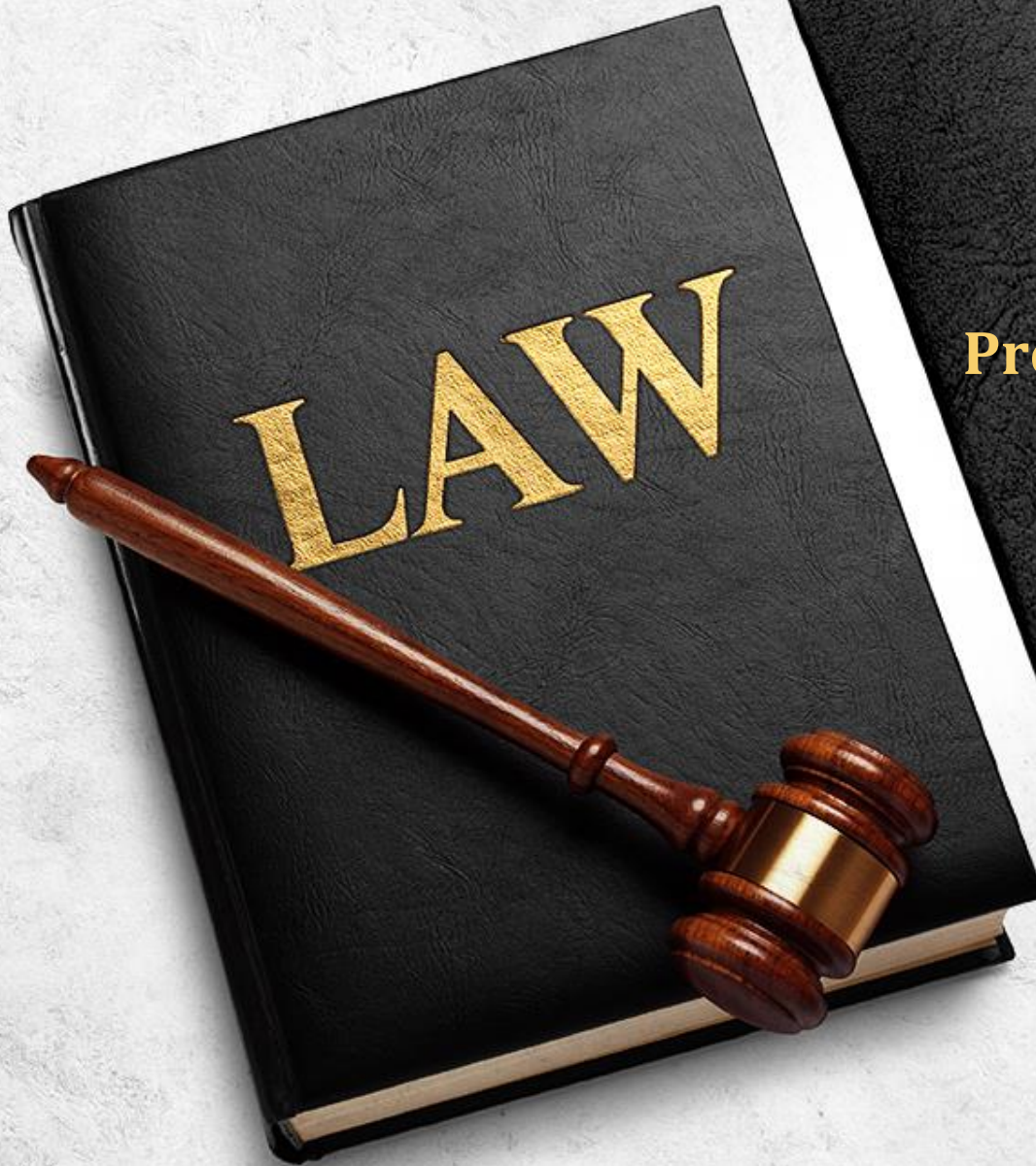


# Legal Ethics

## Lecture 07

Prof. Marvin Longabaugh

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# Duties to Opposing Party

- Don't obstruct the other party's investigation or destroy evidence
- Don't falsify evidence or put a witness on the stand who will lie MRPC 3.4(b)
- Don't ignore a judge's order unless you're challenging the legality of that order and have a good faith basis to believe that it is invalid MRPC 3.4(c)
- Don't make frivolous discovery demands and try to live up to the discovery demands made of you MRPC 3.4(d)
- Don't bring up, at trial, facts that are irrelevant or overly prejudicial or improper issues MRPC 3.4(e)
- Don't use the disciplinary process to intimidate or harass your opponent



