

# Integrity

*(The author wishes to remain anonymous)*

*“If you have integrity, nothing else matters.  
If you do not have integrity, nothing else matters.”<sup>1</sup>*

## INTRODUCTION

Whether a legal professional or a valuation analyst, providers of professional services in a marital dissolution context have the responsibility, and the fiduciary obligation, to provide services in a professional manner at the highest level of integrity. Though retained by clients, professional service providers are serving the court.

This discussion addresses the following traits from the perspective of a professional service provider:

- Character
- Honor
- Serving the public interest while honoring the public’s trust
- Integrity

## CASE FACT SET

“Mom, who are we? Are we who we say we are?”<sup>2</sup> And so the family meeting ended with the decision made to divide very valuable community property assets equally with the mom’s ex-husband. The following story is a personification of integrity that exemplifies the honesty, ethics, and trustworthiness that expert witnesses and lawyers alike should demonstrate in every aspect of their professional and personal lives.

Lindsay (the mom) was packing the personal belongings of her ex-husband for his retrieval. Lindsay went through a grueling divorce trial against her ex-husband, who some said had absolutely no regard for his obligation to tell the truth under oath,

and his lawyer, whose zealousness to prevail, some said, seemed unbounded by the Rules of Professional Conduct. Lindsay, on the other hand, told the truth under oath, even when it hurt her case and even when she could have lied without detection. I failed to prevail on Lindsay’s behalf and the ruling against her was devastating.

After trial, Lindsay’s ex-husband and his lawyer were adamant in their demands that Lindsay return the ex-husband’s personal belongings, including one-half of a collection of community property valuables that remained in the safe at Lindsay’s home. They repeatedly reminded Lindsay of their careful pre-trial inventory of the collection, and that their accounting of the number due to the ex-husband was precise. The consequences of her failure to comply with their demands were unstated but, given their trial tactics, were an unpleasant prospect.

Lindsay and her children from a previous marriage were gathering the ex-husband’s property and carefully packaging it, as would be expected of a woman of her character. Lindsay finally opened the home safe to get the collection of valuables for division and packaging. To her astonishment, the collection did not match the oft-stated inventory—there were *far more* valuable collectibles than were on the inventory.

The disposition of thousands of dollars’ worth of unaccounted-for collectibles was now in the hands of the one who had told the truth, been subject to needless ridicule, and who felt she had unfairly lost. Neither the ex-husband, his lawyer, nor I would have ever known of the existence of the unaccounted-for assets. Like finding a wallet full of cash on a remote hiking trail, no one would have ever known what

happened to it. No one, that is, except the one who found it.

## “THE MEASURE OF A MAN’S REAL CHARACTER IS WHAT HE WOULD DO IF HE NEVER WOULD BE FOUND OUT”<sup>3</sup>

Lindsay and her family did not need to audibly answer her son’s questions: “Who are we?” and “Are we who we say we are?” They equally divided the overlooked collectibles, packaged them up with her ex-husband’s personal belongings, and returned everything to him, including his share of the unexpected bounty of collectibles.

As professionals whose livelihoods depend on our reputations for truthfulness, character, and integrity, we must be ever mindful of “Who we are” and “Are we who we say we are?”

We must be ever vigilant to guard our positions of trust and be true to our fiduciary duties. Lawyers and expert witnesses enjoy positions of trust that can easily be violated with little risk of discovery. Hiding a fact here, shading a fact there, or taking advantage of the opposition’s unintended mistake are the collectibles in the safe and the wallet on the remote trail for lawyers and expert witnesses.

Fortunately, lawyers and expert witnesses have at their disposal various Rules of Professionalism and Codes of Conduct that serve as the foundation to their efforts to be professionals with integrity.

## “LAWYERS SHOULD CONDUCT THEMSELVES HONORABLY”<sup>4</sup>

The Rules of Professional Conduct governing lawyers include extensive and explicit references to truthfulness, character, and, by direct extension, integrity. The Preamble to Arizona’s Ethical Rules (ERs) admonishes lawyers that they have a “special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.”<sup>5</sup>

Lawyers have a duty of candor towards the tribunal.<sup>6</sup> Lawyers cannot make false statements of fact



or law to the court, nor may they knowingly permit false statements to be made.<sup>7</sup> If a lawyer discovers that she, or even her witness, has proffered false testimony, she has an affirmative duty to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”<sup>8</sup>

This duty applies “even if compliance requires disclosure of information otherwise protected by ER 1.6 [client confidentiality].”<sup>9</sup> Thus, the duty of candor towards the tribunal is so demanding that, in some circumstances, lawyers must breach the otherwise sacrosanct duty of keeping client communications confidential.

