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Cover Page Footnote

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THE CRIMINAL REGULATION OF LAWYERS

Bruce A. Green*

INTRODUCTION

ONE day last summer, the *New York Times* reported two arrests, one of a Brooklyn assistant prosecutor for possessing drugs at a rock concert¹ and another of a recent law school graduate (who happened to have interned in the Brooklyn prosecutors' office) for smuggling drugs into this country from Jamaica.² These were the day's reminders that, although lawyers are sworn to uphold the law and are sometimes charged with enforcing the law, nothing in a law degree or law license wards off the human impulses and temptations to break the law.³

Because lawyers as a class are neither exempt from the reach of the criminal law nor immune from criminal prosecution, the criminal law plays a significant role in regulating lawyers. This role ordinarily is not particularly interesting or troubling. Certainly, when lawyers are acting outside of the professional setting, as in the case of a lawyer caught with drugs at a rock concert, there is no reason why the criminal law should not apply to them straightforwardly. If anything, even in their personal lives, lawyers may have a greater obligation than others to uphold the criminal law.

Even when the criminal law applies to lawyers' professional conduct, its role will often be a welcome, not a troubling, one. For example, the criminal law forbids a lawyer from embezzling clients' funds, as do disciplinary provisions of the lawyer codes of professional conduct. The embezzlement or larceny statute reinforces the disciplinary rules governing the safeguarding of client funds while providing an alternative, and possibly more effective, enforcement mechanism.

The relationship between criminal law and other sources of professional norms, however, is not invariably such an easy one. Sometimes,

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1. See *A Brooklyn Prosecutor Faces Drug Charges*, N.Y. Times, July 18, 1998, at B4.

2. See Joseph P. Fried, *Law Graduate Is Charged with Drug Smuggling*, N.Y. Times, July 18, 1998, at B6.

3. See generally David Weisburd et al., *Crimes of the Middle Classes* 53, 55, 58 (1991) (reporting that a sample of white-collar criminal defendants, among whom were 50 lawyers, disclosed that 14 were convicted of SEC violations, 15 committed mail fraud, and approximately 30% committed tax violations some of which were uncomplex). Weisburd concluded that "[h]igh occupational status may offer many advantages in this world, but it appears to be neither a guarantee against becoming a criminal nor an assurance that one's crimes will be organizationally complex." *Id.* at 91.

there is a question about the distinction between a regulatory offense and a crime: Where does "bad lawyering" end and "criminal lawyering" begin? This question arises when a criminal prosecution is predicated on a lawyer's disciplinary violation, as was true in *United States v. Bronston*,⁴ where a lawyer's prosecution for defrauding a client was premised on the lawyer's failure to disclose a conflict of interest.⁵ As Professor John Coffee has discussed,⁶ this theory of prosecution presents a danger of overcriminalization—that is, that the lawyer's conduct, although wrongful, does not deserve to be deemed criminal.⁷

The more frequent situation is the opposite one in which the professional conduct proscribed by the criminal law appears to be encouraged by the lawyer codes or professional lore. Here the question is where "good lawyering" ends and "criminal lawyering" begins. For example, *State v. Mark Marks, P.A.*⁸ involved a prosecution under a Florida criminal statute that made it a crime for a lawyer to assist a client in submitting an "incomplete statement in support of an insurance claim."⁹ The prohibited conduct, it might be argued, is generally encouraged by disciplinary provisions governing the preservation of client confidences and by the professional understanding that, at least in certain contexts, the principle of zealous advocacy requires lawyers to withhold information that may be harmful to the client's cause. Prosecuting a lawyer under this statute would present a danger of overcriminalization in a different respect. Because it is not entirely clear how the statute applies to lawyers' conduct, it may be unfair to impose a criminal sanction on a lawyer who acted in accordance with a plausible understanding of the professional norms. To be sure, the public, acting through its legislature, may embrace a conception of proper professional conduct that is at odds with the legal profession's or the judiciary's conception and, accordingly, may enact a criminal law that proscribes conduct that lawyers or judges believe should be permissible. But except where the criminal law does so clearly, it might seem excessive to brand as a criminal a lawyer who reasonably relied on his understanding of the professional norms.

