ETHICS AND THE ADVOCATE IN THE ADVERSARIAL SYSTEM

MATTHEW GALLAGHER

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ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

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PART FIVE/

SUMMARY

This thesis is an inquiry into the ethical aspects of the advocate's function within the adversarial system. Specifically, it addresses the question whether that function is inherently unethical in so far as it subordinates truth to client interest.

While many of the issues dealt with are common to both civil and criminal proceedings, the inquiry concentrates mainly on the role of the advocate in criminal proceedings and particularly on that of defence counsel.

The advocate's role is examined within the context of the principles underlying the adversarial system; in particular, the relationship in that system between the pursuit of truth and its recognition of other values associated with individual freedom and autonomy.

The thesis is sequentially structured as follows:

Part One — The uniqueness of the professional advocate-client-court relationship and the duality of the advocate's professional obligations to his client on the one hand, and to the court and the law itself on the other.

Part Two — The rationale of the adversarial trial process as one reflecting a balance between truth discovery and the recognition of moral and social values which it deems to be necessary for the protection of the rights of the individual; comparison with the inquisitorial process.

Part Three/

Part Three — An examination and appraisal of the role of criminal defence counsel; including a discourse on the moral concepts of truthfulness and deception so far as relevant to that role; and an examination of specific situations in which ethical problems most commonly arise.

Part Four — The distinctive features of prosecuting counsel's function as compared with that of defence counsel.

Part Five — General review and conclusions.

Although questioning some features of the adversarial process - and some aspects of the professional precepts governing the ethics of advocacy - the thesis may be seen as an ethical vindication of the advocate's role when viewed in the context of the values and ultimate objectives of the system.

PART ONE

THE PROFESSIONAL RELATIONSHIP

Sections

1.1 The Lawyer and Professional Obligation

Fundamental to any professional occupation is the professional-client relationship. Fundamental to that relationship is the concept of obligation: the obligation to safeguard the client's interests and to advise and assist him or her zealously and dispassionately.

These factors often give rise to ethical problems which are common to all professions - though more apparent in some than in others. The medical profession is a notable example of one in which important ethical issues often arise - the doctor conscientiously opposed to abortion but called upon to perform one or another faced with a decision whether to prescribe a contraceptive for an under-age girl. In situations of this kind, the proper guiding principle seems clear enough: the doctor, in making his decision, must be motivated only by his patient's best interests; that is /

is to say, by his professional rather than his personal perception of those interests. His professional obligation must override any personal or religious beliefs or attitudes. This principle applies to all professions.

But, of course, in professional relationships, this principle of precedence of the client's interests has wider implications. It postulates such precedence, not only over the professional's own personal views or scruples, but also - in regard to the particular matter for which the relationship exists - over the interests of all parties outwith that immediate relationship; the client, and he or she alone, is the professional's central and paramount concern. His or her interests take precedence over the interests of all others. On this point, the view has been expressed that since:

> "Ethics, seriously considered as in philosophy, usually speak in terms that require treating all other persons on an equal footing....the central problem in professional ethics can be described as the tension between the client's preferred position resulting from the professional connection and the position that everyone else is accorded by general principles of morality and legality." [1]

In so far as this infers that precedence for the client is per se unethical, it seems a questionable proposition. Such precedence need not necessarily affect the interests of others. In so far as it may do so, however, it seems clear that the principle of the paramountcy of the client's interests does not mean total disregard for the interests of others who may be affected. As will be later discussed,

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a professional may, in certain situations, be perceived as also having obligations to persons other than his client.

Another important qualification to the precedence of the client's interests is the professional's obligation to his profession: to act honourably and in a law-abiding manner. However imperative his duty to his client, this is not seen as justifying wrongdoing or transgressing the canons of conduct of his professional body.

This diversity of duties - and the potential for conflict in the interaction of one with the other - are common to all professions. But for the purpose of analysing the lawyer's position - and, specifically, those aspects of his role with which we are mainly concerned - certain distinguishing factors may be identified.

The principle of precedency of the client's interests over the personal moral views or attitudes of the professional adviser is, as has been said, not distinctive to the lawyer. But there is a sense in which it may often be said to have a particular cogency in the lawyer-client relationship; for the lawyer, particularly when acting, for example, as defence counsel in criminal proceedings, may often be called upon to act for someone who, in the popular conception, may be the most despised of persons, accused, perhaps, of a morally repugnant offence or of whose way of life the lawyer, personally, may strongly disapprove.

Further/

Further, the nature of the circumstances in which a lawyer, again particularly in the criminal sphere, is often called upon to render his professional services, adds particular emphasis and urgency to his commitment to his client. He is his client's champion against a hostile world; in many cases, indeed, the only person to whom he can turn in the face of powerful forces ranged against him.

The lawyer, nevertheless, is also perceived as having obligations to other individuals as well as his client, such as, for example: "the client's family and other people towards whom the client is under a legal or moral obligation." [2]

It may be noted that the other individuals referred to in this quote from the Declaration of Perugia do not - explicitly at any rate - include a person or persons with whom the client and his lawyer may be in legal contention. This does not mean that lawyers and their clients are perceived as having no obligations whatever to such persons. But the reason why legal opponents of the client are not specifically mentioned in this context may be indicative of another crucial aspect of the lawyer's role which is relevant to the ethics of his calling. In significant areas - notably litigation - <u>contention</u> is, by definition, the lawyer's business - contention between the interests of his client which he is professionaly bound to uphold and the interests /

interests of his client's antagonist which (as regards the particular issue in contention), he is bound to oppose.

For this reason, the remarks of Hazard as quoted above may seem more apposite to the lawyer than to other professional people. Indeed, on his view of the strict ethical principle of treating all people on an equal footing, he concludes that the lawyer's business is inherently unethical because:

> "... a lawyer usually intervenes in relationships between others with a predisposition to treat the one who is his client with greater solicitude than he treats the other, regardless of the merits of their respective positions. According to any 'nonlegal' ethics, intervention on these terms is difficult to justify. It violates the principle of equal treatment inherent in all forms of universalist ethics. It lacks the involuntarism that is present in the ethical dilemmas of everyday life. For the lawyer does not merely encounter choices between the conflicting interests of others but makes a business out of such encounters, and takes partisan positions for money. Thus, his vocation violates the concepts of ethics held both by philosophers and in folklore. On this analysis, the idea of an ethical lawyer is therefore an impossibility." [3]

On the other hand, as against this somewhat radical view - which, if valid, would morally condemn the litigious lawyer - there is the contrary view that the lawyer's function, far from violating the principle of equal treatment for all, is, in fact, necessary to preserve equality in law; as in, for example, civil cases where the ordinary citizen is facing a powerful opponent such as a large corporation or, in criminal cases, where he is contending for his liberty, or possibly /

possibly his life, with the mighty State; and indeed, for this reason, the lawyer is sometimes referred to as the "equalizer". [4]

It is nevertheless true that the view of the litigating lawyer as a "hired gun" - prepared to plead causes for money "regardless of merit" is a persistent factor in attacks upon the ethics of his function. Such criticism is not, however, normally based on violation of an ethical principle of equality of treatment; nor is the fact that a lawyer undertakes causes for money commonly seen, per se, as the basic ethical issue of his role - but rather the apparently conflicting principles and values involved in his role.

It is here that we turn to the most marked and, for our purposes, the most relevant, distinction between the lawyer and other professional people; for, while the other distinguishing factors mentioned may be said to make him particularly vulnerable to ethical problems in the practice of his profession - or, at any rate, to give rise to problems of a different order from those which confront other professionals - the most fruitful source of such problems and that which is most characteristic of the uniqueness of the lawyer in this regard, is the nature of his particular obligation to his profession - to the profession of the law.

The lawyer's relationship with and commitment to his profession involves a dimension which does not exist in other professions -

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a dimension which, some may argue, constitutes an inherent contradiction and an intrinsic ethical conflict. The profession of "the law" has a different nuance from, say, the profession of "medicine" or "accountancy". Professionally, the law is, to be sure, a science and a discipline; but "the law" itself is much more; it is a concept, a principle, or a complex of principles, woven into the fabric of society; an essential component of its structure. It is also an ideal necessarily associated with the concept of justice. But the lawyer is distinctive, not only in regard to the nature of his profession, but also as regards his relationship with it. he is not merely a practitioner of the law. He is, in fact, perceived professionally as an integral part of the infrastructure which upholds it. He is an "officer of the law" and, as such, one whose professional duty it is to "serve the interests of justice as well as of those who seek it". [5] He is thus seen as being professionally committed, not only to the interests of his client but also to the principle of the law itself - and its concomitant, justice.

It is perhaps, above all, this duality of function and loyalty which distinguishes the lawyer from other professional people and is at the core of many of the ethical problems peculiar to his role in society; for although himself a servant of the law, he is often perceived, when acting in pursuit /

pursuit of his client's interests, to be in conflict with it. This apparent contradiction gives rise to the ethical dilemma often seen as being inherent in his function - the reconciliation of his duty to his client with his duty to those other interests to which he is also perceived, professionally, to owe allegiance - law and justice.

Thus, the questions are often posed and argued - not only among laymen but also, as will be discussed, within the profession itself: where does the lawyer's paramount duty lie - to his client or to the law? And if to the law, does this paramount allegiance extend, not only to the associated ideal of justice, but, even more problematically, to "truth and justice"?

1.2 The Lawyer as Advocate

Taking the profession as a whole, the lawyer as court litigator is a minority role. Apart from specialists, such as barristers in Britain, most lawyers spend little time in the courtroom - and indeed there are many who never appear in court. Nevertheless the lawyer as litigator has a high profile in the public perception of his function. It is in this role also - as advocate in the courts - that the ethical questions we have mentioned seem to arise most acutely. It is here that the apparent conflict of duties seems most evident and it is this role, consequently, which has been the most fertile source of the cynicism of which the lawyer has traditionally been the victim. It is the advocate who has been the most popular target of wits and satirists, being variously described as a legal mercenary or "hired gun"; as one who, in the words of Swift, is prepared to prove "that white is black and black is white" according as he is paid [6] and of whom Macaulay is said to have observed that he would not enquire:

> "whether it be right that a man should, with a wig on his head and a band round his neck, do for a guinea, what, without those appendages, he would think it wicked and infamous to do for an empire." [7]

While the more discerning critic may not take such rhetoric too seriously, many do have genuine difficulty in understanding how a professional man can hire his skill and wits in the service of what, at times, appear to be dubious causes without detriment to his integrity and, if his

pleading be successful, to the cause of justice.

A frequently quoted answer was that given by Dr. Johnson:

> "Sir, a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider Sir; what is the purpose of Courts of Justice? It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could. If, by a superiority of attention, of knowledge, of skill and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage one side or the other, and it is better that advantage should be had by talent than by chance. If lawyers were to undertake no causes till they were sure that they were just, a man might be precluded altogether from a trial of his claim though, were it judicially examined, it might be found a very just claim." [8]

Plausible as it sounds, and often though it is invoked in defence of the advocate's role, it would appear that this line of argument has never quite carried conviction as a complete vindication of that role; nor has it sufficed to allay public scepticism. The doubts persist - and not only among lay people. It may be significant that the opinions expressed /

expressed in the passage quoted were in answer to a question put to Dr. Johnson by his biographer, Boswell, himself a member of the Scottish Bar. While lawyers themselves may be satisfied that no question of personal or professional integrity arises when an advocate champions a cause which he, personally, may believe to be unjust, they are by no means unanimous in their perception of their own function as professional pleaders in relation to important ethical issues. Eminent members of the profession differ in their views about crucial ethical aspects of the advocate's role - particularly as to where his paramount duty lies.

On this point, the divergence of view is well illustrated in an exchange between Lord Brougham and Lord Chief Justice Cockburn, the occasion being a dinner in honour of an eminent French advocate. In the course of his remarks, Lord Brougham is reported as saying that the qualities of an advocate were:

> "to reckon everything subordinate to the interests of his client - to have no purpose except to serve his cause effectively - to make no deviation or digression to please either jury or judge, or the populace or the Crown, but to do his duty looking only to the success of his client."
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> Lord Cockburn is reported as replying:
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> "My noble and learned friend, Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction: that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client <u>per fas</u> but not <u>per ne fas</u>; it is his /

> his duty to the utmost of his power, to seek to reconcile the interest he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice." [9]

The divergence revealed in this exchange is more than one of emphasis. it reflects an important difference as to the true nature of the advocate's role and his relative priorities - a conflict of view as to the relative priorities of the values which he should acknowledge. It poses the questions: is there inherent in the advocate's function an ethical conflict between his duty to his client and his obligations as an officer of the law? Can his duty to the law be said to extend to a prior commitment to "the eternal and immutable interests of truth and justice" - or is his paramount loyalty to the interests of his client - "to reckon everything subordinate" to those interests? And - whichever or whether either of these propositions may be valid - can the advocate's role, in so far as it may involve the avoidance or subordination of truth, be seen to be inherently unethical?

No proper attempt to seek an answer to these questions can be made without first examining the system in which the advocate operates - and the values which that system itself may be seen to acknowledge; in particular, the place within the system of the value of truth as an objective in the pursuit of justice. Only by so doing can we obtain a proper perspective of the advocate's role.

Fundamental /

Fundamental to the pursuit of truth is the determination of fact. Courts and advocates are, of course, concerned with questions of both law and fact, but, in terms of their significance as affecting a court's decision - and important as issues of law undoubtedly are - issues of fact are of greater import. The fact of a case must be ascertained - or held to have been ascertained - before the law can be applied. The American judge, Jerome Frank, criticised the legal establishment for devaluing the significance of fact as compared to law in litigation:

> "..... most books by learned lawyers talk as if the chief difficulty in the job of the courts inheres in determining what rules should be applied, what the rules mean, their extent and interpretation. I think those books are grossly misleading. I grant that sometimes such rule-difficulties exist. Otherwise, I as an upper-court judge, would have almost nothing to do. But the other part of the job of the courts, that part which is assigned almost entirely to trial courts - the ascertainment of the facts of individual law suits - presents a far more difficult, a far more baffling, problem." [10]

And pointed out that:

> ".... no matter how certain the legal rules may be, the decision remains at the mercy of the courts' fact-finding. If there is doubt about what a court, in a law-suit, will find were the facts, then there is at least equal doubt about its decision." [11]

It follows that the main influence which the advocate exerts upon a court's decision will, more often than not, depend primarily on his presentation of the factual aspects of his case - and that it is this aspect of his function which is /

is central to its ethical implications.

Further, while, as will be later discussed, the advocate's position in regard to the disclosure of matters of law is fairly clear, his obligations in relation to the disclosure to the court of matters of fact, are much less so.

For these reasons, we shall, in the course of this inquiry, primarily address those questions which relate to the advocate's perceived rights and obligations in regard to the disclosure or suppression or manipulation of fact: what, for example, is his position regarding relevant facts concerning his client's case which are known to him but not to the court? To what extent does the confidential nature of the relationship with his client justify his withholding or concealing those facts? Is he justified, in cross-examination, in casting doubt upon testimony which he knows to be true? What is his perceived position in the face of a client's intention to commit perjury? In criminal trials, what is his position as defence counsel when his client has confidentially admitted factual guilt? What are his professional rights and obligations when acting as prosecutor? In what respects do they differ from his role as defence counsel?

The ethical problems of forensic advocacy are inherent in both civil and criminal procedures. However, while many of the principal issues are applicable to both areas, the criminal /

criminal process has features which are particularly pertinent to the ethics of the advocate's role. Central to the criminal process is the vital issue of the freedom of the individual - and the conflict between that freedom and the duty of the State as guardian of the public interest through the maintenance of law and order. But the preservation of individual freedom and dignity is also vital to the public interest. Thus there is in the criminal process an underlying tension between these competing interests and the necessity to maintain a fair balance between them. This dichotomy of function in the administration of the criminal law is often reflected in an apparent moral ambiguity in the role of the advocate - particularly of the defence advocate - in the criminal courts and, as compared with the civil process, tends to bring into sharper focus the ethical issues arising from the apparent conflict between the advocate's duty to his cause and his obligations to society and the law itself.

We may also note other important features of the criminal process which have significant implications in relation to the advocate's role: the principal of the presumption of innocence and the privilege against self-incrimination. Both features give rise to another marked distinction between civil and criminal procedure. A cardinal principle of our criminal law is the accused's right to remain silent. Strictly speaking, neither he nor his counsel /

counsel is required to say anything other than to tender an oral plea of not guilty. Specifically, whatever defence counsel's knowledge as to the truth or falsehood of particular allegations by the prosecution, he is not obliged either to affirm or deny them. The onus is entirely on the prosecution to establish its case in all its aspects. In civil cases, however, the pleadings of both parties are in written form and, while the onus of proof rests upon the plaintiff, "the defender in a civil litigation is not, like an accused in a criminal action, entitled to sit back and put the opposing party to proof of every element in the case against him whether he knows it to be true or false...." [12] This distinction between civil and criminal procedure and the relatively privileged position which it gives defence counsel in criminal cases have, as will be seen, important ethical implications in relation to the advocate's function.

For all these reasons, it is proposed in this inquiry to concentrate mainly on the advocate as a pleader in the criminal courts. However, since many of the issues dealt with are also relevant to civil proceedings, some of the authorities and examples cited will be taken from civil sources.

PART TWO

THE TRIAL IN ADVERSARIAL PROCEDURE - A SEARCH FOR TRUTH?

Sections

2.1 Origins and Nature of the Adversarial System

The origins of the adversarial trial system as practised in Britain and America and other common law jurisdictions, are obscure. Various views have been expressed. The American, H.J. Abraham, ascribes to Professor Max Radin the view that the system:

> "has been in vogue since its adoption in Rome in the fourth or fifth century B.C. when - for better or worse, and quite conceivably the latter - the judge's task changed from determining the truth to the umpiring of a competition." [13]

As regards the conceptual origins of the adversarial method, Sheriff Stone asserts an even earlier source:

> "The theoretical origins of our adversary system of attaining the truth....are to be found in the dialectical methods of the ancient Greek philosophers, who developed the view that the conflict between alternative contentions was the best way of conducting an inquiry." [14]

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The umpireal role of the adversarial judge and the arguments for and against the contention that adversarial conflict is the best way of conducting an inquiry, are later discussed, but here we may also note the "fight substitute" views as to origin such as the contention of Jerome Frank that the system has its origins as a legalised substitute for private fights or feuds [15] and the statement by Professor Hazard of Yale Law School that "its antecedent is often said to be the Norman trial by battle." [16]

However, whatever its origins and whatever legal or social philosophy may have influenced its adoption, it is a system which, in those countries in which it is practised, is deeply rooted, not only in the legal systems of such countries, but in the cultural traditions and consciousness of their societies; a fact which may explain its apparently uncritical - or, at any rate, largely uncritical - acceptance by those societies as a judicial process for the eliciting of facts upon which crucial rights, the personal freedom - and, indeed, in some jurisdictions, the life - of a citizen may depend. Thus, Professor Wolfram of Cornell Law School:

> "There is no reason to think that the adversary system sprang fully intellectualized from the brows of a Solon. Many of the rules and practices of the adversarial system are important products of history or culture. The adversary system in the United States is culture-bound beyond an extent that most lawyers would prefer to admit. The same social system that supports professional prize-fighting and football, but outlaws chicken fighting, can be seen mirrored in the set of contradictory rules that limit yet then allow aggression and competition in the legal arena." [17]

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While these remarks were made in an American context, there seems no reason to suppose that the system is any less "culture-bound" in Britain or any other country in which it is practised; nor are the contradictions to which Wolfram refers any less evident.

Although there may be differences as to particulars, in general and in substance, the system is essentially the same in all adversarial jurisdictions. Its common and fundamental features may be summarised as follows.

Essential Features

As the description implies, the system is a combative process: one which, in the words of Mr. Justice Jackson: "sets the parties fighting." [18]; a gladiatorial contest, the gladiators being, in criminal trials, the respective advocates for the accused and the Crown or State. During the trial it is they who play the main part in the proceedings. They conduct the interrogation of witnesses - by way of examination-in-chief, cross-examination and re-examination. A significant ingredient in the outcome of the contest may often be the skill employed by the advocates in their interrogations and presentation of their cases - the object being to present and marshall the evidence in the manner they deem best suited to their respective causes. This they do, not only by the adroit presentation of the evidence of their own witnesses, but also by trying to /

to discredit opposing evidence - at least, to the extent that the rules of procedure and professional ethics allow.

The judge, by contrast, does not, by and large, intervene in the conduct of the proceedings. He - and the jury, where there is one - are "both neutral and passive" [19]. The judge's role is essentially that of an impartial arbiter - pronouncing as required on disputed points of procedure. Although he may, on occasion, intervene to ask a question on a technicality or to clarify an apparent abiguity, he plays no substantive part in the interrogation of witnesses. In the words of Sheehan, dealing with the system as practised in Scotland:

> "The function of the judge is not to act as inquisitor and inquire into the matter.... The judge's role is to 'preside at a forensic contest between two parties' to ensure that the rules of law are applied and to decide on a verdict (except where there is a jury). He must arrive at a decision on the facts submitted to him for judgment." [20]

Abraham confirms this point: the judge:

> "is not in any sense an active elicitor of truth regarding the testimony presented." [21]

On the other hand, it would, as both these writers emphasise, be wrong to deprecate the function or overstress the passivity of the judge's role. Thus Abraham:

> "He is - or certainly he is expected to be - in complete charge of courtroom procedure, and as such possesses a considerable residue of what in legal parlance is termed judicial discretion. In this connection, that intriguing compound noun demands an application - '....enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just....!."[22]

Sheehan, /

Sheehan, quoting from an English case, makes a similar point - albeit in somewhat less idealistic terms:

> "in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large....however a judge isnot a mere umpire.....his object above all is to find out the truth and do justice according to the law." [23]

It cannot, of course, be denied that, however passive or relatively inert the judge's role compared with that of the contending advocates during the course of the trial, he - and the jury, where there is one - play a crucial and obviously essential part in adversarial proceedings. Further, while we cannot discount the fallibility of any human judgments and their vulnerability to prejudice - even if only subconscious - we can probably accept the basic assumption of the system that judges at any rate, (juries, perhaps, more questionably), are in the main uninfluenced by partisan considerations and are honestly activated by the sole desire to discover the true facts.

However, the fact must be acknowledged that, to whatever extent the adversarial judge is motivated by the "overwhelming passion to do that which is just", he can only do so within the limitations imposed by the system. That system requires that the only relevant evidence upon which his (or the jury's) verdict can be based is the /

the evidence competently presented to the court at the trial. But it is the partisan advocates of the contending parties who largely control the nature of that evidence which is, therefore, in the main, likely to be highly selective and biased in favour of one side or the other. As will be discussed, however, the justification advanced for the system is that the biased evidence of one side will be counteracted by that of the other, it being the function of the court to produce a balanced judgment from a consideration and weighing of both. Those who support the adversarial method argue that truth is more likely to emerge from such a balanced judgment of conflicting theses.

Nevertheless, viewed purely as a fact-finding process, the rationale of the system may, perhaps, seem puzzling to a disinterested observer. Indeed, divorced from the historical and cultural traditions and loyalties referred to by Wolfram (supra), some may question whether it would be adopted by any of the countries which practise it were they to devise a system de novo. Such a doubt would appear to be shared by, for example, the present Commissioner of the Metropolitan Police in England. [24]

No balanced assessment of the merits of the system can, however be made without taking into account other important features which are perceived by its supporters as enshrining the principles of individual liberty and justice and which are later discussed in the context of moral and social /

social values. Pre-eminent among these are the principle of the presumption of innocence and the privilege against self-incrimination. These two principles are related. Since an accused person is presumed innocent until and unless proved guilty beyond reasonable doubt, he is not required to prove - or, indeed, even to assert - his innocence. [25] The onus rests entirely upon the prosecution to produce evidence sufficient in law to prove guilt and the accused is entitled, if he so chooses, to remain silent and put the prosecution to proof. It is for this reason that the system is sometimes given the alternative designation "accusatorial" - since "it is left to the prosecutor to bring an accusation and produce evidence to justify it". [26]

While much is made of these, and other, adversarial principles or values by apologists for the system - Abraham, for example, regarding them as being "fundamental to the notions of liberty and justice that pervade the political system of the liberal and democratic west" [27] - they are not all the subject of universal acclaim; nor are they universally perceived as indicative of the superiority of the system relative to other systems of criminal justice.

Before exploring the merits of these opposing views, it may be instructive to examine briefly the very different process of criminal justice with which the adversarial system is often compared and which is commonly called the "inquisitorial system.

2.2 The Inquisitorial System Compared

Abraham's comment (supra) associating the adversarial concept of criminal justice with the "political system of the liberal and democratic west" is puzzling if that phrase is taken, as presumably it must, to include the countries of the west European continent; for in those countries it is the inquisitorial and not the adversary system which is practised. The difference between these systems is fundamental. It reflects, not merely a procedural distinction, but a radically contrasting jurisprudential approach to the relationship between the state and a suspected criminal. A look at the main features of the inquisitorial system - of which we shall take the French model as an example - may serve to bring into clearer focus the implications and idiosyncrasies of our own system in regard to notions of truth, justice and individual liberty.

While, as between the two systems, there are many differences in regard to detailed procedure, for the purposes of this inquiry three main contrasting features may be identified: first, the preliminary investigation (the enquete) by an examining magistrate (the juge d'instruction); second, the roles played by judge and counsel at the trial itself; third, the nature and source of the evidence on which the verdict is based.

2.2.1 The Preliminary Investigation

In France, the most serious category of criminal offence, "crimes", must be referred by the public prosecutor to an examining magistrate for a preliminary investigation. Alleged offences of a less serious order, "delits", may also, at the discretion of the prosecutor, be so referred. The examining magistrate is an independent official. He is not a member of the prosecution. His function is not to pronounce on the guilt or innocence of the suspect but to direct and supervise a thorough investigation into all aspects and to decide whether there is sufficient evidence against the suspect to warrant his being sent for trial.

The preliminary investigation is intensive and wide-ranging. A crucial distinction between it and the pre-trial inquiries of the prosecution in the adversarial process is that the French enquete is non-partisan, its purpose being to discover and record in the "dossier" (infra) - for the information of all the parties involved, namely, the prosecution, the defence and the court - all pertinent facts irrespective of whether these are favourable or otherwise to the suspect. [28]

Although the preliminary investigation is conducted in private, the suspect's lawyer is entitled to attend all meetings between his client and the examining magistrate and be kept informed of the progress of the investigation.

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It is, however, the magistrate who conducts all interrogations of the suspect and witnesses. He has, apparently, sweeping powers. He alone may summon witnesses and compel them to appear before him. He may also, it would seem, detain the suspect in custody, should he deem this necessary, until the completion of his investigations. [29] He also has the power to commission experts to report on special aspects.

Of particular significance in regard to the exposure and elimination of perjured testimony is a procedure peculiar to the system - the "confrontation de temoins" - whereby the magistrate can arrange for parties who are telling apparently contradictory stories to confront each other in his presence with a view to challenging and eradicating discrepancies.

The results of his investigations are compiled by the magistrate into a "dossier" which, if he decides that the suspect should be sent for trial, is made available to the presiding judge (but not to the jury) at the trial as well as to the prosecution and defence.

2.2.2 The Roles of Judge and Counsel

If the alleged offence is of a serious nature - a "crime" - the appropriate court is the Cour d'assise comprising the presiding judge, two other judges as "assesseurs" and a jury. However, before the case is sent for trial to that court, /

court, the decision of the examining magistrate so to do must first be ratified by another body - the "Chambre d'accusation", (which also acts as an appeal court to decide on appeals against rulings of the examining magistrate during the enquete).

At the trial itself, the proceedings and the respective roles of the professional participants are markedly different from those applicable to the adversarial trial. As between judge and counsel there is, indeed, a virtual reversal of roles as regards the eliciting of evidence. Compared with their adversarial counterparts, the inquisitorial advocates for the opposing sides play a minor part. They do not examine or cross-examine witnesses in the manner of adversarial counsel. In this and in other respects it is the presiding judge who has the dominant role - a positive and controlling role, contrasting sharply with the relatively passive and mainly umpireal function of the adversarial judge. At the inquisitorial trial it is the presiding judge's function actively to interrogate the accused and all witnesses. Counsel may suggest questions for the judge to put to witnesses, it being in the judge's discretion whether, and in what manner, to do so; and the prosecutor, it appears, may, on the conlusion of the judge's examination of the accused, put questions direct [30]; but it is the judge who is the main interrogator.

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The control of the presiding judge also extends to the citing of witnesses; for although the witnesses are initially cited by the contending parties, the judge may direct other witnesses to be summoned if he considers this necessary. He may also - like the examining magistrate in the preliminary investigations - arrange for witnesses giving contradictory evidence to confront each other.

Another distinctive feature of the inquisitorial judge's role is that, at the conclusion of the trial, he - with his two assesseurs - retires with the jury to consider both verdict and sentence.

2.2.3. Nature and Source of Evidence - the Dossier

The dossier in which the examining magistrate compiles the results of his preliminary investigations is of major significance in the inquisitorial process and its implications as affecting the attitude towards and the outcome of a criminal trial are indicative of another major distinguishing feature as compared with the adversarial process.

Several important facts may be noted as regards this document. First, as has been said, it is made available, not only to the prosecution, but - unlike the police pre-trial /

trial information in the adversarial procedure - also to the defence and the trial judge. Second, as has also been said, since it contains the results of a wide-ranging and non-partisan investigation, it will reveal all facts uncovered by the examining magistrate - and not only those deemed to be indicative of the guilt of the suspect. Third, in accordance with the French principle that "on juge l'homme, pas les faits", its comprehensiveness extends, not only to all the discovered evidence pertaining to the offence, but to the whole life history and personality of the suspect - including, (this, no doubt, an objectionable factor in the eyes of adversarial practitioners), any previous convictions against the suspect. [31]

Finally - and perhaps most fundamentally -it is largely on the basis of the information before him, as contained in the dossier, that the presiding judge will conduct his interrogations at the trial. It follows that, although the dossier itself is not made available to the jury, the evidence it hears elicited at the trial is likely, in the main, to follow the information contained within the dossier.

The importance of the dossier in the French procedure is also underlined by a further fact noted by Sheehan. In the Cour d'assise which sits with a jury, witnesses are always cited because the jury, which does not have access to the dossier itself, /

itself, must hear the oral evidence. However, in the lower courts, where there is no jury, it appears that the prosecutor will often not cite witnesses to the trial on the grounds that their evidence has already been given to the examining magistrate during the preliminary investigations and is contained in the dossier which is before the judge. [32]

2.2.4. Concluding Comments on the Inquisitorial System

To many of those reared in the adversarial tradition, the inquisitorial process may appear alien to familiar notions of individual freedom and justice. The designation "inquisitorial" is itself possibly emotive - if not, indeed, pejorative - evocative of Torquemada or the Star Chamber. On this point, it has been suggested that a less invidious appellation would be "interrogative". [33]

To some extent also, criticism of the system by adversarial lawyers may perhaps be influenced by a tribal loyalty to our own ways and by a distaste for all things foreign to our traditions. But there may be more rational grounds for criticism.

In the first place, British lawyers and their colleagues in other adversarial countries probably tend to have an instinctive aversion to judicial interrogation behind closed doors /

doors - albeit by a magistrate professionally committed to impartiality and in the presence of the suspect's lawyer. However, on this point, it can be argued that the privacy of the preliminary investigation is designed both to protect the reputation of a person whom the magistrate eventually decides should not be sent for trial - and to avoid improperly prejudicing a suspect who is.

A more cogent criticism commonly expressed is that the inquisitorial procedure is inconsistent with our highly valued principle of the presumption of innocence. Some critics, indeed, would go further and assert that it is in fact based - at least, by implication - on a presumption of guilt [34]; that although, in theory, the onus of proving guilt rests, in the inquisitorial process, as it does in the adversarial system, upon the prosecution, the fact that the examining magistrate - after such a thorough and non-partisan investigation - has adjudged the evidence against the suspect to be sufficient to warrant his being sent for trial - an assessment subsequently ratified, in the case of serious crimes, by three senior judges of the Chambre d'accusation - cannot but influence the trial judge and jury in favour of a presumption of guilt. French apologists, as one would expect, strongly repudiate this accusation - asserting, among other arguments, that the principle of the presumption of innocence is inherent in the French Declaration of the Rights of Man and the Citizen [35]. While this may be so, it does not, of course, meet /

meet the criticism since constitutional declarations, however impressive, cannot per se affect the practical consequences of the system.

A more forceful point which the French might make is that this particular criticism of their system applies also to the adversarial process - in so far as the mere fact of an accused having been brought to trial may give rise to a presumption of guilt in the mind of the trial court. Given the human tendency to reason that "there must be something in it or he wouldn't be there", this is no doubt an inevitable factor in any criminal process. However, as between the two systems, the inquisitorial pre-trial process, given its nature and purpose as an intensive and independent investigation, would seem to be more likely to give rise to an inference of guilt; for, in the adversarial system, the pre-trial police information on which the decision to prosecute is normally based, is clearly orientated towards the prosecution - and recognised as such by the trial court.

On the other hand, it may also be argued in favour of the French procedure that the intensity and thoroughness of the preliminary investigations reduces the risk of an innocent person being sent for trial. On this point, Sheehan, referring to cases in the lower court (the tribunal correctionnel), quotes the low average acquittal rate of about five percent - though acknowledging that this is a double- edged argument [36].

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A less easily defended criticism may be the fact, also noted by Sheehan, that:

> "all the facts concerning the background and personal life history of the accused (including any previous covictions) are made known to the court before it reaches its judgment." [37]

While pointing out that any disclosure of bad character or previous convictions "should be ignored" when deciding on a verdict, he acknowledges that:

> "while a professional judge may be able to do this, a jury may have more difficulty in so doing." [38]

However, such criticisms notwithstanding, it would seem, on any objective view, to be difficult to resist the conclusion that the inquisitorial process - viewed solely as a fact-finding exercise - is, ostensibly at least and whatever its other possible defects, a more determined and, probably, more effective, method of unearthing the relevant facts than is the adversarial method. The inquisitorial system perceives this most crucial function as the exclusive prerogative of the non-partisan judicial role - both in the preliminary investigations and at the trial itself. The adversarial system, however, has no place for any independent functionary equipped with the necessary powers to elicit all the facts so far as discoverable. In that system, this task is assigned to the partisan protagonists in the forensic contest.

This brief look at the inquisitorial system of the administration of criminal justice may serve, as has been said /

said, to put into clearer perspective the idiosyncrasies of our own system - particularly in regard to what must be seen as the most radical difference between the systems - the sharply contrasting methods of fact determination - the pursuit of truth. But before attempting to draw any firm conclusions by way of comparison, we must further analyse our own system. For that purpose we will, at this stage of our enquiry, address two main questions: first, the concept of truth as an objective in the trial process - and the conflicting views as to the best way of seeking it; second, the significance for the administration of criminal justice of those moral and social values associated with the concepts of individual liberty and justice and commonly perceived as hallmarks of the adversarial philosophy.

As will be seen, all these factors are relevant to our main theme - the ethics of the advocate's role - since they are crucially pertinent to the moral and jurisprudential milieu in which he functions.

2.3. Truth in the Trial Process

2.3.1 The Concept of Truth

The question whether, or to what extent, the adversarial trial process may be perceived as being pre-eminently a search for truth, invites the fundamental question - asked, not only by the "jesting Pilate" [39], but by philosophers down the ages: what is truth? Pilate, according to Bacon, "would not stay for an answer"; nor need we; for, clearly, an exploration of this concept in all its philosophical aspects is beyond the scope and purpose of this inquiry.

However, two particular senses in which the word "truth" is commonly used - and, as will be later discussed, sometimes confused [40] - are relevant to our theme: first, truth in the epistemological sense of fact determination - the veracity of objective facts; second, truth in the ethical sense of truthfulness - the subjective conduct of individuals as regards speaking honestly.

The concept of truth in this, second, ethical sense is directly relevant to the ethics of the advocate's function - and is later discussed in the context of the moral issues involved in deception and lying [41]. For our immediate purpose, however, we are here concerned with truth in the epistemological sense - and its place in that particular sense in the relative priorities of the adversarial system.

2.3.2. /

2.3.2 Truth as a Product of Conflict

The main question here addressed is whether adversarial conflict, as practised in our system, can be perceived as an aid - rather than an obstacle - to the pursuit of truth.

Within the legal profession in adversarial jurisdictions, conflicting views on this issue abound. On the pro-adversarial side, the view attributed by Sheriff Stone [42] to the ancient Greek philosophers that conflict between alternative contentions is the best way of conducting an inquiry, seems to command substantial support and is probably the most common argument advanced in justification of the system. Sissela Bok, in dealing with the arguments advanced by adversarial lawyers to justify the ethics of their role in litigation, notes this defence as:

> ".....an appeal to the principle of veracity. Veracity itself will be advanced, many argue, if each side pushes as hard as it can to defeat the other." [43]

Wolfram notes the same argument:

> "An assumption that underlies the adversarial system is that the mutually contentious strivings of relatively equal advocates will make truth and justice apparent to the judge..."[44]

And again:

> "Ascertaining truth is argued to be one of the chief justifications of the adversarial system. It is claimed that it is designed to lead to the truth more surely than competing models for litigation. The lawyers, committed to seeking a partisan victory in the trial by any legal means, are motivated to search diligently for facts /

> facts and to test the evidence offered by the opposing party through cross-examination and counterevidence. Through the reciprocating process of proof and challenge to proof, the fact finder is best able to determine where the truth lies." [45]

We may note here also Wolfram's representation of what can be seen as traditional adversarial counter-attack on the role of the inquisitorial judge:

> "The adversary process is often contrasted with an arbitral system, in which a single inquisitor is to decide a dispute between parties without advocacy from either side. The paradoxical position of the inquisitorial judge is that, as a matter of psychology, one searching for facts and for the limits and nuances of the law is much more likely driven to creative and tireless effort if one is committed to discovering support for a thesis. But once the judge forms and proceeds upon a thesis, the natural human instinct is to resist sloughing off that thesis, and such support as has been gathered for it, in order to investigate conflicting or variant theses." [46]

The argument here would appear to be that the discovery of truth is less likely to be achieved where the judge, as in the inquisitorial process, is initially influenced by only one thesis - that reflected in the dossier - and is not subjected to the discipline of weighing alternative theses as in the adversarial procedure. This interpretation seems to be confirmed by Wolfram's additional comment that - in a criminal case - the inquisitorial judge:

> "may be ill disposed to take any stance but one antagonistic to the accused because, by prior acquaintance with the facts from the dossier prepared in advance by the committing magistrate, the judge has already developed a basis for decision." [47]

Even /

Even Jerome Frank - otherwise, as we shall discuss, a severe critic of what he considers the excesses and abuses of the "fight" element in the system - concedes the value of the basic adversarial principle:

> "The zealously partisan lawyers sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked. Apart from the fact element of the case, the opposed lawyers also illuminate for the court, niceties of the legal rules which the judge might otherwise not perceive. The "fight" theory, therefore, has invaluable qualities with which we cannot afford to dispense." [48]

Among legal figures in Britain, we may perhaps cite the former Master of the Rolls, Lord Denning, as a representative of the view that there is no inconsistency between the combative nature of the system and its validity as a truth-finding process. Lord Denning's perception of the system as regards its commitment to "truth and justice" are later discussed in the context of the advocate's role (Part Three), but - in relation to the belief attributed to him by David Pannick that a law case is "an inquiry to find out the truth" - we may note the dissent - and a degree of cynicism - reflected in Pannick's comment that "this will come as a surprise to most lawyers who have always understood judicial proceedings in the United Kingdom to be combative rather than inquisitorial". [49]

This comment - in so far as it may be taken to imply that the combative nature of the system is inconsistent with the pursuit of truth - also commands significant support within the /

the profession. We may note, for example, the remarks of Lord Justice-Clerk Thomson in a Scottish (civil) case deriding the notion that adversarial litigation is pre-eminently - or even to any significant degree - about the pursuit of truth:

> "Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense." [50]

Hazard also, while saying that:

> "....the adversary system stands with freedom of speech and the right of assembly as a pillar of our constitutional system."

acknowledges that:

> "On the other hand, the adversary system in practice is known by its practitioners often to be anything but the truth-revealing process that it pretends to be." [51]

And quotes Judge Learned Hand:

> "About trials hang a suspicion of trickery and a sense of a result depending upon cajolery or worse." [52]

Wolfram - notwithstanding the views expressed supra as to the merits of adversarial conflict - also gives expression to opposing views:

> "No logically defensible theory of the adversary system can ignore the importance, if not the contrality, of truth in litigation. Yet some observers of the American judicial system have wondered whether truth is a regularly achieved product of litigation, whether the discovery of truth in litigation to the extent that it occurs is not more the result of serendipity than design, and whether advocates are capable of discriminating between truth and falsity in a careful and systematic way. Those doubts are not weak, nor are they necessarily /

> necessarily an adverse reflection upon the morals of lawyers. The search for truth is not the only business about which lawyers must concern themselves. They are also charged by their office with duties of zealously furthering the interests of their clients and of maintaining confidentiality in protecting client information. Those three objectives - truth, zeal and confidentiality - can pull in different directions." [53]

The advocate's problem arising from conflict between truth and duty to his client is, of course, central to our theme and is later dealt with in detail, but in relation to Wolfram's exoneration of lawyers in this passage, we may also note his remarks elsewhere in his book in the context of "courtroom forensics" and the advocate's "tools of the trade":

> "Unfortunately, the tools of trade also, and too often, include dirty tricks, subterfuge, misleading and prejudicial argument, distortion, obfuscation, manipulative efforts to evade the rules of evidence, and an assortment of other forensic outrages that try judges' and adversaries' souls rather than fairly try a contested question of fact or law." [54]

Finally, in this context, we may note the views of Judge Jerome Frank, one of the most outspoken critics of the system as presently practised. Frank, as has been said, does not appear to reject the adversarial principle as such, but, while conceding its "invaluable qualities", he also adds:

> "But frequently the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it. I shall attempt to show that we have allowed the fighting spirit to become dangerously excessive." [55]

As /

As we shall later discuss, Frank's strictures are particularly directed against some techniques often employed by lawyers when cross-examining witnesses, as to which, however, he adds:

> "However unpleasant all this may appear, do not blame trial lawyers for using the techniques I have described. If there is to be criticism, it should be directed at the system that virtually compels their use, a system which treats a law-suit as a battle of wits and wiles. As a distinguished lawyer has said, these stratagems are 'part of the manoeuvring....to which (lawyers) are obliged to resort to win their case.....under the present system it is part of a lawyer's duty to employ them because his opponent is doing the same thing, and if he refrains from doing so, he is violating his duty to his client and giving his opponent an unquestionable advantage....' These tricks of trade are today the legitimate and accepted corollary of our fight theory." [56]

Of particular interest, in a social and political context, is Frank's suggestion:

> "as an additional partial explanation of the perpetuation of the excessive fighting methods of trials, both civil and criminal, the belief in uncontrolled competition, of unbridled individualism. I suggest that the fighting theory of justice is not unrelated to, and not uninfluenced by, extreme laissez-faire in the economic field." [57]

At the conclusion of the chapter in his book in which these issues are discussed - headed "'Fight' Theory vs. 'Truth' Theory" - he finally adds:

> "A distinguished legal historian, Vinagradoff, has said that an 'ancient trial' was little more than a 'formally regulated struggle between the parties in which the judge acted more as an umpire or warden of order and fair play than as an investigator of /

> of truth'. To continue that ancient tradition, unmodified, to treat a law-suit as, above all, a fight, surely cannot be the best way to discover the facts." [58]

We are confronted, therefore, with these two opposing schools of thought as to the effectiveness of the adversarial system as a vehicle for the pursuit of truth in the sense of fact determination. We may note however that, despite their differences, they have in common one fundamental feature - the assumption that, whatever the method adopted, the discovery of truth - the striving to get at the pertinent facts - is a valid objective of the trial process. They do not differ as to the objective - only as to the best means of trying to attain it.

