

Lessons in Legal Ethics from the Wisdom of Yogi Berra

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Welcome and Introductions

Using the wit and wisdom of baseball legend Yogi Berra, this session takes a lighthearted but insightful look at ethical and professional responsibilities of in-house and outside counsel in today's business world. Through real-world scenarios and classic Berra-isms, the panel will examine rules of professional conduct, client identification and representation, conflict management, and the challenges of advising multiple entities.

Though “you can observe a lot by watching,”
this session will help you understand even more.



Inning 1 – Clients

**“So I’m ugly. I never saw anyone
hit with his face.”**

It’s not about me. It’s about the client.

Inning 1 – Clients

The client is the one in the client-lawyer relationship who sets the goals and makes the material decisions.

Rule 1.2(a): Client-Lawyer Relationship

“Subject to paragraphs (c) and (d), 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.”

Inning 2 – Organization as Client

“I’m a lucky guy and I’m happy to be with the Yankees. And I want to thank everyone for making this night necessary.”

Inning 2 – Organization as Client

Rule 1.13(a): Organization as Client

“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

Inning 2 – Organization as Client

Factual Situation

- In-House lawyer at industrial chemical company
- Discovers inadequate record keeping
- Senior management knows and is “dealing” with it, instructed staff not to mention errors in logs or disclosure documents
- Federal law requires disclosure, but “errors” can be inferred from data

Inning 3 – Client-Lawyer Relationships

“Pair up in threes.”

Insured – Insurer - Attorney

**In-House Counsel - Outside Counsel -
Entity Client**

Inning 3 – Client-Lawyer Relationships

Factual Situation

- In-House attorney prepares for corporate deposition
- Depositions of officers and employees also noticed
- Corporate representative states, “You are my lawyer.”

Inning 4 – Duty of Confidentiality

“I don’t know (if they were men or women fans running naked across the field). They had bags over their heads.”

Inning 4 – Duty of Confidentiality

Rule 1.6(a)

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

Inning 4 – Duty of Confidentiality

Factual Situation

- Client hires you on a money laundering charge
- During confidential consultation, you learn that client committed murder
- You negotiate a sweet deal on the money laundering trial
- After consultation ends, you learn that the person charged with client's murder has been convicted and sentenced to life without parole
- You send anonymous letter/tip that client confessed to the murder



Inning 5 – Conflicts

“He hits from both sides of the plate. He’s amphibious.”

Inning 5 – Conflicts

Rule 1.7(a) Concurrent Conflicts

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Inning 5 – Conflicts

Conflict of Interest Basics Joint Representations Acting as Scrivener

Inning 5 – Conflicts

Factual Situation

- Husband and Wife, Ross and Rachel, seek divorce
- Hire same attorney – to save money – who discloses obvious conflict
- Sign conflict waiver – no children, separate accounts, separate cars, apartment lease is expiring, no property to divide
- Attorney agrees to represent both



Inning 6 – Owning Up When You Make a Mistake

“We made too many wrong mistakes.”

Inning 6 – Owning Up When You Make a Mistake

ABA Formal Op. 481 (Apr. 17, 2018) (“A Lawyer’s Duty to Inform a Current or Former Client of the Lawyer’s Material Error”)

“Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client’s representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client’s representation.”

Inning 6 – Owning Up When You Make a Mistake

Factual Situation

Seventh Inning Stretch

Take me out to the ball game,
Take me out with the crowd.
Buy me some peanuts and Cracker Jack,
I don't care if I never get back.
Let me root, root, root for the home team,
If they don't win, it's a shame.
For it's one, two, three strikes, you're out,
At the old ball game.



Inning 7 – Not Making False Statements

**“Half the lies they tell about me
aren’t true.”**

Inning 7 – Not Making False Statements

Rule 4.1

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.



Inning 8 – Dealing with Unrealistic Expectations

**“Making predictions is hard to do,
especially about the future.”**

Inning 8 – Dealing with Unrealistic Expectations

Rule 1.4 (“Communications”)

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Inning 9 – Professional Misconduct

“The towels were so thick there I could hardly close my suitcase.”

Inning 9 – Professional Misconduct

Rule 8.4(c)

“It is professional misconduct for a lawyer to: ... engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Inning 9 – Professional Misconduct

Factual Situation

- Arizona prosecutor charged 15 people for riots, hindering prosecutions and aggravated assault following George Floyd and Dion Johnson protests
- Added gang-related charges
- Prosecutor charged with
 - Not reviewing hours of video
 - Claimed gang-related connections when none existed
 - No evidentiary support for gang charges
 - Police reports stated no gang involvement
 - Prosecutor believed charges were a novel approach and likely to be newsworthy
 - One person (tourist) just taking pictures of the city at sunset – witnesses agreed
- (Two-year suspension)



Extra Innings

“It ain’t over ‘til it’s over.”

Extra Innings

Rule 1.16(d) (“Declining or Terminating a Representation”)

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

Extra Innings

Factual Situation

- You complete your litigation matter with a favorable judgment, or
- You complete your transaction and the deal closes, or
- You provide a 50-state survey and your client implements a successful new program
- What do you do now?

Yogi Berra's Nine Rules for Lawyers

1. It is all about the ~~Game~~ Client
2. If the Client is an Organization, the Client is *the* Organization
3. The Lawyer Represents the Client
4. Preserve the Client's Confidences, at Every Peril
5. Beware of Conflicts – Protect the Client
6. Be Honest with the Client – Disclose and Fix (Wrong) Mistakes
7. Make No False Statements (only True Statements)
8. Set Expectations – Full Disclosure
9. No Professional Misconduct – (No Unprofessional Misconduct, either)
10. When it's over, it's over

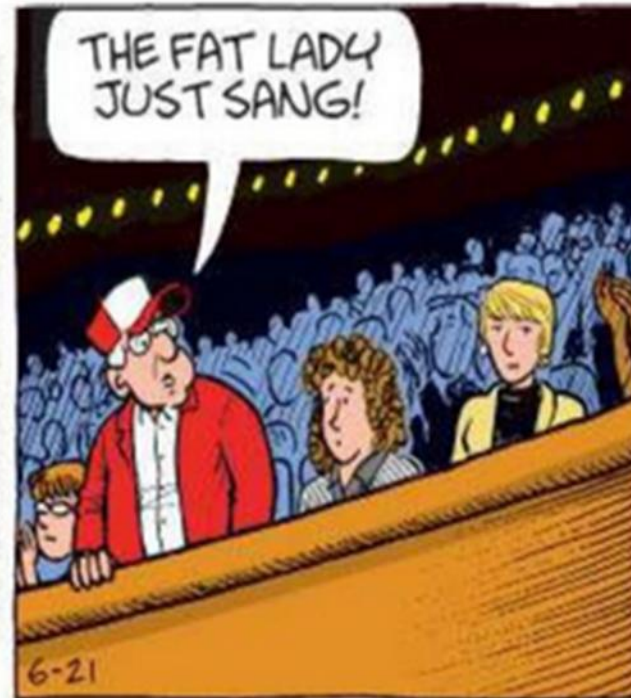
Extra Innings

Q&A

Post-Game Thoughts

Yogi Berra did NOT say ...

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Welcome and Introductions

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