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THE SOCIAL RESPONSIBILITY OF LAWYERS IN THEIR PROFESSIONAL CAPACITY

RAY GARRETT, JR.*

The lawyer in securities regulation has a responsibility to the public to make an adequate investigation to determine the truthfulness of all matters requiring disclosure. Protection of the public through the federal securities disclosure system relies upon the proper behavior of the professionals in the field. However, the developing actions and attitudes of the SEC toward attorney responsibility in securities regulation do not reflect a general assertion that legal counsel has a social responsibility that must prevail over the interests of the client. The objective of federal securities law to protect the investor and the public is the distinguishing factor. In securities regulation the primary responsibility of the lawyer is to effectuate compliance with federal regulations. The primary social responsibility of all lawyers is to provide guidance to their clients to enable them to comply with the law or to achieve their desired goals in a lawful manner.

After the events of the past decade, it should come as no surprise that the obligations and role of attorneys are coming under more intense and critical public scrutiny. While it would seem unrealistic to hold the American Bar responsible for our tragic experience in Vietnam, that is perhaps the only catastrophe of recent years in which lawyers have not played a significant role. With every other social institution under reexamination, the legal profession cannot hope for immunity.

It is not easy to grasp the underlying forces creating this passion for exposure and reappraisal. It may even be a mistake to try to conceive of it as a single phenomenon. Thus one might develop a better understanding by thinking of each attack as a separate development related to all others in time and place, but springing from different social sources. It might, therefore, be asked if there is any logical connection between the critical reappraisal of the value of the family as an institution and the critical—not to say hostile—attack on the proper role of business corporations.

This is not the time to examine that sort of question at any

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length. There is a sense, however, that there is some connection, although it is not clear what it is, and one does not want to appear as a reactionary so beyond redemption that any attack on an established institution is regarded as an attack on them all, and therefore the work of anarchists.

There is, however, one generalization that seems to shed some light on the topic of this conference. There seems to be somewhat of an attack on established systems and professionalism as utilized in many quarters including the legal profession. The lay world has always tended to regard lawyers with some uneasiness and distaste. As Chicago's Mayor Daley might say, lawyers do not plant any trees. They live off the troubles of others. They are too clever and speak a mysterious argot clearly intended to bewilder common folk. The cleverest get bought up by the rich and powerful to help them get around our laws and cheat the public. Everyone senses this strain, which is not unique to this country or this era, and it surfaces every once in a while.

The public cry, it seems, is aimed at the underlying philosophies of the present institutions. Thus, unlike his modern counterpart, Adam Smith would have felt no animosity in realizing that in getting prompt and proper service from his tailor, he relied not so much on the tailor's good nature and pride of craft as on the tailor's desire to get paid. Such motivation is becoming less morally acceptable. Today's consumer wants the tailor to want to do good for reasons of pride. This may even be more important than whether he actually does do a good job.

So, too, with corporate activity. Society is not satisfied with a system which produces a "general good" only because the natural results of the desire to maximize profits are either discouraged or forbidden by a complex system of legal controls. Corporate management must *want* to operate for the general welfare, even at the sacrifice of some profit, though perhaps not to the point of financial suicide.

In addition to this general public discomfort there is emphasis on individual conscience in conflict with group decisions "properly" arrived at through the "democratic" system; thus, another trend with the ultimate result of unsettling familiar patterns. As a corollary to this trend, it might be that much more difficult to arrive at successful collective action. Thus, to the extent that every difference in judgment, opinion or taste becomes a matter of personal conviction, notwithstanding contrary decisions arrived at by a

proper majority or duly constituted authority, collective action tends to become impossible.

The reason these centripetal trends prevail, including among them the sudden resurgence of ethnic, religious and other separatist movements of all kinds in so many countries, at a time when human beings are becoming more and more interdependent in every physical respect, is indeed a mystery. Perhaps these trends signify a striking out at a system that has become too big, and requires too much subjugation of the individual's personality in order for him to survive. If the individual does not strike back, will the computers swallow him?

If there is a public attack, it is not a logical or coordinated striking out. Since society fears bigness in government and business, it demands to know everything that these behemoths are doing and, indeed, to be permitted to watch them do it. Therefore, a Freedom of Information Act¹ is enacted, and a bill to compel "Government in the Sunshine"²—such as some states, like Florida, already have. Simultaneously, however, society is also afraid that the government knows too much about individuals, so there is a Right of Privacy Act³—something not only inconsistent, *pro tanto*, with freedom of information, but also clearly, deliberately anti-efficient.

What if anything, has all of this to do with the social responsibility of lawyers in their professional capacity? It might have a good deal to do with it. It depends, in part, on how one reads the question.

To a large degree it may be asserted that the lawyer's contribution to society as a professional is to use his skills to the best of his ability to serve the expressed desires of his client, provided, however, that these desires are not clearly illegal. In fact, this may comprise the whole of criminal defense advocacy. There is only limited dispute with the proposition that every indicted person is entitled to skilled and vigorous efforts in his behalf, no matter what he did or how evil a person he may be.

There is, however, controversy concerning tactics. The strident methods utilized in some well-publicized cases to, in effect, put society on trial or to make an orderly trial impossible have been much debated. Additionally, several more intemperate citizens tend to lose their passion for due process in the presence of certain crimes

1. 5 U.S.C. § 552 (Supp. IV, 1974).

2. *E.g.*, Government in the Sunshine: The Sunshine Law, FLA. STAT. § 286.011 (1975).

3. 5 U.S.C. § 552a (Supp. IV, 1974).

and types of criminals. This is certainly not new, although there may be more of it in recent times. Also, there are defense counsel who tend to identify themselves with certain types of offenses and alleged offenses, not because of their peculiar experience and skill in the line of cases, but because of the strength of their emotional commitment to a particular class or cause—a degree of personal involvement traditionally regarded as non-professional.

However, this paper is directed to those circumstances where the lawyer is not simply defending events that have already occurred, but is participating in the shaping of events and policy, whether as an advocate before administrative and legislative bodies, or a negotiator, counselor and draftsman. Here the lawyer is not engaged solely to put past conduct in the best possible light, but is using his talents to shape the future. Since the lawyer may be in a position to influence decision making, the questions arise as to what extent, on what terms, and upon what considerations should the lawyer seek to use this influence. Further, what is his duty, and to whom does it run?

Why should these questions seem more pressing today than they were yesterday? They are not, of course, entirely new. It has long been agreed that a lawyer ought not to help his client to commit a crime, whether through shrewd advice or otherwise, and that he should inform the authorities if he knows a crime is about to be committed. The same attitude extends to the commission of fraud, but, as used in the Code of Professional Conduct,⁴ one senses that fraud is intended to mean old-fashioned fraud and not every misleading statement or opinion⁵ that might today become actionable under the federal securities laws.

Perhaps this was all of the relevant ethical equipment necessary for lawyers primarily advising individuals at a time when crimes meant primarily the common law felonies. In the present condition, where laws, including administrative rules and forms, are so numerous and so complex that they baffle all, including, often-times, specialists, avoidance of the commission of a crime is both too little and too much. Too little, when the lawyer is dealing with decisions that will affect large numbers of persons, and too much

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY.

5. The CODE provides that "a lawyer *may* reveal the intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(c)(3) (emphasis added).

when it is increasingly difficult to know whether everything a company is doing is legal.

Today's situation is also characterized by some confusion as to whom the client is. In difficult cases this has been something of a dilemma for corporate counsel at least since the public ownership of shares became widespread and the corporate managers became employees, not owners. Corporate attorneys are still struggling with the consequences of this development, even though it has in fact been with us for many years. Efforts at reconciliation have been, and will continue to be, stormy, involving such collateral matters as the attorney-client privilege and lawyers' liability for money damages. The Securities and Exchange Commission has become deeply involved in this process.

