

The Attorney's Duties of Disclosure

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THE ATTORNEY'S DUTIES OF DISCLOSURE

Introduction

A few years ago, in the case of *In re Greenberg*,¹ Chief Justice Vanderbilt of the New Jersey Supreme Court made the statement that "counsel is responsible . . . for making known to the court any decisions *in the State* adverse to his cause in the event his opponent fails to cite them. . . ." ² Taken at face value, this means that the attorney is not fulfilling his ethical duty if he deliberately presents a one-sided picture of the law applicable to the fact situation being litigated. At first appearance, this seems to be an extremist position, and one without foundation in the Canons of Professional Ethics, which are at least the immediate source of the attorney's standards. But, in reality, all duties of disclosure can be traced to an origin in the Commandment, which directs us to be truthful in all our dealings with other men.³ Further, these Canons, as standards of conduct, would seem to have been derived as particular applications of the moral law. The very word "Canon" itself suggests a derivation from the principles which controlled the conduct of the ecclesiastical authorities when much of the administration of justice was in their hands.⁴

Thus, it can be seen that the obligation as proclaimed by Chief Justice Vanderbilt at least has a basis in the moral law. But a study of the obligations of disclosure already enumerated by the Canons, and presently enforced by the courts and the various bar associations will show that this apparently recent development also comes within the purview of the Canons, implicitly at least, as a logical and necessary corollary of these other obligations of disclosure.

Development of Professional Standards

The practice of the law was not recognized as a profession from the very beginnings of recorded history;⁵ hence, there was not always a need for a special code to regulate the conduct of the men who advocated the cause of others before the courts. Historians tell us that the earliest practitioners, at least in England, were not what could be

¹ 15 N.J. 132, 104 A.2d 46 (1954).

² *In re Greenberg*, 15 N.J. 132, 104 A.2d 46, 48 (1954) (emphasis added).

³ "You shall not bear false witness against your neighbor." EXODUS 20:16.

⁴ Webster defines a canon as "a decree, decision, regulation, code, or constitution made by ecclesiastical authority . . ." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1938).

⁵ See PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 204 (4th ed. 1948); 1 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 213 (2d ed. 1899); WILKIN, THE SPIRIT OF THE LEGAL PROFESSION 8-9 (1938). Holdsworth tells us that it was not until the reign of Edward I (late thirteenth century) that there arose a class of professional attorneys. 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (4th ed. 1936).

properly called professional men.⁶ Rather, they were learned and capable men who merely appeared in court on behalf of a friend or relation.⁷ As the evolutionary development of the law continued and its complexities multiplied, however,⁸ a need for trained specialists to respond to the new demand became apparent. There thus arose a group of professional advocates who derived their right to practice law from the king.⁹ Today, then, it is well recognized that the practice of law is a privilege conferred upon the attorney by the state,¹⁰ as successor of the powers of the king.

With the arrival of legal practice at a stage of development where it was considered a profession, a need for uniform regulation of the conduct of members of the bar became apparent.¹¹ The restrictions which have been most obviously necessary have been provided by criminal laws.¹² But there is another area which has not been covered by law, and it is this area which the profession itself seeks to regulate through self-discipline.

The Canons of Professional Ethics of the American Bar Association and of the bar associations of the individual states constitute the core of these principles of self-discipline. These Canons guide the attorney's conduct in the many professional relationships into which he enters. Though the most obvious of these relationships is that of attorney-client, the practice of law involves other equally important relationships, such as those with the opposing counsel, with the court, with the public, and with the profession itself. Because the practice of law is a privilege emanating from the state, however, the courts have a rightful claim to the primary loyalty of the attorney, whom they describe as an "officer of the court."¹³

⁶ See HOLDSWORTH, *op. cit. supra* note 5; PLUCKNETT, *op. cit. supra* note 5; POLLOCK AND MAITLAND, *op. cit. supra* note 5.

⁷ PLUCKNETT, *op. cit. supra* note 5, at 205.

