vis the other partner?
- Is an up front, written waiver effective?
- What if JV partner 1 abandons the JV, can the attorney for JV partner 2 represent the JV and JV partner 2 vis a vis JV partner 1?

# Ethical Issues in Alternative Dispute Resolution

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- Mediation and Arbitration
- Neutrals and Advocates for Parties

# Pennsylvania Rules of Professional Conduct

- Promulgated by the Pennsylvania Supreme Court.
- 8 Rules – 99 pages.
- Apply to ADR neutrals? YES
  - Neutrals: Rule 2.4 – Comment 2
  - “... Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.”
  - Apply to Attorney Advocates? YES
- Other Rules of Professional Conduct:
- Lawyers who represent client in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

# Rule 3.3 Candor Toward the Tribunal

- A lawyer shall not knowingly:
  - Make a false statement of material 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;
  - 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
  - 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 before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal....

# Rule 4.1 Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
  - Make a false statement of material fact or law to a third person; or,
  - Fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

# Pennsylvania Code of Civility

## § 99.2 A Judge's Duties to Lawyers and Other Judges

- Apply to ADR? YES
- Key Sections of 15 Sections
  1. A judge must maintain control of the proceedings and has an obligation to ensure that proceedings are conducted in a civil manner.
  2. A judge should show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating all with civility.
  6. A judge should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties or witnesses.
  9. A judge should ensure that disputes are resolved in a prompt and efficient manner and give all issues in controversy deliberate, informed and impartial analysis and explain, when appropriate, the reasons for the decision of the court.

# Pennsylvania Code of Civility

## § 99.3 The Lawyer's Duties to the Court and Other Lawyers

- Apply to ADR? YES
- Key Sections of 19 Sections
  1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyer's conduct in the courtroom, in office practice and in the course of litigation.
  2. A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers.
  4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom.

# Pennsylvania Code of Civility

## § 99.3 The Lawyer's Duties to the Court and Other Lawyers (cont).

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.
6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.
8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.
19. A lawyer should be cognizant of the standing of the legal profession and should bring these principles to the attention of other lawyers when appropriate.

# American Arbitration Association

## Code of Ethics for Arbitrators in Commercial Disputes

- Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.
- Canon II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.
- Canon III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.
- Canon IV: An arbitrator should conduct the proceedings fairly and diligently.
- Canon V: An arbitrator should make decisions in a just, independent and deliberate manner.

# American Arbitration Association

## Code of Ethics for Arbitrators in Commercial Disputes (cont.)

- Canon VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.
- Canon VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.
- Canon VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.
- Canon IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.
- Canon X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

# Neutral Conflict and Informational Disclosures

- Disclose it all up front.
- Duty is ongoing.
- Duty of counsel for the parties to disclose.
- Duty to instruct your client.
  - What happens when disclosures are not taken seriously and clients are not told?
  - Information to disclose.
    - Past representation of parties.
    - Past use of experts.
    - Knowledge of witnesses.
    - Attorney relationships/social relationships.
    - Interaction at ACBA Construction Law Section events.
    - Anything you would want to know if you were considering engaging the neutral as counsel for a party.
    - If in doubt about a disclosure, ask for clarification.
    - Arbitrator disclosures versus mediator disclosures.
    - Mediation has greater party autonomy.

# The Neutral Who Thinks He/She is the “Smartest Person” in the Room

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## Arbitration

- Arbitrator asking questions that go beyond clarification.
- Arbitrator raising new claims/defenses.
- Deciding the case on a basis not raised by a party.
- Engineer arbitrators?

# The Neutral Who Thinks He/She is the “Smartest Person” in the Room

## Mediation

- Mediator interjecting his or her know-how on overlooked, substantive legal or factual issues.
  - Facilitative mediation: Problem solving. Get parties to understand their situation through skillful questioning.
  - Evaluative mediation: Assumes that the parties want the mediator to provide direction as to the appropriate grounds for settlement.
  - What if one party is so overmatched? Arbitration as opposed to mediation?

