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Professional Responsibility: Education and Enforcement

Robert H. Aronson
University of Washington School of Law

PROFESSIONAL RESPONSIBILITY: EDUCATION AND ENFORCEMENT

Robert H. Aronson*

The fallout from the Watergate scandals has had a profound effect upon the legal profession because many of the prominent offenders were attorneys. The severity of the conduct involved and the suspicion that the activities publicized represent merely the tip of the iceberg[1] have caused the American Bar Association, state and local bar committees, and law schools to seek new ways of educating prospective lawyers with respect to their ethical duties, and to seek more effective sanctions against ethically deficient attorneys.[2] It is ironic, however, that increased awareness and activity in the area of legal ethics should be motivated by Watergate, because no course in ethics, no better program of discipline, no keener awareness of moral issues would have succeeded in altering the conduct of the principle offenders where the criminal laws and their personal moral values failed to deter their activities. Nevertheless, the impetus to re-examine approaches to the teaching of professional responsibility and re-evaluate the principles and objectives of the governing rules of legal ethics should not be lost, for the legal profession's record in the education and enforcement of professional responsibility has been unsatisfactory.[3]

* B.A., 1969, University of Virginia; J.D., 1973, University of Pennsylvania; Assistant Professor of Law, University of Washington. The author gratefully acknowledges the contribution of Professor Barbara Babcock, Stanford Law School, to the concepts and hypothetical problems described in this article.

1. *See, e.g.*, 19 AM. B. NEWS, Sept., 1974, at 3 (remarks of ABA President James Fellers); 19 AM. B. NEWS, Mar., 1974, at 8 (remarks of former ABA President Chesterfield Smith); Tunney, *The Erosion of Regard for Legal Profession*, Los Angeles Times, May 19, 1974, pt. VI, at 6, col. 1 (excerpts from talk given at Harvard Law School Forum). *See generally* ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft, 1970) (Clark Committee Report).

2. It should be noted that the interest in finding more effective ways of teaching Professional Responsibility is not a new development. *See, e.g.*, EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER (D. Weckstein ed. 1970) (Proceedings of the National Conference on Education in the Professional Responsibilities of the Lawyer, University of Colorado, Boulder, Colorado, June 10–13, 1968).

3. *See generally* Pincus, *One Man's Perspective on Ethics and the Legal Profession*, 12 SAN DIEGO L. REV. 279 (1975); Thomforde, *Public Opinion of the Legal Profes-*

To date, no method of instruction in professional responsibility has achieved substantial success in raising the level of awareness or increasing the ability of students and attorneys to resolve ethical dilemmas arising in the multifaceted practice of law.[4] This failure is in part a function of the present inability to bridge the gap between academic discussion of ethical rules and principles in the classroom and actual recognition of ethical issues in applying those principles in the complex, pressure-filled practice of law. The first part of this article advocates a mode of professional responsibility instruction designed to remedy this defect by combining aspects of traditional teaching methods with student involvement in simulated problems.

The failure of the Bar to regulate effectively the ethical conduct of its members is not solely the failure of law school teaching methodology. A much more serious deficiency—and one far more difficult to resolve—concerns the way lawyers perceive and attempt to enforce professional responsibility. Instead of providing an analytical framework which the individual lawyer can employ in considering problems arising in practice, the legal profession has chosen a series of ambiguous and only tangentially related rules which are often contradictory or misleading. Because these situation-oriented rules do not clearly encompass even a majority of the myriad factors potentially relevant in resolving a particular ethical dilemma, the Bar has found itself unable to agree upon the proper course of conduct in any but the most obvious cases, making it virtually impossible to control the actions of attorneys acting in good faith. The existing situation-oriented rules are unworkable and unenforceable. Effective instruction in and enforcement of professional responsibility requires a system model of legal ethics. The second part of this article describes system-oriented

sion: A Necessary Response by the Bar and the Law School, 41 TENN. L. REV. 503 (1974); Tunney, *Is the Bar Meeting Its Ethical Responsibilities?*, 12 SAN DIEGO L. REV. 245 (1975).

4. *See* Thielens, *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 J. LEGAL ED. 587 (1969), presenting empirical data measuring changes in ethical responses of students from four law schools in the Class of 1964:

> On the average, . . . the class was just 6.4% more likely to adopt an ethical stance at graduation than it had been at entrance. This would mean that if all ethical positions had changed equally at all schools, each class at each school would have a net addition of thirteen more members out of each 200 graduates adhering to each value than had at entrance.

Id. at 591. The average percentage of ethical replies to the questionnaires increased from 54.4% at entrance to 60.8% at graduation. *Id.* at 592. The study is discussed further in Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 267 (1975).

models and how such models can aid practicing lawyers and law students in resolving ethical questions.

I. TEACHING PROFESSIONAL RESPONSIBILITY

The debate as to whether professional responsibility is a subject which can be taught effectively by law schools has been short-circuited by Watergate and the resulting public reaction to the legal profession. Public pressure alone mandates law school education on the subject. However, certain of the skeptics' arguments warrant mention. First, legal ethics has been perceived by many as dependent upon the individual lawyer's conscience and moral responsibility.[5] Such ethical precepts are formed long before law school matriculation. Thus, it is argued, a formal course in professional responsibility is either unnecessary or ineffective in causing attorneys to "do the right thing" in any given situation. This analysis is unsound because it ignores the crucial differences between professional and personal ethics. Even assuming that a student will have developed a personal moral perspective prior to entering law school, knowledge of what the legal profession considers to be professionally ethical is an entirely different matter.[6] For example, a lawyer may not violate any personal moral code by commingling his client's and his own funds or property, but failure to comply strictly with the dictates of the American Bar Association's

5. One of the Conference Reporters for the Legal Education Course at the 1968 National Conference on Education in the Professional Responsibilities of the Lawyer noted that at the conference "[t]he most commonly heard detracting expression was that ethics cannot be taught." Thurman, *Summary and Evaluation Report*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 41, at 50 (D. Weckstein ed. 1970). The other Reporter indicated that "[m]any felt that a goal of guiding a student toward higher personal ethical standards was not realistic." Sutton, *Summary and Evaluation Report*, in *id.* 54, at 58.

See generally Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 CONN. L. REV. 459 (1971–72), wherein it is suggested that the teaching of professional responsibility has been "largely a fruitless enterprise because it assumes that professional norms and values can be 'internalized' during law school . . . ." *Id.* at 459.

6. For an interesting survey indicating that students can be trained to subordinate their personal value preferences where clear precedents so dictate, see T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE chs. IV & V (1964). Professor Becker concluded that law students, acting as judges, were "virtually unanimous in their dependence upon and reference to precedent as the foundation for their decision" in deciding contrary to their own value preferences. *Id.* at 128. On the other hand, only half the undergraduates "even alluded to precedent as the basis of their decision against their own values." *Id.* at 129.

Code of Professional Responsibility[7] DR 9–102 proscribing such commingling could result in severe sanctions.[8] Likewise, there may not be anything personally unethical in an attorney's asserting "his personal opinion as to the justness of a cause." It is only the effect of such an assertion on the fair administration of the legal system that makes such conduct professionally unacceptable and therefore "unethical."[9] Issues such as these can be effectively treated in a law school setting.

Aside from acquainting students with those relatively unambiguous rules of professional responsibility such as the above examples, a formal course is essential to sensitize students to ethical questions as yet unresolved by the Bar;[10] as to these, even personal ethics of the highest order may give little guidance. Only through extended discussion and analysis will students be able to recognize these problems, seek assistance when confronted by them in practice, and aid the legal profession in its continuing efforts at resolution.

A second argument advanced against instruction in legal ethics is that most law professors are not competent to teach professional responsibility because they have never engaged in the intense and active practice of law in which most of the difficult ethical questions are faced.[11] However, it remains to be demonstrated that one must actually experience a particular ethical dilemma in order to recognize it

7. Adopted in 1969 [hereinafter cited as ABA CODE]. (All page citations are to the 1969 edition, printed by Martindale-Hubbell, Inc.).

8. *See, e.g.*, Resner v. State Bar, 53 Cal. 2d 605, 349 P.2d 67, 2 Cal. Rptr. 461 (1960) (attorney disbarred for continuous course of commingling clients' funds and use thereof for attorney's own purposes); Peck v. State Bar, 217 Cal. 47, 17 P.2d 112 (1932) (suspension for one year—no improper use or motive shown).

9. ABA CODE, DR 7–106(C)(4). Justifications offered for this rule include: 1) such assertions induce the trier of fact to determine guilt or innocence on the basis of whether or not the attorney is believable or even likeable; 2) collateral matters thus dominate the trial; and 3) such an assertion in one case will require the attorney either to lie when he does not believe his client or else to greatly prejudice those clients whom he does not believe.

10. Despite the fact that ethical problems often must be left unresolved, the student may be aided by being forewarned of the frequency with which lawyers are faced with responsibility problems in their routine activities, by being alerted to the kinds of situations out of which such problems often arise, and by being informed of the various factors which should receive consideration by the lawyer as he decides what course of conduct to pursue to resolve his particular problem.
T. SMEDLEY, PROFESSIONAL RESPONSIBILITY PROBLEMS RELATING TO MORTGAGE TRANSACTIONS 1 (1966).

11. Remarks of Prof. Charles Meyers, then President-Elect of the Association of American Law Schools, delivered at a meeting of the Board of Visitors of the Stanford Law School, Apr. 4, 1974, and at the Conference of Western Law Schools, Apr. 6, 1974.

and attempt a resolution in a classroom setting. One does not have to have been a prosecutor to enunciate the advantages, disadvantages, and underlying rationale of prosecutorial discretion and plea bargaining. Nor must one have served as a public defender to help students identify and analyze ethical problems encountered in the defense of one known to be guilty. Even if it were true, this argument indicates the need for greater efforts to better educate professors, not the abandonment of efforts to educate students with respect to their ethical duties.

Professor Currie has written that "training for professional responsibility and for awareness of the role of law in society is not a matter that can be parcelled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time."[12] A misreading of this statement has led some to the belief that professional responsibility should *only* be taught as individual ethical problems arise in each law school course; a formal course would be either elective or nonexistent. True, it would be most effective for all professors to indicate and discuss ethical issues as they arise in each course,[13] but there are too many ethical problems, particularly those dealing with the proper functioning of the legal system as a whole, which would be cursorily treated or totally ignored in the absence of a separate course in professional responsibility.[14]

Most important is the institutional commitment to the importance of legal ethics. Establishment of a core curriculum common to all law training expresses the belief that lawyers should be familiar with certain basic concepts and principles. Some required courses (*e.g.*, Contracts and Property) form the foundation for more complex analysis. Others, like Constitutional Law (which has increasingly been adopted

12. Currie, *Law and the Future: Legal Education*, 51 NW. U.L. REV. 258, 271 (1956).

13. As one means of putting this procedure into effect, Vanderbilt Law School has prepared a set of teaching materials for use in raising ethical issues as they arise in the various substantive courses. "These materials are designed to suggest ethical and responsibility issues which are particularly relevant to the subject of the course, to indicate at what points in the class discussion such matters may be introduced most naturally, and to propose methods by which the questions may be raised most effectively." T. SMEDLEY, *supra* note 10, at 1.

14. Also, a number of professors have expressed to the author that the time pressures and need for coverage in their particular subjects make it difficult, if not impossible, to integrate ethical considerations into their courses. Hence, absent a course in Professional Responsibility, some students might *never* be forced to consider the ethical problems they must face as lawyers.

as a required, often first-year, course), are necessary for a better understanding of all areas of the law. Still others, such as Criminal Law, are considered to be so important to society that every lawyer should have the basic skills necessary to monitor and assist the profession's efforts in that area. By any of these criteria, professional responsibility is a course which should be required for all those who enter into the practice of law.

A. The Traditional Approaches

One reason for the present resistance to courses in professional responsibility is the fact that the nature of the more enigmatic ethical problems defies the traditional law school modes of presentation: lecture and the Socratic method. These techniques are particularly inappropriate where professional ethical duty is the subject matter and compliance with that duty is the goal. A mode of instruction which involves only a few students (Socratic method) or none at all (lecture) cannot successfully induce students to recognize the vast array of potentially unethical courses of action, let alone to subordinate their personal views to the good of the legal system. As one educator has stated:[15]

> A teacher can lecture about ethics and the students can discuss without personal involvement what the proper course of behavior should be for everyone. But this very ease of universal moral judgment lessens the effectiveness of classroom instruction in ethics and professional responsibility. It is too easy an exercise to make a dent on the psyche. And, since not much of lasting impact is taken away by the student, these classroom courses do not rate high in the law school curriculum.

