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REDEFINING THE ADVOCATE'S ROLE: A CONTRACT THEORY OF LEGAL ETHICS

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I. INTRODUCTION

This article presents a theory of professional responsibility in advocacy[1] based on the policy that a client, when represented by a lawyer, should fare neither better nor worse than would a fair-minded person trained in the law representing himself. This theory contemplates an ethical "contract" between client and lawyer under the following terms: "I, the lawyer, will zealously present your case; but to the extent you thereby gain any unfair advantage, I must rectify it." Client perjury, fraud, and misleading evidence breach the contract and require the lawyer to take all steps necessary to eliminate their effects. This may require more than withdrawal from the case: the attorney also may have to disclose his client's deceit.

Critics argue that this philosophy emasculates the attorney-client privilege and thus penalizes the client for retaining counsel and being candid.[2] These critics claim that an ethical contract

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1. For recent treatises on legal ethics, *see* R. ARONSON & D. WECKSTEIN, PROFESSIONAL RESPONSIBILITY (1980); M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); D. MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973). *See also* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Essay, *Three Discussions of Legal Ethics*, 126 U. PA. L. REV. 452 (1977). For a collection of essays on the topic, *see* LAWYER'S ETHICS (A. Genson ed. 1980). For scathing attacks on lawyers, *see* J. LIEBERMAN, CRISIS AT THE BAR (1978); R. NADER & M. GREEN, VERDICTS ON LAWYERS (1976); A. STRICK, INJUSTICE FOR ALL (1977) (nonlawyer author). Not surprisingly, these last three essays are directed toward a popular audience.

2. *See, e.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966) (lawyer may assist client who intends to perjure himself). *See also* Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951) (lawyer may be justified in lying to judge); Fried, *supra* note 1, at 1081 (unjust for lawyer first to seek, then to betray, his client's trust).

which requires disclosure of the client's falsehoods may encourage the client to withhold information or to lie during preliminary discussions with his lawyer. Counsel thus might not know that his client is testifying falsely at trial.[3] This article will demonstrate, however, that the attorney-client privilege is an inappropriate standard by which to judge ethical conduct. Imposing proper ethical restraints upon an attorney does not penalize the client but rather constitutes a fair price which the client should pay for having a skilled advocate present his case. Special attention will be directed at the proposed Model Rules of Professional Conduct (Model Rules), which embody this equitable approach. The article concludes by supporting the position of the Model Rules that, in certain circumstances, a lawyer must reveal his client's secrets to avoid injustice.[4]

II. BACKGROUND

A lawyer should preserve the confidences and secrets of his client[5] and represent him zealously.[6] A lawyer also owes a duty of candor to both the court and the legal system.[7] His representation, therefore, must be within the bounds of the law.[8] While legal scholars disagree as to where these bounds should lie, an imaginary scale from one to ten best illustrates the nature of the dispute, a score of one representing the greatest ethical duty and a score of ten representing the least ethical duty. The lawyer who acts as an officer of the court and fulfills his duty to assist the trier of fact in ascertaining the truth of a matter earns a rating of one.[9] This duty

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3. Freedman, *supra* note 2, at 1472. Uninhibited communication between lawyer and client can take place only if the client foresees no possibility that his remarks will be repeated by his attorney. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 468-69 (1977).

4. ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.1(b), (d) (Discussion Draft, January 30, 1980) [hereinafter referred to as MODEL RULES]. For the text of MODEL RULES, *see* 48 U.S.L.W. No. 32 (Feb. 19, 1980) (special supplement). *See also* notes 92-94 *infra*.

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4 [hereinafter referred to as the CODE or CPR]. The CODE defines "confidences" as "information protected by the attorney-client privilege" and "secrets" as "other information gained in a professional relationship that the client has requested be held inviolable or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* Disciplinary Rule 4-101(A).

6. *Id.* Canon 5.

7. ABA COMM. ON PROFESSIONAL ETHICS, OPINION NO. 146 (1947).

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7.

9. *See, e.g.*, Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L.

rises to the level set by the court for it is the court that empowers the lawyer to walk into the courtroom and argue a case.[10] The lawyer, therefore, can undertake no activity inconsistent with the court's objective: To search for the truth[11] and to achieve justice. In this regard, the lawyer investigates and presents, fully and accurately, the client's case.[12] Conversely, a rating of ten is accorded to the lawyer who serves as his client's mouthpiece.[13] He does that which his client would do, short of breaking the law. In this situation the client and lawyer are one entity:[14] if the client wishes to lie, the lawyer must permit him to do so. The lawyer complements his client by filling gaps in the client's legal expertise and by ignoring whatever disrespect the client may have for the court and for his opponent.[15] At a rating of ten on the scale, neither ethics nor professional responsibility exist since the lawyer is responsible only to his client. Ethical restraints, such as forbidding a lawyer to use perjured testimony or requiring him to reveal either adverse legal authority or his client's false testimony, shift the lawyer's performance from a rating of ten toward a rating of one. The apparent effect of this shift is to penalize the client for retaining counsel. If the client had neither sought legal advice nor revealed the true facts to his lawyer, the client might have fared better. The client

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REV. 1031 (1975); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Polster, *The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance*, 28 CASE W. RES. L. REV. 3 (1977); Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921; Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975).

10. Curtis, *supra* note 2, at 7.

11. *See* Tehan v. Shott, 382 U.S. 406 (1966), in which the Court stated, "The basic purpose of a trial is the determination of truth. . . ." *Id.* at 416.

12. G. HAZARD, *supra* note 1, at 135; Rosett, *Trial and Discretion in Dutch Criminal Justice*, 19 U.C.L.A. L. REV. 353, 371-75 (1972).

13. ABA DEFENSE FUNCTION STANDARDS, Introduction (1979) [hereinafter referred to as ABA DEFENSE STANDARDS]; Noonan, *supra* note 9, at 1491. *See generally* Curtis, *supra* note 2; Freedman, *supra* note 2.

14. "After the retainer, they are considered as the same person with their clients." C.B. GILBERT, EVIDENCE 138 (London ed. 1752), *quoted in* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 543 n.3 (McNaughton rev. ed. 1961).

15. The contract theory contemplates a duty to the court and the opponent, as well as to the client. *See* Frankel, *supra* note 9, at 1038, in which the author states, "Whatever doctrine teaches, it is a fact of interest that most criminal defense counsel are not at all bent upon full disclosure of the truth." Professor Fried believes that a lawyer need not concern himself with his opponent any more than a father with children to support should help alleviate famine around the world. Fried, *supra* note 1, at 1066.

could lie about the facts or deliberately misstate the law if he represented himself. When represented by an ethical lawyer, however, the client loses these options.

