

# Stand By Your Man

## (and Other Ethics Lessons From the Classics)

By Sam Phillips

Many people, including lawyers, turn to the Classics for life lessons. Some find all the metaphors they need in Shakespeare. Our parents and clerics use parables from our collective scriptures to inspire and teach life's rules. With all those wonderful stories and teaching tools available, why would we use the "Country Classics" to help us brush up on legal ethics? Hank Williams and Tammy Wynette in the same breath as Homer, Shakespeare and Moses?

Here is one effort to do just that – to find keys to a professional law practice in the simple music written by American songwriters in the 20th Century.

(Some song titles and lyrics may be used to make a point that is beyond the context of the song. **Please Release Me** (and Jim Reeves) from fault for that.)

### Stand By Your Man

Tammy Wynette had a choice; lawyers, on the other hand, have a *duty* of loyalty under Rule 4 (the Rules of Professional Conduct). "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." *Rule 4-1.7, Comment 1*. Duties of loyalty include maintaining confidences and avoiding conflicts with responsibilities to other clients, former clients, third persons, or the lawyer's own interests. Lawyers are further required to create office systems to avoid conflicts and to assure client confidences are secure. And, duties of loyalty and confidentiality

apply long after representation ends. Lawyers must mean it when they say: "I'll be true to you" – just as the Oak Ridge Boys said it – "...even though you didn't ask me to."

Tammy stood by, but she didn't necessarily endorse her man's behavior. Likewise, lawyers can be loyal without sanctioning everything their clients do. "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." *Rule 4-1.2(b)*.

### Talk to Me (Tell Me What I Want to Know)

This tune, written by Joe Seneca, was recorded by the Beach Boys, Mickey Gilley and many others. Looking at lawyer discipline data, it is clear that this song must be every client's favorite. When lawyers provide status reports; promptly send copies of case materials, explain delays, setbacks, and opportunities; and discuss potential conflicts and fees openly, clients complain less. And, when lawyers communicate with their clients, they meet their obligations under *Rules 4-1.4, 4-1.5, 4-1.7, and 4-1.8*.

### Funny How Time Just Slips Away

Willie Nelson's lyrics make a point that all busy lawyers have felt. The song, however, provides no defense to a disciplinary complaint about unnecessary case delays. Less poetic, but

just as telling, are these lyrics from *Comment 3 to Rule 4-1.3*: "Perhaps no professional shortcoming is more widely resented than procrastination." When time slips away, clients get upset.

Malpractice carriers remind us that calendaring systems are significantly less expensive than claims. Likewise, time and energy spent responding to disciplinary complaints and malpractice claims are time and energy not spent with family or working on revenue-producing cases.

### You Got to Know When to Hold 'Em ...

Lawyers settling cases for their clients must have, as their primary motivation, the best interests of the clients. Under *Rule 4-1.4*, settlement offers must be delivered to clients. Then, like the gambler told Kenny Rogers, the lawyer and client can jointly determine whether to **hold 'em, fold 'em, walk away or run**.

Lawyers who are thinking "**We Can Work it Out**" may also want to look at *Comment 2 to Rule 4-4.1*. "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud."

Thanks to The Beatles for joining country music stars for this presentation.

### Walk On By – [Don't] Wait on the Corner

Many successful practitioners – but probably not singer/songwriter Leroy Van Dyke's lawyer – report that they enjoy their practice more, and increase their income, when they improve their client screening process – and let a few prospective clients **just walk on by**. Choose clients carefully.

### They're Gonna Put Me in the Movies – And All I Gotta Do is Act Naturally

Buck Owens – and also The Beatles and Riders in the Sky – made it seem so easy. Maybe it is easy. Maybe they really will “**make a big star out of me.**” But, here are a few caveats for future legal stars.

First, until a representation is concluded, *Rule 4-1.8(d)* prohibits making or negotiating agreements giving literary or media rights to the lawyer, if the portrayal or account is based in substantial part on information relating to the representation.