The need to involve both student and professor in the situations where ethical problems are faced has led to the effort to teach professional responsibility in the context of law clinics:[16]

> Only in the clinic, where the teacher and the student are personally involved; where they have to take action and face the consequences; where they undergo tensions which upset their emotions and take away their peace of mind, is there opportunity to develop the moral

15. Pincus, *Law School Clinical Training for Professional Responsibility and Competence*, 6 ALI–ABA CLE Rev., July 18, 1975, at 2.
16. *Id.*

fiber and the proper instincts for dealing with ethical problems in a professionally responsible way.

Despite the advantages of teaching professional responsibility in a clinical legal education context, however,[17] three major defects render this technique unacceptable as the sole or even primary law school effort in the area. First, and most obvious, in those schools which provide clinical programs not every student enrolls in the program. Second, due to lack of funds, shortage of faculty members, and other related reasons, most clinical programs assign students to a practicing attorney, usually in a legal aid office of some kind. The "supervising" attorney generally has little time for careful review and analysis of the student's legal competence, let alone ethical awareness. The attorney himself may even set a bad example by unwittingly engaging in unethical practices.[18] It is not possible for the practicing lawyer to do an effective job of teaching professional responsibility in the midst of the overwhelming demands involved in supervising unskilled students who are handling the diverse legal problems of numerous clients. The situation is improved if a faculty member is in charge of the clinical program and reviews the work of each student, but even then the press of the workload, the sheer number of students involved, and the unexpected appearance of ethical dilemmas requiring snap decisions make unethical actions probable. Hence the third objection to the

17. Both the advantages and disadvantages of teaching professional responsibility in conjunction with a clinical program are evident from a reading of LAWYERS, CLIENTS & ETHICS (M. Bloom ed. 1974). Sponsored by The Council on Legal Education for Professional Responsibility, Inc., the book presents 15 "case histories" of ethical problems faced in the context of a clinical program in the San Francisco Bay area. The cases are followed by the commentaries of a prominent practitioner, two law professors who teach professional responsibility, and a psychiatrist who is also a law professor.

The book is an excellent vehicle for recognizing and analyzing common pitfalls encountered by students in their initial contacts with real clients and the resulting ethical and practical dilemmas. The ability of the supervising attorney to discourage unethical behavior and instruct students with respect to the problems with various alternative courses of action is clearly evident in many instances. Yet in every case discussed, a client was subjected to some form of unethical (sometimes even illegal) conduct. The supervising attorney was often unable to prevent such actions beforehand and missed valuable opportunities to sanction or criticize the actions after the fact; few of the students were made to understand *why* they had acted in a particular way and what could be done to prevent a re-occurence.

18. *E.g.*, in one case history utilized in LAWYERS, CLIENTS & ETHICS, *supra* note 17, a supervising attorney, despite his better judgment, permitted one of his students to oppose a rehearing beneficial to her client, in order to appeal so that the eventual decision would be published and contribute to the student's prestige. *Id.* at 107, 109 (comments of Fellers), 110 (comments of Sacks).

clinical method of teaching professional responsibility is that it is unfair to prospective clients to subject them to students as yet untrained in their ethical duties—even if the students' mistakes are subsequently corrected.[19]

B. An Alternative Method

There is an alternative, however, one which retains the benefits of teaching professional responsibility in conjunction with a clinical program, yet at the same time eliminates many of the disadvantages. The method, developed by Professor Barbara Babcock and the author, was taught for the first time at Stanford Law School in 1974. It simulated lawyers' resolution of some of the thornier ethical questions, utilizing hypotheticals which, for the most part, were derived from actual cases and experiences. Each week the class members were asked to assume a role such as members of a state bar grievance committee, OEO-funded legal aid office, high-powered metropolitan law firm, or disciplinary board to review judicial conduct. The problems presented various potential courses of action: whether to represent a particular client, employ a given defense, reveal allegedly unethical conduct of another attorney, or sanction an attorney or judge for certain actions. A member of the class was assigned to write a memorandum concerning the choice of future action on each side of the issue, and the memoranda were distributed prior to class. Each side then argued its position in class. After the class members had considered and evaluated all of the available alternatives from both an "ethical" and "practical" perspective, a series of public votes were taken on the available options.

There are several advantages to this kind of simulation over a strictly clinical approach. The issues and problems can be tailored to present certain specifically desired aspects of legal ethics. A limited amount of time can be put to its best use by raising ethical dilemmas which a lawyer or clinical student might not face in many years of practice. Ethical problems faced in all areas of the law, by extremely diverse groups of lawyers (government, small firm, large metropolitan

19. As Professor Rogow has put it: "Sorry, your husband died while we were experimenting on him in the operating room, but, you know, we have to learn somehow. Yes, but when do they teach the course on human responsibility? Should it not be prior to trial tactics and open-court surgery?" *Id.* at 93.

firm, legal aid, defense-oriented, civil, criminal), can be presented to the students. Since subject matter control is attainable, particularly difficult or appealing clients and situations may be created.

Another advantage is that the instructor, aided by the class, can isolate and analyze the issues in light of the Code of Professional Responsibility, state codes, general principles of ethics, and pragmatic considerations. Additionally, the course can be offered *prior* to any student attempts at actual law practice. Ethical "mistakes" occur, are detected, and discipline "imposed" at no cost to the students and, more importantly, at no cost to the public. No unethical conduct escapes consideration because of time, expense, or personality problems. Finally, the job of the clinical supervisor will be made substantially easier where the students have viewed common ethical dilemmas from a variety of perspectives.[20] This is not to say that law schools

20. A brief summary of one of the problems and the students' responses thereto may best illustrate advantages of this approach to the teaching of Professional Responsibility. The problem was:

A few days ago John Johnson, president of our community public housing project's Tenants Association, visited the legal services office with a Ms. Joan Wellington, a tenant of the housing project and a new member of the Association. Johnson and Ms. Wellington claim that the Wellingtons have just received an eviction notice from the City Housing Authority, and that the only (unofficial) reason for this notice was that Ms. Wellington's sixteen-year-old son had recently been arrested and charged with disorderly conduct, though the charges were subsequently dropped. Johnson wants the office to prevent the Wellington's eviction, and thereby "straighten up" the Housing Authority's eviction policy. Johnson claims to speak for an "overwhelming majority" of the members of the Tenants Association.

The day following the aforementioned visit, five tenants of the housing project (three of whom are known to be members of the Tenants Association) visited the legal services office and insisted that Johnson's request did not comport with the desires of the project's "decent" tenants. They claim to endorse the Housing Authority's policy of evicting "unruly" tenant-families, and appear to oppose the office's representation of Ms. Wellington.

Later that same day, Johnson reappeared at the legal services office and restated his request that we represent Ms. Wellington. He also requested that the office draft a set of by-laws for the Tenants Association which would prevent its "takeover" by a faction holding the same views as our five tenant-visitors.

One student wrote a memorandum in favor of representing Ms. Wellington; another wrote in favor of representing the Tenants Association rather than Ms. Wellington. At the meeting of the class/legal aid office, the following practical and ethical issues were among those raised and analyzed:

(1) Conflict of interest: Is the Tenants Association a "client" of the legal aid office? Do the five individuals who objected to our representation of Ms. Wellington speak for the majority of the tenants in the Association? Is the Association properly constituted and representative? Does the office have the right to make that decision? Can the office ethically represent *both* the Tenants Association and Ms. Wellington?

(2) The need for a legal aid office to build a good community reputation and win the confidence and support of individuals and organizations in the community: Should this interest dictate taking any and all community cases? Only

should abandon or even diminish their efforts to teach professional responsibility in conjunction with clinical programs. Such instruction is essential, but should not be the students' first and only exposure to lawyers' ethical duties.

1. Shortcomings of the method

There are disadvantages to teaching professional responsibility in the above-described manner. The course cannot exactly simulate the pressures of practice—the time constraints, the financial burdens, the adamant client, or lures of prestige in litigating "The Case" in a particular area of the law; these problems are, however, at least raised and discussed. The more serious disadvantage in this method, however, is the problem of expense and resource allocation. There were 22 students in the Stanford course. At the University of Washington, the course is now being taught to 30 students. In order to reach a greater number of students, it might be necessary to involve more teachers, modify the course, or experiment with a larger class enrollment. But it is clear that law schools will not have met their responsibility to the public until all students receive *effective* instruction in professional responsibility prior to practicing law, whether in a clinical program or upon graduation.

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individuals? Only organizations? Should the interests of community leaders be considered? Should they be decisive?

(3) In representing Ms. Wellington the office would be supporting law reform in the area. But Ms. Wellington is (or may be) in a small minority, and action on her behalf could alienate the majority of members in the community, destroy the efficacy of the Tenants Association, and result in extreme distrust for the legal aid office. In a poor community where solidarity is essential, shouldn't the office support any organized group which democratically represents the community? Does the office have the right to sacrifice the legal rights of the few for the good of the many? Should the office attempt to persuade the Tenants Association to support Ms. Wellington for its own benefit?

(4) Could the office refer Ms. Wellington to another legal aid office or private attorney? Could she afford the latter? Or could the office convince someone to take her case *pro bono*?

(5) Should the office refrain from representing *either* party, at least until they resolve their internal conflict? Should the office take an active part in trying to persuade either of the two opposing parties to adopt the other's position? And what about the suggested by-laws—should the office help?

(6) Do the office's congressional mandate and resource allocation permit or require only representation of individuals or organizations?

Most importantly, the need for further investigation of the facts, the organizational setup of the Tenants Association, and the positions of the opposing factions were emphasized.

This problem was derived from a problem used in Professor Howard Lesnick's Legal Profession Course at the University of Pennsylvania Law School.

2. The difficulty in practical application of the Code

In a course which concentrates solely on professional responsibility, with no immediate duty to real life clients, students are able to go beyond the specific problem at issue and recognize defects in the system itself. For example, in the Stanford experiment, the breakdown of votes by members of the class indicated serious defects in the Code of Professional Responsibility as a means of defining and enforcing legal ethics. In each case of alleged misconduct, the class voted on whether specifically charged Ethical Considerations had been transgressed, whether Disciplinary Rules had been violated, and what sanctions, if any, should be imposed.

As an experimental simulation of lawyers' handling of ethical questions in the context of the Code of Professional Responsibility, the class could be considered a success. Observation of the class' treatment of the problems yielded useful insight into possible reasons for the reluctance of bar grievance committees to sanction attorneys for Code violations. Of primary importance to the self-government of lawyers was the class' treatment of the Code as if it were a criminal statute, reflected in its importation of procedures and concepts from the criminal law.[21] If an attorney were to be "punished," he or she must have been found to have violated "the law." For example, the class had, in many instances, a relatively clear idea of what conduct was most *desirable*. This was reflected in the high percentage of the class indicating that one or more of the aspirational Ethical Considerations had been transgressed.[22] But severe problems arose when the class attempted to analyze alleged breaches of the mandatory Disciplinary Rules under commonly accepted principles of "due process."[23]

21. The Supreme Court similarly requires that the Code be applied consistent with due process. *In re* Ruffalo, 390 U.S. 544 (1968). *See also* Goodrich v. Supreme Court of South Dakota, 511 F.2d 316, 318 n.4 (8th Cir. 1975).

22. Neither the Code nor any body chosen to enforce it, however, has determined the *effect* of a failure to observe an Ethical Consideration. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." *Preliminary Statement* to ABA CODE at 1. Since no indication had been given to the offender that *any* sanction would be imposed for such a failure, the class determined that lack of notice precluded imposition of sanctions for violations of Ethical Considerations, regardless of the severity of the transgression. Violations of Ethical Considerations were taken into account, however, with respect to the severity of the sanction ultimately imposed for violation of one or more Disciplinary Rules.