The tension between criminal law and professional norms is most interesting, and most troubling, where the lawyer in question is a criminal defense lawyer. Ordinarily, prosecutors are expected to be professionally detached. Yet, the criminal law gives prosecutors authority to regulate their professional adversaries—criminal defense lawyers.

4. 658 F.2d 920 (2d Cir. 1981).

5. See *id.* at 922.

6. See John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 *Am. Crim. L. Rev.* 117 (1981).

7. See *id.* at 130-42.

8. 698 So. 2d 533 (Fla. 1997). For a discussion of this case, see *infra* notes 241-49 and accompanying text.

9. *Id.* at 534-37.

In this situation, the prosecutor's professional judgment and detachment are to be trusted least. Consequently, there is a particular danger not only of overcriminalization, but of overdeterrence—that is, to avoid the possibility of an unwarranted prosecution, lawyers may refrain from engaging in lawful conduct that is professionally desirable. For example, in *United States v. Cueto*,¹⁰ the federal obstruction-of-justice statute was recently applied to a lawyer who, seeking to protect a corporate client from federal criminal prosecution, undertook various litigation including an initially successful state-court motion to enjoin a state investigator from interfering with the client's business.¹¹ The criminalization of this conduct might be considered excessive, given the obstruction statute's lack of clarity and the conventional understandings about a lawyer's duty of zealous advocacy in the context of a white-collar criminal investigation. But even if this conviction was deserved in light of the venality of this particular lawyer's intentions, other lawyers who are uncertain about the reach of the statute and about how a prosecutor may perceive their conduct may now refrain from advocating for clients in criminal cases in ways and with intentions that courts would consider to be legitimate. What makes the risk of overdeterrence particularly troubling is that, in a criminal case, the rendition of zealous representation is not simply desirable and encouraged by the law, but to some extent constitutionally mandated.

This Article examines these problems and takes a modest stab at a response. By way of background, part I provides a broad outline of the criminal law's regulatory role. Often, the professional conduct covered by the criminal law would in any case be forbidden by disciplinary rules. But, the criminal law allows prosecutors to enforce these standards of conduct, thereby encouraging compliance with professional norms that coincide with the dictates of the criminal law. Additionally, criminal law independently establishes professional norms by proscribing conduct that might otherwise be professionally permissible. It also influences the development of disciplinary rules that encourage lawyers to avoid criminal misconduct. Finally, criminal law plays a collateral role in the lawyer licensing process—a role that prosecutors may take into account when deciding whether to investigate or prosecute a lawyer.

Part II discusses the tension between the criminal law and other professional norms, describing how the professional norms might be understood to encourage conduct that is forbidden by criminal provisions. Two sets of examples are highlighted, the first involving accessory liability and the second involving obstruction-of-justice provisions.

10. 151 F.3d 620 (7th Cir. 1998).

11. *See id.* at 626-29.

Part III looks at how courts and the Restatement of the Law Governing Lawyers respond to this problem. It describes a range of responses. In some cases, including federal cases such as *Cueto* involving the professional conduct of a criminal defense lawyer, courts have been fairly indifferent to the possibility that the lawyer on trial may have lacked fair notice that his conduct was proscribed and that future lawyers will be deterred from engaging in legitimate advocacy. These decisions underscore that lawyers, above all others, are expected to know the law and to comply with it. In other cases, such as *Mark Marks*, courts have responded to this problem more sympathetically, dismissing the prosecution of a lawyer on the ground that the criminal law was not sufficiently clear in its intent to apply to the professional conduct at issue. Other courts, taking a middle ground, have determined that professional norms that might have encouraged the conduct in question may be considered by the fact-finder in evaluating the lawyer's conduct, but do not necessarily foreclose the possibility of a prosecution and conviction. The Restatement, also taking a middle ground, suggests that, in construing a criminal provision that might apply to a lawyer's professional conduct, courts should resolve ambiguities by giving weight to "[t]he traditional and appropriate activities of lawyers in representing clients consistent with the requirements of the applicable lawyer code"¹²

Finally, part IV offers two proposals. First, it suggests that, as an interpretive matter, courts should give greater deference to professional norms than the Restatement contemplates. Second, it suggests that, as a matter of discretion, prosecutors should consider deferring to the disciplinary process to resolve ambiguities about whether a lawyer's professional conduct was unlawful, rather than employing a criminal prosecution to resolve factual or legal uncertainties.

