ADVOCATE

MODEL RULE 3.1

RULE 3.1 - MERITORIOUS CLAIMS AND CONTENTIONS

(a) 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..**

RULE 3.1 – COMMENT 2

The filing of an action or defense or similar action taken for a client is **not** frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.

What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make **good faith arguments** in support of their clients' positions.

RULE 3.1 – COMMENT 2

Such action is **not** frivolous even though the **lawyer believes** that the client's position ultimately **will not prevail**.

The action **is** frivolous, however, if the lawyer is **unable either to** make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

RULE 3.2 – EXPEDITING LITIGATION

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

RULE 3.2 – COMMENT 1

Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is **not** proper for a lawyer to:

- **routinely fail** to expedite litigation solely **for the convenience of the advocates.**
- Nor will a failure to expedite be reasonable if done for the **purpose of frustrating** an **opposing** party's attempt to obtain rightful redress or repose.

RULE 3.2 – COMMENT 1

It is not a justification that similar conduct is often tolerated by the bench and bar.

Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3 – CANDOR TOWARD THE TRIBUNAL

(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

RULE 3.3 – CANDOR TOWARD THE TRIBUNAL

(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.**

RULE 3.3 – CANDOR TOWARD THE TRIBUNAL

(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.

RULE 3.3 – CANDOR TOWARD 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.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(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.**

RULE 3.3 – COMMENT 5

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer **knows to be false, regardless of the client's wishes** . . . A lawyer does not violate this Rule if the lawyer offers the evidence for the **purpose of establishing its falsity**.

RULE 3.3 – COMMENT 6

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should **seek to persuade the client** that the evidence should not be offered.

If the persuasion is ineffective and the lawyer continues to represent the client, the **lawyer must refuse to offer the false evidence.**

RULE 3.3 – COMMENT 6

If only a **portion** of a **witness's** testimony will be **false,** the lawyer may call the witness to testify but **may not elicit** or otherwise permit the witness to present the testimony that the lawyer knows is false.

RULE 3.3 – COMMENT 15

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.

RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

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;

RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

(b) **falsify** evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Cmt [3]: it is not improper to pay a witness's **expenses** or to **compensate** an expert witness on terms permitted by law. The common law rule is that it is improper to pay an occurrence witness any fee **for testifying** and that **it is improper to pay an expert witness a contingent fee.**

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

(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;

RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

(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

RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

(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.

RULE 3.4 – COMMENT 4

Paragraph (f) permits a lawyer to advise **employees** of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client.

See also Rule 4.2

RULE 3.5 — IMPARTIALITY AND DECORUM OF THE TRIBUNAL

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;

RULE 3.5 – IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(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

RULE 3.5 – IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(d) engage in conduct intended to disrupt a tribunal.

Cmt [5]: The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, **including a deposition**. See Rule 1.0(m).

ABA FORMAL OP. 14-466

Unless limited by law or court order, a lawyer **may** review a juror's or potential juror's **Internet presence**, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

ABA FORMAL OP. 14-466

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media.

An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

ABA FORMAL OP. 14-466

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such **does not** constitute a communication from the lawyer in violation of Rule 3.5(b).

ABA FORMAL OP. 14-466

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

RULE 3.6 – TRIAL PUBLICITY

(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

RULE 3.6 – TRIAL PUBLICITY

(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;

RULE 3.6 – TRIAL PUBLICITY

(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

RULE 3.6 – TRIAL PUBLICITY

(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;

RULE 3.6 – TRIAL PUBLICITY

(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.

RULE 3.6 – TRIAL PUBLICITY

(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.**

RULE 3.6 – TRIAL 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).

RULE 3.6 – TRIAL PUBLICITY

Comment 5 (important!)

There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

RULE 3.6 – TRIAL PUBLICITY

Comment 5 PROHIBITED TOPICS

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

RULE 3.6 – TRIAL PUBLICITY

Background: ***Gentile v. State Bar of Nevada***, 501 U.S. 1030 (1991)

Gentile, a Nevada lawyer, represented Sanders in a criminal trial. The defendant was charged with stealing drugs and money used in an undercover operation conducted by the Las Vegas police.

RULE 3.6 – *GENTILE* CASE

During a pre-trial press conference, Gentile made several inflammatory statements, accusing a detective of stealing the drugs and travelers' checks and framing Sanders. Six months later, a jury acquitted Sanders on all counts.

The State Bar of Nevada filed a complaint against Gentile for violating Nevada Supreme Court Rule 177 (almost identical to the then-current version of ABA MRPC 3.6).

RULE 3.6 – *GENTILE* CASE

The rule prohibited attorneys from making any "extrajudicial statement" that a reasonable person would expect to be spread among the public and to materially prejudice the proceedings.

The disciplinary board found Gentile guilty of violating the rule, and in a 5-4 decision, the Supreme Court reversed.

RULE 3.6 – *GENTILE* CASE

The Supreme Court held that some state limitations on extrajudicial statements in criminal cases violated free speech rights.

