

THE DUTY TO THE TRUTH: DEFENSE TECHNIQUES AND LEGAL ETHICS IN THE MIDDLE AGES AND EARLY MODERN PERIOD

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Abstract: During Middle and Early Modern Ages, the lawyer's duty to the truth was stated within a wider debate about defense techniques, in which two different concepts of the role of the lawyer as acting as a participant in the administration of justice were discussed. The prohibition to give false or misleading information to the court was certain. The matter all concentrated on the limits of legal argumentation, balancing out the protection of his own client's interests, with particular regards to the respect of professional secrecy, and the cooperation with the judge in the pursuit of the truth.

Keywords: Lawyer ; legal ethics ; truth ; Middle Ages ; Early Modern Ages

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1. *Ban on defending unjust causes and ban on resorting to unjust means to defend a cause.*

1.1. *Medieval premises: the debate between canonists and theologians.*

«Ad iustitiam causae pertinet etiam modus, unde non solum Advocatus, antequam suscipiat causas debet advertere, si sit iusta, et nullis iniustis conditionibus coniuncta, sed etiam in progressu ipsius causae debet summopere pro defensione suae animae cavere, ne iniustus modus aliqua ratione interveniat»¹.

In the middle of the seventeenth century, the theologian Pietro Paolo Guazzini expressed the principle cited above in his *Tractatus moralis ad defensam animarum advocatorum, iudicum, reorum*. It was a widely shared ethic in the early modern period, and indeed it is still very much alive in the present day: it held that a lawyer was to actively participate in the administration of justice², meaning that he had an obligation to avoid defending unjust causes³, as well as to conduct himself during trial in accordance with what the code of conduct for Italian lawyers today defines as a duty to the truth⁴.

In the Middle Ages, jurists and theologians conceived of what is today described as a duty to the truth as a ban on resorting to unjust means to defend a cause. Just like the ban on defending an unjust cause, this

¹ P.P. Guazzini, *Tractatus moralis ad defensam animarum advocatorum, iudicum, reorum*, Venetiis, 1650, p. 38b, n. 1.

² For a classic piece on the idea of the legal profession as a fundamental element of the legal system, see P. Calamandrei, *L'avvocatura nella riforma del processo civile*, in Id., *Opere giuridiche*, M. Cappelletti (ed.), vol. II, *Magistratura, Avvocatura, studio e insegnamento del diritto*, Napoli, 1966, pp. 12-64 (especially p. 31), and Id., *Troppi avvocati*, ibid., pp. 69-194 (especially pp. 69-71).

³ On the subject of the ban on defending unjust causes and on the elaboration of the concept of *causa iniusta* in the Middle Ages, see R. Bianchi Riva, *L'avvocato non difenda cause ingiuste. Ricerche sulla deontologia forense in età medievale e moderna. Parte prima, Il medioevo*, Milano, 2012.

⁴ Art. 50 of the code of conduct for Italian lawyers. In addition, see R. Danovi, *Dovere di verità e dovere di lealtà nella deontologia forense*, in Id., *Saggi sulla deontologia*, Milano, 1987, pp. 95-104.

concept was divided into various rules, the basis of which remained consistent into the early modern period⁵: namely, the oath *de calumnia* that Justinian had required *patroni causarum* to take under his constitution *rem non novam*⁶. At times, these rules had also been expressed in the wording of oaths formulated under canon law and local law⁷.

The ban on defending unjust causes had been the result of careful reflection on the professional oath a lawyer was to take; on the contrary, the ban on using unjust means to defend a cause had been the result of a wide-ranging debate revolving around defense techniques. This discussion had led to two opposing views on the role of the legal profession in the administration of justice: on the one hand, there was the opinion that a lawyer could resort to any means necessary to defend his client if it was a just cause; on the other hand, there was the conviction that resorting to such means was absolutely forbidden when it meant being dishonest to attain justice.

There was a passage in the *Decretum* that allowed anyone who was fighting a just war to resort to deception and ambush⁸. In keeping with the traditional portrayal of lawyers as *militēs*⁹, the provisions of the canon

⁵ B. Agricola, *Advocatus, sive de qualitatibus et officio boni advocati*, Neapoli Nemetum, 1647, p. 105.

⁶ The oath's wording evoked the values of truth and justice, see Cod. 3, 1, 14, 4 (1), *de iudiciis* l. *rem non novam* § *patroni*. On *iuramentum de calumnia* by Justinian, see also N. Sarti, *Maximum dirimendarum causarum remedium. Il giuramento di calunnia nella dottrina civilistica dei secoli XI-XIII*, Milano, 1995. On the subject of the professional oath taken by lawyers and its use in practice, see Bianchi Riva, *L'avvocato non difenda cause ingiuste* (nt. 3), pp. 9-42, 52-77.

⁷ I refer to the ban on making false statements, producing false evidence, suborning false witnesses, and suborning clients; see *Sacrorum conciliorum nova et amplissima collectio*, J. Mansi (ed.), vol. 23, Graz, 1961, coll. 218-219, 240-241; *Constitutiones regni Siciliae tum Melfienses, tum quae postea diversis temporibus a Friderico secundo editae fuerunt*, in *Historia diplomatica Friderici Secundi*, J.L.A. Huillard-Breholles (ed.), Paris, 1854, vol. IV, part I, pp. 62-63.

⁸ Decr. C. 23 q. 2 c. 2, *dominus*.

⁹ Cod. 2, 7, 14, *de advocatis diversorum iudiciorum* l. *advocati*. On the definition of lawyers as soldiers, see V. Piergiovanni, *Tra difesa e consulenza: tipologie professionali degli avvocati nelle società di antico regime*, in *Un progetto di ricerca sulla storia dell'avvocatura*, G. Alpa, R. Danovi (ed.), Bologna, 2003, pp. 69-79 (especially pp. 70-71).

dominus could be analogously applied to legal defense, and the ordinary gloss on the *Decretum* had established that a lawyer could legitimately «decipere adversarium suum»¹⁰ if he was defending a just cause.

