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ARTICLES

PROHIBITING LAWYERS FROM ASSISTING IN UNCONSCIONABLE TRANSACTIONS: USING AN OVERT TOOL

LEE A. PIZZIMENTI*

There is no professional duty . . . which compels an advocate . . . to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.

George Sharswood¹

Covert tools are never reliable tools.

Karl Llewellyn²

I. INTRODUCTION

Section 2-302 of the Uniform Commercial Code (U.C.C.) deals in a straightforward manner with the unenforceability of unconscionable clauses in contracts. Prior to its adoption, courts used "covert tools" to invalidate unfair contracts. Several theories were used, some improperly, to justify

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1. G. SHARSWOOD, PROFESSIONAL ETHICS 100-01 (2d ed. 1860).

2. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

denial of enforcement. The result of using such tools was unpredictable and confusing legal regulation. U.C.C. section 2-302 reduces that uncertainty.

Adoption of U.C.C. section 2-302 cannot alone cure the problem of unconscionable contracts. It is unlikely that the party with inferior bargaining power will recognize and enforce his right to avoid an unconscionable contract. Conversely, the attorney hired to draft the unconscionable clause by the party with superior bargaining power should recognize that the contract is unenforceable. Therefore, the best and most overt way to minimize the occurrence of unconscionable contracts is to forbid a lawyer from drafting them. This article proposes a new disciplinary rule prohibiting the attorney from drafting unconscionable clauses.

This prohibition is based on two notions. First, the profession has an interest in regulating this behavior because, as in litigation, the attorney is performing a public function when drafting contracts. The current rules of professional conduct, which prohibit assisting with baseless lawsuits, should be extended to prohibit the drafting of baseless contracts. Second, courts already have begun to use "covert tools," such as the doctrine of fraud, to regulate this behavior. This article suggests that the concerns raised regarding a prohibition against drafting unconscionable clauses do not justify failure to promulgate the disciplinary rule.

II. THE PROBLEM OF UNCONSCIONABILITY

Perhaps the central tenet of contract law is that parties are free to negotiate and determine the terms of their bargain.³ It is well-recognized, however, that some contracting parties, by virtue of their superior bargaining

3. This tenet is sometimes expressed through the doctrine of "adequacy of consideration." Generally, so long as a promise is "bargained for," courts will not inquire into the substantive aspects of the deal. See *RESTATEMENT (SECOND) OF CONTRACTS* § 79 (1981). As Professor Corbin stated:

We have a free market, under our common law, for the reason that the courts have left it free. They do not require that one person shall pay as much as others may be willing to pay, or that one person shall receive for what he sells as little as others may be willing to receive for a like article. The contracting parties make their own contracts, agree upon their own exchanges, and fix their own values.

A. CORBIN, *CORBIN ON CONTRACTS* § 127, at 185 (1952). Professor Farnsworth suggests that the "bargain" theory of consideration, which shifted the inquiry away from the substance of the agreement to whether the promise was bargained for, was consistent with the prevailing notion of trust in free enterprise. E. A. FARNSWORTH, *CONTRACTS* 41-42 (1982); cf. Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 630-31 (1943) (freedom of contract is the inevitable counterpart of a free enterprise system, which stresses individualism and *laissez faire*; the result is that contracts are private lawmaking that judges may interpret, but they may not create contracts for the parties).

situation and sophistication, may force powerless parties to enter into agreements that are grossly unfair, rendering this tenet an illusion.⁴

In early response to this problem, courts, in the absence of a coherent doctrine, used various devices such as contract interpretation,⁵ lack of consideration,⁶ fraud,⁷ misrepresentation,⁸ and duress⁹ to avoid the offending contract or clause.¹⁰ Although their intentions may have been admirable, courts have made both apt and inapt uses of these theories to reach desired ends. The use of "covert devices"¹¹ resulted in a morass of unintelligible caselaw easily manipulated by intelligent lawyers. As Karl Llewellyn observed:

[T]he law of agreeing can be subjected to divers [sic] modes of employment, to make the whole bargain or a particular clause stick or not stick according to the status of the party claiming under it . . .

4. See, e.g., E.A. FARNSWORTH, *supra* note 3, at 293 (agreements sometimes not freely reached by parties of equal bargaining power but assented to by weaker party with little or no opportunity for negotiation); Holley, *A Moral Evaluation of Sales Practices*, 5 BUS. & PROF. ETHICS J. 3 (1988) (contract voluntary only where both parties understand contract, neither are compelled to enter into relation, and both are able to make a rational judgment about costs and benefits); Kessler, *supra* note 3 (weaker party "consents" because he is not in a position to shop around for other terms, either because strong party has a monopoly or competitors use the same terms); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) (standardized contracts generally are not, under any reasonable test, the agreement of the recipient to whom they are delivered); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 933 (1969) (in practice, parties do not freely agree to unconscionable contract terms).

5. See, e.g., *Galligan v. Arovitch*, 421 Pa. 301, 219 A.2d 463 (1966); *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 44, 73 P.2d 1272 (1937). Farnsworth observes that three tenets of contract interpretation were especially helpful in striking down unconscionable contracts: Terms are generally interpreted against the drafter, separately negotiated terms prevail over standardized terms, and handwritten or typed terms prevail over printed terms. E.A. FARNSWORTH, *supra* note 3, at 298.

6. Where there is a preexisting duty, agreement to perform will not be viewed as consideration. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981); *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902); *Rexite Casting Co. v. Midwest Mower Corp.*, 267 S.W.2d 327 (Mo. Ct. App. 1954). As Farnsworth observes, this notion does not make sense in light of the supposed inability of courts to review the adequacy of consideration: If the parties bargain for continued willingness to perform, that should be the end of the matter. E.A. FARNSWORTH, *supra* note 3, at 271. The doctrine came into vogue because the notion of economic duress had not yet evolved. *Id.*

7. See, e.g., *Williams v. Logue*, 154 Miss. 74, 122 So. 490 (1929).

8. See, e.g., *Manly v. Ohio Shoe Co.*, 25 F.2d 384 (4th Cir. 1928); RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

9. See, e.g., *Laemmar v. J. Walter Thompson Co.*, 435 F.2d 680 (7th Cir. 1970); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533 (1971); RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

10. See generally E.A. FARNSWORTH, *supra* note 3, at 212-302; Llewellyn, *supra* note 2, at 702; Spanogle, *supra* note 4, at 934.

11. Llewellyn, *supra* note 2, at 702-03.

The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.¹²

Motivated by these concerns, Llewellyn and the other drafters of the U.C.C. promulgated an "overt tool" to confront the problem of unfair deals. U.C.C. section 2-302 provides that a court may refuse to enforce a contract or clause it finds to be unconscionable.¹³ Section 208 of the Restatement (Second) of Contracts includes an identical provision designed to extend the prohibition to contracts that do not involve transactions in goods.¹⁴

12. *Id.* (emphasis in original); see also Spanogle, *supra* note 4, at 933-34 (surreptitious invalidations of contracts caused great difficulty in predicting court rulings; contract draftsmen encouraged to try again with "clearer" language which in fact "was always longer, more technical and harder for the non-drafting party to understand."); Kessler, *supra* note 3, at 633 (attempts to avoid unfairness while keeping common law contract rules intact rendered law confusing: Courts rendered just decisions by construing clauses as ambiguous even where no ambiguity existed; society thus paid a high price for the luxury of seeming homogeneity).

13. U.C.C. § 2-302(1) (1988) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

14. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). Article 2 of the U.C.C. applies only to transactions in goods. U.C.C. § 2-102 (1988). However, it has been applied by analogy in other contexts. See, e.g., *Coast Indus., Inc. v. Noonan*, 4 Conn. Cir. Ct. 333, 231 A.2d 663 (1966); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 408 N.E.2d 1370 (1980); *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978). As Farnsworth states, E.A. FARNSWORTH, *supra* note 3, at 308, there are several uniform laws adopting a prohibition on unconscionability; see, e.g., UNIF. CONSUMER CREDIT CODE § 5.108; UNIF. CONSUMER SALES PRACTICE ACT § 4 (1971); UNIF. LAND TRANSACTIONS ACT § 1-311 (1975); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.303 (1972).

The unconscionability doctrine has been construed to mean that agreements evidencing an absence of meaningful choice on the part of one of the parties, when coupled with contractual terms that are unreasonably unfair to the disadvantaged party, will not be enforced.¹⁵ The immediate benefit of the unconscionability doctrine was that, as Llewellyn hoped, friends and critics of the doctrine could, for the first time, discuss the advantages and disadvantages of the doctrine in a straightforward and intellectually honest manner.¹⁶ Moreover, some victims of unconscionable contract clauses were able successfully to use U.C.C. section 2-302 or Restatement (Second) of Contracts section 208 to avoid them.¹⁷

Standing alone, however, sections 2-302 and 208 are incapable of resolving the problem of the victimization of persons entering into unconscionable contracts. The very notion of unconscionability presumes that a party, through lack of understanding, sophistication, or bargaining power, is unable to recognize or protect his interest.¹⁸ As a result, it is highly unlikely that the disadvantaged party will ever understand that relief from such a

15. See *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3 (3d ed.1988) (most cases are consistent with *Williams* analysis). For a discussion of whether unconscionability is too difficult to define, see *infra* text accompanying notes 135-53.

16. They did. Compare, e.g., Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975); Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); with, e.g., Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Spanogle, *supra* note 4.

17. See, e.g., *Martin v. Joseph Harris Co.*, 767 F.2d 296 (6th Cir. 1985) (§ 2-302); *Williams*, 350 F.2d 445 (§ 2-302); *Vockner v. Erickson*, 712 P.2d 379 (Alaska 1986) (§ 208); *Truta v. Avis Rent a Car Systems, Inc.*, 193 Cal. App. 3d 802, 238 Cal. Rptr. 806 (1982) (§ 2-302); *Davis v. MLG Corp.*, 712 P.2d 985 (Colo. 1986) (§ 208); *Williams v. Williams*, 306 Md. 332, 508 A.2d 985 (1986) (§ 208); *Vasquez v. Glassboro Serv. Assoc.*, 83 N.J. 86, 415 A.2d 1156 (1980) (§ 2-302); *Heen & Flint Assoc. v. Traveler's Indem. Co.*, 93 Misc. 2d 1, 400 N.Y.S.2d 994 (N.Y. Sup. Ct. 1977) (§ 208); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 289 N.Y.S.2d 264 (1969) (§ 2-302); *Snyder v. Rodgers*, 346 Pa. Super. 505, 499 A.2d 1369 (1985) (§ 208).

