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CANDOR IN CRIMINAL ADVOCACY

Bruce A. Green*

"It is precisely when one tries to act on abstract ethical advice that the practicalities intrude . . . ."

– Monroe H. Freedman¹

I. INTRODUCTION

Monroe Freedman's 1966 article on the three hardest ethics questions for criminal defense lawyers² has lost none of its vitality. Most notably, the article asked whether defense lawyers may knowingly present false testimony³—a question to which Freedman returned on subsequent occasions,⁴ and which continues to vex lawyers and judges.⁵ Freedman also examined whether defense lawyers may discredit truthful prosecution witnesses on cross-examination⁶ and whether defense lawyers may give legal advice that would tempt their clients to concoct false stories.⁷ These questions are hard because they present a tension between abstract principles, such as that a lawyer is an "officer of the court" and that a trial is a search for truth, on the one hand, and that a criminal defense lawyer is the client's agent, confidant, counselor, and advocate, on the other.⁸ When Freedman explored the three questions,

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2. See id. at 1474-75, 1478.
3. Id. at 1475-78.
6. Freedman, supra note 1, at 1474-75.
7. Id. at 1478-82.
there was no professional consensus on their resolution. The general principles expressed in the 1908 American Bar Association (“ABA”) Canons of Professional Ethics, and the other prior writings to which Freedman referred, provided no clear answers. Freedman’s analysis, rooted in both his philosophy of legal representation and his practical experience as a defense lawyer, led him to conclude that in each case the lawyer’s duties to the client should be paramount.

In the following years, ethics in criminal advocacy has become an increasingly fertile subject of scholarly and professional debate, thanks in no small measure to Freedman’s own further work in the field. Expanding his critical inquiry beyond criminal defense to also include prosecutors’ conduct, Freedman uncovered and analyzed many other hard questions of professional propriety for lawyers in criminal adjudications.

This Article, in Monroe Freedman’s memory, examines lawyers’ duty of candor to the court in criminal cases. Like the hard questions Freedman explored in 1966, the questions raised here present a tension between competing principles in the criminal justice process.

Consider the following two scenarios:

Scenario 1. At trial, the defendant admits to having driven with a revoked license, but the prosecution and defense contest whether the defendant’s prior convictions support a judgment of conviction on a felony rather than misdemeanor charge. The trial judge, expressing uncertainty, says that he is inclined to enter a misdemeanor conviction, as zealous representatives of their clients and as officers of the court with responsibilities for fairness and disclosure that transcend their clients’ interests. For a fuller and more interesting discussion of what it means for an ethics question to be “hard,” see Alice Woolley, Hard Questions and Innocent Clients: The Normative Framework of The Three Hardest Questions, and the Plea Bargaining Problem, 44 Hofstra L. Rev. 1179, 1179 (2016), which explains, “In Freedman’s scholarship, a ‘hard’ question arises where any answer ... permits a lawyer to pursue a moral value but also requires another moral value to be sacrificed.”

10. See, e.g., MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 79 (1975); Monroe H. Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 GEO. L.J. 1030, 1032-41 (1967). Of course, in his extraordinary scholarly career, Freedman also made significant contributions to the academic literature on legal ethics outside the criminal context as well as in other areas of law.
11. See infra Part II. Other interesting questions exist regarding lawyers’ duty of candor to opposing counsel and opposing parties. One chestnut, often posed to applicants for positions in New York prosecutors’ offices, is whether a prosecutor must disclose the death of an essential prosecution witness when the defendant would otherwise agree to plead guilty based on the erroneous assumption that the prosecution may be able to obtain a conviction at trial. This hypothetical is based on People v. Jones, 375 N.E.2d 41, 42-45 (N.Y. 1978). See David Aaron, Note, Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose Nonevidentiary Information, 67 FORDHAM L. REV. 3005, 3025-27 (1999); Rebecca B. Cross, Comment, Ethical Deception by Prosecutors, 31 FORDHAM URB. L.J. 215, 226-29 (2003).
sentence the defendant, and allow the prosecution to appeal, so that the appellate court can resolve the question. Defense counsel realizes, however, that the only way a higher court can decide upon the issue is for the trial court to enter a felony conviction. The prosecution would not be permitted to appeal from a misdemeanor conviction because double jeopardy would bar the subsequent instatement of a felony conviction. Must defense counsel correct the judge’s erroneous legal assumption before the judge rules?12

Scenario 2. The prosecution charges the defendant with second-degree rape, which involves the use of force, based on the victim’s testimony that the defendant forcibly dragged her to a dimly lit stairwell, forced her into sexual acts she tried to resist, unsuccessfully, by biting and hitting him, and then left her behind undressed and hysterical, causing physical and psychological injuries. After a hung jury results in a mistrial, the prosecution agrees to allow the defendant to plead guilty to third-degree rape—which involves nonconsensual sexual intercourse—and to recommend a sentence within the standard range up to one year. At sentencing, the prosecutor knows that an account of the defendant’s criminal conduct would probably cause the judge to reject the prosecution’s recommendation and impose a higher sentence. Must the prosecutor give the judge a full account of what the prosecution’s evidence shows?13

In each scenario, the lawyer in question possesses legal or factual information that would enable the judge to make a more informed decision. Must either lawyer disclose the information to the judge unbidden? If this Article has any one objective in the exploration of this subject, it is to illustrate that fifty years after Monroe Freedman’s groundbreaking article,14 and more than forty years after he wrote the book on Lawyers’ Ethics in an Adversary System,15 questions of ethics in criminal advocacy still occasion uncertainty and disagreement. Legal academics honor Monroe Freedman by continuing, and building on, his efforts to identify and analyze hard questions of ethics in criminal advocacy.
II. LAWYERS' DUTY OF CANDOR