Lawyers have duties of fairness to opposing parties and counsel.<sup>10</sup> Lawyers must not alter, conceal, or destroy any information of potential evidentiary value.<sup>11</sup> They must not permit or counsel anyone else to do so either, including expert witnesses.<sup>12</sup> Lawyers may not falsify evidence, nor assist anyone else to do so.<sup>13</sup> Thus, lawyers must pursue their cases fairly and they cannot encourage witness misconduct; nor can they tolerate or overlook it.

Lawyers must always be truthful in their statements to others.<sup>14</sup> They may not make false statements of material facts or law, nor may they fail to disclose material facts when “disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6 [client confidentiality].”<sup>15</sup> Thus, even when doing so is painful, lawyers must ensure that they tell the truth.

Lawyers must always show respect for the rights of others, including opposing expert witnesses.<sup>16</sup> Lawyers may not use litigation tactics “that have no substantial purpose other than to embarrass,

delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such person.”<sup>17</sup>

In my practice, I have been fortunate enough to engage, and to oppose, the best of the best of expert witnesses, primarily valuation and forensic accounting experts. I commence every engagement with an express notice that all of my communications with my experts are discoverable, which is a reminder that “the world may see” the level of our professionalism, or lack thereof. And I tell my experts that I expect from them only “the truth.” The facts are what they are; we can handle anything so long as it is the truth.

Showing respect for an opposing expert does not equate with a soft touch or even gentleness. The very best experts sincerely believe in their work and opinions; they will not be swayed easily by vigorous cross-examination, nor should they be. The best experts expect the opposing lawyer to confront them with the lawyer’s best cross-examination.

When I cross-examine an exceptional expert, I enjoy sometimes seeing that wry smile on the face of the witness—a clear indication that we are both giving it our best. After one trial, I called an expert whom I felt I had blistered rather harshly under cross-examination, perhaps unfairly so. His response? “Oh no, Jeffrey, you did exactly what I expected of you. You brought your best and so did I. When are we having lunch?” This gentleman is among the best in my jurisdiction and he understands that vigorous cross-examination is a respectful search for the truth and, if done professionally, permits the fact-finder to discern the facts (and, when done with professionalism, enjoy a lively battle).

It is professional misconduct for lawyers to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” or to “engage in conduct that is prejudicial to the administration of justice.”<sup>18</sup> From an expert witness’s perspective, this includes any attempt by your hiring lawyer to ask you, expressly or impliedly, to do anything that would compromise your duty, as the Uniform Standards of Professional Appraisal Practice (USPAP) put it, to “promote and preserve the public trust inherent in appraisal practice by observing the highest standards of professional ethics.”<sup>19</sup>

## “SERVE THE PUBLIC INTEREST, HONOR THE PUBLIC TRUST”<sup>20</sup>

Like the Rules governing the conduct of lawyers, the Codes governing the conduct of appraisers, accountants, and examiners include extensive and explicit

references to truthfulness, character, and integrity as well, perhaps even more references than lawyers’ Rules.

Consider the American Institute of Certified Public Accountants’ (AICPA) professional code of conduct that “Members should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism.”<sup>21</sup> Or, the American Society of Appraisers’ admonition that “The appraiser’s primary obligation to his/her client is to reach complete, accurate, and credible conclusions and numerical results regardless of the client’s wishes or instructions in this regard.”<sup>22</sup> Or, the Association of Certified Fraud Examiners’ principle that “Certified Fraud Examiners shall conduct themselves with integrity, knowing that public trust is founded on integrity.”<sup>23</sup> And, the Institute of Business Appraisers’ guidance that “A member shall remain objective, maintain professional integrity, shall not knowingly misrepresent facts, or subrogate judgment to others. The member must not act in a manner that is misleading or fraudulent.”<sup>24</sup>

Most codes governing the conduct of expert witnesses illustrate with great detail the lengths to which experts must go to “preserve the public trust” and to “maintain the integrity” of the profession and of the professional. Experts are required to always be impartial, unbiased, and independent.<sup>25</sup> Experts are not to “advocate the cause or interest of any party or issue.”<sup>26</sup> And valuation experts may not “communicate a report that is known by the appraiser to be misleading or fraudulent.”<sup>27</sup> Much like the Rules of Professional Conduct for lawyers, the Codes of Professional Conduct for valuation expert witnesses simply reflect how our character is to be measured, even “if [we] knew [we] would never be found out.”<sup>28</sup>

“Integrity is an element of character fundamental to professional recognition. It is the quality from which the public trust derives and the benchmark against which a member must ultimately test all decisions.”<sup>29</sup> What a wonderfully well-articulated standard of conduct promulgated by the AICPA.

