What's a Lawyer to Do?: The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct

Introduction

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct require that a lawyer provide zealous advocacy for the client to the fullest extent possible within the bounds of the law.[1] In this context "within the bounds of the law" encompasses the Rules of Professional Conduct as well as the Canon of Professional Responsibility and the Model Code of Professional Responsibility. Although a violation of the Rules by a lawyer does not subject him to fines and imprisonment *per se*, it does subject him to discipline by the governing authority, usually the state bar association. Also, professionalism as an unwritten code of conduct guides lawyers in knowing what is and is not permissible professional conduct.[2] In fact, the unwritten code of professionalism guided the legal profession years before the various codes of ethics were enacted.[3] On the other hand, lawyers owe clients a fiduciary duty to represent their causes competently, diligently, and with zeal.[4] If the advocate fails to adequately represent the client, he subjects

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[1] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) ("A lawyer should represent a client zealously within the bounds of the law."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 1 (1983) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause. . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed.").

[2] Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 32 (1993).

[3] *Id.*

[4] Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859, 863 (1995).

himself to professional discipline and even potential civil liability for malpractice.[5] The question presented then is: What is the lawyer to do when the best avenue for his client may violate the Rules of Professional Conduct? The answer, time and again, is that the various duties owed to the court and opposing counsel trump the client's interest, except in limited situations.

The primary focus of this Note is on two of the Rules of Professional Conduct. These rules address the duty owed to the tribunal[6] and the duty owed to the opposing party and counsel.[7] Through case analysis, the tension between zealous advocacy and the Rules of Professional Conduct is examined in a manner that will assist attorneys in knowing what is and what is not within the bounds of the law and the discipline utilized when zealous advocacy goes beyond the bounds of the law. Many of the cases were decided before the Model Rules of Professional Conduct were codified. However, the conduct in question would have been a violation under the ethics code in place at the time and would also be a violation under the Model Rules. Following the principals gleaned from these cases, a lawyer should know what he is to do for the court, his opposition, and his client.

I. Duty Toward the Tribunal

The first Rule of Professional Responsibility to be examined is the rule relating to candor toward the tribunal.[8] Lawyers have long been regarded as officers of the court; indeed many refer to themselves as officers of the court.[9] The role of a lawyer as an officer of the court was brought over from the English justice system.[10] This term signifies that a lawyer's

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[5] *Id.* at 863-64.

[6] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (1983).

[7] MODEL RULES OF PROFESSIONAL CONDUCT 3.4 (1983).

[8] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (1983).

[9] *See* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39 (1989).

[10] *In re* Griffiths, 413 U.S. 717, 732, 93 S. Ct. 2851, 2860, 37 L. Ed. 2d 910, 921 (1973) (Burger, C.J., dissenting).

duties to the judicial system as a whole outweigh his duty to the client.[11] "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course."[12] The duty to the client is not an unqualified duty.[13] The primary characteristic of the lawyer's role as an officer of the court is the duty to subordinate the interests of the client and the interests of the lawyer to the interests of the judicial system and the public.[14] The rule of candor toward the tribunal provides a list of actions that a lawyer cannot knowingly perform.[15]

A. False Statement of Material Fact or Law

The Rules of Professional Conduct state that a lawyer is not to "make a false statement of material fact or law to a tribunal."[16] The reason for the rule is to ensure that judges are able to rely on representations made by counsel.[17] The primary purpose of a trial court is to reach the truth so that the applicable law can be applied to the facts to reach a just conclusion.[18] The courts are almost wholly dependent on members of the bar to present the true facts. The lawyer, by not making a false statement of material fact or law, enables the judge or jury to "cook the adversary contentions in a crucible and draw off the material, decisive facts to which the law may be applied."[19] In *Florida Bar v. Oxner*, the lawyer lied to the judge by stating that he was unable to get in touch with a witness in order to obtain a continuance in the case.[20] The judge telephoned the witness

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[11] Gaetke, *supra* note 9, at 45-46.

[12] *In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265, 268 (1937).

[13] *In re* Griffiths, 413 U.S. at 732 (Burger, C.J., dissenting).

[14] Gaetke, *supra* note 9, at 48.

[15] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (1983).

[16] MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(1) (1983).

[17] Florida Bar v. Oxner, 431 So. 2d 983, 986 (Fla. 1983).

[18] Dodd v. Florida Bar, 118 So. 2d 17, 19 (Fla. 1960).

[19] *Id.* at 19.

[20] 431 So. 2d 983, 984 (Fla. 1983).

and discovered the lawyer's false statement.[21] The court imposed a sixty day suspension because the lawyer misled the court.[22] When a lawyer misleads a court, he tarnishes his image in the eyes of all judges.[23]

This rule is illustrated in *Virzi v. Grand Trunk Warehouse & Cold Storage* where the plaintiff's lawyer did not tell the judge or the opposing counsel that the plaintiff had passed away.[24] Three days after a mediation statement was filed with the mediation panel, the plaintiff died from causes unrelated to the basis of the personal injury lawsuit.[25] Plaintiff's counsel did not disclose this fact and allowed the claim to go into mediation.[26] The defendants' counsel claimed that the "sole reason for recommending acceptance of the mediation award was that [the] plaintiff would have made an excellent witness" had the case gone to trial.[27] The court stated that the duty of candor and fairness is not confined to truthfully answering questions asked by the court or opposing counsel; it includes volunteering information if it is necessary for justice to be served.[28] "A lawyer has no right to seek to advantage his client at the expense of the court."[29] The zealous representation of a client does not include the withholding of essential information. The court set aside the settlement and the case was docketed for trial.[30]

In a case where the lawyer misrepresented the facts in his brief and at oral argument, the court stated that the work of appellate courts cannot proceed satisfactorily if the courts cannot rely on the representations of counsel as to both the facts and the law.[31] The lawyer stated that an interval of fifteen to twenty minutes had elapsed from the time an all clear

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[21] *Oxner*, 431 So. 2d at 985.

[22] *Id.* at 986.