I. THE ROLE OF CRIMINAL LAW IN THE REGULATION OF LAWYERS

Although, as previously noted, the Restatement's chapter on the regulation of the legal profession includes a provision on "Lawyer Criminal Offense,"¹³ writings on lawyer regulation generally give short shrift to the significance of the criminal prosecutor's role in the lawyer regulatory scheme. For example, in his article, *Who Should Regulate Lawyers?*,¹⁴ David Wilkins presented an overview of enforcement systems that identifies disciplinary controls (characterized by the current disciplinary system), liability controls (involving lawsuits by injured clients and other private parties), institutional controls

12. Restatement (Third) of the Law Governing Lawyers § 8 (Proposed Final Draft No. 2, 1998).

13. *See id.*

14. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992).

(involving the imposition of sanctions by courts and administrative agencies for improprieties by lawyers appearing before them), and legislative controls (involving the proposed establishment of an administrative agency to investigate and prosecute lawyer misconduct), but made no mention of criminal controls.¹⁵ Likewise, in a Foreword to the special issue of a law review on "Institutional Choices in the Regulation of Lawyers," Ted Schneyer described the multiplicity of institutions regulating lawyers,¹⁶ including "legal institutions with broad missions that include some incidental regulation of lawyers,"¹⁷ but did not identify criminal law enforcement agencies as being among these.¹⁸

As described below, criminal law plays several roles in the regulation of lawyers. To the extent that criminal law proscribes conduct that is also proscribed by disciplinary norms, the criminal law allows criminal prosecutors a role, alongside that of disciplinary agencies and others, in enforcing standards of professional conduct. Additionally, criminal law has a role in defining the standards of professional conduct governing lawyers directly and, by influencing the drafters of disciplinary rules, indirectly. Finally, criminal law has a collateral role in the licensing process, in that the commission of a crime may serve as a ground for denying an individual admission to practice law or for suspending or disbaring a lawyer.

A. *Criminal Enforcement of Professional Norms*

The criminal law plays a role in enforcing professional standards. In many instances, professional conduct that is defined as improper by professional rules is also proscribed by the criminal law. For example, the willful misappropriation of client funds may be not only a violation of disciplinary rules governing safekeeping of client funds,¹⁹ but also the crime of embezzlement or larceny.²⁰ Likewise, deliberately billing a client for work never performed may constitute not only a breach of disciplinary rules governing reasonable fees²¹ and honesty in dealing with clients,²² but also a criminal fraud.²³ As a result, a lawyer

15. *See id.* at 805-09.

16. *See* Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 *Fordham L. Rev.* 33, 33 (1996).

17. *Id.* at 35.

18. *See id.* at 35-38.

19. *See* Model Code of Professional Responsibility DR 9-102 (1981); Model Rules of Professional Conduct Rule 1.15(a) (1983).

20. *See, e.g., In re Hampton*, 602 N.Y.S.2d 480 (App. Div. 1993) (involving a lawyer's previous plea of guilty to petit larceny based on the misappropriation of client funds).

21. *See* Model Code of Professional Responsibility DR 2-106; Model Rules of Professional Conduct Rule 1.5.

22. *See* Model Rules of Professional Conduct Rule 1.4; *cf.* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993) (opining that billing more than one client for the same time violates the Model Rules). *See generally* Lisa G.

who engages in certain professional misconduct faces the risk of a criminal sanction, such as imprisonment, which would be more harsh than professional discipline or civil liability. Additionally, because the criminal process may be more effective than either the disciplinary or the civil process, lawyers who engage in misconduct proscribed by the criminal law may face a more substantial risk of discovery and punishment.

