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To Respond or Not to Respond? Confidentiality and Defending Against Online Critics

The Truth, the Whole Truth and Nothing But the Truth—Well … Not Exactly. Trial Attorney Ethical Problems

We posed 10 dilemmas that confront criminal defense attorneys to a blue-ribbon panel of the smartest prosecutors, judges, criminal defense attorneys, and law professors. We asked them to tell us the correct way to resolve 10 problems, hoping our panel would give us the answers once and for all. Instead, none of them agreed on anything.

BY DON SAMUEL AND AMANDA R. CLARK PALMER

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We learned in law school that legal ethics questions often have no right answers, but often some very bad answers. The rules that govern our behavior are silent on some of the more difficult (and recurring) problems that confront criminal defense attorneys; different rules also point in opposite directions to solve some problems; and the rules often are inconsistent with intuitive notions of morality.

We are implored to zealously represent our client by Georgia Rules of Professional Conduct (hereinafter "Rule") 1.3 [1], but be fair to the opposing party, Rule 3.4. We are required to always exhibit candor with the court, see Rule 3.3 (a) (2) and (4); however, omitting to tell the court information that is unfavorable to the client is not only permissible but mandatory (Rule 1.6). Calculating how to balance these different principles is like trying to gauge whether a rock is heavier than a tree is tall.

We are often confronted with situations that require us to make decisions—sometimes quickly—but there is no Mercks Manual to consult, or a checklist like astronauts have in case of a sudden unexpected event. We can look at the Rules, yet one rule commands that we "go east" while another directs us to "go west." We are itinerant, if not fickle, in our commitment to one goal or another.

Most of us have learned that there are lawyers in our midst who will provide (with a learned tone of voice) a suggested course of conduct, perhaps a senior member of the firm, or a favorite former professor; but if you have more than one mentor, the odds are that you will get two different suggestions. (One of our favorite "go to" mentors once reported to us that when he delivers an ethics lecture at CLE seminars, the State Bar directs that audience members actually *lose* an hour of ethics credit). If you read Monroe Freedman and Abbe Smith, you reach one conclusion; consult Geoffrey Hazard's writings, you receive contrary advice; yet a third recommendation comes from The Restatement (Third) of the Law Governing Lawyers; and a fourth from the ABA Criminal Justice Standards.

Many problems require us to decide—according to the Rules—what it means to "know" something. Whether we "know" some fact governs many of our ethical obligations. Do we know the truth about some event, thus limiting our right to introduce evidence or answer a judge's question in a way that is contrary to that version of the event? Is the truth that we know determined only by what we can see, smell, touch, taste or hear? If we are told something by a reliable source, is that sufficient to know it? What if our unreliable client tells us something—can we ever know what he tells us is true? If a client says she did not rob the bank, is it safe to assume that all evidence pointing to her innocence is truthful? What if she tells us that she *did* rob the bank? Is that "admission against interest" so reliable that we then know that any information inconsistent with that fact is a lie? Even if we leave these epistemological questions aside, at what point is our tentative belief regarding certain facts sufficiently uncertain that it does not forbid a course of conduct that is inconsistent with that belief? See Rule 1.0 (a) and (m). To what extent can we gerrymander the information we have gathered and decide, "I really do not know."

Uneasy about the right answers to these questions, we decided to ask our colleagues for their reaction to certain recurring ethical problems. Surely, they would unriddle the problems uniformly and point us to the north star. Almost all of the following questions have been posed to us by a younger lawyer at one time or another and many of these problems—a majority—have arisen in our practice. We wanted to find the answer. Thus, we surveyed law professors, prosecutors, defense lawyers and judges, all of whom are experienced in the criminal justice system and all of whom have been practicing more than a decade. Surely they would know the answers to these vexatious problems.

Alas, we were better off before we launched this investigation. The defense lawyers did not agree with one another. The prosecutors did not agree with one another; same with the law professors. They all disagreed with each other on many of the issues. Some prosecutors agreed with some defense lawyers on some questions, but not others.

One law professor agreed with many of the answers by some of the prosecutors. Another law professor agreed with the opposite opinion voiced by defense lawyers on the same questions. The law professors disagreed with each other (one law professor threw up his hands on one question and wailed, "I just don't know"—regrettably that answer is not an option for a lawyer confronting the problem).

