

**Reel Appeal II:
You Can't Handle the Truth!
Or Can You?**

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I. Introduction

In the four years that have passed since our original Reel Appeal presentation, we've heard from many practitioners about their favorite movies and the intersection between reel and real life ethical issues. This paper discusses additional ethical questions appellate judges and lawyers are called upon to answer in the pursuit of justice.

In our presentation, the marriage of film clips to the rules of professional responsibility not only enhances the impact of our discussion, but also, in the words of Professor Paul Bergman, reflects the power of popular legal culture to reflect and reinforce viewers' attitudes about law, lawyers and the legal system. In an age in which the public regularly questions whether lawyers uphold their oath to "honestly demean [themselves] in the practice of law" and whether judges "faithfully execute [their] duties," understanding both our ethical obligations and the public's perception of our ethical obligations is essential to our ongoing efforts to preserve the integrity of our system of law.

Tip: In this paper, we largely refer to the ABA Model Rules of Professional Conduct and the ABA Model Code of Judicial Conduct because state rules/codes largely provide the same or substantially similar requirements. However, please be aware that some state requirements vary from the model. Always check the requirements governing your situation for the correct standards by which your actions will be measured.

II. The Impact of Implicit Bias on Judges and Advocates

I highly commend to *everyone* Nicole E. Negowetti's insightful and truly helpful article on "Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators." 4 ST. MARY'S LEGAL MAL. & ETHICS 278 (2014). Despite the title, this article is incredibly useful for lawyers and judges in both the civil and criminal arenas. If the first step in solving a problem is admitting one exists, Ms. Negowetti's article is a valuable first step in avoiding the misunderstanding and miscommunications that

result when—inevitably and without any malice or conscious thought—biases and preconceptions inherent in each human being creep into our relationships with, representations of, and decisions regarding clients/litigants. Her article also provides useful examples and suggestions to assist in taking the next steps to address and resolve the problem.

A. The Impact of Implicit Bias in Evaluating Clients and Litigants

Human reasoning functions through a "dual process" cognitive system. Negowetti, *Navigating the Pitfalls*, 4 ST. MARY'S LEGAL MAL. & ETHICS at 284.

- System I is rapid, intuitive, and error-prone.
- System II is more deliberative, calculative, slower, and is often more likely to be error-free.

Id.

Implicit biases operate in System I. They are automatic, unconscious mental processes based on implicit attitudes or implicit stereotypes that are formed by life experiences. *Id.* System I processes provide a convenient shortcut in many contexts, but when used to understand, communicate with, and make decisions regarding new people and circumstances in a professional context, implicit bias may interfere with the consistent and fair administration of justice.

For example, although many lawyers may consider reason and logic as the driving force behind their behavior, their decisions are often based on implicit biases that form "a lens through which we view the world" and "automatically filter[] how we take in and act on information." Negowetti, *Navigating the Pitfalls*, 4 ST. MARY'S LEGAL MAL. & ETHICS at 284. And although most judges believe they are objective and able to avoid the influence of biases, recent studies have demonstrated that even the most qualified judges may rely on intuitive thought processes, resulting in judgment that is flawed with systemic errors. *Id.* at 299-300.

Implicit bias may shape how a lawyer evaluates the strengths and weaknesses of a case at the initial intake stage. Preconceived notions and

earlier experiences may lead a lawyer to incorrect conclusions about the strengths of potential issues. And assessments of possible bias that may be encountered from decisionmakers (such as jurors and jurists) may lead a lawyer to focus more on the obstacles to success than the ways in which a diligent advocate could educate and overcome those biases.

Similarly, implicit bias may constrict the manner in which a judge evaluates the strengths and weaknesses of a legal argument or applies the law to the facts of a case. If the initial evaluation leads to a decision based in part on implicit bias rather than legal principles, the judge risks violating the duty to uphold and apply the law. MODEL CODE JUDICIAL CONDUCT 2.2. And even if the initial reactions and tentative decisions do not ultimately control the outcome, the imposition of additional, non-legal hurdles for a litigant (and advocate) to overcome threatens the judge's ability to comply with the duty to perform all duties of judicial office fairly. *Id.*

B. The Impact of Implicit Bias in Understanding and Advising Clients

Rule 1.3 requires lawyer to act with reasonable diligence. MODEL R. PROF. CONDUCT 1.3. This rule requires more than prompt attention, demanding that a lawyer act "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* cmt. 1. In order to meet this demand, an attorney must first understand the client's goals and motives. Negowetti, *Navigating the Pitfalls*, 4 ST. MARY'S LEGAL MAL. & ETHICS at 295. But implicit biases may interfere with an attorney's ability to comprehend and represent a client's experiences, viewpoint, and goals. *Id.* at 295-96.

