CHAPTER 1

The Duty of Candor: Where Were the Lawyers and Why Didn't They Come Forward?

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§ 1.01. Introduction.

"It may be a dog-eat-dog world, but one dog may eat another only according to the rules."(1) So wrote Robert Kutak, who, in the late 1970's, chaired a committee appointed by the American Bar Association (ABA) to revise the ethical guidelines governing the legal profession. In a society where lawyers are often
viewed as hired guns employed to attain the goals of their clients regardless of the methods used, the 
ethics of the legal profession are subject to much scrutiny and oft-undeserved criticism. Many complaints, 
such as the high cost of services, are not particular to lawyers but shared by physicians, accountants, and 
other professionals. The adversarial nature of our legal system, however, has set lawyers apart from the 
providers of other professional services.

In most instances of what the public commonly considers the legal process, a lawyer can achieve success for 
his or her client only to the dis-advantage of another party. This "winner-loser" characteristic, although an 
inherent and approved aspect of the American civil justice system, gives rise to some measure of discontent 
with lawyers and their tactics. Nevertheless, as in most adversarial contests, there are rules with which 
lawyers must comply. Some rules of the legal profession take the sub-stantive form of statutes, regulations, 
and case law. These rules, which are often unfamiliar to the general public, set limits as to which of a 
client's goals can and cannot, or should and should not, be achieved through the legal process. Procedural 
guidelines -- those statutes, rules, and regulations which govern the method by which the "contest" is fought 
-- are the lawyer's stock in trade. These are the rules that most often perplex and aggravate the non-lawyer. 
They are also the rules that make lawyers a necessary part of the legal system. Much of a lawyer's education 
and experience is devoted to charting courses through the procedural framework of various courts, tribunals, 
and administrative agencies.

In addition to these substantive and procedural guidelines, however, lawyers are governed by ethical rules. It 
is within the context of these rules that much of the criticism from the general public arises. This is likely 
due to the fact that, rather than precisely worded statutes and complicated legal principles discussed in court 
opinions, ethical rules are grounded in fairness and equity, areas in which the non-lawyer is as 
knowledgeable and experienced as any legal professional. Ethical rules are not, of course, confined to the 
legal profession. Most professional fields have their own set of guidelines and enforcement mechanisms. 
Again, however, the adversarial nature of the legal system tends to give legal ethics a more prominent role. 
Parties who emerge from a lawsuit on the losing side, and those spectators who sympathize with them, may 
find comfort in attributing a portion of their ill fortune to a lawyer's "dirty tricks." Admittedly, these 
complaints are sometimes justified. Often, however, it is the framework by which these ethical rules are 
developed and enforced that fosters discontent. Like most professions, the legal profession develops and 
enforces its own ethical rules. These are typically drafted by lawyers and adopted by judges, who are also 
lawyers. Those exceptional ethical standards that are imposed by statute are, due to the overlap between law 
and politics, often supported and enacted by legislators who, again, are lawyers. Enforcement is left to 
judges or committees also made up of lawyers.

It is this closed system of ethical rule development and enforcement that makes the consistent and 
conscientious application of ethical duties of paramount importance to the legal profession. One ethical duty 
is that of candor. The controversy surrounding the extent of this duty usually arises in the context of a 
lawyer's competing duty of fairness to the court and opposing counsel and the duty to maintain the 
confidences of the client. A comprehensive examination of this controversy is beyond the scope of this 
Chapter. (3) Therefore, this discussion will focus instead upon the lawyer's duty to disclose information 
which is not protected by the attorney-client privilege.


[1]--Canons of Professional Ethics.

The earliest rules of ethics that applied to lawyers were those adopted by the bars of various jurisdictions. In 
1908, the ABA promulgated the Canons of Professional Ethics. At that time, bar associations in ten states 
had adopted ethical codes, based largely on the 1887 Code of Ethics of the Alabama State Bar 
Association. (4) The Canons, like the Alabama Code on which it was based, addressed specific areas, but
were not intended to be all encompassing:

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.\(^{(5)}\)

The lawyer's duty of candor to the court and opposing counsel was addressed in Canon 22:

**Candor and Fairness.**

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.\(^{(6)}\)

Canon 22 addresses active deception by the lawyer. The Canons were later amended to add Canon 41, which provided guidance to the lawyer who became aware of a fraud or deception perpetrated by others:

**Discovery of Imposition and Deception.**

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.\(^{(7)}\)

It should be noted that Rule 41 offered protection not only against fraud on the court, but also provided a remedy for the deception of any party.

