

The Role of the Defense Attorney: Not Just an Advocate

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Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.¹

The proposed hypothetical clearly demonstrates the truth of the statement quoted above from the Preamble to the ABA Model Rules of Professional Conduct. The preamble is not often referred to in legal scholarship and some might even look on its use as an overly simplistic view of a complicated problem. In this essay it is appropriate, however, to begin analyzing the hypothetical by remembering the role of the attorney. The tri-partite role of the attorney is the beginning point when dealing with what has been called the criminal defense attorney's trilemma.² To attempt to answer the question from the myopic view of only an advocate is to miss the important role that attorneys play in society as a whole. It is imperative that this ethical dilemma be evaluated by applying a combination of all the responsibilities required of the attorney in today's American legal system. The unwillingness of attorneys, whether criminal defense or others, to assume all of the roles assigned to them has led, in part, to the negative public perception that has plagued the legal profession.³

The Model Rules of Professional Conduct define the role of the attorney as threefold: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁴ The language does not differentiate the roles based on the kind of law the lawyer practices nor does it prioritize the different roles. This lack of differentiation leads to the conclusion that all lawyers, no matter what area of law, have a responsibility that goes beyond merely advocating for the client. An attorney must act as an officer of the court, respecting the need for truth and truth-seeking within the confines of the adversary system and as an active participant of a system that places justice as a core value.

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¹ MODEL RULES OF PROF'L CONDUCT pmbl. (2009).

² MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 159-95 (3d ed. 2004).

³ L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1707-08 (2007).

⁴ MODEL RULES OF PROF'L CONDUCT pmbl. (2009).

The question is not whether an attorney must fulfill each of these roles, the question is really *how* the roles of the attorney are played out in different specialized areas of law and more importantly, for purposes of this essay, how each of these roles are fulfilled in a particularly difficult ethical situation. Although, as the preamble recognizes, “[a] lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious,”⁵ it is in situations such as the one proposed that the roles seem to conflict. The problem faced by a criminal defense attorney with a client intent on lying has been called “the perfect storm of ethics issues.”⁶ The answer to the problem is found in accepting the responsibility to fulfill each of these roles in any given situation. This essay will look at the hypothetical from the assumption that the multiple roles of an attorney implicate distinct responsibilities and each must be fulfilled in every action and decision.

I. THE THREE ROLES OF THE CRIMINAL DEFENSE ATTORNEY

A. *Role of Advocate*

The role of the advocate is a familiar one for the criminal defense attorney. The oft-quoted language from Lord Henry Brougham of England famously describes the lawyer’s “first and only duty” as “[t]o save that client by all means . . . at all hazards and costs to other persons, and, amongst them, to himself.”⁷ The American Bar Association Criminal Justice Standards suggest that the defense attorney satisfies his duty to “the administration of justice and as an officer of the court” merely by serving “as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”⁸ Some scholars take the position that the criminal defense attorney has one role, zealously representing the client, within the bounds of the law, and assert that the role of the criminal defense attorney to protect the accused against the power of the government dictates the attorney’s moral obligations.⁹ This role often has led attorneys to be called “partisan advocates.”¹⁰

⁵ *Id.*

⁶ Perrin, *supra* note 3, at 1725.

⁷ MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 65 (1990).

⁸ ABA STANDARDS FOR CRIM. JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2 (3d ed. 1993).

⁹ Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 FORDHAM L. REV. 1263, 1267 (2007).

¹⁰ Perrin, *supra* note 3, at 1707.

B. Officer of the Court

The criminal defense attorney has duties to the court and others as well as the defendant. To apply only the duty of the advocate is to miss the multi-faceted duties of an attorney. To say that a criminal defense attorney is only an advocate and nothing else is inaccurate and unethical. As an officer of the court, an attorney has a duty of candor to the court and others.¹¹ As Chief Justice Marshall recognized in *Ex parte Burr*,

[o]n one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved.¹²

Therefore, first and foremost, the officer of the court is required to make decisions that reflect respect for the truth-seeking function of the trial process. ABA Model Rule 3.3 emphasizes the importance of this responsibility even requiring the attorney to disregard the confidentiality rules, if necessary.¹³ The officer of the court is required to refrain from involving himself in misrepresentation, fraud, and dishonesty. The issue of client perjury has been debated at length, and although many might argue to the contrary,¹⁴ the ABA Model Rules make it clear that the officer of the court cannot participate in perjurious testimony, and if he becomes aware of his involvement then he must take reasonable steps to remedy it.¹⁵

C. Minister of Justice

Finally the criminal defense attorney is called to be a citizen with a special duty to justice. This role goes beyond the duty of the officer of the court to respect the truth-seeking process. One might say that “[j]ustice is something larger and more intimate than truth. Truth is only one of the ingredients of justice.”¹⁶ This

¹¹ MODEL RULES OF PROF’L CONDUCT R. 3.3–3.4, 4.1 (2009) (describing candor to the court, fairness to opposing counsel, and truthfulness in statements to others).

¹² *Ex parte Burr*, 22 U.S. 529, 530 (1824).

¹³ MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2009). The rule in part states: “The duties in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

¹⁴ See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); but see Stephen Gillers, *Monroe Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821 (2006).

¹⁵ See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2009).

