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# Restraining the Overly Zealous Advocate: Time for Judicial Intervention

PAUL LOWELL HAINES\*

As I look back, however, I wonder how I could justify doing what I was planning to do had the case been tried. I was prepared to stand before the jury posing as an officer of the court in search of the truth, while trying to fool the jurors into believing a wholly fabricated story, i.e., that the woman had consented, when in fact she had been forced at gunpoint to have sex with the defendant. I was also prepared to demand an acquittal because the state had not met its burden of proof when, if it had not, it would have been because I made the truth look like a lie. If there is any redeeming social value in permitting an attorney to do such things, I frankly cannot discern it.<sup>1</sup>

“The law often permits what honor forbids”

Bernard Joseph Saurin  
Spartacus 1760

## INTRODUCTION

The American legal system imposes upon the lawyer a professional responsibility to “assist[] members of the public to secure and protect available legal rights and benefits.”<sup>2</sup> The Model Code of Professional Responsibility and the Model Rules of Professional Conduct further require that the lawyer provide such assistance zealously and to the fullest extent possible within the bounds of the law.<sup>3</sup> However, in recent years public opinion has evidenced dissatisfaction with this traditional role of lawyer as zealous advocate.<sup>4</sup> In particular, scholars and practitioners have challenged

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1. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 135 (1987).

2. A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 93 (1980).

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) (“A lawyer should represent a client zealously within the bounds of the law.”); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1983) (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause . . . The law, both procedural and substantive, establishes the limits within which an advocate may proceed.”).

4. See G. HAZARD, ETHICS IN THE PRACTICE OF LAW 133 (1978); Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 646-47 (1981); Brown, *What Happened to the American Legal Profession?*, BOSTON B. J. Nov.-Dec. 1987, at 12, 15; Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311 (1987); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 36 (1984).

the role as being improperly regulated,<sup>5</sup> morally bankrupt,<sup>6</sup> inefficient,<sup>7</sup> damaging to the legal profession's image<sup>8</sup> and prejudicial to the administration of justice.<sup>9</sup> They further argue that such problems have resulted in regular abuses and a legal system that, at times, seems to be anything but "just" and only secondarily concerned with discerning "truth." In addressing these problems, writers have suggested a variety of remedial measures that range from providing young lawyers with improved education concerning ethical matters<sup>10</sup> to radically changing the American system to one resembling its European counterparts.<sup>11</sup>

In 1975, Judge Marvin Frankel proposed that the American legal system's "adversarial ideal" be significantly limited and that a duty be imposed upon legal contestants to "make truth the paramount objective."<sup>12</sup> Although his views were controversial,<sup>13</sup> the problems in the adversary system that he identified have not vanished and, if anything, have become more evident. It can legitimately be said today, as it was then, that "the legal profession is in a state of turmoil, assailed from without and bitterly attacked from within."<sup>14</sup> Recognizing this fact, the legal profession has desperately attempted to address the problems by adopting Rule 11,<sup>15</sup> the Model Rules of Professional Conduct, and even "aspirational creeds."<sup>16</sup> Yet some of the most powerful members of the legal establishment seriously question whether continued reliance on the adversary system as it currently exists is acceptable.<sup>17</sup>

This Note resurrects the suggestions made by Judge Frankel for the modification of the "adversarial ideal" and the recrowning of truth-seeking as the primary objective of our legal system. It suggests that the solution

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5. Abel, *supra* note 4.

6. A. GOLDMAN, *supra* note 2, at 90.

7. Miller, *supra* note 4, at 1-2.

8. M. FRANKEL, *PARTISAN JUSTICE* 3-4 (1978).

9. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3, 4 (1987).

10. ARONSON, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 275 (1976).

11. See BROWN, *How to Stop the Decline of the American Law Profession: Divide the Bar and Raise a Cadre for Civilization*, 1 GEO. J. LEGAL ETHICS 653, 654 (1988); see also Gerber, *supra* note 9, at 24.

12. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055 (1975).

13. Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975); see also Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975).

14. L. FORER, *THE DEATH OF THE LAW* 205 (1975).

15. FED. R. CIV. P. 11.

16. Law. Man. on Prof. Conduct (ABA/BNA) 268 (Aug. 17, 1988).

17. S. LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 1 (1984) (the author refers to former Chief Justice of the Supreme Court, Warren Burger, and the American Bar Association's Commission on the Evaluation of Professional Standards).

to the current problems does not lie in wholesale abandonment of the adversarial ideal. Rather, the solution lies in limiting the role of lawyer as zealous advocate. This Note emphasizes the role the judiciary must play in that process, through clarification, intervention, and enforcement. It also discusses a recent action taken by the United States District Court for the Northern District of Texas<sup>18</sup> and whether this action should serve as a model for the judiciary of the type of judicial activism required to effectively restrain the overly zealous advocate.

## I. THE ADVERSARY SYSTEM

Harry Jones, in his article *Lawyers and Justice: The Uneasy Ethics of Partisanship*,<sup>19</sup> provides a description of the basic structure of the adversary system:

As an advocate in open court, the lawyer faces the opposition of a presumably equally able and well-prepared advocate whose counter-partisanship will offset his own . . . [T]he proof of facts and issues of law are contested by the two partisans in the presence and under the surveillance of an unbiased and presumably competent judge. Truth, the common law has long believed, best emerges from the fires of controversy.<sup>20</sup>

Thus, the adversary system, at its core, is simply a *means* to fairly adjudicate disputes and discern truth and justice.<sup>21</sup> It is not, even under the most favorable analysis, an *end* in itself.<sup>22</sup> Assuming this to be true, it should be

18. *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988).

19. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978).

20. *See id.* at 968.

21. Of course, whether the system successfully achieves its intended result is a source of great debate. For a favorable discussion of the advocacy system, see L. STRYKER, *THE ART OF ADVOCACY* 277 (1954).

[W]ithout a free and honorable race of advocates, there would have been little of the message of justice. Advocacy is the outward and visible appeal for the spiritual gift of justice. The advocate is the priest in the temple of justice trained in the mysteries of the creed, active in its exercises (quoting Judge Parsy, an English judge, in his *Seven Lamps of Advocacy*).

*Id.* For a differing view, compare Gerber, *supra* note 9, at 24.

We now have a system that charges low entrance fees for practitioners, invites most everyone to play, invokes both law and justice, succumbs to few inhibitions in style or career other than rules, and rewards lawyers—not clients—by its length, costs, and complexity. We also have on paper—or at least in our hearts—a system that seriously searches for truth, that rewards goodness, punishes evil, and achieves swift justice even for the common folk. Which is the dream, which the reality?