III. THE ATTORNEY-CLIENT PRIVILEGE, CONFIDENTIALITY, AND LEGAL ETHICS

The possibility that a client's position may worsen after he secures counsel requires an understanding of the attorney-client privilege and its role in the system of ethical restraints. The privilege has been stated as follows:

> Where legal advice of any kind is sought . . . from a professional legal advisor in his capacity as such, . . . the communications relating to that purpose, . . . made in confidence . . . by the client, . . . are at his instance permanently protected . . . from disclosure by himself or by the legal advisor, . . . except [should] the protection be waived.[16]

A lawyer's ethical obligation regarding client confidences is broader than the evidentiary privilege of attorney nondisclosure upon which the ethical duty is founded.[17] Anything learned in the course of representation, regardless of the source, may not knowingly be disclosed.[18] Furthermore, the lawyer may not use such information to the client's detriment.[19]

Obviously, a client is more likely to be candid with his lawyer if the lawyer is barred not only from revealing adverse information disclosed by the client but also from using this information against the client in any way.[20] It is equally apparent that the more a lawyer knows about the case, the more effectively he can achieve his client's objectives.[21] Analysis of the attorney-client privilege's history and policy, however, indicates that its principal purpose is not to protect the inviolability of client secrets. The primary goal of the privilege is to encourage individuals to seek counsel.[22] Public pol-

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16. 8 J. WIGMORE, *supra* note 14, § 2292, at 554.

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4-4.

18. *Id.*

19. *Id.* Disciplinary Rule 4-101(B)(2).

20. E. W. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 175 (2d ed. 1972).

21. *Id.*

22. Annesley v. Earl of Angelsea, 17 How. St. Tr. 1129, 1225 (1743), in which the court stated that "An increase of legal business and the inabilities of the parties to transact that business themselves, made it necessary for them to employ . . . other persons who might transact that business for them." E.W. CLEARY, *supra* note 20, at 175 n.3. *See also* Wade v. Ridley, 87 Me. 368, 373, 32 A. 975, 976 (1895):

icy favors the handling of litigation by lawyers, rather than by litigants, to ensure more just and expeditious results.[23] Representation by lawyers equalizes the opposing litigant's strength[24] since the power derived from representation by a lawyer offsets the client's weakness.[25]

Originally, as with other evidentiary privileges, there also was concern about the corruption of family relations and quasi-family relations, such as those existing between physician and patient and between attorney and client.[26] Preservation of these relations demanded the fullest *"uberrima fides,"*[27] or fidelity. The accepted theory, however, at least according to one commentator, is that the truth is preferable to fidelity.[28]

Since the attorney-client privilege often prevents the lawyer from revealing the truth,[29] it has been subject to attack.[30] The classic criticism was leveled by Jeremy Bentham, who believed that an innocent party needs no privilege and that a guilty one should not have the assistance provided by the privilege.[31] Other commenta-

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> An order of men . . . learned in the law and skilled in legal procedure, is essential to the beneficient administration of justice. The aid of such men is now practically indispensable to the orderly, accurate and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right.

Id.

23. E. W. CLEARY, *supra* note 20, at 176.

24. *But see*, Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 492 (1928).

25. *Id.*

26. *Id.* at 489.

27. *Id.* at 490. According to Dean Wigmore, a precondition for invoking the privilege is that "[t]he *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation." 8 J. WIGMORE, *supra* note 16, § 2285, at 527 (emphasis in original).

28. Radin, *supra* note 24, at 490.

29. 8 J. WIGMORE, *supra* note 16, § 2291, at 554.

30. "Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' " Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). *See* Note, *supra* note 3, at 465. *Contra*, Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Courts Today*, 31 TULANE L. REV. 101 (1956).

31. The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have any thing to fear from it . . . What then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law

tors, however, have observed that, human nature being what it is, no client's story is likely to be either all good or all bad.[32] Thus, the balance between maintaining the privilege and revealing the truth is struck in favor of the privilege. Accordingly, the ultimate goal of the attorney-client privilege is not to foster the client's complete, unfettered revelation of facts to his lawyer, but to encourage the layman to retain a lawyer rather than to represent himself. The end of the attorney-client privilege is to encourage the seeking of counsel; the means is the safeguarding of confidences. As will be shown, however, the American Bar Association's Code of Professional Responsibility (the Code) and Defense Standards, which currently[33] govern ethical conduct, adhere to the policy of the privilege in an inconsistent manner. Moreover, a stronger allegiance to the attorney-client privilege would dictate that lawyers not be bound at all by ethical restraints in advocacy—an unacceptable state of affairs.

IV. ATTORNEY-CLIENT PRIVILEGE'S SHORTCOMINGS AS JUSTIFICATION FOR ETHICAL RULES

A. *Knowingly Using Client's Perjury*

Employing the attorney-client privilege as a major justification for the ethical rules has led to an inconsistent application of certain rules. One example is the disparate treatment of client perjury in civil, as contrasted with criminal, cases. In this regard, consider the following situation.

Your client is indicted for assault and battery. He tells you that he went up to the victim, unprovoked, and punched him in the nose. This happened in New York, but your client wishes to testify that he was in Nebraska at the time. Can you put him on the stand? The answer, with minor qualifications, is "no" since the

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advisor, in the way of concerting a false defence, as he may do at present. . . .

J. BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 302-04 (1827), *quoted in* D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 542 (3d ed. 1976).

Bentham's philosophy also led him to believe that a lawyer who defended a man he knew was guilty was an accessory after the fact. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 293 n.2 (1980).

32. *See, e.g.*, 8 J. WIGMORE, *supra* note 16, § 2291, at 552.

33. Every state except California has adopted the CODE with minor variations. ABA CODE OF PROFESSIONAL RESPONSIBILITY, By State 1 (1977).

Code forbids the use of perjured testimony.[34] You may permit your client to testify only if your client's intention to perjure himself becomes apparent to you at a time when it is infeasible for you to withdraw from the case[35] or if the court forbids your withdrawal.[36] Even then, you must discourage your client from testifying.[37] If your client insists on testifying, you may only introduce him to the trier of fact and allow him to tell his story in a narrative fashion.[38] This procedure has been held not to violate the defendant's right to due process and a fair trial.[39] Conversely, in an analogous civil litigation, under no circumstances may you put your client on the stand.[40] The Code does not differentiate between civil and criminal cases in this regard. Rather, the American Bar Association (ABA) Defense Standards[41] relax the ethical restrictions in a criminal case. Also, a landmark ABA ethical opinion suggests that a distinction be drawn between civil and criminal cases but gives no supportive reasoning.[42] The combination of a criminal defendant's right to counsel and his right to testify arguably requires a lawyer

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34. *Id.* Disciplinary Rule 7-102(A)(4).