The legal profession frequently refers to lawyers' duty of candor, but the term has no fixed meaning. Lawyers and judges often equate candor with truthfulness or regard candor as an overarching concept that combines obligations of truthfulness, lack of deception, and disclosure.\textsuperscript{16} However, candor can also have a narrower and more distinct meaning. As Judge Richard Posner noted several years ago, "[t]here is a difference, famously emphasized by Kant, between a duty of truthfulness and a duty of candor, or between a lie and reticence."\textsuperscript{17} For Kant, a truthful declaration is one that the speaker believes to be true (to correspond to reality). But, being \textit{truthful} is different from being \textit{candid}. One might speak truthfully, believing everything one says to be true, but not say everything that matters. If one discloses all the relevant information, one is candid. To make a false statement is to lie, but to withhold relevant information—to fail to be candid—is to be reticent.\textsuperscript{18}

The professional conduct rules speak separately to truthfulness and to candor, as so defined. The general principle that emerges regarding truthfulness is, do not lie. In speaking to a tribunal, a lawyer may not knowingly "make a false statement of fact or law,"\textsuperscript{19} and in speaking to others, a lawyer may not knowingly make a material false statement of law or fact.\textsuperscript{20} The key concept is knowledge. Lawyers might be expected

\begin{thebibliography}{9}
\bibitem{16} See \textit{e.g.}, San Diego Cty. Bar Ass'n, Formal Op. 1 (2011) (explaining that an attorney violates his or her duty of candor by either lying to the court or declaring falsely to not know the answer to a judge's question about the client's whereabouts).
\bibitem{17} City of Livonia Emps.' Ret. Sys. v. Boeing Co., 711 F.3d 754, 758-59 (7th Cir. 2013); see also John D. King, \textit{Candor, Zeal and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant}, 58 AM. U. L. REV. 207, 255 n.190 (2008) ("A lack of candor is one thing and affirmatively lying to the court is—or might be—another.").
\bibitem{18} See generally James Edwin Mahon, \textit{Kant on Lies, Candor and Reticence}, 7 KANTIAN REV. 102, 103, 112-13, 117-19, 121-23 (2003). These distinctions may not fully correspond with how we think about truth and candor in judicial proceedings. We think of a lie as a declaration under oath that is both untrue and untruthful. For purposes of our perjury law, testimony is not a lie if, as may occur on rare occasion, the witness makes a declaration that is factually accurate under a mistaken belief the declaration is actually false. See \textit{e.g.}, United States v. Castro, 704 F.3d 125, 137-39 (3d Cir. 2013).
\bibitem{19} \textit{MODEL RULES OF PROF'L CONDUCT} r. 3.3(a)(1) (AM. BAR ASS'N 2013).
\bibitem{20} \textit{Id.} r. 4.1(a). Some lawyers think that the rules should forbid lawyers from knowingly making any false statements, and in some states, that is the rule. But, most state courts have adopted the ABA model, which allows a lawyer to tell insignificant lies. \textit{See id.} This prevailing view necessarily requires that particular attention be paid to the term, "material." \textit{See id.}

To the surprise of some, the rules also provide that certain kinds of statements are not regarded as statements of material fact. \textit{Id.} r. 4.1 cmt. 2. For example, it is not considered to be a lie in negotiations when a lawyer says, "[t]his car is worth $100,000," or "[m]y client will not pay more than $50,000 for your car," even if those statements are false. \textit{See id.} Perhaps, Kant would say that these are false statements but not false declarations because, under the conventions of negotiations, they are not meant to be believed—nobody in the negotiations takes statements such as these
to exercise care to ensure that what they say is true—indeed, they are subject to civil liability in certain contexts for negligently making false statements—but as a general rule, they are not subject to discipline unless they know that what they say is false. Although the rules allow lawyers to knowingly tell immaterial lies to third parties, even immaterial lies to the court are punishable.

While truthfulness is the rule for lawyers, candor is the exception. The rules on professional conduct recognize that “[a] lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.” Likewise, when representing a client in court, a lawyer may ordinarily make a one-sided presentation of the facts or law and place the burden on opposing counsel to present the other side, thereby taking advantage of the opposing party’s lack of diligence.

The professional conduct rules that require candor can be separated into two categories. Several candor rules relate to the reliability of information lawyers convey and, specifically, impose a duty on them to correct false statements and misleading implications to protect courts and others from being deceived by their words or conduct. In adjudications, lawyers must correct their own prior false statements to the tribunal (for example, statements believed to be true when made but later discovered to be false). Additionally, authorities have interpreted both the rule proscribing false statements and the rule proscribing “conduct involving dishonesty, fraud, deceit or misrepresentation” seriously. See Mahon, supra note 18, at 105, 107-08.

21. See, e.g., Greycas, Inc. v. Proud, 826 F.2d 1560, 1561-63, 1565, 1568 (7th Cir. 1987).

22. See Larsen v. Utah State Bar, 2016 UT 26 ¶¶ 24-25; MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1), 4.1(a). However, with regard to false statements about a judge's integrity or qualifications, the disciplinary standard is slightly more demanding. Under Rule 8.2(a) of the ABA Model Rules of Professional Conduct, lawyers are subject to discipline if the false statements were made “with reckless disregard as to [their] truth or falsity.” Id. r. 8.2(a).

23. Id. r. 4.1 cmt. 1.

24. Id. r. 3.3 cmt. 14 (“Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party.”).

25. See, e.g., ABA Comm’n on Ethics & Prof'l Responsibility, Formal Op. 387 (1994) (stating that plaintiff’s counsel has no obligation, as a matter of candor, to tell the court or opposing party that the statute of limitations has run on the plaintiff’s claim and the defendant could therefore raise a successful defense that the claim is time barred).

26. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 4.1(b) (explaining that, subject to their confidentiality duty, lawyers must disclose material facts where “necessary to avoid assisting a criminal or fraudulent act by a client”).

27. Id. r. 3.3(a)(1).

28. Id. r. 8.4(c).
forbid lawyers’ silence in other situations where their declarations or conduct would otherwise be intentionally or knowingly misleading.29

The remaining candor rules impose disclosure duties based on policy judgments about how to promote fairness in adjudicative proceedings.30 These rules narrowly define situations where the public interest in the disclosure of relevant law and facts to promote fair and reliable adjudications is thought to outweigh countervailing interests—chiefly, the client’s ordinary interests in zealous advocacy and confidentiality.31 First, lawyers must disclose certain significant judicial decisions that are contrary to the lawyer’s own legal argument without regard to the position of the client.32 Second, in ex parte proceedings, lawyers must disclose all the significant facts, not just those facts that are favorable to the client’s position.33 Third, and perhaps most interestingly, bar applicants and lawyers in disciplinary proceedings are forbidden from making false statements of material fact, must respond to lawful demands for information, and may not “fail to disclose a fact necessary to correct a misapprehension known . . . to have arisen in the matter.”34 The requirement recognizes that omitting to correct an adjudicator’s factual “misapprehension,” a form of reticence, is different from making a material false statement. It suggests that in adjudicative contexts, where the general rule is simply that lawyers must not lie, the rule drafters did not mean to require candor as well.

These rules and other procedural law do not necessarily state the limits of lawyers’ candor duties in general or, in particular, in criminal cases. Courts are free to impose demands and enforce expectations that go beyond explicit rules. They may do so by invoking generally worded rules such as the rule forbidding “conduct that is prejudicial to the

29. For example, courts have recognized that a lawyer must disclose the death of a client who is a party to a lawsuit. See, e.g., Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983); Harris v. Jackson, 192 S.W.3d 297, 305 (Ky. 2006); Ky. Bar Ass’n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997). The ABA Ethics Committee’s explanation is that it would be misleading for a lawyer to communicate in a matter purportedly on behalf of a client without disclosing the client’s death, because otherwise the lawyer would misleadingly imply that the lawyer’s client is still alive. ABA Comm’n on Prof’l Ethics & Grievances, Formal Op. 397 (1995). On this theory, the committee concluded, the client’s death needs to be reported only when the lawyer next communicates with either the court or opposing counsel. See id. On the general subject of lawyers’ candor duties, see Bruce A. Green, Deceitful Silence, LITIG., Winter 2007, at 24, 25; Douglas R. Richmond, Deceptive Lawyering, 74 U. CIN. L. REV. 577, 578-79, 583, 588-89 (2005); Barry R. Temkin, Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis, 32 SEATTLE U. L. REV. 123, 127-29, 166-71 (2008).
30. MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 12.
31. See id.
32. Id. r. 3.3(a)(2).
33. Id. r. 3.3(d).
34. Id. r. 8.1(a)–(b).
administration of justice." They may also do so as an exercise of their supervisory authority over the bar or pursuant to other authority.

Courts and other authorities are not necessarily of one mind on the extent of lawyers’ duties of candor beyond what the rules expressly require. Some pronouncements suggest demanding expectations. A 1902 legal ethics treatise asserts that an attorney owes the same duty of fidelity to the court as to the client, and “it is a part of that duty to correctly inform the court upon the law and the facts of the case that it may arrive at correct conclusions and render exact justice.” A 1993 federal appellate court goes farther, declaring that the duty of candor to the court is even weightier than duties to the client:

All attorneys, as “officers of the court,” owe duties of complete candor and primary loyalty to the court before which they practice. An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.

Others take a more restrained view, however, recognizing that high-blown rhetoric about the trial as a search for truth must be read in light of the expectation that the truth will emerge through the clash of lawyers who, owing single-minded devotion to their clients, present the most helpful evidence and legal arguments for their side and leave it to the other side to offer contrary evidence and arguments. On this understanding, it would be anomalous for a contemporary lawyer to volunteer adverse information on the premise that it is needed for justice to function smoothly.

35. Id. r. 8.4(d).
37. For example, in class actions, pursuant to Federal Rule of Civil Procedure 23, courts have required various disclosures by putative class counsel to enable the court to fulfill its responsibilities in certifying the class and supervising class representation. See, e.g., Rodriguez v. West Pub’g Corp., 563 F.3d 948, 958-60 (9th Cir. 2009).
38. GEORGE W. WARVELLE, ESSAYS IN LEGAL ETHICS 191 (1902).
40. See Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1080-81 (2d Cir. 1972) (“Broad statements that a trial is a search for truth must be read in the context that, under our legal system, the method for reaching this goal is a properly conducted adversary proceeding. The vague requirement of ‘candor and fairness’ in the Canons of Professional Ethics . . . could hardly be read as requiring [the receiver’s attorney] to make certain that his opponent was fully aware of every possible defense that could be advanced.”).
A. Criminal Defense Lawyers’ Candor Duties

Besides having to abide by disclosure obligations established by procedural law, criminal defense lawyers, like other lawyers, must ordinarily make disclosures where their statements or conduct would otherwise be misleading. For example, criminal defense lawyers have been sanctioned for placing an individual similar in appearance to the defendant at counsel table in the defendant’s place to prompt a witness to make an in-court identification of someone other than the defendant. The concern is that, given the defendant’s conventional place at counsel table, the lawyer’s conduct misleads not only the prosecution and the witness but also the trial judge. Defense lawyers’ reticence may also be considered misleading, absent trickery. In New Jersey, which has a unique rule expressly forbidding lawyers from misleading the court by silence, courts have found improprieties where criminal defense lawyers failed to disclose non-privileged, non-evidentiary information that the court would have considered important to its decision whether to dismiss criminal charges or to accept a guilty plea.