*Id.*

22. Miller, *supra* note 4, at 35.

recognized that the system is neither sacred nor above criticism and change.<sup>23</sup> Rather, it must remain flexible and open to modification if such modification improves its ability to reach its intended results.<sup>24</sup>

### A. *The Arguments*

Proponents of the adversary system consistently cite a number of arguments supporting the validity of the system in its current form and the role of lawyer as zealous advocate. Among those arguments most frequently cited are constitutional "recognition" of adversary concepts, societal commitment to the autonomy of the individual, and system effectiveness as a truth determining device. These arguments are increasingly countered by members of the legal profession who see the adversary system as fraught with abuse.<sup>25</sup>

Critics of the adversary system charge that it subordinates the importance of "truth" to other less important ideals,<sup>26</sup> emphasizes legal autonomy while discounting moral autonomy,<sup>27</sup> de-emphasizes the importance of what is morally right,<sup>28</sup> and creates an environment where victory is more valued than justice.<sup>29</sup> In addition, they argue that the adversary system stresses the role of lawyer as advocate for the client while diminishing the role as officer of the court,<sup>30</sup> fails to take into consideration the rights of third parties,<sup>31</sup> and holds the duty of confidentiality in higher regard than the obligation to do what is morally correct.<sup>32</sup> In addressing these criticisms as they relate to procedural abuses in the justice system, Arthur Miller suggests that "[t]his behavior is easily explainable given a professional ethic mandating that lawyers owe complete allegiance to their clients, very little to the system, and none at all to the adversary."<sup>33</sup>

The following sections review those arguments that arise most frequently in discussions on the merits of the adversary system. These sections show that while the arguments supporting the adversary system and the role of

23. Jones states that "[i]n our profession, we have for too long taken the partisan ethic as something given and beyond question, as if it were revealed or self-evident truth. It is time to rethink this ethic, at least in some of its applications." Jones, *supra* note 19, at 965.

24. Miller suggests "[m]eaningful reform of the existing litigation system requires rethinking many of the assumptions on which it is based." Miller, *supra* note 4, at 16.

25. Former Chief Justice Burger is quoted as having suggested "that the adversary system as presently constituted denies justice to litigants, impairs faith in the courts, and raises the specter of the 'breakdown' of the judicial machinery." S. LANDSMAN, *supra* note 17, at 1.

26. See *infra* notes 86-89 and accompanying text.

27. See *infra* notes 49-76 and accompanying text.

28. *Id.*

29. See *infra* notes 76-94 and accompanying text.

30. See *infra* notes 95-100 and accompanying text.

31. See *infra* notes 67-75 and accompanying text.

32. See *infra* notes 173-75 and accompanying text.

33. Miller, *supra* note 4, at 17.

the zealous advocate have merit in theory, they pale when confronted with the criticisms and abuses resulting from the adversary system in practice. Their review, then, highlights the shortcomings of the adversary system in practice and the resulting need for judicial intervention.

### B. *The Constitution*

The argument that today's adversary system and the role of the zealous advocate are constitutionalized finds its roots in the fifth,<sup>34</sup> sixth,<sup>35</sup> seventh,<sup>36</sup> and fourteenth<sup>37</sup> amendments. When the rights of notice, jury, counsel, confrontation and compulsory process are read together, it appears that the drafters of the Constitution intended the use of an adversary system of justice, or something similar to it.<sup>38</sup> This argument also finds support in a variety of court decisions which state or imply that the adversary process and its constituent parts are constitutionalized.

The Supreme Court addressed the constitutionality of the adversary system in *Herring v. New York*.<sup>39</sup> In determining that the counsel for the defense in a criminal case has the right to make a closing statement, the Court stated the following concerning the adversary process:

The Sixth Amendment guarantees to the accused in all criminal prosecutions the rights to a "speedy and public trial," to an "impartial jury," to notice of the "nature and cause of the accusation," to be

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34. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

35. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

*Id.*

36. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

37. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

38. See Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 583-85 (1988).

39. 422 U.S. 853 (1975).

"confronted" with opposing witnesses, to "compulsory process" for defense witnesses, and to the "Assistance of Counsel." These fundamental rights are extended to a defendant in a state criminal prosecution through the Fourteenth Amendment.

The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the *traditions of the adversary factfinding process that ha[ve] been constitutionalized in the Sixth and Fourteenth Amendments.*<sup>40</sup>

Thus, it appears the Court considers the "adversary factfinding process," at least in the criminal context, to have constitutional support.

In a more recent case, the Supreme Court addressed the defendant's right to assistance of counsel in a criminal case.<sup>41</sup> While determining that the Constitution requires that the accused have "counsel acting in the role of an advocate,"<sup>42</sup> the Court also addressed the significance of the adversary system, stating that "the adversarial process [is] protected by the Sixth Amendment."<sup>43</sup> The Court then stated the following:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.<sup>44</sup>

Such statements by the Court provide strong support for proponents of the adversary system who argue that the system finds its roots in the Constitution.

However, critics counter this position by arguing that the adversary system has not been *expressly* adopted in the Constitution and that constitutional support is, therefore, questionable. The Supreme Court itself has lent credibility to this position by raising the question of constitutional protection of the adversary system, and then leaving the question unanswered.<sup>45</sup> Recent

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40. *Herring*, 422 U.S. at 856-57 (footnotes omitted) (emphasis added).

41. *United States v. Cronin*, 466 U.S. 648 (1984).

42. *Id.* at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)).

43. *Id.* (citing *Anders*, 386 U.S. at 738).

44. *Id.* at 656-57 (footnotes omitted).

45. *See United States v. Ash*, 413 U.S. 300, 317 (1973) ("Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses."); *see also United States v. Byers*, 740 F.2d 1104, 1121 (1984) ("Using the guarantee of counsel for the purpose of preserving evidence would make '[a] substantial departure from the historical test' and convert the Sixth Amendment into 'a generalized protection of the adversary process.'" (citing *Ash*, 413 U.S. at 317)).

decisions, however, seem to indicate a Court more committed to the adversary process.<sup>46</sup>

Generally, those cases addressing the "constitutionality" of the adversary system are criminal cases. Indeed, the sixth amendment, the amendment most often cited as providing support for the constitutionality of the adversary system, expressly addresses itself to "criminal prosecutions."<sup>47</sup> However, some note that the arguments providing support for the constitutionality of the adversary system in the criminal context may extend to the civil context in that "the Code extends the adversary model from the criminal to the civil context."<sup>48</sup>

The constitutional argument for the adversary system is a strong one. Despite the fact that express adoption of the adversary system does not exist, those aspects of the judicial system that are expressed, when read together, certainly lend credence to the notion that the framers intended a legal system resembling our adversary system. What are not apparent are the details of that system and how it should operate. Judicial clarification and guidance with regard to these factors would prove beneficial.

### C. *Autonomy of the Individual*

Proponents of the adversary system find additional support for their position in the value our society places on maintaining individual autonomy. According to Stephen Pepper, that societal value is "founded on the belief that liberty and autonomy are a moral good, that free choice is better than constraint, [and] that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us."<sup>49</sup> To that end, proponents of zealous advocacy argue that an individual's autonomy and, therefore, the lawyer's responsibility to maintain that autonomy, should extend to the limits of the law.<sup>50</sup> It is the role of the courts and legislature, and not the lawyer, to determine what the legal limits should be.<sup>51</sup>

According to the proponents, in order for our legal system to operate successfully, and in order for individual autonomy to be maintained, it is important to keep separate and distinct the roles of each of the system's participants: advocate, judge, jury, and legislature.<sup>52</sup> "The role of the lawyer

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46. See *supra* notes 39-44 and accompanying text.

47. See U.S. CONST. amend. VI (text of amendment is at *supra* note 35).

48. A. GOLDMAN, *supra* note 2, at 121 (Goldman refers to the Model Code of Professional Responsibility.).

49. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616-17.

50. *Id.* at 614.