Second, *Rule 4-1.8(a)* restricts and governs lawyers' business transactions with clients. The terms must be fair and reasonable. They must be fully disclosed in writing in a manner that can be reasonably understood by the client. The client must be advised in writing of the desirability of seeking, and given a reasonable opportunity to get, independent legal advice. Clients must give informed consent, in writing. The consent must address the terms of the transaction, the lawyers' role in the transaction, and explain whether the lawyer is representing the client in the transaction. Since 2007,

client's signatures have been required on the consent document.

Third, *Rule 4-3.6* governs lawyers' duties in dealing with trial publicity. The rule permits many types of statements, but lawyers are well advised to promise to return reporter's calls, and then go re-read *Rule 4-3.6*. “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” *Rule 4-3.6(a)*. (Prosecutors must also understand and follow the restrictions in *Rule 4-3.6(b)(7)* and *Rule 4-3.8*.)

Finally, lawyers can become “big stars” by advertising their practice. But, they must comply with *Rules 4-7.-7.5*. It would be a mistake for a lawyer to engage in any business solicitation or public marketing before carefully reading those rules.

### Your Cheatin' Heart

Hank Williams understood. And numerous rules prohibit both lying and cheating. *Rule 4-3.3* prohibits false statements in court. That rule also requires lawyers to correct false statements previously made, and to disclose legal authority “known to the lawyer to be directly adverse to the position of the client and not revealed by opposing counsel.” It also prohibits lawyers from offering evidence known to be false.

*Rule 4-3.4* prohibits falsifying evidence and frivolous filings.

*Rule 4-7.1* prohibits false or misleading advertising. It defines misleading advertising with 11 concerns:

- (a) material omissions;
- (b) unjustified expectations;
- (c) proclaimed results without a specified disclaimer;
- (d) implications that laws or rules can be violated;
- (e) the material compares quality without capacity to substantiate ;
- (f) the material indicates an area of practice unless the lawyer has experience and competence;
- (g) the material indicates an area of practice in which referrals are routinely made – unless that is conspicuous;
- (h) paid testimonial – unless the fact of the payment is conspicuously disclosed;
- (i) simulated portrayal of lawyer, victim, scene or event – unless the fact that it is simulated is conspicuously disclosed;
- (j) the material indicates a part-time office location without conspicuously disclosing the part-time status; and
- (k) contingent fees without a conspicuous specified disclaimer.

*Rule 4-8.2(a)* prohibits making a statement about a judge that is false or “made with reckless disregard as to its truth or falsity” concerning the judge's qualifications or integrity.

*Rule 4-8.4(c)* prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. Lying and cheating often result in disbarment. *In re Stormont*, 873 S.W. 851 (Mo. 1996), *In re Oberhellmann*, 873 S.W.2d 851 Mo (1994) and *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997).

### Lookin' for Love in All the Wrong Places

For lawyers, the wrong place to

look for love is in their clients' faces. *Rule 4-1.7* prohibits lawyers from allowing their personal interests to interfere with the best interests of their clients. Perhaps more to the point, *Rule 4-1.8(j)* explicitly prohibits lawyers from having sexual relations with clients unless a consensual sexual relationship predated the lawyer/client relationship. With apologies to both Johnny Lee and Kenny Rogers, it just doesn't work for lawyers and clients to be "**Daytime Friends and Nighttime Lovers.**"

## Take this Case and Shove It

Occasionally, lawyers learn too late that they really don't want to represent certain clients. Unlike Johnny Paycheck's situation, if the case is in court, a lawyer's ability to fire himself is dependent on obtaining the judge's permission. Lawyers should review *Rule 4-1.16*, and its comments when they wonder whether their client has created a situation mandating withdrawal. Those situations include: when the representation will result in violation of the Rules of Professional Conduct or other law; the client has discharged the lawyer; or the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. *Rule 4-1.16(a)*. Permissive withdrawal, assuming court approval, is available under several other circumstances. See *Rules 4-1.16(b) and (c)*.

