

## The Central Moral Tradition of Lawyering

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SUMMARY: ... There is a central moral tradition within which American lawyers ought to live and dwell. ... Except for the desire to continue reaping large fees from OPM and to defend themselves later from accusations of complicity, how can one explain the reluctant casting about for an "ethical" way out? Should these lawyers not have been angry that their professional services had been used to bilk people out of untold millions of dollars? Was not some expression of indignation or outrage called for? Some serious investigation of the client's wrongdoing, and their unwitting participation in that wrongdoing, was essential to their own integrity and to the integrity of the legal system. ... If the clients did wrong without telling their lawyers, presumably fraud would be involved and the lawyers had to reveal the fraud or persuade the client to rectify. ... That means, in general, the adversary system is appropriate in its appropriate context; and lawyers who work within the system are acting within the central moral tradition of lawyering. ... Phelps, however, believed his duty to his client justified his lying and his advocacy. ... The arguments Phelps offered to Brendan were those of an advocate, and would have been even if offered to one of the client's employees. ...

TEXT:

### [\*311] INTRODUCTION

There is a central moral tradition within which American lawyers ought to live and dwell. No code or treatise has completely captured that tradition. It is doubtful any will; for like all traditions it is rich in stories and tales, complex in meaning and ambiguity, constantly on the move, changing rising

again like a phoenix from the ashes of our greed and compromise and necessity.

Although inadequate in many ways, the best single expression of the tradition is the 1958 *Report of the Joint Conference (Joint Report)*, authored by Lon Fuller and Jon Randall. n1 The *Joint Report* clearly influenced the writing of the 1969 *ABA Code of Professional Responsibility*. n2 Its influence peaked, however, with the Discussion Draft of the *ABA Rules of Professional Conduct* in 1980. n3 The final [\*312] version of those Rules, passed by the ABA in 1983, blunted that direct influence. n4 However, the object of this Article is not to chart the history of the influence of the *Joint Report*. Neither is it to chart the history of the moral tradition it embodies. Rather, the task is to try to articulate some of the key features of that tradition and to place them before the bar and the academic community for reaction and response. My aim is both similar and dissimilar to the aims of those recent authors who have asked the question: Is it possible to be a good lawyer and a good person simultaneously? n5 My aim is similar in so far as I want to reconcile the conflicts inherent in the lawyer's duty to the client and his duty to the law. The approach is dissimilar in so far as I do not ask the preliminary question that seems to be the focus of much of the current debate: Can the adversary system be justified? n6 I accept that it can be and is, but do not argue the point. n7 What I seek to do is to describe how a good lawyer may or should act and operate within the adversary system according to the best traditions of the bar. This is, of course, really a prescriptive task. We are all caught in a web of an existence where there are real institutions in real societies. Our legal, political and economic systems are a part of the circumstances within which our moral lives are led. Indeed, the whole point of applied ethics is to see where we stand and how we might act in the real world. n8 Of course, we need to [\*313] continue to examine critically all of our institutions and social mores. We need to recommend, indeed advocate, change where we believe the greater good may be better realized. To accomplish this, however, is not the primary task I have set before me in this Article. I believe we have yet to get the paradigm straight.

The task of this Article, then, is to articulate more fully and coherently the key elements in the central moral tradition of lawyering. The demands of practice itself and changing social, economic, political and moral forces cause immense confusion. Although the central moral tradition is alive and even shows signs of revitalization, n9 it also shows signs of unmistakable damage and distortion. Tradition, of course, "does not have to be understood to be

dominant." n10 At the same time, particularly at moments of great confusion, it is helpful to remember that tradition "cannot be inherited, and if you want it you must obtain it by great labor." n11 So let us begin.

### *The Senior Partner's Ethics*

A story and a question. The story is a short one, written by Louis Auchincloss. n12 I will hold the question until I briefly recount the tale Auchincloss tells.

Brendan Bross is a young associate with Nichols & Phelps, a Wall Street Law Firm. He embarked on his career with initial misgivings of the kind that tell us much about the present moral atmosphere surrounding lawyers. He had wanted to study history. For economic reasons he chose law instead; but questioned the "validity of a life" of long hours and tedious paper-work, one "dedicated to [\*314] the apotheosis of money-making." n13 Nevertheless, Brendan soon finds himself working with an older partner, Theodore Childe, in a piece of litigation involving Childe's only client, the East River Trust Company. n14 Childe is a rather pathetic figure as he is briefly sketched for us. n15 His whole professional life is tied to this bank and he seems to have been constantly anxious lest the bank's work be taken away from him and he cut loose to shrivel and die. During the discovery process Brendan notices that a certain document, tangential to the matter at hand, but at the least embarrassing if not slightly damaging to the bank's case, is not produced as required by the appropriate discovery request. n16 When Brendan confronts Childe with the question as to the whereabouts of the document, nervously, but emphatically, Childe denies its very existence. n17 Perplexed by the partner's behavior and certain that Childe has destroyed or hidden the document, Brendan approaches Laurison Phelps, the dominant senior partner of the firm. n18 Told the tale, Phelps argues in consequentialist terms that Brendan should do nothing about the missing document; however, he puts the decision solely on the shoulders of the young associate. n19 Phelps stops short of bribing Brendan with an early partnership. n20 He is too clever, too detached, even too whimsical, for that. n21 Nevertheless, he skillfully attempts to coerce the young associate into doing nothing. Phelps' arguments include assessing the consequences to the litigation, to the client, to the firm, and to Childe; he even assesses certain 'social goals' about deterrence and the criminal law, if only to suggest that "society" will not be damaged by Brendan's silence. n22 Dismissed abruptly, Brendan [\*315] leaves the office. The next morning, he tells plaintiff's counsel about the document, then testifies in open court about the whole, sordid affair. n23

In several nonchalant sentences, Auchincloss tells of the aftermath of Brendan's ethical decision. Childe commits suicide after a newspaper story "raised the question of disbarment proceedings." n24 The lawsuit was finally settled with the missing document playing little or no role. n25 Quickly the scene shifts to Brendan, "propped up in his bed in his bare single room at the psychiatric division of the Yorkville Hospital." n26

The denouement is illuminating. Visiting Brendan in the hospital, Phelps invites the associate to come back to the firm when he gets well, cheerfully commending him for his act. n27 He also says he would have done exactly what Brendan did if he were in Brendan's situation. n28 Incredulous, the associate stammers back: "You astound me. I thought you were advising me not to do it when I consulted you." n29 The resulting colloquy is where I will end the retelling of this modern morality tale. Phelps admits that he did believe Childe had destroyed the document, even though he said otherwise at the time Brendan came to him for advice. Replying to Brendan's question "why were you not in my shoes?", the senior partner and the associate have the following conversation:

"Because I hadn't, like you, seen the memorandum. I had only your word for it."

"But you believed my word."

"That is a purely subjective matter. Did I have a right to believe it? Was it reasonable for me to take the word of an associate I hardly knew against that of a partner whom I had known and trusted for twenty years? Was that doing my duty to a client? Oh, no, my friend, I did not have the presumption to substitute my inner hunch of what had really happened for the presumption of right conduct that my partner surely deserved."

"So that is the law," Brendan mused. "And if you had been I and had seen the memorandum you would have done as I did?"

[\*316] "Precisely."

"And yet you tried to talk me out of it!"

"Well, you see, it wasn't my duty to do it. It was my duty to my client to avoid, if possible, the whole bloody mess."

"Even at the price of talking me out of doing *my* duty?"

"Well, if you were weak-minded, didn't I owe it to East River Trust to work on your weak mind?"

"Good God, could things be that simple?" n30

I have briefly retold the tale; now, the question: Was Phelps ethically correct in his assessment of the situation? More broadly, what duties did Phelps have under the circumstances? How should those duties have been discharged?

#### *A Lawyer's Primary Duty*

Before Phelps begins his consequentialist arguments to Brendan, he says a curious thing:

I could argue that no matter what the truth or falsity of your charges against Mr. Childe, a paramount duty to our client prohibits a public revelation. But I admit that is questionable. So let me state again that I do not believe your charges. I do not believe for a minute that Mr. Childe destroyed that file or even that it existed. n31

Phelps admits later that he lied, that he did indeed believe Brendan's charges. He only said he did not believe the young man because he believed it was his "duty" to his client "to avoid . . . the whole bloody mess." n32 Moreover, although he would not argue that a "paramount duty to our client prohibits a public revelation," n33 Phelps clearly acted as though he did believe his paramount duty was to the client to avoid a public revelation. n34 His adversarial speech n35 implied but did not expressly state this underlying assumption. He did not argue the paramount duty; he only argued the consequences [\*317] of not adhering narrowly to that duty. n36 On the other hand, Brendan was both more honest and more forthright concerning his idea of duty. After the confrontation with Childe, Brendan says, "Of course, I shall go immediately to Mr. Phelps myself. It is obviously my duty to offer the firm an opportunity to redress the impropriety before taking it to court. My duty not only to the firm, but to the client." n37

The first duty Brendan knew he had was "to redress the impropriety." He knew Childe had violated the discovery rules, which meant he had violated both the law n38 and the lawyer's ethical obligations. n39 It is important to stress this point. In the infamous *Kodak* case, n40 which may have been the source of Auchincloss' tale, n41 a lawyer from a major Wall Street law firm concealed documents which he was required to produce, and lied to opposing counsel and to the court, claiming the documents were destroyed. n42 Although (as in the story) the substance of the documents was not terribly damaging, the lawyer's unlawful and unethical conduct created a sensation. n43 The trial judge sentenced the lawyer to 30 days in jail for

"contempt" as a result of his perjury; the firm itself was discharged from the case and eventually paid \$ 675,000 to the client to settle a malpractice claim. n44

The Auchincloss story and the *Kodak* case emphasize what is assumed but rarely said: the lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the law. DR 7-102 of the ABA's *Model Code of Professional Responsibility (Code)* explicitly limits the lawyer's representation to behavior "within the [\*318] bounds of the law." n45 Immediately relevant to the behaviors of Childe and the lawyer in *Kodak* is DR 7-102(A)(3), which states that "[i]n the representation of a client, a lawyer shall not . . . knowingly fail to disclose that which the lawyer is required by law to reveal." n46 (In both cases, legitimate discovery requests were ignored). Nor can the lawyer ever knowingly make "a false statement of law or fact." n47 (In both cases, lawyers lied about the existence of the documents.) These rules are not self-executing; but the kind of pure case we have in Auchincloss' story or in *Kodak* should demonstrate beyond argument that to claim that the lawyer's primary obligation is to the client is dangerously misleading if not completely false. n48

If asked wherein lies a lawyer's "paramount duty," presumably both Childe and Phelps would have answered, to the client. I am certain that most lawyers would give the same answer to that open-ended question. I am also certain most lawyers would not do what either Childe or Phelps did. n49 Childe and Phelps were wrong both in their answer and their actions. One of the purposes of this Article is to persuade lawyers to reconcile their actions with their beliefs. n50

On the other hand, Brendan was clearly right both in what he said and in the way he behaved. Why? The *Joint Report* cryptically gives an answer which is broader than the usual reference to the lawyer's duty to "the law," or more often, and even more narrowly and misleadingly stated, to "the court." n51 In a subsection entitled, [\*319] "The Lawyer as a Guardian of Due Process," n52 the *Joint Report* states: "The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions." n53

This means that the lawyer's duty (or "loyalty") to the client is bounded and contextualized by the legal system itself; moreover, the role of the lawyer within that system "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends." n54

These words are so obviously true, and yet so odd sounding in the ears of lawyers that some deeper probing of their meaning is necessary. In the first place, there is no such thing as a "client" without a legal system within which the words "lawyer" and "client" have meaning. When Lord Brougham sang his famous paean to the advocate, he uttered hyperbolic nonsense:

an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion. n55

Putting aside for the moment, the use of the word "advocate" rather than "lawyer" or "attorney at law" in Brougham's statement, n56 it is not an exaggeration to say that the lawyer's obligations to the client are often so deep and so pervasive that it does seem almost appropriate to say that lawyers do represent clients in myriad circumstances "regardless of the consequences." To take the most [\*320] obvious examples: what of the lawyer who defends a vicious killer or rapist or a drug dealer who corrupts the youth of a community? The lawyer may know the truth, that the criminal defendant did in fact do what he or she is alleged to have done, and yet use enormous intellectual skill and experiential savvy to "get him off." That the lawyer may defend the "guilty criminal" n57 is a well accepted postulate of the adversary system. This reality, of course, causes most critics to begin to discourse on the deficiencies of the system itself. n58

As announced previously, the purpose of this Article is not to critique the adversary system. I accept the lawyer's role as "champion" n59 of his or her client because that is universally accepted as a central part of the moral tradition of lawyering. Clearly, this means that, at least in some cases, lawyers will be pursuing ends for clients that in Richard Wasserstrom's words, "an ordinary person need not, and should not" pursue. n60 The question for practicing lawyers and students of law is: How should the lawyer behave given that particular role as "champion" within the context and confines of the adversary system of justice? In other words, what means are appropriate to ends that often seem, and indeed often are, inconsistent with justice or good morals as those terms are generally understood by the average good and reasonable citizen. n61

If the primary duty of the lawyer is to the processes, procedures and institutions of the law, then the lawyer is the client's "champion" only within that realm and only in ways the laws, social mores, [\*321] and moral traditions of lawyering within that realm allow. To explore this matter - the meaning of how, the meaning of means n62 - is the burden of the rest of this Article.

#### *Within the Boundaries of the Law?*

It is not exactly startling to hear that lawyers ought not to break the law for their client's benefit, although even that idea has been challenged by some. n63 Nevertheless, the idea that the lawyer's duty is circumscribed by the law is a commonplace one. However, this idea is too often superficially understood only as a constraint on representational behavior, something to be gotten around if possible by guile or brute force. n64 That is not the position suggested by the *Joint Report*, nor the one I espouse as fundamental to the best traditions of lawyering. To say that the primary obligation of the lawyer is to the processes, procedures and institutions of the law is to say something fundamental about the entire orientation of one's lawyering life.

How does this work itself out in concrete terms? In the first place, it immediately rejects the so-called "Rambo" n65 mentality that treats litigation as war. In the words of the *Joint Report*: "All institutions, however sound in purpose, present temptations to interested exploitation, to abusive shortcuts, to corroding misinterpretation." n66

True leaders of the bench and bar have begun to react against the sordid tactics of delay, discovery abuse and sundry sharp practices that have done so much to disturb the legal landscape in the recent past. Two reactions are worthy of note. The first is the stiffening [\*322] of Rule 11 of the *Federal Rules of Civil Procedure* in light of abusive practices; n67 the second is the extraordinary movement to restore "civility" in practice as evidenced by the adoption of various lawyers' creeds of professionalism. These creeds are not being advanced as creating new ethical guidelines, but as a way of emphasizing the moral tradition of lawyering that seems to be eroding. n69 The emphasis on civility, while necessary, needs to be accompanied by a concomitant emphasis on the way in which sharp and abusive practices corrode the institutions and procedures of the law itself. That is the central point. We do not treat other lawyers fairly because they are necessarily nice people or even because they are our brothers and sisters at the bar, n70 but because lawyers are necessary actors that the legal system needs in order to function fairly for citizens. n71

*Beiny v. Wynyard* n72 presents a particularly apt case with which to illustrate the problem. Desiring privileged information in the hands of a non-party liquidator of a defunct law firm, a litigator at Sullivan & Cromwell served a subpoena duces tecum and notice of deposition upon the liquidator. n73 Pursuant to a rule of procedure, all parties to the litigation were to be given at least twenty days notice of the deposition. n74 The notice to the liquidator itself was given to appear in less than 20 days and no notice at all was given to other [\*323] parties. n75 Moreover, counsel told the liquidator in its letter accompanying the notice that it represented the executor to the will of the former client. n76 This was not true since the will had never been offered for probate. n77 Counsel also assured the liquidator that copies of the files it requested would be made available to opposing counsel. n78 It did not do so. Shortly after the materials were turned over to the litigator, the liquidator's deposition was cancelled. n79 The documents obtained were then used to surprise the opposing party at her deposition, and the litigator refused to divulge where or how he had obtained them except in exchange for "discovery concessions" n80

The ploy was clear to the judges who reviewed the matter. n81 Knowing that opposing counsel would resist the examination of the documents, and that a court would refuse to grant access to any privileged documents, the litigator decided to engage in clever and deliberate system abuse. All he had to do was ignore the notice rule long enough to obtain the documents, then cancel the deposition and claim that since the deposition was cancelled, the notice requirement was superfluous. Of course, that ignores the reason for the rule itself, to alert opposing counsel to the other sides' discovery gambits. Also of particular importance here, was the attempt to get around the proper procedure for obtaining discovery from a non-party, which was to be obtained by motion for a court order with notice to "all adverse parties." n82

The court was outraged at the ploy. It said:

We do not believe that Sullivan & Cromwell was ignorant of these rules, nor would its ignorance be excusable. These are not trivial or seldom invoked provisions; they are fundamental to the orderly and fair conduct of pretrial litigation and are daily put to use by litigants and the courts.