By proscribing certain professional conduct, the criminal law allows criminal prosecutors to serve as institutional regulators of lawyers' professional behavior. The cases in which lawyers are prosecuted for professional wrongdoing, such as the misappropriation of client funds or fraudulent billing of clients, are legion. Prosecutions for offenses such as obstruction of justice committed on behalf of clients are also common. Perhaps the best known example is the criminal prosecution of Clarence Darrow for allegedly participating in bribing a juror.²⁴ A more colorful example is recounted in the history of the turn-of-the-century New York City law firm of Howe & Hummel,²⁵ described as "the Cadwalader, Wickersham & Taft of low practice."²⁶ The law firm, which practiced in the areas of criminal and civil litigation and entertainment law, owed some part of its considerable success, profit, and renown to the practices of bribing judges, suborning perjury, and extortion.²⁷ Only after Howe's death did the New York district attorney manage to put the law firm out of business by securing a criminal conviction of Hummel for suborning perjury in a civil lawsuit. The conviction came after a lengthy period during which Hummel's minions kept the prosecution's principal witness beyond the prosecution's reach and "very nearly succeeded in debauching [him] to death."²⁸

Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659 (1990) (analyzing the deception of clients by lawyers); Sonia S. Chan, Note, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling*, 9 Geo. J. Legal Ethics 611 (1996) (discussing unethical billing practices).

23. See Lee A. Watson, Note, *Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing*, 11 Geo. J. Legal Ethics 189, 189-90 & nn.2-3 (1998) (citing cases of lawyers convicted for billing fraud); see also *United States v. D'Amato*, 39 F.3d 1249, 1252 (2d Cir. 1994) (finding insufficient evidence to support a lawyer's mail fraud conviction where the lawyer's bills concealed from those in control of the corporate client the nature of his relationship with, and work for, the corporation); *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991) (holding that billing for services never performed is fraudulent even if payment is due for other services rendered).

24. See Geoffrey Cowan, *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer* (1993).

25. See generally Richard H. Rovere, *Howe & Hummel* (1947) (discussing clients and methods of operation of the most successful and notorious law office in New York City at the turn of the century).

26. *Id.* at 123.

27. See *id.* at 73, 77, 91.

28. *Id.* at 157.

The literature on corporate and white-collar crime has given attention to criminal prosecutions of lawyers²⁹ in part because of the danger of overcriminalization—that is, that the charged conduct, although wrongful, does not deserve to be sanctioned criminally. The context in which this danger has elicited particular concern is where the prosecution of a lawyer is predicated, in part, on the lawyer's violation of disciplinary standards. Examples might include criminal prosecutions in which a disciplinary violation is offered as circumstantial evidence to prove that the lawyer possessed criminal intent³⁰ or to rebut a claim that the lawyer's intent was innocent.³¹ The most frequently cited example, however, is *United States v. Bronston*,³² in which a disciplinary violation was essentially an element of the charged offense.³³

29. See, e.g., Pamela H. Bucy, *White Collar Crime: Cases and Materials* 807-17 (2d ed. 1998) (discussing the decision to uphold a lawyer's mail and travel fraud convictions in a section on "fraud upon clients" as part of chapter on "criminal and civil liability of professionals"); Jerold H. Israel et al., *White Collar Crime: Law and Practice* 169-72 (1996) (explaining a decision to uphold a lawyer's mail fraud conviction under a topic titled "Breach of a Fiduciary Duty" in a chapter on mail and wire fraud); *id.* at 172-77 (noting a decision vacating a lawyer's mail fraud conviction under a topic titled "intent" in a chapter on mail and wire fraud).

30. See *United States v. Machi*, 811 F.2d 991, 1001 (7th Cir. 1987); *United States v. Klauber*, 611 F.2d 512, 520 (4th Cir. 1979). In *Klauber*, a lawyer who represented plaintiffs in personal injury cases was charged with seeking inflated charges from doctors which could be used to obtain inflated settlements from insurance companies. The court held that the lawyer's violation of a disciplinary rule was properly offered and considered by the jury as proof of "the attitude Klauber, as a member of the Bar, should have maintained toward practices that were proven." *Id.* (citing *United States v. Reamer*, 589 F.2d 769, 771 (4th Cir. 1978)).

