The Attorney's Duty to the Court Against Concealment, Nondisclosure and Suppression of Information as Coextensive with the Duty Not To Allow Fraud To Be Committed upon the Court

> The extent to which it is regarded as counsel's duty to advise the court as to matters relevant to the proper decision of the case of which opposing counsel is ignorant or which he has overlooked turns on the degree to which the old idea that litigation is a game between the lawyers has been supplanted by the more modern view that the lawyer is a minister of justice.
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> H. Drinker, *Legal Ethics* 76 (1953).

A case dealing with the failure of an attorney to advise the court of a matter which was relevant to a proper decision is *Sullins v. State Bar.*[1] A testatrix had disinherited her daughter and left her whole estate to her nephew. The daughter began an action to contest the will. Sullins, who had been the attorney for the conservator of the testatrix before her death, represented the executor of the will.[2] In this capacity, Sullins wrote to the nephew telling him of his position as sole beneficiary and that the daughter was contesting the will. The nephew immediately replied in a notarized letter, expressing his desire not to receive anything under the will and that the property should be the daughter's without her having to contest the will. Sullins did not acknowledge this letter nor did he disclose its receipt or the information contained therein to the daughter or to the court, which had before it the probate of the estate and the will contest. Three years later, still without having disclosed the letter, Sullins obtained from the court a 50% contingency fee, replacing a 33 1/3% agreement that had been in effect. In the petition for the new agreement, Sullins stated that the 33 1/3% fee was not adequate "because the civil action had been and would continue to be

1. 15 Cal. 3d 609, 542 P.2d 631, 125 Cal. Rptr. 471 (1975), *cert. denied,* 425 U.S. 937 (1976).

2. As attorney for conservator, Sullins had handled an action to set aside a conveyance by the testatrix of real estate, making up the bulk of the estate, to the disinherited daughter and herself as joint tenants because of lack of delivery. A default judgment against the daughter was obtained, but she secured permission to file an answer.

fiercely contested."[3] The daughter's attorney requested that the nephew come to California for the taking of depositions before trial. At these depositions, the nephew revealed the correspondence between himself and Sullins. As a result of this information, the daughter obtained the removal of the administrator and Sullins from the handling of the estate. The court found that fraud upon the court and the estate had been committed when the petition for the increased fee was presented for the court's approval while the letter from the nephew was kept secret. An administrative committee of the State Bar found that Sullins had not carried out the oath and duties required of an attorney, citing several sections of the Business and Professions Code.[4] The disciplinary board decided to reprove Sullins publicly rather than suspend him for ninety days as had been suggested by the administrative committee. The reasons Sullins gave to justify his actions were, *inter alia,* that the daughter's attorney had also concealed the letter, that the nephew's letter violated a no-contest clause of the will, or in the alternative, that the nephew's interest could not be assigned, and that as attorney for the estate he owed a duty to its creditors. The court held that whether the other attorney failed to disclose the contents of the letter had no bearing on the issue of whether Sullins should be disciplined. The contention that the letter violated the no-contest clause or that the nephew could not assign his interest would be helpful, the court held, only if Sullins had in good faith believed these were reasons not to disclose the information contained in the letter. There was no evidence that he really believed these were valid reasons for his failure to disclose. According to the court, the duty to the creditors of the estate was no defense because sections 6068 and 6128 of the Business and Professions Code absolutely prohibit an attorney from misleading or deceiving the court and Sullins admitted the concealment.[5] Public reproval was found to have been the appropriate discipline.[6]

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3. 542 P.2d at 634, 125 Cal. Rptr. at 474.

4. In CAL. [BUS. & PROF.] CODE § 6103 (West 1974), a violation of the oath or duties of an attorney is a cause for discipline. Section 6128 makes it a misdemeanor for an attorney to be a party to any deceit or collusion intended to deceive either the court or any other party. Section 6106 makes discipline proper for acting in a dishonest manner or with moral turpitude.

5. *Id.* Section 6068 makes it the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

6. The court did not decide whether the court was misled for the attorney's

Failures to disclose numerous things to the court have been held to have been professional misconduct, including association of a juror with the attorney,[7] property in a bankruptcy proceeding,[8] facts relevant to possible unreliability of a witness,[9] prior adjudication,[10] settlement of a case,[11] perjury of a witness,[12] and adverse case law.[13] The ABA Code of Professional Responsibility (hereinafter referred to as ABA Code) places upon an attorney a duty not to withhold from the court information he has an obligation to disclose.[14] There are, however, no clear guidelines for telling an attorney exactly what his duty entails.