23. The dificulty which the class experienced in this regard may be traced to the fact that "[t]he Disciplinary Rules, unlike the Ethical Considerations, are mandatory

Substantively, sections of the Code were found to be "void for vagueness." For example, attorneys violate DR 1–102(A)(6) if they "[e]ngage in any other conduct that adversely reflects on [their] fitness to practice law." As a section of a criminal code, it would be stricken because "men of common intelligence must necessarily guess at its meaning"[24] and the class often felt compelled to take just such a course of action. If the Disciplinary Rule at issue in a particular problem was not sufficiently clear, if it did not proscribe narrowly defined conduct, then it could not be made the basis for sanctions. Likewise, if the "attorney" for the alleged offender could find in the Code a Disciplinary Rule that might be reasonably interpreted to justify or mandate the conduct in question, the class reluctantly refused to find any violation, or if a violation was found, only a warning or no sanction at all was imposed.[25] The class perceived the injustice of imposing any but very minor sanctions under such circumstances, a perception also evident outside the classroom from the infrequency of severe penalties imposed by bar grievance committees.

Since neither the Code, the class, nor the Bar in general have as yet identified, much less proposed, a single or even primary guiding principle for determining the nature and effect of alleged misconduct, rationalizations are readily available to an alleged offender. For example, a portion of one of the class problems dealt with what would seem to be a clear-cut violation of the Code. In a negligence action brought on behalf of a mental incompetent who was injured on Attorney X's client's property "while properly there," the court, on its own motion, ruled that since the plaintiff was incompetent, he could not testify. Attorney X moved for a directed verdict against the plaintiff. He was aware of but did not reveal to the court a case decided by the state supreme court which was almost one hundred years old and seldom

in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* No other guidance is provided, however, with respect to the nature of the "disciplinary action" to be imposed: "The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances." *Id.*

24. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (ABA Code Disciplinary Rules seeking to proscribe extrajudicial comments by attorneys during both civil and criminal cases held to be unconstitutionally vague and overbroad).

25. "A statute . . . is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." State *ex rel.* Neelen v. Lucas, 24 Wis. 2d 262, 267, 128 N.W.2d 425, 428 (1964).

cited, but never overruled. The case held that in circumstances similar to those involved in the trial, an incompetent plaintiff may take the stand in his own behalf, and the weight of his testimony will be left to the jury.

Attorney X was charged with a violation of DR 7–106(B)(1):[26]

> In presenting a matter to a tribunal, a lawyer shall disclose . . . [l]egal 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.

The student assigned to defend Attorney X emphasized the importance in an adversary system of loyalty to one's client. ("In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client.")[27]

Although the best interests of the client (presumably nondisclosure of the prior case in this hypothetical) may arguably be subordinated to an unambiguous contrary Disciplinary Rule, it was contended that DR 7–106(B)(1) is ambiguous as to whether it applies only to the substantive law of the case, or also to "*procedural* matters such as the competency of a witness to testify."[28] The student argued that under the adversary system, it must have been intended that only contrary principles of substantive law need be revealed:[29]

> Any other construction would require the lawyer, for example, to disclose authority adverse to his position when he objects to testimony on the grounds that it is hearsay. The number of times during a trial that the attorney would be required to undermine his client's claim is potentially enormous. The adversary system could not tolerate such a burden.

Since the Disciplinary Rule on its face did not provide clear guidance, it was quite proper, contended X's "attorney," for X to assume that the rule in question referred only to substantive law. In fact Ethical Con-

26. ABA CODE.
27. ABA CODE, EC 7–9.
28. Brief in Defense of Clint Whitehead at 6 (Student Memorandum, Stanford Professional Responsibility Class), copy on file at the offices of the *Washington Law Review*.
29. *Id.* at 7.

sideration 7–3 provides that "[w]here the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. . . . While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law."

Even though the class ultimately concluded that Attorney X had acted improperly, her defense of good faith resolution of conflicting Code sections in favor of her client was accepted by the class to the extent that it voted not to discipline X, other than to issue a warning that in the future such conduct would result in more severe sanctions.

This resolution of the Attorney X case is typical of class decisions with respect to other problems and suggests one of the major obstacles to imposition of effective sanctions by bar grievance committees. At a time when the ethics of the legal profession are questioned with increasing frequency, a mode of instruction which reveals deficiencies in the present disciplinary system is invaluable. The legal community can also benefit from this recognition and isolation of the Code's deficiencies.

II. ENFORCING PROFESSIONAL RESPONSIBILITY

Innovations in the teaching of professional responsibility alone cannot ensure satisfactory ethical performance by lawyers until the members of the legal profession collectively provide students and attorneys with an unambiguous and uncontradictory set of principles concerning the lawyer's proper function in the legal system. The view of professional responsibility as dependent upon the moral responsibility of individual lawyers has resulted in a set of rules which give attorneys little guidance as to what the profession expects of them.[30]

30. Indeed, the theme of individual moral choice by attorneys is expressed throughout the language of the *Preamble* to the Code of Professional Responsibility:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
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> The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. *Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.* . . .

ABA CODE at 1 (emphasis added).

Attorneys are told that they have a duty to their clients, to the legal profession, and to society as a whole.[31] In a very few instances, these duties do not conflict (*e.g.*, a lawyer shall not engage in "illegal conduct involving moral turpitude"[32]). When they do conflict, however, a search of the relevant state code usually reveals no more guidance than to "do the right thing" under the circumstances. The attorney is not told which of the conflicting duties is deemed to be of greater importance or given an ultimate goal or legal theory to apply. These problems of determining and enforcing professional responsibility under the Code are not limited to students. Rather, they are an inevitable by-product of a situation-oriented approach to the analysis of ethical dilemmas. The presently operating system is described herein as the "situation model" of professional responsibility, and is contrasted with two alternative "system models." It is the thesis of this article that the situation model (exemplified by the ABA Code of Professional Responsibility) has failed to provide the necessary guidance, and that it must be replaced with a system model to ensure professional responsibility.

A. The Situation Model

The essence of this model is that each situation in which an ethical question is presented is unique. The situation may demand primacy for the truth, or for maintenance of the adversary system, or for the attorney's personal ethics, or for other goals relevant only to the particular problem. A uniform goal orientation is subordinated to reaching the "right" result in each case.

For instance, under the ABA Code of Professional Responsibility, the goal of preserving the lawyer-client privilege, with its concomitants of encouraging trust and candor, is paramount in the situation where the client admits committing the crime charged. There is an absolute duty on the attorney not to reveal in any way what has been learned—no matter what the client's admission indicates about the future dangerousness of the client, nor how personally distressing it may be to the lawyer to conceal the knowledge.[33] But this interest in

31. *Preamble* and *Preliminary Statement* to ABA CODE at 1. *See generally id.* Canons 4, 5, 6, & 7 (duty to client); 1, 2, 8 (duty to legal profession); 3, 9 (duty to public).
32. ABA CODE, DR 1–102(A)(3).
33. ABA CODE, DR 4–101(B). *See* EC 4–4, EC 4–5.

protecting the relationship of the lawyer and client disappears when the client reveals an intention to commit another crime. In this situation, the Code suggests that the lawyer consider first the protection of the public and second his or her own integrity.[34] Knowledge of an intent to commit a crime thus calls for radically different behavior on the part of the lawyer, even though revelation of the client's confidence will be equally destructive of the relationship in either case. The situational model is, in effect, a balancing test, which has intuitive appeal.[35] But its practical application raises perplexing questions about the factors to be balanced and their relative weight.

Factors to be considered in any ethical decision under the traditional Code analysis include the public interest, the individual needs of the client, and the role of the lawyer according to the nature of the transaction. Perhaps the most difficult to weigh is the public interest. An example is a recent cause celebre in New York: appointed attorneys representing an indigent learned that their client had not only committed the murder of which he was accused, but two others as well.[36] The two victims had been missing for many months, and the fact of their murders was unknown. The client gave the lawyers sufficient information to discover the bodies. At this point, a layperson would surely think that the public interest would demand disclosure of these crimes, and certainly any decent person would desire to disclose them. But the lawyers, despite such a desire, felt bound by Canon 4, which states that "*A Lawyer Should Preserve the Confidences and Secrets of a Client*,"[37] and did not reveal what they knew. This rule expresses the public interest in maintaining the almost sacred trust between lawyer and client which enables the work of the law to progress because clients will candidly disclose their affairs. Yet one of the footnotes to the rule of confidentiality states that " '[p]ublic policy forbids that the relation of attorney and client should be used to con-

34. *See* ABA CODE, DR 4–101(C)(3).

35. *See* Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 386–407 (1965); Note, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179, 1186, 1189 (1970).

36. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975).

37. ABA CODE. *See id.* DR 4–101. CAL. BUS. & PROF. CODE § 6068(e) (West 1974) provides: "It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

ceal wrongdoing,' "[38] and that " 'a communication by a client to his attorney in respect to . . . a continuing wrong is not privileged from disclosure.' "[39]

Unfortunately, the mode of analysis by which these lawyers were to define and weigh the public interest in their case was unclear. Technically, within the explicit dictates of the Code, there was no future or ongoing "wrongdoing" in the sense of criminal activity. But neither were the murders a *fait accompli*, since the parents and police were continuing the search for the missing persons not yet known to be dead. Much "wrongdoing" in the sense of added suffering and expense was ongoing due to the silence of the lawyers involved. It would seem that at the very least the attorneys should have informed the parents or police anonymously, through as many intermediaries as was necessary to protect their client, of the death or whereabouts of the victims. But because the factor of "public interest" is merely the expression of a conclusion, the Code left the lawyers without meaningful guidance for their actions and, quite properly, no sanctions were subsequently imposed on them. *Nor would any have been imposed had they revealed the whereabouts of the victims.* A system purporting to affect self-discipline which exerts little or no influence in difficult cases is inadequate. Additionally, there is some indication in the Code that a lawyer's ethical decision changes according to the nature of his client.[40] For example, the organized Bar has recognized that legal ser-

38. ABA CODE at 18 n.15 (footnote to DR 4–101(C)(2) *quoting* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 156 (1936)).

39. *Id.*

40. *Compare* the general rule of DR 2–104(A): "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . ." *with* the exception found in subsection (2) of the same Disciplinary Rule:

> A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2–103(D)(1) through (5), to the extent and under the conditions prescribed therein.

The use of varying ethical standards would appear to have limited utility if effective education and enforcement in terms of legal ethics is to be achieved. Whereas it may be possible to delineate different standards of conduct for attorneys representing wealthy and indigent clients, there would be no effective means of line drawing. For example, should a well-staffed and financed public defender's office have a lesser duty to the prosecutor or court than a private attorney representing a client earning $6,000 per year? Should these variable standards apply to rich and poor civil parties? At what point is one no longer "indigent," so that the greater duty arises? For a discussion of the difficulties involved in representing the poor see Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

vices cannot be effectively delivered to the poor without informing and persuading them of their need for such services and has made special rules modifying the prohibition against solicitation and advertisement by lawyers.[41] Popular writers and many within the profession have advocated a difference in a lawyer's duty when he acts for private interests against the public (government) than where such advocacy is performed in litigation between private parties.[42] Whether the attorney is being paid; whether the primary purpose of the representation is the vindication of constitutional rights; whether the attorney is acting as prosecutor or defense attorney; all exemplify considerations which may arise in the context of a particular ethical dilemma. All must be thrown in the balance before the "right" course of action is determined under the situation model of ethics.

This dilemma is further illustrated in the civil area by a problem employed in the professional responsibility class discussed earlier, which Professor Babcock refers to as the case of "The Destroyed Data Base." In pursuing a complex antitrust action against the industry giant (RPM), a small, relatively successful computer company (CDM) constructed a computerized tape file from over 27 million RPM documents to serve as a "data base." This data base, among other advantages, revealed trends and comparisons not otherwise evident from the raw material. The Justice Department was also pursuing a civil antitrust action against RPM in an effort to break it into competing units before it could develop a revolutionary new line of "virtual memory" computers. RPM was under court order not to destroy any document involved in the CDM litigation. RPM's general counsel, a former assistant attorney general, knew that without the data base the Justice Department would be unable to maintain its action against RPM successfully. Since CDM's major concern was with RPM's strength in the peripheral "software" area, the attorney negotiated a settlement of the CDM action that transferred RPM's software servicing division to CDM, along with $60 million in damages, in return for destruction by CDM of the data base and all copies of RPM documents (RPM retained the originals).

The result was that CDM obtained a virtual monopoly of one aspect of the computer industry, and RPM was protected from Justice

41. *See, e.g.*, 19 AM. B. NEWS, Mar., 1974, at 1–2.
42. *See* Note, *supra* note 35, at 1196; J. GOULDEN, THE SUPERLAWYERS 329–330 (1972); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 148 (1935).