31. For example, in *United States v. Zeman*, 1992 U.S. App. LEXIS 29842 (6th Cir. Nov. 9, 1992), the defendant, a lawyer for the kingpin of a drug organization, paid the lawyer for a courier in the organization in order to induce that lawyer to advise his client to become a fugitive rather than testifying for the government. See *id.* at *3. The payments were not disclosed to the client. See *id.* at *18-*19. The defendant was tried and convicted under 18 U.S.C. § 1512(b)(1) of witness tampering, and the Sixth Circuit affirmed the decision. See *id.* at *1-*2. In order to rebut the defendant's attempt to show that this was an ethical third-party payment of a fee under Model Rule 1.8(f), the government was permitted to introduce testimony that his conduct was in fact unethical. See *id.* at *13-*14, *30-*31.

32. 658 F.2d 920 (2d Cir. 1981).

33. See *id.* at 927. Another example is *United States v. Drury*, 687 F.2d 63 (5th Cir. 1982). Drury represented plaintiffs in personal injury actions on a contingent-fee basis. See *id.* at 63. He received 40% of the recovery after the deduction of expenses. See *id.* He referred most of his clients to one particular physician, a Dr. Macaluso, who served as an expert witness. See *id.* Pursuant to an agreement that was not disclosed to the clients, Drury paid Macaluso only 85% of the doctor's medical bill while the rest was pocketed by Drury himself. See *id.* Drury was convicted of defrauding his clients and the conviction was upheld. See *id.* at 64, 66. There was no showing that the doctor's fee was inflated to take account of the 15% kicked back to Drury. See *id.* at 64. The theory was that Drury deprived the clients of information that he had a fiduciary duty to reveal. See *id.* at 64-65. The principal source of this duty was DR 5-107 of the Louisiana Code of Professional Responsibility, which established a duty to disclose compensation from a third party in connection with representation of a client. See *id.* at 64-65.

The defendant in *Bronston* was both a state senator and a partner of Rosenman & Colin, a New York City law firm.³⁴ The firm agreed to represent a group of minority investors in BusTop Shelters, Inc., that was seeking to renew its bus stop shelter franchise in New York City.³⁵ At around the same time that the firm started to provide investment advice to these individual clients, Bronston began to provide legal assistance to a friend, Saul Steinberg, who was seeking to compete for the New York City franchise and for other bus stop shelter franchises elsewhere.³⁶ With his firm's knowledge and reluctant approval, Bronston began by directing a law firm associate to set up a shell corporation, Convenience and Safety Corp. ("C&S"), that would serve as Steinberg's vehicle for the bus stop shelter competition.³⁷

Over the succeeding months, Rosenman & Colin represented the minority investors in negotiating the terms of their investment in BusTop and Bronston participated in some meetings at the law firm regarding this work.³⁸ Meanwhile, apparently unknown to his partners, Bronston expanded his professional relationship with Steinberg and C&S, which named him to its Board of Directors.³⁹ Although a different law firm assumed responsibility for representing C&S in its efforts to obtain the New York City franchise, Bronston received information about the status of C&S's bid, billed C&S for reviewing one piece of correspondence, and sent a letter on state senate letterhead to the city comptroller opposing the renewal of BusTop's franchise.⁴⁰

The grand jury indicted Bronston under the federal mail fraud statute, which makes it a crime not only to defraud by false statements, but also, in some cases, by material omissions.⁴¹ As interpreted by federal courts, a "fraud" committed by nondisclosure or concealment, as opposed to an affirmative misrepresentation, required a defendant's breach of a fiduciary duty to disclose information under circumstances where the withholding can harm the one to whom the defendant owes a fiduciary duty.⁴² Bronston was tried and convicted of mail fraud on the theory that he had breached a fiduciary duty owed to clients of his law firm by not disclosing that he had undertaken a representation in conflict with their interests.⁴³ Over a dissent, the court of appeals upheld Bronston's conviction on this theory,

For an example of a criminal contempt prosecution of a lawyer predicated on a perceived violation of professional norms, see *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), discussed *infra* at notes 172-73.