The Securities Exchange Act of 1934⁶ imposes upon companies, if their assets exceed one million dollars and their shareholders number 500 or more,⁷ the requirement of registration, with the subsequent duty to make public filings of financial and other company information annually, quarterly, and on a current basis for major developments. A cause of action will accrue in favor of an injured security holder for a material false or misleading statement or omission made in any of these documents, or, in the familiar litany, a failure to state a fact necessary to make a statement therein not misleading. Companies also at intervals give out public information through press releases or other unfiled documents which may constitute violation of the general provisions of the Commission's rule 10b-5⁸ which outlaws any material misstatements or omissions in connection with the purchase or sale of any securities. These laws also govern the solicitation of proxies by company management. In addition registration of public offerings of securities under the Securities Act of 1933⁹ imposes similar obligations of disclosure and sanctions for false or inadequate disclosure.

From the outset of federal regulation of securities, lawyers have characteristically played a major role in the preparation of all documents required to be filed under these acts. Although it is long familiar to those who practice in the area, it is somewhat unusual because nothing in the statutes, the rules, or forms requires lawyer

6. 15 U.S.C. §§ 78a *et seq.* (1970).

7. *Id.* § 78l(g)(1)(B).

8. 17 C.F.R. 240.10b-5 (1975).

9. 15 U.S.C. §§ 77a *et seq.* (1970).

involvement beyond the furnishing of a formal legal opinion in certain cases. But lawyers in fact do most of the work in the preparation of these documents except for the financial information, which is the primary responsibility of accountants.

Curiously, although the practical involvement has been there from the beginning, the legal consequences thereof went largely unexamined until a few years ago.¹⁰ The Commission has long had a disbarment procedure for lawyers who deliberately lie to it or to others in connection with securities matters. But, except for outrageous incidents, there was no searching examination of the lawyer's duty in these activities.

This is not to say that the work was generally performed in a slipshod manner. The practitioners in the field took their responsibilities very seriously. They were in fact occasionally accused, by other lawyers as well as business executives, of overdramatizing the complexities and importance of it all. In view of the cases brought by the Commission and some security holders in recent years, it is doubtful that these accusations are much heard any more. If they are heard, they are not heeded by any lawyer with any sense.

What has happened, historically at least, is the product of the frenzied finance of the late 60's. Too many people were trying to do too much too quickly, and in too many cases what they were doing was not financially sound. It led to sudden collapses of security values if not of the companies themselves, which led to Commission investigations, investor complaints, and lawsuits.

Owing to the nature of its jurisdiction, the Commission's investigative attention naturally concentrated on the adequacy of the public disclosures that a company had made. In every case one or more lawyers were found to have been deeply involved in the whole undertaking. In several significant cases,¹¹ it seemed clear that the lawyers had either in fact committed a violation of the securities laws, aided and abetted a violation, or at least were guilty of such practice as should submit them to discipline.

This is best illustrated by an example which is hypothetical but suggested by an actual case. Company A planned to acquire Company B by merging B into A. The merger required the favorable vote of the shareholders of each company, and, for this purpose, proxies were solicited under the Commission's proxy rules. After all formal-

10. See *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1963).

11. *E.g., id.*; *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284 (D.D.C. 1973).

ties had been completed except the final closing and the filing of the merger papers, the auditors for A announced that they could not deliver the so-called "comfort letter",¹² as required by the merger agreement. They had decided that certain downward adjustments must be made in A's statement of earnings and these applied to a significant extent to the 6 month statement included in the proxy statement by which shareholder approvals had been obtained. After considering the matter, top management of each company decided that they were prepared to waive the point and proceed with the merger. Whereupon counsel for each company delivered their opinions and the merger was consummated. Shortly thereafter, A collapsed in a major scandal, which led to an SEC investigation of A's circumstances and behavior. When it came to the merger with B, the Commission concluded that it should not have been effected in the circumstance and that the respective legal counsel had aided and abetted in a violation of the securities laws. It is emphasized here that the actual case is being hotly defended and is far more complicated than this simple abstract.

It could be surmised that the respective counsel established that the top officers of each company were fully informed of the auditor's position and that they concluded either that the deficiencies in the proxy statement were not material, or that, even if material, the merger was so beneficial for their respective companies and their shareholders, and so much time and effort had already been devoted to the project, that on balance it was better to proceed. On the other hand suppose counsel believed the deficiency to be material. In the face of this, must counsel tell the officers that they are wrong; that the deficiencies are clearly material; that shareholder approval was obtained in violation of the Exchange Act; and that the companies must not proceed further, no matter how good the deal is?

In its complaint the Commission has answered this question in the affirmative and has gone further to say that, when the principals determined to go forward anyway, counsel should have withdrawn from the engagement and—bitterest of all—informed the SEC.¹³

12. The certifying accountants are usually requested to furnish a "comfort" letter to the SEC to the effect that the financial statements and schedules which they prepare comply or conform with the requirements of the SEC. L. RAPPAPORT, *SEC ACCOUNTING PRACTICE AND PROCEDURE* § 10, at 25 (2d ed. 1966).

13. Complaint at 48(i), *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284 (D.D.C. 1973).

In other cases, the Commission has proceeded against counsel for contributing to false and misleading registration statements, other filed documents or offering material, either knowingly or through failure to make adequate investigation to determine the truth. While these cases are not many in number, they have created a major stir, if not storm, within the bar.

Why has the Commission taken this position? In many statements on the subject the Commission has stressed the considerable reliance that the entire federal disclosure system places on professionals, including accountants as well as lawyers. With the small examining, investigating, and prosecuting staff of the SEC, investor protection through disclosure depends upon proper behavior of professionals. If the professionals are careless or inept in the performance of their duties, or still worse, if they cooperate with management in denying proper disclosure to investors, the system will not work and investor confidence in our capital markets will be lost.

Why is the bar so alarmed? In part there is some uncertainty as to the legal standard of care to be applied. Scarcely anyone can disagree, at least in public, that strong sanctions should be imposed upon a lawyer who knowingly and deliberately participates in preparing and filing false and misleading material. Short of that, where is the line drawn? Carelessness or gross negligence? Ought to have known and on notice with duty to inquire? Simple negligence? The problem is muddier for lawyers than for auditors because there is no authoritative statement of appropriate procedures for lawyers' investigations in these matters. Since the deficiencies involved seldom concern questions of law, there is fear that the Commission and the courts will attribute to lawyers a degree of financial acumen that many, even securities lawyers, do not in fact possess.

Moreover, there is the fear of civil liability in alarming proportions. The Commission can sue only to seek an injunction. Its suits are in legal contemplation, prophylactic. Although, in certain cases they may be joined with a prayer for ancillary relief which may include some payments of money, especially disgorgement of unjust enrichment. However, while it does not necessarily follow that conduct which will support an injunction will result in liability to investors, the matters are not wholly unrelated, and the danger is there. This is a most troublesome area in our law, because professionals are dealing with sums out of all proportion to their individual resources, and insurance is not always the easy answer it is sometimes made to appear.

Beyond these considerations, the Commission's actions, and the instant extrapolations that the bar is wont to apply, have generated some confusion in client identification and relationship. If the client is not the chief executive officer, then who is it? The corporate entity, the abstraction, as the ABA's canons seem to say; or present security holders of the company; or just holders of equity securities; or all investors, potential as well as present? How can there be completely frank and open discussion with management personnel and access to information if there is always the latent threat that the lawyers may decide that something is material and must be disclosed because their major duty is to future stockholders?

These fears are far from frivolous, but further exploration of them would lead the discussion too far astray. The more pertinent question is to what extent the developing actions and attitudes of the Commission reflect an assertion that legal counsel has a social responsibility that must prevail over the desires and interests of his client. Strictly speaking, it is this writer's opinion that the answer is, not at all. The Commission is saying that when a lawyer is retained by a company to work on compliance with the disclosure requirements of the Federal securities laws, which exist for the protection of investors, his primary duty is to cause the company to comply with those laws. He is not justified in participating in non-compliance because the chief executive officer finds compliance onerous, personally harmful or embarrassing.

Does this mean that these cases have no relevance outside of the specialty of securities regulation? Insofar as the securities counsel's duty is seen to extend to present shareholders, and since he is retained by and for the company and paid from company funds, there would seem to be no application to the legislatively intended beneficiaries of other laws to which the company may be subject. To the extent that the securities counsel's duty is seen to flow to potential shareholders, which begins to approximate the general public, there may be some spill-over of applicable theory—although allowance must be made for the unusual practical role counsel customarily plays in the disclosure process, surely quite different from his role in other areas of company activity.