⁸ *Ibid.*

⁹ ". . . we see a group of counsel, of serjeants and apprentices on the one hand, and a group of professional attorneys on the other, and both of them derive their right to practice from the king either mediately or immediately." POLLOCK AND MAITLAND, *op. cit. supra* note 5, at 217.

¹⁰ See RULES OF THE NEW YORK STATE BOARD OF LAW EXAMINERS (as amended May 1, 1956). See also N.Y. PEN. LAW § 270, which makes it unlawful to practice or appear as an attorney "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state. . . ."

¹¹ ". . . it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." Preamble, CANONS OF PROFESSIONAL ETHICS OF THE NEW YORK STATE BAR ASSOCIATION (1950).

¹² *E.g.*, N.Y. PEN. LAW §§ 320 (barratry), 376, 376-a, 377 (embracery), 379 (bribing witnesses), 1620-34 (perjury and subornation of perjury).

¹³ "An attorney at law is an officer of court . . . [with] obligations both public and private." *Langen v. Borkowski*, 188 Wis. 277, 206 N.W. 181, 190 (1925). See also *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1866); *Bowles v. United States*, 50 F.2d 848, 851 (4th Cir. 1931); *People v. Gorman*, 346 Ill.

It is upon this premise, and the obligation of all men to be truthful, that the attorney's duties of full disclosure of both law and fact are predicated. Thus, Canon 22 of the Canons of Professional Ethics provides a general guide for the attorney in this area. It states that "the conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."¹⁴ In addition, several other Canons impose a duty of disclosure in particular situations.¹⁵ But all of these Canons are worded generally, and it consequently is necessary that they be interpreted and applied so as "to assist the practitioners of the law in maintaining the highest standards of ethical conduct as they are daily confronted with the problems of their profession."¹⁶ In order to understand and apply the standards of conduct regarding disclosure to particular situations it is necessary to look to the applicable case law and to the opinions of Committees on Professional Ethics of the bar associations, which are "representative groups of experienced lawyers to whom members of the profession . . . submit their ethical problems for considered advice and opinion."¹⁷

An Exception—The Attorney-Client Privilege

Before beginning an inquiry into the ethical obligations of disclosure imposed on the attorney, it is necessary to state that certain facts are exempt from the general rule that all material facts must be brought forth. "[C]onfidential communications between an attorney and his client are privileged from disclosure . . . as a rule of necessity in the administration of justice."¹⁸ In New York State, the Civil Practice Act extends this privilege of non-disclosure to attorneys and their employees so long as the information being withheld was acquired by them "in the course of [their] professional employment."¹⁹

This exception to the general rule is itself subject to a few exceptions, at least from the point of view of ethics. The Committee on Professional Ethics and Grievances of the American Bar Association,

432, 178 N.E. 880, 885 (1931); *Danforth v. Egan*, 23 S.D. 43, 119 N.W. 1021, 1024 (1909).

¹⁴ Canon 22, CANONS OF PROFESSIONAL ETHICS.

¹⁵ *E.g.*, Canon 5: "The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." Canon 29: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities." Canon 41: "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it . . ."

¹⁶ 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 xi (1956).

¹⁷ *Id.* at viii.

¹⁸ *United States v. Funk*, 84 F. Supp. 967, 968 (E.D. Kv. 1949).

¹⁹ N.Y. CIV. PRAC. ACT § 353.

in several of its opinions, has indicated that this strict confidence may be broken if it is necessary to do so in order to defend against unjust charges,²⁰ or to prevent prospective crime.²¹

As a matter of first impression, it might seem that this privilege of non-disclosure actually impedes the proper administration of justice in that it hinders the full and complete disclosure of all relevant facts. But this exception has a sound basis in public policy. The Committee on Professional Ethics and Grievances of the American Bar Association has pinpointed this consideration, stating that "it is essential to the administration of justice that there should be perfect freedom of consultation by client with attorney without any apprehension of a compelled disclosure by the attorney to the detriment of the client."²²

Duties of Disclosure—Facts

Though the duty of an attorney to make a full disclosure of the law of the state applicable to particular fact situations may be considered fairly novel, the duty to present to the court all the facts has long been recognized.²³ This duty to disclose facts is applicable to tasks performed by an attorney before and after, as well as during, the conduct of a trial. Thus, the direction to use candor and fairness before the court and with other lawyers imposes the duty of truthfulness upon the attorney in the performance of such duties as the drawing of pleadings and motion papers, the arguing of motions, the selection of a jury, the examination of witnesses, and the preparation and argument of briefs on appeal.