51. A. GOLDMAN, *supra* note 2, at 96-97.

52. Aronson, *supra* note 10, at 301 (quoting Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961)).



in the adversary system is not to interpose his or her own belief about what the facts are."<sup>53</sup> In fact, personal knowledge of the facts or truth is irrelevant,<sup>54</sup> and the role as advocate forbids lawyers from acting upon what knowledge they have.<sup>55</sup> In effect, lawyers take on what is sometimes described as an "amoral" role.<sup>56</sup>

This apparent reduction in moral responsibility is, therefore, justified in terms of the lawyer's place in the broader legal system.<sup>57</sup> Lawyers are not to be judged by the morals which govern people acting on their own behalves, but rather by a "special moral code" which governs people acting on behalf of others.<sup>58</sup> Alan Goldman contends that the result of this high degree of role differentiation is extreme. "He [the lawyer] may do for his client what he could not morally do for himself, his friend, or even his wife or child . . . . He may do what is immoral for the client to even suggest for himself."<sup>59</sup> At this point, the perception of abuse of the legal system becomes most evident. However, proponents argue that for the lawyer to do otherwise is to, in effect, "negate[] the function of the adversary system,"<sup>60</sup> "usurp the role of judge and jury,"<sup>61</sup> and undermine the client's individual autonomy.<sup>62</sup>

Critics, however, disagree with a concept of role differentiation that requires a lawyer to subvert his own moral standards in order to maintain his client's autonomy.<sup>63</sup> They argue that the "legal" limits placed on the zealous advocate are insufficient and, as a result, a great deal of unfair and immoral commercial and social behavior occurs without violating the law.<sup>64</sup> They further argue that the amoral role permits the legal system to operate in a "mindless fashion unrestrained by the values, calculations and

53. Subin, *supra* note 1, at 136.

54. L. FORER, *supra* note 14, at 210.

55. M. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 53 (1975). Of course, certain prescribed situations exist in which the values of zealous advocacy are concededly subjected to other values such as the efficient administration of the courts.

56. See Pepper, *supra* note 49.

57. See A. GOLDMAN, *supra* note 2, at 96-97.

58. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 16 (1951).

59. A. GOLDMAN, *supra* note 2, at 95-96.

60. Aronson, *supra* note 10, at 315; see also M. FREEDMAN, *supra* note 55, at 53.

61. A. GOLDMAN, *supra* note 2, at 97; see also Pepper, *supra* note 49, at 617. See generally Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

62. See *supra* notes 49-75 and accompanying text.

63. See generally A. GOLDMAN, *supra* note 2. See also Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Pepper, *supra* note 49, at 614-15 ("The criticism of the amoral role has been extraordinarily diverse . . . ."); Kaufman, *A Commentary of Pepper's "The Lawyer's Amoral Ethical Role,"* 1986 A.B.A. RES. J. 651, 651 ("With the notable exceptions of the contributions of Monroe Freedman and Charles Fried, however, most of the writings have been critical of the position that argues for an amoral ethical role.").

64. Jones, *supra* note 19, at 970.

considerations which operate in most areas of life."<sup>65</sup> Thus, a system designed with the intention of justly deciding disputes between people is set adrift with no moral "rudder" other than that of the client's wishes.<sup>66</sup>

Critics also argue that a proper libertarian model of advocacy does not empower a lawyer to go so far in protecting a client's individual autonomy as to harm other individuals or the system of justice.<sup>67</sup> When such harm is done, they argue, it is an illegitimate exercise of individual autonomy.<sup>68</sup> Proponents counter, however, that the determination of whether or not harm has been done or an action has been legitimate is a legal question for the courts to decide, not the lawyer.<sup>69</sup>

Finally, critics argue that permitting lawyers to further a client's immoral but legal purposes, for the sake of maintaining individual autonomy, imposes clear moral costs on society as a whole. Proponents respond by arguing that reaching a consensus as to what is moral is not possible today and, therefore, the only constraints on the zealous advocate should be those restraints imposed by law, not morals. One strong proponent of zealous advocacy has gone so far as to suggest that the lawyer takes on a role that is morally justified when assuming the role of zealous advocate.<sup>70</sup> He argues that by doing so, the lawyer performs the morally correct task of enabling the client to maintain liberty and autonomy within the context of our complex and unfamiliar legal system (unfamiliar, that is, to the public at large).<sup>71</sup>

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65. L. FORER, *supra* note 14, at 213.

66. If the lawyer does not consult with the client about legal strategy and tactics, then even the minimal moral restraint of the client's wishes will be lacking.

67. A. GOLDMAN, *supra* note 2, at 127-28.

68. It is readily admitted that the adversary system imposes few, if any, obligations on the lawyer to take into consideration the rights of third parties. As Goldman states, "a lawyer has no obligations whatsoever to persons whose interests may clash with those of his client, [and] no obligations to respect the moral rights of such persons unless these are explicitly protected by law." *Id.* at 95. Proponents of the system admit to this shortcoming and yet justify it by referring to their responsibility to the Code and Rules which clearly identify the lawyer's role as advocate for the client. In addition, they argue the advocate is merely playing out a role in the judicial system and the system, not the lawyer, is responsible to insure protection of the integrity of third parties.

Whatever the justifications, this lack of obligation is perhaps one of the most serious shortcomings of the adversary system, and results in many visible abuses and much public criticism. Justice is not served when innocent third parties are harmed under the pretense of adherence to legal obligations.

69. See A. GOLDMAN, *supra* note 2, at 111-12; cf. Subin, *supra* note 1, at 138 ("The argument that the attorney cannot know the truth until a court decides it fails. Either it is sophistry, designed to simplify the moral life of the attorney, or it rests on a confusion between 'factual truth' and 'legal truth' . . . The question is not whether an attorney can know the truth, but what standard should be applied in determining what the truth is." (footnotes omitted)).

70. See generally Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

71. *Id.* The average citizen is totally dependent upon his lawyer for access to the law and

Alan Goldman, however, challenges the proponents of the autonomy theory who assume that aiding individuals in the exercise of their legal rights is always a good thing.<sup>72</sup> He argues that such assumptions are "institutional blinders" that tend to relieve lawyers of their sense of moral responsibility, reduce sensitivity to their roles as professionals, and increase public skepticism of the profession and legal system.<sup>73</sup> He further states,

[w]hatever validity there is to the appeal to autonomy in the argument for full advocacy, it clearly must be balanced against the degree of immorality in a particular client's purpose or demands and the consequences of their realizing their objectives. It cannot justify a principle of doing whatever the client demands as long as it is not clearly illegal.<sup>74</sup>

Thus, the value of maintaining one's individual autonomy must be weighed against the price of that maintenance to society.

The arguments on both sides of the autonomy issue have merit. Both sides agree that maintaining one's individual autonomy is essential to our system of justice and, indeed, our system of government.<sup>75</sup> Both sides also agree that maintaining one's autonomy must occur within limits. The dispute arises as to where those limits should be placed. As a primary purpose of the adversary system is the maintenance of one's individual autonomy, the autonomy issue, therefore, provides support to those who counsel against its total abandonment. Here again, the judiciary can insure that system support for individual autonomy does not come at the expense of justice by playing a more active role through clarification, intervention and enforcement.

#### D. *The Effectiveness of the Adversary System as a Truth Determining Device*

In *Tehan v. United States ex rel. Shott*,<sup>76</sup> the Supreme Court stated, "the basic purpose of a trial is the determination of truth . . ."<sup>77</sup> For years,

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use of the legal system's machinery. Charles Fried, in arguing for the moral nature of the zealous advocate's role, describes the lawyer as the client's "special purpose friend" in this endeavor. *Id.* He argues that a client's "rights are violated if, through ignorance or misinformation about the law, an individual refrains from pursuing a wholly lawful purpose." *Id.* at 1075 (emphasis in original). The client is, therefore, needy of the lawyer's expertise and the lawyer performs a morally worthy task by making "his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law." *Id.* at 1073.

