TRUTH & THE CLIENT'S INTEREST: A U.S. PERSPECTIVE

In *Truth and the Client's Interest*, Frederick Ochieng'-Odhiambo argues that *defense* lawyers have a substantial ethical conflict because the lawyer's professional obligation to the client diverges from his/her philosophically ethical obligation to truth.[1] Professor Ochieng'-Odhiambo bases his argument on the nine canons of legal ethics identified by R.L. Wise[2]

Interestingly, except by implication, none of the canons relied up by Professor Ochieng'-Odhiambo directly require truthfulness by lawyers in their representation of clients, and these simplistic canons are not the governing ethical principles in any jurisdiction in the U.S. While there are some differences between states, as a practical matter the American Bar Association's *Model Rules for Professional Conduct*[3] serve as a general and minimal standard nationwide, and are sufficient to respond to Professor Ochieng'-Odhiambo's contentions.

The most relevant of the ABA Model Rules, RPC 3.3, provides as follows:

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[4]

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1 Ochieng'-Odhiambo, Frederick. "Truth and the Client's Interest." *Philospohy Now*, Jun. - Jul. 2010.

2 RL Wise, *Legal Ethics*, 320 (2d ed. 1970).

3 American Bar Association. "Model Rules of Professional Conduct." American Bar Association - Center for Professional Responsibility. http://www.abanet.org/cpr/mrpc/mrpc_toc.html (accessed December 11, 2010).

4 *Id.*

Notice that the ABA RPC – in contrast to the RL Wise canons – directly address the obligation of truth. Contrary to the implications in Professor Ochieng'-Odhiambo's paper, under the ABA RPC, truth cannot be subordinated to the client's interest. Lawyers are personally prohibited from offering false evidence (RPC 3.3(a)(1)) and prohibited from allowing their clients or witnesses to do so (RPC 3.3 (a)(3) and (b)). Indeed, where clients or witnesses testify falsely, the lawyer has an obligation to "correct" the false evidence, including by informing the tribunal.

Professor Ochieng'-Odhiambo argues that competent and zealous representation of the client requires that the lawyer know the "truth" of all matters concerning the case, and that the lawyer is protected from being required to disclose adverse knowledge by the attorney-client privilege. To some extent, this is true. But, RPC 3.3 does not allow attorney-client privilege to shield client perjury; therefore, if the strategy of a criminal defense requires that the defendant testify (in the U.S., the privilege against self-incrimination permits the criminal defendant not to testify[5] and prohibits consideration of the defendant's silence in determining guilt[6]) there are often limits to what the lawyer wants to know. These limits are even more important in civil cases where the client can be compelled to testify. After all, lawyers have no obligation with respect to testimony the lawyer does not know to be false. To the extent the lawyer remains willfully blind, Professor Ochieng'-Odhiambo's contentions have some merit.

His suggestions, however, that lawyers are interested neither in objectivity nor morality, and that lawyers distort truth for monetary gain are unsupportable. Certainly, lawyers are not objective. They are advocates. And, their adversaries are equally non-objective advocates. Ethical lawyers are interested in "morality" – justice – because (to mix a metaphor) a trial is a crucible of truth. In virtually every case, "truth" is not binary. The underlying philosophical issue is that "truth" is inherently subjective. Juridical systems strive to achieve justice through presentation of alternative views of truth by adversarial advocates. As for influence of money, there are many lawyers (of which I am one) who practice *pro bono* almost exclusively, and few paying clients are willing to pay enough to influence a rational lawyer to commit an ethical violation and risk loss of the net present value of the privilege to practice.

As regards truth, Professor Ochieng'-Odhiambo seems to be advocating a new and different standard: Lawyers should be prohibited from making any untrue statements of material facts and from omitting material facts necessary in order to make all of the statements made on behalf of their clients, in the light of the circumstances under which they are made, not misleading. This is a paraphrase of the prevailing standard of disclosure in another context, Rule 10b-5[7] promulgated by the U.S.

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5 *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951) . See also *Emspak v. United States*, 349 U.S. 190 (1955) ; *Blau v. United States*, 340 U.S. 159 (1950) ; *Blau v. United States*, 340 U.S. 332 (1951) .

6 *Griffin v. California*, 380 U.S. 609, 614 (1965) . The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. See *Wilson v. United States*, 149 U.S. 60 (1893) . In *Carter v. Kentucky*, 450 U.S. 288 (1981) , the Court held that the self–incrimination clause required a State, upon the defendant's request, to give a cautionary instruction to the jurors that they must disregard the defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. *Bruno v. United States*, 308 U.S. 287 (1939) . In *Lakeside v. Oregon*, 435 U.S. 333 (1978) , the Court held that a court may give such an instruction, even over the defendant's objection. *Carter v. Kentucky* was applied in *James v. Kentucky*, 466 U.S. 341 (1983) (request for a jury "admonition" is sufficient to invoke the right to an "instruction.")

7 17 C.F.R. § 240.10b-5

Securities Exchange Commission under the Securities Exchange Act of 1934[8] governing the secondary trading of financial securities. Applying an analog Rule 10b-5 to lawyers is clearly inappropriate. Issuers of securities are the sole source of "truth" for prospective investors; there are no contrary advocates. So, imposing a higher standard of objectivity on those who serve as the sole source of "truth" might be appropriate. Nevertheless, as the financial markets have shown us in recent years (frank criminal misconduct notwithstanding), "truth" is, indeed, subjective.

Interestingly, Professor Ochieng'-Odhiambo focuses his arguments on *defense* lawyers. Criminal *prosecutors* are – at least in the U.S. – subject to much more stringent obligations of truth. ABA RPC 3.8 provides, in relevant part:

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

...

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

...

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.[9]

The ethical obligations applicable to prosecutors approach or exceed those of issuers of securities subject to Rule 10b-5. And, the rationale for imposing these more substantive requirements on prosecutors is justifiable because they are not viewed as advocates, but as "ministers of justice."[10]

Contrarily, it equally interesting that Professor Ochieng'-Odhiambo excludes from his analysis the obligations of candor owed by civil plaintiffs' lawyers ("trial lawyers"). An inquiry into their obligations to truth and justice might be more valuable.

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8 15 U.S.C. § 78a, et seq.

9 American Bar Association, *supra*.

10 *Id.* See comment to Rule 3.8.