18. See, e.g., *Williams*, 350 F.2d at 449 (parties with obvious lack of education have little or no knowledge of terms); *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971) (need for application of standard most acute when the professional seller is seeking the trade of those most subject to exploitation — the uneducated, inexperienced and people with low incomes); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967) (negotiations with Spanish speaking buyer in Spanish; contract in English not explained). Cf. Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1449-53 (citing empirical studies indicating that persons with lower income and education are less likely to perceive quality problems and less likely to complain, given fatalistic attitudes regarding their plight and lack of knowledge regarding how to complain).

contract is possible.¹⁹ For example, a study of one hundred tenants with leases in Ann Arbor, Michigan disclosed that only one-half of the tenants (who were generally well educated) understood the meaning of simple lease terms, while only one-third indicated they understood a sample clause exculpating the landlord from paying damages and requiring the tenant to make repairs.²⁰

Even assuming parties understand what they sign, they may conclude from reviewing the document that they have no rights when, in fact, they do. For example, the tenants were asked whether clearly unenforceable sample clauses were "valid and enforceable in a court of law."²¹ More than fifty percent of those responding assumed they were.²² Thus, it is to the advantage of parties seeking an unfair bargain to include unconscionable clauses in their contracts. At a minimum, they will keep some from enjoying the rights they are entitled to receive.²³

In sharp contrast to the ignorance of the disadvantaged party, and the resulting inability of the judicial system to address this problem, is the knowledge of the attorney for the party in the superior bargaining position. The attorney who drafts the offending clause should be well aware of the fact that the clause may be held unenforceable, if his knowledge of the law is current.²⁴

In fact, current ethics rules may provide an incentive to draft such clauses. The rules require lawyers to provide clients with legal and practi-

19. As U.C.C. § 2-302 (1988) indicates, unconscionability is a defense to enforcement of a contract, and it is often used in response to a lawsuit by the party with superior bargaining power. Perhaps in recognition of the inability of parties to recognize unconscionability, courts have raised the issue *sua sponte*. See, e.g., *Langemeier v. National Oats Co., Inc.*, 775 F.2d 975 (8th Cir. 1985); *Capital Assoc., Inc. v. Hudgens*, 455 So. 2d 651 (Fla. Dist. Ct. App. 1984); *Maxon Corp. v. Tyler Pipe Indus.*, 497 N.E.2d 570 (Ind. App. Ct. 1986); *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 125 Misc. 2d 68, 478 N.Y.S.2d 505 (1984) (trial court must hold required hearing, but can declare contract unconscionable on own initiative.).

20. Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 261-62, 276 (1970). For an excellent discussion of why tenants are unwilling or unable to determine or enforce their rights, see Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 525-27 (1979).

21. Mueller, *supra* note 20, at 272.

22. *Id.*

23. Professor Goldberg observes that relief in the judicial area is not alone effective because the expense and risk of litigation deters consumers from seeking legal counsel when confronted with the fact that they had "agreed" to provisions. Realizing this, he concludes, firms have little incentive to remove unconscionable terms from agreements. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. LAW & ECON 461, 488 (1974).

24. There are commentators who suggest that unconscionability is too elusive a concept to be understood by attorneys. See *infra* note 136. This author disagrees. See *infra* text accompanying notes 137-38.

cal information necessary to enable them to make informed decisions.²⁵ The rules also require lawyers to defer to the client's judgment absent fraud or illegality.²⁶ Moreover, lawyers have been found guilty of malpractice for failure to disclose various options to clients.²⁷ As a result, lawyers may feel compelled as a matter of competent representation to advise the client that, while a court would not enforce a clause, the vast majority of people would believe the clauses were valid and would act accordingly. Clients, of course, would have a strong incentive to include the clause if presented with that opinion. Thus, it is the attorney for the person with superior bargaining power who can best avoid the imposition of unfair requirements upon powerless parties. This can be done simply by refraining from advising clients about or drafting such a clause.

In order to achieve this goal, however, the attorney must have some incentive to refrain from drafting unconscionable contracts or contract clauses. One possibility would be to allow maintenance of a malpractice suit by the disadvantaged party against the attorney. It is highly unlikely, however, that such a theory would be successful. Opposing parties have attempted without success to sue opposing counsel for malpractice for bringing frivolous lawsuits.²⁸ In rejecting such claims, courts have reasoned that the opposing party was not the attorney's client and, in fact, had interests adverse to those of the client.²⁹ Absent an exceptional case where

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) requires that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See generally Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

26. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, 7-9 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). MODEL RULE 1.2(e) requires the lawyer to consult with the client concerning limitations on professional conduct where the client expects assistance through means prohibited by the rules, and MODEL RULE 1.2(b) provides that representing a client does not constitute an endorsement of his economic, social or moral views. Those rules, coupled with the requirements of zealous advocacy, supply strong incentive to offer the clause to a client. MODEL CODE OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL RULES OF PROFESSIONAL RESPONSIBILITY EC 7-101 (1980); see Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U. CAL. DAVIS L. REV. 1049, 1064-66 (1984). Professor Maute concludes that clients outside of the litigation context have the greatest ability to control the lawyer given the duty to communicate and the fact that in nonlitigation contexts client ends, which are always decided finally by the client, are more inextricably tied to the means employed, which otherwise may be decided by the lawyer. *Id.* at 1085.

27. See, e.g., *Russo v. Griffin*, 147 Vt. 20, 510 A.2d 436 (1986) (malpractice to refrain from informing client of options regarding covenants not to compete).

28. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Friedman v. Dozor*, 412 Mich. 1, 312 N.W.2d 585 (1981). See generally R. MALLEN & J. SMITH, *LEGAL MALPRACTICE* 376 n.1 (3d ed. 1989).

29. See, e.g., *Bickel*, 447 F. Supp. 1376; *Friedman*, 83 Mich. App. 429, 268 N.W.2d 673.

the attorney is viewed as representing both parties,³⁰ the same logic would apply when parties are presumably bargaining at arm's length.³¹ An incentive more consistent with recent developments in the law of professional ethics would be to promulgate a rule of professional conduct prohibiting attorneys from drafting unconscionable contracts.³² The body responsible for overseeing the conduct of attorneys would enforce the rule.³³

III. THE ARGUMENTS FOR PROHIBITION

A. *Philosophical and Institutional Concerns*

An early draft of Rule 1.2 of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) stated that "a lawyer shall not assist in preparation of a written instrument, which terms he knows or reasonably should know are legally prohibited."³⁴ This proposal was not the first attempt to prohibit lawyers from assisting in the gain of an unconscionable advantage in counseling and negotiation contexts. In 1959, the Joint Conference on Professional Responsibility of the American Bar Association and Association of American Law Schools (Joint Conference) submitted a final report, approved by the Association of American Law Schools (AALS) and the ABA House of Delegates,³⁵ that exhorted the lawyer that he had "no license to participate as a legal adviser in a line of conduct that is *immoral, unfair* or of *doubtful legality*."³⁶ Yet, the final

30. See, e.g., *Nelson v. Nationwide Mortgage Corp.*, 659 F. Supp. 611 (D.D.C. 1987); *Stinson v. Brand*, 738 S.W.2d 186 (Tenn. 1987) (alternate ground for decision); cf. *In re Friedman*, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978) (contract between broker and artist's widow set aside as unconscionable where attorney for broker "explained" contract he drafted and widow gave him two pictures).

31. See, e.g., *Adams v. Chenoweth*, 349 So. 2d 230 (Fla. Dist. Ct. App. 1977) (lawyer for seller owes no duty to buyer); *Bell v. Manning*, 613 S.W.2d 335 (Tex. Ct. App. 1981) (attorney for contractor owes no duty to customers). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1982) prohibit the representation of parties with conflicting interests. Although it is possible to represent both sides in non-litigation contexts, see MODEL CODE EC 5-15 and MODEL RULE 2.2, the lawyer may not do so unless it is reasonable to assume his professional judgment will not be impaired and he can adequately protect the interests of the parties.

32. See *infra* text accompanying note 134. Such a rule would be consistent with MODEL RULE 3.1, which prohibits an attorney from bringing or defending a suit unless there is a basis which is not frivolous, even though there is no malpractice remedy.

33. Ultimate responsibility rests with the state supreme court. ABA, AMERICAN BAR ASSOCIATION STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS § 2.1 (1980).

34. ABA DRAFT MODEL RULES OF PROFESSIONAL CONDUCT § 1.2 (1980).

35. Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereinafter *Joint Conference*].

36. *Id.* at 1161.

drafts of the ABA Model Code of Professional Responsibility (Model Code) and the Model Rules do not include a prohibition against such behavior.

Typically, the organized bar is reluctant to regulate lawyers' conduct toward third parties on the grounds that the adversarial system works best when adversaries clash in battle with every weapon available.³⁷ The Joint Conference Report indicated that the adversarial process reduces the natural human tendency to rush to judgment before considering all of the peculiarities and nuances of an issue, and that intelligent and vigorous advocacy on both sides is the best guarantee that "man's capacity for impartial judgment can attain its fullest realization."³⁸

This argument is unpersuasive for several reasons. It has been observed that the fact that the adversarial system is perceived as the best means to achieve the just resolution of suits does not "crown [the system itself] with supreme value. It is means, not end."³⁹ In fact, several commentators have convincingly established that the adversarial system does not inevitably produce truth or justice.⁴⁰

37. See, e.g., M. FREEDMAN, *ETHICS IN AN ADVERSARY SYSTEM* (1975).

38. *Joint Conference, supra* note 35, at 1161; see also M. FREEDMAN, *supra* note 37, at 4.

39. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

40. For example, Professor Rhode exposed the illusory nature of this justification of the adversarial system:

The most obvious difficulty with this premise is that it is neither self-evident nor supported by any empirical evidence. As Geoffrey Hazard, Reporter for the Model Rules Commission, candidly acknowledges, we have "no proof that the adversary system of trial yields truth more often than other systems of trial." Neither is it intuitively obvious that truth is more often revealed by self-interested, rather than disinterested, exploration. The virtues of private initiative and judicial passivity come at a cost. Lawyers are concerned with the production of belief, not of knowledge. Why assume, to paraphrase Macaulay, that the fairest results will emerge from two advocates arguing as unfairly as possible on opposite sides? That is not the way most countries adjudicate controversies, nor the way other professions conduct factual inquiry. Nor is it how the bar itself seeks truth in any setting outside the courtroom. In preparing for trial, for example, lawyers do not typically hire competitive investigators.

Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 596-97 (1985). Moreover, the notion of battling equals must, to maintain plausibility, ignore the economic and social reality that not all combatants have equal resources. One would therefore expect that the haves come out ahead of the "have nots." *Id.* at 597; see also Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 13 (1975) ("we are, today, . . . certainly entitled to be quite skeptical both of the fairness and of the capacity for self-correction of our larger institutional mechanisms, including the legal system.").

As Professor Shaffer demonstrated, the use of an adversarial ethic to justify a lawyer's actions is a relatively recent development which arose because of three events: Representation of industrial "robber barons" in the 1870's; the growth of national bar associations; and the appearance of the first codes of ethics. Lawyers responded to an outcry regarding manipulation of the legal system by lawyers who engaged in a "public" business by invoking the notion of individual rights. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988). It is

Moreover, competing interests exist. As the Preamble to the Model Rules states, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁴¹ Perhaps in recognition of this, no commentator has suggested that there can be no limit to zealous advocacy.⁴² In fact, both the Model Code and the Model Rules have prohibited behavior that an unbridled zealous advocate might find consistent with the "battle" ethic. For example, lawyers may not make false statements of law or fact,⁴³ assist a client in illegal or fraudulent acts,⁴⁴ or attempt to influence a judge⁴⁵ or juror.⁴⁶ Therefore, any attempt to justify allowing a lawyer to assist in gaining an unconscionable advantage must be justified on its own terms, rather than by a reference to an all-encompassing adversarial ethic, which has never and does not currently exist.⁴⁷

Finally, a justification based on an adversarial ethic, which may be legitimate in a litigation context, loses some force in negotiating and counseling contexts. The Joint Conference Committee agreed that "partisan advocacy plays a vital and essential role in one of the most fundamental procedures of

interesting to note that these changes occurred at approximately the same time as, and were influenced by the same philosophy (that of laissez faire individualism) as the notion that courts would not review the adequacy of consideration. See *supra* note 3.