There is, however, yet another view which questions - indeed, appears to repudiate - this assumption. While unorthodox in approach - and, perhaps, somewhat complex in conception - it nevertheless may contain elements of value in the context of the issues here discussed.

2.3.3 The Relativistic View of Truth

We may take as an illustration of this view Zenon Bankowski's exposition of it in his "The Value of Truth: Fact Scepticism Revisited." [59]

As a basis for launching his thesis, he criticises what he considers to be the rationale of Jerome Frank's attack on the /

the adversarial system:

> "His whole critique is based on the idea that it is possible to get really true facts about the world but that the adversarial or accusatorial system is the wrong way of going about it....Frank and others think there must be a clear and obvious way of discovery which settles all that one need or should do to find the truth. The truth, then, is something that can directly be discovered and we can test our artificial conventional games such as the trial by reference to this direct discovery." [60]

Bankowski expounds his own views:

> "...we do not have immediate access to the 'truth of the matter'.....we have to have procedures for discovery - the apprehension of truth - which cannot be separated out from the truth of the matter, justification. We cannot, when talking of what we know, separate the truth of the matter from our method of apprehending it.....The search for truth is something we only undertake through institutional procedures which give us criteria enabling us to describe our activity as truth seeking. Now these criteria are not obvious for all to see - they cannot be 'discovered' - rather they are normative." [61]

The truth of any matter is, then, on this view, intrinsically linked with the procedures for its discovery. The truth *per se* cannot be isolated and there is no "obvious way" of discovering it.

Applying this philosophy to the adversarial trial process, this is seen as a "truth certifying procedure" in which:

> "The conclusion comes from the judge or jury's view of a complex set of data that has been filtered through the trial and the laws of evidence and procedure. These procedures and criteria are justified normatively and we cannot /

> cannot say that a result obtained through using one is wrong by reference to the procedure and criteria of another. We can compare criteria but in doing that we have to operate at a different level. We might in fact find that both sets of procedure are appropriate but in different circumstances." [62]

From which it follows, on this view, that the appropriate question is not "whether and can the jury get it right" but:

> "whether the criteria in the trial have been followed: to use any other criteria would be judging it by reference to another truth-certifying procedure....It is not a question of whether the jury, in some absolute way, get it right but whether they fulfill their alloted role in the system." [63]

Although they do not affect the main theme, we may note in passing two points in regard to the criticism of Frank's views as here expressed. First, Frank does not appear, as Bankowski implies, to be attacking the adversarial principle as such but - as we have noted supra - only what he considers to be its excesses. Second, it is clear from the general context of Frank's book that he is far from harbouring the illusion that it is possible, by means of any trial process, to find absolute truth. On the contrary, he makes clear his belief that, given human fallibility, the trial process "can never be a completely scientific investigation for the discovery of the true facts" [64]

That said,we may perhaps attempt to sum up the substance of this particular concept of the place of truth in the trial /

trial process: absolute truth is not ascertainable as an independent entity; therefore, it is futile to try to search for it, is irrelevant as an objective of a trial process and is not the appropriate criterion for its justification. It substitutes another kind of "truth" - one which, in the context of a trial process, emanates from and can only be justified as relative to the "discovery" or "institutional" procedures used in that process. In any particular process, these procedures - provided they are correctly followed - are productive of the "truth" by the standards of that process. Truth, therefore, is system-relative.

Two further points may be noted. First, the institutional procedures which, on this view, validate the process, are those:

> "instantiated in concrete social practices
> justified by appeal to appropriate values" [65]

But these values are not specified in kind and we may surmise - though it is not clear - that they are also perceived as relativistic - in the sense that they are those which the particular society using the process happens to favour.

Second, in repudiating the search for truth as a trial process objective, Bankowski points to the dangers of a preoccupation with epistemological objectives at the expense of other values:

> "My /

> "My claim is that such a search for truth is not only based on false premises and epistemological views that need to be more thoroughly explored but is also liable to lead to dangerous policy consequences. I am not claiming that such a 'search for truth' leads immediately to casting aside questions of morality and justice. The view I am attacking would not, for example, inevitably lead to the justification of torture even if torture were shown to be a particularly reliable way of getting at the truth. However, when epistemological criteria are radically separate from moral ones, the temptation is always there." [66]

This point is, as we shall discuss, relevant to the question of the place of moral and social values in the trial process.

2.3.4 Concluding Comments

The question whether the adversarial trial process - particularly in the criminal sphere - is an effective or appropriate medium for ascertaining the facts at issue in a legal dispute and the guilt or innocence of a person accused of a crime, is one which is clearly of much more than academic interest. It is vital for society.

It is, therefore. important that the arguments for and against the adversarial system - as compared with the apparently more dedicated fact-finding process in the inquisitorial system - be examined dispassionately, free from nationalistic prejudice and uninhibited by a reluctance to change the traditional and familiar.

Looked at in this spirit, it may be doubted whether the arguments /

arguments advanced in support of the adversarial principle - that truth is more likely to emerge from forensic conflict - suffice to alter the tentative view earlier expressed that the inquisitorial method of intensive non-partisan inquiry seems a more effective method.

The argument that a balanced judgment of disputed fact is best achieved when skilful advocates forcefully advance before an impartial judge their conflicting theses, may well have merit in certain circumstances; when, for example, the debate proceeds on the basis of known and agreed facts and the judge is asked to decide as between opposing interpretations of or inferences from those facts. When, however, the facts themselves are, not only in dispute, but the subject of manipulation, suppresion or distortion by the contending advocates in their assigned role as fact-eliciters, the argument seems less convincing.

The extent to which such manipulation, suppresion or distortion of pertinent fact may be perceived as a feature of the adversarial process is later discussed in the context of the advocate's role. For that reason, it may be premature at this stage to reach any firm conclusion on comparison between the systems.

As against the inquisitorial method, however, there may, in the light of what has been said, be some force in the view that it may tend to create in the minds of the trial judge and /

and jury a predisposition towards an assumption of guilt; that by reason of the fact that, after such a wide-ranging and independent inquiry, the examining magistrate has - in the light of the facts contained in the dossier which the trial judge has before him - decided to send the accused for trial, what the trial court is being asked to do is, in effect, to ratify the examining magistrate's conclusions as to probable guilt. The fact - noted supra [67] - that witnesses are sometimes dispensed with altogether in the lower courts may strengthen this suspicion.

Turning, however, to the relativistic theme, any comparison between systems would, on this view, seem pointless - since truth is seen as system-relative and "we cannot say that a result obtained through using one is wrong by reference to the procedure of another." [68] By the same token, one system, on this view, is as valid as the other.

It is, of course, clear that in any legal system a court's decision is bound up with and follows from the procedures applied by that system for the discovery of the facts. In so far as that decision may be said to represent the "truth" according to that system, the theory as expounded may be said to have an element of realism. This concept of truth - seen as the end product of the trial procedures - as distinct from their motivation - can perhaps be perceived as a realistic recognition of the distinction between truth

in /

in its normally accepted sense and "legal truth" or "truth according to law" - analogous to the distinction between factual guilt and legal guilt [69].

However, the principle upon which this theory would seem to be based may have disturbing implications. It could perhaps be applied to justify any trial process, however irrational or perverse, so long as the procedure is "instantiated in concrete social practices" in accordance with "appropriate values" [70].

As has been said, the nature of these values is not specified. If they are values which can objectively be perceived as relevant to civilised moral and libertarian considerations involved in the administration of justice, this may lend legitimacy to the theory. But if, as may appear to be implicit in this exposition of it, they are simply values which any particular society has "instantiated" in its social practices as "normative", it could, presumably, be advanced to justify those "policy consequences" to the danger of which the author rightly draws attention [71].

On this view, the ruling establishments in some early or medieval (and, indeed, more recent and existing) societies might claim that their use of, for example, torture, was legitimised by their societies' normative practices and values.

Although /

Although not explicitly advanced as such, this particular theory may possibly be intended, by implication at least, as a defence of the adversarial system - and may also, perhaps, be seen as an implicit recognition of that system's epistemological weaknesses. The underlying theme would appear to be: it is impossible to find and futile to search for objective truth; therefore, let us devise a rationale which avoids the necessity of trying.

However, the particular rationale here advanced seems questionable. Accepting that absolute truth is beyond human reach - in the sense, at any rate, of achieving absolute objective certainty about past events; and even accepting also that truth in this sense may possibly be said to be non-existent within the human dimension - this does not seem to be a valid reason for not striving, as far as human limitations will allow, to get as near as possible to it. In the context of a trial process, ethical principle would seem to demand this.

The reference in the discussion of this theory to values relevant to the trial process invites the question: what is the place of moral and social values in the adversarial system - and how important are they in assessing the merits of that system and of the advocate's role within it?

2.4 Moral and Social Values in the Adversarial System

2.4.1 Individual Rights

The adversarial system of justice has traditionally been presented as reflecting the concepts of individual freedom and autonomy - both in the broader context of political philosophy and in the specific field of the administration of justice. Thus, in the broader context, Professor Hazard:

> "...key elements in the adversary system.... evolved as legal controls on government absolutism in seventeenth century England. Thus, the adversary system is not only a theory of adjudication but a constituent of our history of political liberty." [72]

While, in the legal field, this association of ideas extends both to the civil and criminal law - what Professor Wolfram calls the principle of "rights vindication" [73] - it has probably been more particularly perceived as relevant to the administration of criminal justice - to the awareness of the need to protect the individual citizen from excesses of state power. Thus, in this context, Wolfram notes the conception as being:

> "....that the autonomy and privacy of individuals is not sufficiently respected by a state unless deprivations and obligations that are imposed by law are exacted only following a public process in which the person charged with a civil or criminal wrong is given many procedural and forensic advantages. The extreme illustration is the presumption of innocence and all that it procedurally brings with it in the idealized criminal trial." [74]

Of /

Of particular relevance to our theme is the fact that these adversarial principles or values tend also to be seen by some as justifying the relatively low priority accorded by the system to the pursuit of truth. Thus Hazard again:

> "The real value of the adversary system... ...may not be its contribution to truth but its contribution to the ideal of individual autonomy. This is the rationale underlying many rules that obscure truth, such as the privilege against self-incrimination...." [75]

The main features representing these perceived values in the system may be summarised as follows:

1. The presumption of innocence - an accused is presumed innocent of the charge libelled unless and until proved guilty after due process. He is never required to prove his innocence. The onus of proving guilt lies entirely upon the prosecution.

2. The privilege against self-incrimination - an accused is not compelled to testify on his own behalf or to present a defence affirmative of his innocence. He is entitled, if he so chooses, to remain silent and put the prosecution to proof.

3. Non-disclosure of previous convictions - unlike inquisitorial procedure, except in certain circumstances - such as when the accused presents evidence as to his own alleged good character - previous convictions are not revealed to the court /

court until after a guilty verdict. The accused is entitled to have his case tried only on the basis of the evidence pertaining to the particular crime charged.

4. The rules of evidence - the relative strictness and complexity - as compared, say, with inquisitorial procedure [76] - of the rules of evidence and procedure which control, and may substantially restrict, the evidence which may competently be adduced at the trial.

5. The right to counsel - the right of an accused to have his case zealously presented and argued adversarially by a skilled professional counsel to whom - as we shall discuss - considerable latitude is permitted in regard to issues of fact.

All of these features are commonly presented as essential safeguards of individual rights in situations in which the mighty State versus the humble Smith might otherwise be unfair and unequal contests.

2.4.2 The De Facto Guilty

Notwithstanding the merits commonly claimed for these principles, there is far from being a consensus - either within or outwith the profession - as to their value *in cumulo* either as safeguards of the public interest in combating crime or as precautions against the risk of injustice to the innocent.

As /

As to the former consideration, there seems to be a significant school of thought that the adversarial system, as it presently operates, unduly favours the de facto guilty. In this context, one particular target of criticism is the accused's right to maintain silence. The nature of the debate on this point is reflected in Sheriff Macphail's comments on the Thomson Committee's [77] consideration of the question whether the law of evidence in Scotland should be amended to the effect of compelling an accused to give evidence at his own trial. In the event, the Committee - although recommending certain modifications to this right [78] - did not recommend that an accused should be so compelled. However, Sheriff Macphail poses the question which is central to this debate:

> "What should be the objective of our system of criminal procedure and evidence? It has hitherto been thought more important for society that the innocent should be acquitted than that the guilty should be convicted. The Criminal Law Revision Committee, on the other hand, says that 'it is as much (author's emphasis) in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted." [79]

And, elsewhere in his discussion, he adds the comment:

> "...there is nothing repugnant about a man being condemned out of his own mouth unless there be something repugnant about the truth..."[80]

We may also note Sheehan's question:

> "whether the rights given to the accused...should be allowed to hinder the investigation after truth on which all justice must be based, where the silence of the accused may only serve to obscure or at least conceal the truth..."[81]

We /

We may also note the view that these features of the adversarial system, taken cumulatively - and referred to by Laurence Lustgarten as "rules erecting high evidentiary barriers to conviction" [82] - have undesirable effects in regard to the attitudes and practices of the police - imposing on the police, in Lustgarten's view:

> "...a consistent pressure, leading them to overstep their powers against those they 'know' are guilty." [83]

Lustgarten, it must be observed, was writing in the context of police powers - including their prosecution function - in England and Wales before the recent introduction in that jurisdiction of the Crown Prosecution Service. But this, probably, does not affect his main theme.

The point might also, perhaps, be made that these "evidentiary barriers" to conviction in the system tend to favour, in particular, the more affluent de facto guilty who can afford to engage expensive lawyers having particular skills and experience in the appropriate field. While this is doubtless true of any legal system, it may be seen to confer a more pronounced advantage in a system in which the defence advocate plays such a crucial - and, to a certain extent, privileged - role.

2.4.3 The Innocent at Risk

Conversely /

Conversely, however, the adversarial system, notwithstanding its traditional image as one designed to protect the innocent - even at the cost, in the view of some, of favouring the guilty - also is perceived by some as having the opposite effect.

To follow, for example, Lustgarten's theme: one of the consequences, as he perceives it, of the system's "evidentiary barriers" to conviction, is the incentive given to the police to avoid the hurdle of these barriers and, as they and others may see it - the forensic lottery of the trial - by seeking to obtain a confession from the suspect leading to a plea of guilty [84] - a situation not possible, incidentally, in the French system in which a guilty plea is not permitted. This clearly has dangers for innocent persons who may, for a variety of reasons, be motivated to make a false confession.

In general terms, however, these seems to have arisen in recent times a growing unease about the effectiveness of the system - at any rate as it presently operates - as a medium for determining the guilt or innocence of a criminal suspect and growing concern about miscarriages of justice - actual or alleged. This concern may - in the view of some - take the form of opposition to the whole adversarial principle as such and a plea for the adoption of the inquisitorial method. Thus Ludovic Kennedy, in the context of an interview with /

with the Commissioner of the Metropolitan Police in London:

> "I had been interested to see that in two recent articles the Commissioner had queried the efficacy of our adversary system of criminal justice because for many years now and as a result of studying numerous miscarriages of justice, I had become convinced that the inquisitorial system, as practised in France and elsewhere, is superior to it. The essential weakness of the adversary system, it seems to me, is its artificiality: where police manipulation of evidence can lead to the conviction of the innocent and the skills of counsel to the acquittal of the guilty." [85]

It might also be added here that the right of an accused to have his defence presented by a zealous, partisan and skilful counsel may be seen as a feature which can operate as much against him as for him; for it is obtained at the price of having his innocence challenged by an equally zealous, partisan - and possibly even more skilful - prosecutor.

Two features, however, may be identified as specific targets for criticism in the context of the innocent accused - the absence, at any stage in the adversarial process of an independent investigator and the conspicuous disparity between the investigative resources of the state prosecution machinery and those available to the normal accused. It is probably these factors, above all, that influence those urging a radical revision of the system.

2.4.4. Concluding Comments

It would be foolish to over-stress the negative qualities of /

of the moral and social values reflected in the adversarial system of criminal justice - and, even more so, not to recognise the merits of the main principle which underlies them: the protection of individual rights against the temptation to excessive power to which all state bureaucracies are, at times, vulnerable. Pre-eminent among those values - what must be regarded as unequivocal in merit and the main bulwark against the erosion of those individual rights - is the presumption of innocence.

It would likewise be wrong not to recognise the dangers in any system of criminal justice of an over-zealous preoccupation with the pursuit of truth which these values may be seen as designed to counter.

In this connection, one must also acknowledge a possible weakness in the inquisitorial method in so far as it would, as has been said, appear to be open to the accusation of creating an initial bias in the mind of the trial court against the accused, and - whatever the French Constitution may say - give rise to some doubt as to the operation, in practice, of the principle of the presumption of innocence.

But to derive from such considerations the inference that our adversarial system is superior to, and has nothing to learn from, that of our Continental neighbours, would probably be simplistic. In the light of what has been said, there /

there would seem to be grounds for questioning whether - excepting the presumption of innocence - those values which we acclaim, however well-intentioned, operate in practice to the over-all benefit of individual freedom and autonomy and, in particular, even if they, or some of them, do, whether they suffice to offset what probably must be seen as the most conspicuous weakness - the absence of any kind of independent fact investigation.

In reflecting on these issues, two factors of fundamental importance are worthy of note. In so far as the view may be sustained - and there would seem to be cogent arguments for it - that some of the rules of the system permitting the obscuring of truth, operate to the undue advantage of the de facto guilty, leading to their acquittal, not only the public interest but individual freedom itself suffers; for, in the final analysis, such freedom is at risk in any society in which anarchy and violence reach unacceptable levels.

Second, while there doubtless are circumstances in which the permitted concealment or obfuscation of fact may benefit an innocent accused, generally speaking, where truth is a casualty, it is likely to be the innocent who suffer and the guilty who gain.

In summary on this issue, while the concepts of individual freedom /

freedom and autonomy which the moral and social values of the adversarial system are designed to protect, may be at risk from a too rigorous pursuit of truth, they may also be at risk from an over zealous preoccupation with such values at the expense of truth. What matters is the point of balance struck between them.

The maintaining of a proper balance is the function of society acting through its legislators and its courts. But in the day-to-day operation of the system, the ethical conduct of the advocate - the main focus of this inquiry - plays a vital role.

It is this latter point which is central to our main purpose. The issues so far discussed are relevant to that purpose but we are not primarily concerned with an assessment of the relative merits of the adversarial and inquisitorial system - nor even, indeed, with the merits of the adversarial system itself; but rather with the implications of the workings and objectives of that system, whatever its merits, in relation to the ethics of the roles of the contending advocates - and, specifically, their functions as regards the elicitation and disclosure of fact. To this end, it has been necessary to look at the system in order to obtain a proper perspective of the context within which the adversarial advocate operates. Also, the comparison drawn between the rival system has been useful in that it serves to /

to throw into relief those peculiar features of our system which are of particular relevance to our primary purpose.

In the light of what has so far been discussed, it seems clear that, whatever dissension there may be as to the relative merits of the adversarial and inquisitorial processes, one firm conclusion at least can be drawn: by reason of the dominant role which the adversarial process assigns to the advocates as fact eliciters and presenters - and the opportunity this affords for the manipulation of evidence on which the verdict of the court will depend - it is that process which gives rise, in a much more acute form, to the ethical problems with which the advocate has to cope - problems which have significant implications for the administration of justice.

2.5 Summary

1. The essential epistemological feature of the adversarial system is that it assigns to the partisan and contending advocates the crucial function of fact elicitation. There is at no stage in the process an independent investigation of fact. The judge plays a mainly passive and umpireal role.

2. In all these respects it differs from the inquisitorial system which perceives the function of fact investigation as an independent judicial prerogative both in the pre-trial stage and at the trial itself. While open to the criticism that it may create an initial bias on the part of judge and jury against the accused - and possibly impair the principle of the presumption of innocence - it would ex facie seem a more effective method of fact finding.

3. Given that, in the adversarial process, the elicitation and presentation of the facts at issue are functions assigned to the partisan advocates - and the opportunity this affords for manipulation of fact - the argument that truth is more likely to emerge from a balanced judgment of conflicting contentions lacks conviction. The relativistic argument - in so /

so far as it may be seen to deny the search for truth as a valid criterion of a trial process - also lacks credibility.

4. The moral and social values associated with the concepts of individual freedom and autonomy are important features of the adversarial system. However, while commendable in intention, it may be questioned whether some of them, in effect, operate to the advantage of either the public or individual interest or - in so far as they may do so - whether they suffice to justify the epistemological weaknesses of the system.

5. The proper criterion for the assessment of any trial system is not the pursuit of truth per se - or its recognition of other moral and social values per se - but whether it may be perceived as maintaining a proper balance between these values.

PART THREE

THE ROLE OF DEFENCE COUNSEL IN ADVERSARIAL SYSTEMS

Sections

3.1 The Criminal Defence Lawyer

Wolfram notes that in a Harris poll conducted in the United States in 1978, lawyers "ranked very near the bottom" in public esteem - along with "advertising agencies, labor unions, and Congress". [86] He suggests as one of the reasons for this poor showing the fact that "many lawyers are forced into public performances that may appear unsavoury" and adds:

> "The most obvious illustration is the criminal defense lawyer. It is probably accurate, if controversial, to say that defense of persons accused of crime has led to more public antipathy toward the legal profession than any other cause." [87]

In reference to these remarks, we may also note, however, another, /

another, perhaps compensatory, aspect of the criminal defence lawyer's public image - that of the fearless and skilled champion of the legally oppressed. In no other role is the tradition of loyalty and dedication to the client so strongly marked.

It may, therefore, be said that whatever antipathy or cynicism may be directed towards the criminal defence lawyer, it is often paradoxically combined in some measure with a certain admiration; to such extent, indeed, that many of the most eminent have acquired, both within and outwith the profession, the status of folk heroes. To these facets of the defence lawyer's role, we may note yet another of crucial pertinence to the ethics of his function: the considerable latitude which he is permitted within the adversarial system in deference to his perceived duty to his accused client; a latitude which reflects the "many procedural and forensic advanatages" [88] given by the system to accused persons.

The nature and limits of this latitude it is our purpose to examine in detail, but we may here note that it is such as, in Wolfram's words, gives the defence lawyer "sweeping powers" unique to the adversarial system. [89]

All of these features of the defence advocate's function tend to make it the main focus of controversy about ethical issues for the degree of latitude which he is allowed - and, indeed, in certain situations, required - to exercise in compliance with /

with his duty of loyalty to and zealous protection of his client's interests, are often perceived as being in conflict with the pursuit of truth in the public interest.

The controversy, it may also be noted, is not confined to the public domain. As will be discussed, important aspects of the criminal defence function are also the subject of professional debate. It is now proposed, therefore, to examine, in some detail, the various issues which are central to this debate as seen in the light of the views and pronouncements of various authorities within the legal profession.

3.2 Duty to Client and to the Court

In the light of what has been said as to the duality of the function and perceived professional loyalties of the advocate, it will be clear that his role involves a duality of professional relationships - the relationship with his client and his relationship with the court before which he appears. It is in the interaction between these relationships that the conflict of ethical principle becomes manifest.

While, as in all issues of ethical conflict, there are many shades of opinion, the debate within the legal profession as to the relative significance of these relationships is, as will be seen, broadly characterised by two opposing views.

We may note first, however, that the two relationships are interdependent; the advocate's views as to the nature of his relationship with his client must impinge upon his perception of the nature and extent of his duty to the court. In particular, the advocate's perception of the point of balance between his duty to his client and to the court will depend upon the extent to which he considers himself to be, not merely the client's agent and adviser, but, in a sense, his *alter ego*. One of the most explicit professional pronouncements on this issue was contained in the first edition of the American Bar Association's Standards relating to the Administration of Criminal Justice which sought to define the role of defence counsel and the main points of which /

which may be summarised as follows:

1. His primary role is to act as "champion" for his client. In this capacity he is the "equalizer" - placing his client on an equal footing under the law. This he does by "taking those procedural steps and recommending those courses of action which the client, were he an experienced advocate himself, might fairly and properly take".

2. In so doing, counsel must not be timorous - courage and zeal are necessary qualities - a duty resting all the more heavily upon him since the accused may well be "the most despised of persons" - faced with a hostile world and called to "the bar of justice by his government". The accused must be able to rely on counsel as his "single voice" and with confidence that "his interests will be protected to the fullest extent consistent with the rules of procedure and standards of professional conduct".

3. Counsel is an "intermediary" - but not a "mere mouthpiece" or "alter ego" of his client. He is not a "conduit for his client's desires" nor "an agent permitted, and perhaps even obliged, to do for the accused everything that he would do for himself if only he possessed the necessary skills and training in law". As intermediary, "counsel expresses to the court objectively, in measured words and forceful tone, what a particular defendant may be incapable of expressing himself simply because he lacks the education and training". [90]

Although, in this passage, the ABA mentions the fact that, in the past, the "occasional voice" has advocated the alter ego theory, it is strong in its condemnation of this "spurious view" which has been "totally and unequivocally rejected for over one hundred years under canons governing the English Barristers and is similarly rejected by canons of the American Bar Association and other reputable professional organisations". [91].

Although this particular edition of these ABA Standards has since been superseded, its pronouncements on this issue doubtless /

doubtless represent the general view of professional bodies in adversarial jurisdictions. While the current British Codes do not contain any express repudiation of the alter ego theory, they do stress the professional independence of the advocate vis a vis his client. In England, a barrister:

> "may not accept any brief or instructions which limit or seek to limit his ordinary authority or discretion."[92]

and:

> "In all cases it is the duty of the barrister to guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or any other person or otherwise are an abuse of counsel's function, and to exercise his own judgment both as to the substance and the form of the questions put or statements made." [93]

In Scotland, the advocate's professional independence is more emphatically expressed, for, while he:

> "must at all times do, and be seen to do, his best for his client and he must be fearless in defending his client's interests..."[94]

The Faculty of Advocates expressly adopts the principles enunciated in 1876 by Lord President Inglis:

> "....the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent and act according to his own discretion and judgment...";

but not only that; the Scottish Faculty extends the concept of the advocate's independence to the point of endorsing Lord President Inglis' view that it is an advocate's legal right to conduct the case:

> ".....without any regard to the wishes of his client....and what he does bona fide according to his own judgment will bind his client...." [95]

This /

This stress in the British codes upon the independence of the advocate in relation to his client may be indicative of a difference in this context between the American and British systems - a difference to which Hazard draws attention:

> "In the English system...the barrister is insulated from the case in several important ways. An English barrister has no continuing relation with any client; his fee is fixed before trial in negotiations to which he is not a party and on a basis unrelated to eventual victory or defeat; the case is placed with a barrister through a solicitor as intermediary; and barristers as a group are small in number, aristocratic, clannish, and closely tied to the judiciary. The barrister is thus strongly identified as an officer of the court and as a gatekeeper concerning what kind of evidence will be offered.....In the American system, however, the advocate's relationship to his client's cause is much more dependent and intimate...."[96]

The distinction here drawn between the American advocate and the English barrister (which term, as used by Hazard, we may also take, presumably, to include his Scottish counterpart) may explain why the British codes do not deem it necessary to expressly repudiate the alter ego concept - for such repudiation is no doubt implicit in the emphasis which they place upon the advocate's independence of and detachment from the client.

In making this distinction, Hazard's point is that the more intimate relationship between the American advocate and his client exacerbates the conflict between the advocate's duty to his client and to the court. His comparison, however, while it may be valid as between the American advocate and British barristers, is not so apposite as regards the solicitor branch /

branch of the British legal system for the solicitor's court role is not, of course, limited to that of an intermediary between client and barrister. He also plays an important role as an advocate in his own right in the numerous cases where a barrister is not involved. Contingency fee arrangements apart, in that role the solicitor is probably as closely associated with his client as is his American counterpart. In legal terms (in Scotland, at any rate) the solicitor's relationship with his client is perceived as different from that between barrister and client. Lord President Inglis, elsewhere in the passage quoted above from the Scottish Advocate's Guide, is also quoted as pointing the contrast: the solicitor - unlike the "advocate" (in the strict professional sense of that term in Scotland as equivalent to the English "barrister") - enters into a "contract of employment" with and is an "agent" of his client. As such, a solicitor must "as a general rule" follow the client's instructions but:

> "the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent, as well as the counsel, owes a duty to the court, and must conform himself to the rules and practices of the court....." [97]

(It may be noted here that according to the modern usage of the term "contract of employment", a solicitor could not be said to enter into such a contract; the solicitor-client relationship being more appropriately seen as one of agency.)

But, /

But, whatever the differences in this context between America and Britain or between barristers and solicitors within Britain, it is clear that the lawyer, in all adversarial countries and whatever his status, is in no sense seen by the professional bodies as a puppet of his client, obliged to act according to the client's dictates irrespective of legality or propriety. It is in this pejorative sense that the ABA, in the passage quoted above, uses the terms "mere mouthpiece" and "alter ego" and distinguishes such a "spurious view" of the advocate's function from his duty to take only that action which the client, were he an experienced advocate himself, might "fairly and properly" take.

However, while the alter ego concept, in the sense in which that term is used by the ABA, is clearly rejected, in the broader context this rejection may need to be qualified. While it is true that the advocate cannot be seen as the "mere" mouthpiece of his client he is, in an important sense, the client's mouthpiece nevertheless - his "single voice" as the ABA themselves put it. Moreover, according to Hazard, it would seem that, in America at any rate, and whatever the ABA view, some lawyers consider that:

> ".....duty to client requires aiding him in whatever the client feels he must do to vindicate himself in court. The advocate is then absolved because he is merely an instrument." [98]

In his discussion of this subject, Hazard himself clearly disapproves of such an attitude and, in the light of what has /

has been said, it would certainly also be repudiated by the legal professional bodies. But if the advocate is not perceived by such bodies as being required to assist "in whatever the client feels he must do....", he is nevertheless authoritatively seen as having:

> "....the same privileges as his client of asserting and defending the client's rights by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law." [99]

In this limited, but important, sense, it may, perhaps, be argued that the advocate can indeed be seen as a legal alter ego of his client - in that there is vested in him all the rights and privileges accorded to his client by law for the purposes of his defence.

If so, this poses the question: what are the implications as affecting the interaction between his duty to the client and his duty to the court? It is true that the persona of his client which the advocate may, in this juristic sense, be said to adopt, is qualified in an important particular: it is a persona clothed in his own professional integrity. His obligations are limited to "what is permitted by the principles and practice of the law". Nevertheless, if the advocate - albeit only in this juristic sense - can be seen as the legal alter ego of his client, it may seem reasonable to argue that, while acknowledging his duty to the court and the law itself, his primary loyalty must be to his client and that, in his role as defence counsel in criminal proceedings, his professional /

professional commitment must be his client's commitment, namely, to prevent his being convicted.

Such a view - in so far as acknowledging loyalty to the client as the advocate's primary duty - is not, however, universally accepted within the legal profession. There are those who maintain - in the tradition of Lord Cockburn [100] - that his duty to his client, however imperative, is subservient to his duty - not only to the court - but to those concepts which they appear to see as synonymous with it: "truth and justice". Thus Lord Denning in Rondel v. Worsley:

> "(Counsel) must accept the brief and do all he honourably can on behalf of his client. I say 'all he honourably can' because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice." [101]

This was a civil case but Lord Denning's remarks were directed to the conduct of a barrister in a criminal case. Rondel was suing a barrister, Worsley, for professional negligence arising from a criminal case six years previously in which Rondel was unsuccessfully defended by Worsley. The case is authority for the principle that an action cannot be maintained against a barrister for negligence in the conduct of a criminal or civil cause, but for our purposes its significance lies in the fact that Lord Denning not only rejected - in accordance with the consensus view of legal professional bodies - the "mouthpiece" theory, but expressed a principle which is not

to /

to be found (explicitly, at any rate) in any professional code: that the advocate's paramount allegiance is not to his client but to "truth and justice". This seems consistent with the view attributed to Lord Denning by David Pannick [102] that a law case is "an enquiry to find out the truth" and would seem to be saying that the primary function of the advocate is to aid the court in that objective.

This, however, is rejected by other legal authorities who, in the tradition of Lord Brougham, maintain that the advocate's duty is "to reckon everything subordinate" to the client's interest [103] - a view reflected, as regards criminal defence advocates, in Wolfram's statement that the advocate in this role is perceived as one who "owes loyalty to his or her client alone" [104]. One of the most forceful exponents of this school of thought is Dean Freedman of Hofstra University Law School in the United States. Dealing with the subject in the context of the primary objective of a criminal trial process, he not only repudiates the view that the adversarial trial is pre-eminently a search for truth and that the defence counsel's primary function is to assist the court in finding the truth, but states that counsel's duty to his client may, on occasion, necessitate his being an obstacle to that objective:

> "...under our adversary system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination. A trial is, in part, a search for truth. Actually, however, a trial is far more than a /

> a search for truth, and the constitutional rights that are provided by our system of justice may well outweigh the truth-seeking value - a fact which is manifest when we consider that those rights and others guaranteed by the Constitution may well impede the search for truth rather than further it...." [105]

According to Freedman, it follows that:

> ".....the defense lawyer's professional obligation may well be to advise the client to withhold the truth.....Justice White has observed that although law enforcement officials must be dedicated to using only truthful evidence, 'defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission.... ...(W)e....insist that he defend his client whether he is innocent or guilty.' Such conduct by defense counsel does not constitute obstruction of justice. On the contrary, it is 'part of the duty imposed on the most honorable defense counsel from whom we countenance or require conduct which in many instances has little, if any, relation to the search for truth'. The same observation has been made by Justice Harlan, who noted that, 'in fulfilling his professional responsibilities' the lawyer 'of necessity may become an obstacle to truthfinding'....." [106]

In passing, two points of interest may be noted here. First, the distinction made in the quote from Justice White between the professional obligations of "law enforcement officials" and those of defence counsel - a distinction which will be later discussed in the context of the role of the advocate as prosecutor; second, the distinction implicitly drawn in the same passage between "truth" and "justice", concepts which, in regard to the questions at issue, are frequently juxtaposed; for although, in Freedman's view, defence counsel's professional obligation "may well be to advise the client to withhold the truth", he does not consider that such conduct constitutes "obstruction of justice". This distinction, as we shall later discuss, is of significance in /

in relation to the ethical imnplications of the advocate's function.

Confronted by such apparently diametrically opposed views as to his primary function, it would seem that the advocate must steer a cautious - and perhaps, on occasion, a perilous - path between his duties to his client, to the court, and to "truth and justice". In his efforts to reconcile these often conflicting duties, he does not appear to be greatly assisted by official pronouncements on the subject. That conflict does, indeed, exist between these duties is explicitly recognised in such pronouncements. Thus, for example, the Scottish Advocate's Guide sees the advocate's duty to his client as "only one of several duties which he must strive to reconcile". [107] More specifically, the Declaration of Perugia states that:

> "a lawyer's function.....lays on him a variety of duties and obligations (sometimes appearing to be in conflict with each other.....)"

and proceeds to identify several parties to whom the advocate has a duty - the client, his family and others to whom the client is under a legal or moral obligation, the courts, the legal profession and the public. [108]

Such pronouncements, however, afford no guidance as to the relative priority of these competing interests. Moreover, such guidance as is available in regard to the ethical limitations upon the advocate's duty to his client tend often to be expressed in generalities which, however commendable in principle, are of little practical value in dealing with actual situations. Thus, as we have been, he is advised by Lord Denning that he must do all he "honourably" can /

can on his client's behalf; by Dr. Johnson, that he is to do for his client all that his client might "fairly" do for himself [109]; and by the Scottish Advocates' Guide that he must not go beyond what is "lawful and proper". The difficulty is that it is the interpretation of such expressions themselves which is in question.

In order, therefore, to attempt a more precise and realistic assessment of the ethics of the advocate's role in the adversarial system, we must look beyond such generalisations. We must examine in some detail how that system - and the advocates within it - operate in practice. In particular, we must explore the question as to whether, and if so, to what extent Freedman may be right in maintaining that "the defence lawyer's professional obligations may well be to advise the client to withhold the truth" and that, (quoting Justice Harlan), the advocate himself, in fulfilling those obligations, may "of necessity.....become an obstacle to truth-finding...."

This means that we must look closely at what must be regarded as the essence of the matter - the advocate's position in relation to FACT.

3.3 Fact and Law

As has been said in another context, while opinion is free, facts are sacred. Even more so, one would suppose, should this apply to a legal process in which the ascertainment of truth is claimed to be the main objective. While accepting that the absolute truth about anything is probably beyond human reach, it would seem clear that the extent to which a court can arrive at the nearest possible approximation to it must correspond to the extent to which it is apprised of the relevant facts. It would, therefore, also seem reasonable to conclude that it is the advocate's role in relation to the disclosure of known facts which is the main test of his commitment to truth and the main criterion of the real nature of the adversarial trial process.

In the context of criminal trials, Sheriff Marcus Stone confirms the central importance of factual issues:

> "It is self-evident that the fact-finding process is the heart of the matter in criminal trials. Provided that the evidence led by the prosecution is sufficient in law for possible conviction, the real issue is almost always one of fact rather than law...." [110]

Also, Frank, as we have seen, forcefully makes the point that it is the fact rather than the legal element which is both the more significant and the more uncertain in court trials. [111]

While, clearly, there is often ample scope for dispute as to what the law is on any particular issue, most would probably agree that it is more easily accessible to discovery and consensus than disputed fact. Moreover, in regard to the elicitation of fact, as distinct from law, the court is, as /

as we have also seen, entirely dependent, or virtually so, on the partisan skills of the contending advocates. For these reasons, one might expect that, as between fact and law, the discovery of fact would be subject to the more rigorous control. But here an apparent paradox emerges; for while - as we have discussed and as will later be examined in more detail - the advocate, particularly when acting as criminal defence counsel, is allowed considerable latitude in regard to facts adverse to his client's case, he is held on a tighter rein in regard to matters of law:

> "...this House expects, and indeed insists, that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it....."

Thus, Lord Birkenhead in The Glebe Sugar Refining Company v. Trustees of the Port and Harbours of Greenock [112] in a ruling held to be the main authority on the point in the United Kingdom. Generally speaking, the principle here enunciated, applies in both civil and criminal proceedings [113] and its implications, as pointing the contrast with the advocate's perceived obligations in regard to matters of fact, merit further analysis and comment.

The circumstances which occasioned Lord Birkenhead's remarks in the passage quoted related to a section of a local Act which had not been referred to by either party in the lower court but which the House of Lords held to be crucial - indeed, on which they mainly based their decision which reversed the judgment of the First Division of the Court of Session. /

Session. It may be noted that in this case Lord Birkenhead absolved counsel involved in the case from blame because he considered that they, themselves, were unaware of the existence of the section in question, but he found it:

> "...very difficult to believe that some of those instructing learned counsel were not well aware of the existence, and the possible importance and relevance, of the section in question.." [114]

It may be noted, however, that in the light of a more recent case, the principle enunciated by Lord Birkenhead is not to be construed as meaning that an advocate is guilty of improper conduct merely because he argues a point in law which a court holds to be "bad". In Abraham v. Jutsun, the circumstances related to the awarding of personal costs against a solicitor by the Divisional Court because, in that Court's view, he had, at a previous hearing in the Magistrates' Court, "taken a thoroughly bad and unmeritorious point....which had had the effect of causing all the costs in the Divisional Court." The Court of Appeal reversed this judgment, Lord Denning observing that the solicitor in question had not:

> "in the least degree (been) guilty of any misconduct. The points which he took were fairly arguable....as it turned out, both points were bad points; but the appellant was not the judge of that. The magistrates had their clerk to advise them on the law. He was to advise them whether the points were good or bad. It was not for the advocate to do so....it was....his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court..." [115]

On /

On analysis, it may be doubted whether the light cast by Lord Denning on this issue is particularly luminous. Where and how does an advocate draw the line between a "fairly arguable" and a "knowingly" bad point? It will be noted that Lord Denning's remarks regarding the advocate's usurping "the province of the judge" echo those of Dr. Johnson [116]. He might well have added the further statement by Johnson that "an argument which does not convince yourself, may convince the judge to whom you urge it". [116] On this reasoning, there can be nothing reprehensible in an advocate's making the best of a line of argument of the merits of which he is not himself convinced - and which, indeed, if he himself were the judge, he might reject as "bad".

However that may be, what does seem to emerge clearly, from the Glebe Sugar case at any rate, is that, on points of law, as distinct from fact, the mere consideration that a particular authority does not favour his client's cause, does not, in itself, justify an Advocate's failure to bring it to the attention of the court if he is aware of its existence.

For the reasons given above, we now address the question as to the rational justification, if any, for this distinction. In the Glebe Sugar case, Lord Birkenhead prefaced the remarks quoted above with the observation that:

> "It is not, of course, in cases of complication, possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel, and those who instruct counsel...."

