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Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority

Angela Gilmore

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SELF-INFLICTED WOUNDS: THE DUTY TO DISCLOSE DAMAGING LEGAL AUTHORITY

ANGELA GILMORE

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I. INTRODUCTION

Rule 3.3(a)(3) [alternatively, the "Rule"] of the Model Rules of Professional Conduct [hereinafter MRPC], entitled "Candor Toward the Tribunal," warns that: "[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." 2 The MRPC was drafted in 1977 by a committee appointed by the president of the American Bar Association [hereinafter ABA] and approved in 1983 by the policy-making body of the ABA, the House of Delegates. 3 So far, about

1 Associate Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I would like to thank my colleagues Lundy Langston, Elena Marty-Nelson and John Sanchez for their helpful and insightful comments on earlier drafts. Research assistance was provided by Anne-Marie Clark, Hellen Bryan and Natalie Anderson, Nova Southeastern University Shepard Broad Law Center.


thirty-eight states and the District of Columbia have adopted all or part of the MRPC, with or without alterations, as the code of ethics governing lawyers' behavior. The MRPC is written in "restatement" format. In this regard, each of the individual Model Rules frames both a black letter rule, which is obligatory, and a commentary, which aids in interpretation of the rule.

The conceptual underpinning for Rule 3.3(a)(3) stems from an adversarial judicial system where the best decision is achieved when the court is made aware of all of the legal premises and authorities that apply to a particular dispute. Accordingly, a party in a legal action is not entitled to benefit from an opponent's failure to reveal legal authority found by the opponent that is damaging to its position. Moreover, with all parties before the tribunal bound by the same ethical obligation, the tribunal may rest assured that it has access to all relevant law when the time comes for rendering a decision, thus serving the ends of justice.

This article analyzes Rule 3.3(a)(3) and its implications for opposing parties in an adversarial legal system. The article's conclusion is that strict compliance with Rule 3.3(a)(3) by all members of the Bar is necessary to preserve the integrity of the legal system. Circumvention of the Rule is a disservice to the legal system. Part II explains Rule 3.3(a)(3) so that lawyers can grasp the ethical duty owed. Part III examines three roles simultaneously played by a lawyer: a representative of clients, an officer of the legal system, and a private citizen having a special responsibility for the quality of justice. Part III also portrays how Rule 3.3(a)(3) raises a conflict among these roles. Part IV analyzes the adversarial legal system against the backdrop of Rule 3.3(a)(3). Finally, Part V explains how the adversarial system sorts out the conflict in roles lawyers face in light of Rule 3.3(a)(3). In addition, Part V suggests the addition of clarifying language to the commentary of Rule 3.3(a)(3) to make it more effective.

II. RULE 3.3(a)(3)

A. Ethical Forerunners

Rule 3.3(a)(3) can be traced back to the Canons of Professional Ethics [hereinafter CPE], published by the ABA in 1908. The CPE served as the ABA's first code of ethics for attorneys. Canon 22 of the CPE, entitled "Candor and Fairness," reads in part: "[t]he conduct of the lawyers before the Court and with

4Id. at xvi.


6MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1983). "The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." Id. at cmt. 3.


8MORGAN & ROTUNDA, supra note 5, at 11.
other lawyers should be characterized by candor and fairness." While Canon 22 does not explicitly state that attorneys owe a duty to disclose damaging legal authority to the tribunal, subsequent formal opinions issued by the ABA Committee on Ethics make clear that the drafters of the CPE envisioned that lawyers would be so bound. In Formal Opinion 146, the ABA Committee on Ethics ruled that Canon 22 forces a lawyer to disclose decisions damaging to his case which are known to him but unknown to his adversary.

In 1969, the ABA adopted the Model Code of Professional Responsibility [hereinafter MCPR], a forerunner of the MRPC. In short order, virtually every state adopted some version of the MCPR. The MCPR consists of three parts: canons, which serve as chapter headings; ethical considerations, which are aspirational in nature; and disciplinary rules, which are obligatory. The MRPC replaced the MCPR as the ethical code regulating attorney conduct in a majority of the states for reasons unrelated to the question of a lawyer’s candor toward the tribunal. The MCPR was replaced, in part, because it did not adequately address the obligations owed by lawyers practicing in large firms or reflect the many tasks performed by lawyers. For example, the MCPR did not fully address the ethical questions lawyers face when serving as negotiators.

