

# Legal Ethics and *A Civil Action*

Kevin E. Mohr\*

## I. INTRODUCTION AND BACKGROUND TO *A CIVIL ACTION*

A student's performance in law school does not necessarily indicate whether the student will be a good lawyer. Nor will a student's enjoyment of law school portend that she will enjoy the practice of law. Being a lawyer is not simply being able to cogently analyze a set of facts. The practice of law does not ebb and flow with the regularity of law school semesters or quarters. You do not receive grades at regular intervals, nor does your work come in nicely discrete packets with foreseeable termination dates. Rather, you prove you can "be a lawyer" by diligently representing your clients year after year, often feeling fatigued and enduring acrimonious interactions with opposing counsel, yet still maintaining your ethical and moral compass.

As a litigator or trial lawyer, you usually cannot predict the slack periods when you can sit back and reflect on what you are doing, as you might between semesters while still in school. Even under the most strict judge, you cannot always predict when a trial will end (or even begin) or a case will settle. Even if you could, usually several other cases await your immediate attention once it does. Intense periods of trial preparation and trial can last for months; during many stretches you have to work most weekends just to keep on top of your cases. This preoccupation with your clients' matters is especially true when your efforts are focused on a single case, as illustrated in Jonathan Harr's *A Civil Action*.<sup>1</sup>

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\* Associate Professor, Western State University College of Law, Fullerton, California. J.D., Yale Law School, 1984; M.S., Human Biology, University of Wisconsin-Madison, 1977; B.A., Harpur College, State University of New York at Binghamton, 1972. The author wishes to thank Brian Mohr for reviewing and commenting on an earlier draft of this Article, and Edith Warkentine for introducing him to the many possibilities for teaching ethics in *A Civil Action*. The author also wishes to thank Hon. Edward Wallin, Hon. David Weinberg and Hon. Ellen R. Peck for the generous contribution of their time to the Legal Ethics in *A Civil Action* panel from which this Article sprang.

1. JONATHAN HARR, *A CIVIL ACTION* (First Vintage Books ed. 1996). All page references in this Article are to this edition of the book.

Harr's book dramatically describes how a case can consume a lawyer's life to the exclusion of all else. The book describes lawyers' pursuit and defense of a toxic tort case that arose out of events in the town of Woburn, Massachusetts. A statistically high number of children and adults, all of whom drank water from the town's wells, contracted leukemia. After determining that runoff from land owned by W.R. Grace & Co. and a subsidiary of Beatrice Foods may have polluted the wells, a Boston personal injury lawyer, Jan Schlichtmann, together with a public interest organization, Trial Lawyers for Public Justice (TPLJ), filed suit on behalf of these Woburn residents (the Woburn plaintiffs) against Grace and Beatrice. The book recounts the problems the plaintiffs' lawyers confronted, not only in trying to prove their case, but also in trying to overcome the formidable defenses prepared by the principal lawyers for the defendants, William Cheeseman for Grace and Jerome Facher for Beatrice. Covering the case from the filing of the complaint to posttrial maneuvers over alleged discovery abuses, the book also devotes substantial space to the interactions among the lawyers and between the lawyers and the judge who presided over the case, United States District Judge Walter Skinner.

Lawyers identify with this book, perhaps because, after an opening section describing the families and their injuries, the narrative presents the pursuit of the case almost exclusively from the lawyers' perspective. The book is not episodic entertainment like "L.A. Law." *A Civil Action* does not take place in a world where the firm's law library functions primarily as a setting for interpersonal squabbles or late-night trysts. Instead, it is a place of half-eaten meals at the office, documents and files occupying any horizontal surface, and clothes worn a second day. In scene after scene, the book depicts the sustained pressure and the frustrations and doubts that can overwhelm a lawyer as he pursues his client's claims.

The book also depicts a world that can leave the reader with the impression that ethics took a holiday during the Woburn case, probably because it ends with the posttrial motions over the concealment of the Yankee Environmental Engineering Report<sup>2</sup> and Riley's destruction of evidence.<sup>3</sup> The reader is left with the feeling that had this

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2. HARR, *supra* note 1, at 459-61. This was an environmental report that John Riley, president of Beatrice's subsidiary, the J. Riley Tannery, had commissioned to investigate the migration of waste from the tannery property to the city wells. The report supported the predictions that Schlichtmann's expert Pinder had made at trial. *Id.* at 460. Although the report had been completed three years before trial, defendant Beatrice never produced it during discovery despite Judge Skinner's finding that Schlichtmann had properly requested it. *Id.* at 464.

3. *Id.* at 469-87. In 1983, after Schlichtmann had filed the complaint and three years before

information been available to plaintiffs' lawyer Schlichtmann before or during the trial, the jury would have reached a substantially different verdict, or the case would have settled for substantially more money. While these two events are the most conspicuous, many other incidents in the book, both peripheral to and related directly to the Woburn case, are rich sources of material for educating students about legal ethics.<sup>4</sup> Yet despite the impression a reader may have that justice was subverted, the lawyers in *A Civil Action* generally comported themselves within the strictures of the ethical codes.

In writing this Article, however, my intent is neither to vindicate nor to rebuke the lawyers involved in the Woburn case. Instead, I want to show how *A Civil Action* can be used to supplement a course in Professional Responsibility.

One law professor reports that the first time he taught Professional Responsibility he asked his students what they wanted to get out of the course. They stated three concerns: "First, they wanted to know what they needed to do to pass the professional responsibility bar exam. Second, they wanted to know what they needed to know to stay clear of trouble in practicing law. Third, they were concerned with their grades."<sup>5</sup> In teaching Professional Responsibility, I have had much the same experience. I address the second concern by exposing the students, through oral and written hypotheticals, to the kinds of ethical dilemmas they eventually will confront in their practices. According to student feedback, this approach not only has helped prepare them for practice, but also has helped allay their first concern.<sup>6</sup>

*A Civil Action* contains many events that can similarly be used to introduce students to ethical dilemmas they will confront when they enter the profession. These events can breathe life into otherwise dry

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the trial, Riley had hired a waste removal company to remove several truckloads of material from the 15-acre piece of property between the tannery and the city wells. He testified during trial that he had not removed anything from that property. *Id.* at 473. During the hearing on destruction of evidence, he admitted he had lied during trial. *Id.* at 482.

4. An example of an incident that is collateral to the Woburn case but is still a rich source of material for an ethics discussion is Schlichtmann's handling of the Eaton matter, the first case he took to trial. See *infra* Part III. An example of an incident that is central to the main events of the book, especially as it set the tone for the relationships between and among the lawyers and the judge and established the extent to which the lawyers would act as advocates for their client, is the first Rule 11 hearing on barratry. See *infra* Part IV.

5. Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 506 n.129 (Spring 1999) (citing comment by Gary Friedman in PROJECT FOR THE STUDY AND APPLICATION OF HUMANISTIC EDUCATION IN THE LAW, HUMANISTIC EDUCATION IN LAW, MONOGRAPH I (1980) (reassessing law schooling)).

6. As for resolving their third concern, grades, I leave that up to the students themselves.

discussions of acceptable ethical behavior as set out in ethical codes. In accord with the Lessons from Woburn Project's goal to make *A Civil Action* and its associated materials into a powerful teaching tool, the book's events vividly illustrate the ethical parameters within which a lawyer must operate, ethical parameters that exist regardless of how tired a lawyer may be or how antagonistic the opposing party may act.

Part II contains a brief overview of the mechanisms for regulating lawyers' conduct, the various responsibilities and functions a lawyer holds within our legal system, and the lawyer's professional duties. After this brief overview, I discuss in depth several events in the book that illustrate the roles and duties a lawyer has, and what a lawyer should do in each event to fulfill her ethical obligations. Part III presents an event collateral to the Woburn case, Schlichtmann's first trial, and raises issues of the lawyer's duty of competence and the fundamental division of authority and responsibility between lawyer and client in achieving the aims of the representation. Part IV focuses on the Rule 11 hearing where Schlichtmann contested allegations of barratry. This part of the Article demonstrates the difference between the attorney-client privilege and the lawyer's duty of confidentiality, two fundamental ethical concepts many practicing lawyers confuse, and which can also serve as a springboard for a classroom discussion of the place morality holds in the legal profession. Moreover, it reminds students that common sense need not be left at the courthouse door.

Part V follows up on the theme of morals in the legal profession. It uses the false deposition testimony of Barbas to introduce the classic conflict between a lawyer's responsibilities as a representative of clients and as an officer of the legal system. It also familiarizes the student with how lawyers may say or do one thing, but intend something entirely different. Finally, Part VI discusses legal fees, a topic dear to the hearts of most lawyers and central to *A Civil Action*. This part also introduces the kind of ethical ramifications that exist when a lawyer professionally associates with nonlawyers to create a multidisciplinary practice. The current ABA President has identified this issue as the most important issue facing the legal profession today.<sup>7</sup>

The reader must remember that in some of these events, particularly the scenes that take place in the courtroom or between the lawyers, the book is generous with details that permit a discussion of the ethics within the context of the actual events.<sup>8</sup> In other instances,

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7. See ABA Commission on Multidisciplinary Practice, General Information Form, at <<http://www.abanet.org/cpr/mdpgeninfo.html>>. The Commissioner's Report on Multidisciplinary Practice and supporting documents can be found at <<http://www.abanet.org/cpr/mdpfinalreport.html>>.

8. See *infra* Parts IV.A., V.A., VI.



however, the book is spare about what actually occurred. Not surprisingly, this occurs most often when lawyer-client communications are involved.<sup>9</sup> In those situations, one can hypothesize about what may have happened and whether it comports with a lawyer's ethical duties.<sup>10</sup> Alternatively, the events can function as vehicles that can be used to segue into other related topics in ethics. Taken as a whole, they demonstrate that *A Civil Action* can be used not only to illustrate a lawyer's ethical obligations, but also as springboards to discussions of more general ethical and professional concerns. These discussions will demonstrate that *A Civil Action* is a rich repository with which to supplement a course in legal ethics.<sup>11</sup>

## II. BRIEF OVERVIEW OF PROFESSIONAL RESPONSIBILITY

To better understand the ethical issues that arise in *A Civil Action*, it is helpful to briefly review the sources of regulation of the legal profession, the different roles and responsibilities a lawyer has within the legal system, the adversarial nature of that legal system, and the duties a lawyer owes, not only to his client, but also to the legal system.

### A. Sources of Regulation of the Legal Profession

The legal profession is self-regulated, primarily through the various codes of professional conduct the states have adopted during this century.<sup>12</sup> The codes, which generally set forth minimally acceptable

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9. See *infra* Part III.A.3.

10. I have relied exclusively on the book's descriptions of events. As more materials from the case become widely available, it will be possible to supplement these descriptions for a more complete discussion of the issues. See, e.g., LEWIS A. GROSSMAN AND ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* (1999) (containing the pleadings and other materials from the Woburn litigation).

11. My involvement with *A Civil Action* as a teaching tool began in Fall 1998 when I prepared a handout for a panel discussion on "Professional Ethics and *A Civil Action*" at Western State University College of Law. The panel, consisting of several distinguished judges and lawyers, appeared before the law school's first year students, all of whom were required to purchase and read the book before as part of their Professional Skills course. The handout addresses more ethical issues arising in many other events in *A Civil Action* than there is space to discuss in this Article. It is available at <<http://www.wsulaw.edu/general/index.htm>> or by requesting a copy from the author.

12. For a general discussion of the regulation of the legal profession, see generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2 (1986). As Wolfram notes, lawyers are regulated not only through the formal mechanisms of bar discipline, but also through, *inter alia*, the inherent powers of courts to regulate lawyers, federal antitrust laws, and malpractice actions. *Id.* at 20-21. In addition, Wolfram observes that there are informal mechanisms, such as "negative publicity and other expressions of peer disapproval, the cutoff of valuable practice opportunities (firm membership or referral business), denial of access to centers of power and prestige (bar association committee membership and officership), and preclusion from judicial posts." *Id.*

conduct for lawyers, are a means for determining a lawyer's liability for professional discipline. There are three different ethical codes currently in force: The American Bar Association Model Rules of Professional Conduct,<sup>13</sup> the American Bar Association Model Code of Professional Responsibility,<sup>14</sup> and the Rules of Professional Conduct of the State Bar of California.<sup>15</sup> Every state has adopted one or some variation of these codes.

The first, the Model Rules, has been adopted in over forty states.<sup>16</sup> Because of their predominance, I will primarily use the Model Rules in analyzing the events in *A Civil Action*.<sup>17</sup> California is alone in having its own code of lawyer conduct, all of the other states

at 22.

13. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter MODEL CODE]. The Model Code is divided into Canons, each of which expresses "in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." MODEL CODE Preamble. For example, Canon 4 of the Model Code states, "A Lawyer Should Preserve the Confidences and Secrets of a Client." Each Canon in turn is subdivided into a number of Ethical Considerations (EC) and Disciplinary Rules (DR). The Ethical Considerations are "aspirational in character and represent the objective toward which every member of the profession should strive." MODEL CODE Preamble. The words "may" and "should," implying that the statement is precatory rather than mandatory, pervade most of the Ethical Considerations. Disciplinary Rules, on the other hand, are mandatory in character. They "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." MODEL CODE Preamble. For example, DR 4-101(B)(1) provides that "[e]xcept when permitted under DR 4-101(C), a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client." (emphasis added).

15. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA (1989) [hereinafter CAL. RULES].

16. Although an ABA Commission drafted, and the ABA House of Delegates approved, both the Model Code and the Model Rules, a code must first be adopted by a state legislature or the state's highest court before it functions as a measure of attorney liability for discipline.

17. In doing so, I realize that Massachusetts did not adopt the Model Rules until 1997, effective January 1, 1998. See MASS. SUP. JUD. CT. COURT RULE 3:07 (Rules of Professional Conduct and Comments, Preamble, & Scope). Thus, when the events of the Woburn case occurred, the Model Code was not in force in Massachusetts. Nevertheless, because the majority of law students will practice under the Model Rules, I will use them as the primary source for the analyses that follow, but will also refer to the California Rules and Model Code where applicable. One final note is in order here. In 1997, the ABA created the Ethics 2000 Commission, to comprehensively review and student the Model Rules. The Ethics 2000 Commission is charged with the following:

- 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession;
- 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions;
- 3) conducting original research, surveys and hearings;
- and 4) formulating recommendations for action.

See Ethics 2000 Home Page, <<http://www.abanet.org/cpr/ethics2k.html>>. Although the ABA has cautioned it has no intention to abandon the Model Rules, *id.*, the Commission's review and study of the current rules and practices in the states probably will result in some proposed substantial changes to the current rules. The Commission's final report is scheduled for release in the year 2000. *Id.*

and the District of Columbia having adopted either the Model Rules or the ABA code. I will also regularly refer to the California Rules in analyzing the events.<sup>18</sup> In addition to the Model Rules, the California Rules, and the ABA code, a lawyer's duties may also be found in state statutes and under other more generally-applicable areas of law, such as the law of agency and the law of fiduciaries.<sup>19</sup>

### B. *The Lawyer's Responsibilities and Roles Within the Legal System*

A lawyer wears several hats within the legal system. Not only does the lawyer represent clients, but she is also an officer of the legal system and a "public citizen having special responsibility for the quality of justice."<sup>20</sup> In representing a client, a lawyer can perform various functions: advisor, advocate, negotiator, intermediary, and evaluator.<sup>21</sup> Although we see lawyers performing each of the first three functions in *A Civil Action*, we primarily remember them as advocates for their clients—advocates devising their respective strategies and arguing their clients' positions to each other or before Judge Skinner or the jury. Given the adversarial model upon which the American system of justice is based, it should not surprise us that the lawyers' roles as advocates for their clients predominate in *A Civil Action*.

### C. *The Adversary System*

The United States has an adversary system under which the parties to a dispute each present to a trier of fact, traditionally a jury, their versions of facts underlying the dispute. Under the adversary model, the fact trier then distills the true facts from the parties' different ver-

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18. Aside from a certain parochialism, my decision to use the California Rules rests on the large number of California law students and the fact that the State of California is home to more lawyers than any other state.

19. In particular, California has the State Bar Act, CAL. BUS. & PROF. CODE §§ 6000-6228 (1990), which includes provisions setting forth ethical duties that govern lawyer conduct. See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (which sets forth a lawyer's duty not to disclose a client's confidential information, a duty that is set out in both the Model Rules and Model Code, but is not included in the California Rules).

20. MODEL RULES Preamble para. 1.

21. The Preamble to the Model Rules discusses these various functions:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokes[person] for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

MODEL RULES Preamble para. 2.

sions of the same story.<sup>22</sup> To ensure that the adversary system functions properly and the parties are able to present their arguments to the trier of fact persuasively, each is represented by a trained advocate: a lawyer. The advocate's job is not to reconcile her client's version of the facts with the opposing party's version, but rather to convince the trier of fact to adopt her client's version.<sup>23</sup>

#### D. Duties of a Lawyer to the Client

Fundamental to the adversary system is the requirement that a lawyer must serve her client with absolute loyalty. As the client's advocate, the lawyer effectively steps into the client's shoes. Unless her loyalty is undivided, unless all her resources at that moment in time are devoted to the client's interests, she cannot be an effective advocate. Thus, the justice system presupposes the lawyer's undivided loyalty to her client.<sup>24</sup>

##### 1. The Duties of Loyalty and Confidentiality

Because of its centrality to the effective functioning of the adversarial justice system, the duty of loyalty is arguably the most fundamental of the lawyer's duties.<sup>25</sup> The ethical codes identify a number of other duties that foster the duty of loyalty. First, as already noted, a lawyer is expected to be a zealous advocate for her client.<sup>26</sup> Additionally, to be an effective advocate, the lawyer must be both competent<sup>27</sup> and diligent.<sup>28</sup> To help the lawyer represent the client competently

22. See DAVID A. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50-103 (1988), for a discussion and criticism of the underlying rationale for the adversary system.

23. The Preamble to the Model Rules notes: "[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." MODEL RULES Preamble para. 7. In short, aside from making her client's argument, the lawyer need not concern herself with the effectiveness of the system so long as the other party has a lawyer.

24. In the last two decades or so, a number of commentators have questioned the view that the adversary system requires rigid adherence to the client's position even if that will result in injustice prevailing in a particular case. See, e.g., LUBAN, *supra* note 22, at 322-35; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

25. See, e.g., State Bar of Cal. Comm. on Professional Responsibility and Conduct, CAL 1987-93 (1987); CAL 1984-83 (1984).

26. See *supra* note 23 and accompanying text.

27. "A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES Rule 1.1. See also CAL. RULES Rule 3-110; MODEL CODE DR 6-101. See also *infra* Part III.A.

28. The Model Rules require that a lawyer "act with reasonable diligence and promptness in representing a client." MODEL RULES Rule 1.3. The California Rules include diligence in the definition of competence: "For purposes of this rule, 'competence' in any legal service shall

and diligently, the lawyer is expected to become familiar with the facts. The lawyer can obtain some of this information independently, but the natural starting point for a lawyer to familiarize herself with a matter is the client. The attorney-client privilege,<sup>29</sup> combined with the lawyer's further duty of confidentiality (*i.e.*, the duty not to disclose the client's confidential information),<sup>30</sup> assures the client that her communications will remain private and helps the lawyer to master the case.<sup>31</sup> In addition to these duties, the various rules governing conflicts of interest further ensure the lawyer's duty of loyalty remains undivided and her zealous advocacy not jeopardized.<sup>32</sup>

## 2. The Duty to Communicate and Allocation of Authority Between Client and Lawyer

Communication is essential to the effective representation of a client. The Model Rules recognize that "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation"; the lawyer generally makes tactical decisions, while the client makes decisions on issues that are dispositive of the case.<sup>33</sup> To ensure the proper allocation of authority and responsibility between client and lawyer, the client must be kept informed so he can make the dispositive decisions that he alone has the authority to make. These decisions include all decisions that affect the resolution of the case or otherwise affect the client's substantive rights, such as the decision to settle the case or to plead guilty.<sup>34</sup> Consequently, the lawyer has a

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mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." CAL. RULES Rule 3-110(B). See also MODEL CODE DR 6-101(A)(3).

29. See *infra* Part IV.B.

30. See MODEL RULES Rule 1.6; MODEL CODE DR 4-101; CAL. BUS. & PROF. CODE § 6068(e) (1990).

31. See also MODEL RULES Preamble para. 7, which notes that "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."

32. MODEL RULES Rules 1.7-1.11; MODEL CODE Canon 5; CAL. RULES Rules 3-300, 3-310.

33. MODEL RULES Rule 1.2 cmt. 1. In general, a lawyer has the authority to make tactical and procedural decisions in the case because of her knowledge of the law. See, *e.g.*, *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985); *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991). Note, however, that if a lawyer and client disagree about tactical decisions in a criminal case, the lawyer generally must follow the client's wishes. See, *e.g.*, *State v. Wilkinson*, 474 S.E.2d 375, 382 (N.C. 1996); *Ali*, 407 S.E.2d at 189. The client, on the other hand, determines what the objectives of the representation are to be, whether or not to file a lawsuit in the first place, and who the defendants will be. MODEL RULES Rule 1.2.

34. See, *e.g.*, *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 749 P.2d 90 (N.M. 1988); *Blanton*, 696 P.2d 645 (noting client's authority to make decisions that affect client's "substantive rights").

duty to communicate the information necessary for the client to make an informed decision.<sup>35</sup>

This brief review outlines the broad parameters of the attorney-client relationship that are central to the functioning of the adversarial system. This review, however, is far from exhaustive. It has focused on the lawyer's role as a client representative within our adversarial legal system and is intended merely to help the reader appreciate the illustrations that follow from *A Civil Action*.