41. MODEL RULES OF PROFESSIONAL CONDUCT, preamble, at 9; see also Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (autonomy of client is one moral good among many).

42. Monroe Freedman, for example, proposes the rule that an attorney must disclose his client's intention to commit a crime which results in death or serious bodily harm. Freedman, *Lawyer-Client Confidences Under the ABA Model Rules: Ethical Rules Without Ethical Reason*, 3 CRIM. JUST. ETHICS 3, 7 (1984). Fried believes that an attorney acts immorally where using a method not anticipated by the system. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). Pepper agrees that the lawyer may not aid in illegal conduct, and adds the lawyer may practice conscientious objection to serving the client in extraordinary cases of immoral, though not illegal conduct. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

43. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(1), 4.1(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1982).

44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1982).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(A) (1982).

46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(a) (1983). Nor can attorneys bribe witnesses. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108 (1982); MODEL RULES OF PROFESSIONAL CONDUCT 3.4(b) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1982).

47. Professor Pepper's defense of an amoral role for attorneys is not based upon the notion of an adversarial system. Pepper, *supra* note 42.

a democratic society."⁴⁸ Yet, members of the Committee acknowledged that "all-out partisanship acceptable in courtroom advocacy is not to be carried over lock, stock and barrel in the performance of the lawyer's role as counselor."⁴⁹ As many commentators have recognized,⁵⁰ it is presumed that advocates in open court will each vigorously represent his client under the surveillance of a well-qualified and unbiased judge.⁵¹ Professor Harry Jones, Reporter to the 1959 Joint Conference, stated that this presumption does not apply outside the litigation context:

[W]hen the lawyer is in his office devising a course of business conduct, a standard form contract, or a complex scheme of land acquisition and development, no opposing lawyer is there to represent the equities of the many persons who may be affected by the lawyer's plans, no judge is present to monitor the fairness of the arrangements, and there are no fires of controversy to keep the counselor honest and purge his client's specifications of overreaching self-interest.⁵²

48. *Joint Conference*, *supra* note 35, at 1161; Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 967 (1978).

49. Jones, *supra* note 48, at 968.

50. See, e.g., Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RES. J. 519; Rhode, *supra* note 40; Rubin, *supra* note 39; Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

51. Jones, *supra* note 48, at 968; cf. *Westlake v. Abrams*, 565 F. Supp. 1330, 1350 (N.D. Ga. 1983) (advocate should resolve doubts in favor of client; counselor should give professional opinion as to what ultimate decision of courts should be).

52. Jones, *supra* note 48, at 968-69; see Schwartz, *supra* note 50, at 677-78 (self-policing necessary where there is no neutral decision maker). As Rhode observes, the problem arises because the psychology of role-differentiated behavior, together with pressures of the marketplace, and other forces, such as the ideology of advocacy, force lawyers to minimize the rights of others whose interests are directly implicated. Rhode, *supra* note 40, at 629. As Wasserstrom explains, role-differentiated behavior is behavior entailing a preference for a particular person's interests, e.g., one's child or client, which may result in indifference to several moral concerns which might otherwise be relevant. See Wasserstrom, *supra* note 40, at 5. The "ideology of advocacy" is the ethical orientation the lawyer adopts to rationalize an amoral approach to the legal profession. One tenet of this ideology is a belief in the principle of "procedural justice." It assumes that legitimacy rests on whether a result was produced through an appropriate procedure rather than by the intrinsic appropriateness of the result. So long as procedures are adequate, "one can act justly by conforming to them regardless of the consequences to which one's conduct contributes." Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 38. Simon recognizes, as do Rhode and Wasserstrom, that the moral justification of the amoral role lessens where in fact it cannot be shown that the system is fair. See *supra* note 40.

One more element is at work here: The psychological notion of "cognitive dissonance:"

When there is an inconsistent thought, a person experiences an unpleasant psychological state called cognitive dissonance. To avoid this discomfort, the individual will behave so as to reduce the dissonance and restore balance. Applied [to lawyers] dissonance is created by the conflict between "I believe X," but "I am advocating not X." In attempting to reduce

A second justification for refusing to prohibit the aiding of unconscionable transactions is that the lawyer is the only means by which a client can exercise autonomy in our legal system.⁵³ Thus, the lawyer should not be inhibited from aiding that effort. Professors Fried and Pepper have offered variations on this theme to posit the broader declaration that a lawyer is not morally responsible when acting in the client's interest. Pepper claims the amoral role of an attorney is proper so long as the "conduct [he] facilitates is above the floor of the intolerable";⁵⁴ that is, it is not unlawful. Fried claims the lawyer is not morally responsible wherever he aids in a wrong that a "reasonably just legal system" permits.⁵⁵ Applied in this context, attorneys should be able to draft contracts which are unenforceable so long as they are not illegal.⁵⁶

There are limits to the efficacy of this argument. First, to conclude that any act contemplated by a system is just, one must presuppose that the system itself is just. As many commentators have observed, this is by no means a truism.⁵⁷ Second, while "[o]ther things being equal, . . . increasing

the dissonance caused by this behavior the speaker may change his attitudes, so that his "private belief becomes consistent with his public behavior."

Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 32 (1980). Professor Chemerinsky notes that cognitive dissonance, along with other factors, tends to make the lawyer's views change to comport with those of the client. *Id.* at 32-34. This phenomenon, of course, would lead to even less identification with the concerns of unrepresented parties.

53. See Fried, *supra* note 42; Pepper, *supra* note 42.

54. Pepper, *supra* note 42, at 617.

55. Fried, *supra* note 42, at 1084; see also *id.* at 1080-87.

56. If the distinction between illegal (void) contracts and voidable (or unenforceable) contracts is tenable, attorneys should be able to assist in drafting many fraudulent contracts, most of which are voidable rather than void. See *infra* text accompanying notes 198-200.

57. See *supra* note 40. Fried's faith in the propriety of actions so long as procedural devices are followed is a classic example of the ideology of advocacy at work. See Fried, *supra* note 42, at 1080-87. Moreover, it is inconsistent with his notion that lawyers protect client autonomy, because he argues that the lawyer acts immorally where the lawyer uses a method not anticipated by the system. *Id.* at 1073, 1080-81. If he is truly concerned about protecting individuals against the tyranny of the sovereign, he would be forced to say that the lawyer is especially justified in acting when an action is not condoned by the sovereign. Yet it is at this point that the lawyer's moral immunity ends. For additional criticism regarding Fried's view, see Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977); Schwartz, *supra* note 50, at 693.

Simon has a response to the problems inherent in an ideology of advocacy. Rather than an amoral perspective based on that ideology, Simon suggests that a lawyer-client relationship must be based upon mutual respect for the other's autonomy, and that the lawyer must treat problems of advocacy as problems of personal ethics, to be resolved in a manner consistent with one's own moral notions. Simon, *supra* note 52, at 130-44. Simon adds that the lawyer should have the professional duty to exercise discretion to take actions most likely to promote justice. It should be recognized that lawyers must zealously represent clients, but the lawyer must recognize the public

individual autonomy is morally good,"⁵⁸ there is a distinction between the value of autonomy in the abstract and the desirability of actions taken through autonomous choice. All things are *not* equal where the exercise of autonomy leads to immoral results.⁵⁹ This conclusion is consistent, of course, with a major tenet of a system built on the notion of autonomy: The imperative that one exercise one's will in a way which will not interfere with the autonomy of others in society.⁶⁰ Sacrifice of some measure of autonomy is essential to assure that heterogeneous people can live together peacefully as a society.⁶¹

Moreover, the argument has even less force in the context of unconscionability, because states have already placed limits upon autonomy in this context. The legislatures of forty-nine states have made clear that there is a limit on the ability to bargain fully; an unconscionable contract will not be enforced.⁶²

As a result, neither the adversarial ethic nor the right to unfettered autonomy serves as an insurmountable barrier to prohibiting a lawyer from assisting in unconscionable conduct. It remains to be shown whether it is appropriate to adopt such a prohibition.

dimension to his role as well. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

Pepper's notion that society would prohibit behavior if it were "intolerable" enough also presupposes a completely rational system, perhaps one where the powerful do not have better access to lawmakers. Even assuming Pepper is right, there are, as Professor Luban states, many reasons society should not prohibit behavior which may be "intolerable":

We should not put into effect prohibitions that are unenforceable, or that are enforceable only at enormous cost, or through unacceptably or disproportionately invasive means. We should not prohibit immoral conduct if it would be too difficult to specify the conduct, or if the laws would of necessity be vague or either over- or under-inclusive, or if enforcement would destroy our liberties.

Luban, *supra* note 41, at 640.

58. Luban, *supra* note 41, at 639.

59. *Id.*

60. I. KANT, *THE PHILOSOPHY OF LAW* 43-47 (1974). For a utilitarian's concurrence, see J.S. MILL, *ON LIBERTY* (1859) (government should not proscribe mere "self-regarding" actions, but has a role in regulating "other-regarding" actions).

61. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 49-51 (J. Gough, ed. 1976); *THE SOCIAL CONTRACT, ESSAYS BY LOCKE, HUME & ROUSSEAU* 179-82 (E. Barker, ed. 1980).

62. North Carolina did not adopt U.C.C. § 2-302 immediately but added it in 1971. See N.C. GEN. STAT. § 25-2-302 (1986). California adopted an unconscionability section designed to apply to all contracts. CAL. [CIV.] CODE § 1670.5 (West 1985). Louisiana has not adopted Article 2 of the U.C.C. but has developed a considerable amount of common and civil law on the topic. See Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 LA. L. REV. 1315 (1983).

B. *The Public Nature of the Role of Lawyer as Negotiator,
Counselor and Drafter*

The central question is, of course, whether the lawyer should have duties to anyone other than the client in the drafting and subsequent negotiation context. The Model Code and Model Rules recognize that a lawyer clearly has duties to the system and to third parties in a litigation context.⁶³ Yet, the Model Code provides no guidance regarding ethics in negotiating or drafting contexts, and the Model Rules offer only limited direction. The Model Rules recognize that legal decisions are made in contexts other than litigation,⁶⁴ but they do not fully appreciate the public nature of the lawyer's role in a private counseling or drafting context. Lawyers are a part of our legal system's apparatus regardless of whether a particular matter will ever become "grist for the mills of courts."⁶⁵ Yet, the Model Rules view lawyers as officers of the court "only when they are actually or incipiently in one."⁶⁶

This focus has begun to change for two reasons. First, as indicated above, there is no neutral decisionmaker to assure fairness or the emergence of truth.⁶⁷ While society has "an interest if not an expectation"⁶⁸ concerning legal matters decided in negotiation, just as it does in litigation, only lawyers can assure fairness in non-litigation contexts. Next, because lawyers are licensed to advise laypersons about the law, lawyers are perceived as spokespersons for, or representatives of, the law to that group.⁶⁹

The latter argument is recognized in a limited way by Model Rule 4.3, which states that a lawyer dealing with an unrepresented person may not state or imply that he is disinterested.⁷⁰ As the comment to Model Rule 4.3 indicates, the rule is premised upon the idea that laypersons may conclude that a lawyer is a disinterested authority regarding the law even when he

63. See *infra* text accompanying notes 78, 204-05; see also *supra* notes 43-46.

64. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT 2.1 (lawyer as advisor); MODEL RULE 2.2 (lawyer as intermediary); and MODEL RULE 4.1 (duty of trustworthiness in contexts other than before tribunal).