It must, of course, be allowed that no judge, however learned, can be expected to know all the law, or , indeed, even a significant part of all the law; but the legal authorities bearing on any particular issue are usually readily accessible to judges who, normally, have ample opportunities and facilities - in the form, one would suppose, of an extensive legal library - to look them up. Indeed, in Glebe Sugar, one of their Lordships at least took the trouble to do so - as the report of the case makes clear:

> "While the case was under consideration Lord Atkinson called the attention of their Lordships to section 23 ...." (the non-disclosed authority), whereupon "the appeal was set down for further judgment upon the effect of that section." [117]

For the same reasons, it may be difficult to accept that judges, in respect of relevant legal authorities, are "very much in the hands of counsel" or, at any rate, that they ought to be so. It is the function of the advocate to argue the law. It is the function of the judge to discover and rule upon it. So one might reasonably argue. Moreover, in so far as it might be allowed that a judge, in regard to points of law, was, to any degree, in the hands of counsel, he is certainly not so in the same sense or to anything like the same degree as he is in regard to issues of fact.

In this context, the authors of "Lawyers" pose the question: "why is there a greater duty to disclose law rather than fact?" They tentatively suggest: "is it largely to avoid embarrassment for the judges?" [118] But even if such a consideration may have influenced the Glebe Sugar ruling, it can hardly be advanced as a ratio decidendi. Two factors, however, might be advanced as justifying a distinction between disclosure of fact and /

and law - though not necessarily as justifying the rationale of the Glebe Sugar ruling in itself.

First, questions of law, as distinct from fact, are matters purely for professional debate and deliberation as between advocates and judge. The disclosure of legal authorities does not impinge upon the advocate's duty to his client in the same way as disclosure of fact. Certainly, the outcome of legal debate may well have serious consequences for the client, but, in so far as the only point at issue is the law applicable to facts admitted or held as proved, the requirement that an advocate must bring to the attention of the court all authorities known to him as relevant to the issue - whether or not such authorities assist his client's case - is not perceived as infringing his duty to his client. True, he has a duty to his client to make the best possible case for him both in law and fact - and to argue as best he can any "fairly arguable" point of law - but this is not seen as justifying deliberate deception of the court on matters of pure law.

Second, and more particularly, questions of law do not involve the crucial issue of confidentiality as between advocate and client. Whatever considerations may influence an advocate to pursue or not to pursue, to disclose or not to disclose, a purely legal point, they will not generally involve any conflict between the duty to honour his client's confidences and his duty to the court. And, as will be seen, it is this conflict which is at the heart of many of the most critical issues /

issues which arise in regard to the ethics of the advocate's role.

Some further remarks of Lord Birkenhead in Glebe Sugar, albeit made in the context of the disclosure of legal authorities and not of factual information, are of relevance to the main purpose of this inquiry. After criticising "those instructing learned counsel" for their failure to direct attention to the statutory provision in question, he observed:

> "A similar matter arose in this House some years ago, and it was pointed out by the then presiding judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material and the information which a properly informed decision requires .....and to obtain a decision founded upon imperfect knowledge. The extreme impropriety of such a course cannot be made too plain..."[119]

Although he does not use the term, Lord Birkenhead is here talking about deception - deliberate and culpable deception, as he perceived it, of the court in regard to a material point of law. But would not the same strictures apply - a fortiori - to deception as to material points of fact - information in regard to which the court is wholly dependent upon the advocate? Indeed, if one were, in the quotation given, to substitute the one word "fact" for "authority", could it not be said that this "withholding" - or worse - in order to obtain a decision from a court "founded upon imperfect knowledge" is what happens in courts every day? Is there any valid justification for such deception? If so, what are its limits of /

of permissibility? Do these limits extend beyond deception by silence - mere "withholding" - to positive attempts to conceal material facts; to distortion by cross-examination tactics; even to lying?

These and other like questions it is the business of this inquiry to explore. It is such issues that are the subject of confusion both within and outwith the legal profession - a confusion reflected not only in the conflicting opinions and diverse beliefs of various writers and authorities, but even, it would appear, in statements by the same authority. Lord Denning, for example, the author of the emphatic statements in Rondel, supra, as to the advocate's duty to the "higher cause" of truth and justice, expressed in an earlier case, Tombling v. Universal Bulb Company, a somewhat more equivocal view of an advocate's duty - citing with apparent approval Cicero's dictum that while it is the duty of the judge to pursue the truth, "it is permitted to an advocate to urge what has only the semblance of it." [120]

The context in which Lord Denning made this observation will be later examined [121] but, on the face of it, the two statements would seem difficult to reconcile.

With a view to exploring these questions in greater detail, it is proposed to examine those specific areas where the problems associated with them appear to arise most acutely.

Before doing so, however, it may be useful, in order to command a better perspective of the advocate's role in this context, to have a brief look at general and philosophical concepts of deception and attempt to assess their relevance to the advocate's function.

3.4 Deception and Lying

3.4.1 Relevance for the Advocate

"A lawyer is not to tell what he knows to be a lie" [122]

"I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client."[12

These two views could be taken, on face value, to represent extremes of conflicting opinion as to the advocate's ethics. But such a conclusion may be premature. We must first ask what is meant by "lie" in each of these statements; what is a lie? Can its meaning be legitimately restricted to an actual statement intended to mislead? Or is it capable of interpretation in a wider sense - any deliberate attempt to deceive: to make others believe what we ourselves do not believe - by whatever means: gesture, disguise, innuendo, even mere silence? In other words, is deception in any form also a lie?

This question is important for the advocate professionally, for he is told by his professional bodies and by the courts that he must never lie to a court. If lying is interpreted in the wider sense of any form of deception, this has serious implications for him. When, for example, an advocate deliberately withholds from the court a crucial fact known to him - or, in cross-examination, attempts to discredit the testimony of a witness which he knows to be true - is he, in effect, "lying"?

But in the context of the ethics of the advocate's function, we /

we must ask the further questions: whatever latitude in regard to questions of fact he may or may not be permitted professionally does it matter - in moral terms - whether to deceive is also to lie? Is not to do either to act dishonestly and therefore morally wrong?

But is it always wrong? Are there circumstances in which lying or any other form of deception can be justified? And does the advocate have any particular justification?

These questions are clearly of relevance to our theme for we cannot appraise the advocate's function in ethical terms without reference to moral principles.

However, before discussing them further, we may note a related aspect - the different senses in which the word "truth" is used - and sometimes confused - and the consequences of this confusion for professional ethics in general and for legal ethics in particular.

3.4.2 Truth and Truthfulness

We have earlier noted the two different senses of the concept of truth - the epistemological and the ethical. [124] The former - with which we have dealt in Part Two in relation to the nature of the adversarial system - concerns the ascertainment - or attempted ascertainment - of objective fact; the latter, the concept of truthfulness - speaking or acting honestly.

Sissela Bok, in her book on "Lying", expresses the view that philosophers such as Plato have tended to be preoccupied with the /

the epistemological concept - giving rise to the "great risk of a conceptual muddle" of confusing:

> "the moral domain of intended truthfulness and deception, and the much vaster domain of truth and falsity in general. The moral question of whether you are lying or not is not settled by establishing the truth or falsity of what you say. In order to settle this question, we must know whether you intend your statement to mislead." [125] [Bok's emphasis]

Bok's "conceptual muddle" would seem to have support on a point of particular relevance to court proceedings: what is meant by the phrase, "the truth, the whole truth, and nothing but the truth". She quotes J.L. Austin:

> "Like freedom, truth is a bare minimum or an illusory ideal (the truth, the whole truth, and nothing but the truth about, say, the battle of Waterloo.....)" [126]

Austin here uses "truth" in its epistemological sense but, as Bok points out, this it not the sense in which it is used in court but refers to testifying honestly - the proscription of intentional deception:

> "It is to this question alone - the intentional manipulation of information - that the court addresses itself in its request for 'the truth, the whole truth, and nothing but the truth' "[127]

It is, then, the criterion of truth in the sense of truthfulness which is applied by the court in this context. For a witness - as for anyone else - what matters, in moral terms, is not whether what he says is objectively true or false, but whether he believes it to be true or false.

Stone makes a similar point:

> "It is an essential element of lying that the witness should believe that what he states is untrue ....."

Such /

Such a witness, therefore, is still a dishonest witness even if his testimony which he believes to be incorrect "happens to be objectively accurate" [128]

We may note here also two further consequences - in Bok's perception - of the traditional preoccupation with the epistemological concept of truth to the relative neglect of the ethical.

First, she believes this to be a partial reason for the paucity of debate within the field of moral philosophy on the concept of deception [129] and, in regard to lawyers, points in particular to the absence of analysis and debate within the legal profession in regard to the problems of and possible justification for deception by a lawyer in court. On this point, she quotes from a textbook on the professional responsibilities of lawyers:

> "There is simply no consensus, for example, as to the lawyer's duty to the court if he knows his client is lying. In that and other situations a lawyer can only be sensitive to the issues involved and resolve these difficult cases as responsibly as he or she is able."

Bok adds the comment:

> "Closer to the throwing up of one's hands one cannot get. To leave such a choice open to the sensitive and the responsible without giving them criteria for choice is to leave it open as well to the insensitive and the corrupt" [130]

As will later be seen, it is not quite correct to say that no guidance is given to the lawyer in situations where he knows his client to be lying - or to be intending to lie - but, particularly in the criminal sphere, there would appear to be a deficiency in this respect and such guidance as is available may not be very helpful [131]

Secondly, /

Secondly, this absence of analysis of the concept of deception is seen by Bok to give rise to another consequence which is relative to a matter we have earlier discussed:

> "This absence of real analysis is reflected also in teaching and in codes of professional ethics. As a result, those who confront difficult moral choices between truthfulness and deception often make up their own rules. They think up their own excuses....One deserves mention here.....It holds that since we can never know the truth or falsity of anything anyway, it does not matter whether or not we lie when we have a good reason for doing so." [132]

While it would probably be unfair to represent it as a justification for telling lies, the relativistic view of truth which we have looked at [133] might possibly be one of the attitudes here criticised.

As for the "throwing up of hands", it probably must be conceded that Bok's quote from the legal textbook, given supra, may indeed be typical of some professional pronouncements within the legal establishment. It may, of course, be argued that the "insensitive and corrupt" will remain so whatever criteria for choice were devised and would doubtless find ways of circumventing them. For others, however, the criticism may be valid. The absence of clear criteria other than the exercise of individual judgment in regard to the permissible limits of deception in court, not only leaves the conscientious advocate without guidance but, on occasion, may put him at considerable professional risk: leaving him to steer perilously between the Scylla of being accused of failing in his duty to his client and the Charybdis of being disciplined for failure in his duty to the court.

In /

In particular, he may be left on occasion to decide on his own responsibility the question: what is a "lie"? And can it be justified in his client's interests?

3.4.3 What is a "Lie"

This, as has been said, is an important question for the advocate not only morally but professionally for, in the United Kingdom and elsewhere in adversarial jurisdictions, the general consensus within the legal profession seems to be that a lawyer, whatever latitude he may be permitted in other respects, must not lie to the court.

As Montaigne said, the lie has many faces [134], but, broadly speaking, it can and has been defined in two ways: the first, in the sense in which the word is probably most often used in normal speech - that is, an actual statement directly communicating, with intent to mislead, what the communicator does not believe to be true: the "clear-cut" lie. Bok herself adopts this definition for the purposes of her book but acknowledges that some philosophers - citing St. Augustine as an example - adopt a wider definition, equating lying with deception in general, i.e.:

> "When we undertake to deceive others intentionally, we communicate messages meant to mislead them, meant to make them believe what we ourselves do not believe. We can do so through gesture, through disguise, by means of action or inaction, even through silence..." [135]

However, whatever definition of the lie is adopted, they have one element in common - the intent to deceive; and it would seem difficult to resist the logic of the view that, in moral terms, /

terms, that is what matters. If I wish to implant in the mind of another the belief that something is true though I myself believe it to be untrue, it does not matter whether I do so by an overt statement or by another method of deception. The distinction, therefore, between the narrow and wide definitions would seem to be one of form rather than substance. On this view, one can, therefore, reasonably agree with Bok that it does not really matter, morally speaking, which way lying is defined, "so long as one retains the prerogative of morally evaluating the intentionally misleading statement....."[136]

However, as has been said, it does matter, professionally speaking, for the advocate. If a lie is to be interpreted as including all forms of deception, then, clearly, there is a difficulty - and not only for him but for the whole adversarial system; for, in the light of what has been earlier discussed and what will later emerge, it seems manifest that the adversarial trial process - whatever merit may be claimed for it in other respects - may be reasonably described as a legal framework of condoned deception by the adversaries - indeed, in a sense, of professionally imposed deception, in the case of criminal defence counsel; for it is to be remembered that defence counsel is professionally proscribed from disclosing to the court adverse facts confided by his client, however relevant and material, and that, as has been said, even mere silence can, in certain situations, be a form of deception - and therefore included in the broad sweep of the wider definition of lying. And, of course, there are many other forms of deceptio which are normal features of the adversarial system - a system in /

in which even such as Lord Denning concede that it is permitted to an advocate to urge, not the truth, but "only the semblance" of it [137].

In the light of the absurdities which, for these reasons, would otherwise result, it must be assumed that when it is said that an advocate must not lie to the court, the word "lie" is used in the normal sense of everyday speech - the overt lie: making an untrue statement - either directly or indirectly through his client, such as, for example, being a willing accessory to perjury.

This does not, of course, settle the moral question as regards other forms of deception in court - nor indeed the professional implications of such other forms as regards perceived permissible limits which it is our purpose to explore.

3.4.4 Arguments for Justification

Given that the ethical issues inherent in the advocate's function involve not only overt lying - such as perjury by the client - but other forms of deception, we shall, in discussing the relevance to the advocate of the arguments commonly advanced in justification, regard such arguments as applicable to all forms of intentional deception - lying in the wider sense.

It would seem that the traditional Christian view - following the Augustine/Aquinas doctine - is that all lies are intrinsically wrong; though recognising degrees of "abhorrence" - ranging from the venial "white lie" to the most serious - the "malicious" lie [138].

Kant /

Kant was a notable exponent of the extreme absolutist view, prohibiting all lies - even those told for the best of motives [139]; a view also expressed in the rustic wisdom of Dickens' Joe Gargery in "Great Expectations":

> "There's one thing you may be sure of, Pip, namely that lies is lies. However they come, they didn't ought to come, and they come from the father of lies, and work round to the same." [140]

But such extreme views, however exemplary in precept, are difficult to sustain in practice.

Broadly speaking, the arguments most commonly advanced in justification may be said to concern those lies whose professed purpose is, one way or another, to avoid harm - or, at any rate, to do more good than harm. However, in view of the prominence, in the professional context, of those relating to professional confidentiality - and although these can be seen as another variant of avoidance of harm - it may be convenient to deal with the arguments under two heads: first - in the general context - those based upon the avoidance of harm principle; second - in the professional context - those relating to professional confidentiality and, specifically, lawyer-client confidentiality.

The Avoidance of Harm - The most obvious example of this kind of argument is that relating to a situation in which a lie is necessary to prevent great and immediate harm to someone - what may be called the "common sense" argument. Thus Dr. Johnson:

> "The general rule is, that the truth should never be violated; there must, however, be some exceptions. If, for instance, a murderer should ask you which way a man has gone." [141]

Such extreme and clear-cut situations are, however, relatively rare /

rare in everyday life where situations tend to be somewhat less urgent and more complex. It is then more likely to be a question of weighing the consequences of lying or not lying - what Bok refers to as the utilitarian criterion and the Benthamite school which held that what matters is not the lie itself but the consequences attendant upon it [142]. Bok sees this as another example of the common sense approach and as being in line with how people, in practice, usually behave, that is:

> "In choosing whether or not to lie, we do weigh benefits against harm and happiness against unhappiness..." [143]

While it is doubtless true that this is the criterion people normally apply, it suffers from the disability that it is not always easy in complex situations to assess consequences. Moreover, a person disposed to lie may well be biassed in the weighing.

It is also important to note that a truly moral approach would probably require rejection of the view that lying, per se, is morally neutral and would postulate, in the weighing process, an initial presumption or negative weighing against lying as something, ideally to be avoided. [144] This is probably again in line with how most people - at any rate, conscientious people normally behave.

Professional Confidentiality - The lawyer is not, of course, unique as regards the ethical problems arising from the concept of professional confidentiality. Other professions - notably the medical profession - share these problems. Also, there are, among these professions, common factors in their arguments in defence of confidentiality: the harm which disclosure of a confidence /

confidence might cause to the patient or client; the latter's right to privacy and the claimed inviolability of the implicit professional promise of confidentiality.

There is also a further argument relevant both to the doctor and to the lawyer: that breach of trust by unauthorised disclosure of confidences would deter people from confiding in their doctor or lawyer and, therefore, from seeking and obtaining the benefit of medical or legal assistance.

However, there are important differences in this context between the legal and other professions. For purposes of comparison, we may again take the medical profession as an illustration. First, crucial as it is in the field of medical ethics, the confidentiality of the doctor-patient relationship is not so vital to the structure of the medical services system as is that of the lawyer-client relationship to the legal system. Lawyer-client confidentiality is a basic and essential feature of the adversarial system of justice and any substantial erosion of that concept would threaten, if not destroy, the fundamental principles of that system; for the advocate could not effectively function as the zealous champion and protector of his client in accordance with those principles if the client could not repose complete confidence in him. It is mainly for this reason that lawyers attach so much importance to confidentiality.

Second, the trilateral relationship which normally gives rise to the ethical issues of confidentiality is also significantly different as between doctor and advocate. The third parties who /

who normally feature in the doctor's problems in regard to issues of disclosure, are not in the same professional relationship to him as is the court to the advocate. Such obligations as the doctor may, or may not, be perceived as having to such parties are of quite a different order from the advocate's professional obligations to the court - and through it to the law itself - of which, as was noted at the beginning of this inquiry, he is also the servant.

Third, there is also an important difference as regards the significance to the third party of the confidential information which the professional in each case seeks to withhold, suppress or otherwise obfuscate in deference to professional confidentiality. In the doctor's case, the information in question may indeed be of importance to the third party; in the lawyer's case, however, in so far as it is material to the issue before the court, it relates to the essential function of the court.

For all these reasons, the concept of, and the problems arising from, professional confidentiality tend to feature more prominently in the legal than in other professions.

3.4.5 The Validity of Arguments for Justification

Which, if any, of these arguments advanced in defence of lying or deception, in certain situations, could be validly invoked by the court lawyer as a moral justification?

In addressing this question, it may be convenient to follow the sequence in which these arguments have been discussed.

The /

The Avoidance of Immediate and Serious Harm - As has been said, the extreme situations in which this particular argument - the "common sense" Johnsonian argument - is likely to apply are rare in the everyday life of ordinary people. At first sight, it may also seem inappropriate to the advocate's situation - at least in the context of the extreme circumstances cited by Dr. Johnson: "If a murderer ....." ; but, in the case of the criminal defence advocate particularly, perhaps not all that inappropriate; for it is not difficult to envisage a situation in which defence counsel, in a criminal trial, may be faced with a decision whether or not to lie - or to be party to a lie - as the only means of saving his client from an unjust fate; such as, for example, in a murder trial where, although counsel knows, or sincerely believes, his client to be innocent, the circumstantial evidence against him is so great that he is in grave danger of being convicted and thereby forfeiting his liberty - or even his life. Given the two quotes from Dr. Johnson - the "murderer" example and "a lawyer is not to tell what he knows to be a lie" [145], it is interesting to speculate what his answer would have been if asked whether, in such a situation, it would be right for the lawyer to lie to save his client. Indeed, there may be those who would see the "murderer" example as cited by Dr. Johnson as a not too fanciful analogy in that those radically opposed to capital punishment may well cast the state in the role of a "murderer" when it sanctions state execution. This, no doubt, would be a very extreme view but, nevertheless, it is an extremely serious situation and poses

a /

a particularly difficult and delicate question. It may involve the advocate's acting as an accessory to perjury - the "most abhorrent" of lies [146] - and one unequivocally proscribed professionally [147]. All that one may, perhaps, safely say is that, viewed only in terms of strict moral principle - and professional proscription apart - the argument that lying may be justified to avoid serious and immediate harm may have application to this and similar extreme situations.

Weighing the Consequences - As has been said, the avoidance of harm argument for justification tends, in less extreme and more complex situations, to merge into what may be seen as the most significant and relevant for ordinary people in most situations in real life - what Bok refers to as the utilitarian criterion: that what matters is not the lie or deception per se but the consequences flowing from it; that, therefore, in deciding in any particular case, whether or not to lie or deceive, one must attempt to weigh the likely consequences; assess the overall goodness or badness of the options; weigh the benefits against harm.

What application does this have to the court lawyer?

As we have discussed, in the absence of clear professional and positive guidance as to the proper course to take in some delicate situations - such as, for example, when a lawyer knows that his client is lying to the court - it seems to be this principle, in effect, which the advocate is sometimes advised to apply; the resolving of such problems is left to his individual responsibility - to his own "sensitivity" [148]. This would seem to be another way of saying that he should weigh the /

the consequences of the options. In such situations, this may also seem, therefore, to be the most relevant principle for the lawyer as well as for ordinary people.

But certain caveats must be entered.

The proper moral application of this principle relies greatly on personal integrity. The "insensitive and corrupt", to use Bok's phrase - or, even if not corrupt, the less scrupulous - could well take a biassed view of the consequences and invoke the principle as justification for dubious conduct. It must also be remembered in this context that, in accordance with the generally accepted principles of utilitarianism, the consequences which are to be weighed are not only the consequences to the weigher - or, in the case of the advocate, to his client (though the latter must be a major factor) - but the consequences to all parties and interests involved.

There is also the further important factor, already mentioned, which is as applicable to the advocate as to people in everyday life, that lying or deception is not to be perceived as morally neutral and that his assessment of the consequences of such conduct in any situation should include an initial presumption - or negative weighing - against it.

Professional Confidentiality as Justification - This is the argument most often invoked by lawyers as justification for what they may see as necessary deviations from truthfulness. Thus Professor Wolfram:

> "By turns sacred and controversial, the principle of the confidentiality of client information is well-embedded in the traditional notion of the Anglo-American client-lawyer relationship." [149]

And:/

And:

> "The assurance of confidentiality.....is purchased only at the price of excluding from trials evidence from lawyers and clients about their conversations - a detraction from the search for truth that is 'plain and concrete'." [150]

Bok has scant sympathy for the concept as a justification for untruthfulness and believes that:

> "Lawyers see it as so manifestly different from the shadier privileges claimed through the ages, ranging from the feudal sexual privilege to the excesses of 'executive privilege' as to require no defence." [151]

Whether lawyers adopt such an a priori assumption may be questionable. However, whether they do or not, the arguments they advance in support of the privilege must be looked at objectively. They are cogent arguments which, as has been said, go to the heart of the adversarial system of justice. They involve weighty considerations. Nevertheless, it may be questioned whether they conclusively demonstrate that professiona confidentiality, per se, provides a special moral justification which overridesveracity in all circumstances.

Apart from arguments already mentioned as supporting the sanctity of confidentiality, much is also made of the element of the implied professional promise not to disclose confidences - and of the alleged inviolability of that promise. But can such a promise per se provide an absolute moral justification for not breaking it under any circumstances - irrespective of the harm which may result? Such an absolutist position is not easy to defend for it is not difficult to envisage situations where the keeping of a promise, (even assuming that it is not an intrinsically evil promise), would cause much more harm than breaking it.

These /

These considerations would seem to invite the conclusion that there are and must be limits to the privilege of professional confidentiality and it may also seem reasonable to conclude that the moral criterion for determining those limits is probably, in the final analysis, that which we have discussed and described as the "weighing of the consequences" - the individual's perception of the overall goodness and badness of the effects of his decision. In its application to the advocate, this would mean that, however cogent the arguments in favour of confidentiality, they cannot, in themselves, be regarded as conclusive but merely as some of the factors - albeit important factors - to be assessed in the weighing of the consequences.

3.4.6 - Summary

The main conclusions which we can, at this stage in our inquiry, derive from this discussion on the moral principles involved in lying and deception, may be summarised as follows -

(1) The distinction between the narrow and wider definitions of lying is one of form rather than substance. The common factor is deception and the intent to deceive.

(2) However, professional ethics in the adversarial system do recognise a distinction. Although the advocate is forbidden to lie - or to be an accessory to a lie by his client - he is permitted to practise other forms of deception; to urge the "semblance" of truth. It must, therefore, be assumed that the "lie" which is professionally proscribed is only the overt, clear-cut lie.

(3) /

(3) The argument most commonly advanced by lawyers for the justification of lying or deception is that based upon the sanctity of professional confidentiality. However, this, per se, cannot provide absolute moral justification but must be seen as but one factor - albeit a cogent factor - in the advocate's assessment of the consequences.

(4) Viewed only in terms of moral principle - and professional and legal ordinances apart - this weighing of the consequences for or against lying or deception would appear to be the most relevant for the advocate as it is for people generally - involving the principle that it is to the consequences and not to the lie itself that he must look for the moral criterion. While this principle rejects the concept of lying as intrinsically wrong, there must always be an initial presumption against it.

Before attempting to draw final conclusions, we must now turn to the actual workings of the adversarial system and to a more detailed analysis of the advocate's role within it - particularly in those specific areas where the ethical issues arise most acutely. Four such areas may be identified -

Non-Disclosure of relevant facts - with particular reference to the distinction drawn, or attempted to be drawn, between passive "withholding" and positive attempts to "conceal".

Cross-Examination Tactics - with particular reference to the ethics of discrediting testimony known to the cross-examiner to be true.

Perjury - the advocate's position when representing a perjurious client.

The "Guilty Accused" Situations - the advocate's position where his client has confidentially admitted his factual guilt.

3.5 - Non-Disclosure -"Withholding" and "Concealing"

3.5.1 - Introduction

Central to many of the problems confronting the advocate - particularly, though not exclusively, in his role as criminal defence counsel - is the question as to what extent he is permitted, or, indeed, obliged, in the interests of his client, to keep the court in ignorance of pertinent facts which he deems to be adverse to his client's case - and the means he may legitimately employ to achieve that objective.

This issue features in all the situations we shall examine, but, here, we address two particular questions: first, to what extent can the legal limits of permissibility in this context - in so far as these can be inferred from available case law - be perceived as recognising or reflecting a distinction between a passive "withholding" of information and a positive contrivance to conceal it? Second, in moral terms, can any firm line be drawn between these concepts?

Also, while, as will later emerge, most of the issues arising in connection with the suppressing of adverse facts involve the concept of professional confidentiality, we are here concerned with the non-disclosure of facts which are within the advocate's knowledge but which are not necessarily of a confidential nature; being facts which may not be directly pertinent to the alleged offence itself or other issue before the court but which, nevertheless, may be considered by the court to be of material import as regards the issue it has to decide.

3.5.2 /

3.5.2 - The Limits of Permissibility.

On this, as in so many other ethical issues, the advocate's position does not seem to be greatly facilitated by the professional guidance which he is sometimes offered; guidance which, on the face of it - and sometimes emanating from the same source - often seems contradictory. On the one hand, he is, for example, told to be "open and truthful" with the court and, on the other, that, "in presenting the facts of a case you have a duty only to refer to those favourable - unless you are prosecuting....."[152]

Again, he is told by Lord Denning that while he must not "knowingly mislead" the court, he is at liberty to exercise his discretion as to what facts he should disclose according to whether or not they are to his client's advantage [153].

It would seem, however, that attempts have been made to lay down reasonable criteria for demarcating the limits of permissible conduct by an advocate in this context. The authors of "Lawyers" point to an alleged distinction between "concealment" and "withholding" of evidence:

> "Concealment involves a positive attempt to prevent information being discovered, whereas withholding is a mere failure to disclose. Generally speaking, it is unethical for a lawyer to conceal the facts, but ethical for him to withhold them."[15

They proceed to quote from an Australian practitioners handbook a ruling which arose from the question as to whether a defence counsel had an obligation to reveal to the court previous convictions against his client which had been confided to him by his client:

> "1. If the prosecution says nothing about previous convictions it is the duty of counsel not to disclose them where he has acquired knowledge of them from his client or from enquiries made /

made on behalf of his client or in any other manner covered by professional privilege without his client's specific instructions.

2. It can never be his duty in any event to volunteer prejudical matter unless he conceives it to be in his client's interest to do so....."[155]

This quote is of interest in so far as it makes the point that it is not only the right but the duty of defence counsel not to disclose prejudical information - whether or not such information is covered by professional confidentiality - but it does not seem to provide authority as such for the alleged distinction between concealing and withholding, nor do the authors cite any specific authority. Indeed, they themselves pose the question: "Is it sensible and desirable to distinguish between active and passive conduct if both result in the court getting a false impression?" [156]

While, in modern times, there seems to be a consensus for the view that counsel has no duty to reveal information adverse to his client, that may appear to be at odds with the observation of Lord Esher in the case In Re G. Mayor Cooke in regard to the duties of a solicitor:

".....His duty was.....not to fight unfairly, and that arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour. He had, however, a duty to the court and it was part of that duty that he should not keep back from the court any information which ought to be before it and that he should in no way mislead the court by stating facts which were untrue....."[157]

The tenuous nature of the distinction between proper and improper conduct in this context and the precarious nature of the ethical tightrope which the advocate has, at times, to walk is particularly illustrated by two more recent English cases which merit /

merit examination in some detail - Tombling v. Universal Bulb Company Ltd. [158] and Meek v. Fleming [159].

3.5.3 - The Cases of Tombling and Meek

Both of these cases involved an application by one of the parties for a new trial on the ground that the court of first instance had been misled as to material fact. In Tombling, the application failed. In Meek, it succeeded.

Tombling - Counsel for the plaintiff had produced as a principal witness a person who had been a prison governor but who, at the time of giving his evidence, was resident in a prison - not, however, as governor but as an inmate following his conviction for a motoring offence - a fact known to the plaintiff's counsel but not disclosed to the court. The facts are summarised in the judgment of Somervell L.J.:

> "Mr. Meikle started life in the prison service. He became a prison governor. He left the prison service eleven days after (his) first conviction. At the time he gave evidence he was in prison. He was brought to the court in charge of a warder in plain clothes. The fact that he was in prison was unknown to the defendants' advisers, and, as the warder was not in uniform, did not become apparent either to them or the judge. It was known to the plaintiff's solicitor and counsel. There is an affidavit by the plaintiff's solicitor that no request or suggestion was made by him or on the plaintiff's behalf that the warder should be in plain clothes. There was a letter from the Prison Commissioners that normally, when producing a prisoner in court, uniform is worn by the escort, but in certain cases discretion has been exercised and the escort has worn civilian clothes.
>
> The first five questions put to Mr. Meikle by Mr. MacDermot, counsel for the plaintiff, were as follows: '(Q) Is your full name Alexander Barthwick Meikle? (A) Yes. (Q) Do you live at 96, Church Road, Stoneygate, Leicester? (A) Yes. (Q) I think you are a qualified engineer? (A) Yes, I am. (Q) After serving in the first world war, I think you became a prison governor for about five years? (A) Yes. (Q) You later entered the employment of Prior Stokers, Limited? (A) Yes.
>
> Mr./

Mr. MacDermot, though he knew that Mr. Meikle had been brought from prison, did not know of the other matters. Mr. Elwes relied particularly on the second question as to where Mr. Meikle lived. Mr. MacDermot told us that this was in Mr. Meikle's proof. No doubt that remained Mr. Meikle's home though he was temporarily in prison. Mr. MacDermott told us that he considered the question whether he ought to inform the court that the witness came from prison. He came to the conclusion that it was not his duty so to do. He relied, I think with force, on the fact that there is no duty to inform the court of previous convictions. On the question whether the court should be aware in all cases that a witness comes from prison, as it is when the escort is in uniform, I desire to express no opinion as it does not seem to me necessary to do so. I can see arguments on both sides. The first question here is whether there was something in the nature of a 'trick', though that is not a term of art and was not defined. Mr. MacDermott was, I think, in a difficult position. Knowing what he did, and having had more time than he had to consider what was the right course, I think that it would have been better if he had omitted to put the questions as to the witness' address and previous position as a prison governor, but I cannot regard what happened in this case as a 'trick'... ..Mr. Elwes' argument.....must be that the court should be more ready to grant a new trial if there has been something in the nature of a 'trick'. I can find no authority for this, and it seems to me wrong in principle. The question whether there should be further litigation must depend on the nature of the evidence and not on the circumstances which prevented its being available.....it is perhaps unnecessary to point out that, if there is a failure by those who owe a duty to the court to carry out that duty, there are steps which can be taken to deal with that matter. For reasons, which I hope I have sufficiently indicated it seems to me, in itself, irrelevant to the question whether there should be a new trial." [160]

It was against this background that Lord Denning invoked the Cicero quote [161]:

"The duty of counsel to his client in a civil case - or in defending an accused person - is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such others as in his descretion he thinks will be most to the advantage of his client. So also, when it comes to his speech, he must put every fair argument which appears to him to help his client towards winning his case. The reason is because he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best /

> best of his ability, without making himself the judge of its correctness, but only of its honesty. Cicero makes the distinction that it is the duty of the judge to pursue the truth, but it is permitted to an advocate to urge what is only the semblance of it.....Tried by these tests, I see nothing improper in the conduct of the case for the plaintiff. There is no duty on counsel to tell the judge that a witness comes from prison to give evidence, any more than there is to tell the judge that he has had previous convictions. It is irrelevant save as to his credit, and no counsel is bound to bring before the judge the discreditable facts in the life of his witness; for they do not mean that he is not to be believed on this occasion. Counsel did indeed ask the witness if he lived at 96, Church Road, Stoneygate, Leicester, to which he answered 'Yes'. If that had been done knowingly to mislead the court, it would be improper. But after hearing Mr. MacDermott I am quite satisfied that it was not done to mislead. The question was only asked so as to give the man's permanent address, without disclosing the discreditable but irrelevant fact that he was at present in prison for a motoring offence." [162]

Singleton L.J., in his dissenting judgment, took a different view:

> ".....In view of these considerations I should have been disposed to direct a new trial, but, as the other members of the Court take a different view, I content myself by expressing regret that a false picture of the witness Meikle was before the judge. It ought not to have been so." [163]

Meek - A chief inspector of police had been sued for damages for assault and false imprisonment. By the time of the trial however, he had been demoted to sergeant. The demotion was not, apparently, connected with the assault charge but with a separate disciplinary offence which, however, appears to have involved the deception of a court. The demotion was known to the defendant's counsel but not to the plaintiff or his counsel or the trial court. The plaintiff lost his case but, upon the demotion coming to light, applied for a new trial. The facts which, for the purposes of analysis, it is again necessary to recount in some detail, appear from the judgment of Holroyd Pearce L.J.:

> "The /

"The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus there was no visible sign of the defendant's altered status He was constantly addressed by his counsel as 'Mr.' and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff's counsel, however, and the judge frequently addressed the defendant, or referred to him, as 'inspector' or 'chief inspector', and nothing was done to disabuse them. The defendant started his evidence with a brief summary of his career up to the time when he was chief inspector at Cannon Row police station, but no reference was made to his reduction in rank. In cross-examination he was asked: 'You are a chief inspector, and you have been in the force, you told us, since 1938? (A) Yes, that is true.' That answer was a lie. Later: '(Q) You realise, as chief inspector, the importance of the note being accurate? (A) The importance of it conveying to me what I want to give in evidence.' He was asked further: 'Let us understand this. You are a chief inspector. How old are you? (A) I am forty-six years of age.' And again: (Q) I am not asking you whether you took part in the inquiries, but whether you as a responsible and senior adult man - never mind about you being a chief inspector - had no anxiety about this case, no concern or interest? (A) No, I can only repeat I have nothing to fear.' The judge referred to the defendant as 'inspector' or 'chief inspector Fleming' many times in his summing-up to the jury. It is clear that he reasonably considered that the defendant's rank and status were relevant on credibility in a case where there was oath against oath, and where there was a question of the defendant's conduct in the course of his duty.....Nor was the defendant's counsel prepared to forgo the advantage to be derived from the status in the police force of his witness in general.... In his opening speech for the defence, counsel stated that the jury had not yet had an opportunity of listening to persons against whom it was at times fashionable to make wild hysterical allegations, but who could not have reached their positions unless they had shown to those who controlled the Metropolitan Police a substantial degree of responsibility. They were not concerned here with some newcomer to the force who had only just finished his course, and was out in the street full of enthusiasm to arrest the first person he could.....

(In Tombling) the failure to reveal was not a premediated line of conduct. Nor was the conviction for a motoring offence so relevant on credibility as the demotion of a chief inspector (who is a party to the case) for an offence which consisted in deceiving a court of law as to the accurate facts relating to an arrest. There is no authority where the facts have been at all similar to those of the present case, but in my judgment the /

the principles on which we should act are clear.

Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scales in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment thus unfairly procured...In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and the jury were mislead on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client....

It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. Suggestio falsi went hand in hand with suppressio veri....." [164]

The concurring judgment of Wilmer L.J. concentrated, in the following passage, on distinguishing Tombling:

"I think that the exceptional nature of the present case becomes clear when regard is had to the features which distinguish it from Tombling v Universal Bulb Co. Ltd. There the application was to adduce further evidence by way of cross-examination of a witness for the plaintiff in respect of matters going to his credit. True, he was an important witness, but failure to disclose his record was only of incidental significance. But here we are concerned with the evidence relating to the character of one of the parties to the suit, and it is a case in which the character of the parties was of peculiarly vital significance, so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis.

Next, the matter sought to be proved against the witness in Tombling's case was his conviction for a wholly irrelevant offence, that is to say, a motoring offence. Here the matter sought to be proved against the defendant was an offence involving not only the deception of a court of law, but also a question of police discipline, a matter which, I should have thought, was of crucial importance having regard to the issues to be determined. Lastly, in Tombling's case what was done was not done knowingly to deceive the court; see per Denning L.J. Had it been done knowingly, Denning L.J. would have regarded it as improper; and it is to be inferred that he would /

would have concurred in the view of Singleton L.J. that a new trial should have been directed.

In the present case there is no doubt that the course taken, which had the effect of deceiving the court, was taken deliberately. Counsel for the defendant has so informed us with complete candour. I accept his assurance that the decision was not taken lightly, but after careful consideration, and in the belief that the course taken was proper in all the circumstances. But for my part I am in no doubt that it was a wrong decision. I would venture to follow the example of Singleton L.J. in Tombling's case in quoting from Lord Macmillan on 'The Ethics of Advocacy'. This is what Lord Macmillan said: 'In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the state and a duty to himself.' It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.....[165]

3.5.4 Analysis of Tombling and Meek

The question to which both these cases were addressed was whether the circumstances in each case were such as to warrant a new trial. They were not concerned *per se* with what may constitute improper conduct by counsel. But in the light of the judgments in each case, it is not always easy to separate these issues. However, in *Tombling*, Somervell L.J. clearly distinguished:

".....if there is a failure by those who owe a duty to the court to carry out that duty, there are steps which can be taken to deal with that matter.....it seems to me, in itself, irrelevant to the question whether there should be a new trial." [166]

Presumably "steps which can be taken" means disciplinary action. However, as we have seen, what mattered, in his view, was "the nature of the evidence" and not "the circumstances which prevente its being available".

The other judges do not so clearly distinguish but, taking their judgments /

judgments as a whole, what seems to emerge as the distinctive feature of improper conduct in this context is, in Lord Denning's words in Tombling, for counsel "knowingly to mislead" the court. Notwithstanding the form of the question put by the plaintiff's counsel to witness Meikle: "Do you live at.....", he did not consider that this was done to mislead, but if it had been done "knowingly" to mislead, it would have been "improper".

This criterion of improper conduct by counsel seems also to be reflected in the judgments in Meek. There, Wilmer L.J. distinguished between the two cases: "....in Tombling's case what was done was not done knowingly to deceive the court", whereas: "In the present case there is no doubt that the course taken, which had the effect of deceiving the court, was taken deliberately." Counsel's decision so to do "involved insufficient regard being paid to the duty owed to the court...".

Likewise, Holroyd Pearce L.J. considered that while, in Tombling, the failure to reveal "was not a premeditated line of conduct", Meek was a case in which "a party deliberately misleads the court in a material matter" and that the advocate's duty to the court had been "unwarrantably subordinated to the duty to the client..."

However, in both cases also, the right of counsel to suppress facts adverse to his client's case was not - per se - challenged, and, indeed, was specifically defended by Lord Denning in Tombling where he says that, while counsel must not knowingly mislead: ".....short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will /

will be most to the advantage of his client". But given that, in both cases, the counsel in question freely admitted that they had deliberately decided to keep the court in ignorance of the facts at issue - namely, in Tombling, that the witness Meikle was in prison and, in Meek, that the defendant had been demoted - the question arises: what was perceived as distinguishing deliberate non-disclosure from "knowingly misleading"?

On this point, the observations of Holroyd Pearce L.J. in Meek are, perhaps, the most revealing:

> "It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. Suggestio falsi went hand in hand with suppressio veri....."

These remarks would seem to suggest that the dividing line between permissible non-disclosure and non-permissible "misleading" is perceived to be the point at which the passive becomes the active - where the "suppressio veri objective of counsel, achieved by a purely passive - albeit, deliberate - omission to reveal, merges into or is allied with a positive contrivance to suggest a falsehood.

In Tombling, it was considered - in the majority view - that this dividing line had not been crossed; in Meek, that it had. In Tombling, the issue of propriety of conduct involved consideration of two factors - the precise form of the question to and answer from the witness Meikle in regard to his place of residence and the fact that his prison escort - contrary, apparently, /

apparently, to normal practice - was in plain clothes. As for the latter factor, the court, it appears, was satisfied that the civilian apparel of the escort had not been contrived by the plaintiff's advisers or by the witness himself in order to deceive. As for the place of residence, notwithstanding the ambiguity of the question "Do you live at.....", this, as has been said, was, in Lord Denning's opinion, merely designed to give the man's permanent address "without disclosing the discreditable but irrelevant fact" that he was in prison. In other words, in the majority view at any rate, counsel had not stepped beyond the permissible bounds of mere non-disclosure by also contriving to suggest a falsehood. The dissenting judge, Singleton L.J., took a different view - regretting that "a false picture of the witness Meikle was before the judge".

In Meek, however, the suggestio falsi element was, in the court's view, all to apparent. The court's reasoning here, it would seem, was that it was not merely a matter of counsel's exercising his right not to reveal something to his client's discredit - namely, the fact of his demotion in police rank - but that he had contrived by various means to suggest - by implication at least - that the defendant retained the rank which he had lost. These means included the fact that the defendant (in plain clothes, unlike the other police witnesses) was addressed by counsel by the ambiguous "Mr."; that, when he entered the witness box, he was not asked his name and rank in the usual manner; that although frequently addressed by opposing counsel and by the judge as "inspector" or "chief inspector", nothing was said to disabuse them; and that his counsel,/

counsel, in his opening speech, sought to derive an advantage from his client's senior rank as former chief inspector.