Nevertheless, the reader should recognize that a lawyer does not function only as a client's representative. A lawyer also functions as an officer of the legal system and, thus, is expected to conform her conduct to the law.<sup>36</sup> The lawyer's responsibility as an officer of the legal system can sometimes conflict with her role as client representative. As we will see, this conflict arises with some regularity in legal practice and is illustrated in *A Civil Action*.<sup>37</sup>

### III. DID THE LAWYER OVERSTEP HIS BOUNDS?

One incident that is collateral to the Woburn case and that raises important ethical issues is the description of Schlichtmann's first trial and the events that lead up to the trial.<sup>38</sup> The case involved the drowning death of client Lowell Eaton's son in a gravel pit. The insurance company made a settlement offer before trial and then increased the offer just before the case went to the jury. Despite the urging of the experienced trial judge to accept the offer, Schlichtmann insisted on hearing the jury's verdict.

The author probably included this incident to demonstrate Schlichtmann's tenacity, a trait that would play a large role in the Woburn case,<sup>39</sup> and his confidence that he and his clients would pre-

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35. MODEL RULES Rule 1.4; CAL. RULES Rules 3-500, 3-510; CAL. BUS. & PROF. CODE § 6068(m) (1990).

36. MODEL RULES Preamble para. 4. In its entirety, paragraph 4 provides:

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

*Id.*

37. See *infra* Part V.

38. HARR, *supra* note 1, at 60-63.

39. For example, Reed, of Mulligan & Reed, said of Schlichtmann: "The kid is like a bull-dog," and "once he gets hold of something, he doesn't let go." HARR, *supra* note 1, at 66. These later would become prophetic words. During the settlement discussions with Grace after Beatrice had been dismissed from case, Schlichtmann appeared to be the last person on the plaintiffs'

vail if he could only present his case to a jury.<sup>40</sup> This relatively short passage also raises two broad issues that will later resonate in the Woburn case: (1) *competence*, or what cases can—or should—a lawyer take and still be able to fulfill her duty to represent her client competently; and (2) *communication*, or how a lawyer should counsel the client so the client can make the kind of decisions it is the client's right or responsibility to make. Both of these issues are important to law students, who will be practicing within a year or two of taking their Professional Responsibility course. Many of these students will work in a solo practice or a small firm and will be concerned about how, without the guiding hand of a senior attorney, they can acquire the experience and skill necessary to represent their clients competently.

The facts of the Eaton case are straightforward. Lowell Eaton's son had drowned in a gravel pit owned by a construction company. When Eaton approached Schlichtmann to take the case several years later, the boy's grandmother, the only witness to the accident, had died, and the pit had been filled. Another lawyer had filed the suit against the construction company, but the last time Eaton had called him about the case, the lawyer told Eaton "to stop dwelling on the death of his son," and that the case "was hopeless."<sup>41</sup>

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team to concede they probably could not win at trial and needed to settle the case. *Id.* at 439.

40. *Id.* at 219.

41. *Id.* at 60. Did the first lawyer neglect the case? It is not clear from the facts whether the lawyer had done much, if any, work on the case. This is another offshoot to explore: how cases sometimes get put on the back burner, and when the time arrives to go forward with them, the evidence has been lost or misplaced, and the case has become "hopeless." If this is what actually happened in the Eaton case, then the first lawyer violated his duty to act diligently and promptly on his client's behalf. See MODEL RULES Rule 1.3; CAL. RULES Rule 3-110. While a discussion of case management may be better placed in a Law Practice course, failure to properly manage files is the subject of numerous disciplinary complaints. This fact warrants at least a general discussion in an ethics course. See, e.g., Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?* 1974 U. ILL. LAW F. 193, 195-217 (1974) (reporting that for the year ending April 30, 1970, the Bar of the City of New York reported that 524 out of 966 disciplinary complaints, 54.6%, which the intake screeners had labeled prima facie allegations with the disciplinary agency's jurisdiction, involved neglect). Sometimes a lawyer does not neglect a case merely because she has forgotten about it. Lawyers may know a case is in their files but will ignore it, seemingly hoping it will go away. Perhaps this occurs because the lawyer originally told the client she had a good case, but after review now realizes what she should have known when she accepted the representation: she cannot win the case. Despite HARR's writing that many cases in many firms "die quietly in the files," HARR, *supra* note 1, at 66, for a lawyer to ignore a case in this fashion is a disciplinable offense. See, e.g., *In re Anderson*, 788 P.2d 95 (Ariz. 1990) (holding that it was a "knowing and callous" lack of diligence for a lawyer to file suit, "do some discovery," but then fail to file pretrial brief and ignore client's letters requesting he try to get case back on the docket); *In re McCausland*, 605 N.E.2d 185 (Ind. 1993) (holding that lawyer's failure to advise client he had no claim, failure to act promptly, and failure to return file upon client's request was a disciplinable offense).

### A. Competence

Many lawyers are told early in their careers that a cardinal rule of a successful law practice is to never turn down new clients, regardless of how busy the lawyer may be. After all, you can never tell when the practice will be slow and you will need the business. When Eaton came to his office, however, being too busy was not one of Schlichtmann's concerns. Schlichtmann had been a lawyer in solo practice for less than two years, following a brief stint as a government lawyer. We are told he "eked out a living," and had fallen behind on his law library payments.<sup>42</sup> Despite the first lawyer's appraisal that the Eaton case was "hopeless," the case and its potential for recovery was probably attractive to the cash-strapped Schlichtmann.<sup>43</sup>

All the same, however, Schlichtmann was relatively inexperienced. Although the book refers to his handling a few workers' compensation cases and a "slip 'n fall," he had never taken a case to trial before.<sup>44</sup> The question, then, is: what kinds of cases can—or should—a relatively inexperienced lawyer accept? More specifically, should Schlichtmann have taken the Eaton case? In essence, this situation poses a conundrum: if a lawyer should not take certain kinds of cases unless she has experience in those kinds of cases, how can the lawyer ever obtain the necessary experience to take the case? This problem is particularly relevant for a newly-licensed sole practitioner.

Both the Model Rules and the California Rules address this conundrum by stating plainly that a lawyer is presumed to have certain legal skills, such as case analysis, evaluation of evidence, legal writing, and the ability to identify what legal issues are involved in the client's case.<sup>45</sup> With these skills as a foundation, the lawyer can provide adequate legal representation "through necessary study"<sup>46</sup> or "by

42. HARR, *supra* note 1, at 60.

43. *Id.*

44. *Id.* at 59-60. It is possible that Schlichtmann had more experience than we can infer from descriptions in the book. For purposes of generating class discussion, however, the experiences outlined in the book are sufficient.

45. See MODEL RULES Rule 1.1 cmt. 2; CAL. RULES Rule 3-110(b)(C).

46. MODEL RULES Rule 1.1 cmt. 2. Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 2 to Model Rule 1.1 provides in full:

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessar-



acquiring sufficient learning and skill before performance is required."<sup>47</sup> In short, despite a lack of experience in a particular area of law, a lawyer generally should be able to apply the research and analytical skills she acquired in law school to unfamiliar substantive areas of law well enough to represent the client adequately.<sup>48</sup>

Competent representation of a client in a trial, however, does not rest solely on a lawyer's research and analytical abilities. Trial advocacy is a skill in itself that improves with experience. It is not a skill most lawyers can learn from reading books. A lawyer who goes to trial on behalf of a client without any prior trial experience is probably not acting competently. Where a lawyer is in a firm, she can usually gain such experience as a second chair at trial. In the prosecutor's or public defender's office, another lawyer from the office will often assist the new lawyer in her first trial. How, then, can a relatively inexperienced

ily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

47. CAL. RULES Rule 3-110(C), which provides in full:

If a member does not have sufficient learning and skill when the legal service is undertaken the member may nonetheless perform such services competently by (1) associating with or where appropriate, professionally consulting another lawyer reasonably believed to be competent, or (2) by acquiring sufficient learning and skill before performance is required.

48. For example, David Boies, who recently represented the U.S. Department of Justice in its antitrust trial against Microsoft, has established a reputation as a formidable trial lawyer across a broad spectrum of law. In the mid-1980s, he represented CBS in a libel suit brought by retired General William C. Westmoreland. Boies believes that he can learn about any substantive area of law:

Like other great litigators, Boies takes considerable pride in his ability to litigate anything: an antitrust case, a contested takeover, a libel action. Prior to the Westmoreland case, for example, he had never handled a libel suit—which caused initial anxiety among the defendants. Mary Boies, an attorney herself and then a CBS vice president for corporate information, recalls her colleagues there saying, "David's a really good antitrust lawyer, but what does he know about the First Amendment?" And I'd say, "Well, it's a very short amendment. He will learn it."

As Boies sees it, "It's not that hard to learn an area of the law. I know how to communicate, read cases, organize facts. That is what a lawsuit is all about."

Cary Reich, *The Litigator: David Boies, The Wall Street Lawyer Everyone Wants*, N.Y. TIMES, June 1, 1986, section 6, at 19. There are exceptions to the broad sweep of this "rule," that is, there are probably areas of the law in which a lawyer should not—and in some instances, may not—venture without specific training or background. Drafting and filing patent applications is an area of law for which a lawyer must be specially licensed by the Patent and Trademark Office. A lawyer attempting to practice in this area without being appropriately licensed would be subject to discipline. Some areas of law are highly technical and complex and have special courts for resolving disputes. In these areas, a lawyer should assess a prospective client's situation and his experience very carefully before accepting the client's case. Bankruptcy and tax law are two such areas. In situations where the lawyer determines she should not take the case by herself, she can refer the matter to a qualified lawyer or associate. See, e.g., MODEL RULES Rule 1.1 cmt. 2; CAL. RULES Rule 3-110(C).

sole practitioner such as Schlichtmann gain the necessary experience? One possibility is to associate with a more experienced trial lawyer for your first trial. This, in fact, is what the ethical codes recommend.<sup>49</sup>

Whether by teaching himself the law or associating with a more experienced lawyer, a lawyer need not reject a case merely because he is inexperienced. Nevertheless, we still need to ask whether Schlichtmann should have taken the Eaton case. He had little experience in personal injury cases (a “slip ‘n fall” and a few workers’ compensation cases).<sup>50</sup> He had never tried a case, and he had no experience preparing for trial.<sup>51</sup> In fact, we are told he “began reading books on the fundamentals of discovery and trial practice.”<sup>52</sup> The first lawyer had assessed the case as “hopeless.”<sup>53</sup> Most experienced personal injury lawyers—including Schlichtmann’s friend and partner, Conway—probably would have accepted the insurance company’s offer to settle for \$5,000.<sup>54</sup> Nevertheless, the fact that the insurance company offered anything demonstrates that Schlichtmann, despite his inexperience, was able through self-education to put together a case that convinced the insurance company that settling a “hopeless” case was still in its best interest.

After his trial victory, it is easy to say that Schlichtmann made the right decision in taking the Eaton case. Would we reach the same conclusion, however, without the benefit of hindsight? On the one hand, we cannot overlook the fact that when Mr. Eaton walked through his office door, Schlichtmann’s finances were in trouble. There is always the danger that a lawyer will overestimate his abilities or the value of a case when “baby needs a new pair of shoes.”<sup>55</sup> The eco-

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49. See MODEL RULES Rule 1.1 cmt. 2; CAL. RULES Rule 3-110(C). At the law school where I teach, many of our graduates open solo practices or join firms with just one or two other lawyers after being admitted to the bar. Many of my former students have related the fear they felt when preparing for and conducting their first trial. They have all stated that the single most important factor in helping them prepare for and conduct the trial was their having taken a Trial Practice course in law school. All of them, however, said they consulted with a more experienced lawyer.

50. HARR, *supra* note 1, at 59.

51. *Id.* at 60.

52. *Id.* at 61.

53. *Id.* In later offering Schlichtmann \$5,000 to settle, the insurance company’s claims manager appears to have seconded this assessment by noting “[e]verybody in the case is dead—the owner of the construction company, the boy’s grandmother, the boy. Without the grandmother, you don’t have a witness to the boy’s death.” *Id.*

54. This of course assumes Conway would have accepted the case in the first place. It is likely he would not have done so. See HARR, *supra* note 1, at 126 (Conway would say, “You measure your success by the cases you don’t take.”).

55. In my Professional Responsibility class, I emphasize that a lawyer’s self-interest is often implicated in a lawyer’s practice. It can affect the lawyer’s actions and the recommendations the lawyer makes to a client, whether it be to take a case in the first instance or to recommend that

conomic realities of a law practice might cloud the lawyer's judgment and persuade him to take a case, a decision he may later regret. Such decisions may result in the case becoming a "dog" or "orphan," in Conway's taxonomy, relegated to gathering dust in the files.<sup>56</sup>

Evaluating cases is a skill. A new lawyer will probably take more cases that eventually will be dismissed than a lawyer who has been practicing for many years. Time devoted to cases that eventually will be dismissed weighs heavily on a new lawyer's resources and makes him function less efficiently—and competently. Although Conway's saying that "[y]ou measure your success by the cases you don't take"<sup>57</sup> may be an overstatement, it is not far off the mark; as a lawyer learns to evaluate cases, she will become more efficient in her practice and better able to serve her clients.

On the other hand, despite Schlichtmann's relative inexperience in tort law, he had been a general practice lawyer for nearly two years and had spent another nine months working as a government lawyer. By that point, he may have reached a "comfort level"<sup>58</sup> regarding his abilities and would probably have been in a good position to assess his chances of successfully prosecuting the case. His tenacity, at any rate, was never in question.

A young lawyer will make mistakes. She will explore legal paths that will become dead ends, take depositions or seek discovery that eventually will prove irrelevant to the case, and spend many more hours on the case than is necessary. There is nothing wrong with these actions, particularly in a case for which the lawyer is being paid

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the client settle a case. In presenting a hypothetical situation in class, I usually like to remind the student that "baby needs a new pair of shoes." In other words, I want the student to discuss how she would resolve the ethical dilemma if she were in practice and facing the realities of having to make a living. It is easy in law school to divorce oneself from such realities and simply spout an answer that reflects the aspirational goals of the profession (for example, withdrawing from representing a client is a favorite response when the ethics of the situation appear even marginally askance). I prefer, however, that the student factor into the calculus of her reasoning the financial responsibilities each lawyer must face in her practice. This is not to say that I disparage the aspirations of the ethical codes; if anything, I urge the students to strive to realize them. At a minimum, however, I want them to realize they can fulfill their ethical obligations and still earn a living.

56. Kevin Conway, Schlichtmann's partner, distinguished "dogs," or frivolous cases, from "orphans." "Orphans" might have some merit, but because of problems of proof of liability or damages, or expense to prepare, these cases are passed from lawyer to lawyer, often without any lawyer ever actually taking the case. HARR, *supra* note 1, at 126. In addition to "dogs" and "orphans," there are also "gold mines," or especially promising cases. *Id.* at 66. Gold mines, although promising at first, nevertheless may reveal a fatal flaw after investigation, at which point the lawyer might let the case wither in the files. That is what the first lawyer apparently allowed to happen in the Eaton case. *Id.*

57. *Id.* at 126.

58. *See supra* note 48.

on a contingent, or outcome, basis. As the lawyer gains experience, she will be better able to recognize such fruitless avenues and not pursue them. Thus, she will be in a better position to represent clients more efficiently. While learning these lessons, however, she will still be able to represent her client adequately, just as Schlichtmann adequately represented his client Eaton.

The important point here is that each lawyer has to assess not only her experience, but also her ability to learn the law and to teach herself what she needs to know in order to adequately represent the client. A lawyer who is more comfortable advising clients on business transactions and has never felt comfortable in adversarial situations probably should not have taken the Eaton case. Another lawyer, however, who, either during law school or in motion hearings, has come to feel comfortable in court or court-like situations and has confidence in her ability to teach herself the nuances of discovery and procedure, probably could take the case. Nevertheless, such an inexperienced lawyer—indeed, someone like Schlichtmann—probably should associate with a more experienced lawyer.<sup>59</sup>

### B. Communication

A second issue that Schlichtmann's first trial raises is the lawyer's obligation to communicate with his client. As already noted, communication between client and lawyer fosters the lawyer's duty of loyalty and, thus, is necessary for effective representation.<sup>60</sup> Nevertheless, one of the most common complaints that clients have about their lawyers is that the lawyers ignore them and do not return their calls. In particular, clients complain that the lawyers fail to obtain the clients' consent.<sup>61</sup>

There are situations in *A Civil Action* directly related to the Woburn case that raise issues concerning a lawyer's duty to communicate.<sup>62</sup> The relatively straightforward facts of the Eaton case however,

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59. See *supra* note 49. Schlichtmann did, in fact, associate with a more experienced lawyer, Roisman of Trial Lawyers for Public Justice (TLPJ), in the Woburn case. HARR, *supra* note 1, at 76-77. His decision to associate appears to have been guided not only by Roisman's superior expertise, but also by his realization that he did not have sufficient resources to pursue this litigation. *Id.* Thus, another lesson to be taken from both Eaton and Woburn is the importance of the lawyer's assessment not only of whether he has the expertise, but also whether he has the financial resources to pursue a case on the client's behalf in a contingency fee situation.

60. See *supra* Part II.D.2.

61. See, e.g., NATIONAL LEGAL MALPRACTICE DATA CENTER, CHARACTERISTICS OF LEGAL MALPRACTICE (1989). The National Malpractice Data Center was created by the American Bar Association to gather data to determine the extent of the malpractice problem. The report covers data gathered during the period from 1981 to 1985.

62. Probably the most striking illustration regarding a lawyer's duty to communicate with

provide a better introduction to the duty to communicate and its ramifications, even though the book is thin on details about the advice Schlichtmann actually gave the Eatons about the insurance company's offer.<sup>63</sup> The case provides a better example because the other facts—such as Schlichtmann's inexperience, the lack of percipient witnesses, and Schlichtmann's and the Eatons' relatively shaky financial situations—can generate a fruitful discussion on what information a lawyer should include in her advice to a client where the client must make a decision, such as deciding whether to accept a settlement offer.

### 1. Division of Authority Between Lawyer and Client

The Model Rules recognize that “[b]oth lawyer and client have authority and responsibility in the objectives and means of representation.”<sup>64</sup> In general, a lawyer has the right to make tactical and procedural decisions in the case because of her knowledge of the law.<sup>65</sup> In contrast, the client should determine what the objectives of the representation are, whether to file a lawsuit in the first place, and who will be named as a party to the suit.<sup>66</sup> In addition, the client must make all decisions that affect the resolution of the case or otherwise affect the client's substantive rights, such as the decision to settle the case or plead guilty.<sup>67</sup>

As part of providing competent representation, lawyers have a duty to communicate with their clients.<sup>68</sup> Of particular concern is that

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her client revolves around the settlement negotiations between Schlichtmann and Grace. HARR, *supra* note 1, at 405-48, 451-54. The lawyers had been involved in negotiations for a while when Tom Kiley, Schlichtmann's friend and another personal injury lawyer who had provided support throughout the Woburn case, said, “We've got a problem, Jan. I think you're ethically bound to tell the families about the offer.” *Id.* at 415. At that point, with a serious offer on the table, it was imperative Schlichtmann speak with the families before he pursued further negotiations. See *infra* notes Part III.B.1-2.

63. See HARR, *supra* note 1, at 62 (“He told the Eatons about the offer. ‘I think we'll win the case,’ he said, ‘and I think we'll get more money from the jury.’” Lowell Eaton told Schlichtmann to do what he “thought best.”).

64. MODEL RULES Rule 1.2, cmt. 1.

65. See, e.g., *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993); *State v. Ali*, 407 S.E.2d 183 (N.C. 1991). Note, however, that if a lawyer and client disagree about tactical decisions in a criminal case, the lawyer generally must follow the client's wishes. See, e.g., *Ali*, 407 S.E.2d at 189.

66. Limitations exist, however, on the client's right to make these determinations. For example, if the objective of the representation or the client's course of action is criminal or fraudulent, or if it will cause the lawyer to violate her ethical duties, the lawyer may not assist the client. MODEL RULES Rule 1.2(d), (e), cmts. 6-7.

67. See, e.g., *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 749 P.2d 90 (N.M. 1988); *Blanton*, 696 P.2d 645 (holding that a client has authority to make decisions that affect client's “substantive rights”).

68. See MODEL RULES Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4 (Communication); CAL. RULES Rule 3-500 (Communication), Rule 3-510 (Communication of Settlement

a lawyer keep the client apprised of matters about which the client has authority to decide.<sup>69</sup> Moreover, even when the client has delegated authority to the lawyer, the latter should keep the client informed of the matter's status.<sup>70</sup>

It is sometimes difficult to draw a line between "tactical" decisions and decisions that affect the client's substantive rights, particularly in criminal cases. For example, whether to waive a jury trial or testify in one's defense, although superficially "tactical" decisions, have potentially grave consequences for the client's substantive rights. Therefore, these decisions are decisions that are universally recognized as the client's to make.<sup>71</sup> In civil matters, lawyers are accorded more deference in making tactical decisions, within certain limitations.<sup>72</sup> Thus, while a lawyer may not stipulate to facts that would foreclose an essential defense,<sup>73</sup> the lawyer can make decisions as to which witnesses to present or how to conduct cross-examination.<sup>74</sup>

## 2. The Duty to Communicate Settlement Offers

A lawyer is obligated to keep his client informed about the progress of the case and to explain the matter to the client so that the client can make an informed decision about those matters for which the client has responsibility.<sup>75</sup> As already noted, it is the client's decision whether to settle a case,<sup>76</sup> and the lawyer must keep the client apprised

Offer); CAL. BUS. & PROF. CODE § 6068(m). See also *Calvert v. State Bar*, 819 P.2d 424 (Cal. 1991) ("Adequate communication with clients is an integral part of the competent professional performance as an attorney.")