Is the situation different where the duty of compliance with the law is not the central factor? For example, after a great deal of careful study, the management of an electric utility company has concluded that the most efficient means by which it can provide the generating capacity to meet the projected power requirements of its

territory is through a heavy commitment to nuclear power. The task of the company's attorney is to seek certain legislation and regulatory approvals to facilitate the nuclear construction program. If counsel personally agrees with management's decision, or has no view one way or the other, he has no problem other than to do a good professional job.

If, however, counsel does not agree with management, then what? He has done a substantial amount of reading and worrying on the subject, and concluded that the hazards of nuclear generation present too great a danger to the environment to justify the possible advantages. Perhaps he had an opportunity to make his case during management's deliberations, and perhaps he did not. (Counsel are not always included in such decision making.) Which ever way it was, counsel's position did not prevail. What does he do? His private opinion is that nuclear power should be abolished or at least not increased; his professional task is to apply his energy and skills to increase nuclear power. Where does counsel's duty lie in this situation? Does he have an obligation to pursue his own judgment even though contrary to the decision of the management of his client? Is this like a disclosure question under the securities laws? Counsel is retained by the company to represent its interests and those of its shareholders and not the individuals constituting management. But he is convinced that the long range interests of the company require preservation of the environment, which in turn means no more nuclear power. Therefore, although management thinks otherwise, counsel sees his duty to work for the company to stop nuclear construction.

This is a wholly untenable position. The one unacceptable course is for counsel to continue to represent the company and in fact work to defeat the program properly adopted by management, whether he does so openly or secretly. How is this distinguished from a disclosure problem? The presence of the Federal securities laws and their particular provisions make the difference. There is a point of professional honor that applies even to thieves, murderers, and prospective despoilers of the environment. One does not purport to undertake legal representation to achieve one result and in fact work to achieve the opposite.

Can, nevertheless, a person of conscience undertake the engagement on these terms? The answer is yes, provided only that the attorney's opinion is not so strong that he could not do a good, professional job. There are, certainly, cases, primarily in the crimi-

nal area, where the bar owes the accused representation no matter how distasteful the task, and someone must come forward or be appointed. Here the hypothetical situation does not seem to present that challenge, at least as a practical matter. Accordingly, if the attorney cannot do a proper job, he may and should decline—a simple solution in concept which could present a tragic career crisis to corporate counsel.

However, it is perfectly acceptable for counsel to disagree on the merits and yet devote his professional efforts to achieve the result. This is not to say that lawyers are simply hustlers, and it is quite proper for them to be. There should be no presumption that a lawyer personally believes in the merits of his client's cause. Some advocates invite this association by arguing in terms of personal belief and conviction, but it is unprofessional and collectively unwise for lawyers to do so.

By practicing as a lawyer, one has deliberately chosen a fundamentally adjective role, one not in the direct line of decision making in our society and economy. In the nuclear energy hypothetical, accordingly, it is reasonable and professional for counsel to say, in effect, in my judgement management has reached the wrong decision, but it is a decision that is clearly within their authority. The responsibility for making such decisions is theirs; they do not propose anything illegal, and they are more expert on these questions. The lawyer thus recognizes that management is entitled to professional help in working out the program they propose in a lawful manner, and also recognizes that he as the attorney is not so confident in his special insight into these matters that he cannot provide this professional help.

Therefore, it is asserted that the primary social responsibility of a lawyer is to provide guidance to persons to enable them to comply with the law or to achieve their desired goals in a lawful manner. As society and its legal system grow more complex, this task becomes ever more demanding. Despite important efforts to preserve individuality, the main trend of affairs is to make effective collective action more and more imperative. This makes process more and more important and at the same time difficult. How decisions are made, how agreements are achieved, and how disputes are resolved are vital questions in our communities, our nation and our world. Everyone cannot be expert at or responsible for everything. Lawyers are the guardians of due process, not simply in the technical sense, but in the broader sense of the ordering of affairs of all

kinds. To the extent that the lawyer injects his own views on the merits of the matters he must handle, he lessens his professional attitude and effectiveness. Such intrusions of conscience must be limited only to those matters of deepest significance to the individual.

If this seems like a less heroic role than some would like lawyers to play, it is suggested that more thought and reflection be given to how our society operates and where it seems to be headed. The role envisioned in this discussion is quite heroic indeed.

PANEL DISCUSSION

The following excerpts are taken from the panel discussion which followed the paper presented by Mr. Ray Garrett.

In addition to Mr. Garrett the panel consisted of Ms. Lynn Russo, an instructor of law at the University of Miami, who served as the moderator of the panel; Mr. Tracy Danese, an attorney and Vice-President of Florida Power and Light Company; Mr. Stanley Hagendorf, a tax attorney and visiting Professor of Law at the University of Miami; Mr. Phillip Hubbart, who heads Dade County's Public Defenders Office; Mr. John Cyril Malloy, a patent attorney in Miami; and The Honorable Arden Siegendorf, of the 11th Judicial Circuit Court, Dade County, general jurisdiction division.

Ms. Russo: *The title of this session, "Reconciling social responsibility with the role of the advocate" actually presupposes an answer to the question which will underline today's discussion. Is there a conflict today between a lawyer's duty of commitment and dedication to the client's interest, and the public interests? Certainly the lawyer's role as an advocate serves a social function. This is recognized by the Code of Professional Responsibility, which provides that the duty of a lawyer both to his client and to the legal system is to represent his client zealously within the bounds of the law. However, the attorney's commitment to his client's interest is not absolute. For instance, the lawyer's duty under the Code to preserve the client's confidence and secrets is somewhat tempered by the receipt of information for which the attorney-client privilege is not applicable, as with information about a client's perpetration of fraud, or information about a client's intention to commit a criminal act. Mr. Hagendorf, in respect to your experience in the tax field, could you tell us whether this is the extent of the attorney-client privilege in the tax area, and also whether you think that particular privilege should be expanded or contracted?*

MR. HAGENDORF: There is an attorney-client privilege in the tax field, as in all other fields. The question really deals with and depends upon the nature of the subject matter. In the tax field you can get just about anything—from a client coming in who is having an audit of his tax returns, to the quite frequent situation of a client coming in and saying “I have not filed returns for 10 to 15 years.” There is a wide range of situations with respect to the privilege. Anything that a client tells you is privileged. The difficulty is in situations where a client comes into your office and says: “I have about \$300,000 dollars in cash; how do I open up a Swiss bank account? And what is the best way of doing it?” At this point I show him the door. The question is then raised; do I have the duty to call the Internal Revenue Service, and tell them a certain well-known individual walked into my office and told me that he was going to deposit \$300,000 in a Swiss account? I do not believe that I have that duty. I may get some disagreement with this, but I feel to that extent there is an attorney-client privilege.

Ms. Russo: *Do you find, for example, that the attorney-client privilege is somewhat diminished for the attorney in the tax area? Most of the returns are looked at by accountants, and the accountant does not have an accountant privilege.*

MR. HAGENDORF: One of the main problems is the fact that the accountants do not have a privilege. On occasion I have had an accountant call me and say: “There is a federal strike force in my office. What do I do?” I usually tell them that I am on my way down. I have also had the situation where a client will call me, and I will suddenly see moving people bringing files into my office. I will ask what these are. The answer will be that these are all the records in connection with that tax return and the accountant is concerned that someone may come in and therefore prefers to have them in my office rather than in his office.

As far as the actual examination is concerned, again, it depends upon the particular situation. Accountants today are very vulnerable because they do not have the privilege. The question again is raised, suppose a client comes to you and asks you to hire the accountant and get him under the umbrella of your privilege. Is he privileged? Or a client asks you to prepare his tax return instead of his accountant. My feeling is that I do not believe attorneys should prepare returns. I think that is a job for accountants, and when legal questions are asked that is the function of a lawyer. You get a very

difficult problem in this particular area of exactly where is the attorney-client privilege.