It may be surmised that each of these factors, taken by itself, might not, perhaps, have been seen as conclusive on the issue of impropriety of conduct. The fact, for example, that the defendant chose to appear in plain clothes could not, in itself, be said to be indicative of deviousness - and, moreover, was not a matter within his counsel'scontrol. The fact that he was addressed as "Mr." was not, it might reasonably be argued, any more suspect in intent than the ambiguous "Do you live at.....?" put by counsel in Tombling; and (on the view that counsel had no duty gratuitously to divulge the fact of his client's demotion), it may even, perhaps, be questioned whether he had a duty to disabuse his opponent and the judge of their assumption that he still held his former rank. Finally, the remarks by defendant's counsel in his opening speech, which Holroyd Pearce L.J. also criticised, referred to all the police witnesses and not only to his client and, in any case, were not, as regards degree of responsibility, necessarily inappropriate even to the lower rank of sergeant.

These considerations may suggest that it may not have been any of these factors, taken individually, but their cumulative effect, that may have been the deciding influence in the court's judgment.

A major difference between the two cases was, of course, the relative materiality of the information of which the lower court had, in each case, been deprived. As was pointed out in /

in the judgments, the fact, in Tombling, that the witness Meikle was in prison for a motoring offence was, in the words of Wilmer L.J. in Meek, "only of incidental significance" to the case, whereas, in Meek the information in question related to the character of the defendant in a case in which the character of the parties "was of peculiarly vital significance". Clearly, the significance to the issue before the court of the non-disclosed information must be a major factor in deciding whether or not the circumstances warrant a new trial. What is not so clear is the extent to which the issue of professional misconduct per se was seen in both cases as being contingent upon this question of materiality.

In Tombling, Lord Denning, although he considered the "discreditable" fact that the witness was in prison to be irrelevant, nevertheless expressed the view that if the particular form in which the question as to his place of residence had been put, had been adopted by counsel in order "knowingly to mislead", then that "would be improper". This seems to be saying that in regard to questions concerning professionaol misconduct in the context of deliberate misleading of the court, the materiality of the matter on which the court has been mislead is itself irrelevant.

On the other hand, in Meek, Holroyd Pearce L.J. linked his criticism of the "suggestio falsi" conduct to situations where "it is a material matter" and Wilmer L.J. considered that because, in that case, the matter in question was of vital significance,/

significance, "failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis." Such remarks might be seen as suggesting that the dividing line between deliberate, but permissible, non-disclosure and deliberate, non-permissible, "misleading" is determined not only by the point at which *suppressio veri* becomes *suggestio falsi*, but also by the materiality of the subject matter.

However, the remarks, in this context, of Lord Denning in *Tombling* and of the judges in *Meek* may not, necessarily, be mutually inconsistent. What would seem to emerge from their remarks is that where counsel goes beyond the exercise of his legitimate right not to reveal information prejudicial to his client and seeks, actively, to *suggest* a falsehood, he acts improperly irrespective of the materiality of the particular falsehood; but in situations where the information in question is of vital significance, even mere failure to disclose *may* - in certain situations such as those in Meek - be perceived by the courts as amounting, *ipso facto*, to misleading. In Meek, it was, perhaps, defendant's counsel's misfortune to be caught up in a situation in which - given the form of the verbal exchanges, not only between him and his client but among all the parties involved, including the judge - it was difficult, if not impossible, however carefully contrived his questions, to exercise his right, in deference to his duty to his client, to avoid disclosure of his client's demotion without also exposing himself to the accusation of misleading the court.

In /

In summary, this exploration of the circumstances and contrasting decisions in these two cases would seem to invite the following conclusions:

(1) Counsel has the right - in civil and (as defence counsel) in criminal cases - to exclude from evidence information which he considers to be prejudicial to his client.

(2) He must not, however, actually contrive, directly or by implication, to suggest a falsehood, that is, "knowingly mislead".

(3) It is professionally improper to so mislead the court irrespective of the materiality of the matter in question.

(4) Where the information in question is of vital significance to the issue before the court, there may arise certain situations in which non-disclosure may be seen as amounting to misleading.

3.5.5 - "Withholding" and "Concealing" - the Moral Issues

In the light of the above analysis of Tombling and Meek, two questions arise and will now be considered.

First, can the judgments in either of these cases be seen to reflect recognition of the alleged ethical distinction, referred to supra [167], between "withholding" and "concealing"? Second, whether or not they can, does the line which appears to have been drawn in these cases between proper and improper professional conduct have any validity in moral terms?

As for the first of these questions, in neither case is there any explicit use of these terms as denoting, respectively, permissible

permissible and non-permissible conduct by counsel. In the judgments as cited, "withholding" is not used at all. "Conceal" is used once - admittedly in a critical context - in the course of the remarks of Holroyd Pearce L.J. regarding the decision of counsel for the defendant in Meek "to conceal the facts" [168]. But this, in itself, is not conclusive as to whether the courts recognised these terms as definitive of the distinction between proper and improper professional conduct. In order to determine whether such a distinction may be inferred from the judgments cited, we must look beyond literal usage and consider the concepts which these terms may be said to convey.

"Withhold" has, of course, other connotations with which we are not here concerned: such as to disallow or restrain. We are here using it in the sense of keeping back or not revealing certain information in communicating with another party. In this context, it may be said that in one sense, in normal usage, the words "withholding" and "concealing" have different shades of meaning - reflecting, respectively, passive and active conduct. But this may be a too simplistic distinction; for the concept of withholding may not be entirely passive, nor that of concealing entirely active. Withholding, for example, does not have the same nuance as, say, a mere failure to mention. This latter expression can normally be said to be wholly passive. It does not, necessarily, have any motivation. It may be occasioned by mere inadvertance, absent mindedness, or a belief that the thing not mentioned is not relevant to the matter in hand. Withholding information, on the other hand, implies /

implies a deliberate decision to keep it back. If I withhold information from someone, it implies that I do so because, for whatever reason, I do not wish that person to have that information. I achieve this objective by silence - but it is a motivated silence. To "conceal", by contrast, may be used to indicate active conduct - inferring not only a desire to keep back information from someone, but an attempt by some active means - suggestion, distortion, even actual lying - to prevent the information from reaching that someone. But the concept of concealing does not, necessarily, have these active connotations: for to remain deliberately silent about something is also to "conceal" it. In this sense, to withhold is also to conceal. The common factor in both is the desire to "hide" or "keep secret".

This conclusion as to the essential identity of these concepts would seem to find support, by implication at least, in the views of Sissela Bok in her book, "Secrets" [169] which, as she says in her Introduction, she wrote as a sequel to her book on "lying" [170] and as a continuation of:

> "the exploration of concrete moral issues begun in my book 'Lying' .....The central theme of the two books - lying and secrecy - intertwine and overlap. Lies are part of the arsenal used to guard and invade secrecy....."

In dealing with the definition of "secrecy", she writes:

> ".....anything can be kept secret so long as it is kept intentionally hidden, set apart in the mind of its keeper as requiring concealment.....To keep a secret from someone, then, is to block information about it or evidence of it from reaching that person.....and to do so intentionally to prevent him from learning it. The word 'secrecy' refers to the resultant concealment....Accordingly, I shall take concealment or hiding, to be the defining trait of secrecy.. ...."[171]

In /

In support of this view, she quotes the definition of secrecy in Dr. Johnson's Dictionary as including "something studiously hidden" [172]

It would seem to follow, therefore, that since, to deliberately withhold information is to hide it - and, indeed, to "studiously' hide it - it must, in Bok's view, be the same as intentional concealment - the common element in both being the desire to "keep secret".

Bok also, it may be noted, includes silence - the definitive feature of "withholding" - as one of the aspects of secrecy and also, therefore, of intentional "concealment" [173].

On this view, the concepts of withholding and concealing would not seem to be appropriate for describing the criteria of permissible and non-permissible professioal conduct as reflected in the judgments in Meek and Tombling. The more accurate distinction would appear to be between passive and active conduct - or, in terms of the expressions used by Holroyd Pearce L.J. in Meek, between suppressio veri alone and suppressio veri allied to suggestio (or, more reprehensibly, expressio) falsi. Put another way, it may be said that, in the law's perception of honourable professional conduct in this context, what matters is not the suppression of truth per se, but the means adopted to achieve it.

The Moral Issue - However, the distinction between permissible and non-permissible conduct by counsel, in whatever way it may be defined precisely in legal terms, invites the question posed supra [174]: is it sensible and desirable to distinguish betwee active /

active and passive conduct if both result in the court getting a false impression? Can a line be drawn - in moral terms - between suppressio veri and suggestio or expressio falsi? Can the latter be described as deliberately misleading while the former cannot? If an advocate wishes to keep a court in ignorance of a fact which is relevant - and, possibly, crucial - to the cause which it is trying, does it matter morally whether this is achieved by mere silence or by some active means - even a lie?

In the light of our discussion regarding the general concept of deception, the answer would appear to be that it does not matter; that all that does matter is the intent to deceive - to make someone (in this context, the court) believe what the advocate himself knows not to be true; and that, therefore, the particular form which the deception may take is irrelevant in moral terms.

But if this view is taken, it would seem to put such as Lord Denning in a difficulty for while, as has already been said, he claims that the advocate's highest allegiance is to the "cause of truth and justice" [175], he also concedes, as we have seen in Tombling, the advocate's right to put in or omit evidence according to his perception of his client's advantage - a right which, in the same sentence, he distinguishes from knowingly misleading. It may be argued in Lord Denning's defence that later in the same passage he makes the point that what the plaintiff's counsel in Tombling did not disclose was, in any event, irrelevant. But, in moral principle, that point in itself would also seem to be irrelevant for, as we have discussed, /

discussed, what matters in deception is the intent and perception of the deceiver. The court may have considered the non-disclosed fact irrelevant, but if the advocate himself had also so considered it, would he have been at pains to withhold it?

By an interesting coincidence, a similar point which seems to run counter to Lord Denning's reasoning on this issue was made by Holroyd Pearce L.J. in Meek. In that case, it was, apparently argued by counsel for the defendant that the concealment of the fact of his client's demotion in police rank did not have any "substantial result" because the greater part of the defence depended on other witnesses than the defendant. This reasoning was repudiated by the judge:

> ".....since the defendant and his advisers thought fit to take so serious a step, they must, in the light of their own intimate knowledge of their case, have regarded the concealment as being of overwhelming importance to their success....." [176]

But this argument admits of at least one qualification which can, perhaps, more validly be cited in Lord Denning's defence. There may be some situations in which an advocate may decide to withhold a fact from the court, not because he believes that it is relevant to his client's case but because, notwithstanding its irrelevance, he thinks it may, nevertheless, prejudice a judge or jury against his client - and Tombling may well be a case in point.

However, such an argument for moral justification for non-disclosure would apply only in the particular situation cited and /

and does not invalidate the conclusion to which our discussion seems to point: that the distinction which, in circumstances such as those of Tombling and Meek, the law appears to draw between permissible and non-permissible conduct by counsel - a distinction motivated, presumably, by considerations of justice and ethical propriety - is difficult to reconcile with basic moral principle.

This may be seen as indicative of the ethical inconsistencies of the adversarial system. For reasons which have earlier been mentioned, and will later be developed, such inconsistencies are not necessarily to be taken as condemning the system but they do give rise to the intrinsic difficulties of the ethical issues we have been discussing and with which judges have to grapple in attempting to determine and justify the limits of permissible conduct by advocates.

These difficulties - not only for judges but more so, probably, for advocates - are not made easier by imposing upon the advocate a paramount duty to "truth and justice" while, at the same time, conceding his right in pursuit of his duty to do his best for his client, to urge, not the truth, but only the "semblance" of it [177].

3.5.6 - Summary

In the light of this discussion of the subject of non-disclosure of fact, the following main points would seem to emerge:

(1) In terms of professional ethics, the law, in situations such as those in Tombling and Meek, recognises a distinction between passive and active conduct by counsel /

counsel - between the withholding of truth which is seen as generally permissible in the interests of the client, and suggesting or expressing a known falsehood which is seen as a deliberate misleading of the court and, therefore, not permissible.

(2) Such a distinction seems difficult to reconcile with basic moral principle because both types of conduct have the same end - deception - and only differ as to means.

(3) The resultant inconsistency between perceived professional standards of ethical conduct and moral principle is indicative of the ethical tensions in the adversarial system and gives rise to problems such as those encountered by judges and advocates in the cases of Tombling and Meek.

3.6 - Cross-Examination Tactics

3.6.1 - Nature and Purpose

Notwithstanding the strictures expressed against "suggestio falsi" in Meek, active concealment of known truth and false suggestion can take many forms which may be seen as acceptable - or, at any rate, frequently employed - tactics in advocacy within the adversarial system. Pre-eminent among such tactics are the techniques of cross-examination.

Jerome Frank, in the course of his criticism of what he perceived as the abuses of the adversarial system, remarked on the tendency of some of those who indulge in "deplorable excessive praise" of the courts to quote Cicero - that "fascinating Roman" who "kept his noble principles in one pocket and his actual lawyer's practices in another" [178]. This comment on Cicero may find support in one of his observations: "When you have no basis for an argument, abuse the plaintiff" [179]. To some, this cynical exhortation may seem offensive. To others - and not only lawyers' critics - it may be accepted as a not too unreasonable summing-up of some aspects of the normal strategy and techniques of cross-examination.

The term "cross-examination" is the name given to that stage in a trial process when an advocate is afforded and takes the opportunity to challenge the testimony of a witness who has given evidence for the other side. On the assumption that the pre-eminent objective of the adversarial trial process is, indeed, to elicit truth, the purpose and tactics of cross-examination would /

would seem clear enough: to elicit from the witness facts which counsel or his client may believe that the witness, in his main examination, has, either deliberately or otherwise, omitted, evaded, misrepresented or distorted - and, perhaps, to bring out new facts which were not put to the witness in his main examination but which, in the cross-examiner's perception, are relevant to the case. Such, one would suppose, would be the purpose, at any rate, of a non-partisan inquisitor such as a judge.

But, as has been said, in the adversarial process, the function of eliciting evidence is not that of the judge but of the contending advocates whose objective is to win the verdict of the judge or jury. Their professional function; indeed, their professional obligation, is to do so - not by all means, fair or foul - but by the exercise of their forensic skills and interrogation techniques in a manner according with the rules of evidence and procedure and within the limits of permissible ethical conduct so far as such can be ascertained from the pronouncements of professional bodies and other authorities.

It is the purpose of this part of our inquiry to discuss these limits, their adequacy as useful guides, the extent to which they may or may not be observed in practice - and the extent to which professional precept and practice may be judged to be in accord with ethical principle.

3.6.2 - Criticism of Cross-Examination Techniques

Whatever the ethical guidelines and to whatever extent they may or may /

may not be observed, it is probably true that there are few features of the advocate's function which attract greater hostility and cynicism than his perceived treatment of adverse witnesses. In this context, the image of the lawyer in the eyes of many may not be all that far removed from that of Dickens' Sergeant Buzfuz in "Pickwick Papers". Another novelist, Trollope, as quoted by Frank, is more directly scathing:

> "One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harassed; but this is not the fact; to turn a witness to good account, he must be badgered this way and that till he is nearly mad; he must be made a laughing-stock for the court; his very truths must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manner of villainy, threatened with all manner of punishment; he must be made to feel that he has no friend near him, that the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. What will fall from his lips when in this wretched collapse must be of special value, for the best talents of practised forensic heroes are daily used to bring it about; and no member of the Humane Society interferes to protect the wretch. Some sorts of torture are, as it were, tacitly allowed even among humane people. Eels are skinned alive, and witnesses are sacrificed, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty." [180]

While conceding that Trollope's strictures are somewhat "overdrawn" Frank himself expresses candid criticism of cross-examination tactics [181]. It will be recalled from our earlier discussion that he did not attack the principle of the adversarial system as such but considered that we had allowed the "fighting" spirit in that system to become excessive. The most obvious example of this, he writes, is in the handling of witnesses:

> "Suppose a trial were fundamentally a truth-inquiry. Then, recognising the inherent fallibilities of witnesses, we would do all we could to remove the causes of their errors when testifying. Recognising also the importance of witnesses' demeanour as clues to their reliability, we would do our best to /

to make sure that they testify in circumstances most conducive to a revealing observation of that demeanour by the trial judge or jury. In our contentious trial practice, we do almost the exact opposite." [181]

Frank, as a widely experienced senior judge, was, of course, well acquainted with the wiles and strategems of court lawyers but what he forcefully brings out is not only the dubious and aggressive tactics often employed to intimidate and confuse witnesses but the fact that such tactics, far from being condemned, are often encouraged and, indeed, advocated, by those regarded as reputable textbook authors:

"What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of strategems to minimise the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book 'Hints on the Trial of a Law-suit' (a book endorsed by the great Wigmore), in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness'. The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury....." [182]

It will be noted that in this passage Frank refers to the "honest adverse" witness. The situation which arises when a lawyer knows that the witness he is cross-examining is telling the truth raises particular issues which will later be dealt with, but, for the moment, we are dealing with aggressive cross-examination as such.

Frank /

Frank proceeds to give specific examples of strategems which are designed, not to elicit, but to conceal the truth - stratagems recommended by textbook writers and with which any observer of trial proceedings will be familiar: as, for example, cutting short an adverse witness in order to deny him the opportunity of explaining an apparent inconsistency:

> "'When', writes Tracy, counseling trial lawyers, in a much praised book, 'by your cross-examination, you have caught the witness in an inconsistency, the next question that will immediately come to your lips is, Now, let's hear you explain,... ..Don't ask it, for he may explain and, if he does, your point will have been lost....' Tracy adds, 'Be careful in your questions on cross-examination not to open a door that you have every reason to wish kept closed'. That is, don't let in any reliable evidence, hurtful to your side, which would help the trial court to arrive at the truth." [183]

He also quotes Sir William Eggleston:

> "The most painful thing for an experienced practitioner.....is to hear a junior counsel laboriously bring out in cross-examination of a witness all the truth which the counsel who called him could not bring out and which it was the junior's duty as an advocate to conceal." [184]

Frank concludes this section of his book as follows:

> "These, and other like techniques, you will find unashamedly described in the many manuals on trial tactics written by and for eminently reputable trial lawyers. The purpose of these tactics - often effective - is to prevent the trial judge or jury from correctly evaluating the trustworthiness of witnesses and to shut out evidence the trial court ought to receive in order to approximate the truth.
>
> In short, the lawyer aims at victory, at winning the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation."[185

3.6.3 - The Orthodox Professional Attitude

Frank's severe criticism of the nature and purpose of cross-examination, /

examination, as commonly practised, will doubtless be approved by many outwith the legal profession. His views may also, indeed, be shared, privately at least, by many within the profession. Given, however, that they would appear to reject the whole concept of such a major feature of the adversarial system, they are unlikely, in their more extreme form at any rate, to be favourably received by more conventional professional opinion. We must here consider, however, how professional orthodoxy itself views cross-examination; what is the perspective of professional organisations, the courts, or other authoritative bodies?

As for professional organisations, it may be observed that although Frank cites the views of "eminently reputable" trial lawyers, he does not refer to any guidance on the subject by any such organisations. This, perhaps, is not surprising for, notwithstanding the central importance to the adversarial system of the cross-examination process and the criticism and hostility which it frequently attracts, one has to look hard for any advice in professional edicts or guides in regard to its use or abuse.

On the question of intimation of witnesses, it would appear that, in America, evidence rules place an obligation on trial judges to protect witnesses against harassment or undue embarrassment [18(

Within the United Kingdom, the English Bar Code, as we have noted [187], contains a provision against insulting witnesses and the Scottish Advocates' Guide provides:

> "In the examination of witnesses, and particularly in the cross-examination of hostile witnesses, an advocate must remember that the law places him in a privileged position which he should not abuse - for example, by bullying or insulting behaviour or by making offensive or personal remarks." [188]

However, /

However, apart from these two references, the professional codes, within the United Kingdom at any rate, appear to be generally silent about the ethics of cross-examination tactics; in particular, there does not appear to be any positive advice as to the importance of putting timid or frightened witnesses at their ease in order to facilitate coherent testimony.

In defence of the advocate, it is probably true that intimidation or bullying of witnesses - at least in anything like the extreme form depicted by Trollope - is, in the United Kingdom at any rate, probably the exception rather than the rule. Apart from the offensiveness of such conduct, the astute cross-examiner may often find it less effective than the polite, low-key, or even ostensibly flattering approach. It may also be added that, faced with a perverse, evasive, and, in the cross-examiner's perception, untruthful witness, a measure of intimidation may, on occasion, be justified.

On the hypothesis that the purpose of examination and cross-examination is, in theory at least, to elicit truthful testimony, of even greater significance, perhaps, is the apparent absence of professional guide-lines on the ethics of those tactics, criticised by Frank, which seem clearly designed to frustrate it. Some clues, however, as to the attitude of professional authorities to some of these tactics may be found in other sources. While the sources here cited refer to the situation in Scotland, the attitudes they reflect may probably be taken as indicative of the general official approach in adversarial countries.

In 1978 the Scottish Law Commission requested Sheriff I.D. MacPhail

to /

to write a research paper with a view to consideration by the Commission of possible changes to the law of evidence in Scotland. In 1987 Sheriff MacPhail published a revised version of his Paper which incorporated the actual changes made to the law following the publication of his original Paper by the Commission in 1979 - and the Sheriff's comments thereon. Of particular interest for our purposes is the section in the Revised Paper headed: "Where Apparent Inconsistency in Witness's Evidence". In his original Paper Sheriff MacPhail had quoted from Professor Walker:

> "Opinions have differed as to the proper course for the cross-examiner when there is an apparent inconsistency in the evidence of the witness. Is he entitled to leave the inconsistency and found on it, or must he give the witness an opportunity to explain it?"

He then added his own comment: "A rule to the effect that he must do the latter may be helpful."

In his Revised Paper he gives the result of the Commission's consideration of his suggestion:

> "The Commission considered that the cross-examiner should be able to do either at his option, but that there should be no fixed rule; and observed that that seemed to be in accord with present practice. (memo No. 46, para G20)" [189]

Sheriff MacPhail makes no comment on this rejection of what would seem to have been a helpful suggestion and a useful contribution to truth-finding - if, indeed, that is the perceived objective of cross-examination. The Commission's observation that "that seemed to accord with present practice" is puzzling if intended as a reason for the rejection. It was, presumably, because present practice observed no fixed rule, and the Sheriff thought there should be a rule, that he made the suggestion.

Of /

Of interest also, in affording an insight as to the attitude of the legal establishment towards these issues, is the section of the Sheriff's Paper headed "Final General Question". Frank, in his discourse on cross-examination, notes the comments of a judge to the effect that:

"....the want of questions (to a witness in cross-examination)... ...calculated to excite those recollections which might clear up every difficulty.....may give rise to important errors and omissions." [190]

Sheriff MacPhail raises a similar point:

"The Commission of Justice which produced the Report entitled 'False Witness' [191] considered the question 'whether at the conclusion of every witness's evidence, the judge or magistrate should formally ask him whether he had any further information which he thought might help the court. At that stage the witness would have a better idea of what was relevant and would be more able to say what he wanted to say without interruption. He would be asked whether he wished to correct, explain or add anything to what he had already said.' The Committee rejected the idea, expressing the view that it was 'impracticable' and that to 'invite a witness to say something without specifying the exact nature of the information required would be to invite the irrelevant and inadmissable.' "

The Sheriff adds the following comments:

"The proposal that a witness should be so interrogated raises the important question whether the adversary system has the effect of producing for the court's consideration all the relevant evidence which is within the witness' knowledge. In theory, all such evidence is elicited by means of thorough pre-trial preparation, and by examination and cross-examination in court. But in practice, it may be argued, advocates may be inadequately briefed and badly prepared and litigants and accused persons may be unrepresented; if a witness, having been badly or incompletely examined, could be interrogated in the manner proposed, he would be able to assist the court and to perform his duty to the best of his ability as he saw it.. .." [192]

Again, the reasons advanced for the rejection of this suggestion seem to lack conviction. It would not, one would have thought, be beyond the wit of the judge, before putting the final question, to /

to guide and warn the witness on the matter of relevancy and admissibility. But, in any event, in view of the obvious advantages of the course suggested - to the court, at any rate - would the risk not be worth taking?

Some comment may also be appropriate on the additional reasons advanced by Sheriff MacPhail for the suggestion, namely, that a witness may have been "badly or incompletely examined" due to the fact that the advocate may have been "inadequately briefed and badly prepared". In some cases, no doubt, this may be true; but, in the light of our discussion as to the tactics often employed by cross-examiners to suppress rather than elicit inconvenient truthful testimony, the reasons so advanced omit, and may possibly be said to discreetly cloak, more cogent reasons: that, far from being badly prepared, the cross-examiner might have been very well prepared and exercised his partisan adversarial skills accordingly.

Both in regard to this point and the proposal that a witness should be given the right to explain an apparent inconsistency, it would seem difficult to resist the inference that the real reason for rejection is the Sheriff's comment regarding the "final general question" suggestion, namely, that this proposal would be considered as "an anomolous infringement of the adversarial principle" [193].

In this context, he quotes a passage from the case Thomson v Glasgow Corporation in which Lord Justice-Clerk Thomson makes the point that the judge, in our trial system:

> ".....is at the mercy of contending sides whose whole object is not to discover the truth but to get his judgment.....a litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's /

> judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points." [194]

Specifically, as regards cross-examination, this realistic approach seems consistent with another quote by Sheriff MacPhail from Lord Avonside in a more recent case:

> ".....cross-examination is just what it means. It consists in questioning an adverse witness in an effort to break down his evidence, to weaken or prejudice his evidence, or to elicit statements damaging to him and aiding the case of the cross-examiner." [195]

The context in which Lord Avonside made these remarks was an appeal against conviction for murder on the ground that the trial judge had improperly admitted evidence of a confession which had been improperly obtained by the police who had, inter alia, subjected the accused to "prolonged cross-examination". The defence founded on dicta by Lord Cooper in Chalmers v H.M. Advocate to the effect that a confession obtained by "what amounts to cross-examination" by police of a suspect would be inadmissible. The Court rejected the appeal and took the view that the interrogation to which the accused was subjected by the police did not amount to "cross-examination". It was therefore Lord Avonside's purpose in making these remarks, to distinguish between such interrogation by the police and the process of cross-examination in court. In so doing, he tended, perhaps, to concentrate upon the harsher features of court cross-examinatic Nevertheless, the remarks are reproduced by Sheriff MacPhail, without comment, and under the heading "Nature of Cross-examination" - and apparently therefore, as an authoritative definition of cross-examination and its purpose. As such, it may be /

be seen as a candid illustration of the adversarial-minded approach which is consistent with the equally candid remarks of Lord Thomson. There is no mention here of the elicitation of truth; only the elicitation of "statements damaging to him (the witness) and aiding the case of the cross-examiner". All that matters, apparently, is that the witness is "adverse"; therefore, his evidence must be broken down, weakened or prejudiced. Whether he is perceived as honest or dishonest, or whether his testimony is accurate or inaccurate is, it would seem, irrelevant.

3.6.4 - Discrediting True Testimony

These comments upon what appears to be the conventional, professional, approach to cross-examination invite the question: what is the perceived position of the cross-examining advocate when the witness is known by the advocate to be honest and his testimony known to be accurate?

It will be recalled that Frank's strictures against certain cross-examination tactics and those who use and recommend them, included situations "when the lawyer has no doubts of the accuracy and honesty" of the witness's testimony. [196] As has been said, this situation gives rise to particular problems and here some professional bodies have something to say.

The American Bar Association (in the 1974 edition of its "Standards") specifically addressed this question:

> "A lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances but may affect the method and scope of cross-examination. He should not misuse the power of cross-examinatio or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."[197]

The /

The British Bar Codes do not appear to address the question so directly but they do deal with a similar situation - the cross-examination of prosecution witnesses in cases where an accused has admitted his factual guilt to his counsel. Thus, the English Bar Code, after proscribing, in such situations, the setting up by defence counsel of an "affirmative" case, states:

> "A more difficult question is within what limits, in the case supposed, may an advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go." [198]

Dealing with the same situations - confessions of factual guilt - the Scottish Advocates' Guide says that, while the defence advocate "may not put to the witness any question suggesting, or tending to suggest, that the accused did not commit the act... ...", he may "test the evidence for the prosecution by cross-examination". [199]

The wider implications of confession of guilt situations are later discussed [200], but, on the specific question of cross-examination ethics, it may here be said that such pronouncements, while no doubt genuine attempts to deal with a difficult and delicate subject, hint at an equivocation andambivalence which seem to be characteristic of some professional rulings on the matter of ethics in advocacy. They leave scope for doubt. In view of the fact that the American statement, for example, explicitly excludes attempts to discredit a truthful witness, one /

one may wonder what, precisely, is meant by "appropriate cross-examination" which it does not exclude in every circumstance. If this latter phrase is merely intended to mean any attack on those parts of the testimony which are not known to be true, it would seem reasonable to assume that it would have said so. The implication, therefore, may be that it may mean something else; what that something else may be, the advocate is left to interpret for himself.

Similarly, in the English and Scottish Bar statements, one is left to ponder the implications of the advocate's right to "test" the evidence. While not explicitly stated, the context in which, in both rulings, the word "test" is used, seems to invite the implication that the prosecution evidence which the advocate is entitled to test is evidence which, by reason of his client's confession of factual guilt, he knows to be true. If so, "testing" would seem to be superfluous.

Another source of advice on this question seems commendably unequivocal. A Scottish book on ethics for solicitors states simply:

> "Do not suggest to a witness in cross-examination that he is lying, if you know from your own client that the witness is telling the truth" [201]

While refreshingly direct, the scope of this exhortation is, perhaps, somewhat narrow - at least, if interpreted in the letter rather than, (as is no doubt, intended), in the spirit. There are clearly other ways of discrediting true testimony than suggesting directly to the witness that he is lying. An Advocate, for example, although knowing that what a witness says he /

he saw or heard is correct, might attempt to cast doubt, not on his honesty, but on the soundness of his sight or hearing. He may also play on the witness' personality weaknesses. Frank, for example, quotes the American lawyer, Henry Taft:

> ".....a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him hang himself' "[202]

Or make the witness out to be a rogue; again Trollope, as quoted by Frank:

> "Nothing would flurry this (the witness he was cross-examining), force her to utter a word of which she herself did not know the meaning. The more he might persevere in such an attempt, the more dogged and steady she would become. He therefore soon gave that up.....and resolved that, as he could not shake her, he would shake the confidence the jury might place in her. He could not make a fool of her, and therefore he would make her out a rogue.....As for himself, he knew well enough that she had spoken nothing but the truth. But he.....so managed that the truth might be made to look like falsehood, - or at any rate to have a doubtful air." [203]

In summary on this issue, it may perhaps be said that the cautious and somewhat uncertain tone of some of the official professional precepts are indicative of the ethical tensions within the adversarial system - in this case, the tension between an acknowledgment of the ethical unacceptability of deliberately discrediting testimony known to be true, and recognition of the reality, in practice, of the adversarial approach: that the primary purpose of cross-examination is to break down or cast doubt upon testimony, any testimony, which is adverse to the interests of the cross-examiner's case.

3.6.5 - Cross-Examination and Confidentiality

The issue we have been discussing - the discrediting, in cross-examination, /

examination, of a witness known to the cross-examiner to be both honest and accurate - may, in certain situations, involve, in a particularly acute way, a conflict between the advocate's duty to honour the confidences of his client and his duty to the court and to truth.

The moral implications of professional confidentiality in regard to the general question of lying and deception have already been discussed; here we are concerned with the specific problems which it poses in relation to discrediting truthful testimony.

All professional manuals on legal ethics emphasise the duty upon a lawyer to hold in strictest confidence, information confided to him by his client. Specifically, in a court situation, the advocate, as we have also discussed, has not only the right, but is under a professional obligation, not to disclose to the court information prejudicial to his client. But in the context of the ethics of discrediting true testimony, this obligation poses the question: does it exclude only positive or explicit disclosure of such confidential information or does it oblige the advocate to eschew any conduct based upon it which would prejudice the client? For example, would an advocate be betraying his obligation of confidentiality if he refuses to challenge true testimony when he knows it to be true only because of information disclosed to him by his client?

In his discussion of this issue [204], Freedman's answer, at any rate, would seem to be in the affirmative - particularly in a situation where the advocate knows, or sincerely believes, his client to be innocent and where the testimony in question, although accurate, /

accurate, is circumstantial and likely to result in an unjust outcome. He believes that failure by defence counsel in such circumstances to challenge damaging testimony, however, true, would undermine the whole basis of lawyer-client confidentiality which is essential for an effective defence of accused persons under our adversarial system.

Freedman, however, acknowledges the distressing implications of this view if applied generally and rigorously. He cites, by way of example, a rape case where the accused has confided his actual guilt but insists upon a defence which involves attacking the true testimony and character of the innocent victim. In such situations, he expresses the "strong personal view" that a lawyer should be able to decline to accept the defence brief on grounds of conscience. It is to be noted, however, that his defence of the advocate's right, even in such circumstances, to attack the true testimony is based upon the confidentiality principle alone and not on the alleged right, (here quoting Chief Justice Burger) of defence counsel to use "all the legitimate tools available to test the truth of the prosecution's case". Indeed, he strongly attacks what he considers to be the legal establishment view that:

> "Cross-examination.....is good, and therefore any lawyer, under any circumstances and regardless of the consequences, can properly impeach a witness through cross-examination....."[205]

Nevertheless, this disclaimer notwithstanding, it is difficult to accept that the privilege of confidentiality, however, sacred in the professional perception, can justify conduct such as that envisaged in the rape case example or in similar situations. As

we /

we concluded in our discussion of confidentiality as a justification for lying, this privilege must have its limits, and it is likely that most advocates, in the circumstances hypothesized, would consider those limits to have been reached.

While Freedman's views on this - and, indeed, on other ethical issues - can probably not be regarded as typical of the approach of most legal commentators and would also seem, ostensibly at any rate, to be in conflict with the general tenor of the professional guidelines quoted, they may be said to reflect an uncertainty about, and bring into open debate, problems which the professional guidelines fail to confront and which their guarded precepts do little to resolve.

3.6.6 - Conclusions on Cross-Examination

In regard to cross-examination in general, and its perceived relationship to truth-finding, it would be wrong to overstate the critical arguments. It is doubtless true that in many cases cross-examining counsel do genuinely try to elicit truth, as the cross-examiner perceives it, from a hostile witness; also, as has been said, when such a witness is not only adverse, but perverse and untruthful, a measure of aggression and even of intimidation may well be justified in the interests of truth.

However, in the light of our discussion, it would seem difficult to challenge the perception that cross-examiners generally pursue truth only when it suits their clients' interests so to do; that what they only pursue are statements or admissions, whether or not true, which suit those interests; and that truth, when adverse /

adverse to those interests, is a legitimate target for challenge. Moreover, such a perception would seem, in the light of what has been said, to be supported by some eminent authorities.

Summary - The main conclusions which would seem to emerge from this discussion may be summarised as follows:

(1) If the primary purpose of the adversarial trial process is to find out the truth, the purpose of cross-examination should be to elicit the truth - as the cross-examiner honestly perceives it - from the witness.

(2) In practice, cross-examination is, in the main, perceived and used as a device - sometimes an intimidatory device - to advance the cross-examiner's case by "breaking down", ridiculing or otherwise weakening an adverse witness' testimony - irrespective of its (known) accuracy.

(3) This "adversarial" view of the purpose of cross-examination is often encouraged by textbook writers. To some extent at least, it also seems to be reflected in the attitude of the legal establishment, some of the guidelines of which - on the question of discrediting true testimony - seem equivocal and inadequate.

3.7 - Perjury

3.7.1 - The Judicial Oath

Historically, perjury is the wilful utterance of false evidence while on oath. When a witness in judicial proceedings takes the oath he is making a solemn appeal to God in witness of the truth of the evidence he is about to give. To proceed in such a situation to give knowingly false evidence is, in religious and moral terms, a serious form of blasphemy. For this reason, perjury has been traditionally regarded as "more abhorred than other lying" [206]. This tradition of abhorrence is reflected in the ancient strictures against perjury: by the law of Moses, "if a false witness rise up against any man.....then shall ye do unto him as he had thought to have done unto his brother" [207]. The second century Roman writer, Auius Gellius, mentions in his writings that persons who had been found guilty of perjury were thrown from the Tarpeian Rock [208].

Although, in modern times, witnesses who, for religious or other reasons, do not wish to invoke the name of God, are permitted to make a form ofsolemn affirmation of truth in lieu of the traditional oath, they are still guilty of perjury should they proceed to give knowingly false evidence and the moral taboo against perjury retains its religious associations and origins. This taboo, however, was, in earlier times, based not only on moral repugnance but also on the fear of divine wrath and, for that reason, was probably a more effective means of achieving truthful testimony than it is to-day. Frank considered /

considered the juristic oath to be a late form of the primitive "ordeal". As used in primitive times, it was:

> ".....a self-curse, conditionally made. The oath-taker says in effect, 'If I do not tell the truth, may destruction or torments be visited upon me'. The oath is an ordeal in words instead of acts. Super-natural power vouches or refuses to vouch for the oath-taker...."[209]

Since, on the strength of the oath, it was considered that the Deity would vouch - or refuse to vouch - for the truthfulness of the witness, it followed that the swearing of the oath was, per se, evidence of the truthfulness of the testimony:

> "For it was presumed that no man, having taken an oath, would dare swear falsely and thus risk supernatural vengeance...."[210

To what extent, in this more sceptical age, considerations of moral repugnance or fear of divine wrath may be instrumental in promoting truthful testimony is a matter of conjecture. That it should be so, would at any rate appear to be the law's expectatio In the words of Lord Justice-General McNeil in 1863:

> "The obligation on a witness to tell the truth, the whole truth and nothing but the truth is an obligation imposed by the law irrespective of any oath. The administering of an oath is a means resorted to by the law to insure the fulfilment of the obligation to speak the truth, the whole truth, and nothing but the truth."[211]

We may question whether, even in the apparently more religious conscious climate of 1863, the swearing of a judicial oath was, in itself, sufficient to "insure" that a witness would speak the truth; though as a means of discouraging perjury, it was possibl more effective then than in the probably less God-fearing society of today. Nevertheless, it may be true that even today there ar many - and not only those who subscribe to a particular system of faith or worship - for whom the invocation of "Almighty God" as a witness to their honesty, has a reverential and, indeed, awesome significance which may be a more effective incentive to telling the /

the truth than a mere "declaration" - however "solemnly" expressed Sheriff MacPhail, in discussing, in a Scottish context, the arguments for and against replacing the oath with a "form of declaration", seems to support this view:

> "Depressing though it is to hear the oath so frequently dishonoured especially in criminal cases, it may well be that there are still many witnesses in the Scottish courts to whom the oath, administered with deliberation by the judge, serves to bring home most strongly the solemnity of their obligation to tell the truth and to give their evidence with care." [212]

It may be noted here that the Sheriff's reference to the depressing fact of the frequent dishonouring of the oath is relevant to the discussion, infra, regarding the effect upon its truth-vouching value of the practice of allowing accused persons to testify on their own behalf.

3.7.2 - The Professional Proscription of Perjury

Morals apart, perjury is a flagrant perversion of justice - or, at any rate, is perceived intrinsically as such by all orthodox legal opinion - and is therefore a serious criminal offence; as is also the aiding or abetting of perjury by another.

It follows that neither the law nor the canons of conduct of legal professional bodies can countenance any justification either for perjury by a witness or for the wilful procurement of it by a lawyer in any circumstances. In this context, the terms of the English Bar Code may be taken as generally representative of the view of all professional bodies in adversarial countries. In dealing with the situation in which an accused person has confesse factual guilt to his lawyer, it states:

"....An /

"....An advocate may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud." And it would be absolutely wrong for him to "....call any evidence which he must know to be false....."[213]

However, in this - as in other issues pertaining to legal ethics - the question arises: to what extent are such unequivocal proscriptions reflected in either the views or actual practice of court lawyers? In the opinion of some legal writers at least, these high-principled exhortations against perjury are far from being unanimously accepted by practising lawyers. Thus Hazard:

"An advocate has a duty not to present false evidence, but he also has a duty not to conduct himself so as to prejudice his client. In civil cases, it is generally accepted that the advocate should never present false evidence and that he has a duty to see that his client produces evidence legitimately demanded by the other side, even if the evidence is very damaging. In criminal cases, it is recognised that the prosecutor has a duty as minister of justice to prevent the use of fabricated evidence against an accused. The unsettled question is whether a lawyer defending a criminal may properly put his client on the stand even when satisfied that the testimony will be perjured. The rules as they stand clearly prohibit the lawyer from doing so. However, most criminal defence lawyers feel this is wrong and many of them actually believe the rule is otherwise; they think the advocate's duty to his client implies that in a criminal case he should conduct the defendant in his testimony even when counsel knows the defendant is lying." [214]

Hazard was, of course, writing primarily in an American context, but it may be questioned whether there is any reason to suppose that the views he attributes to American criminal defence lawyers are not also held, to some degree at least, by their counterparts in other adversarial countries.

In relation to the passage quoted, Hazard includes, as one of his sources, a review of Monroe Freedman's "Lawyers' Ethics in an Adversary System" In one respect, however, they appear to differ. Hazard distinguishes between civil cases, where he seems to /

to consider the unequivocal proscription of perjury to be non-controversial within the legal profession as a whole, and criminal cases where - as regards the defence function - the question is "unsettled". However, while, as will be discussed, it is true that the main doubts and difficulties in this context arise in criminal proceedings, Freedman believes that most lawyers - even in civil cases - would have little hesitation in certain circumstances in encouraging, and even actually assisting perjury by their clients [215]

With regard to this particular observation of Freedman, it may be appropriate to note here that this may be seen as typical of his candid approach to many of the difficult and delicate issues involved in the ethics of advocacy. Although he may be regarded as unorthodox by more conventional authorities, as a Dean and Professor of Law, and one often cited by others, his views, even if one may not always agree with him, must command respect. For this reason and because of his willingness to confront problems which the more cautious tend to evade, he is frequently cited in this inquiry.