This view had then been reaffirmed by the gloss on the decretal *cupientes*, which was contained in the *Liber Sextus*: he who was on the side of a just cause could react to the *cavillationes* and *malitiae* of his opponent by resorting to the same means, thanks to the principle of equality of arms in legal proceedings¹¹.

Thus, the need to have justice prevail would have justified even the most audacious of defensive tactics. But just how far could a lawyer have pushed his cunning? For example, could he have asserted factual circumstances that did not correspond to reality, or produced false documents or false witnesses? Or would he have had to limit himself to providing a partial account of the facts or an incomplete description of what legal doctrine had to say about the issue?

The gloss on the decretal *cupientes* had re-evaluated the possibility to resort to *insidiae*, as permitted by the gloss on the canon *dominus*: indeed, it held that legal sophistry was acceptable, but resorting to falsehoods was not¹². This ban on using falsehoods in legal proceedings would eventually become a cornerstone of the *ius commune*, and no one would dare question it, at least not openly.

Nonetheless, in what was perhaps more than a coincidence, legal doctrine would come to misinterpret the meaning of the two glosses: as such, the only part that would be passed down was that which allowed a lawyer to ‘deceive’ his opponent, while the opinion of St. Thomas would be help up in contrast, as it established more restrictive limits on how to carry out a defense.

¹⁰ Gl. *insidijs* ad Decr. C. 23 q. 2 c. 2, *dominus*. On this subject, see S. Di Noto Marrella, *L'avvocato in un trattatista del tardo Cinquecento*, in *A Ennio Cortese*, tome I, Roma, 2001, pp. 436-454 (especially p. 442).

¹¹ Gl. *malignantium* ad VI, 1, 6, 16, *de electione et electi potestate c. cupientes*. On the principle of equality of both parties, see C. Storti, “*Aequalitas servanda est in iudiciis*”. *Il principio di uguaglianza delle parti nel processo del diritto comune classico*, in «Rivista internazionale dei diritti dell'uomo», 5 (1991), pp. 58-81.

¹² Cf. gl. *malignantium* ad VI, 1, 6, 16, *de electione et electi potestate c. cupientes*.

Indeed, Thomas Aquinas had specifically forbidden a lawyer from using fraudulent falsehoods. Once again, he had made reference to the analogy between the military *ordo* and the legal profession: just as it would have been lawful for a soldier or general fighting a just war to resort to subterfuge and ambush, by prudently concealing his strategies, so too could a lawyer defending a just cause conceal that which might hinder his client's case, or that which might be favorable to his opponent¹³. Saint Augustine, too, had drawn a distinction between stating falsehoods and concealing the truth¹⁴, which would later be adopted by the *Decretum*: according to him, the ban on using unjust means to defend a cause did not include an obligation to produce evidence that would be disadvantageous to one's own client. As Pietro Paolo Guazzini would point out, remaining silent would come to be associated with shrewd strategy¹⁵. Hence, a lawyer's only weapon for fighting the unfounded claims of an opponent was to knowingly omit information.

In both the theological and canonical theories, the entire issue came down to the not-always-clear distinction between silence, half-truths and falsehoods.

In formulating the *cautelae advocatorum*, the *ordines iudicarii* had already highlighted the need to distinguish between lying, which was strictly forbidden, and sophistry, which was seen in the same light as *dolus bonus*. As a matter of fact, in the middle of the thirteenth century Bonaguida d'Arezzo had advised legal professionals not to lie in court, but rather to show off their eloquence¹⁶. From this perspective, a defender was not to make use of *falsitates*, even if it seemed to be the only way to counter the unfounded claims of his opponent; on the contrary, he was to resort to *cavillationes*, and ultimately, to rely solely upon his own rhetorical prowess.

¹³ Thomas of Aquinas, *Summa Theologiae*, IIa IIae, q. 71 art. 3.

¹⁴ Decr. C. 22, q. 2, c. 14, *ne quis*.

¹⁵ Cf. Guazzini, *Tractatus moralis* (nt. 1), p. 38b, n. 2.

¹⁶ Bonaguida d'Arezzo, *Summa introductoria super officio advocacionis in foro ecclesiae*, in *Anecdota quae processum civilem spectant*, A. Wunderlich (ed.), Gottingae, 1841, pp. 121-345 (especially p. 158).

Some canonists thought it wiser to adopt the teachings of Thomas Aquinas, as they were aware of the fine line between sophistry and lying. For example, Antonius de Budrio had declared his preference for the theological viewpoint over what he felt was an excessively liberal opinion based on the glosses on *corpus iuris canonici*¹⁷.

Alberico de Rosate, however, had reached the same conclusion as that of the two glosses, even though it went against the severe criticism he had sometimes reserved for the legal profession. The experience he had gained in court had prompted him to perform an exegetic reading of the constitution *rem non novam*, and this in turn had probably led him to believe that a favorable outcome to a dispute would have justified any expedient that the defender might have resorted to in order to win the case¹⁸.

1.2. *The early modern period: lawyers and the fine line between cavillationes and falsitates.*

Medieval and modern-age jurisprudence had no qualms about embracing the opinion that a lawyer defending a just cause could mislead his opponent¹⁹.

Between the fourteenth and sixteenth centuries, the compendiums of law and theology known as *summae confessorum* attempted to find a balance between Saint Thomas's theory – which was unequivocal in banning the use of falsehoods during a trial – and that of the glosses on the *Decretum* and *Liber Sextus*, which, as shown above, had taken on a certain meaning in subsequent legal tradition. Thus, lawyers were permitted to use «cavillationes et malitias», «dummodo non opponant falsas allegationes»²⁰.

¹⁷ Antonio de Budrio, *Lectura super Quarto Decretalium*, 1532, *Lectura super X*, 4, 17, 12, *qui filii sint legitimi c. per tuas*, f. 49ra, n. 20.

¹⁸ Alberico de Rosate, *In Primam Codicis partem Commentarii*, Venetiis, 1586 (anastatic reprint Bologna, 1979), *Comm. in Cod. 3, 1, 14, de iudiciis l. rem non novam*, n. 4-5. On this subject, see Bianchi Riva, *L'avvocato non difenda cause ingiuste* (nt. 3), pp. 75-76.