However, Disciplinary Rule 7-106(B)(1) of the MCPR and Rule 3.3(a)(3) are virtually identical. Under Disciplinary Rule 7-106(B)(1) of the MCPR, "[i]n presenting a matter to the tribunal, a lawyer shall disclose: [l]egal 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." Because of the similarity of the language of the two rules, cases interpreting and applying the Disciplinary Rule bear some weight in analyzing the Model Rule.

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9 CANONS OF PROFESSIONAL ETHICS 22 (1908).
10 The Committee on Ethics is one of the standing committees of the American Bar Association. The committee’s tasks include rendering opinions on proper professional conduct for lawyers and assisting bar associations, courts, committees, etc. in interpreting the Model Rules of Professional Conduct. Policy and Procedures Handbook (American Bar Association) 1982-1983 at 26.
12 GILLERS & SIMON, supra note 3, at 409.
13 Id.
14 MORGAN & ROTUNDA, supra note 5.
15 GILLERS & SIMON, supra note 3, at 409.
B. "A Lawyer Shall Not Knowingly Fail to Disclose to the Tribunal"

Rule 3.3(a) outlines what a lawyer shall not "knowingly" do. In the MRPC, the word "knowingly" refers to actual knowledge. Actual knowledge is, technically, subjective—what a particular lawyer knows in reality, not what he should have known. Whether or not a lawyer has actual knowledge may be inferred from the circumstances, thereby turning a subjective standard into one that may be objectively measured. For instance, courts have disciplined lawyers for failing to reveal cases that are brought to light by shepardizing the cases cited by the lawyer. Thus, the legal authority a lawyer actually knows often includes authority that a court says a lawyer should know.

Rule 3.3(a)(3) also details what a lawyer shall not knowingly "fail to disclose to the tribunal." "Tribunal" is a term left undefined by the MRPC. A tribunal has been described as a body before which trial-type proceedings are held. Trial-type proceedings include those in which parties present evidence, where witnesses are examined, and where neutral decision-makers render decisions based on the strength of evidence and arguments developed in the proceeding. The MCPR defines a tribunal as all courts and all their adjudicatory bodies. Under this definition, bank regulatory agencies and the Internal Revenue Service are not tribunals to which a duty of disclosure is owed under Rule 3.3(a)(3). This conclusion seems appropriate given that such agencies do not profess to be "unprejudiced and unbiased in the judicial sense." A similar duty may be owed in such administrative proceedings,

19 Id.
20 Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), rev'd 801 F.2d 1531 (9th Cir. 1986). The district court, in its opinion sanctioning counsel for violating Federal Rule of Civil Procedure 11, also discussed counsel's duty under the Rule. The imposition of sanctions was subsequently reversed by the Court of Appeals. "For counsel to have been unaware of those cases means that they did not Shepardize their principal authority." Id. at 129. See also, Spangler v. Sears, Roebuck & Co., 752 F. Supp. 1437, 1447 (S.D. Ind. 1990) ("[d]efendants' counsel's failure to locate controlling authority and bring it to the attention of this court and his intransigence in adhering to his incorrect legal opinion in the face of contrary controlling authority could lead this court to conclude that defendants' counsel was less than diligent in the effort he made to adhere to the Rules of Professional Conduct.").
23 Id.
however, pursuant to Model Rule 3.9, "Advocate in Nonadjudicative Proceedings" or Model Rule 4.1, "Truthfulness in Statements to Others."

Two knotty questions over the interpretation and application of Rule 3.3(a)(3) linger after the terms "knowingly" and "tribunal" have been defined. First, what is legal authority from a controlling jurisdiction; and second, when is legal authority directly adverse to a client's position?

C. "Legal Authority from a Controlling Jurisdiction"

An advocate's duty to disclose directly adverse legal authority in the controlling jurisdiction under Rule 3.3(a)(3) seems to be an outgrowth of the drafters' commitment to the principle of stare decisis. Stare decisis is a doctrine of repose by which courts are bound when deciding cases. Rather than creating new law each time a legal issue is raised, courts owe a duty to decide issues against the backdrop of principles established in earlier, similar cases.