Certain facts must be established before an attorney is ethically entitled to proceed with a cause of action. Since we operate under the principle of *res judicata*,²⁴ a cause which has once been finally adjudicated between the parties may not be again re-litigated.²⁵ Thus, an attorney is imposing upon the court if he attempts to proceed with the trial of a cause that has already been decided. Similarly, the failure to disclose the pendency of an action in another court, based on the same subject matter, may also be considered an imposition. In addition to the general standard prescribed by Canon 22, the bringing of actions in both of these instances can be said to be specifically

²⁰ Opinions 19 and 202, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 94, 405 (1946).

²¹ Opinion 202, *op. cit. supra* note 20, at 405.

²² Opinion 91, *op. cit. supra* note 20, at 201.

²³ See, e.g., *In re Glover*, 176 Minn. 519, 223 N.W. 921 (1929) (per curiam); *In re Marron*, 22 N.M. 252, 160 Pac. 391 (1916); *In re Abrams*, 36 Ohio App. 384, 173 N.E. 312 (1930); *In re McCullough*, 97 Utah 533, 95 P.2d 13 (1939).

²⁴ See *Heyman v. Heyman*, 175 Misc. 69, 72, 22 N.Y.S.2d 832, 835 (Sup. Ct. 1940); *Buffalo Fire Appliance Corp. v. City of Norwich*, 156 Misc. 486, 487, 281 N.Y. Supp. 939, 941 (Sup. Ct. 1935); *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791, 795 (1941).

²⁵ *Foster v. The Richard Busted*, 100 Mass. 409, 412 (1868).

forbidden by Canon 30, which prohibits unjustifiable litigation.²⁶ At least one court has squarely faced the question whether concealment of a prior adjudication constitutes a fraud upon the court, showing the attorney to be unworthy to practice law. The question was answered in the affirmative, and the attorney's license to practice law was suspended.²⁷ In another case, involving an action for annulment, an attorney was censured for failing to disclose the pendency of a separation action between the same litigants.²⁸ Although this problem has appeared infrequently in disciplinary actions, the stand taken when it has arisen would indicate that courts do recognize this duty of disclosure.

Once the attorney has reached the court, he has the further duty to ensure that any potential bias on the part of jurors or witnesses, known to him, will be disclosed. The Constitution of the United States guarantees to its citizens, in certain instances, the right to a trial by an impartial jury.²⁹ The obligation of securing such an impartial panel should rest on all the parties involved in the litigation. This impartiality is secured in part by the right given by law to the attorneys to challenge a certain number of prospective jurors peremptorily³⁰ or for cause.³¹ But this alone cannot solve the problem. There remains the possibility that certain jurors will be empanelled even though they are bound to one of the attorneys by bonds of blood, friendship, or business, since the opposing attorney may very well be unaware of the existence of such bonds. It is in this instance that the attorney has the obligation to come forth and declare to the court the existence of such a relationship. This situation arose in the disciplinary proceeding of *In re Shon*³² in New York. There the attorney was disbarred for, *inter alia*, allowing two close friends to sit as jurors in the trial of a case which he was handling, without disclosing that fact to the court.

The Committee on Professional Ethics of the Association of the Bar of the City of New York was confronted with a similar situation in a problem submitted for its consideration.³³ The question asked was whether it was professionally proper for an attorney to fail to disclose that a prospective juror was an employee of a corporation linked to his corporate client through an interlocking directorate. In

²⁶ "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong." Canon 30, CANONS OF PROFESSIONAL ETHICS.

²⁷ *People v. Case*, 241 Ill. 279, 89 N.E. 638 (1909).