The inference which sadly follows is that, far from making an 'earnest' attempt to comply with the rules, Sullivan & Cromwell chose to chart a course which it knew to be at variance with acceptable discovery practice so as to obtain by stealth that which [\*324] could not be readily obtained through proper channels. n83

Not only were the rules flaunted, but Sullivan & Cromwell repeatedly lied in order to carry out its hardball strategy. Such actions have no place in the life of a lawyer. Again, the best traditions always praise the lawyer as a person of her word. n84 Skeptics, of course, scoff at this kind of statement. Richard Wasserstrom once asked ironically whether the following traits were not lawyer-like: "lying to the public, dissembling, stonewalling, tape-recording conversations, playing dirty tricks." n85 The answer is they are not lawyer-like in the best tradition. This cannot be stated too often. If lawyers lie or break the rules, they abuse the system. Even if the client has a good substantive case, n86 the end does not justify the means. At the heart of the *Beiny* case was a disrespect for the system, including the substantive rule of attorney-client privilege. n87 The court pointed out that counsel must have known these documents were privileged, which is why it resorted to this atypical practice. n88 All of this is bad enough, but the lawyers went further. They resorted to the most ridiculous, then inconsistent, then positively ludicrous defenses of their actions, causing a two and one-half year delay in the case. n89 It also resulted in an opinion by the Presiding Judge upon a motion to reargue, renew or appeal from the disqualification of Sullivan & Cromwell that drips with sarcasm and bile. One example may stand as a symbol for the rest. The record contained at least five statements by Sullivan & Cromwell claiming that the documents in question proved that "the [\*325] trustee unlawfully transferred the property at issue to entities in her control, or defrauded the petitioner or violated her fiduciary duties to him, and is a perjurer." n90 Yet upon motion to reargue, counsel maintained that the documents really were "not substantially related to the subject matter of the present proceeding." n91 The court characterized the argument as "nothing short of audacious" n92 and further characterized counsel's efforts as "an appeal that is before us solely because of the misconduct of lawyers in pursuit of a fee;" n93 and one legal argument was "notable if only because it might have caused an applicant's failure upon the Bar examination." n94

The last straw was actually the first paragraph in Judge Murphy's opinion. n95 In referring the "proceeding to the Department of Disciplinary Committee for Investigation," the court included a report of "The *Wall Street Journal* that Donald Christ, a member of Sullivan & Cromwell, allegedly assaulted an attorney . . . in the Surrogate's Court at a conference in this case." n96 All of this demonstrates clearly why Rule 11 and Professional Creeds have become symbols for the tradition gone amuck.

Unlike the *Kodak* case or the Auchincloss story the abuses here were actually defended openly by the lawyers involved. n97 Ignoring the rules in

order to obtain documents is as clearly wrong as hiding or destroying documents legitimately called for in the discovery process. The interesting issue in the Auchinclass story was the adversarial posture of the senior partner in trying to persuade Brendan not to do his duty as a lawyer in order to protect the client and firm from the ramifications of a clear misdeed. n98 Belief that client protection is paramount was the driving force behind the senior partner's arguments to his young associate; and the instinctive habits of the advocate were set in motion to achieve that paramount end. But at least the senior partner was not fooled about the underlying wrong. Later, he not only admitted the discovery abuse was wrong, but that he would have disclosed the misdeed as Brendan did had he been "in [\*326] Brendan's shoes." n99 This moral myopia and lack of understanding of how and when lawyers should act as advocates or as counsellors is a serious problem. I will return to this issue later in the Article. n100 By comparison, however, the problem in the *Beiny* case is sadder, more serious, and more paradigmatic because the Sullivan & Cromwell lawyers saw nothing wrong with anything they did; they showed no embarrassment over their wrongdoing; and they defended themselves to the bitter end. Here is Rambo with a vengeance. n101

The associate who devised the scheme to obtain the documents without the knowledge of opposing counsel probably thought he was a clever and skilled young lawyer. How can I obtain the documents I want, he must have mused, without having to alert the other side? After all, he wanted these documents, presumably, to catch the other side in lies at her deposition. It was a good end, but the means chosen were execrable. He broke the discovery rules, but he probably argued to himself that all he was doing was exploiting a "loophole." He showed no sense of understanding what the rules were trying to accomplish, nor of a lawyer-like reading of the rules themselves. Even worse, he showed no respect for the process itself, of testing adversarially the legitimacy of what he was up to. This kind of behavior and moral myopia can only be changed by promoting a sense that a lawyer's primary obligation is to the law and to the processes, procedures and institutions of the law.

#### THE LAWYER AS OFFICER OF THE LAW

A lawyer is not only an "officer of the court" n102 but is truly an officer of the law. Admittedly, a lawyer's functions are different from those of judges, police, government administrators or others whose varied tasks are designed to produce together a just and efficient legal system. Of course there are abuses. People are sometimes mean, stupid, avaricious, and incompetent. But until we say clearly what it is we expect from the various

officers of the law, we invite more chaos. Although expectations do not always lead to action, they are a good place to start. n103 So, another principle of this tradition is urged, [\*327] one which was captured in all the drafts of the *ABA Model Rules of Professional Conduct (Model Rules)* by an exception to the rule of confidentiality, but which was not part of the *Model Rules* as adopted. Rule 1.6(b)(2) of the Revised Final Draft states that a lawyer may reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." n104

This kind of ethical rule emphasizes the lawyer's role as an officer of the law and of the legal system itself. It only makes sense to require clients not to abuse the system if they are to take advantage of the system. In effect, we offer clients an opportunity to seek the counsel and assistance of a lawyer to help them work through the complexities and obscurities of the legal system. Whatever a client has done in the past, be it substantive system abuse or even heinous criminal behavior, it can be disclosed to a lawyer the same as to a priest or psychiatrist, n105 and it will be protected against disclosure to the outside world. There are sound psychological and social policy reasons for protecting confidentiality here. n106 Nevertheless, it is ludicrous to allow the client to abuse the system by using a lawyer's talent, while simultaneously taking refuge in the confidentiality principle. This rule is designed to help citizens use the law properly, not to help them disobey it. n107 Misusing your own lawyer is as much an abuse of the legal system as is direct disobedience of the law.

The story of the relationship between OPM Leasing and its attorneys, Singer Hutner Levine & Seeman, is the classic case of abuse of counsel. n108 Almost from the beginning of its corporate existence in 1970, OPM relied upon fraud and bribery for its survival. n109 A \$ 5 million check-kiting scheme resulted in the company pleading guilty to 22 felony counts in March of 1980. n110 No personal indictments [\*328] were handed down then, but the two principles of OPM, Myron Goodman and Mordecai Weissman, continued a pattern of illegal activity, which included the creation of fraudulent leases by forgery, the removal of signature pages from legitimate documents, the attachment of those pages to false documents, the compiling of falsified title documents, and the altering of the terms of genuine leases. n111 Much of this activity concerned computer leases OPM had with Rockwell International. n112 All of it was accompanied by various practices designed to keep the truth from its own lawyers who, among other

things, negotiated and prepared documents for these fraudulent deals and also "provided lenders with legal opinions regarding . . . the legality of OPM's leases." n113 In June of 1980, OPM's chief in-house accountant discovered the Rockwell scam. n114 After consulting with his own lawyer, he wrote a letter to one of the Singer Hutner partners detailing his knowledge of the fraud, and although the specific facts thereafter are in some dispute, it is clear that soon Singer Hutner learned three things: "(1) that OPM had perpetrated a large-scale fraud, (2) that the law firm itself had contributed to this fraud, and (3) that the fraud was probably ongoing." n115

Singer Hutner retained outside counsel to ask what it should do, stressing that "they wanted to do the ethical thing, and they wanted to continue representing OPM unless they were ethically and legally obliged to quit." n116 Because the firm had no actual knowledge of ongoing fraud, outside counsel concluded it could continue representing OPM without disclosing information about the "past fraud" to anyone, nor did it have a duty to withdraw the opinion it had previously given. n117 Incredibly, the firm was also advised it had no duty "to check the authenticity of computer leasing documents . . . before closing new loans." n118 It was merely recommended that the firm require OPM to "certify in writing that each new transaction was legitimate." n119 As might be expected, Goodman simply signed false [\*329] certifications to satisfy that formal requirement. n120 A second recommendation was that Singer require Goodman to reveal "the details of his wrongdoing," but not to "pressure" him to do so without affording him the benefit of outside counsel. n121 Retained counsel for Goodman then proposed that any disclosures "be deemed protected by the attorney-client privilege." n122 Singer Hutner agreed. n123 As a result, there occurred another \$ 85 million in further losses to fraud victims. n124

Although we've only begun to unravel the story, it is impossible not to comment on the lawyer's actions so far. Respect for the law or for themselves as officers of the law should have resulted in a very different approach. Except for the desire to continue reaping large fees from OPM and to defend themselves later from accusations of complicity, how can one explain the reluctant casting about for an "ethical" way out? Should these lawyers not have been angry that their professional services had been used to bilk people out of untold millions of dollars? Was not some expression of indignation or outrage called for? Some serious investigation of the client's wrongdoing, and their unwitting participation in that wrongdoing, was essential to their own integrity and to the integrity of the legal system. Instead, the lawyers meekly buried their heads in the sand and closed fraudulent loans for

OPM totaling \$ 61 million throughout three summer months in 1980. n125 During this time a Singer Hutner partner discovered what he thought were false title documents and use of the same equipment for different leases and loans. n126 Meanwhile, OPM stalled and lied and refused to discuss the details of admitted past wrongdoings. n127

Finally, Goodman told enough about the fraudulent Rockwell leases that Singer Hutner felt it had to resign. n128 Of course the firm also felt it necessary to withdraw slowly so as not to "prejudice" the client. n129 To protect itself on the financial front during the withdrawal [\*330] period, the firm demanded and received \$ 500,000 from OPM, half for services already performed and half as "an advance retainer against our customary time charges." n130

When lenders and other interested parties inquired about Singer Hutner's departure, the law firm said the two had "agreed" to part company and did not elaborate. n131 Interestingly, when Hutner was asked at a later deposition whether or not this was a lie, he said "[i]t was inaccurate," then scrambling for cover, he amended the remark by saying, "more accurate than not, if not totally accurate." n132 When asked by a partner from the replacement firm whether there was "anything he should be aware of" in deciding whether or not to represent OPM, Hutner told him: "[T]he decision to terminate was mutual and . . . there was mutual agreement that the circumstances of termination would not be discussed." n133 The partner making the inquiry was an old friend of Hutner's. n134 Hutner said later about this conversation: "This specific thing caused me more personal pain than anything I can recall during the course of the entire OPM thing, including learning that Myron [Goodman] was a thief." n135

What could have possessed the lawyers of Singer Hutner to accept such abuse, to accept being lied to, manipulated and used as an instrument for fraud? Indeed, not only did the firm accept this, it refused to acknowledge it was happening and refused to conduct any investigation. In fact, all it did was ask the client to explain, in the client's own time, what was going on. I will speak later of the minimum obligation of the lawyer as counsellor to try to keep his client law-abiding. n136 For the moment I want to suggest two reasons why these sophisticated New York lawyers did what they did. The first is their almost pathological pro-client attitude, backed by a narrow reading of the *Code of Professional Responsibility*. The second is tied to the first. It is the lawyer's economic interest. Whatever the pro-client stance means in psychological or moral terms, the economic factor is hidden not too far from the surface. Witness what happened when Singer Hutner finally

decided it had to resign. It demanded \$ 500,000 from the client, not only to keep the client current, [\*331] but to make certain the lawyers could wrap-up the client's affairs risk-free, at least as far as its fees were concerned. n137 In the aftermath of this case, Singer Hutner reportedly paid \$ 10 million (out of \$ 65 million) to help settle certain civil actions filed against them by the defrauded lending institutions, n138 so bad economics were also involved.

The desire to keep clients happy so as to continue billing them is hardly unusual, nor is it wrong as an abstract proposition. But lawyers are professionals, supposedly wedded to the idea that service to the public comes before their own monetary gain. n139 If the notion is hopelessly old fashioned and out-of-date, the public ought to have the good sense to relieve lawyers of the burden of fashioning rules for themselves. Self-regulation as a concept is tied inextricably to public service as a primary goal. n140 Of course, the response to this is usually the extreme pro-client stance of some professionals. The stance is so pro-client, it seems, that clients can abuse lawyers themselves as badly as spouses in some cases of domestic abuse. n141

This behavior is inconsistent with the central moral tradition of lawyering. Some lawyers say their goal is "total annihilation" of the other side. n142 But others say: "Advise the client what he should have -- not what he wants." n143 For the Bar to remain independent, it must function apart from direct governmental interference and also apart from a close identification with the client's narrow self-interest. n144 All of the lawyers involved in the Singer Hutner case continue to practice law in New York. None, to date, have been disciplined by [\*332] the Bar. n145 From what we can learn, they all seemed to want to do the "ethical thing," going so far as to hire an "expert" and following his advice to the letter. n146 The problem resulted from a tension between the relevant provisions of the *Code* and the obsessive client-centered approach to the *Code* and to the vocation of lawyering.

In the 1969 version of the *Code*, DR 7-102(B)(1) directed lawyers to "reveal . . . to the effected person or tribunal" any frauds perpetrated by clients "in the course of the representation" which the client refused to rectify. n147 Under that version of the *Code*, lawyer abuse should not happen. If a client tried to do wrong and told its lawyers, the lawyers had to refuse to help and had to try to persuade them "to stop" before they started. If the clients did wrong without telling their lawyers, presumably fraud would be involved and the lawyers had to reveal the fraud or persuade the client to rectify. n148

Thus, in any jurisdiction where the original language of the *Code* remains unaltered, n149 there would have been an affirmative duty to turn in OPM Leasing as soon as the fraud detailed by the inhouse accountant was verified. For example, this would be the case in my own state, Ohio. n150 In 1974, DR 7-102(B)(1) of the *Code* was amended to add the infamous "except clause." n151 New York was one of only a handful of states which adopted the clause, which, although [\*333] badly drafted, has been construed to negate the lawyer's obligation to rectify client fraud committed "in the course of the representation." n152 The ABA itself interpreted the provision as barring the lawyer from rectifying the effects of the fraud. n153 Thus, the past fraud of a client committed during the course of the lawyer's representation became protected as a "confidence" under the *Code*, as amended. n154 The ethics experts read the rule and advised Singer Hutner according to the letter of the provision. The only problem is that the experts and OPM's lawyers deliberately avoided the responsibility members of the bar have to keep clients law-abiding. What they did was to operate on the basis of a narrow, legalistic reading of the *Code* in order to avoid the painful reality of dealing with systemic abuse.