35. *See, e.g., id.* Disciplinary Rule 2-110(c) (lawyer may not withdraw, subject to listed exceptions).

36. ABA DEFENSE STANDARDS § 7.7(c).

37. *Id.* § 7.7(a).

38. *Id.* § 7.7(c). "Criminal defendants in most European countries do not testify under oath, but simply 'tell their stories.' " M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 31 (1975). *See* Silving, *The Oath (Pt. 2)*, 68 YALE L.J. 1527, 1533-36 (1959).

39. Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978). In *Lowery*, the defendant's conviction was reversed because his attorney moved to withdraw rather than follow the ABA DEFENSE STANDARDS and allow the defendant to testify in narrative form without aid of counsel. The appellate court believed that the trial judge, sitting without a jury, might have inferred the fact of perjury, even though counsel gave no reason for withdrawing. *Id.* at 729-31. The court added that a lawyer's disclosure of his client's perjury in a criminal case would deprive the defendant of effective assistance of counsel. *Id.* at 730.

40. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule, 7-102(A)(4); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 847 (1977). The ABA DEFENSE STANDARDS, which in certain instances permit perjury, apply only in criminal cases. *See* note 37 *supra*.

41. ABA DEFENSE STANDARDS § 7.7(c).

42. ABA COMM. ON PROFESSIONAL ETHICS, OPINION NO. 287 (1953). Former ABA CANONS OF PROFESSIONAL ETHICS NO. 41 (1908) provided that "[w]hen a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it. . . ." ABA OPINION NO. 287 held that "[w]e do not believe that Canon 41 was directed at a [criminal] case, . . . but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception." *Id.* at 612-13.

to allow the accused to testify, even falsely.[43] Recent cases, however, have qualified the right to testify falsely. These cases hold that even a criminal defendant has no right to take the stand if he intends to lie.[44] For example, in *State v. Whiteside*,[45] the court said "A defendant is entitled to present his defense and to an opportunity to testify fully . . . . [H]owever, he has no right to commit perjury, nor is an attorney permitted—much less required—to aid in such a purpose."[46] Thus, the court held that an attorney was not required to put his client on the stand knowing that he would lie.[47] The opinion added that "A lawyer should not . . . decide what is true and what is not unless there is compelling support for his conclusion."[48] The court in *Johnson v. United States*[49] observed that an ethical dilemma does not arise when the veracity of the defendant's testimony is conjectural but would arise either if the client has admitted guilt or inculpatory facts to his lawyer or if the lawyer has corroborated his suspicion through an independent investigation.[50]

If a criminal defendant has no right to take the stand to lie, there may be no reason to distinguish between civil and criminal cases in ethical terms. Civil litigants have rights parallel to those of criminal defendants, including the right to be heard[51] and a privi-

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43. United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977). The facts in *Johnson* were similar to those in Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). *See* note 39 *supra*. In *Johnson*, however, counsel's belief that her client was lying was unsubstantiated. Thus, while holding that defendant had the right to testify and the right to counsel, the court added:

> If an attorney faced with [client perjury] were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel. . . .
>
> . . . It is apparent that an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured.

555 F.2d at 122. *See generally* Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 679-83 (1978).

44. State v. Whiteside, 272 N.W. 2d 468 (Iowa 1978). *Cf.* Johnson v. United States, 404 A.2d 162, 164 (App. D.C. 1979). *See also* Harris v. New York, 401 U.S. 222, 225 (1970) (privilege to testify does not include privilege to commit perjury).

45. 272 N.W.2d 468 (Iowa 1978).

46. *Id.* at 470.

47. *Id.*

48. *Id.*, citing United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977)). *See* note 43 *supra* for a discussion of *Johnson*.

49. 404 A.2d 162 (App. D.C. 1979).

50. *Id.* at 164.

51. Mathews v. Eldridge, 424 U.S. 319, 349 (1975).

lege against self-incrimination.[52] They also have a right to be heard through counsel, insofar as the court cannot deny them retained counsel.[53] Unlike criminal defendants, however, civil litigants do not have the constitutional right to appointed counsel or "effective assistance of counsel."[54] Since criminal cases base the right to testify on the sixth amendment, rather than on the fifth amendment right against self-incrimination,[55] this reliance on the sixth amendment may provide a compelling reason to distinguish ethically between civil and criminal litigants' right to effective counsel.[56]

B. *Using Perjury by Third Party*

Another illustration of the attorney-client privilege's inadequacy as justification for the ethical rules appears in the rule against witness perjury.[57] Assume that your client's cousin wishes to swear falsely that he was with your client in Nebraska at the time the crime allegedly was committed in New York. You cannot put the cousin on the stand.[58] Even if the defendant had a constitutional right to testify falsely, which he does not,[59] he cannot, through his lawyer, call a witness so inclined.[60] Yet the lawyer probably acquired knowledge of the witness' intent to lie from the client, or at least as a result of the representation, just as he did when the client himself proposed to lie.[61]

These situations, when analyzed in the context of the attorney-client privilege, illustrate that the ethical rules are contrary to their purpose,[62] to encourage people to seek legal counsel by safeguarding their confidences. The client's confidences have been used against him when, as illustrated above, he is precluded from taking the stand in a civil case, when he suspiciously uses the narrative form in the criminal case, and when his cousin is prevented from testifying falsely. The lawyer, knowing the entire story, will

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52. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

53. Powell v. Alabama, 287 U.S. 45, 69 (1932). *See* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

54. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

55. *Id.* at 732 (Hufstedler, J., concurring); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 121 (3d Cir. 1977).

56. *See* notes 103 & 104 *infra* and accompanying text.

57. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-101(B)(2).

58. *In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969).

59. *See* note 44 *supra*.

60. *Id. See* Wolfram, *supra* note 40, at 864 n.214.

61. Wolfram, *supra* note 40, at 864 n.214.

62. *See* notes 20-30 *supra* and accompanying text.

not represent the client as effectively as he would have had his client told him from the beginning that he was in Nebraska when the crime was committed. The client, penalized for confiding in his lawyer, thus is discouraged from seeking counsel or from revealing the truth to his lawyer should he hire counsel. Accordingly, the client might have done far better by representing himself. This result is contrary to the Code's policy of encouraging litigants to seek effective counsel. In one respect, the legal system is protected since the client cannot both defraud the system and have a lawyer. Litigants must choose one or the other.