In general, as long as they do not mislead the court, defense lawyers need not correct judicial misunderstandings or false assumptions regarding evidentiary facts or make evidentiary disclosures needed to promote fair or reliable outcomes. For example, there is a professional

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41. See, e.g., Taylor v. Illinois, 484 U.S. 400, 403-05, 413-16 (1988) (explaining that the defense lawyer engaged in misconduct where he failed to provide alibi notice); People v. Colin, 41 N.E.3d 526, 535-36 (Ill. App. Ct. 2015) (criticizing both prosecutor and defense lawyer for lack of candor in failing to disclose terms of plea agreement to the trial judge when the defendant pled guilty, as required by state rule of criminal procedure).

42. See, e.g., United States v. Thoreen, 653 F.2d 1332, 1336-37, 1340-41 (9th Cir. 1981).

43. See, e.g., id. at 1336-37, 1340-43; see also United States v. Sabater, 830 F.2d 7, 8, 10-11 (2d Cir. 1987); People v. Simac, 641 N.E.2d 416, 417-21 (Ill. 1994). But see ALFRED COHN & JOE CHISHOLM, TAKE THE WITNESS 40-41 (1934) (describing defense lawyer’s success in switching defendant with lookalike).

44. See, e.g., Simac, 641 N.E.2d at 421-24.

45. NEW JERSEY RULES OF PROF’L CONDUCT r. 3.3(a)(5) (N.J. SUPREME COURT 2015) (“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 . . . .”).

46. See In re Seelig, 850 A.2d 477, 480-81, 483-84, 488-91 (N.J. 2004) (finding that a defense lawyer violated the professional conduct rule in failing to disclose that client, for whom he entered guilty pleas on motor vehicle violations arising out of a motor vehicle accident, was subject to indictment because deaths resulted from the accident); In re Norton, 608 A.2d 328, 334-36 (N.J. 1992) (deciding that a defense lawyer, as well as prosecutor, should be disciplined for failing to advise court that officer’s unwillingness to proceed on charges lacked good cause).

47. See, e.g., Pa. Ass’n Comm’n on Legal Ethics & Prof’l Responsibility, Informal Op. 73 (1994) (finding that a defense lawyer need not disclose to the court or prosecutor that defendant’s street clothes, provided to the lawyer by prison clerk, matches the description given by the prosecution witness of the clothes worn by the assailant); Va. Legal Ethics Comm’n, Formal Op. 1400 (1991) (explaining that a defense lawyer may not correct judge’s mistake in erroneously
consensus that when the prosecutor misinforms the sentencing judge, or the judge wrongly assumes, that the defendant has no prior criminal convictions, the defense lawyer need not correct the judge.\textsuperscript{48} While the criminal defense lawyer may not falsely confirm or imply that the defendant has a clean criminal record, correcting the court would violate the lawyer's duties to the client.\textsuperscript{49} Even though the defendant's prior convictions are a matter of public record, the lawyer's knowledge is at least confidential if not privileged and, therefore, disclosure would contravene the duty of confidentiality.\textsuperscript{50} Further, disclosure would violate the duty of zealous advocacy, which includes duties to try to achieve the client's lawful objectives and not to harm or prejudice the client.\textsuperscript{51} Recently, the San Diego County Bar Legal Ethics Committee counseled reticence in a comparable scenario. It said that when the judge asked why the defendant was absent from a scheduled court proceeding, the defendant's lawyer should not disclose his knowledge that the
defendant left home under the influence of drugs the night before. The ethics committee advised the lawyer to respectfully decline to answer, citing the duty of confidentiality, rather than either lying by professing ignorance or breaching confidentiality by answering truthfully.

On the other hand, some courts and ethics committees have identified exceptional circumstances, not codified in professional conduct rules, where they believe defense lawyers must make disclosures as a matter of professional candor, notwithstanding the ordinary duties of confidentiality and zealous advocacy. For example, courts have recognized that defense lawyers must prevent or correct procedural deficiencies by alerting the court to the lawyer's own conflicts of interest and to the client's potential incompetence to stand trial. Authorities have also held that, in some circumstances, defense lawyers must correct a judge's ministerial or procedural error.

In its 2015 edition of the ABA Standards for Criminal Justice: Prosecution and Defense Function, the ABA captured the tension between the defense lawyer's duty of candor to the court and duties to the client. A newly added provision, entitled "Defense Counsel's Tempered Duty of Candor," begins:

In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense

54. See, e.g., Campbell v. Rice, 265 F.3d 878, 885 n.2 (9th Cir. 2001).
55. See, e.g., United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998).
56. See, e.g., Dickerhoff v. State, 33 N.E.3d 1211, 1211 (Ind. Ct. App. 2015) (Robb, J., concurring) (explaining that both the prosecutor and defense counsel should have corrected the trial judge when he misadvised the defendant that he had a right to appeal, even though the plea agreement waived that right, because as "officers of the court [they both] have a responsibility to correct any obvious [judicial] errors at the time they are committed"), State Bar of Wis., Formal Op. 7 (1984) (stating that a criminal defense lawyer must inform the court of the clerk's error in marking a misdemeanor charge as dismissed on the court's docket, even though it would be beneficial to the client for the error to go undiscovered). But see Md. State Bar Ass'n Comm. on Ethics, Op. 2016-04 (2016) (explaining that the criminal defense lawyer had no duty to inform the court of a sentencing error favorable to the client providing in the record the court sent to correctional authorities for earlier release than the court intended).
57. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION (4th ed. 2015). The ABA first published the Standards in 1968 and has amended them three times since then. Although not directly enforceable by law, these Standards are meant to guide the professional conduct of prosecutors and criminal defense lawyers and, in some respects, to influence courts' development of the law governing these lawyers' conduct. See generally Martin Marcus, The Making of the ABA Criminal Justice Standards: Forty Years of Excellence, CRIM. JUST., Winter 2009, at 10, 10-12, 14-15.
CANDOR IN CRIMINAL ADVOCACY