On the particular issue here discussed, it may also be observed that Freedman's views, however, unorthodox in the conventional establishment perception, appear to have strong support at practitioner level in America. Wolfram, for example, notes that the Association of Trial Lawyers of America, in the course of a "frontal assault" on the provisions of The American Bar Association's "Draft Model Rules of Professional Conduct" (issued in 1980), demanded recognition of a lawyer's right to "participate in presenting a client's perjured testimony in both civil /

civil and criminal trials if necessary to avoid impairing a client confidence". [216]

3.7.3 - Encouraging Perjury

Another example of Freedman's approach - and of his willingness to admit error - is his discussion of potential perjurious situations in which lawyers may become involved when advising clients.

While, by definition, the crime of perjury can only be committed during the course of judicial proceedings, situations in which perjury may be procured or encouraged by a lawyer may arise at an earlier stage. A lawyer, when advising a client may - unwittingly or otherwise - put the idea of perjury into his mind. Freedman poses the problem thus [217]: a lawyer is asked for advice by a client charged with a capital offence and says:

"If the facts are as you have stated them, you have no legal defence and you will probably be electrocuted. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over and we will talk about it to-morrow....."

We may assume from this example that the lawyer has been apprised by the client of facts which indicate a premeditated crime. The question arising can be stated thus: how far may a lawyer legitimately go in advising as to the law when, from the information given by his client, such advice may encourage or suggest perjury by the client?

In this context, it is, as will be seen, important to distinguish the disparate meanings of "advise" - whether it means merely to inform the client as to what the law is on the matter at issue - or to suggest or recommend a particular course of action which is at variance with the facts as revealed by the client and may amount in effect to the fabrication of a fraudulent case.

The /

The delicacy of the problem which may arise in these situations is aptly illustrated in Freedman's example. For the lawyer to explain the significance of the distinction in the criminal law between a premeditated act and one committed impulsively "in a blind rage" may be regarded as a legitimate exercise of his professional function - albeit that in so doing he may, unintentionally, have implanted the idea of perjury in the client's mind; but the injunction to "think it over" could be construed as an implied invitation to the client to revise his true version of the facts.

The distinction between merely informing and - in the sense of recommending positive action - advising, is brought out in two other hypothetical cases which Freedman cites by way of further analysis:

"Assume that your client, on trial for his life in a first-degree murder case, has killed another man with a penknife but insists that the killing was in self-defense. You ask him: 'Do you regularly carry the penknife in your pocket. Do you carry it frequently or infrequently, or did you take it with you only on that particular occasion?' He replies: 'Why do you ask me a question like that?' It is entirely appropriate to inform him that his carrying the knife only on that occasion, or infrequently might support an inference of premeditation, while, if he carried the knife invariably, or frequently, the inference of premeditation would be negated. Thus your client's life may depend upon his recollection as to whether he carried the knife frequently or infrequently. Despite the possibility that the client or a third party might infer that the lawyer was prompting the client to lie, the lawyer must apprise the defendant of the significance of his answer. There is no conceivable ethical requirement that the lawyer trap the client into a hasty and ill-considered answer before telling him the significance of the question."

In support of this view, Freedman quotes Profession John Noonan of Boalt Hall:

"A lawyer should not be paternalistic toward his client, and cannot assume that his client will perjure himself..... Furthermore, a lawyer has an obligation to furnish his client with all the legal information relevant to his case; in fulfilling this duty to inform his client, a lawyer would normally not violate ethical standards."

One /

One criticism of Freedman's reasoning might be ventured here. While it is no doubt true that a lawyer has a duty to furnish his client with all legal information relevant to his case, his justification of the lawyer's conduct in this particular example may seem somewhat disingenuous. A lawyer would certainly be wrong to assume that his client will perjure himself, but in a situation where his life is at stake - or, indeed, even in other less serious situations - the temptation to do so is clear. It could be said that in the case cited, a lawyer, anxious to extract the truth, ought to insist on the client's answering his question before explaining why he had asked it. This could not reasonably be said to be trapping the client "into a hasty and ill-considered answer". Some may well suspect that his failure to do so is indicative of the fact that some lawyers, in such situations, may deem it expedient not to know the truth. This view is supported by Wolfram's assertion that "a lawyer who advises a witness about the law or about desired testimony before seeking the witness' own version of events comes dangerously near subornation of perjury." [218]

Freedman continues his discussion of this topic by offering a further example - this time, in a civil context:

> "Assume that a man consults a tax lawyer and says: 'I am fifty years old. Nobody in my immediate family has lived past fifty. Therefore, I would like to put my affairs in order. Specifically I understand that I can avoid substantial taxes by setting up a trust. Can I do it?' The lawyer informs the client that he can successfully avoid the estate taxes only if he lives at least three years after establishing the trust or, should he die within three years, if the trust should be found not to have been created in contemplation of death. The client then might ask how to go about satisfying the Internal Revenue Service or the courts that the trust was not in contemplation of death."

At /

At this point, says Freedman, the lawyer can either refuse to answer or he can proceed to advise the steps the client should take to satisy the Internal Revenue Service - never again tell anyone he is concerned about an early death; write letters and tell friends that he is setting up a trust for reasons that have nothing to do with contemplation of death, etc. Freedman then proceeds to disavow an earlier opinion he had expressed as to the proper course for the lawyer to take in this situation:

"On the assumption that virtually every tax attorney in the country would answer the client's question (and subsequently present in court the letters and the testimony about the client's conversations), I concluded (in an earlier article in (1966) 64 Mich. L.R. 1469) that it should not be unethical for the lawyer to give the advice. Although I did not articulate it at the time, I also had in mind the 'I am a law book' rationale, that is, that the attorney would be doing no more than informing the client of what is in the applicable statutes and court decisions. After considerable reflection, I now consider that decision to have been wrong. The lawyer in the tax case is, purely and simply, the active instrument in establishing - and, ultimately, presenting - a fraudulent case...."

He adds that a further consideration which had influenced his earlier opinion was the fact that the information which the client sought as to how to satisy the authorities as to his bona fides was information which the lawyer himself would have without advice were the lawyer in the client's position, and that the client was entitled to such information and to make his own decision as to whether to act upon it, but:

"The fallacy in that argument is that the lawyer is giving the client more than just 'information about the law', but is actively participating in - indeed, initiating - a factual defense that is obviously perjurious....."

This hypothetical case is another apt illustration of the difficulties which may confront the conscientious lawyer in such situations and the delicacy of the decisions he has, at times, to make /

make - though, if Freedman's remarks as to the course which "virtually every tax attorney" would take are valid, conscientious lawyers in this context would seem to be a rare breed - among tax lawyers in the United States at any rate.

In the example given, the inference would seem to be that the proper course for the lawyer would be to refuse to answer the client's query as to "how to go about satisfying" the authorities. This is not at odds with Professor Noonan's quoted statement in the "penknife" case that a lawyer should not be "paternalistic" towards his client and "cannot assume that his client will perjure himself"; for the particular form in which the client is envisaged as putting his query conveys the clear implication that he has a perjurious intent.

What would seem to emerge from this discussion is that while, in principle, there is a clear distinction between the legitimate giving of legal information and non-legitimate advising the fabrication of a fraudulent case, in practice, in some situations, even the mere giving of information - depending on how this is done - may be tantamount to - or may be construed by the client as - encouraging a perjurious course of conduct; and that, although the lawyer is not entitled to assume that the client will make perjurious use of the information, he must be guided by his perception of his client's intentions.

The client is, of course, entitled to advice and information on all aspects of the law pertinent to the matter in hand. This includes information as to the reasons motivating questions put to him by the lawyer. It might, indeed, be said that the lawyer, without /

without being asked, should in any event - in situations where his reasons may not be patently obvious - explain why he is putting a particular question; for a lawyer should also not be paternalistic in the sense of treating his client as a child who need not know, or is incapable of understanding, the legal significance of the question. But this obligation, in the kind of situations we are discussing, must be tempered with circumspection. As has been said in reference to Freedman's "penknife" illustration it is not unreasonable for the lawyer in such circumstances to require the client to answer his question before explaining why he asked it; nor can that be said to be inconsistent with his obligation to give full information on the law. In such situations, the sequence of question and answer is important since the conscientious lawyer will wish to ensure that the client's answer to his question will be truthful and not tailored to suit the legal situation as previously explained to him.

With regard to the assertion of Professor Noonan, as quoted by Freedman, that a lawyer should not assume that his client will perjure himself, the point might also be made that, in situations where the incentive to perjury clearly exists, his advice as to the law should preferably include a caveat and explanation regarding the crime of perjury and its consequences - including, it may be added, not only its criminality but also its possible tactical consequences, in that, the perjury, if exposed, may well destroy, or at any rate, weaken, his other, possibly truthful, evidence.

Apart,/

Apart, however, from the proscription of any explicit or implicit encouragement of perjury, the nature of the situations we have been discussing would seem to be such as make it difficult to lay down any precise rules as to the propriety of professional conduct. Whatever the doubts and difficulties of the lawyer in such situations, however, from the ethical standpoint, what really matters is his intent.

These particular problems have, of course, a wider ambit than the ethics of advocacy as such. But they are of relevance to our theme in at least two respects: first, they illustrate how - wittingly or unwittingly - the seeds of perjury may be sown before the court process begins; second, if the views of Freedman as to the attitudes of practising lawyers are valid, the encouragement of, or giving assistance to, perjurious conduct by clients is, in both the civil and criminal fields - and legal and professional proscriptions notwithstanding - not uncommon among lawyers, in America at any rate.

3.7.4 - The Perjurious Client

The main problems, however, which may confront a lawyer in regard to perjury by his client arise after a court process has begun. The principle question is: what is the proper course for the advocate when his client insists on giving perjured testimony - or when it comes to his knowledge during the trial that the client has committed perjury?

As regards civil proceedings, a leading case on this issue is Myers v. Elman which concerned the swearing of an untrue affidavit of /

of documents and in which Viscount Maughan observed:

"I think it useful to observe here that there is this plain distinction between defences which consist - as they did here - of a denial of allegations and untrue affidavits of documents. The defences are not on oath and they merely put the plaintiff to the proof of the allegations in the statement of claim;.....On the other hand in many actions and in particular in such an action as Mrs. Myers had brought, based on disgraceful frauds, and on fraudulent conspiracy of the most shameless character, it is essential in the interests of justice that the defendants should be compelled to make full disclosure of all the documents bearing on the alleged frauds in the form of proper affidavits of documents. If the defendants are guilty of the alleged frauds, it is hardly to be expected that they will make adequate affidavits without considerable pressure. However guilty they may be, an honourable solicitor is perfectly justified in acting for them and in doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the court, prepare and place a perjured affidavit upon the file... .."[219]

Later in his judgment, he expresses the further opinion that where the lawyer realises that his client has sworn an untrue affidavit and has omitted important documents, he has a duty to advise his client that he, the lawyer, must inform the other party of the omitted documents and, should the client refuse his assent, the lawyer must cease to act for him. [220] While these opinions relate to false or incomplete documents, no doubt the same principles must be held to apply to verbal testimony.

In the light of these observations, the lawyer's position when acting for a perjurious client - in civil proceedings - would seem to be as follows: if the client persists with an intention to /

to commit perjury, the lawyer should withdraw; if, during the proceedings, it becomes manifest to the lawyer that his client has already committed perjury, the lawyer must also withdraw if the client refuses to purge his perjury by authorising his lawyer to inform the other party of the perjury. This latter principle is, with one alteration, enshrined in the Code of Conduct for the Bar of England and Wales:

> "If at any time before judgment is delivered in a civil case, a barrister is informed by his lay client that he has committed perjury or has otherwise been guilty of fraud upon the Court, the barrister may not so inform the Court without his client's consent. He may not, however, take any further part in the case unless his client authorises him to inform the Court of the perjured statement or other fraudulent conduct and he has so informed the Court." [221]

The alteration is in the injunction, in the Bar rule, to inform the Court, whereas Viscount Maughan refers to informing the other party. In practice, however, the situation would appear to require that both the Court and the other party be informed.

It is to be noted that the English Bar rule specifically applies this particular provision to civil cases, thus appearing to infer that it is not applicable in criminal cases. In the general context of perjury in criminal cases - as distinct from the provisions applying in the particular case where an accused person has confessed guilt to his counsel [222] - there seems to be little or no specific guidance for an advocate acting for a perjurious client - though certain inferences may perhaps be drawn from the guidance afforded in confession of guilt situations One such inference would appear to be that where - <u>before</u> trial - the client makes it clear that he is determined to give perjured testimony, the advocate should withdraw from the case [223].

This, /

This, however, is not clear and there appears to be no specific provision on the point.

Similarly, there does not appear to be any specific rule as to the advocate's proper course where such a situation only arises during trial - though here again there may be an inference from the confession of guilt provisions that, in such a case, he should only withdraw if he can do so without compromising his client's case - with the proviso that, failing withdrawal, he can only be permitted to do all he "honourably" can for his client and cannot use, aid, or abet the perjury [224].

In situations such as those provided for in rule 137 of the English Bar Code, quoted above, that is, where the client has already committed perjury, the fact that the provisions of that rule are explicitly applied only to civil cases may convey the implication that, in a similar situation in a criminal case, withdrawal by counsel is not mandatory even where the client refuses to purge his perjury. However, whatever doubts there may be as to whether, in such situations, counsel for an accused person should or should not withdraw, it is clear, in the light of the unequivocal proscriptions in all canons of professional conduct against the aiding or abetting of perjury, that, in the official professional view at any rate, an advocate must not lead his client in giving knowingly perjured testimony or otherwise make use of it in any way in the conduct of the case.

Predictably, perhaps, Freedman dissents from the strict application of this official directive. He argues that, in certain situations, the advocate's duty to his client requires an acknowledgment of the client's right to "tell his story" - even /

even if this involves perjured testimony. As an illustration of such a situation, he cites another of his hypothetical cases: a man has been "falsely" accused of robbery. He consults his lawyer and - in return for an assurance of confidentiality from the lawyer - admits the circumstantially damaging fact that he was in the vicinity of the crime about the time of its occurrence. On the assumption that this fact - taken with other (false) testimony against him - might lead to an unjust conviction, he tells the lawyer that he proposes to deny, on oath, that he was in the vicinity. Freedman accepts that the lawyer must advise that this would be unlawful but, nevertheless, considers that he has a duty, should the client persist in his intention, to "proceed in the normal fashion in presenting the testimony and arguing the case to the jury...."

Freedman argues that in these circumstances, since the lawyer would not be wilfully procuring the perjury but merely, and reluctantly, accepting the client's decision, he would not be guilty of subornation of perjury.

He adds:

> "There is a point of view, which has been expressed to me by a number of experienced attorneys, that the criminal defendant has a 'right to tell his story'. What that suggests is that it is simply too much to expect of a human being, caught up in the criminal process and facing loss of liberty and the horrors of imprisonment, not to attempt to lie to avoid that penalty. For that reason, criminal defendants in most European countries do not testify under oath, but simply 'tell their stories'. It is also noteworthy that subsequent perjury prosecutions against criminal defendants in this country are extremely rare....." [225]

In envisaging a situation in which the client is, in fact, innocent - and known or believed by his lawyer to be so - Freedma is, of course, making the strongest possible moral case both for the /

the accused and his lawyer for ignoring the strict proscription of perjury enshrined in the canons of professional conduct. The particular example he gives is similar to that earlier discussed [226] in the context of possible moral arguments for the justification of lying - specifically, lies to avoid serious harm. It may also, perhaps, be seen as an illustration of another possible moral justification - the lie to undo another lie.

It is to be noted, however, that the views here expressed by Freedman in defence of perjury in certain circumstances do not appear to be restricted to innocent accused situations.

Two particular points which Freedman makes in his remarks are also worthy of special note: the perjurious consequences, as he sees it, of allowing defendants in criminal cases to testify under oath and the rarity of subsequent perjury prosecutions.

3.7.5 - The Accused as Witness on his Own Behalf

As regards perjury by criminal defendants under oath, Hazard expresses similar views to those of Freedman:

"Why should dissimulation not be acceptable in court? There are many cultures in which it is assumed that parties to legal conflict lie on their own behalf; no pretense is made that they should be expected to do otherwise. The common law formerly exhibited the same attitude, for it did not allow testimony from a criminal defendant or any 'party in interest' in civil litigation. The present ethical dilemma in the adversary system may therefore be ultimately traceable to the abolition of the common law rules of witness disqualification.

The reform of the common law rules occurred in the nineteenth century. It was based on the proposition that few injustices would result if interested persons were allowed to testify. It was believed that with cross-examination and the good sense of the jury, truth will out most of the time. Perhaps it is time that this premise was re-examined, for it seems evident that if the stakes involved in a lawsuit are substantial, if the outcome depends /

> depends on the truth, and if the parties are authorized to give evidence as to what the truth is, the parties will distort their submissions to the maximum extent possible....."[227]

On any realistic view, the proposition that it is not to be expected that an accused, even under oath, will tell the truth if this is likely to result in his conviction would appear to have compelling force. Clearly, however, no civilised legal system can officially countenance or condone perjury. It may, therefore, be said that the adversarial system, as it presently operates, is one which, while of necessity condemning perjury by an accused, and the aiding or abetting of it by his lawyer, sanctions a procedure which, in practice, encourages, or even (in the opinion of some) necessitates, both.

It is, of course, true that the accused is not compelled to testify under oath. He can avoid perjury by declining to take the stand. But although failure to testify on his own behalf cannot be founded upon by the prosecution, it seems clear - as we shall later discuss in the context of "guilty accused" situations - that such failure cannot but have an adverse effect upon the court [228].

In the particular example given by Freedman - that of an innocent accused - a conscientious person who has a strong aversion to lying under oath is faced with an invidious choice - either to admit under oath a damaging fact which, despite his innocence, may lead to an unjust conviction, or declining to take the stand and thus, perhaps give rise to an inference which may have the same result.

It /

It would seem clear, therefore, that under the present system, there are strong incentives for an accused to elect to testify on his own behalf; that, in many situations - and even, sometimes, when the accused is innocent - there will be, in the accused's perception, compelling reasons to perjure himself; and that, in situations similar to those in the Freedman example, there may, in his counsel's perception, be cogent moral considerations which justify his acceptance - however reluctantly - of his client's decision so to do.

3.7.6 - The Rarity of Prosecutions for Perjury - the Implications

The rarity of perjury prosecutions against criminal defendants - a fact which would appear to be as true in the United Kingdom as in the United States - also invites the question whether the adversarial system itself is in fact based on a genuine expectation that accused persons will tell the truth under oath - even at the cost of self-incrimination - or whether perjurious conduct by criminal defendants is, in reality, accepted as a fact of life justifying a legal blind eye.

The latter conclusion would seem to find support in views expressed by Sir Rupert Cross, as quoted by Sheriff MacPhail:

> ".....I would have no objection to the abolition of the accused's liability to be prosecuted for perjury in giving false evidence on his own behalf. Such prosecutions are rare in England, and many Europeans think that even the possibility of proceedings of this nature is an Anglo-Saxon absurdity." [229]

However, the suggestion that the law should legitimise perjury by an accused when testifying on his own behalf is, we must surmise, unlikely to be countenanced - explicitly, at any rate - and was, indeed /

indeed rejected by the High Court of Justiciary in Scotland in H.M. Advocate v. Cairns [230]

This case highlights the rarity of such prosecutions in that it appears to be the only instance of such in Scotland since the passing of the Criminal Evidence Act, 1898 [231] which made an accused a competent witness in his own defence. Cairns had been tried for murder by stabbing one, Malcolmson, in Barlinnie Prison, Glasgow, but was found non-proven. Subsequently, however, he was served with an indictment for perjury in that, at his trial for that murder:

> "....you, being sworn as a witness in a criminal cause then proceeding in the High Court of Justiciary, did depone that you did not....assault and stab Alexander Malcolmson.....the truth as you well knew being that you did.....assault and stab said Alexander Malcolmson."

His counsel, by way of a plea in bar of trial for perjury, relied, inter alia, on considerations of natural justice and argued that:

> "When an accused person was interrogated on oath about the crime which he was alleged to have committed, and perjured himself in answer, he was not liable to be punished for perjury" and that "the denial of the commission of an offence by an accused person on oath at his trial was neither a crime at common law nor a contravention of an Act of Parliament applicable to Scotland."[232

The Court rejected these arguments, upholding the prosecution submissions that the decision whether or not to prosecute for perjury in these circumstances was a matter for the discretion of the Lord Advocate and that the 1898 Act did not give an accused a licence to commit perjury. The Court further considered that defence counsel, in support of his argument on natural justice, had not shown that:

> ".....there is something so inherently inequitable in prosecuting a person for giving false evidence at his trial denying his guilt that the giving of such evidence does not amount to perjury under the law of Scotland." [233]

Also, in the opinion of Lord Wheatley:

"To /

"To give a general immunity to accused persons to commit perjury, however blatant, and perhaps even publicly boast of its success would only bring the law into disrepute." [234]

The significance of this observation of Lord Wheatley can perhaps be better understood in the light of the fact that the productions at the perjury trial included a contract between Cairns and Beaverbrook Newspapers and a transcript of a "tape-recorded confession" to the murder of Malcolmson made by Cairns to a representative of that newspaper company. [235]

This background may suggest that the motivation for the perjury prosecution in this case owed less to the perjury itself than to the fact that the accused had, apparently, been so rash as to publicise and, in Lord Wheatley's words, "boast" about it. This being so, it would appear that while the case demonstrates that the law will not explicitly countenance perjury even by an accused when testifying on his own behalf, it cannot be construed as indicative of a general willingness on the part of the legal authorities to prosecute for perjury in such circumstances. On the contrary, its extreme rarity and the special circumstances applying would seem to support the view that, in normal circumstances, such perjury is tolerated - if not tacitly condoned - as an inevitable, albeit regrettable, consequence of the system.

Of particular interest in this case is the argument advanced by the defence that perjury by an accused in regard to the crime of which he is accused, is not a punishable crime in law. This was, of course, rejected by the Court, but the fact that it was deemed worthy of submission as a serious legal point may be a significant /

significant reflection of the law's general tolerance of such perjury. Further, in so far as the argument so advanced may be taken as indicative of the prevailing ethos among criminal defence lawyers - or a significant proportion of them - it may lend support to the view that many of them may regard such perjury as often justified in ethical, if not in strictly legal, terms.

3.7.7 - Value of the Oath Diminished

If, for the reasons expressed by the court in Cairns, the law is unlikely to countenance the legitimising of perjury by an accused when testifying on his own behalf, it would also seem unlikely to countenance Hazard's suggestion that, as in pre-1898 Act days, he should not be allowed to testify at all. Apart from the objection that such a proposal would be seen as regressive and would deny the right of an innocent accused to proclaim his innocence under oath, recent deliberation within the legal profession, in Britain at any rate, far from contemplating such a reversal, appears to focus on the contrary possibility that an accused should be compelled to give evidence at his trial. We may note, for example the deliberations of the Thomson Committee [236] in Scotland on this topic.

While Sheriff MacPhail supports the conclusion of the Thomson Committee that an accused should not be so compelled, he nevertheless considers that "there is nothing repugnant about a man being condemned out of his own mouth unless there be something repugnant about the truth....."[237] While this is no doubt a valid observation, it is also true that, as has been said, an accused, /

accused, generally speaking, is unlikely to condemn himself out of his own mouth - a fact which accounts for what the Sheriff elsewhere refers to as the "depressing" frequency of the dishonouring of the oath in criminal causes [238].

To the extent that there is within the legal system itself a tacit assumption that criminal defendants will and do frequently lie under oath - and, moreover, do so with impunity - to that extent the truth-vouching value of the judicial oath and, therefor the benefit to be derived from it as a solemn assertion of innocence, are diminished.

3.7.8 - Summary and Conclusion on Perjury

(1) Perjury by a client - and the wilful aiding or abetting it by his lawyer - are serious criminal offences which are unequivocally forbidden by law and by the canons of professional conduct.

(2) While perjury itself can, of course, only be committed during judicial proceedings, its seeds may - wittingly or unwittingly - be sown by a lawyer when giving information or advice. Such situations can sometimes pose delicate problems for the conscientious lawyer.

(3) Apart from the official proscription against procuring, aiding or abetting perjury, there seems - in criminal cases - to be little positive guidance as to the proper course of conduct for an advocate whose client is intent upon, or has committed, perjury.

(4) Notwithstanding the legal and professional strictures against perjurious conduct by clients or lawyers, there are indications /

indications that such conduct may not be uncommon and evidence of a view among practising criminal lawyers - in America at any rate - that it may, in certain situations, be justified.

(5) These considerations, coupled with the fact that perjury prosecutions of criminal defendants are rare, may suggest a realistic acceptance by the legal system itself of the inevitability of perjury by criminal defendants - if not, indeed, a tacit condonation of it - and possibly, perhaps, a similar acceptance that such perjury is, not uncommonly, passively assisted, even if not wilfully procured, by their lawyers.

(6) This may, in turn, suggest that, although there may be cogent and commendable arguments for the present practice of allowing criminal defendants to testify on their own behalf, it may be perceived as exerting pressure on defendants and their lawyers which are tantamount to the encouragement of perjurious conduct; as detracting from the sanctity and evidential status of the judicial oath; and as exacerbating the ethical problems of the advocate in his role as criminal defence counsel.

In conclusion, it may be added that this discussion of perjury would seem once again to demonstrate a significant gap in the field of legal ethics between precept and practice and the ethical inconsistencies of the adversarial system of justice.

3.8 - The Guilty Accused

3.8.1 - Confession of Guilt by Accused

The subject we here examine is probably the most obvious example of a potential perjurious situation for both client and counsel. It is also a situation in which a decision as to whether or not an accused should take the stand is particularly crucial for both.

Since a person on trial for a criminal offence is, under our legal system, assumed to be innocent unless and until he is convicted by the court, use of the term "guilty accused" before the court's verdict has been given is, in legal terms, inappropriate. But in the context in which it is here used, it is intended to denote a situation in which an accused who wishes to plead, or has pled, not guilty, has admitted in confidence to his counsel that he did, indeed, commit the offence charged - or, at any rate, has admitted facts which, in his counsel's opinion, clearly establish factual guilt.

It is probably true that the traditional public cynicism towards the criminal defence lawyer is, in large measure, influenced by its recognition of the fact that such situations must, not uncommonly, arise; but recognition within the legal profession itself that they do in fact arise, is aptly demonstrated by the official professional pronouncements on the subject. All the professional codes of conduct in adversarial jurisdictions appear to provide specifically for confession of guilt situations; but although intended to give guidance as to defence counsel's proper course /

course of conduct in such circumstances, the guidance afforded does not, as will be seen, resolve his ethical dilemma in such cases and, indeed, gives rise to serious problems for counsel in attempting to reconcile his duty to the court with his duty to his client.

From the public viewpoint, doubts as to the ethics of defence counsel's role tend to have a wider ambience than situations in which counsel knows that his client is factually guilty. Many lay people also find it difficult to understand how a lawyer can conscientiously defend a person - particularly one charged with a serious offence - whom, short of absolute certainty he strongly suspects to be guilty. Within the legal profession, however, this particular issue is non-controversial. There is universal professional agreement that mere suspicion of guilt, however strong, cannot justify a lawyer's refusing to defend - much less requiring him to so refuse. From the ethical standpoint, in this situation, public censure appears to be adequately countered by Dr. Johnson's assertion that "the justice or injustice of the cause is to be decided by the judge" [239], or by the observation of Baron Bramwell:

> "A man's rights are to be determined by the court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the court." [240]

But when the facts actually known to counsel extend beyond mere suspicion of actual guilt and amount to certainty, such arguments appear inapt. It is here that the difficulty arises and it is on this issue that debate within the profession is focused.

One /

One obvious way of avoiding counsel's problems in the face of a confidential confession of guilt, is, of course, for the accused to plead guilty. As has been said, however, we are here dealing with a situation where the accused, notwithstanding such a confession, wishes to plead not guilty. It is a fundamental feature of our legal system that, irrespective of factual guilt, an accused person is never required to convict himself; that he is always entitled to plead not guilty; that counsel is a legal agent - not a keeper of his client's morals. Thus the Code of Conduct for the Bar of England and Wales:

> "It is the duty of defending counsel to advise his client generally about his plea to the charge. It should be made clear that whether he pleads 'not guilty' or 'guilty', the client has the responsibility for and complete freedom of choice in his plea. For the purpose of giving proper advice, counsel is entitled to refer to all aspects of the case and where appropriate he may advise his client in strong terms that he is unlikely to escape conviction and that a plea of guilty is generally regarded by the Court as a mitigating factor." [214]

It may be noted here, however, that the Scottish Faculty of Advocates' Guide is somewhat differently worded on this issue; for, while saying that "Counsel may not put pressure on him (the accused) to tender a plea of guilty.....", this is qualified by the phrase ".....so long as he maintains his innocence". [242] On the assumption that this latter phrase means a situation where the accused affirms his factual innocence - as distinct from merely insisting on his right to plead not guilty - the implication may be that counsel is justified in exerting pressure on his client to plead guilty where he has, in fact, admitted his guilt in confidence.

However /

However that may be, in the light of what is discussed below, it is clear from both the English and Scottish Bar Codes that a confession of guilt is not, per se, sufficient warranty for counsel to insist upon a guilty plea; further, the English Code rule, as quoted above, would seem, by implication, to reject the view that such a confession would justify counsel's pressurising his client to plead guilty - and to assert the principle that the only valid reason for counsel's advising a guilty plea is "that he is unlikely to escape conviction and that a plea of guilty is generally regarded by the Court as a mitigating factor". The appeal is therefore to self-interest and not to morality.

But the main questions to which this part of our inquiry are addressed are these: If it is the defence advocate's right - and indeed his duty - to defend a person charged with a criminal offence notwithstanding his confidential admission of factual guilt, is it possible for him to perform that duty adequately while, at the same time, avoiding the presentation of a perjurious case? And are the restrictions imposed by the professional rules in such situations compatible with a viable defence?

An illustration of the doubts and difficulties which have traditionally assailed defence advocates on this issue is an early case referred to by Lord Birkett in a radio talk in 1961 [243] - and mentioned also by others such as Wolfram and Richard Du Cann [244]. The case concerned a Swiss man-servant, Courvoisier, who stood trial for murder in England in 1840. His defence counsel was Charles Philips. During the course of the /

the trial, Courvoisier admitted to his counsel that he had indeed committed the murder but added: "And I now rely on you to do the best you can to prove that I have not". Philips, it is said, sought the advice of Baron Parke who told him that it was his duty to continue the defence and to use all fair arguments arising out of the evidence. Philips did in fact continue to defend although his client was, in the event, convicted and executed. This example may also be said to be illustrative of the ambivalence which tends to characterise much of the advice given to advocates on this and other ethical issues; for there is no way of knowing precisely what is meant by "fair arguments". We are not told what "fair" arguments counsel did in fact use in the conduct of the defence; in particular, it is not known whether he complied with his client's request to attempt to "prove that I have not" - as distinct from merely exercising his client's right to put the prosecution to proof. As will be seen, this is, in terms of current professional guidelines, a crucial distinction.

3.8.2 - Provisions of Professional Codes

We shall now look at the pronouncements of various professional guidelines on this issue and discuss to what extent they may be said to reflect a uniform approach.

In regard to one particular aspect - the situation where the confession of guilt is made by the accused to his counsel before trial - the attitude of the English Bar would appear to have undergone a change in fairly recent times. The Australian writer, J.V. Barry, in an article in 1941, set out the position as follows:

"So /

"So far as concerns members of the English Bar and those who take their traditions from that Bar, an authoritative ruling on the duties of advocates was given by the English Bar Council in 1915; a ruling approved by Sir Edward Carson and Sir Robert Finlay.....The Council discusses the subject under two heads, depending on the time the confession of guilt is made to counsel. When a confession of guilt is made before trial, the Council states that 'it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate....'"[245]

This would seem to have remained the position until the time of, or very shortly before, the publication of the current guidelines of the Bar of England and Wales in 1981 which now expresses the position as follows:

"A barrister to whom a confession of guilt has been made by his client must observe the following rules:

(a) If the confession is made before the proceedings have started he may continue to act only if the plea is to be one of guilty, or if the plea is to be one of not guilty and he acts in accordance with the rules set out in Annex 13 which impose very strict limitations on the conduct of the defence. In the latter case he must explain his position to the client and his instructing solicitor.
If the barrister is instructed to act otherwise than in conformity with this rule he should return his brief." [246]

This change is significant in that the former 1915 ruling appeared to regard a pre-trial confession - per se - as a ground for withdrawal by counsel from the case, whereas the current rule sees withdrawal by counsel as necessary only if he is instructed to act otherwise than in conformity with the Annex 13 rules (infra). The change would seem to be well advised since, on the face of it, the former ruling would appear to negate the right of an accused person to put the prosecution to proof - and the right and duty of his counsel to assist him in so doing; a right, indeed, which that same former ruling goes on to expound. Further the /

the statement in the former ruling that "no harm can be done" to an accused by requiring him to retain another advocate, seems highly questionable, particularly if the situation arose very shortly before the trial was due to begin.

Otherwise, however, the current English Code closely follows the previous 1915 ruling:

> "If the confession is made during the proceedings or in such circumstances that he cannot withdraw without compromising the position of his client, he should continue to act and to do all he honourably can for him; but his situation similarly imposes very strict limitations on the conduct of the defence; and the barrister may not set up an affirmative case inconsistent with the confession, by, for example, asserting or suggesting that some other person committed the offence charged or calling evidence in support of an alibi." [247]

Annex 13 to the Code expounds at some length the principles to which the defence advocate, in confession of guilt situations, should have regard, but, for our purposes, its essence is contained in the following extract:

> ".....the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his counsel, is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the advocate from his imperative duty to do all he honourably can for his client.
>
> But such a confession imposes very strict limitations on the conduct of the defence. An advocate 'may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud.'
>
> While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person has committed the offence charged, or to call any evidence which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi which is intended to show that the accused could not have done or in fact had not done the act; that is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him."

As /

As regards solicitors in England, the Law Society has a rule in broadly similar terms:

"Where, prior to the commencement or during the course of proceedings, a client admits to his solicitor that he is guilty of the charge, the solicitor must decline to act in the proceedings if the client insists on giving evidence in the witness box in denial of guilt or requires the making of a statement asserting his innocence. The advocate who acts for a client who has admitted his guilt but has pleaded not guilty (as he is so entitled), is under a duty to put the prosecution to proof of its case and may submit that there is insufficient evidence to justify a conviction. Further, the advocate may advance any defence open to the client, other than protesting his innocence or suggesting, expressly or by implication, that someone other than the client committed the offence." [248]

In Scotland, the Faculty of Advocates' Guide deals with the subject under two heads relating, respectively, to "Duties in Relation to the Client" and "The Duty to the Court and Duties Connected with the Court and Similar Proceedings". Under the former heading, the rule is expressed as follows:

"Where an accused person makes a confession to counsel and counsel is satisfied that in law such confession amounts to guilt, counsel must explain to the accused (if he is not pleading guilty) that the conduct of his defence will be limited by that confession as set out in paragraphs 9.2.2.5 and 9.2.2.6 below. Counsel must emphasise to the accused that no substantive defence amounting to innocence or a suggestion of innocence, will be put forward on his behalf and that, if he is not satisfied with this, he should seek other advice....." [249]

(The Faculty adds a rider here to the effect that counsel should consider the advisability of obtaining confirmation in writing from the accused that he has been so advised.)

Under the general heading of "Duty to the Court", paragraph 9.2.2.5 states:

"....where an accused has admitted that he has committed the act with which he is charged (whether or not that admission is an explicit admission of guilt in law), an advocate may not conduct the defence on a basis inconsistent with that admission. Thus, he may not put to a witness any question suggesting, or tending to suggest, that the accused did not commit the act. A fortiori, he may not seek to set up a special defence of alibi or incrimination."

The /

The succeeding paragraph, 9.2.2.6, lists the lines of defence permitted to counsel in this situation - these being broadly in accord with the English rule: objections to jurisdiction, competency, relevancy and sufficiency of evidence, but in somewhat greater detail.

Finally, to complete this review of the relevant rules of professional bodies in Britain, we have the brief injunction to Scottish solicitors:

> "If a client confesses his guilt to you, in a serious case, you can and should continue to act to put the prosecution to proof of its case but you must decline to act if the client requires the case to be conducted so as to assert his innocence." [250]

Comparison of Provisions - Although variously expressed, these rules and guidelines would, in British jurisdictions at any rate, appear to reflect a broadly similar approach to situations where the accused, whether before or during trial, has admitted factual guilt to his counsel. Certain differences can, however be detected and, while they do not affect basic principles, they may be worth noting.

The English Bar Code, for example, makes the point (Annex 13) that its provisions apply only where "....the accused has made a clear confession that he did 'commit the offence charged'...." and not where:

> "... statements are made by the accused which point irresistably to the conclusion that the accused is guilty but do not amount to a clear confession."

To this is added the comment:

> "....Statements of this kind must hamper the defence, but the questions arising on them are not dealt with here. They can only be answered after careful consideration of the actual circumstances of the particular case."

None /

None of the other guidelines cited appear to make this explicit distinction - and, indeed, it will be noted that the Scottish Bar rules are stated as being applicable to any confession which "amounts to guilt" (rule 8.2.3.) and to any admission "whether or not that admission is an explicit admission of guilt in law (rule 9.2.2.5).

On another point - the propriety, in such situations, of "testing" the prosecution evidence, (a subject earlier discussed in connection with cross-examination tactics [251])- it will be noted that while both the English and Scottish Bar rules allow the "testing" of prosecution witnesses as a proper defence tactic notwithstanding the accused's confession of guilt to his counsel, the English rule acknowledges - as the Scottish rule does not - the "difficult question" as to:

> "....within what limits, in the case supposed, may an advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal....."[252]

On a more significant matter, however, - that of withdrawal by counsel from the case - there would seem to be an element of doubt and some difficulty of interpretation, particularly in regard to the English Bar rules. The other codes and guides appear to be clear that where an accused who has confessed his guilt to his counsel, refuses to accept the restricted defence which counsel advises him is a necessary consequence of his confession, counsel should withdraw. The English Bar Code, however, - particularly rule 149 (b) - is not so clear and would seem to be capable of bearing the interpretation that counsel should only withdraw if the confession is made <u>before</u> trial - and, in circumstances in which withdrawal can be effected without /

without compromising the client's position. However, the reality of the situation would seem to compel withdrawal if the client rejects his counsel's advice on such a crucial matter.

Paradoxically, perhaps, the somewhat peculiar wording of the English Bar rules in this context may give rise to another doubt - but this time in the reverse situation where the confessed accused is prepared to accept the restrictions on his defence; the question here being whether his counsel, in that situation, has a professional duty - or merely the option - to continue to act. On this point, the briefly worded injunction to the Scottish solicitors in Webster, is the most clear: "...you can and should (my emphasis) continue to act....". The Scottish Advocates' rules are not so specific but in the light of the general professional obligation upon an advocate to render assistance, when requested, to a criminal defendant - and, in particular, his obligation to recognise the right, even of a de facto guilty accused, to plead not guilty - they are probably capable, in the absence of contrary provision, of bearing the interpretation that in such situations the advocate has a duty to continue to act. Likewise, the English Law Society rule, as quoted, may probably be so interpreted - particularly in view of its emphasis on the accused's entitlement to plead not guilty.

The suggestion of possible doubt as to the English Bar position on this point relates to pre-trial confessions and may, in some measure, be due to a not very successful transition in phraseology from the former 1915 ruling [253]. The words "he may continue to act only if" in the current rule 149(a), as read with the initial /

initial wording of rule 149(b) [254], may be capable of sustaining the inference that, in the case of pre-trial confessions, counsel is professionally free to withdraw because of the confession per se - if he can do so without "compromising" his client's position. However, Annex 13 of the English Bar Code, to which rule 149(a) is specifically related, does say that:

> ".....the mere fact that a person charged with a crime has..... made such a confession....." does not ".....release the advocate from his imperative duty to do all he honourably can do for his client" [255]

It would probably be safe to assume, therefore, that despite the possible doubt mentioned, the position of English Barristers on this point is the same as that for other counsel within the British jurisdiction - namely, that, notwithstanding any confession of factual guilt, whether before or during trial, and provided the client is willing to accept the consequential restrictions upon the conduct of his defence, his counsel has not only the right, but the duty, to continue to act.

Summary of Provisions - In the light of this analysis and comparison of the relevant provisions of the codes and guidelines of professional bodies in Britain, there would appear to be a consensus as to the basic principles to be applied in situations where an accused has admitted factual guilt to his counsel. These may be summarised as follows:

(1) The fact that an accused has, whether before or during trial, confessed factual guilt to his counsel, is, in itself, no bar to counsel's continuing to undertake the defence.

(2) /

(2) Further, it would seem that counsel, in such situations, and subject to the restrictions mentioned below, has not only a right but a duty to continue the defence.

(3) In view of such a confession, however, defence counsel cannot properly set up an affirmative case which is inconsistent with it; that is to say, he is professionally prohibited from conducting the defence in such a manner as to amount to an assertion of his client's innocence. A fortiori, he must not set up any special defence of alibi or incrimination.

(4) Subject to these restrictions, counsel must do the best for his client to prevent his conviction - by exercising his client's right to put the prosecution to proof; by challenging the jurisdiction of the court or the competency, relevancy or sufficiency of the prosecution evidence; by testing the evidence of prosecution witnesses or by other appropriate means.

(5) Should the accused refuse to accept the restrictions on his defence arising from his confession, counsel should withdraw

3.8.3 - Problems Arising

The restrictions imposed by the professional codes on the conduct of the defence in such situations pose serious problems for both client and counsel. It may be noted at the outset that these restrictions extend beyond a mere embargo on perjury by the client by his taking the stand to protest his innocence. Even if the accused voluntarily refrains from so doing, or his counsel /

counsel dissuades him, the conduct of the defence is not thereby necessarily validated; for defence counsel is also prohibited by the professional rules from asserting - or even, in the Scottish Bar version, "suggesting" - his client's innocence in any other way - whether in the course of examining or cross-examining witnesses or in his speech or statements to the court.

The problems arising from these professional rules may be broadly identified as of two kinds: first, those caused by the withdrawal of defence counsel in situations where the accused refuses to accept the restricted defence; second, those caused by the restricted defence itself.

Withdrawal by Counsel - Apart from the disruption likely to be caused in the preparation and presentation of the defence, withdrawal by counsel in the circumstances referred to gives rise to a variety of problems - between lawyer and client, between lawyers inter se and, where the withdrawal occurs during trial, between the defence lawyer and the court.