65. Brown & Dauer, *supra* note 50, at 520.

66. *Id.* The MODEL CODE was worse, including no references to the lawyer as counselor and negotiator. The MODEL RULES, at least, recognize those functions, albeit in a limited way. See *supra* note 64.

67. See *supra* text accompanying notes 50-52.

68. Brown & Dauer, *supra* note 50, at 528.

69. *Id.*

70. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1983); Brown & Dauer, *supra* note 50, at 528-29.

represents another person.⁷¹ Considering that rule together with Model Rule 4.1, which prohibits the lawyer from making a false statement of law, one can see a “glimmer of the recognition of the negotiating lawyer as an official of the law.”⁷² In fact, lawyers have been found to have responsibilities to, and even a fiduciary relationship with, unrepresented persons who act in reliance upon their statements.⁷³ Further, duties to third parties have explicitly been recognized in the context of drafting agreements.⁷⁴

The lawyer's public function is even more clear when the lawyer drafts a “form” contract: “[T]he lawyer is, in effect, drawing up a private constitution intended to govern the conduct of a client and masses of persons. . . . Here there is more than an unrepresented person. There are innumerable unrepresented persons.”⁷⁵ As one commentator adds, “[i]f by making law we mean imposing officially enforceable duties or creating or restricting officially enforceable rights, then automobile manufacturers make more warranty law in a day than most legislatures or courts make in a year.”⁷⁶ Thus, when innumerable unrepresented persons receive a contract they assume it

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 comment (1983); see Brown & Dauer, *supra* note 50, at 528-29; C. WOLFRAM, MODERN LEGAL ETHICS 617 (1986). Professor Wolfram notes the clear potential for lawyer overreaching due to the lawyer's superior legal knowledge: An unrepresented party might mistakenly but reasonably rely on his understanding that the lawyer would protect his interests. *Id.*

72. Brown & Dauer, *supra* note 50, at 529.

73. See *supra* note 70; see, e.g., Fassihi v. Sommers, 107 Mich. App. 509, 309 N.W.2d 645 (1981); cf. *In re Friedman*, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978) (contract for consignment of art between broker and artist's widow deemed unconscionable, in part because broker's attorney “explained” contract to her).

74. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK No. 722 (1948) (unethical for lawyer to insert waiver previously determined to be void “as against public policy” into lease); cf. Slotkin v. Citizens Casualty Co., 614 F.2d 301 (2d Cir. 1979) (negligent or reckless omissions in process of settlement agreement); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (negligence in drafting letter regarding status of partnership supported cause of action against attorneys); Stare v. Tate, 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (1971) (settlement agreement reformed because attorney for husband knew of wife's mathematical error and did not fix it).

75. Brown & Dauer, *supra* note 50, at 529.

76. Slawson, *supra* note 4, at 530. He adds that, since so much law is promulgated by standard form, it should be made democratically “with the consent of the governed.” *Id.* Because there is no consent where standard forms are either not read or are misunderstood, Slawson concludes that standardized contracts should be enforceable only where consistent with authoritative standards in the public law, or to nonauthoritative standards in the public interest. See also Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 484 (1974) (If the government role is restricted to passive enforcement of private contracts, legislature essentially delegates lawmaking in the form of standard form contracts to a private party; bias of such “legislation” will inevitably be in favor of stronger party.).

is the law (because a *lawyer* drafted it), when in fact, there may be some clauses without any legal basis.⁷⁷

Essentially, if the contract clause is unconscionable, the lawyer aids a client in extracting an advantage to which he is not legally entitled. Because a court would not enforce the clause, it is difficult to see any logical distinction between drafting an unconscionable clause and extracting a settlement in a frivolous lawsuit. The latter, of course, is expressly forbidden by both the Model Code and the Model Rules.⁷⁸

There are no compelling reasons why lawyers should have greater ability to proceed with unfettered zealous advocacy in non-litigation contexts. In fact, there are reasons why conduct should be more circumscribed in those situations.⁷⁹ Thus, it is anomalous that a lawyer can extract an unconscionable, and therefore legally baseless advantage in a negotiating context while he could never pursue that advantage in litigation.

The authors of the Model Code and the Model Rules have not recognized this anomaly. Although lawyers are permitted to withdraw if they do not wish to aid their client in gaining an unconscionable advantage,⁸⁰ they are not required to do so. There is no prohibition against assisting their client in achieving such results.⁸¹ In fact, the Model Code provides some incentives for the lawyer to offer an unconscionable clause for his client's consideration.⁸²

77. See *supra* notes 18-23.

78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (prohibits lawyer from "bring[ing] or defend[ing]" the claim); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1982) (prohibits the lawyer from "knowingly advanc[ing]" such a claim). Both sections are broad enough to prohibit frivolous settlements, and such a settlement could be set aside. See C. WOLFRAM, *supra* note 71, at 596 n.12; see also RESTATEMENT (SECOND) OF CONTRACTS § 555 (1979); *Slotkin*, 614 F.2d 301.

79. See *supra* notes 49-52, 67-69. Professors Hazard and White argue that it is too difficult to enforce notions of good faith in negotiations for two reasons: First, negotiation arises in too many contexts, from international treaties to simple contracts; second, value judgments vary too much within the profession. See Hazard, *The Lawyer's Obligation to Be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981); White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926. Whatever force those arguments have in general is reduced greatly in an unconscionability setting. Unconscionability generally arises in one context, the consumer contract context. See *infra* notes 148-49. Moreover, lawyers may refer for moral guidance to the legislative pronouncement. See *infra* text accompanying notes 194-96.

80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983); see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(e) (1982).

81. Although the lawyer is permitted to attempt to dissuade the client, he must defer to the client's judgment regarding objectives. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a),(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, 7-9 (1982). See *supra* note 26. See generally Maute, *supra* note 26.

82. See *supra* text accompanying notes 25-27.

C. *The Current Situation: Use of Covert Tools to Control Lawyer Behavior*

In 1967, the New Jersey Supreme Court in *In re Giordano*⁸³ clearly held that a lawyer could be disciplined for assisting in an unconscionable transaction. Lawyer Henneberry had represented a lender in a usurious loan. Although the court concluded the law had been unsettled regarding whether aiding in a usurious transaction was illegal, it found the lawyer had engaged in "highly unconscionable and the grossest kind of overreaching"⁸⁴ to the borrower, who was elderly and of little education. The court cited no disciplinary rule, however, and no other court has admitted to disciplining a lawyer on those grounds.

As in the time prior to adoption of U.C.C. section 2-302, absence of any direct prohibition may lead to unfair results where courts are unwilling to be as forthright as was the New Jersey Supreme Court. As Karl Llewellyn, a legal realist,⁸⁵ recognized, a flexible system of common law decision making has a response: Use the existing tools available to respond to an injustice; if the result is an unintelligible mess that reduces the predictability of law, so be it.⁸⁶

Perhaps because decisionmakers intuitively recognize the illogic of the Model Code and Model Rules, this inexorable common law process has

83. 49 N.J. 210, 229 A.2d 524 (1962).

84. *Id.* at 223, 229 A.2d at 531; *see also* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK No. 722 (1948) (unethical for lawyer to insert waiver previously determined to be void "as against public policy" into lease).

85. Llewellyn was what Luban calls a "high realist." "Low realists" are mere legal skeptics who would posit that "what's right is whatever you can get away with." Luban, *supra* note 41, at 646. Conversely, the "high realists" "claim that law is a prediction of what human officials will do in their good faith efforts to interpret and enforce authoritative rules." *Id.* For an example of Llewellyn's requirement of good faith and importance of developing "baseline norms" in commercial agreements, *see infra* notes 180-82 and accompanying text.

86. *See, e.g.*, HART & SACHS, MATERIALS ON THE LEGAL PROCESS 565-95 (Preliminary ed. 1958); Llewellyn, *supra* note 2, at 702. Kessler described the process:

[T]he rules of the common law are flexible enough to enable courts to listen to their sense of justice and to the sense of justice of the community. Just as freedom of contract gives individual contracting parties all the needed leeway for shaping the law of contract according to their needs, the elasticity of the common law, with rule and counterrule constantly competing, makes it possible for courts to follow the dictates of "social desirability." Whatever one may think about the possibility of separating the "law that is" from the "law that ought to be," this much is certain: *In the development of the common law the ideal tends constantly to become the practice.* And in this process the ideal of certainty has constantly to be weighed against the social desirability of change, and very often legal certainty has to be sacrificed to progress. The inconsistencies and contradictions within the legal system resulting from the uneven growth of the law and from conflicting ideologies are inevitable.

Kessler, *supra* note 3, at 638 (emphasis added).

begun to occur in the context of regulating the aid of unconscionable agreements. Lawyers have always been and currently are prohibited from assisting a client in committing fraud.⁸⁷ Although commentators generally agree that the Model Code or Model Rules prohibit activity only where the strict common law definition of fraud is met,⁸⁸ courts have disciplined lawyers in situations where some elements of that definition were missing.⁸⁹

The tort of fraud traditionally required proof of a false representation,⁹⁰ scienter, i.e., knowledge that the representation is false; an intention to induce reliance upon the misrepresentation; actual reliance, i.e., materiality; and damage.⁹¹ More recently, actions for negligent⁹² and innocent⁹³ misrepresentations have served as a basis for contract rescission⁹⁴ and damages.⁹⁵ Attorneys have successfully been sued in tort by nonclients for negligent and innocent misrepresentation where it was foreseeable that reli-

87. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1982).

88. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975); Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); C. WOLFRAM, *supra* note 71, at 698, 703-04; Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 MINN. L. REV. 89 (1977).

89. See *infra* notes 100-117 and accompanying text.

90. Silence is generally not a basis for finding a misrepresentation. This requirement can be met by failure to communicate only if actual concealment occurs, a fiduciary relationship exists, a "half-truth" is spoken, or subsequent information renders a previously true statement false. P. KEETON, PROSSER & KEETON ON TORTS 737-39 (5th ed. 1984); C. WOLFRAM, *supra* note 71, at 722.

91. See P. KEETON, *supra* note 90, at 728.

92. See RESTATEMENT (SECOND) OF TORTS § 552 (1976).

93. See RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979); RESTATEMENT (SECOND) OF TORTS § 552 (1976).

94. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979); P. KEETON, *supra* note 90, at 729.

95. See, e.g., *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985); *Williams v. Polgar*, 391 Mich. 6, 215 N.W.2d 149 (1974); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App. 1971); *Roberts*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901; *Haberman v. Public Power Supply Sys.*, 109 Wash. 2d 107, 744 P.2d 1032 (1987). See generally P. KEETON, *supra* note 90, at 745-48; 2 R. MALLIN & J. SMITH, *supra* note 28, at 372-74.