[23] *Id.*

[24] 571 F. Supp. 507, 508 (E.D. Mich. 1983).

[25] *Virzi*, 571 F. Supp. at 507.

[26] *Id.* at 508.

[27] *Id.*

[28] *Id.* at 511.

[29] *Id.*

[30] *Virzi*, 571 F. Supp. at 512.

[31] *In re* Greenberg, 15 N.J. 132, 135, 104 A.2d 46, 47 (1954).

signal was sounded and a train was started and contended that the elapsed time was "uncontradicted evidence."[32] The court discovered no mention of the time lapse in the record.[33] When the judge questioned the lawyer concerning the statement at oral argument, the lawyer conceded he had no basis in the record for the assertion.[34] The court stated that the lawyer's "oath binds him to the highest fidelity to the court as well as to his client."[35] His duty as an officer to the court is to aid the court in the administration of justice.[36] In this case, the lawyer escaped discipline because he did not write the appellate brief and he did not argue the case in the lower court.[37]

The duty to not knowingly make a false statement of material fact applies to a false statement told to the court and the withholding of essential information from the court. Also, the duty applies to a lawyer when he is not acting in his capacity as advocate for a client.[38] In *Montgomery County Bar Ass'n v. Hecht*, the lawyer was giving a deposition concerning his own interest in property.[39] He stated that he did not have an interest in property when he actually knew he had an interest in the specified property.[40] The court stated that the fact that the lawyer was acting in his own behalf when the statements were made did not allow him to escape discipline.[41] The appellate court affirmed his suspension from the practice of law.[42]

Another case involving a lawyer disciplined for making a false statement on his own behalf concerned a lawyer who received a speeding

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[32] *Greenberg*, 104 A.2d at 46.

[33] *Id.* at 47.

[34] *Id.*

[35] *Id.* at 48.

[36] *Id.*

[37] *Greenberg*, 104 A.2d at 47.

[38] *See In re* Barratt, 663 N.E.2d 536 (Ind. 1996) (suspending attorney for one year for fabricating letter and testifying falsely thereto in a breach of contract action between the lawyer and the company where he bought his facsimile machine).

[39] 456 Pa. 13, 18, 317 A.2d 597, 600 (1974).

[40] *Hecht*, 317 A.2d at 601.

[41] *Id.*

[42] *Id.* at 602.

ticket.[43] He was charged with speeding and failure to provide proof of insurance.[44] The prosecutor informed the lawyer's counsel that the failure to show proof of insurance charge would be dropped if counsel could show proof that the defendant lawyer had insurance.[45] At trial, the defendant lawyer produced a photocopy of an insurance card that he had falsified and he testified falsely about having insurance at the time of the ticket.[46] The truth was that the defendant had no insurance when he received the speeding ticket.[47] He was suspended from the practice of law for one year and one day.[48] He was also ordered to take and pass the multistate professional exam and pay costs of the court proceedings.[49] The court reasoned that an attorney testifying falsely raises questions about the attorney's fitness to practice law.[50]

Thus, punishment for giving a false statement of material fact to the court can range from suspension from the practice of law for a specified period of time to the favorable outcome of the court setting aside the client's case. Also, the rule of always being candid with the tribunal applies to attorneys even when they are not acting as advocates.

B. Adverse Legal Authority in the Controlling Jurisdiction

A lawyer shall not knowingly "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."[51] This rule allows the court to be "able to make a fair and accurate

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[43] People v. Kolbjornsen, 917 P.2d 277, 278 (Colo. 1996).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Kolbjornsen*, 917 P.2d at 279-80.

[49] *Id.* at 280.

[50] *Id.* at 279.

[51] MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(3) (1983).

determination of the matter before it" by having the benefit of all the relevant authority in the jurisdiction.[52] "The function of an appellate brief is to assist, not mislead, the court."[53] Counsel has an affirmative duty to advise the court of adverse authority, although counsel may urge reconsideration of the adverse authority.[54] Failure to cite adverse authority may stem from inexperience, neglect, incompetence, or deliberate intent.[55] Courts often apply a reasonableness standard to determine whether a lawyer should have found the adverse authority.[56] Some courts require that similar authority be produced, even if not controlling in that particular jurisdiction.[57]

In *Cicio v. City of New York*,[58] the City of New York failed to disclose numerous adverse controlling authorities.[59] The court stated that the failure to disclose those authorities was disturbing and totally inexcusable because the city was a party to two of the cases.[60]

> The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state.[61]

At least one court has taken the position that if the issue is a very common issue, the lawyer need not cite all the relevant decisions in the jurisdiction.[62] That court also stated that when the question is new or

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[52] Newberger v. Newberger, 311 So. 2d 176 n.1 (Fla. Dist. Ct. App. 1975).

[53] Cicio v. City of New York, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 469 (1983).

[54] *Cicio*, 469 N.Y.S.2d at 469.

[55] Stewart Howard, Comment, *The Duty to Cite Adverse Authority*, 16 J. LEGAL PROF. 295, 296 (1991).

[56] *Id.* at 297.

[57] *Id.* at 298.

[58] 98 A.D.2d 38, 469 N.Y.S.2d 467 (1983).

[59] *Cicio*, 469 N.Y.S.2d at 468.

[60] *Id.* at 469.

[61] *Id.* (quoting *In re* Greenberg, 15 N.J. 132, 137-38, 104 A.2d 46, 49 (1954)).