Ms. Russo: *Mr. Malloy, with respect to the patent area, can you comment on the client-attorney privilege?*

MR. MALLOY: One of the problems that we have in the patent field is that most of the things that give rise to questions involving the attorney-client privilege take place in an *ex parte* atmosphere, that is in proceedings before the patent office where the government is represented by the examiner, but you do not have the adversary system in full force. The other problem is that the actions that you take are judged in hindsight, 15 or 20 years later, and according to the standards that prevail at that later time. This gives rise to serious problems for the attorney when he tries to advise a client today with respect to how he may be judged 15 years hence.

One example that comes to mind is when I started practice in 1959, all the offices, for the most part, were equipped with copying equipment of what was called an APCO variety which was a wet chemical process. Now offices have Xerox machines. We know that probably by 1985 all will have copy equipment that will more than likely reproduce in color. The question arises—if we are procuring a patent now for color, or where shades of color are important, what will be the effect of not using color equipment to support the arguments in an *ex parte* proceeding dealing with why something is different than something that is already known. How well will you fare in 1985 by not having presented your materials in color when it is judged by the equitable standards that will exist at that time. So in advising a client, we have to advise him in the light of his duty of a disclosure to the patent office in an *ex parte* proceeding, and advise him of the type of disclosure which must be made. The patent attorney must also bear in mind the question of reliance, and what standards exist at that time in the patent office, and what knowledge is available to them. They can then rely or not rely on what you do not say.

There is another problem. When you reveal to the patent office the reason you think you should get a patent, you will subsequently be judged on whether you should have revealed more than you did, but did not do so because it may have been your belief that it was not relevant at the time to the issue before the patent office. Similarly, you may have a situation where you believe that the patent office knew the state of that art and that you were proceeding beyond that. So it is primarily a question of reliance. The problem of

what is included in the attorney-client privilege includes the questions of whether the attorney should hire the expert who evaluates materials and submits it, whether the management group can have the privilege apply in its submission of technical information and evaluation of it, and whether that will fall within the scope of attorney-client privilege. It even ranges to the extent that many of the patent attorneys who advise corporate clients utilize a standard procedure of stamping "privileged and confidential information," on almost all documents that they feel may subsequently be evaluated, in the hope that this stamp in large print will give some protection when they are judged later with respect to this information.

Ms. Russo: *Is there a difference in the attorney-client privilege, if you are an attorney who is employed in a given state, and, although not licensed to practice in that state, are able to work for a corporation in the patent area in making certain determinations? Do you find the attorney-client privilege will be different with respect to that person and a person who is working for a private law firm when asked questions concerning patent law?*

MR. MALLOY: Patent attorneys for the most part are nationwide; they are licensed by the patent office as well as the local state bar. The basis of the attorney-client privilege is that you are dealing with an attorney. If the question arises in litigation as to whether the matter alleged to be within the privilege was within the attorney-client privilege because the person you were dealing with was an attorney in the jurisdiction where the disclosure took place there is divergence of opinion. In Delaware, for example, where there are many large corporations, which necessarily employ as staff counsel attorneys who are not necessarily members of the Delaware Bar, the Delaware courts and the federal courts have, for the most part, held that the attorney-client privilege does apply, notwithstanding the fact that the person is not a member of the bar in that state. In other areas, however, there is the view that one must be an attorney authorized and licensed to practice in that jurisdiction before the attorney-client privilege attaches. So there is a distinct difference.

Ms. Russo: *If a client does not follow the advice of a lawyer, should the lawyer be obligated to take affirmative action by resigning or informing the appropriate tribunal, whether administrative agency or court, about the clients conduct? We have heard Mr. Garrett's view, with respect to that. I would like to give Judge Sie-*

gendorf a hypothetical. Should an attorney inform the judge when his client has committed perjury on the stand?

JUDGE SIEGENDORF: I think in that specific example, Mr. Garrett was talking about the privilege yielding where a crime was committed, or to prevent a crime. If it were established that perjury had been committed or is about to be committed, I do think that the lawyer would have the obligation to approach the bench and advise the court and at the same time move to withdraw. Otherwise the lawyer might be involving himself in a situation where perjury is involved. If the client tells the attorney he just hired someone who will testify that he was 100 miles away from the scene of the crime at the time, clearly, since the lawyer was aware of it, he should tell his client: "You cannot testify for you are not permitted to do so." He should also advise the client that if he intends to testify or put the hired witness on the stand, that the attorney will have to advise the court of this matter and ask for leave to withdraw. I do not know if Mr. Hubbart agrees with that point.

MR. HUBBART: The problem arises in two ways. First, the client tells you he is guilty of the crime, but wants to take the stand to say he is innocent. The second situation is where the client tells the attorney he is innocent of the crime and has a particular version, and when on the stand he begins to tell a totally different version. Then what is your obligation? I will deal with the former first.

The American Bar Association's minimum standard study on criminal justice on standards relating to the prosecution function and the defense function addresses the first problem. Their recommendation is that the duty of the attorney is not to participate in the announced perjury, and attempt to convince the client not to take the stand. That is his first duty. But I must put this in perspective. I have been practicing law since 1961 and it has arisen once. So it is really not an earth-shattering problem that occurs every day in my practice. But, your first obligation according to the ABA is to try to convince the defendant not to take the stand. If you are unsuccessful, the second recommendation is to advise the court, without revealing the confidences of the client, that you wish to withdraw. I do not think that is a practical solution for court-appointed counsel because another attorney must be appointed who is going to have the same problem again. The final recommendation is to place the defendant on the stand, ask him to state his name and make his statement, and not participate any further in the examination. Then in closing argument to the jury, counsel can not

refer to anything the client has said, because the duty of the lawyer is not to participate in any way in the perjury. In addition, counsel can not argue to the court, in any way, the truth of the statement made by the defendant. Obviously, when it is laid out in front of the client that this is what you are going to have to do if he takes the stand, it is a rather persuasive argument for him not to take the stand. This is what happened to me in the situation which occurred once in my practice. Everyone is going to know the client is committing perjury if his own lawyer cannot argue the point.

The second problem is different. That is where the client suddenly begins to shift his story somewhat from what he has previously said. I do not think it is quite as dramatic as the situation where the client tells you, "I am guilty, but I want to take the stand." That is a clear indication of an intention to commit a crime and clear intention to commit perjury. When a client is beginning to shift his story somewhat, I think it would depend on the degree. If he radically changed it, I think the obligation of the attorney is to cease examining him and not to argue his story to the jury or to the court. But the obligation does not extend to informing the court because the problem with informing the court is that you are totally breaching the confidential communication, and the only exception is the announced intention to commit a crime. In this instance, the perjury is a continuing kind of thing, and I think you should cease participating in it, but it is a past event at that point; at least what little the client has said up to that point becomes a past event. Consequently, I think a lawyer should simply cease examining the defendant. This is my personal point of view. I have no authority for it, and the Canons of Ethics unfortunately, until recently, did not address some of the more difficult ethical problems that arise in the practice of criminal law.

Perhaps we can discuss other such problems. Judge Siegenorf and I were mentioning particularly the problem which arises where a client comes to a lawyer and gives him a murder weapon. What is the attorney's obligation in reference to the murder weapon or when the client comes in with some contraband, narcotics, or stolen property? There is a recent decision by the Florida Fourth District Court of Appeals where the defense lawyer turned over the property to the police, but refused to tell the police where he got it, except that he got it from a client. The State Attorney subpoenaed him and also his secretary to state the name of the person from whom he had received this stolen property. The defense lawyer in-

voked the attorney-client privilege and he was found in contempt. The District Court of Appeals reversed. It appears to me to be a rather sensible solution to the problem which respects the attorney-client privilege. I can easily imagine the lawyer being charged himself with the possession of contraband if he refused to reveal the person's name. I can see a police officer getting very upset if you do not tell him where you got it. There are some very serious problems involved in that. If you reveal that you got it from a client, the police want to know exactly where he is. If you do not tell them, they may charge you with possession. You can look at the Canons of Ethics on this and the ABA study and you are not going to find an answer. I think the Fourth District resolution of it does seem to be the most reasonable one.