Counsel must act zealously within the bounds of the law and applicable rules to protect the client’s confidences and the unique liberty interests that are at stake in criminal prosecution. 58

The provision might be read to give general priority to the duties owed to the client. But, in stating that the “duty of candor may be tempered,” rather than that the duty of candor is invariably superseded by duties to the client, the provision indicates that sometimes the candor duty wins. 59

Unhelpfully, the provision does not say when. 60

B. Prosecutors’ Candor Duties

On top of the candor duties of lawyers generally, such as the duty to correct one’s own misstatements, 61 prosecutors are said to have unique disclosure duties. 62 As one federal judge put it: “Government attorneys ... by virtue of their unique position, owe a greater responsibility to the justice system. The courts have come to expect and have rightly demanded a higher degree of candor from government..."

58. ABA Standards for Criminal Justice: Prosecution and Def. Function, Standard 4-1.4(a).
59. Id.
60. The candor provision has two additional subparts:
(b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.
(c) Defense counsel should disclose to a court legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the client and not disclosed by others.
attorneys.\textsuperscript{63} To like effect, newly added Prosecution Standard 3-1.4, entitled “The Prosecutor’s Heightened Duty of Candor,”\textsuperscript{64} begins as follows: “In light of the prosecutor’s public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.”\textsuperscript{65} Courts and other authorities may mean various things when they refer to prosecutors’ higher candor duty,\textsuperscript{66} but one common understanding is that prosecutors are expected to volunteer relevant factual and legal information in various situations where other lawyers, and certainly criminal defense lawyers, might legitimately remain reticent.\textsuperscript{67}

There are at least two reasons for prosecutors’ heightened candor duty. First, prosecutors ordinarily have no compelling duties, like those owed by criminal defense lawyers to their clients, offsetting their duties as “officers of the court” to promote the fairness of adjudication.\textsuperscript{68} While individual prosecutors do have a confidentiality duty to their office,\textsuperscript{69} the prosecutor’s office has discretion to disclose confidences to further the public interest.\textsuperscript{70} Disclosure does not betray a private client’s trust or discourage future disclosures that are necessary to effective advocacy, as might be the case if a lawyer disclosed a private client’s confidential information without consent.

Second, a prosecutor’s duties as an officer of the court are ordinarily reinforced by the duties owed as both a lawyer and as an


\textsuperscript{64} ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.4 (4th ed. 2015).

\textsuperscript{65} Id. Standard 3-1.4(a).

\textsuperscript{66} Sometimes, the court may not mean that prosecutors must make disclosure in situations where other lawyers may be reticent, but that when prosecutors violate their duties regarding truthfulness and candor, this wrongdoing is more shameful or lamentable than when other lawyers act improperly. For example, in a decision disciplining a state prosecutor who had lied to the defense lawyer in a case, a Florida state court observed: “[T]ruth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing.” Fla. Bar v. Feinberg, 760 So. 2d 933, 936-39 (Fla. 2000). Since judges have greater confidence in what prosecutors say, judges may feel more betrayed when prosecutors are untruthful. Additionally, courts may be suggesting that prosecutors should be more careful than other lawyers to be certain that what they say is accurate. Perhaps the heightened duty noted by courts is, at least in part, a duty to avoid making unintentional or careless misstatements.

\textsuperscript{67} MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2013).

\textsuperscript{68} See id. r. 3.8 cmt. 1; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 4-1.2(a).


\textsuperscript{70} Id. at 1820, 1834, 1836-37.
executive branch official who makes decisions on the client’s behalf.71 In the 1935 Berger v. United States decision, when the Supreme Court took a prosecutor to task for an improper jury argument, it recognized:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.72

Elaborating on the Supreme Court’s observation, the Comment to Rule 3.8 explains:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.73

As these pronouncements reflect, prosecutors are ethically distinctive because they do not represent individual parties.74 Rather, they represent a sovereignty (the state, the government, or the public) that has public-oriented objectives comparable to those of the court, and they make decisions on behalf of the sovereignty that a client or another representative would ordinarily make. While the public has an interest in just punishment of criminal wrongdoers, it also has an interest in ensuring that only the guilty are convicted, that the law is upheld, that trials are procedurally fair, and that punishment is not disproportionately harsh.75 The prosecutor must act to promote all of these interests, at times resolving the tension among them. The prosecutor’s candor duties, arising out of the duty to the sovereignty to promote procedural fairness,

71. See id. at 1817-18, 1820.
72. 295 U.S. 78, 85-88 (1935). Following Berger, lower courts have reminded prosecutors that their responsibilities in the adjudicative setting are more demanding than those of other trial lawyers. See, e.g., Fla. Bar v. Cox, 794 So. 2d 1278, 1285 (Fla. 2001) (“The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities.”); Greene v. State, 931 P.2d 54, 62 (Nev. 1997) (“As representatives of the state, prosecutors have a special, heightened duty of fairness and responsibility, particularly in capital cases.”).
73. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2013). Rule 3.8 is not meant to be a comprehensive list of a prosecutor’s special duties. See id.; Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. ILL. L. REV. 1573, 1586-87 (2003).
74. For example, prosecutors do not represent crime victims or the police. See Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607, 626, 633 (1999).
75. Id. at 634.
temper the prosecutor’s adversarial interest in securing criminal convictions of people who commit crimes.