C. *Discrediting a Truthful Witness*

The practice of discrediting a truthful witness by establishing a bias further illustrates the de facto harm that legal representation might cause.

Assume, for example, that in the above assault and battery case your client is Jewish and the victim is a Nazi. After questioning the Nazi at trial, you know that he is telling the truth because he related the facts precisely as your client had. Can you, with an eye toward concocting a frameup and establishing bias, cross-examine the victim on the basis of his beliefs and his concomitant hatred of your client? Initially, the difference between using perjured testimony and discrediting a truthful witness appears great. Ethically, however, the situations should not be treated differently.[63] If the use of perjury amounts to making falsehood sound like truth, then the discrediting of a truthful witness makes truth sound like falsehood. A lawyer should not be permitted to establish bias when he knows that whatever bias the witness has has not affected his testimony. The Code is silent on this issue. A lawyer, by cross-examining the Nazi in an effort to depict him as biased, is not using perjury or false evidence, nor is he perpetrating a fraud as proscribed by the Code.[64] Arguably, the bias is irrelevant in the lawyer's mind and thus cannot be adduced ethically under the Code Disciplinary Rule 7-106(C)(1), which forbids the lawyer

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63. *See* Noonan, *supra* note 9, at 1487. *Contra*, Pye, *supra* note 9, at 958 (interaction of adversary system and obligation to prove guilt beyond reasonable doubt justifies tactic despite disagreement elsewhere). Professor Freedman believes that there is no ethical difference. He resolves the issue, however, in favor of both using perjury and cross-examining the truthful witness. Freedman, *supra* note 2, at 1469.

64. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(4) (perjury and false evidence); *Id.* Disciplinary Rule 7-102(A)(7) (counsel or assist in fraudulent conduct).

from alluding to matters he does not believe are relevant to the case.[65]

As an evidentiary matter, however, credibility is always a relevant issue,[66] and impeachment on that basis is permitted. The following ABA Defense Standard provides the only ethical guidance on the matter:

> A lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.[67]

This provision is inadequate, however, because perplexing issues are treated in too broad a manner. The prohibition against misusing the power of cross-examination provides little guidance, if any, regarding particular tactics. For example, in the assault and battery situation involving the Nazi, how can an attorney limit the method and scope of cross-examination without undermining his client's objectives? His duty to limit the examination is further evidence that, once again, a situation appears in which representation by counsel may harm the effectiveness of a litigant's case.

D. *Unknowingly Using Client Perjury: Duty to Disclose to Court*

In the perjury and cross-examination situations explored above, the lawyer knew the facts before he examined or cross-examined the witness. A far different situation occurs when the lawyer learns the truth after examination[68] and may have an obligation to reveal that his client lied. If fraud or perjury[69] occurs dur-

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65. *Id.* Disciplinary Rule 7-106(C)(1) provides: "In appearing in his professional capacity before tribunal, a lawyer shall not: State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

66. *See* Pye, *supra* note 9, at 933-57 (relationship between ethics and evidence). "There is understandably a desire to avoid the conclusion that a lawyer can do anything not prohibited by rules of evidence or procedure or law." *Id.* at 945.

67. ABA DEFENSE STANDARDS § 7.6(b). Professor Pye suggests that ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(2), prohibiting the advancement of an unwarranted defense, might apply in a "general and ambiguous" way. Pye, *supra* note 9, at 943.

68. *See generally* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976).

69. Perjury is a fraud upon a tribunal. ABA COMM. ON ETHICS & PROFES-

ing the course of the representation and the lawyer learns about it after it has occurred, the lawyer first must call on his client to rectify the fraud or perjury: if the client refuses or is unable to do so, the lawyer must do so. An exception is provided if the information is protected as a privileged communication.[70] A privileged communication is defined as anything the lawyer learns in the course of the professional relationship.[71] Accordingly, if the lawyer learns of his client's fraud from the client, it cannot be disclosed. Information acquired while interviewing witnesses, conducting a title search, or examining any other sources uncovered in the course of representing a client also would be privileged.[72] There is some doubt whether the duty to reveal testimonial fraud exists at all in a criminal case because of the accused's right to effective assistance of counsel.[73] The Code, however, draws no distinction between civil and criminal cases. One commentator points out, though, that all information gained during the attorney-client relationship usually will be privileged in either case so a lawyer will rarely have to reveal it.[74]

The scope of the privileged information doctrine is narrowed when the lawyer learns of relevant facts independent of the representation. When the lawyer acquires information from a third

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SIONAL RESPONSIBILITY, FORMAL OPINION NO. 341 (1975); *Id.* FORMAL OPINION NO. 287 (1953); Brazil, *supra* note 68, at 602-04, nn. 1 & 5; Wolfram, *supra* note 60, at 820, 864-66.

70. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B)(1).

71. ABA COMM. ON ETHICS & PROFESSIONAL RESPONSIBILITY, FORMAL OPINION NO. 341 (1975).

72. *Id. See also* ABA CANONS OF PROFESSIONAL RESPONSIBILITY, NO. 41.

73. *See* Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978). *But see* United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977). For a discussion of *Johnson*, *see* note 43 *supra*. The *Johnson* opinion stated that if an attorney discussed his client's perjury without possessing a firm factual basis for believing that his client lied, he would be violating his client's constitutional rights. If the converse were to be true, then possessing a factual basis might justify the lawyer's disclosure of perjury. *See* Harris v. New York, 401 U.S. 222, 225 (1971) (illegally obtained confession may be used to impeach testimony at trial, since fifth amendment does not confer privilege to lie).

