

Chapter 4 – Legal Ethics

Yes. You read that right – legal ethics. Har de har. Go ahead. Get it out of your system. How about this one? Why do scientists prefer using lawyers over lab rats? There are some things lab rats just won't do. Are we done?

Yes, I know you think lawyers don't have ethics. But ethical gaffes in shows and novels about lawyers just make me steam. My favorite TV groaner is the one where the lawyer switched sides in the middle of the case. What the writer of that episode didn't show was the disbarment proceeding that would have taken place right afterward.

I'm going to talk here about some of the things you may not know about lawyers' ethical rules and how they may affect your stories.

Conflict of Interest

I didn't think it needed to be said until I saw it on a TV show. I'll say it again here. The lawyer can't switch sides in the middle of the case. It can never happen. The lawyer cannot handle a case against the interest of a current client. The lawyer cannot handle a case against the interest of a former client regarding the matter they handled for the former client. The lawyer's firm cannot handle one side of the case with the lawyer handling the other.

So, let's say your character is a homeowner whose house is sitting on a toxic waste dump. He goes to his deposition and decides that he likes the other side's lawyer better than his own. No matter how much he begs, no matter how much he offers to pay, your lawyer character can't take the case and represent someone on the other side of his existing client even if he withdraws. Your lawyer character can't even talk to this person without their lawyer present.

Let's say your character, Ida Mae, had her will done by a lawyer, then files a suit against Jones Company, can the lawyer who did Ida Mae's will represent Jones Company against her? Yes, unless the lawyer is still representing Ida Mae on something like a re-draft of the will. See the difference? Current client, never, ever. Former client, only if they are truly former.

How about if your character's title to real estate is at issue? Can the lawyer who prepared the title policy represent someone who claims the title is bad? No, even if the client is a former client, because the dispute is regarding something the lawyer handled.

What if the client consents? Well, then the lawyer character could represent somebody against the client's interests, but only if it didn't require them to reveal something against the former client's interest that was said in confidence. For instance, say your lawyer character represented two clients who worked for the same company and are claiming discrimination. Suddenly, they end up having to testify against each other because one knows the other punched the boss, giving the company cause to fire. Sometimes they will both agree to allow the lawyer to represent one of them. But if the lawyer knows something about the former client they wouldn't know if they hadn't represented them, they can't use that information against the former client. If the boss is in a coma after the punch you may have to write it differently than if the boss is able to testify.

Scope of representation

Can your character's lawyer do something the character specifically told them not to? No, no, no. Can they accept a settlement without getting the client to agree? No, absolutely not. So if the lawyer does this in your story, you'd better show them running from the Bar.

If the client tells the lawyer to lie for them or to help them commit a crime can the lawyer do it? No. Not without ending up in jail or disbarred.

Does the lawyer have to believe the client is a good person, believe in the client's religious, political or personal views, or think the client is moral? Heck no.

Fraud on the court

If the client tells your lawyer character they intend to lie on the stand, can the lawyer allow them to testify? No. If the client testifies falsely and the lawyer finds out later do they have to tell the judge? Yes.

If the lawyer in your story knows there's a case that would mean they'd lose their motion, can they fail to disclose it and hope nobody finds it in time? No.

Meeting with the judge or the opposing party

Is your lawyer character allowed to take the judge aside and tell her things about the case without the other side being present? No. Can the lawyer for the plaintiff meet with the defendant without the defense lawyer present? No. Neither side can meet with the judge or any represented party without the other side present.

What about key witnesses? If the disgruntled president of the company your lawyer character is suing calls the lawyer up and offers to provide secret evidence and to give a statement, should your character jump on it? No. Any officer or manager of the company is considered an agent with authority to bind the company. What does that mean? For all intents and purposes, somebody high up IS the company. If the company is represented, the lawyer can't meet with that person.

If the janitor comes to the lawyer and offers to testify against his employer, can the lawyer take his statement? Absolutely. Anyone lower to mid-level in the company can meet with either lawyer if they want. The company can force its employees to meet with the company lawyer, but meeting with the other side is either voluntary or done in a deposition with both sides present.

What if the former president offers to testify? It's a stickier situation. Most lawyers would call the former president for a deposition unless that former president is represented by other counsel. For instance, if your lawyer character gets that call, but the president volunteering to talk has their own lawsuit against the company, then the lawyer still can't speak to the president. What they have to do is get permission from the president's current attorney, or speak with the president in the presence of their attorney. Confused? Heck, ethics is a whole class in law school, so don't feel bad.

In fact, your lawyer character could be confused about their ethical requirements. They could hire another attorney to give them advice or get an opinion from their Bar Association before they decide what to do. Or they could guess, get it wrong, and end up in hot water.

Confidentiality

The lawyer has to keep all client communications confidential. Surely you knew that from watching TV court shows. But did you know there are times the lawyer can tell or even has to tell something the client told them not to disclose?

If the client character tells the lawyer they are about to commit a crime, the lawyer has to report the client. Same with bodily harm – if the client says they are going to beat somebody up or kill them, the lawyer has to go to the police. If the lawyer knows the client is a child abuser, they can't allow the child to be in danger and have to go to the appropriate agency.

