

# TIME FOR A REFRESH

Proper ethics are paramount during trial work

By **BOB CLIFFORD**

In March, a jury in Tallahassee, Florida, determined 3M fraudulently and negligently misrepresented information about its earplugs and found that it was responsible for the hearing loss of a U.S. Army National Guardsman.

The court held in the bellwether case of *Wilkerson v. 3M, et. al.*, 7:20-cv-00035, U.S. Dist. Ct. N.D. Fl. that 3M's motion for a new trial was predicated on an objection that should have been presented during trial. "The court and the parties spent an extraordinary amount of time finalizing the jury instructions and verdict form," U.S. District Court Judge M. Casey Rodgers ruled. "There were multiple drafts, multiple briefs on specific objections, documents memorializing preserved objections, two separate orders on the parties' objections and an extensive charge conference that went well into the night ... the defendants failed to raise this issue before the jury was dismissed, and thus they cannot raise it now."

The multidistrict litigation was created in April 2019. It includes cases brought by hundreds of thousands of military veterans and service members. The cases allege 3M and its subsidiary, Aearo Technologies LLC, supplied defective CAEv2 earplugs to the military. Was the defendant's trial strategy here intentional?

Just like Tallahassee, Chicago and the country struggle to get back to pre-pandemic trial levels. It is an appropriate time for lawyers to review some of the Rules of Professional Conduct as they move to in-person trials.

## PROPER CONDUCT

Too often during Zoom proceedings, stories of lawyers' inappropriate decorum have been reported – from lawyers clandestinely coaching witnesses to one Michigan attorney angrily displaying the middle finger and being sanctioned \$3,000 by an appellate court.

It boils down to every client being accorded due process with lawyers maintaining ethics and professionalism in the courtroom. If not, misconduct can lead to a malpractice claim.

Discovery practice can lead to some serious

sanctions. One example of a sanctionable offense is document dumping. When an influx of documents is available, some parties have submitted more documents than necessary in an attempt to bury critical or pertinent information. Courts don't look favorably upon this practice. For example, a New York court fined a law firm \$10,000 for responsive documents being "imbedded in large amounts of otherwise irrelevant documents." The court ordered the plaintiff to put the documents in an electronically searchable format and to organize them in the order requested by the defendants.

The Illinois Rules of Professional Conduct include a level of competence in electronic technology. "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ..." (Rule 1.1, Comment 8).

Spoilation of evidence can spark a malpractice claim. U.S. District Court Judge Edgardo Ramos allowed breach of contract and malpractice claims against a law firm accused by its former client of failing to adequately advise them against destroying evidence. There, the client had no preservation policy in place, relevant documents were discarded and relevant files were reused as scrap paper in an effort to support recycling. The plaintiff entered into a \$2.5 million settlement in the underlying lawsuit, then sued its attorneys for malpractice, alleging the firm failed to issue a litigation hold and failed to properly oversee the company's compliance with its discovery obligations. The court held the responsibility to preserve evidence "runs first to counsel." In denying the law firm's motion for summary judgment, the court held the failure to do so "falls below the ordinary and reasonable skill possessed by members of the legal bar."

## LEARN MORE

Clifford Law Offices will host a free two-hour ethics program to help Illinois attorneys get back in the saddle as courtrooms re-open. "Refresher on Ethics of Trial Work in a



Courtroom" is scheduled to take place from 2:30 to 4:30 p.m. Thursday, Feb. 16 (register at [www.cliffordlaw.com](http://www.cliffordlaw.com)).

The panel, which I will be moderating, will discuss hypotheticals that impact lawyers in the courtroom. It will feature James Grogan, adjunct ethics professor at Loyola University College of Law and former ARDC deputy administrator and chief counsel; Christopher Heredia, CNA risk control consulting director and former ARDC litigation counsel; and 7th Judicial Circuit Court Judge April G. Troemper, who is a member of the Illinois Judicial Ethics Committee.

From discovery issues to closing arguments, hypotheticals will be presented at various pre-trial, trial and post-trial stages with attendees answering polling questions on best practices. As of Jan. 1, the Illinois Supreme Court enacted an updated Illinois Code of Judicial Conduct for the first time in almost two decades. The code is currently in line with national standards, having addressed the use of social media and other technology that didn't exist when it was last majorly updated in 1993. How some of these rules fit with trial lawyers in a courtroom will be discussed.

It's time to pause and decide if you need to brush up on trial skills. The COVID-19 pandemic took its toll on many people in different ways. It's important that clients don't also witness its effects after waiting for an in-person trial. [CL](#)

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