Damages are not generally available in actions for innocent misrepresentation absent some benefit to defendant. See, e.g., *Riddle v. Lacey*, 135 Mich. App. 241, 351 N.W.2d 916 (1984). See generally P. KEETON, *supra* note 90, at 748-49; C. WOLFRAM *supra* note 71, at 721.

ance might occur.⁹⁶ Thus, a relaxation of the strict common law standard has occurred for purposes of professional liability.⁹⁷

Courts have also used "fraud" as a device to support discipline where the lawyer's activities simply did not fit the classic definition of fraud. For example, some cases have defined knowledge as being inferred whenever an attorney "should" know.⁹⁸ Arguably, this is a negligence standard.⁹⁹

An especially interesting example of how courts can create intention to defraud can be found in *Pickus v. Virginia State Bar*.¹⁰⁰ In *Pickus*, a bank that agreed to lend the client money to refinance existing deeds of trust instructed Pickus to satisfy the prior deeds of trust and to obtain title insurance. Pickus obtained title insurance, endorsed the bank checks, and turned them over to the client because the client assured him that the earlier liens would be satisfied. In fact, they were not. The court accepted for purposes of argument that scienter was required in order to discipline the attorney for misrepresentation, but concluded that Pickus "knew" the prior liens were not satisfied while representing that they had been. In so doing, the court rejected Pickus' argument that he had acted unknowingly upon the representations of his client, not because there was any evidence Pickus had reason to disbelieve his client, but because the court concluded that Pickus had a fiduciary duty to the bank in receiving and handling the funds.¹⁰¹ While Pickus' behavior might support a claim for negligent mis-

96. Generally, privity serves as a bar to suits by nonclients. See R. MALLIN & J. SMITH, *supra* note 28, at 376 n.1. But see, e.g., *Eisenberg*, 766 F.2d 770 (negligent); *Slotkin*, 614 F.2d 301 (negligent or reckless); *Norman v. Brown, Todd & Heyburn*, 693 F. Supp. 1259 (D. Mass. 1988) (negligent); *Lubin v. Sybedon Corp.*, 699 F. Supp. 7425 (S.D. Cal. 1988) (negligent); *Pasternak v. Sagittarius Recording Co.*, 617 F. Supp. 1514 (E.D. Mich. 1985) (negligent); *In re McGrath*, 96 A.D.2d 267, 468 N.Y.S.2d 349 (1983) (negligent); *Stinson v. Brand*, 738 S.W.2d 186 (Tenn. 1987) (negligent); *Green Spring Farms v. Kersten*, 128 Wis. 2d 221, 381 N.W.2d 582 (Ct. App. 1985) (innocent); *Roberts*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (negligent); see also *supra* note 90.

97. Liability for negligent failure to disclose has been found against other professionals. See, e.g., *Chernick v. Fasig-Tipton Kentucky, Inc.*, 703 S.W.2d 885 (Ky. Ct. App. 1986) (consigner has duty to ascertain information and disclose to buyers of mare); *Mathis v. Yondata Corp.*, 125 Misc. 2d 383, 480 N.Y.S.2d 173 (1984) (agent for computer software seller liable for negligent misrepresentation); see also Annotation, *Liability of Public Accountant to Third Parties*, 46 A.L.R. 3d 979, 990-91 (accountants).

98. See, e.g., *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967) (lawyer charged with knowledge where reasonable lawyer would know); *State v. Zwillman*, 112 N.J. Super. 6, 270 A.2d 284 (1970) (attorney has duty to investigate client perjury where he knows or through professional experience should reasonably suspect that client is lying); cf. ABA Formal Op. 346 (1982) (lawyer who accepts as true the facts a tax client gives when lawyer should know further inquiry would disclose facts are untrue aids in giving fraudulent tax opinion or, at minimum, violates DR 6-101(A)).

99. See P. KEETON, *supra* note 90, at 182-85.

100. 232 Va. 5, 348 S.E.2d 202 (1986).

101. *Id.* at —, 348 S.E.2d at 205.

representation,¹⁰² it did not appear to rise to the level of an intentional misrepresentation. Yet, Pickus was disciplined for intentional misrepresentation.

"Fraud" has been found where other elements of the common law definition were missing. For example, the attorneys in *In re Carroll*¹⁰³ and *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Crary*¹⁰⁴ were disciplined for assisting in fraudulent testimony, even though opposing counsel was aware of the fraud in each case. Thus, reliance was missing.¹⁰⁵ *In re A*¹⁰⁶ is a classic example of the evolution of fraud theory. There the court held that, in the future, lawyers would be disciplined for failure to withdraw where the client offers "misleading," though not false, testimony.¹⁰⁷ Although the courts in *Crary*, *Carroll* and *In re A* were concerned with the integrity of the legal system as well as harm to individuals, it is clear that courts are willing to manipulate the fraud doctrine to serve their purposes when application of the strict definition would result in an unjust or unwise result. In fact, Model Rule 3.3(a)(4), with no reference to fraud, states simply that a lawyer who offers evidence to a tribunal and who comes to learn of the falsity of a material fact must take remedial action.

Moreover, courts have disciplined for "fraud" for impropriety outside the litigation process. In *In re Sherre*,¹⁰⁸ a lawyer was disciplined for involvement in sham transactions. The court rejected the argument that a lawyer should not be disciplined for committing fraud unless someone suffers damage.¹⁰⁹ *In re Segall*¹¹⁰ is analogous to *In re A* although it arose in a

102. Assuming Pickus was a fiduciary to the bank, a theory for which the court offers no support, he would have a duty to transmit information. Although failure to investigate might support a claim for negligence, see RESTATEMENT (SECOND) OF AGENCY § 381 (1958), there is no doctrine (absent proof of recklessness) that elevates such failure to the level of an intentional tort.

103. 244 S.W.2d 474 (Ky. Ct. App. 1951).

104. 245 N.W.2d 298 (Iowa 1976).

105. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 844 (1977).

106. 276 Or. 225, 554 P.2d 479 (1976).

107. *In re A* involved testimony in a divorce case. Husband, who inherited his mother's estate upon her death, was questioned by the judge regarding her status. The judge asked where the husband's mother was at the time, and he replied she was "in Salem." In fact, she was dead and buried in Salem. In a hearing after the judge had rendered his verdict, the husband testified he was told "to answer all questions truthfully during the divorce suit but not to volunteer." *Id.* at —, 554 P.2d at 482. The court did not discipline the attorney because it found the law regarding the lawyer's duties in such a situation to be confusing. *Id.* at —, 554 P.2d at 487.

108. 68 Ill. 2d 56, 368 N.E.2d 912 (1977).

109. *Id.* at 61, 368 N.E.2d at 914. Several courts have found misrepresentation absent damage. See, e.g., *Garlow v. State Bar of California*, 30 Cal. 3d 912, 640 P.2d 1106, 180 Cal. Rptr. 831 (1982); *In re Price*, 429 N.E.2d 961 (Ind. 1982); *In re Labendz*, 95 N.J. 273, 471 A.2d 21

negotiation context. In *Segall*, a lawyer was disciplined for sending checks to his credit card companies for very low amounts compared to his debts. Letters accompanied the checks indicating that the checks were intended to satisfy any claims. Although there were no false statements in the letters, the court, "finding fraud whenever there is conduct 'calculated to deceive'"¹¹¹ found the lawyer had committed fraud because he failed to add in his letter the amount actually due.¹¹² The dissent disagreed, claiming the letters evidenced a lack of good faith but were not fraudulent.¹¹³

In addition, other courts have found fraud where they concluded an attorney acted unfairly towards a third party. For example, in *State ex rel. Nebraska State Bar v. Addison*,¹¹⁴ the court disciplined counsel not for a false statement, but for a "fraudulent" failure to speak and correct a misimpression suffered by a hospital administrator regarding insurance coverage. Unlike the more typical case,¹¹⁵ there was no evidence in *Addison* that the attorney uttered any half-truths; he was found to have acted fraudulently by remaining silent. *Addison* did not commit a fraud in its traditional sense.¹¹⁶ The duties imposed by the court are instead quite similar to those imposed by the Restatement (Second) of Contracts, section 161, which confers a duty to speak if an actor knows another has a misimpression regarding a basic element to the transaction, whether or not he caused the confusion.¹¹⁷

Some courts have recognized the disastrous effect that the use of "covert tools" can have. As a result, they have disciplined attorneys while admitting an absence of fraud. In *In re McGrath*,¹¹⁸ the court found that negligent misrepresentation of policy limits indicated a lack of reasonable care and therefore adversely impacted on the lawyer's ability to practice law.

(1984); *In re Conti*, 75 N.J. 114, 380 A.2d 691 (1977); *In re Pridgen*, 288 S.C. 96, 341 S.E.2d 376 (1986).

110. 117 Ill. 2d 1, 509 N.E.2d 988 (1987).

111. *Id.* at 7, 509 N.E.2d at 991 (quoting *In re Armentrout*, 99 Ill.2d 242, 251, 457 N.E.2d 1262, 1266 (1983)).

112. *Id.* In addition, *Segall* sent the letter directly to his creditors rather than to the creditors' lawyers, and did not mention that one dispute had been reduced to a judgment. *Id.*

113. *Id.* The dissenting opinion noted that the attorney's intentions were clear from reading the letter, and that each company was free to reject the offer of settlement but chose to accept it. *Id.* at 10, 509 N.E.2d at 992 (Clark, J., dissenting).

114. 226 Neb. 585, 412 N.W.2d 855 (1987).

115. *See, e.g., Slotkin*, 614 F.2d at 301 (The attorney listed other insurance policies for opposing counsel but refrained from listing an umbrella policy).

116. *See supra* note 90.

117. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979); RESTATEMENT (SECOND) OF TORTS § 552 (1976).

118. 96 A.D.2d 267, 468 N.Y.S.2d 349 (1983).

The court disciplined him for violating Model Code of Professional Responsibility DR 1-102(A)(6).

In *In re Hiller*,¹¹⁹ the lawyer for a creditor deposed defendants. He learned (but did not believe) that there existed an oral agreement that the loan from the creditor to the debtor was not due until the creditor sold his land. The lawyer instructed his client to convey the land to the lawyer's secretary, with a signed document to reconvey for a nominal amount after a suit for the debt was completed. Although the debtors reviewed the conveyance documents, they were unaware that a reconveyance agreement had been executed as part of the deal. The Oregon Supreme Court upheld the finding by the trial court that the lawyer did not intend to mislead.¹²⁰ However, it found that misrepresentation could occur absent intent, stating that parties "should be able to rely on express or implied representations."¹²¹ The court added that "[a] person must be able to trust a lawyer's word . . . without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches."¹²² As a result, Hiller was disciplined for violating Model Code DR 1-102(A)(4), which prohibits an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."¹²³

The Florida Supreme Court adopted a finding that there was no fraud in *Florida Bar v. Davis*.¹²⁴ Yet, it disciplined counsel, who also was an officer and director for a seller of timeshares in condominiums, for violating Model Code DR 7-102(A)(7).¹²⁵ The court found that counsel "fail[ed] to provide adequate protection for purchasers."¹²⁶ He did not provide warranty deeds and title insurance, and did not insist that the seller stop selling timeshares after foreclosure proceedings were commenced against the seller corporation.

The Arizona Supreme Court reached the same result in *In re Kersting*.¹²⁷ Despite a finding of no specific intent to defraud, the court determined that counsel for a land purchaser and developer violated Model Code

119. 298 Or. 526, 694 P.2d 540 (1985).

120. *Id.* at 534, 694 P.2d at 544.

121. *Id.*

122. *Id.*; see also *In re McGrath*, 96 A.D.2d 267, 468 N.Y.S.2d 349 (1983) (negligent misrepresentation of limits of insurance discussion is grounds for discipline because the lawyer's negligence reflected adversely on his ability to practice law).

123. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1982).

124. 19 So. 2d 325 (Fla. 1982).

125. *Id.* at 327. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1982) provides that a lawyer may not counsel or assist a client in illegal or fraudulent activities.

126. *Id.*

127. 151 Ariz. 171, 726 P.2d 587 (1986).

