

ETHICAL CONSIDERATIONS:

OPENING STATEMENTS AND CLOSING ARGUMENTS

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Introduction:

“The New Jersey Rules place the public interest before the interests of both clients and lawyers.... [In this way, the] New Jersey Supreme Court has given a different interpretation to the idea that in an adversarial system of justice, a lawyer's duty of loyalty to his client is the same as his duty to the legal system. Although traditional adversarial ethics (reflected in former rules) provide a legal and, perhaps, a moral justification to ignore the public interest when pursuing the interests of a client, the New Jersey Rules clearly do not.”

[Michael P. Ambrosio, *The “New” New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 *Seton Hall Legis. J.* 121, 130 (1987).

All attorneys admitted to practice in the state of New Jersey are bound by the Rules of Professional Conduct. In particular, the Rules of Professional Conduct instruct “[a] lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal.” RPC 3.3(a)(5). The burden this rule places on lawyers was detailed by the New Jersey Supreme Court, determining RPC 3.3(a)(5): See, *Generation Mortg. Co. v. Tassy*, 2014 WL 5365158 (N.J.Super.Ch.).

I. R.P.C. 3.3 Candor Toward the Tribunal

(a) A lawyer shall now knowingly:

- (1) Make a false statement of material fact or law to a tribunal;
- (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a legal, criminal or fraudulent act by the client;
- (3) 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;
- (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) Fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(5)(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

II. R.P.C. 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

..... (e) In trial, allude to any manner that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts and issue except when testifying as a witness, or statement a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

III. HISTORICAL BACKGROUND: ETHICS FOR LAWYERS

“In 1887, the first comprehensive code of ethics governing attorneys was adopted by the State of Alabama. An attorney has been tasked with “ow[ing] entire devotion to the interest of his client [and] warm zeal in the maintenance and defense of his cause,” while being required to show “[t]he utmost candor and fairness . . . [in] dealings . . . with the courts and with each other.” Although the balance between these duties has fluctuated over the years, lawyers have been expected to honor both duties. See, 7 Drexel L. Rev. 1,

IV. ETHICAL QUANDARY

- The ethical requirement to zealously represent our clients is limited when a duty arises to exercise a competing requirement of “candor toward the tribunal”.
- What happens when there is a conflict between duty to client and candor to the court?

Example:

A case in your favor was just overruled...you know it but neither the court nor your adversary knows it.

Question:

- Disclose the case that will tank your client’s case?
- Leave it to your adversary to discover?

Answer: Counsel has a duty to disclose to the court the correct state of the law.

V. Duty (and limitations) in the exercise of zealous representation

A. In the Matter of Jack L. Seelig, An Attorney at Law

Jack Seelig¹ a New Jersey certified criminal defense lawyer with an unblemished record for over 20 years. He represented a client who was driving a car that struck a person who was pushing a disabled car on the highway. The person pushing the car died immediately and the person sitting behind the wheel of the disabled car, died two days later. Jack Seelig's client was the cause of two fatalities but would escape prosecution for indictable offenses due to inept prosecution and a sheer blunder of the Municipal Court Judge.

When Seelig's client appears "in orange" in Municipal Court, the only charges on the docket are traffic offenses. The Prosecutor and Judge both don't ask why the defendant in a traffic case is in prison garb. Seelig's client pays a fine and goes home a free man.² One person does know the extent of the damage caused and the likelihood of indictable offenses and that is Jack Seelig. In representing his client, Mr. Seelig believed, in good faith, that his client's Sixth Amendment right to counsel required him to withhold the information about the indictable offenses from the municipal court.

What did Jack Seelig do if not zealously represent his client? Is it Seelig's job to do the work of the Prosecutor and the Judge?

The Disciplinary Review Board, in review of this case, and held by a clear and convincing evidence, recommended disbarment, holding that:

"..[R]espondent's failure "to disclose that two deaths had occurred and that indictable charges were also pending against his client" misled the court, with the result that guilty pleas were improperly entered jeopardizing prosecution on the more serious offenses. That failure to disclose violated *RPC 3.3(a)(5)*, which requires a lawyer to inform the court about a material fact when he or she has knowledge that without such information the court will be misled.

In re Seelig, 850 A.2d 477, 483, 180 N.J. 234, 244 (N.J.,2004) (EMPHASIS ADDED)

In the disciplinary hearing, Jack Seelig asserted:

¹ In the Matter of Jack L. Seelig, An Attorney at Law, 180 N.J. 234, 650 A2d. 477 (2004)

² Double jeopardy is implicated in a municipal court determination on motor vehicle violations that also includes indictable offenses. Had the Municipal Court Judge known of the indictable offenses, the hearing for traffic offenses would have been stayed pending a decision of the Grand Jury on the indictable offenses.

“I have absolutely no obligation to....I don't believe that a defense attorney has an obligation to perform the function of the [S]tate, whether it be the judge, prosecutor, the police, whatever.... If we get to the point where the defense attorney has to stand up and stop a proceeding because the court, the prosecutor ... [are] not doing their function, then we don't have a Fifth Amendment right or Sixth Amendment right to a lawyer.... You have one side proceeding against the defendant without representation.

In re Seelig, 850 A.2d 477, 482, 180 N.J. 234, 241-42 (N.J.,2004)

The New Jersey Supreme Court, *id.*, affirmed in part and modified in part the finding of the DRB, sparing Mr. Seelig from any disciplinary sanctions because he and his expert had a good faith belief that he his duty to client superseded his duty of candor to the court.

VI. CONCLUSION

Candor toward the tribunal trumps your client's right to zealous representation.