72. A. GOLDMAN, *supra* note 2, at 155.

73. *Id.*

74. *Id.* at 128.

75. Even Judge Frankel, who has consistently criticized the adversary system for placing a higher value on individual autonomy than on discerning truth, admits that "[i]t is strongly arguable . . . that a simplistic preference for the truth may not comport with more fundamental ideals—including notably the ideal that generally values individual freedom and dignity above order and efficiency in government." Frankel, *supra* note 12, at 1056-57. See also Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) ("[I]n a society that respects the dignity of the individual, truth-seeking cannot be an absolute value, but may be subordinated to other ends, although that subordination may sometimes result in the distortion of the truth.").

76. 382 U.S. 406 (1966).

77. *Id.* at 416.

writers addressing the justifications for the adversary system have argued that it is the best legal system in existence for discerning truth.<sup>78</sup> The foundational theory behind that argument is "that in the contest between the parties, each interested to demonstrate the strength of his own contentions and to expose the weakness of his opponent's, the truth will emerge."<sup>79</sup> Proponents of the adversary system believe that one of the reasons for its retention over time, with few changes, is its proven ability to discover truth and reach fair decisions when the parties argue their positions in the manner it prescribes.<sup>80</sup> They warn that changes will only result in a less effective truth seeking system.

Critics argue, however, that the very premise that truth will emerge from the adversary "contest" is flawed. How can truth be the product, they ask, of a legal system where the propensity is to reduce the legal process to a "game-playing"<sup>81</sup> environment with "many of the attributes of a contest";<sup>82</sup> where justice becomes a secondary consideration while victory is the primary goal;<sup>83</sup> and where winning at all costs, even if inconsistent with the quest for truth, is legitimized as the lawful role of the advocate?<sup>84</sup> The critics suggest, in the words of today's computer programmer, that "when garbage goes into the system, garbage is bound to come out."<sup>85</sup>

78. *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 468 (1976) ("The bedrock premise is that the adversary contest is the ideal way to achieve truth and a just result rested upon the truth."); see also Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964) ("The plea for the adversary system is that it elicits a reasonable approximation of the truth.").

79. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185 (1948).

80. Neef & Nagel, *The Adversary Nature of the American Legal System: A Historical Perspective*, in *LAWYERS' ETHICS: CONTEMPORARY DILEMMAS* 85 (A. Gerson ed. 1980).

81. Gerber, *supra* note 9, at 5.

82. Jones, *supra* note 19, at 958.

83. Frankel, *supra* note 78, at 470.

84. See Gerber, *supra* note 9, at 3 (quoting a Wall Street lawyer) ("The greatest thrill is to win when you're wrong!"); see also *id.* at 23-24.

85. See, e.g., Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83 (D. Luban ed. 1983). In addressing this concern, David Luban states the following:

Perhaps science proceeds by advancing conjectures and then trying to refute them, but it does not proceed by advancing conjectures that the scientist knows to be false and then using procedural rules to exclude probative evidence.

The two adversary attorneys, moreover, are each under an obligation to present the facts in the manner most consistent with their client's position—to prevent the introduction of unfavorable evidence, to undermine the credibility of opposing witnesses, to set unfavorable facts in a context in which their importance is minimized, to attempt to provoke inferences in their client's favor. The assumption is that two such accounts will cancel out, leaving the truth of the matter. But there is no earthly reason to think this is so; they may simply pile up the confusion.

*Id.* at 94 (footnotes omitted).

In addition, critics argue that, in practice, the system openly places insufficient value on truth discovery.<sup>86</sup> In the adversary system, "[t]he advocate's prime loyalty is to his client, not to [the] truth as such."<sup>87</sup> As a result, the practicing lawyer, while in pursuit of the client's interests, can spend a lot of time actually attempting to avoid or subvert the truth that the system is supposedly seeking.<sup>88</sup> The unfortunate result of this "win at all costs" mentality is that "legal victory does not necessarily follow virtue; it sometimes goes to the wily warrior."<sup>89</sup>

Critics further argue that the legal system, from the law schools to the legal codes, provides full assistance to the "wily warrior" in the quest to win at all costs. "Time-honored tricks and stratagems"<sup>90</sup> abound to assist in making an argument for the client's interest, no matter what it is. What rules do exist generally only prohibit those actions that would otherwise be illegal.<sup>91</sup> In addressing such concerns, R. J. Gerber has stated the following:

[O]ne cannot but wonder at the propriety of law schools and bar advocacy programs that instill in fledgling lawyers a predilection for victory over truth, and in the process, bestow on each pupil a bursting bag of trial tricks more like that of vaudeville actors than officers of the court.<sup>92</sup>

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86. S. LANDSMAN, *supra* note 17, at 36. Judge Frankel is considered the foremost proponent of this view. See Frankel, *supra* note 12, at 1032 ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."); see also Aronson, *supra* note 10, at 297 ("[I]n our system of adjudication, truth is often not the highest goal.").

87. Frankel, *supra* note 12, at 1035. Richard Abel states that "[l]awyers . . . are held to higher standards of truthfulness when they apply to the bar (that is, when they are seeking to enter the profession) and when they advertise . . . than when they function as advocates in litigation or negotiation." See Abel, *supra* note 4, at 645.

88. M. FRANKEL, *supra* note 8, at 76 ("[P]artisan lawyers do not . . . try to uncover the truth. On the contrary, lawyers, trained and commissioned to seek justice, are engaged very often in helping to obstruct and divert the search for truth."). Surprisingly, this activity of "legal truth subversion," see Subin, *supra* note 1, at 127, has received support regularly in the courts. See *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., joined by Harlan & Stewart, JJ., dissenting in part and concurring in part) ("[A]s part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."); see also *In re Roger S.*, 19 Cal. 3d 921, 943, 569 P.2d 1286, 1300, 141 Cal. Rptr. 298, 312 (1977) (Clark, J., dissenting) ("It is popularly held '[u]nder our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.'" (quoting Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1288 (1975))).

89. Gerber, *supra* note 9, at 5. For an interesting example of the "wily warrior," see *id.* at 23-24 (citing Spence, *Questioning the Adverse Witness*, 10 LITIGATION 13 (1984)).

90. Frankel, *supra* note 12, at 1038. These legal devices range from the destructive and misleading cross-examination of truthful witnesses and the filing of frivolous suits to shotgun complaints and procedural maneuvers aimed at delaying the process or encumbering one's opponent. For a thorough examination of the many legal devices used to subvert truth in the adversary context, see Gerber, *supra* note 9, at 3.

