

CORKED BATS, SPITBALLS AND EXCESSIVE PINE TAR

*(Ethical Issues
in Baseball
and the Law)*

By Sam Phillips



"Well, it's our game; that's the chief fact in connection with it; America's game; it has the snap, go and fling of the American atmosphere; it belongs as much to our institutions, fits into them as significantly as our Constitution's laws, is just as important in the sum total of our historic life."

~ Walt Whitman

Reasonable people preach that sport teaches valuable life lessons. Most agree that good health, teamwork, fairness, and learning to accept both victory and defeat with grace can be worthy by-products of youth sports. Those values apply on the golf course, where golfers call penalties against themselves, and even in baseball, where players who steal (the most bases) are enshrined in the Hall of Fame.

Baseball has a rich and colorful language, perhaps more than any other sport. Let's see where a few of those phrases lead in the world of legal ethics.

STEALING

In baseball, a base runner can steal a base by advancing from one base to the next, even if the batter doesn't put the ball in play. Lawyers, of course, may not steal. Rule 4-1.15 and 4-8.4(c). Moreover, lawyers may not even *borrow* from their clients – at least not without obtaining written informed consent. When engaging in any business transaction with a client, lawyers must make sure the terms are fair and must fully disclose the terms in writing in a manner that can be reasonably understood by the client. The lawyer must advise the client, in writing, that he or she should seek independent counsel and assure the client has a reasonable opportunity to accomplish that. Before borrowing from a client, or lending to a client, or participating in any other transaction, the lawyer must obtain informed consent, in writing, to all those essential terms (Rule 4-1.8(a)).

Stealing home, whether by a “suicide squeeze” or a “safety squeeze,” is a high risk/high reward play. In legal ethics, it is axiomatic that lawyers are likely to be called out (suspended or disbarred) if they steal a client's property. And, they are at risk of suspension if they take a client's property as security for a fee and fail to comply with the letter and spirit of Rule 4-1.8:

“At a minimum, when a lawyer accepts an interest in property other than cash in payment of a fee and after the transfer both the lawyer and the client hold a legal or equitable interest in the property, the transaction is subject to the heightened scrutiny and notice requirements of Rule 4–1.8(a).” *In re Snyder*, 35 S.W.3d 380, 383 (Mo. banc 2000).

CROOKED NUMBERS

Crooked numbers have nothing to do with politicians, gambling or the law. This baseball term simply refers to a team scoring more than one run in an inning. While crooked numbers are great for the team that scored, they

are not so great for the team in the field. Likewise, a lawyer with more than one client with conflicting interests appreciates both clients' business, but must consider Rule 4-1.7, the primary rule addressing conflicts of interest.

When representations of two clients are directly adverse, or when there is a significant risk that the representation of a client will be materially limited by the interests of the lawyer or another client, a conflict exists. Except when the lawyer cannot reasonably conclude that competent and diligent representation can be provided, and the representation is not prohibited by law, and does not involve a claim of one client against another in the same matter, written informed consent can often constitute a valid waiver (Rule 4-1.7).

Lawyers want to approach potential conflicts from an independent, unbiased perspective. Maybe they should ask a risk manager, who thinks a lot like a catcher. For example, like lawyers with their clients, pitchers occasionally get emotionally caught up in their battles with batters. A good catcher knows when and how to offer independent thought and insight into the pitcher's task. Lawyers can play that position for their clients, but not when the clients' interests conflict. In possible conflict situations, lawyers should get the advice of an independent risk manager. Those who insure lawyers are happy to help their insured avoid problems. And, the Legal Ethics Counsel offers free conflicts consultations. Defensive lawyering is akin to choosing the right pitch and proper positioning of fielders to increase the chances of getting outs; it takes a little effort, but reduces risks of disciplinary complaints, malpractice claims and unhappy clients.