Federal judges disagreed with each other and with their colleagues on the state court bench. One surprising fact, in light of the disparate survey results, was that all five judges seemed relatively nonchalant about receiving inaccurate information from a criminal defense lawyer, while many of the lawyers believed that the inaccuracy had to be corrected (see questions #9 and #10. The three law professors could not agree on even half of the questions and in one instance provided three diametrically opposed answers (#4).

So if you were hoping to get *the* answers for how to handle these tricky ethical situations you can just stop reading right now. There are not only no right answers, there are also no gurus and no reliable mentors from whom we can seek guidance. We remain bedeviled. But we want to share our bedevilment. For the trial lawyers, one way to be thankful for this result is to know that, no matter what you decide to do, you can find somebody who will say, "that's perfectly OK."

There are 10 questions included in our survey with the results from our 21 respondents for each question. *We guaranteed the respondents that they would remain anonymous, though we would reveal the occupation of each respondent.* Every lawyer and judge who responded is experienced in his or her respective role. There are two judges on the federal bench, and three from the Superior Court. The same is true with the prosecutors: federal and state, and all occupy supervisory positions in their respective offices. The defense lawyers are among the best known criminal defense lawyers in the state, all of whom have been practicing more than 15 years (and, as far as we could determine, they have escaped any Bar sanctions during their careers). The law professors are from Georgia State University School of Law, the University of Georgia College of Law and Atlanta's John Marshall Law School.

Question 1

A witness expresses certainty to you that the defendant was not at the scene of the crime at noon on June 1. This alibi witness is very important to your defense of the defendant. You suspect that the witness is mistaken, but she is not knowingly mistaken. Can you put the witness on the stand to provide the alibi, given the fact that her testimony is probably false, but not perjurious (because she is mistaken, not knowingly providing false testimony)? Assume that the reason for the mistake is a simple miscalculation on the part of the witness, and does not in any way reflect any "suggestion" or persuasion from the defendant or anybody else (e.g., the witness is apparently confused about which day she was at the bank that month because she has looked at a check that she cashed and it appears to you that the check was dated incorrectly). Note: this question does not invite an answer, "Don't call the witness, because the opposing party will prove that the witness was wrong and this will hurt the case"—we recognize this strategic reason for not summoning the witness to court. We

are interested in the ethical response to the problem.

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Georgia Rule of Professional Conduct 3.3 (a) (4) states that a lawyer may not present false evidence. But the question we posed is nuanced, in that we postulate that the attorney only "suspects" the witness is wrong. Perhaps the defendant previously confessed to the attorney. Or there are 10 eyewitnesses and a surveillance camera establishing the defendant's role in the offense. Strategically, of course, there are many reasons not to call the witness. But ethically? This presents the "knowledge" issue fairly dramatically. Do we simply justify our decision by declaring, "I know nothing for sure?" Or "It is not my job to judge." As we explained above, the notion that an attorney "knows" the truth is questionable, unless there is some official test for "knowledge." See also Comment 8 to Rule 3.3: "The prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances."

As an aside, it is worth noting that Professor Freedman's iconic "The three hardest questions" included this question: "Can a defense attorney seek to impeach a witness and challenge the witness's credibility, veracity, and bias, despite positively knowing that the witness told the truth?" Does a lawyer who does this explicitly encourage the jury to believe a false inference, i.e., the witness is a liar when, in fact, you "know" the witness told the truth?

Question 1 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
Call the witness	6	1	3	2
Do not put up the witness	1	4	2	1

Question 2 Responses

Report the lawyer	2	2	0	2
Do not report the lawyer	6	3	5	1

Question 2

Batson prohibits exercising peremptory strikes on the basis of race. There are hundreds of reported appellate decisions in Georgia, and thousands in the appellate and trial courts around the country in which the court concluded that trial counsel violated this rule. Not only did the court conclude that trial counsel violated the rule, but also found that trial counsel lied to the court when counsel explained the "real" reason the juror was struck (e.g., "because of his job" or "her third cousin once removed was previously arrested for jaywalking" or "he did not look at me when he answered my questions"). Whether trial counsel who told the court *untruthfully* about the reason for exercising the strike was the prosecutor or the defense attorney, should the court report the event to the State Bar to institute disciplinary proceedings based on (1) the lawyer violated the constitutional command of *Batson*; and (2) the trial court found that the lawyer lied to the court when the lawyer offered pretextual (i.e., false) reasons for exercising the strike?