Rule 3.8, the special rule for prosecutors, identifies two duties of candor that prosecutors owe to the defendant to promote a fair process. First, Rule 3.8(d) builds on prosecutors’ constitutional duty to disclose favorable evidence to the defense under Brady v. Maryland. Second, under Rule 3.8(g), a recent addition to the ABA Model Rules of Professional Conduct, prosecutors must disclose significant new evidence of innocence following a conviction.

Judicial opinions establish prosecutors’ heightened duty of candor to the court. At minimum, a prosecutor is generally expected to correct, not exploit, a court’s erroneous factual and legal assumptions. A prosecutor is also expected to apprise the judge of procedural deficiencies, even if not of the prosecutor’s making. For example, courts have recognized prosecutors’ duty to alert the court to jury misconduct and to a defense lawyer’s conflict of interest or obvious incompetence. However, courts have not gone so far as to say that in

76. MODEL RULES OF PROF’L CONDUCT r. 3.8(d), (g).
77. 373 U.S. 83, 87-88 (1963); MODEL RULES OF PROF’L CONDUCT r. 3.8(d). Some courts have expressly referred to the Brady obligation as a duty of candor. See, e.g., Evans v. Janing, 489 F.2d 470, 474-75 (8th Cir. 1973); United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972) (“There is no doubt that the prosecution in a criminal trial has a duty of candor toward the defendant.”); Whit v. State, 276 S.E.2d 64, 66 (Ga. Ct. App. 1981).
78. MODEL RULES OF PROF’L CONDUCT r. 3.8(g); see Warney v. Monroe Cty., 587 F.3d 113, 125 (2d Cir. 2009) (“The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Thus prosecutors are under a continuing ethical obligation to disclose exculpatory information discovered post-conviction. Any narrower conception of a prosecutor’s role would be truly alarming.”).
79. See, e.g., Jackson v. Conway, 763 F.3d 115, 126-27, 148 (2d Cir. 2014) (finding that the prosecutor’s lack of professional candor was inexcusable, where the trial judge allowed a doctor to testify for the prosecution based on the mistaken assumption, which the prosecutor failed to correct, that the doctor was a treating physician, not an expert witness).
adversary proceedings prosecutors must disclose all material information to the court. The Prosecution Function Standards on candor also fall short of this expectation. While urging prosecutors to take care to ensure that their declarations are true and that their evidence is reliable, these Standards simply restate established candor obligations. They do not address whether a prosecutor should generally correct a judge’s mistake or make disclosure necessary to an informed judicial decision.

III. THE HARDER QUESTIONS

In the two scenarios at the outset of this Article, the answers would be easy if the roles were reversed. In the first scenario, the prosecutor could not remain silent—or reticent—if he knew that the court was unwittingly entering a judgment of conviction predicated on an erroneous assumption about the law or legal process. The prosecutor would be expected to correct the court’s legal misunderstanding about the availability of an appeal both because the prosecutor is an officer of the court and because it is in the interest of the public, which the prosecutor serves, to make sure that criminal proceedings are procedurally fair. In the second scenario, the criminal defense lawyer would have no duty to give the court details of the client’s criminal acts. The lawyer’s duty would be to serve the client’s interest in leniency and preserve the confidentiality of incriminating information, whether or not the information is privileged or known to the prosecution.

The first scenario presents a hard question, however, because of the tension between the criminal defense lawyer’s duties to the court and the client. The lawyer’s silence here would not be misleading, but courts might nonetheless identify a duty, as a matter of fairness, to correct the court’s mistaken legal assumption.

83. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.4(b) (4th ed. 2015). Standard 3-1.4(b), in pertinent part, provides: “The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes.” Id. By requiring prosecutors to refrain from making statements that they do not reasonably believe, rather than only statements they know to be false, Standard 3-1.4(b) expects prosecutors to take greater care than the ethics rules generally require of lawyers to avoid making false statements. Id.; see, e.g., Hooker v. Eighth Judicial Dist. Court of the State ex rel. Cty. of Clark, No. 65016, 2014 WL 1998741, at *2 (Nev. May 12, 2014) (finding that prosecutor engaged in misconduct by making a false statement to the court that was reckless, if not intentional).

84. The Standards advise prosecutors to make disclosures where necessary “to avoid misleading a judge or factfinder,” to correct the prosecutor’s prior false representations, and to avoid assisting a crime or fraud. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.4(b). Additionally, the Standards restate the obligation to disclose adverse legal authority. Id. Standard 3-1.4(c).
On one hand, the lawyer’s legitimate objective in the sentencing hearing is to secure leniency for the client, and silence would serve that objective, while candor would subvert it. The defendant did nothing wrong and, personally, has no legal duty to correct the court’s mistaken assumption about the appellate implications of a misdemeanor conviction. If the lawyer, who also did nothing wrong, corrects the judge’s mistake out of a sense of obligation to the court, the lawyer puts the client in a worse position than if he were unrepresented. Having a lawyer would come at a cost. When the client learns that out of a sense of fidelity to the court, the lawyer disclosed information that influenced the court to enter a felony rather than misdemeanor conviction, the client may lose trust in the lawyer as the one person in the legal process who is supposed to be on his side.

On the other hand, the client has no legitimate interest—no interest that the law would respect—in a legally uninformed judge. The public interest is in judges who know the law. As an “officer of the court,” the defense lawyer’s obligations are vaguely defined, but if they have any content at all beyond what the law explicitly demands, one might assume the obligations generally include correcting judges’ legal misunderstandings.