In today's major leagues, baseball players are very well paid. For the most part, the incentives are obvious: better players are better paid. Unfortunately, a few players have been offered additional incentives to play poorly and lose games. That conflict of interest is obvious and direct; and, like direct conflicts between a lawyer and client or direct conflicts between two clients in the same case, even a waiver after informed consent does not provide justification, per Rule 4-1.7

In a 2010 Court of Appeals decision, a lawyer was stopped when he tried to represent both the victim and the defendant in a criminal assault case, *State ex rel. Wexler Horn, v. Ray*, 325 S.W.3d 500 (Mo. App. E.D. 2010). In that case, the lawyer argued that the victim waived any conflict; the trial court agreed, finding “that Missouri Supreme Court Rule 4–1.7 does not apply in this case because the victim is not a party to the litigation, and that the victim's engagement of counsel was voluntary.” *State ex rel Wexler Horn v. Ray*, 325 S.W.3d 503-504. But the

Eastern District overruled the trial court, holding that “The conflict is not merely between a defendant and a material witness as argued by counsel and as analyzed by the trial court. The conflict is between a defendant and his victim, who had accused the defendant of committing a violent crime against her.” *State ex rel Wexler Horn v. Ray*, 325 S.W.3d 504. The Court of Appeals explained: “Given the obvious difficulties with undivided loyalty to, and zealous advocacy for, both the defendant and the victim, counsel’s asserted belief that he can provide competent and diligent representation to both clients simultaneously in the same criminal proceeding against the defendant is patently unreasonable.” *State ex rel Wexler Horn v. Ray*, 325 S.W.3d 504.

TOOLS OF IGNORANCE

In baseball parlance, “tools of ignorance” describes catchers’ gear. The thought is that no intelligent player would want to wear an extra 10 pounds of gear and sit in a crouch all afternoon in August. The legal profession tries to avoid ignorance altogether. Veteran lawyers, much like veteran ballplayers expected to perform jumping jacks in spring training, are required to attend MCLE programs. Missouri Supreme Court Rule 15 mandates that lawyers earn 15 CLE credits each year. Within that obligatory annual 15 credits are two hours of MCLE in legal ethics, professionalism and law practice management.

*“The best degree a baseball manager can get is a J.D.” ... The law degree taught me how to study, how to think, and how to develop and implement a strategy.”²
Tony La Russa, lawyer and baseball manager*

Rule 4-1.1 (competence) requires that we stay up to date in our practice, just like ballplayers who take batting practice and study video of their opponents before games. Some commentators suggest that lawyers who don’t take advantage of electronic legal research or who don’t engage in electronic discovery techniques may be at risk of competence violations.

HUMAN RAIN DELAY

A “human rain delay” describes a pitcher who walks behind the mound after each pitch, talks to himself, then stretches for a while, steps off the mound before restarting the ritual, and then stares at the batter. Some use the same term to describe a batter who steps out of the batter’s box between each pitch, adjusts his helmet, loosens and re-fits his batting gloves, spits, steps back in with his hand up, while digging a new trench for his rear foot. Many of us spend too many hours on the Internet or find

other distractions that interfere with efficient practice. Fortunately, inefficiencies don’t automatically implicate the ethics rules. But clients get frustrated with delays. Procrastination and other diligence failures account for 40 percent of all disciplinary complaints. And, lawyers who charge clients by the hour, and charge for wasted time, aren’t complying with Rule 4-1.5; that rule requires reasonable fees.

BUSINESSPERSON’S SPECIAL

*“It’s a great day for a ball game. Let’s play two!”³
Ernie Banks*

Here’s how a “businessperson’s special” might be in play – in the field of legal ethics. That term describes a mid-week day game and explains why some law offices in baseball cities appear understaffed when the home team schedules one. On the one hand, lawyers under deadlines (what lawyer isn’t?) who choose to watch a baseball game instead of work may be at risk of violating Rule 4-1.1 (competence) by failing to prepare. Other possible violations include Rule 4-1.3 (diligence) and Rule 4-3.2 (expediting litigation). On the other hand, disciplinary case files are loaded with lawyers who are overworked, stressed out, and in need of diversion. It may be that both lawyers and clients are well served when lawyers enjoy an afternoon at the ballpark.

CUP OF COFFEE

In baseball, a “cup of coffee” refers to a player’s brief stay at a particular level in his career. For example, if a player was promoted to the big leagues but only stayed for a couple days before being demoted back to the minor leagues, his teammates might say that he stayed just long enough to have a cup of coffee. Even in today’s transient legal profession, most lawyers stay a few years at their firms. But we do have ethical responsibilities related to changing jobs. When firms break up, or when lawyers leave firms, the lawyers must notify their clients, and permit the clients to choose their lawyer. *In re Cupples (I)*, 952 S.W.2d 956 (Mo. banc 1997).