This is the Senior Partner, Phelps, all over again; refusing to believe the young associate, Brendan, and refusing to investigate lest that prove too costly to the firm and to the client. Of course, Phelps did believe Brendan. n155 Singer Hutner merely believed that OPM had engaged in widespread fraud while Singer Hutner represented them. n156 They knew they should not be participants with OPM in any further scam, yet they deliberately refused to set up any policing mechanism to assure that they were going to uncover the truth about OPM's nefarious activities; nor did they try to rectify the effects of serious criminal activities in which they played a central, albeit unwitting, role. n157

The history of the drafting of the *Model Rules* shows a similar movement away from the concern with lawyer abuse that I am considering in this section. The original Discussion Draft in 1980 would have allowed lawyers to reveal any information necessary "to prevent or rectify the consequences of a deliberately wrongful act by the client," except if the lawyer is employed to handle the matter encompassed [\*334] by the bad act. n158 This provision goes beyond anything attempted before in regulating lawyers regarding their duties as officers of the law. It is surely too idealistic in content, as well as poorly drafted. It is not just lawyer as policeman, it is also lawyer as moral and legal judge of past and future "wrongs" committed by the client. The role of the lawyer cannot be pushed that far. However, the



1981 Proposed Final Draft and the Revised Final Draft of 1982 both contained language designed to allow lawyers to protect their own role as officers of the law and to prevent clients from abusing the system by abusing their own lawyers. n159 The language of the Revised Final Draft reads as follows: "A lawyer may reveal . . . information to the extent the lawyer believes necessary . . . to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." n160

This kind of provision best exemplifies the tradition. Lawyers' services may not be used to commit crimes or frauds; if they are, the client may not use the confidential relationship provided by the system to abuse the system further.

It is useful to point out that the traditional exception to confidentiality for failure to pay lawyers' fees or for responding to accusations against lawyers by clients (and sometimes others) might rest on this same foundation. n161 Rather than an embarrassing anomaly, this exception should be considered merely an extension of lawyer-abuse-as-system-abuse, consistent in the original 1969 *Code*, but seriously disingenuous in the ABA adopted version of the 1983 *Model* [\*335] *Rules*. n162

If some lawyers have lobbied to allow results which permit lawyer abuse without recourse to the rectification of illegal or fraudulent consequences, it is because they are deeply mistaken about their role or because they believe their own economic interest dictates silence and a refusal to assess the damage they helped to cause. The principle of non-accountability is surely not applicable here. n163

The difference between the kind of case discussed here and the average criminal case must be made clear. Surely, the argument goes, in a criminal matter where the lawyer's skills turn a known (to the lawyer) guilty defendant free to wreak further havoc on society, the lawyer has also been an instrument in causing damage to others. What is worse, for some, is the fact that the lawyer acted deliberately in defending the criminal; but unwittingly in the kind of case I am discussing. Is not a deliberate wrong worse than an unintended wrong? In the usual case, yes. In the role of lawyer, no; for the lawyer's first obligation is to the system of law itself, its processes, procedures and institutions. What was done to help the "guilty" n164 criminal defendant is no more than what that defendant was entitled by law to have done for him. It is exactly the reverse in the fraud case. Here, if the lawyer knows what is happening, he or she must refuse to assist and counsel the

client away from lawbreaking or fraud. As I shall argue later, the counseling function is the lawyer's primary function, n165 and to counsel a client against lawbreaking and fraud is one of the lawyer's chief responsibilities as counselor. It is only this tradeoff that truly justifies broad confidentiality rules at all. n166

### [\*336] ROLES OF THE LAWYER

Two related (but usually unarticulated) principles have so far been set forth: (1) the lawyer's primary obligation to the legal system is an affirmative one; it is not simply another way of saying the lawyer's obligation is to the client as circumscribed by law; and (2) the lawyer is also part of that system; misusing the lawyer's services as an unwitting instrument for illegal or fraudulent behavior is also system abuse.

To go further, the system itself is designed to have lawyers perform a variety of tasks for a variety of clients in a variety of settings. The ethical responsibilities of lawyers change depending on the type of task, the client and the setting. n167 Recognition of this diversity was one of the chief legacies of the *Joint Report* upon subsequent attempts to draft ethics codes for lawyers. n168 Too much emphasis had, and has, always been placed on the advocacy role of lawyers. n169 The lawyer's roles as counselor, negotiator, drafter and intermediary, while always part of the tradition, tended to be submerged in light of the lawyer's more dramatic role as advocate. n170 The trial lawyer is, indeed, a figure of mythic proportion in the United States. Novels, movies, plays and television dramas continue to celebrate this particular hero, who is champion of the underdog, fierce advocate for individual rights and the one who is uniquely able to bring about justice. n171 The lawyer's role as advocate is similar to that of the lone [\*337] gunfighter who, against all the odds, restores peace and establishes justice by slaying the forces of evil. n172 Reality is more complex and far less dramatic than that. In the words of John W. Davis: "There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state." n173

Before taking up two of the lawyer's key roles for extended analysis, it is useful to add another general principle that will, no doubt, strike some as unnecessary and others as uncommonly silly. The principle is that, insofar as possible, lawyers should try to act in all of their professional dealings as a good person should act. n174 Before lawyers like Charles Curtis and Monroe Freedman n175 began to show vividly the moral tension alive in the

lawyer's role as advocate, there was a common assumption among lawyers that "no man can be either too honest, too truthful, or too upright to be a thoroughly good lawyer, and an eminently successful one." n176 It could be that lawyers who said things like that were hypocrites, or at least naive in the extreme. It could be, however, that persons of real honesty were called to the bar. It could be that for every oily Mr. Tulkinghorn n177 there were, and are, four or five lawyers like Atticus Finch. n178

[\*338] Keeping this principle in mind, the next task is to examine the roles of advocate and counselor to see if the ideas developed so far, along with the insights of the *Joint Report*, help us to understand better the central moral tradition of lawyering. First, it is necessary to put the issue of the adversary system in some perspective. To that end, the structure of the *Joint Report* is illuminating. The authors began by dividing the lawyer's role into three categories of services the lawyer provides society, n179 with important distinctions noted within these categories. The first category deals with the lawyer as the designer of the framework of collaborative effort. n180 A second category deals with the lawyer's opportunities and obligations of public service. n181 However, I want to focus on the third category because it occupies such a dominant place in the tradition and because the relationship between its two subcategories is so often misunderstood. This category deals with the lawyer's work in the administration and development of the law. n182 It is subdivided into the lawyer's role as advocate and as counselor. n183

This section of the *Joint Report* begins by stating a primary principle of advocacy: "The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest." n184

This adversarial role depends upon a clear understanding of the system itself. In its classic formulation, the adversary system is a "philosophy of adjudication" which requires partisan advocates, an impartial decision-maker and a structured forensic procedure. n185 Although few would quarrel with what is *included* in that bare definition, disagreements about what is *excluded* would erupt on at least two fronts: (1) the need for the judge to be "passive" or "umpireal" as well as "impartial" or "neutral; n186 and (2) the centrality of the [\*339] lawyers as those who gather and produce "the factual material upon which adjudication depends." n187 I offer this modest basic definition, together with other possible emendations, not to enter into a debate about definitions. n188 All that is required for present purposes is to recognize that the adversary system does not depend on the existence of

particular bodies of law. This is an important clarifying point. The constitutional right to counsel for criminal defendants recognized in *Gideon v. Wainwright* n189 did not alter the essential nature of the adversary system; n190 nor did the change in the evidentiary rule regarding the permissible scope of cross-examination of rape victims in criminal trials. n191 Changes in substantive or procedural rules of law do not change a system of adjudication. n192

The *Joint Report* argues that the adversary system is essentially [\*340] a good one, n193 though no one need engage in the fruitless debate about whether or not it is the "best system." n194 To do so is like arguing whether parliamentary or republican government is best. The answer largely depends upon historical and cultural realities, not moral truth in some abstract sense. n195 Advantages of the system arguably include the fact that it provides a way to effectively combat a natural tendency to put a familiar pattern on what is unknown, n196 thus the partisan role of the lawyer keeps the judge and/or jury psychologically honest. The system of thrust and parry also allows a narrowing of issues and a "true public trial of the facts and issues." n197 What makes the system work, of course, is not merely the presence of an impartial judge and partisan advocates, but the agreement by all that the proceedings will be governed by rules fairly applied by the judge and meticulously respected by the lawyers. Even if one adopted a phrase like the "sporting theory" of justice as an adequate metaphor for the adversary system, n198 it would still be a fundamental requirement that the game be played according to the rules. Thus, one can see how deeply wrong the destruction of documents properly requested by the opposing side must be. n199 The immediate reaction of Brendan to Childe's act in Auchincloss' story has its real life counterpart in the reaction of Kodak's chief lawyer, who went to the judge immediately upon hearing of the breach of ethics. n200 Despite the incredible mileage Monroe Freedman has gotten from his argument that a criminal defense lawyer should assist his client in committing [\*341] perjury, n201 the reaction of the bar n202 at the time was wrong because of its inconsistencies with larger principles of free speech, and academic freedom; but it at least serves as an attestation of the horror of perjury in our version of the adversary system. n203 Warren Burger's attempt to have Freedman disbarred and dismissed from his academic position merely for advocating such conduct unhappily obscured the central issue. n204 If free speech and academic freedom are to mean anything, then these freedoms surely include the freedom or individuals to speak even thoughts with which we disagree. n205 Nevertheless, if, as a criminal defense lawyer, Freedman or anyone else actually did "assist" the client in committing perjury, disbar-

ment would not be an inappropriate remedy. n206 This is so because the health of the system depends upon the lawyers playing the game according to the rules and at least not helping the players to break the rules. n207 If, as in Civil Law countries, criminal defendants were not put under oath and perjury not prohibited by law, n208 then a lawyer might be able to examine his or her client as Freedman advocates. n209 I cannot imagine how such a change in our system would play out, but that is not the present point.

The advocate must be law-abiding and must keep the client law-abiding, especially within the realm of judicial inquiry and process. Think of the horror of withholding or destroying a document. In Auchincloss' story, the discovery of documents withheld produced a suicide; n210 in the *Kodak* case, the judge sentenced the offending [\*342] lawyer to thirty days in jail. n211 Compare that reaction to the system's (not the public's) reaction when a lawyer successfully defends a drug dealer by having evidence excluded from the trial because it was obtained through an illegal search in accordance with *Mapp v. Ohio*. n212 Here again is where the justification of the adversary system is often questioned. I do not want to argue the justification question. I simply want to point out that the problem raised by *Mapp* is one of constitutional law, not of the "adversary system" or of lawyers' ethics. The lawyer who refuses to argue *Mapp* for his or her client must either resign without prejudicing the client or else face a malpractice suit. n213 That is what the system requires of an advocate. Suborning perjury is also malpractice -- against the system itself. n214

I offer these commonplace examples to underscore the lawyer's fundamental obligations to the legal system, to observe its procedural rules and ensure that the client observes them too. This obligation is just as important to the proper functioning of the judicial system, as it is for the lawyer to be the client's champion. It does not make sense to allow lawyers to argue *Mapp* for one client while simultaneously allowing them to assist other clients in committing perjury. The means are of crucial importance to the health of the adversary system. If lawyers are to be true to their fundamental task as advocates, scrupulous observance of the rules is of vital importance.

However, the lawyer is also duty-bound to present the facts and the law in a partisan manner on behalf of the client. Not to do so would undermine the system just as much, as well as undermining the individual rights of the client. This fact should not be controversial. What is controversial are the following questions: (1) whether the lawyer should refuse to take a particular case in the first place (or to stay with it in the midst of moral discomfort); and (2) how "zealous" must the lawyer be in adversarial proceedings? The first

issue will be discussed later; n215 the second will be briefly addressed now.

### [\*343] *The Zealous Advocate*

Ideally, all the "facts" should be produced and all relevant witnesses should be able to tell what they know as truthfully as they can at trial. Advocates could then really advocate and spend their time and resources arguing interpretation, nuance, and implication, both as to fact and law. Of course, that ideal can never be fully realized, partly because of the contingencies of life and the imperfections of human beings, and partly because "facts" are not so easily isolated from interpretation. n216 Not to mention the question of "truth" in relation to fact. Distortions of reality come about all too often simply by isolating or emphasizing one true fact. n217 Lawyers, of course, know this all too well. n218 So the second question of advocacy, after affirming the primacy of the obligation to processes, procedures and institutions, is to see how this primary obligation plays itself out in the trenches when confronted with partisan zeal, particularly in relation to factual distortions and the quest for "truth."

Marvin Frankel defines truth in a courtroom setting in a helpful, pragmatic way:

[T]ruth may be taken to embrace (1) accurate accounts by competent people of what they genuinely believe they recall from sensory experience - things seen, heard, smelled, etc., and (2) honest production of papers and objects relevant to legal controversies. You may be wrong when you 'genuinely believe' you saw your neighbor's cat yesterday. But if you do believe it and you say so, you're telling the 'truth' as defined here. n219

This definition sufficiently distances us from philosophical questions about the nature of perception. As a description of what we are after in a trial, it's about as good as we can do. Nevertheless, even using this pragmatic definition, Frankel bluntly reminds us: "[L]awyers do indeed spend a lot of time seeking to block or distort [\*344] the truth." n220

Contrast Frankel's realism with the following passage from the *Joint Report*:

The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the head-waters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature. n221

Is the realism of Frankel's statement reconcilable with the more lofty and idealistic statement just quoted from the *Joint Report*? I would argue that it is if we understand the latter statement to be expressing concern with corrosive distortions of processes, procedures and institutions, not with distortions of "truth," even as Frankel has defined that term. This bothers Frankel greatly. n222 It bothers me less because I see no way fully to reconcile the adversarial process with truth in the philosophical sense. However, I believe that if lawyers were more committed to their primary obligation of playing by the rules, many of the major problems of distortion would be eliminated. Of course I cannot prove this; but if lawyers made it a practice to play "tough but fair," n223 I believe the best traditions would be revitalized.

Still, I admit some of the hardest questions of advocacy would remain. For example, may a lawyer vigorously cross-examine a truthful witness? n224 May a lawyer take advantage of the ignorance or lack of skill of the opposing lawyer? n225 I agree with Charles Fried's answer to these questions, and refer to his distinction between systemic and personal wrongs n226 to offer a partial justification for methods which seem as unjust or immoral as the goal of helping a guilty criminal defendant to go free. For Fried, it is morally appropriate [\*345] to expose "a witness to the skepticism and scrutiny envisaged by the law." n227 Thus, if the little old lady with thick glasses and poor eyesight correctly identifies your client, it is appropriate to suggest, via skillful cross-examination, that she did not accurately identify the client because she could not see well enough. n228 This is to be contrasted with a personal attack, calling a truthful witness a vicious liar. n229

It is useful to remind ourselves, in this context particularly, that the lawyer does not often know, with a high degree of certainty, the truth of the witness's story. One of the reasons for the adversarial presentation is to lift the ultimate burden of decision making from the shoulders of the advocate. This is not to deny that the lawyer often does know with reasonable certainty the truth or falsity of a witness's story. The lines here are delicate and complex. Remember, the lawyer may never deliberately elicit false testimony, and if false testimony is given, the lawyer has an historic obligation to rectify the consequences thereof. n230 Inference and argument from facts not known to be false is a different thing entirely. I am content to leave the matter at this as an example of the adversary system at work. Of course, I believe that the system works well most of the time. n231 I might add that as an "ordinary" moral matter, it seems to be no worse to cross-examine a

truthful witness than it is to defend a known guilty criminal. n232 Beyond that, if there are suggestions for changes in our evidentiary rules, I would welcome them. If all witnesses could tell their stories without interruption from lawyers, that might help. n233 I leave the matter here. My main point is to capture [\*346] the central moral tradition, and only incidentally to suggest changes in various procedural or evidentiary rules that might make the system work better and place less strain on the attorney who wants to be a good lawyer and a good person.