For example, a client's appearance, race, religion, age, gender identification, sexual orientation, socio-economic background, or political affiliation could lead a lawyer to incorrect presumptions and value judgments. *Id.* at 296. When a lawyer allows his or her internal dialogue to substitute for dialogue with the client—filling spaces with assumptions, "reading between the lines," and asking narrow questions that serve only to confirm the lawyer's assumptions, instead of expressly asking questions and truly listening to

the answers—the lawyer may miss the opportunity to learn and understand valuable components of information that may substantively help the client's case. Recognizing (and admitting) the tendency for implicit biases to affect one's judgments about people can help a lawyer ask questions that will move the discussion beyond these stereotypes. *See id.*

Ignoring the influence of implicit bias creates the risk of misunderstandings that not only cause frustration (*e.g.*, "My client just doesn't make any sense!"), but also lead to the failure to achieve the client's true objectives. *Id.* Understanding the role of implicit biases in coloring perceptions can help a lawyer understand what, at first glance, appears to be an illogical story or an ill-conceived goal, which "might be perfectly reasonable with another's lens and another's bundle of preferences and values." *Id.* at 297 (quoting Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 412 (2002) (footnote omitted)). Moreover, this process of understanding presents an invaluable opportunity for the lawyer to note facts and issues that may need to be addressed, in addition to facts and legal issues central to the case, to accurately communicate the client's positions to the decisionmakers (*e.g.*, judges and jurors) who also will bring their own implicit bias to the table.

Implicit bias also can interfere with a lawyer's compliance with the duty to "exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social[,] and political factors that may be relevant to the client's situation." MODEL R. PROF. CONDUCT 2.1. For example, although the relief a client may obtain from a court may be limited to or focused on monetary recovery, the client may be more concerned with repairing a relationship, obtaining an apology, or dealing with the emotions, such as guilt, embarrassment, or fear, triggered by the situation. Negowetti, *Navigating the Pitfalls*, 4 ST. MARY'S LEGAL MAL. & ETHICS at 298. Understanding those goals may lead a lawyer to conclude that the dispute might be better resolved through early mediation or courses of action that avoid litigation altogether. *Id.*

Similarly, allowing implicit bias to paint a client as less able to understand a complex legal argument or to comprehend the “big picture” can lead a lawyer to downplay the client’s goals or to advocate for strategic choices that undermine, rather than serve, the client’s objectives and interests. Equally, the lawyer may try to simplify or gloss over more complicated aspects of the case, running afoul of duties regarding client communication. For instance, a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” MODEL R. PROF. CONDUCT 1.4(a)(2). In addition, a lawyer must “keep the client reasonably informed about the status of a matter” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *Id.* 1.4(a)(3), (b). When implicit bias leads a lawyer to give these duties short shrift, opportunities for misunderstandings and ineffective representation may arise.

III. Boundaries on the Judicial Role

We want our judges to be dynamic, intellectually curious, internally motivated leaders, but the law demands a certain amount of passivity as a neutral arbiter. *Accord* Abram Chayes, *The Role of the Judge in Public Litigation*, 89 HARV. L. REV. 1281, 1286 (1976). An appellate judge generally may decide only the issues presented and briefed by the parties. *See, e.g., Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994). An appellate judge may not reverse a jury verdict because he or she might take a different view of the facts upon reading the record. *See, e.g., Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 730 (4th Cir. 2019). Judges who do not honor these boundaries may inject reversible error into the case. *See, e.g., Chayes, Role of the Judge*, 89 HARV. L. REV. at 1286 n.25.

Ethically, judges who do not honor these boundaries may violate applicable rules. For instance, a judge must uphold and apply the law, including any case law and procedural rules limiting appellate review to the scope of the record. MODEL CODE JUDICIAL CONDUCT 2.2. In addition, abiding by the limits of review in one appeal but roaming beyond them in another would seem to

run afoul of a judge’s responsibility to perform all duties of judicial office fairly. *Id.* An essential component of fairness is the consistent application of procedural rules to all litigants. *See, e.g., King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006); *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996).

IV. Handling Frustration in the Courtroom

Roadblocks to effective advocacy in the courtroom, whether in trial or on appeal, can drive you crazier than a big hole in your screen door. Handling the frustration that inevitably ensues, given that (at this point in time, anyway) all lawyers are human beings, is essential not only to one’s chances for success, but also to upholding one’s ethical obligations.

For example, a lawyer is prohibited from engaging in conduct intended to disrupt a tribunal. MODEL R. PROF. CONDUCT 3.5(d). A lawyer equally is prohibited from making statements the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. MODEL R. PROF. CONDUCT 8.2(a). Getting into a heated discussion (rather than a lively but professional debate) or grandstanding may feel good at the moment, but allowing one’s passion to take the wheel creates a real risk that one or both of these rules may be violated.