[62] *Greenberg*, 104 A.2d at 48.

novel, or where authority is lacking, the lawyer's duty may be broader.[63] The test in each case is whether the case that opposing counsel has overlooked is one which the court should consider in deciding the case at issue.[64]

C. No Offering of Evidence That the Lawyer Knows to Be False

A lawyer shall not "offer evidence that the lawyer knows to be false."[65] A lawyer does not violate the rule if he does not know that the client or witness is presenting false evidence or testimony. "The nature of lying does not lend itself to discovery if the liar can prevent it."[66] The question is when does the attorney know enough to know that the client is committing perjury. "An attorney must determine at what point opinion and belief become so unreasonable and untrue" as to become perjury.[67]

In a case involving disbarment of an attorney who urged and advised several persons, including his clients, to give false testimony, the court stated that no breach of professional ethics, or of the law, causes more harm to the administration of justice than an attorney using false testimony when he knows of its falsity.[68] When false evidence is allowed and the law is applied to the false evidence, justice is not served. "When an attorney adds or allows false testimony to be cast into the crucible from which the truth is to be refined and taken to be weighed on the scales of justice, he makes impure the product and makes it impossible for the scales to balance."[69]

Often an attorney may feel that the only way he can win for his client is to offer false evidence. However, the goal of the lawyer should be to

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[63] *Id.* at 49.

[64] *Id.*

[65] MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(4) (1983).

[66] Charles F. Thompson, Jr., *The Attorney's Ethical Obligations When Faced With Client Perjury*, 42 S.C. L. REV. 973, 986 (1991).

[67] *Id.* at 975.

[68] Dodd v. Florida Bar, 118 So. 2d 17, 19 (Fla. 1960).

[69] *Id.* at 19.

see that justice is done, rather than to do anything possible to gain an advantage for the client.[70] "Counsel does have an obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession.'"[71] The attorney faced with the situation of knowing his client intends to offer false testimony faces a dilemma. He cannot knowingly allow his client to offer false testimony to the court.[72] If he reveals the intentions of his client, he has violated the duty of loyalty owed to the client. However, courts have held that when a lawyer refuses to assist a client in committing perjury, the client does not have a claim against the lawyer for ineffective assistance of counsel.[73] This follows the reasoning that the attorney's primary duty is to the court, not the client. An attorney should not be punished for following the requirements of the Rules of Professional Conduct.

The criminal attorney faces complications in this area that the civil attorney does not face. Criminal defendants are protected by the constitutional right against self-incrimination when they testify on their own behalf.[74] In *Nix v. Whiteside*, the lawyer told his client that he would withdraw from representation if the client insisted on committing perjury.[75] Whiteside stabbed a man as the man lay in bed, and he initially told his lawyer that the man was reaching to get a gun out from under a pillow.[76] When the lawyer questioned Whiteside about the gun, Whiteside admitted that he had not actually seen the gun, but he knew that unless he testified that the victim had a gun he would be "dead."[77] A week before the trial, Whiteside told his lawyer that he had viewed something metallic in the victim's hand.[78] The lawyer informed Whiteside that he

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[70] Thornton v. United States, 357 A.2d 429, 438 (D.C. 1976).

[71] *Id.* at 437 (quoting Mitchell v. United States, 259 F.2d 787, 792 (D.C. Cir. 1958)).

[72] *Id.* at 437-38.

[73] *See id.*; *see also* Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986); United States v. Henkel, 799 F.2d 369 (7th Cir. 1986).

[74] U.S. CONST. amend. V.

[75] 475 U.S. 157, 161, 106 S. Ct. 988, 991, 89 L. Ed. 2d 123, 131 (1986).

[76] *Whiteside*, 475 U.S. at 160.

[77] *Id.* at 161.

[78] *Id.*

would withdraw if Whiteside insisted on committing perjury.[79] Following the admonishment from his lawyer, Whiteside did not testify that he saw something metallic in the victim's hand while on the stand.[80] After the jury convicted him, Whiteside sued his lawyer for ineffective assistance of counsel.[81] Whiteside's conviction for second degree murder was affirmed on appeal.[82] The United States Supreme Court stated that "it is elementary that such a right does not extend to testifying falsely."[83] A lawyer who allows a witness to testify when the lawyer knows that the testimony is going to be false is as guilty as a lawyer who "[tampers] with witnesses or jurors by way of promises and threats, and undermines the administration of justice."[84]

In a civil action, the severity of perjury is as much as in a criminal action. However, in a civil action the constitutional implications of one having the right to testify on his own behalf do not come into play. In *In re Carroll*, an attorney was disciplined for allowing his client to commit perjury in a divorce action.[85] The attorney represented the husband in an action filed by the wife to receive temporary alimony.[86] When asked what property he owned, the client testified that he owned no property whatsoever except an old automobile.[87] The attorney knew that the client was lying because the attorney was the equitable owner of certain real estate he was holding in trust for the client which was conveyed a few days before the judicial proceeding.[88] The court stated, "[u]nder *any* standard of proper ethical conduct an attorney should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the

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[79] *Id.*

[80] *Id.* at 162.

[81] *Whiteside*, 475 U.S. at 162.

[82] *Id.*

[83] *Id.* at 173.

[84] *Id.* at 169.

[85] 244 S.W.2d 474, 474 (Ky. 1951).

[86] *Id.*

[87] *Id.*

[88] *Id.*

issue under consideration."[89] Because the conduct impaired public confidence in the high moral standards of the legal profession and the attorney, as officer of the court, violated his duty to maintain the integrity of the judicial system, he was suspended from the practice of law for ninety days.[90]

In another case involving an attorney knowing that his client was testifying falsely during a domestic proceeding, the attorney was suspended from the practice of law for sixty days.[91] The attorney knew that the testimony was false because the client falsely answered questions regarding the attorney's fee.[92]

The comments to Rule 3.3 provide assistance for the lawyer confronted with a client intending to perjure himself. One option is to permit the witness to testify by narrative.[93] Testifying by narrative means that the witness will testify without the assistance of the lawyer's questioning. Even though the attorney does not solicit the answers, if he has knowledge that the witness is testifying falsely, he is not being candid with the court. He may even be guilty of subordination of perjury.[94] The comments to Rule 3.3 also propose that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client.[95] This makes the advocate a knowing instrument of perjury.[96] Lastly, the comments allow for the lawyer to reveal the client's perjury if necessary to rectify the situation.[97] If the testimony has been offered, the lawyer should withdraw if that course will remedy the situation. Disclosure to the court is the next step the lawyer is to take if withdrawal is not feasible.[98]

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[89] *Id.* (emphasis added).