Department interference and was able to market its new line of computers. The issue was whether the lawyer for RPM behaved ethically. The answer under the Code is less than clear. DR 1–102(A)(5) provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." Certainly the destruction of the data base was prejudicial to the administration of the antimonopoly laws. Certainly also, the public interest was adversely affected by the lawyer's employment of his skills to prevent the effective public prosecution of RPM. But if the lawyer believed that his client held an unjust monopoly, *anything* he did in the client's interest would be prejudicial to the administration of justice, so if that rule were strictly adhered to, he could not represent RPM at all, much less zealously.

If, on the other hand, the lawyer were to advise RPM that he could not represent it because of a belief that the public interest would be best served if RPM gave up its monopoly or at least gave the public a fair opportunity to attack it, the lawyer might be violating the canon which states that a lawyer should assist the legal profession in making counsel available.[43] After all, if lawyers were to refuse to represent clients whose goals they did not approve, there might be some clients who would be without representation altogether.

Does the fact that the lawyer would not have appreciated the full significance of the data base without prior experience in the Justice Department create a conflict of interest? DR 9–101(B) provides that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." Only by interpolation does that rule apply to this case because there was no suit pending against RPM at the time that the attorney was in the Justice Department. Yet Canon 9, upon which DR 9–101(B) is based, states that a lawyer should avoid even the appearance of impropriety. As in the New York case,[44] the Code's guidance is ambiguous and conflicting.

Another factor to be considered by the ethical lawyer is the role he or she is playing in a particular situation.[45] Thus, an attorney may

43. ABA CODE, Canon 2.
44. *See* note 36 and accompanying text *supra*.
45. Lawyers have, for instance, been criticized for advocating "as lawyers, legislative measures which as citizens they could not approve . . . ." Louis D. Brandeis, *quoted in* J. GOULDEN, *supra* note 42, at 326. A famous example of a lawyer assuming different positions about what was right, according to the role he was playing, is

have entirely different ethical obligations according to whether he or she is a counselor, legislator, mediator, arbitrator, or advocate.[46] Ethical problems arise when an attorney is asked to perform (or in good faith believes it to be his or her duty to perform) several roles at the same time. In the trial of the Chicago Seven,[47] the attorneys for the defendants were torn between performing traditional roles as advocates—attacking the constitutionality of the antiriot statute and the conspiracy charge, the rulings by the judge, and the wiretapping by the Government—in short "doing everything to win, including having the defendants cut their hair, wear suits, act decorously at the defense table and avoid any speech or action that might antagonize the jury,"[48] and what they believed to be their role in the conduct of a "political trial." In the end, the attorneys chose both courses of action—and were found in contempt[49] for their roles in the political aspect of the trial while their clients were convicted.[50] If, however, each situation is to be judged on its own unique circumstances and attorneys are permitted to observe ethical norms which vary with their role, then it is at least arguable that the Chicago Seven defense was for the most part proper. If in fact the defendants' lifestyles were on trial, then their decision to present their belief in the injustice of a criminal prosecution based on their political views to the public outside the courtroom

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cited with approval in the Report of the Joint Conference on Professional Responsibility:

> As a barrister [Thomas] Talfourd had successfully represented a father in a suit over the custody of a child. Judgment for Talfourd's client was based on his superior legal right, though the court recognized in the case at bar that the mother had a stronger moral claim to custody than the father. Having thus encountered in the course of his practice an injustice in the law as then applied by the courts, Talfourd later as a member of Parliament secured the enactment of a statute that would make impossible a repetition of the result his own advocacy had helped to bring about. Here the line is clearly drawn between the obligation of the advocate and the obligation of the public servant.

44 A.B.A.J. 1159, 1162 (1958).

46. Prof. Murray Schwartz has suggested, for example, that in a contested judicial matter the standard of a lawyer's conduct is that he "*should do* everything for his client that is lawful and that the client would do for himself if he had the lawyer's skill," but that in nonlitigated matters the appropriate standard is that he "*need not* do for his client that which the lawyer thinks is unfair, unconscionable or overreaching, even if lawful." Schwartz, *Legal Ethics v. Common Notions of Morality*, 2 LEARNING AND THE LAW, Spring, 1975, at 46, 49, 52 (emphasis in original).

47. *See* United States v. Seale, 461 F.2d 345 (7th Cir. 1972); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

48. *Playboy Interview: William Kunstler*, PLAYBOY, Oct., 1970, at 78.

49. *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

50. United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

was legitimate. The role of such clients' attorney would not be that of a traditional advocate, but in the nature of a legislator or "political agent."[51] The role played by the lawyer, like the "public interest," is therefore of little assistance in defining the proper course of action.

Even if there were agreement on the factors which should enter into resolution of each ethical dilemma, the question remains one of who is to do the balancing. At the first instance, the attorney decides, without significant professional or institutional support to aid in the decision. But realistic review or sanction of a decision made by balancing factors of such varying kinds and weights is nearly impossible.[52] The organized Bar's inability to establish unambiguous and uncontradictory guidelines renders review of all but the most obvious violations of the rules fundamentally unfair.

B. The System Model

A system-oriented model of professional responsibility would define the lawyer's role in terms of the legal system's overall goals. The lawyer's primary function would be to serve those goals to the best of his

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51. As William Kunstler described the role:

> The obligation of a lawyer for a defendant in a political trial is merely to explain to the client what the law is and what penalties he may suffer for certain political actions he may take in the courtroom. Once that's explained and the defendant decides on a political defense, the lawyer's responsibility is to help him do just that. In sentencing me for contempt, Judge Hoffman pointed out that I had never publicly admonished the defendants nor in any way called them to task for what they were doing in the courtroom. He was right. I hadn't. But as I told him then, and I tell you now, I don't think it is my responsibility in a political trial to do that.
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> ....
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> Again, I must emphasize that in a political trial, where the intent is to punish a defendant for his thoughts, my conception of a lawyer's obligation is that he must join with his client in presenting a political defense; that he should, in effect, be the political agent of his client in the courtroom.

Playboy Interview, supra note 48, at 76. *See also* ABA CODE, EC 7–8, EC 7–3, EC 8–2, EC 8–9; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 280 (1949). *See generally* H. ZINN, DISOBEDIENCE AND DEMOCRACY (1968).

52. The general approach to sanctioning ethical violations has been expressed in official documents as follows. The *Introduction* to *The Defense Function* in ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION 114 (1974), provides:

> The complexity of the demands which law and life place upon the trial lawyer requires that his role be approached sympathetically, and that any set of standards for the judging of his conduct be reasonable in the demands it makes upon his capacities and his humanity.

See also Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958), *cited in* ABA CODE at 1 n.4; EC 9–2.

or her ability regardless of personal ethics. The duty as a member of the legal profession to subordinate personal morality for the good of the system is not an adoption of the maxim "the end justifies the means." Rather, it calls for awareness of the fact that each ethical dilemma does not stand on its own as a discrete entity, unrelated to other parts of the system, and recognition that choosing the "best" or most ethical course of action in a given situation might have an adverse, "unethical" effect somewhere else in the system.

Take, for example, the case of the lawyer who, through skilled representation, obtains an acquittal for a person who has committed a heinous crime. Since the Constitution entitles one accused of a crime to counsel, it is axiomatically ethical under our criminal justice system to act as his counsel, no matter how horrible his crime or how "guilty" or unpopular he may be.[53] The attorney who attempts to exonerate one he knows to be guilty is no less ethical than the prosecutor who seeks to effect his conviction. Both are equally necessary to the proper functioning of the system. Admittedly, there are essential functions which the defense attorney does not perform. But that is why the system provides police, prosecutor, judge, and jury. Therefore, an attorney who uses his skills on behalf of a "guilty" client acts properly with respect to the system. One who does less for such a client than he would do for "innocent" or popular clients improperly permits personal ethical beliefs to take precedence over professional responsibility. The goal of the system is achieved only because the attorney performs in a manner which might otherwise be perceived as unethical if considered in isolation.

Because the system model defines professional responsibility in individual cases in terms of a goal or guiding principle, it is essential that the Bar achieve consensus as to the overall goal of each subpart of our system of justice. The two most widely accepted goals of the system, each often dictating somewhat different behavior in different situations, are truth-oriented and adversary-oriented, with a subclass of the latter applying only to criminal justice: innocence-oriented. The following sections illustrate how each of these system models would operate, indicating the advantages and disadvantages of each. The final determination as to the most preferable is left to future consideration by the legal profession.[54]

53. This position is reflected in the Code. ABA CODE, EC 2-27, EC 2-29.

54. One needed reform is the redrafting of the Code of Professional Responsibility

1. Truth-oriented model

Under this model the Anglo-American trial is seen as a process "within which man's capacity for impartial judgment can attain its fullest realization,"[55] and the function of the advocate is "to assist the trier of fact in making this impartial judgment."[56] On a practical level, extensive discovery procedures for civil litigation and the easing of barriers to pretrial discovery in criminal law aid in implementing

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and its state equivalents to indicate more clearly what conduct is prohibited. *See, e.g.*, Rules of Professional Conduct of the State Bar of California, CAL. BUS. & PROF. CODE Rule 16 foll. § 6076 (West 1974):

> A member of the State Bar shall not, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer except in open court upon the merits of a contested matter pending before such judge or judicial officer; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

In those situations not resolved by the clear import of a particular Rule, the paramount objective of the system as a whole must be determinative of the proper cause of action and the appropriate discipline imposed for misconduct. It would seem too elementary to merit discussion that a code of professional responsibility—any code the violation of which could result in severe sanctions—can only be properly interpreted in view of its overall purpose. Whether the Code of Professional Responsibility is considered from the perspective of its draftsmen or the attorneys who must abide by it, a guiding principle is not evident.

Much of this inherent ambiguity can be resolved if the Bar would state the paramount objective of the Code with as much particularity as possible. For example, the case of Attorney X, text accompanying notes 26–29 *supra*, would have been resolved easily, without altering DR 7–106(B)(1), had another Disciplinary Rule proclaimed:

> As an officer of the court, it is the lawyer's primary duty to assist in the search for truth to the fullest extent possible. Therefore, in those cases where the lawyer's allegiance to truth and his client's best interests come into conflict, he shall choose that course which will best promote the search for truth, unless that course is proscribed by statutory or decisional law.

Attorney X would then have had little difficulty in determining that he must reveal the contrary case law; he would also have little defense to the imposition of sanctions for his failure to do so. Of course, the Rule could also be drafted to provide that the lawyer's primary duty [when acting in the capacity of advocate] is to his client and the promotion of justice through the adversary system. The "adversary system" would then be substituted for the "search for truth" in the above formulation. For examples of the redrafting of individual rules to reflect the paramount goal chosen, see note 124 *infra*.

The need for the Bar to determine and articulate the paramount objective of the Code is clear, and that means the adoption of a system-oriented model of professional responsibility. *Which* objective should be the guiding principle (*i.e.*, which of the system-oriented models should be adopted) is not so clear.

55. *See Professional Responsibility: Report of the Joint Conference, supra* note 52, at 1161.

56. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1487 (1966). *See also* Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 23, 24–25 (1966): "All lawyers must remember that the basic purpose of the trial is the determination of truth."

the truth-oriented model. Partisan advocacy is appropriate only insofar as it aids in the correct adjudication of the facts; when it "misleads, distorts and obfuscates," it is unacceptable.[57] For example, DR 7–106(B)(1)[58] obligates an attorney to disclose to the court mandatory precedent which he knows is directly contrary to his client's position and which is not cited by the opposing attorney. This provision is based on ABA Opinion 146,[59] which interpreted former Canon 22 requiring an attorney to deal with the court with "candor and fairness."[60] With respect to the duty to disclose adverse legal authority, then, an attorney is ethically required to subordinate the client's interests to the profession's interest in truth.[61]

In addition to its intuitive appeal, the truth-oriented model permits the lawyer to subordinate the client's interest to a higher personal moral value. A lawyer is not forced to choose between what he or she personally believes to be moral and professional responsibility to the client:[62]

> He [the barrister] gives to his client the benefit of his learning, his talents, and his judgment, but he never forgets what he owes to himself and to others . . . . He has a prior and perpetual retainer on behalf of truth and justice. He is the professional representative but not the alter ego of his client.

