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# *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*

Gerald S. Gold\*

**N**OWHERE IN LAW do ethical considerations play a greater part or come into greater conflict than in the defense of those accused of crime. The lawyer defending an accused owes a duty to his client, a duty to society, and a duty to the court. The duties to each are not completely clear and when the various loyalties conflict, fair, safe, and moral resolutions are most difficult.

## **The Duty to the Client**

Probably the most quoted overstatement of fidelity to one's client is found in Lord Brougham's argument concerning the defense of Queen Caroline:

. . . that an advocate by the sacred duty which he owes his client knows in the discharge of that office but one person in the world, that client and none other. To save that client, by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and the most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon others.<sup>1</sup>

It appears that this was not in the mainstream of English thinking even in 1846. Lord Chief Justice Cockburn, speaking to an audience which included Lord Brougham said that in carrying out the interests of his client the fearless advocate should wield the "arms of a warrior and not of the assassin."<sup>2</sup> The history books do not record whether the learned Chief Justice directed any of his remarks toward the chair occupied by Lord Brougham.

The relationship of the accused and his counsel, which demands at least some of the loyalty called for by Brougham, is the same whether the attorney is retained by the client or assigned by the court. The confidential relationship begins as soon as the

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<sup>1</sup> C. C. Savage, Q. C., *The Duties and Conduct of Crown and Defense Counsel in a Criminal Trial*, 1 Crim. L. Q. 164 (1914).

<sup>2</sup> Denning, *Road to Justice*, 39 (1914).

attorney confers with the accused (even prior to being retained) and continues after the final disposition of the case.<sup>3</sup>

The first ethical consideration of counsel is whether he should accept the case. A lawyer is under no legal duty to accept a criminal retainer nor will he by such denial violate any ethical canon.<sup>4</sup> The Canon of Professional Ethics (Number 5) provides:

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

In the opinion of Edward Bennett Williams, whose experience in criminal cases has been considerable, "Moral judgments by the lawyer are frequently wrong and he learns not to make them."<sup>5</sup> There is also the right to accept cases wherein the client admits his guilt and cases in which counsel thinks that the client is guilty. If a lawyer has decided to represent only those whom he believes innocent he must not interview an accused without disclosing this factor.<sup>6</sup> Once counsel has accepted a case he should have resolved his own moral conflicts and determined to follow the case through. If moral qualms exist he should not

<sup>3</sup> Canons of Professional Ethics of the American Bar Association: Confidences of a Client,

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer, of his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

<sup>4</sup> Warvelle, *Legal Ethics* 141 (1902). *But see*, Canon 4: When Counsel for an Indigent Prisoner,

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

<sup>5</sup> Williams, *One Man's Freedom* 27 (1962).

<sup>6</sup> Op. 90, Committee of Legal Ethics and Grievances of the American Bar Association.

accept the case. Taking on a criminal case, like getting married, is "for better or for worse." In a criminal case as in marriage there are reasons for breaking the relationship. But, one of them is not simply that the lawyer later learns that his client is probably guilty. That consideration does not extinguish the role of the advocate.

A practical example may illuminate problems which develop once the case has been accepted. Suppose that a client confesses to counsel that he committed the precise crime charged. Counsel follows his professional duty to advise the client that perhaps a plea to a lesser offense or even to the offense charged might mitigate in his favor. The client, however, untutored in law school, but well schooled in the jail house, tells the lawyer, "Let's make them prove it." The duty of the advocate is to follow his client's wishes in this case since the desire expressed parallels his rights guaranteed by law. The advocate must exercise competence, zeal and ability to take advantage of any and all legal defenses in properly representing his client. If the client later demonstrates to a reviewing court that such was not done, a new trial will be ordered because of incompetent counsel.<sup>7</sup> Some lawyers who have either a limited criminal practice or none at all feel that a successful endeavor on behalf of a guilty client is something to be decried. Many attorneys in the practice of criminal law avoid the moral issue with the argument that the defense lawyer does not know whether his client is guilty or innocent until determined by a judge or jury. This, I feel is a semantic rationalization. There are many cases when a lawyer does know. "It is not the lawyer but the law that does not know whether his case is good or bad. The law does not know because it is trying to find out and so the law wants everyone defended and every debatable case tried. Therefore, the law makes it easy for a lawyer to take a case, whether or not he thinks it bad. . ." <sup>8</sup>

Yet, while the law makes it easy for the attorney to accept a client whom he believes guilty, it does not make it easy for the lawyer to advocate his client's cause which the law requires him

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<sup>7</sup> *E.g.*, *People v. Ibarra*, 30 Cal. Rptr. 223 (D. C. App. 1963) (failure to object to illegally obtained evidence); *MacKenna v. Ellis*, 280 F. 2d 392 (5th Cir. 1960) (failure to properly notify and serve alibi witnesses); *Sanchez v. State*, 199 Ind. 235, 157 N. E. 1 (1927) (failure to properly investigate). See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 N.W.U.L. Rev. 3. (1964).