74. Wolfram, *supra* note 40, at 864-65. Wolfram interprets ABA FORMAL OPINION NO. 341 (1975) to mean that in addition to having been learned from a source independent of the representation, the information must have been learned before the representation had begun or after it had ended. *Id.* at 837 n.106. Thus, he concludes, "[t]he practical effect . . . is nearly to emasculate the affirmative disclosure duty stated in [CPR] DR 7-102(B)(1)." *Id.* Perhaps if the client had said, "I've lived in the home for 20 years," but you know that your sister had lived there until two years ago at which time your client in fact had moved there, Wolfram would hold that disclosure is required.

party, outside the scope of representing his client, the information is not privileged and must be revealed. If a client were to represent himself, the client would not be obligated to reveal such information. Thus, a client may be penalized for securing counsel. Consider the following situation. Your client is sued in contract for $100,000. His only asset is a spacious home. The plaintiff moves to attach it. Your client asks you how he can successfully oppose the motion. You inform your client that he should file an affidavit explaining that he has lived in the home for twenty years and has no intention of selling it. In addition, he should declare that attachment would ruin his credit and consequently would prevent him from financing his children's college education. Assume that this all happens to be true except that, unknown to you, your client actually intends to sell his home. A judge, conceivably, could consider the affidavit and deny the plaintiff an attachment under the false assumption that the defendant planned to keep the house in his possession as security. A few weeks later you are looking for a home and see your client's house in the multiple listing service. It was put on the market before he filed his affidavit but after the suit was filed and you were retained as counsel. If your client sells his house, the plaintiff will have no security for the judgment which he may recover. Since you learned of the sale outside the scope of representing your client, you must reveal this information to the court or to the plaintiff if your client refuses to do so.[75] You would have no such obligation, however, if you learned of the sale directly from your client.[76] In fact, you would be bound not to disclose the information, just as you would be bound if your client told you about a past crime he had committed.[77] Regardless of the

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75. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B)(1). If your client had already sold the home, the fraud would be irremediable, in which case that attorney may not have any duty to disclose.

76. The obvious question is whether the communication is truly confidential in view of the client's having uttered it to a third party, such as to the broker or buyer, as well as to his attorney. The rule is that it makes no difference that the information was available through nonconfidential sources or was received from a third party as well as from the client. In these situations, no disclosure is permitted, as long as the client intended no revelation by the lawyer. Doe v. A Corp., 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971) (citing H. DRINKER, LEGAL ETHICS 105 (1953)), *aff'd sub nom.*, Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972).

Also, one might argue that the privilege should not apply because the communication that the client lied in his affidavit was not made for the purpose of seeking legal advice. But "[professional responsibility] . . . looks beyond technical considerations of secrecy in the evidentiary sense and shields all information given by a client to his attorney whether or not strictly confidential in nature." *Id.* at 1356.

77. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 4-101(B)(1).

information's source, the client will regard your disclosure as a betrayal. He justifiably may believe that he would have fared better without a lawyer, or at least with a lawyer ignorant of all matters except those learned from his client.

E. *Duty to Disclose Third-Party Perjury and Adverse Legal Authority*

The Code penalizes the client for retaining counsel in several related areas. According to the Code, if a favorable witness commits perjury, the lawyer must reveal the falsehood[78] since the witness is not his client and the attorney-client privilege is inapplicable. The lawyer, though, learned of the perjury as a result of the representation just as he did when his client lied.[79]

The Code penalizes the client who chooses to retain counsel by requiring a lawyer to reveal to the court legal authority adverse to his case.[80] The lawyer, however, need not disclose adverse facts.[81] This distinguishes facts which are learned from the client, and therefore are privileged, from the applicable law, which can be found in books which are available to all.[82] Since the law, by its nature, is public information, the lawyer can be candid with the

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The crime, perjury, already has occurred. A lawyer is not required to, but may reveal a future crime. The future sale of the home, however, is a fraud, not a crime; therefore, the lawyer may not reveal it. *See id.* Disciplinary Rule 4-101(C)(3). *See also* note 123 *infra*.

78. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B)(2). Wolfram, *supra* note 40, at 864.

79. Wolfram, *supra* note 40, at 864 n.214.

80. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-106(B)(1): "In presenting a matter to a tribunal, a lawyer shall disclose: legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." In addition, a lawyer may not knowingly make a false statement of law. Ashbaugh v. State, 400 N.E.2d 767, 772 (Ind. 1980). ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(5). Not only would direct misstatements, such as "this is a case of first impression," "authorities are in conflict on the point," or "the case holds X," come under the purview of this section but so would indirect or interpretative misstatements, such as "this case clearly comes within the rule of A," or "the unmistakable trend in the law is toward B." Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 HOFSTRA L. REV. 729, 731-33 (1978). *See also* Seidenfeld, *Professional Responsibility Before Reviewing Courts*, 25 DEPAUL L. REV. 264 (1976).

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 4-101(B)(1); MODEL RULES 3.1, *supra* note 4, Comment, Disclosure of facts; N.Y. COUNTY LAWYER'S ASSOC. COMM. ON PROFESSIONAL ETHICS (hereinafter referred to as N.Y. COUNTY OPINIONS), OPINION NO. 309 (1933) (lawyer need not disclose existence of unfavorable witness).

82. R. ARONSON & D. WECKSTEIN, *supra* note 1, at 298-99.

court without breaching his client's confidence. Also, the judge, who often requests that the lawyer brief the law, relies on the lawyer's research[83] and takes a passive role in the presentation of the facts. These explanations for revelation of legal authority to the court ignore the ultimate objective of the attorney-client privilege: To encourage the seeking of counsel.[84] In addition, the client is penalized for hiring a lawyer in the above situations: a *pro se* party might misstate the law, but retained counsel cannot. Nor may the attorney knowingly make a false statement of fact,[85] something which the client might be tempted to do despite the sanctions for perjury. Privilege or not, the client whose lawyer reveals adverse legal authority will feel no less betrayed than the client whose secrets are disclosed or used against him.

V. THE PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT VIS-A-VIS CONTRACT THEORY

In 1977, the ABA established the Commission on Evaluation of Professional Standards, known as the Kutak Commission, to consider preparation of a complete overhaul of the ABA Code of Professional Responsibility.[86] After over two years of reevaluating "the fundamental tenets of ethics and self-regulation in the legal profession"[87] the Commission prepared and distributed the Discussion Draft of the Model Rules of Professional Conduct (Discussion Draft).[88] According to the report's preface, the rules "simply provide a legal framework for the ethical practice of law,"[89] a framework that is based on both the current Code and on the continuing evolution of ethical thought, specifically that of the 1970's.

The Discussion Draft has not been adopted or approved by the ABA's House of Delegates and, therefore, does not represent the policy of the ABA.[90] Instead, the text is open for continuing revisions until the proper ethical balance can be achieved. Fearing that the Model Rules might be approved without any real scrutiny,

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83. Vargas v. McNamara, 608 F.2d 15, 19 (1st Cir. 1979).
84. *See* notes 21-30 *supra* and accompanying text.
85. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(5).
86. *See* R. Kutak, *Coming: The New Model Rules of Professional Conduct* 66 A.B.A.J. 46, 47 (1980).
87. MODEL RULES, *supra* note 4, at 1 (preface).
88. *See id.* at 1.
89. *Id.* at 2 (scope & definitions).
90. *Id.*

one commentator[91] has suggested that the legal profession should critically debate the new and controversial directions proposed by the Model Rules. Despite potential revisions in the Discussion Draft, if the Model Rules are approved in substantially the same form as proposed, they will represent a significant new approach to the regulation of ethical conduct having far-reaching effects for every attorney in the United States.