Say your client character is suing the lawyer for malpractice. Can the lawyer tell the court about the client's confidences? Heck yes. The lawyer is allowed to defend themselves, and confidentiality is out the window.

Ending representation

If the client character fires the lawyer, can the lawyer still handle the case because they want to help? No. That is, unless the judge orders them to stay in. The judge can refuse to allow a lawyer to withdraw from the case in some circumstances, such as the middle of a trial.

If the lawyer character knows the mob boss client is using the lawyer to commit a crime, can the lawyer continue representing your mob boss? No.

If the lawyer is a drug addict and isn't in denial about it, or has gone off her manic depression meds and can't properly represent the client, can she continue representing your character? No.

If the client is a criminal but the lawyer's representation doesn't help them commit the crime, can the lawyer continue to represent your client character in a civil case? Yes, but they are also allowed to withdraw.

If the client insists on doing something stupid or unethical, can your lawyer client stay in the case? Yes, but they can also get out at that point.

If the client stops paying, is the lawyer stuck in the case? No, unless the judge says otherwise. They can withdraw with the judge's permission if a lawsuit is going on.

If the client refuses to obey a court order or provide information the lawyer needs, can the lawyer withdraw? Yes. They don't have to, but that is something that allows them to get out.

If the judge orders your lawyer character to stay on the case even though the corporate president client has threatened to kill the judge, refuses to pay the lawyer, and has fired the lawyer, does the lawyer get to withdraw? No. The lawyer has to obey all court orders. The lawyer can and should appeal such an order though.

Dealing with the other side

Can your lawyer character burn evidence they know goes against their client's case? No.

Can your lawyer character lie to the other side? No.

Can your lawyer character pay a witness to testify? No. The witness fee allowed is usually something from under ten dollars to around forty dollars. The only witnesses that can be paid are expert witnesses.

Can your lawyer character threaten to notify the police about a crime if the other side doesn't settle quickly? No. And that's extortion, so they'll go to jail for it.

Can the lawyer character threaten to report the other side to the Bar unless they settle? No. Still extortion.

Lawyer as witness

You think it would be fun to have a key witness in your story also be the lawyer. Can you have the lawyer walk from counsel table to the witness stand and call himself to testify? Well, maybe. I've actually seen it done. It was absolutely not a good idea because the lawyer's testimony ended up hurting his client. The only times it really happens is if the lawyer has won the case and is testifying about their own fees to get the court to make the other side pay the fees.

When else can it happen? It's allowed if the testimony isn't adverse to the client, and if the matter is supposed to be a formality or uncontested. Say the lawyer is the only person who can authenticate a particular piece of evidence, that is, say that the evidence is the real thing. The lawyer is probably allowed to testify. But things can go so wrong so fast if the lawyer is on the stand in their client's case.

Would it be fun to have your lawyer character testify, then have the other side turn it around to work it against the client? What if the lawyer testifies that the client did something based on their advice. Could the plaintiff's attorney get them to admit they would never have advised the course of action the client actually took?

Malpractice

Here's where the doctors have it good. If a lawyer realizes they did something wrong in a case, missed a deadline or failed to raise an issue they should have, can they sit back and hope nobody finds out? Nope. They have to tell the client. Do you think doctors have to disclose to patients that they sewed the sponge in during surgery? No, they don't. So your young lawyer could have to tell the elderly character they missed the deadline to file the lawsuit to get back the money the nursing home bilked from them. Does she do it, or does she move to Wisconsin and become a waitress?

Consequences

Now, of course, I've said lawyers can't do these things, but we all know they can. They aren't supposed to, but even lawyers break the rules. What happens if a lawyer is caught breaking an ethical rule? One of three things usually happens.

- **Disbarment** - where the lawyer loses their license to practice law. Sometimes a lawyer admitted in two states can continue practicing in the second state (but they have to tell the other state about the disbarment). So maybe the incompetent lawyer moves to New York after getting disbarred in California, leaving your bilked character frustrated with the system.
- **Suspension** - where the lawyer has to stop practicing law for a set period of time. It could be a week or a year. The Bar Association has lots of discretion in setting the penalty. Many times the lawyer will accept a suspension with the agreement they won't be disbarred. Is your character so angry when her crooked lawyer gets to come back to practice law and steal from another client that she takes matters into her own hands?
- **Reprimand** - where the Bar tells the lawyer not to do it again. A public reprimand is published in the papers, done in court or a public ceremony, and the other lawyers get to kick sand in the reprimanded attorney's face. Well, I made up the last part, but a public reprimand isn't a picnic. A private reprimand means the lawyer is told quietly not to do

it again, and they get to avoid the public humiliation.

So, if your characters do something that you know they aren't allowed to do, are you going to tell and show the reader the possible consequences, or do you hope the reader doesn't notice the inconsistencies? The show that had the lawyer switch sides mid-case lost me as a viewer forever. Considering how many lawyers there are, do you really want to take that risk with your writing?