* * * * *

The respondents were fairly uniform, with some exceptions, in saying that there was no ethical violation and no basis to report a constitutional violation to the State Bar. Some respondents did suggest that lying to the court about the reason for exercising the strike is reportable to the Bar. Odd that many respondents believe that there is no reportable conduct, yet there are hundreds of *Batson* cases in appellate courts where the court found that the trial lawyer was not truthful in explaining the reason for a strike, and we are aware of not a single referral to the State Bar, to say nothing of a court-imposed sanction (other than re-seating a juror). Batson says that the judge must make a finding of fact regarding the attorney's actual motive. If the lawyer says "my reason for exercising that strike was to exclude a juror whose cousin was once arrested for jaywalking," and the trial judge rules, "that is a pretext, you actually struck the juror because of her race and I make that finding based on the number of white jurors who also had cousins who committed crimes that you did not strike, as well as the prima facie case reflecting the overwhelmingly disproportionate number of minority jurors you struck and the illogical reasons you offered for each strike"—is there any way to describe the judge's conclusion other than as condemnation of the lawyer's lie? Why is that different than a lawyer who tells the judge, "This document (which turns out to be a forgery) was personally given to me by the doctor who treated my patient," when, in fact, the document was given to the lawyer by the client who forged the doctor's signature? Why is one lie an ethical problem, but another lie deserves a pass? And if so many of our respondents agree that the lying lawyer should be punished by the Bar or the court, why has that never happened, despite the hundreds of *Batson* decisions that result in re-seating improperly struck jurors? If we agree that a lawyer has lied to the court, Rule 8.3 states that once a violation is ap-

parent, a lawyer "should" report the violation to the Bar.

Question 3

The client is 21 years old. His mother was in his room and looked at his computer and saw child pornography. She immediately closed the computer and brought it to your office. You should:

- Put it in your file cabinet without looking at it.
- Give it back to your client or his mother, explaining that your office is not a storage closet (or a secret hideaway).
- Give it to the police.
- Throw the computer in the Chattahoochee River.

* * * * *

Contraband is contraband. It is no different than the client asking you to "hold on to this bag of cocaine for me." But why does only one respondent question the propriety of handing the laptop (or bag of cocaine) back to the mother, which the majority of respondents urged? Is that not distributing contraband? Is there some belief that if you return it within a short period of time (1 minute, 5 minutes, 1 day), it does not amount to a distribution to the recipient?

Also, what if you don't positively believe the mother when she says the computer has child porn? Or you think that she may be mistaken in her definition of child porn? Do you look at it before you return it to her? Can you put the laptop in your file cabinet *without* looking at it with the rationalization that you really don't know what the mother saw and trusting her word for what's on the computer is not necessary? You are an ostrich, in other words. Just because a prudish mother says, "this computer has icky child stuff on it" are you obligated to return it? Once again, we are pondering what it means to know something.

Fortunately, no respondent suggested heading for the Chattahoochee River. See *United States v. Russell*, 639 F.Supp.2d 226 (D. Conn. 2007)(attorney indicted for obstruction of justice after allegedly destroying a laptop computer that contained child pornography).

The Office of the General Counsel

operates an **Ethics Helpline** during regular work hours. Call **404-527-8741/800-682-9806** or visit **www.gabar.org/submitethicsquestion** and log in to your Member Account to send an email when you need help working through an ethics issue. The helpline attorney can direct you to the applicable rules of professional conduct and provide informal, nonbinding advice about the appropriate course of conduct.