Samuel Williston, while defending on a contract, was faced with the problem of whether or not to disclose a letter to the court. At Williston's counsel table there was an assembly of correspondence between the parties to the suit. The judge found for the defendant, stating as one of his reasons, a fact which was shown by one of the letters to be in error. Williston, though feeling uncomfortable, kept quiet. He concluded that it would have been a violation of his duty to his client if he had disclosed the unfavorable evidence. Williston stated that a lawyer, after deciding to represent a client, does not have to and should not inform the court of information which would be harmful to the cause of his client.[15] It is generally believed that Williston's action in this situation was proper.[16]

It is an overstatement to say that an attorney never has to

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own gain because the misleading of the court was itself sufficient reason for the discipline.

7. Mississippi Power Co. v. Stribling, 191 Miss. 832, 3 So. 2d 807 (1941).

8. *In re* Glover, 176 Minn. 519, 223 N.W. 921 (1929).

9. *In re* Tepper, 170 App. Div. 889, 154 N.Y.S. 412 (1915). *See generally* Note, *The Attorney's Duties of Disclosure,* 31 ST. JOHN'S L. REV. 283 (1957).

10. People *ex rel.* Healy v. Case, 241 Ill. 279, 89 N.E. 638 (1909).

11. State *ex rel.* Dill v. Martin, 45 Wash. 76, 87 P. 1054 (1906).

12. *In re* King, 7 Utah 2d 258, 322 P.2d 1095 (1958).

13. *In re* Greenberg, 15 N.J. 132, 104 A.2d 46 (1954).

14. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Ethical Consideration [hereinafter cited as EC] 7-27 reads in pertinent part as follows: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." ABA CODE, Disciplinary Rule [hereinafter cited as DR] 7-102(A)(3) states that while representing a client, a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

15. *See* S. WILLISTON, LIFE AND LAW 271-72 (1940).

16. Countryman, *The Scope of the Lawyer's Professional Responsibility,* 26 OHIO ST. L.J. 66, 69 (1965).

reveal information which would be harmful or even fatal to a cause he is trying. Although not very helpful, the general rule could be said to be that an attorney, as an officer of the court, has a duty to inform the court of anything which it is entitled to be informed of.[17] It has been held that "the true position of an attorney before the court is that of an aide and assistant."[18] Yet, the Committee on Professional Ethics of the Bar of New York City has decided that an attorney would have committed no wrong in allowing a court to grant a default judgment on all the issues in a new trial even though the attorney knew that the new trial had been limited in scope by the judge who ordered it.[19] But the attorney in *People ex rel. Healy v. Hooper*[20] was said to have deceived the court and was disbarred for, *inter alia,* representing that his client was entitled to a default judgment when he was aware, and the court was not, that a motion to quash the service had been filed by the other party. One way of distinguishing the situation encountered by the Ethics Committee and the *Healy* case would be to say that the attorney's client in the ethics opinion was entitled to a default judgment, even though it should have been limited, while the party in *Healy,* because of the motion to quash made by the other party, was not entitled to a default judgment and still the attorney asked for one. Still, it seems that only a matter of degree separates the two failures to disclose.

An attorney does not owe a lesser duty to the court in a criminal case than he does in a civil case.[21] In the second inquiry of Opinion No. 287 of the ABA Committee on Professional Ethics, there is a situation somewhat analogous to Williston's problem even though it deals with a criminal proceeding.[22] An attorney heard the judge give his convicted client probation due to the fact that the client had no criminal record. The custodian of criminal records had misin-

17. De Blanc v. De Blanc, 18 So. 2d 619 (La. 1944).

18. Alabama Great S.R.R. v. Swain, 248 Ala. 533, 535, 28 So. 2d 714, 716 (1947).

19. THE ASSOCIATON OF THE BAR OF THE CITY OF NEW YORK, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, No. 52 (1926-27).

20. 218 Ill. 313, 75 N.E. 896 (1905).

21. *In re* Palmieri, 176 App. Div. 58, 162 N.Y.S. 799 (1916), *rev'd on other grounds,* 221 N.Y. 611, 117 N.E. 1078 (1917). *See generally* NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION CODE OF ETHICS AND PRINCIPLES FOR THE PROSECUTION AND DEFENSE OF CRIMINAL CASES, *published in* 14 ROCKY MTN. L. REV. 203 (1953).

22. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS [hereinafter cited as ABA OPINIONS] No. 287 (1953).

formed the judge and the attorney knew that his client actually did have a criminal record. The issue was whether it would be a breach of the attorney's duty to the court if he remained silent. The Committee decided that if there was not a confidentiality problem, then the determination would depend on the resolution of the conflict between what is required of an attorney by two canons of the now replaced ABA Canons of Professional Ethics. Canon 22 required that an attorney act with candor and fairness toward the court, while Canon 6 required representation of the client with undivided fidelity and with no divulging of his secrets. As stated by the Committee: "If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness [of the information] . . . the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record."[23] Here is support for the idea that any duty an attorney has as a minister of justice to inform the court as to matters which might be harmful to the client's cause stems only from the obligation not to allow fraud or misrepresentation to be practiced on the court.[24] The New York County Lawyers Association Committee on Professional Ethics has held that it would not be improper for an attorney to fail to reveal that he knew of an eye-witness to an accident when the case was dismissed for lack of evidence.[25] This opinion has been questioned.[26] If the attorney had obtained the dismissal upon his implied representation that he did not know of a witness, he would probably have breached his duty to inform the court.[27] If nothing was done to conceal the witness, there would probably be no misrepresentation since judges do not rely on an attorney to produce the other side's evidence.[28]

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23. *Id.* at 615.

24. *Cf.* ABA CODE, EC 8-5 reads: "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers." DR 1-102(A)(4) says that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of wilful misconduct."

25. THE NEW YORK COUNTY LAWYERS' ASSOCIATION, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, No. 309 (1933). *See* Cohen, *The Fundamentals of Legal Ethics in Alabama,* 36 ALA. LAW. 160, 202 (1975).

26. *See* H. DRINKER, LEGAL ETHICS 77 n.42 (1953).

27. *Cf.* ABA OPINIONS, No. 287 (1953).

28. *See* Cheatham, *The Lawyer's Role and Surroundings,* 25 ROCKY MTN. L. REV. 405 (1953).

A prosecutor in a criminal case has a strong obligation to disclose information even if it is harmful to the prosecution efforts.[29] An attorney does not have the same obligation to produce evidence unfavorable to his side, in either a criminal or civil case, but he may not conceal or suppress evidence necessary for a just determination of a cause.[30] This does not mean that a just determination was not reached in the case where Williston did not inform the court of the information contained in the letter he possessed, because a just determination is made when both parties perform their duties and the court performs its duty.[31] Williston performed his duty by being loyal to the client's case and yet, suppressing or concealing no evidence which he should have revealed. While in most cases an attorney does not have the duty to introduce evidence harmful to his client, he may not take steps to prevent the court from having the truth presented to it.[32] The attorney in *In re Williams*[33] was found to have breached his professional responsibility by advising the destruction of a decedent's written instructions as to the disposition of property with knowledge that they would be needed at trial. In *Bar Association v. Greenhood,*[34] an attorney was disbarred for not

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> The most distinctive element in the lawyer's work is the method used for the determination of controversies not otherwise resolved. A trial is not a dispassionate and cooperative effort by all the parties to arrive at justice. It is the adversary system, the competitive system in the administration of law. In a court there is a judge, who is to pass on the questions, and there are lawyers on each side. Under the American system, the judge is relatively passive, listening, moderating, and passing on what is offered to him. But neither the judge nor any other representative of the public is active in developing the facts. The lawyers are the ones who develop and present the case. They do so, each for his own side and not for both sides. If one lawyer is poor or lazy, his side suffers accordingly. If the other side is unscrupulous, his side may benefit unduly.

Id. at 409.

29. Turner v. Ward, 321 F.2d 918 (10th Cir. 1963); ABA CODE, EC 7-13. *See generally* Comment, *Actions Against Prosecutors Who Suppress or Falsify Evidence,* 47 TEX. L. REV. 642 (1969).

30. *See* Annot., 40 A.L.R.3d 169 (1971); Annot., 1917B L.R.A. 384.

31. *See generally* CURTIS, IT'S YOUR LAW (1954). *See also* Curtis, *The Ethics of Advocacy,* 4 STAN. L. REV. 3, 12 (1951), where the following language appears: "The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom."

32. *See* ABA OPINIONS No. 131 (1935).

33. 221 Minn. 554, 23 N.W.2d 4 (1946).