91. A. GOLDMAN, *supra* note 2, at 95.

92. Gerber, *supra* note 9, at 22-23.

To be sure, most of these devices have legitimate uses in the litigation context.<sup>93</sup> However, they can be and are used frequently to defeat the very purposes they were created to achieve, that is to make it impossible for either party to present a truthful account.<sup>94</sup>

The uncertain line drawn between the lawyer's responsibilities as advocate for the client and officer of the court is another inadequacy that limits the system's effectiveness as a truth determining device. Proponents of the adversary system point to the clear mandate the lawyer has to zealously advocate the client's wishes within the bounds of the law.<sup>95</sup> Critics, of course, focus on the express obligation that the lawyer has as an officer of the court.<sup>96</sup> They further suggest that due to the lack of clarification on which role takes precedence, the lawyer's role as zealous advocate has come to clearly dominate the role as officer of the court. As a result, actions are regularly taken as client advocate that are inconsistent with the lawyer's responsibilities as court officer and truth seeker.<sup>97</sup> Describing this inadequacy, William Simon states:

the lawyer has been both an advocate and an "officer of the court" with responsibilities to third parties, the public, and the law. There has never been a consensus about where to draw the line between these two aspects of the lawyer's role, and the two have always been in tension within the professional culture.<sup>98</sup>

This "anomalous"<sup>99</sup> role contributes to many of the criticisms lodged at the adversary system to date.<sup>100</sup>

In the end, there is no conclusive evidence for the proposition that zealous advocacy systematically promotes the search for truth. The proponents of zealous advocacy offer in support of their proposition only general theories and dire warnings about the perversity of an alternative means of structuring legal representation.<sup>101</sup> The critics, however, offer reality: a legal system

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93. Frankel, *supra* note 12, at 1039.

94. *Id.*

95. *See supra* note 3.

96. MODEL RULES OF PROFESSIONAL CONDUCT Preamble para. 1 (1983) ("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.").

97. Examples of this are evidenced in the previous discussions concerning the zealous advocate's responsibility to pursue his client's cause even at the expense of truth or justice. *See supra* notes 49-76 and accompanying text. Miller suggests that the tendency to favor the role of advocate is hardly surprising considering the clear mandate for zealous advocacy as opposed to the vague notions of duty to the judicial system. *See Miller, supra* note 4, at 18.

98. Simon, *supra* note 63, at 1133.

99. The role is "anomalous" because the theoretical justifications of zealous advocacy run to a "pure" system of unfettered advocacy while, in reality, both the Rules and the Code require the attorney to advocate zealously within the limits imposed by a duty to an institution as well as the duty to the client. *See L. FORER, supra* note 14, at 208.

100. *See generally id.* at 208-09.

101. *See supra* notes 76-81 and accompanying text.

where truth is often distorted, abused and repressed.<sup>102</sup> The truth argument, therefore, provides little support for the unfettered role of the zealous advocate. Rather, it provides ammunition for those who see the need for restraining the overly zealous advocate through greater judicial intervention.

## II. RESPONSES TO THE CRISIS

For years, efforts to address the inadequacies of the adversary system have run into obstacles or opposition.<sup>103</sup> Legal scholars have proffered a variety of solutions, one of the most recent of which is William Simon's "discretionary" approach to the lawyer's adversarial responsibilities.<sup>104</sup> Mr. Simon suggests that, in fulfilling their responsibilities, lawyers in adversarial situations should only "take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice."<sup>105</sup> Of the many other solutions suggested over time, the three proposals most frequently put forward are as follows: 1) to reform the legal system radically by either abandoning zealous advocacy or seriously modifying its structure;<sup>106</sup> 2) to reform the rules modestly in order to further clarify the lawyer's responsibility;<sup>107</sup> or 3) to better educate lawyers about the current rules and their responsibilities under those rules (under a theory that our current woes result from ignorance rather than from an inherent problem in the rules).<sup>108</sup>

### A. *Radical Reform of the Adversary System*

More than a decade ago Judge Frankel challenged the legal profession to question whether the adversary system was necessarily a good system of justice.<sup>109</sup> Since that time a number of writers have called for "meaningful reform" and a "rethinking [of] many of the assumptions on which [our legal system] is based."<sup>110</sup> It has been suggested that in place of the adversary system the United States should either adopt the Continental inquisitorial

102. See *supra* notes 81-94 and accompanying text.

103. See Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

104. Simon, *supra* note 63, at 1083.

105. Simon, *supra* note 63, at 1090. This Note agrees that Mr. Simon's approach would go a long way toward addressing the problems currently resulting from the role of the zealous advocate. However, it is suggested that the "discretionary" approach alone is not enough and that a more involved judiciary is also required to satisfactorily address the problem.

106. See *infra* notes 109-15 and accompanying text.

107. See *infra* notes 115-31 and accompanying text.

108. See *infra* notes 131-36 and accompanying text.

109. Frankel, *supra* note 12, at 1052.

110. Miller, *supra* note 4, at 16-17; see also L. FORER, *supra* note 14, at 295 ("I am convinced that the law and the framework of legal institutions must be drastically altered and simplified. The aims of the law must be not simply restated but reformulated, or the system will be overthrown.").

system,<sup>111</sup> or replace adversarial conflict with a participatory system based on cooperation.<sup>112</sup>

As previously noted, however, there are problems with such proposals. First, the Constitution implies use of a legal system resembling our adversary system.<sup>113</sup> Second, our societal commitment to individual autonomy provides support for a system where individuals are entitled to advocacy that represents their best interests to the limits of the law.<sup>114</sup> Therefore, it appears that wholesale abandonment of the adversary system is not required, and that adjustment within the system is the only realistic option to insure that the "justice" system is, indeed, producing justice.

### B. Rules and More Rules

The call for clearer, more enforceable rules governing the conduct of the zealous advocate is another typical response to the problems of the adversary system.<sup>115</sup> Proponents of this approach believe that predetermined rules are preferable to on-the-spot decisions made by individual lawyers.<sup>116</sup> The assumption is that rules which are made in advance and by a "group" of experts are more likely to correctly address problems that arise in difficult advocacy situations.<sup>117</sup> In addition, these moderate reformers argue that the inherent ambiguity which currently exists in the rules provides support for adopting additional rules for clarification.<sup>118</sup> Abel argues that to effectively "mold [the] behavior" of the zealous advocate, the rules "must set forth the boundaries of that behavior with clarity; the vaguer they are, the less effect they can have . . . ."<sup>119</sup>

Although they have some merit, such arguments fall short when accompanying the expectation that a change in the rules alone will solve the many problems of the adversary system. Most would agree that rules will always be insufficient to adequately address all the situations, problems, or conflicts

111. See, e.g., Gerber, *supra* note 9, at 24; see also *Vinton v. Anton*, 786 F.2d 1023, 1025-26 (11th Cir. 1986).

112. See, e.g., Gerber, *supra* note 9, at 24.

113. See *supra* notes 34-49 and accompanying text.

114. See *supra* notes 49-76 and accompanying text.

115. Loder, *supra* note 4. Even such critics of the adversary system as Judge Frankel, on occasion, express hope that a change in the rules might improve the situation. See M. FRANKEL, *supra* note 8, at 85-86. The courts also, at times, call for greater regulation and supervision of the bar. See *State Bar v. McGhee*, 148 Okla. 219, 224, 298 P. 580, 585 (1931); *State Bar v. Superior Court*, 207 Cal. 323, 330-31, 278 P. 432, 435 (1929).