¹⁶ Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951).

duty places an affirmative responsibility on all attorneys to appreciate justice as a core value of our system.¹⁷ The typical case requires the criminal defense attorney to “advocate with courage and devotion and to render effective, quality representation.”¹⁸ However, in some situations the duty of the criminal defense attorney may be protecting the system from unjust results. Justice considers whether the issues of the substantive and procedural rights of the accused have been protected throughout the process. Justice requires adherence to the right methods and processes, through which justice is accomplished. And in the end, it requires that false testimony would not be the basis of a “just” conviction.¹⁹

II. APPLYING THE ENTIRE DUTY OF THE ATTORNEY WHEN ANSWERING THE TOUGH QUESTIONS

So if my premise is correct, how does the attorney fulfill all three roles in the hypothetical situation? The attorney in the proposed hypothetical is faced with a client who intends to lie to receive a beneficial plea bargain. The attorney will not be putting on the false testimony;²⁰ however, the attorney’s services were used to obtain the plea agreement based on the false information, and presumably will be involved after-the-fact, in the client’s sentencing where reward for the false information will be confirmed. Thus, an attorney who seeks to fulfill his obligations as an advocate, an officer of the court, and as seeker of justice must remedy the situation. As the Supreme Court repeatedly has said: “[W]hen defendants testify, they must testify truthfully or suffer the consequences.”²¹

The first step for the criminal defense attorney is to attempt to persuade his client not to proceed with the false testimony. As the advocate for the client, the criminal defense attorney must recognize that his client’s intended course of action is very dangerous. If during the course of the case against the kingpin the false testimony comes to light, the prosecutor’s reaction will be to not only use that information as evidence of “obstruction of justice” at the defendant’s sentencing (which routinely occurs after the trial of the kingpin) but also to file additional charges against the defendant. Even putting aside all the duties of the attorney but the advocate role, a good advocate for the defendant would attempt to dissuade his client from continuing with the agreement with the prosecution. The risk of

¹⁷ The Kentucky Supreme Court (known prior to 1976 as the Court of Appeals) indicated that the attorney is “a minister in the temple of justice.” *In re Taylor*, 189 S.W.2d 403, 405 (Ky. 1945).

¹⁸ ABA STANDARDS FOR CRIM. JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2 (3d ed. 1993).

¹⁹ *In re Michaels*, 326 U.S. 224, 227 (1945) (“All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.”).

²⁰ One must assume for purposes of this essay that the attorney has the requisite “knowledge” that in fact what his client intends to testify to is false.

²¹ *United States v. Havens*, 446 U.S. 620, 626 (1980).

detection is just too high, and the consequences too severe. When the additional obligations of the attorney are considered, it is clear that the attorney must have a pointed conversation with his client.

The productiveness of conversation will depend on the relationship with the client. An attorney who has made the attorney's role clear from the beginning of the relationship will be in a much better position to have this conversation. Additionally, a client who has grown to trust her attorney through the attorney's diligence in representing her will be much more likely to listen to the attorney's suggestions and warnings. However, even in the best of relationships this is going to be a "hard sell," much more so than trying to persuade a client not to testify. The criminal defense attorney will be proposing that the client withdraw her offer to testify, which will cause the case to begin again with a very unhappy prosecutor. The advocate will be stretching his persuasive skills to convince the client that she should "come clean."

If the defendant refuses to correct the false statements she has made to the prosecutor, then the attorney must withdraw. Attorneys, as officers of the court, must refrain from assisting the client in committing fraud. In this hypothetical, the client has actually used the attorney's services to perpetuate the fraud; therefore, the attorney has an added duty to withdraw from the representation or risk violating Model Rule 1.2(d), which prohibits an attorney from assisting in a client's criminal or fraudulent acts.²² Although attorneys are not the morality police for their clients, neither may they involve themselves in the fraudulent conduct of their clients.

Because the attorney's services were involved in the fraud, the attorney has a responsibility to distance his services from the continuing fraud. The withdrawal must therefore be a "noisy withdrawal."²³ In situations where merely withdrawing will not eliminate the lawyer's involvement in the fraud, the ABA Model Rules suggest that it "may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."²⁴ The attorney, acting as an officer of the court and the representative of the client, must attempt to withdraw and alert the prosecutor to the issue, without disclosing any more confidential information than is absolutely necessary. If the prosecutor is the same for the plea agreement as the client's case, then the withdrawal will be the signal that will alert her to the problem. By withdrawing, the attorney is not assisting in a fraud and has allowed the prosecutor to detect a problem with the client's testimony, without revealing the content of the confidential information.

Finally, however, if the noisy withdrawal does not remedy the situation, meaning that the client proceeds to testify falsely, then the obligation of the criminal defense attorney is to inform the prosecuting attorney. The attorney can assume the client will not testify falsely; however, in this hypothetical the client

²² MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

²³ *Id.* at 1.2(d) cmt. 10.

²⁴ *Id.*

has told her attorney that she had no information about the kingpin and therefore if she testified at all in the kingpin's case, her testimony would be false. If the client proceeds to testify against the kingpin, the attorney's obligation to speak springs from a duty to see that an injustice does not occur. The injustice would be for the kingpin to face conviction and incarceration based on false testimony.

Robert Kennedy once said "courage is the most important attribute of a lawyer."²⁵ The job of the criminal defense attorney is multi-faceted and not for those who lack courage. The criminal defense attorney must have the courage not only to represent the client, but to act as an officer of the court and a seeker of justice.

²⁵ Edward A. Hartnett, *Becoming a Lawyer*, 25 SETON HALL L. REV. 863, 868 (1994).