¹⁹ See A. Alciato, *Opera omnia*, tomo II, *In Pandectarum seu Digestorum Iuris civilis septimae partis titulos aliquot Commentaria*, Francofurti, 1617, col. 1045, n. 11. This tactic was also accepted by the Reichskammergericht, cf. A. Gaill, J. Mynsinger, *Observationes practicae Imperialis Camerae*, Augustæ Taurinorum, 1609, lib. II, obs. VI, f. 337vb, n. 1.

²⁰ S. Mazzolini, *Summa Sylvestrina quae summa summarum merito nuncupatur*, Venetiis, 1581, *pars prima*, v. *Advocatus*, f. 27ra, n. 6; A. Carletti, *Summa Angelica de casibus*

This meeting of the legal and theological traditions was fertile terrain for the legal treatises circulating in Europe between the sixteenth and seventeenth centuries, which called for greater responsibility in the employment of defense techniques and reaffirmed a ban on «mentiri vel falsitate uti». The idea was to curb a lack of restraint on the part of the members of the legal profession; to make them aware of the inherent risks in taking too many liberties when arguing their case. Nonetheless, this concept did not exclude the possibility of using this kind of argumentation to their advantage.

For example, the above-mentioned Pietro Paolo Guazzini approved of the use of deceit, as long as it did not turn into lying²¹. And in his *De officio iudicis et advocati liber unus*, the Catalan Juan Pablo Xammar also allowed a lawyer to deceive his opponent «arte et dolo, id est solertia, dilationibus, et subterfugijs ac fallacijs», though he urged caution in interpreting the two glosses²². Only the Castilian lawyer Melchor Cabrera Nuñez de Guzman returned to the original meaning of the canonical texts in his *Idea de un abogado perfecto*: thus, he permitted a lawyer to defend by resorting to «stratagema util a su parte», in accordance with the gloss on the canon *dominus*, but not to falsehoods, as asserted in the gloss on the decretal *cupientes*²³.

On the other hand, the Cremona-born Giovanni Pietro Ala, writing in his *Tractatus brevis de avvocato et causidico christiano*, felt that it was wiser to subscribe to Saint Thomas's theory that «ne falsitate, aut mendacio adiuvent causam»²⁴. Ephraim Nazius also repudiated the canonical gloss in a dissertation on the *conscientia advocati* directed by

conscientialibus, Venetiis, 1578, v. *Advocatus*, f. 31va, n. 10. On the literary genre of *summae confessorum*, see lastly M.G. Di Renzo Villata, *L'iniuria entre religion morale et droit dans les sommes de casuistique italiennes du XIVe-XVIe siècle. Quelques remarques, in L'offense. Du «torrent de boue» à l'offense au chef de l'État*, J. Hoareau-Dodineau, G. Métairie (ed.), Limoges, 2010, pp. 201-223.

²¹ Guazzini, *Tractatus moralis* (nt. 1), p. 38b, n. 1 e ss.

²² J.P. Xammar, *De officio iudicis et advocati*, Barcinonae, 1639, f. 229rb, n. 6.

²³ M. Cabrera Nuñez de Guzman, *Idea de un abogado perfecto*, Madrid, 1683, p. 168.

²⁴ G.P. Ala, *Tractatus brevis de avvocato, et causidico christiano, in duas partes divisus*, Mediolani, 1605, p. 43.

Samuel Stryk. In fact, he denied the basis of the gloss itself, namely that war and litigation were analogous, on the grounds that, contrary to parties in court, «belligerantes [...] Judicem superiorem non habent, qui motam discordiam componat»²⁵. Nonetheless, Stryk permitted the use of rhetoric to a far greater extent than the strict limits that Thomas Aquinas appeared to have imposed on it.

Judging from how much early modern treatises reiterated the ban on resorting to fraudulent falsehoods during legal proceedings, the ban must have been frequently disregarded; so much so that a need arose to formulate rules of conduct, the aim of which was to help define the legal profession's cooperative role in the administration of justice, while at the same time restoring dignity to the profession itself.

2. *The ban on producing false evidence or using false statements in legal proceedings.*

As mentioned above, the ban on resorting to unjust means to defend a cause was divided into distinct and independent rules, each of which had been specifically cited in past works on legal procedure, and especially in thirteenth-century textbooks *de instructione advocatorum*²⁶.

First and foremost, a lawyer was to do his part to achieve the truth – which indeed was the goal of the entire justice system – by refraining from fabricating events or producing false evidence. Writing in the middle of the fifteenth century, the Sieneese jurist Giovanni Battista Caccialupi summed up as much in his *De advocatis*: such conduct would have posed a “danger” from which a legal professional «debet omni providentia cum diligentia se tutum reddere»²⁷.

²⁵ E. Nazius, *Dissertatio de conscientia advocati [...] in Academia Viadrina praeside dn. Samuele Strikio [...] Ad diem 21 April. Anno 1677 [...]*, Francofurti ad Viadrum, 1683, p. 51, n. 62 e s.

²⁶ On the genre of books *de instructione advocatorum*, see N. Sarti, *Un giurista tra Azzone e Accursio. Iacopo di Balduino (...1210-1235) e il suo “Libellus instructionis advocatorum”*, Milano, 1990, and lastly, N. Sarti, S. Bordini, *L’avvocato medievale tra mestiere e scienza giuridica. Il Liber cautele et doctrine di Uberto da Bobbio (...1211-1245)*, Bologna, 2010.

²⁷ G.B. Caccialupi, *De Advocatis*, in *Tractatus universi iuris*, tome III, *De Iudiciis*, part I, Venetiis, 1584, ff. 359vb-362ra (especially f. 361ra, n. 10). On the relationship between

This rule was based on the teachings of Guillaume Durand's *Speculum iudiciale*.

If a lawyer had produced an untruthful *instrumentum*, he would have been punished for forgery²⁸, unless he was able to demonstrate that he had been unaware of the falsity of the document. For this reason, lawyers were urged to check that the documents provided by their clients had not been altered in any way, especially if they harbored any doubts in that regard²⁹.