The Court mandated a less demanding standard for attorney's speech regarding their pending cases in upholding the "substantial likelihood of materially prejudicing that proceeding" test.

RULE 3.6 – *GENTILE* CASE

The Court struck down parts of the Nevada rule which specified that an attorney could make "general" statements about the defense without "elaboration." The Court considered it too confusing of a standard and recognized that even a general statement could materially prejudice a case.

The Court ultimately upheld a general test, but struck down the more explicit language of the rule.

RULE 3.7 – LAWYER AS WITNESS

(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.

RULE 3.7 – LAWYER AS WITNESS

(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.

RULE 3.7 – CASES

State ex rel. Karr v. McCarty, 417 S.E.2d 120 (W. Va. 1992) (prosecutor whose testimony necessary to establish chain of custody of taped telephone conversations, integrity of which was contested, was properly disqualified)

RULE 3.7 – CASES

The advocate-witness rule applies to a lawyer's testimony in the form of a written affidavit. Even so, not all affidavits filed by a lawyer implicate the rule. Whether Rule 3.7 is implicated depends upon the affidavit's content and how the particular jurisdiction interprets the rule.

See, e.g., Int'l Res. Ventures v. Diamond Mining 934 S.W.2d 218 (Ark. 1996) ("Rule 3.7 is applicable to a lawyer's giving evidence by affidavit as well as by testimony in open court"; lawyer disqualified after choosing to submit evidentiary affidavit and testify)

RULE 3.7 – CASES

Unlike disqualification based upon conflicting interests, disqualification under Rule 3.7 is generally limited to representation at trial.

See, e.g., Culebras Enter. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988) (lawyers did pretrial work in civil rights case in which they would have been necessary trial witnesses but retained another firm to serve as trial counsel; trial court's finding that they violated Rule 3.7, and halving their fee award as sanction, reversed)

RULE 3.7 – CASES

Branch v. State, 882 So. 2d 36 (Miss. 2004) (defense lawyer whose testimony at trial merely authenticated physical evidence need not be disqualified).

Bernier v. DuPont, 715 N.E.2d 442 (Mass.App. Ct. 1999)(lawyer for executrix in probate matter should have been allowed to testify regarding amount of legal fees at issue in case).

RULE 3.7 – CASES

The rationales of the advocate-witness rule do not apply to the pro se lawyer-litigant.

Accordingly, courts have generally allowed lawyers to represent themselves even when they were likely to be necessary witnesses.

See, e.g., Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985)

RULE 3.7 – ABA INFORMAL ETHICS OPINION 83-1503 (1983)

Neither Model Code nor Model Rules prohibit a lawyer who withdrew as counsel of record in anticipation of testifying from assisting substitute counsel or arguing the appeal, or from testifying at trial on remand if the appeal succeeds.

Even so, the lawyer may do so only if the testimony is not an issue on appeal and there is no conflict of interest between the lawyer and client.

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(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;

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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;

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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;

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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;

RULE 3.8 – COMMENT 4

Paragraph (e) is intended to **limit** the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a **genuine need to intrude into the client-lawyer relationship.**

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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,

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Cont. (f): 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.

RULE 3.8 – COMMENT 5

Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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.

RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(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.

RULE 3.8 – COMMENT 8

Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

RULE 3.8 – OTHER POINTS

A prosecutor's agreement to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the arrest is called a **release-dismissal agreement.**

RULE 3.8 – OTHER POINTS

As a matter of federal common law, release-dismissal agreements are valid and enforceable if they are voluntary, if there is no evidence of prosecutorial misconduct, and if enforcement would not adversely affect the public interest.

Town of Newton v. Rumery, 480 U.S. 386 (1987) (upholding waiver of civil rights claim in connection with release of criminal prosecution)

RULE 3.8 – OTHER POINTS

The U.S. Constitution requires prosecutors to provide the defense with any favorable evidence that is material to guilt, punishment, or impeachment. *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution did not disclose accomplice's confession to homicide for which defendant convicted).

Favorable evidence is deemed material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667 (1985).

RULE 3.8 – OTHER POINTS

Rule 3.8, however, requires disclosure of all information that "tends to negate the guilt of the accused or mitigates the offense."

See ***Cone v. Bell***, 129 S. Ct. 1769 (2009) (although *Brady* "only mandates the disclosure of material evidence," duty to disclose other evidence "may arise" under Rule 3.8(d)); *Kyles v. Whitley*, 514 U.S. 419 (1995) (*Brady* "requires less of the prosecution" than Rule 3.8(d) or the ABA Standards for Criminal Justice)

RULE 3.8 – OTHER POINTS

In 2008, subsections (g) and (h) were added to Rule 3.8. They create post-conviction duties for prosecutors to disclose "new, credible and material evidence" they come to know of that "creat[es] a reasonable likelihood that a convicted defendant did not commit an offense" (subsection (g)), and to "seek to remedy [a] conviction" when they come to know of "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction" did not commit the offense for which he or she was convicted.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

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.