DR 1-102(A)(4) and DR 7-102(A)(7) because he failed, among other things, to disclose risks of exchanging secured notes on land sold for substitute mortgages on other, undeveloped property.¹²⁸ The court noted that the lawyer knew the project was risky, and the "lot purchasers were unsophisticated, out-of-state investors who bought the land sight-unseen . . ." ¹²⁹

Although it is commendable that these courts do not attempt to fit these cases into a fraud theory where the elements of fraud are missing, confusion remains. Courts make general references to rules prohibiting dishonesty, fitness to practice, and misrepresentation, but make no attempt to define the elements of the offense giving rise to the discipline. Rather, it appears that if it "smells bad," an act should be the subject of a disciplinary action.¹³⁰ In fact, the New Jersey Supreme Court cited no disciplinary rule in support of its decision in *In re Giordano*.

Such an ad hoc and "covert" approach does more than simply raise problems regarding the predictability of law.¹³¹ It raises concerns of a constitutional dimension. Disciplinary hearings are quasi-criminal in nature.¹³² As a result, the attorney is entitled to some due process protection, including fair notice of what constitutes a violation of the disciplinary rules.¹³³ Notice arguably cannot exist unless "fraud" is expressly defined in the disci-

128. He also violated MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1982), prohibiting the lawyer from concealing that which he is required by law to reveal, and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1982), which prohibits knowingly making false statements of law or fact.

129. *In re Kersting*, 151 Ariz. at 176, 726 P.2d at 592. The court also noted that purchasers were not people with experience in real estate transactions; rather, they were "working people — all eager to buy land in Arizona . . ." *Id.*; cf. *Lupoff v. Hartog*, 237 So. 2d 588 (Fla. Dist. Ct. App. 1970) (lawyer/mortgagee who drafted agreement was estopped from claiming statutory requirements necessary for mortgagor to collect interest and attorney fees were not met; although no attorney/client relationship existed, it was "unconscionable" for lawyer to exploit widow with no counsel).

130. This author is not suggesting that attorneys in the preceding cases were not guilty of culpable conduct; rather, the suggestion is that clearer rules providing notice of what constitutes a violation are necessary. See *infra* notes 132-33.

131. See *supra* text accompanying notes 12, 86.

132. See *In re Ruffalo*, 390 U.S. 544, 550-51 (1968); *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972).

133. *In re Ruffalo*, 390 U.S. at 550. "Life, liberty and property [cannot] . . . be taken by virtue of a statute whose terms [are] 'so vague, indefinite and uncertain' that one cannot determine their meaning." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 513 (1978) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939)). The ABA has recognized the right of an attorney to due process protection by providing the attorney with procedural safeguards during disciplinary hearings. See ABA, *American Bar Association Standards for Lawyer Disciplinary and Disability Proceedings* §§ 8.32-8.40 (1980). The Oregon Supreme Court avoided a notice problem in *In re A* by announcing that lawyers would be disciplined in the future but not disciplining the lawyer in that case. See *supra* text and accompanying note 107.

plinary rule as including negligent and innocent misrepresentation, or unconscionability. If such behavior is to be the subject of discipline, it should be explicitly prohibited.

IV. A PROPOSAL FOR CHANGE: OVERT REGULATION

As suggested earlier, attorneys, as representatives of the legal system, should not subvert the legal judgment of forty-nine legislatures by assisting in unconscionable transactions. Moreover, courts have begun to show some willingness to use covert or undefined means to deter conduct they view as unfair. The system would be more predictable, as well as fairer to attorneys, if the requirement to refrain from assisting in unconscionable transactions were made explicit. Therefore, the following rule should be promulgated by disciplinary authorities:

A lawyer shall not assist in the preparation of a written instrument containing terms which are unconscionable. A lawyer may assist in such preparation where there is a basis for concluding the terms are not unconscionable that is not frivolous, including a good faith argument for an extension, modification or reversal of existing law.

This rule essentially parallels Model Rule 3.1, which prohibits the lawyer from bringing or defending suits unless there is a basis which is not frivolous.¹³⁴

V. SOME CONCERNS AND A RESPONSE

A. *The Ambiguity of Unconscionability Theory*

Several concerns have been raised concerning the promulgation of the proposed rule. Model Rule 1.2 was amended to exclude a prohibition against drafting legally prohibited contracts. The legislative history of the Model Rules indicates that the major reason was that the drafters found an inherent ambiguity in the phrase "prohibited by law."¹³⁵ Moreover, some commentators indicate that prohibiting "unfairness" in negotiation is much too vague to be a subject of discipline.¹³⁶ These concerns are understandable given the lack of consistency in defining fraud.

134. Professor Schwartz suggests a rule which, among other things, would prevent the lawyer from assisting a client when he "knows or it is obvious that such assistance is intended or will be used . . . to allow the client to obtain an unconscionable advantage over another person." Schwartz, *supra* note 50, at 685-86. The proposed rule is consistent with the approach taken in the MODEL RULES. See *infra* note 160.

135. ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 32 (1987).

136. See *supra* note 79.

To avoid these problems, the proposed rule prohibits the lawyer only from assisting the client in reaching an *unconscionable* agreement. While some commentators have suggested that the unconscionability doctrine is also too vague,¹³⁷ the official comment elaborates slightly by stating that the principle is one of "prevention of oppression and unfair surprise."¹³⁸ While these terms are also flexible, there is an existing body of law to be consulted,¹³⁹ and this body of law provides a useful, analytical framework in which all unconscionability cases can be considered.¹⁴⁰ Thus, a lawyer could easily learn whether a particular contract or clause is unconscionable, and would only be guilty of violating the proposed rule if he nevertheless drafted it.

For example, unfair surprise involves some deception by artifice, such as hiding a clause in a mass of fine print or phrasing it in an unintelligible manner.¹⁴¹ The requirement of *unfair* surprise indicates that the substance of the agreement must be unfair. Oppression connotes duress or inability to choose contract terms, coupled with onerous terms which either impair the fair meaning of the bargained terms or are manifestly unreasonable.¹⁴²

Moreover, courts have placed a judicial gloss on the definition of unconscionability which renders it a workable concept. Most courts have adopted a definition like the one articulated by Judge J. Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*:¹⁴³ "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹⁴⁴ That is, some form of procedural abuse

137. See, e.g., Leff, *supra* note 16; Epstein, *supra* note 16.

138. U.C.C. § 2-302 comment 1 (1977).

139. Schwartz, *supra* note 50, at 681, 689; Ellinghaus, *supra* note 16, at 761.

140. Spanogle, *supra* note 4, at 943.

141. *Id.* Ellinghaus would refer to this problem as "misleading bargaining conduct." Ellinghaus, *supra* note 16, at 763-65.

142. Spanogle, *supra* note 4, at 944-46; Ellinghaus, *supra* note 16, at 765-68 (inequality of bargaining position). The requirement of reasonableness is used throughout Article 2 and has not been attacked as vague. See, e.g., U.C.C. § 2-103(1)(b) (good faith observance of reasonable standards in the trade); U.C.C. § 2-305(1) (open price term may be filled with reasonable price); U.C.C. § 2-306 (no unreasonably disproportionate changes in quantity in output or requirement contracts); U.C.C. § 2-309 (time for shipment absent agreement is reasonable time).

143. 350 F.2d 445 (D.C. Cir. 1965).

144. *Id.* at 449; see also *Martin v. Joseph Harris Co.*, 767 F.2d 296 (6th Cir. 1985); *Preston v. Kruezer*, 641 F. Supp. 1163 (N.D. Ill. 1986); *Truta v. Avis Rent a Car System, Inc.*, 193 Cal. App. 3d 802, 238 Cal. Rptr. 806 (1982); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1972); *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138 (Pa. Super. 1985). See generally *J. WHITE & R. SUMMERS, supra* note 15, at 187 (nearly all cases are consistent with the *Williams* analysis). Some courts are even more specific. See, e.g., *Bekins Bar v. Huth*, 664 P.2d 455, 461-63 (Utah 1983) (factors include absence of meaningful choice; circumstances at the time of the con-

in the formation of a contract must be coupled with some substantive unfairness.¹⁴⁵ As many commentators recognize, courts essentially perform a balancing test, requiring some quantum of each type of abuse.¹⁴⁶

It may be argued that it is too hard to predict the outcome of such a balancing test. However, the very notion of unconscionability would be useless if a rigid definition were adopted. Lawyers could simply draft to the threshold of unconscionability, recreating the problem in a slightly different context, thus defeating the purpose of the doctrine.¹⁴⁷

Moreover, most unconscionability cases tend to arise in similar and easily identified contexts. White and Summers suggest that most unconscionability problems can be grouped into a few categories. The procedural aspect of unconscionability is relatively easy to find: most cases involve consumer contracts.¹⁴⁸ A judicial finding of procedural unconscionability, or lack of meaningful choice, "is usually founded upon a recipe consisting of one or more parts of assumed consumer ignorance and several parts of seller's guile."¹⁴⁹

With respect to the substantive component of unconscionability, White and Summers conclude that most cases "can still be lumped under one of two headings: Excessive price-cases and cases in which the creditor unduly restricted the debtor's remedies or unduly expanded his own remedial

tract; use of boiler plate contracts; excessive price or interest; incomprehensible language to the layman; an overall imbalance in obligations; exploitation of the underprivileged, unsophisticated and uneducated; oppression or unfair surprise; and lack of opportunity for meaningful negotiation; *accord* *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976).

145. Spanogle, *supra* note 4, at 948-49. Professor Leff was the first to recognize explicitly that unconscionability should be analyzed in this manner. Leff, *supra* note 16, at 489-528.

146. J. WHITE & R. SUMMERS, *supra* note 15, at 199; Spanogle, *supra* note 4, at 950. Spanogle suggests that the more onerous the term, the less emphasis the court places on the method used to create the clause. *Id.* Courts in equity cases preceding U.C.C. § 2-302 did the same thing. *See* Spanogle, *supra* note 4; Ellinghaus, *supra* note 16; Davenport, *supra* note 16.

147. *See* Ellinghaus, *supra* note 16; Spanogle, *supra*, note 4; *see also* J. WHITE & R. SUMMERS, *supra* note 15, at 186-87 (not possible to define unconscionability precisely, but cases use consistent analysis).

148. J. WHITE & R. SUMMERS, *supra* note 15, at 184. Some cases do arise in commercial contexts, but most unconscionability claims are rejected as parties are viewed as having given informed and voluntary consent. *See, e.g.*, Geldermann & Co. v. Lane Processing, Inc., 527 F.2d 571 (8th Cir. 1975); United States Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F. Supp. 449 (E.D. Mich. 1972); Architectural Aluminum Corp. v. Macarr, Inc., 70 Misc. 2d 495, 333 N.Y.S.2d 818 (1972). *But see, e.g.*, *Weaver*, 257 Ind. 458, 276 N.E.2d 144. *See generally* J. WHITE & R. SUMMERS, *supra* note 15, at 205-10; Mallor, *Unconscionability in Contracts Between Merchants*, 40 S.W. L.J. 1065, 1080 (1986) (with few exceptions, unconscionability found in commercial context only where unsophisticated business people have no ability to select suppliers or negotiate terms).