## “AM I DOING WHAT A PERSON OF INTEGRITY WOULD DO?”<sup>30</sup>

We are professionals, serving the public, seeking to earn the public trust and striving to maintain the highest standards of our respective crafts. Our livelihoods depend on our reputations, and our character and integrity are the foundation upon which our reputations rise, or fall. The AICPA, again, articulates a measurement for integrity exceedingly well:

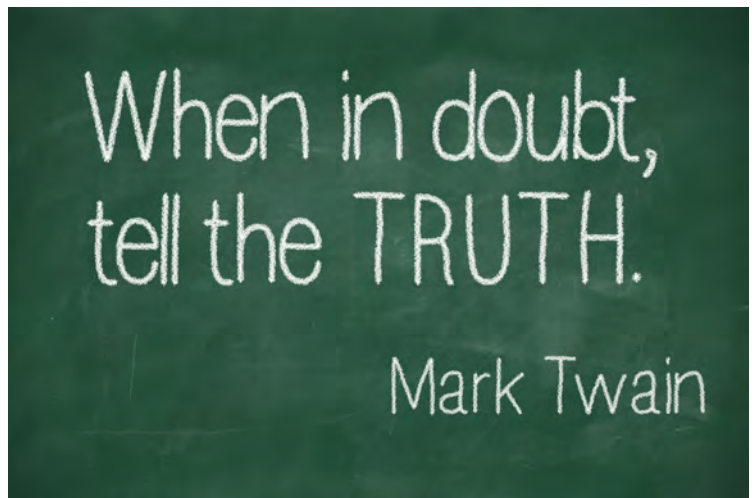
Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance or in the face of conflicting opinions, a member should test decisions and deeds by asking: “Am I doing what a person of integrity would do? Have I retained my integrity?” Integrity requires a member to observe both the form and spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.<sup>31</sup>

When I was a child, my father took me to a store and, upon leaving, he noticed that the cashier had over changed him by a quarter. I was overjoyed at our good fortune. My father immediately took me back to the cashier to tell her of the mistake and return the quarter. He admonished me for having any thoughts of keeping the quarter, even though no one would have ever known. “Son,” he gently but firmly said to me, “Our integrity is worth more to us than any amount of money.” So, too, as professionals, our integrity is worth more to us than any client, any project, and any express or implied suggestion to do anything except that which “a person of integrity would do.”<sup>32</sup>

Let your conscience be your guide in your professional endeavors. Let your Rules of Professional Conduct be your sword and shield against anyone who would ask you to sacrifice your integrity, even “just a little” or “just this once.” When you take the oath on the witness stand, let lawyers and judges alike say, “This expert’s reputation for integrity is unblemished; I trust what he or she has to say.”<sup>33</sup>

**Notes:**

1. Alan Simpson, former U.S. Senator from Wyoming.
2. Quote from the son of one of my former clients during a family meeting to decide the disposition of valuables overlooked by her ex-husband. Shared with permission by my former client, whom I shall refer to as “Lindsay.”
3. Thomas Babington Macaulay, British poet.
4. Arizona Rules of Professional Conduct, Preamble at ¶ 1.
5. *Id.*
6. Arizona Rules of Professional Conduct, ER 3.3. (The Arizona Rules are substantially similar to the American Bar Association’s Model Rules of Professional Conduct.)
7. *Id.* at ER 3.3(a)(1)
8. *Id.* at ER 3.3(a)(3).
9. *Id.* at ER 3.3(c).
10. *Id.* at ER 3.4.
11. *Id.* at ER 3.4(a).



12. *Id.* at ER 3.4(b).
13. *Id.*
14. *Id.* at ER 4.1.
15. *Id.* at ER 4.1(b); but cf. ER 3.4(b).
16. *Id.* at ER 4.4.
17. *Id.* at ER 4.4(a).
18. *Id.* at ER 8.4(c) and (d).
19. Uniform Standards of Professional Appraisal Practice (USPAP) Ethics Rule, 2014-15 Edition.
20. American Institute of Certified Public Accountants (AICPA), Code of Professional Conduct, The Public Interest, ¶ 01.
21. *Id.*
22. American Society of Appraisers (ASA), Principles of Appraisal Practice and Code of Ethics, June 2015, at § 4.
23. Association of Certified Fraud Examiners (ACFE), Code of Professional Standards, 2014, at § III (A) (1).
24. Institute of Business Appraisers (IBA), Professional Standards, 2011, at § II (A).
25. USPAP Ethics Rule, Conduct.
26. *Id.*
27. *Id.*
28. See endnote 3, *supra*.
29. AICPA “Integrity,” ¶ 02.
30. *Id.* at ¶ 04.
31. *Id.*
32. See endnote 28, *supra*.
33. My thanks to the following experts who generously contributed the professional association materials from which I gained invaluable insights and research for this discussion: Don Bays, Marc Fleischman, Mark Hughes, Lynton Kotzin, Frank Pankow, and Charles Wilhoite.

*This discussion was written by a prominent attorney in the State of Arizona who is a Fellow of the American Academy of Matrimonial Lawyers™. Please direct any questions to the editor of this Insights issue.*