[2]--**Model Code of Professional Responsibility.**

The Canons of Professional Ethics were in effect until 1969, when the ABA adopted the Model Code of Professional Responsibility. The Model Code was subsequently adopted, often with amendments, in 49 states and the District of Columbia.\(^{(8)}\) The Model Code greatly expanded the guidance set forth in the Canons of Professional Ethics by using a multi-tiered framework. Canons, embodying general standards of
professional conduct, were complemented by Ethical Considerations (EC) and Disciplinary Rules (DR). Ethical Considerations were viewed as "aspirational objectives" while Disciplinary Rules were mandatory in character. (9) Unlike the Canons of Professional Ethics, the Model Code was enforceable as law once adopted by a state.

Canon 7 requires that a lawyer "represent a client zealously within the bounds of the law." A number of Ethical Considerations derived from Canon 7 touch on a lawyer's duty of candor, primarily addressing active concealment by the lawyer. For example, EC7-25 cautions a lawyer against making statements before a tribunal that the lawyer does not believe to be supported by admissible evidence. EC7-23 requires the lawyer to disclose adverse legal authority overlooked by opposing counsel. EC7-26 prohibits the use of false or fraudulent testimony. Yet, the lawyer is advised of the duty to present any evidence favorable to his client's cause, so long as he does not know that evidence is false. (10) These guidelines are stated more concisely in DR 7-102 (11) and DR 7-106(B). (12)

A competing duty is set forth in DR 7-101 -- "A lawyer shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship except as required under DR7-102(B)." (13) DR4-101, regarding confidentiality, is also implicated. (14)


As a result of numerous inconsistencies within the Model Code, the ABA appointed a Commission on Evaluation of Professional Standards in 1977. The Commission was charged with determining whether the Model Code was sufficient, or could be made sufficient through amendment, to address the complex ethical issues arising in the modern practice of law. (15) In its final draft of the proposed Model Rules, submitted to the ABA for approval in 1982, the Commission adopted a black-letter rule and comment format similar to that of the American Law Institute's Restatements of the Law. Difficulties with the Model Code's tripartite format, such as the lack of direct ties between Ethical Considerations and Disciplinary Rules, made it burdensome to work with and led to inconsistent enforcement from jurisdiction to jurisdiction. (16) After debating the draft rules and a number of proposed amendments, the Model Rules were adopted by the ABA in 1983. Currently, 40 states and the District of Columbia have adopted ethics codes based on the Model Rules. (17)

[a]--Candor to the Court.

The Model Rules separate the lawyer's duty of candor to the court from the duty of candor to the opposing party and third persons. The lawyer's duty of candor to the court is discussed in Rule 3.3.

Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) 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

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to
know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.\(^{(18)}\)

Rule 3.3 incorporates the prohibitions of DR 7-102(A)(3)(6), (B)(1)-(2), and DR 7-106(B)(1). In addition to Rule 3.3(b), the Comments following the rule make clear that a lawyer's duty of candor to the court overrides the duty to maintain client confidentiality.\(^{(19)}\)

[b]--Candor to Others.

The Model Rules address the lawyer's duty of candor to persons other than the court in Rules 3.4 and 4.1.\(^{(20)}\)

Generally, the lawyer's duty to disclose information to the opposing party and others is not as stringent as the obligation owed to the court. For example, although Rule 3.4 prohibits the falsification of evidence and the assistance in a witness's perjury, there is no requirement that these actions, once unknowingly taken, be disclosed to opposing counsel. Even if the failure to disclose is viewed as assisting in the witness's perjury,\(^{(21)}\) any duty to disclose is, arguably, limited to notifying the court. Similarly, a lawyer has no duty to disclose false material facts to a third person unless disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; then disclosure is required only if it is not prohibited by the lawyer's duty of confidentiality under Rule 1.6. However, a lawyer's duty to the court is not limited by Rule 1.6.