# Duty to Mediate in Good Faith

- *Restatement (Second) Contracts*, §205 states “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.
- Uniform Commercial Code (UCC) §1-203: “Every contract or duty within the act imposes an obligation of good faith in its performance or enforcement.”
- Courts have held that these clauses do not override express contractual provisions while suggesting that these clauses impose obligations beyond those expressed in the contract.
- See *Kelly J Vay v. Robert Houston, et al.*, United District Court for the Western District of Pennsylvania, a case in which the court granted sanctions when during mediation the defendant refused to make an offer. The court stated “upon motion, or on its own, a court may issue sanctions if a party or attorney:” referencing Rule 16(f) part B which states in part that if a party “is substantially unprepared to participate – or does not participate in good faith – in the conference:” sanctions are appropriate.
- See also *ADR Policies and Procedures of the Western District of Pennsylvania: “Good faith” defined at Section 2.8 and Ethical Guidelines for Settlement Negotiations*, American Bar Association, Section of Litigation, August 2002.

# Confidentiality in Mediation and Arbitration

- Private consensual proceedings. Neutrals most respect that and maintain confidentiality.
- Confidentiality during the mediation process.
  - Information to transmit and to not transmit.
  - Mediator's conundrum of the lie conveyed by the mediator to the other side followed by later revealing the truth which the lying party will not allow the neutral to convey to the other side.

# Party Appointed Arbitrators

- AAA Code of Ethics Canon IX – Party Appointed Arbitrators
  - Presumed to be neutral.
  - Party appointed arbitrator must ascertain at the outset whether neutral or not and report to the parties and the panel.
- AAA Canon X – Non-neutral, Party Appointed Arbitrators
  - Non-neutral party appointed arbitrators.
  - Must at outset disclose if they will communicate with counsel for party.
  - Cannot disclose deliberations, communicate after record closed or reveal award prior to issuance.
  - Cannot discuss case with neutral in the absence of other party appointed arbitrator.

# The Mediator's “Best and Final” Settlement Recommendation to the Parties

- Situations to use.
- When and how to deliver.
- Mediator's conundrum:
  - One party emails a yes and accepts the offer.
  - Other party emails and says no we do not accept, but we are close and we only need X to have a deal.

# Multi-Party Mediations

- Impasse at session with seven parties.
- Later, two defendants call and want to ask the mediator to help on a deal between them.
- Two defendants ask the mediator not to disclose to other five defendants.
- What should the mediator do?
  - Honor the request, but if any party contacts the mediator, he/she should tell the party that he/she is working on a two-party deal. Eventually, tell them when there is a deal in principle, then disclose.

# Confidentiality and Non-Disparagement Clauses in Mediation Settlement Agreements

- Counsel and the neutral should explain to the clients/parties what it means.
- Tell them to take it seriously.
  - *Gulliver Schools, Inc. v. Snay*. 137 So.3d 1045 (Fla. 3d DCE 2014). Daughter of plaintiff parents, the Snays, who settled the case with defendant Gulliver and agreed to confidentiality posts on Facebook:
    - “Mama and Pap Snay won the case against Gulliver. Gulliver is now paying for my vacation to Europe this summer. SUCK IT.”
- Result ??

# Key Rules to Remember

## Lessons from Law School Ethics Class





# Key Rules to Remember

“Dusty Rhodes”



# Key Rules to Remember

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Do not intermingle your  
 with client 

# Key Rules to Remember

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Do not spend client



# Key Rules to Remember

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Do not date clients!



## Key Rules to Remember

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Make sure you get your CLE Credits. Do not ignore the CLE Board!

# Key Rules to Remember

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If anyone goes to jail at the end of the day ...



# Key Rules to Remember

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... Make sure it is the client,  
not you!

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THANK YOU!

