

# CHAPTER 1

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

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"It may be a dog-eat-dog world, but one dog may eat another only according to the rules."<sup>(1)</sup> 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.<sup>(3)</sup> Therefore, this discussion will focus instead upon the lawyer's duty to disclose information which is not protected by the attorney-client privilege.

## **§ 1.02. Origin of the Duty of Candor.**

### **[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.<sup>(4)</sup> The Canons, like the Alabama Code on which it was based, addressed specific areas, but