[c]--Other Provisions.

Rule 3.8 requires prosecutors in criminal cases to disclose to the defense all exculpatory and mitigating information. Disclosure of mitigating information regarding sentencing must also be made to the court. Rule 3.9 requires that a lawyer appearing before a legislative or administrative body in a non-adjudicative proceeding disclose, if applicable, the fact that the lawyer is appearing in a representative capacity. The provisions of Rules 3.3(a)-(c) and 3.4(a)-(c) are also applicable in these proceedings.

§ 1.03. Information Subject to Disclosure.

[1]--Facts.

Our adversarial legal system contemplates that each party will fully investigate the facts of a dispute and bring to the attention of the court those facts most favorable to its position. The system is based on the belief that, in this manner, the court will be fully informed of the circumstances underlying the dispute. Another aspect of this system is that a party has no general duty to volunteer information to the opposing party.\(^{(22)}\) The discovery provisions of the Federal Rules of Civil Procedure, however, require some information be disclosed on demand. Proposed amendments to the Rules will, if adopted, require an initial disclosure of specific information. Generally, however, a party is not required to provide information to the opposing side unless a request, enforced by the court, is made.\(^{(23)}\)

A lawyer's ethical obligations alter this general rule with respect to evidence known by the lawyer to be false\(^{(24)}\) and offered in support of his client's position. It is contemplated that the adversarial nature of our
system, through investigation by a party, will reveal the falsity of any evidence offered by the other side. Nevertheless, adequate investigation may not be made, the evidence may be within the sole possession of the offering party, or it otherwise may not be available to the opposing side. In these cases, the true facts will not be revealed without additional safeguards. Accordingly, counsel is prohibited from knowingly offering false evidence and, upon discovering that false evidence has been submitted unknowingly, required to take remedial action.

This duty to disclose false evidence was included in both the Model Code and the Model Rules. The primary difference between the two is the resolution of the conflict between the duty of candor and the duty to maintain a client's confidences. This conflict arises most often in the context of client perjury or fraud. The lawyer usually learns of the client's misconduct through communications protected by the attorney-client privilege. The Model Code, as amended, subordinated the duty of candor to the duty to preserve client confidences.\(^{(25)}\) The Model Rules adopted the opposite approach.\(^{(26)}\)

Client confidentiality is not always an issue. In *United States v. Shaffer Equipment Co.*,\(^{(27)}\) the Department of Justice brought a claim on behalf of the Environmental Protection Agency (EPA) to recover the costs of a hazardous waste cleanup. The EPA employee in charge of the cleanup operation -- a material witness -- testified on deposition that he had completed the course work for a bachelor's degree and was working toward a master's degree. The Department of Justice and EPA counsel subsequently learned, partially through information obtained by opposing counsel, that the employee had not completed his undergraduate course work and was not enrolled in a master's degree program. In the course of an internal investigation, counsel also determined that the employee had falsified his employment records and had falsely testified as to his credentials in other cases. Although counsel notified opposing counsel that it would inform them if the employee's deposition testimony required correction, the EPA continued its prosecution and filed a motion for summary judgment without disclosing its employee's misrepresentations. On discovering this information, the defendants moved for dismissal based upon the misconduct of the EPA and its counsel.

The court granted the defendants' motion and dismissed the action with an award of attorneys' fees to the defendant. The court found that the government's decision to seek a ruling on its motion for summary judgment without informing the court that a material witness had lied about his credentials constituted a violation of counsel's duty of candor. Counsel's decision not to support its motion for summary judgment with any of the employee's deposition testimony and its subsequent request for a stay of proceedings\(^{(28)}\) was, in the court's view, insufficient to avoid the duty of disclosure.\(^{(29)}\)

