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**CLS CONFERENCE OUTLINE:**

**“Moving mountains by faith in the legal arena”**

**Ethical Issues: Pro Bono Representation, Competence, Diligence and Meritorious Claims and Contentions**

**Introduction.** God calls His servants to believe Him to move mountains in the most dire, impossible and desperate of legal arenas. Specifically, cases in family court, criminal court, civil court and immigration court will be highlighted. One of the family court and one of the criminal court cases were featured in legal magazines (Iowa Bar Association and CLS's The Christian Lawyer).

God has a plan that He leads us into--no matter the impossibility—where we have opportunity to discover the depths of His wisdom, faithfulness, love and grace. The rendition of these true stories below have been celebrated by Ken Starr, the Iowa Public Defender and college/university students. Goal of the presentation is to inspire His servants to see Him perform His wondrous works that bring Him glory and fill our hearts with joy and praise. This presentation will include a renewed call to Pro Bono Representation and a closer look at three ethical rules that are all too often overlooked: Competence, Diligence and Meritorious Claims and Contentions.

(1) **A renewed call to pro bono legal representation.**

(a) Most state bars seek to encourage attorneys to consider the pro bono representation of the poor and needy.

(b) **Virginia: Rules of Professional Conduct, Preamble:**

“A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf.”

c) **Virginia: Rules of Professional Conduct, Rule 6.1 Voluntary Pro Bono**

**Publico Service**

“1. A lawyer should render at least two percent per year of the lawyer’s professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.

(d) Most Christian attorneys are familiar with a similar call from scripture:

“Defend the poor and fatherless; do justice to the afflicted and needy.

Deliver the poor and needy; free them from the hand of the wicked.”

Psalm 82:3-4

( e) Example of pro bono representation:

Barbosa v. Barbosa. Christopher attends Christian Legal Aid clinic seeking help. Three of the four CLS attorneys at the clinic had no experience in family court; the fourth attorney had minimal experience. Christopher was on disability, can't afford an attorney and came to the clinic for help. His ex-wife has filed for a court order terminating his visitation rights with their four young children based upon her accusation that Christopher said he was going to kill her. Christopher has already temporarily lost all visits; his ex-wife and her new husband has retained an excellent family law attorney. Attorney at CLA clinic agrees to represent Christopher pro bono. Christopher is 100% innocent of the accusation, but he has no chance against his ex-wife in court.

**(2) Competence:**

(a) Most attorneys realize they do not have sufficient knowledge and legal skill to competently represent a client in a majority of possible areas of law. Indeed, for example, a very tiny fraction of attorneys handle asylum immigration cases, a needed area for skilled Christian attorneys to represent Christians fleeing persecution. A massive challenge for attorneys who may desire to help their brethren as a simple glance at the ethical rules relative to every state bar makes clear it would not only be unethical to engage in a field of law one has no

experience in, but could also subject oneself to possible legal sanctions and/or a malpractice lawsuit. However, the Lord has, can and will surprise those who seek Him in this regard to do what he or she would have thought impossible.

(b) **Scripture:** “But He said, ‘The things which are impossible with men are possible with God.’” Luke 18:27.

(c) **Virginia Rule 1.1 Competence:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

“Comment: ...[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar...Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. **A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question. (Boldness added for emphasis.)**

“[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.”

(d) **California Rule 1.1 Competence:**

“(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

“(b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.

“(c) **If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required...**

“(d) **In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical.**” (Boldness added for emphasis).

( e) **Strategies of gaining competence:**

- 1) **“Associating with or...professionally consulting another lawyer...”**

Find another Christian attorney whom you believe is competent, who is reasonably nearby (1 hour?), introduce yourself, invite to lunch or go to their office with a gift, and ask if you may ask a few questions.

- 2) **“...acquiring sufficient learning and skill before performance is required...”**

Spend time in a good law library (1/2 a day?) and find “how to” books, treatises, articles, CLE audio/videos.

- 3) **“...acquiring sufficient learning and skill before performance is required...”**

Search in YouTube for short (less than 30 minutes) instructional videos by other attorneys on the subject matter you need knowledge about.

- 4) **“...acquiring sufficient learning and skill before performance is required...”**

Visit a courthouse and ascertain when the next relevant hearing or trial will take place and sit in the audience area and observe.

( f) **Examples of gaining competence**

Application for Asylum and for Withholding of Removal re Zakarya Rezaie

People v. Cloud, criminal case (admission of video evidence)

Schneider v. Schneider, impossible custody/visitation case

(3) **Diligence**

(a) As many can attest, the best in any endeavor of life, from education coursework through a professional career, the difference between excellence and mediocrity is whether one is diligent at what they do. Scripture supports this:

(b) **Scripture:**

“See a man diligent in his business? He shall stand before kings; he will not stand before mean (unknown) men.” Proverbs 22:29

“The soul of a lazy man desires, and has nothing; but the soul of the diligent shall be made rich.” Proverbs 13:4

“He that diligently seeks good procures favor...” Proverbs 11:27

( c) **Virginia Rule 1.3 Diligence:** “(a) A lawyer shall act with reasonable diligence and promptness in representing a client...”