Stare decisis accomplishes a number of worthwhile goals. The doctrine reinforces a court's image as an impartial arbiter because the outcome in a particular case stems not from the pet impulses of the decision-maker, but from a respected body of law. The doctrine of stare decisis also makes for speedier decisions since the decision-maker need only apply existing authority and need not reinvent the wheel each time it decides a case. The doctrine also fosters the impression that the legal system is stable and predictable so that parties who have couched their dealings in reliance on well-entrenched law need not fear a "bolt from the blue."

Despite its importance to decision-makers, stare decisis raises certain concerns. Stare decisis may block urgent innovation. In his dissent in *Bowers v. Hardwick*, Justice Blackmun, citing Justice Holmes, wrote:

I believe that [it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished

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28 "A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), and 3.5." *Model Rules of Professional Conduct* Rule 3.9 (1983).

29 *Model Rules of Professional Conduct* Rule 4.1(a) (1983) ("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person....").


33 *Id.*
long since, and the rule simply persists from blind imitation of the past.\textsuperscript{34}

Blind adherence to the doctrine of stare decisis may render decision-makers reluctant to revisit a law's moorings even when times radically change.

Comment 3 makes clear that Rule 3.3(a)(3) serves to ensure that "the legal premises properly applicable to the case" are discussed.\textsuperscript{35} Above all, Rule 3.3(a)(3) instructs an advocate to disclose to the tribunal legal authority that the tribunal should take into account before fulfilling its duty under stare decisis. Simply put, Rule 3.3(a)(3) mandates disclosure of law bearing precedential weight. While a tribunal might find a particular authority useful, the advocate owes no obligation to disclose such authority under Rule 3.3(a)(3) unless the authority can serve as precedent. Rule 3.3(a)(3) dictates disclosure of cases decided by the same court or higher courts in the same jurisdiction which interpreted and applied a rule of law to a fact pattern which resembled the case in question and which posed similar legal issues, if those decisions (1) run counter to the position of the advocate; (2) are known to the advocate; and (3) are not brought to light by opposing counsel. Although an advocate does not subject herself to professional discipline for failing to disclose extra jurisdictional authority, she nevertheless may draw criticism from the bench for failing to follow the "spirit of the law" governing disclosure of authority.\textsuperscript{36} While those cases may well be persuasive, strictly speaking they bear no precedential weight.\textsuperscript{37}

Under Rule 3.3(a)(3), advocates also owe a duty to disclose controlling statutory authority\textsuperscript{38} and agency regulations\textsuperscript{39} since they often have the same practical effect as cases. Counsel violates the spirit, if not the letter, of Rule 3.3(a)(3) when one fails to disclose rulings she participated in addressing virtually identical issues by courts in other jurisdictions.\textsuperscript{40} While such decisions bear no precedential weight, failure to disclose them may lead to sanctions.\textsuperscript{41}

\textsuperscript{35}MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1983).
\textsuperscript{36}20 AM. JUR. 2D Costs-Covenants § 203 (1965).
\textsuperscript{37}Id. at § 191 (1965).
\textsuperscript{38}See Dorso Trailer Sales v. American Body & Trailer, Inc., 464 N.W.2d 551, 557 (Minn. App. 1990) aff'd in part and rev'd in part, 482 N.W.2d 771 (Minn. 1990) ("counsel's failure to disclose the good cause requirement of chapter 80E, Minn. Stat. § 80.06 subd. 1(c) ... clearly formed the basis for the district court's finding that counsel made a grievous mistake").
\textsuperscript{39}See In re Slodov 79-1 T.C. 9215 n.12 (Bankr. N.D. Ohio 1979), vacated sub. nom United States v. Slodov, 675 F.2d 808 (6th Cir. 1982) (government's failure to disclose manual containing authority that might have decisive influence upon a disputed issue "did not accord with the spirit of [DR 7-106(B)]").
\textsuperscript{40}Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 845 (S.D.N.Y. 1988).
D. "Directly Adverse to the Position of the Client and not Disclosed by Opposing Counsel"