149. J. WHITE & R. SUMMERS, *supra* note 15, at 187.

rights."¹⁵⁰ One practitioner suggests that most unconscionability problems can be resolved by the printing of forms in clear, readable type on opaque paper, and by assuring that both parties have mutual benefits and obligations.¹⁵¹

Finally, the concept of unconscionability is no more flexible or vague than several notions that any competent lawyer is assumed to be capable of understanding. For example, a lawyer should know that a duty in negligence is found where the probability and gravity of harm outweigh the burden of taking adequate precautions.¹⁵² A lawyer should also be capable of giving meaning to such terms as "reasonableness,"¹⁵³ "due process,"¹⁵⁴ "equal protection,"¹⁵⁵ and "contracts or combinations in restraint of trade or commerce."¹⁵⁶

Viewed in isolation, these terms are vague, but they have served as fodder for practicing lawyers, judges and commentators alike, and nobody has suggested that attorneys should not be held responsible for comprehending their meaning. An attorney is trained to deal with uncertainty and to derive some meaning from terms with reference to judicial decisions. Lawyers are consulted for the very reason that they can unravel ambiguity. In the context of unconscionability, there is ample case law construing the term, and commentators have successfully found a structure in which to analyze

150. *Id.* at 189. An "excessive price" is one which returns too great a profit, yields too great a return on invested capital, or is substantially higher than that of other merchants. *Id.* at 191. Examples of remedy meddling are where a credit seller attempts to set liquidated damage penalties for nonacceptance, to limit his liability for consequential damages, to disclaim some or all warranty liability, or to include a waiver of defense clause. *Id.* at 194.

151. See Davenport, *supra* note 16, at 148-49. For additional guidance, see *supra* notes 138-50. In those few circumstances where it is unclear whether a contract would be construed as unconscionable, the lawyer is protected by the objective standard of care which the proposed rule imposes. See *infra* text accompanying notes 158-66.

152. This formula is the "Learned Hand balancing test" articulated in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1969). As Professor Keeton states:

The statement that there is or is not a duty begs the essential question — whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself But it should be recognized that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.

P. KEETON, *supra* note 90, at 357-59.

153. See *supra* note 142. See generally P. KEETON, *supra* note 90, at 173-75, 357-59.

154. L. TRIBE, *supra* note 133, at 421-55, 474-77.

155. *Id.* at 991-1136.

156. 15 U.S.C. § 1 (1982).

unconscionability problems.¹⁵⁷ A competent lawyer cannot, therefore, argue he has no way of analyzing unconscionability problems.¹⁵⁸

Moreover, attorneys are protected by standards built into the proposed rule. Because a clause must have a reasonable legal basis, the proposed rule imposes a requirement that the lawyer investigate case law prior to drafting an instrument. However, the Model Rules already require this by demanding competence¹⁵⁹ and informed consent following full disclosure of relevant facts and law.¹⁶⁰

Further, a lawyer would not be disciplined every time a judge concludes a clause is unconscionable.¹⁶¹ Because an objective standard is built into the proposed rule,¹⁶² a lawyer would be protected from discipline whenever a reasonably prudent, well-informed attorney could find there is a basis for

157. See *supra* notes 138-51.

158. Like Justice Stewart regarding obscenity, Professor White's students knew unconscionability when they saw it, concluding it is inappropriate to use exaggeration and distortion when dealing with laymen. White, *supra* note 79, at 930 n.13. This author's students sometimes complain about the vagueness of the term, but they too generally can be made to admit they know it when they see it.

159. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1982). Because § 2-302(2) allows the court to consider the commercial setting, purpose and effect of a clause in determining unconscionability, competent representation would require the lawyer to be familiar with the client's business. One would assume competent representation of a corporate client would always include such a duty. If there are certain facts which the lawyer, though reasonably diligent, was unaware he would be protected by the objective standard at the proposed rule. See *infra* note 165 and accompanying text.

160. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.4 (1983).

161. The determination of unconscionability is a question of law for the judge. See U.C.C. § 2-302(1) (1978).

162. An argument can be made that the proposed rule, as well as MODEL RULE 3.1, does not create an objective standard as there is no requirement that the conclusion have a reasonable basis. In fact, that term was deleted from the final draft of MODEL RULE 3.1. See PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1981). However, the predecessor of MODEL RULE 3.1, MODEL CODE DR 7-102(A)(1), stated the attorney was precluded from bringing suit if "he knows or when it is obvious that such action would serve merely to harass or maliciously injure." MODEL RULE 3.1 relies on an external standard, the status of the law, rather than upon the subjective intention of the lawyer or client. The comment to MODEL RULE 3.1 specifically states it creates an "objective standard," and Professor Hazard, reporter to the MODEL RULES, observed that the rule, rather than referring to such intentions, requires "a minimum of merit." See ABA LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 119-20. It is difficult to imagine how it could be determined that a claim had no merit other than by considering what an ordinary lawyer exercising reasonable prudence would do if similarly situated. Given the necessity of objective input, this author would prefer to see MODEL RULE 3.1 amended, and the proposed rule adopted, with a candid reference to the reasonable attorney. See generally Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1566 (1980). In the interest of consistency, however, the rule is drafted to conform with MODEL RULE 3.1 as it currently is drafted.

concluding that a clause is conscionable.¹⁶³ Just as an attorney has a responsibility to make some judgment concerning the merits of a lawsuit prior to filing a complaint,¹⁶⁴ an attorney would have a responsibility to attempt to predict whether a clause previously not considered by a court would be unconscionable. However, if the law is unclear regarding the effect of a particular clause or contract, the lawyer would be protected so long as his choice regarding resolution of the conflict is a well-informed one.¹⁶⁵

In addition, the caveat that a good faith argument for extension, modification or reversal of present law may serve as a basis for a finding that a clause is conscionable parallels Model Rule 3.1 and enables an attorney, within the bounds of conscionability, to pursue zealously the objectives of the client and to assert that a clause that is conscionable where the law is unclear.¹⁶⁶ Thus, the proposed rule is clearer than a general exhortation to "be fair." It simply requires that an attorney be aware of existing caselaw and act accordingly.

B. *The Efficacy of "Unenforceable" Rules*

A second concern of some commentators is that, since violations occur in private settings, a prohibition of this sort may be essentially unenforceable.¹⁶⁷ A weakening of respect for all rules may follow the recognition that lawyers probably will not get "caught."¹⁶⁸ However, the unconscionable clause may become public, especially if contained in a form contract, at

163. Cf. R. MALLIN & J. SMITH, *supra* note 28. But cf. C. WOLFRAM, *supra* note 71 (standard of care is question of law in discipline). Schwartz advocates an objective standard in regulating the lawyer's conduct as a nonadvocate, in part to allow adjustment for future developments in the law. Schwartz, *supra* note 50, at 689.

164. FED. R. CIV. P. 11 provides that an attorney must certify that a complaint is well grounded in fact and warranted by existing law. All circuit courts have recognized the rule's objective requirement of undertaking a reasonable inquiry regarding the law and facts. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 205-07; see Schwarzer, *Sanctions Under the New Federal Rule 11: A Closer Look*, 104 F.R.D. 181, 186-89 (1985).

165. Cf. *Alcy v. Mash*, 38 Cal. 3d 413, 696 P.2d 656, 212 Cal. Rptr. 162 (1985) (lawyer required to be familiar with caselaw before making legal judgment; not liable for malpractice if well-informed prediction of change in law mistaken); *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783 (5th Cir. 1986) (objective standard used to determine whether lawyer believed pleading satisfied FED. R. CIV. P. 11; negligent failure to research claims violates rule); *In re Curl*, 171 So. 2d 371 (Fla. 1965) (no reasonable lawyer would take his client's word regarding what a judgment meant).

166. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1982); Schwartz, *supra* note 50, at 686, 689. Thus, fears regarding vagueness of law unless the case arises in a "typical" unconscionability setting are reduced.

167. See White, *supra* note 79, at 926-27.

168. *Id.*

which time a lawyer could be subject to investigation. Reports of such cases could have some deterrent value. Because lawyers drafting such clauses, most likely represent institutions, they and the organizations to which they belong can quickly spread the word that certain clauses are not acceptable.

To the extent enforcement is unlikely, it should be noted that enforcement of the Model Code or Model Rules in general is erratic.¹⁶⁹ This presents two choices: Admit that all the rules are rarely enforced and, as a result, give up on promulgating rules; or, recognize that functions other than enforcement are served by promulgating rules.

The logic that rules should not be promulgated absent a strong likelihood of enforcement has not been persuasive in many legal contexts.¹⁷⁰ For example, many citizens continually evade traffic and income tax statutes; yet, we see no groundswell of support for their abolition or weakened support for other criminal prohibitions.¹⁷¹ Similarly, it would be difficult to assume that a rule requiring a lawyer to refrain from aiding in an unconscionable transaction would lead inevitably to a lack of respect for, or adherence to, other rules.¹⁷² Moreover, the drafters of the Model Rules clearly did not allow such argument to deter them from drafting other rules that are particularly difficult to enforce.¹⁷³

Thus, rather than focusing only on enforcement, we should recognize the proposed rule's symbolic and pedagogic functions.¹⁷⁴ First, it may have some deterrent effect.¹⁷⁵ Additionally, there are honest lawyers who would rather not commit acts they find to be morally abhorrent. They would probably prefer to tell a client that the Model Code or Model Rules prohibit an action, rather than that they find it personally distasteful.¹⁷⁶ Thus, the

169. See, e.g., Schwartz, *supra* note 50, at 682; Martyn, *Lawyer Competence: Beyond the Bar?*, 69 GEO. L.J. 705 (1981); Schneyer, *Review Symposium: The Model Rules of Professional Conduct: The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 945-46.

170. Rhode, *supra* note 40, at 647-49.

171. *Id.*

172. *Id.*

173. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT 4.1 (trustworthiness in dealing with third parties when not before a tribunal); 8.1 (responsibility to report wrongdoing of other members of the bar).

174. Rhode, *supra* note 40, at 647-49.

175. See Schwartz, *supra* note 50, at 682.

176. *Id.*; Rhode, *supra* note 40, at 648 (citing a survey of 1200 business executives who indicated that a primary function of industry ethical codes is to fortify individuals who would like to "refuse an unethical request impersonally"); see Brenner & Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV. 57, 68 (1977). Professor Rhode concludes that more demanding

proposed rule would provide a "reinforcement" for views privately held.¹⁷⁷ Moreover, it removes any incentive the Model Rules currently provide attorneys to draft such clauses.¹⁷⁸

The pedagogic function is served by telling lawyers what society expects. If a code articulates only the absolute minimum decency required, "[t]he consequence may be socialization to the lowest common denominator of conduct that a highly self-interested constituency will publicly brand as deviant."¹⁷⁹ The Model Code and Model Rules have the ability to create a custom above the lowest common denominator, and they should fulfill that function.

Llewellyn recognized the importance of creating a custom above the lowest common denominator in his discussion of a need for "baseline" norms, or limits on behavior. He noted that "[b]oth ways and norms of business practice may be firm at the center, but they are hazy at the edge; they offer little sureness to guide in deciding the outside and unusual case."¹⁸⁰ To supply some clarity, he believed the law should create norms. For example, usage of trade or custom in the U.C.C. is composed of "usages currently observed by the great majority of *decent* dealers, even though dissidents ready to cut corners do not agree."¹⁸¹ Contracting parties are expected to adhere to notions of mercantile good faith and fair dealing.¹⁸² Should we as a profession essentially make the statement that lawyers need not adhere to such a standard? The message that approach conveys is deplorable.

C. *Impact on the Attorney-Client Relationship*

Another concern is that a rule barring a lawyer from participating in unconscionable conduct will hamper the attorney-client relationship because the client may feel less inclined to confide in the lawyer if he anti-

standards can provide "protective coloration" to attorneys who wish to do the right thing, but who are unwilling to appear sanctimonious. Rhode, *supra* note 40, at 648-49.

