

Professional Responsibility

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Maintaining the Integrity of the Tribunal

1 Duties in Litigation

1.1 Candor to the Tribunal

1.1.1 False representations or evidence & duty to remedy

Rule 3.3(a), (b) & (c)

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

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

1.1.2 Candor in Ex Parte Proceedings

Rule 3.3(d)

Attorney must disclose all relevant facts, including those adverse to client

1.2 Impartiality & Decorum

Rule 3.5

1.2.1 Ex Parte Communications

Rule 3.5(b)

- Prohibition 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) 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
 - Judicial ethics rules likewise prohibit *ex parte* communication by judge with parties, attorneys, and others
 - Even if judge initiates communication with lawyer, lawyer should refrain from engaging in communication

1.2.2 Trial Publicity

Rule 3.6

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

1.2.3 Lawyer as Witness

Rule 3.7

1.2.4 Special Responsibilities of Prosecutors

Rule 3.8

2 Fairness to Opposing Parties

Rule 3.4

Roth v. La Societe 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

3 Duties to Non-Clients Outside Litigation

3.1 Advocate in Non-Adjudicative Proceedings

Rule 3.9

3.2 Communications and Dealings With Non-Clients

3.2.1 Truthfulness In Statements To Others

Rule 4.1

3.2.2 Communication With Person Represented By Counsel

Rule 4.2

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

3.2.3 Dealing With Unrepresented Person

Rule 4.3

3.2.4 Respect For Rights Of Third Persons

Rule 4.4