A lawyer was also not allowed to suborn false witnesses to commit perjury³⁰. Ugolino da Sesso had pointed out that consulting with a witness simply to find out what he knew did not constitute a violation of this rule³¹. Nonetheless, Bonaguida d'Arezzo had advised defense lawyers not to speak with witnesses before their deposition³², in order to avoid what Uberto da Bobbio had described as shameful and dishonorable accusations³³. Indeed,

evidence and the search for the truth, see A. Giuliani, *Il concetto di prova. Contributo alla logica giuridica*, Milano, 1961; G. Ubertis, *Fatto e valore nel sistema probatorio penale*, Milano, 1979; Id., *La ricerca della verità giudiziale*, in *La conoscenza del fatto nel processo penale*, Id. (ed.), Milano, 1992, pp. 1-38.

²⁸ On *crimen falsi*, see G.P. Massetto, *I reati nell'opera di Giulio Claro*, in Id., *Saggi di storia del diritto penale lombardo (secc. XVI-XVIII)*, Milano, 1994, pp. 61-227 (especially pp. 121-123).

²⁹ Guillaume Durand, *Speculum iuris*, Augustae Taurinorum, 1578, *pars prima*, f. 118va, n. 8.

³⁰ *Ibid.*, n. 12. Cf. art. 377 of the Italian Criminal Code and art. 55 of the code of conduct for Italian lawyers.

³¹ Ugolino da Sesso, *Tractatus de testibus*, Barcelona, Archivio de la Corona de Aragon, ms. S. Cugat 55, f. 144ra. The manuscript is published in *Tres lecciones del siglo XII del estudio general de Palencia*, in «Anuario de historia del derecho español», 60 (1991), pp. 391-449 (especially p. 444). The treatise by Ugolino da Sesso was the subject of A. Bassani's speech entitled *The Tractatus de testibus by Ugolino da Sesso*, delivered at the *14th International Congress of Medieval Canon Law (Toronto, 5-11 August, 2012)*.

³² Bonaguida d'Arezzo, *Summa introductoria super officio advocacionis* (nt. 16), p. 158. On the relationship between lawyer and witness, see D. Carponi Schittar, *La menzogna nel processo. Non dire falsa testimonianza*, Milano, 2004, pp. 105-134.

³³ The *Liber cautelae et doctrinae* by Uberto da Bobbio is published in Sarti, Bordini, *L'avvocato medievale tra mestiere e scienza giuridica* (nt. 26), pp. 203-350 (especially p. 212).

false testimony was considered a very serious crime, so much so that Hostiensis – who had claimed that it was one of the most widely-used practices in court – had maintained that any lawyer guilty thereof should be disgraced and punished on the same level as a murderer³⁴.

The practice of resorting to false witnesses must have become a very frequent occurrence during the early modern period, though there were some exceptions, as proudly recounted by Pietro Paolo Guazzini: indeed, he boasted of the fact that his father, the jurist Sebastiano Guazzini, had never approached a witness before his examination³⁵. According to Giovanni Pietro Ala, these crimes were committed mainly in defense of the accused³⁶, and specifically through an agreement between the lawyer and the notary in charge of recording depositions, whereby the latter would not administer the oath to the witnesses and thus allow them to lie «alacri animo». In that regard, Ala pointed out that even though the false deposition often resulted in the accused not being sentenced, it still obstructed the course of justice, and as such it would not have exempted the witness, the lawyer or the notary from being charged with making false statements and/or perjury³⁷.

3. *Legal argumentation: the fine line between the art of rhetoric and lying.*

The ban on resorting to unjust means to defend a cause was not only to be observed during the preliminary inquiry, but also during the closing arguments that followed³⁸. Guillaume Durand had cautioned defense lawyers against producing «falsam legem vel canonem, cuius auctor ignoratur, vel

³⁴ Henry of Segusio, *Summa*, Lugduni, 1542, f. 275ra, n. 32.

³⁵ Guazzini, *Tractatus moralis* (nt. 1), p. 39a, n. 4.

³⁶ Ala, *Tractatus brevis de avvocato* (nt. 24), p. 98.

³⁷ Ala, *Tractatus brevis de avvocato* (nt. 24), p. 100.

³⁸ On the relationship between legal argumentation and the professional oath taken by lawyers, see Bianchi Riva, *L'avvocato non difenda cause ingiuste* (nt. 3), pp. 41-42. On the subject, see also *L'arte del difendere. Allegazioni avvocati e storie di vita a Milano tra Sette e Ottocento*, M.G. Di Renzo Villata (ed.), Milano, 2006. Lastly, see also F. Procchi, *Verità e verosimiglianza nelle argomentazioni del difensore*, in *L'argomentazione e il metodo nella difesa*, A. Mariani Marini, F. Procchi (ed.), Pisa, 2004, pp. 75-84.

abrogatam»³⁹, or resorting to strained interpretations of the rules⁴⁰. Once again, in this case a lawyer could be charged with making false statements⁴¹.

What's more, refraining from false argumentation was simply in the lawyer's best interests. The German Bartholomaeus Agricola, who penned a *relectio* of the *lex advocati*, highlighted how recourse to unfounded arguments could weaken the defense and thereby jeopardize a client's case: not only would the lawyers lose credibility in the eyes of the magistrates⁴², but also in what today we would call the 'court of public opinion', as pointed out in a treatise by the Frisian lawyer Jacob Bouricius⁴³.

While it was agreed that false statements were to be banned, wide use of legal rhetoric was nonetheless permitted, so that a lawyer could make a more convincing case when defending; this was in keeping with a tradition that could be traced back to Bonaguida da Arezzo. Tiberio Deciani openly embraced *malitiae*, *fraudes* and *cavillationes*, «si aliter facere non potest», and seemed to justify the use of any means that the defense deemed convenient⁴⁴. On the other hand, it is worth noting that Guazzini saw the art of rhetoric as a lawyer's last resort when trying to save the life of a client who was on trial for a crime that was punishable by death⁴⁵.

As affirmed by the *summae confessorum*, a lawyer would be able to conceal the "weak points" of his defense strategy by resorting to ambiguous expressions⁴⁶ or «hiperboles et exagerationes»⁴⁷.

