



**Julia
Roberts
is
Erin
Brockovich**

A Presentation
for C.L.E. by:

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Professional
Responsibility

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The Story

After sustaining a neck injury in a car accident, Erin Brockovich retains attorney Ed Masry to represent her in a personal injury suit. Unsuccessful in her claim, Brockovich, a feisty, unkempt, and single mother desperate for cash, forces her way into a job at Masry's law firm. While working at the firm, she comes across a *pro bono* case concerning Pacific Gas and Electric's (PG&E) purchase of Donna Jensen's property in Hinkley, California. Confused by the fact that medical records were involved in the transaction, Erin decides to investigate further. After meeting the ailing Donna Jensen and other citizens of Hinkley and learning of the many medical problems they hold in common, Brockovich realizes PG&E's operations were the likely cause.

The Story (Cont'd)

PG&E had for many years been dumping toxic hexavalent chromium into unlined holding pools allowing it to seep into Hinkley's groundwater.

Brockovich shares her findings with her boss, Ed Masry, who is reluctant to take on a corporation worth \$28 billion. However, as a champion for the lives at stake, Erin convinces him to keep the case, invest his fortune, and demand PG&E compensate the Hinkley citizens for their health injuries. With the help of attorney Kurt Potter, Masry files suit, survives PG&E's summary judgment motion, and through binding arbitration recovers \$333 million for the affected Hinkley citizens.

The Big Issues

Can lawyers utilize non-lawyers in their practice?

What should be the extent of their involvement?

Who is responsible?



The following presentation explores the issues faced by a lawyer who employs highly involved non-lawyers in his or her law practice. Several clips from the Academy Award-winning *Erin Brockovich* have been included in order to shed light on the nature and function of professional ethics of lawyers in Arkansas.

**Clip #1: Ed Gives
Erin "the nod" to
Investigate**



Clip #1: Ed Gives Erin
“the nod” to Investigate

Potential for Problems

When a lawyer gives to a non-lawyer the right to work on one of his cases, there arises the possibility of ethical problems. Not only does the lawyer open himself up to a greater likelihood for error, but he also potentially allows himself to be subjected to professional conduct violations through the acts of his employees. In *Erin Brockovich*, several "problems" arise:

The "Problem" Areas

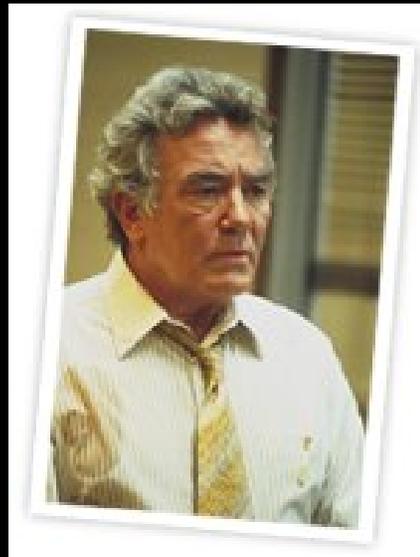
1. Proscribed Communication

2. Solicitation

3. Unauthorized Practice of Law

*Although not an exhaustive list, these problem areas are explored in this presentation.

Thus, when deciding whether to make such a decision, the lawyer should be aware of several factors:



The Factors

1. The Arkansas Rules of Professional Conduct, Rules 5.3 and 8.4.
2. Does the non-lawyer have lawyer experience, and are they competent to handle the ethical challenges posed to lawyers by the legal profession?
3. What professional risks are posed to the lawyer's practice and to the clients involved?
4. What are the benefits?
5. Is the lawyer making a reasoned decision?

1. The Rules

The Arkansas Rules of Professional Conduct incorporate a reasonableness standard for determining the responsibility of lawyers for the actions of their non-lawyer employees. Thus, the rule does not answer the question in an absolute manner, and each situation must be judged by the reasonableness of the lawyer's actions.