The subject of zealous advocacy is a large and complex one; it deserves more detailed and refined treatment. However, I will not elaborate further except to emphasize as strongly as I can that the entire discussion of advocacy so far is confined to "the lawyer's role as advocate in open court." n234

Any justification of advocacy methods is applicable solely in open court. It is in open court where there exists appropriate partisans and a neutral decision maker. Once the setting is out of a courtroom, the moral safeguards of a neutral decision maker applying formal rules to the process are lost and the lawyer's responsibilities for "fairness" therefore increase. n235 Carrying over the formal courtroom style, even to discovery matters, is wrong because there is no neutral judge safeguarding the process. Carrying it to matters of negotiation is wrong because there is not even a record of the proceeding. Carrying it to matters of counselling is an abomination. n236

Before discussing some of these misapplications, however, one final point must be made. We are dealing here at the level of principle. That means, in general, the adversary system is appropriate in its appropriate context; and lawyers who work within the system are acting within the central moral tradition of lawyering. They are neither immoral nor amoral because they do these things. They are, in fact, presumptively moral in the same way obedience to or compliance with widely accepted moral principles usually results in persons being called "good." This point might be more clearly expressed by comparing these principles to those prima facie moral principles that philosophers so often acknowledge to be true. For example, Joel Feinberg says there are eleven "representative and plausible" principles that are intuitively correct, including such duties as keeping promises, telling the truth, playing fair, returning favors, not causing [\*347] pain to others, and not killing others. n237 Bernard Gert argues there are ten Moral Rules that all rational persons would acknowledge to be true. n238 The list, expressed differently, is similar to Feinberg's, do not kill, do not cause pain, keep promises, do not deceive, and others. n239 My argument here is analogous. It is that in the

moral role of lawyering the principle of advocacy applies in general and without further need to justify. Once a competing moral claim is advanced, however, the situation calls for further argument. That competing moral claim, however, cannot be one fundamentally opposed to the adversary system. It cannot be argued that a lawyer should not represent a known guilty criminal defendant. n240 Partisanship would be impossible if that argument were valid.

It might be argued that a lawyer should not be able to cross-examine a truthful witness, but that argument must take into account partisanship in the systemic sense. Lawyers have obligations not to put perjured testimony or false evidence before the court. It is certainly consistent with those obligations to forbid lawyers from cross-examining truthful witnesses with the object of inferring falsity. n241

[\*348] The most challenging arguments are those where the personal and the systemic *means* are hard to sort out. For example, testing the eyesight of an identifying witness versus abusiveness in the manner of questioning in the hope of tripping up a witness. Surely more leeway in "abusive" questioning should be allowed when the lawyer has good reason to believe the witness is lying. n242 It may be that the definition of "abuse" changes in those two cases. n243 As with so much of what has been discussed, this subject needs to be analyzed in greater depth and scope. I want to move on, however, reminding the reader once again that all I have been discussing in this section is the role of the advocate "in open court." It is time to contrast the counselling function with the advocacy function and to make some meaningful connections between the two. It must be left for another article to analyze the representative capacity of the attorney in performing other lawyering roles, such as conducting pretrial discovery, n244 negotiating, n245 and drafting, n246 tasks where partisanship is [\*349] also expected.

#### *The Lawyer's Role as Counselor*

In Auchincloss' *The Senior Partner's Ethics*, when Brendan Bross tells Laurison Phelps that Theodore Childe either hid or destroyed the requested document, Phelps responds by saying he did not believe Brendan. n247 Later, Phelps admits he lied. n248 We can all agree that in general, lying is wrong. n249 The ethical codes all forbid it; n250 and as Fried points out, a lawyer may not lie in his "representative capacity." n251 Asking a trier of fact, in court, to accept an inference which ultimately is not true, is not the same as lying. This is because our system is designed so that these kinds of

inferential arguments are not understood to be accepted by the lawyer personally. n252 In some respects, a trial may be analogized to a play, a work of art, which like all art, sometimes deceives in order to reach ultimate truth. n253 The lawyer, in some ways, is an actor, playing a role -- the role of advocate. If the idea of using deception to reach ultimate truth seems paradoxical, it is because of abuses in the system, not because the analogy is unsound. Remember that the Roman Catholic Church uses a similar device, known as the devil's advocate, to try to determine whether a candidate is worthy of sainthood. n254 [\*350] The Church's view on lying is quite severe, n255 yet the devil's advocate is a time-honored mechanism which serves the same function as the lawyer in open court does; it probes the truth of the matter in as many ways as possible. n256

The deception perpetrated by Phelps is an altogether different matter from that of an advocate arguing an inference from a fact not known to be false. In the first place, it is a lie. Phelps speaking for himself, tells Brendan he does not believe Childe hid or destroyed the document. n257 Later Phelps admits that he did. n258 So he did make an "utterance contrary to one's mind." n259 He lied. It was wrong both personally and professionally for him to do so. n260 Why did he lie? According to Phelps, it was out of duty to his client, "to avoid . . . the whole bloody mess." n261 But Phelps is not permitted to avoid the "mess" in this way. If he were cross-examining a witness in open court, and attempting to impeach truthful testimony by a young associate concerning the destruction of a document by a long-standing member of the bar, Phelps could have argued rhetorically to the jury, "is it reasonable to believe this young man?" Even if Phelps did believe him, he could test the young man's credibility, n262 drawing inferences that would cast doubt on the truthfulness of the associate's story. He could do so even if he knew the associate's story to be true, although he could not put the older partner on the stand and elicit perjury from him n263 Every lawyer knows this and all experienced trial lawyers have done something like this. However, the Phelps-Bross conversation was not a cross-examination in open court. It was a counselling session between two colleagues. Phelps not only lied, he treated the conversation as if it were an opportunity for advocacy. He [\*351] argued the case against disclosure as cleverly as he would have delivered a summation to a jury. What Phelps did was to misunderstand his role: first, by lying; n264 second, by advocating in a counselling situation; n265 and third, by ignoring his primary duty to the law by trying to convince another member of the bar (and a colleague from the same firm) not to do his duty. n266 Brendan eventually did what Phelps later admits was the right thing to do. n267 Phelps, however, believed his duty to his client

justified his lying and his advocacy. I think enough has been said about lying; but I need to expand on the misuse of advocacy, especially because deception and advocacy often go hand in glove in non-courtroom settings.

After Phelps admits to Brendan in the hospital that he did believe him at the time Brendan sought advice, he deflects Brendan's incredulous questioning of Phelps' motive by delivering the confused and dangerous explanation that: (1) it was not "reasonable" to believe Bross over Childe; n268 and (2) it was Phelps' duty to the client to act on his reasonable belief rather than on his actual belief. n269

In open court, it is the lawyer's duty to present the client's case in the most favorable light, even if the lawyer doubts its truthfulness, as long as there is no solid evidence to turn the doubt into knowledge. n270 "A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor." n271 Thus the *Joint Report* admonishes that "the reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is [\*352] immoral, unfair, or of doubtful legality." n272 The *Joint Report* concludes, that the lawyer as counsellor "must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do." n273

Suppose Brendan was not Phelps' young associate. Suppose he were, instead, a young manager of the East River Trust Company, the firm's longstanding and prosperous client. Suppose further that the young manager told Phelps that a senior vice-president destroyed the document. What would have Phelps' duty been then? I submit his duty would have been quite similar to what it actually was in the story. That duty would have not been to presume or to advocate but to question and to investigate. n274 His duty to the legal system should have caused him to ascertain exactly what the truth was; for if a document had been withheld, it would have been his duty as lawyer to see to it that the document was produced and the truth told. The arguments Phelps offered to Brendan were those of an advocate, and would have been even if offered to one of the client's employees. How ludicrous to offer them either to the client or to his own associate. The primary objective of the counselling function is to assist clients in pursuing their own interests in a way that is consistent with law and good morals. This is to be understood as a corollary to the primary duty to processes, procedures and institutions. The *Joint Report* resolves the issue as follows:

The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. n275

[\*353] It is in the lawyer's office that the fullest integration of good lawyer and good person occurs. Here, the lawyer is called upon to help another person or persons accomplish something; to avoid trouble, extricate themselves, exercise the rights of free persons. The lawyer explains, expands, cajoles, debates. This is the place for the moral dialogue between and among autonomous persons to occur. Lawyers must try to keep clients law-compliant. This is a complex matter. It does not mean one cannot or should not find "loopholes" in the law to help clients avoid tax liability. n276 It may mean a strong admonition to keep industrial pollution more than within the technical bounds of the current regulations. n277 These matters depend on the laws themselves and their purposes, the political climate, and the moral positions of lawyer and client in dialogue. No hard and fast rules can be drawn, but the underlying principle is clear: a lawyer must provide his or her client with an explanation, with options, and with advice, all consistent with the law, its spirit as well as its letter.

It does not follow that the lawyer cannot or must not proceed to help the client accomplish what the client desires to accomplish, even if that goal is considered immoral by the lawyer. n278 Nor does it follow [\*354] that the lawyer must do what the client wants no matter what. n279 Initially, the lawyer is free to decline a representation that is morally repugnant to him or her. n280 I will argue later, however, that this freedom is limited by the lawyer's individual obligation to make legal services available to all, including the duty to represent an unpopular client. n281

In addition to having a broad moral choice in determining whether or not to represent someone initially, the lawyer may also resign if, during the course of the representation, the client wants to do something the lawyer considers immoral even if it is legally permissible. n282 This is harder to do, however, and entails some additional obligations on the part of the lawyer. The lawyer may resign, but must take special care to see that the client's legal rights are not compromised. n283 What do these principles mean in

concrete terms? What means are appropriate if the ends are morally repugnant?

If I have not yet made my position clear, the approach I am advocating as central to the best traditions of lawyering does not amount to "quandary" ethics. n284 Quandary ethics usually means the posing of a hypothetical case with a true/false, yes/no, may/should "bottom line" answer. n285 The Multi-State Professional Responsibility [\*355] Examination is a crude example of the quandry approach. n286 Although much of legal ethics and, in fact, law itself seems to be taught in this way, it is essentially incompatible with the central moral tradition. n287 Examining several hypothetical scenarios will flesh out this process.

Suppose a wealthy, old and widowed land owner named Rex Lear n288 comes to ask you to draft a will for him. Lear is a long-standing client who is prideful, stubborn and beginning to "fail." He still seems competent but has determined to exclude Cordelia, one of his three daughters and long his "favorite," from any inheritance. The "quandry" ethics question is: should you draft such a will for Lear?

The argument on the one side is that, under the law, any competent person can exclude one of his children from his will if he so desires. Steven Pepper would probably argue that an ethical lawyer must draft the will, because the rights of "first-class-citizenship" demand it. n289 Law is a public good and all are entitled to take advantage of it, so the argument goes. n290 People need lawyers to obtain this good. Therefore, the lawyer must obey the client's will in order for the client to be free and equal within our legal system.

On the other side of the argument sits those, like David Hoffman, who would not lend their hands to the immorality of helping a failing old man to disinherit one of his children. n291 For people like Hoffman, this decision presumably turns on the motive of a man like Lear. Let us assume Lear wanted to disinherit Cordelia because she would not express her love for him in the same extravagant terms her two sisters, Regan and Goneril, are wont to do. n292 It would not [\*356] be unreasonable to judge Lear's reason as based on foolish, even sinful pride and stubbornness. This should lead to the judgment that his exclusion of Cordelia as an object of his bounty was unjust, therefore immoral.

Whatever the final decision, the first thing to say about the Lear matter is that a necessary starting point for a "good lawyer" (be it "good" as "competent" or good as "competent" and "morally good") would be to probe Lear's

motivation. A lawyer would want to know that this decision was truly Lear's. Is Lear really acting autonomously? Some lawyers might not be comfortable with this. We should only be concerned with this issue, they would argue, in so far as it bears on free choice. n293 This is the first serious moral issue to be confronted in the case of Rex Lear. Here the counselling function is crucial. Lear is law-compliant in his determination to exclude Cordelia from his bounty; but he is, presumably, also acting unjustly towards his youngest daughter. In addition, as Shakespeare takes monumental pains to remind us, Lear is more "foolish" than "bad," one more "sinned against than sinning." n294 Both foolishness and injustice is something the wise counsellor must also deal with. In a modern setting, perhaps one wise counsellor would speak thusly:

Rex, you are distraught. Cordelia has always been the apple of your eye. You know in your heart of hearts she loves you deeply and truly. Don't do this. Remember, too, Cordelia is the only one unmarried and without an income. She still needs to get through college and medical school. She needs your help more than the older children. Don't you have an obligation to provide for her education [\*357] at least? You did see Regan through college; and Goneril beyond that, through to her MBA. Can you be less scrupulous in fulfilling your parental duty to her? Sleep on this awhile. Let's have lunch next week and talk about it again.

The point I am making is that the lawyer is not limited to a particular manner of appeal. If a reminder of Lear's parental duty seems to be a better avenue than a reminder of his daughter's love, there is no moral problem with stressing it. As a long-term client, Lear is known to you. You have a relationship. That partly shapes what you say and how you say it.

The point is that the good lawyer must introduce moral suasion into the decision-making process. n295 It would be wrong not to confront Lear with the foolishness of his wishes. It seems to me that a good person, who is not a lawyer and who is in a counselling position or is asked for help in carrying out someone else's decision, is duty-bound to make some such effort. n296

What does this say about the quandry issue: could a good person draft such a will? Yes. It would not be immoral for him to do so. This is where the "first-class citizenship" model has its bite. n297 However, if the lawyer chooses to draft the will, he has a continuing obligation to such a long-term client (and to Cordelia) to try to persuade Rex Lear to make a new will, one which includes Cordelia fairly in his bounty. On the other hand, there is no obligation for the lawyer to draft such a will.

On one L.A. Law episode, Stuart Markowitz faced a task similar [\*358] to the one the lawyer in our Lear hypothetical first faced. n298 Markowitz used moral suasion on his aging client, who wanted him to draft a will leaving her plentiful estate to a T.V. evangelist, about whom the client cared not a fig. The lawyer's knowledge of his client led him to the conclusion that she was disinheriting her children purely from spite. She claimed they did not pay enough attention to her. Markowitz acted as I suggested the good lawyer should, in the Rex Lear hypo. Instead of "thinking it over," however, the woman called another lawyer who quickly drafted a different will, leaving all of the estate to Markowitz "who will know what to do with it." n299 Rather than pursue the intriguing professional responsibility problems that ensued as a result of this turn of events, let us go on.

One of the dangers of refusing to go along quickly and more quietly with a client's desires may be the loss of the client. This means not only lost income, but also, perhaps, lost opportunities to use moral suasion to change the client's mind (or heart) later on. Of course, there are circumstances where the lawyer and the client are so far apart in their moral positions that the lawyer must resign; but this decision rarely turns on legality.

