COURTESY AND CANDOR IN THE COURTROOM

Judge Von Deroian

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STATE OF CALIFORNIA ATTORNEY'S OATH

I, solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability. ***As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.***

2

Lawyers who know how to think but have not learned how to behave are a menace and a liability . . .to the administration of justice. . .The necessity for civility is relevant to lawyers because they are the living exemplars - and thus teachers - every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.

Supreme Court Chief Justice Warren Burger

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People v. Kelly (1977) 75 Cal.App.3d 672

- **Prosecutor to defense counsel during a pretrial hearing:**
  - "Excuse me. If you interrupt me again, I'm going to kick you in the ankle."
- **At sidebar prosecutor repeatedly demanded defense counsel be cited for misconduct and contempt.**
  - ". . . counsel has been a lawyer much too long."
- **At sidebar prosecutor reprimanded defense counsel for being "awfully noisy."**
- **Prosecutor threatened that when the time came for defense counsel to go on vacation she was not going to speed up questioning of witnesses.**

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People v. Kelley, cont'd

- **DA accused counsel of "screaming, yelling and yapping."**
- **The prosecutor and defense counsel engaged in a minor shoving match.**
- **Side bar exchange:**
  - Court: Let him finish
  - DA: He was all through and he interrupted me.
  - Court: You stop it right now.
  - DA: I'm angry.
  - Court: I know you are angry and I am angrier than you are and I wear the black robe. Now you shut up.
  - DA: Yes you do wear a black robe.

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People v. Kelley, cont'd

- **Prosecutor's response to a motion for mistrial based, in part, on the circus like atmosphere of the trial:**
  - "If I had been a male lawyer, someone would have hit each one of you, except Mr. Broady, of course, right square in the face. There is no doubt in my mind about that."
- **Prosecutor's response to defense objection to testimony previously ruled inadmissible:**
  - "I can ask any questions I want and if I want to engage in misconduct I will just go ahead and do it."

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People v. Kelley (1977) 75 Cal.App.3d 672, 688.

. . . a public prosecutor, as representative of the people, must satisfy additional standards of conduct by reason of his position as the officer who possesses the power and authority to speak for the State.

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Lasalle v. Vogel (2019) 36 Cal.App.5th 127

The term "officer of the court" with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance in maintaining standards of professionalism.

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Hawk v. Superior Court (1974) 42 Cal.App.3d 108, 126

- **. . . an attorney, as an officer of the court, owes a duty of respect for the court as well as fidelity to his client. The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law.* It is the imperative duty of an attorney to respectfully yield to the rulings of the court, *whether right or wrong* . '(I)f the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.**

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DUTY OF CANDOR TO THE COURT

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California Rules of Professional Conduct

- ***Rule 3.3 (formerly 5-200(B): Candor Toward the Tribunal***

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RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- **Knowingly make a false statement of fact or law or fail to correct false statement;**
- **Fail to disclose controlling legal authority in known to lawyer to be directly adverse to the position of client or knowingly misquote to court language of statute, book decision or authority;**
- **Offer evidence lawyer knows to be false; and**
- **In ex parte proceedings, inform court of all material facts known to the lawyer.**

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RULE 3.3(a)(1)

- ***A lawyer shall not:***
  - *Knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.*
  - *An omission may also be a violation of Rule 3.3*

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Williams v. Superior Court (1996) 46 Cal.App.4th 320

A member of the State Bar "shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." " 'Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense.' " [Citations omitted] "Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice."

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OMITTING FACTS IS A VIOLATION OF DUTY OF CANDOR

The duty of candor is not simply an obligation to answer honestly when asked a direct question by the trial court. It includes an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events. [Citations omitted].

Levine v. Berschneider (2020) 56 Cal. App. 5th 916

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Duty of Candor vs. Duty to Maintain Client's Confidential Information

Occasionally, counsel's duty to maintain inviolate a client's confidential information conflicts with his or her duty of candor to the tribunal. If, for example, a lawyer discovers the client or a witness called by the lawyer has offered false testimony, or knows that a person intends to engage (or is engaging/has engaged in) criminal or fraudulent conduct related to the proceeding, the lawyer must take reasonable remedial measures.

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"An attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct."