A duty to disclose a client's perjury or other misconduct may be imposed even if the lawyer has not offered the false evidence. In a complicated case involving the misidentification of the defendant, a lawyer violated his duty of candor by accompanying his client to a pre-sentence interview with a probation officer. At that time, the client used an identity known by the lawyer to be false. Although the lawyer did not participate in the interview, the court found that the lawyer had scheduled the interview using his client's alias and confirmed that misinformation by his presence at the interview. The court found, however, that the lawyer did not violate any ethical duties by failing to inform a bail officer that his client had used a false identity in the procurement of bail.\(^{(30)}\) Nor did the lawyer violate any ethical duties when, at a subsequent arraignment on a different charge, he failed to inform the court of his client's conviction under a false identity.\(^{(31)}\)

A lawyer is not required to disclose client misconduct, even if that misconduct constitutes a crime, unless the misconduct is relevant to an issue before the court. Accordingly, a lawyer, told by his divorce client that the client is in violation of his parole in another jurisdiction, is not required to disclose this information unless he believes that it is relevant to a matter, such as child custody, to be decided by the court.\(^{(32)}\) The decision as to relevancy is often left to the lawyer's judgment. In another divorce case, the husband had a history of mental illness. He was granted child visitation rights, with the condition that his psychiatrist keep
the court advised of his condition. He was subsequently hospitalized involuntarily in a psychiatric facility and instructed his lawyer not to inform the court. On his release, the husband proceeded pro se. Asked whether the lawyer had a duty to disclose his client’s hospitalization, the ethics committee responded that the determination of whether the hospitalization was a "material fact" was left to the professional judgment of the lawyer. Further, the duty to disclose is not owed to the general public or the local prosecuting attorney. Thus, even if a lawyer must reveal certain information to the court or opposing party to fulfill the ethical duty of candor, the lawyer may not be required to report that misconduct to local authorities.

The misconduct of persons other than a client may also trigger a lawyer's duty of disclosure. In one case, a lawyer learned that a plaintiff in a case in which the lawyer was not involved had defrauded the court. Rather than reporting this to the court, the lawyer attempted to sell it to defense counsel in the case. When his conduct was reported, the lawyer received a 90 day suspension. In another case, defendants A, B, C, D, and E, represented by Attorney X, were successfully sued as shareholders of a corporation. A and B, represented by Attorney Y, subsequently were sued by C, D, and E, who claimed that Attorney X had given preferential treatment to A and B. In his deposition, Attorney X maintained that he had treated all of his former clients equally. Attorney Y later discovered correspondence from Attorney X to A and B indicating an intent to protect their interests above those of C, D, and E. Attorney Y settled the case before revealing the correspondence. The court, citing both the Model Code and the Model Rules, found that Attorney Y had violated the duty of candor.

Under some circumstances, material facts not involving fraud or other misconduct must be disclosed, even if they are adverse to the client. However, disclosure is usually limited to situations in which the failure to disclose will result in an inequitable decision by the tribunal. In one case, the respondent offered testimony as to the value of a parcel of property. Approximately four weeks later, while an appeal was pending, the respondent contracted to sell the property for an amount substantially greater than the value reflected by his testimony. The court found it "noteworthy" and "most serious" that the respondent's counsel, who had prepared the sales contract, neglected to disclose this development in a subsequent post-trial memorandum. In another case, the respondent was retained to convey property from his clients to a newly formed corporation, of which the clients were the sole stockholders. Respondent knew that the property had been pledged as security as part of a settlement agreement that his clients were seeking to have set aside. The court found that the respondent's subsequent participation in the proceedings, without disclosing the true state of title to the property, violated his duty to the court and to opposing counsel.

The death of a client has been held to be a material fact to be disclosed. In a case where the plaintiff's counsel settled a case two weeks after learning of his client's death, the court set aside the settlement because of the lawyer's failure to disclose his client's death prior to the settlement. In yet another case involving the EPA, an action was brought against the defendant for violations of federal environmental laws governing the disposal of hazardous waste. The EPA's claims were based on lab tests which it subsequently determined were invalid. Despite discovery requests from the defendant, the EPA failed to disclose this information and entered into a consent decree with the defendant. The defendant subsequently learned of the invalid results through a FOIA request and moved to have the consent decree set aside. Finding that EPA's counsel had engaged in misconduct prohibited by the Model Code and the Model Rules, the court granted the defendant's motion.

