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# 3 Ethical Traps For 'Gladiator' Litigators

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Olivia Pope, the D.C. lawyer at the heart of the television drama Scandal, calls herself and her team "gladiators" — actually, "gladiators in suits." By that, she means that she is willing to fight for her clients like a gladiator thrown into the arena. Pope even applies the lessons learned from gladiators: "Gladiators don't run" and "Gladiators don't have feelings." While litigation may sometimes feel like gladiatorial battle, there are important differences.

Armed with evidence, argument, legal precedent and rhetoric, litigators like gladiators are ready at a moment's notice to enter the arena of the courtroom and fight for their clients. But gladiators fight to the death and fight for sport, which is not the case with litigation, where practitioners are guided by rules of professional conduct and by the law. So although it may be good for television drama to call oneself a gladiator, thinking like a gladiator can get litigators into trouble. The gladiatorial perspective — the adrenaline of combat — can run afoul of the myriad rules of ethics and conduct that govern litigators. Below are the top three ethical mistakes litigators can make if they take the role of gladiator engaged in a death match too much to heart.

**1) Failing to Recognize Conflicts of Interest**

Gladiators must be loyal. Lawyers also must be loyal to their clients. Even a cursory read of Law360, or any other publication that gathers cases involving ethical issues, shows that motions to disqualify counsel are on the rise, and nearly all such motions stem from conflicts of interest. Motions to disqualify are expensive propositions for clients. No client wants to hire a lawyer, get them geared up for litigation, and then face losing their chosen champion. As a result, all litigators must keep in mind the rules governing conflicts of interest.

Most jurisdictions have adopted some version of the ABA Model Rules of Professional Conduct. Under those rules, lawyers are prohibited from the concurrent representation of clients in direct adversity. The principal policy reason to prohibit a law firm from simultaneously representing two adverse clients, even on unrelated matters, stems from the duty of loyalty. A lawyer must be loyal to his or her client — like a gladiator, he or she cannot serve two masters at once. While no litigator would think he or she could wage legal war on both sides of a case, most conflict problems arise because another lawyer in the firm — maybe even in another office of the firm — represents a client to which the litigator wants to be adverse. Under the rules, it does not matter if the representation of Client A is unrelated to the litigation that the litigator wants to bring against Client A on behalf of Client B. Client A is entitled to expect that none of the gladiators at their chosen law firm will sue it. To proceed, then, the litigator must obtain the consent of both Client A and Client B. What if Client A will not consent, but the litigation is cutting-edge and potentially lucrative for the litigator? Too bad. That arena is closed to that gladiator. And the firm cannot pave the way for the litigator by firing Client A. The so-called "hot potato rule" — in effect in most jurisdictions — prevents the law firm from simply firing Client A to represent Client B.

Lawyers, like gladiators, relish a good contest. But the enthusiasm for the next big, exciting, lucrative piece of litigation cannot overshadow the need to check and recheck for conflicts of interest.

**2) Overzealous Discovery**

A gladiator's arsenal consists of shield and sword, knife and lance. A litigator's arsenal starts with his/her discovery, investigatory and subpoena powers. While a gladiator can thrust and strike at will, lawyers must take care when using their weapons to insure they comply with two crucial ethical rules — truthfulness to third parties, and not using illegal or unfair tactics to obtain evidence. For example, litigators often want to interview nonparty witnesses and almost always want to interview former employees of a represented company, particularly in employment discrimination or similar cases.

Although many jurisdictions permit lawyers to talk to those potentially disgruntled ex-employees, whom the lawyer certainly hopes has an axe to grind and useful evidence to share, lawyers must be "assiduous in meeting [their] ethical and professional standards." The lawyer cannot mislead the employee about the purpose of the interview, or who the lawyer represents. Thus, it would be unethical to pretend to be interviewing a former employee for a job, when the lawyer was actually interviewing the employee to get evidence to use in the lawsuit against the employee's former company. The lawyer also must avoid asking questions to get information that is forbidden — for example attorney-client privileged information, or confidential information such as trade secrets. Though gathering information can be crucial to a litigator, it must be done fairly and truthfully.

**3) Lack of Candor to the Tribunal**

Once in the arena, according to National Geographic, "although their final outcomes may have been brutal, ancient Roman gladiators fought like gentlemen ... Forensic analysis of remains from a gladiator cemetery in Turkey indicates that gladiators followed a strict set of rules, never letting the fight descend into the type of mutilation common on battlefields of the day."[i] Litigators similarly must follow a strict set of rules in the arena of the courtroom, such as rising to object to a question or piece of evidence, or asking permission to approach a witness, to name just two of many. One strict rule — candor to the tribunal — is actually at the heart of fair litigation. It is a litigator's foundational ethical rule.

Most jurisdictions have a version of Rule 3.3 of the Model Rules of Professional Conduct. It provides that a lawyer may not knowingly: "(1) make a false statement of fact or law to a tribunal or fail to correct a

false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false." That rule also requires the lawyer to fix what is broken, namely, to take reasonable remedial measures if he or she learns that a client or witness has offered materially false evidence.

Candor is a foundational ethical rule for litigators because the American justice system is adversarial. Neither judges nor jurors investigate cases. Neither tramps around in the fields searching for clues, conducts witness interviews, or reviews documents for misleading financial disclosures. Rather, in an adversarial system, two competing lawyers present their arguments and their evidence, which they have gathered and prepared in their zealous, (but not overzealous), representation of their clients to the best of their respective abilities guided by the rules of evidence and procedure. The idea is that a neutral decision-maker, judge or jury, should then be able to find the truth with a capital T or discern justice with a capital J. To do that, courts must be able to rely on the truthfulness of attorneys. The obligation of truthfulness insures that there is no taint, no dishonesty, and no lie to mar the decision-making process.

What does the obligation of candor mean in practice? It means a lawyer must be truthful when answering questions from the court. It means a lawyer cannot bury or fail to disclose legal precedent that goes against his or her argument and hope the judge won't find it. It means that, when discussing precedent or the evidence, a lawyer cannot puff, or exaggerate. Those may be easy rules to follow in the abstract, but hard to remember in the heat of legal combat. When passing through the bar to argue in the legal arena of the courtroom, the truth must govern.

A good litigator thrives on the challenges and thrill of advocacy, and clients deserve the zealous dedication and focus of a gladiator. But a litigator cannot let the buzz of legal combat override any of the ethical rules. Gladiators fought in the Colosseum for public entertainment. Lawyers doing legal combat in the courtroom help ensure fairness, and ultimately justice — for the public good and in the public interest.

—By Debra Squires-Lee and Christopher R. Blazejewski, Sherin and Lodgen LLP

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[i] http://news.nationalgeographic.com/news/2006/03/0303_060303_gladiators.html