

ETHICAL ISSUES IN REMOVAL AND REMAND

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**HANDLING YOUR FIRST (OR NEXT)
REMOVAL OR REMAND**
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CHAPTER 5



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Mr. Smith served on the Board of Directors of the State Bar of Texas from 2005-08, representing 24 counties in northeast Texas, where he was recognized as *Outstanding Third Year Director*. He has chaired the editorial board for the *Texas Bar Journal*, and the Litigation Section of the State Bar of Texas, and currently serves on the IP Law Section's governing council. In 2016 he was selected him as one of two nominees for President-elect of the State Bar. Mr. Smith is a past president of the Eastern District of Texas Bar Association, East Texas Trial Lawyers Association, and the Harrison County Bar Association, and is a charter member of the T. John Ward American Inn of Court, and an Associate of the American Board of Trial Advocates, where he has served as president for the East Texas ABOTA chapter. He is also a Life Fellow of the ABOTA Foundation, and a Sustaining Life Fellow of the Texas Bar Foundation. He has been selected for inclusion in each of the *Texas Super Lawyers* lists since 2008, and is a recipient of the Texas Access to Justice Foundation's *Cy Pres: Impact on Justice* award, TexasBarCLE's *Standing Ovation* award, and the *Sam B. Hall, Jr. Civic Service* award from East Texas Baptist University. In 2012, *Texas Lawyer* named him one of four *Top Notch* lawyers in Texas in the field of intellectual property.

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ETHICAL ISSUES IN REMOVAL AND REMAND

I. INTRODUCTION

Removal and remand is an area of federal court practice which is full of checklists and requirements, both procedural and substantive. But in addition to ensuring that the right boxes are checked, lawyers should also be cognizant of the potential ethical issues involved in the removal and remand process.

This article will review some of the applicable ethical rules and explain how they can be triggered, sometimes inadvertently, during the process of advocating for or against removal or remand.

II. APPLICABLE ETHICAL RULES

There are several ethical rules that can come into play in the removal and remand context. The following excerpts the relevant language from the rules and accompanying comments.

A. Scope and Objectives of Representation – TDR 1.02

In relevant part, TDR 1.02(a)(1) provides that, subject to certain exceptions, a lawyer must abide by a client's decisions concerning the objectives and general methods of representation. According to the comment to the rule, the lawyer should assume responsibility for the means by which the client's objectives are best achieved, and has “very broad discretion” to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

B. Fees – TDR 1.04

A lawyer is prohibited from entering into an arrangement for, charging, or collecting an illegal fee or unconscionable fee. Comment 6 to TDR 1.04 states that a lawyer should not handle a matter so as to further the lawyer's financial interests to the detriment of the client. “For example,” it states, “a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.”

C. Meritorious Claims and Contentions – TDR 3.01

TDR 3.01 states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

The comment to the rule makes clear that an advocate has a duty to use legal procedure for the fullest benefit of the client's cause, “but also a duty not to abuse legal procedure.” The law, both procedural and substantive, as well as the TDRs themselves, affects the limits within which an advocate may proceed. *See* TDR's 3.02-3.06, 4.01-4.04, and 8.04. But it also notes that “the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.”

The ethical obligation starts with the requirement that the attorney cannot file frivolous or knowingly false pleadings, motions or other papers with the court. Nor can they assert in an adjudicatory proceeding a knowingly false claim or defense. The comment states that “a filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. It also is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.”

A filing or contention is frivolous if it contains knowingly false statements of fact. But it is not frivolous merely because the facts have not been first substantiated fully or because the lawyer expects to develop crucial evidence only by discovery. Nor is it frivolous simply because the lawyer believes that the client's position ultimately may not prevail.

It is important to remember that the Disciplinary Rules are not the only standard for a lawyer's conduct, however. For example, the comment explains that duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in TDR 3.01.

Additionally, local rules or orders may impose additional requirements. In many instances these take the form of limiting advocacy via page or word limits on briefing. Advocacy must therefore comply with the rules within these limits.

D. Minimizing The Burdens And Delays Of Litigation – TDR 3.02

TDR 3.02 requires that “[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.”