Insofar as the candor duty is “tempered” here by countervailing duties to the client, the countervailing duties are less compelling than in ordinary situations. The confidentiality duty is not strongly implicated because the lawyer’s recognition that the prosecution could not appeal a misdemeanor conviction does not come from the client; it is not privileged. It is “legal information” presumably derived from judicial decisions—all public information. The lawyer’s understanding might be said to entail intellectual or legal work product, but disclosing publicly available legal information would not betray the client’s confidences or chill the client from making future disclosures. The zealous advocacy duty is implicated here, but perhaps only to a degree. Ordinarily, lawyers are supposed to give clients the benefit of their superior legal insight, acumen, or cleverness, and not use it to influence the judge to rule against the client. But, one might rationalize that candid disclosure of relevant law does not compromise the lawyer’s advocacy because the defendant is only entitled to zealous advocacy within the construct of a properly functioning system of adjudication, which includes judges who are informed about the relevant law.

No formula, general principle, or series of logical steps resolves this kind of question. A court might conclude that the duty of candor to the court should trump the duty of zealous advocacy because that is where the court’s interests lie, but the court would be hard-pressed to present a
convincing justification. For example, in \textit{State v. Leuze}, \textsuperscript{85} the case on which the first scenario is based, the criminal defense lawyer corrected the judge's erroneous legal assumption that the prosecution could appeal a misdemeanor conviction, and the judge then entered a felony conviction. \textsuperscript{86} Rejecting the defendant's argument that he was denied effective assistance of counsel because of the defense lawyer's candor, the appellate court responded that the lawyer's disclosure was not merely permissible but obligatory. \textsuperscript{87} It reasoned that "an attorney is an officer of the court and is sworn to aid in the administration of justice and to act in good faith in all legal matters," and "[a]s such, an attorney should not seek to secure from the court an order or judgment without a full and frank disclosure of all matters and facts which the court ought to know." \textsuperscript{88} The explanation seems unsatisfactory, however, both because the asserted principle seems overstated and because its application here is not self-evident. There are many situations where defense lawyers permissibly withhold "matters and facts," such as the defendant's prior criminal convictions, that a judge would consider important to know. It is not clear why a trial judge "ought to know" the law governing an appeal but not the defendant's criminal background. \textsuperscript{89}

In the second scenario, abstract principles suggest that the prosecutor must disclose details regarding the defendant's criminal wrongdoing because the information is highly relevant to the judge's sentencing decision and the prosecutor has a heightened duty of candor. The sentencing judge's responsibility is to mete out an appropriate sentence, within the range of discretion afforded by the statute governing the crime for which the defendant was convicted. \textsuperscript{90} Determining the

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  \item \textsuperscript{85} 668 N.E.2d 232 (Ill. App. Ct. 1996).
  \item \textsuperscript{86} \textit{Id.} at 234.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.} The court derived the concept that a lawyer must disclose what "the court ought to know" from \textit{People v. Buckley}, which held that criminal defense lawyers could not refuse a trial judge's request for their computation of the amount of time that had elapsed for speedy trial purposes, to enable the trial judge to set the trial before the case would have to be dismissed. 517 N.E.2d 1114, 1118-19 (Ill. Ct. App. 1987). \textit{Buckley}, in turn, derived this principle from \textit{People v. Sleezer}, where a lawyer was sanctioned for holding himself out as representing a defendant when in fact, according to him, he had not been retained in the matter. 130 N.E.2d 302, 307-08 (Ill. App. Ct. 1955). \textit{Sleezer}, in turn, relied on \textit{People ex rel. Fahey v. Burr}, which involved lawyers' lack of candor in child custody proceedings. 147 N.E. 47, 52 (Ill. 1925).
  \item \textsuperscript{89} It was unnecessary for the court to go as far as it did in \textit{Leuze} because the defense lawyer's disclosure would have been reasonable, for purposes of the ineffective assistance of counsel standard, if it was not outside the standard of conduct of ordinary lawyers in the community. A finding that lawyers have discretion to make a disclosure, or that a reasonable lawyer might have made a disclosure given the uncertainty of the applicable standard of conduct, would equally have led to the conclusion that the defendant received competent representation.
  \item \textsuperscript{90} \textit{See} Becky Gregory & Traci Kenner, \textit{A New Era in Federal Sentencing}, 68 TEX. B.J. 796,
right sentence, in light of the purposes of punishment (for example, retribution, general deterrence, specific deterrence, rehabilitation), presupposes knowledge of the facts bearing on this decision. Since the judge has no independent investigative authority, the sentencing judge must rely in large part on the prosecution for the relevant facts about the offense. If any lawyer must make full and frank disclosure of factual matters relevant to the sentencing court's decision-making, it is surely the prosecutor.

And yet, the resolution is not so plain, because prosecutors have broad charging and plea bargaining discretion that confines judges' sentencing authority. While plea agreements cannot supersede prosecutors' ethics obligations—prosecutors could not, for example, agree to lie to the court—a prosecutor's decision about what factual assertions to make to the court at sentencing might be regarded as an exercise of discretion comparable to a decision about what charges to bring, whether to dismiss charges in exchange for a guilty plea, or what sentence to recommend. The right to volunteer the prejudicial details of the defendant's criminal conduct may be among the prosecution's bargaining chips, traded away to secure a guilty plea that spares witnesses from having to testify and that serves other legitimate administrative and law-enforcement objectives.