“COMMENT [1] **A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in** (effective March 4, 2024 (Rule 8.4(f)) 27) advocacy upon the client's behalf...A

lawyer's work load should be controlled so that each matter can be handled adequately...diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] **Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions;** in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. **(Boldness added for emphasis).**



(d) **California Rule 1.3 Diligence:**

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client...
- (b) For purposes of this rule, **“reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.**

(e) **Strategies and Examples of Diligence**

- 1) Always be at least five minutes early to every meeting, hearing or conference. Example of Orange County family court judge taking the bench right at the time called for; ten minutes late for federal court hearing in Providence, RI.
- 2) Arrive at first pre-trial hearing and *hand-deliver* discovery demand to prosecutor/opposing attorney; if video involved, hand to prosecutor/opposing attorney a USB flash drive of subject video on it.  
  
*People v. Cloud*
- 3) Call and/or email prosecutor/opposing attorney to discuss the case prior to the first hearing. *People v. Flum*

- 4) Try to foresee upcoming evidentiary, legal issues far, far, far in advance of when the issue will ripen into a hearing, etc. Far, Far...
- 5) Carefully, fully involving client, review documents in client's case, i.e., criminal case police reports, narratives, photos, etc. Consider what further evidence is needed to prove your client's position, or to disprove the other side's position. *State v. Schultz*

#### **(4) Meritorious Claims and Contentions**

- (a) Attorneys have the right and privilege of commencing a legal action that can bring about much good not only for their client, but for the community at large. At the same time, attorneys can initiate a series of events/actions that can bring destructive forces that cause desperate fear, deep distress, wrath and overwhelming frustration if for wrong purposes motivated by the ill will, hostility and/or vengeance of a person or group. Attorneys have an opportunity to be a wall of justice that brings as its fruit peace, kindness and grace. We, especially as Christian attorneys, must not only proceed in the legal arena in behalf of clients, but also in behalf of what is good, right and just. In pursuit of those principles, Christian attorneys may on occasion need to refrain from taking a particular client with a particular cause, or if already retained, he/she may need to withdraw.

(b) **Scripture:**

“Send Zenas the lawyer and Apollos on their journey with haste, that they may lack nothing. And let our people also learn to maintain good works, to meet urgent needs, that they may not be unfruitful.”

Titus 3:13-14

“He has shown you, O man, what is good; and what does the LORD require of you but to do justly, to love mercy and to walk humbly with your God.” Micah 6:8

“How long will you judge unjustly, and show partiality to the wicked? ...do justice.” Psalm 82:2-3

(c) **Virginia Rule 3.1 Meritorious Claims and Contentions:**

**A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.**

COMMENT:...[2] The filing of an action or defense or similar action taken for a client is **not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. (Boldness added for emphasis).**

(d) **California Rule 3.1 Meritorious Claims and Contentions:**

- (a) A lawyer shall not: (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

- (b) **A lawyer for the defendant in a criminal proceeding**, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, **may nevertheless defend the proceeding by requiring that every element of the case be established.**
- (e) **Examples illustrating of cases that have merit and worthiness, and several that did not.**
- (1) Alan H. legal malpractice case. Alan, a fellow Christian attorney practicing in the same county as I. Prepared estate planning documents for a client; made an error in the preparation of the documents. A judgment against Alan could have risen to over \$500,000. I decided to represent Alan, discovered a defense in the case, found a recent appellate decision just a few days prior to a hearing I calendared to dismiss the case. Case dismissed. Yes, Alan had made a mistake in his practice, but it was not done in an effort to intentionally harm someone and I decided if I could find a technicality of some sort to stop the plaintiff, I would. I did, and the case was dismissed.
- (2) People v. N.F., a criminal case. This defendant was a young man of around 18; he'd become seriously depressed and decided to commit suicide. He jumped off a public, city pier into the ocean. This was against the law. The lifeguards rescued him, took him to the hospital and he was revived. He was later arrested for violating the city ordinance against jumping off the pier. I called the city attorney before the arraignment, simply told him the situation. The city attorney agreed it was a case he didn't want to prosecute; we agreed the young man would do some community service and the city would dismiss the case. He was truly guilty of violating the law, but the bigger picture caused the prosecutor to show mercy.

- (3) San Jose potential case. A young man called me and wanted me to defend him from some technical gun violations. As we talked, he revealed he was seriously antisemitic. I refused to represent him as a relative of his is the one who called the police as a result of hearing him express hate for Jewish people and he had recently bought new guns and ammo.
- (4) Polk County Jail criminal defendant. Serious criminal charges of which the defendant was admittedly guilty of; the defendant wanted me to put up a big fight at a trial and made clear he thought it was all a big joke. He wanted to play the system and maybe get a better deal. I could not in good faith represent him and asked the court to allow me to withdraw, which I did.
- (5) University student (years later becomes a criminal defense attorney) was trying to decide whether to attend law school. One of his professors was also an attorney. Student asked the attorney/professor's guidance as to how he might make up his mind. The attorney/professor suggested student visit the court and see what they do.

Student did so and while watching the sentencing of a drug dealer, the defendant ran out of the courtroom. Two bailiffs ran out after him. Several minutes later, student left the courtroom and proceeded towards his car. When he departed from the courthouse he noticed that the defendant had been caught and was being brought back up the sidewalk into the courthouse. One of the bailiffs pointed towards student who was watching and ordered a nearby police officer to arrest student.

Student was arrested and charged with aiding and abetting an escape attempt. Student was at that time indigent, with no money for either bail or an attorney. He spent three days and nights in the county jail (very large jail, thousands of inmates) before being brought before a judge. Student was 100% innocent, but his accuser was a county deputy sheriff who was one of the bailiffs who chased the defendant. An impossible situation as a criminal defendant to have as your accuser a deputy sheriff/courtroom bailiff.

The student later became an attorney and who handled each of these.