JUDGE SIEGENDORF: An incident like this did occur a few years ago with several local defense counsel who represented a client who was in jail. The client asked the attorney to pick up some of his belongings at a particular locker and when the attorney did, it was discovered that the bag was full of a large quantity of heroin. The attorneys who were involved in the case had to make a decision as to what to do with the contraband. They collectively decided to destroy it rather than turn the contraband in. The attorneys were subsequently prosecuted in federal district court for conspiracy and obstruction of justice. I believe they were acquitted.

Ms. Russo: *Mr. Danese, do you find professional responsibility less acute when acting in the capacity of a lobbyist?*

MR. DANESE: When you are acting in the role of advocate before a legislative body, you have to deal with a massive amount of information, and as a practical matter there are always two sides, three, four, or ten sides. There is such a wealth of information being fed to you with any issue, that the question of confidentiality is really not a practical consideration. There is a great deal of information coming in, and much of it is totally subjective. In the role of the professional lobbyist, you wish that less subjectivity and more objectivity could be in the process. But that is not the way it works, so the confidentiality question does not come up often. The question of whether you are given good information is there. My experience and knowledge of others who act in a professional role makes me very sensitive about others objectivity and the truth of the information they present. In addition, the simple fact is that in a matter of minutes or hours, any mistruth is easily ascertainable. Then your

cause is completely gone. Probably the greatest safeguard in the whole process is the fact that the other side can expose any mistruth, and also there is a very active media waiting to expose truth or mistruth.

Ms. RUSSO: *What is your view with respect to lobbying for something you might personally disagree with but which the corporation would be very interested in?*

MR. DANESE: I am in complete agreement with Mr. Garrett's answer to that question. If you disagree with it so strongly you should quit your job. If you are going to take your pay, you should do it within the bounds of propriety, and propriety means you do not lie, and that you advocate your company's or your client's position.

Ms. RUSSO: *Mr. Malloy, what do you think in respect to a lawyer taking affirmative action in terms of either resigning when a client will not take his advice, or informing the appropriate tribunal in respect to what to do?*

MR. MALLOY: I do not know the answer. I have certain milestones that I have gone by. In one early case that I had, I knew that my client had not lived a good life, and he was being sued by a very large corporation represented by very respectable counsel. There was collateral litigation involving the same patent in California. In our particular case they were alleging large commercial success satisfying a need for this particular invention. In the course of the proceedings, I prepared interrogatories asking who the people were who were licensed under this patent, and the extent under which the licenses were taken. The corporate counsel talked to me in a private conference and said: "You know what kind of a person you are representing. Everybody did. If we tell him our customers, we are going to have him raiding our customer list. Will you agree to answers where we will not tell you the amounts of the customers, but will reveal the names of the 15 largest corporations who are representative of taking licenses and the total dollar value of the licenses taken?" This seemed to me to be a reasonable solution. It totalled about a million dollars, and included Boeing, General Electric and about 15 large corporations. This case continued and later the collateral case in California began. I was involved in that case also. The attorney in the California case would not take this information and he insisted on the details with respect to these particular licenses. It turned out that about 99 percent represented the total amount of money from the commercial success. It was received as

an advance on royalties, with the proviso that these law suits had to be won or the money would be returned. The other large licensees were actually only one dollar. For example, Boeing was provided with a machine together with the license for one dollar; they on the other hand had a \$5000 machine contributing to a good image of commercial success.

The point is, I learned at an early date that you must give your clients the benefit of every doubt. That is my motto and my creed. I think if anybody comes to my office, first they have a problem that they cannot solve themselves, second; they are not as articulate as a lawyer, and finally they do not know how the facts fit into a legal pattern. I give my client the benefit of every doubt, and I do not think that he should be deserted simply because he cannot express himself clearly on a point or he does not understand how the priority of the elements of a point fall into place. If the client were clearly lying or doing something that went against my basic concepts of what is right or wrong, I would have to seriously evaluate the case and resign as in the situation where you would not take the money of an employer if you consciously knew you were not going to do the job. On the other hand, you have to stand up for your clients. You have to maintain your own basic sense of what is right and wrong, and, in my judgement, you must give the client the benefit of every doubt and help him as a good faithful attorney.

Ms. Russo: *Mr. Garrett, do you think an attorney should resolve all doubts in favor of the client in the securities area?*

MR. GARRETT: I do not think the fact that it was a securities case would make any difference; the events have already occurred and it is a defense against the consequences. It becomes more complicated in a corporate situation where there are both corporate defendants and individual defendants, as to what the corporate counsel's role should be. It is common in derivative actions in which the corporation, the board of directors, or some of the officers are involved as defendants, to appoint separate corporate counsel. The interests are different. It would be a mistake for corporate counsel, I think, necessarily to defend individuals, if in fact the corporation had a claim against the individuals.

JUDGE SIEGENDORF: From a criminal law point of view there should be more affirmative action, as you are using that phrase, taken by lawyers in the particular area. In my experience of 3 years on the bench in the criminal side, most attorneys cite the attorney-client privilege as a complete blanket. There are many instances

where counsel should advise the court, or at least request a recess to confer with their client to prevent perjury and fraud on the court and judicial system.

Recently I was presiding over a first degree murder trial where the deceased had been killed with a .45 caliber bullet. The defendant took the stand and was being asked in cross-examination by the prosecutor: "Did you own such a weapon?" The defendant said: "No; I did at one time and it was stolen some months before." "Did you have .45 caliber bullets in your home on the date of the incident?" He looked directly at the prosecutor and said "No." Everyone in the courtroom knew that was a lie, because at a pre-trial hearing, certain of these bullets were found in his home but were suppressed for some deficiency in the consent. Everyone in the courtroom knew that he was telling an absolute bald-face lie. I looked over to his attorney, and he did not bat an eye, nor say a word. I called for a recess, and excused the jury, to discuss the matter with the attorney. Counsel felt he had no obligation at all. He felt that his client took the stand and he knew the consequences. Counsel did not feel obliged to advise his client further in that context. The matter was resolved when I permitted the State to use as impeachment the material which had been suppressed under the *Harris* line of cases. I held the State could use for rebuttal, confession material which was not permissible in the State's direct case. I think that is a graphic example. The lawyer may not have known what was in the client's mind. I do think the Code of Professional Responsibility and the greater responsibility of the lawyer to prevent fraud on the legal system required counsel to do something. Perhaps he should have requested a recess and discussed with his client that question, or he could have come back and answered the question, even explained his answer. By doing nothing, I think the attorney was abdicating his responsibility to the legal system; I think that young lawyers, and potential lawyers, should be thinking about the greater responsibility to the legal system and keep it in balance with the particular responsibility owed to the client.

Ms. Russo: *Mr. Hubbart, what do you think in respect to resolving all doubt in favor of the client?*

MR. HUBBART: First I will comment on the problem that Judge Siegendorf just mentioned. I think in that context, where the client is lying, or testifying about a fact which clearly conflicts with suppressed evidence, it is my view, that the attorney not argue that testimony to the jury as being the truth. I would not comment on it

one way or the other. There probably would be an obligation to ask for a recess and confer with the client for the purpose of convincing him to testify truthfully.

In response to your general question about resolving all doubts in favor of the client, from a criminal defense point of view, the defense is directed toward all past conduct, so there really is not any problem there. I think you have to resolve all doubts in favor of your client and present the best view of the client's conduct. We are not in a position of advising a client what to do to avoid criminal consequences; in criminal defense the consequences have already occurred, and I think I would agree with Mr. Malloy that doubt should be resolved in favor of the client, wherever possible, as to past conduct.

Ms. Russo: *Mr. Garrett, what do you think with respect to the situation where a company is reporting under the continuing reporting requirements, which means that they have to report yearly, and the attorney learns of a material misrepresentation in a prior statement. The attorney decides that the information should be included in a subsequent statement, but in revealing that to the SEC he thereby has problems of disclosing something that has happened before, which therefore, breaks an attorney-client privilege. How should the attorney deal with such a situation?*

MR. GARRETT: This situation does occur and to a degree is involved in the present controversy between the auditors and lawyers with respect to the so-called lawyer-auditor letters, that is, in the letters they are asked to supply information about any undisclosed claims, as well as results of known claims that have not yet been resolved. One thing is clear. The lawyer cannot knowingly participate in repeating mistakes. The material submitted next has got to be right. Beyond that, does the attorney have to call to anyone's attention the fact that last year the statement lied, intentionally or unintentionally? I have great difficulty, myself, in saying that the lawyer must alert potential plaintiffs about contingent claims against companies that they have not yet discovered, but I am saying this as a private individual. I am not sure what the Commission's attitude would be. Part of it is going to be worked out with respect to lawyer's letters to auditors and I am not sure how that is going to work out.