Question 3 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
File cabinet	1	0	1	0
Give back to the client/mother	7	2	4	2
Give it to the police	0	3	0	0
Throw it in the Chattahoochee	0	0	0	0
Cannot answer	0	0	0	1

Question 4 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
File cabinet	2	2	2	1
Give back to the client	4	3	3	1
Give it to the police	2	0	0	1
Throw it in the Chattahoochee	0	0	0	0

We have not posed what may be a considerably more complicated problem: assuming you return the computer to the client or the client's mother (which is what most respondents urged the lawyer to do), what do you tell the mother or the 21-year-old? If the mother says, "I came to you for advice; I didn't come here just to have you push the laptop back at me!" What do you say? Do you tell her to destroy the contraband? Do you tell her that destroying contraband might be a crime under various federal and state laws? (concealing a crime, destroying evidence, or otherwise obstructing justice)? Do you tell them that not destroying the contraband and keeping it is also a crime? Do you tell them, "You are out of luck, goodbye"? Perhaps this question will be on the next survey.

Question 4

The police executed a search warrant at your client's house, looking specifically for a shirt with bloodstains. They searched high and low and did not find the shirt and then left. The next day, the client brings you the shirt, which was hidden under his mattress at the house. You should:

- Put it in your file cabinet
- Give it back to your client
- Give it to the police
- Throw the shirt in the Chattahoochee River.

* * * * *

Unlike the computer, the shirt is not contraband. It is evidence, but it is evidence that is no different than the defendant's cell phone, which might contain information related to the crime, or his contacts. Or a ledger that he might have kept of his drug sales. Or his receipts and invoices that are foundational (and either incriminating, or exonerating) for a tax case. Must a lawyer decline to take possession of any kind of evidence, no matter its nature?

If the crucial issue here is the existence of the search warrant, why is that determinative? Defense lawyers are not clueless. They know the shirt would be "wanted by the police" even in the absence of a search warrant. Same with the aforementioned invoices, and cell phone.

And as for those respondents who advocate for handing the shirt over to the police ("but don't tell them where you got it"), are the police idiots? Do you think the police will believe that the shirt came into your possession like manna from heaven? And can the prosecution, at trial, introduce evidence that the defendant's lawyer) delivered the shirt?

Regarding destruction of evidence, it might be worth noting the opinion in *United States v. Yates*, 574 U.S. 528 (2015), that construed 18 U.S.C. § 1519 (obstruction of justice by concealing or destroying "tangible objects") not to apply to items of physical evidence that are not "records."

We do not agree that it is absolutely necessary to return the shirt to the client. That will likely result in the destruction of evidence. Why would that be the favored approach? Also, what about the defendant's right to test the bloodstain? You are not lying to the police or hiding evidence (the police have already searched the house and left). See § 119 of the Restatement (Third) of the Law Governing Lawyers; ABA Criminal Justice Standard § 4-4.7.

We vote with the minority: keep it at the office, but maintain the integrity of the evidence and prepare a detailed memorandum explaining the circumstances. (And be prepared to post bail in case a Georgia court disagrees with this approach; but have this article handy so you can point to the 40% of judges surveyed who believe that putting the shirt in your file cabinet is OK).

Question 5

At your client's federal sentencing, one of the most persuasive items was a letter written by the local sheriff who discussed what an admirable person your client is, what contributions he has made to the local community and the local law enforcement charitable endeavors. The client provided the letter to you a week before sentencing and you included it in the sentencing package submitted to the court prior to sentencing. The judge commented on the significance of this letter in deciding to impose a shorter sentence (12 months) than the judge had initially considered imposing (3 years).

The day after sentencing the client tells you that he led the local sheriff to believe that he was applying for a job as a Little League coach and that the sheriff's letter would be used as a reference for that job. The sheriff had no idea the defendant would use the letter at a sentencing hearing—in fact, the sheriff did not even know the defendant was heading to a sentencing hearing, or that he had been convicted of a crime. You should:

- Let the sentencing judge know what has happened.
- Shake your head and go back to the office and forget about it.

What if the client tells you about this six months after sentence is imposed?

* * * * *

Georgia Rules of Professional Conduct 3.3 (a) (4) and (b) require that you promptly advise the court of any misrepresentations that occurred in court. But this col-

lides with the obligation never to reveal a client's communication about prior misconduct. The ambiguity of this problem is that the letter apparently is "truthful" though it was obtained under false pretenses. The sheriff did not know the purpose for which the letter was requested and did not know the defendant's criminal background, but equally sure, the sheriff did not lie when he wrote the letter. The fact that he did not know the truth about the defendant's conviction and impending sentence is no different than the situation with any character witness who is encouraged to write a letter supporting a defendant who has assured the character witness that he—the client—is absolutely innocent and has been framed. Nobody thinks presenting that character witness is a fraud upon the court.