69. See MODEL RULES Rule 1.4 cmt. 1.

70. *Id.*

71. See *Jones v. Barnes*, 463 U.S. 745 (1983); see also, e.g., *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (holding that a decision to testify is the client's).

72. See *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1117 (4th Cir. 1988).

73. See, e.g., *Linsk v. Linsk*, 449 P.2d 760, 763 (Cal. 1969).

74. See, e.g., *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974); *Nahhas v. Pacific Greyhound Lines, Inc.*, 13 Cal. Rptr. 299 (Cal. Dist. Ct. App. 1961).

75. See *supra* Part III.B.1. On the issue of communication generally, see MODEL RULE 1.4, which provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See also CAL. RULES Rule 3-500, which provides:

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

76. See MODEL RULE Rule 1.2(a) (providing that a "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter" and, in a criminal case, "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered,

of any good faith settlement offer.<sup>77</sup> Indeed, California has a separate rule that identifies the lawyer's duty to communicate settlement offers.<sup>78</sup>

### 3. The Eaton Case—An Illustration in Communication

In the Eaton case, Schlichtmann, who had expended \$15,000 preparing the case, rejected the insurance company's claim manager's offer to settle for \$5,000.<sup>79</sup> Before closing arguments on the last day of trial, the judge urged the parties to settle and suggested the defense lawyer offer \$75,000 to settle the case.<sup>80</sup> Schlichtmann advised the Eatons of this offer in the courthouse hallway. Although a court clerk advised him to take the offer, noting that a jury had awarded only \$20,000 in a recent, arguably more compelling case,<sup>81</sup> Schlichtmann told the Eatons: "I think we'll win the case and I think we'll get more

whether to waive jury trial and whether the client will testify"). See also MODEL CODE EC 7-7, 7-8; *Blanton v. Womancare, Inc.*, 696 P.2d 645, 650-51 (Cal. 1985) (holding that although the lawyer has implied authority concerning procedural matters, the client has ultimate authority concerning decisions that affect the outcome of the case or the client's substantive rights).

77. MODEL RULES Rule 1.4 cmt. 1. See, e.g., *In re Cardenas*, 791 P.2d 1032 (Ariz. 1990) (finding that attorney failed to inform client of settlement offer prior to rejection of offer and failed to explain matters to client in a manner that would allow the client to make informed decisions).

78. California Rule 3-510 provides in part:

(A) A member shall promptly communicate to the member's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
- (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

CAL RULES Rule 3-510. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 70-326 (1970) (noting that lawyer should inform his client of all settlement offers made by the opposing party).

79. HARR, *supra* note 1, at 61. We do not know whether Schlichtmann ever communicated this offer to the Eatons. If he did not, it could have been a violation of the Model Rules, which require the lawyer to communicate good faith offers to the client. Assuming the offer was made in good faith and not just an attempt to test the waters (compare Facher's "bouncing ball" offer later in the book, HARR, *supra* note 1, at 229-31), did Schlichtmann violate his duty to communicate such offers? It is possible Mr. Eaton had already authorized Schlichtmann to reject offers below a certain amount. It is also possible that the claims manager, who laughed when Schlichtmann told him how much he had spent to prepare the case, withdrew the offer when he said, "Maybe I'll come and watch this. I want to see the kid who blew the Eaton case." Finally, under California Rule 3-510, a lawyer need only communicate "written" settlement offers. Here, the offer was made over the phone. Even in California, however, if the offer could have been deemed a "significant development" within the meaning of California Rule 3-500, then Schlichtmann would be required to communicate it even if the offer was not in writing. "Any oral offers of settlement made to the client in a civil matter should also be communicated if they are 'significant' for purposes of rule 3-500." CAL. RULES Rule 3-510 Discussion.

80. In a sidebar conference, the judge said, "I think seventy-five thousand dollars is fair." HARR, *supra* note 1, at 62.

81. The case involved a drunk driver who "ran down a kid playing on his own lawn." *Id.* at 62.

money from the jury.”<sup>82</sup> Eaton then told Schlichtmann to “do what he thought best.”<sup>83</sup>

Despite the author’s inclusion of only a few details of what Schlichtmann and the Eatons discussed in deciding whether to accept the settlement, we can infer or hypothesize different scenarios that will generate an interesting classroom discussion. The remainder of this part of the Article demonstrates the directions in which the discussion could go.

Model Rule 1.4(b) requires that the lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>84</sup> Did Schlichtmann’s advice comport with this rule? A lawyer generally must explain the ramifications of a settlement offer. For example, if an accident victim has sued the insured client for damages in excess of the client’s policy limits but has offered to settle within the policy limits, the lawyer must explain to the client that she risks personal exposure for any sums beyond policy limits that a jury may eventually award.<sup>85</sup> Did Schlichtmann provide Eaton with the kind of information Eaton needed to make the decision to tell Schlichtmann to “do what [Schlichtmann] thought best,” in essence rejecting the settlement? If not, what should Schlichtmann have told the Eatons?

We are told only that Schlichtmann told the Eatons he thought they would win at trial and the jury would award more money than the insurance company offered.<sup>86</sup> Schlichtmann did not explain why he thought the jury would award more money than the settlement offer,

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82. *Id.*

83. *Id.*

84. Model Rule 1.4, Comment 1 elaborates on the information a lawyer is expected to provide the client under the duty to communicate:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

MODEL RULES Rule 1.4, cmt. 1.

85. See, e.g., *Lysick v. Walcom*, 65 Cal. Rptr. 406 (Cal. Ct. App. 1968) (holding that an attorney’s failure to communicate information to client so as to allow client to make intelligent decision regarding representation was a violation of professional standards of care); *Levier v. Koppenheffer*, 879 P.2d 40 (Kan. 1994) (holding that insurer’s failure to inform client of settlement offer and value of plaintiff’s injuries breached duties of good faith and communication); *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988) (holding that a lawyer retained by insurance company to represent insured was obligated to advise insured that accident victim, whose complaint sought damages in excess of lawsuit, had made a settlement offer that came within policy limits).

86. HARR, *supra* note 1, at 62.



nor did he explain what the court clerk had told him about the other case. Moreover, the author tells us that "after nearly a year of work, Schlichtmann wanted to hear what the jury would say,"<sup>87</sup> suggesting that Schlichtmann might have been more interested in hearing his first jury verdict than in doing what was best for his client.<sup>88</sup>

Should not Schlichtmann have articulated why he thought his clients would do better before a jury? It is possible he did. Although the book contains only one line illustrating his advice to the Eatons, it is likely his advice was more substantial.<sup>89</sup> For example, he may already have gone over the law and the evidence he had developed to prove his case. Moreover, before Schlichtmann had presented the case to the jury, the insurance company had offered only \$5,000. The judge, an experienced trial lawyer, was now suggesting \$75,000 was a fair offer.<sup>90</sup>

As to the case the court clerk described in urging Schlichtmann to accept the settlement, we are not told whether Schlichtmann mentioned it to the Eatons. Although that case may have appeared more compelling, we do not know all the facts. There may have been other factors at play in the previous case that warranted the jury's awarding only \$20,000 to the boy's parents. Schlichtmann could have fairly made the evaluation that the outcome of the previous case was not relevant to the decision whether to accept the \$75,000 settlement offer. Further, merely wanting to hear "what the jury would say" does not by itself condemn Schlichtmann's actions. Schlichtmann had spent a substantial amount of time and money preparing the case<sup>91</sup> and, although lawyers

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87. *Id.*

88. The Eaton case was Schlichtmann's first opportunity to argue a case before a jury and get "trial experience." Should Schlichtmann have told the Eatons that he was relatively inexperienced? Should he have told them that he had never actually tried a case? Is this the kind of information the Eatons would have needed to make an informed decision about the offer and to better evaluate Schlichtmann's opinion of their chances of prevailing before a jury? Indeed, we might well ask whether Schlichtmann should have mentioned his relative lack of experience during the initial consultation with Eaton. It is possible he did and that informing Eaton had no effect on Eaton's decision to retain Schlichtmann. After all, the first lawyer had told Eaton that the case was "hopeless" and, as noted above, most experienced personal injury lawyers probably would not have taken on the case. See *supra* notes 52-54 and accompanying text. Indeed, Eaton may very well have been to other lawyers who had rejected his case. These are all questions worth pursuing with students, many of whom will face similar situations as they attempt to build a practice.

89. Recall that during the time Schlichtmann was meeting with the Eatons, the defense counsel, McCarthy, had to contact his client, the insurance company, and obtain authorization to make the \$75,000 offer. HARR, *supra* note 1, at 62. This probably would have taken longer than a few minutes.

90. *Id.* In addition, by subsequently agreeing with the judge on the \$75,000 figure, the insurance company, through its experienced trial lawyer, demonstrated it was aware the jury could return with a much larger figure.

91. Spending more money prosecuting a case than the defendant offers in settlement is not a situation most experienced lawyers would encounter. An experienced lawyer becomes adept at

can never be sure, juries so often being unpredictable, he probably had confidence in the case he had put together, a confidence buttressed by the insurance company's increased settlement offer. Communicating his confidence to the Eatons would not be unethical. Thus, while a quick reading of the Eaton case facts suggests Schlichtmann violated his duty to discuss the ramifications of rejecting the offer, further consideration suggests he may have had good reason at that point to urge them to hear from the jury.

After he returned to court and refused the offer, however, the judge said, "I was a trial lawyer for a long time. I think you ought to give this very serious thought."<sup>92</sup> This was not a court clerk's opinion. It was the opinion of a judge, an experienced trial lawyer, probably offered because the judge knew from Schlichtmann's performance during the trial how inexperienced he was.<sup>93</sup> Was Schlichtmann obligated to request a recess so he could tell his clients what the judge had said? Again, it is difficult to say with certainty because we do not know precisely what Schlichtmann told the Eatons during their later conference in the hallway. It is likely Schlichtmann was aware that the guaranteed settlement of \$75,000, not dependent on the fickleness of a jury, was a good offer. He knew the Eatons were not well-to-do<sup>94</sup> and could walk away with nothing if the decision were left up to the jury. Should he have told them what the judge had said after he returned to the court?

This is a difficult question. If, in the hallway conference, Schlichtmann had adequately disclosed the advantages and disadvantages of proceeding to a jury verdict, then the Eatons' decision probably would not have been affected by the judge's further statements. The Eatons already should have been aware that the judge favored settlement, and any further information would not change their decision. Moreover, the Eatons had lost their son, had been stonewalled by both the construction and insurance companies, and had even been abandoned by their first lawyer. At this point, a money settlement, where the defendant admits no wrongdoing, may not have been what the Eatons wanted from their suit.<sup>95</sup> It is possible that the parents

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evaluating a case and estimating how much it will cost to bring to trial. If the lawyer determines the probability of losing money on the case is great, she will not accept the case. See *supra* note 54.

92. HARR, *supra* note 1, at 62.

93. We are told the judge often "would summon Schlichtmann to the bench and explain the rudiments of trial technique." *Id.*

94. Consider the claims manager's statement that \$5,000 was "more money than this family has ever seen before." *Id.* at 61.

95. Money is not what plaintiffs always want to get from a lawsuit. Compare the Grace settlement, where the judge would vacate the verdict and order a new trial. *Id.* at 451. This did not sit well with some of the families who repeatedly had stated they were not suing for the

wanted vindication in court as much or more than they wanted money. They wanted to hear from a jury that the company, and not they or the child's deceased grandmother, was responsible for their son's death. Under those circumstances, the Eatons might have been willing to risk the chance of getting no recovery.

If that were true and Schlichtmann had already discussed the possibility of no recovery with the Eatons, then he probably was within ethical bounds by not seeking further consultation with the Eatons after the judge's comment. Given the facts we have, however, especially the judge's strong language when Schlichtmann returned to court, he probably should have requested a recess and mentioned the judge's opinion.<sup>96</sup>

There are other situations in *A Civil Action* where the lawyer's duty to communicate arises, most often in the relation to communicating settlement offers and their ramifications to clients. These include the Grace negotiations toward the end of the book<sup>97</sup> and the O'Connell case.<sup>98</sup> These situations also raise other interesting issues, such as the rules that prohibit a lawyer from participating in an aggregate settlement by all the lawyer's clients unless all the clients agree,<sup>99</sup> and whether the lawyer must disclose to a client his interest in settling a case where he intends to use his fee to fund another lawsuit.<sup>100</sup> They are both topics worth pursuing in class.

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money but rather to obtain an apology from the companies that had caused the pollution that killed their children. *See id.* at 442.

96. The author may give us some insight into what actually transpired when he writes, "Schlichtmann's gamble had paid off, but it had been foolhardy, dignified only by his inexperience and the fact that he'd won. It was not necessarily the best sort of lesson for a fledgling lawyer." *Id.* at 63. This suggests that Schlichtmann's recommendation to go to the jury was wrong, and it was only because he was inexperienced that he had even suggested it. Any experienced lawyer would probably readily have taken the \$75,000, avoiding the dangers of an unpredictable jury.

97. *See supra* note 62 and accompanying text.

98. HARR, *supra* note 1, at 322-23, 341-42. *See also infra* note 100.

99. "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client consents after consultation, including disclosure of the existence and nature of [all the claims involved] and of the participation of each person in the settlement." MODEL RULES Rule 1.8(g). *See also* CAL. RULES Rule 3-310(D). This situation arose during the Grace negotiations. Some of the families would likely be dropped from the suit in light of the jury's responses to the special verdict, and, therefore, might be more interested in settling their claims than the other families who could remain in the suit. HARR, *supra* note 1, at 441-43. Schlichtmann recognized this and understood his ethical obligations that all the families agree to the settlement or there would be none. *Id.* at 442.

100. Compare the ethical considerations involved in the Unifirst settlement with the O'Connell settlement. *Id.* at 322-23; 341-42. In the former case, where the settlement proceeds were earmarked to fund the very same suit from which the settlement was obtained, there were no conflict of interest concerns. In the O'Connell case, however, there was pressure on the law-

## IV. DUTIES OF CONFIDENTIALITY AND LOYALTY

One of the more intriguing scenes in *A Civil Action*, a scene that sets the tone for the interaction between and among the various parties and lawyers throughout the lawsuit, is the Rule 11 motion Cheeseman filed early in the suit. In his motion, Cheeseman accused Schlichtmann not only of filing a lawsuit before Schlichtmann had sufficient facts to support his legal claims, but also of the rarely invoked claim of barratry, which is the groundless stirring up of lawsuits.<sup>101</sup>

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yers to settle the suit of one plaintiff, O'Connell, so they would have sufficient resources to fund the Woburn suit. This was a potential conflict of interest that was never realized. From the description of the O'Connell negotiations, Schlichtmann et al. comported themselves in an ethical manner. *Id.* at 324 (after being told the insurance company had offered only \$175,000, Phillips said, "we'll have to put the case on the trial calendar for next fall and hope you're finished with Woburn by then. We can't sell out. We've got to settle for fair value or we won't settle.").

101. *Id.* at 100-19. Barratry is related to champerty, the unlawful maintenance of a lawsuit, that is, "where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation." *Saladini v. Righellis*, 687 N.E.2d 1224, 1225 (Mass. 1997). Barratry is probably better understood as a lawyer "soliciting" business by either personally or through an agent approaching clients for their legal business. Generally, lawyers are prohibited from soliciting business in-person (including live telephone calls) from prospective clients, the notorious "ambulance chasing." See MODEL RULES Rule 7.3; MODEL CODE DR 2-104(A). As already discussed, *supra* notes 30-40 and accompanying text, it is believed the legal system functions best if both parties are represented by competent counsel. A person's choice of lawyer is a very important decision. Because it is feared that a lawyer, someone skilled in the persuasive arts, would be able to unduly influence a prospective client's choice, the ethical codes consistently have prohibited solicitation. MODEL RULES Rule 7.3, MODEL CODE DR 2-104. See *Edenfield v. Fane*, 507 U.S. 761 (1993). The bar on solicitation in both the Model Rules and the Model Code applies regardless of whether or not the suit for which the lawyer solicits the plaintiff is groundless or not. Although barratry also involves solicitation of clients—the lawyer cannot "stir up" a suit without a client—it goes further in that the lawyer solicits clients so that he can file a meritless or "groundless" suit. Presumably, the lawyer who engages in barratry anticipates he will be able to force a settlement of some of the suits regardless of their merit. Finally, it should be noted that solicitation of prospective clients where pecuniary gain is not the primary motive for solicitation is not barred. MODEL RULES Rule 7.3; *In re Primus*, 436 U.S. 412, 422 (1978).

Other situations arise in the book where a teacher could discuss a lawyer's solicitation of prospective clients. Neither a lawyer, nor an agent for a lawyer, may solicit business from a prospective client. Consider, for example, when the Woburn lawyer who handled her divorce, called Donna Robbins, said he had been following events in the newspaper, and suggested a lawsuit against the city. HARR, *supra* note 1, at 45. He then suggested Mulligan as a good candidate to be her lawyer. *Id.* We do not know whether the lawyer had an agreement with Mulligan, but we do know that he previously had referred Donna Robbins to Mulligan. Given that both Reed and Mulligan were proponents of "referral fees," *id.* at 64, 455, we might infer that he and the Woburn lawyer had a quid pro quo relationship. If true, the lawyer's contacting Donna Robbins was a violation, as would any referral fee Mulligan would pay the lawyer. See *infra* Part IV.B.

As a counterpoint to this situation, a professor could also refer to the incident where Schlichtmann was retained by the ex-husband of one of the victims of the Piper Arrow case. See HARR, *supra* note 1, at 64. There, the ex-husband met Schlichtmann's secretary in a bar, he told her he was looking for a lawyer, and she referred him to Schlichtmann. This was not a case, however, where the secretary sought out the husband. Had she done so, Schlichtmann would have been liable for improper solicitation of legal business because his secretary is deemed his agent. Of

Barratry itself is of no particular interest. Indeed, since the events of *A Civil Action*, the Supreme Judicial Court of Massachusetts ruled that barratry would no longer be recognized in that state.<sup>102</sup> The Rule 11 motion and ensuing hearing, however, provide an excellent introduction for students to several ethics issues: the attorney-client privilege (the "privilege") and how it differs from the lawyer's duty not to disclose her client's confidential information (the "duty of confidentiality");<sup>103</sup> a lawyer's duty not to file frivolous lawsuits;<sup>104</sup> and a lawyer's duty of loyalty to his or her client.

#### A. *The Facts Underlying the Barratry Allegations*

The facts that gave rise to Cheeseman's Rule 11 motion alleging barratry involved Roland Gamache, an adult Woburn resident who was diagnosed with leukemia.<sup>105</sup> Schlichtmann's discussion of strategy with the potential plaintiffs at the Trinity Episcopalian Church preceded Gamache's diagnosis, and so Gamache did not become involved in the lawsuit until April 1982, about a month before Schlichtmann filed the complaint. One of the other plaintiffs, Gamache's neighbor Joan Zona, had asked Gamache if he wanted to join the suit against the polluters. He decided to join and met with Schlichtmann in Boston. Although Gamache and his wife spent an entire day with Schlichtmann "answering questions about themselves," Schlichtmann apparently never identified precisely who the defendants were.<sup>106</sup>

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course, given the supposition involved in both these scenarios, a reader could well decide they are mere stirrings up of groundless ethical discussions.

102. *Saladini*, 687 N.E.2d at 1224.

103. The attorney-client privilege and duty not to disclose client information are two separate but related concepts central to the practice of law that many practicing lawyers nevertheless confuse.

104. Federal Rule 11, which was amended in 1993, generally prohibits a lawyer from filing suits that are not supported by the facts or law, or which are filed for an improper purpose such as harassing the opponent or increasing the cost of litigation. See FED R. CIV. P. 11. Model Rule 3.1 prohibits a lawyer from bringing or defending a proceeding, or asserting or controverting an issue in the suit unless there is a nonfrivolous basis for doing so, essentially tracks Rule 11's prohibitions. Bar discipline for violations of Model Rule 3.1, however, is imposed only in the rarest cases. Thus, Rule 11 probably provides the most important practical sanction if a lawyer fails to verify the facts or law upon which she relies: Rule 11 awards attorney's fees to the party that prevails on the motion. Despite Rule 11's practical importance to regulating lawyer conduct in the litigation contest, a detailed discussion of its intricacies is beyond the scope of this introduction to using *A Civil Action* to supplement a legal ethics course. I will discuss Model Rule 3.1 only briefly in relation to Cheeseman's assertion of the attorney-client privilege. See *infra* Part IV.C.

105. HARR, *supra* note 1, at 101-03.

106. It is likely Schlichtmann would have mentioned that they were suing Grace and Beatrice, but he may not have mentioned that the tannery owned by Beatrice was part of the lawsuit.