Only "directly adverse" legal authority triggers the duty to disclose. Attorneys naturally balk at the notion that they owe a duty to disclose or raise claims or theories not advanced by their adversaries. However, neither the MRPC nor the MCPR explain what is meant by "directly adverse." In a footnote to Disciplinary Rule 7-106(B)(1), the drafters refer to ABA Opinion 280. The footnotes, according to the CPE, "are not intended to be an annotation of the views taken by [the drafters]." In ABA Opinion 280, the Committee on Professional Ethics found that the duty to disclose embraces not only authorities that squarely settle the pending case, but also any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." In this regard, even if a court ruling can be read in a number of ways, if one construction is directly adverse to the lawyer's client, the duty to disclose arises.

In sum, this segment of the rule instructs an advocate, at the very least, to disclose any legal authority that on its face raises a possibility that the advocate's client should not prevail, either ultimately or on a particular issue. This duty to disclose under Rule 3.3(a)(3) does not force an advocate to admit defeat in the face of damaging authority.

III. An Attorney's Many Hats

According to the MRPC's preamble, a lawyer is "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." Lawyers and judges have bandied these terms back and forth, but their meanings, especially regarding the duty to disclose under Rule 3.3(a)(3), are far from clear. Given the common understanding of the terms and the obligations imposed by the MRPC, the lawyer's various roles seem headed on a collision course. For example, while an attorney who comes forward with adverse legal authority from a controlling jurisdiction may appear loyal to the court and the legal system, her fidelity to her client, at least

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41 Id. ("Decisions in the district court in Florida are not controlling in this Court, so Medtronic's behavior was not a violation of the letter of the Code of Professional Responsibility, but it is a clear violation of its spirit. Repetition of such dubious behavior is likely to result in the imposition of sanctions by this Court.").

42 Dorso Trailer Sales, 464 N.W.2d at 557.


47 MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1983).
in her client’s mind may be cast in doubt as the client may not understand why her attorney is disclosing damaging law. This raises a question regarding the merits of Rule 3.3(a)(3).

A. Representative of Clients

On the surface, a lawyer’s role as a client’s representative seems easy enough to define. As the MRPC points out, a lawyer in her role as a representative of clients acts as a legal advisor, advocate, negotiator, intermediary, and evaluator. The foregoing list, however, merely outlines some of the tasks assigned the lawyer as an agent. It does not fully describe what that role consists of.

The image of the attorney as a client’s agent is sometimes cast as the "lawyer-as-hired-gun." As the Mississippi Supreme Court stated:

To many, the lawyer is a mere extension of the will of the client. The client wishes to pursue certain ends but is without technical, legal skills. The lawyer provides those skills. He is in a sense a conduit through which the client pursues his ends. The lawyer at once is both highly partisan and completely neutral. He aggressively pursues the ends of his client, yet he remains personally indifferent to those ends.

Couched in these terms, the lawyer is simply and solely the client’s agent. The lawyer performs at the behest of the client without ideally adding any prejudices to the relationship. Others dismiss the image of lawyer-as-hired-gun.

In the client-and-attorney relation the client is not a master, the lawyer is not a mere hired hand - he is an officer of the court, with a duty of independent judgment in the performance of his professional service and under a duty to serve all sorts and conditions of men.

This view recognizes that lawyers play multiple and interlocking roles, and that one role cannot be singled out at the expense of others.

48 Id.


50 Thornton v. Breland, 441 So.2d 1348, 1350 (Miss. 1983).

51 This perspective has also been described as libertarian. A lawyer who adopts this approach believes it her duty to pursue any legal objective of the client. See William H. Simon, Ethical Discretion In Lawyering, 101 HARV. L. REV. 1083 (1988).


53 "Most lawyers would probably admit that the hired gun approach, in its most uncompromising form, has never been and should not be the actual tradition of the legal
The lawyer, as an agent of clients, has also been likened to the "lawyer-as-guru." As such, the client looks to the lawyer to chart the proper course of action, and the lawyer brings to bear all her professional skills in laying the course to pursue. The lawyer-as-guru has few guideposts along the way: "The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice." Before a lawyer takes those actions that promote justice, however, he or she must understand what justice is and convey this theory of justice to the client for his consideration.