²⁸ *In re Heimsoth*, 255 N.Y. 409, 175 N.E. 112 (1931) (per curiam).

²⁹ U.S. CONST. amends. VI, VII; see also N.Y. CONST. art. 1, § 2.

³⁰ N.Y. CIV. PRAC. ACT § 451.

³¹ N.Y. CIV. PRAC. ACT § 452.

³² 262 App. Div. 225, 28 N.Y.S.2d 872 (2d Dep't 1941).

³³ Opinion 217, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 107 (1956).

responding in the negative, the Committee declared that withholding such information is unfair to the court, to the opposing attorney, and to the litigant, and hence clearly unethical.

But the possibility of bias, far from being confined to jurors, is more likely encountered in witnesses. The position of the witness in our judicial structure is, to a certain extent, anomalous. For, although it is known to all that he is being called to testify in the furtherance of one of the conflicting causes, yet he, like all of the participants in a judicial proceeding, has the primary obligation to see that the ends of justice are met.

Ordinarily, jurors are the ultimate judges as to the credibility of a witness, and how much weight should be attached to the facts he has brought forth.³⁴ Realizing that witnesses are partisan, at least to the extent that the facts which are within their knowledge favor one particular side, it becomes the jurors' task to sift and weigh all of the factors involved in the presentation of testimony by the witness. Physical appearance, composure or lack thereof, nervous mannerisms—all of these factors are bound to affect the manner in which the jurors consider the witnesses' testimony. But the important point to keep in mind is that the jurors, as the arbiters of facts, must have all factors bearing on the credibility of witnesses brought to their attention before an intelligent and fair appraisal can be handed down. It is for this reason that counsel is obliged to reveal whether a witness is being compensated for his testimony, since if compensation is involved it is reasonable to assume that such testimony will be, at the very least, channelled in a favorable direction.

The Committee on Professional Ethics of the New York City Bar Association has, in two of its opinions,³⁵ declared it to be unethical on the part of counsel to allow a witness to testify on his client's behalf without disclosing to the court the fact that the witness is either monetarily or otherwise being compensated for the testimony. Although this failure to disclose has been found by courts to be reversible error, there are few cases³⁶ in which this failure to disclose has formed the basis of a disbarment proceeding. However, in New York State, there are at least two significant decisions in this area. In the case of *In re Schapiro*,³⁷ decided in 1911, the defendant attorney, having brought forth a doctor as a witness in a personal injury action, was disbarred for remaining silent when the doctor denied to the court that he had any pecuniary interest in the outcome of the case, when in fact there had been an agreement that the doctor was to have a percentage share in the recovery. The case of *People*

³⁴ RICHARDSON, EVIDENCE §§ 123, 125 (8th ed. 1955). For instances when this is not so, see RICHARDSON, *op. cit. supra* §§ 116-26.

³⁵ Opinions 8 and 505, *op. cit. supra* note 33, at 5-6, 276-77.

³⁶ See, e.g., *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853 (1956); *cf. People v. Creasy*, 236 N.Y. 205, 140 N.E. 563 (1923).

³⁷ 144 App. Div. 1, 128 N.Y. Supp. 852 (1st Dep't 1911).

v. Savvides,³⁸ though not a disciplinary proceeding, is a more recent expression of the courts' attitude in this area. Here, the defendant was convicted on the testimony of a witness for the prosecution who had been promised lenient treatment by an Assistant District Attorney in return for his testimony. At the trial, the witness denied that there was any agreement that he was to receive lenient treatment. The court held that the failure of the Assistant District Attorney to expose this lie by the witness was "error so fundamental, so substantial, that a verdict of guilt will not be permitted to stand."³⁹ In addition to the possibility of bias mentioned earlier, the court found that an additional, and at least equally important reason for requiring disclosure of this fact is that since the witness himself had concealed the fact that he was to be rewarded for his testimony, that act of concealment should be taken into consideration by the jury in evaluating the worth of the balance of his testimony.⁴⁰ Thus, it would appear that both the courts and committees on professional ethics have taken a definite stand regarding an attorney's duty to disclose facts which are pertinent to the question of possible bias by jurors and witnesses.