Several months later, Gamache asked Riley, the tannery's president and a defendant in the case, for a favor. Riley was aware Gamache was a plaintiff and angrily questioned him. Gamache admitted he was unaware Riley was a defendant and stated, "I didn't realize your tannery was part of the lawsuit. The lawyers were looking for people to join the case. All we want to do is stop the big chemical companies from dumping."<sup>107</sup> Riley then called Neil Jacobs, one of Facher's partners, and told him that Gamache was unaware that Riley was a defendant, and added that "[h]e said he did it because the lawyer got him into it."<sup>108</sup>

Although Beatrice, the tannery's parent corporation, had decided not to join Cheeseman's Rule 11 motion, Jacobs called Cheeseman and described Riley's meeting with Gamache.<sup>109</sup> Based on this information, Cheeseman included the barratry allegation in his Rule 11 motion. Cheeseman stated in support of the allegation that "[w]e have highly specific and direct evidence to support this charge, but at this time, it is based on privileged communication from counsel for W.R. Grace's codefendant."<sup>110</sup> The rationale for Cheeseman's assertion of privilege was that Riley's comments, which were the basis for the allegation, had been *communicated* to his lawyer Jacobs<sup>111</sup> and, thus, were protected by the attorney-client privilege. Due to the alleged privileged nature of the communication, Cheeseman did not reveal the substance of Riley's allegations either in the motion or during the Rule 11 hearing.<sup>112</sup>

### B. *The Attorney-Client Privilege and the Duty Not to Disclose the Client's Confidential Information*

It is important to distinguish between the attorney-client privilege on the one hand and the lawyer's duty not to disclose his or her client's confidential information on the other. The attorney-client privilege is a narrow evidentiary privilege that allows a client to pre-

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107. *Id.* at 103.

108. *Id.* at 104.

109. *Id.*

110. *Id.* at 105.

111. *See infra* Part IV.B.1.

112. It is important to understand that Schlichtmann was completely in the dark about what the "highly specific and direct evidence" could be. He had no idea, in fact, that the "evidence" had been obtained from one of his clients. This was not a case where he could simply interview all his clients to see what they might have said among themselves or to other persons, and which then could have gotten back to other side. In addition to being in the dark, if the judge found him liable for barratry, the judge would have reported him to the state bar. Not knowing what evidence would be presented against him left Schlichtmann understandably upset before the motion hearing. HARR, *supra* note 1, at 108-09.

vent a witness from revealing confidential *communications* between client and lawyer (or either's agents).<sup>113</sup> It applies whenever the authority of the state, through its subpoena or contempt power, is invoked to *compel* the giving of information.<sup>114</sup>

The legal system is adversarial, and a lawyer cannot adequately represent his client unless he knows the client's side of the story. The policy underlying the privilege is to encourage candor between the client and lawyer.<sup>115</sup> Without the assurance of the attorney-client privilege, it is believed the client would not reveal the information necessary to enable effective representation.<sup>116</sup> However, when the client is assured the lawyer cannot be compelled to disclose communications between lawyer and client, the client will disclose the facts the lawyer needs for competent representation.<sup>117</sup> This in turn "promote[s] the broader public interests in the observance of law and administration of justice."<sup>118</sup>

The lawyer's ethical duty to preserve a client's confidences and secrets, on the other hand, is broader. It applies in every other situa-

113. The attorney-client privilege is governed by statute in most states. *See, e.g., CAL. EVID. CODE* § 952. Nevertheless, the statutes appear to be for the most part codifications of the common law rule. *See, e.g., Spectrum Systems Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1059-60 (N.Y. 1991) (describing attorney-client privilege as "a mere reenactment of the common-law rule"). *See also* J.F. Rydstrom, *Annot., Applicability of Attorney-Client Privilege to Communications with Respect to Contemplated Tortious Acts*, 2 A.L.R. 3d 861 § 1 n.4 (1965). No federal statute or rule sets out a federal attorney-client privilege. Instead, the Federal Rules of Evidence provide a more general framework for deciding evidentiary questions based on a claim of privilege:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. *See also* *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

114. To invoke the privilege, it is not necessary to actually be present in a proceeding in a court or other government tribunal, nor is it necessary that a *state official* be attempting to compel the disclosure of information. Depositions and other discovery requests propounded by nongovernment, private lawyers also implicate the privilege because lawyers conduct discovery under the general authority of the courts and, thus, state authority. A lawyer compels compliance with a discovery request by invoking the state's authority and filing a motion in court to compel the other party's compliance with Federal Rule of Civil Procedure 26.

115. *Swidler & Berlin*, 524 U.S. 399 (citing *Upjohn Co.*, 449 U.S. at 389).

116. *See, e.g., Swidler & Berlin*, 524 U.S. at 403; *Jaffee v. Redmond*, 518 U.S. 1, 11-12, (1996). *See also* MODEL RULES Preamble para. 7, Rule 1.6 cmts. 2 & 4.

117. *See infra* notes 135-39.

118. *Upjohn Co.*, 449 U.S. at 389.

tion not covered by the privilege, that is, the duty exists regardless of whether someone invoking the state's power is trying to compel the lawyer to disclose information and regardless of whether the lawyer learned of the information from the client or a third person. Put another way, it is the lawyer's duty not to "gossip" about his client<sup>119</sup>—to not voluntarily disclose information about the client that is not public knowledge.<sup>120</sup>

Schlichtmann asked the court to order Cheeseman to disclose the "evidence" upon which he based his motion, but Cheeseman demurred. Because Cheeseman's refusal to disclose the information before a tribunal implicated the attorney-client privilege, it is discussed first. The lawyer's ethical duty not to disclose confidential client information is discussed after the privilege.<sup>121</sup>

### 1. The Attorney-Client Privilege

Because the attorney-client privilege is a privilege that prevents the trier of fact from obtaining evidence that would assist in discovering the truth, it generally is narrowly construed. That is, the privilege is not applicable unless specific requirements are satisfied. Wigmore set out the rule governing the privilege's application:

(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.<sup>122</sup>

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119. Referring to the duty as a "duty not to gossip" is not intended to belittle the lawyer's duty to preserve client confidential information, but rather to impress upon the reader the broad reach of the duty. It is a duty that is of paramount importance to preserving the lawyer-client relationship. The codification of California's duty in section 6068(e) of the California Business and Professional Code neatly communicates that the duty is akin to sacred:

It is the duty of an attorney . . . :

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client.

The Model Rules, while perhaps not so emphatic as the California statute, nevertheless state that a "lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry the representation, and except as stated in paragraph (b)." MODEL RULES Rule 1.6(a).

120. Indeed, some authorities argue that the proscription on discussing client confidential information applies even when the information has subsequently become public. See, e.g., WOLFRAM, *supra* note 12, at § 6.7.4. See also State Bar of Cal. Comm. on Professional Responsibility and Conduct CAL 1986-87 (1986) (holding that a lawyer may not reveal client's criminal record to court, even though criminal record is public).

121. See *infra* Part IV.B.2.

122. 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961) (footnote omitted).



Under this characterization, Riley's communication to Jacobs<sup>123</sup> was privileged. Riley was discussing the lawsuit with Jacobs when he told Jacobs about his meeting with Gamache; thus, Riley was seeking legal advice<sup>124</sup> from Jacobs, a "legal adviser," acting in his capacity as Riley's lawyer.<sup>125</sup> Riley and Jacobs were talking over the phone, so the conversation was made in confidence.<sup>126</sup> Therefore, the client Riley can prevent the lawyer's disclosure of the legal consultation's details or refuse to disclose what he said to Jacobs, even in the face of testimonial compulsion. The client, Riley, can waive the privilege and allow his lawyer to testify or even disclose the details of the legal consultation himself. That, however, did not happen. Instead, Cheeseman, counsel for Beatrice's codefendant Grace, claimed the privilege when Judge Skinner questioned him.<sup>127</sup>

The foregoing paragraph raises several questions. The answers to these questions can elucidate the privilege's parameters for a student: (1) How can a lawyer claim the attorney-client privilege prevents him from disclosing information when the information is from a

The Restatement (Third) of The Law Governing Lawyers, reduces the number of elements, stating the rule as follows:

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 135 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (Proposed Final Draft No. 1 1996)

123. HARR, *supra* note 1, at 92-93.

124. Even if one were to argue that Riley's comments on Gamache were not directly related to the lawsuit, a questionable argument at best, the comments are still privileged. Where the client has sought legal advice from a lawyer, the fact that some of what was said is nonlegal and incidental to the representation does not result in loss of the privilege. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

125. Two points need to be made here. First, it is critical that the lawyer was consulted in her capacity as a legal adviser and not as a business adviser or a friend. *See, e.g., People v. Gionis*, 892 P.2d 1199 (Cal. 1995) (holding that attorney client privilege is not applicable to conversation between criminal defendant and a lawyer where lawyer told the defendant he would not represent either the defendant or his wife, who had just served him with divorce papers, and where the defendant nevertheless proceeded to discuss the case with the lawyer). Second, I have referred to Jacobs as Riley's lawyer for simplicity of discussion. Jacobs and Facher represented Beatrice, the parent corporation of the tannery. Strictly speaking then, Jacobs was not Riley's lawyer. In fact, we know that Riley had retained a personal lawyer, Mary Ryan, in the matter. HARR, *supra* note 1, at 462-64. Nevertheless, by virtue of the tannery's being a subsidiary of Beatrice, and Riley's and Beatrice's interests being the same, Riley's communications would have been privileged. *See infra* notes 136-39 and accompanying text.

126. Under the Federal Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-22 (1994 & Supp. 1998), a privilege for otherwise privileged material is not waived solely because it was transmitted electronically and then intercepted. 18 U.S.C. § 2517(4).

127. HARR, *supra* note 1, at 112-13.

conversation between opposing parties to a lawsuit, plaintiff Gamache and defendant Riley? (2) Assuming a privilege attaches to the Jacobs-Riley consultation, why could Facher have not simply given his consent to Cheeseman's disclosing the Gamache-Riley conversation? In other words, if the tannery is the client, who can waive the privilege: the tannery, the tannery's lawyers, or Riley? (3) How can Cheeseman claim the privilege; was the privilege not waived and lost when Jacobs, counsel for Beatrice, told Cheeseman, counsel for Grace, about his conversation with Riley? (4) By disclosing his conversation with Gamache to Jacobs, did Riley bring that conversation within the privilege so that he (Riley) would not have to testify about the underlying facts (the Gamache-Riley conversation)?

First, we need to identify precisely what the privileged communication was. The defendants in this case were not claiming that the conversation between Gamache and Riley was privileged; after all, neither was a lawyer. Nor could a party to a lawsuit expect that a conversation with an opponent was confidential. Rather, the claimed privileged *communications* were made during the legal consultation between Riley and his lawyer, Jacobs, the subject of which was the lawsuit.<sup>128</sup> As already discussed, that consultation is privileged.<sup>129</sup>

The next question asks who the client is for purposes of waiving the privilege. The defendant in the lawsuit was Riley's tannery, but Riley himself relayed the details of the Gamache conversation to Jacobs. Who then is empowered to make the decision to invoke or waive the privilege?

Although a corporation does not have the same Fifth Amendment right not to incriminate itself that an individual has,<sup>130</sup> it is accorded the attorney-client privilege concerning communications between its *human* constituents and its lawyers.<sup>131</sup> A corporation can create, assert, and waive the privilege only through the acts of its employees and officers.<sup>132</sup> Moreover, it is not just the communications of the corporation's controlling management group that are protected. Communications of low-level employees can also be protected.<sup>133</sup>

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128. See *infra* note 146 and accompanying text.

129. See *supra* note 124 and accompanying text.

130. *McPhaul v. United States*, 364 U.S. 372, 380 (1960).

131. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

132. *Id.* at 390-91.

133. In concluding that the communications from low-level Upjohn employees to the corporation's employees were privileged, the Supreme Court explained:

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and

Here, Riley, the president of the tannery, a member of the control group (indeed, probably *the* control group by himself), communicated information concerning the lawsuit to Jacobs. Because only the corporation, here the tannery, can waive the privilege,<sup>134</sup> its lawyers (Facher and Jacobs) could not reveal the substance of Jacobs' consultation with Riley without the tannery's permission. The tannery's permission could be communicated only through one of its human constituents, Riley. Therefore, Facher had to leave the courtroom when Judge Skinner asked him. Facher had to call Riley, the de facto holder of the privilege Cheeseman asserted, and obtain a waiver from Riley to reveal the Gamache conversation on which the barratry allegations were based.<sup>135</sup>

The third issue asks why the privilege was not waived when Jacobs told Cheeseman about his conversation with Riley. If the conversation was between Riley and his lawyer, how could Cheeseman claim the privilege? Neither Riley nor the tannery were clients of Cheeseman, and the privilege generally will be deemed waived if revealed to a third person.<sup>136</sup> Cheeseman's and Facher's clients, however, were engaged in a "joint defense." Courts have generally applied a "joint defense" or "pooled information" doctrine, holding that

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tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. . . . Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

*Id.* at 394-95 (footnotes omitted). The rationale for protecting communications of low-level employees is that the legal system functions best when the lawyer, in this case the lawyer for the corporation, knows the facts. *Id.* at 391-92. It is often the lower-level employees who are familiar with the facts. If there were no privilege for their communications, then a lawyer would have no incentive to question them, which would undermine the central rationale for allowing the privilege in the first place.

134. See, e.g., *Innes v. Howell Corp.*, 76 F.3d 702, 712 (6th Cir. 1995); *In re Grand Jury Proceedings*, 570 F.2d 562, 563 (6th Cir. 1978).

135. Note that we are only discussing the lawyers' authority to disclose what Riley and Jacobs discussed in their conversation. Just because Riley has communicated the facts of his conversation with Gamache, however, does not make that conversation privileged. See *infra* notes 142-46 and accompanying text. Finally, Facher probably did not leave the courtroom to call Riley to obtain his permission to reveal the contents of the Riley-Gamache conversation. It is more likely that the tannery's parent, Beatrice, which ultimately would pay for any recovery against the tannery, was "calling the shots" in the litigation. Facher probably left to contact the persons at Beatrice's headquarters who were overseeing the litigation.

136. See, e.g., *Church of Scientology v. Cooper*, 90 F.R.D. 442 (S.D.N.Y. 1981). Moreover, some authorities have held that if a communication *could have* been overheard, even if the lawyer and client did not intend it to be, the privilege can be lost. See, e.g., New York State Bar Association Comm. on Professional Ethics Op. 641 (1993) (holding that lawyers must take care when disposing of papers that contain client confidences).

communications between and among co-parties and their counsel in civil and criminal actions are privileged.<sup>137</sup> Thus, Jacobs telling Cheeseman about his conversation with Riley would not have waived the privilege.

However, such communications come within the privilege only so long as a "community of interest" between or among the parties exists or the parties communicated with each other to advance a common interest.<sup>138</sup> Facher had declined to join in Cheeseman's Rule 11 motion.<sup>139</sup> Moreover, only after Facher had made this decision did Jacobs tell Cheeseman about his conversation with Jacobs. Could the privilege, which only attaches where co-parties have a common interest, have survived Jacobs' conversation with Riley? Because the information had been communicated so that one of the "joint parties" could develop its own strategy, it arguably was not within the "pooled information" exception. Nevertheless, despite the apparent "schism" between the Woburn defendants on early strategy, Grace's prevailing on the Rule 11 motion would also accrue to the benefit of Beatrice and the tannery. Thus, the community of interest remained intact and the privilege could be asserted.

Two issues remain regarding the attorney-client privilege that the barratry allegations raise. Although Cheeseman and Grace probably could assert the privilege with respect to the Jacobs-Riley conversation, most students will probably be troubled by one lawyer asserting a privilege to avoid disclosing the basis for a motion that raises questions about another lawyer's professional reputation. Two things are troubling here. First, most readers probably cannot help but feel that the Gamache-Riley conversation cannot be privileged,<sup>140</sup> that is, Riley's merely relating what transpired to Jacobs should not be able to insulate Riley's conversation with Gamache from disclosure.

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137. The doctrine can apply to both plaintiffs and defendants. It is recognized for certain communications between parties who share a common interest in a lawsuit but are represented by different lawyers. See WOLFRAM, *supra* note 12, at § 6.4.9 (pooled information doctrine). See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 140 (N.D. 1993); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

138. WOLFRAM, *supra* note 12, at § 6.4.9. Consequently, if there is a falling out among the parties, there would be no further protection for confidential information revealed in joint conversations. This may have been one of the reasons why Facher was upset with Cheeseman for impleading Unifirst into the lawsuit. Aside from the fact that Unifirst was peripherally involved and would want to settle the suit—thus replenishing the plaintiff's war chest—there was no incentive for Unifirst to cooperate with either Beatrice or Grace. Thus, neither Facher nor Cheeseman could expect any of their communications with Unifirst would be privileged.

139. In describing Facher's decision, the author relates one of the more memorable lines in the book: "'I'm a great believer in doing things once,' Facher liked to say. 'If you're going to knock a guy down, do it so he can't get up again.'" HARR, *supra* note 1, at 104.

140. See *supra* note 127 and accompanying text.

Second, assuming the students' impression about the nonprivileged nature of the Gamache-Riley conversation is accurate, most students will view Grace's assertion of a technical privilege as gratuitous gamesmanship, unfair not only to Schlichtmann, but also to the legal system. Should not Cheeseman have simply obtained the tannery's waiver before he filed his motion? This second question is addressed in the section outlining the duty to not file frivolous law suits.<sup>141</sup>

With respect to the former point, the readers' gut feeling is correct: Riley's telling Jacobs about the Gamache conversation does not make that conversation privileged. Were Riley called to the stand and placed under oath, Riley would have to testify truthfully about what happened when Gamache came to ask a favor.<sup>142</sup> In other words, the privilege does not protect the underlying facts that are discussed during the attorney-client conference.<sup>143</sup> It does, however, protect the *communication* between lawyer and client.<sup>144</sup> What this means in the context of the barratry allegations is that lawyer Jacobs—and, for that matter, Facher and Cheeseman as well<sup>145</sup>—cannot be called to testify at all. Their knowledge of the Gamache-Riley conversation comes only from the privileged conversation Jacobs had with Riley. Moreover, even though Riley would have to disclose what he and Gamache said to one another, that is, testify about the *underlying facts* disclosed during the privileged conference with his lawyer, he would not have to testify about what he told Jacobs or Jacobs said to him. Again, that consultation is privileged.<sup>146</sup>

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141. See *infra* Part IV.C.

142. Realistically, Schlichtmann would not even call Riley if he had even known the evidence upon which Cheeseman was basing the barratry allegations was a conversation one of the defendants had had with one of Schlichtmann's clients. All Schlichtmann would have to do is question his clients about whether they had met with any of the defendants. Of course, it is possible Gamache would have been embarrassed by the problems he had caused and reticent about his participation, but most likely Schlichtmann would have been able to extract the information so that he could then counter the barratry charges. Nevertheless, for purposes of discussion, we will assume that Riley is called to the stand.

143. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

144. *Id.* at 395. The privilege protects not only the client's communications to the lawyer, but also legal advice the lawyer gives to the client. See, e.g., *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997); *In re LTV Securities Litigation*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981); CAL. EVID. CODE § 952 ("confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.").

145. As discussed *supra* notes 142-46 and accompanying text, Cheeseman need not testify because of the "pooled information" doctrine.

146. See *supra* text accompanying note 144. This is an important distinction. It means that a client cannot insulate facts or documents—underlying facts—from discovery simply by disclosing them or giving them to his lawyer. The client still has to testify about those underlying facts and the lawyer would have to produce the documents during discovery. The tobacco

## 2. Lawyer's Duty to Preserve Client's Confidences

Because the barratry allegations and conference involved the attorney-client privilege, little has been said about the broader duty to preserve clients' confidential information, the aforementioned "duty not to gossip."<sup>147</sup> The Rule 11 conference nevertheless provides a meaningful counterpoint to one of the most important duties a lawyer owes her client.<sup>148</sup> Unless a client is relatively certain that his lawyer will neither disclose embarrassing information about him, nor use his confidential information either to the client's advantage or the lawyer's advantage, the client cannot trust the lawyer and their relationship will fail.<sup>149</sup> Moreover, the lawyer's duty of confidentiality is central to other issues that arise in legal ethics, including conflicts of interest<sup>150</sup> and client perjury.<sup>151</sup>

As is evident from the previous discussion on the barratry motion, the attorney-client privilege acts as a shield with a narrow

companies litigation has unfortunately revealed that the companies in fact were able to insulate otherwise discoverable documents such as unfavorable research reports by delivering them to their lawyers and then claiming they were privileged. See, e.g., Ronald L. Motley & Tucker S. Player, *Issues in "Crime-Fraud" Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C. L. REV. 187 (1998). The conduct of the lawyers in tobacco litigation during much of the century is viewed as one of the great legal ethical embarrassments of the profession. See, e.g., *id.*; Richard A. Zitrin & Carol M. Langford, *Ethics in Ashes: Big Tobacco's Lawyers Hide Behind the Cloak of Privilege*, 18 CAL. LAW 46 (1998). With respect to a client's attempt to conceal documents by delivering them to her lawyer, consider the reference in the book to Riley's personal lawyer, Mary Ryan, admitting "that she had 'tannery documents coming out of my ears,'" some of which were at her office, others of which were at a warehouse. HARR, *supra* note 1, at 481. These documents included the chemical formula books that could have been relevant to the case. *Id.* In her defense, Ryan argued that Schlichtmann had never asked for the documents and was "'aware of numerous, numerous files that were not searched.'" *Id.* A professor might question students how a lawyer, in possession of such documents, should respond to a document request directed to the client which requests all documents "in your [*i.e.*, the client's] possession."

147. See *supra* note 119 and accompanying text.

148. See, e.g., MODEL RULES Rule 1.6 cmt. 5 (comparing the duty of confidentiality with the attorney client privilege, stressing that unlike the privilege, which requires that the confidential information have been acquired from the client, the duty applies regardless of the source of the information).

149. Comment 4 to Model Rule 1.6 notes:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

150. See, e.g., MODEL RULES Rule 1.8(b), (f) (Conflicts of Interest: Prohibited Transactions); Rule 1.9 (Conflict of Interest: Former Client); Rule 1.10 (Imputed Disqualification: General Rule); Rule 1.11 (Successive Government and Private Employment). See *infra* notes 195-202 and accompanying text.