³⁹ Guillaume Durand, *Speculum iuris* (nt. 29), *pars prima*, f. 118va, n. 9.

⁴⁰ Ibid., n. 10. See also *additio* ad Cino da Pistoia, *Super Codice et Digesto veteri lectura*, Lugduni, 1547, *Lectura super Cod. 2*, 58 (59), 1, *de iureiurando propter calumniam dando l. in omnibus*, f. 86rb; Alberico de Rosate (nt. 18), *Comm. in Cod. 3*, 1, 14, *de iudiciis l. rem non novam*, f. 139ra, n. 1.

⁴¹ Guillaume Durand, *Speculum iuris* (nt. 29), *pars prima*, f. 118va, n. 10. Cf. Massetto, *I reati nell'opera di Giulio Claro* (nt. 28), pp. 116-127.

⁴² Agricola, *Advocatus* (nt. 5), p. 105.

⁴³ J. Bouricius, *Advocatus*, Leovardiae, 1650, p. 13.

⁴⁴ T. Deciani, *Tractatus criminalis*, Augustae Taurinorum, 1593, tome I, f. 6ra, n. 18.

⁴⁵ Guazzini, *Tractatus moralis* (nt. 1), p. 40a, n. 10; Xammar, *De officio iudicis et advocati* (nt. 22), f. 229rb, n. 4.

⁴⁶ See the examples presented by Mazzolini, *Summa Sylvestrina* (nt. 20), *pars secunda*, v. *Mendacium*, f. 174ra, n. 6.

Not only was a lawyer allowed to keep inconvenient truths from coming out, he was also allowed to use smoke and mirrors to make his case. Drawing on canonical tradition⁴⁸, legal treatises permitted lawyers to embellish their defense with «colorata et persuasiva»⁴⁹. It had been observed that when delivering their sentences, judges frequently cited reasons that were ostensibly well-founded⁵⁰, yet in reality irrelevant or immaterial to the case. This had led jurists to permit lawyers to use a form of argumentation that could convince a judge to decide in favor of their clients, even if it was not entirely germane to the *quaestio iuris* being disputed – especially if the judge was not well-educated, as Panormitano had made clear⁵¹.

Though there was no doubting the importance of the methods of argumentation used to persuade judges, lawyers were nonetheless cautioned against crossing the line that separated rhetorical artifice from lying⁵². Indeed, they were to carry out their defense within well-defined boundaries: respect for their client's interests on the one hand, respect for justice on the other.

⁴⁷ Guazzini, *Tractatus moralis* (nt. 1), p. 40a. See also Xammar, *De officio iudicis et advocati* (nt. 22), f. 229rb, n. 5.

⁴⁸ Johannes Andrea, *In Quartum Decretalium librum Novella Commentaria*, Venetiis, 1581, Comm. in X, 4, 17, 12, *qui filii sint legitimi c. per tuas*, f. 57va, n. 7; Peter of Ancarano, *Lectura aurea ac pene divina super Quarto et Quinti libro Decretalium*, 1535, Lectura super X, 4, 17, 12, *qui filii sint legitimi c. per tuas*, f. 41ra, n. 10; Nicolò de' Tudeschi, *In Quartum et Quintum decretalium lib. Interpretationes*, Lugduni, 1547, Comm. in X, 4, 17, 12, *qui filii sint legitimi c. per tuas*, f. 51vb, n. 6; Antonio de Budrio (nt. 17) *Lectura super X, 4, 17, 12, qui filii sint legitimi c. per tuas*, f. 49ra, n. 19.

⁴⁹ Ala, *Tractatus brevis de avvocato* (nt. 24), p. 45

⁵⁰ Ibid.; Xammar, *De officio iudicis et advocati* (nt. 22), f. 229va, n. 8.

⁵¹ Nicolò de' Tudeschi (nt. 48), Comm. in X, 4, 17, 12, *qui filii sint legitimi c. per tuas*, f. 51vb, n. 6.

⁵² Xammar, *De officio iudicis et advocati* (nt. 22), f. 229va, n. 8. On legal rhetoric, see B. Mortara Garavelli, *L'oratoria forense: tradizioni e regole*, in *L'avvocato e il processo. Le tecniche della difesa*, A. Mariani Marini, M. Paganelli (ed.), Milano, 2003, pp. 69-92; *L'argomentazione e il metodo nella difesa* (nt. 38); *Ragionare in giudizio. Gli argomenti dell'avvocato*, U. Vincenti, A. Mariani Marini, F. Cavalla (ed.), Pisa, 2004; *Retorica e deontologia forense*, M. Manzin, P. Moro (ed.), Milano, 2010.

4. *Towards a duty to the truth: the lawyer and his party during trial.*

4.1. *Educating caudices about the truth: criticism of the legal profession.*

The truth is an ineliminable feature of the relationship between a lawyer and his client: it is the premise of trust upon which that relationship is based. In that regard, it is important to remember that according to the *Decretum*⁵³, a lawyer was on an equal footing with a doctor or a confessor⁵⁴.

Procedure in the *ius commune* required a litigant to tell the truth during trial: if a party was personally summoned to make statements during any part of the legal procedure, he was considered a witness and required to take an oath. As Alberico de Rosate had pointed out, equating the duties of a litigant with those of a witness meant that the defender could not counsel his client to make false statements; on the contrary, he was to exhort him to answer without denying the facts or fabricating events⁵⁵.

Thus, a lawyer's duty to the truth arose out of the analogous duty that a party was to respect during trial, and it came to include a lawyer's conduct as well: hence the ban on resorting to unjust means to defend a cause.

Starting in the thirteenth century, special attention had been dedicated to *positiones*⁵⁶. Members of the legal profession had been considered a cunning bunch: so much so that they were reputed to be willing to abet their clients in coming up with false statements or answers just to win a

⁵³ Decr. C. 22 q. 2 c. 9, *cum humilitatis*; Decr. D. 6 c. 1, *testamentum*.

⁵⁴ Guillaume Durand, *Speculum iuris* (nt. 29), *pars prima*, f. 111vb, n. 2.