Another problem which may arise in the course of a trial involves the misstatement of fact on the witness stand on the part of an attorney's own witness. When this occurs, it is recognized that the witness himself, if discovered, can be prosecuted and punished for perjury.⁴¹ What, however, is the responsibility imposed upon the attorney to correct such misstatements when and if they are known by him to be false? If the misstatements made by a witness are pursuant to instructions given to him by the attorney, the latter is guilty of a violation of professional ethics,⁴² and is also liable to be criminally prosecuted for subornation of perjury.⁴³

These situations require little further discussion because they are specifically covered by either penal statutes or Canons of Professional Ethics. There is, however, one situation which, while not accompanied by criminal sanctions, does pose a difficult ethical problem. Ordinarily, when an attorney proceeds to trial, he should be completely familiar with the facts of his case and with the statements which his witnesses and his client are going to make to the court. In the regular course of events these are the facts and the statements which will be repeated under oath in the actual trial. But it might

³⁸ 1 N.Y.2d 554, 136 N.E.2d 853 (1956).

³⁹ *People v. Savvides*, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854 (1956).

⁴⁰ *Id.* at 557, 136 N.E.2d at 855.

⁴¹ "A person is guilty of perjury who . . . knowingly testifies . . . falsely, or states in his testimony . . . any matter to be true which he knows to be false. . . ." N.Y. PEN. LAW § 1620.

⁴² "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses . . ." Canon 22, CANONS OF PROFESSIONAL ETHICS.

⁴³ "A person who wilfully procures or induces another to commit perjury in the first degree is guilty of subornation of perjury . . ." N.Y. PEN. LAW § 1632.

happen that a witness on the stand would contradict, or at least vary the statements which he had previously made to his attorney. When the attorney knows the statements originally made to be the true ones, can he remain silent, or must it be pointed out to the court that his witness's story has been, at the very least, inconsistent?

It would be well to remark at this point that we are here concerned with statements made by witnesses, which the attorney *positively knows to be false*. Were it merely a case of the attorney suspecting perjury on the part of his witness, it would reduce itself to a matter of the attorney usurping the jury's prerogative of judging the credibility of witnesses, something which no canon of ethics would or could require him to do.

The problem would be difficult enough to solve merely from the ethical point of view; it is further complicated by the rules of evidence which concern the impeaching of witnesses. Where adverse witnesses are involved, they may be impeached.⁴⁴ As to one's own witnesses, however, the rule is that ordinarily their credibility cannot be impeached.⁴⁵ In New York, this has been modified by statute. The New York Civil Practice Act⁴⁶ and the New York Code of Criminal Procedure⁴⁷ both provide that an attorney may disclose inconsistent statements on the part of his own witnesses when the prior statements were made in writing or under oath. Further, if his witness's testimony takes him by surprise, he may "interrogate the witness in respect to previous statements inconsistent with the present testimony, for the purpose of refreshing or probing his recollection, and of giving him an opportunity to explain the apparent inconsistency."⁴⁸

"By proceeding with the trial after having become aware of the fact that it was based upon perjured testimony, the attorney . . . [makes] himself a party to the attempted fraud upon the court. . . ." ⁴⁹ Thus, it seems that the perjuring witness and his attorney (provided he had knowledge of the perjury) are considered as being *in pari delicto*. This does not, however, lead to the conclusion that a failure to convict the witness of perjury will, of necessity, free the attorney from any responsibility for his wrong. Perjury, being a criminal

⁴⁴ See *Hanrahan v. New York Edison Co.*, 238 N.Y. 194, 144 N.E. 499 (1924); RICHARDSON, EVIDENCE § 523 (8th ed. 1955).

⁴⁵ See *People v. DeMartini*, 213 N.Y. 203, 214, 107 N.E. 501, 505 (1914); *Pollock v. Pollock*, 71 N.Y. 137, 152 (1877); *Thompson v. Blanchard*, 4 N.Y. 303, 311 (1850); RICHARDSON, *op. cit. supra* note 44, § 520; 3 WIGMORE, EVIDENCE §§ 896-901 (3d ed. 1940).