34. See *United States v. Bronston*, 658 F.2d 920, 922 (2d Cir. 1981).

35. See *id.*

36. See *id.*

37. See *id.* at 922-23.

38. See *id.* at 923.

39. See *id.* at 924.

40. See *id.*

41. See *id.* at 925.

42. See *id.* at 926.

43. See *id.* at 927.

citing Disciplinary Rule 5-105 of the state's Code of Professional Responsibility as evidence of Bronston's fiduciary duty to the BusTop investors. The court reasoned that since BusTop investors were clients of his law firm, Bronston had a duty not to "promot[e] the interests of Steinberg and C&S in competition and conflict with those of the BusTop investors."⁴⁴

Troubled by the premise that the mail fraud statute should be interpreted to criminalize certain breaches of a fiduciary duty, some criminal law scholars have criticized *Bronston*.⁴⁵ Even if one embraces that premise, however, *Bronston* is nonetheless a troubling decision because it erroneously assumes that disciplinary rules governing conflicts of interest establish fiduciary duties to the clients of one's law firm. As discussed below, the conflict rules are more restrictive than the common law of agency that, independently of the lawyer codes, establishes a lawyer's fiduciary duties to a client. Therefore, even if it is not excessively harsh to make a federal criminal case out of a lawyer's fiduciary breach, it may be excessively harsh to make one out of a lawyer's violation of a prophylactic disciplinary rule dealing with conflicts of interest.

In general, disciplinary rules are not meant either to codify lawyers' common-law duties to their clients and others or to serve as an independent basis of civil liability. They are meant exclusively to serve as regulatory provisions that guide lawyers and provide a basis for disciplining them.⁴⁶ The ABA Model Rules of Professional Conduct make plain that, although disciplinary rules are "a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority," they should not be "deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."⁴⁷ In light of their intended purposes, many disciplinary rules are cast in highly general terms, their meaning and scope left uncertain at the margins. They are understood to be general principles, which may be amplified, or even

44. *Id.* at 927. Additionally, with respect to other elements of the crime, the court found that Bronston had "intent to defraud" (based on his secretly undertaking a representation that could harm the firm's clients). *See id.* The court also found that the concealment of the fact of his representation was material. *See id.* at 928 ("This was no mere technical failure on a law firm's part to disclose all potential conflicts of interest to its clients. One can imagine few nondisclosures more crucial . . .").

45. *See* Coffee, *supra* note 6, at 130-42 (criticizing *Bronston*); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 Am. Crim. L. Rev. 423, 448-64 (1983) (same). *But see* Craig M. Bradley, *Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. Crim. L. & Criminology 573, 603 (1988) (defending *Bronston*).

46. *See* Model Rules of Professional Conduct Scope; *see also* Model Code of Professional Responsibility Preliminary Statement ("The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.").

47. Model Rules of Professional Conduct Scope.

superseded, by standards of conduct reflected in common understandings or set forth in bar association ethics opinions or judicial decisions.⁴⁸ Individual lawyers are afforded some discretion in deciding how the rules apply to them, particularly in situations involving legal

48. For example, the court in *International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975), noted:

It behooves this court . . . while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.

Id. at 1293 (quoting the brief of the Connecticut Bar Association); *see also* Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("While unquestionably important, and respected by the courts, the code does not have the force of law." (citation omitted)); *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 508 N.E.2d 647, 650 (N.Y. 1987) ("When we agree that the Code applies in an equitable manner . . . we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned." (quoting *Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring)); Elliott T. Cheatham & Gabriel I. Lewis, *Committees on Legal Ethics*, 24 Cal. L. Rev. 28, 37-38 (1936) (opining that bar association ethics committees "should go beyond the letter of" the lawyer code and base its judgments on "foundation principles, the purposes of the judicial system and its jurisprudence, the privileges and duties of lawyers and the best and most reasonable and practical methods of obtaining them" (quoting the Committee on Professional Ethics of the New York County Lawyers' Association)); Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 Brook. L. Rev. 485, 537-38 (1989) [hereinafter Green, *Interpretation of Ethical Rules*] (arguing that the court has discretion "to decide for itself how most appropriately to interpret an ambiguous disciplinary rule, just as the court would be free, in the absence of a body of rules, to define attorney misconduct as an exercise of its inherent supervisory authority over attorneys").