A third, informal view depicts the lawyer as a friend to her client. After bonding with the client, the lawyer acts in the best interests of the client and effectively adopts the client's interests as her own. Often, the lawyer's role goes beyond merely helping the client-friend achieve a particular legal goal. The lawyer may also counsel the client on moral, as well as, non-legal issues raised by the case.

No matter how one portrays the role of a lawyer as a representative of clients, it is universally recognized that the lawyer should "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." However, even zeal can go too far. "[A] lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." A lawyer's defense of "I did it for my client," cuts no ice in a disciplinary proceeding, since an attorney's legal maneuverings are confined by codes of ethics among other law. A lawyer cannot rely on "I did it in the best interest of my client" if that means that she acted unprofessionally for the sake of her client. In short, a lawyer cannot bend ethical rules in the name of winning her case.


54 SHAFFER & COCHRAN, supra note 49, at 3.

55 Id.

56 Simon, supra note 51, at 1090.


58 Id.


60 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983).

61 Id.

62 See MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1983). "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law." Id.
Given the competing schools of thought regarding the nature of the lawyer’s role as an advocate of clients, lawyers may find common ground on the tasks a lawyer performs, yet disagree on how those tasks should be performed. For example, Rule 1.2(c), entitled "Scope of Representation," notes that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." The amount of information that a lawyer will share with her client in the course of consultation relates to the lawyer’s sense of her role. A lawyer who sees herself as her client’s friend will likely share more information with her client than the lawyer who sees herself as her client’s hired gun. Both lawyers, although probably conveying different information, arguably are complying with the duty outlined in Rule 1.2(c). Because of the objective nature of the rule, there remains room for a reasonably prudent lawyer to frame her role as either friend or guru.

B. Officer of the Legal System

A second role played by lawyers is "officer of the legal system" or "officer of the court." This role implies that while a lawyer serves a client, she owes a duty to and shares a bond with a third party. This bond resembles an agency relationship with the court serving as principal and the lawyer as agent. The question then arises—where lies a lawyer’s primary allegiance? The answer is far from clear. When push comes to shove, the lawyer’s primary allegiance may well be owed to the court:

[a]ttorneys are officers of the court and their first duty is to the administration of justice. Whenever an attorney’s duties to his client conflict with those he owes to the public as an officer of the court, he must give precedence to his duty to the public. Any other view would run counter to a principled system of justice. However, the duty owed by a lawyer to her client and to the legal system may be on an equal footing: "the bar have great liberty and high privileges in the assertion of their clients’ rights as they view them, but, on the other hand, they have equal obligations as officers in the administration of justice." When a lawyer finds herself caught in a bind over clashing allegiances owed to court and client, the scales must tilt toward the court. Times where the

63 Model Rules of Professional Conduct Rule 1.2(c) (1983). According to the Model Rules of Professional Conduct Terminology (1983), a consultation is the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Id.

64 Model Rules of Professional Conduct pmbl. (1983); see also Eugene R. Gaetke, Lawyers as Officers of the Court, 42 Vand. L. Rev. 39, 41 (1989). Note 7 states "[t]here is some variance in the terminology used to identify the characterization of lawyers as officers of the court." Id.


66 In re Scouten, 40 A. 481 (Pa. 1898).
lawyer's duty owed to the court trumps loyalty to the client range far and wide. On the most obvious level, an attorney may never be a party to conduct prejudicial to the administration of justice. Specifically, a lawyer must forego communicating with a party who is represented by counsel without that counsel's consent. Moreover, it is wrong for a lawyer to mislead a person unrepresented by counsel over the lawyer's role in a matter. In addition, a lawyer owes a duty to take reasonable remedial measures after learning that she has introduced false evidence.

C. Private Citizen

A lawyer's third role is that of a private citizen having a special responsibility for the quality of justice. This role imposes responsibilities on the lawyer which reach beyond the representation of a single client in an isolated legal matter. A lawyer "should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." This role recognizes that "[t]he practice of law is not a craft or trade; it is a profession whose main purpose is to aid in the doing of justice according to law between the state and the individual and between man and man." Amid many duties and while vigorously pursuing her client's interests and fulfilling her obligations owed to the legal system, a lawyer must be mindful of the impression she leaves on the public at large.