[90] *Carroll*, 244 S.W.2d at 475.

[91] Medoff v. State Bar of California, 71 Cal. 2d 535, 536, 455 P.2d 800, 801, 78 Cal. Rptr. 696, 697 (1969).

[92] *Medoff*, 455 P.2d at 801.

[93] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 cmt. 9 (1983).

[94] Thompson, *supra* note 66, at 978.

[95] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 cmt. 9 (1983).

[96] *Id.*

[97] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 cmt. 10 (1983).

[98] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 cmt. 11 (1983).

Another possibility is to question the witness only on subjects on which the attorney knows he will testify truthfully.[99]

D. Candor Toward Tribunal Supercedes Client Confidentiality

The duties of candor toward the tribunal continue until the conclusion of the proceedings and "apply even if compliance requires disclosure of information otherwise protected by" the client confidentiality rule.[100] This follows from the officer of the court rationale in which the lawyer is a quasi-judicial officer.[101] As an officer of the court, the lawyer's duties are both private and public.[102] When zealous advocacy for a client conflicts with duties as an officer of the court to further the administration of justice, the private duty to the client must yield to the public duty to the court.[103] The duty of a lawyer to a client, whether in a civil or criminal proceeding, is subordinate to his responsibility for the proper administration of justice.[104]

E. Miscellaneous Duties Owed to the Tribunal

A lawyer owes an obligation to turn evidence in his possession over to the proper authority.[105] This obligation stems from the lawyer's duty as an officer of the court, which requires him to aid in the determination of truth whenever possible.[106] This requirement creates a conflict between zealous advocacy and the Rules of Professional Conduct, especially when

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[99] Thompson, *supra* note 66, at 980.

[100] MODEL RULES OF PROFESSIONAL CONDUCT 3.3(b) (1983).

[101] Fite v. Lee, 11 Wash. App. 21, 28, 521 P.2d 964, 968 (1974).

[102] *Fite*, 521 P.2d at 968.

[103] *Id.*

[104] State v. Kruchten, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966).

[105] Hitch v. Pima County Super. Ct., 146 Ariz. 588, 594, 708 P.2d 72, 78 (1985).

[106] *Hitch*, 708 P.2d at 76.

the evidence came into the lawyer's possession through communications with the client. Thus, a potential dilemma of violating the attorney-client privilege or violating the duty to disclose evidence to the proper authority could arise.

The Washington Supreme Court held that "[t]o be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client."[107] In this case, a lawyer was subpoenaed to a coroner's inquest and was told to bring all knives in his possession relating to his client and two other persons.[108] The lawyer stated that he had no knives belonging to the two other persons and raised the attorney-client privilege when questioned whether he had in his possession any knives relating to his client.[109] A "confidential communication may be made by acts as well as by words, as if the client rolled up his sleeve to show the lawyer a hidden scar, or opened the drawer of his desk to show a revolver there."[110] The court employed a balancing process which weighed the attorney-client privilege and the privilege against self-incrimination against the public's interest in the criminal investigation process.[111] The court held that the *subpoena duces tecum* was invalid because it required the lawyer to testify to matters protected by the attorney-client relationship without his client's consent.[112]

In a factually similar case, the lawyer came into possession of a wristwatch taken from his client's jacket.[113] The wristwatch belonged to the victim and the lawyer received it through his client's girlfriend, a third person.[114] The issues facing the court were whether "a defense attorney

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[107] State v. Olwell, 64 Wash. 2d 828, 831, 394 P.2d 681, 683 (1964).

[108] *Olwell*, 394 P.2d at 682.

[109] *Id.*

[110] Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897, 903 (1986) (quoting C. MCCORMICK, EVIDENCE § 89, at 183 (1972)).

[111] *Olwell*, 394 P.2d at 684.

[112] *Id.* at 686.

[113] *Hitch*, 708 P.2d at 74.

[114] *Id.*

[has] an obligation to turn over to the state potentially inculpatory, physical evidence obtained from a third party," the proper manner in which this should be done, and whether the lawyer must withdraw from the case.[115] The Arizona Supreme Court held that if the lawyer reasonably believes that evidence will not be destroyed, he may return it to the source, explaining the laws on concealment and destruction.[116] If the lawyer believes that the evidence might be destroyed, he can turn it over to the prosecution.[117] The proper procedure for the lawyer to employ in turning the evidence over to the proper authorities provides giving the evidence to an agent who would then deliver it to the police without disclosing the source of the item or the case involved.[118] The prosecutor then is precluded from making mention of the source of the evidence in front of the jury.[119] The lawyer need not withdraw as counsel if the chain of possession can be stipulated and no mention is made to the fact that the defendant's lawyer turned the evidence over to the prosecution.[120] The facts of the *Hitch* case required the lawyer to disclose the evidence because he had a reasonable belief that it would be destroyed or concealed if he did not take possession and turn it over to the appropriate authorities.[121]

A somewhat different approach to the lawyer's duties concerning evidence that comes into his possession was taken by the Supreme Court of California. In *People v. Meredith*, the defendants appealed from first degree murder and first degree robbery convictions.[122] The issue was whether the attorney-client privilege shields evidence which was seized by the lawyer or an agent of the lawyer.[123] The lawyer learned from the defendant that the defendant had placed the victim's partially burned

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[115] *Id.*

[116] *Id.* at 78.

[117] *Id.* at 79.

[118] *Hitch*, 708 P.2d at 79.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] 29 Cal. 3d 682, 685-86, 631 P.2d 46, 48, 175 Cal. Rptr. 612, 614 (1981).