A. *Civil Cases*

In civil cases, the Model Rules differ from the present Code in three important respects. First, a lawyer must disclose false evidence, even if the client's confidences are thereby violated.[92] Second, a lawyer may not offer evidence which is substantially misleading.[93] Third, the lawyer must correct any manifest misapprehension resulting from a previous representation he has made.[94]

The following situation illustrates conduct which would be considered unethical under the Model Rules but which would be permissible under the present Code. Assume that your client has committed rape. At the time of the crime's commission he had no unusual identifying marks on his body. The victim sues your client in a civil action. Shortly afterward your client undergoes an appendectomy. The operation leaves a large scar near his genitals, and he informs you of it. At trial, you ask the victim on cross-examination whether the defendant had any identifying marks, and

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91. Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A.J. 1074, 1075 (1980).

92. MODEL RULE 3.1(b) provides:

> Except as provided in paragraph (f) [criminal cases], if a lawyer discovers that evidence or testimony presented by the lawyer is false, the lawyer shall disclose that fact and take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification.

93. MODEL RULE 3.1(a)(3) provides: "A lawyer shall not: . . . except as provided in paragraph (f), offer evidence that the lawyer is convinced beyond a reasonable doubt is false, or offer without suitable explanation evidence that the lawyer knows is substantially misleading. . . ."

94. MODEL RULE 3.1(d)(2) provides: "Except as provided in paragraph (f), a lawyer shall disclose a fact known to the lawyer, even if the fact is adverse, when disclosure: . . . is necessary to correct a manifest misapprehension resulting from a previous representation the lawyer has made to the tribunal." Whether the words "the lawyer has made" mean the lawyer, but not the client, is not clear. In MODEL RULE 4.2(b)(2), involving negotiation, the Discussion Draft specifically includes misapprehensions created by the client as well as those formulated by the lawyer is imposing a duty of disclosure upon counsel.

she responds in the negative. At the close of the government's case, your defense consists entirely of asking the defendant to reveal his scar in court. The jury assumes that the scar was there at the time of the rape, doubts the veracity of the victim, and acquits your client. No perjury, fraud, or false evidence was offered at trial. The argument that the exhibition was irrelevant, and therefore unethical under the Code, is a weak one. Thus, although your trial tactic was misleading, the Code would seem to permit it. Testimony is misleading if, irrespective of its lack of falsity, it is likely to impede further inquiry into the truth.[95] The Model Rules would prohibit this tactic as "substantially misleading."[96] If the attorney learned of his client's deceit after the fact, he would be required to disclose it, regardless of the source of his knowledge. The trend clearly is toward a "one" rating:[97] the Model Rules encourage the lawyer to serve as an officer of the court by seeking true justice rather than serving as a mere mouthpiece for his client.

B. *Criminal Cases*

In criminal cases, on the other hand, the Model Rules are closer to the "ten" rating,[98] where the client's wishes prevail over legal ethics. Not only are the civil provisions inapplicable, but if the accused so insists, the lawyer must offer false evidence when "applicable law requires that the lawyer comply with such a demand."[99] The Discussion Draft of the Model Rules does not explain the quoted portion. The commentary, however, states that a criminal lawyer's ethical obligations are subordinate to his loyalty to his client.[100] The commentaries thus supplement the provisions of the Model Rules in a manner similar to that used in the Uniform Commercial Code.[101] The effect of these comments as persuasive authority, therefore, is difficult to predict.

For reasons previously stated,[102] the law does not seem to require that this "no holds barred" attitude of the Model Rules be

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95. The MODEL RULES do not define "misleading." The definition in the text is that of the author. *See* Pye, *supra* note 9, at 942 (implied equation of suppression of truth with misleading of jury).

96. *See* note 93 *supra*.

97. *See* text accompanying notes 9-15 *supra*.

98. *Id.*

99. MODEL RULES 3.1(f)(3).

100. *Id.* (Comment) (Perjury by a criminal defendant).

101. *See* Kaufman, *supra* note 91, at 1076 (author expressed "uneasy feeling that often the comments range far beyond the text of the rule"). *Id.*

102. *See* notes 42-47 *supra* and accompanying text.

maintained in criminal cases. Nonetheless, there are several reasons for relaxing the ethical obligations of a criminal lawyer. First, and most importantly, the accused faces a loss of liberty or even life, whereas the civil litigant faces loss of property. Second, when a criminal client is acquitted, no particular party loses, only the sovereign.[103] Third, our system of jurisprudence frowns upon any apparatus forcing the accused to play a role in his own conviction. The more the defendant prejudices his own case by talking to his lawyer, the less the prosecution must bear its burden of proof. Were criminal defense lawyers forced to disclose false evidence, they might be subjected to interrogation by the prosecution.[104] These issues currently are unresolved. They do indicate, however, that disclosure can severely prejudice a client's case.

C. *Contract Theory*

As shown in both criminal and civil cases, the existing ethical prohibitions against the use of perjury and false evidence, as well as the requirement that a lawyer disclose the perjury of a favorable witness, inhibit the client's full disclosure of facts to his lawyer. Moreover, requiring the disclosure of adverse legal authority and client fraud which is discovered independently of the representation discourages individuals from securing counsel. Current principles of professional responsibility therefore, contrary to their stated purpose, are based only partially upon the attorney-client privilege. A stronger commitment to confidentiality, on the other hand, would exclude ethics from a lawyer's obligations. Stricter confidentiality would transform the lawyer into a mouthpiece for his client, possibly leading him to disregard the truth.[105]

This is not to imply that confidentiality is undesirable or that the attorney-client privilege should be abolished. Rather, this article suggests that a client should not be permitted to use his attor-

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103. Wolfram, *supra* note 40, at 859-60.