Furthermore, when auditors are preparing to certify annual financial statements, they are going to have to deal with standing claims against the company. If there is a lawsuit in the company's

file, the auditor's only concern is with respect to the probable results of the outstanding lawsuits and to decide whether some reserve should be set up in the event that a suit is lost. The lawyer's problem is trying to guess how the litigation will come out, which is hazardous at best, but even if he is willing to guess, there is a tactical disadvantage in setting up a reserve and letting the other side know what you think his chances are. This immediately becomes a minimum target for settlement. If you know a company has a reserve of \$500,000 against a lawsuit, you would not be inclined to settle for less. These are relatively minor problems, however, compared to the auditor's request to the lawyer that he be informed of any other contingent claims, whether or not they are being asserted. That is what has alarmed and distressed the bar. For example, the lawyer discovers that last year's annual statement had a material deficiency in it, but nobody else has discovered this. If somebody does discover it and the price of the stock has gone down (probably for completely unrelated reasons) a big class action could be brought against the company which, at the very least, would cost lots of money to resolve. What should the lawyer do? Should he tell the accountants? If he tells the accountants, he has violated the privilege. Of course even then the privilege will not amount to anything, unless somebody discovers there is a question to be asked.

To make this example more dramatic, the lawyer finds that if this deficiency were discovered, it could be quite disastrous. But, the lawyer also knows the chances of somebody discovering it are rather remote. If he informs the auditors of all this, what are they supposed to do? My own opinion in this type of situation is that the lawyer does not have to alert possible plaintiffs of claims that they have not yet discovered; his obligation is to avoid harming people in the future, and he does not have a duty to alert them to possible causes of action that they do not know about. I am not sure, however, that this would be the ultimate resolution of the bar and the accounting profession.

Ms. Russo: *I now want to direct our attention to the effect that the expanding role of the attorney may have on the nature of the legal services which a client will receive. It has been asserted that due to the fear of liability a lawyer will be less likely to give "hard advice," and/or will tend to give a conservative opinion resolving all doubts in favor of regulatory restrictions, thus eliminating available choices for consideration by the client. Mr. Hagendorf, what is your opinion of this assertion?*

MR. HAGENDORF: In the tax field this comes up frequently. A client will come in and say: "This is a transaction I want to go through." You plan it out and find several problems. First, the tax field is so complicated that even the world's expert can make a mistake in the area. You always are concerned about "what have I not seen." On top of that you have a problem with time spent. Again, because the tax law is so complicated you cannot spend 6 months doing an absolute research job on a particular item, although in certain instances, I have gone as far as checking back the personal diary of a deceased legislator in order to find out what his state of mind was when he reported something to a committee. But that is rare. In tax law it is really a tough problem. What I usually do is give the client the advice that I think is right. He may follow it and he may not. If he does not, this is his judgment. I will usually write him a letter outlining my recommendations—outline the pros and the cons, outline whether he may have litigation, and the various risks involved. I do this by letter, specifically if the client goes against what I advise.

The main difficulty is that the tax law in these areas and the problems I get are not clear-cut. If they were clear-cut clients would not come to a tax lawyer to determine which way to go. In this area you have got to be very careful. I personally try to protect myself by keeping detailed memoranda of all the conversations with clients, detailed correspondence; and when I do recommend a specific plan of action, I do it in a very carefully worded letter. If there is a risk involved, and there are cases that may be questionable, or there is an open area, I would advise the client that this is an open area and that the government could come in and audit the return, and if they do audit the return, we may get involved with a tax litigation. Then I leave the basic decision as to whether to proceed to him.

Again, this area is unique for several reasons. One, you are dealing with the Internal Revenue Service, which is a constant dealing, and all advice that you do give will be reflected on someone's return. Sooner or later you have the possibility of a client being audited. You can give advice that is really "out in left field," but if the agents never pick it up and 3 years go by, assuming you have not left out too much income, that is it. The client thinks you are the greatest hero in the world. On the other hand you can give advice and think you are really on a sound basis and the government subsequently issues a ruling which says they are going to go the

other way notwithstanding what all the courts say. Or the Service puts it on what is known as a "prime issue list," which means they are going to litigate. You have to advise a client that there is no way of knowing what is going to happen when the IRS goes through the return and questions an item. Many times you are going to get involved in an audit and you are going to get involved with an appeal up to what they call the Appellate Division. You may get involved with a tax court litigation and you may win. Then your client says, you cost me money; you won it, but look at all the legal expenses I had. All these factors have to be considered. However, the greatest danger in the tax law, is that you will give advice and sitting somewhere there is an old case, or a very fine point in a statute which you have overlooked or misread. The Internal Revenue Code is so complex an act that the danger always exists.

MR. GARRETT: Ms. Russo, I would like to see if the others agree. It seems to me there is a noticeable difference in style, if that is the right word, or in acceptable attitude and objective in different areas of law. I take it there is nothing reprehensible about trying to minimize taxes. It is reprehensible to lie or cheat; but to try to characterize transactions in a way to minimize taxes, is at least an acceptable if not laudable objective. No lawyer is ever thought of as a little bit shady because he decided to take a chance and stretch a point in order to minimize taxes as long as he has not deceived his client. I think you have a different problem when you are writing a tax opinion for investors in a registration statement or a proxy statement because it is not acceptable to minimize disclosures, at least if you care what the SEC thinks about you. The SEC does not think it a proper objective for a lawyer to undertake with his client the game of seeing how little disclosure he can possibly make and stay out of jail. In fact, a lawyer who is well regarded in the securities bar starts out the other way. The objective is to disclose everything, but that is theoretically and practically impossible. However, the burden is on the one who says we do not have to disclose it.

MS. RUSSO: *You are assuming there that disclosure is costless, right?*

MR. GARRETT: Not necessarily, no.

MR. HAGENDORF: Let me interject this comment. The Internal Revenue Code does have certain provisions where you have got to disclose. For example, if you liquidate a corporation, you have to make certain disclosures. If you complete a reorganization, you have to have certain disclosure. If a client wants to acquire a company,

the tax attorney can structure it in one of many ways. If it is done one way and a company fails, he can get a huge write-off. If done in another way and the company fails, the client can end up with a handshake. If a type of reorganization is done to get a certain basis, this is perfectly legal; everything is recorded, and as a matter of fact in these particular areas, you usually get an advance ruling. But, as far as misrepresenting or making a false statement, no lawyer should do that.

MR. HUBBART: I do not know if this is quite the same thing, but in the defense of criminal cases there is a problem of advising a client whether to accept a guilty plea, and this comes up very frequently. The attorney is faced with the question whether to advise the client conservatively or whether you want to take the expansive view of your ability to prevail at trial. In addition there is a problem where we are not going to prevail at trial, but we have a great appeal based on a pre-trial ruling which went against us on which the court was wrong, or at least you think the court was wrong. Do you want to advise the client to go through with the trial and tell him he probably will be convicted because, for example, in a narcotics case, the whole defense is that they seized the narcotics unlawfully? He lost the pre-trial motion on unlawful seizure, so chances are very great he will be convicted at trial. One of the things a defense lawyer will face is that one does get a better sentence on a plea of guilty; that is, a lesser sentence than if convicted at a trial. Sometimes a resolution can be found in other ways, a *nolo contendere* plea, and then an appeal from there. Generally, that does not hurt the client more than just a straight plea. However, there is a difficult problem whether to advise the client to take an offer of probation when you think you can prevail on appeal, although this may cost the client a year in jail while you litigate the issue. Furthermore, you may not prevail in the Third District Court of Appeals, and may have to go to the Florida Supreme Court which takes another 8 months to 1 year. If you do not prevail there, you may have to take a federal habeas corpus, and you may have to go to the United States Supreme Court. In other words, your client may be sitting in jail 3 or 4 years while you litigate this issue.