116. William Simon addresses this argument. See Simon, *supra* note 63, at 1143-44.

117. *Id.*

118. Hazard, *Legal Ethics: Legal Rules and Professional Aspiration*, 30 CLEV. ST. L. REV. 571, 574 (1981).

119. Abel, *supra* note 4, at 642.



that the advocate currently faces or could potentially face in the future.<sup>120</sup> No matter how many rules are drafted, lawyers will invariably find themselves in situations without adequate guidance.<sup>121</sup> In addition, more or better rules do not solve problems resulting from the competitive spirit or moral imperfections of the advocate.<sup>122</sup> Rather, the proliferation of rules decreases moral sensitivity and development,<sup>123</sup> reduces flexibility,<sup>124</sup> and discourages critical thinking.<sup>125</sup> In effect, the lawyer enters a "simplified moral world"<sup>126</sup> and becomes an "unreflective rule-follower[]." <sup>127</sup> Although this relief from responsibility may appear attractive to the professional faced with difficult moral decisions, most would agree that, in the long run, such over-regulation and "relief" is detrimental to the lawyer as well as the profession.<sup>128</sup>

However, in spite of arguments that counsel against the proliferation of rules, the profession appears to be succumbing to the pressure to draft and adopt more and more rules in an effort to address problems that more

120. Reed Elizabeth Loder states that:

[u]nless one assumes that drafters can discover particular rules which satisfactorily rest on universal principles, mandatory rules will create inevitable crises of conscience for morally engaged lawyers. One lawyer's relief from moral alienation in a given situation may be another lawyer's anguish. . . . Unless the legal profession is prepared to freeze some ideal standard of conscience as the only correct one, it may be unwise to narrow an individual attorney's discretion in circumstances of genuine moral ambiguity.

Loder, *supra* note 4, at 319-20.

121. In addressing this problem, Judge Frankel comments that "[t]he lawyer's capacity for ignorance is large." Frankel, *supra* note 12, at 1051. This statement would certainly appear to be supported by the continual adoption of more and more rules to structure the role of the zealous advocate. As previously noted, in 1981, the Code of Professional Responsibility was adopted in an effort to provide the profession with greater structure. In 1984, the Model Rules of Professional Conduct were adopted to provide additional support for and clarification to the Code. During the summer of 1988, the American Bar Association adopted a new set of "aspirational creeds" to supplement the Model Rules. *See supra* notes 14-17 and accompanying text.

122. As in other professions, many lawyers are unethical, morally deficient, and subject to peer pressure. Judge Frankel encourages those sensitive to adversary system concerns and desirous of addressing their shortcomings not to expect lawyers to be anything more than mere human beings with all the accompanying inadequacies. Frankel, *supra* note 12, at 1051. Reed Elizabeth Loder suggests that "the tightest imaginable code could not erase moral imperfection in lawyers any more than the Ten Commandments could eliminate sin in religious believers." Loder, *supra* note 4, at 330; *see also supra* notes 81-94 and accompanying text concerning the lawyer's competitive spirit.

123. Loder, *supra* note 4, at 311-12, 314-16, 337.

124. *Id.* at 313-14 and 337.

125. *Id.* at 330.

126. *Id.* at 315-16.

127. Simon, *supra* note 63, at 1143.

128. *See* Loder, *supra* note 4, at 329-30 ("A Code which discourages critical thought, either through over-regulation of conduct or through simple failure to address complex moral questions, ultimately disserves the profession, the individual lawyer and the public."); *see also* Frankel, *supra* note 12, at 1059 ("A bar too tightly regulated, too conformist, too 'governmental,' is not acceptable to any of us.").

rules alone cannot solve.<sup>129</sup> As William Simon states, “[i]t is remarkable to see a profession consisting of people recruited, socialized, and trained with the preeminent goal of inculcating a capacity for normative judgment insisting that the norms that govern them be spelled out at a level of detail that would obviate such judgment.”<sup>130</sup> Although well-drafted rules are desperately needed in a profession so often confronted with moral conflict, and although those rules currently existing need to be regularly purged, clarified and updated, the adoption of more rules alone is not the answer to solving the many problems of the adversary system.

### C. *Ethical Education for the Lawyer*

Finally, reformers call for better training and education of lawyers on ethical matters as a method of addressing the problems of the adversary system.<sup>131</sup> This call was first made in the mid-seventies following the Watergate episode.<sup>132</sup> During the intervening years, most law schools added courses in professional conduct to their curriculum requirements<sup>133</sup> and many bars adopted similar continuing education requirements. The thinking behind such requirements was that greater familiarity with role responsibilities and potential conflicts would result in a bar more sensitive to ethical matters.

In spite of such efforts, “the legal profession’s record in the education . . . of professional responsibility [remains] unsatisfactory.”<sup>134</sup> The need for and subsequent adoption of the Code, the Model Rules, Rule 11, and the current “aspirational creeds,” which are all efforts to provide the advocate with more guidance as to what is proper conduct, provide evidence that improved education in ethics has not successfully dealt with the problems of the adversary system. In addition, after a decade of educational efforts, a recent poll suggests that forty-one percent of those lawyers questioned felt that unethical behavior is worse today than it was ten years ago.<sup>135</sup>

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129. See *supra* note 121.

130. Simon, *supra* note 63, at 1132.

131. See, e.g., Frankel, *supra* note 12, at 1041.

132. See Jones, *supra* note 19, at 959.

133. Jones, *supra* note 19, at 959. Following the Watergate episode: the American Bar Association (ABA) amended its legal education standards to add a mandatory provision that all accredited law schools must offer and require for all students . . . instructions in the duties and responsibilities of the legal profession which covers . . . the history, goals, structure, and responsibility of the legal profession and its members, including the Code of Professional Responsibility of the American Bar Association.

*Id.*

134. Aronson, *supra* note 10, at 273.

135. See Brown, *supra* note 4, at 14 (“U.S.A. Today recently published highlights of a survey of 750 American lawyers. Eighty-six percent of the lawyers polled said they had encountered ‘unethical lawyers’ . . . . Forty-one percent said unethical behavior is worse now than it was ten years ago.”).

Education alone, therefore, like the call for more rules, is not the answer to the current adversary system problems.

### III. THE CASE FOR JUDICIAL INTERVENTION

The problems of the adversary system will not be resolved, and the system will fall into increasing disrepute, unless the judiciary is willing to intervene and address the excesses of the zealous advocate. Complete abandonment of the adversary system is not required. However, historical responses such as increasing regulation and improving education are not the answer to the problem.<sup>136</sup> What is required is a re-examination by the judiciary of its responsibilities to control the conduct of its "officers," and a re-focusing of its efforts to insure that truth and justice are indeed the product of the adversary system.<sup>137</sup> The role of the trial judge must be expanded if the overly zealous advocate is to be tamed.<sup>138</sup>

#### A. *The Inherent Power of the Court*

Expansion of the judicial role does not require granting the court any more power than it inherently possesses. Inherent judicial powers are those powers not expressly granted to the courts by a constitution but recognized to exist merely because they are necessary for the court's proper functioning.<sup>139</sup> They are closely tied to the doctrine of separation of powers. The court, as one of the three independent branches of government, must have the powers necessary to maintain its integrity as an institution.<sup>140</sup> Among others, these powers include the right to admit, supervise, sanction and disbar officers of the court who abuse their positions.<sup>141</sup>

A study by the Center for Professional Responsibility described the judicial role in lawyer discipline as follows:

The judicial role in lawyer discipline is inherent in the relationship between lawyers as officers of the court and judges as presiding officers

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136. Indeed, these "solutions" are relatively without impact unless the judiciary is willing to enforce that regulation and, thereby, underscore the seriousness of its support for what ethical education does occur in the law schools.