But, on the other hand, if this argument is sound (the sheriff's opinion is his opinion, regardless of why he was asked to offer it) would those respondents also think it is okay to tender the letter if you learn that it was obtained under false pretenses *before* you filed it in court? In other words, if your argument for not reporting the deception to the court after learning of the deception is that the letter was actually truthful (so there was no deception), why does that exact argument not apply when the letter's genesis is learned before you file it?

Also worth considering is the recent decision in the Court of Appeals, *In re Ragas*, A21A0237 (June 8, 2021) (counsel's failure to alert the trial court about the client's failure to abide by a court order was probably not an ethical violation—the Court did not definitively decide this issue—and was certainly not a basis for holding the attorney in contempt).

No respondent thought that learning the information six months after sentencing required a different analysis. Yet, the Rule describes a difference between learning that perjury occurred when it is timely to correct and learning about perjury when it is too late to correct the testimony.

Question 6

You know that the victim's prior conduct (including a child molestation conviction among other crimes), will not be admissible at trial under any reasonable existing theory or precedent. Nevertheless, you are defending your client in a small community and you file a motion to permit the introduction of such evidence and alert the local newspaper to the filing and the oral argument scheduled to hear that motion. You know the local jury pool will read the newspaper and that the evidence will not be admissible. Should you proceed with this strategy?

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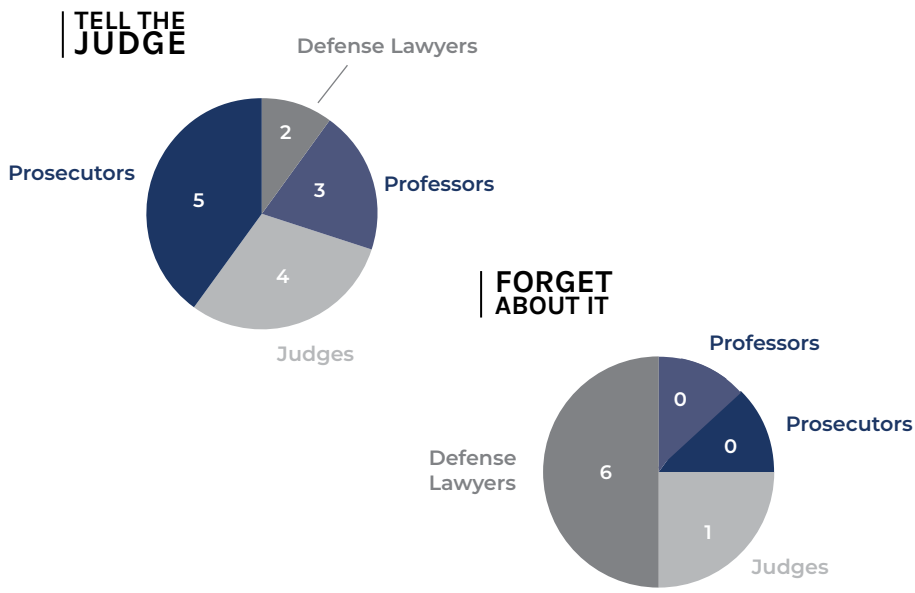
If your client passed a polygraph, would you put that in a motion and argue that the law should change regarding admissibility of unstipulated polygraphs? Is that not aggressive, but permissible, advocacy—even if an appellate decision was issued the day before barring all polygraph evidence from the court?

What about a prosecutor who knows (there's that word again), that a confession was obtained from the defendant

Question 5 Responses



Question 6 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
File the motion	3	0	1	0
No way	4	5	4	3
It depends	1	0	0	0

after the cop said, "In my experience, you will get a much lighter sentence if you confess?" The prosecutor knows that the confession will inevitably be suppressed by the judge. May the prosecutor file a motion seeking a hearing on the admissibility of the statement and attaching the confession as an exhibit? Can you really be challenged ethically for telling the 100% truth about the victim's prior conduct in a pleading, even if this truth is unlikely to see the light of day at trial? And why is it relevant that you told a reporter about a publicly filed document?

