

# Ethics Theatre:

## Using Scenes from Movies to Discuss the Kansas Rules of Professional Conduct

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I. Consulting with (or Coaching?) a Client – *Anatomy of a Murder* (1959)

- A. Based on a novel by a former Michigan Supreme Court judge, *Anatomy of a Murder* depicts the trial of an Army lieutenant accused of murdering Barney Quill, a bartender who he claims has raped his coquettish wife. It stars Ben Gazzara as Frederick Manion, the foul-tempered defendant, James Stewart as defense attorney Paul Biegler, and George C. Scott as state prosecutor Claude Dancer.
- B. Scene: Attorney Biegler has an initial client consultation with Client Manion regarding the facts and the law applicable to Manion's case.
- C. Consider this passage from the novel where Paul Biegler describes "the Lecture," a passive way for lawyers to coach their clients:

"The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. 'Who, me? I didn't tell him what to say,' the lawyer can later comfort himself. 'I merely explained the law, see.' It is good practice to scowl and shrug here and add virtuously: 'That's my duty, isn't it?'" Robert Traver, *Anatomy of a Murder* (1958), p. 35.

D. Ethical Rules to Consider in Evaluating the Movie Scene

1. KRPC 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

## 2. KRPC 1.2

(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

### 3. KRPC 1.18

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

4. KRPC 3.3(a)(3)

A lawyer shall not knowingly . . . 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.

Comment 7. The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

Comment 8. The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(e). 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.

Comment 9. Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the

lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment 7.

5. KRPC 3.4(b)

“A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

Comment 1. “The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly influencing witnesses*, obstructive tactics in discovery procedure, and the like.” (Emphasis added.)

6. KRPC 8.4(c)

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

II. Getting Paid – *Lincoln Lawyer* (2011)

- A. Criminal defense attorney Mickey Haller (Matthew McConaughey) operates around Los Angeles out of a Lincoln Town Car driven by a former client working off his legal fees.

B. Scene: Haller has been hired by a motorcycle gang to defend one of its members, Harold, in a criminal case. Despite being ready for trial, Haller has continued Harold's case because the initial \$5,000 the gang advanced to Haller for Harold's defense has been spent in preparing for trial. The leader of the motorcycle gang, Eddie (Trace Adkins) speaks to Haller about his reason for continuing Harold's case.

C. Ethical Rules to Consider in Evaluating *Lincoln Lawyer* Movie Scene I

1. KRPC 1.8(f)

"A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives *informed consent*;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6." (Emphasis added.)

2. KRPC 1.0(f)

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

3. KRPC 1.6(a)

"A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ."

4. KRPC 5.4(c)

“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”

5. KRPC 1.15(a)

“A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.”

D. Ethical Rules to Consider in Evaluating *Lincoln Lawyer* Movie Scene II

1. KRPC 4.1(a)

“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.”

2. KRPC 4.4(a)

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to . . . burden a third person . . . .”

3. KRPC 8.4(c)

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



### III. Pretrial Procedure – *Class Action* (1991)

- A. Liberal activist lawyer Jedediah Tucker Ward (Gene Hackman) alienated daughter Maggie Ward (Mary Elizabeth Mastrantonio) years ago when she discovered his many extramarital affairs. Now a conservative corporate lawyer, Maggie agrees to go up against her father in court. Maggie must defend an auto manufacturer in a wrongful death case alleging that one of its models (the Meridian) has a defectively-designed electrical circuit which is susceptible to igniting the car on fire during a collision.
- B. Scene: Jedediah and Maggie argue before a judge the merits of a discovery motion that Jedediah has filed compelling the defendant to produce the names, job descriptions, and current addresses of all employees involved in the design of the Meridian model between 1980 and 1985.
- C. Ethical Rules to Consider in Evaluating *Class Action* Scene

#### 1. KRPC 1.7

“(a) 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 . . . there is a substantial risk that the representation of one or more clients will be materially limited by . . . *a personal interest of the lawyer.*”

“(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.” (Emphasis added.)

Comment 11. “When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. *The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.* See Rule 1.10.” (Emphasis added.)

## 2. KRPC 1.8(i)

“A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.”

3. KRPC 1.8(l)

“While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.”

Compare KRPC 1.8(l) with KRPC 1.10(a)

4. KRPC 1.10(a)

“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, *unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.*” (Emphasis added.)

Disciplinary Administrator’s Position: 1.10(a) controls. We follow Comment 11 to 1.7 (“The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.”)

5. KRPC 3.2

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

6. KRPC 3.3(a)(1)

“A lawyer shall not knowingly . . . 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.”

Comment 3. “[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows

the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.”

7. KRPC 3.4(d)

“A lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

8. KRPC 4.1(a)

“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.”

Comment 1. “A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing person of relevant facts.”

9. KRPC 4.2

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

Comment 7. “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the

organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.”

10.KRPC 4.3

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

11.KRPC 4.4(a)

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

12. KRPC 8.4(c)

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

IV. Opening Statements – My Cousin Vinny (1992)

- A. Driving through Alabama in their 1964 Buick Skylark convertible, Billy Gambini and Stan Rothenstein, college students from New York who just got scholarships to UCLA, shop at a convenience store and accidentally shoplift a can of tuna. After they leave, the store clerk is robbed and killed, and Billy and Stan are arrested for the murder.

Due to circumstantial evidence and a confession to the shoplifting that is misconstrued as one to the shooting, Billy is charged with murder, and Stan as an accessory. Billy's mother tells him there is an attorney in the family: his cousin Vinny. Vincent LaGuardia Gambini travels there, accompanied by his fiancée, Mona Lisa Vito. Although he is willing to take the case, Vinny is a personal injury lawyer from Brooklyn, newly admitted to the bar, and with no trial experience.

B. Scene: Prosecutor Trotter, Vinny, and Public Defender John Gibbons give their opening statements.

C. Ethical Rules to Consider in Evaluating *My Cousin Vinny* Scene

1. KRPC 1.1

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Comment 1. “In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.”

Comment 2. “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the

evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”

2. KRPC 3.4(e)

“A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

3. KRPC 3.5(d)

“A lawyer shall not . . . engage in undignified or discourteous conduct degrading to a tribunal.”

4. KRPC 3.8

“The prosecutor in a criminal case shall:

“(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

“(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

“(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

“(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”