One of the prime considerations of the ABA standards is that in representing a client, the chief goal is to represent the client's best interest, and not engage in some academic exercise for the intellectual interest of the lawyer. The lawyer may be fascinated with the point of law, but the primary issue is what is best for this client. It

is a tough decision to let the judge get away with ruling against you on a point of law, which you are absolutely right about, and go ahead and advise the client to plead guilty and take probation so he will not have to serve time. It is my inclination, frankly, that most of these issues do require a great deal of litigation, and thus, I usually will advise the client to take the probation, rather than risk imprisonment while I go ahead and litigate all these issues. But it is a tough issue, and there is a further consideration. That is, the difficulty of losing. From a personal point of view, trial lawyers do not like to go to trial and lose. Consequently, there is a great bias on the part of a good many trial lawyers to accept a guilty plea, or advise their client to accept a guilty plea, in part because they do not wish to go to trial and be embarrassed with a guilty verdict. Obviously, that is a totally extraneous consideration, but it is impossible really to put it out of your mind, because no trial lawyer, who is a good trial lawyer, enjoys losing. He would prefer to win. Since taking a guilty plea is not an embarrassment, but going to trial and losing is, there is a personal consideration in advising a client whether to take a plea of guilty or not. I have not resolved anything, but I raise the problem for all of you who are interested in practicing criminal law.

MR. GARRETT: In making that kind of decision, does it matter whether the defendant is in fact guilty or not? In your example, it sounds like he committed the crime, but you thought he had constitutional grounds for preventing the state from proving it. Suppose you actually thought he was innocent?

MR. HUBBART: That presents a separate problem. It is a very difficult one and it does come up occasionally. The man is innocent, and you think he is innocent, but the evidence is against him. In a robbery case, for example, where there are witnesses who identify him, but you think it is a question of mistaken identification because you have five or six reliable witnesses who put him somewhere else. Robbery carries life imprisonment. I think if he goes to trial, he may very well get a stiff sentence. On the other hand, because the State feels they may lose the case, they are offering probation. Now what do you do? My feeling is that the duty of the attorney is to advise the client as to the probable outcome of the case based upon the available evidence, irrespective of his personal views—whether or not he thinks he is innocent or guilty. It is a very difficult decision to make. It is subjective and is not measured in any scientific terms. You are predicting something, and you may

very well be wrong. I have seen robbery cases go both ways. I have seen one robbery where the defendant was convicted and got 50 years imprisonment. I have seen other cases where the defendant got acquitted. To answer your question, my personal view of whether or not the man is guilty or innocent really does not play any role. What does play a role is the strength of the State's evidence against my client and what I think the outcome of the case will be.

MR. HAGENDORF: I would like to comment on criminal tax evasion cases, of which I have handled a few. I found that all clients tell you that they are innocent, usually until the day before the trial. Also, unfortunately, in the tax evasion field, it is a question of intent, so even someone who has not filed a tax return for 10 or 15 years, is coming to you and says: "Well, I really did not intend to do it. What happened was, I forgot about it the first year as I was busy, and the second year, I was also busy, and by the third year, I was afraid to file because they would catch me for the other two." It is very rare, in this particular field, to find a client who says: "Sure, I did not file and meant to avoid taxes."

MR. MALLOY: On the question of reconciling responsibility and the role of the advocate, I take the position that you should resolve all doubts in favor of your client, not in a vacuum, but in view of the system. Judge Siegendorf pointed out that the system should provide a vehicle so that the explanation for any position can be made, and I believe that there is a duty that the system owes to the attorney. The attorney should cooperate with the system to the end that it provides the vehicle or procedure for getting the information out which is necessary for a decision by the trier of fact. Then over and above those two points, I believe there is a duty of the attorney practicing in a field to participate in setting the standards that exist in the peculiar field that he is in. I think that the panel today has in general revealed that in the different fields and phases of the law, there will be different standards. I think the attorney has a duty to participate in the establishment of those standards through his bar association work. In addition, I think the court, together with the lawyers, has a duty to provide for the explanation. The attorney has the duty to resolve doubts in favor of his clients and I think he has to be able to rely upon the overall purpose of the system to provide a vehicle for advising a client, so as not to be fearful that when he does that in good faith and good conscience the system is going to penalize him for doing his job as he sees best in advising his client.

Ms. RUSSO: *Are there any questions from the floor?*

QUESTION: *I would like to direct a question to Mr. Malloy in regard to patent attorneys and actual pragmatic practices. For example, with chemicals in a chemical process, oftentimes people will put down the reality of chemical process, but not the laboratory experience, which means in 15 years time, if someone wishes to utilize the information and the patent has misinformation, he cannot utilize it because there is no reality as to the laboratory experience. Do you find this is something of social responsibility that you should deal with?*

MR. MALLOY: Let me state the question a slightly different way. In order to get a patent in the medieval times, you would go to the king and tell him your idea and he would lock it up in a safe. Seventeen years later he would let everyone else practice that idea and you would have the monopoly period of 2½ apprenticeship periods for yourself. This presupposed that when you went to the king in the first instance and told him your secret process it should be disclosed in a manner that would be useable 17 years later when the king opened up the safe. Today when a person goes to the patent office, he is torn between whether he should tell all that is helpful in carrying out his development or his secret, or whether he should just tell enough so that it can be done if you work hard enough but leave as many obstacles in the path of others as possible. The patent statutes require disclosure of the best mode of practicing that particular invention. But many times a person gets into the conflict of how much goes into the best mode. How much do you have to disclose? Do you disclose what will not work as a guidepost to what will work? Do you disclose how well it will work if you do one thing, and how poorly it will work if you do another? When you file for a patent application, should you write an entire book? How much background in the art should you reveal? The patent application, it is presumed, is addressed to people skilled in an art and therefore you do not need to present the complete background; but certainly, you must present sufficient information so that they can practice the invention.

One example that comes to my mind is the nylon patent. I have studied that patent, and it seems that any one of us could make nylon in our own bathroom, using the disclosure in the patent file. But the question of how to put the filament that is reduced from utilizing the process into actual practice and make it a commercially available invention is another thing. How to wind it on a spool

in such a way that you have it in a useful form? You get into these questions, and that is what I was saying about the patent.

The patent is good for 17 years, and you have a prosecution history of 3 years, thus perhaps a 20 year period where the attorney is required to have foresight, realizing that the standards of his action today will be judged by the standards that exist whenever the litigation occurs. The doctrine of clean hands, which is the defense that is usually raised, or inequitable conduct which justifies non-enforceability may knock out a patent that may be producing a million dollars a year in royalties. The equitable standards applied are those that exist at the time that it is judged. But the acts that are being judged may very well have taken place in private, 15, 18, 20 years earlier, between the attorney and his client. Therefore, you always have this basic premise that you must do your best to be guided by a good firm sense of what is right and wrong. The penalty for not doing so may be a future lack of enforceability of your client's patent.

In addition, other problems arise: the problem of having a monopoly, which you do not deserve and which appalls the common law; the question of your client having to pay attorney's fees which can be awarded in patent cases, especially if some kind of deceit or inequitable conduct is disclosed; and there is the ultimate problem of disbarment of the attorney for participating in the fraud itself. So overall there are penalties that affect your client if you do not use the foresight that is necessarily guided by a good sense of right and wrong. Finally, over and above that, there is the need to follow the development of the case law to ascertain some of the trends. The trends now indicate more and more full disclosure. Also, the art of purging prior inequitable conduct is becoming quite an art in many fields of law, especially in patents. How do you purge what may appear to have been, or may in fact have been, some relatively minor yet deleterious amount of failure to disclose so that the penalty to your client would not be as severe when judged in the future? Thus the art of purging is emerging in patents as well as in other areas.

QUESTION: I would like to ask Mr. Danese about the amount of disclosure that might be necessary in a lobbying effort where in the situation you discussed there is input from two, three, five, perhaps ten different sides. Suppose that access is such that you realize, because of the time element, that the only input that will be given to the legislative body in terms of information upon which

legislation or administrative rules can be based, would be yours. Do you feel that the lawyer then has to temper that which is company-promoting in order to represent what he might consider to be a public interest?