137. Arthur Miller suggests that meaningful reform can only occur if the legal profession is willing to take another look at the assumptions on which our adversary system is based, including the roles assigned the lawyer and the judge. Miller, *supra* note 4, at 16-17. This Note concurs with that assessment.

138. See Aronson, *supra* note 10, at 319. Aronson suggests that in addition to expanding the role of the trial judge, the attorney-client privilege must be limited, pretrial discovery must be extended, and loopholes and technicalities must be reduced if truth is to be a serious objective of the judicial system.

139. Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784 (1976).

140. See *id.*

141. *Id.* at 785.

and administrators of the court. Lawyer misconduct, in and out of court, within and outside of the lawyer-client relationship, is of direct concern to judges for two primary reasons: first, is the direct effect certain types of misconduct (falsification of documents, counseling false testimony, filing frivolous claims, and similar acts) have on the administration of justice; second is the less immediate but more damaging effect lawyer misconduct has on the moral authority of the justice system and upon the public's perception of it.<sup>142</sup>

Thus, use of the court's inherent power is important to the effective administration of justice, necessary to the maintenance of its moral authority, and integral to maintaining positive public perception of the system.

This inherent power to serve as "governor of the trial for the purpose of assuring its proper conduct"<sup>143</sup> has long been recognized by the courts.<sup>144</sup> The Supreme Court itself has set the stage for a more active judiciary. In *Roadway Express, Inc. v. Piper*,<sup>145</sup> the Court referred to the "'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices."<sup>146</sup> In *National Hockey League v. Metropolitan Hockey Club, Inc.*,<sup>147</sup> the Court stated the following:

[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.<sup>148</sup>

It only remains for the judiciary to accept its responsibility as the adversary system's "governor,"<sup>149</sup> to assert its authority and to address the problems caused by the overly zealous advocate.

### B. *The Passive Court*

Unfortunately, to date, the judiciary has *not* been a dynamic force for change and has failed to use its inherent power to address the many problems

142. A.B.A. STANDING COMM. ON PROF. DISCIPLINE, CENTER FOR PROF. RESP., THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT ii (1984).

143. *Quercia v. United States*, 289 U.S. 466, 469 (1933).

144. *See Batson v. Neal Spelce Associates*, 805 F.2d 546 (5th Cir. 1986).

Nevertheless, federal courts possess inherent power to assess attorney's fees and litigation costs when the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . ."

. . . Courts may also award fees, however, as a sanction for bad faith in the conduct of the litigation resulting in an abuse of judicial process.

*Id.* at 550 (citations omitted). For other sanctions currently available to the court to address lawyer misconduct, see *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 870 n.3 (5th Cir. 1988).

145. 447 U.S. 752 (1980).

146. *Id.* at 765.

147. 427 U.S. 639 (1976) (per curiam).

148. *Id.* at 643.

149. *Quercia*, 289 U.S. at 469.

of the adversary system.<sup>150</sup> Gerber critically describes the judge as a "passive ticket holder at a lawyer's night club act."<sup>151</sup> Judge Frankel, himself, charges that many of his colleagues are "withdrawn from the fray, [and] watch it with benign and detached affection, chuckling nostalgically now and then as the truth suffers injury or death in the process."<sup>152</sup> Historically, judges have rarely exercised their ability to sanction those who abuse the legal process.<sup>153</sup>

The reasons for this reluctance are unclear. One writer suggests that since many judges come from the lawyer ranks they are slow to penalize the advocate for practices they, themselves, used when practicing law.<sup>154</sup> Another suggests that the judiciary may be too concerned with its own popularity.<sup>155</sup> In addition, judges, like lawyers, probably believe that the principles of zealous advocacy have been constitutionalized and long established in common practice. They are, therefore, reluctant to intrude on such "hallowed" ground.

However, whatever validity there is to the argument that the Constitution recognizes the adversary system, the argument should not extend to the abuses of the overly zealous advocate. As with all constitutionally protected rights and systems, the adversary system is protected, but only within limits.<sup>156</sup> There must be some point at which the traditional deference paid to the "wily warrior" is limited; if not, the system's "guardian" fails to sufficiently guard the system from abuse. Whatever the reason for its past reluctance, the judiciary has the power to address the many abuses resulting from our system of zealous advocacy. What is required is a judiciary willing to take on the task.

### C. Dondi Properties Corp. v. Commerce Savings & Loan Ass'n

Actions taken by the United States District Court for the Northern District of Texas<sup>157</sup> present a possible model of the type of judicial activism necessary to address the problems of the adversary system. On July 14, 1988, the

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150. L. FORER, *supra* note 14, at 246; *cf.* Miller, *supra* note 4, at 26 ("[C]ourts in recent years have indicated a greater willingness to impose sanctions.").

151. Gerber, *supra* note 9, at 23.

152. Frankel, *supra* note 12, at 1034.

153. The judicial threat of sanctions has been described as a "toothless tiger." Miller, *supra* note 4, at 24.

154. Miller, *supra* note 4, at 25.

155. Gerber, *supra* note 9, at 23.

156. See 16A AM. JUR. 2D *Constitutional Law* § 446 (1979) ("Every constitutional right or privilege must be enjoyed with such limitations as are necessary to make its enjoyment by each consistent with a like enjoyment by all, since the right of all is superior to the right of any one.").

157. Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

*Dondi* court became the first court to adopt "standards of practice" for lawyers involved in civil litigation before it.<sup>158</sup> The court's opinion identified the "abusive litigation tactics . . . rang[ing] from benign incivility to outright obstruction"<sup>159</sup> of justice that were occurring with "alarming frequency"<sup>160</sup> as the reason for its action. It also noted the resulting damage to the judicial system.<sup>161</sup>

After recognizing its inherent power to control lawyer conduct, it stated that the standards were "appropriately established to signal [its] strong disapproval of practices that have no place in [the] system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play."<sup>162</sup> The standards adopted by the court read as follows:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of

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158. Law. Man. on Prof. Conduct (ABA/BNA) 239 (Aug. 3, 1988).

159. *Dondi*, 121 F.R.D. at 286.

160. *Id.*

161. *Id.*

162. *Id.* at 289.

conduct which judges, lawyers, clients, and the public may rightfully expect.<sup>163</sup>

The question that immediately arises after reading such standards is whether the *Dondi* court actually did anything new or simply fell further into the "black hole" of adopting rules on top of more rules.<sup>164</sup> The answer to that question is that the standards themselves appear to add little to the Model Rules that already govern the conduct of lawyers. Standard "A" simply rephrases Paragraph (1) of the Preamble of the Model Rules which 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."<sup>165</sup> Standards "B" and "D" appear to be generalized paraphrases of the responsibilities set forth in Model Rule 3.2, which addresses the lawyer's responsibilities for expediting litigation, 3.3, which addresses the duty of candor to the court, and 3.5, which addresses responsibilities for maintaining the impartiality and decorum of the court. Standard "C" is actually given force by Model Rule 3.4's duties to the opposing party and counsel.

In addition, Standard "E" simply restates Paragraph (4) of the Preamble to the Model Rules which states, "[a] lawyer should demonstrate respect for the legal system, and those who serve it, including judges, other lawyers, and public officials."<sup>166</sup> Standard "F" appears to be adequately addressed by Model Rules 1.16(3)'s allowance for attorney withdrawal upon repugnant demands of a client and 4.4's requirement of respect for the rights of third persons. Standards "H", "I", and "J", all dealing with diligence, delay, and harassment, find counterparts in the Rules in 1.3, 3.2, 3.4(d), and their comments. Finally, Standard "K", although more general, is addressed by Rule 4.4's demand that a lawyer respect the rights of third persons.