⁴⁶ N.Y. CIV. PRAC. ACT § 343-a.

⁴⁷ N.Y. CODE CRIM. PROC. § 8-a.

⁴⁸ RICHARDSON, *op. cit. supra* note 44, § 522; *cf. WIGMORE, op. cit. supra* note 45, § 1044.

⁴⁹ *In re Hardenbrook*, 135 App. Div. 634, 643-44, 121 N.Y. Supp. 250, 258 (1st Dep't 1909). *But see* CONNELL, MORALS IN POLITICS AND PROFESSIONS 112 (1951) where Father Connell opines that "if a witness for the defence, without the foreknowledge or connivance of the lawyer, gives false testimony, the lawyer has no obligation to point out the perjury."

charge, must be supported by a finding of wrongful intent and guilt beyond a reasonable doubt before a conviction can be sustained.⁵⁰ A disbarment proceeding, on the other hand, is civil in nature, and requires only a finding by a fair preponderance of the evidence that a prescribed act has been committed or omitted.⁵¹ In fact, disciplinary suspensions and censures have been sustained by the courts on a mere showing that the defendant negligently made a serious error of omission or commission.⁵²

However, the attorney's obligation to make a complete disclosure of material facts does not end with the completion of the trial. Just as it would be wrong to produce non-existent facts in the trial, so it is wrong to present disputed facts on appeal, leading the court to believe that they were established in the trial court when in reality they were not. In the disciplinary proceeding of *In re Greenberg*,⁵³ that is the precise violation with which the attorney was charged.

Duties of Disclosure—Law

From the obligations already outlined, it would seem but a short step to the obligation mentioned at the beginning of this article, that of disclosing decisions adverse to the client's cause, when they are known to counsel. If there be resistance to this precept, it can probably be traced to the influence of the old idea that litigation is a game, and the opposing counsel are adversaries.⁵⁴ This concept, far from archaic, is still with us today⁵⁵ and may well be at the root of the problem.

This idea, regarding litigation as a game, is clearly erroneous if the purpose of the court system really is to dispense justice. For, if it is wrong to cite an overruled case,⁵⁶ because it leads the court to decide on the basis of what is no longer law, it would seem equally wrong for a case to be decided upon a consideration of only a part of the applicable authority. Further, since the suppression of facts is an

⁵⁰ N.Y. CODE CRIM. PROC. § 389; RICHARDSON, EVIDENCE § 97 (8th ed. 1955); 9 WIGMORE, EVIDENCE § 2497 (3d ed. 1940).

⁵¹ RICHARDSON, *op. cit. supra* note 50, § 97; WIGMORE, *op. cit. supra* note 50, § 2498.

⁵² See, e.g., *Matter of O'Neill*, 175 App. Div. 973, 161 N.Y. Supp. 899 (1st Dep't 1916); *In re McKenna*, 100 Cal. 540, 107 P.2d 258 (1940) (*per curiam*); *Trusty v. State Bar of California*, 100 Cal. 501, 107 P.2d 10 (1940).

⁵³ 15 N.J. 132, 104 A.2d 46 (1954).

⁵⁴ See DRINKER, LEGAL ETHICS 76 (1953); Quisumbing, *The Rights of the Accused—Their True Basis*, 2 FRANCISCO COLL. L.J. 12, 19 (1955).

⁵⁵ For example, Norberto Quisumbing, Chief of the Prosecution Division of the Department of Justice of the Philippines, feels that a trial is a "judicial contest" in which the State isn't interested in discovering the truth, but rather in settling the dispute between the parties on the basis of "what the facts appear to be as disclosed by the materials submitted by the parties." Quisumbing, *supra* note 54, at 19.