2. Competence

In determining the level of access his non-lawyer employee should have in a given case, the lawyer should put himself in the place of the employee and determine whether the employee's actions would be ethical if performed by the lawyer himself. Thus, since the lawyer's reputation is on the line, he should make certain that his non-lawyer employee is competent and sufficiently prepared to execute the duties delegated to him or her. Employees should be adequately trained to ensure compliance with the Arkansas Rules of Professional Conduct.

3. Risks Involved

By giving over authority and responsibility for the case to a non-lawyer, the lawyer opens himself up to professional conduct violations, ineffective assistance of counsel (i.e. malpractice), and a greater possibility of mistakes.

4. Benefits

Under Rule 5.3, a lawyer may take into account the totality of the circumstances in determining whether it is reasonable to assign legal tasks to non-lawyers. On balance, the lawyer must make a reasonable decision or be subject to discipline.

4. Benefits (Cont'd)

- **Efficient allocation of scarce attorney resources**
- **Non-lawyer investigators may be received more openly by laypersons**
- **Harms that would go unredressed may be rectified through effective involvement of non-lawyer support staff.**

5. Reasoned Decision?

Note how Ed Masry was not paying attention to Erin when she asked if she could investigate the Hinkley case. Did he really assent? Perhaps under such circumstances it would be unreasonable to expect that his non-lawyer employee would drive 120 miles from Los Angeles to Hinkley to interview clients.

Contrast this situation with the following clip:

**Clip #2: Ed Gives
Erin the Go-Ahead
to Investigate**



Clip #2: Ed Gives Erin the
Go-Ahead to Investigate

Applying the Factors

The following four film clips from *Erin Brockovich* involve scenes that may put Ed Masry in violation of the Arkansas Rules of Professional Conduct. The propriety of each action under the rule would depend on whether a reasonable lawyer in Masry's shoes would have acted with more caution.

Proscribed Communications

Clip #3: Erin is
Introduced to PG&E
Employee Nelson
Perez



Clip #3: Erin is
Introduced to PG&E
Employee Nelson Perez

The Rule

Lawyers may not communicate with persons whom they know are represented by counsel unless opposing counsel consents to the communication. This prohibition includes current employees of litigant organizations. Additionally, the restriction on such communication may still apply even if the represented person initiates the contact.

- See Rule 4.2, Official Comment, and Arkansas Annotation

Nelson Perez

* Perez provided Erin with internal information that could constitute admissions on the part of PG&E.

* Ed failed to inform Erin of the professional limitations on communications with current employees of PG&E in possible violation of the ethics rules.

But . . .

Ethical Dilemma

...would a reasonable lawyer have expected his non-lawyer employee would violate this rule under these circumstances?



Ethical Dilemma

Besides the rule, there are other moral and juridical considerations:

1. The Value

2. The Severity

3. The Power



overs

Justice

Cover-ups

“Whistle-blowing”

Notwithstanding the above violation, employees should be given latitude to blow the whistle on their employer's tortious conduct. Rule 4.2 does not provide for this, thus leaving social ills unredressed.

Truth and Justice

Here, the employee sought out Erin and on his own initiative provided Erin with valuable information that may have been suppressed by PG&E had he not been able to speak with Erin. Thus, there is a substantial benefit in allowing such communications to take place.

Cover-ups and Deception

Given the past unethical conduct of PG&E (i.e. providing deceptive pamphlets and retaining biased doctors) in efforts to cover-up the degree of harm caused by their actions, it is foreseeable that they would destroy documents and otherwise hinder legitimate discovery.

What should the lawyer do?

Rule 5.3 is concerned with the reasonableness of the lawyer's conduct in supervising his non-lawyer employee.

In light of moral considerations and personal convictions, it may be reasonable for a lawyer or non-lawyer employee to obtain evidence in order to help endangered people in the face of a profit-driven corporation.

Although Ed Masry was not standing next to Erin at the picnic, perhaps he should have foreseen and warned her that PG&E's employees might be present and she should refuse to speak to them. The fortunate thing is that she acquired highly useful evidence concerning PG&E's tortious conduct.