MR. DANESE: First, if as you say, I, or the lobbyist, would have the sole input, the only thing I can envision would be an ex parte proceeding. That is forbidden and there are sanctions for that these days. But assuming, for whatever circumstances, I may be the only person giving input, then yes, there is going to be a balancing.

However, the situation you present is almost impossible. When I said, many inputs, I was talking about other people, other groups, and other interests who are in an adversarial role but not within the confines of the adversarial procedure as we know it in the judicial system. It is a much broader concept, and much more amorphous. The safeguards that are there seem to arise naturally in the event. If you are thinking of the stereotype person who counts the numbers of members on a committee and buys 50 percent of them plus one, you know that is wrong. But contrary to what some of the syndicated columnists feel, and contrary to the exposés on big oil companies and campaign contributions, (most of which, by the way, were in foreign countries, where they are not only a way of life but a necessity of life) you just do not find that much going on.

MR. MALLOY: I can speak with some experience. There are not any limitations when it comes to lobbying. There is a wide range of lobbyists. It is a practical matter that most incumbents ordinarily will not be defeated except once in 50 years. Those are the odds all over the country, historically speaking. Thus those people who are elected and are members of the legislative body are more than likely going to be there a substantial period of time. During that period of time, the lobbyist who supplies false, fraudulent, or unreliable information will find that less and less reliance is placed on what he says; the effect of his lobbying ability is going to be diminished greatly; and he will not be able to stay in the business. That is not to say that there are not lobbyists who are in the highest tradition. There are some who do come with false information; there are some who bear gifts; there are some whom you cannot count on at all. However, lobbyists serve an important function in guiding legislation because it is through the lobbyists who are reliable that some of the most important information comes to the legislature upon which they have the fact basis for enacting laws that will guide the future events.

QUESTION: *I direct my question to Mr. Hagendorf. Mr. Garrett said earlier that you do not have a duty to alert potential plaintiffs. I guess that the Internal Revenue Service is really a potential plaintiff.*

MR. HAGENDORF: The biggest one there is.

QUESTION: *What must you disclose to the IRS about information you may find out after you filled out a return? For example, after completing a return for a large estate and having taken a marital deduction, you find a contract between the husband and the wife which defeats the deduction.*

MR. HAGENDORF: I had a fact situation about 10 years ago that is very close to your hypothet. A husband had died, and I supervised the preparation of the return as well as handled the estate. About 2 years later and shortly before the federal auditor was finishing the audit of the return, the wife died and the daughter went to the bank vault and found a large amount of cash in 10's and 20's. I found out about it, and told her that I wanted to notify the IRS because there was an audit of the husband's return. The wife had never worked, and I explained that I wanted the IRS to be aware of this and make the decision as to whether it should be included in the husband's return. The daughter refused. The result was that I resigned from her father's estate, her mother's estate, and I called the IRS agent and told him I was resigning. I would not explain the reason why, but simply told them I was resigning. That alerted the IRS agent. The daughter then came back to my office and the result was that we did include the money in the father's federal estate tax return.

Thus, there is a duty. Let me add that in dealing with the IRS, if you are a tax attorney, or even an accountant, you get a reputation. One of the things that I found in many years is that by revealing the way it is before the IRS, you do get a good reputation with IRS agents. They know then if you say that this is so and so, they believe it is so and so. They know you are not giving them something that they have to check into or something that is false. Reputation in the tax field is enormously important. I hope I did not give the impression that all tax lawyers go around lifting up the rugs looking for loopholes. A reputation is important to the IRS and I think a tax lawyer must hold himself in the highest standards of integrity.

QUESTION: *Suppose you discovered the error after the estate is closed out, so that you had filed the form to the best of your knowledge?*

MR. HAGENDORF: The difficulty was that I had no knowledge

on my own account that the money was includable in the husband's estate. As a matter of fact, the daughter did say it was not, but would not tell me where it came from. So I had to comment on it. Even if cash is found, there is nothing to say that it is taxable income; there is nothing to say which year it was income; maybe the statute of limitations has run; maybe it was an inheritance. There are a lot of things that could have happened which depend upon the facts. Certainly if a client comes in and says, I just made \$100,000 as a bribe payment, then yes, I think you have got a duty to disclose. There is no question about it. But if it is discovered now, you do not know where it came from. Your client may not know, and many times even if they know, they will not tell you.

QUESTION: Mr. Danese, I ask you the extent to which the attorney-client privilege exists and the extent to which it should be used by the attorney. When the attorney is an employee of a corporation, doing only legal work for the corporation, and in his daily activities comes across many pieces of information through the grapevine and gossip, and this information may have bearing, day to day, on contracts that he writes, on what he says to other people, customers of the corporation, etc., is he not in a much different situation than the attorney who is sitting in his office and the corporate client walks in?

MR. DANESE: First, although I can talk about the question you have raised, I do not know for a fact whether I can answer it. I will explain my situation. I am not in-house counsel for the Florida Power and Light Company, a corporate counsel as such. I am in management. We do not have in-house counsel. As a part of management, I do not pretend there is any confidentiality in what I say or do. If I tell another officer something, as far as I am concerned that is as subject to deposition or subpoena as anything else because I am not functioning as an attorney.

I do, however, get caught in the middle. I am the administrator, or manager of the legal affairs of the company and we deal with approximately 25 or 30 law firms at any one time. I get in a gray area when I deal with our attorneys, who then talk to other officers of the company and later come back and talk to me about what they talked about to the officers. I have tried to adhere to the theory that when the outside attorneys are talking to me, it is the same as if they are talking to any other officer of the company, be he lawyer or not.

As for in-house counsel, which I will discuss hypothetically, the problem that you outlined is a serious one. As Mr. Garrett said,

when you become a lawyer, somehow you either totally or partially abdicate your role in management; in other words, once you decide to become an advocate, you disengage yourself from policymaking. Corporate counsel, in-house counsel, is in a very difficult situation in that regard. Almost everything that occurs today in a large company, particularly a regulated utility, from the time you walk in the door until the time you walk out, deals with legal matters. In-house counsel have a substantial amount of difficulty, and I guess I would have to say on balance, they are more management, and therefore the confidentiality would be, if not eliminated, weakened. We treat them more as management officials on the presumption of course that outside counsel are also working on the case. If in-house counsel is working exclusively as the lawyer in a case then I think he should be treated with exactly the same degree of confidentiality as outside counsel would be.

QUESTION: *I address this to the entire panel. Assume you are representing a client, and there is an important rule under advisement. The client comes to you and says: "Don't worry about it, this involves a lot of discretion, and we have supplied an opinion to the judge, or we have supplied important facts and it is going to be ruled in our favor." What is your duty and to whom do you disclose?*

JUDGE SIEGENDORF: The judge is subject to the supervision of the Judicial Qualifications Commission, and I assume a complaint of that nature should be directed to the Chairman of the Judicial Qualifications Commission, with specific reference to the judicial conduct.

I think the greater duty of disclosure applies to counsel if it came to his attention that his company had engaged in unethical or questionable conduct. That question has not been in issue and I think if there has been some ex parte approach to a judge and counsel is aware of it, and feels that the judge may be involved, a complaint should be directed to the Judicial Qualifications Commission.

MR. MALLOY: I have a feeling that from the way you posed the question, that a lawyer representing a client found out that some material had been submitted to the court on behalf of his case. I think that that lawyer should immediately send a copy of that material to the opposing counsel and also send a cover letter to the judge to inform him. My feeling is that a lawyer should never hold back from providing argument or applicable legal authorities or memoranda of law to the court. I do believe that there is a con-

stant duty to do so in a proper way and always to give opposing counsel the benefit of those lead authorities and arguments so that he can respond to them. I think the major transgression in that case was in not providing a copy to the opposing counsel so that he could respond to it, and give the court the benefit of the full argument on both sides of the issue.

JUDGE SIEGENDORF: I would also advise that the Florida Bar's Code of Professional Responsibility specifically prohibits *ex parte* communications with the court. Then the bar could decide through its grievance procedure whether to formally charge and proceed against the attorney.