Perhaps the appropriate response from the defense is that the law should be changed to admit this type of evidence. After all, the current rules permit the prosecution to introduce evidence of just about any sexual malfeasance committed by the defense in any sex assault trial (O.C.G.A. § 24-4-414). As the question postulates, maybe currently there is no reasonable theory of admissibility, yet, there is no prohibition in seeking a ruling that preserves the issue for appellate review so that the appellate court can facilitate the evolution of the "existing theory or precedent."

Question 7

Prior to trial, you call the key prosecution witness on the phone and properly identify yourself as the defense attorney. The witness says, "I ain't talking to you; I'll see you in court on June 15 and that's when you'll hear what I am going to say about your lousy client." You know that the trial is scheduled for June 8. You say nothing to anybody. The witness does not appear at the trial on June 8. You say nothing. The prosecutor asks for a continuance because he cannot locate the star witness and is concerned that she may be sick, or too scared to come to court or in danger. You should:

- Argue against a continuance because there is no excuse for the prosecution's failure to have its witnesses present and you are ready to proceed.
- Continue to say nothing.

* * * * *

Not telling the truth, when you know it, about a matter that has nothing to do with what your client told you (i.e., there is no attorney-client privilege) seems more problematic to us than most respondents seemed to think. It was surprising that most everyone, particularly the prosecutors, agreed the defense attorney ought to argue against the continuance, placing blame squarely on the prosecution for failing to have its witnesses present. Is "candor with the court" limited to matters that the lawyer expressly states, and not to what the lawyer knows but fails to reveal? Is a material omission not the same as fraud via a material misrepresentation? If it is permissible for the defense attorney to remain mute while knowing the reason the prosecution witness has not appeared, do our respondents think if the roles were reversed, that it would be permissible for the prosecutor to stand mute if a defense witness failed to show up (because the witness had the wrong date—and the prosecutor knew that)?

Question 8

Your client tells you shortly before trial that he wants to proceed *pro se* and asks if you will serve as standby counsel. You know that the client is just barely competent and will do a terrible job representing himself. The client asks you to help him prepare for the hearing regarding his request to represent himself so the judge will find him capable of proceeding *pro se*, including writing down the likely questions and the answers (possible sentence range, rules of evidence that may apply, the elements of the offense, etc). You should:

- Help him, even though it is essentially helping him put the noose around his neck.
- Refuse to provide him any assistance so that the judge may reject his request to proceed without counsel.

* * * * *

This is a troubling issue and pits the client's best interest (in *your* mind) against the client's best interest (in h*is* mind). Consider the decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), authored by Justice Ruth Bader Ginsburg when she said a lawyer must adhere to the client's request in choosing a strategy in a death penalty trial, despite it clearly being a terrible strategy. We do not agree that there is any good answer to this problem;

Question 7 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
Argue against the continuance	6	4	4	3
Say nothing	2	0	1	0
Tell the prosecution	0	1	0	0

Question 8 Responses

Help him	3	4	3	1
Refuse to assist	4	1	2	1
Did not respond	1	0	0	1

we can't even identify the better answer. We believe that the lawyer in this situation is as hapless as McCoy's lawyer who apparently had no choice but to use his client's ridiculous defense: a strategy that certainly would have landed McCoy on death row. So we retreat and reframe the question and simply respond, "Just reason with the client until the client recognizes the importance of having counsel present his defense."

Question 9

Your client is being sentenced in state court for a relatively minor non-violent theft offense and you have negotiated a deal for probation. He has not asked for First Offender status, but the prosecutor, to your surprise, tells the court that she does not oppose a First Offender sentence, because her documents reveal that he has no prior record. The judge asks you, "Is your client eligible for First Offender status?" The answer, in your opinion, is "no" because your client has a prior conviction for raping a young child. You realize that the prosecutor is unaware, as is the judge, of the defendant's background and not only will he not get a First Offender disposition, but he will also have the plea rejected by the judge when this is revealed. You should:

- Tell the judge he should know better than to ask the defense lawyer questions such as that.
- Tell the judge to please direct such questions to the prosecutor.
- Tell the judge that you agree that the record that the prosecutor has reveals no prior convictions.
- Respond to the judge's question as follows: "I do believe that the Falcons should get a new quarterback." (This was the approach taken by the witness in the case of Barry Bonds when asked whether he gave steroids to Bonds).