<sup>8</sup> C. P. Curtis, *The Ethics of Advocacy*, 4 *Stan. L. Rev.* 3, 14 (1951).

to do by all honorable means. To some extent the Canons of Professional Ethics mitigate this problem by providing that it is improper for counsel to assert his personal belief in his client's innocence or the justice of his cause.<sup>9</sup> As Mr. Curtis of the Boston Bar stated:

It is called improper just so that the lawyer may feel that he does not have to. This I think, must be its only purpose, for it is honored in no other way.<sup>10</sup>

When an innocent man is convicted, a tragic error has occurred. When a guilty man is acquitted the error is no less tragic, only less grievous. It is for this reason that guilt must be satisfactorily proved, "otherwise, innocent persons, victims of suspicious circumstances might suffer."<sup>11</sup> It is also for this reason that the law imposes a strict duty of advocacy upon the lawyer and forbids him to prejudge his client's cause.

Although a client cannot control the manner in which his attorney conducts the trial,<sup>12</sup> if the client desires to testify it is most difficult practically, as well as constitutionally, to prevent him from doing so. Let us suppose that the "make-em-prove-it" client insists on taking the witness stand in his own defense after hearing the prosecution's case. Counsel has done everything in his power to advise against it.<sup>13</sup> The accused then begins to narrate a tale completely different from that previously told and inconsistent with facts which his counsel has discovered by investigation. In short, he lies. What is the proper course for counsel at this point? The alternatives which suggest themselves are: 1. Immediate disclosure to the court, or 2. immediate withdrawal from the case.

Canon 22<sup>14</sup> provides that the conduct of the lawyer before the court should be characterized by candor and fairness. There

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<sup>9</sup> Canons of Professional Ethics, No. 15.

<sup>10</sup> Curtis, *op. cit. supra*, n. 8 at 15.

<sup>11</sup> Canons of Professional Ethics, No. 5.

<sup>12</sup> Canons of Professional Ethics, No. 24.

<sup>13</sup> Canons of Professional Ethics, No. 16:  
Restraining Clients from Improprieties,

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong doing the lawyer should terminate their relation.

<sup>14</sup> Canons of Professional Ethics of the American Bar Association.

are instances where affirmative disclosures should be made. Attorneys have been suspended or disbarred for failing to disclose the whereabouts of clients who have jumped bail,<sup>15</sup> the presence of two friends on the jury panel<sup>16</sup> and the fact that a client's mother had known and talked with a petit juror.<sup>17</sup> It has been held unethical not to disclose that the corporate employer of a petit juror was a corporate relative of the defendant corporation.<sup>18</sup> In *re Schapiro*,<sup>19</sup> a doctor testified that he had no pecuniary interest in the outcome of the case. Counsel for plaintiff knew that the witness had a contingent fee agreement and failed to disclose it to the court. It was held that the attorney's failure to disclose the bias of the witness was improper.

Despite these cases which exact a high degree of candor by the lawyer to the court, I have been unable to find a case in which a defense lawyer in a criminal trial has been required to disclose his client's lack of veracity or that of any other witness. Moral backing for the non-necessity of disclosure is provided by Father Connell:

If a witness for the defense without the foreknowledge or connivance of the lawyer gives false testimony, the lawyer has no obligation to point out the perjury.<sup>20</sup>

The basis of the attorney-client privilege is to allow freedom of communication between client and attorney. The limitations of the privilege include prospective crimes but not past crimes.<sup>21</sup> Public safety demands the former but the proper administration of justice denies the latter. Nowhere can justification be found for a breach of the privilege by affirmative disclosure under the above circumstances. The argument that the patent perjury is a prospective crime seems to be a tortured extension of the exception to the privilege.<sup>22</sup> The practical effect of an affirmative

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<sup>15</sup> *In re McCullough*, 97 Utah 533, 95 P. 2d 13 (1939).

<sup>16</sup> *In re Shon*, 28 N.Y.S. 2d 872, 39 N.E. 2d 310 (1941).

<sup>17</sup> *U. S. v. Henson*, 179 F. Supp. 474 (D.D.C. 1959).

<sup>18</sup> Op. 217, Opinions of the Committee on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers Association (1957).