"Free speech" cases may drive the point home more clearly. We have First Amendment rights to speak, but that legal right is often abused morally. n300 Should lawyers fail to vindicate the legal right because the message may be immoral? n301 The lawyer's role invariably puts him or her in a position where a client's action may result in an injustice to another. I used the Lear and L.A. Law hypotheticals to demonstrate that this issue is far from being one that arises in the context of litigation only. If getting a guilty criminal defendant "off" is a moral wrong, then so is writing a will for Lear which excludes Cordelia. If the criminal defendant's wrong was minor, theft for example, or morally excusable on one ground or another, then the injustice in Rex Lear's case is much greater than that in the criminal [\*359] case. I also want to suggest that proper use of the counselling function does not preclude action by a lawyer that ends in what may be an "injustice," though not one that could legitimately be called so within the framework of the legal system. There are various moral wrongs that the legal system should not even attempt to remedy. This is a truism that yields a concurrence from thinkers as diverse in their thinking as Thomas Aquinas and Oliver Wendell Holmes, Jr. Aquinas argued that human law should not attempt to repress all vice, but only those from which it is possible to abstain, given human nature and cultural proclivities. n302 Holmes made a similar point in telling of a learned German professor at the turn of the century who said if

you tried to raise the price of beer two cents in Germany there would be a revolt. n303 It is simply true that rules are relatively crude weapons to combat certain evils, and they sweep from the path much that we would not like swept if we could find a way to separate "wheat from chaff."

Statute of limitations and statute of fraud defenses are examples of such rules. We want, in the former case, for people not to sit on their legitimate claims too long because of various policy reasons including the fact that evidence grows stale or gets lost. n304 In the latter case, we want the solemnization of a writing out of fear that fraudulent claims will be advanced. n305 There are good reasons for these rules, but it is clear they will sometimes be used to defeat claims which are both substantively just and otherwise relatively provable. David Hoffman said lawyers should not plead the statute of limitations to defeat an otherwise just claim n306 and William Simon argues that a lawyer ought to have discretion whether or not to plead the statute of frauds for a client who clearly owes a moral debt. n307 To allow lawyers to refuse to take cases like these is part of [\*360] the best moral tradition; but to suggest they can take these cases and not plead a good affirmative defense without their client's consent is to grant fearful power to lawyers, and would turn the profession of lawyering on its head. There is an obligation on the part of the lawyer to try to have the client do the morally right thing. However, if the client wants to stand on his legal rights, how can we allow the lawyer to deprive his own client of such rights without due process of law? Would we say it is permissible for a judge to decide the case without process or without justification other than his belief that the defense's position was sounder than plaintiff's? n308 Of course not. The issue is one of value, and the whole idea of justice under law is a value worth more than the vindication of one case. We do not have to be Hobbesians n309 to see the value in not allowing the private exercise of power, even and especially by lawyers, to go unchecked. In Simon's analysis of the statute of frauds case, he admits there are "rights on both sides." n310 Why should the lawyer be the one to adjudicate those rights rather than the system which is set up to do so?

This section has drifted far from the counselling function. It is easy to do that, because counselling is suggesting or not suggesting action, be it drafting a lease, filing a complaint or bargaining hard for a contract clause. I want to repeat that I believe the lawyer has a duty to counsel the client to do the morally right thing; and yet that it is not immoral for the client to achieve legal ends by legal means, fairly utilized. That caveat comes from the primary obligation of the lawyer to process, procedures and institutions. "Sharp



practices" may be technically legal but it is wrong for a lawyer to engage in them. n311 How we know what practices are "sharp" depends on legal, social, and cultural traditions, which, in turn, need explanation, discussion, and moral debate.

[\*361] This is not to deny that lawyers should assess each case as a new moral challenge. If Rex Lear wanted to divest himself of all his properties, giving half to Regan and half to Goneril and nothing to Cordelia, relying on the "largesse" of his two older daughters to provide for him in his old age, it might be that the only moral option the lawyer has is to refuse to do it. Once the deeds are passed, of course, both Lear and Cordelia are dispossessed. On the other hand, if the deeds could be drafted giving Lear a life estate or with a reverter clause based on a contingency, then dispossession of Cordelia for Lear's sake might be a viable, though uncomfortable, moral option. The crucial point is the lawyer's determination not to simply do what the client wants without question, but to engage in moral dialogue with him.

#### MAKING LEGAL SERVICES AVAILABLE TO ALL

If the attempt to dissuade Lear from his folly fails, it is certainly the lawyer's right -- and under some set of facts as discussed above, perhaps the lawyer's duty -- to refuse to represent Lear. n312 Generally, the moral freedom of a lawyer to reject any client must be understood in the context of two other traditional principles. The first is that lawyers have a responsibility to help to make legal services available to all. As the *Joint Report* states: "[T]he precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself." n313

The dispute over mandatory *pro bono publico* work, which erupted after the Discussion Draft of the *Model Rules* was released, is a subset of this larger obligation. n314 As members of a profession which has an economic monopoly on law practice, lawyers are bound by their calling to help in the effort to give complete access to our system of justice. This obligation is serious and fundamental. Some of the strongest criticism of adversarial ethics come from those who [\*362] argue from the standpoint of distributive justice. n315 If all people had equal access to justice, the argument runs, perhaps adversarialness could be justified. My response is twofold: 1) thoughtful attempt at articulating the paradigm cannot be postponed until the distributive justice problem is solved; and 2) part of the justification and the central moral tradition of lawyering requires lawyers to

be active in solving the distributive justice problem. Money time, political effort -- any or all of these resources are available to lawyers to achieve the goal. Unless some reasonable outlay of one or another of these lawyerly resources is expended by the lawyer, he or she cannot justify partisanship even in its usual form. Such an outlay is not a matter of charity. It is an obligation that comes with the license to practice law.

The second contextual principle is akin to the first, but has even greater resonance because of what it says about the fundamental moral tradition itself, particularly the means-ends question which is central to my argument. The principle consists of the lawyer's willingness to represent unpopular causes. n316 It is widely celebrated in law-day speeches, but not usually applauded even by lawyers in the concrete case. Early in the history of our country, John Adams felt the sting of public outrage when he represented Captain Preston and several British soldiers who killed colonists in the infamous Boston Massacre. n317 Fifty years after the incident Adams remembered vividly "the abuse heaped upon . . . myself for defense of the British Captain and his soldiers: we heard our names execrated in the most opprobrious terms whenever we appeared in the streets of Boston." n318

Closer to our own time is the story of Jewish lawyer David Goldberger, who defended the right of Nazis to assemble before the village hall in Skokie, Illinois to demonstrate for "white power." n319 The Nazis planned to wear uniforms akin to the stormtrooper uniforms of World War II, replete with swastikas. n320 Skokie was a village whose residents were predominantly Jewish, and had a large [\*363] population of Nazi concentration camp survivors. n321 Goldberger probably had no desire to represent these hateful people. He did so because no one else would and they needed and deserved representation. The right to be represented by counsel is as basic as any right in this country, no matter the character of the client. It is an old song. We sometimes simply refuse to sing it when the audience is not who we want it to be. Again, the question seems less one of ends than means. It is clear that the central tradition requires lawyers to make representation available to all, particularly to the poor and unpopular. What must be emphasized is that these obligations are just that -- obligations. Neither the individual nor the profession as a whole may ignore them. Moreover, the moral rightness of the client's cause is not the determining factor in assessing the moral worthiness of the lawyer's actions in representing that client.

#### CONCLUSION

The *Joint Report* goes some distance in capturing the central moral

tradition of lawyering. However, it does not go far enough, nor could it since the idea of a central tradition has not yet been clearly espoused. Nevertheless there are traditions of the bar that do find their way frequently enough into our codes and writings to be singled out for identification, clarification, and explication as central to our traditions. If the adversary ethic so damned by Luban and Shaffer is of recent vintage n322 or represents a distortion of healthy partisanship then let us try to articulate why this is so and decide what can be done about it. My contention is that "reform" or "modification" of lawyers' ethics within the adversary system is a secondary challenge to the task of getting the central idea of lawyering straight to begin with. This essay is a modest attempt to begin that task. I trust others will want to explore the tradition with me. If not, the zealots have won the day. This means reform before appreciation; reaction before understanding. It means extremism from both sides. In a profession such as ours, this is clearly unacceptable.

#### FOOTNOTES/ENDNOTES

n1. Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereinafter *Joint Report*].

n2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter ABA CODE] (amended 1990). Footnote references to the *Joint Report* abound in the *ABA Code*, attesting to its influence. All told there are twenty such references, making it the single most cited document in the *ABA Code*.

n3. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980) [hereinafter ABA RULES DRAFT], reprinted in T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 67 (Supp. 1980) [hereinafter PROFESSIONAL RESPONSIBILITY]. The influence on the Discussion Draft is more substantively pervasive, particularly in the way in which the drafters separated lawyers' duties by roles: advisor, advocate, negotiator, intermediary, and evaluator. See ABA RULES DRAFT (Table of Contents), *supra*, reprinted in PROFESSIONAL RESPONSIBILITY, *supra*, at 69-70; cf. *Joint Report*, *supra* note 1, at 1160-62 (discussing the role of lawyer as advocate, counselor, and designer of collaborative frameworks). Compare ABA RULES DRAFT, *supra*, Rule 1.7(c)(2), reprinted in PROFES-

SIONAL RESPONSIBILITY, *supra*, at 83 (allowing a lawyer to disclose a client confidence "to the extent it appears necessary to prevent or rectify the consequences of deliberately wrongful act by the client.") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter ABA RULES] (adoting the rule on confidentiality of information but deleting 1.7(c)(2)). See also *Joint Report*, *supra* note 1, at 1162 (emphasising that the lawyer's primary obligation is to the legal system.)

n4. See generally ABA RULES, *supra* note 3. In the final version of the *ABA Rules*, specific rules replaced distinct roles. Compare *id.* Rules 2.2, 2.3 with ABA RULES DRAFT, *supra* note 3, Rules 5, 6, reprinted in PROFESSIONAL RESPONSIBILITY, *supra* note 3, at 126-34 (noting the de-emphasis on the variety of roles lawyers play as compared to the description in the *Joint Report*, *supra* note 1). Of course, the narrowing of the exceptions to the confidentiality rules is a clear substantive change. Compare ABA RULES DRAFT, *supra* note 3, Rule 1.7, reprinted in PROFESSIONAL RESPONSIBILITY, *supra* note 3, at 83 with ABA RULES, *supra* note 3, Rule 1.6.

n5. This, of course, is the question that is truly at the heart of the moral inquiry into the ethics of lawyers. See generally Wasserstrom, *Roles and Morality*, in THE GOOD LAWYER: LAWYER'S ROLES AND LAWYER'S ETHICS 25 (D. Luban ed. 1983) [hereinafter THE GOOD LAWYER] (examining how a persons's role enters into the deliberation and assessment of the morality of her actions); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). But see Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952) (stating that "no man can be either too honest, too truthful, or too upright to be a thoroughly good lawyer."). Thus under the older tradition, no conflict existed.

n6. See, e.g., Luban, *The Adversary System Excuse*, in THE GOOD LAWYER, *supra* note 5, at 83.

n7. This is not to say the matter is not worth arguing.

n8. See Caplin, *Ethical Engineers Need Not Apply: The State of Applied Ethics Today*, SCI. TECH. HUM. VALUES, Fall 1980, at 24. The "emphasis" in applied ethics "is on finding means of analyzing and resolving practical, personal, or professional dilemmas." INSTITUTE OF SOC'Y ETHICS AND THE LIFE SCIENCES, HASTINGS CENTER, THE TEACHING OF ETHICS IN HIGHER EDUC. 13 (1980).

n9. The emergence of Professional Creeds is a paradoxical sign both of

serious distortion and revitalization. In August, 1988, the ABA House of Delegates adopted *The Lawyer's Creed of Professionalism* and recommended that state and local bars adopt a similar creed and urge compliance with it. [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 01:401 (Aug. 31, 1988) [hereinafter Manual]. The widespread rationale for the movement seems to be to restore civility to the bar. See, e.g., Karp, *Inaugural Address*, 59 CLEVELAND B.J. 238, 240 (1988) (stating that the continuing education program must concentrate on ethics); Taylor, *Texas Sets Its Sights on "Rambo,"* Nat'l L. J., Aug. 31, 1989, at 3. (discussing the problem of overly aggressive litigators in Texas).

n10. J. PELIKAN, *THE VINDICATION OF TRADITION* 19 (1984).

n11. T. S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS* 14 (3d ed. 1950).

n12. L. AUCHINCLOSS, *The Senior Partner's Ethics*, in *SKINNY ISLAND: MORE TALES OF MANHATTAN* 194 (1987) [hereinafter *Senior Partner's Ethics*].

n13. *Id.* at 195.

n14. *Id.* at 196.

n15. Childe is "stiff . . . almost painfully neat." *Id.* He talks to his wife and colleagues mechanically. *Id.* at 198. He is absorbed only by his word for his single client, East River Trust. An older associate says that Childe is "limited, specialized. If the firm ever lost that bark, they'd have no more room for Theodore Childe, and he knows it." *Id.* at 199.

n16. *Id.* at 201.

n17. *Id.* at 203.

n18. Phelps is a different breed of cat. "He reveled in his own genius and versatility." *Id.* at 206.

n19. *Id.* at 208-11.

n20. After listening to Phelps' description of the consequences of disclosure, Brendan adds what appears to be the logical conclusion: "And Brendan Bross becomes a junior partner!". *Id.* at 210.

n21. He answers Brendan's logic about being made a "junior partner" with "explosive laughter" that "seemed to carry a note of triumph." *Id.* at 210.

"Ah, dear fellow," he says, "you can't really think me such an ass as

that!" *Id.*

n22. *Id.* at 209-10.

n23. *Id.* at 211.

n24. *Id.* at 211-12.

n25. *Id.* at 212.

n26. *Id.*

n27. *Id.* at 215.

n28. *Id.* at 214.

n29. *Id.*

n30. *Id.* at 214-15.

n31. *Id.* at 208.

n32. *Id.* at 214.

n33. *Id.* at 208.

n34. See *id.*

n35. Clearly what Phelps was doing was trying to persuade Brendan not to disclose. After claiming that he was merely "analyzing the situation" for Brendan when they had the conversation about Brendan's moral choice concerning disclosure, Phelps confesses that he had lied to Brendan about not believing him. "We both know I did," he says. *Id.* at 214. Phelps then attempts to advocate for the client *against* Brendan. "[D]idn't I owe it to East River Trust to work on your weak mind?" *Id.* at 215.

n36. *Id.* at 209-10.

n37. *Id.* at 206.

n38. See, e.g., FED. R. CIV. P. 26(b)(1) (enabling a party to the litigation to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.")

n39. See *infra* notes 45-48 and accompanying text.

n40. *Berkely Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977). See generally J. STEWART, *Kodak: Donovan Leisure Newton & Irvine*, in *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* 327 (1983).

n41. I have no evidence of this other than a comparison of the facts as cited in the text accompanying this note and *infra* note 42. Of such things is art made. The complex tale of Anna Karenina grew in Tolstoy's imagination from the story of a woman throwing herself in front of a train because her lover had left her for another. Hearing the story, Tolstoy attended the woman's autopsy. A year later, he began to write. See Troyat, *Introduction* to L. TOLSTOY, ANNA KARENINA at v-vi (1973).

n42. See J. STEWART, *supra* note 40, at 341-42.

n43. See *id.* at 257-60.

n44. C. WOLFRAM, MODERN LEGAL ETHICS 644 n.62 (1986).

n45. ABA CODE, *supra* note 2, DR 7-102 (1990).

n46. *Id.* DR 7-102(A)(3).

n47. *Id.* DR 7-102(A)(5).

n48. The famous quote from Lord Brougham, is, of course, what have in mind. See *infra* note 55 and accompanying text.

n49. One of the difficulties of applied ethics, particularly if one is interested in moral traditions and practices, lies in the lack of good empirical data to support (or undermine) strongly held beliefs. For example, Monroe Freedman once reported on a survey of lawyers in the District of Columbia which revealed that 95% would call a perjurious criminal defendant to the witness stand and that 90% of those lawyers "would question the witness in the normal fashion." M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 38 (1975). All of this is contrary to what the organized bar claims does and should happen.