151. See MODEL RULE Rule 3.3 (Candor Toward the Tribunal). See also *Nix v. Whiteside*, 475 U.S. 157 (1986); Monroe H. Freeman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975).

application: it protects only *qualified*<sup>152</sup> lawyer-client *communications* from compelled disclosure. The duty not to disclose, however, applies in every other situation involving confidential client information<sup>153</sup> where the privilege does not apply. What this means is that a lawyer may not *voluntarily* disclose confidential client information. This proscription applies regardless of the source of the confidential information.<sup>154</sup> Whereas the privilege applies only to *communications* between client and lawyer, the duty applies even where the lawyer has obtained the information from a third person.<sup>155</sup>

The Rule 11 hearing raised the issue of the attorney-client privilege, which applies in judicial and other proceedings where a lawyer might be called as a witness or compelled to produce evidence concerning a client. Thus, the attorney-client privilege prevented Cheeseman and Facher from revealing the contested information without Riley's consent. Imagine now, however, that Cheeseman was trying to decide whether to use the Gamache-Riley conversation as the basis for a barratry allegation in his Rule 11 motion. Could he have

152. See *supra* notes 122-26 and accompanying text (discussion of what kinds of communications qualify for the privilege).

153. Because the privilege protects only communications between client and lawyer, it is relatively easy to eliminate what is not protected; unless the alleged protected conversation involved the lawyer or client (or one of their agents) or the alleged protected document was sent between the lawyer and client, it cannot come within the privilege. Confidential information subject to the duty not to disclose, however, does not require this client-lawyer nexus. How then does a lawyer determine what information is subject to the duty? The Model Rules state that a "lawyer shall not reveal information *relating to the representation of a client . . .*" MODEL RULES Rule 1.6(a) (emphasis added). The information need only be related to the lawyer's representation of the client; implied in this is that the information may have been obtained from any source. Model Code DR 4-101(B) provides "a lawyer shall not knowingly," except for certain exceptions, "[r]eveal a confidence or secret of his client." DR 4-101(A) defines "confidence" and "secret":

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

The protected client information under the Model Rules is somewhat broader than under the Model Code: any information related to the representation is protected, regardless of whether the client has specifically requested the lawyer to maintain its confidentiality, and regardless of whether it is embarrassing to the client. See MODEL RULES Rule 1.6 (Model Code Comparison para. 1).

154. See MODEL RULE 1.6 cmt. 5.

155. Indeed, some authorities contend the proscription on voluntarily disclosing client confidential information applies even when the information has subsequently become publicly known. See WOLFRAM, *supra* note 12, at § 6.7.4:

[V]oluntary disclosure of a secret that has become generally known should be treated no differently than disclosure of any other client secret, unless it can be confidently said that the information has become so much a matter of public record that general knowledge of its content, its significance, and its public status is incontrovertible.

*Id.* at 303.

discussed the conversation with another lawyer in his law firm to get that lawyer's opinion on the viability of the motion? Could he use the conversation, similar to what I am doing here, to illustrate the difference between the attorney-client privilege and duty of confidentiality in a course he is teaching at a local law school or at a bar-sponsored continuing legal education (CLE) seminar? Could he have discussed the conversation and its ramifications with a nonlawyer friend over lunch?<sup>156</sup> What constraints are there on Cheeseman's using the information in these situations?

First, Cheeseman would have to treat the information he received from Jacobs as confidential client information subject to the confidentiality duty for the same reason he was able to assert the privilege during the motion hearing—the "joint defense" or "pooled information" doctrine.<sup>157</sup> Therefore, Cheeseman generally may not disclose the Riley-Gamache conversation.

Nevertheless, the ethical rules provide exceptions to the duty to preserve confidences. One exception is that a lawyer may make "disclosures that are impliedly authorized in order to carry out the representation."<sup>158</sup> Comment 8 to Model Rule 1.6 elaborates: "Lawyers in

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156. See *infra* note 161.

157. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) (obligations of lawyer who formerly represented a client in connection with a joint defense consortium). Although Cheeseman might not owe a duty directly to Beatrice or the tannery, he would be obligated not to disclose the information because of his duty to his client Grace not to disclose information "relating to the representation." Moreover, in the unlikely event he were to subsequently represent a party with interests adverse to Beatrice in an action against Beatrice that is substantially related to the Woburn case, he likely would be disqualified. See, e.g., *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (disqualifying lawyer for suing former codefendant of client he had represented where there was a substantial relationship in the subject matter of the two representations and confidential information was shared in the prior representation).

158. MODEL RULES Rule 1.6(a). Model Rule 1.6 also has other exceptions that include allowing, but not mandating, a lawyer to reveal information to prevent the client from committing a criminal act that will "likely result in imminent death or substantial bodily injury," or to defend herself in litigation between the client and her, or to defend against charges arising from the client's conduct or the services the lawyer has provided the client. MODEL RULES Rule 1.6(b)(1),(2). California alone does not provide any explicit exceptions to its confidentiality rule, although it does provide a "criminal act" exception to the assertion of the attorney-client privilege. Compare CAL. BUS. & PROF. CODE § 6068(e) (1990) (It is the duty of a lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client") with CAL. EVID. CODE § 956.5 ("There is no privilege . . . if the lawyer reasonably believes that disclosure of any confidential communication relating to representation is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."). There is at present a debate in California whether the exception to the attorney-client privilege in section 956.5 of the California Evidence Code also applies to the confidentiality duty set forth in section 6068(e) of the California Evidence Code. See, e.g., State Bar of California, Office of Professional Competence, Planning and Development, Request That The Supreme Court of California Approve Proposed Rule 3-100 of



a firm may, in the course of the firm's practice disclose to each other information relating to a client of the firm, unless the client has instructed that particular information to be confined to specified lawyers."<sup>159</sup> Cheeseman's seeking advice from his colleague in the firm would thus be permitted.

Cheeseman's use of the same information in a law school or CLE hypothetical would probably be permitted, so long as he took precautions to preserve its confidentiality. The key concern is that he not disclose so much information that the listener would be able to identify the client he represents and the relevance of the information. Again, assume that his class or seminar meets while he is still deciding whether to include the barratry allegations in his motion. As an initial matter, using information for a "good cause," for example, legal education, is not a recognized exception to the confidentiality duty. Nevertheless, his use of the Gamache-Riley conversation to drive home a point about the client-lawyer privilege would not violate the ethical codes so long as he took precautions so that the identities of the client (Riley) and case were not disclosed. On its face, this would appear to be easy; all he would have to do is avoid referring to Riley or Gamache by name and avoid mentioning the location of the suit.

Not disclosing names and locations, however, may not be sufficient. In this case, it is likely that merely relating the facts would reveal both the case and the parties, thus violating the duty to preserve confidences. First, the Woburn case was well-publicized. There is always a danger that just mentioning the facts would reveal the case and, thus, confidential information.<sup>160</sup> Second, Cheeseman may have mentioned to his class earlier in the semester that he was involved in the Woburn suit, or given the case's notoriety, his name would have

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the Rule of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation, at 3-4 (May 1998). The debate remains unresolved. On three separate occasions since 1987, the State Bar of California has submitted to the California Supreme Court proposed revisions to the California Rules that would create express exceptions to the confidentiality rule set out in section 6068(e) of the California Business and Professions Code. In 1987, the bar withdrew its proposal in the face of questions by the court. See Nancy McCarthy, *Proposed Rule May Permit Breach of Confidentiality*, CAL ST B.J. 1, 22 (July 1997). In 1993, the supreme court rejected the proposal without comment. *Id.* Finally, on September 2, 1998, the court issued a minute order, again rejecting without comment the proposed revision. See Minute Order—S070520, Request That the Supreme Court Approve Rule 3-100 Request Denied (Cal. Sept. 2, 1998).

159. MODEL RULES Rule 1.6 cmt. 8.

160. In the externship programs at our law school, we place students with judges, law firms, and government agencies. A requirement of all our externships is that the students keep journals reflecting on their experience. We caution the students to exercise extreme caution when they are working on a high-profile case. We remind them that even elliptical references to certain facts may disclose the identity of the case and result in disclosure of confidential client or chambers information.

appeared in news reports as representing Grace. Thus, his students may have known he was involved even if he said nothing. Moreover, the lawyers attending his CLE seminar probably would be familiar with pending high-profile cases and the participants and, if nothing else, Woburn was notorious. In any case, it is likely his students would know he was involved in the case.

Thus, if he were to present the hypothetical by saying, for example, "an interesting situation arose in a case I am currently working on," and then referred to a conversation between one of the plaintiffs and the president of a defendant "facility" alleged to have polluted the environment, the students might be able to determine that Riley was involved, even if Cheeseman had never mentioned Riley, the tannery, or Woburn by name.<sup>161</sup> Cheeseman would have revealed Riley's confidential information without Riley's consent and, thus, would have violated his ethical duty, even though he had not identified the name of the case or the names of any of the persons involved.

The foregoing hypothetical presumed Cheeseman wanted to use the information while the case was still active. Even if he wanted to use the same information several years later, he would still have to take precautions if the information had not become generally known as it

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161. In some instances, it is conceivable that a person to whom information is being relayed could decipher who the players are and what case is involved even without the lawyer having told the other person who his client is. For example, imagine that a computer hacker was arrested, convicted, and imprisoned several years ago. From prison, the hacker calls Lawyer, who lives in a city near the prison, to see if Lawyer can help him sell the media rights to his story. During the conversation, the hacker reveals information that is not known publicly to Lawyer. Lawyer replies he cannot help the hacker and that evening has dinner with a friend who owns a business that sells goods on the Internet. His friend previously had complained that he had been having trouble maintaining the security of his computer servers and had lamented the hacker culture that treated breaking into computers as a game. At any rate, Lawyer mentions that just that day he has spoken with a computer hacker in prison who wanted help in selling his story and then reveals some of the details of his conversation with the hacker. Lawyer does not identify the hacker by name, nor does he even reveal where the hacker is located. Despite Lawyer's not identifying the hacker or where he is located, it is possible the friend will be able to identify who the hacker is and learn the hacker's confidential information.

For example, because he owns a business involved in selling goods on the Internet, the friend likely will be aware of computer security matters, and could very well know the names of some computer hackers. In addition, because the prison is located near the city where the lawyer and friend live, it is more likely the friend may be aware of the hacker. Moreover, because the friend had previously complained to Lawyer about computer hackers, Lawyer probably should have been aware his friend might be familiar with the hacker and not mentioned any details of the conversation to the friend.

Finally, note that Lawyer has a duty not to disclose the hacker's confidential information even though he turned down the representation. When a prospective client consults a lawyer in good faith to obtain legal representation, the duty of confidentiality applies even though the lawyer declined the representation and did not perform any legal services. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990); CAL. EVID. CODE § 951.

did by publication of the book.<sup>162</sup> The duty of confidentiality survives the termination of the representation.<sup>163</sup> The result is that the lawyer cannot ever use the information to the client's disadvantage,<sup>164</sup> and will be disqualified from subsequently representing a person with interests adverse to the first client in a later, substantially related matter.<sup>165</sup>

### C. *The Lawyer's Duty to Not File Frivolous Motions*

Returning to the barratry allegations, we need to address the last issue raised about Cheeseman's assertion that the privilege attached to the Gamache Riley conversations: Should Cheeseman simply have obtained Riley's waiver before filing the motion? It might appear to even a casual reader that Cheeseman should have obtained Riley's waiver. After all, Riley would have had to testify about the Gamache incident if called to testify and the barratry assertion implicated Schlichtmann's professional reputation.<sup>166</sup> It might seem fairness obligated Cheeseman to disclose to Schlichtmann the evidence supporting the barratry assertion. This scenario raises two often conflicting duties of a lawyer: the lawyer's duty of loyalty to her client (and to zealously advocate her client's position) and the lawyer's duty as an officer of the legal system.<sup>167</sup> The question becomes whether a lawyer has to "split hairs," that is, assert every viable claim on behalf of the client. There is no simple answer to this question, except perhaps "it depends."

Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."<sup>168</sup> Comment 1 to Rule 1.3 further states that a lawyer

should pursue a matter on behalf of a client despite opposition,

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162. Some commentators argue that a lawyer is precluded even from using client information that has become public. See *supra* note 120.

163. The attorney-client privilege also survives the death of the client. See *supra* notes 119-20 and accompanying text.

164. See MODEL RULES Rule 1.8(b).

165. MODEL RULES Rule 1.9.

The rationale behind this rule is as sound as it is elementary. The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians . . . [T]he client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him.

*United States v. Standard Oil Co.*, 136 F. Supp. 345, 355 (S.D.N.Y. 1955).

166. Although one can argue that Schlichtmann's complaints about his reputation were self-serving and overblown, Judge Skinner recognized he was obligated under Massachusetts law to report Schlichtmann to the bar for possible sanctions in the event he concluded the assertions were accurate. HARR, *supra* note 1, at 112.

167. See *supra* notes 20-23 and accompanying text.

168. MODEL RULES Rule 1.3.

obstruction or personal inconvenience to the lawyer, and may take *whatever lawful and ethical measures* are required to vindicate a client's cause or endeavor . . . [and] should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>169</sup>

Comment 1, however, also states "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has *professional discretion* in determining the means by which a matter should be pursued."<sup>170</sup> Given the discretion a lawyer has to assert positions on a client's behalf, Cheeseman appears to have acted ethically in asserting the defense of privilege to avoid disclosing the basis for the barratry assertions.<sup>171</sup>

Further, Cheeseman's ethical stance does not appear to be otherwise undermined by his status as an officer of the legal system<sup>172</sup> and his duty to not file suits or bring motions that are frivolous. Model Rule 3.1 provides that "[a] lawyer shall not bring . . . a proceeding, or assert . . . an issue therein, unless there is a basis for doing so that is not frivolous . . ." <sup>173</sup> The question then becomes whether the claim or motion asserted is "frivolous." The Comment to Rule 3.1 states an "action is frivolous . . . if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken . . ." <sup>174</sup> Here, Cheeseman could make a

169. MODEL RULES Rule 1.3 cmt. 1 (emphasis added).

170. *Id.* (emphasis added).

171. Moreover, consider Model Rules Scope para. 1, which, recognizing that certain ethical rules are discretionary, explicitly states, "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."

172. See MODEL RULES Preamble para. 1 (a lawyer is an officer of the legal system). Paragraph 4 provides:

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

173. MODEL RULES Rule 3.1.

174. MODEL RULES Rule 3.1 cmt. 2. See also *supra* note 104 and accompanying text, regarding the similarity between Model Rule 3.1 and Federal Rule of Civil Procedure 11. The equivalent California rule provides in part:

Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.

good faith argument that Schlichtmann had engaged in barratry, based on the information about Gamache that Riley had provided to him.<sup>175</sup> Moreover, Cheeseman had a good faith, albeit technical, argument that the privilege applied and he could not reveal the evidence underlying his motion.<sup>176</sup> Thus, Cheeseman did not violate any duties he had to the justice system as an officer of the legal system.<sup>177</sup>

Nevertheless, something still simply does not feel right about Cheeseman's repeated assertions that he could not reveal the basis of the barratry allegations. As just discussed, he may have been ethical in advocating his client's position, and he may not have violated any ethical duty as an officer of the legal system. Nevertheless, as we read the details of the court hearing, we are almost embarrassed by his insistence on the privilege, particularly after Facher stated he would not have characterized the Gamache information as "highly specific and direct."<sup>178</sup>

Why could Cheeseman not have simply obtained the waiver from Riley before the hearing, or even before he filed the motion? Although he may have acted within ethical guidelines set out in the

CAL. RULES Rule 3-200. The relevant Disciplinary Rule of the Model Code, DR 7-102(A)(1), provides that a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Both of these ethical codes focus, as do the comments to the Model Rule, on claims or motions intended to "merely harass" the opponent.

175. Recall that Gamache had told Riley, "I didn't realize your tannery was part of the lawsuit. The lawyers were looking for people to join the case. All we want to do is stop the big chemical companies from dumping." HARR, *supra* note 1, at 103.

176. See *supra* notes 124-28, 136-59, and accompanying text. Comment 2 to Rule 3.1 also states that an "action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail." MODEL RULES Rule 3.1 cmt. 2. Thus, a lawyer can in good faith assert a position even though he determines it probably will be rejected, as a lawyer might predict for a technical argument based on a privilege.

177. There might be a question that Cheeseman made the barratry allegations and asserted the privilege at least partially in an effort to harass Schlichtmann. Recall that Cheeseman thought Schlichtmann's statements at the press conference upon the filing of the complaint were unprofessional, HARR, *supra* note 1, at 98. Cheeseman also told Schlichtmann his barratry allegations were "no more outrageous than the allegations you've made against my client." *Id.* at 108. We have the benefit of hindsight and know how the barratry allegations arose. It is helpful to remember what information Cheeseman had when he filed the motion: he was relying on Riley's characterization of his meeting with Gamache, as relayed by Jacobs. Cheeseman was not aware, as we are, that there is a simple explanation why Gamache did not realize the tannery and Riley were involved in the lawsuit: he was not present at the earlier meetings Schlichtmann had with the plaintiffs where he outlined the lawsuit. *Id.* at 102. Without this information, it would be natural to conclude that a party who did not even know who he was suing was being manipulated by the lawyer. With this in mind, and given that Cheeseman had a reasonable legal and factual basis for the motion, see *supra* notes 124-28, 136-39, and accompanying text, it would be difficult to conclude he took the action merely to harass Schlichtmann.

178. HARR, *supra* note 1, at 113-14.

codes, he nevertheless left the hearing with egg on his face, having failed miserably in what he set out to do for the judge, who never really seriously considered the heart of Cheeseman's Rule 11 motion: that Schlichtmann had filed a frivolous suit.<sup>179</sup> Cheeseman attracted both the skepticism and displeasure of the judge.<sup>180</sup>

Perhaps the most valuable lesson to be learned from the barratry hearing, particularly for lawyers in training, is a practical lesson: regardless of whether your position is nonfrivolous and is within the ethical bounds of the codes, you have to assess the realities of the situation, particularly when asserting a technical defense. Despite all that is said about how trials are decided by which side tells its story best, a judge will still generally view the function of the adversary system in general, and the litigation process in particular, as a search for the truth.<sup>181</sup> Although crafty procedural legerdemain might earn

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179. It was not simply Schlichtmann's argument over the privilege that appears to have worn down the judge to the point where he lost enthusiasm for the hearing on the Rule 11, but also Schlichtmann's insistence that he could not testify about what he knew when he filed the lawsuit because it would create a conflict with his clients. See *infra* Part IV.D. Nevertheless, the arguments over privilege appear to have occupied most of the hearing, and it is fair to say that they set the tone for the eventual questioning of Schlichtmann by the judge. Given that Judge Skinner eventually held that Schlichtmann violated Rule 11 at least in part by filing the complaint, HARR, *supra* note 1, at 487, the privilege assertion arguably was a fatal procedural error; but for the drama that infused the Rule 11 hearing, the judge might have granted Cheeseman's motion.

The judge, however, did not actually hold that the original filing was frivolous. *Id.* In the early stages of a lawsuit, judges are more willing to give plaintiffs time in discovery to work up the necessary information to support their claims, particularly where the defendant possesses most of the information necessary to prove the case. Indeed, that is expected under notice pleading. See FED. R. CIV. P. 8; see, e.g., *In re Bolland*, 79 F.R.D. 665 (D.D.C. 1978) (holding that, as Federal Rules merely require a short and plain statement of the claim and relief sought, precomplaint discovery is not allowed as method for plaintiff to determine whether claim exists); *Mahon v. Bennett*, 6 F.R.D. 213 (W.D. Mo. 1946) (holding that Federal Rules contemplate that complaints should not be amplified or extended in view of discovery rules). On the other hand, courts are split on whether a plaintiff's lawyer can avoid Rule 11 sanctions if discovery subsequently proves the complaint's allegations are well-founded, even though the lawyer had no knowledge when first filing the complaint. See *In re Keegan Management Co. Sec. Litig.*, 78 F.3d 431 (9th Cir. 1996) (holding that imposition of Rule 11 sanctions was error and abuse of discretion, as district court based its decision on erroneous view of the law by focusing on plaintiffs' attorneys' subjective knowledge at the time they filed complaint where, following discovery, plaintiffs' pretrial evidence was enough to render their complaint nonfrivolous). *But cf.* *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994) (affirming imposition of sanctions on lawyers who failed to investigate facts before filing complaint, even though subsequent discovery revealed complaint was accurate.)

180. Indeed, even Cheeseman felt the motion hearing shadowed him in the suit. HARR, *supra* note 1, at 141 (noting that Cheeseman felt the Rule 11 motion had "come back to haunt him" when Judge Skinner denied his motion for summary judgment).

181. One commentator has written that judges act upon the assumption that "the law is structured by a coherent set of principles about justice and fairness and procedural due process," and judges "enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards." RONALD DWORIN, *LAW'S EMPIRE* 243 (1986). See also David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

your peers' admiration, it will often infuriate a judge who wants a litigant to have his day in court. Along these lines, any privilege, whether it be attorney-client, priest-penitent, or physician-patient, necessarily interferes with the truth-seeking function of the system. Therefore, the judges who preside over the system will often be skeptical of a privilege claim. Where, as in this case, the asserted privileged nature of the Jacobs-Ryan consultation is razor thin, a lawyer might well confer with his client and advise the client that, in the long run, it might not be in the client's best interests to assert it.<sup>182</sup>

#### D. Lawyer's Duty of Loyalty to Client

Much of the drama of the Rule 11 hearing derives from Schlichtmann's repeated refusals to take the stand and testify regarding the allegations that the complaint he and Roisman had filed was baseless.<sup>183</sup> Judge Skinner decided that the best way to determine what Schlichtmann and Roisman knew when they filed the complaint and, thus, whether they had sufficient facts to support a non-frivolous complaint, was for one of plaintiffs' lawyers, Schlichtmann or Roisman, "to take the witness stand and answer questions by the defendant's attorney."<sup>184</sup> Schlichtmann refused on the ground that he could "no longer be a professional, objective advocate for my clients."<sup>185</sup>

Putting aside the soundness of Judge Skinner's approach,<sup>186</sup> the primary issue here is the lawyer's duty of loyalty to his clients.