⁵⁵ Alberico de Rosate (nt. 18), *Proemium*, f. 2vb, n. 17. Jurists also deduced that witnesses could be submitted to torture, based on the fact that party and witness were of equal status, in L. Garlati, *Il "grande assurdo": la tortura del testimone nelle pratiche d'età moderna*, in «Acta Histriae», 19 (2011), pp. 81-104.

⁵⁶ On the *positio* and the fundamental importance of a confession in a civil trial, see Giuliani, *Il concetto di prova*. (nt. 27), pp. 169-174; M. Cappelletti, *La testimonianza della parte nel sistema dell'oralità. Contributo alla teoria della utilizzazione probatoria del sapere delle parti nel processo civile. Parte prima*, Milano, 1962. On a confession as evidence in old-regime trials, see P. Fiorelli, voce *Confessione (storia)*, in *Enciclopedia del diritto*, vol. VIII, Milano, 1961, pp. 864-870; I. Rosoni, *Quae singula non prosunt, collecta iuvant. La teoria della prova indiziaria nell'età medievale e moderna*, Milano, 1995, pp. 75-76.

case, and in that way obtain fame and fortune. The ordinary gloss on the decretal *statuimus* had addressed this by denouncing the habit by which lawyers only warned their clients of the immediate consequences of their statements, while ignoring the spiritual⁵⁷ consequences thereof. In keeping with a practice that had been observed in other courts of law, the gloss had thought it more prudent to remove defense lawyers from the courtroom so as to avoid influencing their clients⁵⁸.

In the early modern period, the debate surrounding the legal profession was fueled even further by *procuratores* and *solicitatores* who illicitly defended clients without the educational qualifications required of lawyers⁵⁹. Giovanni Pietro Ala attempted to restore prestige to jurists who held university degrees by holding underqualified practitioners responsible for the violation of professional norms: to that end, he attributed the *infiniti errores* committed in the Court of Cremona – «in responsione ad positiones partis contrariae» – to the slyness and negligence of *causidici*. According to Ala, the *procuratores* who took on the defense of cases without a lawyer's assistance would frequently counsel their clients to deny the facts, if they did not do it themselves when summoned to act in *nomine clientis*. In particular, *causidici* were known to routinely dispute the content of documents that they themselves had drawn up in their capacity as notaries: not only did they not want to corroborate their opponent's case with their own statements, but above all, this would force the parties who had to fulfill the burden of proof to pay the notarial fees needed to obtain certified copies of the documents⁶⁰.

⁵⁷ Cf. gl. *statuimus* ad VI, 2, 9, 1, *de confessis c. statuimus*.

⁵⁸ See also G. Cagnazzo, *Summa Tabiena, quae summa summarum merito appellatur*, Venetiis, 1580, *pars prima*, v. *Advocatus*, p. 77a, n. 11.

⁵⁹ On the different figures who made up the legal profession, see A. Padoa Schioppa, *Brevi note sull'avvocatura nell'età del diritto comune*, in *Un progetto di ricerca sulla storia dell'avvocatura* (nt. 9), pp. 41-53. On the illicit exercise of defense by *causidici*, see F. Colao, *Procuratori e avvocati a Siena nel Settecento* in «Studi senesi», 37 (1988), pp. 630-652 (especially pp. 637-638); E. Pagano, *Avvocati ed esercizio della professione legale in Lombardia nel secondo Settecento. I causidici collegiati di Milano*, in «Rivista di storia del diritto italiano», 74-75 (2001-2002), pp. 355-418 (especially p. 411).

⁶⁰ Ala, *Tractatus brevis de avvocato* (nt. 24), p. 58-59. On *causidici* and notaries, see E. Brambilla, *Genealogie del sapere. Per una storia delle professioni giuridiche nell'Italia*

4.2. *Defense lawyers and the pursuit of the truth in old-regime criminal trials*

In their treatises, jurists put a great deal of emphasis on the principle of truth in criminal proceedings, and reference was made to both the lawyer and to the party he represented. The idea was to outline a set of rules that could suit both accusatorial and inquisitorial procedures, but more so the latter: indeed, it was here where the truth was held by the defendant alone, and it is a well-known fact that even torture was justified to have the truth come out⁶¹. There is no doubt that these early modern treatises were also referring to the inquisitorial system – widely practiced in old-regime courts – despite the fact that the defender had very little room for maneuver, which in turn meant that the defendant usually did not have a chance to consult his lawyer during questioning⁶². As is common knowledge, it was only after the *publicatio* that a defendant could consult his lawyer in order to agree upon a defense strategy. Criminal law scholars had debated over the possibility of having a court official be present during examination, «ne instruantur rei et ne occasio detur veritatem occultandi». This issue was also addressed by the *additio* to Claro's *Liber quintus*, which

padana, secoli XIV-XVI, in «Schifanoia», 8 (1989), pp. 123-150 (especially p. 143); R. Ferrante, *Il «governo delle cause»: la professione del causidico nell'esperienza genovese (XV-XVIII secolo)*, in «Rivista di storia del diritto italiano», 62 (1989), pp. 181-255 (especially p. 250). On the illegal acts committed during trial by those who were not qualified notaries in the early modern period, see F. Bambi, *Fides, la parola, i contesti. Ovvero, alla ricerca della publica fides*, in *Hinc publica fides. Il notaio e l'amministrazione della giustizia*, V. Piergiorganni (ed.), Milano, 2006, pp. 23-47.

⁶¹ On the relationship between the absolute truth and the inquisitorial trial, see F. Cordero, *Ideologie del processo penale*, Milano, 1966, pp. 152-153, 200-201; G. Alessi, *Processo penale (diritto intermedio)*, in *Enciclopedia del diritto*, vol. XXXVI, Milano, 1987, pp. 360-401 (especially p. 377); L. Garlati Giugni, *Inseguendo la verità*, Milano, 1999; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Bari, 2004, pp. 17-18. On torture, see P. Fiorelli, *La tortura giudiziaria nel diritto comune*, Milano, 1954; A. Giarda, «*Persistendo 'l reo nella negativa*», Milano, 1980; M. Sbriccoli, «*Tormentum idest torquere mentem*». *Processo inquisitorio e interrogatorio per tortura nell'Italia comunale*, in *La parola all'accusato*, J.-C.M. Vigueur, A. Paravicini Bagliani (ed.), Palermo, 1991, pp. 17-32.