[123] *Meredith*, 631 P.2d at 48.

wallet in a trash can behind the defendant's house.[124] The court reasoned that the purpose of the attorney-client privilege was to encourage full and open communication between the client and his lawyer.[125] The attorney-client privilege gives the client assurance that he can make full disclosure to his lawyer.[126] This is especially compelling in the criminal context because if the client was afraid to fully confide in his lawyer, it would be difficult for him to obtain adequate legal advice. However, the court held that when defense counsel alters or removes physical evidence, he deprives the prosecution of the opportunity to observe its original location and condition.[127] Therefore, whenever defense counsel removes or alters evidence, the attorney-client privilege does not bar revelation of the original location or condition of the evidence.[128] The flaw with this logic is that the duty to disclose the evidence makes the attorney "little more than an agent of the state, and thus is inconsistent with an adversarial system of justice in which an attorney is a zealous advocate for his client's cause."[129]

A different result concerning the attorney-client privilege was reached in a case involving a lawyer learning through communications with the client that additional murders had been committed by the client and the location of the victims' bodies.[130] In *People v. Belge*, the lawyer was indicted for violating a decent burial ordinance when he refused to disclose the location of the bodies which was revealed to him during the course of representing his client.[131] The court stated that the "effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense."[132] The court further stated, "[t]here

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[124] *Id.*

[125] *Id.* at 51.

[126] *Id.*

[127] *Id.* at 53.

[128] *Meredith*, 631 P.2d at 53.

[129] Michael B. Dashjian, People v. Meredith: *The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CAL. L. REV. 1048, 1059 (1982).

[130] People v. Belge, 83 Misc. 2d 186, 187, 372 N.Y.S.2d 798, 799 (1975).

[131] 372 N.Y.S.2d 798, 800 (1975).

[132] *Belge*, 372 N.Y.S.2d at 801.

must always be a conflict between the obstruction of the administration of criminal justice and the preservation of the right against self-incrimination which permeates the mind of the attorney as the alter ego of his client."[133] The indictment against the lawyer was dismissed.[134]

Although the duty to the court supercedes the duty to the client, some courts have given deference to the attorney-client privilege and realized its significance on the client's representation.[135] Those that hold that the lawyer must disclose evidence, even if it violates the attorney-client privilege, follow the reasoning that the lawyer is both a public and a private figure.[136] He is a public figure in that he is a member of the judicial system.[137] He is a private figure in the representation of individual clients.[138] When the public duty and the private duty conflict, the latter must give way to the former, even though it could be devastating to the client.[139] Although, the attorney knows what he is required to do when confronted with these types of situations, it is no doubt very difficult to not be loyal to one's client, knowing that the client is depending upon the lawyer.

Another area in which the lawyer must allow his role as a judicial officer to lead his decisions arises when he receives materials which are intended for other persons. Sometimes a lawyer will receive materials sent by the opposing party or counsel which are not intended for the lawyer. This occurs without misconduct or fault on the part of the lawyer receiving the materials. However, in the era of fax machines and speed dial, proposals have been made to amend the Rules of Professional Conduct to cover situations in which the lawyer receives information not intended for him.[140] Three proposals concerning received information

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[133] *Id.* at 803.

[134] *Id.*

[135] *See id.* at 801; *Olwell*, 394 P.2d at 685.

[136] *See, e.g., Olwell*, 394 P.2d at 684; Fite v. Lee, 11 Wash. App. 21, 25, 521 P.2d 964, 968 (1974).

[137] *Fite*, 521 P.2d at 968.

[138] *Id.*

[139] *Id.*

[140] Kondakjian v. Port Auth. of N.Y. & N.J., No. 94 Civ. 8013, 1996 WL 139782 (S.D.N.Y. 1996) (stating report of the New York City Bar Association with proposed amendments to the Model Rules of Professional Conduct attached to opinion).

through a mistake made by the opposing party are for the lawyer to refrain from examining the documents, notify opposing counsel of the mistake, and abide by the instructions of the sending party regarding the return or destruction of the documents.[141] If the receiving lawyer does not know that the material is not intended for his benefit until after he has read the material, he is to notify the sender of the mistake and to return the original documents if so requested.[142] The burden then falls on the sender to seek a court order limiting the inadvertent recipient's use of the document.[143] "[T]here are many limitations on the extent to which a lawyer may go 'all out' for the client" and "[t]he limitation contemplated by this opinion is entirely consistent with these ethical restraints on uncontrolled advocacy."[144]

A lawyer is not to perpetrate a fraud upon the court. A lawyer is not to mislead the court concerning the law nor the facts, whether at trial or on appeal. However, fraud is more than blatant deception as to the law or the facts. Fraud can include substituting someone other than the defendant at the defense table without gaining the judge's permission.[145] In *People v. Simac*,[146] the defense lawyer substituted his law clerk for the defendant at the defense trial table.[147] The charges against the defendant for failing to yield while making a left turn and driving with a revoked license resulting in an automobile accident were dropped after two misidentifications during the trial.[148] The law clerk and the defendant both were tall, thin, dark blond-haired, and both wore glasses.[149] The Illinois Supreme Court upheld the trial court's finding that the defense attorney was guilty of direct criminal contempt, but the fine was reduced from five

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[141] *Id.*

[142] *Kondakjian*, 1996 WL 139782 at *8.

[143] *Id.* at *3.

[144] *Id.* at *4.

[145] People v. Simac, 161 Ill. 2d 297, 313-14, 641 N.E.2d 416, 424, 204 Ill. Dec. 192, 200 (1994); *see also* United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981); Miskovsky v. State, 586 P.2d 1104 (Okla. Crim. App. 1978).

[146] 161 Ill. 2d 297, 641 N.E.2d 416, 204 Ill. Dec. 192 (1994).

[147] *Simac*, 641 N.E.2d at 417.

[148] *Id.* at 419.

[149] *Id.* at 418.

hundred dollars to one hundred dollars.[150] A lawyer cannot knowingly deceive the court, even if doing so would be in the best interests of the client. The court stated that the defense lawyer had at least three alternatives to substituting the clerk at the defense table which included conducting an in-court line-up, seating the defendant with the audience and not substituting someone else at the table, and placing more than one person at the defense table.[151]

An attorney can be disciplined for practicing a deception upon the court without even being present in court.[152] Deception could occur, for example, when an attorney knew or should have know that her client was using the client's brother's name and the attorney did not reveal this information to the court.[153] The attorney testified in the disciplinary proceedings that she did not know her client had a brother.[154] The attorney further stated that had she known of the client's deceit, the deceit would be protected by the attorney-client privilege.[155] The court held that the fact that one person is representing himself as another is not protected by the attorney-client privilege.[156] Therefore, the attorney had a duty to the court to reveal the client's fraud.