Lawyers who seek free agency or who are involved in a “double switch” should carefully review Rule 4-1.10. Updated conflicts checks by and for both the new lawyer and the lawyer’s new firm are essential. Actual and effective screens are often necessary to assure that a lawyer with a conflict or with confidential information has no participation with cases where the conflicts lie.

When a baseball player is traded from a rival team, his new manager probably hopes to learn weaknesses of his

new player's former teammates. Lawyers switching firms have to keep their former clients' secrets to themselves.

KICKING DIRT AND THROWING CAPS

"I've never questioned the integrity of an umpire. Their eyesight, yes."

Leo Durocher

Baseball managers are notorious for showing their frustration with umpires. They scream, kick dirt, throw caps, and gesticulate wildly. Most umpires, like most judges, show considerable restraint in the face of outbursts. But both umpires and judges have the final word and have several remedies when managers and lawyers use certain magic words. While managers may not always mind if they get thrown out of a game, no lawyer wants to be jailed for contempt of court. Lawyers should review Rule 4-8.2 – and its comments – to learn how much complaining is too much.

Ours is a profession and system with formal procedural opportunities to address perceived grievances. Lawyers who believe that a judge missed a call can file a motion and appeal. The Rules don't prohibit passion or persistence. But Rule 4-8.2, in protecting the integrity of the legal system, prohibits lawyers from making statements known to be false, or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge. Likewise, Rule 4-3.5 requires a more civil process than is often seen on baseball fields. Lawyers who engage in conduct intended to disrupt judicial proceedings are subject to discipline in a manner similar to baseball managers who say certain magic words.

Screaming, "Can you in the name of Jesus be fair?" while "dancing and prancing" may or may not get a baseball manager thrown out of a game. In court, that particular language and behavior (and more) led to a lawyer being cited for contempt and disciplined for a violation of Rule 4-3.5 (disruption of a tribunal) (*In re Coe*, 903 S.W.2d 916 (Mo. banc 1995)).

Another lawyer's repeated personal attacks in letters and verbal abuse in the courtroom led to discipline in 2009. Among other colorful language, the lawyer wrote or said: "you were not faithful to the law" and "in your ruthless abuse of power and contempt of the rule of law, you silenced me and ordered me out of the courtroom;" and "Apparently, you think that you are the most important person in this process and are beyond such apology and explanation." The Supreme Court explained why that lawyer should be disciplined: "... [his] allegations against both judges were completely without factual basis and were

made in the heat of anger and pique. ... The conduct falls far below the standard of 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances'" (*In re Madison*, 282 S.W.3d 350,358 (Mo. banc 2009), citing *In Re Westfall* 808 S.W. 2d at 837).

SACRIFICES AND ASSISTS

Ballplayers aren't expected to be perfect; Ted Williams, one of the best hitters ever to play, said: "Baseball is the only field of endeavor where a man can succeed three times out of ten and be considered a good performer." After they fail, players often ask the next batter to "pick me up." And, batters occasionally "sacrifice," giving up an out in order to advance a teammate to the next base or to home for a run. Defensive players are awarded an "assist" when they field a hit ball and throw it to another fielder – who actually gets credit for the out. The Rules of Professional Conduct encourage lawyers to sacrifice time and skills to assist and "pick up" others in need: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." Comment 3 to Missouri Supreme Court Rule 4-6.1.

Perhaps any sport could be a metaphor for life. This short trip around the base path was offered simply as a fun way to think about a few legal ethics topics.

*"It ain't over 'til it's over."*⁴

Yogi Berra

It's over.

ENDNOTES

1 COVERING THE BASES: QUOTATIONS ON BASEBALL (Paul Gangi ed. 2003).

2 THE QUAD, Southern Methodist University (Fall 2008).

3 COVERING THE BASES: QUOTATIONS ON BASEBALL (Paul Gangi ed. 2003).

4 *Id.*



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