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182. The reader has probably noticed that I have not discussed whether a lawyer should do what is moral and not just what is ethical. As one commentator has noted, "[d]rafting [ethical codes] is inherently a process of finding the lowest common denominator" because if the result is too strong or radical a position, "a powerful segment of lawyers will find them too odious or unprofitable to obey," with the result that the rule will be widely ignored because of competitive pressures and a sense of unfairness. WOLFRAM, *supra* note 12, at 49 (citing David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Lawyers' Ethics*, 40 MD. L. REV. 451, 460-61 (1981)). Because the mandatory provisions of the codes set out an ethical minimum, there is a large area between conduct required of a lawyer and conduct that is aspirational. The recognition of this gap has spawned a rich literature of opinion that could be a springboard for an excellent class discussion on the place of morals in the law. See, e.g., LUBAN, *supra* note 22; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

183. HARR, *supra* note 1, at 115-17.

184. *Id.* at 115.

185. *Id.* at 116.

186. All of the judges who have appeared at Western State's Panel Discussions on Ethics in *A Civil Action*, see *supra* note 11, found Judge Skinner's position to be curious or unusual. None of them would have ordered Schlichtmann to take the stand under these circumstances, preferring to make any determinations by affidavit. Part of that view may be due to their aversion to Rule 11-type motions and concern that it can be used primarily as a tactical device to harass an opponent. Even Facher appears to have recognized that such motions usually fail. See HARR, *supra* note 1, at 104. At any rate, the idea of allowing a lawyer to cross-examine an opposing lawyer this early in the proceedings did not appeal to the judges.

Schlichtmann's concern was that his loyalty to the Woburn plaintiffs was threatened, as his answers to Cheeseman's questions could have resulted in the dismissal of the case.<sup>187</sup> As already noted, loyalty is central to the adversary system, advanced by the lawyer's duties to provide competent and diligent representation, preserve client confidential information, communicate with the client, and avoid conflicts of interest.<sup>188</sup> The ethical rules that address conflicts of interest are crucial to ensuring the lawyer's duty of loyalty.<sup>189</sup>

Each of the ethical codes has a provision that prohibits a lawyer from simultaneously acting as advocate and witness.<sup>190</sup> Where the lawyer is testifying favorably for the client, the rule is intended to avoid confusing the jury as to the lawyer's two roles in such situations: on the one hand, as a witness who is required to testify based on personal knowledge and, on the other hand, as an advocate who "is expected to explain and comment on evidence given by others."<sup>191</sup> Thus, where the lawyer would testify favorably to the client, the rule is intended more to protect the opposing party, the rationale being that a lawyer's testifying about facts under oath will project favorably on her functioning as an advocate, arguing on behalf of her client. Where the lawyer's testimony is adverse to the client's interests, however, the greater concern is that the resulting conflict of interest will call into question the lawyer's loyalty and undermine the attorney-client relationship.<sup>192</sup>

Here, Schlichtmann's testimony could have resulted in the case being dismissed. If Schlichtmann and Roisman did not have sufficient facts to support the allegations in the complaint, the court could have dismissed the complaint to the detriment of the Woburn families.<sup>193</sup> Thus, Schlichtmann's testimony was potentially adverse to his clients,

187. In reaffirming that he intended to have Schlichtmann testify, Judge Skinner told Schlichtmann, "[i]f you filed the [complaint] without making some kind of investigation, then I'll strike the complaint." HARR, *supra* note 1, at 115.

188. See *supra* Part II.D.

189. See MODEL RULES Rules 1.7-1.11, 3.7.

190. See MODEL RULES Rule 3.7, which provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work substantial hardship on the client.

See also CAL. RULES Rule 5-210; MODEL CODE DR 5-101(B), DR 5-102(A).

191. MODEL RULES Rule 3.7 cmt. 2; *Jones v. City of Chicago*, 610 F. Supp. 350, 362 (N.D. Ill. 1994). See also CAL. RULES Rule 5-210 Discussion (explaining that the rule does not apply where the lawyer is to testify before a judge).

192. MODEL RULES Rule 3.7 cmt. 5.

193. See *supra* note 179.



creating a conflict between Schlichtmann and his clients. It is primarily the responsibility of the lawyer to determine whether such a conflict exists.<sup>194</sup> Schlichtmann believed a conflict existed and might have had to disqualify himself from representing the families.<sup>195</sup>

A professor, however, could challenge a class by suggesting that Schlichtmann was grandstanding by his refusal to testify. After all, the discussion following the California rule notes that the rule is inapplicable where the lawyer is to testify before a judge rather than a jury.<sup>196</sup> That comment, however, recognizes that the primary concern when a lawyer is giving testimony favorable to the client—that the trier of fact will confuse the lawyer's two roles as witness to the facts and advocate whose duty is to argue the facts—does not apply when a judge is the trier of fact. Presumably, a judge should be able to distinguish the lawyer's two roles.<sup>197</sup> The comment would not apply to a situation like Schlichtmann's, where the lawyer is giving testimony that is potentially adverse to his client.<sup>198</sup>

The judge and parties resolved the dilemma created by Judge Skinner's procedure by having the judge, rather than Cheeseman, question Schlichtmann. This, however, was not necessarily the proper solution. Regardless of who was asking the questions, Schlichtmann still would have had to give the same testimony.<sup>199</sup> If his testimony would create a conflict when Cheeseman asked the questions, it is difficult to see how having the judge ask the questions would avoid the conflict.

Finally, although Judge Skinner eventually concluded that Schlichtmann had violated Rule 11, at least as to the allegations against Beatrice,<sup>200</sup> he denied Cheeseman's motion in these early stages of the

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194. MODEL RULES Rule 3.7 cmt. 5.

195. See, e.g., *People v. Beals*, 618 N.E.2d 273 (Ill. App. Ct. 1993) (testifying against a client violates Model Rule 3.7 when the lawyer reasonably should have known the testimony would be adverse to the client's case).

196. CAL. RULES Rule 5-210 Discussion ("This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge.").

197. For the same reason, appellate courts will generally not overturn a bench trial verdict in a civil case, even though evidence presented would have been prejudicial at a jury trial, because a judge is presumed to be able to weigh the evidence and exclude from her deliberations improper evidence. See, e.g., B.E. WITKIN, CALIFORNIA EVIDENCE §§ 30-32 (3d ed. 1986). But cf. *Fahy v. Connecticut*, 375 U.S. 85 (1963) (holding that no deference is given to a judge in a bench trial where there is a reasonable possibility that inadmissible evidence may have contributed to the defendant's conviction).

198. See *supra* notes 189-91 and accompanying text.

199. See, e.g., MODEL RULES Rule 3.3(a) ("Candor Toward the Tribunal, which provides that a "lawyer shall not knowingly . . . (1) make a false statement of material fact or law to a tribunal.") See also CAL. BUS. & PROF. CODE § 6068(d) (1990).

200. HARR, *supra* note 1, at 487.

litigation. Thus, the conflict issue was never squarely addressed at the earlier Rule 11 hearing. Nevertheless, the Rule 11 motion and Schlichtmann's refusal to take the stand provide an excellent springboard for a discussion of conflict of interest rules, an important part of any professional responsibility course.

## V. WHEN A LAWYER'S RESPONSIBILITIES CONFLICT

We have examined in some detail the attorney-client privilege and the lawyer's duty of confidentiality, and noted how the latter is central to resolving other ethical issues that confront a lawyer.<sup>201</sup> Perhaps the most wrenching problem a lawyer confronts arises when he realizes his client has lied, either in court testimony or in responses to discovery. At that point, two of the lawyer's roles conflict: as advocate for her client and as an officer of the legal system. Should the lawyer disclose the client's fraud on the system? Or should the lawyer remain loyal to the client and not disclose the information she has obtained from a confidential client communication?

The facts surrounding the Barbas deposition set the stage for a discussion of the quandary a lawyer can confront when her ethical duties are in conflict. The Barbas situation also provides a springboard to a broader discussion on client perjury.

### A. *The Barbas Deposition Facts—An Illustration of Conflicting Duties*

Several factual situations in *A Civil Action* raise these issues, including the events surrounding the deposition testimony of Grace employee Thomas Barbas.<sup>202</sup> During his deposition, Mr. Barbas, a painter at Grace's Woburn plant, stated that while he may have disposed of cleaning solvents in the drainage ditch behind the Grace plant during his first few months of work, he subsequently emptied the solvents into fifty-five-gallon drums.<sup>203</sup> He denied having participated in dumping the filled drums of solvent into a pit behind the plant, claiming to have heard only that drums had been dug up and

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201. See *supra* notes 39, 182-99, and accompanying text. In particular, a lawyer's duty of confidentiality is central to resolving many conflicts of interest questions and client testimonial perjury, the subject discussed in the following paragraphs.

202. The alleged concealment of the Yankee Engineering Report, and Riley's removal of the contaminated sludge from his property, HARR, *supra* note 1, at 469-70, are the main focus of discovery misconduct in the book, and, as noted above, may be why readers are left with the impression ethics took a back seat in trying the case. See *id.* at 460, 469-70. Although these two events would allow for an excellent discussion on a lawyer's duty where the client has lied or obstructed the case, they are beyond the scope of this introduction to using *A Civil Action* to teach legal ethics.

203. *Id.* at 158.

removed.<sup>204</sup> Schlichtmann subsequently learned at a meeting with another Grace employee, Al Love, that Barbas had been lying.<sup>205</sup>

At about the same time that Schlichtmann met with Love, Barbas contacted Cheeseman to tell him that he now remembered being involved in dumping the drums containing solvent into the pit.<sup>206</sup>

204. *Id.* at 159.

205. The meeting between Schlichtmann and Love, arranged by Anne Anderson, took place at Love's house. *Id.* at 168-69. Schlichtmann's meeting with Grace's employee Love raises another issue: whether he contacted a represented person in violation of Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so." Cheeseman had not consented to Schlichtmann's talking with Love, so the question is whether Love can be deemed to have been represented by Cheeseman, or any other lawyer, for that matter.

Comment 4 to Model Rule 4.2 states that when the person is an employee of an organization, the lawyer must seek permission from the organization's lawyer to contact a person "having a managerial responsibility on behalf of the organization" or whose "act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995); CAL. RULES Rule 2-100(B) (defining "party"). The purpose behind limiting the employees who are deemed represented by corporate counsel is to prevent the organization's lawyers from insulating all employees from contacts with opposing lawyers by asserting a blanket representation of the organization. *Id.* See also *Wider Sports Equip. Co., Ltd. v. Fitness First, Inc.*, 912 F. Supp. 502, 508-09 (D. Utah 1996) (holding that if the rule is read too broadly, it would shelter "organizations, corporations and other business enterprises from the legitimate less costly inquiry and fact-gathering process sometimes necessary to make a legitimate assessment of whether a valid claim for relief exists"); *Niesig v. Team*, 558 N.E.2d 1030 (N.Y. 1990) (holding that covered employees are those whose acts or omissions in matter that is subject of representation are binding on the corporation or imputed to it for liability, or who are implementing the advice of corporate counsel).

Love was not a member of management, but it appears he was in a position to bind the corporation by his admissions, having been personally involved in the polluting activities. Moreover, because he was named as a deponent in the litigation, had met with Cheeseman just after his deposition and before he met with Schlichtmann, HARR, *supra* note 1, at 166-67, and eventually approached the United States Attorney with information about Grace, *id.* at 171-72, it is likely that Love fits within the protected class of corporate employees whom Schlichtmann should not have contacted without Cheeseman's permission.

Further, even if Love had approached Schlichtmann, Schlichtmann still must obtain permission from the employee's counsel, in this case Cheeseman. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995). Finally, it should be noted that Model Rule 4.2 would not have applied to Schlichtmann's meetings with former employees of Grace. *E.g.*, HARR, *supra* note 1, at 169-71; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 n.47 (1995); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991).

The relevant California rule restricts communication with a "represented party." In the organizational context, the rule defines "party" in the same way as the MODEL RULES: "'party' includes: (1) An officer, director or managing agent of a corporation . . . ; or (2) an employee of [a] corporation . . . , if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." CAL. RULES Rule 2-100(B)(1), (2).

206. HARR, *supra* note 1, at 172.

Cheeseman now confronted a situation where he knew Barbas, an employee of his client, had lied during his deposition. Cheeseman resolved this crisis by calling Schlichtmann and telling him "I won't object if you want to depose Barbas again."<sup>207</sup> When Schlichtmann asked him to explain "what's going on," Cheeseman explained that Barbas had remembered emptying drums into the pit.<sup>208</sup>

### B. Duty of Confidentiality Versus Duty to Legal System

Model Rule 1.6, the lawyer's duty of confidentiality, and Model Rule 3.3, the lawyer's duty of candor to the tribunal, are in conflict when a lawyer's client lies. Model Rule 1.6 prohibits a lawyer from disclosing "information relating to the representation of a client" except under certain circumstances.<sup>209</sup> Moreover, even where these circumstances exist, the rule states only that a lawyer "may" reveal the information; it does not mandate the lawyer's disclosure.<sup>210</sup> Whether to reveal such information is thus discretionary with the lawyer.<sup>211</sup>

On the other hand, Model Rule 3.3 imposes on a lawyer a duty of candor toward the tribunal. It provides "[a] lawyer *shall not* knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the law-

207. *Id.*

208. *Id.*

209. These circumstances include situations where the client consents to disclosure or the lawyer is impliedly authorized to disclose information, or where the lawyer believes revealing the information is necessary to prevent the client's committing a criminal act the "lawyer believes is likely to result in imminent death or serious bodily harm," MODEL RULES Rules 1.6(b)(1), or the lawyer believes revealing the information is necessary to defend the lawyer in cases in which the client's conduct or the lawyer's conduct on behalf of the client is at issue. MODEL RULES Rule 1.6(b)(2).

210. The Model Code is also permissive. "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE DR 4-101(C)(3). States that adopt either the Model Rules or the Model Code are free to modify them as they see fit. A number of states have amended their version of the Model Rules or Model Code to make the lawyer's disclosure mandatory under certain circumstances. A recent survey of the various state ethical codes (including the District of Columbia) identified 39 states that have kept the codes' original language and provide an exception to the lawyer's confidentiality duty that allows a lawyer (the lawyer "may") to reveal the client's intention to commit a crime likely to result in death or serious bodily injury, ten states make the duty to reveal in these circumstances mandatory (the lawyer "shall"), and one state code (New Mexico) provides the lawyer "should" reveal such information. THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 133-142 (Appendix A) (1999). Only one state, California, which has adopted neither the Model Rules nor the Model Code, has no explicit exception to the confidentiality duty. See CAL. BUS. & PROF. CODE § 6068(e) (1990). See also *supra* note 158.

211. See MODEL RULES Scope para. 13 ("Other [rules], generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.").

yer shall take reasonable remedial measures."<sup>212</sup> Moreover, this duty applies "even if compliance [with the rule] requires disclosure of information otherwise protected by Rule 1.6."<sup>213</sup> Thus, if taking "reasonable remedial measures" includes the lawyer's disclosing confidential client information, the lawyer must disclose it, even where Rule 1.6 provides no explicit exception.<sup>214</sup>

### C. Cheeseman's Duties

Cheeseman's handling of the Barbas deposition provides the basis for discussing not only how conflicting duties can arise, but also

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212. MODEL RULES Rule 3.3(a)(4) (emphasis added); *id.* Scope para. 13 ("Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline.")

213. MODEL RULES Rule 3.3(b). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-376 (1993):

A lawyer in a civil case who discovers her client has lied in discovery responses must take all reasonable steps to rectify the fraud, which may include disclosure to the court. In this context, the normal duty of confidentiality in Rule 1.6 is explicitly superseded by the obligation of candor toward the tribunal in Rule 3.3. Lawyer must first attempt to persuade client to rectify situation or, if that proves impossible, must herself take whatever steps necessary to ensure a fraud is not perpetrated on the tribunal. In some cases this may be accomplished by a withdrawal from the representation; other cases may require disclosure to opposing counsel; finally, if all else fails, direct disclosure to the court may prove the only effective remedial measure for client fraud.

See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 80-1458 (1980) (duty of lawyer to disclose knowledge of inaccuracy in document produced during discovery).

But cf. Cal. Comm. on Professional Responsibility and Conduct CAL 1983-74 (1983):

An attorney employed in a civil, nonjury trial does not have a duty to advise the court that his/her client has committed testimonial perjury; the attorney is precluded from divulging the perjury absent the client's consent. However, the attorney is required promptly to pursue remedial action. If the remedial action fails, the attorney is required to move to withdraw—but without disclosing any confidence or secret of his/her client. If the attorney is unable to withdraw, the attorney may not use the perjured testimony to support the client's claim.

214. See *supra* note 157. The rule speaks of the lawyer's duty of candor "toward the tribunal." Because of the general prohibition on ex parte contacts with a judge or other judicial officer, see, e.g., MODEL RULES Rule 3.5(b); CAL. RULES Rule 5-300(B), the lawyer in practice must necessarily reveal the existence of any false evidence to the other side in the dispute. In other words, by providing to the opposing party copies of all papers submitted with the court, as the general prohibition on ex parte contacts requires, the lawyer necessarily will inform that party of any false testimony. This is also true of the lawyer's duty "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES Rule 3.3(a)(3). In effect, the lawyer must disclose authority adverse to the lawyer's client to the other side—even if the other side is not aware of it.

Many of my students have reacted negatively to this latter requirement. The other side should do its own work, they argue. The point of the rule, however, is not that the lawyer must do her opponent's work, but instead that the tribunal—the court—must be kept fully apprised of the applicable law so that it will apply the correct legal standards to the case before it. See MODEL RULES Rule 3.3 cmt. 3.

how a lawyer in practice might resolve the conflict. The broad conflict issue is whether, by calling Schlichtmann and telling him he would not be opposed to having Barbas deposed again, Cheeseman acted ethically to resolve the apparent conflict between his duties as advocate and as officer of the legal system.<sup>215</sup> There are two questions contained in this broad issue statement: First, did Cheeseman have to “take reasonable measures” to correct Barbas’ testimony, that is, did Barbas’ testimony trigger Cheeseman’s obligations under Model Rule 3.3? Second, assuming he was so required, did Cheeseman’s calling Schlichtmann and telling him he could again take Barbas’ deposition constitute “reasonable remedial measures” within the meaning of Rule 3.3?

As to the first question, Barbas’ deposition testimony was both evidence and false. Even though it was Schlichtmann who had noticed the deposition, the “evidence”—or rather, Barbas’ failure to reveal his illegal actions—was offered in defense of Cheeseman’s client, Grace. The evidence was also “material”; to prove his case that Grace was responsible for his client’s injuries, Schlichtmann had to establish that Grace had dumped chemical solvents in the ground. Finally, Cheeseman knew Barbas had testified falsely when Barbas called and told him he now remembered. These combined facts triggered the requirement in Rule 3.3 that Cheeseman take “reasonable remedial measures.”

The second question asks what would have constituted “reasonable remedial measures” in this situation. As an initial matter, Cheeseman had learned that Barbas’ testimony was false from Barbas, one of his client’s employees. Thus, any knowledge Cheeseman had of the falsity of Barbas’ testimony was based on confidential client information, implicating the proscriptions of Rule 1.6<sup>216</sup> and creating a

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215. In a sense, Cheeseman’s decision is not that difficult. Here, an employee of his corporate client has come forth and admitted he had not told the truth. This is not a situation where, for example, Cheeseman might have merely suspected that Barbas had not been forthcoming in his testimony. Nor is this a situation where the client is telling the lawyer not to disclose the truth. In short, everyone here “appears to be on board” about the proper course to take.

216. As discussed previously, a corporation can act only through its managers and employees. Just as the corporation owns the privilege for purposes of deciding whether to waive it, a lawyer owes a duty to the corporation to preserve confidential information relating to his representation of the corporation that he learns from corporation employees. See *supra* notes 130-34 and accompanying text; MODEL RULES Rule 1.13 (Corporation as Client); CAL. RULES Rule 3-600 (Organization as Client). The California rule explicitly states that a lawyer representing a corporation may not violate her duty to protect client confidential information under section 6068(e) of the California Business and Professional Code when deciding how to proceed upon gaining knowledge that an agent of the corporation may be acting in violation of law. CAL. RULES Rule 3-600(B). Model Rule 1.13(b) also cautions the lawyer in making such decisions about “the risk of revealing information relating to the representation to persons outside the

conflict between his duty not to disclose client information and his duty of candor.

Should Cheeseman first have contacted Grace to obtain its permission before calling Schlichtmann, as the information regarding Barbas' testimony was confidential information?<sup>217</sup> He did not have to do so. Model Rule 3.3 expressly identifies the lawyer's duty to remedy false evidence even if it conflicts with the lawyer's duty of confidentiality under Model Rule 1.6.<sup>218</sup> Thus, although Cheeseman could have called Grace as a courtesy to obtain their consent under Model Rule 1.6, he was under no obligation to do so.<sup>219</sup> Cheeseman thus appears to have acted properly by calling Schlichtmann about Barbas and, when Schlichtmann asked, confirming that Barbas now remembered he was involved in dumping chemical solvents. Schlichtmann would now be able to correct, on the record, the previously false testimony of Barbas.