In at least one jurisdiction, it is an ethical violation for the prosecuting attorney or defense counsel not to inform the court that a police officer's failure to testify may be the result of an intent to aid the defendant.

A lawyer's duty to disclose factual misrepresentations does not, according to some authorities, extend to
correcting factual or legal errors made by the court or other parties. For example, defense counsel was not required to point out the court's error in imposing a misdemeanor sentence when the defendant had been convicted of a felony if counsel did not assist in preparing the sentencing order and did not endorse it.\(^{(42)}\) According to another ethics opinion, defense counsel was allowed to present alibi evidence when a witness's mistake as to the time of the crime resulted in an alibi defense, even though counsel knew his client was guilty.\(^{(43)}\) This rule sometimes has harsh results. A case was dismissed when plaintiff's counsel failed to file a new complaint when a case was transferred to another court in a jurisdiction where a new filing is required on transfer. The plaintiff subsequently retained new counsel, who was not informed of the dismissal. The state bar's ethics committee advised that defense counsel could wait for the statute of limitations to run without informing plaintiff's counsel of the dismissal. In fact, the committee opined that disclosure was prohibited without the consent of the defendant.\(^{(44)}\)

The duty to disclose adverse facts is heightened in \textit{ex parte} proceedings or other situations where the opposing party is not given an adequate opportunity to present evidence. In these cases, a lawyer must present all material facts, regardless of their effect on the client's position.\(^{(45)}\)

[2]--Law.

The duty to disclose adverse facts is confined to situations where the court may be misled by misrepresentations or, in some cases, omissions by a party or counsel. This limitation does not apply to counsel's obligation to disclose adverse law.\(^{(46)}\) This duty, however, is limited to \textit{controlling} authority in the jurisdiction that \textit{directly contradicts} the client's position. Controlling authority must be disclosed if it is not cited by the adverse party. This duty exists even if the lawyer is convinced that the case is distinguishable or the statute is unconstitutional.\(^{(47)}\) The appropriate course of action is to cite the authority, then vigorously attack it. Unlike the duty to disclose adverse facts, there has been little controversy regarding the duty to disclose adverse law.\(^{(48)}\) The relevant provisions of the Model Code and Model Rules on this matter are virtually identical.

\section*{§ 1.04. Sanctions for Violation of Duty.}

Since it is an ethical violation, a violation of the duty of candor is usually addressed by a bar's disciplinary board or committee. Sanctions may range from reprimand to disbarment, depending upon the circumstances of each case. Because they are directly affected by a violation of this duty, however, courts often impose sanctions independent of professional disciplinary measures. Sanctions available to the court include fines,\(^{(49)}\) suspension from practice before the court,\(^{(50)}\) striking the lawyer from the record in a particular case,\(^{(51)}\) revoking a lawyer's \textit{pro hac vice} status,\(^{(52)}\) and charges of criminal contempt.\(^{(53)}\) If the misconduct is shared by the lawyer's client, the court may bar the admission of evidence or dismiss the client's claims.\(^{(54)}\)

§ 1.05. Conclusion.

The adversarial nature of our legal system will inevitably lead to criticism of lawyers. Nevertheless, the system is designed to put all relevant facts and law before the decision makers -- the judge and jury. The lawyer's primary purpose in this process is to promote the goals of his or her client. The lawyer is above all, however, an officer of the court.

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. The [lawyer] cannot serve two masters and the one [the lawyer has] undertaken to serve
In fulfilling ethical duties, the lawyer has an ethical obligation to avoid misleading the court and to take steps to protect the court from misrepresentations by others, even if the misrepresentations would aid the lawyer's client. While some who criticize a lawyer's underhanded tactics may also protest when those same tactics are not used in their behalf, the public's confidence in the legal system and its practitioners will be bolstered by observing the duty of candor. Strict compliance with this and other ethical obligations will allow one to achieve the lawyer's mission of zealous representation within the bounds of the law.