Rule 3.3 of the Rules of Professional Conduct appears to places numerous restraints on the advocate. These restraints operate to ensure that an advocate's primary purpose is to see that justice is served. The lawyer's role as officer of the court requires that when the duty to the court and the duty to the client conflict, the duty to the court must prevail.[157] Also, when the duty to the court and the lawyer's own interest conflict, the duty to the court must prevail.[158] The tribunal is in place to seek the truth and an advocate should assist the tribunal in seeking the truth, even if it means compromising the duty owed the client. However,

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[150] *Id.* at 424.

[151] *Id.* at 422.

[152] *See* State v. Casby, 348 N.W.2d 736, 737 (Minn. 1984).

[153] *Casby*, 348 N.W.2d at 737.

[154] *Id.* at 738.

[155] *Id.* at 739.

[156] *Id.*

[157] Gaetke, *supra* note 9, at 48.

[158] *Id.*

the rule does not encompass the lawyer disclosing to the court the lawyer's own opinion about the guilt or innocence of his client.[159] If the role of the judge or jury, not the lawyer, is to determine the facts.[160] The court knows the correct facts and is presented with the law necessary to make an adequate decision; the right result will be reached. Therefore, the attorney's first loyalty is to the justice system as a whole and the advancement of truth.

II. Duty Toward Opposing Party and Counsel

Rule 3.4 of the Rules of Professional Conduct states that a lawyer is to be fair to opposing parties and counsel.[161] Again, the reasoning is for justice to be served and the truth sought. A lawyer should not have to deal with opposing lawyers as he would deal in the marketplace.[162] One court stated that a lawyer who deals with another lawyer should not need to exercise the same degree of caution one would exercise when trading for an "antique copper jug at a bazaar."[163] Many lawyers have come to believe that litigation is war and every available weapon should be utilized against opposing counsel.[164] The Rules of Professional Conduct do not condone such tactics.

A. Unlawfully Obstructing Another Party's Access to Evidence

"A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other

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[159] MODEL RULES OF PROFESSIONAL CONDUCT 3.3 cmt. 1 (1983).

[160] United States v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977).

[161] *See* MODEL RULES OF PROFESSIONAL CONDUCT 3.4 (1983).

[162] Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983); Kath v. Western Media, Inc., 684 P.2d 98, 100 (Wy. 1984).

[163] *Kath*, 684 P.2d at 101 (quoting Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiations*, 35 LA. L. REV. 577, 589-90 (1975)).

[164] Keeling, *supra* note 2, at 31.

material having potential evidentiary value,"[165] which includes procuring the absence of a witness from a proceeding.[166] The Rule encompasses more than the lawyer counseling a witness not to appear for the proceeding. A lawyer was reprimanded after encountering two witnesses on the stairs of the courthouse and instructing them that his client would be hurt if they testified.[167] The witnesses testified in the later proceeding that the lawyer did not tell them not to go into the courtroom.[168] However, the lawyer did not advise the judge or the opposing counsel that he had spoken with the witnesses.[169] As an officer of the court, the lawyer's duty was to tell both the court and opposing counsel that he had conversed with the witnesses and failure to do so was prejudicial to the administration of justice.[170] Just as courts and opposing counsel must be able to rely on what lawyer's say they must also be able to rely on what lawyer's do not say.[171]

In *Synder v. State Bar*, the lawyer defended his client in an unlawful detainer action.[172] An hour before the client's court-ordered deposition, his lawyer filed involuntary bankruptcy against the landlord to impede the unlawful detainer action.[173] The lawyer also advised his client not to appear at the court-ordered deposition.[174] Also, the lawyer referred to the opposing parties as "flannel-mouth" and "The Mouche," and he referred to the opposing attorneys as "alleged attorneys."[175] The lawyer was disbarred from the practice of law for these and other violations.[176]

Just as an attorney cannot commit fraud upon the tribunal by not revealing evidence that comes into the attorney's possession, the attorney

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[165] MODEL RULES OF PROFESSIONAL CONDUCT 3.4(a) (1983).

[166] State v. Martindale, 215 Kan. 667, 670, 527 P.2d 703, 705 (1974).

[167] *Martindale*, 527 P.2d at 705.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 706.

[171] *Id.* at 707.

[172] 18 Cal. 3d 286, 289, 555 P.2d 1104, 1105, 133 Cal. Rptr. 864, 865 (1976).

[173] *Synder*, 555 P.2d at 1105.

[174] *Id.*

[175] *Id.* at 1106.

[176] *Id.* at 1108.

cannot destroy or conceal physical evidence from the opposing party or counsel.[177] Likewise, an attorney cannot instruct another to conceal or destroy evidence.[178]

B. Falsifying Evidence or Assisting Witness to Testify Falsely

A lawyer shall not falsify evidence, or counsel or assist a witness to testify falsely.[179] Falsifying evidence includes altering evidence.[180] The California Supreme Court suspended a prosecutor from the practice of law for five years for altering evidence.[181] The execution of the order was stayed and the lawyer was suspended for two years plus any longer time necessary for him to pass the Professional Responsibility Examination.[182] The prosecutor altered a taxicab ticket to make it comply with the driver's testimony.[183] The ticket had not been provided to the defense, although it had been in the possession of the police department for some time.[184] The prosecutor obtained the ticket from the taxicab driver after the taxi driver's testimony was given.[185] He destroyed the original, after photocopying it, and provided the photocopy to opposing counsel.[186] The

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[177] *See* People v. Meredith, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981) (Lawyer's investigator found burned wallet in trash can behind defendant's house. The court held that whether the lawyer must turn the evidence over to the appropriate authorities depended on whether the authorities would be able to find the evidence.). *But see* State v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964) (holding attorney-client privilege protects evidence the attorney receives through communications with the client).