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57. *Professional Responsibility: Report of the Joint Conference, supra* note 52, at 1162.

58. The rule is set out in the text at note 26 *supra*. For further discussion see text accompanying notes 26–29 *supra*.

59. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 146 (1935).

60. ABA CANONS OF PROFESSIONAL ETHICS No. 22.

61. *But see* text accompanying notes 26–29 *supra;* Tunstall, *Ethics in Citation: A Plea for Re-Interpretation of a Canon,* 35 A.B.A.J. 5 (1949). Mr. Tunstall severely criticized Opinion 146 for ignoring the adversary nature of our system of adjudication:

> [The lawyer] is not called upon to volunteer detractions from the force of his own authorities. His march to a conclusion need not be interrupted by self-sought skirmishes, nor continued to the accompaniment of *dubitandos*. He is an advocate, not an umpire. He is participating in an argument, not a speculative inquiry; a trial, not a confessional.

Id. at 6.

62. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint,* 5 AM. CRIM. L.Q. 11, 15 (1966) (quoting an unidentified "great British barrister, later a judge"). *See also* Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952):

> Of course no one could say that an occasion might not possibly arise when there was no alternative except the truth or a lie and when the consequences of the truth were such that the lawyer might be tempted to lie. This, however, would not make it right for him to do so.

Id. at 350.

Thus, the New York missing bodies case and the hypothetical case of the destroyed data base, so difficult to resolve under the situation model, are resolved easily under the truth model. In the former, a lawyer would clearly have a duty to reveal the fact of the murders, whether anonymously or not. In the latter, the attorney for RPM would take into account the ultimate interest of the system in correctly deciding the facts about RPM's interests and would not negotiate for the destruction of the data base.

As these examples indicate, if our system were devoted to eliciting the truth above all other goals, professional responsibility would be both easy to teach and to enforce. If an attorney's actions for any reason hindered or distorted rather than aided and enlightened the search for truth, he would be remiss in his professional conduct. Yet in our system of adjudication, truth is often not the highest goal. Monroe Freedman has demonstrated that many of the accepted rules of our legal system often serve to hinder, rather than to further, the discovery of truth:[63]

> The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial. *Such are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim.*

Justice, not truth, is the overriding goal of the American legal system, and "[j]ustice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned."[64]

Even if it were possible to conduct legal proceedings in such a way that the truth always emerged, neither the profession nor the public would be satisfied unless the truth was obtained in a just manner. In fact, we have demonstrated a willingness to sacrifice some measure of

63. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 (1966) (emphasis added).
64. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951).

truth in order to assure the litigants and the public that justice has been obtained as well as the truth discovered.[65] In a criminal proceeding, probably the best means of eliciting the truth would be skillful interrogation of the accused. Yet the fifth amendment privilege against self-incrimination protects the accused from any questioning by law enforcement officers. Although the requirement that police obtain evidence of a crime independently of the accused has truth-serving components, the primary purposes for the privilege are humanitarian in nature and unavoidably interfere with the discovery of the truth.[66] In sum, the existing legal system is designed to effectuate goals which sometimes take precedence over the search for absolute truth. But because this is not generally acknowledged or understood, lawyers often act to preserve truth and their personal integrity at the expense of the adversary system and their clients.

For example, although the Bar considers the representation of the unpopular and those believed to be guilty to be "[o]ne of the highest services the lawyer can render to society," and although ABA Ethical Consideration 5–1 provides that the professional judgment of a lawyer "should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties," inadequate defenses sometimes result from attorneys' devotion to truth and personal moral standards. In *Johns v. Smyth*,[67] for example, the defendant, a prison inmate, was convicted of the murder of another inmate and was sentenced to life imprisonment. Defense counsel submitted no instructions as to lesser offenses, although according to the defendant's statement made on the day following the

65. As one commentator has stated:
> Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes which ensure regard for the dignity of the individual be followed, irrespective of their impact on the determination of truth. . . . [I]n a society that respects the dignity of the individual, truth-seeking cannot be an absolute value, but may be subordinated to other ends, although that subordination may sometimes result in the distortion of the truth.

Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) (footnote omitted).

66. For delineation of the purposes underlying the privilege against self-incrimination see 8 J. WIGMORE, EVIDENCE § 2251 (J. McNaughton rev. 1961); Aronson, *Should the Privilege Against Self-incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 60–62 (1973), and authorities cited therein. *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

67. 176 F. Supp. 949 (E.D. Va. 1959). *But cf.* United States *ex rel.* Wilkins v. Banmiller, 205 F. Supp. 123, 128 n.5 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964).

crime, the killing was a reaction to advances by the deceased suggesting homosexual acts. Under the laws of Virginia it was possible in these circumstances for the defendant to have been convicted of voluntary manslaughter, carrying a sentence of five years. Further, defense counsel agreed with the prosecutor to submit the case to the jury without argument. In explanation of his actions, he stated that he could not conscientiously argue that Johns was guilty of only manslaughter, in light of Johns' " 'very vague' " explanation of the incident.[68] The court, in granting the writ of habeas corpus on the basis of ineffective assistance of counsel, stated:[69]

> [W]hen defense counsel, in a truly adverse proceeding, admits that his conscience would not permit him to adopt certain customary trial procedures, this extends beyond the realm of judgment and strongly suggests an invasion of constitutional rights. . . .
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> . . . .
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> . . . The failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience.

The attorney's personal moral values (truth-oriented) clearly interfered with the goal of preserving justice in this case (adversary-oriented).

An overriding concern for truth and the defense counsel's own personal morality were also responsible for the result in *People v. Heirens*,[70] where counsel induced the defendant to plead guilty to three murders and a number of assaults and refused to raise an insanity defense despite a weak prosecution case and counsel's own " 'doubts as to this defendant's mental capacity for crime.' "[71] The defendant had been subjected to every kind of coercion and interrogation—including illegal search of his living quarters, four days of continuous questioning, and the use of sodium pentothal and lie detector tests—resulting

68. 176 F. Supp. at 953. Defense counsel further stated: " 'You can talk about legal duty to client all you wish, but I consider it dishonest for me to get up before a jury and try to argue that the statement that came out from the Commonwealth was true when Johns had told me that it wasn't.' " *Id.*

69. *Id.* at 952–53.

70. 4 Ill. 2d 131, 122 N.E.2d 231 (1954), *cert. denied*, 349 U.S. 947 (1955).

71. *Id.* at 140, 122 N.E.2d at 237. Defense counsel further stated: " 'I have no memory of any case, certainly not in my time at the bar, when counsel on both sides were so perplexed as to the mental status of an individual and the causes which motivated him to do certain acts.' " *Id.* at 140, 122 N.E.2d at 236.

in what would have been inadmissible real evidence and an inadmissible confession. Despite this treatment and psychiatric evidence suggesting mental instability, defense counsel repeatedly urged a guilty plea because he and the prosecuting attorney[72]

> . . . were collectively agreed that any thought on the part of the State to cause this man to forfeit his life would be unjust. It would be unfair. By the same token we were collectively agreed that any course on our part which would assist in having him returned to society would be equally unfair.

In acknowledging defense counsel's " 'cooperative assistance' " to the court, the prosecutor stated that without defense counsel's aid, " 'to this day a great and sincere public doubt might remain as to the guilt of William Heirens. . . .' "[73]

Although the court refused to reverse Heirens' conviction on his guilty plea because the representation was not "of such low caliber as to be equivalent to no representation at all,"[74] it is clear that counsel's first loyalty was to his own conscience and moral beliefs, rather than to his client's interest in obtaining the best treatment permitted under the law. *Johns* and *Heirens* are two instances where an attorney's devotion to truth and his own integrity subverted our system of justice.[75] They are also examples of the need for the legal profession to provide better guidance with respect to the proper resolution of conflicts between loyalty to one's client and loyalty to the truth.

2. *Adversary-oriented model*

Rather than requiring the judge to perform the functions of both

72. *Quoted in id.* at 140, 122 N.E. 2d at 237.
73. *Id.* at 140, 122 N.E.2d at 236.
74. 122 N.E.2d at 238.
75. Professor Alschuler has observed with respect to the *Heirens* case:

> William Heirens' culpability under traditional legal standards was doubtful, yet both the defendant and society were deprived of an authoritative resolution of this issue. Heirens is today an inmate of the Stateville Penitentiary, although no one has determined on the basis of the evidence that a prison is where Heirens belongs. Society devised the insanity defense precisely to avoid such distressing spectacles.

Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 75 (1968).

investigator and arbitrator,[76] the adversary system requires that each side investigate, introduce, and argue the evidence most favorable to its own side of a legal dispute:[77]

> The philosophy of adjudication that is expressed in "the adversary system" is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of the judge from that of jury, on the other. The decision of the case is for the judge, or for the judge and jury. That decision must be as objective and as free from bias as it possibly can.

This method of presentation avoids the natural tendency to "judge too swiftly in terms of the familiar that which is not yet fully known."[78] No matter how great an effort one makes to remain neutral, past experience, subconscious biases, and preconceptions formed from preliminary investigation inevitably lead to prejudgment.[79] Once a number of facts indicate guilt, for example, the virtually irresistible tendency is to find additional evidence substantiating the initial judgment. Contrary evidence or testimony is thereafter not as actively pursued. The adversary system recognizes this psychological tendency, but avoids its dysfunctional aspects by instructing each side of a dispute to form a bias and pursue all facts, testimony, legal precedents, and arguments in its favor, and attack all evidence and arguments for the opposing side. Through partisan advocacy, both sides are fully presented to a trier of fact.[80]

A second function served by the adversary process of adjudication is not only to ensure that justice in fact *has* been done, but that it also *appears* to have been done. To the extent that trials take the place of self-help by wronged individuals; to the extent that rehabilitation of criminal offenders requires that those convicted believe themselves to

76. This is the requirement in a number of inquisitorial systems, particularly in French criminal procedure. *See generally* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935); Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483 (1970).

77. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961).

78. *Professional Responsibility: Report of the Joint Conference*, *supra* note 52, at 1160.

79. *See* Fuller, *supra* note 77, at 36.

80. *See* Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967).

have been tried fairly; and to the extent that the orderly functioning of government and protection against resort to violence require faith in the integrity of the legal system; it is essential that all sides in a controversy be seen to have been adequately represented. This function is aided, particularly with respect to the accused in a criminal trial, by providing a partisan advocate on either side of the controversy.

A third function of the adversary process in criminal cases, particularly related to its educative aspect of making justice apparent, is the preservation of the presumption of innocence. Professor Goldstein deems the presumption of innocence central to the accusatorial system:[81]

> An accusatorial system assumes a social equilibrium which is not lightly to be disturbed, and assigns great social value to keeping the state out of disputes, especially when stigma and sanction may follow. As a result, the person who charges another with crime cannot rely on his assertion alone to shift to the accused the obligation of proving his innocence. The accuser must, in the first instance, present reasonably persuasive evidence of guilt. It is in this sense that the presumption of innocence is at the heart of the accustorial system. Until certain procedures and proofs are satisfied, the accused is to be treated by the legal system *as if* he is innocent and need lend no aid to those who would convict him.

The best way to accomplish this goal is by providing the accused a representative who does not act according to a personal opinion on the facts, but rather assumes innocence and acts as an advocate to promote that view.[82]

In maintaining the adversary system and the presumption of innocence in the criminal justice system, each of the participants in the system functions properly only if he understands and is able to fulfill his role. It is in part due to the nature of the adversary system—that the attorney must remain firmly in role—that he may not express a personal belief as to the guilt or innocence of the client.[83] Personal views

81. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1017 (1974) (emphasis in original). Professor Goldstein notes: "Comparativists generally assume that inquisitorial systems are primarily concerned with enforcing criminal laws and are only incidentally concerned with the manner in which it is done." *Id.* at 1018.

82. For a more detailed analysis of the presumption of innocence aspects of the adversary model see notes 125–36 and accompanying text *infra*.

