

## Professional Responsibility

Eric M. Fink  
Elon Law School  
Fall 2019

## Advocacy & Fairness

### 1 Candor to the Tribunal

#### 1.1 False representations or evidence & duty to remedy

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

*Nix v. Whiteside* (US 1986)

- Standard for ineffective assistance (from *Strickland*)
  - Lawyer's conduct fell below standard of reasonableness
  - Client suffered prejudice (i.e. outcome of was less favorable) as a result
- Lawyer warned client that if he gave false testimony, lawyer would disclose that to court and seek to withdraw
- Client testified truthfully

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

- Conviction affirmed, without prejudice to client's ability to assert ineffective assistance claim
- Client declined to testify after lawyer told judge he believed client might commit perjury
- Evidentiary hearing is needed to determine if lawyer's conduct fell below *Strickland* standard of competence

#### 1.2 Ex Parte Proceedings

Rule 3.3(d)

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

### 2 Fairness in Litigation & Other Proceedings

#### 2.1 Impartiality & Decorum of the Tribunal

Rule 3.5

##### 2.1.1 Ex Parte Communications

Rule 3.5(b)

- Not limited to communication about the case; covers all communication about any subject
- Limited social communication may not result in discipline absent circumstances suggesting prejudice, but best practice is to avoid all communication with judge & jurors while case is pending
- Even if judge initiates communication, lawyer should not engage

#### 2.2 Trial Publicity

Rule 3.6

*Gentile v. State Bar of Nevada* (US 1991)

- Attorney discipline for public statement about pending criminal case violated 1st amendment
- Statements expressed political opinion and were unlikely to prejudice client's right to fair trial

## 2.3 Lawyer as witness

Rule 3.7

## 2.4 Special Responsibilities of Prosecutors

Rule 3.8

## 2.5 Advocate in Non-Adjudicative Proceedings

Rule 3.9

# 3 Duties to Opposing Parties & Other Persons

## 3.1 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 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

## 3.2 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