This rule addresses those situations where a lawyer or the lawyer's client perceive that the client's interests will be served by conduct that delays resolution of the matter or that increases the costs or other burdens of a case. Because

such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are unreasonable are prohibited.

The comment states “[a] lawyer's obligations under this Rule are substantially fulfilled by complying with Rules 3.01, 3.03, and 3.04 as supplemented by applicable rules of practice or procedure.” Thus, so as long as the contention is meritorious, and the rules requiring candor toward the tribunal and fairness in adjudicatory proceedings are complied with, this rule should not come into play. When it does, however, it does so in two principal ways.

1. Unreasonable Delay

The comment notes that dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be unreasonable within the meaning of this Rule. This Rule, however, does not require a lawyer to eliminate all conflicts between the demands placed on the lawyer's time by different clients and proceedings. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations.

On the other hand, a client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action. *See also* Rule 3.01. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or maliciously injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

2. Unreasonable Costs and Other Burdens of Litigation

Like delay, increases in the costs or other burdens of litigation may be viewed as serving a wide range of interests of the client. Many of these interests are entirely legitimate. Litigation by its very nature often is costly and burdensome, and this rule does not subject a lawyer to discipline for taking any actions not otherwise prohibited in order to fully and effectively protect the legitimate interests of a client that are at stake in litigation.

But not all conduct that increases the costs or other burdens of litigation can be justified in this manner. One example of such impermissible conduct, the comment notes, “is a lawyer who counsels or assists a client in seeking a multiplication of the costs or other burdens of litigation as the primary purpose, because the client perceives himself as more readily able to bear those burdens than is the opponent, and so hopes to gain an advantage in resolving the matter unrelated to the merits of the client's position.”

III. ETHICAL ISSUES IN REMOVAL & REMAND

With the above four ethical rules in mind, let's examine the process of removal and remand.

A. **Removal**

Removal is a tactical decision for a defendant. By removing a case to federal court a defendant may obtain several benefits, including avoiding local prejudice, obtaining a different judge, a delay of the trial setting, favorable procedural rules and numerous perceived other benefits. But since a defendant has a right to remove the case if the statutory requirements are met, the fact that doing so might delay the case or multiply the cost and complexity of the procedures will not violate ethical considerations

Thus in comparison to other contexts, i.e. discovery, where ethical considerations come into play, the question for removal is not whether proceeding in federal court is unnecessary or inconvenient, but simply whether the statutory requirements for removal are present, i.e. has the requirement of TDR 3.01 that counsel not be making a frivolous assertion of removal jurisdiction been met?

The ethical risk here can take several forms. First, is counsel correctly asserting the citizenship and other relevant facts to the court? Second, are the relevant time frames being complied with, and are the admittedly arcane requirements for removal complied with? But TDR 3.02 is generally not in play here.

B. **Remand**

Whereas removal only involves conduct by the defendant, the decision of whether to seek or oppose remand involves both parties.

1. Plaintiff

When a plaintiff receives a defendant's notice of removal, the first question is whether remand is available. But this does not exhaust the opportunities for ethical mischief, since the next step is whether a plaintiff wants to defeat removal by seeking leave to amend to destroy diversity. Again, while the ethical requirements of TDR 3.01 must be complied with, there may be some leeway in determining whether an argument to seek remand would be permissible,

in spite of the fact that the decision to modify the environment of the suit may increase or decrease complexity and delay.

But in most cases, the most likely ethical issue presented here is simply ensuring that any arguments made are good faith argument under the existing case law. Often that will mean negotiating sometimes conflicting case law regarding whether there is a possibility of establishing a cause of action against the nondiverse party the plaintiff is seeking to join.

2. Defendant

While the defendant did not need to worry about ethical considerations in whether to remove in the first place, since removal was available as of right, the question of whether to oppose a request for leave to remand the case to state court does trigger the more discretionary argument of whether to argue that the court should deny leave either because the plaintiff has no possibility of establishing a cause of action against the nondiverse party, or because the defendant believes that the plaintiff has fraudulently pleaded jurisdictional facts. Again, the request must comply with TDR 3.01, but in the ordinary case, TDR 3.02 should not come up.

IV. CONCLUSION

Although removal and remand present primarily issues of procedure, there are ethical issues intertwined with the decisions to be made.