

Professional Responsibility

Eric M. Fink
Elon Law School
Fall 2019

Maintaining the Integrity of the Tribunal

1 Duties in Litigation

1.1 Meritorious Claims & Contentions

Rule 3.1:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact 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.

Cf. FRCP Rule 11(b)

By presenting to the court a pleading, written motion, or other paper ... an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;*
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;*
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and*
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.*

1.2 Expediting Litigation

Rule 3.2

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Applies to all phases and aspects of litigation.

- Cf. FRCP Rule 11(b)(1): Applies to pleadings and motions

1.3 Candor to the Tribunal

Rule 3.3

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Withdrawal

Rule 3.3, Comment 15:

Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

1.3.1 False representations or evidence

Nix v. Whiteside (US 1986)

- Ineffective assistance of counsel claim rejected
- Court reiterates *Strickland* standard
 - Lawyer's conduct fell below standard of reasonableness
 - Client suffered prejudice (i.e. outcome of case was less favorable) as a result
- Lawyer warned client that if client gave false testimony lawyer would have to disclose that to the court and would seek to withdraw if client insisted on doing so
- Client testified truthfully

1.3.2 Duty to Remedy

U.S. v. Long (8th Cir. 1988)

- Conviction affirmed, without prejudice to defendant's ability to assert ineffective assistance claim in collateral proceeding
- Prior to client's testimony at trial, lawyer told judge he believed client might commit perjury
- Client then declined to testify
- Court says evidentiary hearing is needed to determine whether attorney's conduct fell below *Strickland* standard of competence

1.4 Impartiality & Decorum of the Tribunal

Rule 3.5

A lawyer shall not:

- (a) *seek to influence a judge, juror, prospective juror or other official by means prohibited by law;*
- (b) *communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;*
- (c) *communicate with a juror or prospective juror after discharge of the jury if:*
 - (1) *the communication is prohibited by law or court order;*
 - (2) *the juror has made known to the lawyer a desire not to communicate; or*
 - (3) *the communication involves misrepresentation, coercion, duress or harassment; or*
- (d) *engage in conduct intended to disrupt a tribunal.*

1.5 Ex Parte Communications

An *ex parte* communication is any communication (written or oral) between a judge or juror and a party to a legal proceeding, but without the opposing party (or their attorney).

The prohibition against unauthorized *ex parte* communications under Rule 3.5(b) is not limited to communication about the case, but covers all communication about any subject.

- In practice, limited social communication (e.g. exchange of greetings) with the judge or jurors may not result in discipline absent circumstances suggesting prejudice.
 - But the best practice is for lawyers to avoid all communication with judges and jurors while case is pending.
- Where *ex parte* communications are permitted, Rule 3.3(d) requires that the lawyer disclose material facts, including those that are adverse, which the lawyer might not otherwise be obligated to disclose.
 - This might include information otherwise treated as confidential under Rule 1.6.

Judicial ethics rules (Model Code of Judicial Conduct, Rule 2.9) likewise prohibit *ex parte* communication by judge with parties, attorneys, and others, except in specified circumstances.

- Even if judge initiates communication with lawyer, lawyer should refrain from engaging in communication

1.6 Trial Publicity

Rule 3.6

- (a) *A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.*
- (b) *Notwithstanding paragraph (a), a lawyer may state:*
- (1) *the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;*
 - (2) *information contained in a public record;*
 - (3) *that an investigation of a matter is in progress;*
 - (4) *the scheduling or result of any step in litigation;*
 - (5) *a request for assistance in obtaining evidence and information necessary thereto;*
 - (6) *a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and*
 - (7) *in a criminal case, in addition to subparagraphs (1) through (6):*
 - (i) *the identity, residence, occupation and family status of the accused;*
 - (ii) *if the accused has not been apprehended, information necessary to aid in apprehension of that person;*
 - (iii) *the fact, time and place of arrest; and*
 - (iv) *the identity of investigating and arresting officers or agencies and the length of the investigation.*
- (c) *Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.*
- (d) *No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).*

1.6.1 First Amendment Protection

Gentile v. State Bar of Nevada (US 1991)

- Attorney disciplined for public statement about pending criminal case.

- Discipline violated first amendment, where statements expressed political opinion and were unlikely to prejudice client's right to fair trial.

1.7 Lawyer as Witness

Rule 3.7

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;*
- (2) the testimony relates to the nature and value of legal services rendered in the case; or*
- (3) disqualification of the lawyer would work substantial hardship on the client.*

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

1.8 Special Responsibilities of Prosecutors

Rule 3.8

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;*
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;*
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;*
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;*
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*
 - (1) the information sought is not protected from disclosure by any applicable privilege;*
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and*
 - (3) there is no other feasible alternative to obtain the information;*

- (f) *except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.*
- (g) *When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:*
 - (1) *promptly disclose that evidence to an appropriate court or authority, and*
 - (2) *if the conviction was obtained in the prosecutor's jurisdiction,*
 - (i) *promptly disclose that evidence to the defendant unless a court authorizes delay, and*
 - (ii) *undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.*
- (h) *When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.*

1.9 Fairness to Opposing Parties

Rule 3.4

A lawyer shall not:

- (a) *unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;*
- (b) *falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;*
- (c) *knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;*
- (d) *in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;*
- (e) *in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or*
- (f) *request a person other than a client to refrain from voluntarily giving relevant information to another party unless:*

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Roth v. La Societie Anonyme Turbomeca France (Mo. App. 2003)

- Plaintiff's interrogatories asked about defendant's insurance coverage
 - Defendant falsely stated limit was \$50 million
 - Plaintiffs entered into settlement agreement, relying on defendant's misrepresentation
 - After executing the agreement and receiving payment, plaintiffs discovered true policy limit
- Court affirmed dismissal of negligent misrepresentation and conspiracy claims against attorney
 - Attorney did not owe negligence duty of care to non-client
 - Attorney, acting as client's agent, cannot conspire with client

2 Duties to Non-Clients Outside Litigation

2.1 Advocate in Non-Adjudicative Proceedings

Rule 3.9

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

2.2 Communications and Dealings With Non-Clients

2.2.1 Truthfulness In Statements To Others

Rule 4.1

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

2.2.2 Communication With Person Represented By Counsel

Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Palmer v. Pioneer Inn Assocs. (Nev. 2002)

- Application of "no contact" rule to employees of organization represented by counsel

- Different tests have been applied to determine which organizational employees are covered by the rule
 - Control group: only high-level management
 - Managing-speaking test: employees with authority to speak for the organization with respect to the matter at issue. Based on *Upjohn C. v. US* (US 1981) (applying similar test to determine which employees' communications with attorney are covered by privilege)
 - Admission test: any employee whose statements would be attributable to the organization as an admission by a party-opponent under the rules of evidence

2.2.3 Dealing With Unrepresented Person

Rule 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

2.2.4 Respect For Rights Of Third Persons

Rule 4.4

- (a) *In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*
- (b) *A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.*