When lawyers do withdraw, they nevertheless have continuing obligations. Even if leaving "**is the best thing**" for the lawyer, he or she must make sure that it is not "**the worst thing that could happen**" to their clients, with appreciation to both Jimmy Webb and The Lettermen. *Rule 4-1.16(d)* explains: "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." The Supreme Court of Missouri has made it clear that the case files belong not to the lawyer, but to the client. *In re Cupples (I)*, 952 S.W. 2d 226 (Mo. banc 1997); see also Missouri Supreme Court Advisory Committee *Formal Opinion 115, as amended*.

## Take this Job and Shove It

When it is time for lawyers to leave their firms, they should skip this Johnny Paycheck song; instead, they should read the Supreme Court's decisions in two cases involving a lawyer who left two firms. *In re Cupples (I)*, 952 S.W.2d 226 (Mo. banc 1997); *In re Cupples (II)*, 979 S.W.2d 932 (Mo. banc 1998).

In the first *Cupples* decision, the Court held that the departing lawyer(s) and their firm owe duties to their clients. The firm and lawyer should give their clients opportunity to choose either or neither the departing lawyer and firm. The Court also noted that lawyers have duties to their firms, and may not simply take firm fees or cases without an effort to work out arrangements with their firms.

## Whiskey River

You may have a lawyer friend who seems to sing this Willie Nelson favorite a little too often. Or, unlike Hank

Williams, Jr., you may not want to be there when "**all [your] rowdy friends are coming over tonight**" again. Or, your friend, **Good Time Charlie, Got the Blues** (written by Danny O'Keefe; performed by Jerry Lee Lewis and others). In any of those situations, confidential help is available. Contact the Missouri Lawyers' Assistance Program to get help for you or your friends. 1-800-688-7859.

## Your Cheatin' Heart - Will Tell on You (Reprise)

Lawyers who cheat cannot simply worry about their own consciences. Even if their hearts don't tell, other lawyers – and judges – might have to. In some circumstances, *Rule 4-8.3* requires lawyers to report other lawyers' serious violations of Rule 4, including any violation the lawyer *knows* about "that raises a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer in other respects." Even if those standards are not met, lawyers, like anyone else, *may* report violations. Judges have similar reporting obligations under *Rule 2, Canon 3(D) (2)*.

## Here You Come Again

Dolly Parton probably wasn't thinking about the lawyer discipline system when she wrote this song. But, lawyers who have once received discipline should understand that sanctions are likely to increase with future violations. Courts often rely on the *ABA Standards for Imposing Lawyer Discipline*; those guidelines list prior and multiple offenses as aggravating circumstances. To help prevent further violations, the bar and the OCDC produce various re-training programs for frequent complaint recipients.

## Folsom Prison Blues

Unfortunately, each year a few lawyers are found guilty of felonies. Most are suspended or disbarred. See *Rule 4-8.4(b)* and *Rule 5.21*. (Any list of country classics should include something from Johnny Cash.)

## Turn Out the Lights/ Green, Green Grass of Home

“Turn out the lights, the party’s over, ...they say that all good things must end” (by Willie Nelson – and

often sung by Don Meredith on Monday Night Football.) A new *Comment to Rule 4-1.3* tells lawyers to consider preparing a “plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of death or disability and determine whether there is a need for immediate protective action.” Check out The Missouri Bar’s excellent online Law Practice Management Center for materials related to practice succession planning. By preparing for the inevitable, a lawyer will know that “they’ll all come to see me

in the shade of that old oak tree as they lay me ‘neath the green, green grass of home.” Thanks to songwriter Claude “Curly” Putnam, Jr., and singers Porter Wagoner and George Jones.



**Sam Phillips** is Deputy Chief Disciplinary Counsel at the Office of Chief Disciplinary Counsel.