⁶² On defense in old-regime criminal trials, see E. Dezza, *L'avvocato nella storia del processo penale*, in *Un progetto di ricerca sulla storia dell'avvocatura* (nt. 9), pp. 111-134 (especially pp. 113-116).

stated the opposite, namely that the conversations between lawyer and client were to be free from external influence or interference: in this way, the defendant could state all of the facts to his lawyer without concealing any details that would help prepare the best defense possible⁶³. In any case, the ban on lying was still wholly in force, though some recognized that the accused were naturally inclined to resort to it nonetheless, especially because they knew there were inherent flaws in the judicial system when it came to establishing the truth. Indeed, this same logic had led Gerolamo Cardano to advise defendants to use every trick in the book to get out of a trial unscathed, after his son Giovanni Battista fell victim to a miscarriage of justice and was sentenced to death for poisoning in 1560⁶⁴.

Even so, Egidio Bossi observed that a lawyer could not instruct a client to conceal the truth⁶⁵. On the other hand, Giovanni Pietro Ala told of how *advocati* and *causidici*, with a guilty conscience, would often counsel their clients to deny the accusations against them. In any case, Ala was of the opinion – which would later be shared by Xammar – that a distinction had to be made: if the magistrate had proceeded to examine the accused on the grounds of *legitimi inditii*, then the latter would have been duty-bound to respond truthfully; otherwise, the person under investigation would not have been obligated to confess. Nevertheless, this did not imply that the accused could lie, but only that he could evade the judge's questions by providing elusive answers⁶⁶. And this was exactly the case in which a lawyer's experience could prove useful to a defendant, by providing

⁶³ G.B. Baiardi, *additio* ad G. Claro, *Liber quintus, sive Practica criminalis*, Venetiis, 1626, p. 426b, n. 3.

⁶⁴ G. Cardano, *De utilitate ex adversis capienda*, M. Baldi, G. Canziani (ed.), Varese, 2004, pp. 761-784. On this court case, see C. Storti Storchi, *Gerolamo Cardano "giurista" e la giustizia*, in *Gerolamo Cardano nel suo tempo. Atti del Convegno 16-17 novembre 2001*, Pavia, 2003, pp. 207-219.

⁶⁵ E. Bossi, *Tractatus varii*, Lugduni, 1562, p. 142a, n. 18 e ss.

⁶⁶ Ala, *Tractatus brevis de avvocato* (nt. 24), pp. 95-96; Xammar, *De officio iudicis et advocati* (nt. 22), f. 232ra, n. 39. On the relationship between confession and clues, see L. Garlati Giugni, *Il diabolico intreccio. Reo convinto e indizi indubitati nel commento di Bartolomeo da Saliceto (C. 4.19.25): alle radici di un problema*, in *Panta rei. Studi dedicati a Manlio Bellomo*, O. Condorelli (ed.), tome II, Roma, 2004, pp. 387-419.

shrewd answers that neither aggravated the charges against him, nor denied the alleged facts. Indeed, a lawyer could neither counsel his client to lie, nor to remain silent, as silence was not an option in old-regime trials⁶⁷: the most he could do was instruct the defendant on how to navigate the judge's questions without contradicting himself.

Though the principle of *nemo tenetur se detegere* was beginning to be recognized as a natural right of the accused, it did not encroach upon the duty to the truth as expressed in treatises on the legal profession.

According to Samuel Pufendorf, a lawyer in a civil case could not object to his opponent with «simulationes, falsas allegationes, fictas rationes et dilatorias exceptiones»; in a criminal trial for violent crime, however, the lawyer would be allowed to resort to any means of defense that the accused was permitted to use. The natural law expert from Germany believed that it would not be the defense lawyer's powers that hindered the correct administration of justice, but that on the contrary, any miscarriages of justice would fall under the exclusive responsibility of the judge⁶⁸.

Although Pufendorf's distinction only referred to the type of argumentation used in court, Stryk was critical of it. The latter reaffirmed his stance that generally speaking, a party under examination could not deny the crimes he committed «salva conscientia»; consequently, the lawyer, too, could not build his defense on lies. While it was acknowledged that a defendant would be naturally inclined to deny having committed a crime, Stryk reiterated that there was indeed a legal obligation to respond truthfully, in addition to a moral duty to do so. This derived from the fact that evidence would have to be provided by the offender himself if he was to be promptly and effectively prosecuted, especially «in an inquisitorial procedure, which relied on, and anxiously strove to obtain, the defendant's testimony»⁶⁹.

⁶⁷ L. Garlati, *Silenzio colpevole, silenzio innocente. L'interrogatorio dell'imputato da mezzo di prova a strumento di difesa nell'esperienza giuridica italiana*, in *Riti, tecniche, interessi. Il processo penale tra Otto e Novecento. Atti del Convegno (Foggia, 5-6 maggio 2006)*, M.N. Miletta (ed.), Milano, 2006, pp. 265-339.

⁶⁸ S. Pufendorf, *Gesammelte Werke*, band 4.1, *De jure naturae et gentium*, F. Bohling (ed.), Berlin, 1998, p. 325.

⁶⁹ Garlati, *Silenzio colpevole, silenzio innocente* (nt. 67), p. 280.

For that reason, Stryk's conclusions were the opposite of Pufendorf's. Nonetheless, both opinions were influenced by the fact that criminal defense lawyers carried little weight in old-regime systems. In that regard, Pufendorf actually permitted defense counsel under the assumption that it would have had no bearing on the verdict, while Stryk felt that it should be excluded from trial, because it risked getting in the way of the justice system⁷⁰. In both cases, it was the judge's responsibility to establish the truth: indeed, up until the nineteenth century, the prevailing theory held that a judge was required to search for evidence not just against the defendant, but in his favor as well⁷¹.