The class discussion, however, need not stop here. Suppose Cheeseman, in response to Schlichtmann's inquiry "what's going on,"

organization."

217. See *supra* Part IV.B.1.

218. MODEL RULES Rule 3.3(b). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-376 (1993) (lawyer's obligation where client lies in response to discovery requests).

219. In addition, a professor could suggest that Cheeseman's decision to disclose Barbas' false testimony was within his discretion to determine litigation strategy. Generally, it is the lawyer's responsibility to make tactical litigation decisions. If one views Cheeseman's disclosure as a litigation decision, then it was his to make, not Grace's. Calling Grace, then, may have been a courtesy, but Grace would not have had veto power over his decision. See, e.g., MODEL RULES Rule 1.2 cmt. 2:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

The decision whether to reveal client confidences, however, is the client's, not the lawyer's. Therefore, but for the fact Cheeseman had a duty of candor under Model Rule 3.3 that superseded his duty to preserve client confidences under Model Rule 1.6, Cheeseman would have had to obtain Grace's consent to the disclosure. As for California, given the constraints of section 6068(e) of the California Business and Professional Code, Cheeseman would have had to contact Grace for their permission to reveal the information. See, e.g., State Bar of Cal. Comm. on Professional Ethics and Conduct CAL 1983-74 (1983), discussed *supra* note 212. If Grace refused, then Cheeseman would have had to withdraw.

had replied, "I'd really rather not say; just take my word that you probably want to take Barbas' deposition again." Would Schlichtmann have understood what was going on, even if he had not already spoken with Love? A discussion of this point will introduce students to a practical aspect of legal practice and provide a springboard to a broader discussion of client perjury.

Cheeseman's elliptical reference to Barbas' false deposition testimony—"I won't object if you want to depose Barbas again"—probably would have constituted "reasonable remedial measures" even without further explanation. Lawyers often talk in a kind of code when embarrassed or angered by what their clients have done.<sup>220</sup> Cheeseman's telling Schlichtmann he would not object to Schlichtmann's taking Barbas' deposition again would have spoken volumes, even if Schlichtmann had not already spoken with Love.<sup>221</sup> Although Schlichtmann had been practicing law for only half a dozen years, his experience as a litigator would have already introduced him to this lawyer "codespeak."<sup>222</sup>

In a Professional Responsibility class, the Barbas incident would also provide a suitable springboard for, or counterpoint to, a discussion of client perjury in the criminal context. For example, a professor could compare Cheeseman's statement to Schlichtmann with the approach recommended in the Model Rules,<sup>223</sup> and endorsed by the Supreme Court,<sup>224</sup> for how a lawyer should handle the situation where her criminal defendant client insists on taking the stand and giving testimony the lawyer knows to be false.<sup>225</sup> Both the Barbas deposition

220. Perhaps "embarrassed" is not the proper word here. When faced with information that undermines the case the lawyer is putting together, her first reaction is often a wish that it will "just go away." She knows she must deal with the problem, but when she first becomes aware of it, she can be overwhelmed, often to a state of paralysis or anger as much of the work she has done is now rendered useless. Also weighing heavily on her mind will be the misrepresentations her client has foisted on the other side, calling into question her professional integrity for having allowed this information into the record in the first place.

Consider Cheeseman's reaction, as described by Harr: "Cheeseman, seated at his desk, had the sensation of 'going suddenly cold,' he recalled later. He stood and looked out the window to the courthouse as he listened to Barbas. He felt himself getting angry." HARR, *supra* note 1, at 172. It is no wonder then that Cheeseman would have first taken an elliptical route to telling Schlichtmann what had happened.

221. This is a valuable lesson for students. It is not intended so much to countenance this approach to communicating information between lawyers, but to sensitize students to this fact of the profession, so that they will understand what the opposing lawyer is really saying.

222. Indeed, Schlichtmann had suspected Barbas had been lying during the deposition itself. *Id.* at 160.

223. MODEL RULES Rule 3.3 cmts. 7-10.

224. See *Nix v. Whiteside*, 475 U.S. 157 (1986).

225. This is one of the more difficult areas of legal ethics. On the one hand, a lawyer has a duty to competently represent her client. MODEL RULES Rule 1.1; CAL. RULES Rule 3-110. To do this, she must first learn the facts. In learning the facts, however, she may realize the cli-



and client perjury situations involve communications that can be implied from words or actions.

Although the client has a constitutional right to testify in his defense in a criminal trial and, thus, can insist on taking the stand, he does not have a constitutional right to testify falsely.<sup>226</sup> Therefore, if the client intends to commit perjury and the lawyer knows this, his insistence on taking the stand creates an irreconcilable conflict between the lawyer's duty to zealously represent the client and her duty of candor to the tribunal. The solutions to this dilemma proposed by the Model Rules, intended to avoid the lawyer's having to disclose directly the fact of her client's perjury, effectively communicate that very fact.

For example, Model Rule 3.3 suggests the lawyer first should seek to withdraw.<sup>227</sup> The problem with this resolution is that the client's intent to testify falsely may not become apparent until trial, at which point a court would likely deny the lawyer's request to be replaced.<sup>228</sup> Moreover, bringing a motion to withdraw contemporaneously with or just before your client defendant takes the witness stand signals to everyone in the courtroom that your client is about to commit perjury.<sup>229</sup> This is a striking example of how a lawyer's conduct can result in an implicit disclosure of confidential information.<sup>230</sup>

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ent has not told her the whole truth. Because she usually learns the facts from her client in confidential communications, she has a second duty to preserve confidences. MODEL RULES Rule 1.6; CAL. BUS. & PROF. CODE § 6068(e) (1990). She also, however, has a third duty of candor to the tribunal, that is, a duty to the system of justice. MODEL RULES Rule 3.3; CAL. RULES Rule 5-200; CAL. BUS. & PROF. CODE § 6068(d) (1990). A lawyer cannot comply with all three of these duties when the client has, by words or actions, communicated to the lawyer that he will commit perjury. This situation is referred to as the lawyer's "trilemma," and has given rise to a substantial amount of debate over the last three decades. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 121-23 (1990); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1036 (1975).

226. See, e.g., *Nix*, 475 U.S. 157 (1986).

227. MODEL RULES Rule 3.3 cmt. 7.

228. See, e.g., *id.*

229. This is especially true because in these situations a lawyer must give some reason for withdrawing, which is usually that there is an ethical conflict between lawyer and client. See, e.g., *People v. Jennings*, 70 Cal. App. 4th 899 (1999); *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998).

230. Moreover, even if the lawyer did not first bring a withdrawal motion, another suggested resolution of the conflict—to let your client take the stand and have the client testify in an uninterrupted narrative—would have the same adverse communicative effect. See, e.g., MODEL RULES Rule 3.3 cmt. 9. Several cases have expressly approved the narrative approach. See, e.g., *Nix*, 475 U.S. 157; *Johnson*, 72 Cal. Rptr. 2d at 817-18. A narrative testimony, particularly by a criminal defendant testifying without guidance from his lawyer, runs so counter to accepted trial practice that it is akin to hanging a sign around your client's neck that states "don't believe a word I am saying." Even the comments to Model Rule 3.3 recognize that to permit the client to testify by narrative "subjects the client to an implicit disclosure of information imparted to counsel." MODEL RULES Rule 3.3 cmt. 9.

Analogizing the client perjury approach to Barbas' testimony, Cheeseman's calling Schlichtmann to tell him that he would not object to Schlichtmann's taking Barbas' deposition probably would have constituted "reasonable remedial measures" even if he had not explained to Schlichtmann what it was "all about."<sup>231</sup> This is not meant to countenance lawyer's "codespeak," but it is a reality of the profession, and students should be made aware of it and cautioned to be sensitive to the practice.

## VI. FEES AND PROFESSIONAL RELATIONSHIPS

Legal fees can be a highly sensitive issue for lawyers. Regardless of whether the client is pleased with the results the lawyer obtained, large fees often lead to criticism about how much lawyers are paid. Recently, there have been several cases where the fees the lawyers stood to recover drew substantial criticism in the media. For example, the enormous potential fees of the firms involved in the tobacco litigation have led politicians and other critics to complain.<sup>232</sup> In another case that has garnered headlines, lawyers who represented victims of the Holocaust and helped recover millions of dollars from Swiss banks came under criticism for accepting any legal fees at all.<sup>233</sup>

The problem is often one of perception and can affect even a client whom a lawyer has successfully represented. Much of the time spent by lawyers on the client's matter is done working behind the scenes; time spent in court, conferring with the client, or otherwise being involved in a visible activity is often a small portion of a litigator's time.<sup>234</sup> Even to the successful client, a one-line minute order or even a thirty-page court opinion the judge issues on a motion for

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231. In other words, Cheeseman's elliptical reference to taking another deposition is the kind of disclosure that should have satisfied his duty to disclose false testimony to the tribunal. See *supra* notes 219-20 and accompanying text.

232. For example, one firm stands to recover over \$800 million in fees for the part it played, in association with states' attorneys general, in the tobacco settlement. See, e.g., Peter J. Boyer, *Big Guns*, THE NEW YORKER, May 17, 1999, at 54, 58. See also Lester Brickman, *Want to Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A11; Ann Davis, *Cashing in on the Tobacco Bonanza*, WALL ST. J., Dec. 15, 1998, at B1; Ann Davis, *Lawyers Filing Tobacco Suits Cast as Villains*, WALL ST. J., May 26, 1998, at B1; Myron Levin, *Anti-Tobacco Lawyers Rebuked Over Fees Law*, L.A. TIMES, Nov. 26, 1998, at C2.

233. See Ann Davis, *Holocaust Suit Settlement Spawns a Legal Fee Fight*, WALL STREET J., Sept. 2, 1998, at B1.

234. In *A Civil Action*, we get a behind-the-scenes look at numerous lawyer-lawyer and lawyer-client conferences, but very little space is devoted to the time spent actually preparing to take a deposition or researching the law that would go into the numerous briefs filed. When we do get such a glimpse of lawyer preparation, it is usually by reference to the exhausted lawyers rather than by actually describing the process. Legal research does not play well, either in prose or on the screen.

which the lawyer spent scores of hours preparing might not appear to be worth the fee the lawyer charges.

It is lawyers who work on a contingent basis, however, who seem to incur the greatest wrath. Unless her client prevails, the lawyer gets nothing for the effort she put into the case. Nevertheless, where a lawyer agrees to represent a client on a thirty or forty percent contingency fee basis, she stands to recover hundreds of thousands or even millions of dollars in fees if the jury awards a large verdict. Although a lawyer may view a contingent arrangement as feast or famine<sup>235</sup> and must live with the latter, the public sees only the feasts and will subject those to criticism, arguing that the lawyer is only taking money that more properly should go to the injured client.<sup>236</sup>

All of the ethical codes regulate legal fees. Because fees play a large role in *A Civil Action*, the book is an excellent source from which to examine the ethics concerning payment for legal services. As it is, the prospect of earning fees or not contributes to much of the drama in *A Civil Action*, as the cash-strapped firm of Schlichtmann et al. attempts to pursue the Woburn case against the defendants' seemingly bottomless pockets. Without the fees they earned from other pending lawsuits or the money they obtained by using potential fees as collateral for loans, the firm would have been unable to continue funding the lawsuit. The firm may even have been forced to settle the case early or dismiss the suit without any recovery.<sup>237</sup>

Moreover, others besides the bank had a financial stake in the case. Both Joe Mulligan, the lawyer who originally accepted the case, and Trial Lawyers for Public Justice (TLPJ), the nonprofit group that originally associated with Schlichtmann to file the complaint but subsequently opted out, had claims on any legal fees the Woburn case might generate. In light of the fee-sharing constraints in the ethical codes,<sup>238</sup> it is well worth asking whether these fee arrangements were

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235. Judge John F. Grady, however, argues that because most uncomplicated personal injury cases eventually settle, a lawyer does not risk much by taking the case on a contingent basis. He concludes that because most such cases settle with little work required of the lawyer, the majority of cases where a lawyer charges the "standard" one-third fee are "excessive by any standard of reasonableness." John F. Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIGATION 20 (1976). *But cf.* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (holding a contingent fee not unreasonable merely because case settles early, removing much of risk of nonrecovery for client and lawyer).

236. Or, in the case of the tobacco litigation, to the taxpayers, by giving more of the settlement to the government. *See, e.g.,* Brickman, *supra* note 232.

237. In fact, but for the potential fees from the two "deep-pocket" defendants, Schlichtmann might not have continued to pursue the case after he left Reed & Mulligan. HARR, *supra* note 1, at 79.

238. MODEL RULES Rule 1.5(e); CAL. RULES Rule 2-200(A). *See also infra* notes 251-67 and accompanying text.

ethical, and even if they were, whether the fees Schlichtmann paid Mulligan and TLPJ out of the Grace settlement were reasonable given the work each had actually performed on the case. Finally, the relationship Schlichtmann's firm had with its financial advisors, Gordon and Phillips, may have violated the ethical prohibitions on sharing fees with nonlawyers.<sup>239</sup>

This section will explore the ethics of each of these financial arrangements. The following discussion will demonstrate how *A Civil Action* can be a convenient vehicle for teaching the ethics of legal fees.

### A. Illustrations of Fee Sharing Arrangements Between Lawyers in A Civil Action

Two instances arise in *A Civil Action* where lawyers denominate fees as "referral fees." In one incident unrelated to Woburn, lawyer Reed tried to persuade Schlichtmann to let him handle the Piper Arrow case.<sup>240</sup> If Schlichtmann agreed, Reed "would pay Schlichtmann a handsome referral fee when the case was settled, and Schlichtmann would not have to do any work."<sup>241</sup> In addition, we are told that out of the Woburn settlement, Schlichtmann paid Mulligan, who had spent less than a week working on the case, \$350,000 to settle the suit Mulligan had filed against Schlichtmann for his "referral fee."<sup>242</sup>

In addition to these "referral fees," Schlichtmann associated with TLPJ early during his involvement in the Woburn case.<sup>243</sup> Under their agreement, TLPJ's Executive Director Roisman took over as lead counsel, with Schlichtmann to remain as "local counsel."<sup>244</sup> They

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239. Although Phillips is described as having a law degree, he no longer practiced law. HARR, *supra* note 1, at 211.

240. The Piper Arrow case involved the crash of a single engine Piper Arrow plane in the Long Island Sound, killing all aboard. One of the three passengers was a young divorcee, whose ex-husband retained Schlichtmann. The other two passengers retained Reed of Reed & Mulligan. *Id.* at 63-64.

241. *Id.* at 64. As it turned out, Schlichtmann turned down Reed's offer and, largely through Schlichtmann's efforts, the case settled quickly. *Id.* at 66.

242. *Id.* at 455. Recall that Mulligan, who believed the Woburn case was a potential "gold mine," had convinced Schlichtmann to take over the case while Schlichtmann was still associated with Reed & Mulligan. *Id.* at 67-68. When Schlichtmann took over the case, there was a single file folder less than an inch thick, indicating that "Mulligan had spent little time on the case." *Id.* at 68. The file, which contained numerous newspaper clippings about Woburn, suggests that law students hired by Mulligan for minimum wage, and told "to collect whatever pertinent information they could find in Woburn," did most of the work done on the case before Schlichtmann became involved. *Id.* at 66-67.

243. We are told in fact that Schlichtmann had gone to Woburn to tell the families he could not continue on the case for lack of resources to pursue it. When he learned that Trial Lawyers for Public Justice was looking for "a good environmental case," he decided to pursue that avenue. *Id.* at 76.

244. Every federal district court and most state trial courts have a set of "local rules" in

would split the case's costs equally and TLPJ would received two-thirds of any fee that might result from a settlement, with the remaining one-third going to Schlichtmann.<sup>245</sup>

Nearly as soon as Roisman became involved, he had an assistant gather information about the case and he and Schlichtmann drafted the complaint, filing it just days before the statute of limitations expired.<sup>246</sup>

About two and a half years later, after Schlichtmann had spent tens of thousands of dollars responding to Cheeseman's summary judgment motion, TLPJ decided that because there "can only be one captain of the ship," and because Schlichtmann had "put so much time into the case already," they would let him "run with it."<sup>247</sup> TLPJ would still take 12 percent of any settlement or judgment as a "fee for its early work."<sup>248</sup> After the Grace settlement, Schlichtmann paid TLPJ \$300,000 of the \$648,000 they had demanded as their share of the fee.

Did either the Mulligan or TLPJ fee arrangement violate ethical guidelines, either at their formation or in the final payout? There are two questions for each arrangement: first, whether the arrangement is ethical on its face and, second, assuming it is, whether the fee nevertheless constitutes an unreasonable or unconscionable fee.

### B. Ethical Guidelines for Legal Fees

As an initial matter, the fee agreement between Schlichtmann<sup>249</sup> and the Woburn plaintiffs violates no ethical rules. Contingent fees are allowed by American law with only a few restrictions, the rationale being that such a fee arrangement is often the only way a person can "afford, finance and obtain the services of a competent lawyer."<sup>250</sup>

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addition to the Federal or State Rules of Procedure that govern lawsuits in the courts generally. These rules usually have a provision that requires an out-of-state lawyer who wishes to practice in the court to associate with local counsel who reside in the judicial district and are licensed to practice in that state. See, e.g., LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CIV. RULES Rule 2.2.3.3.

245. HARR, *supra* note 1, at 77. Schlichtmann would then split his one-third with Mulligan. *Id.*

246. *Id.* at 78, 81.

247. *Id.* at 142. The Board members of TLPJ were appalled at the amount of money Schlichtmann was spending on the case. *Id.*

248. *Id.* at 142-43.

249. Actually, the original fee agreement was between Joe Mulligan and the plaintiffs. *Id.* at 47-48.

250. MODEL CODE EC 2-20. Usually it is the plaintiff who enters into such arrangements, but defendants in civil actions can also contract to pay their lawyers contingent on how much the lawyer saves them. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-373 (1993) (holding that a benefit to client cannot be inflated). Contingent fee arrangements, however, are not permitted in criminal or domestic relations cases. See MODEL RULES Rule 1.5(d). The rationale for prohibiting a fee that is contingent on the lawyer's gaining an acquittal

Thus, the underlying arrangement between the lawyers and plaintiffs is ethical.

Generally, however, a lawyer may not pay a finder's or referral fee to another lawyer not in the same firm or promise to send business to the other lawyer in return for business the other sends to him. This prohibition on finder's fees or quid pro quo arrangements is virtually universal in the United States.<sup>251</sup> Payment of referral fees has generally been deemed contrary to public policy, resulting in dilution of the lawyer's loyalty to the client and potentially creating conflicts of interest, as well as creating the impression that the lawyers are brokering in clients.<sup>252</sup>

Although the ABA Code strictly prohibits finder's fees, requiring each of the participating lawyers both to provide some of the legal services *and* to retain responsibility for the matter,<sup>253</sup> the Model Rules have relaxed the prohibition somewhat. Under Model Rule 1.5(e), lawyers may divide a fee if "the division is in proportion to the services performed by each lawyer *or*, by written agreement with the client, each lawyer assumes joint responsibility for the representa-

for the defendant is that a conflict is created: to collect the fee, the lawyer would want to go to trial and try to gain an acquittal, even though a plea bargain may be in the client's best interests. In domestic relations cases, there is a concern that a contingent fee arrangement would inhibit efforts by the parties at reconciliation, the lawyer's fee being dependent on her success at recovering more of the marital estate for the client.

251. See, e.g., MODEL RULES Rule 1.5(e); ABA Code DR 2-107(A); CAL. RULES Rule 2-200(A).

252. WOLFRAM, *supra* note 12, at 509-10. The editors of a legal newspaper criticized a proposal to validate referral fees as amounting "to saying that a lawyer should be bribed to act ethically. For it happens to be the unambiguous rule . . . that lawyers not competent to handle cases should not handle them." NATIONAL LAW JOURNAL, Feb. 5, 1979, at 18, quoted in MORGAN & ROTUNDA, *supra* note 210, at 471. In short, a lawyer who has referred a case to a specialist because he lacks the necessary expertise, or to another lawyer because he does not have the time to devote to it, should not be paid for simply acting ethically.

A class discussion need not end here, however. A professor can note that the rules prohibiting fee divisions with lawyers outside the firm—and which thus prohibit referral or finder's fees—do not apply to "referrals" within a firm. Thus, even if a firm's "rainmaker" does no work on a particular matter she brought to the firm, she will still receive part of the fee in the partnership draw if a partner, or a bonus if an associate. Would not allowing referral fees enable sole practitioners or small firms to take advantage of the expertise outside their firms in the same way that large firms do? Keep in mind, however, that even rainmakers who do no work on a matter retain responsibility for it by virtue of their membership in the firm and personal liability for the partnership.