A recent study indicated that clients would not stop coming to lawyers if the confidentiality rules were weakened. See Zacharias, *Rethinking Confidentiality*. 74 IOWA L. REV. 351, 358, 377-78 (1989). This is also contrary to the bar' claim.

Although no one would claim one study is sufficient to prove the conclusion reached, studies like these should be replicated. Much of what we claim is based on a mix of factual assumption and values. At least we ought to try harder to get the facts straight.

n50. I do not mean to suggest that lawyers are hypocritical. It is not that they necessarily say one thing and deliberately do something else. The point is one of focus and understanding.

n51. The phrase is popular, although ambiguously defined. See C. WOLFRAM, *supra* note 44, § 1.6, at 17-19.

n52. *Joint Report*, *supra* note 1, at 1162-1216.

n53. *Id.* at 1162.

n54. *Id.*

n55. D. MELLINKOFF, THE CONSCIENCE OF A LAWYER. 189 n.10 (1973) (quoting 2 TRIAL OF QUEEN CAROLINE 8 (1821)). One of the leading scholars in professional responsibility says that today Brougham's words "reflect the dominant, although hardly universal, professional ethic." C. WOLFRAM, *supra* note 44, § 10.3, at 580. As with other empirical statements regarding lawyers, we really do not know whether this is true or false.

n56. Here I want to emphasize the tasks that lawyers perform, other than those of advocacy. See *supra* notes 3-4 and accompanying text.

n57. I use this phrase in the ordinary, not the technical sense of the words. Samuel Johnson referred to the matter the way most professional lawyers would want it referred to, when he said: "A lawyer has no business with the justice or injustice of the cause which he undertake, . . . . The justice or injustice of the cause is to be decided by the Judge." J. BOSWELL, THE JOURNAL OF A TOUR TO THE HEBRIDES 175, reprinted in JOHNSON'S JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND AND BOSWELL'S JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON L.L.D. (R. Chapman ed. 1924).

n58. See, e.g., D. LUBAN, LAWYERS AND JUSTICE 50-66 (1988). "Most people I have spoken with about lawyers' ethics assume that the paradigmatic case of the morally dubious representation is the defense of the guilty criminal, the defense that gets him back out on the street." *Id.* at 59. Luban himself does not share the views of "most people" on the subject, although he is a nuanced critic of the adversary system as he understands it. See *id.* at 58-66.

n59. The word "champion" suggests Roscoe Pound's "sporting theory" of justice, not Jerome Frank's "fight theory," nor what Marvin Frankel calls, the Adam Smith theory of adjudication, a "grimly combative proposition." M. FRANKEL, PARTISAN JUSTICE 11 (1978).

n60. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5 (1975).

n61. I presume that most people would think it just to convict those who performed the acts alleged in the indictment and unjust not to. I also presume most people believe it immoral to help someone evade conviction in those cases where the facts alleged are true. Although I disagree with these presumptions, my disagreement is not the subject of this paper.

n62. An Aristotelian at heart, I do not sharply distinguish between ends and means. As a leading commentator on Aristotle note: For Aristotle, "the decisive point of human activity . . . is *the activity itself*." J. FINNIS FUNDAMENTALS OF ETHICS 39 (1983) (emphasis in original). Nevertheless, the usage is common enough to provide the vehicle to ride most of the way I want to go. The *ABA Code* uses the means/ends distinction quite clearly in apportioning decision-making responsibilities between lawyer and client. See ABA CODE, *supra* note 2, EC 7-7 (1990).

n63. A philosopher who has written a well-known book on the subject of professional ethics argues just this. See A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 140 (1980) (arguing that "knowingly submitting false documents to the court" might be not only justified in some circumstances, but "a morally praiseworthy act" for a lawyer).

n64. What I call a "superficial" understanding of law has been labeled the "dominant view of law inculcated in the law schools." Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 624. I doubt the accuracy of this statement of dominance, but it is another empirical observation that cannot be proven or refuted.

n65. See Taylor, *supra* note 9.

n66. *Joint Report*, *supra* note 1, at 1162.

n67. The literature on Rule 11 is voluminous. For a place to start see, Batista *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 FORDHAM L. REV. 1 (1985). Some scholars have argued that the active application of Rule 11 may chill a lawyer's creativity in fulfilling his responsibility to his client. See M. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 81-82 (1990).

n68. See Manual, *supra* note 9 (noting the adoption of "The Lawyer's Creed of Professionalism" in August 1988).

n69. See Karp, *supra* note 9.

n70. Whatever the rap on lawyers for their excessive "clubability," which went far enough to cause the Supreme Court to damn lawyers for price-fixing, see *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the best tradition connects this fraternal treatment as useful for the administration of justice. See ABA CODE, *supra* note 2, EC 7-37, 7-38 (1990).

n71. Cf. *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (stating that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

n72. 129 A.D.2d 126, 517 N.Y.S.2d 474 (1987), *pet. for leave to reargue, renew or appeal from disqualification denied*, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1987), *appeal dismissed*, 71 N.Y.2d 994, 524, N.E.2d 879, 529 N.Y.S.2d 277 (1988). For the first salvos shot in this case, see *In re Weinberg*, 133 Misc. 2d 950, 951-54 (1986) and its predecessor, *In re Weinberg*, N.Y.L.J., Oct. 3, 1985, p.7, col.2. The episode is touched upon in N. LISAGOR & F. LIPSIOUS, A LAW UNTO ITSELF 267-270 (1988), which purports to be the "untold story of the Law Firm Sullivan & Cromwell."

n73. *Beiny v. Wynyard*, 129 A.D.2d at 129, 517 N.Y.S.2d at 476.

n74. See N.Y. CIV. PRAC. L. & R. 3107 (McKinneys 1990).

n75. *Id.* at 131, 517 N.Y.S.2d at 477.

n76. *Id.* at 134, 517 N.Y.S.2d at 479.

n77. *Id.*

n78. *Id.* at 129, 435, 517 N.Y.S.2d at 476, 480.

n79. *Id.* at 132, 517 N.Y.S.2d at 478.

n80. *Id.*

n81. See *infra* text accompanying note 82.

n82. *Beiny v. Wynyard*, 129 A.D.2d. 126, 132, 517 N.Y.S.2d 474, 478 (1987).

n83. *Id.*

n84. The ABA Comm. on Professional Ethics and Grievances, Formal Op. 81 (1932) (stating that "[m]isrepresentation by a lawyer is a cardinal professional sin," in response to the question of whether an attorney admitted in a state may present himself as an attorney-at-law in another state where he is not admitted.)

n85. Wasserstrom, *supra* note 60, at 11.

n86. One of the rhetorical devices Monroe Freedman uses to defend his assertion that a lawyer should allow a criminal defendant to perjure himself is to pose a hypothetical featuring an innocent criminal defendant. *See* M. FREEDMAN, *supra* note 49, at 30-31. The argument has much less persuasive force if the defendant actually committed the crime. Although another of those factual assertions that cannot be proven, I assume criminal defense lawyers defend far more guilty than innocent defendants. The vitality of the system depends, however, on observing the rules, no matter what the lawyer's belief about the substance of the matter. In *Beiny*, the lawyer was out to prove the other side was lying. *See Beiny v. Wynyard*, 129 A.D.2d at 128, 517 N.Y.S.2d at 475.

n87. *See In re Weinberg*, 133 Misc. 2d 950, 509 N.Y.S.2d 240 (Sur. Ct. 1986) (holding that the attorney client privilege is not waived when an agent of a corporation to which the privilege attached consulted with the attorney for the corporation in a representative capacity).

n88. *See supra* note 80 and accompanying text.

n89. *Beiny v. Wynyard*, 132 A.D.2d 190, 192, 522 N.Y.S.2d 511, 513 (1987).

n90. *Id.* at 195, 522 N.Y.S.2d at 511.

n91. *Id.* at 206, 522 N.Y.S.2d at 522.

n92. *Id.*

n93. *Id.* at 192, 522 N.Y.S.2d at 513.

n94. *Id.* at 193, 522 N.Y.S.2d at 514.

n95. *Id.* at 191, 522 N.Y.S.2d at 512.

n96. *Id.* Christ was the senior partner who supervised the associate, Beeney, in this matter. *Id.* at 198, 522 N.Y.S.2d at 517.

n97. *See supra* note 96 and accompanying text.

n98. *See supra* notes 16-18 and accompanying text.

n99. *Senior Partner's Ethics*, *supra* note 12, at 214.

n100. *See infra* notes 216-311 and accompanying text.

n101. *See* Taylor, *supra* note 9 (discussing the problem the Texas bar

has with "Rambo," or overzealous, lawyers).

n102. C. WOLFRAM, *supra* note 44, § 1.6, at 17-19.

n103. *See, e.g.*, ABA CODE, *supra* note 2, Preamble and Preliminary Statement (stating that the "Ethical Considerations are aspirational . . . and represent the objectives toward which every member of the professional should strive.").

n104. CENTER FOR PROFESSIONAL RESPONSIBILITY, AM. BAR ASSOC., THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 48 (1987).

n105. These three professions, more than any others, seem to invite the confession of those afflicted by guilt. *See* S. BOK, SECRETS 73-88 (1982).

n106. MCCORMICK ON EVIDENCE 171-72 (E. Cleary 3d ed. 1984).

n107. "The proposition is that the detriment to justice from a power to shut off inquiry into pertinent facts in court will be outweighed by the benefits to justice (not to the client) from a franker disclosure in the lawyer's office." *Id.* at 205.

n108. P. HEYMANN & L. LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS 184-97 (1988).

n109. *Id.* at 186.

n110. *Id.* at 187.

n111. *Id.*

n112. *Id.*

n113. *Id.* at 185.

n114. *Id.* at 188.

n115. *Id.* at 189.

n116. *Id.* at 190 (quoting Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (Magazine), at 31.)

n117. *Id.* at 191.

n118. *Id.*

n119. *Id.*

n120. *Id.*

n121. *Id.*

n122. *Id.*

n123. Taylor, *supra* note 116.

n124. P. HEYMANN & L. LIEBMAN, *supra* note 108, at 192.

n125. *Id.* at 193.

n126. *Id.* at 192.

n127. At one point Goodman threatened to kill himself in response to his lawyer's request to set a deadline to "tell what he had done." Taylor, *supra* note 116, at 48.

n128. P. HEYMANN & L. LIEBMAN, *supra* note 108, at 193.

n129. *Id.* at 193-94.

n130. Taylor, *supra* note 116, at 49.

n131. *Id.*

n132. *Id.*

n133. *Id.*

n134. *Id.*

n135. *Id.*

n136. *See infra* notes 209-14 and accompanying text.

n137. Taylor, *supra* note 116, at 49.

n138. P. HEYMANN & L. LIEBMAN, *supra* note 108, at 196.

n139. Roscoe Pound set forth the classic definition of a profession as: "[A] group of men pursuing a learned art as a common calling in the spirit of a public service." R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). Pound then added, "[it is] no less a public service because it may incidentally be a means of livelihood." *Id.*

n140. *See* C. WOLFRAM, *supra* note 44, § 2.1, at 20.

n141. Spouses have been known to endure extreme mental and physical abuse because of psychological and economic dependency. *See, e.g.,* Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 *HASTINGS L.J.*

895 (1981). Lawyers' economic dependency is clear enough. The psychological is becoming more apparent. *See* Cooper, *Lawyers Succumb to Stress*, Nat'l L. J., Dec. 1, 1980, at 1, col. 3 (discussing the psychological problems and accompanying stress suffered by attorneys).

n142. This language is from a prosecutor lecturing other prosecutors. *See Frankel, supra* note 56, at 32 (quoting M. Nadjai, Selection of Jury (voir dire), lecture for National College of District Attorneys, University of Houston (Summer 1971)).

n143. D. LUBAN, *supra* note 58, at 148 (quoting Louis Brandeis).

n144. *See* C. WOLFRAM, *supra* note 44, § 1.1, at 2. This independence is one of the basic justifications for the legal profession. *Id.*

n145. *See* P. HEYMANN & L. LIEBMAN, *supra* note 108, at 196-97.

n146. Taylor, *supra* note 116, at 33. Even after the debacle, the experts maintained that their advice neither to disclose anything to anybody nor to push their clients to disclose everything to them was correct. The basis was their belief that "[a] lawyer's primary obligation loyalty and responsibility, must be to his client." *Id.* at 52.

n147. ABA CODE, *supra* note 2, DR 7-102(B)(1).

n148. *Id.*; *see e.g.,* Pennsylvania Bar Association Comm. on Legal Ethics and Professional Responsibility, Formal Op. 89-199 (undated) (stating that a lawyer was required to disclose fraud to a tribunal).

n149. Few states ever adopted the amended language. *See* A.L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 144 (3d ed. 1989); C. WOLFRAM, *supra* note 44, § 12.5.3, at 658.

n150. OHIO CONTINUING LEGAL EDUC. INST., *CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1)* (Ohio Revised Code 1988). The situation has changed now because the majority of states have passed some version of the *ABA Rules*. Although the *ABA Rules* themselves do not allow disclosure of the on-going or future crime of commercial fraud, *see* ABA RULES, *supra* note 4, Rules 1.6, 3.3, nevertheless many of the states which have adopted the *ABA Rules*, have altered the confidentiality provisions to allow such disclosure. *See* [Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 160 (Aug. 31, 1988).

n151. C. WOLFRAM, *supra* note 44, § 12.5.3, at 658. The "except clause" prohibits a lawyer from rectifying frauds perpetrated by clients "when the information is protected as a confidence or secret." ABA CODE, *supra*

note 2, DR 7-102(B)(1) (1974). The "except clause," in effect, swallows up the rule. See M. FREEDMAN, *supra* note 67, at 94-95.

n152. See NEW YORK STATE BAR ASS'N, THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (1990). However not all have construed it that way. See Rotunda, *Officers, Directors, and Their Professional Advisors -- Rights, Duties, and Liabilities*, 1 CORP. L. REV. 34, 39 (1978) (discussing the ABA's interpretation of the rule, which allows disclosure of continuing crimes).

n153. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

n154. It seems to me the "except clause" could have been read to change the mandatory language into optional language, thus tying it back to Canon 4. Admittedly this reading strains the language too, but no more so than the ABA interpretation.

n155. *Senior Partner's Ethics*, *supra* note 12, at 214.

n156. See P. HEYMANN & L. LIEBMAN, *supra* note 108, at 190-91.

n157. *Id.* at 190-92.

n158. ABA RULES DRAFT, *supra* note 3, Rule 1.7(c)(2), *reprinted in* PROFESSIONAL RESPONSIBILITY, *supra* note 3, at 83.

n159. See ABA RULES, *supra* note 3, Rule 1.6(b)(3) (proposed final draft 1981); *id.* Rule 1.6(b)(2) (revised final draft 1982).

n160. *Id.* Rule 1.6(b)(2) (revised final draft 1982).

n161. At least the self-defense justification (if a charge is brought by the client) and the fee collection justification are both instances of potential lawyer abuse. A client cannot complain of a lawyer's work if the lawyer cannot defend himself, nor should the client be able to hire a lawyer, use his or her service, then hide behind confidentiality to avoid fair payment. Admittedly, not the whole of this traditional exception may be covered by the lawyer-abuse-as-system-abuse argument. See ABA CODE, *supra* note 2, DR 4-101(C)(4) (1990) and ABA RULES, *supra* note 3, Rule 1.6(b)(2). *But see* Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 786 (1977) (arguing that there are only three distinct formulations of the exception and that none are "consistent with acceptable ethical standards, sound policy, or relevant principles of law."). Cases involving third party litigation or threats could probably be justified on the system abuse argument,

although if this argument were accepted in those situations, all the exceptions to strict confidentiality would need reassessment.