One particular difficulty concerns the relationship between the instructing solicitor and counsel in those cases where both are involved. If the confession of guilt is made to the defence solicitor outwith the presence of counsel, professional propriety would seem to require that he should reveal it to counsel; otherwise, they would be placed in an invidious position in relation to each other in that the solicitor would be privy to crucial knowledge not possessed by counsel. But if, in the light of the confession revealed to him - and the accused's refusal to accept the limited defence required by the rules - counsel withdraws, /

withdraws, the solicitor is then faced with the problems of retaining another - and of deciding what to tell him. Again, professional propriety would seem to require that he should tell the new counsel the reason for the first counsel's withdrawal. But then, of course, the second counsel would be in the same position as the first and - assuming that the accused was still not prepared to accept the limited defence - he would also need to withdraw.

It may be suggested that in such situations the proper course would be for both the instructing solicitor and the original counsel to withdraw, but, clearly, this would not resolve the dilemma since, unless the accused is to remain professionally defenceless, he would need to obtain other lawyers. Should he repeat his confession to them, the original problem would recur. Another ethical question which may arise here is whether, in such situations, the solicitor or counsel who withdraw should advise the accused not to repeat his confession to his new lawyers. Common sense might seem to suggest this course though some may question its propriety since it means, in effect, advising the accused not to tell his new lawyers the whole truth and, moreover, is contrary to the principle that complete candour by the client in divulging the full facts is essential for an effective defence. However, the same objective could probably be achieved by their simply explaining to the accused, in plain terms, their professional position arising from his confession and his refusal to accept the limited defence required by the rules. In any event, it seems likely that the accused himself, having paid /

paid the price of his candour, will draw the necessary conclusions and decide to keep silent as to his factual guilt next time round. In that event, his new counsel will be able to provide a full, unrestricted, defence with a clear professional conscience - though he will be doing so in ignorance of all the pertinent facts. It will also mean that he will - albeit innocently - be presenting the fraudulent defence, including, probably, the use of perjured testimony, which the withdrawal of the first counsel was designed to prevent.

Where counsel withdraws during the trial, another problem of serious import for the accused is the effect of the withdrawal upon the court. On the subject of withdrawal by counsel during trial, the English Bar Code does not appear to have any specific provision as to the procedure which should apply, but the Scottish Bar Guide provides:

> "Where he (counsel) feels obliged to withdraw in the course of a trial or other hearing, he must formally move the judge (or chairman) for leave to withdraw from acting and protect the interests of the client by moving for an adjournment so that the client can get other advice. He is under no obligation to explain in detail to the court or tribunal his reasons for withdrawing, since to do so may prejudice the client, and he should not yield to pressure to do so. [256]"

Notwithstanding the concern here expressed about prejudicing the client, it is difficult to see how, in situations such as we are discussing, withdrawal can be effected without prejudicing the accused in the eyes of the court. The wording of the rule quoted seems to infer that, although a detailed explanation for the withdrawal is not obligatory, some reason would be expected to be offered. In any event, for defence counsel to take such a radical step during the trial would clearly indicate to the court that all was not well with the defence case. In whatever manner /

manner the reason for withdrawal was cloaked, and whatever verbal formula was devised, it seems likely that the court might well suspect the true reason and cannot but be adversely influenced against the accused.

The Restricted Defence - It is, of course, open to the accused to avoid the problems arising from the withdrawal of his counsel by agreeing to accept and comply with what the English Bar Code calls "very strict limitations" [257] imposed upon his counsel by the professional rules. it will be clear from what has been said that he will have a strong incentive so to do; but if he is capable of appreciating the full implications of what is sometimes called the "frozen" defence [258], he may possibly consider the problems attendant upon withdrawal by his counsel to be the lesser of the evils.

As has been said, the strict limitations imposed by the professional rules in these situations extend beyond the proscription of perjury by the accused - or the subornation of that perjury by his counsel. Certainly, in terms of these rules, the accused is deprived of the right to take the stand to protest his innocence under oath. They also, as one would expect, proscribe the fabrication of a false alibi or the incrimination of another party. But the limitations imposed are more radical than these specific restrictions for they strike at the heart of the whole conduct of the defence by proscribing any attempt to assert - or even, as has been said, in the words of the Scottish Bar provision, to "suggest" - the accused's innocence. Thus, defence counsel cannot, whether in the course of examining defence witnesses or cross-examining prosecution witnesses, put questions /

questions in a manner tending to suggest his client's innocence; nor is he allowed, in his speech or other statements to the court, to assert or suggest his innocence. Apart from the presentation of a special defence such as insanity or, possibly, (if not inconsistent with the accused's confession), self-defence, counsel would seem in effect to be restricted to a line of defence aimed at merely frustrating the prosecutor's attempt to discharge his legal onus of proof - by challenging the sufficiency of his evidence to discharge that onus or by technical attacks on competency, relevancy or jurisdiction.

Apart from the question as to whether any defence advocate - professionally obliged, as he is, zealously to protect his client - can realistically be expected to conduct such an insipidly negative defence, the question may, perhaps, be reasonably put whether it is in fact feasible to draw the dividing line which the professional rules require between an implied assertion of innocence and an assault upon the prosecution evidence. The English Bar rules, as we have noted [259], acknowledge this difficulty in the context of "testing" the prosecution evidence - a tactic which, notwithstanding the confession of guilt, both the English and Scottish rules allow. It is, of course, true that it does not necessarily follow from the accused's factual guilt that all the prosecution witnesses are telling the truth; and where it is known or believed by the accused or his counsel that they are being untruthful, it is no doubt right that they should be challenged. Such a challenge may, for example, be significant and necessary as a basis for a plea of mitigation. There may also be malevolent witnesses who testify falsely against the accused

out /

out of vindictiveness and defence counsel clearly has the right and duty to expose their untruthfulness irrespective of his client's actual guilt. But, as we have earlier noted [260], there seems to be ample evidence that in the adversarial system the primary purpose of the cross-examination of witneses - even, it would appear, of witnesses whose testimony may be known to the cross-examiner to be truthful - is recognised - and, indeed, authoritatively recognised - as being to break down, ridicule or destroy the credibility of the testimony. If, in the situations we are discussing, this principle is applied, it invites the question as to whether it is intrinsically consistent with a strict conformity with the professional precepts; for, as has been said, these precepts forbit putting questions to a witness in such a manner as merely to suggest theaccused's innocence. It may, therefore, be arguable whether a general attack upon the credibility of the prosecution evidence can be sustained without such an inference.

At any rate, a scrupulous defence counsel, intent upon strict conformity with the rules, must steer a perilous course between his perceived duty to the court and his profession and his duty to his client; for in attempting to avoid even a suggestion of his client's innocence in cross-examination, he must also ensure that, by so doing, he is not seen to be tacitly or implicitly admitting his guilt.

The feasibility of the professional rules in this context may also be questionable as regards another aspect: where the confession of guilt is made to counsel at a late stage in the trial - or, indeed, at any point after defence counsel has committed himself to a defence along orthodox lines on the basis of his client's innocence. Although the English rules are explicitly stated as applying where the confession is made during, as

well as before, the trial, both they - and the Scottish rules - appear nevertheless to be framed on the assumption that it has been made before counsel has begun to "set up" his defence and offer no guidance as to how he is supposed to deal with a situation where, prior to the confession, he has, in good faith, been conducting an affirmative defence. it is difficult to see how counsel in such circumstances could, without serious and unacceptable prejudice to his client, change course to the extent of radically altering his defence strategy and adopting a "frozen" defence; nor can one deduce from the rules whether or to what extent he is expected to attempt to do so. In the absence of clear provision, one can but surmise that the most counsel can "honourably" do in such situations is to attempt to modify his presentation in line with the restricted defence rules - but only, presumably, to the extent that it may be possible so to do without destroying any credibility in his client's case. The extent to which this may be possible will depend mainly upon how late in the proceedings the confession is made; clearly, the later the stage, the more difficult it will be; and, indeed, if made at a very late stage, the point may have been reached where any modification of the defence line will have ceased to be professionally practicable.

However, this particular problem apart, if we assume that the defence advocate, in deference to the professional rules, decides to embark upon the restricted defence, we must now consider the implications for the accused as regards the effect which the adoption of this line of defence may have upon the trial court.

Notwithstanding the accused's legal right to maintain silence and /

and the right of him and his counsel to elect to offer no evidence affirmative of his innocence - whether by taking the stand or otherwise - the effect of this upon the court cannot but be adverse to the accused and seriously impair his prospect of acquittal. Sheriff Stone deals with this matter in his "Proof of Fact in Criminal Trials" [261]:

> "The law, in both Scotland and England, is clearly to the effect that an accused is entitled to defend himself without leading any evidence. A prosecutor may not, by statute, comment on an accused's failure to lead evidence, and a judge may comment on that only in exceptional and appropriate circumstances, and with restraint....."

But he adds:

> "The point with which we are concerned is one about how the mind normally works in reaching a conclusion. The only proposition which is suggested is a moderate one, namely that failure to answer the prosecution case by affirming an alternative version of the facts, does involve a risk...."

In the light of the authorities which he cites in this context, the risk involved in relying upon an entirely negative defence is substantial. Thus, the Lord Justice-Clerk in a Scottish case in 1972:

> "The silent defender does take a risk and if he fails to challenge evidence given by witnesses for the Crown by cross-examination or, in addition, by leading substantive evidence in support of his challenge, he cannot complain if the court not merely accept that unchallenged evidence, but also, in the light of all the circumstances, draw from it the most unfavourable and adverse influences to the defence that it is capable of supporting. [262]

And from an English case in the same year, Lord Diplock, on the consequences, in a civil case, of calling no defence evidence:

> "this is a legitimate tactical move under our adversarial system of litigation; but a defendant who adopts it cannot complain if the courts draw from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold." [263]

Although /

Although expressed in judicial terms, what the judges in these cases appear to be saying is that, in the absence of any affirmative evidence or assertion of innocence, the court is likely to assume the worst as regards the defendant and, therefore in a criminal context, his guilt.

It may also be noted that their comments appear to be addressed to a situation in which the defence, for tactical reasons, has freely elected to adopt this negative defence; whereas, we are dealing with a situation in which an accused person, because of his candour in revealing his factual guilt in confidence to his counsel, has this restricted defence imposed upon him as a condition of retaining the services of counsel.

It may, of course, be said that if the accused is, in fact, guilty, he should plead guilty and cannot complain if he is prevented from asserting his innocence during his trial. In ethical terms, this would seem to be a cogent proposition. But we are here dealing with this issue within the framework of a system of criminal justice of which a corner stone is claimed to be the presumption of innocence and the right of an accused - even of a factually guilty accused - to plead not guilty and to have a professionally assisted defence in support of that plea.

It may again be objected that the professional rules we are discussing do not infringe these principles; that, notwithstandin the severe curbs on his defence, the accused is still entitled to put the prosecution to the proof and is still presumed innocent unless and until the prosecution discharge the onus of proof and secure a conviction by the court. Strictly speaking, this is true /

true but, in the light of what we have discussed regarding the effect upon the court if the professional rules are rigorously applied, it may appear to some to be rather disingenuous in that a defence which has such a slender prospect of success and predisposes the court to an inference of guilt, effectively negates the principle of the presumption of innocence and makes virtually meaningless the right, even of a confessed accused, to have a professionally assisted and adequate defence.

Although his criticism of the official professional stance on this issue is not expressed in precisely these terms, Freedman's views in the context of the American Bar Association rules which were current when he was writing - would seem to point to a similar conclusion:

> "Experienced trial attorneys have often noted that jurors assume that the defendant's lawyer knows the truth about the case, and that the jury will frequently judge the defendant by drawing inferences from the attorney's conduct in the case. There is, of course, only one inference that can be drawn if the defendant own attorney turns his or her back on the defendant at the most critical point in the trial, and then, in closing argument, sums up the case with no reference to the fact that the defendant has given exculpatory testimony." [264]

In the context of the current British codes, this passage require explanation. The ABA rules to which Freedman was referring were, in relation to confession of guilt situations, somewhat less rigorous than the present British rules. Although denouncing perjury by the accused by his taking the stand to assert his innocence - and advising the withdrawal of counsel (but only wher the confession was made before trial and where withdrawal was "feasible") - if the client insisted upon taking the stand, they were, apparently prepared to countenance the acquiescence - albei reluctant - of his counsel in so doing, but advised that:

"Before /

"Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or triers of the facts: the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of the facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument." [265]

The advice given in this particular version of the former ABA rules clearly does not resolve all the problems we have discussed. As Freedman points out, the significance of defence counsel's unusual conduct in failing to examine his client in the conventional manner and making no reference to his exculpatory testimony, will not be lost upon the court. Nevertheless, given the intrinsic difficulty of such situations - for which, indeed, no entirely satisfactory solution appears possible - this particular ABA rule may be said, perhaps, to reflect a more flexible compromise than do the current British codes between, on the one hand, upholding the professional integrity of counsel and, on the other, protecting, so far as the circumstances permit, his client's interests. In the first places, in not making withdrawal by counsel mandatory during the trial, it avoids the problems to which this gives rise. Secondly, it allows the obstinate client who so insists against his counsel's advice, to "tell his story" - albeit a perjured story - in a manner which does not involve the co-operation of counsel. Thirdly, its proscription against counsel's arguing or relying upon his client's false testimony does not appear - though the point may be debatable - to be as rigid or comprehensive as a blanket embargo /

embargo on an affirmative case. For these reasons, it may possibly be argued that it is more realistic than the current British approach.

In the context of realism, and given the professional duty of an advocate - particularly a criminal defence advocate - to act as the zealous champion of his client, we may ask again to what extent the profesisonal rules we have discussed are followed - or, indeed, genuinely expected to be followed - in practice; to what extent a zealous advocate may indeed be realistically expected to conduct a defence which has such little chance of success. We may gather from Professor Freedman's remarks in this context - and in the context of perjury generally [266] - that even perjury is not discountenanced by practising criminal lawyers, in America at any rate, on the basis that an accused person - faced with the prospect of loss of liberty, or worse - has the right, as has been said, to "tell his story". We may recall also the expressed view of the Association of Trial Lawyers of America that official recognition should be given to a lawyer's right to "participate in presenting a client's perjured testimony.....if necessary to avoid impairing a client confidence" [267]; and note also that Hazard quotes with approval the dictum of Lord Brougham, (in the course of his defence of Queen Caroline), that the protection of the client was the advocate's "first and only duty", and, on the specific issue of the <u>de facto</u> guilty accused, justifies the conduct of counsel in pursuing a vigorous defence:

> "The.....case was a prosecution for murder of a man whom his counsel discovered, during trial, was in fact guilty. Counsel nevertheless played out the defence, putting a key prosecution witness through a gruelling and suggestive cross-examination. The ensuing professional debate concerning his conduct establishe the principle that an advocate is responsible only for presenting the best possible case for his client and not for the truth."[268

The /

The principle here stated as having been established would seem clearly to be at odds with the professional rules we have been discussing and neither this nor the other views expressed as indicative of practitioner opinion in America can be taken as necessarily reflecting such opinion in the United Kingdom; but they may invite the question whether they may not more accurately reflect the common practice and attitudes of not a few criminal defence advocates in all adversarial jurisdictions.

In the light of these views and of the general problems we have been discussing, it may perhaps be said that it is in the "confessed" accused situation, more than any other, that the formal precepts of professional canons of conduct render the profession vulnerable to the suspicion that such precepts may be in the nature of professional "window-dressing" - a ritual deference to ethical probity designed to impress a sceptical public.

This is not to say that all or most lawyers will willingly embark upon a knowingly fraudulent and perjurious defence. We may perhaps reasonably surmise that, in practice, experienced criminal defence lawyers will assuage their professional conscience by discreetly evading or discouraging an explicit admission of factual guilt and, in the knowledge that mere suspicion of guilt, however strong, is no bar to their undertakir a full and vigorous defence, will proceed, with a clear conscience, to do that.

We may also note here, as in our discussion of perjury in general the significance of the practice within our system of allowing a defendant the option of testifying on his own behalf. The problems arising in the "confessed" accused situations may be seen /

seen by some as lending support to the views of those, like Hazard [269], who favour a return to the former common law prohibition of such testimony. This would not solve all the problems we have discussed but would tend to make less conspicuous in the eyes of the court the accused's failure to present an affirmative case.

3.8.4 - The Legal Concept of Guilt

The situation where an accused has confessed his factual guilt to his counsel demonstrates more clearly than any other a feature of our criminal law which is of crucial significance to the ethics of the defence advocate's role: the legal meaning of the concepts of guilt and non-guilt as contrasted with the normal sense in which these terms are used outwith the context of the criminal law. That this important distinction in meaning is not clearly appreciated, at least, by the lay public, is perhaps a major cause of misunderstanding and confusion about the ethics of advocacy in the criminal courts - a confusion, moreover, which may also, to some extent, be evident in the terminology used by lawyers themselves.

Legal guilt and factual guilt are not the same; nor is the distinction a mere lawyer's quibble. Whether or not an accused person has, in fact, committed the crime charged, he is not, and cannot be, guilty in law unless and until he has been convicted by a guilty verdict of the trial court after due legal process. Unless and until such a verdict is returned by the court, he is, in the eyes of the law, innocent. This is what is meant by such statements as:

"The issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent." [270]

So /

So far, such statements may appear to be expressing the obvious, but they have important implications. It follows, for example, that if the accused is convicted by the court after due process, he is legally guilty even though he may, in fact, be innocent.

Conversely, a not guilty verdict does not necessarily mean that the accused has not, in fact, committed the act charged. It means that the trial court has adjudged that the charge has not been proved by the prosecution in the manner required by law; or, in the words of Sheriff Stone:

> "A verdict acquitting the accused does not establish any facts; it means only that the prosecutor has failed to prove his case." [271]

More significantly, in the context of the "confessed" accused situation, it follows that a plea of "not guilty" does not, in law, mean - although, in the case of a factually innocent accused, it may be intended to mean - "I did not commit the act charged" but, rather, "I claim my legal right to require that the prosecution prove guilt according to law".

When, therefore, an accused, has, in fact, committed the offence charged - and has admitted such to his counsel - he is not, by tendering a plea of "not guilty", making a false assertion to the court - nor, therefore, is his counsel assisting a falsehood in undertaking the defence.

Although these distinctions between factual and legal meanings are no doubt appreciated by lawyers, they are not, perhaps, so readily understood by the public at large. In particular, the normal and natural association in the lay mind between "guilt" and factual culpability tends to confirm the view of the lawyer - particularly the criminal defence lawyer - as a "hired gun"; one /

one who, in the words of Swift, is prepared to prove "that white is black and black is white, according as they are paid." [272]

Moreover, this misunderstanding of the advocate's function is, perhaps, to some extent, encouraged by somewhat loose terminology by lawyers themselves in a way which tends to blur the distinctio in question - and consequently also, to blur the issues. As we have seen, for example, in our review of the professional rules concerning confessions of "guilt" by an accused to his counsel, the terms "guilt" and "guilty" appear - notwithstanding their strict legal meaning - to be used in the rules themselves in their non-legal and factual sense. Another notable example of confusing terminology is seen in the Scottish alternative verdicts of "not guilty" and "non-proven". The fault here does not lie in the uniquely Scottish "non-proven" verdict. Indeed, in the light of what has been said, that is, in strict legal terms, a more appropriate verdict than "not guilty"; but in the fact that their formal recognition as alternative verdicts infers a distinction which does not, in law, exist.

More to the point for our present purposes, in view of what has been said it may be argued that there is a case for abandoning the pleas of "guilty" and "not guilty" in criminal proceedings and replacing them by terms such as "not contested" and "contested". Such a change would more clearly and accurately reflect the legal realities and would assist in removing or abating public misconceptions both as to the position of the accused and the function of his counsel. In particular, the substitution of "contested" for "not guilty" would make it clear /

clear that the plea tendered by an accused who elects to go to trial is not necessarily an assertion of fact but of intention - namely, his intention to claim his right to require that the prosecution prove the charge according to law.

In the context of the "confessed" accused situation, it would be particularly helpful in clarifying the ethical issues which at present tend to be obscured, in the public mind at any rate, by the "not guilty" plea; for, to "contest" the charge would be less easily misunderstood as a fraudulent assertion of factual innocence. It may possibly be objected that such a change might be unfair to the factually innocent accused since it would deny him the right to the unequivocal assertion of innocence which is conveyed by the normal (as distinct from the legal) meaning of "not guilty"; but, to "contest" a charge, while admittedly somewhat less unequivocal in nuance, does not convey any adverse inference.

3.8.5 - Conclusions

In reviewing this discussion, it may be said that no situation demonstrates more vividly the ethical dilemma of defence counsel than that in which his client has confidentially admitted his factual guilt. As has also been said in regard to other difficult situations, the dilemma is particularly acute for the conscientious advocate who places a high value both on his professional integrity and his dedication to his client. On the one hand, he is professionally bound to be his client's zealous and fearless defender; on the other, he is also bound by his professional rules to offer his client the bleak choice of being abandoned or submitting to a line of defence which can have /

have but little chance of success and, indeed, if the professional rules are punctiliously observed, may, in many cases make conviction virtually inevitable.

It may also, perhaps, be said that this particular situation appears to reflect an inconsistency in the official professional attitude to the advocate's perceived commitment to truth. As we have discussed, in other situations, the advocate, particularly in his role as criminal defence counsel, is accorded a wide latitude in regard to known factual issues relevant to his client's case. This is so notwithstanding that counsel must, in many cases, be aware of circumstances which are strongly suggestive of the factual guilt of his client, albeit not in the form of an explicit confession. In such cases, however, and short of assisting his client's perjury, there is no bar to his presenting a vigorous affirmative defence - and, indeed, he is seen as having a duty so to do. Given that the line between strong suspicion and actual knowledge of counsel as to his client's factual guilt can be a very tenuous one, the rigorous embargo imposed by the professional rules on any kind of affirmative defence in "confessed" accused situations may seem difficult to justify.

This situation also raises in an acute form the issue of professional confidentiality. The accused who reveals all to his counsel by candidly admitting his factual guilt is doing so, presumably, in the expectation that his confidence will be guaranteed by his counsel's professional probity and will not be betrayed to his prejudice. It may be argued by some, however, that /

that the course of action imposed on counsel by the professional rules amount, in effect, to such a betrayal. It may be counter-argued that the principle of lawyer-client confidentiality, however sacred, cannot justify perjury - a proposition which those such as Bok [273] would certainly support and which seems difficult to refute in ethical terms. But, as we have seen, the "frozen" defence imposed on counsel flows from the confession of guilt per se and is not confined to situations in which the accused insists upon taking the stand to give perjured testimony. This being so, it may indeed, perhaps, be plausibly argued that the price which the confessed accused pays for reposing complete confidence in his counsel amounts, in effect, to a breach of that confidence.

This consideration may give additional weight to the doubt earlier expressed as to the extent to which these particular professional rules are, in practice, punctiliously observed - or, indeed, genuinely expected to be so observed.

Finally, in total perspective, the situation we have been discussing may be seen as particularly illustrative of the uneasy compromise within the adversarial system between the perception of the advocate as a vehicle for the pursuit of truth and his role as the protector and champion of his client; a compromise which at times casts the advocate in the unenviable role of one who, in the words of Hazard:

> ".....is supposed to be both the champion of his client and a gatekeeper having a duty to prevent his client from contaminating the courtroom."
>
> "In principle", he adds, "these responsibilities are compatible. The duty to the court simply limits the way in which a lawyer can champion his client's cause. In practice, however, the duties have come to be in perhaps uncontrollable conflict." [274

3.8.6 - Summary

(1) The rules and precepts of legal professional bodies in Britain (as summarised on pages 175/183 supra) regarding the proper course of conduct for defence counsel to whom an accused has confessed factual guilt, create serious problems for both counsel and client.

(2) These problems may arise either from mandatory withdrawal by counsel, where the rules so require, or from the restricted defence which they impose as a condition of counsel's continuing to act.

(3) The limitations upon the defence imposed by the rules in this situation are of a nature and severity which raise questions as to -

(a) whether it can properly be described as a viable defence which is consistent with the principle of the presumption of innocence and with the accused's right to effective professional assistance in support of his not guilty plea.

(b) whether the kind of defence imposed is logically feasible.

(c) whether, in view of its entirely negative nature, there can be any realistic expectation that the rules imposing it are, in practice, followed.

(4) The "confessed" accused situation -

(a) highlights the significance in ethical terms of the technical concepts of guilt and non-guilt in criminal law terminology;

(b) /

(b) appears to involve a degree of inconsistency in the official professional perception of the advocate's position in relation to issues of fact;

(c) raises important issues regarding the sanctity of lawyer-client confidentiality;

(d) illustrates in a particularly acute form the ethical problems with which the advocate has to cope.

PART FOUR

THE ROLE OF THE PROSECUTOR

Sections

4.1 Comparison of the Roles of Prosecutor and Defence Counsel

The adversarial trial has been variably described as a fight, a game, and a sporting contest. Common to all these activities is the urge to win.

In our review of the role of the advocate as criminal defence counsel, it seems apparent that, to whatever extent his motivation may be perceived as tempered by the pursuit of truth, his predominant objective is to win the "fight" or "game" for his client. It will also be apparent that, in pursuing this objective, he takes - and, indeed, is given by the system itself - fairly wide latitude in regard to questions of fact: by way of the non-disclosure of adverse facts, the selective presentation of favourable facts, and the general manipulation of evidence in the manner he deems most beneficial to his client.

In examining the role of his protagonist, the prosecutor, we must ask the question as to the extent to which these features of the defence counsel's function may also be perceived as applying /

applying to him. Is the primary objective of the prosecutor also to win the "fight" or "game" by securing a conviction? Are the rules of the game the same for both adversaries?

Before proceeding to explore these questions, we may note that the "game" aspect of the adversarial trial is not peculiar to that system. In so far as there are rules governing the process - and an umpire or referee, in the form of the judge, to ensure the rules are followed - there is clearly an element of the "game" also in the inquisitorial or, indeed, any other civilised system. What distinguishes the adversarial trial most clearly is the strong competitive element in the forensic contest between the contending advocates. For this reason, the sporting contest analogy is perhaps the most apt. In referring to this analogy, Frank quotes Damon Runyan:

> "A big murder trial.....possesses some of the elements of a sporting event. I find the same popular interest in a murder trial that I find.....on the eve of a big football game, or a pugilistic encounter, or a baseball series. There is the same conversational speculation on the probable result, only more of it.....The trial is a sort of game, the players on the one side the attorneys for the defense, and on the other side the attorneys for the State. The defendant figures in it merely as the prize.....And the players must be men well-schooled in their play. They must be crafty men..... The game of murder trial is played according to very strict rules, with stern umpires, called judges, to prevent any deviations from these rules....." The players "are supposed to be engaged in a sort of common cause, which is to determine the guilt or innocence of the defendant...." [275]

On the question of "popular interest", it may also be remarked that, in a trial as in a sporting event, the relative skills and reputations of the contending advocates may be important ingredients in the entertainment value; the more equally matched their reputed skills in advocacy, the greater the public interest - in major trials, at least.

More /

More importantly, this fortuitous factor of relative skills in the arts of the "game" may, in our adversarial trial system, be sometimes said to have almost as important an effect on the outcome as it has in a sporting event. On this point, however, the analogy cannot be carried too far. In a sporting event, as distinct from a law trial, the relative justness or moral merits of the contending sides are not relevant considerations; nevertheless, in the eyes of some, success in a trial may often seem to owe less to virtue than to virtuosity.

Further, the analogy between a sporting event and an adversarial trial is, of course, valid only in terms of the competitive element of both activities. Clearly, there is a vast difference between them in other respects. But even in the competitive context, the analogy breaks down as regards several important aspects. There are crucial differences which are of significance to the respective functions of defence counsel and prosecuting counsel.

One of these differences relates to the relative resources of the contending sides. In the sporting world, this may vary - in some cases, the resources of each side in terms of back-up and financial reserves being roughly on a par; in others, less so. But, in adversarial criminal trials, a considerable disparity in resources is a constant factor; for, arrayed against the individual accused and his counsel are the vast power and resources of the state prosecution bureaucracy. These include the investigative and technical resources of the police who, in the adversarial system, as Lustgarten points out, "take an /

an avowedly partisan stance" [276] in the criminal justice process on the prosecution side.

There are other differences, however, of an even more fundamental nature. There is, first, the obvious difference that counsel, in his role as a Crown prosecutor, is a public official - an agent of the Crown and state as representing the public interest. Defence counsel, on the other hand, although, as we have discussed, he is perceived, in a sense, as the holder of a quasi-public office - as an "officer of the law" [277] - is not in any sense an agent of the state. His duty is to his client within the law. The distinction here between "the law" and "the state" is, of course, of crucial constitutional importance - and not only in a criminal process context.

This distinction in status between defence counsel and the prosecutor gives rise to important distinctions in function. It is a function of the state, as representing the public interest, to ensure that criminals are brought to justice. In achieving this objective, it must also, however, seek - again, in the public interest - to ensure so far as possible that the criminal process so operates as to minimise the possibility of unjustly convicting the innocent. It is, therefore, the duty of the Crown prosecutor to seek to ensure that only the guilty are punished. For these reasons, he has been described as a "minister of justice" [278]; and is seen, in theory at least, as an advocate whose professional function, unlike that of his defence colleague, involves no duality of duties but only an unequivocal /

unequivocal commitment to truth and justice.

The consequential and contrasting features of the prosecutor's role may be identified under two heads: first, those relating to the considerations which should guide him when deciding whether to undertake a prosecution; second, his obligations in relation to questions of fact when conducting a prosecution.

4.2 - The Decision to Prosecute

4.2.1 - Honest Belief in Guilt

In regard to the criteria to be applied when deciding whether to undertake a case, a notable illustration of the distinction traditionally drawn between prosecution and defence counsel is the case of Oscar Wilde. As is well known, Wilde embarked on an ill-advised prosecution of the Marquess of Queensberry for criminal libel and lost. However, in the light of the evidence which came out in the case, he was very soon thereafter himself prosecuted by the Crown and convicted for the (then) crime of sodomy. Wilde's prosecution of Queensberry was based on the latter's allegation that Wilde was a sodomist. Montgomerey Hyde, in "The Trials of Oscar Wilde", recounts that Wilde's counsel, Sir Edward Clarke, requested, as a condition of his undertaking the brief in Wilde's prosecution of Queensberry, an assurance of Wilde's innocence of Queensberry's allegation. Since Clarke accepted the brief, we may assume that this assurance was given to him. In clarification of this incident, Montgomerey Hyde comments:

> "It should perhaps be pointed out here that since his client was technically the prosecutor in this case, Clarke was justified in putting this question to him. Of course, had Wilde been facing a criminal charge himself at this stage, Clarke would obviously not have done so, it being contrary to professional etiquette and the traditions of the Bar for counsel to make his client's declaration of his innocence a condition of defending him." [279]

In the context of Montgomerey Hyde's remarks concerning this incident, it seems clear that Sir Edward Clarke's attitude in the /

the matter of his undertaking to act as prosecuting counsel on behalf of Wilde was not peculiar to him but represented the general professional attitude to prosecution briefs: that such briefs should not be accepted unless counsel is satisfied as to the probable guilt of the accused. By contrast, as defence counsel, the advocate has no obligation to satisfy himself as to his client's factual innocence; and, indeed, as we have seen, may properly undertake a defence brief even when he knows his client to be factually guilty.

The incident related by Montgomerey Hyde reflects what would appear to be a recognised principle that a prosecutor - whether in a private prosecution, as in Wilde's case against Queensberry, or in a prosecution by the Crown - must have an "honest belief" in the accused's guilt. The nature of this obligation was discussed by the English Court of Appeal in Dallison v Caffery. [280] Here, the conduct under scrutiny was not that of prosecuting counsel but that of a detective constable, Caffery, who had arrested Dallison on a charge of larceny and initiated a prosecution against him in name of the police. However, this does not affect the principle at issue. Dallison was remitted for trial by the magistrates but when the case came up for trial at the quarter sessions, counsel for the prosecution offered no evidence against the accused and said he thought it was a case of mistaken identity. Dallison was accordingly acquitted. Thereafter, he sued Caffery for false imprisonment, alleging, inter alia, that the information upon which Detective Constable Caffery had initiated the prosecution against him could /

could not be the foundation of "honest belief" in his guilt nor did it constitute reasonable and probable cause. At the trial on this issue, the judge dismissed the case against Caffery and his decision was thereafter vindicated by the Court of Appeal.

This case is of particular interest in regard to the question we are now discussing: first, it highlights two contrasting aspects of the honest belief principle - the fact that counsel for the prosecution, at the opening of the quarter sessions trial, clearly did not have an honest belief in the guilt of Dallison and therefore declined to proceed; and the fact that, this notwithstanding, the Court of Appeal held that Caffery did have an honest belief in Dallison's guilt when he initiated the prosecution. Second, the fact that counsel for the prosecution and Detective Constable Caffery each came to a different conclusion on the basis of the same information, illustrates the subjectivity of the principle of honest belief in guilt - as distinct from the objective test as to whether there was a reasonable foundation for that belief; a distinction stressed by Lord Diplock:

> "One word about the requirement that the arrestor or prosecutor should act honestly as well as reasonably. In this context it means no more than that he himself at the time believed that there was reasonable and probable cause.....for the arrest or for the prosecution, as the case may be. The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause....."[281]

In the event, it was held that Caffery satisfied both tests, that is, both that he did honestly believe that there was reasonable and probable cause for prosecuting and that that belief had a reasonable /

reasonable foundation.

4.2.2 - Evidential Sufficiency - Code for Crown Prosecutors

The principle of honest belief by the prosecutor would also appear to be reflected, by implication at any rate, in the Code for Crown Prosecutors issued by the Director of Public Prosecutions in England and Wales pursuant to the Prosecution of Offences Act 1985. This Act, which established the Crown Prosecution Service in those countries, provides by Section 10:

"(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them -

(a) in determining in any case -

(1) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be continued;"

The Code is, therefore, described as "a public declaration of the principles upon which the Crown Prosecution Service will exercise its functions." [282]

The principle of "honest belief" is not, however, expressed explicitly in the Code in those terms, but though it may be seen as being implicitly acknowledged in what it has to say regarding evidential sufficiency criteria, the wording could, perhaps, be susceptible to misinterpretation:

"When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the Crown Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Crown Prosecution Service does not support the proposition that a bare prima facie case is enough, but rather will apply the test of whether there is a realistic prospect of a conviction....."[283]

The /

The statement that the prosecutor must be satisfied as to the sufficiency and reliability of the evidence as indicative of the fact that "a criminal offence known to the law has been committed by an identifiable person" may probably be seen as acknowledging the honest belief principle in that the prosecutor must personally be satisfied in the light of all the evidence known to him that the offence charged has been committed by the accused. But the other test mentioned: "whether there is a realistic prospect of a conviction", is a different criterion for it does not necessarily involve a personal belief in guilt but rather is a professional assessment of the likely impact upon the court of the prosecution evidence. Clearly, there will be situations in which the prosecutor, although possibly harbouring doubts as to the accused's factual guilt, may, nevertheless, calculate that, by the adroit presentation of the prosecution evidence, he has a realistic prospect of securing a conviction.

In Dallison, for example, the prosecuting counsel who declined to proceed with the prosecution at the quarter sessions, might possibly have taken the view that, notwithstanding his own possible doubts as to the accused's factual guilt, the evidence was such as to afford a realistic prospect of conviction - the view, presumably, taken by Detective Constable Caffery on the same evidence. Had the prosecuting counsel proceeded with the case in that situation, he would, in the light of the honest belief criterion, have acted unethically. To his credit, he did not do so. However, had he done so, and given the finely balanced issues of fact in dispute in that case, he might well have succeeded.

This /

This demonstrates the danger of not clearly distinguishing between the two evidential sufficiency criteria - a distinction explicitly recognised in the American Bar Association's 1974 Standards relating to the administration of criminal justice:

"The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(1) the prosecutor's reasonable doubt that the accused is in fact guilty;
....."[284]

However, while this distinction is not clearly drawn in the Code for Crown Prosecutors, when taken in context [285] what it appears to be saying is that, in deciding whether or not to institute a prosecution, (and apart from "public interest" considerations with which the Code also deals [286]), there are in fact two tests which the prosecutor should apply: first, whether the available evidence is such as to satisfy him that the accused is factually guilty - the honest belief criterion; second, on the assumption that he is so satisfied, whether, having regard to the legal requirements relating to evidential competency and admissibility, the evidence is such as to afford a "realistic prospect" of conviction by the court.

On this interpretation of the Code's provisions, the evidential sufficiency criteria which the prosecutor is enjoined to apply, have therefore, two different connotations: factual sufficiency relating to probable guilt and technical sufficiency relating to evidential legal requirements. In this regard, therefore, his position is clearly /

clearly different from that of defence counsel. The advocate, when acting for the defence, has no obligation to weigh the evidence in order to satisfy himself as to the innocence of his client before undertaking his defence. His duty, in the words of the English Bar Code, is:

> ".....to endeavour to protect his client from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction...." [287]

For the defence advocate, therefore, it is the "legal evidence" alone with which he is concerned; for him, the assessment of evidential sufficiency means only its implications as affecting his client's prospect of acquittal; not as a pointer to his factual guilt or innocence.

It may, however, be said that the terms of the Code for Crown Prosecutors as regards the principle of "honest belief" as applied to the advocate as prosecutor, are perhaps somewhat ambivalent - albeit, no doubt, unintentionally - in bringing out the importance of the distinction as noted between the <u>factual</u> and <u>legal</u> sufficiency of evidence as a criterion for instituting a prosecution.

A similar criticism could, perhaps, be applied to Sheehan's statement that:

> "The purpose of the pre-trial inquiries by the prosecutor is to establish whether or not there is sufficient evidence, <u>which if believed by the court</u> (my emphasis), would entitle the court to convict....." [288]

On the face of it, this might be taken as implying that the prosecutor need only have regard to the <u>legal</u> sufficiency of the evidence as the criterion for prosecuting. Taken in context, this, presumably, was not his intention for he was not dealing with the ethics of the prosecutor's function as such. Nevertheless, the terminology may again be susceptible to misinterpretation

in /

in that it tends to obscure the important distinction between evidence which the prosecutor himself believes to be sufficiently credible to warrant a prosecution and, possibly, more suspect evidence which he nevertheless believes may suffice to obtain a conviction; and may, therefore, encourage the assumption that only one test - namely, the legal sufficiency test - need be applied.

The distinction between these two tests - and the need for both to be applied by the prosecutor before deciding whether or not to prosecute - are factors which, clearly, are of crucial importance for the administration of criminal justice and, as has been said, are indicative of the crucial difference in this context between the professional roles of prosecuting and defence counsel.

4.2.3 - The Prosecutor and Credibility of Prosecution Evidence

Notwithstanding the importance of these issues, it is perhaps worthy of note that they do not appear to be clearly addressed within the legal profession in the United Kingdom; nor do the distinctive obligations of the advocate as prosecutor - as compared with those of defence counsel - appear to be given the prominence and recognition which their significance would seem to warrant. Indeed, in so far as such matters are touched upon at all, the effect may be said to obscure rather than clarify these crucial distinctions.

The English Bar Code, it is true, includes a brief section relating to "Duties When Prosecuting a Person Accused of a Crime [289]" and advises that:

"It is not the duty of prosecuting counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution....." [290]

However, /

However, while this statement stresses the principle of the impartiality of the prosecutor in relation to the presentation of fact - as contrasted with the clearly partisan role of the defence advocate - the context in which it is made would seem to suggest that it is referring to the situation during a trial and cannot be read as necessarily defining the principle that prosecuting counsel must personally believe in the probable factual guilt of the accused as a prerequisite for the prosecution proceedings. The Scottish Faculty Guide does not appear at any point to refer specifically to the advocate in the role of prosecuting counsel - the references throughout being to "advocate" or "counsel" without distinction as to function. In the one paragraph where the opposing sides in criminal proceedings are mentioned, the prosecution is referred to impersonally as "the Crown" [291]. However, this Guide contains one statement which, in so far as it may be taken as applying to counsel in either role, may be of relevance to the matter under discussion:

> ".....it is for the court, not for counsel, to assess the credibility and reliability of witnesses....."[292]

The general context in which, in this Guide, the term "advocate" or "counsel" is used suggests that, in the main, they are references to advocates in civil proceedings or the defence advocate in criminal cases, and the particular statement here quoted may possibly be construed as so applying. But perhaps not; for a similar statement of principle as to assessing the credibilit of evidence is made by Sheriff Stone in terms which specifically apply it to both prosecution and defence counsel:

> "Where the evidence in the possession of a prosecutor amounts to a prima facie case against the accused, or the evidence in possessio of the accused's advocate amounts to a prima facie defence to the charge, neither advocate has any professional duty to form a view about the credibility of the evidence or the truthfulness of their witnesses." [293]

It /

It is, of course, true that, for the purpose of arriving at a verdict, it is the function of the court, and the court alone, to judge the credibility of evidence and that it is clearly the court and not the prosecutor who must judge guilt or innocence; however, in so far as it is perceived to be the prosecutor's duty to satisfy himself as to the factual sufficiency of the evidence, in its totality, to justify the prosecution proceedings, it would seem to follow that he must also "form a view" concerning the credibility of the evidence or the truthfulness of his witnesses - not only, it may be added, as a criterion for the institution of the prosecution in the first place, but also as justification for continuing with the proceedings; for if, at any rate, the Code for Crown Prosecutors in England and Wales is to be taken as a guide, it seems clear that if, at any stage during the proceedings, it becomes clear to the prosecutor that the prosecution evidence is not in fact sufficiently "admissible, substantial and reliable" as indicative of factual guilt, his proper course is to terminate the prosecution [294].

It may also be noted in passing that Sheriff Stone's apparent view as to the sufficiency of a "prima facie case against the accused" appears to be at odds with that Code's explicit rejection of the proposition that "a bare prima facie case is enough" [295]. However, it is probably true to say that neither Sheriff Stone's remarks nor the statement quoted from the Scottish Faculty Guide can be construed as consciously dissenting from the principle that the advocate, when acting as prosecutor, must personally be satisfied that the available evidence is indicative of probable guilt; for these statements were not addressed to this issue but rather /

rather were made in the context of the advocate's duties in relation to the actual presentation of the evidence to the court during the trial proceedings.