5. *Balancing the duty to the truth with protection of a client's interests: an issue still open to debate.*

Over the course of the Middle Ages and the early modern period, the duty to the truth progressively replaced the ban on resorting to unjust means to defend a cause, and it came to absorb the rules that had been laid out by jurists and theologians in the age-old debate over defense techniques. Legal doctrine had shaped the duty to the truth – and everything it entailed – in the same way as the duty of a litigant, to the point where it was even able to account for a client's natural instinct to lie. The duty to the truth was a fundamental part of criminal procedure in the *ius commune* up until the establishment of the opposite principle, from which there would be no going back: namely, that no one could be *testis contra se*. The right to remain silent and the controversial right to lie – which was an extreme way of safeguarding the defendant's rights during the initial interrogation, and which arose out of liberal criminal doctrine in the nineteenth century⁷² – led to a change in how a lawyer's role during

⁷⁰ Nazius, *Dissertatio de conscientia advocatorum* (nt. 25), pp. 54-55.

⁷¹ On this idea in the Austrian criminal code of 1803, see E. Dezza, *L'impossibile conciliazione. Processo penale, assolutismo e garantismo nel codice asburgico del 1803*, in *Codice penale universale austriaco (1803)*, S. Vinciguerra (ed.), Padova, 2001, pp. CLV-CLXXXII (especially p. CLXV).

⁷² On the function of the interrogation as a safeguard according to liberal criminal doctrine in the nineteenth century, see C. Storti Storchi, *Difensori e diritto di difesa nel processo penale italiano nel primo decennio dell'unificazione legislativa*, in *Officium advocati*, L.

trial was conceived: he was no longer expected to work with the judge in pursuit of the truth or in making sure that justice was served⁷³.

Today, the duty to the truth is set forth in article 50 of the Code of Conduct for Italian Lawyers. A similar duty is laid down in article 4.4 of the Code of Conduct for European Lawyers.

Nonetheless, the litigant and the defense lawyer are not obligated to tell the truth in the context of a trial. Indeed, article 88 of the Italian code of civil procedure only obliges the parties and defenders to respect a duty of loyalty and honesty⁷⁴, while article 99 of the Italian code of criminal procedure states that the defender is vested with the same powers and rights that the law grants defendants.

Some believe that there is a disconnect between the duty to the truth and the duty to defend a client, and that it is to be found in those above-mentioned powers and rights. If the rights of the defense lawyer blur with those of the parties⁷⁵, can a lawyer really be allowed to lie? In short, even the legal profession itself has realized that it is time to reflect on the conduct of lawyers during trial and how that relates to the legal standing of the parties involved, and that comparisons should also be drawn with common law systems. In that regard, it has been highlighted that if a lawyer during trial cannot assert the truth of facts that are detrimental to the interests he has been entrusted with, then neither can he assert falsehoods, as his role also carries a myriad of duties that go beyond the

Mayali, A. Padoa Schioppa, D. Simon (ed.), Frankfurt am Main, 2000, pp. 317-392 (especially pp. 335-336). On the interrogation of the defendant in the old-regime criminal trials, see P. Marchetti, *Testis contra se. L'imputato come fonte di prova nel processo penale dell'età moderna*, Milano, 1994; Garlati Giugni, *Inseguendo la verità* (nt. 61), pp. 140-150; Ead., *Silenzio colpevole, silenzio innocente* (nt. 67), pp. 280-307; Ead., *La voce, il volto, la colpa. Il comportamento dell'imputato durante l'interrogatorio. Conseguenze ed effetti giuridici secondo le pratiche criminali d'età moderna*, in «La Corte d'Assise», 3 (2013), pp. 25-45.

⁷³ On the relationship between truth and justice, see E. Opocher, *Analisi dell'idea della giustizia*, Milano, 1977, pp. 65-68.

⁷⁴ Cf. Danovi, *Dovere di verità e dovere di lealtà* (nt. 4), p. 98; Id., *Commentario al codice deontologico forense*², Milano, Giuffrè, 2004, Comm. on art. 14; L.P. Comoglio, *Etica e tecnica del giusto processo*, Torino, 2004.

⁷⁵ R. Danovi, *La toga e l'avvocato*, Milano, 1993, p. 78.

individual interests of the lawyer-client relationship. Indeed, said duties force him to consider the consequences of his actions on other individuals and on society as well⁷⁶, in accordance with his “dual loyalty” towards the client and towards the legal system, as set forth in the code of conduct for Italian lawyers.

Thus, the duty to the truth must be harmonized with the duties of loyalty and confidentiality⁷⁷, which mainly have to do with protecting the interests of a client. The lawyer’s role in this delicate balance of values is to do his part to get the truth to come out in the courtroom: in an inquisitorial trial, that means searching for an absolute truth; in an accusatorial trial, it means reconstructing a probable truth⁷⁸.

⁷⁶ A. Mariani Marini, *Probabilmente vero: avvocato, giudice, verità*, in *Processo e verità*, A. Mariani Marini (ed.), Pisa, 2005, pp. 17-30 (spec. p. 23).

⁷⁷ Cf. artt. 10 and 13 of the code of conduct for Italian lawyers. On this subject, from an historical perspective, see Bianchi Riva, *L’avvocato non difenda cause ingiuste* (nt. 3), pp. 198-201.

⁷⁸ On the dichotomous concept of the truth, see P. Calamandrei, *Verità e verosimiglianza nel processo civile*, in «Rivista di diritto processuale», X (1955), I, pp. 164-192; G. Capograssi, *Giudizio processo scienza verità*, in Id., *Opere*, V, Milano, 1959, pp. 53-76; Opocher, *Analisi dell’idea della giustizia* (nt. 73), pp. 81-82; Rosoni, *Quae singula non prosunt* (nt. 56), pp. 299-305; Ferrajoli, *Diritto e ragione* (nt. 61); F. Cavalla, *Retorica, processo, verità*, Padova, CEDAM, 2005; Mariani Marini, *Probabilmente vero* (nt. 76), pp. 17-19; F. Macioce, *Processo, giudizio e ricerca della (delle) verità*, in *Inchiesta penale e pregiudizio. Una riflessione interdisciplinare. Atti del Convegno Teramo, 4 maggio 2006*, P. Marchetti (ed.), Napoli, 2007, pp. 81-87.