n162. To continue to have the self-defense and self-interest exceptions while cutting back on future crime and fraud exceptions is, as has been suggested of the entire rule, "scandalously self-serving." A. GOLDMAN, *supra* note 63, at 101.

n163. The famous (or infamous) Principle of Nonaccountability should not be taken so far. The Principle states: "When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978). I trust this Article makes clear that I find the Principle of Nonaccountability erroneous as an operational guide to lawyering in many respects.

n164. Again, by "guilty" I mean in the colloquial, not legal sense. See *supra* note 57 and accompanying text.

n165. See Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979). "The beginning and end of a lawyer's professional life is talking with a client about what is to be done." *Id.*

n166. As the comment to the confidentiality rule in the *ABA Rules* states:

"A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." ABA RULES, *supra* note 3, Rule 1.6 comment.

n167. The Preamble to the *ABA Rules* states that lawyers perform "various functions," as advisors, advocates, negotiators, intermediaries or evaluators. It is clear that special rules exist for representing different clients like corporations, the government, a criminal defendant, and a client with a mental disability. ABA RULES, *supra* note 3, preamble; see Kaufman, *supra* note 148, at 283-346.

n168. See *Joint Report*, *supra* note 1, at 1160-61. The *Joint Report* articulated the differences between the advocate and counsellor. It also suggested a unique role for "The Lawyer as One Who Designs the Framework of Collaborative Effort." *Id.* Special mention was made, too, of the lawyer's obligation when he or she is a public prosecutor or legislator. *Id.* at 1218. It is fair to say that the discussion draft of the *ABA Rules* is organized around the special function idea. See generally ABA RULES DRAFT,



*supra* note 3, reprinted in PROFESSIONAL RESPONSIBILITY, *supra* note 3.

n169. See C. WOLFRAM, *supra* note 44, § 11.1, at 593.

n170. The thoughtful criticism of philosopher Charles Frankel is pertinent here. See Frankel, Book Review, 43 U. CHI. L. REV. 874, 885-86 (1976) (reviewing AMERICAN BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY (1975)) (examining the changing roles of lawyers and questioning whether the ethical rules are cognizant of these changes).

n171. References to Perry Mason or most of the stable of lawyers in the popular T.V. series, *L.A. Law* should suffice to demonstrate this point. See also Mindes & Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image, 1982 AM. B. FOUND. RES. J. 177* (examining three popular views of lawyers).

n172. The John Wayne or Clint Eastwood hero translates - at least in terms of results - into the sometimes flawed heroes of movies like *The Verdict* (Twentieth Century Fox 1982) (concerning an attorney who is a drunk, but also a champion of justice) or even *Suspect* (RCA/Columbia 1987) (where the character sleeps with one of the jurors, but is clearly on the "right side" in the end.) The Al Pacino character in *And Justice for All* (Columbia Pictures 1979) is an even more extreme version of a lawyer bent on justice at any cost.

n173. M. MAYER, *THE LAWYERS 3* (1966).

n174. This bland statement needs a richer context to be understood properly. One such context is provided by Richard Wasserstrom's concentration on the development of character traits in lawyers. See Wasserstrom, *supra* note 60, at 13; M. FREEDMAN, *supra* note 67. Professor Freedman argues that a lawyer's autonomy is limited once a lawyer chooses to represent a client. Freedman, *Personal Responsibility in a Professional System*, 36 CATH. U.L. REV. 191 (1978). In representing a client, a lawyer must respect the client's autonomy and present him with all his legal and moral options, letting the client make the final decision. See *id.* at 204.

n175. See Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Freedman, *Professional Responsibility of The Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

n176. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349, 349 (1952).

n177. Dickens' portrayal of the dark and oily Tulkinghorn is a classic. See C. DICKENS, *BLEAK HOUSE* (1853).

n178. The hero in H. LEE, *TO KILL A MOCKINGBIRD* (1962), has been made an exemplar by Tom Shaffer. See T. SHAFFER, *AMERICAN LEGAL ETHICS: TEST, READINGS, AND DISCUSSION TOPICS 3-57* (1985).

n179. *Joint Report, supra* note 1, at 1160.

n180. *Id.* at 1161.

n181. *Id.* at 1162.

n182. *Id.* at 1160. It is actually the first one discussed in the *Joint Report*.

n183. *Id.* at 1160-61.

n184. *Id.* at 1160.

n185. *Id.* at 1160-61. See generally S. LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE THE AMERICAN APPROACH TO ADJUDICATION 2-4* (1988).

n186. The quoted words passive and umpireal are loaded by the weight of current controversy. Fuller, the architect of the "classical definition" of the adversary system, argued that the judge need not be "passive" at all. See Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW 41* (H. Berman ed. 1961). Frankel accepts the "umpireal" description as classic, even as he argues that, in actuality, judges are lured into an adversarial role by the requirements of their legal system, their own legal experiences and, of course, by human nature. See M. FRANKEL, *supra* note 59, at 39-58.

The word "impartial" is not controversial. I take it to mean what philosopher Bernard Gert describes it to mean in moral terms (using the judicial role as the paradigm). "A is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions." B. GERT, *MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES 80* (1988). A judge may like one lawyer or party more than another, but that fact should be irrelevant with respect to his decision. We know bias is hard to guard against, but we also know the difference between bias toward a person "personally" and bias toward a person "professionally."

n187. Langbein, *The German Advantage in Civil Procedure*, 52 U.

CHI. L. REV. 823, 824 (1985). Langbein observes that both the German and American systems are adversarial, except that in German courts lawyers do not participate in factual gathering and production of material.

n188. The debate about definition itself is complex. Compare Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37 (1954) (concluding that legal definitions can only be elucidated by considering the conditions under which their characteristic use is true) with J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 3-22 (1980) (arguing that definitions should be reached by focusing on the central case or ideal type).

n189. 372 U.S. 335 (1963).

n190. I am not denying that having a lawyer is terribly important to the functioning of the system. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (stating that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."). David Luban's criticisms of the system are deeply colored by his concern that everyone have a lawyer. See D. LUBAN, *supra* note 58, at 237-391. Nearly a third of his theoretical book is taken up with that question. *Id.* at 237-391.

n191. See FED. R. EVID. 412. The so-called "rape-shield" rule, was a response to some morally questionable and surely degrading cross-examination techniques. See Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (discussing *Federal Rules of Evidence*, Rule 412, and instances where evidence of past sexual conduct may have probative value in determining whether a rape occurred); see also S. ESTRICH, REAL RAPE (1987).

n192. See Langbein, *supra* note 187, at 824 (arguing that the system would not be fundamentally changed, but nevertheless would be improved if factfinding was not in the hands of the adversaries).

n193. See *Joint Report*, *supra* note 1, at 1160-61.

[T]he role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.

*Id.* at 1161

n194. Such discussions are probably not productive. See Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) (discussing various experiments designed to test the efficacy of the adversarial process against the nonadversarial process).

n195. See *id.* at 1083 n.1.

n196. See *Joint Report*, *supra* note 1, at 1160.

n197. *Id.*

n198. Address by Roscoe Pound, American Bar Association Annual Convention (1906).

n199. See, e.g., N.Y. CIV. PRAC. L. & R. 3124 (McKinney 1990) (permitting motions to compel discovery).

n200. See J. STEWART, *supra* note 40, at 349. This is not to say that Kodak's chief trial counsel is not subject to criticism for other matters relating to the production/non-production issue. *Id.* at 327-365.

n201. See M. FREEDMAN, *supra* note 49, at 27-41, M. FREEDMAN, *supra* note 67, at 109-41.

n202. Professor Freedman reported that one day after a news story about his position appeared, he was informed by registered letter that disciplinary proceedings had begun against him because he had "expressed opinions in apparent disagreement with the Canons of Professional Ethics." M. FREEDMAN, *supra* note 49, at viii.

n203. See *In re Carroll*, 244 S.W.2d 474 (Ky. 1951) (stating that "[u]nder any standard of proper ethical conduct an attorney should not sit by silently and permit his client to commit what may have been perjury.")

n204. Almost gleefully, Professor Freedman tells us that then Judge Warren Burger was the ringlander in an attempt to have him disbarred and fired from his academic position. M. FREEDMAN, *supra* note 49, at viii.

n205. See *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

n206. See the plethora of cases collected in the Manual, *supra* note 9, at 61:706-08.

n207. In the perjury context under the *ABA Rules*, this means even unwittingly. ABA RULES, *supra* note 3, Rule 3.3.

n208. See M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 189 (1985).

n209. See M. FREEDMAN, *supra* note 67, at 120.

n210. *Senior Partner's Ethics*, *supra* note 12, at 211-12.

n211. J. STEWART *supra* note 40, at 364.

n212. *367 U.S. 643 (1961)*.

n213. If so elementary a matter as an unconstitutional search and seizure were ignored for any reason other than that the argument could not be made in good faith, a malpractice suit would certainly lie. Since one of the elements of a malpractice claim is the standard of care used by the reasonable lawyer in similar circumstances, the case is an easy one. See C. WOLFRAM, *supra* note 44, § 5.6.2, at 211-12.

n214. See *supra* notes 203-07.

n215. See *infra* notes 278-310 and accompanying text.

n216. These matters have greatly troubled the philosophic mind: See, e.g., S. LANGER, *PHILOSOPHY IN A NEW KEY* 266-79 (3rd ed. 1957); P. HENLE, *LANGUAGE, THOUGHT AND CULTURE* 10 (1958); Cook, *Facts and 'Statements of Fact,' 4 U. CHI. L. REV.* 233, 236-42 (1936).

n217. Isolating one or more facts from other facts, or emphasizing one fact over another is, of course, an essential characteristic of advocacy.

n218. See generally Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 *NOTRE DAME L. REV.* 722 (1989) (authored by Christopher Shine) (reviewing the legal and ethical issues that arise when an attorney practices deception in a law enforcement investigatory process).

n219. M. FRANKEL, *supra* note 59, at 73.

n220. *Id.* at 76.

n221. *Joint Report*, *supra* note 1, at 1161.

n222. See generally M. FRANKEL, *supra* note 59 (discussing the author's concern with the distortions of the legal process).

n223. "Tough but fair" is the traditional compliment one adversary pays to another.

n224. This is one of Freedman's classic hard questions. See M. FREEDMAN, *supra* note 67, at 161-71; see also Freedman, *supra* note 175. Then Professor (now Judge) John Noonan's response to Freedman was drawn, in part, from the *Joint Report*, *supra* note 1. See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 *MICH. L. REV.* 1485 (1966).

n225. For a thoughtful discussion of this question, see R. KEETON, *TRIAL TACTICS AND METHODS* (2d ed. 1973).

n226. See Fried, *supra* note 5, at 1082-87.

n227. *Id.* at 1086.

n228. See M. FREEDMAN, *supra* note 49, at 48.

n229. See Fried, *supra* note 5, at 1086.

n230. See ABA RULES, *supra* note 3, Rule 3.3. As I have argued in the past, there are antecedents dating back to the year 1307 in England and 1701 in Massachusetts. See Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 *UTAH L. REV.* 653, 663 n. 43. But see ABA Comm. on Professional Ethics, Formal Op. 287 (1953) (deciding that a lawyer is not bound to reveal past frauds committed by a client on the court). For a discussion of Opinion 287, see M. FREEDMAN, *supra* note 67, at 93-95.

n231. Wasserstrom reminds us that this belief is at the heart of any attempt to support the lawyer's role in the adversary system. See Wasserstrom, *supra* note 60, at 12-13.

n232. And even serious critics of the adversary ethic support a role-differentiated model of lawyer behavior in the criminal area. See, e.g., Wasserstrom, *supra* note 60, at 12; see also D. LUBAN, *supra* note 58, at 151-52 (discussing the balancing between the rights of criminal defendants and the rights of their victims in rape cases).

n233. It has always seemed to me that the evidentiary rules are at the heart of many of our problems with "truth" and "overzealousness" in the courtroom. Why the lawyer should have such control over eliciting, stopping, directing and limiting testimony is beyond my understanding. Most likely, our tradition of lay juries has much to do with this tradition. See M. GLENDON, M. GORDON & C. OSAKWE, *supra* note 208, at 167-68.

n234. *Joint Report*, *supra* note 1, at 1160.

n235. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*. 31 VAND. L. REV. 1295, 1348-61 (1978) (proposing that lawyers' responsibilities for fairness be especially high during the discovery process).

n236. Not only is the setting and the lawyer's role radically different, but presumptions in favor of the client disappear. See *Joint Report*, *supra* note 1, at 1161.

n237. See Feinberg, *Civil Disobedience in the Modern World*, in J. FEINBERG & H. GROSS, *PHILOSOPHY OF LAW* 134 (3rd. ed. 1986).

n238. See B. GERT, *supra* note 186, at 62-76. Rules are different from principles. In Dworkin's now famous phrasing, rules apply in "all-or-nothing fashion" while principles "have . . . weight." Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25-27 (1967). Of course there are exceptions to rules and principles which are sometimes in conflict. When principles clash, Ross adopts Aristotle's notion that "the decision rests with perception." 9 THE WORKS OF ARISTOTLE II09b, II26b (W.D. Ross ed. 1963). It seems to me a better answer lies in the tradition of casuistry, which is being resurrected, in part, because of problems in professional ethics. See Toulmin, *The Tyranny of Principles*, HASTINGS CENTER REP., Dec. 1981, at 31, 38; see also A. JONSEN & S. TOULMIN, *THE ABUSE OF CASUSTRY* 12 (1988).

n239. The full list is:

1. Don't kill.
2. Don't cause pain.
3. Don't disable.
4. Don't deprive of freedom.
5. Don't deprive of pleasure.
6. Don't deceive.
7. Keep your promises.
8. Don't cheat.
9. Obey the law.
10. Do your duty.

B. GERT, *supra* note 186 at 157.

n240. Professor Freedman argues, however, that a lawyer may be held "morally accountable . . . for . . . decid[ing] to accept a particular client or cause." M. FREEDMAN, *supra* note 67, at 71.

n241. I think this question is particularly thorny. Interestingly, one tentative draft of the ABA's Standards Relating to The Prosecution Function and The Defense Function stated, in part, that the criminal defense lawyer "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully." 1 AMERICAN BAR ASS'N, THE ABA STANDARDS FOR CRIMINAL JUSTICE § 4-7.6 (2d ed. 1980). The comment was even more explicit:

A prosecution witness, for example, may testify in a manner which confirms precisely what the defense lawyer has learned from . . . [his own client] and has substantiated by investigation. But defense counsel may believe that the temperament, personality or inexperience of the witness provide an opportunity, by adroit cross-examination, to confuse the witness and undermine . . . [his] testimony in the eyes of the jury.