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Very divergent opinions from our respondents. The same "material omission" versus "material misrepresentation" problem. Are they really ethically different? All four suggested answers, in fact, unmistakably highlight one fact: "My client has a criminal record." So the Respondents' answers, "You cannot lie, but you can't hurt your client" are silly. You are hurting the client by conveying the message that he has a criminal record *and* you are lying to the court by failing to reveal the truth overtly. Any dishonesty or deceitful conduct violates Rule 8.4 (4).

We found it particularly odd that the judges generally were more prone to urge the lawyer not to reveal the true state of affairs than the prosecutors and defense lawyers, many of whom elevated "candor to the court" over the client's interest.

If you are about to buy an engagement ring at a jewelry store, and the salesman *knows* that the ring is a fake, but was told by the guy on the street who sold it to the store that it was real, if you were to ask the salesman, "Is this ring for real?" would it be honest for the salesman to respond simply, "The guy I bought it from on the street told me it was real." The Rules recognize in Rule 3.3[3], "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Also, not a single respondent mentioned another aspect of the problem. If the lawyer tells the judge, "The client is not eligible for First Offender," isn't the judge going to pursue the issue? Won't the DA pursue the issue? It is likely that the prosecutor will find out that the defendant is not eligible for First Offender, *and* moreover he is not getting the deal he thought he was going to get (i.e., probation). So disclosing that the defendant is not eligible for First Offender may be a small ripple in what will eventually be a potentially catastrophic consequence.

Question 9 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
Refuse to answer	1	2	0	0
Tell the court to ask the prosecutor	1	1	1	1
Say he is ineligible	3	2	0	2
Agree with the prosecutor's record	2	0	3	0
Say "I think the Falcons need a new quarterback"	1	0	1	0

Question 10 Responses

Answer	Defense Lawyers	Prosecutors	Judges	Professors
Correct the client's name	3	2	1	3
Don't say anything	5	3	4	0

Lawyers who would like to discuss an ethics dilemma with a member of the Office of the General Counsel staff should contact the Ethics Helpline at 404-527-8741 or toll free at 800-682-9806, or log in to www.gabar.org and submit your question by email.

State Bar of Georgia

Question 10

A defendant is arrested and the police officer mistakenly writes down the name wrong, transposing the first and middle name. When the case results in a plea, the name remains on the judgment just as it did on the arrest paperwork and the indictment. The result is that the defendant who is an undocumented alien, will not be deported. Did the defense attorney have a duty at any point in the process to correct the error?

* * * * *

The respondent's answers were similar to #9 and once again, the judges were more inclined to let the mistake play out than the defense lawyers.

But this comes close to a crime on the part of the lawyer, because if you don't say anything, you are possibly guilty of obstructing justice. See *United States v. Kloess*, 251 F.3d 941 (11th Cir. 2001) (an attorney was indicted for obstruction of justice by entering a plea of guilty in absentia on behalf of a client he knew was using a false name). Does it matter that the error was not the client's fault? In the *Kloess* case, it was the client who presented a fake ID to the arresting officer and the lawyer who perpetuated that fraud by presenting the plea in absentia under the fake name. In our hypothetical situation the client was not the cause of the name being wrongly recorded. It surprised us that so many respondents, including four out of five judges, were not concerned that the person being sentenced was not, in fact, the person who committed the crime.

Conclusion

So there you have it: The wisdom (and the variety of correct answers) from the sages of our judiciary, the academy and the experienced members of the trial bar. They can't agree on anything. Perhaps that is why they are lawyers. Or perhaps that is why we all know that life and the practice of law are complicated. Like rabbis who interpret the casuistry of the Torah, or ministers who can't agree on Biblical commands, we are often left with the task of weighing the competing demands that require us to be zealous advocates, to be truthful, to be candid with the court and to be candid with our adversaries. These heuristics, stitched together in one set of rules leave us without answers. But this much is certain: we are not alone in our uncertainty. ●

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