177. Schwartz, *supra* note 50, at 682.

178. See *supra* text accompanying notes 23-27.

179. Rhode, *supra* note 40, at 647.

180. Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 722 n.45 (1931); Mooney, *Old Contract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 221 n.14 (1966).

181. U.C.C. § 1-205 comment 5 (1978) (emphasis added). According to Mooney, the three most important baselines incorporated into the U.C.C. are that: Legal obligations arise from the "agreement in fact" of the parties; commercial usage is the focal point of analysis rather than technical contract rules; and parties are always bound by rules requiring mercantile good faith and fair dealing. Mooney, *supra* note 180, at 222.

182. See U.C.C. §§ 1-103, 2-103.

pates lectures rather than help. That is, the client may fail to disclose all relevant facts for fear that a lawyer will refuse to assist him in reaching his goal.¹⁸³ There are several responses to this concern. First, the lawyer already has the responsibility to apprise the client of the unconscionability of his act.¹⁸⁴ Both Model Code EC 7-8 and Model Rule 1.2 suggest that the lawyer should disclose possible harsh results that may arise from the imposition of an unconscionable clause.¹⁸⁵ Moreover, Model Rule 1.4 requires that the client be so advised.¹⁸⁶ As Elihu Root once observed, "[a]bout half the practice of a decent lawyer . . . consists in telling [his] clients that they are damned fools and should stop."¹⁸⁷

Second, as discussed above, promulgation of a rule prohibiting such assistance allows the lawyer to couch his refusal in terms of his objective responsibilities rather than to give a lecture on social responsibility. Third, there are several studies indicating that professional rules have little impact on clients' candor with lawyers.¹⁸⁸ Instead, full disclosure is generally seen as a requirement of securing competent legal advice. Finally, any claim that clients may be fearful of disclosure to attorneys regarding unconscionable acts is fanciful, because the proposed rule does not require disclosure of any client confidences. It simply requires that the attorney refrain from assisting in that effort. The attorney must withdraw, but will not be asked to disclose his client's intentions.¹⁸⁹ Even assuming clients feel uncomfortable discussing such issues, "the alternative of allowing lawyers to cooperate in bringing about unjust results may be too high a price to pay to relieve the minds of clients who have those concerns."¹⁹⁰

183. Schwartz, *supra* note 50, at 683.

184. *Id.*

185. *Id.*

186. *See supra* note 25.

187. *Quoted in* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 4 (1976).

188. Schwartz, *supra* note 50, at 683 (citing Uviller, *The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1073 (1975)); Y. KAMISAR, W. LAFAVE, J. ISRAEL, BASIC CRIMINAL PROCEDURE 592-96 (4th ed. 1974); *see also* Subin, *The Lawyer As Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1163-64 (1985).

189. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1982) would require withdrawal as the attorney would otherwise violate a disciplinary rule. In fact, the MODEL CODE and MODEL RULES specifically forbid attorneys from disclosing client's future intentions absent exceptional circumstances. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982).

190. Schwartz, *supra* note 50, at 684; *accord* Goldman, *Confidentiality, Rules, and Codes of Ethics*, 3 CRIM. JUST. ETHICS 8, 14 ("promise of complicity in wrongdoing is too high a price to pay for a chance to be let in on the intention to commit it"); Subin, *supra* note 188, at 1167 (If clients keep matters to themselves, wherein lies the mischief?). Schwartz also recognizes the con-

The final concern prohibiting a lawyer from assisting in unconscionable contracts is that a client is denied help in achieving legal ends which are neither criminal nor fraudulent.¹⁹¹ This is analogous to Pepper's concern that we thereby deny clients' rights to first class citizenship — meaningful access to law “to ease and enable the private attainment of individual or group goals,”¹⁹² regardless of the morality of those goals. Assuming this argument has any force when referring to the lawyer's right to act amorally when not prohibited by law,¹⁹³ it has none here. The only right we “deprive” clients of exercising through lawyers is one they cannot exercise, or at least enforce, themselves. Although persuasive arguments can and have been made that lawyers should be held responsible for aiding in immoral though not illegal acts,¹⁹⁴ promulgators of rules need not go that far here. This is the easy case. Positive law has been enacted prohibiting people from using courts to impose unconscionable terms upon others.¹⁹⁵ Thus, a limitation on the right to attain such private goals already exists. A prohibition imposed on lawyers simply makes clear that lawyers may not be used for that purpose either.¹⁹⁶

One issue remains, however, concerning whether lawyers should be prohibited from assisting in drafting lawful, albeit unconscionable, agreements.¹⁹⁷ An argument against this prohibition might be that, while fraudulent contracts are void, and therefore analogous to “illegal” contracts,¹⁹⁸ unconscionable contracts are merely voidable, or unenforceable,

cern for the danger that standards may be imposed by the elite sector of the bar upon some who are not fairly represented, but rightly concludes that minorities or the disadvantaged would be benefitted, not disadvantaged by the rule. Schwartz, *supra* note 50, at 685. Moreover, it seems fair to assume that those persons or corporations strong enough to impose unconscionable contracts upon others probably have representatives working within the ABA or state bars who are sensitive to their interests.

191. Schwartz, *supra* note 50, at 684.

192. Pepper, *supra* note 42, at 616.

193. See *supra* notes 53-56 and accompanying text.

194. See *supra* text 57-61 and accompanying text.

195. See *supra* note 62.

196. See *supra* note 134.

197. Some commentators suggest that a limitation on the lawyer's abilities of this sort would put a person who has no lawyer in a better position than one with a lawyer, since the former's activities are more circumscribed. See Hazard, *supra* note 79; White, *supra* note 79. This limitation does not create a problem in the unconscionability context because the other person will not be in a position to take advantage of the drafter. See *supra* text accompanying notes 18-23.

198. Contracts with an illegal object are void ab initio. See E.A. FARNSWORTH, *supra* note 3, at 327. Two reasons are cited: The court may see its refusal as a sanction to inappropriate conduct, and it may regard enforcement of the promise as an improper use of judicial machinery. *Id.* at 327-28. As Farnsworth observes, use of the term “illegal” is somewhat misleading as no penalty is necessarily imposed. *Id.* at 327. In fact, there are several techniques available to courts to enforce such contracts where appropriate. *Id.* at 352-68.

at the option of the person harmed. Since society does not forbid the drafting of unconscionable contracts, *ab initio*, neither should a professional code.

This argument rests, however, on an incomplete view of the law of fraud. Only those "frauds in the execution," which mischaracterize the central purpose or existence of a contract, are void.¹⁹⁹ Much more typical are "frauds in the inducement," which involve all other misrepresentations regarding the contract and which render the contract only voidable at the option of the defrauded party.²⁰⁰ Unless the promulgators of the rules are prepared to limit responsibility for fraud to a very narrow category of cases, the void-voidable dichotomy does not support a refusal to adopt the proposed rule.

Alternatively, it has been suggested that assisting a client is unethical only if a client is engaged in conduct which violates criminal law or which can be classified as an intentional tort.²⁰¹ This view is inferred from the limits imposed upon agents by the Restatement (Second) of Agency, section 348, which provides that an agent will be liable to a third party for knowingly assisting in actions involving tortious fraud or duress by the principal.²⁰² This argument seems to suggest that unless a lawyer is liable to a third party, the Rules should not prohibit that behavior. However, liability and ethical responsibility are not necessarily coextensive. In fact, both the Model Code and the Model Rules specifically state that they are not intended to serve as a basis for civil liability.²⁰³

199. *See, e.g.,* Operating Eng'r Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984) (member induced to sign bargaining agreement and pension trust document where he thought he signed only applications for union membership); Curtis v. Curtis, 56 N.M. 695, 248 P.2d 683 (1952) (wife signed separation and property division agreement because husband misrepresented that it was merely for tax purposes); E.A. FARNSWORTH, *supra* note 3, at 235; RESTATEMENT (SECOND) OF CONTRACTS § 163 comment c (1979).

200. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979). Rarely is the fraud so central it is viewed as "going to the very character of the proposed contract itself." E.A. FARNSWORTH, *supra* note 3, at 235. Voidable contracts, unlike void contracts, may be affirmed by the person arguably harmed. *Id.* at 253-57.

201. *See* Hazard, *supra* note 79. It is unclear whether Professor Hazard was attempting to be prescriptive or descriptive in his observations. It appears the former is true given his position that the bar cannot do much more than proscribe fraud because no firm consensus exists regarding moral values. He notes, however, that it is good and economically efficient to be trustworthy. *Id.* at 183-84.

202. RESTATEMENT (SECOND) OF AGENCY § 348 (1958).

203. *See* MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble and preliminary statement (1980). The Code may be relevant in a malpractice action. *See, e.g.,* Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981); Fishman v. Brooks, 396 Mass. 643, 487 N.E.2d 1377 (1986). There is some evidence

In fact, the most analogous section to the proposed provision in the Model Rules is Rule 3.1, which prohibits bringing or defending a frivolous lawsuit. This rule does not require knowledge or intent,²⁰⁴ and many courts have expressly rejected a cause of action on behalf of an opposing party sounding in negligence.²⁰⁵ Yet, an attorney may be disciplined for violating Model Rule 3.1. No one advocates abolishing Model Rule 3.1. There is simply no rational distinction which can be drawn between Rule 3.1 and the proposed rule.

As the Preamble to the Model Rules makes clear, the disciplinary process is not directly concerned with compensating individuals; rather, it seeks to protect a general public interest in the integrity of the legal process.²⁰⁶ That integrity is undermined where a professional code of conduct allows an attorney to pursue ends determined by legislatures to be improper. Other than the tautology that fraudulent behavior is prohibited by section 348 of the Restatement (Second) of Agency, while unconscionable behavior is not, there seems to be no reason to refrain from drafting a rule more reflective of the judgment of the majority of citizens through their legislatures. In fact, the growing number of cases finding attorneys liable to third parties for negligent misrepresentation, which is not within the purview of section 348, is consistent with the idea that responsibility should be borne for improper behavior, regardless of whether it fits into the classic definition of an intentional tort.²⁰⁷

VI. CONCLUSION

State legislatures have concluded that unconscionable contracts contravene public policy, and that judicial machinery may not be employed to enforce them. To enhance the likelihood that this collective decision will have an impact on the lives of citizens who cannot protect themselves, lawyers should not be allowed to draft them. Because a standard can be devised with reference to the existing, positive law of unconscionability, a prohibition is not too vague and, in fact, redresses the current imbalance in the ethics rules. This may encourage lawyers to refuse to offer such services.

Rather than simply referring to existing rules of ethics or current rules of civil liability, "[r]elevant factors [in drafting an appropriate ethics rule]

that opposition to a rule like the proposed rule was motivated by fear of liability to third parties. See Rhode, *supra* note 40, at 616 n.97.

204. See *supra* note 162.

205. See *supra* note 28-29.

206. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983).

207. See *supra* notes 92-96 and accompanying text.

include not only the magnitude and likelihood of potential harm and the attorney's capacity to affect it, but also the personal and social costs that corrective action would impose."²⁰⁸ It is clear that unconscionable contracts cause harm. Yet, a rule prohibiting assistance in this context would deprive clients only of rights to which they are not legally entitled; it therefore would not reduce their autonomy in any meaningful way. On balance, there simply is no good reason to continue to allow lawyers to serve as means to unconscionable ends.

208. Rhode, *supra* note 39, at 645. Although some may find this test too vague, it looks remarkably like the Learned Hand balancing test, which lawyers seem capable of using. *See supra* note 150.