While the duty owed the public shapes yet another agency relationship for the attorney, the nature of this bond resembles an arm's length embrace. Apart from the duty owed to her client and to the court, the lawyer owes a "public" duty to serve the ends of justice. In light of this public dimension of a lawyer's duty, states commonly screen out members of the bar who fall short of a good moral character. This public role of the "lawyer-as-citizen" accounts for the

67 Gaetke, supra note 63, at 62-63. These obligations, according to one scholar, are "vague, seldom enforced, or narrow in their application, or serve primarily lawyer's interests while merely appearing to further the interests of society or the judiciary system." Id. at 76.

73 Id.
75 Justice Frankfurter observed that "[f]rom a profession charged with such responsibilities there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"
practice in some jurisdictions entitling a private citizen with no lawyer-client relationship with the lawyer to raise disciplinary claims against the lawyer. These states recognize that the public, apart from the lawyer's client or the legal system, suffers when a lawyer commits unprofessional acts. As an independent check on the legal profession, a member of the public may set in motion disciplinary proceedings to curb unethical lawyers.

D. Conflicting Roles

What does Rule 3.3(a)(3) have to say about the three interlocking, overlapping roles lawyers play when ethical duties clash? Why should a lawyer, acting for her client, have to weaken her case by turning over legal authority. To be sure, a court ought to be fully informed before rendering a decision on the merits. It appears that a lawyer is obligated to ensure that the court has all of the binding applicable law when rendering a decision, even when the weight of opposing authority leaves the lawyer with an uphill battle on her hands. After all, the lawyer is an officer of the legal system. What is more, as a public citizen, a lawyer apparently owes a special responsibility for the quality of justice and must realize that the best result for the public at large may end up hurting her individual client. In some instances the conscientious lawyer, juggling irreconcilable ethical demands, is tempted to throw up her hands in frustration. Such frustrations must be addressed in order to guarantee that both the public and clients are treated fairly. The legal system owes its members a road map out of this ethical thicket.


76 See, John A. Weiss, The Disciplinary System in Florida Legal Ethics § 2-7 (THE FLA. BAR - CONTINUING LEGAL EDUC. 1992). "There are no standing requirements for filing a complaint against a lawyer. The Bar will process complaints from disinterested parties and from adverse parties or adverse counsel, as well as from the lawyer's clients." Id.

77 Id.

78 Id.

79 "If it is the court's task to acknowledge the competing considerations at issue, and if it is the advocate's task to anticipate the court's task and to help in its performance, then the advocate has to acknowledge and address the competing considerations." Geoffrey C. Hazard, Jr., Arguing the Law: The Advocate's Duty and Opportunity, 16 GA. L. REV. 821, 830 (1982).

80 While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its right under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand. Matthews v. Bay Head Improvement Association, 471 A.2d 355, 365-66 (1984).
IV. THE ADVERSARIAL MODEL AND RULE 3.3(A)(3)

The adversarial legal system takes for granted that all material facts and law will be presented to the tribunal by interested parties. The tribunal, a neutral decision-maker, then digests both facts and law and renders a decision on the merits. The theory is that if a "right" or "fair" process exists, a "right" or "fair" outcome is virtually a foregone conclusion.81

Such logic rests on unstable ground since the adversarial model relies on a number of questionable premises. First, the adversary system assumes that the best basis for determining what is "right" or "fair" for a particular dispute is information presented by the parties—those persons who have most at stake in the outcome of the litigation.82 Second, since the adversary system is only as reliable and credible as its players, the adversary system presumes that the lawyers on both sides are equally skilled at shaping and delivering legal argument to the tribunal.83 The adversary system gambles that the parties come to court with roughly equal resources or at least enough to give the impression that the tribunal has access to all of the information while it deliberates.84