Only Standard "G" does not find a counterpart in the Model Rules. However, the thought expressed in that standard, that a lawyer should not take on the "ill feelings" of his client, is little more than an aspirational ideal with little chance of enforcement. In practice, it would be difficult to prove that a zealous advocate has actually taken on the client's mental attitude.

Assuming that the *Dondi* "standards" do not add significantly to those Rules already adopted, what purpose, if any, do they serve? The answer to this question is not clear. If the court is proffering another list of rules, with good intentions of enforcement, but enforcement does not follow, then the court is simply adding meaningless rules. However, if the court is submitting its standards to the bar as official "notice" that they are tired

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163. *Id.* at 287-88.

164. *See supra* notes 115-31 and accompanying text.

165. MODEL RULES OF PROFESSIONAL CONDUCT Preamble para. 1 (1983).

166. *Id.* at Preamble para. 4.

of "adversarial abuses" and are determined to become more active to stop such abuses, then the standards may have a real impact.

As previously suggested in this Note, the key to addressing the ills of the adversary system is judicial intervention and enforcement. The *Dondi* decision suggests a court committed to putting passivity aside and preparing for intervention and enforcement. The court's opinion states, "[t]hose litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them."<sup>167</sup> In addition, the court spells out the sanctions lawyers can expect from violations. Those sanctions include the full range of Rule 11 sanctions including a "warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."<sup>168</sup> This would appear to be the language of a court resolved to address the problems caused by the overly zealous advocate.

Unfortunately, decisions following the establishment of the *Dondi* standards raise questions concerning the court's willingness to enforce its newly adopted standards. In *Superior Savings Association v. Bank of Dallas*,<sup>169</sup> the court briefly referred the parties in a garnishment action to the *Dondi* standards by "gently remind[ing] [them] of their obligations under *Dondi Properties Corp. v. Commerce Savings and Loan Association . . .*"<sup>170</sup> "Gentle reminders" seem to be inconsistent with the firm language, and confrontational attitude of the *Dondi* opinion. Such gentle reminders may indicate, therefore, a retreat from the hard-line stance taken in the *Dondi* opinion.

In *Dallas Gay Alliance, Inc. v. Dallas County Hospital District*,<sup>171</sup> the defendant, who had prevailed on the merits, moved for an award of reasonable attorney's fees and expenses pursuant to Federal Rule of Civil Procedure 11 and 42 U.S.C. § 1988. The court denied that motion, and in so doing, acknowledged that the defendant had also alleged the plaintiff's conduct should be sanctioned under the *Dondi* standards. The court, however, declined to address the *Dondi* sanctions on the basis of the defendant's failure to move for sanctions under *Dondi*. The court's reliance on a procedural technicality to refrain from applying the *Dondi* standards would again appear to suggest a court hesitant or unwilling to follow through with enforcement of those standards. If so, the *Dondi* standards, as applied, simply add meaningless rules to the adversarial debate.

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167. *Dondi*, 121 F.R.D. at 288.

168. *Id.* (citing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)).

169. 705 F. Supp. 326 (N.D. Tex. 1989).

170. *Id.* at 330 n.10 (emphasis added).

171. No. 3-88-1394-H (N.D. Tex. Aug. 11, 1989) (LEXIS, Genfed library, Dist file).



Despite this questionable start, if subsequent decisions demonstrate that the *Dondi* court follows through with its threat to enforce its new standards, then the decision can still serve as a model to the judiciary of the type of judicial activism required to effectively curb "adversarial abuses." In addition, the *Dondi* court may tame overly zealous advocates in the Northern District of Texas and, in so doing, improve the public's perception of the judicial system.

#### D. Potential Problems

A more active role for the judiciary will, no doubt, result in some problems for the adversary system as we know it. For example, a more active judiciary may result in greater unpredictability within the system. How will advocates know how far they can pursue their clients' interests before running afoul of the particular sitting judge? Will the system and its participants become subject to judicial whimsy and prejudices?

As more is expected of the judge, there is a greater possibility that the judge's own perceptions will impact the matter at hand. However, this does not necessarily lead to the conclusion that a more active judicial role will result in unpredictability. Judges making the transition to the more active role should provide "notice" to those individuals practicing before them.<sup>172</sup> If the court provides such notice and follows it up with enforcement, then the notice and precedent of enforcement should aid lawyers practicing before the court in determining how the court will respond to particular situations.

A changing role for the lawyer may present additional problems. A more active judiciary, one set on discerning truth, will tend to emphasize the lawyer's role as an officer of the court. Conversely, a more active judiciary will de-emphasize the lawyer's role as advocate. This, of course, would be just the opposite of what we currently see in the legal system.<sup>173</sup> Such a change could result in limiting the scope of both the current confidentiality rules and the rules governing zealous advocacy. Such limitations could, in turn, impact negatively on both the general use of the legal system<sup>174</sup> and the lawyer's ability to effectively carry out the duties as advocate within that system.<sup>175</sup>

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172. A possible example of such "notice" is provided by the *Dondi* court in its adoption and publication of litigation standards for the Northern District of Texas. See *supra* notes 157-63 and accompanying text.

173. See *supra* notes 95-100 and accompanying text.

174. Potential clients may not make use of a legal system in which there is a chance their confidences will be violated. If they do make use of such a system, they will most likely be less than candid with their lawyers for fear of such violations.

175. A change in the confidentiality rules may cause clients to be less than candid with their lawyers and thereby render the lawyers unable effectively to carry out their duty of zealous advocacy.

Such a change, however, would simply correct a system that has gone too far in the opposite direction, supporting the lawyer's role as advocate while ignoring the role as officer. To date, failure of the judiciary to keep the lawyer's two roles balanced has led to an adversary system that protects client autonomy at the expense of discerning truth and reaching correct results between parties. As a result, two of the foundational purposes of the judicial system often go unfulfilled.

### CONCLUSION

In the words of Marvin Frankel, "[n]ot many within the legal profession and even fewer outside it, have a stunning sense that all is well in the legal order."<sup>176</sup> The American judicial system's unquestioned commitment to the "adversarial ideal" has resulted in system abuse by the advocate, complacency from the court, and warnings from the academic. It has also led to a crisis in public confidence in the system.

Despite such problems, the adversary system finds strong support for its existence in our Constitution's recognition of the system and our society's commitment to the autonomy of the individual. It is not, therefore, suggested that radical change in the adversary system be made. Rather, adjustments within the system are required to insure that the system is reaching its intended results.

To that end, both increasing regulation and improving the ethical education of lawyers have been attempted, both with limited results. What is now needed is a judiciary willing to acknowledge that the failures of the adversary system came about when the system's commitment to truth and justice was replaced by its unquestioned commitment to the client. The judiciary must again recognize its obligation to insure that truth and justice are the "paramount objectives" of the adversary system. It must awaken from its passive slumber, use its inherent power, and insure that the zealous advocate is put in place within the system of justice.

The court in *Dondi* may have taken a first, shaky step in that process by adopting "standards of practice" and threatening the enforcement of those standards when violated. Whether such actions are effective in restraining the overly zealous advocate depends on whether the court follows through with its threat of enforcement. Whether such enforcement follows remains to be seen.

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176. M. FRANKEL, *supra* note 8, at 107.