*Id.* § 4-7.6 commentary, at 4.92. A number of leading American and British trial lawyers consulted by the Committee believed that because lawyers are afforded a monopoly of the tools of cross-examination and impeachment in order to expose falsehood, it is not proper to use those tools to destroy truth, or to seek to confuse or embarrass the witness under these circumstances. *Id.* As previously indicated, Professor Freedman and Professor Noonan squared off on whether or not it is appropriate for lawyers to impeach a truthful witness years ago. See *supra* note 224 and accompanying text. Significantly, Professor Freedman calls this question "the most difficult and painful" of his original three hardest questions. See M. FREEDMAN, *supra* note 67, at 161; see also Freedman, *supra* note 175.

n242. See R. KEETON, *supra* note 225, at 116-21.

n243. See ABA RULES, *supra* note 3, Rule 4.4. Of course there are basic responsibilities lawyers have to all "third parties" not to degrade, harass or maliciously injure them. See ABA CODE, *supra* note 2, DR 7-102(A)(1) (1990) (stating that a lawyer shall not "take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."); *Id.* DR 7-106 (C)(2) (stating that a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.").

n244. *But see supra* notes 71-99 and accompanying text (discussing *Beiny v. Wynyard*, 129 A.D. 2d 126, 517 N.Y.S.2d 474 (1987))

n245. *See Rubin, A Causerie on Lawyer's Ethics In Negotiation*, 35 LA. L. REV. 577 (1975); White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926; ABA RULES DRAFT, *supra* note 3, Rules 4.2, 4.3, *reprinted in* PROFESSIONAL RESPONSIBILITY, *supra* note 3, at 123-27.

n246. *See Joint Report*, *supra* note 1, at 1161-62.

n247. *Senior Partner's Ethics*, *supra* note 12, at 208.

n248. *Id.* at 214.

n249. *See* S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 30 (1978) (describing how the presumption against lying can be stated to stress the positive worth of truthfulness and veracity).

n250. *See* ABA CODE, *supra* note 2, DR 7-102(A)(5)(1990) (stating that a lawyer shall not "knowingly make a false statement of law or fact."); ABA RULES, *supra* note 3, Rules 3.3(a)(1), 4.1(a) (prohibiting a lawyer from making "a false statement of material fact or law" to a tribunal or third person).

n251. Fried, *supra* note 5, at 1085.

n252. *See* Fried, *supra* note 5, at 1 (describing the lawyer as being seen "as a professional devoted to his client's interests and as authorized, if not in fact required, to do some things for that client which he would not do for himself.").

n253. *See* O. WILDE, THE DECAY OF LYING (1889), *reprinted in* CRITICISM: THE MAJOR TEXTS 638 (W.J. Bate ed. 1970).

n254. *See Advocatos Diaboli*, in 1 THE CATHOLIC ENCYCLOPEDIA 168 (1907). The Devil's Advocate's "duty requires him to prepare in writing all possible arguments, *even at times seemingly slight*, against the raising of any one to the honours of the altar." *Id.* (emphasis added).

n255. *See* Augustine, *Against Lying*, in S. BOK, *supra* note 249, at 255. Augustine is representative when he denounces even the therapeutic lie, saying plainly "it is not true that sometimes we ought to lie." *Id.*

n256. The list of specific functions that the promotor of the faith (popularly called the Devil's Advocate) performs is long and very adversarial *See*

*Devil's Advocate*, in 4 NEW CATHOLIC ENCYCLOPEDIA 829-30 (1967).

n257. *Senior Partner's Ethics*, *supra* note 12, at 208.

n258. *Id.* at 214.

n259. G. ANSCOMBE, INTENTION 4 (1957). In *Intention*, Anscombe examines what it means to intend an act.

n260. The lawyer's codes are clear on the point. *See supra* note 249; *see also* S. BOK, *supra* note 249, at 214 (arguing that not even paternalistic concerns justify deception).

n261. *Senior Partner's Ethics*, *supra* note 12, at 214.

n262. *See supra* notes 223-28 and accompanying text.

n263. *See* ABA RULES, *supra* note 3, Rule 3.3 (expressing an attorney's duty of candor toward a tribunal); ABA CODE, *supra* note 2, DR 7-102(B)(1) (1990) (stating that a lawyer must reveal frauds upon a tribunal to the tribunal).

n264. *See* ABA CODE, *supra* note 2, DR 7-102 (A)(5) (1990) (stating that in the course of representation a lawyer shall not "knowingly make a false statement of law or fact."); ABA RULES, *supra* note 3, Rule 4.1 (stating that in the course of a representation a lawyer shall not knowingly "make a false statement of material fact or law to a third person.").

n265. *See* C. WOLFRAM, *supra* note 44, § 13.2, at 688-89.

n266. *See* ABA RULES, *supra* note 3, Rule 5.1 (1990) (expressing a supervisory lawyer's or partner's responsibility in ensuring adherence to the ethics rules). The *ABA Rules* place an affirmative duty on law firm partners to see "that all lawyers in the firm conform to the Rules of Professional Conduct." *Id.* Rule 5.1(a).

n267. *Senior Partner's Ethics*, *supra* note 12, at 211.

n268. Phelps argues rhetorically: "Was it reasonable for me to take the word of an associate I hardly knew against that of a partner whom I had known and trusted for twenty years?" *Id.*

n269. Phelps continued, "[w]as that doing my duty to a client? Oh, no, my friend, I did not have the presumption to substitute my inner hunch of what had really happened for the presumption of right conduct that my partner surely deserved." *Id.*

n270. See ABA CODE, *supra* note 2, EC 7-24 (1990); ABA RULES, *supra* note 3, Rule 3.1 & comment.

n271. *Joint Report*, *supra* note 1, at 1161.

n272. *Id.*

n273. *Id.*

n274. FED. R. CIV. P. 11 is the prototype here. A lawyer is subject to sanctions if he or she files a paper without first having undertaken a reasonable inquiry to determine *inter alia*, that it is "well grounded in fact." *Id.* Monroe Freedman argues that a lawyers must try to get to the truth in order to do a good job for any client. See M. FREEDMAN, *supra* note 49, at 30-31. That means probing and investigation.

n275. *Joint Report*, *supra* note 1, at 1161. Law-compliance is thus one of the major tasks of the lawyer as counsellor.

n276. Indeed, taking advantage of the intricacies of the Internal Revenue Code is exactly what is expected of tax lawyers. See Paul, *The Lawyer as Tax Advisor*, 25 *ROCKY MTN. L. REV.* 412, 417-18 (1953). More difficult is the question of what ethical standard is to be used in dealing with gray areas of the law or dubious factual propositions. Compare, ABA Formal Op. 314 (1965) (stating that a tax lawyer "may freely urge the statements of positions most favorable to the client just as long as there is reasonable basis for those positions.") with ABA Formal Op. 352 (1985) (stating that a tax lawyer may advise the statement of positions most favorable to a client if the lawyer believes that there is "some realistic possibility of success if the matter is litigated."). Before grappling with the problem of standards, the basic orientation of the tax lawyer needs to be articulated. Since tax systems inevitably rely on the voluntary assessment and cooperation of the citizen, the lawyer has a higher duty than mere advocacy. See B. WOLFFMAN & J. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1981); Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics and Tax Reform*, 80 *COLUM. L. REV.* 1553 (1980). Both the U.S. Code and the Federal Regulations attempt to articulate this higher standard. See 26 *U.S.C.A.* § 6694-95 (1989 & Supp. 1991); Practice Before the Internal Revenue Service, 31 *C.F.R.* § 10.51 (1990). The standard requires the lawyer to take no position he or she would not, in good faith, believe would prevail if litigated before the tax court. This may be too high. *Contra* C. WOLFFMAN, *supra* note 44, at 701.

n277. "In assisting his client to reach a proper decision, it is often desir-

able for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." ABA CODE, *supra* note 2, EC 7-8 (1990).

n278. Here I stress the most commonplace examples. It may be immoral to help a person escape punishment for a criminal act, but lawyers are obliged to do that. It may also be immoral to help Nazis speak their hate-filled diatribe, but first amendment protections are for everyone. See *supra* note 204 and accompanying text; see also Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 *MERCER L. REV.* 761 (1978)

n279. See ABA CODE, *supra* note 2, DR 7-102(1) (1990) (stating that a lawyer shall not "harass or maliciously injure another."); see also Penegar, *The Five Pillars of Professionalism*, 49 *U. PITT. L. REV.* 307, 341-348 (1988) (stating that the phrase "within the bounds of the law" in canon 7 "was intended to be translated into specific 'don'ts' in the ethical considerations and disciplinary rules.").

n280. See ABA CODE, *supra* note 2, EC 2-26 (1990) (stating that "a lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client." (emphasis added)).

n281. See *infra* notes 312-21 and accompanying text; see also ABA CODE, *supra* note 2, EC 2-27 (1990) (stating that "a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.").

n282. See ABA CODE, *supra* note 2, DR 2-110 (C)(1)(e) (1990) (stating that a lawyer is permitted to withdraw if his client "[i]nsists . . . that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer."); ABA RULES, *supra* note 3, Rule 1.16(b)(3) (stating that a lawyer may withdraw if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.").

n283. See ABA CODE, *supra* note 2, DR 2-110 (A)(2) (1990) (stating that a lawyer may not withdraw "until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his clients."); ABA RULES, *supra* note 3, 1.16(d) (stating that upon terminating a representation "a lawyer shall take steps reasonably practicable to protect a client's interest.").

n284. By quandary ethics is meant the belief that ethics has to do with the solving of more problems via the application of correct moral rules and principles. E. PINCOFFS, *QUANDARIES AND VIRTUES* 14 (1986).

n285. Today applied ethics is usually conducted in a quandary method. It ought not to be. *See id.*

n286. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION (1990).

n287. The case method and its modern progeny, the problem method, is an example of the quandary method.

n288. The student of literature will recognize, of course, that my hypothetical is no more than a crude retelling of Shakespeare's masterful tragedy. *See* W. SHAKESPEARE, *King Lear* [hereinafter *King Lear*]. My apologies to the bard.

n289. *See* Pepper, *supra* note 64, at 613, 616-19 (arguing that there should be equality of access to the law and not access defined by a lawyer's morals).

n290. *Id.* at 617-18.

n291. *See generally* D. HOFFMAN, A COURSE OF LEGAL STUDY (reprint 1972) (2d ed. 1836). It was Hoffman, after all, who resolved not to plead the statute of limitations for a client who had no other excuse for lack of payment of a debt than the lapse of time. *Id.* at 754.

n292. *See King Lear, supra* note 288, act I, sc. 1. To call Regan's and Goneril's statements hyperbolic is to be guilty of understatement. Goneril says:

Sir, I love you more than word can wield the matter,

Dearer than eyesight, space and liberty,

Beyond what can be valued, rich or rare . . . .

Regan professes that she loves her father just as her sister does,

Only she comes too short, I profess

Myself an enemy to all other joys,

which the most precious square of sense possesses, And find I am alone  
felicitate

In your dear Highness' love.

Cordelia is, by comparison, measured, exact, even cool:

Good my lord, You have begot me, bred me, loved me, I return these duties back as are right fit, Obey you, love you, and most honor you. Why have my sister husbands, if they say They love you all?

n293. There are at least four distinctions possible among meanings of the word "autonomy." They are as follows: (1) as free action; (2) as authenticity; (3) as effective deliberation; and (4) as moral choice. *See* Miller, *Autonomy & the Refusal of Lifesaving Treatment*, HASTINGS CENTER REP., Aug. 1981, at 22, 24-25.

n294. *King Lear, supra* note 288, act III, sc. 2, line 59.

n295. Of course this is Tom Shaffer's major point. *See* Shaffer, *supra* note 165. *But see* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 148 (1978) (suggesting that moral advice is not within the "narrower definition of a legal advisor's domain."). Both the *ABA Rules* and the *ABA Code* make the raising of moral issues optional. *See* ABA CODE, *supra* note 2, EC 7-8 (1990) (stating that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."); ABA RULES, *supra* note 3, Rule 2.1 (stating that "[i]n rendering advice, a lawyer may refer . . . to other considerations such as moral, . . . that may be relevant to the client's situation."). Obviously, this issue has nothing to do with enforceability. Ethics has been called "obedience to the unenforceable." H.S. DRINKER, LEGAL ETHICS 2 (1953) (quoting Lord Moulton).

n296. Advice ought not to be limited to the strictly "legal," if lawyers are often called upon to tell clients that they are "damned fools and should stop." Elihu Root claimed that admonition was "about half the practice of a decent lawyer." M. MAYER, THE LAWYERS 6 (1966) (quoting E. Root). If what the client wanted to do was perfectly legal, but unsound financially, would the lawyer keep that opinion and advice from the client? What if the proposed plan of action would harm the client's reputation or business or personal relations with others?

n297. *See* Pepper, *supra* note 64, at 615-19.

n298. *See L.A. Law* (NBC television broadcast, Show No. 13, Second Season). For an interesting discussion of *L.A. Law's* value and influence, see generally Gillers, *Taking L.A. Law More Seriously*, 98 YALE L. J. 1607 (1989) (discussing the "ethical riddles" *L.A. Law* regularly confronts and sometimes inaccurately answers); Rosenberg, *An L.A. Lawyer Replies*, 98 YALE L. J. 1625 (1989) (arguing that *L.A. Law* does not define the images

of a lawyer).

n299. *L.A. Law*, *supra* note 298.

n300. *See, e.g., Collen v. California*, 403 U.S. 15 (1971) (holding that while the words "fuck the draft" may be morally offensive, the words fall within the confines of protected speech).

n301. Our constitution protects freedom of speech, even of "the thoughts we hate." *See United States v. Schwimmer*, 279 U.S. 644, 655 (1928) (Holmes, J. dissenting).

n302. Aquinas, *Summa Theological* I-II, Q.96, A.2.

n303. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

n304. Statutes of limitations relieve courts "of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1956) They bar claims that "have been allowed to slumber until evidence has been lost, memories faded, and witnesses disappeared." *Order of R.R. Tel. v. Railway Express Agency*, 321 U.S. 341, 349 (1944).

n305. *See* R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL LAW: TEACHING MATERIALS 481 (4th ed. 1987).

n306. *See* D. HOFFMAN, *supra* note 291, at 321.

n307. *See* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1123 (1988). It is hard to square Simon's approach throughout his article with the real world. Regarding the point at hand, he seems to argue that the lawyer should have the right to decide whether or not to plead the statute of frauds without informing the client. The client's informed consent, not to mention his moral autonomy, would thereby be vitiated. This would turn our present system upside down, although Simon says the plausibility of his approach "depends on the plausibility of the traditional ideal." *Id. at 1144*. I completely disagree. I think Simon ignores what it means to "represent" someone in the "adversary system."

n308. One could argue that the judge's obligation to apply the law is the strongest role differentiated behavior which can be morally justified. *See* A. GOLDMAN, *supra* note 63, at 34-62.

n309. *See* T. HOBBS, LEVIATHAN (1651). Of course Hobbes would turn absolute power over to the state.

n310. Simon, *supra* note 307, at 1124.

n311. *See, e.g.,* ABA CODE, *supra* note 2, EC 7-10 (1990) (stating that a lawyer should treat persons involved in the legal process with consideration); *id.* EC 7-21 (stating that "[t]hreatening to use a criminal process . . . to coerce adjustments of private civil claims or controversies is a subversion of [the criminal] . . . process.").

n312. *See id.* EC 2-26 (stating that "a lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client.").

n313. *Joint Report*, *supra* note 1, at 1216.

n314. The original draft of the *ABA Rules* made *pro bono* work mandatory. *See* ABA RULES DRAFT, *supra* note 3. Rule 8.1, *reprinted in* PROFESSIONAL RESPONSIBILITY, *supra* note 3, at 142. The final version of the *ABA Rules* acknowledged the responsibility, but put the duty in non-enforceable language. "A lawyer *should* render public interest legal service." *Id.* Rule 6.1. at 131 (emphasis added)

n315. *See* Luban, *supra* note 6, at 237-391.

n316. "One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public." *Joint Report*, *supra* note 1, at 1216.

n317. *See* Ernst & Schwartz, *The Right to Counsel and the Unpopular Cause*, 20 U. PITT. L. REV. 725 (1959).

n318. *Id. at 728*.

n319. *See* Goldberger, *supra* note 278.

n320. *Id. at 762*.

n321. *Id. at 761*.

n322. Tom Shaffer seems to think it is. *See* Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 703-09 (1988). Perhaps it depends upon what the phrase "adversary ethic" means. Lawyers have long been known for their forceful partisan ways. Lord Brougham's paean to advocacy occurred in 1820. *See supra* text accompanying note 55, *see also* W. SHAKESPEARE, *The Merchant of Venice*, act IV, sc. I. Shakespeare must have known a fierce advocate or two.