<sup>19</sup> 144 App. Div. 1, 128 N. Y. S. 852 (1911).

<sup>20</sup> Connell, *Morals in Politics and Professions* 112 (1951).

<sup>21</sup> 97 C.J.S. § 285.

<sup>22</sup> Stovall, *Aspects of the Advocate's Dual Responsibility*, 22 Ala. Law. 62, 72 (1961).

disclosure must be a mistrial. It will result in a second trial at best and double jeopardy at worst.<sup>23</sup> The lawyer who makes such a disclosure because of his own deep moral feelings and professional integrity may well find that the very court he sought to protect from fraud is extremely disturbed by his well-intentioned but misguided candor.

Many civil lawyers looking from afar (if not down) upon the criminal trial procedure, view withdrawal from the proceeding as a necessary and proper escape valve for many kinds of ethical breaches by clients or clients' witnesses.<sup>24</sup> A former president of the American Bar Association stated rather strongly:

. . . I think that if a lawyer thinks that his client or a witness is not telling the truth he should not be a party to what he believes to be a perjury and should not be a party to polluting our courts of justice with this poison . . .<sup>25</sup>

Withdrawal may be a balm to the conscience of the lawyer but presents difficult problems for the court. A mid-trial withdrawal would certainly demand the declaration of a mistrial. A devious defendant seeing the evidence mount against him might purposely create a withdrawal situation for his own purposes. On a second trial after the withdrawal, former jeopardy may be a valid defense since the case had started and the mistrial declared without provable fault of the defendant.<sup>26</sup> A very practical difficulty with withdrawing from a matter during trial is that by reason of the possible legal pitfalls as well as the desire

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<sup>23</sup> The very fact of disclosure to authority would so prejudice the case against the defendant in a future as well as the present trial that it would seem that even if the technical aspects of former jeopardy did not apply, the due process law requirement of the United States Constitution would prevent a second trial.

<sup>24</sup> Op. No. 287 of The Committee on Legal Ethics and Grievances of the American Bar Association. But see, Drinker, Some Remarks on Mr. Curtis' "The Ethics of Advocacy," 4 Stan. L. Rev. 349 (1952). Mr. Drinker, the author of Op. No. 287, while strongly opposing Mr. Curtis' emphatic client loyalty (even to the extent of lying), fortunately recognized the necessity of counsel to represent those accused of even the most outrageous acts. Mr. Drinker quotes Baron Bramwell's report of a client stating to his lawyer, "I want your advocacy, not your judgment." Op. No. 287 in practice makes the lawyer a judge of his client rather than his advocate.

<sup>25</sup> Buckner, *The Trial of Cases*, 15 A.B.A.J. 271 (1929).

<sup>26</sup> Since the lawyer is bound by the privilege, he cannot tell the precise reason for withdrawal if it involves confidential communication. It is his *opinion* that the client's insistence on a course of immoral conduct requires withdrawal. Whether counsel's opinion outweighs a defendant's right to be tried *once* for one crime seems to be constitutionally doubtful.

for orderly administration of criminal justice most judges will not allow it.<sup>27</sup>

A good method of avoiding the problem is by explaining to the active accused that his right to testify does not include a right to perjury and if his testimony is not nearly identical to his oft-repeated story, counsel will not comment in his final argument about the defendant's testimony. If this tactic does not prevent the problem from arising and the client insists on taking the stand and reciting a revised story, the lawyer, by refraining from comment on this testimony in final argument, maintains his duty as his client's advocate to "make them prove a case against his client," but does not become an accessory after the fact to his client's perjury.

The reader will please note that the given factual hypothesis is one in which the counsel is convinced of his client's prevarication by uncontroverted facts. If counsel's opinion of guilt is based upon the improbability of the defendant's testimony coupled with seeming strength of the prosecution's case any act other than complete advocacy of his client's cause would be grossly improper.

### Duty to Others

Attorneys although attempting to be objective cannot help but form moral judgments as to the guilt or innocence of their clients. After a number of personal conferences with his client the attorney has formed a personal opinion that his client committed the act charged. The client furnishes counsel the names of certain alibi witnesses. After talking with the witnesses the attorney is convinced that the witnesses are either lying or mistaken. Experience shows that mothers, fathers, husbands, wives and friends will furnish alibis for their dear ones because of love, fear, mistaken belief in their innocence, or because it happens to be true. Many of these people have had no contact with law or law enforcement. What is the duty, if any, of the defense counsel toward them? Should counsel advise the witness that he does not believe him? Should counsel advise the witness of the pen-

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<sup>27</sup> Canon 44 provides that if the client "insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in the presenting of frivolous defenses . . . the lawyer may be warranted in the withdrawing on *due notice* to the client *allowing him time to employ another lawyer.*" (Emphasis supplied.) *Quaere*: once the criminal trial has commenced is "due notice" possible?



alty for perjury? The spectacle of aged parents furnishing a perjured alibi for their oft-convicted son who was caught by the police moments after the offense haunts the kind-hearted defense lawyer.

