

# Ethics for Organizational Attorneys

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UNC SOG

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Which team has won the Victory Bell in 3 of the past 5 years?

Duke

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What the heck  
is the Victory  
Bell?



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Who says we're a  
basketball school?



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## Today's Topics

- *Where Were The Lawyers?*
  - The Penn State saga continues
  - The scandals keep on coming
- Ethics Before and During Trial

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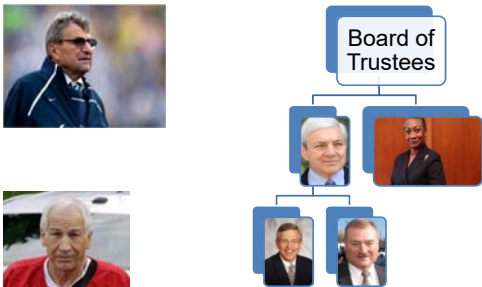
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## The Penn State saga continues . . .



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## The Penn State saga continues...



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## The Penn State saga continues...



Cynthia Barron, former state Supreme Court justice and Penn State trustee, is facing a Pa. Disciplinary Board hearing. John Beale - Centre Daily Times, Pa.

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Disciplinary hearing scheduled for  
former Penn State trustee

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## The scandals keep on coming.

- Rutgers (2013)
- Baylor (2016)
- Michigan State (2018)

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## Rutgers



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## Baylor



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## Michigan State



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Focus on the organization,  
not the individuals.

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## Ethics Before and During Trial

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## Ethical Concerns May Arise at Any Stage of Litigation

- Informal discussions
- Administrative hearing
- Trial
- Appellate proceedings
- Settlement negotiations

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Phone call from NC resident:

- “My brother is in Central Prison and is being abused. What should I do?”

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Phone call from NC resident:

- “Should I get a lawyer?”
- Rule 4.3: Dealing with unrepresented persons.
- 2018 KY Ethics Opinion

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## Employee vs. Agency, Part I

- Pat is an NC Assistant Attorney General assigned to the Dept. of Public Safety
- Pat works closely with the Director of Prisons
- The director is fired and later sues the state.
- May Pat assist in the representation of DPS in the the litigation the former director?

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May Pat represent DPS in the lawsuit by the former director or prisons?

Yes

No

Maybe

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## Rule 1.13 Organization as Client

- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall *explain the identity of the client* when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

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## 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.

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## Employee vs. Agency, Part II

- *Yanez v. Plummer*  
221 Cal. App. 4<sup>th</sup> 180 (2013)

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*Yanez v. Plummer*  
221 Cal. App. 4<sup>th</sup> 180 (2013)

- Employee is deposed by third-party who suffered injury on the work site and is suing employer
- Employee: “*Who will protect me at the deposition?*”
- Corporate attorney: “I’m your attorney for the deposition. As long as you tell the truth, your job won’t be affected.”

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*Yanez v. Plummer*  
221 Cal. App. 4<sup>th</sup> 180 (2013)

- Corporate attorney elicits testimony from employee that contradicts his initial statement about accident
- Employee later fired for dishonesty
- Sues attorney for fraud & malpractice

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More Fun with Depositions

- How would you deal with this opposing counsel?
- <https://www.youtube.com/watch?v=pocKf4-pfhM>

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## Trial Ethics

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What can you say about the opposing party during trial?

“Mr. Taylor claims that the construction work done by ABC Corp. met industry standards. But you heard testimony about the numerous code violations in the new prison built by ABC. Mr. Taylor says those code violations don’t prove anything. I say those code violations prove that Mr. Taylor is a liar.”

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Is this a permissible argument?

Yes

No

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## What Can You Say about the Opposing Party's Expert?

"The company's witness, Mr. Jones, has testified more than 100 times on behalf of the construction industry and has earned more than \$500,000 doing so. Mr. Jones has a mighty strong incentive to say whatever the construction companies want him to say."



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Is this a permissible argument?

Yes

No

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## What Can You Say about Opposing Counsel?

"Attorney Smith has been brilliant. She prepared her client perfectly, picked just the right expert, and presented her case smoothly. Her efforts to deceive and mislead this tribunal have been masterful."



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Is this a permissible argument?

Yes

No

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General Rules for Argument

- A lawyer may not “engag[e] in undignified or discourteous conduct that is degrading to a tribunal.”
  - N.C. R. Prof. Conduct 3.5(a)(4)
- A lawyer shall not “allude to any matter . . . not . . . supported by admissible evidence, assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused.”
  - N.C. R. Prof. Conduct 3.4(e)
- “[A]n attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant,” or argue matters not in evidence.
  - G.S. 15A-1230

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What Can You Say about the Impact of the Decision?

- “If you rule in favor of the plaintiff, the state will be on the hook for more than \$20 million. That’s \$20 million less for our teachers, our environment, our roads. The state can’t afford to lose \$20 million.”

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Is this a permissible argument?

Yes

No

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What Can You Say to the Media?

“I know for a fact that Big Builder broke its promises to North Carolina’s taxpayers. They deserve to be held responsible for those broken promises. And our community needs to send a message to other unscrupulous companies that such conduct won’t be tolerated in our state.”

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Is this statement permissible?

Yes

No

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### N.C. Lawyers Professionalism Creed

- To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail to achieve it, I will make our dispute a dignified one.
- To the courts, and other tribunals, and to those who assist them, I offer respect, truthfulness, and courtesy. I will strive to bring honor to the search for justice.



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### Deadlines & Defaults

- Opposing counsel calls at 4:30 p.m. on the day her client's response to your client's motion for summary judgement is due.
- She asks for you to consent to her request for a two-week extension of the deadline for the response.



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### How do you respond to opposing counsel's request?

- "Absolutely not."
- "Sure, no problem."
- "I'll have to run this by my client first."



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## Deadlines & Defaults

- The opposing party's answer to your complaint was due yesterday.
- What do you do?

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### What do you do about the missed deadline?

File a motion to default the opposing party.

Call the opposing party's attorney and remind her of the deadline.

Ask your client what it wants you to do.

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## NC RRPC Rule 1.2, Comment 1:

- Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel . . . a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

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## NC Ethics Opinion RPC 212 (1995)

- No requirement to obtain client's permission to notify opposing counsel of missed deadline.
- Don't make that call if "opposing counsel is known to procrastinate or delay or the interests of the client will be materially prejudiced by notifying opposing counsel."

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## Being nice might actually be a winning tactic.

- Research shows that fact-finders view as most effective lawyers who show "respect [and] courtesy" to the tribunal, witnesses, and parties
  - Jury consultant Pete Rowland

[T]he advocate who is polite and courteous is engaging in behavior that makes persuasion easier.

- Latour Lafferty, trial advocacy expert

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## What You Can Do

- Change tone of written correspondence
- Limit discovery demands
- Motion for sanctions only when opposing side's action was intentional/critical
- Be flexible when scheduling

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