Moreover, a lawyer’s primary duty in the courtroom is not to indulge his or her own preferences, but instead to provide competent representation and independent “professional” judgment. MODEL R. PROF. CONDUCT 1.1, 2.1. Getting caught up in the emotional rush of the moment can create its own roadblock, distracting the lawyer from upholding these duties. When, for instance, a lawyer is so pleased with his or her prowess at having finally overcome a series of roadblocks that he or she forgets to take a final step necessary to preserve error, the sense of accomplishment may be short-lived. As in many situations, the rules of professional conduct exist to help us avoid opportunities for regret.

V. Ethics in Billing

A lawyer is prohibited from charging or collecting an unreasonable fee or an unreasonable

amount for expenses. MODEL R. PROF. CONDUCT 1.5(a). Viewed from the opposite angle, a lawyer may charge and collect only reasonable fees and reasonable amounts for expenses. Moreover, the basis for the fees and expenses for which the client will be responsible, and any changes in that basis, must be communicated to the client. MODEL R. PROF. CONDUCT 1.5(b). The preference is for the communication to be in writing. *Id.* Wrapping an expense unrelated to the representation into an invoice for fees and expenses would seem to run afoul of one or more of these rules.

In addition, specific rules address the limits on financial transactions between lawyers and their clients. Rule 1.8(a) provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; *and*
- the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL R. PROF. CONDUCT 1.8(a).

With regard to a business transaction to provide financial assistance in connection with litigation, Rule 1.8(e) imposes a specific prohibition with two limited exceptions: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

And of particular interest given our topic of legal ethics in the movies, the rules address literary and media rights regarding a lawyer's representation of a client. Rule 1.8(d) prohibits lawyers from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation prior to the conclusion of the representation. MODEL R. PROF. CONDUCT 1.8(d). (But the rule doesn't restrict a lawyer's prerogative to figure out in advance who ought to play them in the movie if Hollywood does come calling.)

VI. The Intersections of Professional Responsibility and Political Pressure

Many judges must strive to uphold their ethical duties while dealing with politics and politicians. Judges who are elected or subject to reappointment, who aspire to a different or higher bench or office, or who desire to engage in public service beyond the judiciary must deal with additional political considerations and pressures other judges do not. Barry R. Schaller, *Ethical Aspects of Political Dilemmas Faced by Appointed Judges*, 30 YALE L. & POLICY REV. INTER ALIA 101 (2011). The intersections between professional responsibility and political pressures range far beyond the well-traveled byways and can impact even judges who are not required to run for election or to be reappointed.

For example, it is not unusual for a member of a judge's family to be involved in public service, as well. To the extent that a family member runs for office, an appellate judge must walk a line between permissible and impermissible activities regarding the campaign. Except as permitted by law, a judge is not permitted to, *inter alia*, make speeches on behalf of a political organization, publicly endorse or oppose a candidate for any public office, solicit funds for a candidate, or seek endorsements from a political organization. MODEL CODE JUDICIAL CONDUCT 4.1(A)(2), (3), (4), (7). There is no "family exception" to these prohibitions. *Id.* 4.1 cmt. 5.

In addition, the desire to serve the public may prompt an appellate judge to explore opportunities beyond the bench. As the Model Code of Judicial Conduct notes, judges are uniquely qualified to

engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. MODEL CODE JUDICIAL CONDUCT 3.1 cmt. 1. However, certain opportunities, such as private speaking engagements at law firms, may be excluded by applicable rules. Certainly, the Code prohibits some types of speaking or writing. For example, an appellate judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court. *Id.* 2.10(A). Even in private, an appellate judge is prohibited from making a statement that might substantially interfere with a fair trial or hearing, or from making remarks that are likely to appear to a reasonable person to demean individuals based on factors such as national origin, age, or socioeconomic status. *Id.* 2.10(A); *id.* 3.1 cmt. 3.

Judges also must be cognizant of their duty not to convey “or permit others to convey” the impression that any person or organization is in a position to influence them. MODEL CODE OF JUDICIAL CONDUCT 2.4(C). And as officers of the court, lawyers should be careful not to equate experience before an appellate judge with an enhanced ability to persuade him/her. MODEL R. PROF. CONDUCT 8.2(a); *see also* Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 715-16 (1997).

VII. Conclusion

As Justice Cardozo explained: “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge” Negowetti, *Navigating the Pitfalls*, 4 ST. MARY’S LEGAL MAL. & ETHICS at 315-16 (quoting William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 5 (1988) (quoting Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921)). The rules of professional responsibility and the code of judicial conduct provide a framework to surmount these “other forces.” By obeying their dictates, we become free

to practice law as the best and finest versions of our professional selves. After all, “[i]n the last analysis, the law is what the lawyers are.” Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927), quoted in Rand Jack & Dana C. Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 156 (Cambridge University Press 1989).