Nevertheless, as has been said in regard to other somewhat ambivalent statements as to the prosecutor's function, they are vulnerable to misinterpretation and could, perhaps, be exploited by those who may take a more cynical view of that function. This danger is all the more evident in a system based upon adversarial confrontation and in which the will to win and, possibly, considerations of professional prestige and ambition are no doubt as strong for the prosecutor as for the defence advocate - a danger explicitly recognised in the American Bar Association's 1974 Standards:

> "In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or a desire to enhance his record of convictions" [296]

So far as political advantages are concerned, this particular factor is doubtless more relevant in America where prosecutors are political appointees, but in other respects there seems no reason to suppose that the temptation to a prosecutor to be sometimes motivated by considerations of personal or professional advantage through enhancing his record of convictions, is any less evident in the United Kingdom.

4.2.4 - The Scottish Perspective

In the context of the criteria - as applied in practice by prosecutors when deciding whether to prosecute - the position in Scotland, as reflected in a recent survey [297] by Moody and Tombs, is particularly revealing. Being largely based on interviews with individual prosecutors (procurators fiscal) throughout /

throughout Scotland, it reveals their own perceptions of their function in a country in which, unlike England, a Crown prosecution service has been long established; where attitudes and practices have evolved over centuries; where there is no comprehensive statutory code and prosecutors have been left, in the main, to adopt their own philosophies as to their objective and how to achieve it.

Prosecutors in Scotland see themselves as "upholders" of the criminal law, their major concern as being to "safeguard the public interest" and regard punishment of criminals as necessary, not only to deter, but as retribution for a wrong done [298]. However, the adversarial spirit is also evident. A corollary of the will to win which the system encourages is the disposition, among prosecutors as among advocates generally, to view the outcome of a court case, not only in terms of the triumph of justice or injustice, but in terms of professional prestige; and thus, in the case of prosecutors, to see a conviction as success and an acquittal as failure. Thus, Moody and Tombs on the viewpoint of Scottish prosecutors:

> "The image of the fiscal as an impartial prosecutor is hallowed by tradition but may not always be reflected in fiscals' practical aspirations. Some fiscals are quick to point out that they are not: 'in the business of securing convictions'; 'it would give the wrong impression if I said I saw myself as there to secure convictions at all costs because that is clearly not so'. Others, however, admit that they experience a sense of failure when an accused person is acquitted: 'the guy walks free and you know perfectly well that he has done it and that's just appalling'. "[299]

While the sense of failure here expressed is attributed to frustration and indignation at the acquittal of one whom the prosecutor believes to be factually guilty, in some instances it may no doubt also derive from chagrin at having lost in the forensic /

forensic contest.

However, for our immediate purpose, the relevant question is the extent to which, in the light of this Scottish survey, "honest belief" in factual guilt is seen by prosecutors themselves as a necessary prerequisite to prosecution. Given their commendable self-image as upholders of the law and guardians of the public interest, such a prerequisite would seem to be a sine qua non of their function since, clearly, the conviction of innocent people serves the interests neither of the law nor of the public. But, consistent with the view earlier expressed as to the absence of professional guidance and discussion on this particular issue, the question of honest belief is nowhere specifically addressed in the survey; and again, in the general context of the criteria for prosecuting, the language used leaves scope for varying interpretations. Thus, the authors cite [300] as the standard text for these criteria in Scotland the six points specified in Renton and Brown - the following of which is relevant for our purposes:

> "(11) Whether there is sufficient evidence in support of these facts (the facts disclosed in the information before the prosecutor) to justify the institution of criminal proceedings;" [301]

In the light of what has been said regarding the two different connotations of the evidential sufficiency criteria, the wording here is ambiguous. No distinction is made between legal and factual sufficiency. It may be construed as meaning one or the other; or it may be intended to mean both.

However, the general context of discussion in this Scottish survey in regard to evidential sufficiency seems to suggest a preoccupation in the attitude of the prosecutors interviewed with purely /

purely legal criteria: when decisions are taken not to proceed for reasons of evidential insufficiency, it is because the evidence is "legally untenable" [302], or on the ground that it "cannot be legally sustained" [303].

This impression tends to be strengthened by other revelations which might appear ex facie inconsistent with "honest belief" in guilt - and perhaps also to have disturbing implications:

> "A fairly new depute (fiscal) suggested that evidential requirements might be stretched in certain circumstances: 'it may well be a case where there may be just enough evidence..... I will proceed because of the effect it has on the person although he may well not in the end be convicted' "[304]

> "Most fiscals would agree that where proceedings have been instituted the prosecutor's implicit assumption in prosecuting is that the accused is guilty of some or all of the charges libelled against him. This makes it difficult for him to regard an acquittal as the correct verdict: 'I think if one has decided to prosecute, one has got to adopt a positive view. The view that if prosecution is appropriate, then conviction is appropriate.' "[305]

This latter quote is perhaps, for our purpose, the most revealing. It may perhaps be seen as the nearest approach in the survey to an indication of a recognition by prosecutors themselves of the honest belief principle - albeit expressed in terms which may appear to fall somewhat short of it. An "implicit assumption" of factual guilt may mean no more than the prosecutor's perception that the information before him constitutes a prima facie case in law against the accused. But even accepting that it may also mean belief in probable factual guilt, the inference in the passage quoted seems to be that not all prosecutors have such an assumption when deciding to prosecute and that even when they do, it may not necessarily extend to all the charges libelled but only to "some" of them.

In summary, therefore, we may conclude that this inquiry by Moody and Tombs into the prosecution system in Scotland would appear /

appear to support the criticism expressed supra regarding the failure in discussions on evidential sufficiency to make the important distinction between the factual and legal sufficiency criteria and to make it clear that both should be applied.

Further, although their survey appears to reflect a generally conscientious attitude by prosecutors to their function, and its revelations cannot generally be interpreted as necessarily inconsistent with the honest belief principle - it may invite questions as to the extent to which prosecutors are, in practice, guided by that principle as well as by purely legal considerations.

4.3 - The Prosecutor and Questions of Fact

4.3.1 - Introduction

In the light of what has been said we may conclude that, in deciding whether to institute or continue prosecution proceedings, it is considered to be the prosecutor's duty to have regard to all the evidence available whether for or against the accused. He must not be selective or biassed in his assessment. As regards pre-trial inquiries, Sheehan confirms this:

> "The inquiries made by the prosecution are certainly both impartial and thorough and will cover any evidence in favour of the accused as well as that against him....."[306]

But this does not mean that the position of the prosecutor in this regard can be equated to that of the examining magistrate in the French inquisitorial system with his comprehensive "dossier"; for, as Sheehan points out, the inquiries made by the adversarial prosecutor:

> ".....by no means give a full picture of the case as neither the police nor the prosecution has the right to examine the accused who at no time may be questioned unless he voluntarily gives evidence at the trial itself. Furthermore, the investigation by the prosecution is secret, the results not even being disclosed to the defence. Likewise, the accused is not required to state or reveal his defence until the close of the prosecution evidence at the trial." [307]

Consistent, therefore, with the adversarial approach, the opposing sides prepare for combat in secret, concealing from each other their line of attack at the trial - much as will opposing sides in a football match conceal from each other their proposed line-up and tactics.

It follows that the prosecutor in the adversarial system, however impartial and thorough his pre-trial investigations, will not normally have access to the main defence evidence. Nevertheless, inevitably, /

inevitably, in many cases, his inquiries will reveal evidence which favours or seems to favour the accused - whether as regards information about specific facts or about witnesses whose evidence favours or tends largely to favour the accused. Where such evidence is of so fundamental a nature as to effectively negate, in his judgment, the probability of the accused's factual guilt, his proper course, in the light of the principles we have discussed will be to abandon the prosecution.

However, should the proceedings continue, a number of questions arise and will now be addressed in regard to the prosecutor's obligations as to issues of fact both before and during the trial. We may broadly classify these in three categories: first, obligations as regards disclosure to the defence of information revealed by his pre-trial inquiries: second, disclosure to the trial court in the presentation of his evidence during the trial; third, his obligations in regard to calling, or making known to the defence, witnesses adverse to the prosecution case.

4.3.2 - Information Revealed by Pre-Trial Inquiries

For an illustration of the adversarial approach to the relationship between prosecution and defence in the pre-trial stage - and, interestingly, of possible changing attitudes in this connection - we may again turn to Scotland and the case of Smith v. H.M. Advocate [308].

Smith was convicted of murder by stabbing with a dagger. At the locus - a dance hall - the police had found, in addition to the murder weapon, a sheath-knife. They did not report this find to the procurator-fiscal (the local prosecutor), the reason being,/

being, apparently, that they attached no importance to the sheath-knife - there being at that time no suggestion that the victim had been armed - nor any indication by the defence of a plea of self-defence. Just a week before the trial, the Crown Office were informed about the sheath-knife by the fiscal, (he having learned about it accidentally), but, for the same reasons, they took no action to disclose the existence of the knife to the defence. However, three days before the trial, the defence solicitor phoned the police and asked whether another weapon had been found at the locus and was then told about the knife. The defence then intimated a plea of self-defence.

The accused appealed against his subsequent conviction - on the ground (inter alia) of the prosecutor's failure to disclose the existence of the sheath-knife to the defence. The court rejected the appeal:

> "....we are not satisfied that there was any obligation on the Crown to inform the defence of the existence of the sheath-knife or to make available any information concerning it until they knew that self-defence was being pleaded. So far as we can see, there was nothing in the case prior to the intimation of the special defence to suggest that self-defence was a possibility... By the time the special defence was intimated to the Advocate-depute, the defence knew about the knife.
>
> Had the defence been timeously lodged, the defence would have had a grievance if they were not told of the existence of the knife. However, this situation never arose. In the event, when the special defence was belatedly lodged, the defence already knew of its existence and cannot therefore take any point on the failure of the Crown to tell them about it earlier." [309]

Of particular interest, are Lord Thomson's observations as to the general obligations upon the prosecution in regard to information uncovered by its investigations - citing the remarks of Lord Clyde in the well known case of Oscar Slater. Thus Lord Thomson:

"As /

"As Lord Justice-General Clyde said in Slater v. H.M. Advocate [310] 'an accused person has no right to demand that the prosecution should - in addition to supplying him with the names and addresses of all the witnesses who may be called - communicate to him all the results, material or immaterial, of the investigations made by the Procurator-fiscal under direction of the Crown Office'. There can be little doubt, however, that the tendency in recent years has been for the defence to expect from the Crown, and indeed for the Crown to afford, a measure of assistance beyond what would have been in contemplation of any previous generation of Scots lawyers. However that may be, the Crown does nowadays honour the practice of including witnesses and productions beyond what is strictly necessary for its own case.

This practice springs from the Crown's recognition that it has opportunities for investigation which are not enjoyed by the defence. It is based also on the presumption of innocence and the consideration that an accused man is entitled to the benefit of the doubt. But the practice has not been pressed so far as to mean that the Crown is under any obligation to discover a line of defence. If, in a stabbing affray, the information before the Crown showed that both the assailant and victim had knives in their hands, it would be the duty of the Crown to include in the indictment the knife which was in the victim's hand and the witnesses who can speak to it. But, if there is nothing in the material before the Crown to suggest a possible defence of self-defence, it would appear unnecessary for the Crown to include something in the indictment just because it might have a possible bearing on such a defence if taken. It is a question of degree." [311]

The significant points reflected in these observations may be identified as follows -

1. Unlike the information in the French examining magistrate's dossier - all of which is made available to the defence - the information gathered by the adversarial prosecutor's investigations is the exclusive property of the prosecution, pre-eminently orientated towards the prosecution case.
2. This notwithstanding, there appears to be recognition that any facts uncovered by these investigations which may be of material import for defence purposes, should be disclosed - but it is for the prosecution to judge the materiality for defence purposes. While , as Lord Thomson says, the accused is /

is to be given the benefit of any doubt, it is only doubt as perceived by the prosecution.

3. In this context, it may be noted that, in the appeal proceedings, Smith's counsel also invoked the aid of Lord Clyde in Slater as authority for the proposition that "it was the duty of the Crown to disclose to an accused person the results of their investigations so far as materially affecting the question of the accused's guilt or innocence" [312]; for, following the words quoted by Lord Thomson in Smith, Lord Clyde in Slater also said:

> "No doubt a very different question would arise, if it could be shown that the prosecution had betrayed its duty by insisting in a charge in the knowledge of the existence of reliable evidence proving the innocence of the person accused which it concealed from him." [313]

4. Lord Thomson's statement that the prosecution is under no obligation to "discover a line of defence" - this is also indicative of the difference between the adversarial and inquisitorial system. In Smith, the prosecution was not perceived as having any obligation - in the absence of any self-defence plea - to speculate on the possible implications of the finding of the sheath-knife. It may seem reasonable to surmise, however, that the inquisitorial examining magistrate, notwithstanding the absence of any other suggestion of self-defence, might, at least, have considered the possible implications of the presence at the locus of another potentially lethal weapon.

In summary, we may see this case as a significant pointer to current perceptions as to the nature and limits of the prosecution's /

prosecution's obligations to the defence at the pre-trial stage - and also, in the light of Lord Thomson's remarks, as indicative of changing attitudes to the partisanship of the prosecutor's function and of a growing recognition of the implications for criminal justice of the conspicuous disparity in investigative resources between prosecution and defence.

4.3.3 - Fact Disclosure during Trial

On the premise that the prosecutor is one whose function it is to ensure, or honestly endeavour to ensure, that only the factually guilty are convicted, we might reasonably expect that his perceived obligations in relation to the presentation of evidence would require his laying before the court all relevant facts known to him - whatever their import for or against his case. At any rate, such expectation would seem to be in accord with ethical principle; and indeed such a view seems to be clearly reflected in a rule of the New South Wales Bar Association - cited by Disney et al as reiterating "the ethical rule generally accepted in England and Australia":

> "....Crown counsel in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts.....He must not press for a conviction beyond putting the case for the Crown fully and firmly....He must not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind." [314]

Comparing this with the ostensibly analogous provision in paragraph 159 of the current English Bar rules, (earlier mentioned at 4.2.3 supra), invites reflection:

"It /

"It is not the duty of prosecuting counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts."

Although similar in phraseology, an important variation may be noted: the obligation in the Australian rule to lay before the jury "the whole of the relevant facts" is transformed in the English version to "the whole of the facts which comprise the case for the prosecution" - not, it would appear, quite the same thing. The obligation imposed by the Australian Bar rule would seem to be unequivocal: the prosecutor must ensure, so far as he can, that all the facts within his knowledge and relevant to the case are made known to the court - irrespective, presumably, as to whether they are favourable or otherwise to his case. The English rule, on the other hand, seems capable of sustaining the interpretation that the prosecutor's obligation is limited to presenting - albeit "fairly and impartially" - only those facts which support his case.

The English approach on this issue seems to be implicitly recognising the adversarial nature of the trial process - the fact that, however fair and impartial he must be in the presentation of his case, the prosecutor is not - again to use a football analogy - obliged to put the ball through his own goal by assisting his adversary.

An illustration of the difficulties involved in attempting to reconcile this pragmatic and adversarial approach with an ethical view of the prosecutor's function may be found in the following passage from Stone - in the context of "Eliciting New Facts":

"In /

"In principle, prosecution evidence-in-chief should have disclosed all material facts known to the witness and to the prosecutor, even though some of them might have favoured the defence. This arises from the prosecutor's duty to present the case fairly. However, there are limits to that obligation. A prosecutor is not expected to search for possible defences and he is not required to present the case in such a way that he is conducting a defence to the charge. Some alleged new facts which the defence may put to a prosecution witness may not be so, or they may be unknown to the witness or to the prosecutor. Further, the prosecutor may, reasonably, be of the view that some facts are not material or relevant to the issue, and he may omit them from his examination-in-chief in good faith. However, if he were in any doubt about this, it might have been tactically advantageous to him if he had disclosed facts in the examination-in-chief which are brought out for the first time in cross-examination." [315]

Here, Sheriff Stone acknowledges a principle and then proceeds to specify "limits" to its operation; but the limits he specifies do not appear to be strictly relevant to the principle. As he acknowledges, that principle is the obligation upon the prosecutor, in examining his witnesses, to disclose "all material facts" known to himself and the witness - even facts favouring the defence. Clearly, this means those facts which the prosecutor honestly believes to be material. It does not require the prosecutor to bring out adverse facts which he honestly believes to be immaterial; much less, does it impose upon him the impossible task of bringing out facts of which he has no knowledge. Again, while the bringing out of a particular fact favourable to the accused may well assist his defence, the principle in question cannot reasonably be interpreted as obliging the prosecutor to "search for possible defences" or to conduct "a defence to the charge". The "limits", therefore, are illusory and the attempt to so qualify the principle tends to have the effect of diminishin it in deference to the realities of the adversarial contest in which /

which the prosecutor is engaged.

This impression is strengthened by the last sentence in the passage which would seem to suggest tactical advantage rather than ethical probity as the primary consideration when the prosecutor is in doubt as to whether or not to bring out an adverse fact.

However, whatever limits there may or may not be on the prosecutor's obligations to endeavour to ensure that all relevant facts known to him are revealed to the court, it is clear that he is not accorded the latitude permitted to defence counsel in regard to the non-disclosure of adverse fact. In a paragraph immediately following the passage just discussed, Sheriff Stone points the contrast:

"Defence evidence-in-chief, on the other hand, is likely to be more controlled and selective than prosecution evidence. The defence would not be obliged to disclose discriminating facts."[31

And, notwithstanding the somewhat ambivalent wording of the English Bar rule 159, discussed supra, we would not expect to find - and indeed we will not find - in reference to the defence advocate, any obligation analogous to that imposed upon the prosecutor to present his case "fairly and impartially"; for the defence approac is - and is acknowledged by the legal authorities to be - avowedly partisan.

As regards the disclosure or non-disclosure of adverse facts, the distinction between the prosecutor and defence counsel is also specifically recognised - albeit in a negative fashion - in the professional advice given to both English and Scottish solicitors.

Thus, the (English) Law Society's Code:

"Except when acting or appearing for the prosecution, a solicitor who knows of facts which, or of a witness who, would assist his adversary is not under any duty to inform his adversary or the court of this to the prejudice of his own client...."[317]

And Webster's Scottish booklet:

"In /

"In presenting the facts of a case you have a duty only to refer to those favourable unless you are prosecuting...." [318]

4.3.4 - The Prosecutor and Adverse Witnesses

The inference to be drawn from the wording of the Law Society's Code, as quoted above, would appear to be that the prosecutor, unlike the defence counsel or an advocate in civil cases, has a duty to inform the other side or the court about witnesses adverse to his case, but it does not attempt to define precisely the prosecutor's obligations in this context. When, for example, he knows of a witness whose testimony would support the defence, has he unfettered discretion as to whether to call the witness himself or merely pass on particulars about the witness to the defence, leaving it to them to call the person in question as a defence witness? If not, in what circumstances is he perceived as having a duty to call the witness himself? Are there any circumstances in which he need take no action either to call or pass on the witness?

It is these questions that we now address.

We may note at the outset the significance of the distinction betwe a prosecutor's calling a witness himself or leaving it to the defence to do so. As will later be discussed [319], there may, from the prosecutor's standpoint, be a tactical advantage in leaving it to the defence to call a witness whose testimony he knows to be favourable to the defence; for such testimony, coming from the defence side's own witness and elicited in the course of defence counsel's examination of the witness, is perceived as having less impact upon the court than it would have if extracted in the course of defence counsel's cross-examination of /

of the witness as a prosecution witness.

Further, as will also be later discussed, merely leaving it to the defence to call a material witness is in itself no guarantee that the witness will, in fact, be called and his testimony made available to the court.

For guidance on the issues now discussed, we must look mainly to the courts. Dallison v. Caffery [320] may again be referred to as a case in point. In the course of his inquiries into the larceny offence with which that case was concerned, Detective Constable Caffery, who initiated the prosecution of Dallison, interviewed three apparently credible and respectable persons who told him they had seen Dallison on the day of the offence at a place some 34 miles from where it occurred - and at times on that day which would have made it difficult - though not impossible - for him to have committed the offence. However, at the initial hearing before the magistrates, none of these persons was called as a witness nor were the magistrates told of their statements. Their statements had, however, been handed by Caffery to his superior officers in the police who had passed them on to the prosecution solicitors. They, in turn, handed them to Dallison's solicitor immediately after the hearing before the magistrates. The existence of these statements - upon which Dallison founded as alibi evidence - was, apparently, one of the factors which influenced the prosecuting counsel to abandon the prosecution at the opening of the subsequent quarter sessions trial.

However, /

However, at the hearing by the Court of Appeal in the subsequent action by Dallison against Caffery for false imprisonment and malicious prosecution, the conduct of both Caffery and the prosecution solicitor in not making the statements available to the magistrates was vindicated. Thus, Lord Denning:

"I do not see that this should be taken against Caffery. He did not conceal these statements. He put them before his superior officers and also before the solicitor for the prosecution. It was not his fault that the solicitor did not think it necessary to put them before the magistrates. Nor do I think the solicitor need have done. The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. if the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement.....and thereby did his duty." [321]

And Lord Diplock - in regard to the contention by Dallison that all the 'credible evidence" known to Caffery should have been put before the magistrates:

"This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence (see Rex v. Bryant and Dixon). But it is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial. The prosecutor's knowledge that there is such a conflict does not of itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's honest belief that there is a case against the accused fit to go to a jury....." [322]

While both judges agreed on the main issues, one can, perhaps, detect /

detect some difference in approach and emphasis. Lord Diplock's "his duty is to prosecute, not to defend" tends to stress the adversarial nature of the trial process and of the prosecutor's role within it - recognising by implication the perception that the prosecutor is no more obliged than is the defence advocate to fight his adversary's battle in the forensic contest. Further his reference to information from a "credible" witness may suggest the inference that where the prosecutor does not think the witness is credible, he may not be obliged even to make the witness available to the defence. The tone of Lord Denning's remarks are more circumspect. He explicitly acknowledges - as Lord Diplock does not - the prosecutor's option either to call the witness himself or to make his statement available to the defence; and also expresses the view that even when the prosecutor does not consider the witness to be credible, he should, nevertheless, tell the defence about him. Both, however, agree that, in the circumstances of Dallison at any rate, he was not necessarily bound to call credible witnesses to speak to the alibi evidence.

However, in Ziems v The Prothonotary of the Supreme Court of New South Wales [323], a prosecutor was criticised for failing to call a witness - even although the witness was called by the defence.

Shortly after being involved in a brawl in a hotel, during which he was severely beaten up, Ziems, a barrister, was involved in a car accident. While driving on the wrong side of the road, he collided with a motor cyclist who died of his injuries. He was charged with manslaughter, convicted and sentenced to two years imprisonment by a court of quarter sessions. Subsequently, he was /

was also disbarred from practice as a barrister by the Supreme Court of New South Wales. At his trial for manslaughter, the prosecutor called as witnesses police and others who testified that at the time of the car accident Ziems was under the influence of drink; but he did not call a police sergeant who, at the previous coroner's inquiry, had conceded, under examination, that Ziems' condition might have been due to the blows he had received during the hotel fight and not to drink. The police sergeant was, however, called by the defence and his testimony was given to the court on examination as a defence witness.

Nevertheless, at a subsequent hearing by the High Court (of Ziems' appeal against disbarment), the court considered that Ziems, at his trial, had been placed at a material disadvantage by the Crown's failure to call him. The reasoning for this was explained by Fullagar J.:

> "....there could be no possible question that Sergeant Phillis was not merely a material witness but a witness of vital importance. So far as appears, the only possible object of not calling him was to place the appellant under the tactical disadvantage which resulted from inability to cross-examine him. Such tactics are permissible in civil cases, but in criminal cases, in view of what is at stake, they may sometimes accord ill with the traditional notion of the functions of a prosecutor for the Crown. It is a very relevant fact here that the witness in question was a police witness, and a senior member of the force at that.
>
> In fact, as I have said, Sergeant Phillis was called for the defence at the trial. His evidence was of great importance from the point of view of the defence, but, as was to be expected, it came out less favourable to the appellant than the evidence of the same witness before the coroner. For on this occasion it was in cross-examination by the Crown that he said he had formed the opinion that the appellant was very much under the influence of liquor, and the appellant's counsel could not, of course, cross-examine him on that very important statement....."[324]

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The hearing of this appeal revolved mainly around the grounds in law for disbarring a barrister and, in the event, the court replaced the disbarment of Ziems with suspension for the period of his imprisonment. However, the views expressed as to the prosecutor's function - and the cases cited in support of those views - are relevant to the question we are now discussing.

Thus, Fullagar J. again:

"It is difficult to imagine evidence of greater importance than that of Sergeant Phillis. Yet at the trial he was not called as a witness for the Crown. One hesitates, of course, in a case in which the Crown is not represented, to comment adversely on this omission. But no sound explanation of his not being called by the Crown appears either from his cross-examination (when he was called for the defence) or otherwise, and prima facie he ought to have been called by the Crown. There is, of course, no rule of law that a prosecutor for the Crown must call every witness who has been bound over and is available. On the contrary, the discretion of the prosecutor has been recognised in many cases.....Any one or more of a variety of reasons may justify a prosecutor in not calling a witness who has given evidence for the Crown before the coroner or before the magistrates, and I would not wish to say anything that might unduly limit his discretion. The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness....." [325]

In support he cites Lord Roche in Seneviratne v The King:

"Witnesses essential to the unfolding of the narratives on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution." [326]

And Lord Hewart in R. v Dora Harris :

"In criminal cases the prosecution is bound to call all the material witnesses before the Court, even though theygive inconsistent accounts, in order that the whole of the facts may be before the jury". [327]

With regard to the remarks of Lord Roche in Seneviratne, a point not brought out by Fullagar J. is that these remarks were made in the context of criticising the prosecutor - not for failing to call a witness - but, on the contrary, for calling too many.

Lord /

Lord Roche's remarks as quoted above were immediately preceded by the following:

"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecution; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination." [328]

As discussed below, these particular remarks are relevant to the difficulty of identifying the proper balance between the perceived obligation upon the prosecutor to seek to ensure that all material facts known to him are before the court and the realities of the adversarial system.

In reviewing these cases, it would seem difficult to reconcile the decision in Dallison with the views of the judges in Ziems and the other cases cited. Given the circumstances in Dallison - the fact that there, the uncalled witnesses were "completely trustworthy" [329] and that, in the light of their statements, it would have required "split-second" timing [330] for Dallison to have committed the offence - it would seem difficult to argue that they were any less vital or material or any less "essential to the unfolding of the narratives" than the police sergeant in Ziems. Possibly, the main differences between these cases is one of circumstances rather than principle - the circumstance that the judges in Ziems were rather more sympathetic to the unfortunate barrister than were those in Dallison to a man "well known to the police" [331] with a long list of previous convictions,/

convictions, who was suing a police constable.

However that may be, in the light of the cases discussed, the following principles would appear to emerge:

1. Where a prosecutor knows of a witness whose evidence is favourable to the accused - at any rate, a witness whom he deems credible - he must either call that witness himself or make his statements available to the defence.
2. Although his discretion to take either of these courses will not normally be challenged by the courts, there may be situations where, because of the vital and material nature of the evidence, he will be considered obliged to call the witness himself.
3. On the issue of credibility, while there is some doubt, it would seem, (per Lord Denning), that he should also pass on the witness to the defence even if he does not consider him or her to be credible.
4. Tactical advantage, in itself, is not a proper reason for failure by a prosecutor to call a witness.

In passing, it may be noted that, in his recent book, "Landmarks in the Law", Lord Denning refers to the case of Dallison and reiterates his views on the prosecutor's function:

> "There has grown up a great tradition that counsel for the prosecution must be frank in his presentation of the case and, above all, he should be fair to the accused. He must not stress the case against him. He must only tell the jury the facts which he hopes to prove by evidence. He must not say anything which he cannot prove. He must call any credible witness who can give material evidence, no matter whether for the prosecution or the defence: or at any rate he must give his name to the defence so that the defence can call him."[332]

On this issue of adverse testimony - as indeed, as has been said, on any matter pertaining to the prosecutor's function - the British /

British professional codes have not much to say, but in the brief section referring to his function, the following statements in the English Bar Code would seem to be broadly in line with the principles reflected in the cases we have discussed:

> "Where prosecuting counsel has in his possession statements from persons whom he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the defence. Where, however, the defence already know of the existence, identity and whereabouts of any such person and are in a position to call him (as, for example, when a notice of alibi has been served, or when such person is married to a defendant) and in other exceptional circumstances.....then prosecuting counsel may, in his discretion, refrain from showing the statement to the defence." [333]

While it does not say so, it seems reasonable to assume that the statements referred to in this paragraph are of a nature which do not favour the prosecution case and may be of benefit to the accused. As in the case of Lord Diplock's remarks in Dallison - and in contrast to Lord Denning's remarks in that case - the wording is non-committal as to the alternative course of the prosecutor's calling the witness himself.

But however that may be, the significant point is that, on the authority of Dallison, the law - in England and Wales at any rate - would appear to be that, even where the evidence in question may be materially suggestive of the accused's innocence, (albeit, not inconsistent with the prosecutor's "honest belief" in his probable guilt) [334], the prosecutor's obligations to the administration of justice are fully satisfied by his merely passing on the information to the defence.

It may, perhaps, be argued that this may not be fully consistent with the prosecutor's perceived obligation to seek to ensure that all material facts are revealed to the court; for, merely passing /

passing the information to the defence may not necessarily achieve that object. Whether through carelessness by the defence, errors in communication or for some other reason, the witness in question may not in fact be called and the material information may never reach the court. That omission, it may be counter-argued, however unfortunate for the accused, is the responsibility of his lawyers, not of the prosecutor. But it is within the power of the prosecutor to avoid the possibility of this situation occurring - with the possible outcome of an unjust conviction - by his calling the witness himself.

On this view, it may seem reasonable to argue that an unequivocal obligation upon the prosecutor to call all material witnesses known to him - whatever the import of their evidence for or against the accused - would be more in accord with his function as one whose responsibility it is to ensure, so far as within his power, that only the factually guilty are convicted. While it may well be that the testimony of a particular witness, although favourable to the accused, may not be inconsistent with the prosecutor's honest belief - in the light of the totality of evidence in the case - that the accused is, in fact, guilty, he may well be wrong in that belief, and it is the function of the court to assess guilt or innocence in the light of all the available evidence.

It may be noted also that such an unequivocal obligation upon the prosecutor could not be said to be imposing upon him a duty, in the words of Stone, to "search for possible defences" [335], or, in the words of Lord Thomson in Smith, to "discover a line of defence" [336]; for there is a clear distinction between taking /

taking account of defence favourable information which the prosecutor may happen to come across in the course of his inquiries and his actively seeking out such information.

But to impose such a duty upon the prosecutor - however justifiable it may seem on ethical principle - would clearly run counter to the competitive realities of the adversarial system; to the principle enshrined in that system - as perceived by Lord Diplock in Dallison - that it is the prosecutor's function "to prosecute, not to defend" [337].

It would,therefore, seem, on any realistic view, that the adversarial prosecutor cannot be seen as one whose principle function it is to investigate the objective truth in comprehensive terms. However committed - in theory, at any rate - to the obligation to place all material facts known to him before the court, his role - although clearly more circumscribed as regards issues of fact than that of his adversary - is also essentially partisan.

These comments need not necessarily be seen as condemnatory of the adversarial system; for that system must be seen and judged as a whole and in the light of its purpose to maintain the difficult balance between the protection of the rights of individuals faced with criminal prosecution and the protection of the public against crime. In recognition of the importance attached to the former of these objectives, the system, as we have discussed, gives considerable latitude to the defence in regard to issues of fact. Given this latitude, the imposition upon /

upon the prosecutor of a far-reaching obligation to present evidence for the defence as well as for the prosecution, would not only be inconsistent with the basic adversarial principle but may also be seen as tilting the balance in a trial too far in favour of the defence, and thus prejudicial to the public interest.

4.4 - Conclusions and Summary

The following may be identified as the main points which emerge from this discussion of the prosecutor's function:

1. Notwithstanding the analogy between an adversarial trial and a forensic "game" or a sporting contest, there is a crucial distinction as to both status and function between the opposing sides in a trial - prosecution and defence.

2. The function of the prosecutor, as representing the Crown and State, is to seek to ensure that criminals are brought to justice; and, accordingly, that only those who actually commit crimes are convicted according to due process of law. It follows that he has a responsibility also to ensure, so far as within his power, that the criminal process so operates as to minimise the possibility of unjust convictions.

3. The consequential and contrasting features of his role as compared with that of defence counsel are -
   (a) the requirement that he must have an honest belief in probable factual guilt and reasonable and probable cause for a prosecution and
   (b) his obligation to seek to ensure that all material facts known to him, whether favourable or unfavourable to the prosecution case, are revealed to the court - including, in the case of adverse witnesses, an obligation either to call such witnesses himself or make them available to the defence.

4. /

4. However, these distinguishing features, of crucial importance for the proper administration of criminal justice, tend to be obscured by ambivalence in professional codes and textbooks; are not given adequate attention in the professional codes; and, in some respects at least, the ethical principles on which they are based may be perceived as inconsistent with, and limited in practice by, the realities of the adversarial system.

Finally, given the nature and competitive spirit of the adversarial confrontation in a criminal trial, the psychological and professional pressures which it imposes on prosecution and defence counsel alike - and the fact that, for these reasons, the urge to win is no doubt as strong for one as for the other - we may again question to what extent some of the high-principled precepts applied to the advocate as prosecutor are followed in practice; and, indeed, to what extent those who formulate these precepts have a realistic expectation that they will, in the main, be followed.

Although writing explicitly in an American context, Frank reflects these doubts:

"I said that, in theory, in criminal suits the government seems to take greater responsibility than in civil suits, that theoretically, the public prosecutor has made a pre-trial investigation and that he brings out, at the trial, the evidence he has uncovered. Actually, many prosecutors, infected badly by the fighting spirit, in partisan manner produce only the evidence they think will cause convictions" [338]

And, again quoting Runyon's analogy with a sporting event:

"A /

"A player.....for the State represents the people. His function, as I understand it, is to endeavour to convict any person who has transgressed the law.....It is inconceivable that he would wish to convict an innocent person. But it has been my observation that the player or attorney for the State is quick to take any advantage of the rules .....that put his side in front, and equally quick to forestall any moves by the other side." [339]

However, in reference to these remarks, and in fairness to prosecuting counsel, the point must be made that infection "by the fighting spirit" and zeal "to take any advantage of the rules" do not necessarily reflect, and, in the main, will not reflect, bad faith or an evil disposition, but are a logical consequence of the system within which they operate.

PART FIVE

GENERAL REVIEW AND CONCLUSIONS

Sections

5.1 The Questions Addressed

The purpose of this inquiry has been to explore the ethics of advocate's role in the adversarial system - particularly the role of the advocate in criminal proceedings; and, more particularly, that of the defence advocate in such proceedings.

The main questions addressed were posed early in our inquiry - in the context of the historic exchange between Lord Brougham and Lord Chief Justice Cockburn [340]: is there inherent in the advocate's function an ethical conflict between his duty to his client and his obligations as an officer of the law? Can his duty to the law be said to extend to a prior commitment to Lord Cockburn's "eternal and immutable interests of truth and justice" - or, as perceived by Lord Brougham, is it his paramount duty to "reckon everything subordinate" to the interests of his client? Is either of these propositions valid? And, whether or not either may be, can the advocate's role - in so far as it may involve the avoidance or subordination of truth - be /

be perceived to be inherently unethical?

These questions cannot properly be addressed in isolation in terms of abstract principle. They must be examined in the context of the nature and perceived purpose of the legal system in which the advocate has to function and of the professional demands which it imposes upon him. An assessment of the ethics of the advocate's role, therefore, necessarily involves an examination of the ethical principles underlying the adversarial system itself. His role within that system can be fairly appraised only by reference to those moral and social values which the system itself can be seen, in its actual operation, to reflect.

It has, therefore, been necessary for our purposes to examine the adversarial process as it operates; the rights which it confers and the duties which it imposes upon the advocate, particularly in criminal proceedings; and, most particularly, the extent to which it may be seen - in practice and not only in formal precept - to exalt truth as the cardinal virtue and ethical imperative in the advocate's professional function.

As has been discussed [341], there are two different senses in which the word "truth" is commonly used - and sometimes confused: truth in the epistemological sense of fact determination - the veracity of objective fact; and truth in the ethical sense of truthfulness - the subjective concept of speaking and acting honestly: the sense in which the word is used as regards witnesses when swearing to tell "the truth, the whole truth and nothing /

nothing but the truth" [342]. In Part Two of our inquiry, we dealt with truth primarily in its epistemological sense - the extent to which it may or may not be perceived, in that sense, to be the likely product and pre-eminent objective of the adversarial trial process. In Part Three, we addressed the concept of truth in its ethical sense - in the context of the advocate's role in relation to the disclosure, suppression or manipulation of material fact. In that connection, we discussed in general terms the ethical issues involved in the concepts of lying and deception so far as relevant to the advocate and examined in some detail those areas in which such issues appear to arise most acutely: the principles applicable to the non-disclosure of adverse fact, the tactics employed in cross-examination and the specific problems associated with perjury and "confessed" accused situations.

Both these senses of the concept of truth are, therefore, relevant for our purpose. They are also, as we shall discuss, both closely related and interdependent in the context of the trial process.

In the light of these discussions, we may now summarise our conclusions with regard to the ethical aspects of the adversarial system.

5.2 The Adversarial System - Concluding Views

5.2.1 - Truth and Other Values

If a trial process is, primarily, a genuine and determined search for the objective truth as to the material facts at issue, then it is against that criterion that the role of all the participants must be measured. If the trial court is a court of justice - in the sense of justice based strictly on truth - and if justice so perceived is the ultimate criterion of decision as to the facts at issue, then it would seem to be incumbent upon those whose function it is to present the facts to aid in ensuring that justice is done by the full disclosure and impartial presentation of those facts so far as known to them.

The advocates on either side must, on this view, be seen as part of the process of achieving justice based on truth and their proper functions as primarily directed to that end - however adverse the consequences for client or cause.

It would seem necessarily to follow that any trial system which claims the pursuit of objective truth to be its primary objective must be one which can be seen to insist upon truthfulness as the primary and essential professional obligation of those charged with the presentation and eliciting of the facts at issue.

In this context, we may now summarise the salient features of the adversarial trial process as these have emerged from our discussion:

(1) The adversarial trial is essentially a confrontation or contest between two opposing sides represented by the prosecutor and the defence advocate who are the partisan champions of their respective causes.

(2) /

(2) The only competent evidence on which the court's verdict can be based is the evidence presented during the trial through the medium of the contending advocates by way of their examination and cross-examination of witnesses. Unlike his counterpart in the inquisitorial system, the judge, on the whole, plays a passive role as a "referee" or "umpire". He and the jury are, in regard to the discovery of material fact, dependent upon the selective evidence elicited by the advocates.

(3) The system recognises the right - and, indeed, in the case of defence counsel, the duty - of counsel to be avowedly partisan in conducting their cases. Notwithstanding the official proscription against lying or attempting to "deliberately mislead" the court, the defence advocate is professionally prohibited from disclosing to the court facts prejudicial to his client, no matter how material.

(4) Prosecuting counsel, although committed - in principle at any rate - to impartiality in presenting his case, and required to have an honest belief in its factual basis, is nevertheless also perceived as being an adversarial contender for his cause: his duty is to prosecute, not to defend. He is not required or expected to fulfil the role of an impartial presenter of both sides of the case before the court.

(5) There appears to be ample evidence that a major feature of the trial process - cross-examination - while ostensibly designed to elicit truth, is authoritatively acknowledged and /

and commonly used (by both prosecution and defence) as a means of refuting, breaking down or otherwise weakening the testimony of an adverse witness, irrespective of its known truthfulness [343].

(6) There appears likewise to be persuasive evidence that, notwithstanding the unequivocal proscription by the law and by all professional codes of conduct of perjury - or the aiding or abetting of it by lawyers - perjurious conduct in criminal proceedings is tacitly tolerated and, possibly, (in effect, albeit not in intention), encouraged by the system [344].

These facts are not here presented as being, in themselves, necessarily condemnatory - but as a realistic perception of the place of objective truth within the adversarial system of criminal justice as it operates in practice. They would seem to point irresistably to the conclusion that that system - whatever its merits in total perspective - cannot be perceived as one which sees the pursuit of objective truth as its paramount objective.

This cannot be taken as meaning that it disparages truth as an element in the administration of criminal justice but rather that it sees it, perhaps, as only one of a number of values - and, possibly, not the most important - to which society should have regard in that context.

This, at any rate, is an argument commonly advanced in justification of the system. These other values, as we have discussed [345], are perceived to include the concepts of individual liberty and dignity and, in particular, acknowledge the necessity to maintain a proper balance between the power of the state and the rights of an /

an individual accused of a crime. They are seen as a necessary counterbalance to the risks to those rights which an over-zealous pursuit of truth might involve.

5.2.2 - Conflict as an Aid to Truth

These salient features of the adversarial trial process, as summarised above, would also seem to confirm the doubt earlier expressed [346] as to the tenability of the view that adversarial confrontation is the most effective method of conducting an inquiry in a criminal trial: that is, that - notwithstanding the partisanship of the contending advocates - truth is more likely to emerge from a balanced judgment by a non-partisan judge or jury of conflicting theses argued before them. As has been said, such a view may have merit in a situation where a court is asked to adjudicate on conflicting interpretations of agreed facts but lacks credibility when the facts themselves are not only in dispute but are the subject of manipulation by the partisan and contending advocates in their role as fact presenters.

On the other hand, there may be something to be said for the view that a process, such as the French system, which tends to orientate the court to one thesis - that in the dossier prepared by the examining magistrate - and does not subject it to the discipline of weighing conflicting theses, may carry the risk of its being influenced against the accused [347].

However that may be, our discussion would seem to confirm the view that such justification as may be claimed for the adversarial system is not to be found in the adversarial principle as such but rather in the concept of the balancing of truth /

truth with those other values mentioned. This invites the question which we have earlier discussed [348], and which we shall now briefly review, namely, whether these other values can, in fact be seen as compensating for the relatively low priority accorded to truth-finding by the system, in the interests of what Hazard suggests may be its real value - "the ideal of individual autonomy" [349].