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) 559 US 573, 600

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POP QUIZ

Attorney represents client on a drug charge. The night before she is scheduled to appear in court with her client, who is out of custody on bond, she receives a call from client's mother stating, "don't expect to see client in court tomorrow morning; he just left the house high as a kite." The information about client revealed by his mother, while not covered by the attorney-client privilege, falls within the scope of client confidential information.

The next day client does not appear and the Judge asks counsel on the record: "Do you have any idea why your client isn't here?"

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RULE 3.3(a)(2)

- ***A lawyer shall not:***
  - *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 or knowingly misquote to a tribunal the language of a book, statute, decision or other authority*

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"Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed. [Citation omitted.], '[i]n presenting a matter to a tribunal, a member: (A) Shall employ ... such means only as are consistent with truth; [and] (B) Shall not seek to mislead the judge ... by an artifice or false statement of fact or law ....' "

Love v. State Dep't of Educ. (2018) 29 Cal. App.5th 980, 990, (2018); *People v. Phea* (2018) 29 Cal.App.5th 583; *Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.4th 662.

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RULE 3.3(a)(3)

A lawyer shall not:

- *Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions code 6068(e) and Rule 1.6.*

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RULE 3.3(a)(3), CONT'D

- A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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RULE 3.3(b)

- A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code section 6068(e) and Rule 1.6.

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RULE 3.3(b) – REMEDIAL MEASURES

- Attorney must take affirmative steps to correct any misrepresentations attorney may have made to the court in order to avoid assisting Client's wrongful conduct.

- Moreover, Attorney must *withdraw* if continued representation of Client would constitute assistance in a *fraud on the court* (e.g., where Client's conduct adversely affects the court's ability to award effective relief to the opposing party).

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RULE 3.3(b) – REMEDIAL MEASURES

- Upon withdrawing, Attorney must disclose sufficient facts to avoid continued reliance by the court on Attorney's prior representations.

- *Compare:* Where Attorney has not made any misrepresentations to the court, Attorney may not disclose Client's misconduct to the court or successor counsel absent Client's consent.)

ABA Form.Opn. 98-412z

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EXAMPLES OF REMEDIAL MEASURES

- **Remedial measures include:**
  - Explaining to the client the lawyer's obligations under Rule 3.3;
  - Where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw;
  - Remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw;

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OFFERING PERJURED TESTIMONY

1. If a lawyer knows that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence.

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OFFERING PERJURED TESTIMONY

2. **If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.6.**

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EX PARTE COMMUNICATION

Rule 3.5 (Formerly Rule 5-300):

CONTACT WITH JUDGES, OFFICIALS, EMPLOYEES AND JURORS

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RULE 3.5(a)

- A lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.

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EX PARTE COMMUNICATION WITH THE COURT

Rule 3.5(b):

A lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer.

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DEFINITION OF EX PARTE COMMUNICATIONS

- An ex parte communication is one where a party communicates to the court *outside* the presence of the other party. (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013.)

- An ex parte communication includes a communication between counsel and the court when opposing counsel is not present". **(***In re Marriage of Spector*,(2018) 24 Cal. App. 5th 201, 215.)

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PURPOSE OF PROHIBITION OF EX PARTE COMMUNICATION

The prohibition against ex parte communication is " 'in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue.' "

Mathew Zaheri Corp. v. New Motor Vehicle Bd. (1997) 55 Cal.App.4th 1305, 1317, 64 Cal.Rptr.2d 705.

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THE APPEARANCE OF IMPROPRIETY

Generally ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice"

Haluck v. Ricoh Electronics, Inc. (2007) 151 CA4th 994, 1002, 60 CR3d 542, 547-548.

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EXCEPTIONS

- In open court;
- With the consent of all other counsel and any unrepresented parties in the matter;
- In writing with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
- In Ex Parte matters.

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HEAVEY v. STATE BAR

Evidence that attorney wrote letters to judge arguing that dismissal of his client's action should be unconditionally vacated supports finding of culpability on count of communicating with judge, in absence of opposing counsel, on merits of contested matter pending before such judge.

Heavey v. State Bar (1976) 17 Cal.3d 553, 551.

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COMMUNICATING WITH COURT STAFF

In general, ex parte communications with court staff regarding ***administrative*** matters are permitted under California law.

Blum v. Republic Bank (1999)*73 Cal.App.4th 245*

- However, remember administrative matters are different from substantive matters.
- Communications with court staff should be done sparingly.

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