⁵⁶ Canon 22, CANONS OF PROFESSIONAL ETHICS.

acknowledged wrong,⁵⁷ there is at least equal reason for so regarding the suppression of law. But the trend over the last thirty-five years, at least as indicated by the courts and the bar associations, clearly is toward recognition of the duty to disclose adverse holdings. In an important English case,⁵⁸ decided in the House of Lords in 1921, the Lord Chancellor said that the House required, even insisted, that authorities bearing one way or the other as to the subject matter of the litigation should be brought to the attention of the court by anyone who knows of them.⁵⁹

When the committees on ethics have been asked to hand down opinions on this matter, their responses have unanimously favored disclosure. For example, the Committee on Professional Ethics of the Association of the Bar of the City of New York has ruled that an attorney must disclose "an authoritative decision on all fours against his client,"⁶⁰ which he happened to uncover in the course of his research. Similar rulings have been made by the Committee on Professional Ethics and Grievances of the American Bar Association.⁶¹

Though one might at first be led to conclude that the performance of this obligation by an attorney amounts to an abdication of his client's cause, it will be seen that this conclusion does not necessarily follow. As attorney for an individual, counsel has an obligation to render to his client ". . . the benefit of any and every remedy and defense that is authorized by the law of the land. . ." ⁶² But, as was stated earlier, the attorney has another obligation which transcends even the duty owing to the client—the obligation to be truthful, candid, and fair to the court. When these two conflict, the latter must prevail. Actually, the disclosure of such adverse decisions may work to the client's advantage. In the first place, it shows the court that his attorney prepared and is willing to discuss authorities on both sides of the question, fully and candidly; and, secondly, it allows his attorney the opportunity to comment on and distinguish these adverse authorities from the instant case.⁶³

It should be noted, however, that the rule advanced in the *Greenberg* case could not, under any circumstances, be so interpreted as to impose on the attorney the obligation to research both sides of

⁵⁷ See note 23 *supra*.

⁵⁸ *Glebe Sugar Refining Co. v. Trustees of the Port and Harbours of Greenock*, 65 SOL. J. 551 (House of Lords 1921).

⁵⁹ *Glebe Sugar Refining Co. v. Trustees of the Port and Harbours of Greenock*, *supra* note 58, at 552 (dictum).

⁶⁰ Opinion 643, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 369-70 (1956).

⁶¹ Opinion 146, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 305 (1946). See also Opinion 280 in which the Committee stated that this obligation isn't confined to controlling authorities. 35 A.B.A.J. 876 (1949).

⁶² Canon 15, CANONS OF PROFESSIONAL ETHICS.

⁶³ See RE, BRIEF WRITING AND ORAL ARGUMENT 128 (2d ed. 1957).

a case. Rather he is expected to seek only authorities supporting the cause which he espouses. However, if, in the course of his research, he chances upon authority having a direct bearing on the case, though adverse to his cause, it is then that this duty arises, and it is then that he must disclose such authority to the court.

The limits of this duty to disclose adverse decisions are not as yet clearly defined. The Committee on Ethics of the American Bar Association has stated that this obligation is not limited to controlling authorities.⁶⁴ Chief Justice Vanderbilt has said it applies to "any decisions in the State . . ." ⁶⁵ In view of these comments, it is still unclear whether the duty of disclosure should extend to (1) decisions of the lower courts within the jurisdiction, and (2) decisions of the highest courts of other jurisdictions.

Conclusion

Thus, it would appear from what has been said that the courts and the ethics committees do require complete disclosure as to both facts and law. In the preparation of complaints and motions, in the selection of jurors, the examination of witnesses, and in argument on appeal, the attorney is confined within narrow limits. He may not conceal existing relevant facts, nor may he present, as proven, facts whose existence has not been clearly established. As to the law, the attorney is duty bound to inform the court of all case law, within his knowledge, which would be likely to influence the court's decision, regardless of whether such cases support his client's cause. Though performance of some of these duties may be considered by some to be an undue burden upon the privilege of practicing law, they in reality involve no more than a strict adherence to the basic principle of the moral law which binds all men to the truth.

⁶⁴ See note 61 *supra*.

⁶⁵ *In re Greenberg*, 15 N.J. 132, 104 A.2d 46, 48 (1954).