LEGAL ETHICS INQUIRY 78-4

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Reference is made to your letter addressed to the Committee on Legal Ethics of The West Virginia State Bar.

You state in your letter that you represent two clients who, being indicted for separate crimes, are free on bail pending trial, the dates for which have been set. You further state that neither of your clients has been arraigned and that neither has been brought into court and asked to plead to the indictments against them. You believe the prosecutor and judge have forgotten that your clients have not been arraigned. You believe that if you say nothing about the failure to arraign your clients, they will be tried without arraignment. If that happens, the trials will be set aside and new trials will be impossible because your clients have once been put in jeopardy. The situation is further complicated by the fact that the original trial judge has removed himself from both of the cases and a new judge, unfamiliar with the cases, has been appointed to preside over the trials.

You asked whether you have a duty to bring the omission to arraign your clients to anyone's attention or whether you may "sit back and let things happen."

There is, surprisingly, a dearth of authority with respect to the matter about which you inquire. Opinions of the Committee on Professional Ethics of the American Bar Association with respect

to related matters appear to have little application to the present problem.

In Formal Opinions 146 and 280 the Committee on Professional Ethics of the American Bar Association held that a lawyer appearing in a case was under a duty to advise the court of decisions adverse to his client's contention known to him and unknown to his adversary. In Opinion 146 the Committee said:

> A lawyer is an officer of the court (Ex parte Garland, 4 Wall 333, 378; People v. Gorman, 178 N.E. 880, 346 Ill. 432; Bowles v. United States [C.C.A.4] 50 Fed. [2d] 848). His obligation is to his client (In re Bergeron, 220 Mass. 472, 107 N.E. 1007). His oath binds him to the highest fidelity of the court in the due administration of justice (Dodge v. State, 104 Ind. 284, 39 N.E. 745; People v. Gorman, supra; United States v. Frank, 53 Fed. [2d] 128).

In Opinion 280 the Committee said:

> The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position. His personal belief in the soundness of his cause, or of the authorities supporting it, is irrelevant.

The duty of the lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. It is the lawyer's duty to assist members of the public to secure and protect available legal rights and benefits. Each member of our society is entitled to have his conduct judged and

regulated in accordance with the law and to seek any lawful objective through legally permissible means and to present for adjudication any lawful claim, issue or defense.

The bounds of the law in a given case are often difficult to ascertain. Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as an advocate or an adviser. While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. He is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

"Lawyers are sometimes accused of taking advantage of 'loopholes' and 'technicalities' to win. Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win, and if he does not exercise every legitimate effort in his client's behalf, then he is betraying a sacred trust." Rochelle & Payne, The Struggle for Public Understanding, 39 Tex. B.J. 109, 159 (1962). So long as the advocate does not resort to fraud, chicanery or misrepresentation, he is within the bounds of the law.

We know of no principle which requires you as defense counsel to point out to the prosecuting attorney all deficiencies in the proceedings against your clients. They are entitled to a trial in accordance with the law of the state. If the proceedings are defective, you are under no duty to point out those defects to the court or to the prosecutor in advance so they may be corrected.

Certainly, you are under no duty to try the prosecutor's case for him. Of course, you may not by your own actions deliberately induce error or mislead the prosecutor so as to cause him to commit error. However, you may remain silent and you are under no duty to call to anyone's attention the failure to arraign your clients as required by law.

As pointed out above, candor and frankness require a lawyer to call adverse decisions to the court's attention. Furthermore, with respect to the last paragraph of your letter, you would have been under a duty to disclose to the court the ineligibility of a member of the jury panel known to you. When a lawyer knows that a prospective juror is directly interested in the outcome of the case, and such juror in answering the questions on his voir dire concerning his impartiality fails to disclose the fact, it is not fair to the court to permit such juror to be selected. Drinker, Legal Ethics, p. 77 (1953). In our opinion, these principles do not apply to the situation about which you inquire.