253. See MODEL CODE DR 2-107, which allows lawyers not in the same firm to share fees only if (1) the client consents after the lawyers have fully disclosed they are sharing fees; (2) the lawyers divide the fee "in proportion to the services performed and responsibility assumed by each" lawyer; and (3) the total fee the lawyers charge the client is not clearly excessive for the total legal services provided. Note that the lawyers may not split fees unless both lawyers perform some services *and* retain responsibility for the matter, thus precluding payment of a finder's fee to a lawyer who has simply forwarded the matter to another lawyer and not performed any other services.

tion,"<sup>254</sup> the client is advised that both lawyers are participating in the case and does not object,<sup>255</sup> and the total fee is reasonable. Thus, unlike the ABA Code, which requires that both of the lawyers provide services *and* retain responsibility, under the Model Rules a lawyer may do either and still be allowed to share in the fee.<sup>256</sup> This opens the way for a lawyer to be paid a finder's fee, which is generally viewed as payment for forwarding the case, so long as he retains responsibility for the client's matter.<sup>257</sup>

### C. Mulligan's Fee

With the foregoing ethical guidelines in mind, we can now ask whether Schlichtmann paying Mulligan a \$350,000 "referral fee" was an ethical violation. First, we do not know the specifics of the agreement that Schlichtmann and Mulligan entered into when Schlichtmann, Conway, and Crowley left Reed & Mulligan to form their own firm, taking the Woburn case with them. At the time they would have entered into such an agreement, however, they may have both been lawyers in the same firm, Reed & Mulligan.<sup>258</sup> None of the previously discussed ethical rules would have applied, and they would have been able to share fees in the manner they saw fit,<sup>259</sup> subject to their obliga-

254. MODEL RULES Rule 1.5(e) (emphasis added).

255. The lawyers need not disclose they are dividing the fee, only which lawyers are participating. Thus, they need not disclose the share each lawyer is to receive. MODEL RULES Rule 1.5 cmt. 4. Compare CAL. RULES Rule 2-200(A)(1), which requires that the lawyers disclose not only that the fee will be divided, but also "the terms of such division."

256. Model Rule 1.5(e) requires the client's written consent only for a shared fee based on joint responsibility; the client need not consent to the lawyers' division of fees based on the proportion of work each has done.

257. California's rule goes further. Under California Rule 2-200(A), lawyers not in the same firm can divide a fee if:

- (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
- (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

CAL. RULES Rule 2-200A. There is no requirement that a lawyer being paid either perform services or agree to assume responsibility for the matter so long as the client consents. Note, however, that the lawyers must disclose to the client not only that they are dividing the fee, but also "the terms of such division," that is, how much each lawyer is receiving.

258. We cannot be sure of this. Recall that Conway was not paid a salary at Reed & Mulligan, but rather was paid on a case-by-case basis. HARR, *supra* note 1, at 70-72. It is not clear whether Schlichtmann had the same kind of arrangement.

259. Note, however, that the Piper Arrow arrangement Reed proposed, under which he would pay Schlichtmann a "handsome referral fee" and Schlichtmann would not have to do any work, would have been an improper finder's fee. At the time, Schlichtmann was a sole practitioner and was not associated with Reed & Mulligan. Under the Model Code, he and Reed could not divide fees unless they both performed services *and* retained responsibility for the matter. Under the Model Rules, they would either both have to participate in the case *or* obtain

tions to communicate to the clients which lawyer was handling the case.<sup>260</sup> If we assume Schlichtmann and Mulligan were members of the same firm, then the fee paid to Mulligan, although denominated in the book as such, was not a "referral fee."

Regardless of whether the *fee arrangement* was ethical, it should still bother many readers and students that Mulligan received \$350,000 for less than a week's work on the case.<sup>261</sup> Under those circumstances, the question becomes whether Mulligan receiving \$350,000 out of the \$2.2 million in fees from the case was reasonable.<sup>262</sup>

Model Rule 1.5(a) sets forth eight factors to consider in determining the reasonableness of the fee,<sup>263</sup> but the rule addresses whether the *total* fee charged the client is reasonable, not whether the division

the client's consent to their retaining "joint responsibility" for the matter. MODEL RULES Rule 1.5(e). Only under California's rule would the arrangement Reed proposed have been ethical, but they would still have to obtain the client's consent after full disclosure of the fee division.

260. See, e.g., MODEL RULES Rule 1.4 (duty to keep client reasonably informed about the status of a matter); CAL. RULES Rule 3-500 (duty to keep client "reasonably informed" about "significant developments" relating to the representation).

261. HARR, *supra* note 1, at 455, at 66-68. See also *supra* note 242 and accompanying text.

262. The \$2.2 million fee represented 28% of the total settlement, less than the 40% fee originally agreed to in the contingent fee agreement with Mulligan. It is beyond the scope of this Article to determine whether the 40% contingency fee was reasonable under the circumstances. Many states have special requirements for contingent fee agreements, including that it be in writing and include disclosure as to how costs and disbursements will affect the contingency fee and the client's recovery, and a statement that the fee is negotiable. See, e.g., CAL. BUS. & PROF. CODE § 6147 (1990). See also MODEL RULES Rule 1.5(c) (providing that a fee may be contingent on the outcome of the matter and requiring the fee agreement must be in writing, state the percentages the lawyer will recover, and state the method by which the fee will be calculated, for example, whether costs and disbursements will be deducted before or after the contingent fee is calculated).

263. Model Rule 1.5(a) provides:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993) (billing for professional fees, disbursements and other expenses). Both the Model Code and California Rules also have multiple factors that need to be balanced to determine if a fee is not "clearly excessive" or not "unconscionable," respectively. MODEL CODE DR 2-106(B); CAL. RULES Rule 4-200(B).



of fees between or among lawyers is reasonable. Indeed, Rule 1.5(e) regarding division of fees does not require the division to be “reasonable,” only that the “total fee” be reasonable. The concern generally is that lawyers “divide” only the fee to which they are entitled by the legal services they have performed, and do not encroach on the portion of the recovery that belongs to the client. Thus, so long as the total fee charged the client is reasonable, which is probably true here as it represents only twenty-eight percent of the total recovery, Mulligan can claim his \$350,000.<sup>264</sup>

#### D. TLPJ's Fee

In addition to the \$350,000 Schlichtmann paid Mulligan out of the Woburn fees, Schlichtmann and TLPJ settled for a \$300,000 fee, substantially less than the \$648,000 TLPJ originally sought for “Roisman’s early assistance.”<sup>265</sup> Under its agreement with Schlichtmann, TLPJ was to be lead counsel, and it would split expenses with Schlichtmann and be entitled to two-thirds of any fee recovered.<sup>266</sup>

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264. It is important to distinguish between Mulligan’s legal right to the \$350,000, which would depend on a contract law analysis, and whether his receiving the \$350,000 is ethical. It is beyond the scope of this Article—and the facts given in the book—to determine whether Mulligan had a legal right to his fee. HARR, *supra* note 1, at 77. Mulligan, however, filed suit to recover the fee and the \$350,000 was payment to settle that suit. This suggests that Mulligan may have had a contractual claim to an amount beyond quantum meruit. If the court held that Mulligan was entitled to only the value of his services, then he would have recovered substantially less than \$350,000 for his one week’s worth of work on the case.

In addition to legal issues about the enforceability of a contract between Schlichtmann and Mulligan, Schlichtmann’s leaving Reed & Mulligan raises the issue about a lawyer’s ethical obligations concerning clients and their files when the lawyer leaves a firm. While Schlichtmann et al.’s parting appears to have been amicable, stories of departing lawyers backing up a moving van to the firm’s office in the dead of night and filling it with client files abound. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 80-1457 (1980), suggested that in order to gauge the client’s preference on who it wants to represent it—the firm or the departing lawyer—the departing lawyer could send the client a letter similar to the following letter:

Dear Client:

Effective [date], I became the resident partner in this city of XYZ firm, having withdrawn from ABC firm. My decision should not be construed as adversely reflecting in any way my former firm. It is simply one of those things that sometimes happens in business and professional life.

I want you to be sure there is no disadvantage to you, as the client, from my move.

The decision as to how the matters I have worked on for you are handled and who handles them in the future will be completely yours, and whatever you decide will be determinative.

See also Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989); ABA Formal Ethics Op. 99-414 (1999) (concerning ethical obligations when a lawyer changes firms); State Bar of Cal. Comm. on Professional Responsibility and Conduct CAL 1985-86 (1985) (concerning ethical requirements relating to contacts with clients when private law firms dissolve or one or more attorneys withdraw).

265. HARR, *supra* note 1, at 454.

266. *Id.* at 77.

Subsequently, TLPJ gave “control” of the case to Schlichtmann, but would still receive twelve percent of any settlement (not twelve percent of the fees earned).<sup>267</sup>

The arrangement into which TLPJ and Schlichtmann entered did not violate Model Rule 1.5. It is an example of lawyers associating on a matter, just as Rule 1.5(e) contemplates, each providing professional services and retaining responsibility for the matter. Under their agreement, TLPJ and Schlichtmann both retained responsibility. Further, the clients were probably aware of and consented to this arrangement, as it was Reverend Young who had raised TLPJ’s possible participation in the case at a church meeting.<sup>268</sup>

Moreover, TLPJ’s fees for the case were probably reasonable. Even the twelve percent of the settlement amount—that is, the \$648,000 TLPJ demanded—probably would not have been deemed unreasonable. First, TLPJ was involved in the suit for nearly two and a half years. Although it appears Schlichtmann assumed most of the risk by disbursing most of the costs early on, the case would not even have been filed but for TLPJ’s involvement. Schlichtmann had gone to Woburn to tell the plaintiffs that resources were not available to pursue the case. It was only after TLPJ became involved that he moved forward with filing the complaint and pursuing the case. Although he provided his own expertise on personal injury law in Massachusetts, Schlichtmann relied heavily on Roisman’s expertise in complex environmental cases.<sup>269</sup> Even if courts inquired into the reasonableness of fee divisions, under the circumstances here, TLPJ’s fee was not unreasonable.

Consider, however, the hypothetical situation where the recovery the plaintiffs realized was much larger, say \$100,000,000.<sup>270</sup> Would it have then been reasonable for TLPJ to have claimed a fee of twelve million? Or for that matter, for Mulligan to claim a fee for \$4.5 million, his one-sixth share of a \$28 million fee award? These are merely questions to be asked, but they could generate an interesting class discussion of what constitutes a reasonable fee.<sup>271</sup>

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267. *Id.* at 142.

268. *Id.* at 76.

269. *Id.* at 77, 81.

270. Recall that Professor Nesson suggested that the only way to get the corporations’ attention for having poisoned an entire city was to assess a huge damages award, a year’s profit, which, combined, would amount to over \$500 million dollars. *Id.* at 249-51.

271. This would also provide a springboard for discussing the recent cases involving huge fee awards, such as the tobacco litigation and the recovery from Swiss banks of funds that belonged to Holocaust victims. See *supra* notes 232-33 and accompanying text. Further, the class could explore how the various cities that are currently suing or contemplating suing gun manufacturers should draft their fee arrangements with the private lawyers with whom many are

*E. The Arrangement Between the Firm and Its Financial Advisers*

We are not told many of the details of the business and financial arrangements between the firm and Gordon and Phillips, the firm's financial advisors.<sup>272</sup> Nevertheless, there are hints that the two firms may have been involved in a relationship that implicated the ethical codes' proscriptions against fee-sharing and multidisciplinary practice.<sup>273</sup>

For example, we are told that Schlichtmann, Conway, Gordon, and Phillips "became a team," saw each other nearly every day, and that Conway "rarely accepted a new case until he'd discussed it with Gordon or Phillips."<sup>274</sup> Although they maintained separate offices, they installed a direct telephone line between their two firms.<sup>275</sup> Gordon, Phillips, or both were present at nearly every meeting to discuss settlement with Grace,<sup>276</sup> and it sometimes appears they lived at Schlichtmann's office.<sup>277</sup> Although we are told little of how Gordon and Phillips were compensated, the daydreams Gordon had "of a Palm Beach villa with a large yacht moored outside and two Mercedes-Benzes in the garage" after the "\$500 million meeting" with Professor Nesson<sup>278</sup> suggest that Gordon and Phillips would get a percentage of any recovery rather than be paid on an hourly basis.<sup>279</sup>

Model Rule 5.4 is concerned with financial relationships entered into between lawyers and nonlawyers.<sup>280</sup> Its title, "Professional Independence of a Lawyer," communicates the rationale underlying the Rule: its provisions are intended to ensure that nonlawyers do not influence a lawyer's judgment in making the decisions or giving the advice for which he has responsibility in the client-lawyer relationship.<sup>281</sup> The concern is that a lay person, who is not subject to the

associating.

272. HARR, *supra* note 1, at 211-13.

273. See MODEL RULES Rule 5.4(b)-(d); CAL. RULES Rule 1-310, 1-320; MODEL CODE DR 3-103(A), DR 5-107(B)-(C).

274. HARR, *supra* note 1, at 211.

275. *Id.*

276. *Id.* at 405-48.

277. Harr writes that "for all practical purposes, the Economic Planning Group [Gordon & Phillips' firm] now functioned as part of Schlichtmann's firm."

278. *Id.* at 250.

279. It is unlikely that a financial planner's hourly fee, regardless of how many hours that person put in, would be sufficient to fund a villa and yacht!

280. Model Rule 5.4 addresses fee-sharing with nonlawyers. See also CAL. RULES Rule 1-320. Compare MODEL RULES Rule 1.5(e) and CAL. RULES Rule 2-200, which are concerned with financial arrangements between lawyers who are not in the same firm. See *supra* Part VI.A.

281. MODEL RULES Rule 5.4 cmt. 1. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995); ABA Comm. on Ethics and Professional Responsibility Formal Op. 87-355 (1987).

same duties a lawyer owes a client, might be more interested in his own profit rather than the client's welfare.<sup>282</sup>

Model Rule 5.4 regulates this potential source of influence through four separate provisions. Paragraph (a) prohibits a lawyer from sharing fees with a nonlawyer except in certain circumstances.<sup>283</sup> Paragraph (b) prohibits a lawyer forming a partnership with a nonlawyer. Paragraph (c) states that lawyers may not allow a third party who employs the lawyer or pays the lawyer's fees to direct or influence the lawyer's judgment in rendering legal services. Finally, paragraph (d) prohibits a lawyer from practicing law in a professional corporation or association that practices law for profit if a nonlawyer owns an interest in the entity, is a director or officer, or has the right to direct or control the lawyer's decisions in rendering legal services.

As far as we know, Schlichtmann's firm never entered into a formal relationship with Gordon and Phillips to form a combined firm, nor is there any suggestion in the book that they owned an interest in Schlichtmann's firm. Therefore, paragraphs (b) and (d) of Model Rule 5.4 are not applicable. Although Gordon managed the firm's finances, he did not use his own money to pay the costs and disbursements of the suit, so paragraph (c) does not apply.<sup>284</sup> The only provision that would be applicable here would appear to be paragraph (a), prohibiting a lawyer from sharing fees with a nonlawyer.

As already noted, it appears that Gordon and Phillips were to share a percentage fee for their services<sup>285</sup> rather than be paid on an hourly basis for their advice, as Schlichtmann would have compensated experts and other consultants needed to prepare evidence for trial. Being paid a percentage fee would constitute fee sharing in violation of

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282. See, e.g., *Emmons v. State Bar*, 86 Cal. Rptr. 2d 362 (Cal. Ct. App. 1970); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987).

283. A lawyer may pay money to the estate of a deceased firm lawyer; when purchasing a practice, a lawyer may pay the purchase price to the estate of a deceased lawyer; and a law firm can include nonlawyer employees in a profit sharing compensation plan or a retirement plan. MODEL RULES Rule 5.4(a).

284. This is not entirely true; at one point, Gordon gave his Krugerrands to the banker to cover loan payments. HARR, *supra* note 1, at 351. At any rate, paragraph (c) does not place an absolute prohibition on third party payment for legal services, that is, where a third party pays the lawyer to represent the client. Common situations involve an insurance company paying a lawyer to represent an insured or parents paying a lawyer to represent their child. What Model Rule 5.4(c) prohibits is a lawyer's allowing such a third party to direct the lawyer's representation of the client. It is hornbook law that in insurance defenses it is not the insurance company but the insured who is the client to whom the lawyer owes undivided loyalty. See, e.g., *Parsons v. Continental Nat'l Am. Group*, 550 P.2d 94 (Ariz. 1976); State Bar of Cal. Comm. on Professional Responsibility and Conduct CAL 1995-139 (1995).

285. See *supra* text accompanying note 279.

paragraph (a).<sup>286</sup> Thus, the arrangement the firm apparently had with Gordon and Phillips probably violates Model Rule 5.4.<sup>287</sup>

Nevertheless, a class discussion should not stop here. After all, Gordon's and Phillips' involvement in nearly all of the Woburn settlement discussions and the strategy sessions during the trial does not appear to have had any deleterious effect on Schlichtmann's decisions. Schlichtmann repeatedly appears to have been at odds not only with Gordon and Phillips, but also with Conway on a settlement amount.<sup>288</sup> Moreover, there is no indication that anyone but Schlichtmann had the final say on what offers or counteroffers would be made to Grace, subject only to the clients' decision on whether or not to accept a settlement offer from Grace.

In this case, at least, the concerns underlying Rule 5.4 do not appear to have materialized. Indeed, the proscriptions of Model Rule 5.4 on multidisciplinary practice have been the subject of considerable disagreement. Commentators have questioned the wisdom of such prohibitions when a multidisciplinary practice, for example, consisting

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286. Compare *In re Van Cura*, 504 N.W.2d 610 (Wis. 1993) (holding fee splitting unethical where law firm had financed its litigation with funds from a nonlawyer "consultant," who would then receive half of fees from such cases) with *In re Quintana*, 724 P.2d 220 (N.M. 1986) (holding that it is unethical for lawyer to pay for nonlawyer's investigative services with a percentage of fee from the case), and *Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982) (holding that it is unethical for lawyer to pay nonlawyer employee with salary contingent on the amount of fees from cases). The assumption that Gordon and Phillips were guaranteed a percentage may not be correct, based as it is on Gordon's daydreams. See *supra* text accompanying note 279. It is possible that rather than expecting a guaranteed percentage of the legal fees, they were anticipating a generous bonus from Schlichtmann, as was his custom with firm employees after a lucrative recovery. Such bonuses, for which there is no guarantee, may not necessarily violate Model Rule 5.4(a)'s prohibition on fee sharing. Cf. CAL. RULES Rule 1-320(B), concerning a lawyer's giving a gift or gratuity to a nonlawyer for a referral:

A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

287. Although their apparent fee sharing arrangement would violate Model Rule 5.4, the same is probably not true of their advice to Conway on which cases to accept. A lawyer is generally under no obligation to accept a client. *But cf.* MODEL RULES Rule 6.2; CAL. BUS. & PROF. CODE § 6068(h) (1990). Moreover, a lawyer generally does not owe a prospective client any duties (except not to disclose or use client confidences revealed in the initial consultation), so the rule's rationale to avoid a nonlawyer's affecting the lawyer's judgment to the detriment of the client is not implicated. *But cf.* CAL. BUS. & PROF. CODE § 6068(h) (noting that it is a lawyer's duty "never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed"); MODEL RULES Rules 6.1-6.4 (encouraging lawyers to become involved in voluntary pro bono service).

288. See, e.g., HARR, *supra* note 1, at 408 ("Our bottom line cannot be less than our honest valuation of the case.").

of a lawyer and an accountant, could better serve a client's needs.<sup>289</sup> Moreover, the American Bar Association appointed a Commission to investigate the feasibility of amending the Model Rules to allow lawyers to participate in such multidisciplinary practices (MDPs). Recently, past ABA President Philip S. Anderson has called the proposed modifications of the Model Rules to allow MDPs the most important issue facing the legal profession today.<sup>290</sup> In fact, the ABA Commission on Multidisciplinary Practice has issued a proposal recommending that the American Bar Association amend the Model Rules to permit MDPs, allowing the lawyers to share fees with nonlawyers.<sup>291</sup>

There is, however, still an active opposition to this proposal, as evidenced by the numerous comments a preliminary Commission report and request for comments garnered.<sup>292</sup> This is an area of legal ethics that will remain quite lively. The relationship between the firm and Gordon and Phillips provides an entry to the important debate on the advantages and disadvantages of MDPs.

## VII. CONCLUSION

The foregoing analyses of selected events in *A Civil Action* demonstrate how the book is a rich resource for supplementing a course in Professional Responsibility. Whether directly related to or peripheral to Schlichtmann's pursuit of the Woburn case, these events can infuse the study of legal ethics with an immediacy that a dry class discussion of the acceptable behavior set forth in the ethical codes cannot. The lesson learned is that ethics informs each decision a lawyer makes in representing her client. Using *A Civil Action* to supplement the course can impress upon students that legal ethics is not a subject to be learned in school and discarded upon admission to practice.

The reader should remember, however, that the events I have analyzed and discussed are simply illustrations of how to use the book

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289. See, e.g., GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.4:201, at 801 (2d ed. 1990 & Supp. 1998). It appears that Gordon's and Phillips' involvement in Schlichtmann's practice benefited rather than hurt Schlichtmann's clients. Gordon's financial wizardry enabled him to evaluate settlement offers on the fly and advise Schlichtmann on whether the offer was as good as it may have sounded. See, e.g., HARR, *supra* note 1, at 210-11. He was also the person whom Schlichtmann relied upon to structure settlements in ways that might best benefit the clients.

290. ABA Comm. on Multidisciplinary Practice, *Report to the House of Delegates, General Information Form* (June 8, 1999) <<http://www.abanet.org/cpr/mdpgeninfo.html>>.

291. ABA Comm. on Multidisciplinary Practice, *Report to the House of Delegates* (June 8, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>>.

292. These comments can be accessed at <<http://www.abanet.org/cpr/multicomreplies.html>>.

in a course. They are not intended as an exhaustive survey of ethical issues in *A Civil Action*. Many other situations in the book lend themselves to a discussion of ethical principles. Moreover, although I have suggested how a professor can employ some of the illustrations as a springboard to discussions of more general ethical and professional concerns, the reader should not feel constrained by those suggestions. As a class discussion progresses, other avenues worth exploring often arise. Keeping discussions open-ended and less directed or structured often triggers students' memories of their own experiences and can raise class debate to another level. Finally, using *A Civil Action* will help emphasize that legal ethics need not take a holiday regardless of how exhausted a lawyer is or how "right" the cause she represents may be. Ethical considerations affect a lawyer's entire professional life, and *A Civil Action* will help a student understand that.