Conversely, what if the defense counsel has formed the subjective opinion that his client is innocent but finds alibi witnesses mistaken as to times and dates and reluctant to testify, does he express his opinion as to the innocence of his client and "refresh" the witnesses memories? Witnesses should be interviewed but not taught to parrot the defendant's story. Witnesses may be coached but not suborned. The dividing line is thin and only one's own moral integrity can mark it.

The unfortunate spectacle of having parents perjure themselves for a guilty son with false alibi testimony, or of seeing a man, believed by his lawyer to be innocent, found guilty because of the inability of witnesses to remember, sorely tempts the lawyer to overreach his role of advocacy and express his personal convictions as an individual regarding the justice of his client's cause. If a lawyer does this he has gone too far.

The advocate has ceased to advocate and has now become the moral as well as legal judge of his client. Personal opinions as the justness or unjustness of a client's case cannot be reflected in actions of the advocate toward others. Belief in a client's cause should not be so overwhelming that the lawyer's enthusiasm creates witnesses rather than questions them. Nor should disbelief or lack of enthusiasm be such as will discourage possible witnesses from testifying for a defendant.

A related problem occurs when a witness by his testimony can aid the client but must incriminate himself. The witness does not realize this. Should counsel for the accused inform the witness of his right to refrain from testifying?

An advocate can represent only one interest. The duty to the client is controlling. One must act with complete objectivity as an advocate for his client without compassion for individuals whose aid to the accused may be most costly to themselves. He must leave informing the witness to his adversary or to the court.

As *Williston* quotes:

But at best there must be many things in the profession from which a very sensitive conscience would recoil and things must be said and done which can hardly be justified except on the ground that the existence of a profession and

the prescribed methods of its action are in the long run indispensable to the honest administration of justice.<sup>28</sup>

Personal opinions are unwanted luxuries in the arsenal of the advocate. A vigorous but not overzealous assertion of the righteousness of his client's cause is the obligation of every advocate. Disbelief and defeatism deny the defendant the right to effective counsel.

### Duty to the Court

Canon 37 provides that it is the duty of a lawyer to preserve his client's confidences, which duty outlasts the lawyer's employment. When the rule first appeared, it was apparently based on a consideration for the oath and honor of the lawyer rather than for the apprehension of the client, but later and in more modern times it was based on the principle that "in order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed."<sup>29</sup> The confidence must be preserved because worse mischiefs might result from permitting disclosure than from rejecting evidence of it.<sup>30</sup>

Canon 22 demands fairness and candor of the lawyer when dealing with the court.

Canon 37, prescribing the lawyer's duty to preserve his client's confidences, and Canon 22, prescribing the lawyer's duty of candor to the court, directly conflict in the following hypothetical situations:

1. A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, "You have no criminal record, so I will put you on probation."

Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

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<sup>28</sup> Williston, *Law and Life* 272 (1940), (quoting from Lecky, *The Map of Life*).

<sup>29</sup> Wigmore, *Evidence*, § 2291 (3rd ed., 1940). See also *Greenough v. Gaskell*, 1 Myl. § K. 98, 103 (1833).

<sup>30</sup> This is not merely a rule of professional conduct.

2. Suppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?
3. Assume further a situation in which the judge following the conviction asks the defendant's lawyer whether his client has a criminal record.<sup>31</sup>

A majority of the members of the American Bar Association Ethics Committee decided as follows:

If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.

If the fact of the client's criminal record was learned by the lawyer without communication confidential or otherwise, from his client, or on behalf of him, Canon 37 would not be applicable, and the only problem would be as to the conflicting loyalties of the lawyer on the one hand to represent his client with undivided fidelity and not to divulge his secrets (Canon 6), and on the other to treat the court in every case in which he appears as counsel, with the candor and fairness (Canon 22) which the court has the right to expect of him as its officer. In this case we deem the following considerations applicable.

If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the

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<sup>31</sup> Op. 287, Committee on Legal Ethics and Grievances (1953).

question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth.

Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, 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. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not appease on the basis of loyalty to this client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or "any manner of fraud or chicane." (Canon 15).