83. *See* ABA CODE, DR 7–106(C)(4).

should be irrelevant to proper performance of this role. Loyalty to the client, within the bounds of the law, must be paid absolute deference because the system can only function properly if a member of the legal profession argues the defendant's cause as forcefully and convincingly as possible.[84]

Thus, under the adversary-oriented model there is no doubt but that the attorneys for Johns and Heirens acted improperly. In the New York missing bodies case, the lawyer would ask himself how the goals of the adversary system would best be furthered. Since the system can operate only if the relationship of trust and candor between lawyer and client is given priority, the lawyer would be bound to withhold the information about the missing bodies.[85] In the Destroyed Data Base problem also, the lawyer for RPM may not forsake the interests of his client. He must leave to the partisan advocacy and ability of the Justice Department the protection of the public interest in limiting computer industry monopolies. He would negotiate for the destruction of the data base.

a. Equal adversaries alternative

Proper functioning of the adversary-oriented model requires that the advocates have equal weapons and "play according to the rules."[86] Formulating ethical rules for the advocates is a relatively straight-

84. Lord Brougham, in his defense of Queen Caroline's divorce case before the House of Lords stated:

> I once before took occasion to remind your Lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client and none other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.

Quoted in MACMILLAN, LAW & OTHER THINGS 195 (1937), *and* Curtis, *supra* note 64, at 4.

85. The only accommodation the lawyer might make within this model is to seek the client's consent to an anonymous revelation not linked to the client. In other words, it might be possible to reveal the information about the fact of the murders without revealing the implication from the client's own words that he was responsible for them. Revealing the second piece of information would be unacceptable in the adversary-oriented model.

86. References in this article and others in the field to "playing the game" or "playing according to the rules" originated from the "sporting theory of justice," a phrase used by Roscoe Pound in a famous 1906 address. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. pt. 1, at 395, 404 (1906).

forward task. Canon 22 of the former ABA Canons of Professional Ethics laid the groundwork:[87]

> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

A more difficult task is one of assuring that the adversaries are, as nearly as possible, of equal ability in presenting their respective sides. The innate and developed capacities of attorneys can only be kept above a specified minimum level through Bar examination, continuing education programs, and effective assistance of counsel doctrines. The equality of their relative resources and bargaining positions, however, might be increased through statutory reform, case law, or possibly by varying ethical rules for the conduct of attorneys according to the nature of the client.[88]

As *Johns v. Smyth*[89] indicated, some control can be exercised if counsel refuses to do enough for his or her client. Under similar anal-

87. Some of the many other "rules of the game" include: A lawyer should not employ trial tactics that "would serve merely to harass or maliciously injure another," ABA CODE, DR 7-102(A)(1), or "[k]nowingly make a false statement of law or fact," ABA CODE, DR 7-102(A)(5); in appearing in his professional capacity before a tribunal, a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person," ABA CODE, DR 7-106(C)(2), or "[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply." ABA CODE, DR 7-106(C)(5). Substantial compliance with informal customs and practice is often achieved despite the absence of formal sanctions. For example, although FED. R. CIV. P. 30 and 35 provide elaborate mechanisms for the taking of depositions and arranging for physical or mental examination of the opposing party, in most jurisdictions the formal procedures are unnecessary. One simply calls opposing counsel, establishes a mutually convenient time and place, and relies on good faith compliance. Absent unusual circumstances, an attorney who resorts (or compels opposing counsel to resort) to the expensive and time consuming formal procedures is ostracized by other members of the Bar.

88. *See* note 40 *supra*.

89. 176 F. Supp. 949 (E.D. Va. 1959). *But cf.* United States *ex rel.* Wilkins v. Banmiller, 205 F. Supp. 123, 128 n.5 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964). See notes 67-69 and accompanying text *supra*.

ysis, an attorney can also be rebuked for doing too much. In *Commonwealth v. Scoleri*,[90] two prominent and respected members of the Pennsylvania Bar were criticized for obtaining or attempting to obtain a commitment from the sentencing judge in a criminal trial to impose life imprisonment rather than the death penalty if their client were to plead guilty. The Pennsylvania Supreme Court stated:[91]

> Mr. von Moschzisker and Mr. McBride each testified under oath that *in the absence of the district attorney* he went to see one (McBride) or several (von Moschzisker) Judges, with the intention of obtaining from such Judge or Judges—whom they desired and solicited to sit in the Scoleri case—an *absolute commitment* (McBride) or the *equivalent of a commitment* (von Moschzisker) for a penalty of life imprisonment if Scoleri would plead guilty. *This conduct was indefensible and outrageous* and cannot be too strongly condemned.

Counsel is to do neither more nor less for his client than the rules allow. Otherwise, he would obtain a more or less than equal position for his client in relation to opposing counsel.

Recent changes in the standard for review of challenges to effective assistance of counsel illustrate the use of case law to effect greater equality between adversaries. The traditional standard for effectiveness is the "farce or mockery" test, under which representation will be found ineffective only if it makes such a sham of the trial that it shocks the conscience of the court.[92] As Chief Judge Bazelon succinctly stated, however: "The 'mockery' test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment."[93] Recognizing this situation, several federal circuits have recently enunciated stronger tests for determining the effectiveness of counsel. The Court of Appeals for the Fifth Circuit has stated:[94]

> The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representa-

90. 415 Pa. 218, 202 A.2d 521 (1964).
91. *Id.* at 229, 202 A.2d at 526 (emphasis in original).
92. United States v. Sanchez, 483 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); Hayes v. Russell, 405 F.2d 859, 860 (6th Cir. 1969); Davis v. Bomar, 344 F.2d 84, 89 (6th Cir. 1965), *cert. denied*, 383 U.S. 883 (1965).
93. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973).
94. Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

> tion . . . . One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery. . . . Our standard is reasonably effective assistance.

The Court of Appeals for the Eighth Circuit has emphasized that the farce-mockery test should not be taken literally, but rather should reinforce the notion that the petitioner must assume a heavy burden in proving unfairness.[95] In addition to farce-mockery language, that court has evaluated effective assistance with reference to "a lawyer's deliberate abdication of his ethical duty to his client,"[96] and to the "degree of competence prevailing among those licensed to practice before the bar."[97]

In each of the above cases the element added to the farce-mockery test was some standard of reasonableness or professionalism. Several circuit courts of appeal base their test for effectiveness of assistance solely upon notions of reasonableness or professionalism. According to the Court of Appeals for the Sixth Circuit:[98]

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law . . . .

Similar language has been used by the Courts of Appeals for both the Ninth[99] and District of Columbia circuits.[100] A particular level of professional competence is the test of effective assistance in other courts. For example, the Court of Appeals for the Third Circuit has stated: "[T]he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."[101] The Court of Appeals for the Seventh Circuit recently rejected the farce-mockery test when it held that "the Constitution guarantees a criminal defendant legal assistance

95. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).
96. Brown v. Swenson, 487 F.2d 1236, 1240 (8th Cir. 1973), *cert. denied*, 416 U.S. 944 (1974).
97. Johnson v. United States, 506 F.2d 640, 646 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).
98. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).
99. United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972), *cert. denied*, 411 U.S. 934 (1973) (reasonably likely to render and rendering reasonably effective assistance). *But see* United States v. Martin, 489 F.2d 674 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974) (farce or mockery standard).
100. United States v. Butler, 504 F.2d 220, 223 (D.C. Cir. 1974) (reasonably competent assistance).
101. Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

which meets a minimum standard of professional representation."[102] A different approach for evaluating effective assistance of counsel has been developed by Courts of Appeals for the Fourth and District of Columbia circuits. These courts have set forth specific positive duties required of defense counsel.[103] Furthermore, the District of Columbia court has stated that the specific duties enumerated were meant only "as a starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance."[104] Just how far the trend towards requiring a higher level of legal competence will develop is unclear, but the effort to ensure a greater degree of equality between the adversaries is unmistakable.

Another example of the development of case law to assure equal adversaries is the effort to lay ground rules for fair and just plea bargaining. Although few cases or legal commentators suggest that plea bargaining is a valued part of the criminal justice system in its fairness or promotion of truth,[105] it is accepted by most as a necessary evil.[106]

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102. United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), *cert. denied*, 96 S. Ct. 148 (1975).

103. United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973):

> *Specifically*—(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. . . . (3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Id. at 1203–04. Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968):

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Id. at 226.

104. United States v. DeCoster, 487 F.2d 1197, 1203 n.23 (D.C. Cir. 1973).

105. In fact, the plea bargaining system is probably the single most prevalent obstacle to truth finding in the criminal justice system. Defendants are charged with and plead guilty to lesser crimes or crimes unrelated to the crimes actually committed. Conviction and crime commission statistics are proportionately distorted. There is even the possibility that some defendants are induced to plead guilty when they have in fact committed no crime at all. *See, e.g.*, Jones v. United States, 423 F.2d 252 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970).

106. Presently, over 85% of all criminal charges brought in federal district courts

Reform efforts have therefore been directed for the most part towards putting the defendant and the prosecutor in equal bargaining positions and ensuring that the game is played fairly.[107] In *Anderson v. North Carolina*,[108] for example, a plea bargain and subsequent guilty plea were invalidated because the prosecutor talked with the defendant in jail in the absence of his counsel. Commenting on the defendant's unequal bargaining position the court noted: "Unquestionably petitioner Anderson could not bargain on equal terms with the Solicitor. The conference in the jail was inherently unfair, and the agreement made there infects all subsequent proceedings."[109] Recognition that if the game of plea bargaining is to be played at all, it must be played fairly, has also promoted an increasing effort through case law and statutory reform to expose both bargaining and resulting agreements. Rather than pretend that no deals have been made and that the defendant fully admits guilt, what is required is that the defendant fully understand his or her rights and that the agreement be fair.[110]

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result in pleas of guilty or nolo contendere. Without such a high percentage, the overload on the courts could cause a complete breakdown in the system. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 171, at 354–55 nn. 1&2 (1969).

107. Courts have recently gone so far as to treat plea bargaining agreements as enforceable contracts where "fairness" requires, at the least, that the defendant be permitted to plead again in the event the prosecution's promises are not fulfilled, and at the most, that the defendant is entitled to his choice of remedies, including specific performance. *Compare* Santobello v. New York, 404 U.S. 257, 262 (1971) (If a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") *with* Miller v. State, 272 Md. 305, 322 A.2d 527 (Ct. App. 1974) (When a prosecutor reneges on his end of a plea bargain the defendant may elect to have his guilty plea vacated and plead again or elect to leave the plea standing and be sentenced before a different judge.).

108. 221 F. Supp. 930 (W.D.N.C. 1963).

109. *Id.* at 935. *But cf.* People v. Bowman, 40 Ill. 2d 116, 239 N.E.2d 433, 438 (1968) (plea negotiations between sheriff and prisoner in absence of counsel did not, without coercion, vitiate subsequent guilty plea).

110. *See, e.g.,* Jones v. United States, 423 F.2d 252, 255 (9th Cir.), *cert. denied,* 400 U.S. 839 (1970), where the court stated:

> Full disclosure reduces the risk of an unfair agreement—unfair to the public because of an unwarranted concession by an overburdened prosecutor anxious to avoid trial; or unfair to the defendant because the concession is either illusory, or, at the other extreme, so irresistible in light of the inevitable risks of trial as to induce an innocent defendant to plead guilty.

See also Raines v. United States, 423 F.2d 526 (4th Cir. 1970).

Former FED. R. CRIM. P. 11 required the trial judge to insure that a guilty plea had been voluntarily entered, but did not control the practice or even acknowledge the existence of plea bargaining. As amended, however, Rule 11 both recognizes and establishes the ground rules for fair and open plea agreements:

In addition to the attempt to provide effective representation and to ensure equal adversary positions in plea bargaining in the criminal area, greater attention is being directed to the problems of low income litigants who often have no representation whatsoever. Public defender systems and community legal services programs, together with

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(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

FED. R. CRIM. P. 11(e), *as amended by* Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94–64, § 3(6)–(10), 89 Stat. 371–72. Subdivisions (1) through (5) of Rule 11(e) became effective Dec. 1, 1975, while subdivision (6) went into effect on Aug. 1, 1975. *Id.* § 2, 89 Stat. 370.

efforts to reduce the cost of legal services for those above the poverty level but still unable to afford necessary legal help, have also been part of the effort to equalize the position of low income individuals in the adversary system.[111] The fact remains that under the system as it is constituted, poor and lower middle income Americans really cannot be adversaries equal to their government or wealthier individuals. A typical example is the motions practice in a criminal case for which there is often a substantial attorney's fee. Motion papers for severance of defendants and counts, to find the particular statute unconstitutional, and to suppress evidence may fill hundreds of pages. Such motions are possible in every criminal case, but the legal and financial ability to produce them is not.