[178] MODEL RULES OF PROFESSIONAL CONDUCT 3.4(a) (1983).

[179] MODEL RULES OF PROFESSIONAL CONDUCT 3.4(b) (1983).

[180] Price v. State Bar of California, 30 Cal. 3d 537, 550, 638 P.2d 1311, 1318, 179 Cal. Rptr. 914, 921 (1982).

[181] *Price*, 638 P.2d at 1311.

[182] *Id.* at 1318.

[183] *Id.* at 1314.

[184] *Id.*

[185] *Id.*

[186] *Price*, 638 P.2d at 1314.

defendant was convicted of second degree murder.[187] The prosecutor contacted the defendant in jail, and he urged the defendant to refrain from filing an appeal in exchange for the prosecutor seeking a more favorable sentence and out-of-state incarceration.[188] This offer of a more favorable statement was to prevent the lawyer's misconduct from being revealed.[189] The court concluded that the lawyer had the state of mind to know what he was doing; thus, punishment should be imposed.[190]

When a lawyer falsifies evidence, due to the seriousness of the violation, a court will inquire into whether the lawyer was suffering emotionally, mentally, financially, physically, or experiencing other problems before imposing punishment. When a lawyer offers physical evidence into evidence, it must be the original or an exact duplicate of the original to comply with the best evidence rule.[191] When a lawyer offers a piece of physical evidence that is not identical to the original without explanation, he has violated the rule.[192] This rule applies whether the lawyer is acting as an advocate for a client or acting in his own behalf.[193]

Reznik v. State Bar of California involved a lawyer filing suit on his own behalf in small claims court.[194] The lawyer wrote a check to another person in the amount of $200, and the recipient of the check endorsed and deposited it in his account.[195] The lawyer contested the allegations stating that he had written "valid upon execution of agreement" on the back of the check and because the agreement was not executed, he sued for the amount in small claims court.[196] When the check was produced in court,

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[187] *Id.* at 1316.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] FED. R. EVID. 1002; *see also* FED. R. EVID. 1003 (stating duplicates are admissible to same extent as originals unless questioned as to authenticity or unfair to admit in lieu of original).

[192] Reznik v. State Bar of Cal., 1 Cal. 3d 198, 204, 460 P.2d 969, 974, 81 Cal. Rptr. 769, 773 (1969).

[193] *Reznik*, 460 P.2d at 970.

[194] 1 Cal. 3d 198, 201, 460 P.2d 969, 970, 81 Cal. Rptr. 769, 770 (1969).

[195] *Reznik*, 460 P.2d at 970.

[196] *Id.* at 973.

the left end was torn off, and the lawyer explained that his dog chewed it off.[197] However, a copy of the microfilm produced from the bank showed that the notation was not on the check when it was presented.[198] The court suspended the attorney from the practice of law for three years.[199]

The California Supreme Court imposed the same punishment for a lawyer altering physical evidence two years later when an attorney knowingly offered as genuine and true a written instrument fraudulently antedated and fabricated.[200] The lawsuit concerned whether a binding real estate agreement had been reached between the two parties.[201] The lawyer offered into evidence a letter which appeared to be an irrevocable agreement between the parties.[202] The opposing party testified that he had never seen or heard of the letter.[203] The court stated that the lawyer had practiced a wilful deception upon the court and the public.[204] Also, he showed no physical or other problems that might have had a bearing on his wrongdoing.[205] The court stated that it "must protect the public's right to presentation by attorneys who are worthy of trust and who fulfill the professional standards required of them."[206]

In some cases the punishment imposed is a private reprimand. A private reprimand was given to an attorney when he struck out the words "[i]n full payment of all claims to date" on a check given to his client by a third party.[207] The court stated that "to reap a benefit for his client through the destruction of written evidence against him" was reprehensible.[208]

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[197] *Id.* at 974.

[198] *Id.* at 972.

[199] *Id.* at 974.

[200] *See In re* Jones, 5 Cal. 3d 390, 487 P.2d 1016, 96 Cal. Rptr. 448 (1971).

[201] *Jones*, 487 P.2d at 1019.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 1022.

[205] *Id.*

[206] *Jones*, 487 P.2d at 1022.

[207] Colorado Bar Ass'n v. _____, 88 Colo. 325, 326, 295 P. 917, 918 (1931).

[208] *Colorado Bar Ass'n*, 295 P. at 918.

In *Lady v. State Bar*, the lawyer received an assignment from his client.[209] The assignment was for accrued alimony and the attorney was substituted for the assignor in the action against the assignor's husband.[210] The lawyer was served with a *subpoena duces tecum* by the defendant in the action to appear at a deposition with the written assignment.[211] The attorney refused to produce the assignment and refused to answer questions.[212] After the deposition was continued, the attorney produced a different assignment at the second session of the deposition.[213] The original assignment was destroyed by the attorney.[214] The court concluded that the attorney destroyed the instrument because the attorney believed it was material and relevant to the cause and his purpose was to conceal and suppress the facts.[215] His punishment was a public reprimand.[216]

The Alabama Supreme Court disbarred an attorney for falsely witnessing signatures on an instrument purporting to convey shares of stock.[217] The person whose name was signed to the stock transfer agreement filed a complaint with the local bar association claiming that he did not sign the instrument.[218] In a factually similar case arising out of Florida, an attorney signed his client's name to a warranty deed and affidavits without the client's knowledge or consent.[219] He also received money in relationship to the agreement without informing the clients.[220] The Florida Supreme Court granted his request to resign from the bar for this and numerous other violations.[221]

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[209] 28 Cal. 2d 497, 498, 170 P.2d 460, 460 (1946).

[210] *Lady*, 170 P.2d at 460.

[211] *Id.* at 460-61.

[212] *Id.* at 461.

[213] *Id.*

[214] *Id.* at 462.

[215] *Lady*, 170 P.2d at 462.