34. 168 Mass. 169, 46 N.E. 568 (1897).

turning over to the court a copy of an agreement in his possession even though he was aware that the judge was seeking to have the agreement shown. Problems of not being candid with the court are also present where an attorney begins an action with knowledge of facts that would make the allegations made in the complaint untrue. Such conduct has been held improper.[35] These cases seem to fall within the ambits of ABA Code, Disciplinary Rule 1-102(A)(4) and Ethical Consideration 8-5 which deal in part with fraud.[36]

The wrongdoing in suppression of evidence does not come until there is an intent to keep relevant evidence from being available for trial.[37] Keeping evidence from availability for the court's use could be considered a fraud on the court in that there may be an implied representation by the attorney, due to the provisions of the ABA Code, that he has not suppressed or concealed evidennce wrongfully.[38] If evidence has been wrongfully kept from the court, then the court makes its decision based on a misrepresentation. In *In re Marron,*[39] the concealment of immaterial evidence was found to be unprofessional conduct, but the evidence was already in the hands of the court when it was concealed.[40] Rather than being a fraud on the court which would have caused an unjust outcome, there was, in effect, a theft from the court.[41]

The court in *Sullins v. State Bar* specifically stated that by not disclosing information to the court, Sullins had perpetrated a fraud on the court when he sought approval of an increased fee. The provisions of the Business and Professions Code clearly prohibited his actions.[42] His failure to disclose coupled with his petition for increased fees would also seem to be prohibited by the ABA Code

35. *E.g.*, McMahon v. State Bar, 39 Cal. 2d 367, 246 P.2d 1931 (1952).

36. *See In re* Star, 538 S.W.2d 334 (Mo. 1976); note 24 *supra.*

37. *See In re* Luce, 83 Cal. 303, 23 P. 350 (1890); *In re* Chadsey, 141 App. Div. 458, 126 N.Y.S. 456 (1910), *aff'd*, 201 N.Y. 572, 95 N.E. 1124 (1911). In the latter case, the attorney sought to obtain letters written by his client which might have shown immorality. The court held that if there was no purpose to prevent evidence that might be relevant to possible litigation from being available on trial, then there was no wrongdoing.

38. *Cf.* ABA Opinions, No. 287.

39. 22 N.M. 252, 160 P. 391 (1916).

40. *See generally* Annot., 151 A.L.R. 750 (1944).

41. The concealed evidence was actually still in the clerk's office, but the attorney had hidden it beneath a blotter. This would seem to be just as much a theft as if the attorney had removed the evidence from the clerk's office.

42. *See* notes 4 and 5 *supra.*

provisions on fraud[43] and nondisclosure.[44]

It seems that when concealment, nondisclosure, and suppression of information from the court have been found to be unprofessional conduct by an attorney, there has usually also been a fraud on the court. Certainly there can be a fraud perpetrated on a court in many ways besides concealment, nondisclosure, and suppression of information, but it is difficult to see how any of these three actions by an attorney could be found to be unprofessional conduct without at least an attempted fraud upon the court being committed. The trouble comes in deciding when there is a fraud upon the court. Whether fraud has been committed will depend on whether the attorney had a duty to the court greater than the duty to the client with respect to disclosure of information in that particular case.[45] It should not be forgotten that judges are lawyers too and that they do not expect attorneys to give away their cases. What a judge expects of an attorney will be determinative of whether the attorney is considered to have struck the balance correctly.[46]

As stated by William Howard Taft:

> [I]f [the legal profession] serves its high purpose, if it vindicates its existence, [it] requires from those who have assumed its obligation a double allegiance, a duty toward one's client and a duty toward the court which, reconciled as they can be and are in fact reconciled in practice, make for justice . . . . It is the

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43. *See* note 24 *supra*.

44. *See* note 14 *supra*.

45. *See* Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65, 76 (1965). A fact situation was presented in which an attorney and judge were talking about what should be done with the defendant. Neither the defendant nor a jury was present. At question was the duty of candor to the court required by Canon 22 as opposed to the duty of loyalty to the client. The author stated:

> In the above situation for reasons of expediency the lawyer usually leans on his duty of candor to the court rather than on his duty of undivided loyalty to the client. Canon 22 prevails over all others not because it offers the highest moral solution, but because it is practical. The lawyer knows that he will appear before the judge or his associates many times. The discovery of an error which could have been prevented by candid counsel can injure the reputation of the less than candid one among the judiciary. This pragmatic control factor can operate not only when the court directly asks a question but at any time that the lawyer knows something that a sentencing judge should know. *Id.*

46. *See* Cheatham, *supra* note 28.

compliance with these limitations [imposed upon advocacy by the standards of the profession] that is the true reconciliation of the primary duty of fidelity to the client, with the constant and ever-present duty that the lawyer has as a part of the administration of justice owing to the minister of justice in the person of the judge.[47]

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47. *Id.*, *quoting* W. TAFT, ETHICS OF LAW (Hubbard Lectures 1914).