104. *See, e.g.*, People v. Kor, 129 Cal. App. 2d 436, 277 P.2d 94 (1954). In *Kor*, a judge asked an attorney whether his client had told him a different story. The appellate court opined that the lawyer should have opted for a contempt citation and jail rather than answer the judge. *Id.* at 447, 277 P.2d at 101 (Skinn, J., concurring). *See also* 8 J. WIGMORE, *supra* note 14, at § 2291; Sedler & Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1, 9 (1963). Professor Mellinkoff notes that "[t]he privilege [against self-incrimination] reinforces the presumption of innocence, requiring the accuser to gather evidence to prove a man guilty rather than resort to the simpler, faster expedient of squeezing his genitals until he confesses." D. MELLINKOFF, *supra* note 1, at 153.

105. Uviller, *supra* note 9, at 1072.

ney, whether the attorney acts through ignorance or purposeful intent, to catapult himself to a more advantageous position by using falsehoods and labeling them "confidential." Let us reconsider the hypothetical attachment situation.[106] The lawyer's expertise in drafting the affidavit permitted the client unjustly to alienate his sole asset from attachment. Similarly, having the defendant in the hypothetical rape situation display his scar was the lawyer's stratagem. In each of these situations no worthwhile purpose would be served by having the lawyer remain silent or withdraw from the case. Withdrawal or silence is no different than an active betrayal of the court. Thus, the potential for abuse requires a delicate balance between the need for confidentiality and the improper use of attorneys by deceitful litigants. The contract theory[107] of ethics provides a better balance because it does not penalize the client for employing an attorney. This balance is achieved by a mutual agreement that the lawyer will zealously represent the client, but only up to the point where an affirmative breach by the client gives him an unfair advantage. When that occurs, the lawyer must rectify the situation.

Applying a contract theory of ethics does not penalize the client for hiring a lawyer. In each of the hypothetical situations proposed, the client would not have gained the advantage without his lawyer. The client betrayed the trust. The client, not the lawyer, breached the ethical contract. The lawyer's responsibility should be to ensure that the injured party, either the opponent or the court, is restored to the position it would have occupied had the client been truthful.

While the contract theory and the Model Rules appear to deemphasize the attorney-client privilege, they do not signal its death. Nor do they metamorphose the adversary system of justice into an inquisitional one. They do not require the lawyer to disclose adverse facts per se.[108] For example, if six persons witnessed an event involving a client and five would give unfavorable testi-

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106. *See* notes 75-77 *supra* and accompanying text.

107. *See* text accompanying notes 1 & 2 *supra*.

108. *See* note 81 *supra* and accompanying text. *See also* Pye, *supra* note 9, at 942:

> The failure to reveal does, of course, reduce the likelihood of the truth emerging from the trial. . . . However, a distinction should be made between counsel's obligation not to take action that will suppress the truth or mislead the jury . . . and an obligation to take affirmative action to produce additional evidence. . . .

Id.

mony, the lawyer could call the one favorable witness to the stand without presenting the others.[109] The lawyer in no way is asserting that the other witnesses do not exist. He merely is establishing that this particular witness has a particular recollection of the facts. The lawyer's actions are not likely to prevent further inquiry by opposing counsel. Perjury and false or misleading evidence, however, may have such an effect. Consider another example. If a lawyer representing the seller of a used home knows that the roof leaks, he need not disclose it to the buyer. If asked about it, the lawyer can refuse to answer, but he cannot represent that the roof does not leak. If his client misrepresents the roof's condition, under the contract theory and the Model Rules the lawyer must disclose the actual condition. If the lawyer was aware of a title defect but the seller nonetheless wished to convey by a warranty deed, the lawyer could not permit him to do so. If the client insisted, the lawyer would have to withdraw but would not have to disclose his client's fraudulent intentions to the buyer because the client then would be in a worse position than if he had not retained a lawyer.[110] The client has neither gained nor lost by way of counsel, nor should he. The Model Rules and contract theory dictate these results.

It is fundamental that a lawyer must know all the facts if he is to help his client. But does this mean to help him win or to help him establish the truth? It is not difficult to envision a client who might withhold a fact which he considers harmful and which actually would hurt his chances of winning. Imagining a client concealing a fact which he regards as harmful but which actually vindicates his position is more difficult.[111] Therefore, under the Model Rules and under the contract theory, no client who is entitled to victory under the law will lose by reason of withholding information from, or lying to, his lawyer since the truth eventually will be established.

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109. N.Y. COUNTY OPINION NO. 309 (1933). *See also* R. ARONSON & D. WECKSTEIN, *supra* note 1, at 297:

> It would be improper to assert in court that the fact was X when the lawyer knew from evidence in his possession that the fact was Y. Where, however, the lawyer's investigation has produced reliable evidence of both X and Y as the fact, it probably would not be unethical to introduce only the evidence supporting X, which favored the client's position.

110. N.Y. COUNTY OPINION NO. 90 (1916), *cited in* T. MORGAN & R. ROTUNDA, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 46 (1976).

111. 8 J. WIGMORE, *supra* note 14, § 2291, at 551 (citing Flight v. Robinson, 8 Beav. 22, 36, 50 Eng. Rep. 9, 14 (Rolls Ct. 1844) (Lord Langdale, M.R.)).

Some commentators, however, are overzealous in their support of the client, to the detriment of the truth. Professor Freedman, for example, believes that a "sacred trust"[112] requires a lawyer to discredit a truthful witness and to allow his client to commit perjury. The foundation of his argument, though, collapses when he assumes that his client is "falsely accused."[113] Naturally, if the lawyer knew that the client was innocent, perhaps a sentimental argument could be made that he would be justified in fighting the prosecution with false or misleading evidence.[114] We must assume, though, that Freedman does not know that his client is innocent. If Freedman does know, then he should be a witness in the case and not the advocate[115] for the only way he truly could be sure of innocence is by personally having observed exculpatory evidence.[116] Freedman would know that his client was innocent if, for example, he witnessed the complainant throwing the first punch or if the complainant, during an interview, informed him that the defendant, though innocent, was such a bad guy that a frameup was in order. Ethically, had Freedman seen or heard these events, he would have had to testify for his client rather than represent him.

Conversely, the argument has been advanced that a lawyer can never know if his client is lying[117] or if an adverse witness is telling the truth,[118] even if the client so informs him. If lawyers were incapable of discerning falsehood, there could be no ethics. If lawyers could never determine what was false, they could not be responsible for avoiding or revealing falsehood. Court decisions,[119] the ABA Defense Standards,[120] and even Freedman[121] acknowledge that it is possible for lawyers to know if clients are lying or if witnesses are telling the truth.

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112. M. FREEDMAN, *supra* note 1, at 5.

113. Freedman, *supra* note 2, at 1474.

114. *See* Curtis, *supra* note 2, at 8.

115. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-101(B) requires a lawyer to withdraw from or refuse to accept a case in which he may be called as a witness.

116. *See* Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking About the Ethics of Untruthful Practices by Lawyers for "Innocent" Defendants*, 6 HOFSTRA L. REV. 631, 654 (1978).

117. D. MELLINKOFF, *supra* note 1, at 149-50 (a person may confess to shield another, because of a mental aberration, or through ignorance of the critical fact, for example that a person he left for dead recovered).

118. Pye, *supra* note 9, at 945.

119. *See, e.g.*, State v. Whiteside, 272 N.W.2d 468, 470-71 (Iowa 1978).

120. ABA DEFENSE STANDARDS § 7.7 (Comment).

Undoubtedly, there is a distinction between passively refusing to employ false mechanisms beforehand by not allowing a witness to perjure himself and actively eradicating lies after the fact.[122] The first involves no disclosure of the client's secrets while the second does. A lawyer who knows in advance that his client plans to use perjury or false or misleading evidence must withdraw or successfully convince his client to proceed ethically. Neither the Code, the Model Rules, nor the contract theory of ethics imposes upon the lawyer the duty to reveal such intentions of his client.[123] Theoretically, the worst that can happen, from the client's standpoint, is that he will have to take the lawyer's advice or seek another lawyer.[124] If he is unfortunate enough to run into a string of ethical lawyers, he will have to litigate honestly or represent himself.

Under the Model Rules and the contract theory, however, once false tactics are employed, the lawyer actually may have to reveal them but then only to the extent necessary to erase the falsely gained advantage. He may, in effect, have to call his client or a favorable witness a liar. The lawyer can spare the client such embarrassment by explaining the ethical contract at the outset of the professional relationship.[125] The client then will be more likely to tell the entire story in advance.[126] The considerations and advice are similar to those traditionally involved when a criminal defendant elects to testify in his own defense. The client thereby waives his privilege not to incriminate himself.[127] The attorney should be able to waive the attorney-client privilege to the extent necessary to correct any fraud in his client's testimony. The privileges are related, and both are based largely upon the principle of privacy.[128]

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121. Freedman, *supra* note 2, at 1472.

122. Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978). *See* note 39 *supra*.

123. Under the CODE, a lawyer *may*, not must, disclose his client's intent to commit a *crime*. Disclosure of *fraud* is not mentioned. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 4-101(C)(3). In civil cases, at least, disclosure includes contemplated perjury. The MODEL RULES contain a similar provision, 1.7(c)(2), but add that a lawyer *must* disclose a client's contemplated crime if it involves death or serious bodily harm. MODEL RULES 1.7(b). *See* note 2 *supra*.

124. The reason that ethical restraints do not necessarily result in a clients' employment of unethical lawyers is explained in Sedler & Simeone, *supra* note 104, at 8-9.

125. Lefstein, *supra* note 43, at 688-92; Polster, *supra* note 9, at 38-39; Pye, *supra* note 9, at 950.

126. Polster, *supra* note 9, at 39 (initial candor might encourage better attorney-client relations).

127. Brown v. United States, 356 U.S. 148, 155-56 (1958).

128. Fisher v. United States, 425 U.S. 391, 399 (1976); Tehan v. Shott, 382 U.S.

The client's privacy is lost by making public his version of the story.

There is little justification for the current rule that a lawyer cannot aid a client in deceit; but that if he does so unknowingly and later learns of the deceit, he cannot rectify the situation. Tort law imposes no affirmative duty upon a person to rescue unless, of course, he has caused the peril.[129] The lawyer, since he has helped the client to deceive the court, should not be permitted or forced to walk away. Rather he should be permitted to rectify a situation by disclosing the truth to the court and thereby preventing the client from gaining any unfair advantage.

VI. CONCLUSION

The principles incorporated into the Model Rules, and discussed in this article, will not discourage those with legal problems from seeking counsel. It has been suggested that even if the attorney-client privilege were abolished, the legal profession would survive.[130] The inability of nonlawyers to prepare pleadings, to adequately investigate facts and employ discovery techniques, and to present admissible evidence surely will offset the risk of diminished confidentiality and will lead potential litigants to counsel.[131]

The contract theory, like all theories, cannot address every potential situation and leaves several questions unanswered. For example, what should a lawyer do if he discovers his client's perjury long after the case is over? What if his client lies about a matter not material to the case but which, if the truth were known, would be embarrassing? Despite its shortcomings, however, the contract approach is consistent with traditional ethical notions that a lawyer should not, wittingly or unwittingly, be a party to deceit. A trial is, above all, a search for the truth.[132] No lawyer should have to apologize to a client whose deceit he is ethically bound to reveal. On the contrary, a lawyer should be bound to reveal his client's deceit. When Alfred Jodl's case was lost and he was sitting in his jail cell at Nuremberg waiting to be hanged, he was told that his lawyer was ashamed to visit him. Jodl responded that "I must rather be ashamed to have brought him to this situation."[133]

406, 415-16 (1966); D. MELLINKOFF, *supra* note 1, at 137; Louisell, *supra* note 30, at 110-15.

129. Yania v. Bigan, 397 Pa. 316, 321-22, 155 A.2d 343-46 (1959).

130. 8 J. WIGMORE, *supra* note 14, § 2291, at 554.

131. *See* Note, *supra* note 53, at 1331.

132. Tehan v. Shott, 382 U.S. 406, 416 (1966).

133. E. DAVIDSON, THE TRIAL OF THE GERMANS 363 (1966).

The idea that a lawyer should, in some instances, reveal his client's secrets to remedy injustice is not a novel one.[134] It simply has not been applauded.[135] The attorney-client privilege has elevated confidentiality above candor toward the court. By exploring the policies underlying the attorney-client privilege, rather than the mechanics of solving particular situations, attorneys should be better equipped to understand their ethical obligations vis-à-vis their client, their adversary, the court system, and the search for the truth.

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134. *See, e.g.*, MODEL RULES 3.1(b), (d)(2); ABA FORMAL OPINION NO. 287 (Brucker & White, dissenting), *reprinted in* 39 A.B.A.J. 983, 985 (1953); Frankel, *supra* note 11, at 1031; Polster, *supra* note 9, at 34; notes 92 & 94 *supra*.

135. *See, e.g.*, *More Objections to Proposed Ethics Code*, 8 Mass. L. Weekly 827, 840, May 19, 1980, at 14, col. 4 (comment by Professor Gray Thoron of Cornell Law School that a lawyer should not be a "tattletale").