

Historic Preservation Law: Obligations and Opportunities
2018-PBI#10434
Friday, November 30
9:00 a.m. – 4:15 p.m.

Hypotheticals

Limits of Advocacy

William Penn Hill is a posh neighborhood in Philadelphia with many fine examples of colonial architecture and historic buildings from the early days of our country. The area has many other properties with buildings large and small developed over the past 200 plus years. The local civic association is well organized and funded. It learned of a proposed new high rise apartment building planned by Mega Development Co for a site which was never placed on the Register of Historic Places. The association engaged a lawyer who told the members that the project is as of right under zoning and, in fact, was identified as a high density site in recent land planning studies by the community and Planning Commission. The lawyer is directed to find a way to oppose and kill the project by any means necessary. Knowing that the advocate has a duty to use legal procedure for the fullest benefit of the client's cause, and understanding he also has a duty not to abuse legal procedure, he considers the options. Although the community does not really value the existing structures on the site, the lawyer tells them that the very open ended criteria of the local preservation ordinance may provide the basis for a possible designation to the local register. This process would make it very difficult to tear down the structures and build the new tower.

The association lawyer has a friend in Washington DC who likes to protest new development of any kind. He prepares a nomination and files it with the Historic Commission. Before the staff of the Commission is able to review the nomination petition, the developer files for permits authorizing the demolition of the existing structures on the site. Another property owner has an apartment building next door and hires a lawyer to join in the opposition. That owner tells his lawyer that he doesn't care about the preservation of the structures or the design of the new tower. He just wants to delay or kill the project so he can buy the property or just prevent competition between his older units and the new state of the art proposed units. The city issues demo permits and Mega posted them on the property. Several members of the civic association tear down the posters and tell the association lawyer that the property is not posted. He hears rumors that his clients tore down the posters but isn't sure so he raises the posting as an issue in court. Litigation ensues and the lawyers for the opposition decide to use every excuse to delay the hearings: their clients are unavailable, they never received the hearing notices, etc. The lawyer for Mega does not know if these are valid excuses or not, but tells the court that the opposing lawyers and their clients are not being truthful. He files a motion for sanctions trying to run up the legal fees for the Protestants hoping it will cause them to back away from the case. He also plans to subpoena the association lawyer in an attempt to have him disqualified. This too will drive up the association legal fees. At this point, the judge is frustrated but not able to decide how to manage the litigation.

Questions For Discussion on Ethics

1. Rule 3.1 How do you determine when there is a basis in law and fact to support a claim or contention? How far must a lawyer go to make that determination and avoid a bad faith or frivolous argument?
2. Rule 3.2 When does the lawyer breach her duty to expedite litigation? Does she have a potential conflict if her client materially benefits from delay?
3. Rule 3.3 Does the lawyer have an affirmative duty to correct the record when the client or witness testifies inaccurately even if the correction will harm the client's position and even where the lawyer did not elicit or adopt the inaccuracy? May the lawyer allow the court to rely upon a case which the lawyer knows has been repudiated by a higher court?
4. Rule 3.4 When and how may the attorney state his or her own opinion on the credibility, honesty or motivation of a witness or opposing party? What about stating an opinion on the credibility, honesty or motivation of opposing counsel?
5. Rule 3.5 What is the difference between dramatic affect and disruptive conduct by an attorney? When does aggressive cross examination become harassment?
6. Rule 3.6 What is a lawyer allowed to say to the press either before or after the hearing? Does the lawyer have a responsibility to correct a client's misrepresentation to the press?