# Anatomy of a Murder (1959)

M\_Anatomy\_22

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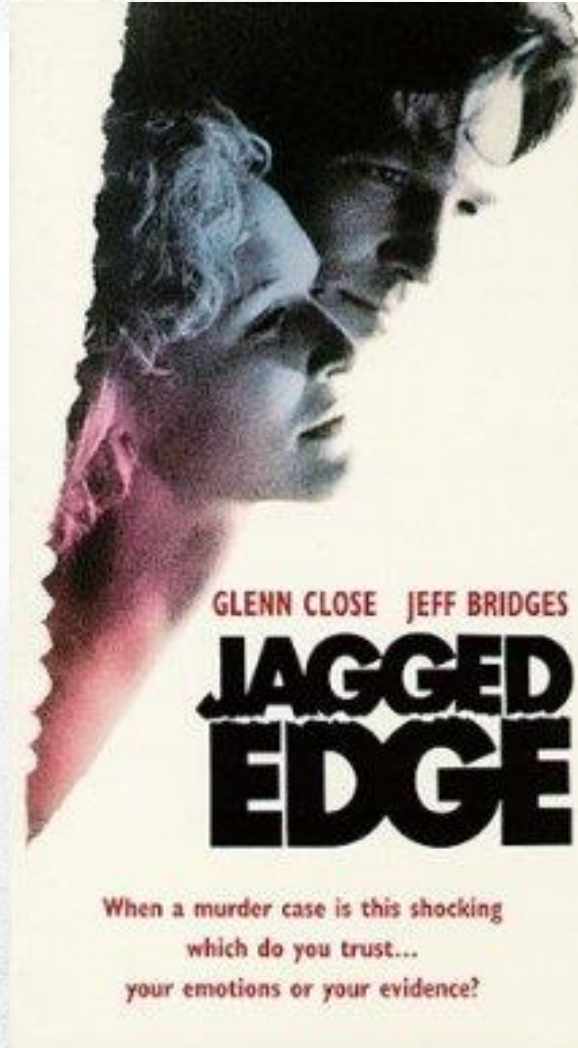
# Candor to the Court

- **This includes the duties (MRPC 3.3) to:**
  - Avoid making false statements of fact or law in court
  - Avoid using misleading case law in a brief
  - Disclose a case or law that is helpful to the opposition, if the case or law is binding
  - Remedy falsities that have already been presented in the case by that attorney
  - Avoid entering evidence that the lawyer knows is false
- **Note:** *If the lawyer **thinks** it may be false, but doesn't **know** whether it's true or false, he has a choice as to whether to enter it*



# Jagged Edge (1985)

M\_Jagged\_14





# False Testimony - The “Perplexing Problem of Perjury”

- Rule for witnesses and/or civil defendants:
  - One MAY NOT allow a witness to testify if the lawyer knows that the witness will lie.
  - If the attorney is unsure as to whether the witness will lie, she may refuse to call the witness



# False Testimony - The “Perplexing Problem of Perjury”

- If it is a criminal defendant who wants to lie on the stand, there is a problem
  - A criminal defendant has a Constitutional right to testify on his own behalf
- Some options for the attorney in such as case:
  - Convince the defendant not to testify or not to testify falsely
  - Try to withdraw (may be refused in mid-trial because it could be prejudicial to the client’s case)
  - Allow the defendant to testify in the “narrative”
  - Some states allow the attorney to question the defendant normally even if he will lie





# The Decision to Call a Witness Who May Testify Falsely



- **Must the lawyer refuse to call a witness if he knows she will commit perjury on his client's behalf?**
- No.
  - Rule 3.3(a) A lawyer shall not knowingly:
    - (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.
- The duty of candor to the tribunal trumps any control the client has over his own case.
- The lawyer has two choices:
  - Call the witness and take remedial measures if "known" perjury occurs
  - Don't call the witness





# The Decision to Call a Witness Who May Testify Falsely

- **What if the lawyer discovers that his witness lied under oath, but the lawyer has an argument that the factual misrepresentation wasn't "material"?**
- Rule 3.3 says that a lawyer may not knowingly make a false statement or offer false evidence.
- If the lawyer does so inadvertently, he need only correct the error if the false statement was material.
- If the lawyer doesn't correct the statement, opposing counsel will likely point out to the court that the witness thought that it was material enough to lie about.
- The trier of fact should be the one to decide if a lie is immaterial.