If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out.<sup>32</sup>

The opinion of the Committee fails to consider a most important factor. The Judge has asked an improper question, one in disregard of the lawyer's role as an advocate. The actions prescribed in the opinion, although certainly in keeping with the dignity of the profession, have the same practical effect on the disposition of the case as an affirmative disclosure of the information. Experience shows that an attempt to distinguish communications of a client and information independently learned is both difficult and unrealistic. Even if the client did not tell his

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<sup>32</sup> *Ibid.*

lawyer of his prior record, he undoubtedly told him confidential facts about himself which placed the attorney in a better position to learn of the past record than the authorities.<sup>33</sup>

Any question asked of a lawyer by a judge which calls for a possible breach of the confidential relationship is dangerous. Questions calling for a moral opinion of one's own client are equally perilous. Do you (the lawyer) think I should put him on probation?

At no time during the existence of the attorney-client relationship must the lawyer state his personal opinion as to the justness or unjustness of his client's cause.<sup>34</sup>

Sentence time should not change the advocate into an assistant judge. Even at this stage of the proceedings, "His (the lawyer's) loyalty runs to his client. He has no other master. Not the court? You ask . . . No, in a paradoxical way. The lawyer's official duty, required of him indeed by the court is to devote himself to the client. The court comes second by the court's, that is the law's own command."<sup>35</sup>

The questioning at the bench is often rhetorical. The judge does not expect the lawyer to deny his client's eligibility for probation or a mitigated sentence when standing beside him in open court. The more serious problem arises when a sincere judge wishing to share in the experience and judgment of a fellow lawyer asks the advocate in the absence of his client what he thinks the court should do with the defendant. The lawyer knows that his unsworn statements to a judge or a fellow lawyer differ from advocacy before a jury. Much of a lawyer's reputation in the legal community is based upon the integrity of his word.

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 ap-

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<sup>33</sup> The distinction between independent fact finding and privileged communication could very well make a client wary as to what the lawyer may discover and he therefore conceals facts which his counsel should know. Such a distinction would seem to thwart the purpose of the privilege.

<sup>34</sup> Canons of Professional Ethics, No. 15.

<sup>35</sup> Curtis, *op. cit. supra*, n. 8, at 3.

pear 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. In most metropolitan areas, judges are furnished thorough presentence reports. The reports are not always correct. Many serious misdemeanors and most less serious are disposed of without presentence reports and often with meager criminal record reports. The judge is then poorly informed and must in part rely upon counsel. The lawyer seeking to be both an advocate for his client and at the same time, fair and candid with the court, faces a true dilemma.

One answer is client control. If the client has faith in his lawyer he will follow his advice and be truthful. However, some of the people accused of crime are criminals. They are anti-social and demand every "break" they can get. Candid counsel may soon be "canned" counsel. Client control is more difficult for appointed counsel because of a basic mistrust of the "state" or "free" lawyer. Even the most faithful client will be perplexed by his own lawyer's presentation of adverse information to the court and will wonder "who's side he is on."

Avoidance of the enforced pragmatic candor of answering the court's improper questions and the forced volunteering of information detrimental to a client's cause is necessary to continue the adversary system in the administration of criminal justice. Any affirmative statement offered by the advocate to the court regarding sentence should be fair and truthful, but the failure of counsel to mention detrimental information violative of the privilege cannot be held against the lawyer. Silence, too, can be candid. If an error is later discovered blame need not be placed on the silence of the lawyer but rather on the system which erred. The adversary system does not conclude with conviction. The prosecution, too, has a responsibility in the sentencing procedure. Abdication of that responsibility does not place the sole duty of informing the court of pertinent facts on the defense counsel. Judges should be able to rely upon the word of counsel but not upon what an advocate does not and cannot say.

### Conclusion

This above all: to thine own self be true and it must follow, as the night the day, thou canst not then be false to any man.<sup>36</sup>

Understanding the ethical principles of the defense advocate enables a lawyer to be true to himself and yet ably represent one accused of even the most outrageous acts. If a lawyer cannot accept these ancient principles he should avoid the vital, living excitement of the criminal trial.

The loyalty which a criminal defense lawyer owes his client is limited but *undivided*. Loyalty does not replace the lawyer's conscience with that of his client and does not allow the use of illegal or unethical means to achieve his goals.

The advocate is not the moral or legal judge of his client. It is not the defense lawyer's duty to guarantee that the guilty do not go free or that sufficient punishment is accorded the convicted. His duty as an officer of the court and as a member of an honorable profession is met when he represents his client with zeal, competence, loyalty and *professional* integrity. Nothing more, is, nor should be required.

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<sup>36</sup> Shakespeare, Hamlet (Act. I, Scene III).