Additionally, when Erin told Ed about the interview with Perez, Ed, by not telling her that this was proscribed conduct under the rules, he tacitly ratified her conduct and might be subject to discipline in Arkansas under 5.3(c).

Solicitation

Clip #4: Erin goes
to see Pamela
Duncan



Clip #4: Erin goes to see
Pamela Duncan

Rule 7.3

A lawyer may not in-person solicit employment from a prospective client.

**Clip #5: Erin Goes
Back to Pamela
Duncan's**



Clip #5: Erin Goes Back to
Pamela Duncan's

The Ethical Dilemma

Without door to door
contact how can a
lawyer feasibly
notify the citizens
of Hinkley?

The Rule's Answer

A lawyer may
contact prospective
clients by general
advertising or
written
communication.

Will This Work in Hinkley?

No.

WHY?



- PG&E Plant has been good for Hinkley
- PG&E lied and said chromium was healthy.
- PG&E retained biased doctors that told the Hinkley clients that the cause of sickness was not the power plant.
- Lawyers are "out to make money."
- Nature of problem & scientific terms difficult to explain in writing.

Should Ed be Responsible?

- Rule 5.3 says a lawyer is responsible when he knows a non-lawyer assistant violated the rules
- Erin's actions did violate Rule 7.3
- Ed did have knowledge of Erin's door to door contact with the citizens of Hinkley

Ethics v. Erin



Though Erin's actions technically violated the rules of ethics, they benefited the people of Hinkley. Because PG&E had such a substantial hold on the residents of Hinkley through authority figures like doctors, a mere advertising letter from an unknown lawyer would likely be thrown in the garbage.

Ethics v. Erin (Cont'd)

Erin was able to relate to the people of Hinkley, understand their problems, and gain their trust.

If Erin had not ignored the "No Soliciting" sign and knocked on Pamela's door, Pamela and her family may not have been compensated for the harm PG&E had caused them.

Unauthorized Practice of Law

**Clip #6: Erin
advises Pamela
Duncan**



Clip #6: Erin advises
Pamela Duncan

The Rule

Under Rule 5.5, attorneys may not assist non-attorneys in the unauthorized practice of law. In Arkansas, “[a]ttorneys have been disciplined for failing to supervise office personnel and permitting them to engage in the unauthorized practice of law. *Mays v. Neal*, 327 Ark. 302, 938 S.W.2d 830 (1997) (manager and paralegal entered into contracts with clients, gave advice, and negotiated personal injury settlements).”

- See Howard W. Brill, Arkansas Professional and Judicial Ethics 202 (6th ed. 2003).

Considerations

- Erin could be disciplined for the unauthorized practice of law pursuant to the ACA 16-22-501 due to the following actions: 1) she advised the citizens as to their personal rights 2) she counseled them as to the advisability of making claims for their personal injuries and 3) she contacted the citizens in person to solicit legal business.
- Ed could be subject to discipline under Rule 5.5 for assisting Erin, not a member of the bar, in the performance of activity that constitutes the unauthorized practice of law.

Ethical Dilemma

- Erin was a gifted counselor and friend to the Hinkley plaintiffs. Ed Masry, on the other hand, was not. Brockovich made it clear that she was not a lawyer, and that she "hated lawyers."

- Given the unique nature of these circumstances, Ed Masry's professional judgment may be appropriate in giving Erin latitude to counsel clients. She had the ability to communicate effectively and keep up the morale of 600 plaintiffs where cohesiveness was needed in order to get for all the clients what they needed and deserved.

The Happy Ending

In the end, Erin and Ed were able to recover \$333 million for the 600 individual plaintiffs that Erin solicited, counseled, and held together in the face of overwhelming adversity. While Ed may have violated the Arkansas Rules of Professional Conduct, the ends may justify the means.

Here, through Erin, Ed was able to take on an "800 pound gorilla" and right a wrong that may not have been redressed had he not had faith in his non-lawyer assistant's judgment and abilities.

Happily-ever After

Erin's counseling talents and fierce determination were the inspiration for Masry's vigilance. She was, indeed, their champion.



The End.