[216] *Id.*

[217] Worley v. Disciplinary Bd. of the Ala. State Bar, 407 So. 2d 822, 822 (Ala. 1981).

[218] *Worley*, 407 So. 2d at 822.

[219] Florida Bar v. Willingham, 386 So. 2d 553, 554 (Fla. 1980).

[220] *Id.*

[221] *Id.*

Altering a fee agreement before it was introduced into court resulted in disbarment for an Oregon attorney.[222] The attorney shared office space with another attorney.[223] The two attorneys undertook joint representation of two persons in a personal injury claim arising out of an automobile accident.[224] Disciplinary actions were brought against the attorney for not withdrawing from the case when a conflict of interest arose because insurance proceeds were limited and the two clients would be competing for the proceeds.[225] At trial, the attorney produced the fee agreement with the other attorney's name deleted.[226] Although the accused attorney fervently denied deleting the other attorney's name, the court found that he had motive and opportunity to do so.[227] For this and other violations, including the misrepresentation of his time and expenses on statements, he was disbarred.[228]

Nothing is more reprehensible than an attorney falsifying evidence. Evidence is presented to the judge or the jury at trial. From the record at the trial stage an appellate brief is written and perhaps argued in appellate courts. If the evidence is falsified, the truth cannot be sought because the law will be applied to false facts. The role of the lawyer is to be a truth seeker, even if the truth is adverse to the client.

C. Inducing Another to Alter Evidence

A lawyer shall not counsel or assist another person to destroy or conceal a document or other material having potential evidentiary value.[229] An attorney who advised a friend of a decedent to change the decedent's

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[222] *In re* Barber, 322 Or. 194, 201, 904 P.2d 620, 624 (1995).

[223] *Barber*, 904 P.2d at 621.

[224] *Id.*

[225] *Id.* at 623.

[226] *Id.*

[227] *Id.* at 624.

[228] *Barber*, 904 P.2d at 630.

[229] MODEL RULES OF PROFESSIONAL CONDUCT 3.4(a) (1983).

will to carry out the decedent's intentions was suspended from the practice of law for one year.[230] A technical omission was made on the will that made it absolutely void.[231] The attorney instructed the decedent's friend to erase the name of a bank on the will.[232] This altered the will; therefore, the attorney was guilty of inducing another to alter evidence.[233] Here, the attorney was carrying out the final wishes of the decedent by instructing the decedent's friend to erase the name of the bank. Again, the interests of the client must be subordinated to the interest of justice because an attorney is first an officer of the court.

A six month suspension was imposed on an attorney that induced a witness to change a ledger sheet during the course of a trial.[234] The attorney claimed that the change was harmless and did not pertain to a material issue of the trial.[235] "[N]othing is more calculated to undermine the administration of justice than the change of proffered exhibits by attorneys. In a most basic sense such conduct is highly improper and merits the severest reprehension."[236]

Although the American legal system is an adversary system in which each legal counsel is presumed to be capable and is charged with the responsibility of doing adequate research and using the necessary skill to assist one's client, it does not allow one to use any means possible to win. Truth should emerge from the controversy, not be hidden or preluded from the court to gain a victory for the client. One should not feel that being bound by the Rules of Professional Responsibility precludes him from zealously representing his client. The counsel for the opposition is bound by those same rules and if each side abides by the Rules, the truth will be found and the appropriate law can be applied to the facts.

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[230] Bar Ass'n of San Francisco v. Devall, 59 Cal. App. 230, 234, 210 P. 279, 280 (1922).

[231] *Devall*, 210 P. at 279.

[232] *Id.* at 280.

[233] *Id.*

[234] *In re* Pegalis, 30 A.D.2d 390, 392, 292 N.Y.S.2d 476, 477 (1968).

[235] *Pegalis*, 292 N.Y.S.2d at 476.

[236] *Id.*

Conclusion

The question "what is a lawyer to do?" is easily answered by the Rules of Professional Responsibility. When dealing with the court, an attorney should always be candid. He is indeed an officer of the court. This includes not making a false statement of material fact or law to the court. If the court bases its decision on a false statement of fact or erroneous law, the ends of justice are not met. Also, an attorney should disclose any adverse authority in the controlling jurisdiction which his opposition has failed to discover. This again is to aid the court in determining the truth. If both sides follow the rule, the court will be fully informed as to the law on the subject and the just result will be reached. Finally, an attorney is not to offer evidence he knows to be false. This includes both physical evidence and testimony from witnesses. If the attorney *knows* of the falsity of the evidence, he is to rectify the situation as soon as possible. All of the attorney's ethical obligations continue until the end of the proceeding. These obligations apply even if compliance with the ethical duty means revealing information learned from the client during confidential conversations. An officer of the court owes his first and foremost duty to the court. The duty to the court is to outweigh the duty to the client and the lawyer's own interests.

When dealing with opposing parties and counsel, an attorney is bound by another Rule of Professional Conduct. Rule 3.4 addresses fairness to opposing parties and counsel. An attorney is not to destruct or alter anything having potential evidentiary value. Also, he is not to counsel or assist another to destroy or alter anything of evidentiary value. The attorney is not to assist a witness to testify falsely in a matter. These rules are in place to enable both parties to discover the necessary evidence and facts surrounding the controversy. If altered evidence is used, the truth cannot be sought. If evidence is destroyed, the truth is lost. An attorney that counsels a witness to testify falsely is impeding the court and the opposing counsel from ascertaining the truth.

A lawyer should do what is fair. He should be fit to practice law. It is an honor and a privilege to practice law. As the cases note, when an attorney violates his ethical obligations, he will be punished. The punishment can come in the most severe form: disbarment. A lawyer is to do

what is right. He is to do what is just and reasonable in the circumstances. Perhaps a lawyer contemplating violating one of the Rules of Professional Conduct to advance his client's interests should ask himself the question of how *he* could ascertain the truth or try a case if his opposition did what he was contemplating. Then he would know what a lawyer is to do.

Angela Dawson Terry