In the end, Rule 3.3(a)(3) may well be the drafters' way of hedging their bets on whether the foregoing articles of faith frame a candid picture of the legal system. First, by forcing advocates to disclose authority that discredits their clients' positions, the Rule assumes that, absent incentive or direction from the MRPC, the parties are unlikely to disclose adverse legal authority.85 Most attorneys measure success by a court's decision in their client's favor. That goal, not to mention the intense pressure lawyers feel in courting clients and the stake that lawyers have in their reputation in the community, make it vital that lawyers paint their cases in a light most favorable to their clients.86 Of course, Rule 3.3(a)(3)'s disclosure duty still leaves room for the attorney to steadfastly

82 Id. at 316-18.
83 Judith Resnick, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494 (1986) ("proponents of [lawyer-based adversarialism] must posit that the disputants are rational, competent actors who make deliberate decisions calculated to enhance their positions").
84 Id. "[P]roponents [of lawyer-based adversarialism] must assume that the disputants have access to resources (in terms of dollars and of power) which in turn enable the generation of information and which give the disputants the opportunity to exercise choices among competing options." Id.
85 Marvin E. Frankel, The Search For Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1037 (1975) ("Employed by interested parties, the process often achieves truth only as a convenience, a byproduct, or an accidental approximation.").
86 Id. ("The business of the advocate, simply stated, is to win if possible without violating the law.").
carry her client’s banner. The Rule merely insists that an attorney not only play hard but also play fair.

Second, Rule 3.3(a)(3) raises the possibility that parties may not be equally diligent when it comes to legal research that buttresses their clients’ case.87 The Rule does not allow the client of a more skilled lawyer to benefit from the failure of opposing counsel to locate legal authority that supports opposing counsel’s client. However, the Rule does not wholly level the legal playing field. It merely sets broad ground rules for the contest between the advocates. Rule 3.3(a)(3) effectively commands that each side follow all the rules and not just the ones that redound to her benefit. The attorney gains an edge not only by selectively following the rules, but also by skillfully playing the rules.

Admittedly, to some extent, Rule 3.3(a)(3) takes into account wide variance in the financial shape of parties.88 An inequality of financial resources may at times skew the outcome of a legal action. Cases are filed everyday in which the plaintiff is an individual of average means, while the defendant corporation, for example, comes laden with deep pockets, easily able to pay far more for legal representation than the plaintiff. Rule 3.3(a)(3) offsets somewhat the edge that money can buy by forcing the corporation to report damaging legal authority.

V. RESOLUTION

Rule 3.3(a)(3) may, on its face, pose a dilemma for the attorney intent upon reconciling her roles as a representative of clients, as an officer of the legal system and as a private citizen burdened with a special responsibility for the quality of justice. In most cases, however, the Rule does not raise a real conflict and allows the attorney to amicably reconcile her three roles.

Rule 3.3(a)(3) in no way erodes the attorney’s role as a representative of her clients. By insisting that the attorney disclose adverse legal authority to the tribunal, the Rule does not force the attorney to breach any duty owed to her client. The Rule does not spell out how the attorney is to present the legal authority, only that she shall not knowingly fail to disclose. Above all, the Rule does not force the attorney to make her opponent’s legal arguments.89 The Rule leaves room for an advocate to distinguish the case at bar from the damaging legal authority.90 Furthermore, the Rule leaves the advocate free to take issue

87 See generally Frankel, supra note 78.

88 Simon, supra note 51, at 1085 ("Lawyers for relatively wealthy clients may invoke procedures in order to impose prohibitive expense on relatively poor ones, and publicly subsidized lawyers for poor clients may engage in tactics that impose expenses on opposing parties required to pay for their counsel.").

89 Hazard, supra note 72, at 830 ("Moreover, the advocate should suggest a means of resolving the conflict that maximizes the chance of prevailing for his client.").

with the adverse legal authority.\textsuperscript{91} In fact, the advocate's duty to disclose may be satisfied by prefacing a cite with a well-placed "but see" or "contra."\textsuperscript{92}

A proposed earlier version of the Rule would have vastly expanded the scope of the duty: "if a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the lawyer shall advise the tribunal of that authority."\textsuperscript{93} This version of the disclosure rule would have burdened advocates with a duty that seemed at odds with the lawyer's role as a client's advocate and was shelved for that reason. This version would have forced an attorney to disclose any legal authority that the attorney stumbled upon that the court could have found material.