Recently, the profession has taken substantial steps towards providing legal services to low and middle income individuals by means

111. According to former American Bar Association President Chesterfield H. Smith, those 80% to 85% of the American people above the poverty level but below the wealthy category have the least access to legal services. 18 AM. B. NEWS, Nov., 1973, at 3. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 7–8 (1963); Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 22–23 (1963); Tunney, *supra* note 1, at 6, col. 1. Suggested means of making legal services available at prices the middle class can afford are specialization, lawyer referral services, legal clinics, prepaid legal insurance, and standardization of agreements in the areas of landlord and tenant, credit and lending, and probate. 18 AM. B. NEWS, Nov., 1973, at 2; Tunney, *supra* note 1, at 6, col. 3. As one distinguished group has concluded:

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE, *supra* at 10.

The awareness that the adversary system cannot function properly unless indigents are provided with at least a minimum of legal weapons to combat the arsenal available to the government and wealthier private litigants has manifested itself on a number of fronts. The Supreme Court has held that indigents are entitled to court-appointed counsel at the trial level [Johnson v. Zerbst, 304 U.S. 458 (1938) (federal); Gideon v. Wainwright, 372 U.S. 335 (1963) (state)], a free transcript [Griffin v. Illinois, 351 U.S. 12, 19 (1955) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.")], and counsel on non-discretionary appeals [Douglas v. California, 372 U.S. 353 (1963)]. It has been argued that indigents should be entitled to free expert witnesses where such experts are, in the words of 18 U.S.C. § 3006A(e)(1)&(2) (1970), "necessary for an adequate defense." *See, e.g.*, Kamisar & Choper, *supra* at 7–9 (1963); Timbers, *Judicial Perspectives on the Operation of the Criminal Justice Act of 1964*, 42 N.Y.U.L. REV. 55, 60–61 (1967). A number of courts have so held, *e.g.*, People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645, 648–49 (1966); United States v. Hathcock, 441 F.2d 197 (5th Cir. 1971) (interpreting FED. R. CRIM. P. 17(b)).

of changes in ethical and common law rules concerning advertising, solicitation, and creation of improved low-cost legal service offices. The new Legal Services Corporation Act[112] is a promising effort in this direction. But it is clear that adoption of the adversary model necessarily implies a commitment to ensuring the equality of the adversaries. Without this commitment, indigent litigants will be no better off under a true adversary model than they are under the existing situation model.

It should be noted, however, that under the present system, at least with respect to criminal prosecutions, absolute adversariness is not always the goal and is in many instances constitutionally impermissible. The prosecutor's primary duty "is not to convict, but to see that justice is done."[113] Therefore he may not act as an equal adversary, employing all valid means to win a case. A somewhat different set of considerations is applied in assessing the conduct of a prosecutor than might be applied to other attorneys, primarily because he is the representative of society as a whole rather than a single client.[114]

If the system is to be truly adversary, however, and justice can best be obtained by means of partisan advocates, the prosecutor's dual allegiance must be kept to a minimum. One way of ensuring fairness in an adversary system would be to impose upon the prosecutor a greater duty towards the defendant *prior to* trial, but permit the same aggressive partisanship at the trial itself. Before trial, the government generally has a police and investigative network at its disposal, along with a large, well-paid staff of attorneys. It also has the force and influence of its authority in obtaining and interviewing potential witnesses—a decided advantage over most defense counsel. The prose-

112. 42 U.S.C. §§ 2996–2996*l* (Supp. IV, 1974).

113. ABA CANONS OF PROFESSIONAL ETHICS No. 5. *See* ABA CODE, EC 7–13. *See also* Berger v. United States, 295 U.S. 78, 79 (1935).

114. In this respect, it has been recognized that

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.

Professional Responsibility: Report of the Joint Conference, *supra* note 52, at 1218. *But see* Taliaferro v. Locke, 182 Cal. App.2d 752, 756, 6 Cal. Rptr. 813, 816 (Dist. Ct. App. 1960) ("In conducting a trial a prosecutor is bound only by the general rules of law and professional ethics that bind all counsel.").

cutor should therefore have a duty to investigate and disclose exculpatory as well as inculpatory evidence which has been discovered.[115]

On the other hand, aside from differences in forensic ability and preparation, the adversaries at trial have the opportunity of at least near equality, and the judge is available to ensure that the defendant's rights are fully protected.[116] Also, at trial it is of greater necessity to the proper functioning of the system that partisan advocacy fully expose the arguments and evidence on both sides than that a duty be imposed on the prosecution to equalize the positions of the adversaries. In fact, the courts already have placed greater pretrial responsibility upon the prosecutor. The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[117] A number of courts have gone further to require such disclosure whether defense counsel makes a specific request for the evidence or not.[118]

With respect to trial conduct, as opposed to pretrial investigation, the prosecutor is not normally held to a higher standard than defense counsel. If defense counsel acted improperly or presented misleading arguments, the prosecutor may be permitted to retaliate in kind.[119] In *United States v. Sober*,[120] for example, the Court of Appeals for the Third Circuit affirmed the defendant's conviction despite allegations of prosecutorial misconduct, concluding that defense counsel had invited the retaliatory remarks of the prosecutor.[121] In other words, the

115. *See* cases cited in notes 117–18 *infra*.

116. *See, e.g.*, United States v. Curcio, 279 F.2d 681 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960) (judge is more than a moderator or umpire); Green v. State, 554 Okla. Crim. 282, 163 P.2d 554, 557, *cert. denied*, 328 U.S. 870 (1945) (trial judge has duty to interfere, in interest of justice, if defense counsel negligently or otherwise fails to protect defendant's rights).

117. Brady v. Maryland, 373 U.S. 83, 87 (1963). *See* Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968) (prosecutor must disclose eyewitness testimony in conflict with his case); Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963) (prosecutor must disclose psychiatrist's finding of incompetency that conflicted with his and defendant's psychiatric testimony at trial).

118. *See, e.g.*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) ("A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.' ").

119. *See* Davis, *Limitations Upon the Prosecution's Summation to the Jury*, 42 J. CRIM. L.C. & P.S. 73, 80 (1951).

120. 281 F.2d 244 (3d Cir.), *cert. denied*, 364 U.S. 879 (1960).

121. *Id.* at 251. *See* People v. Hidalgo, 78 Cal. App. 2d 926, 945–46, 179 P.2d 102, 112–13 (Dist. Ct. App. 1947) ("the record shows that the district attorney gave

prosecutor was only performing his duty as a partisan advocate in an adversary system.[122]

In part, these rules of trial conduct reflect the belief that the prosecutor cannot be expected to act as an adversary and assist defense counsel at the same time—without any guidance other than his own conscience. If he helps defense counsel too much, he will face public criticism and possible loss of his job; if he helps too little, any convictions obtained will be subject to reversal. In light of these alternatives, most prosecutors choose to play their role to the hilt, leaving it to defense counsel to appeal if desired. Law schools and ethics committees can advise no differently until the profession first determines whether a totally adversary system is most desirable,[123] and if not, what spe-

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tit for tat") (dictum). *See generally* Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039 (1952).

122. *See* Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 946–47 (1954) ("the partisanship of the prosecutor, as of any counsel, is important").

An indiciation of just how strongly the belief in the total partisanship of the prosecutor has been ingrained in Americans is the reaction to the Supreme Court decision in Alcorta v. Texas, 355 U.S. 28 (1957). In *Alcorta* the Court struck down a conviction of first degree murder because the prosecutor had "elicited" inaccurate testimony from a key witness with knowledge of its inaccuracy. The defendant had claimed to have killed his wife in a fit of passion after seeing her kiss a man named Castilleja in a parked car at night. Castilleja testified on direct examination that he had not kissed the deceased and had had only a casual relationship with her. It was subsequently revealed that he had informed the prosecutor prior to trial that he had engaged in sexual intercourse with her on a number of occasions and was told not to volunteer any information about the intercourse, but if specifically asked about it, to answer truthfully.

What is most significant is that the prosecuting attorney in *Alcorta* was subsequently recognized as "Outstanding Texas Prosecutor" by the Texas Law Enforcement Foundation "in recognition and appreciation of his signal and matchless contribution to criminal justice in this state." The prosecutor felt that what he had done was "right and proper," and that telling Castilleja to volunteer nothing was simply good practice, taught every day in law school. He feared that the Court's decision threatened to "wipe out" the entire adversary system of pitting one lawyer against another. Martin, *The Innocent and the Guilty*, 223 SATURDAY EVENING POST, July 30, 1960, at 14, 80 *quoted in* M. SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 52 (1961).

123. The approach to adversariness which treats disputes as a battle or game has been denounced as both inefficient and unnecessary. Combat is the rule, although it is often dysfunctional. As one commentator has noted:

> There will be absolutely no reason why both sides should not agree to take a certain action, yet there will be opposition, because the rules of the game permit opposition. Suits will be delayed because it is possible to delay them; petty rules will be relied on, because one can rely on them; discovery will be opposed, not because there is anything to hide, but because the rules permit the opposition.

Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1060 (1970). Clients have been led by the adversary system to expect their attorney to play the game to the hilt, even in those instances where justice would require compromise or conciliation. Traditional law school curricula foster this attitude in the attorneys themselves, so

cific rules might be developed to modify it without destroying its effectiveness.[124]

b. *Innocence-oriented alternative*

The innocence-oriented subclassification to the adversary system would go further in affording procedural protections to the accused in criminal cases.[125] The adversary process is primarily concerned with

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that efforts to temper the adversariness of the system in the interests of efficiency or justice meet stiff opposition.

124. With respect to pretrial discovery, for example, it is not enough to tell the prosecutor that he must turn over evidence which is "material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). *Cf.* Giles v. Maryland, 386 U.S. 66 (1967). Even the courts have been unable to agree with respect to the meaning of "materiality." *Compare* Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966), *with* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

One possibility for resolving this dilemma would be to recognize that full access to *all* facts by both parties is not incompatible with full adversariness. Despite initial resistance to the discovery provisions of the Federal Rules of Civil Procedure, the Rules have aided in eliminating surprise, avoiding unnecessary delay, and producing smoother trials with better prepared attorneys—*and* at the same time, the adversariness of the proceedings have been preserved. This result should be true for criminal as well as civil cases:

> Every one of the many excellent arguments which carried the day for pretrial discovery in civil cases is equally applicable on the criminal side. If the trial is to be the occasion at which well prepared adversaries test each other's evidence and legal contentions in the best tradition of the adversary system, there can be no substitute for a deposition, discovery, and pretrial procedure.

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1193 (1960).

To the extent such a procedure would conflict with the innocence model, a choice between the two would have to be made. But that choice would have to be specifically indicated in the Code, possibly by a preliminary statement which would include the following: "Whenever a particular situation appears to create conflicting ethical duties, that course of action most likely to effectuate the search for truth [*or*: the adversary system] should prevail." *See also* note 54 *supra*.

Further, the Code could be rewritten so that any Disciplinary Rule reasonably subject to varying interpretation would conform to the system chosen. For instance, DR 7–106(B)(1) could be redrafted to provide that an attorney, when appearing before a tribunal as an advocate on behalf of his client, has no duty to assist opposing counsel in any way in the presentation of the latter's case. Likewise, the Disciplinary Rule could be drafted to make the search for truth unambiguously paramount. *See generally* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057–58 (1975) (proposed draft of "new" DR 7–102); Uviller, *The Advocate, The Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1081 (1975) (proposed redraft of DR 7–102, to provide: "It is unprofessional conduct for a lawyer to counsel or countenance testimony by a witness in his favor which, although true in the part stated, omits matters which if stated might reasonably alter the meaning or significance of the testimony.").

125. In some ways the considerations applicable to criminal cases are also relevant in civil controversies:

> [T]here is an element of social condemnation in almost all adverse legal judgments . . . . To be found guilty of negligent driving or of breaking a contract does

pitting two adversaries against each other so that the trier of fact can weigh the issues presented and be better able to render a just and enlightened decision. The innocence-oriented model, on the other hand, is founded upon a series of philosophical and social policy premises which often render irrelevant the most accurate determination of truth in a particular case, even by the adversary method.[126] It is more important that the presumption of innocence be preserved in terms of its inherent goals.

