VI. ETHICAL CONSIDERATIONS

A. Conflicts of Interest

If you are addressing conflicts of interest just before trial, something must have gone wrong. Conflicts of interest must be dealt with as soon as you become aware of them. The Rules are quite specific with respect to how attorneys must handle conflicts of interest (Minnesota Rules of Professional Conduct, Rule 1.7). I believe that much of the literature claims that a high percentage of legal malpractice cases arise out of conflicts of interest which are not handled by using Rule 1.7. Although the general rule in Minnesota is that the conflict of interest itself does not create liability to your client, it is relevant to the matter and can be used to explain to the jury why an attorney negligently handled one client as opposed to the other.

Situations can arise where conflicts of interest do not come to light until just before, or even during, trial. If this happens to you, I recommend that you immediately disclose any potential conflicts to opposing counsel and the court, outside the presence of the jury. At least you are in a position to obtain some feedback from your opponent and a judge at a moment you seriously need it.

In summary, check for all of your potential conflicts of interest as soon as possible. If one develops along the way, you are well advised to immediately disclose the facts to all interested parties if required, and to follow Rule 1.7 to the letter.

B. Handling Prejudicial Evidence

Handling prejudicial evidence is something which should also be analyzed and dealt with as soon as it is discovered. Consider disclosing it to opposing counsel or disclosing it *in camera* to the court. Never, under any circumstances, surprise anyone with potentially prejudicial evidence. Your license to practice law may depend upon it. No matter how probative you think the evidence may be, Rule 803 (24) and Rule 804 (b) (5) of the Minnesota Rules of Evidence regarding hearsay provide useful guidance. Let's

face it, you know what you have in your hands; listen to your heart when it comes time to play it.

In a related, but inverse, ethical dilemma, under no circumstances can you countenance or even know about evidence spoliation (destruction of or tampering with evidence). The cases which have been handed down in recent years are quite draconian in the relief afforded to the party deprived of the opportunity to examine evidence because of tampering or destruction by the other side.

In summary, prejudicial evidence is dynamite. Handle it accordingly.

C. Talking to Witnesses Before they Testify

Some lawyers believe that it is so dangerous to talk to any witnesses other than their clients before they testify they simply refuse to do it. I do not subscribe to this belief, but I do believe you must be extremely careful whenever you talk to a witness before he or she testifies unless it is your client.

Of course, if it is your client, your conversation should normally be completely protected by the attorney/client privilege. No such privilege exists between you and any witness who is not your client, including experts. Any discussion you have with anyone who is not your client (or the client of another attorney who is present and whom you are jointly defending) is fair game. If you follow these rules, it should help limit later embarrassment:

- Assume that everything you and the witness talk about will be explored by opposing counsel
- Always tell the witness to tell the truth (and mean it)
- Keep sandpapering to a minimum

Although most lawyers call it sandpapering in Minnesota, I have heard it called wood shedding in Texas, as well as several other names in other parts of the country. Basically, it involves attempting to influence a witness's testimony, albeit benignly. Some lawyers try to choose words for their witnesses. Other lawyers spend a lot of time telling witnesses what they do <u>not</u> want them to say. I think these tactics are very

dangerous. If you want your witness to be as comfortable and as at ease as possible on the stand, you want them thinking about nothing but a truthful and straightforward answer to the question posed. When you ask a witness to choose certain words or not say certain things, you are putting an incredible amount of pressure on the witness. The witness is trying to recall and follow your instructions and not answer the pending question. In doing so, the witness looks awful. I guarantee excessive sandpapering will almost always backfire. Go with the truth.

D. The Rules of Professional Conduct

Assuming that my colleagues will be addressing the Minnesota Rules of Professional Conduct as they apply to advocacy, I want to focus your ethical considerations upon the General Rules of Practice for the District Courts of Minnesota, Title I and Title II, Part H. You must be familiar with these Rules to be an ethical lawyer during trial.

In Title I, read about court decorum. If you ever seek extraordinary equitable relief, pay attention to the section on Ex-Parte Orders. If you are with another lawyer who is not admitted to practice law in the State of Minnesota, check Title I on it.

In Title II, Part H, there are key guides for pre-trial conferences, voir dire, preliminary instructions, opening statements, final arguments, the availability of witnesses, the examination of witnesses, and other special events which arise during the course of the trial. Without reciting the Rules in these materials, I strongly urge you to review them before each and every trial with the facts of the case to be tried fresh in your mind. I do.