2. 2. This is not a view recently formed, as evidenced by the American Bar Association's Canons of Professional and Judicial Ethics, Canon 15 [hereinafter cited as Canons of Professional Ethics], adopted in 1908:

How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

Though it may be false, this perception does have historical basis, as the following quotation from Lord Brougham's address to the House of Lords in Queen Caroline's defense illustrates:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

D. Luban, Lawyers and Justice: An Ethical Study, 54-55 (1988) (quoting J. Nightingale, 2 Trial of Queen Caroline 8 (1820-21)). For a more recent case of lawyers' misconduct and the quote from which the title of this article was taken, see Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

3. 3. An examination of the evolution of the ethical guidelines regarding this issue suggests that the duty to maintain the confidences of a client, viewed by some as paramount to all other obligations, has been tempered by a lawyer's duty to keep the court informed and to avoid the use of the legal system to engage in fraudulent conduct. Compare Model Code of Professional Responsibility [hereinafter cited as Model Code], DR7-102(B), as amended in 1974:

A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. (emphasis added).

with Model Rules of Professional Conduct [hereinafter cited as Model Rules or Rule], Rule 3.3, promulgated in 1983:

Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) 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
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6. (emphasis added).

See also ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 87-353 (1987) (decided under the Model Rules and discussing ABA Formal Opinion 287 (decided under the Canons of Professional Ethics) and ABA Informal Opinion 1314 (decided under the Model Code.)


5. 2. Canons of Professional Ethics, Preamble.

6. 3. Canons of Professional Ethics, Canon 22 at 15-16.

7. 4. Canons of Professional Ethics, Canon 41 at 39.

8. 5. California, while often relying on the Model Code, adopted its own ethical rules that differ significantly from the Model Code.


11. 8. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Model Code, DR 7-102.

12. 9. Trial Conduct.
(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel;

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

....

Model Code, DR 7-106.


(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Model Code, DR 4-101.


16. 13. Id. at 3-4.


18. 15. Model Rule 3.3.

19. 16. See Model Rules, Rule 3.3, comm. 1 (The duty to present the client's case with persuasive force "while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.")

20. 17. Model 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;

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

(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;

(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

(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.

Model Rule 4.1 Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

21. 18. This is the position taken in ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 87-353 (1987).

22. 1. However, there are those who advocate disclosure here. See M. Frankel, "The Search for Truth Continued: More Disclosure, Less Privilege," 54 U. Colo. L. Rev. 51 (1982), for the argument that a lawyer in a civil case should disclose all material evidence favorable to the other side.


24. 3. A great deal of debate arises to when a lawyer "knows" that evidence or a statement is false. See E. Kimball, "When Does a Lawyer `Know' Her Client Will Commit Perjury?" 2 Geo. J. Legal Ethics 579 (1988). While factual disputes are always present in civil litigation, a lawyer cannot avoid knowing the falsity of a statement through deliberate ignorance or disregard of the obvious.

25. 4. Model Code, DR 7-102(B)(1).


27. 6. 796 F. Supp. 938 (S.D. W. Va. 1992). As this Chapter was being written, an appeal in this case was pending in the Fourth Circuit.

28. 7. The stay was requested after the local United States Attorney was advised of the employee's false testimony.

30. 9. The lawyer obtained a bondsman for the client and informed him of the client's false identity. The bondsman, but not the lawyer, accompanied the client before the bail officer.

31. 10. At the arraignment, the client used his correct identity and the court did not inquire as to prior convictions.


45. 24. See Model Rule 3.3(d). See also Addison v. Brown, 413 So. 2d 1240 (Fla. App. 1982), aff'd sub nom. Lubin v. District Court of Appeals Fifth District of Florida, 428 So. 2d 663 (Fla. 1983) ("where a last minute petition is filed it is mandatory that counsel not only act in good faith, but that the petition and the attached appendix accurately and completely reflect all factual matters which may affect this court's decision").

46. 25. Model Code, DR7-106(B)(1); Model Rules, 3.3(a)(3).


50. 2. Id. at 527.

51. 3. Id.


55. 1. In re Integration of Nebraska State Bar Ass'n., 275 N.W. 265, 268 (Neb. 1937).