5.2.3 - The Balance of Values

In the light of our discussion concerning the nature of the adversarial system it is evident that two of its most important features are the absence at any stage of the criminal process of any independent investigation of the facts at issue and the disparity in investigative resources between the prosecution and the defence. The extensive investigative facilities available through the state prosecution machinery are clearly, in the great majority of cases, vastly superior to those at the disposal of the defence. Further, as we have seen, the prosecutor's inquiries are generally partisan and orientated towards the prosecution case. These factors clearly militate against the accused in a criminal prosecution - a fact generally and authoritatively acknowledged. Thus, for example, Lord Devlin, as cited in a recent interview reported in The Times:

> ".....the main problem is that the defence resources are not equal to those of the prosecution; and legal aid is inadequate where there are scientific matters to be investigated or difficult questions of law.....Proposals for a public defender system - as suggested by Justice, the legal reform group - deserve a thorough airing".

And, in the same interview:

> "It should be made as easy for the defence to ensure that all the evidence is available for the trial court as it is for the prosecution to ensure that all the evidence of guilt is presented. [350]

We /

We may surmise that it is the necessity in the interests of justice to redress the imbalance which would otherwise be caused by such factors, that the adversarial system deems it necessary to afford to criminal defendants and their advocates that degree of latitude which we have discussed as regards factual issues in the presentation of the defence case; and to build into the system those features which we have referred to as reflecting moral and social values - pre-eminent among which are the presumption of innocence and the privilege against self-incrimination. That, at any rate, may perhaps be seen, by implication, to be part, at least, of the rationale underlying the system, even if not explicitly acknowledged as such.

Thus the system can, as has been said, be seen to reflect a balance of values - between the pursuit of truth and those other values deemed necessary to safeguard the rights of individual accused. The maintaining of a fair balance is a continuous process and the proper subject of debate and vigilance in society. As current debate about the controversial right of an accused to silence demonstrates, it is a difficult and complex balance - poised between the twin dangers of unduly favouring the de facto guilty and putting at risk the innocent accused. As we have discussed in Part 2.4, however, the present balance is in fact attacked on both counts. In particular, we have noted that some of the features designed to protect the innocent accused may be perceived as having, in certain situations, the opposite effect; and that there appears in recent times to be evidence of growing doubts about the effectiveness of the system as a whole - at any rate as it presently operates - as a medium for determining guilt or innocence /

innocence in criminal proceedings [351].

However that may be - and while acknowledging the dangers possibly involved in the zealous pursuit of truth to the neglect of other values - it may, as has been said, seem open to question whether the system at present gives sufficient weight in its balancing of values to the objective pursuit of truth. There would seem, on the face of it, to be no good reason why, for example, some form of pre-trial independent fact investigation could not be introduced in a manner which would not prejudice individual rights; indeed, such a reform could be seen to underpin such rights and values; for, as has also been said, where truth is a casualty, it is likely to be the innocent who suffer and the guilty who gain [352].

5.2.4 - The Trial Process - Form and Substance

In our earlier discussion about the nature of the adversarial trial process, comparison was made, as regards certain aspects, with a game or sporting contest. Such a comparison may be open to the objection that it tends to trivialise a serious process but, as was said, the comparison, in so far as it may be valid, is so only as regards its competitive and rule-governing aspects.

As regards other aspects - and particularly as regards the function of the advocates - a more apt analogy may be that of a theatrical drama; or, more aptly still, perhaps, an historical ritual, hallowed by tradition, in which the participants perform their assigned roles - an impression heightened visually (in the British courts) by the bewigged and archaic dress of the professional participants.

While such analogies may again run the risk of appearing to demean or /

or trivialise, they may be seen as indicative of certain facets of the trial process which are relevant to this inquiry - as indicative, for example, of the fact that the word "role" as denoting the advocate's function as an "actor" in the process is particularly appropriate. Indeed, this function - at any rate, in the more notable jury trials - may be perceived as having not a little in common with the thespian arts: the use of rhetoric and gesture; feigned outrage and emotion; playing upon the feelings, susceptibilities - and perhaps, the prejudices - of his main audience, the jury.

In its more histrionic form, such conduct by trial lawyers may be most often associated with fictional Hollywood trial scenes, but in real life its place in the arts of the advocate is also recognised; for his purpose is to create <u>impressions</u>. Thus, the famous advocate, Marshall Hall, as quoted by Richard Du Cann:

> "....if an advocate for the defence can legitimately in his advocacy, convey to the jury the impression of his belief in his client's case, he has gone a long way towards securing their verdict." [353]

And Du Cann himself: "Forensically simulated emotion should be one of the armaments of the advocate." [354]

The advocate, therefore, is indeed playing a part - the part assigned to him by the requirements of his professional role. In so doing, he is required to give expression to views which are not necessarily his own - indeed, he is not allowed to express views as being his own [355] - and must at times urge arguments in which he may himself not necessarily believe; all in the interests of the cause which he has been briefed to champion.

In particular, and more to the point for our purposes, he is often obliged,/

obliged, as is the professional actor, to urge, not the truth, as he in reality may perceive it, but that particular perception of it which accords with his role.

While such analogies may be more relevant to the defence advocate, they may also - notwithstanding his more circumscribed role (in theory, at any rate) as regards objective truth - apply in some degree to prosecuting counsel as the partisan advocate of his brief

Since the contending advocates are the main actors in the adversarial trial process, it is their part in the proceedings which sets the tone of the whole - giving it what has been called its air of "artificiality" [356]. Ostensibly, the procedure is designed to uncover all the material facts. It appears to be dedicated to that end. The examination and cross-examination of the witnesses are ostensibly designed to elicit the true facts. The impression conveyed is that of a process in which the presenters of fact are pre-eminently motivated to find out the truth. In reality, however, as we have seen, this impression is accurate only to a limited extent. For the reasons we have discussed, the main actors in the drama are not necessarily motivated to search for the objective truth - nor are they professionaly bound to do so. Their function is to elicit and argue that perception - or professed perception - of the facts which favour their respective causes; or, in the words of Lord Denning (quoting Cicero): to urge, not the truth, but "what is only the semblance of it" [357].

This does not mean that the whole trial process can be seen as a charade. Judges, clearly, have a genuine desire to get at the truth - so far as their limited powers allow; and, doubtless, there /

there are many instances also when an advocate genuinely attempts to elicit truth - albeit, (in the case of defence counsel, at any rate), only when the truth will not prejudice his case. To such a degree, therefore, truth-finding can be said to be an element in the process. Nevertheless, the artificiality or "truth-semblance" character of the proceedings must be seen as a distinctive feature of the adversarial trial.

There is, of course, one fundamental and obvious difference between a theatre play and a law trial. The trial has as its very serious purpose the determination of the guilt or innocence of a person accused of a criminal offence. But there is another difference. The enactment of a play does not pretend to be other than the fictional representation that it is; but there are those within the legal profession who - notwithstanding the legal realities of the advocate's function - represent the form as being the substance and profess the trial process to be, indeed, in reality - and not merely partly or ostensibly - a process wholly dedicated to the discovery of truth [358].

It is probably this reluctance by many within the profession to acknowledge reality which is a principal cause of the ethical tensions or inconsistencies of the adversarial system: the attribution to the system of ethical imperatives which it cannot, in practice, be seen to uphold; and, in particular, in regard to the ethics of the professional conduct of advocates, the attempt to make distinctions which, in moral principle, do not exist. This in turn gives rise to many of the ethical problems with which the advocate has to cope; for he has to operate within the system as it is and not as some profess it to be.

However,

However, as we have seen, there are those within the profession who are prepared to acknowledge the reality of the trial process; few more so, perhaps, than the Scottish judge, Lord Thomson, as cited by Sheriff Macphail. While Lord Thomson's remarks as here quoted refer to civil proceedings, they are cited by Sheriff Macphail in the context of both civil and criminal proceedings and most of what he says would seem to apply to both - and to confirm much of what has been said in this inquiry:

> "Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term.....It is on the basis of two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose sole object is not to discover the truth but to get his judgment. That judgment must be based only on what he is allowed to hear. He may suspect that witnesses who know the 'truth' have never left the witness room for the witness box because neither side dares risk them, but the most that he can do is to comment on their absence.
>
> A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points." [359]

However, in the context of a criminal trial, it must be repeated that the ethics of the process is not to be seen as being entirely influenced by the adversarial spirit - though that is a potent factor; nor by a perverse disregard for the value of truth; but also by the recognition of other values and of the necessity to maintain a proper balance between them.

5.3 The Ethics of the Advocate's Role - Conclusions

5.3.1 - The Advocate and the System

An examination of the ethics of the advocate's role within the adversarial system necessarily involves, as has been said, some appraisal of the ethics of that system so far as relevant to that role. However, notwithstanding the views expressed in that context, it has not been our purpose to attempt to assess the overall merits of the system itself; for the context in which this inquiry has been conducted is clearly not exhaustive of that wider question.

Nor has it been our purpose in addressing the ethics of the advocate's role to attempt a critique of the general standards of professional behaviour of advocates - including those who may be indifferent to, or, at any rate, not over-troubled by, ethical considerations. Clearly, all professions have their share of such practitioners; though the legal profession - within the United Kingdom at least - tends to claim, no doubt with justification, a generally high standard of conduct among its members. However, on this point, it may, perhaps, be said as regards forensic advocacy, that the adversarial pressures which the system exerts and the lack of clear guidance on some ethical issues, may give undue scope and appear to give specious professional justification for dubious conduct by the less scrupulous. As Bok observes - in regard to the professional tendency to leave certain moral choices to the "sensitivity" of the individual advocate: "To leave such a choice open to the sensitive and the responsible without giving them criteria for choice /

choice is to leave it open as well to the insensitive and the corrupt." [360]

However, be that as it may, we have not here been primarily concerned with either insensitive or corrupt behaviour, but rather with the position of the advocate - whatever his integrity or degree of sensitivity - in regard to those ethical issues which are intrinsic to his function. It is in regard to this question, therefore, that we may now summarise our conclusions.

5.3.2 - Moral Principle

Apart from the somewhat ambivalent position of the advocate as prosecutor, it is evident from this inquiry that the object of the advocate in the adversarial system, is, in Lord Thomson's words, as quoted above, "not to discover the truth" but to get a favourable judgment from the court. More than that, his conduct of a case in court may often be directed towards the avoidance or manipulation of truth should this be to his client's advantage.

Lord Thomson's remarks were, as has been said, in reference to the advocate in civil proceedings, but in the light of our examination of the function of criminal defence counsel - the main focus of our inquiry - the subordination of truth to client interest is even more marked in that role. It is to the advocate in this role that the adversarial system affords the widest latitude in regard to the obfuscation of fact. Indeed, the system requires that he should exercise such latitude in deference to his duty to his client and to the rights of an accused in a criminal trial. It is in this role, consequently, that the moral ambiguity of the advocate's position is most evident.

Viewed /

Viewed solely in terms of the moral principles we discussed in regard to deception and lying, (Part 3.4), the subordination of truth inherent in such a role may appear intrinsically unethical. It is true that, in particular instances, moral arguments such as we have discussed [361] may be advanced in justification - as, for example, where an advocate is defending an accused whom he knows or sincerely believes to be innocent and considers deception of the court to be justified in order to avoid the greater harm which would be caused by his client's unjust conviction. Again, as has been pointed out in our discussion of the legal concepts of guilt and non-guilt, an advocate, in tendering a plea of not guilty - even on behalf of an accused who has confidentially confessed his factual guilt - is not making a false statement to the court. But such arguments are relevant only to specific situations and could not be advanced to justify in general terms a function which, intrinsically, involves the subordination of truth to the interests of the client or cause which the advocate, at any particular time, happens to be representing. Such, at any rate, may appear to be the position when judged solely by strict moral criteria and not in the wider context of the ultimate objectives of the advocate's function within the legal system - and within the society which sustains the system.

This invites the question, which we shall now address: whether ethical justification for the advocate's function can be founded on the requirements of the system in which he operates - whether, in Professor Wolfram's words, the advocate, as an "actor" within the legal system:

> ".....is ethically entitled to take steps within the legal system that are consistent with its dictates and expectations". [362]

5.3.3 /

5.3.3 - The Ultimate Criterion

In discussing this subject - in the context of the role of the criminal defence counsel - Wolfram himself appears to take a sceptical view. While acknowledging that "the topic is a large and difficult one", he writes:

> ".....while a legal system might permit, or even require, the actor to proceed in that way, it is not clear that the actor's conduct within the legal system is above ethical question. Because there is no necessary congruence between legal entitlement of clients or of lawyers and their moral rights and duties, one might conclude that actions taken by lawyers in behalf of their clients are morally wrong even if legally permissible." [363]

This seems a somewhat narrow and shallow view. It is not merely a matter of choosing between strict moral principle and "legal entitlement". Rather, it is between the concept of moral principle on the individual level and the application of those values which we have discussed which the system - and the law and society which sustains it - deem to be to the ultimate common good. The advocate, in fulfilling the role assigned to him is a medium through which those values of the system are applied.

It is, indeed, as the Declaration of Perugia states [364], the advocate's duty "to serve the interests of justice as well as of those who seek it"; but the interests of justice which he must serve are those interests as perceived by the law and by the legal system of which he is part. In particular, the extent of his professional obligations to the pursuit of truth is but a reflection of the extent to which those obligations are recognised by the law itself as desirable in the interests of society /

society as a whole.

The view may, of course, be taken by some that the adversarial system's values - or its balance of values - are wrong; that, in particular, the relatively low priority which it appears to give to truth and truthfulness in the trial process, may be a defect. Some advocates may personally take this view - and indeed share some of the criticisms of the system which we have discussed. If so, they are free to urge reform. In fact, as Du Cann points out, most reformers of the law have come from the ranks of the law [365]. But when acting his role in individual cases, the advocate is bound - in a democratic society at any rate - to accept and apply those values and principles which the law and society for the time being uphold.

This point is illustrated in an example cited by Wolfram; an accused whom his lawyer knows to be factually guilty was subjected to unlawful interrogation by the police. Wolfram poses the question:

> "May the lawyer, on the basis of his or her moral judgments about the client's criminal acts.....refuse to move to suppress the evidence..?"

He points out that the lawyer is professionally obliged to move to suppress the evidence produced by the irregular interrogation - notwithstanding that this may well result in the acquittal of the factually guilty client and the "social costs" that this entails:

> ".....the law providing for the exclusion of accurate evidence has itself accepted the obvious risk that the guilty will go free, in order that public officials may be deterred from infringing the rights of all to be free of unlawful interrogations. A lawyer is certainly not legally required to quarrel with the plainly controversial factual and legal grounds that underlie the exclusionary rule." [366]

This /

This again, however, may be said to be an understatement by Wolfram of the advocate's position. It is not merely a question of the advocate's not being "legally required" to quarrel with the principle which underlies the Law's exclusionary rule; it would be professionally unethical for him so to do. For if advocates were to refuse, in such cases, to move for exclusion of the evidence because of their personal views as to the "social cost" of letting a criminal go free, they would be substituting their own values for those of the law - in this particular case, what must be presumed to be the law's perception that the social cost of allowing the occasional criminal to go free is outweighed by the higher social cost of putting the innocent at risk by encouraging unacceptable methods of police interrogation.

We may, therefore, conclude that the advocate's duty may be properly defined as the duty to serve his client zealously within the bounds of the law; and in accordance with the requirements and values of the legal system sustained by the law. In so far as that legal system may require him, on occasion, to subordinate truth to the interests of his client, he is, in so doing, serving both his client and the law.

We may also conclude, therefore, that there is no ethical conflict in the duality of his role as both a servant of his client and a servant of the law itself. It follows that, in serving his client within the law, he is necessarily also serving the cause of justice - justice, that is to say, in the sense in which it must be held to be perceived by the law - the sense in which it is used by Bok:

"I /

> "I shall be using 'justice' and 'fairness' as synonymous. In doing so, I am not intending the larger sense of 'justice' (all that is right or lawful), but the narrower sense distinguished by Aristotle in his Nicomachean Ethics [1130] of the just as rectifying what is disproportionate or wrong, distributing fairly It concerns, then, both autonomy, or liberty and equality. When lies are told to protect or further these, what is fundamentally at stake is an equilibrium to be prolonged, restored, or set up." [367]

This concept of justice may be seen as particularly appropriate to the adversarial system - as a system which sees the maintenance of a proper "equilibrium" as requiring a degree of latitude to the defence advocate in regard to truth in deference to the values of individual autonomy and liberty.

We may therefore summarise our conclusions in regard to the ethics of the advocate's role by saying that the vindication of his role lies in his serving the cause of justice according to law.

It remains to be added that, in regard to the verbal exchange between Lords Brougham and Cockburn as to the advocate's primary allegiance [368], we may conclude that both their lordships were wrong. It is not the advocate's duty to "reckon everything subordinate to the interests of his client" (per Lord Brougham). His duty is, as has been said, to serve his client zealously within the law - in so far as he honestly perceives that law to be. For the same reason, he is not bound, as Lord Cockburn would have it, to reconcile his duty to his client "with the eternal and immutable interests of truth and justice" perceived as abstract concepts. The interests with which he has to reconcile his duty to his client are the interests of the law and the principles and values which it reflects. Truth and justice are relevant interests only in the sense that those concepts are recognised and applied by the law.

5.4 Precept and Practice

5.4.1 - Rules and Guidelines

Laying down rules for human behaviour in any sphere is always a difficult exercise. There are, basically, two options: first, to rely on general principles or exhortations which are usually unhelpful as a guide in particular situations - and, by leaving such to the subjective interpretation of individuals, invites sophistry and exploitation by the less scrupulous; or, second, to formulate detailed rules which clearly cannot cover every conceivable situation and may involve the risk of appearing to imply a specious approval for any conduct not specifically forbidden.

The professional canons of conduct and other guidelines available in regard to the ethics of advocacy may be seen as a compromise between both options - though the dominant approach appears to be a reliance on "a few general rules" to be "observed in the spirit" [369] and a disinclination to be too specific.

For reasons which will be evident from this inquiry - the ethical tensions of the adversarial system, the apparent moral ambiguity of the advocate's function and the ethical delicacies of the issues with which he has often to cope - the task of formulating rules of conduct is particularly difficult. This may explain, even if it does not necessarily entirely excuse, those features of the rules and guidelines which have been the subject of critical comment in our discussion and which we may now briefly recapitulate.

We have noted the tendency to general exhortation in terms which are of little practical value in actual situations because it

is the interpretation of such terms which is itself in question: such as that the advocate must act "honourably" or "fairly" or must not go beyond what is "lawful and proper" [370]; and that sometimes the advice offered seems ex facie contradictory - to be "open and truthful" with the court but not to disclose facts which are unfavourable to his case; not to "mislead" the court but nevertheless to be guided only by his client's interests in deciding what facts to disclose [371]; this latter factor, in particular, being illustrated by the tenuous ethical lines drawn in the cases of Tombling and Meek [372].

We have also noted what would appear to be significant omissions in regard to matters of serious import: the paucity of advice or direction as to the use and abuse of cross-exmination [373]; the uncertainty and ambivalence of such advice as is given in that context in regard to attacking truthful testimony [374]; the absence of positive guidance in the general context of perjury in criminal cases [375] and the omission to adequately recognise and give due prominence to the distinctive obligations of the prosecutor as compared with those of defence counsel [376]

Some of these unsatisfactory features may be due in part to the inherent difficulties arising from the nature of the adversarial system, as mentioned above, but they may also be attributable in no small measure to one underlying cause: a failure to acknowledge and adequately explain the balance of values which the adversarial system represents - specifically, the relative place of truth among those values; and perhaps also, arising from this failure, to a desire to reconcile the partisanship of /

of the advocate's function with a degree of commitment to the pursuit of truth which it does not, in reality, reflect.

These factors may be seen as giving rise to two other criticisms which have been mentioned: the apparent gap, in regard to some issues, between precept and perceived practice and the consequential vulnerability of such precepts to the accusation that they are a form of window-dressing designed to reassure the sceptical layman.

These matters are clearly of great moment to the advocate. Given that he has a professional duty to serve his client zealously within the law, it is of crucial importance to him that he should have clear guidance as to what the law and the system require of him in regard to the propriety of professional conduct; otherwise he is exposed to the risk of being accused either of unprofessional conduct as regards his duty to the court or of failing in his duty to his client; for any failure on his part to protect or advance his client's interest in a manner not prohibited by the law or professional codes of conduct, may be interpreted as a failure of "zeal".

It follows that the lack of clear guidance exacerbates his problems and makes more perilous the ethical tightrope which he often has to walk. Even more, however, is he at risk from an idealistic misrepresention of his function - the high-principled pronouncements of those who, despite their knowledge of the realities of the adversarial system, would impose upon him a commitment to truth as his pre-eminent duty. Such pronouncements in so far as they may be intended to reassure the sceptics, tend to /

to have the reverse effect in that their patent falsity fuels the cynicism which they are intended to allay.

5.4.2 - Ethics and Justice

However, clear guidance on the ethical issues involved in advocacy - particularly in the criminal courts - are of importanc not only for the advocate himself, but also for society at large. In the adversarial system, the advocate has a crucial impact on the administration of justice. In view of the dominant role which the system assigns to him in the trial process, the manner in which he performs this role - and, in particular, his perception of ethical issues - can have a significant influence on the outcome of a trial. Indeed, in many cases it may be the decisive factor in the determination of guilt or innocence.

It follows that the advocate can - as Du Cann notes [377] - be instrumental in bringing about a miscarriage of justice by his conduct of a case. Conversely, of course, it is true that he can, and no doubt often does, have a beneficent influence. But whether it is one or the other may depend to a significant degree on his approach to ethical matters such as we have discussed.

The advocate, it is also true, is not responsible for the system which confers this responsibility upon him; nor for the adoption of the particular values or balance of values which that system recognises. But the balance is, as we have seen, a delicate one and can be affected by the advocate's perception of ethical issues. The absence of clear guidance on crucial issues /

issues can confound the conscientious and give scope to the less scrupulous to the detriment of justice.

These considerations would seem to point to a need for a new approach by the profession and its codes of conduct to the issues discussed in this inquiry: one which, above all, will realistically acknowledge and reflect a clear understanding of the balance of values which the adversarial system represents - in particular, the interaction between truth and the other values enshrined in the system.

5.5 Summary of Final Conclusions

1. The advocate in the adversarial system - whether in civil proceedings or as defence counsel in criminal cases - is not professionally bound to the pursuit of truth as his primary objective.

2. Ex facie, his role, in so far as it involves the subordination of truth to the interests of his client or cause, would seem, when viewed outwith the context of its place and purpose within the legal system, to be incompatible with moral principle.

3. However, the ethics of the advocate's function can only be properly judged within the perspective of the aims and principles of the law and legal system of which he is part.

4. The adversarial system does not acknowledge truth as the only value in the pursuit of justice but as only one of a number of moral and social values which it deems necessary to that end. In accordance with this philosophy, it concedes to the advocate - particularly in his capacity as criminal defence counsel - the right and, in certain circumstances imposes upon him the duty, to subordinate truth to the interests of his client.

5. The advocate, in playing his assigned role within the system, is serving the ends of justice as perceived by that system and by the law and society which upholds it. His duty cannot be seen either as requiring him to subordinate all other interests to those of his client or as demanding a paramount commitment to the moral absolute of truth or

to /

to the concept of justice as necessarily based on that truth. His duty is to serve his client or cause zealously within the bounds of the law and according to its requirements and values.

6. Idealistic concepts of the advocate's role as one pre-eminently committed to the pursuit of truth, misrepresent his function, exacerbate the advocate's problems, and fuel cynicism of the law and its practitioners.

7. There is a need for clearer guidance on the ethics of advocacy and for codes of conduct which will acknowledge and reflect a realistic understanding of the balance of values which the adversarial system represents.

APPENDIX

NOTES

Part One

1. G.C. Hazard, "Ethics in the Practice of Law", 1978, p.3.
2. The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community, 1977, para 11.
3. Hazard, op cit, pp.13, 14.
4. See A.B.A. Standards quoted in Part 3.2.
5. Declaration of Perugia, op cit para. 11.
6. "Gulliver's Travels" - "A Voyage to the Houyhnhnms", ch. V.
7. Essay on Bacon. (July, 1837) Critical and Historical Essays. Vol. 1.
8. Boswell's "Journal of a Tour to the Hebrides", (entry for 15th August, 1773)
9. From J.V. Barry, "Ethics of Advocacy", 1941, 15 A.L.J., p. 106 at 170, (Quoting from A. Lovat-Fraser, "Erskine", 1932, pp. 148-9).
10. Jerome Frank, "Courts on Trial", 1973 ed., p.4.
11. Frank, op cit p.15.
12. Lossie Hydraulic Co. v. Ecosse Transport Ltd., 1980 S.L.T. (Sh. Ct.) 94, per Sheriff Caplan at p. 96.

Part Two

13. H.J. Abraham, "The Judicial Process", 1975, (3rd ed.).
14. M. Stone, "Proof of Fact in Criminal Trials", 1984, p. 104.
15. Frank, op cit p. 80.
16. Hazard, op cit p. 120.
17. C.W. Wolfram, "Modern Legal Ethics", 1986, ch. 10.1.
18. As quoted by Abraham op cit. p. 100.
19. Wolfram, op cit. p. 564.
20. A.V. Sheehan, "Criminal Procedure in Scotland and France", 1975, p. 117.
21. Abraham, op cit p. 100.
22. Op cit p. 99.
23. Sheehan, op cit p. 117, quoting from Jones v. N.C.B., (1957) 2 W.L.R. 760.
24. Sir Peter Imbert, Metropolitan Commissioner, interviewed by Ludovic Kennedy, as reported in The Times, 12th July, 1988: Q.: "If we were to start from scratch to devise a system of criminal justice for our country today, do you think we would choose the one we've got?" A.: "I'm quite sure we wouldn't."
25. See Part 3.8.4 infra - a not guilty plea is not necessarily an assertion of innocence.
26. Sheehan, op cit p. 118.
27. Abraham, op cit p. 99.
28. Cf. Sheehan, op cit p. 24 et seq.
29. On this point, Sheehan observes (op cit p. 52) that although "the period for which the accused may be detained awaiting trial may not exceed four months ..... the judge, on cause shown, may extend this period by a further four months as often as he wishes (the procureur and the accused having the right to comment on such extensions...." He adds, however, that only 2.4% of all pre-trial detentions in France exceed eight months.
30. /

30. Sheehan, op cit p. 73.
31. " op cit p. 25.
32. " op cit p. 29.
33. Hazard, op cit p. 120.
34. Abraham, op cit p. 100.
35. Ibid.
36. Sheehan, op cit p. 25 (note 3).
37. Ibid.
38. Op cit p. 27 (note 14). This comment may seem puzzling since the jury do not see the dossier but they will no doubt hear any previous convictions, etc., brought out by the judge from its contents.
39. Francis Bacon, "Of Truth", from "Essays Civil and Moral". (Quoted by Bok, infra).
40. Part 3.4.2.
41. Part 3.4.
42. Part 2.1.
43. S. Bok, "Lying - Moral Choice in Public and Private Life", 1978, p. 161.
44. Wolfram, op cit p. 619.
45. Op cit pp. 565-6.
46. Op cit p. 566.
47. Ibid, note 11.
48. Frank, op cit p. 80.
49. Times Literary Supplement, 9th November, 1984, p. 1279.
50. Thomson v. Glasgow Corporation, 1962 S.C. (H.L.) 36 at p. 51.
51. Hazard, op cit p. 123.
52. Op cit p. 1.
53. Wolfram, op cit pp. 638-9.
54. Op cit p. 619.
55. Frank, op cit p. 81.
56. Op cit p. 85.
57. Op cit p. 92.
58. Op cit p. 102.
59. Z. Bankowski, 1981, Vol. 1, Legal Studies, p. 257.
60. Op cit pp. 260-1.
61. Op cit p. 262.
62. Op cit pp. 265-6.
63. Op cit p. 266.
64. Frank, op cit p. 99.
65. Bankowski, op cit. p. 263.
66. Op cit p. 260.
67. Part 2.2.3.
68. Note 62 supra.
69. Part 3.8.4.
70. See note 65 supra.
71. See note 66 supra.
72. Hazard op cit pp. 120-1.
73. Wolfram, op cit p. 567.
74. Ibid.
75. Hazard, op cit p. 129.
76. Sheehan, op cit, pp. 28-9 and p. 118 for comparison between the inquisitorial and adversarial systems regarding rules of evidence.
77. Departmental Committee on Criminal Procedure in Scotland (Second Report) (1975) Cmnd. 6218.
78. I.D. MacPhail, "Evidence - A Revised Version of a REsearch Paper on the Law of Evidence in Scotland", 1987, para 5.12.
79. Op cit para 5.04.
80. Op cit para 5.10.
81. /

81. Sheehan, op cit p. 144.
82. L. Lustgarten, "The Governance of Police", 1986, p. 2.
83. Ibid.
84. Ibid.
85. See note 24 supra.

Part Three

86. Wolfram, op cit p. 3.
87. Op cit p. 4.
88. Op cit p. 567.
89. Op cit p. 588.
90. American Bar Association's "Standards Relating to the Administration of Justice", 1974, p. 109. (As quoted in "Lawyers" by J. Disney and others, 1977, pp. 655-6).
91. Ibid.
92. Code of Conduct for the Bar of England and Wales, 1985, para 53.
93. Op cit para 131.
94. "Guide to the Professional Conduct of Advocates" published by the Faculty of Advocates, para 8.1.2.
95. Op cit para 1.2.
96. Hazard, op cit pp. 131-2.
97. Para 1.2.
98. Hazard, op cit p. 131.
99. Code of Conduct for the Bar of England and Wales, op cit para 111.
100. See Part 1.2 supra.
101. (1966) 3 All E.R. 657 at p. 665.
102. Part 2.3.2.
103. Part 1.2.
104. Wolfram, op cit p. 589.
105. M. Freedman, "Lawyers' Ethics in an Adversary System", 1975, p. 2.
106. Op cit p. 3. (Justice White sourced as U.S. v. Wade 388 U.S. 218; 256-8, 87 S. Ct. 1926, 18L. Ed. 2d 1149, 1174/5 (1967). Justice Harlan sourced as Miranda v. Arizona, 384 U.S. 436, 514, 86 S. Ct. 1602, 16L. Ed. 2d 694 746, 10 A.L.R. 3d 974 (1966). Both were dissenting opinions).
107. Para 8.1.2.
108. Declaration of Perugia, op cit para 11.
109. Part 1.2.
110. Stone, op cit p. 1X (Preface).
111. Part 1.2.
112. 1921 S.C. (H.L.) 72 at p. 74.
113. Cf. para. 136 of Code of Conduct for the Bar of England and Wales.
114. At p. 74.
115. (1963) 2 All E.R. 402 at p. 404.
116. The reference to usurping the province of the judge is contained in the quote from Dr. Johnson cited in Part 1.2 - sourced as per note 8 supra. The further statement by Dr. Johnson here referred to is contained in a passage from Boswell's "The Life of Samuel Johnson" A.D. 1768, p. 342 (Everyman's Library 1978 Edition).
117. At p. 73.
118. "Lawyers", op cit p. 683.
119. At p. 74.
120. (1951) 2 T.L.R. 289 at p. 297.
121. /

121. Part 3.5.
122. From Dr. Johnson passage - Part 1.2.
123. C. Curtis, "The Ethics of Advocacy" - as quoted by Bok, op cit, (heading to ch. X1).
124. Part 2.3.1.
125. Bok, op cit p. 6.
126. Op cit p. 3 - quoting from Austin's "Truth", (Philosophical Papers).
127. Op cit p. 8.
128. Stone, op cit p. 97.
129. Bok, op cit p. 5.
130. Op cit p. 162. Textbook quote is from T.D. Morgan and R.D. Rotunda: "Problems and Materials on Professional Responsibility", p. 2.
131. See discussion of Perjury, Part 3.7 - particularly 3.7.4.
132. Op cit pp. 11-12.
133. See Part 2.3.3.
134. Montaigne on "Essays", quoted by Bok, op cit p. 3.
135. Op cit p. 13.
136. Op cit p. 15.
137. From Tombling v. Universal Bulb Co., note 120 supra.
138. Bok, op cit p. 33.
139. Op cit p. 38.
140. Charles Dickens, "Great Expectations", ch. 1X.
141. Bok, op cit, pp. 39-40 - quoting from Newman's "Apologia Pro Via Sua", (pp. 274, 361). Source of Johnson quote not given.
142. Op cit p. 47.
143. Op cit p. 48.
144. Op cit p. 50.
145 Part 1.2.
146. Bok, op cit p. 158 et seq.
147. See Part 3.7 on Perjury.
148. See Part 3.4.2 and note 130 supra.
149. Wolfram, op cit p.242.
150. Op cit pp 243-4.
151. Bok, op cit p. 159.
152. Webster, "Professional Ethics and Practice for Scottish Solicitors" 1984, ch. 3.04
153. Per Lord Denning in Tombling v. Universal Bulb Co., Part 3.5.3.
154. "Lawyers", op cit p. 678.
155. Op cit p. 679.
156. Ibid.
157. (1889) 5 T.L.R. 407 at p. 408.
158. Note 120 supra.
159. (1961) 2 Q.B. 366.
160. At p. 291.
161. Cf. Part 3.3. at note 120.
162. At p. 297.
163. Ibid.
164. At pp. 375-380.
165. At pp. 382-383.
166. See note 160 supra.
167. Part 3.5.2.
168. Note 164 supra.
169. S. Bok, "Secrets", 1986, Introduction, p. XV.
170. Note 43 supra.
171 /

171. "Secrets", op cit pp. 5-6.
172. Op cit p. 9.
173. Op cit p. 7.
174. See Part 3.5.2., note 156 supra.
175. In Rondel v. Worsley, note 101 supra.
176. Meek v. Fleming, supra, at p. 380.
177. Per Lord Denning, op cit.
178. Frank, op cit p. 34.
179. Cicero, "Pro Flaco", Sec. 10: "In Hominem dicendum est igitur, quum oratio argumentationem non habet".
180. Frank, op cit p. 83.
181. Op cit. p. 81 et passim.
182. Op cit p. 82.
183. Op cit p. 84.
184. Ibid.
185. Op cit p. 85.
186. Wolfram, op cit p. 650.
187. See Part 3.2 and note 93 supra.
188. Para 9.3.2.
189. MacPhail, op cit paras. 8.26 & S8.26. quoting from A.G. and N.M.L. Walker, "The Law of Evidence in Scotland", 1964, p. 342(b).
190. Frank, op cit p. 81.
191. "False Witness", (Stevens & Sons, 1973), paras. 75, 76.
192. MacPhail, op cit paras. 8.36, 8.37.
193. Op cit para 8.38.
194. See note 50 supra.
195. Hartley v. H.M. Advocate, 1979 S.L.T. 26 at p. 28. (Citing Chalmers v. H.M. Advocate, 1954 S.L.T. p. 184).
196. In passage quoted per note 182 supra.
197. A.B.A. Standards, op cit, p. 132.
198. Annex 13.
199. Para. 9.2.2.6 (b).
200. Part 3.8.
201. Webster, op cit ch. 3.
202. Frank, op cit p. 82.
203. Op cit p. 89.
204. Freedman, op cit p. 43 et seq.
205. Op cit pp. 45-6.
206. Bok, op cit p. 158 et seq.
207. Deut. xix 16.
208. British Encyclopedia, 1933 ed.
209. Frank, op cit p. 45.
210. Ibid.
211. McLaughlin v. Douglas and Kidston, (1863) 4 Irv. 273, at p. 286.
212. MacPhail, op cit para. 8.07.
213. Annex 13.
214. Hazard, op cit p. 126.
215. See quotes from Freedman, infra, 3.7.3.
216. Wolfram, op cit p. 62.
217. Freedman, op cit p. 69 et passim.
218. Wolfram, op cit p. 648.
219. (1940) A.C. 282 at p. 292.
220. At pp. 293-4.
211. Para. 137.
222. Part 3.8.
223. /

223. Cf. para. 149 of Code of Conduct for the Bar of England and Wales.
224. Ibid.
225. Freedman, op cit p. 31.
226. Part 3.4.4. supra.
227. Hazard, op cit pp. 129, 130.
228. See Part 3.8.3 - re problems arising from a restricted defence.
229. "An Attempt to Update the Law of Evidence", Hebrew University of Jerusalem, (1974), p. 9. Quoted by MacPhail, op cit para. 5.09.
230. 1967 J.C. 37.
231. Per Lord Strachan at p. 41.
232. At pp. 38-9.
233. Per the Lord Justice-Clerk at p. 40.
234. At p. 48.
235. Footnote at p. 37.
236. See note 77 supra.
237. MacPhail, op cit para. 5.10.
238. Op cit para 8.07.
239. Part 1.2 supra.
240. Johnson v. Emerson and Sparrow (1871) L.R. 6 Ex. 329 at p. 367.
241. Op cit para 150 (a).
242. Op cit para 8.2.4.
243. Lord Birkett, "The Art of Advocacy", 1961.
244. Wolfram, op cit p. 587. R. Du Cann, "The Art of the Advocate", 1986 ed., p. 41.
245. Barry, op cit p. 203.
246. Para 149.
247. Ibid. Sub-para (b).
248. The Law Society, "The Professional Conduct of Solicitors", 1986, para 12.14.5.
249. Para. 8.2.3.
250. Webster, op cit Para 2.08.
251. See Part 3.6.4.
252. Annex 13.
253. See note 245 supra.
254. See note 247 supra.
255. Annex 13.
256. Para. 8.1.4.
257. Para. 149.
258. Cf. "Lawyers", op cit p. 697.
259. See note 252.
260. Part 3.6.4.
261. Stone, op cit pp. 248-50.
262. Per the Lord Justice-Clerk in McIlhargey v. Herron 1972 S.L.T. 185. At p. 188.
263. British Railways v. Herrington (1972) A.C. 877 at p. 930.
264. Freedman, op cit p. 37.
265. A.B.A. (1974) Standards, op cit p. 132.
266. Part 3.7.4.
267. See note 216.
268. Hazard, op cit p. 150.
269. See note 227.
270. Code of Conduct for the Bar of England and Wales, op cit Annex 13.
271. Stone, op cit p. 354.
272. See note 6.
273. Part 3.4.5 and note 151.
274. /

274. Hazard, op cit p. 131.

Part Four

275. Frank, op cit p. 391 (Runyon source not given).
276. Lustgarten, op cit p. 2.
277. See Part 1.1.
278. Cf. Hazard, op cit p. 125.
279. Montgomery Hyde, in the Introduction to "The Trials of Oscar Wilde", (Hodges Notable Trial Series).
280. (1965) 1 Q.B. 348.
281. At p. 371.
282. Code for Crown Prosecutors, H.M.S.O., December 1987, para. 1.
283. Op cit para. 4.
284. A.B.A. (1974) Standards, op cit para. 3.9(b).
285. Code for Crown Prosecutors, paras. 4, 5 & 6.
286. Op cit paras. 7, 8 & 9.
287. Para. 146.
288. Sheehan, op cit pp. 117-8.
289. Paras. 159-163.
290. Para. 159.
291. Para. 8.2.1.
292. Para. 9.2.1. (a).
293. Stone, op cit p. 104.
294. Cf. paras. 4 & 10.
295. Para. 4.
296. Para. 3.9.(c).
297. S.R. Moody and J. Tombs, "Prosecution in the Public Interest", 1982.
298. Op cit pp. 58-9.
299. Op cit p. 120.
300. Op cit p. 56.
301. Renton and Brown, "Criminal procedure according to the Law of Scotland", 5th ed., ch. 3.01.
302. Moody & Tombs, op cit p.79.
303. Op cit p. 129.
304. Op cit p. 61.
305. Op cit p. 120.
306. Sheehan, op cit p. 117.
307. Ibid.
308. 1952 J.C. 66.
309. Per Lord Justice-Clerk Thomson at p. 74.
310. 1928 J.C. 94, per Lord Clyde at p. 103.
311. At p. 72.
312. At p. 67.
313. At p. 103.
314. "Lawyers", op cit p. 683, quoting from rule 44 of N.S.W. Bar Rules.
315. Stone, op cit p. 327.
316. Ibid.
317. The Law Society, "The Professional Conduct of Solicitors" op cit 12.01.2.
318. Webster, op cit 3.04.
319. See the remarks of Fullager J. in Ziems, infra.
320. See note 280 supra.
321. At pp. 368-9.
322. At pp. 375-6.
323. /

323. (1957) C.L.R. 279.
324. At p. 294.
325. At p. 292.
326. (1936) 3 All E.R. 36, per Lord Roche at p. 49; as cited by Fullagar J. at p. 293.
327. (1927) 2 K.B. 587, per Lord Hewart at p. 590; as cited by Fullagar J. at p. 294.
328. At pp. 48-9.
329. Per Lord Denning at p. 364.
330. Ibid.
331. Per Lord Denning at p. 361.
332. Denning, "Landmarks in the Law", 1984, p. 16.
333. Para. 160(a).
334. Cf. Lord Diplock in Dallison, note 322 supra.
335. Cf. Stone, note 315 supra.
336. Cf. Lord Thomson in Smith, note 311 supra.
337. Per Lord Diplock in Dallison, note 322 supra.
338. Frank, op cit p. 99.
339. Op cit pp. 91-2.

Part Five

340. Part 1.2 and note 9 supra.
341. Part 2.3.1.
342. Part 3.4.2 and note 127.
343. Part 3.6.4.
344. Part 3.7.5.
345. Part 2.4.
346. Part 2.3.4.
347. Cf. Wolfram, Part 2.3.2 and notes 46 and 47 supra.
348. Part 2.4.
349. Cf. Hazard, note 75 supra.
350. The Times, 29th January, 1988, p. 5.
351. Part 2.4.3.
352. Part 2.4.4.
353. Du Cann, op cit p. 61.
354. Op cit p. 55.
355. Cf. Code of Conduct for the Bar of England and Wales, para. 132.
356. Cf. quote from Ludovic Kennedy, notes 24 and 85 supra.
357. From Tombling,; see note 162 supra.
358. E.G. Lord Denning as cited by Pannick, note 49 supra.
359. From Thomson v. Glasgow Corporation, note 50 supra, at pp. 51-2.
360. Bok, op cit p. 162.
361. Part 3.4.5.
362. Wolfram, op cit p. 585.
363. Ibid.
364. See note 5 supra.
365. Du Cann, op cit p. 20.
366. Wolfram, op cit p. 587.
367. Bok, op cit p. 81.
368. See Prt 1.2 and note 9 supra.
369. Cf. e.g., Webster's "Professional Ethics and Practice for Scottish Solicitors", op cit. para. 1.04.
370. /

370. Part 3.2.
371. Part 3.5.2.
372. Part 3.5.3.
373. Part 3.6.3.
374. Part 3.6.4.
375. Part 3.7.4.
376. Part 4.2.3.
377. Du Cann, op cit p. 8.