The premise that prosecutorial discretion supersedes candor regarding evidentiary facts relevant to the sentencing process is implicit in a 1998 Washington decision, \textit{State v. Talley}, on which the second scenario is based. After a mistrial on a second-degree rape charge, the defendant agreed to plead guilty to third-degree rape and the prosecution agreed to recommend a prison sentence of up to a year. However, at sentencing, the court received factual submissions on behalf of the rape victim regarding the details of the defendant's crime, leading the court to conclude that a higher sentence was warranted. The court offered to conduct a fact finding if the defense refuted the allegations, but when the

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\item 798 (2005).
\item 93. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.2 (4th ed. 2015).
\item 94. \textit{See} 949 P.2d 358, 362-64 (Wash. 1998).
\item 95. \textit{Id.} at 360.
\item 96. \textit{Id.} at 360-61, 361 n.2.
\end{itemize}
prosecution indicated that it would offer evidence in a hearing, the
defense declined.\textsuperscript{97} On appeal, the state supreme court rejected the
defendant’s argument that the prosecutor violated the plea agreement by
consenting to participate in a hearing.\textsuperscript{98} The court reasoned that “the
prosecutor has an obligation as an officer of the court to participate in
the hearing and present evidence that will help the court make its
decision.”\textsuperscript{99} The court cited earlier opinions on the enforcement of plea
agreements holding “that as an officer of the court” the prosecutor must
honestly answer the sentencing judge’s questions,\textsuperscript{100} and that, even if not
asked, “[a] prosecutor is entitled to present all relevant facts, whether or
not they fully support his [or her] recommendation.”\textsuperscript{101} The key
word here is “entitled.” The court did not say that a prosecutor
is \textit{required} to disclose relevant facts. The court evidently assumed,
without any explanation, that unless the sentencing judge specifically
inquired, a prosecutor had no duty of candor to present provable
facts regarding the defendant’s criminal culpability that are highly
relevant to the judge’s sentencing decision and would undercut the
prosecution’s recommendation of leniency.\textsuperscript{102}

One might reasonably conclude that in both \textit{Leuze} and \textit{Talley}
the courts failed to grapple adequately with the hard questions of
professional propriety. In the end, both courts probably misconceived
the lawyers’ ethical duties.

In the first scenario, the trial court had no legitimate need to
understand the appellate implications of its sentence. This was not a
situation where the court intended to impose an illegal sentence or
otherwise act contrary to law. Such a situation would be a much more
compelling one for candor, even at the client’s expense. For example, if
the relevant statute provided a mandatory minimum sentence of two
years imprisonment, it might be fair to expect the defense lawyer to
correct a judge who announced a one-year prison sentence. Here, in
contrast, the defense lawyer’s position was that the law and facts did not
support a felony conviction, and the judge was inclined to agree. The
judge should have ruled without regard to the appellate implications.
Even if the judge thought the question was a close one, the judge’s
responsibility was to enter a misdemeanor judgment if the judge

\begin{thebibliography}{10}
\bibitem{97} \textit{id.} at 360.
\bibitem{98} \textit{id.} at 363-64.
\bibitem{99} \textit{id.}
\bibitem{100} \textit{id.} at 363.
\bibitem{101} \textit{id.} (quoting \textit{State v. Gutierrez}, 791 P.2d 275, 278 (Wash. Ct. App. 1990)).
\bibitem{102} In contrast, prosecutors have an ethical duty of evidentiary disclosure to the defense in
connection with sentencing. \textsc{Model Rules of Prof’l Conduct} r. 3.8(d) (Am. Bar Ass’n 2013).
\end{thebibliography}
concluded on balance that the law and facts required it. 103 Correcting the judge’s erroneous understanding of collateral law in this case would have encouraged the judge to make his ruling based on an irrelevant and arguably improper consideration.

In the second scenario, prosecutorial discretion does not justify the prosecutor in withholding evidentiary information that is of obvious importance to the sentencing court, and there is no other compelling public interest that outweighs the prosecution’s ordinary duty of candor to the court. Prosecutors have legitimate ways of narrowing judges’ sentencing discretion; for example, one might assume that the prosecution did not abuse its discretion in this case by allowing a plea to third-degree rape. But, that still left the court with a weighty responsibility to select the most appropriate sentence within a legislatively permissible range, and the court was not bound by the prosecutor’s bargained-for recommendation. While not every detail of the defendant’s crime would likely make a significant difference to the sentencing decision, the public has an interest in the decision being informed by knowledge of the provable facts that are likely to matter. 104 Here, the prosecution believed it could prove that the defendant used physical force against the rape victim, which it knew would be an important sentencing consideration. If a presentence report stated that the defendant did not in fact use force in committing the rape, the prosecutor presumably would have had to correct the misinformation in order to promote a fair sentence. 105 The prosecution’s deliberate decision not to disclose the defendant’s use of force potentially distorted the sentencing just as much as a failure to correct misinformation. Finally, it is hard to see why the public interest is better served by leaving it to the sentencing judge to ask the prosecutor whether there are any salient undisclosed facts, rather than placing the burden on the prosecutor to volunteer the important facts.

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103. No doubt, trial judges take similar measures in other contexts. For example, the trial judge who believes that the prosecution’s evidence is insufficient may wait until after a jury’s guilty verdict to dismiss the charges, rather than ruling at the close of the prosecution’s case.

104. The argument for disclosure would obviously be weaker if the prosecution was not prepared to prove the particular factual assertions because, for example, a witness was unavailable or the prosecution wanted to defer to a witness’s preference not to testify.

105. See, e.g., United States v. Jones, 983 F.2d 1425, 1433 (7th Cir. 1993) (stating that the prosecutor must correct inaccuracies in the presentence investigative report because of “the prosecutor’s ethical duty to seek the fairest rather than necessarily the most severe outcome”).

448
Questions about candor in criminal advocacy can be hard. The ABA advises that prosecutors' candor duty is "heightened," while defense lawyers' candor duty is "tempered," but this advice is of limited utility in resolving concrete questions. Courts announce other general principles that are likely to be no more conclusive. Resolutions of the hard questions raised here are offered with nowhere near the certainty that Freedman himself typically expressed. But, one thing is certain. One must go beyond abstractions. As Monroe Freedman's writings illustrate, hard candor questions—and hard ethics questions generally—demand engagement with practical complexities.