The current Rule confirms the obligations an attorney owes to the legal system. A party should prevail in a case wholly on the strength of the merits. One side should not prevail because the court is blind with regard to binding authority. It is fundamental that an attorney may not defraud the court or take advantage of its ignorance under any circumstances.\textsuperscript{94} The Rule leaves plenty of room for the attorney to fulfill her duty to the public by ensuring that court decisions reflect the true state of the law, and not the skill of the advocate or the financial resources of the client.

Nor does the Rule unduly burden the advocate. It only governs legal authority known to the advocate. Specifically, an attorney violates the rule only when she shields binding legal authority she comes across. No ethical breach lies if the attorney is unaware of the adverse legal authority.\textsuperscript{95}

Under the American adversarial system, success is not always the counterpoint of justice. Success is crudely measured by wins and losses, plain and simple. On a loftier plane, justice is served when the tribunal reaches the right result for the right reasons. This occurs when the tribunal renders its decision on the strength of all of the facts and law brought to bear in the dispute between the parties. Only a victory on the merits and by the rules is a victory worthy of the name.\textsuperscript{96} Safeguards such as those embodied in Rule 3.3(a)(3) are in place to protect the integrity of the legal system.

\textsuperscript{91}Id.

\textsuperscript{92}"But see" means that the "cited authority clearly supports a proposition contrary to the main proposition." "Contra" means that the "cited authority directly states the contrary of the proposition." \textsc{The Bluebook: A Uniform System of Citation} 23 (15th ed., 1991) (emphasis in original).

\textsuperscript{93}\textsc{Model Rules of Professional Conduct} Rule 3.1(c) (Discussion Draft Jan. 30, 1980).

\textsuperscript{94}I use the terms "defraud" and "take advantage of" because the Rule only requires disclosure of legal authority that the lawyer is aware of, yet chooses not to reveal.

\textsuperscript{95}But see, supra note 18-19 and accompanying text.

\textsuperscript{96}In \textit{civil} cases, if I am satisfied from the evidence that the \textit{fact} is against my client, he must excuse me if I do not see as he does, and do not press it: and should the \textit{principle} also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incor-
Rule 3.1's ban against filing legal actions without merit,\textsuperscript{97} and Rule 11 sanctions for frivolous lawsuits\textsuperscript{98} support this conclusion. In the end, the question lingers—when an advocate is aware of legal authority that is damaging to her client, is the client's representation compromised when the advocate discloses it to the tribunal? The answer, in light of Rule 3.3(a)(3) is that only by ensuring that the tribunal has all the legal tools to do its job can a lawyer ethically represent her client within the parameters of the adversarial system. Hiding the law is risky business. Although faced with damaging authority, the ethical attorney must bare all to the court, and rely on the strength of her argument to carry the day.

The fundamental issue is how far Rule 3.3(a)(3) should reach. For reasons mentioned above,\textsuperscript{99} the proposed version of the Rule severely hampered the attorney's ability to comply with her duty of zealous representation, because it required the advocate to disclose any possible damaging law that she discovered. On the other hand, the current version of the Rule fails to protect adequately the proper functioning of the system because its scope is so limited. The current version uses the term "legal authority in the controlling jurisdiction" as opposed to "legal authority . . . that would probably have a substantial effect on the determination of a material issue" which the proposed version suggested. Thus, the current rule can be circumvented by the advocate creatively distinguishing her case from the found law. In order to both protect the legal system and to ensure that the lawyer's ability to represent her client zealously remains sacrosanct, the comment to the Rule should advise lawyers that the Rule, although limited to the jurisdiction, is intended to be interpreted broadly.

\textsuperscript{97}The Rule provides in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." \textsc{Model Rules of Professional Conduct} Rule 3.1 (1983).

\textsuperscript{98}Rule 11 of the Federal Rules of Civil Procedure reads in part: The signature of an attorney or party constitutes a certification by him that he has read that, to the best of his "knowledge, information, and belief formed after reasonable inquiry," the pleading, motion, or other paper, is well grounded in fact and is "warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law," and that "it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." \textsc{Fed. R. Civ. P. 11(b)}.

\textsuperscript{99}See discussion \textit{supra} page 20.