The enormous impact which the presumption of innocence has had on the ethical duties of criminal defense attorneys is exemplified by the reasons given for representing a person whom the attorney knows to be guilty. First, "it is said that a man charged with crime should not have his guilt determined in the privacy of a lawyer's office but in open court by due process of law."[127] An attorney who prejudges his client negates the function of the adversary system: to have judgment rendered on the basis of the facts brought out by partisan advocacy on both sides of the issue.

Second, as indicated previously, a criminal trial is primarily an occasion for the prosecutor to attempt to prove the accused's guilt beyond a reasonable doubt. The defendant is not required to do anything or prove anything—not even to his attorney. Further, one cannot be guilty of a particular crime in the legal sense unless convicted by a judge or jury. Until then the defendant has merely com-

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not carry the stigma of a criminal conviction, but in these cases, too, society must be concerned that even the qualified condemnation implied in an adverse civil judgment should not be visited on one who has not had a chance to present his case fully.

Fuller, *supra* note 77, at 38–39. Since the proponents of the innocence model have defined it for the most part in terms of the defendant in a criminal case, it will be so treated in this part of the article.

126. *See, e.g.*, People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975), wherein the court stated:

> A trial is in part a search for truth, but it is only partly a search for truth. The mantle of innocence is flung over the defendant to such an extent that he is safeguarded by rules of evidence which frequently keep out absolute truth, much to the chagrin of juries. Nevertheless, this has been a part of our system since our laws were taken from the laws of England and over these many years has been found to best protect a balance between the rights of the individual and the rights of society.

Id. at 189, 372 N.Y.S.2d at 801.

127. Fuller, *supra* note 77, at 33. *See also* M. SCHWARTZ, *supra* note 122, at 86; *Preamble* to NEW YORK COUNTY CRIMINAL COURTS BAR ASS'N CODE OF ETHICS AND PRINCIPLES FOR THE PROSECUTION AND DEFENSE OF CRIMINAL CASES (adopted May 9, 1941), *reproduced and discussed in* Daru, *The Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases*, 6 ALA. LAW. 39, 49–54, at 49–50 (1945).

mitted an act which may or may not subject him to penal sanctions. The defendant in *Johns v. Smyth*[128] appeared to his attorney to be guilty of murder. In fact, he had killed a fellow prison inmate. However, under the law he could have been insane or acting in self-defense, and thus have been legally innocent, or he might have had a partial justification or excuse, making him guilty only of the lesser charge of manslaughter. One charged with murder for performing an abortion may be morally "guilty" under some religious and philosophical beliefs, but if a fetus is not deemed to be a "person," the accused would not be legally guilty of murder.[129] Juries also have the power to nullify laws by taking into account mitigating factors such as changed societal norms and the character of the accused. One who commits euthanasia, for instance, is entitled to have the jury acquit him because it does not believe him to be culpable under prevailing notions of justice.[130] All of these considerations require that an attorney defend his client as if innocent until the prosecutor proves and the jury finds otherwise.

Third, appearances can be deceiving. There are many proved instances where one accused of a crime appeared plainly guilty "until the patiently turning wheels of justice disclosed his innocence."[131] Even confessions are often unreliable. Innocent people confess out of fear, resignation due to guilt concerning related or unrelated acts, the desire for notoriety, or to protect a relative or friend.

Finally, and most importantly, the lawyer's role, as dictated by the presumption of innocence, is based on the premise that the preservation of the system is more important than the conviction or acquittal of any one individual: that it operates not just to protect the innocent, "but because we have made a value judgment that the rights of the individual are just more important than sending him to jail because he has committed a crime."[132] The resources of the state are all

128. 176 F. Supp. 949 (E.D.) Va. 1959). *See* notes 67–69 and accompanying text *supra.*

129. *See* Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (fetus held not a "human being" for purposes of murder statute).

130. As stated by Justice Harlan: "A jury may, at times, afford a higher justice by refusing to enforce harsh laws . . . ." Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (dissenting opinion).

131. Fuller, *supra* note 77, at 33–34. For collections of cases involving erroneous convictions of persons whose guilt seemed clear see E. BORCHARD, CONVICTING THE INNOCENT (1932), and J. FRANK & B. FRANK, NOT GUILTY (1957).

132. M. SCHWARTZ, *supra* note 122, at 84. *See* Fuller, *supra* note 77, at 35: "The

brought to bear upon the accused in an effort to prove his guilt. The integrity and fairness of the system require that one "learned friend"[133] represent his client, and without prejudgment as to guilt. Above all, it is essential that the defense attorney respect his duty to his client, for the accused has no one else. Unlike the adversary model, the innocence model is premised on the belief that it is better that ten guilty persons shall go free than that one innocent person shall be punished. The system is thus willing to subvert the truth and let individuals whom we know to be guilty escape punishment so that *future* defendants will be better protected.

An attorney therefore can find that it is his ethical duty, under the innocence-oriented view, to defend fully and enthusiastically an accused whom he believes to be guilty. He may hold judgment in abeyance until the trier of fact determines guilt or innocence,[134] convince himself of his client's innocence simply by constant investigation and argument to prove that innocence,[135] or treat the process as a game which, so long as he plays by the rules, it is his job to win.[136]

If the innocence model is to serve as a viable instrument of criminal justice, however, its purpose and rationale must constantly be explained to the public to avoid the appearance of unethical conduct and misunderstanding of the lawyer's duty to his client.[137] The inno-

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purpose of the rule is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member."

133. The phrase is that of Professor Louis B. Schwartz, University of Pennsylvania Law School, but the so-called "alter-ego" theory of criminal defense has a number of proponents. *See, e.g.*, Curtis, *supra* note 64, at 18, 20; ABA STANDARDS, *supra* note 52, at 110 ("a single voice on which [the accused] must be able to rely").

134. "A client is entitled to say to his counsel: I want your advocacy, not your judgment; I prefer that of the Court." Baron Bramwell in Johnson v. Emerson, [1871] L.R. 6 Ex. 329, 367. *See also* 2 J. BOSWELL, THE LIFE OF JOHNSON 47 (G. Hill ed., L. Powell rev. 1934); H. DRINKER, LEGAL ETHICS 142–45 (1953); Orkin, *Defence of One Known to be Guilty*, 1 CRIM. L.Q. 170 (1958).

135. *See* Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 561 (1905); Curtis, *supra* note 64, at 13–14. Anyone who has been assigned to write a moot court brief in law school or an appellate brief for an indigent defendant knows the astonishing amount of sincerity and devotion to the assigned position that is created, despite any initial misgivings or disagreement about the position.

136. *See* G. MURRAY, STOIC, CHRISTIAN & HUMANIST 108–09 (1940); Curtis, *supra* note 64, at 22: "I wonder if there is anything more exalted than the intense pleasure of doing a job as well as you can, irrespective of its usefulness or even its purpose."

137. A Texas State Bar survey of attitudes towards lawyers indicated that public distrust of lawyers was in part due to their representation of the "guilty" and the use of "loopholes" and "technicalities" to win. Rochelle & Payne, *The Struggle for Public Understanding*, 25 TEX. B.J. 109, 159 (1962). Jeremy Bentham believed that a lawyer

cence model does not mean that the attorney should stop at nothing on behalf of his client because of the presumption of innocence. For example, former President Nixon's attorney, Herbert Kalmbach, delivered hush money to the Watergate burglars, allegedly because he unquestioningly assumed that the money was for a valid and legal purpose. Gerald Alch, once Watergate conspirator James W. McCord's attorney, delivered messages to McCord that he would be hearing from "a friend." The "friend" turned out to be former White House aide, John J. Caulfield, and the messages consisted of offers of executive clemency in exchange for McCord's silence. When asked by the Senate Watergate Committee's chief Republican counsel why he failed to find out who was contacting his client and for what purposes, Alch responded that he assumed that no wrongdoing was involved.[138]

These are instances of the failure to promote the proper functioning of attorneys under the innocence model. Mr. Kalmbach performed acts outside his role as an attorney for his client. He therefore had the same duty as any other citizen to assure himself that his conduct was legal. Similarly, although Mr. Alch was entitled under the innocence model to assume that his client was not using him, if the secretive nature of the conversations implied wrongdoing, he had a duty to investigate and counsel his client to avoid illegal action. The innocence model would not alter that duty.

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whose representation enabled a client whom he knew to be guilty to escape punishment was virtually an accessory after the fact to the crime. 7 THE WORKS OF JEREMY BENTHAM 474 (J. Bowring ed. 1843). This view is not outdated and not limited to laymen. Note, *e.g.*, the remarks of a distinguished Canadian attorney:

> [W]hile the fairness of criminal trials must be assured, fairness means that the law should be such as will secure as far as possible that the result of the trial is the right one; it does not mean that the defence have a sacred right to the benefit of anything which may give them a chance of acquittal, even on a technicality, however strong the case is against them.

L.P. de Grandpré (President, Canadian Bar Ass'n), *Criminals Coddled in Court*, CAN. B. BULL., May, 1973, at 3–4, *quoted in* 19 AM. B. NEWS, Mar., 1974, at 9 (excerpt from speech given to annual meeting of Atlantic provinces).

Whereas the choice of models might eliminate these criticisms, if the innocence model is chosen the proper answer to the public's misunderstanding of the lawyer's loyalty to his client is to better inform the public, not alter the duty itself. The public must be made to understand the model as a whole and that zealous advocacy is a necessary part. The "technicalities" (*e.g.*, suppression of illegally seized evidence) also serve a proper function and were intended to be used. If public opinion were permitted to set the standard for professional responsibility, no unpopular individual would ever be able to obtain counsel.

138. Osnos, *Watergate Clients' Lawyers Find Themselves Under Scrutiny*, The Washington Post, June 5, 1973, § A, at 4, col. 8. *See generally* NEW YORK TIMES STAFF, THE WATERGATE HEARINGS: BREAK-IN AND COVER-UP (1973).

III. CONCLUSION

The definition and enforcement of lawyers' professional responsibility is in great need of revision. The failure to develop and adopt a consistent formulation of ethical duty has resulted in a set of ambiguous and contradictory rules as well as the inability to impose discipline effectively in all but instances of the most egregious misconduct. The academic debate has gone on too long.[139] Meaningful choices regarding systems of defining and regulating professional responsibility *can* be made. If the legal profession is to continue to be self-monitoring it must discard the situation-oriented model for one that is system-oriented. Attorneys must decide what goals are to be given priority in cases of conflict. If an equal adversary system is the best means of attaining justice, then *all* rules of conduct must promote that system. A true adversary system may dictate that all lawyers be assigned to indigents and unpopular cases because the interest in permitting them totally free choice is subordinate to the need for the adversaries to be equal. If we are truly to have an innocence-oriented system of criminal justice, then we must stop treating criminal defense attorneys as somewhat soiled and instead develop rules which not only permit but demand that all conduct be consistent with a belief in the innocence of an accused. An attorney who reveals confidences because of a perceived duty to the court, or negotiates a plea in the belief that a duty is owed to society to keep the client off the streets, will be deemed to have acted unethically.

If, on the other hand, we are to accept the search for truth as the overriding goal of the legal system, then the attorney-client privilege must be severely limited, the maximum pretrial discovery constitutionally permissible (both civil and criminal) must be required and enforced, the role of the trial judge must be greatly expanded, and decisions based on "loopholes and technicalities" must be greatly reduced.

It may not be possible to adopt any of the models *in toto*. It may be necessary or desirable to adopt a truth-oriented model in the criminal justice system. Or the attorney as counselor might be required to act under rules designed to promote the search for truth, whereas the

139. *Compare, e.g.*, Curtis, *supra* note 64, *with* Drinker, *supra* note 62; Burger, *supra* note 62, *with* Freedman, *supra* note 63, at 1469 n.1; Frankel, *supra* note 124, *with* Freedman, *supra* note 65.

conduct of lawyers as advocates would be dictated by the adversarly principles. Decisions such as these must be made by the legal profession as a body and not according to the personal balancing test of each individual member of the Bar. Once the decision has been made, all attorneys should be bound by their associates' judgment.

For each of the models discussed the primary goal is justice. Often the models overlap, but always an attorney can resolve doubts by attempting to achieve truth or a fairly balanced adversary procedure, or treatment of an accused which comports with innocence until proven guilty. The overall operation of the system can be handled by mechanisms to change particular dysfunctional results. Without some guiding principle or framework, however, ethical decisions will continue to be made within the framework of attorneys' individual consciences, and after-the-fact review and discipline will continue to be both arbitrary and unjust.