# The Decision to Call a Witness Who May Testify Falsely

- **May a lawyer decide whether or not a client in a criminal case will take the witness stand in his or her own defense?**
- No. The client has the absolute right to decide whether or not to testify.
  - Rule 1.2 (a) ... In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- The lawyer must explain the pros and cons of such testimony to the client so that the client may make an informed decision.
  - Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.







## The Client Who Intends to Commit Perjury When the Client Does Give False Testimony

- **If a client took the stand and broke his promise to be truthful, what must the attorney do?**
- Under Rule 3.3, the lawyer is required to take “remedial measures”.
- First, consult the client confidentially and seek the client’s cooperation with withdrawal and correction of the testimony.
- Second, the attorney may ask permission to withdraw (unlikely to be granted).
- Third, the lawyer must disclose, even if disclosure requires the lawyer to reveal information that would otherwise be protected by Rule 1.6.
- The client has the right to testify, but not the right to testify falsely.



# *Nix v. Whiteside*

## 475 U.S. 157 (1986)

- **Facts**

- Whiteside was accused of murder.
- For his trial, he was appointed a lawyer, Robinson.
- As they were preparing for trial, Whiteside and his friends who were present during the shooting all told Robinson that they saw the victim reaching for something, though they could not see what.
- Robinson's defense strategy was self-defense because Whiteside reasonably believed that the victim was reaching for a gun.
- However, a week before trial, Whiteside told Robinson that the thing the victim had been reaching for was metallic.
- When Robinson questioned him further, Whiteside said that if he did not testify that he saw a gun he would be "dead."
- Robinson assured Whiteside that all they needed to prove was reasonable belief the victim had a gun.





# *Nix v. Whiteside*

## 475 U.S. 157 (1986)

- **Facts**

- Robinson went on to say that if Whiteside testified to seeing something metallic, this would be perjury and Robinson would have to tell the court.
- Whiteside did testify at trial but did not perjure himself.
- The jury found Whiteside guilty of murder.
- Whiteside moved for a new trial claiming he had been deprived of a fair trial when Robinson told him not to testify to seeing something metallic.
- The trial court denied the motion.
- The Eighth Circuit Court of Appeals, however, held that Robinson's threat to violate attorney-client privilege violated the standards of effective representation.



***Nix v. Whiteside***  
**475 U.S. 157 (1986)**

- **Issue**

- Is a defendant denied the effective assistance of counsel when counsel informs him that if he commits perjury, counsel is obligated to disclose this information to the court?





# *Nix v. Whiteside*

## 475 U.S. 157 (1986)

### • **Ruling**

- No. There is no ineffective assistance of counsel when counsel informs a defendant that he must disclose perjury to the court because an attorney cannot allow a client to give false testimony.
- The Model Code of Professional Responsibility, the Model Rules of Professional Conduct, and the American Bar Association require such disclosure.
- The state Code of Professional Responsibility allows withdrawal of representation when a client threatens to commit perjury.
- Furthermore, precedence supports this almost universal standard [*Strickland v. Washington*, 466 U.S. 668 (1984)].
- Therefore, Robinson's actions were in line with accepted norms of professional conduct and did not deprive Whiteside of his Sixth Amendment right to counsel.



*Nix v. Whiteside*  
475 U.S. 157 (1986)

- **Ruling**

- Robinson continued to present the self-defense argument to the jury.
- His admonition merely prevented Robinson from perjuring himself. Accordingly, there was no ineffective assistance of counsel.
- (Concurrence by J. Brennan) The Court has no authority to establish rules of ethics to govern lawyers practicing in state courts.
- **While counsel must take all reasonable and lawful means to attain the objectives of the client, counsel may not assist the client in presenting false evidence or otherwise violating the law.**





# Quick Quiz



# End Of Class Review Quiz

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**THE  
BIG  
QUIZ**





# The End