For example, it is understood that prosecutors may direct their investigators to engage in deceitful conduct in gathering evidence of past criminal conduct, notwithstanding rules forbidding lawyers from engaging in deceitful conduct and from doing indirectly through their agents what they are forbidden from doing themselves. *See* Model Rules of Professional Conduct Rule 8.4(a)(c). Notwithstanding these same prohibitions, courts have recognized that lawyers and their investigators may also use deceit to gather evidence of ongoing wrongdoing in civil rights and other civil cases. *See, e.g.*, *Apple Corps Ltd. v. International Collectors Soc'y*, No. Civ. 96-1571, 1998 WL 345078, at *20 (D.N.J. June 26, 1998) ("[A] public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed.").

Limits on the reach of the conflict of interest rules have also been recognized that have not been based on the language of these rules but are essentially a matter of judicial decree. For example, courts have recognized that the rule of vicarious disqualification may not apply in the same way to large law firms as it applies to small ones, *see S & S Hotel Ventures*, 508 N.E.2d at 648-52, in the same way to legal aid offices as it applies to private law firms, *see United States v. Reynoso*, 6 F. Supp. 2d 269, 270 (S.D.N.Y. 1998), and in the same way to conflicts of interest that arise unexpectedly mid-representation as to conflicts existing at the outset, *see, e.g.*, *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298, 1996 WL 346009, at *1 (S.D.N.Y. June 20, 1996) (denying a motion to disqualify a law firm where a new lawyer of the firm formerly worked for the opposing party's law firm).

or factual uncertainty, not only because the rules are not meant to be applied didactically and inflexibly, but also because, in the long run, lawyers are most likely to act ethically when they are encouraged to exercise independent moral judgment concerning their proposed conduct.⁴⁹ It is anticipated that, acting in areas of uncertainty, lawyers will sometimes engage in conduct that later appears to be wrongful from the retrospective, objective viewpoint of disciplinary authorities, but that if the lawyer is found to have acted in good faith, then a disciplinary agency will decline to bring disciplinary charges or seek a token sanction.⁵⁰

Some commentators have argued that a disciplinary violation should be deemed a violation of the lawyer's duty of care under negligence law, both as a doctrinal matter, because disciplinary rules express the legal profession's minimal standard of conduct expected of lawyers, and as a regulatory matter, because civil liability for disciplinary violations would promote the policies underlying the disciplinary rules and encourage compliance with them, thus compensating for the deficiencies of the disciplinary process.⁵¹ This approach, affording private parties an opportunity to seek damages for disciplinary violations that inure to their detriment, would make sense if the rules were intended to be strongly enforced even at the margins. Consistent with the intention of the drafters of the disciplinary rules that lawyers be allowed to exercise discretion in areas of ambiguity, however, courts have declined to equate a disciplinary infraction with an actionable breach of the lawyer's fiduciary duty.⁵²

49. See generally David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31 (1995) (discussing the idea that good moral judgment is the heart of legal ethics).

50. See Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscientious Avoidance, and Prosecutorial Discretion*, 66 Fordham L. Rev. 1307 (1998) (discussing the situation in which a disciplinary prosecutor might decline to bring charges against a lawyer who had violated a disciplinary rule as a matter of personal conscience).

51. See Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. Rev. 281, 286-95 (1979).

52. See *Baxt v. Liloia*, 664 A.2d 948, 949 (N.J. Super. Ct. App. Div. 1995), *aff'd as modified*, 714 A.2d 271 (N.J. 1998); *Hizey v. Carpenter*, 830 P.2d 646, 651 (Wash. 1992). While rejecting the view that a violation of the ethics code in and of itself creates a private right of action, courts have found that in a malpractice action, an ethics provision may be relevant to establishing the standard of care required of attorneys. For example, the Michigan Court of Appeals has held that a violation of the Code is rebuttable evidence of malpractice. See *Lipton v. Boesky*, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981). The Tenth Circuit has held it proper for an expert witness to rely on Code provisions in giving an opinion on the standard of care expected of lawyers in the community. See *Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348, 353 (10th Cir. 1988). For discussions of the role of ethical rules in malpractice cases, see Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 18.7, at 576-85 (4th ed. 1996); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101 (1995); David Luban, *Ethics and Malpractice*, 12 Miss. C. L. Rev. 151 (1991); Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 27 J. Legal Prof. 33

Given that disciplinary violations standing alone do not establish *civil* liability, it seems obvious that they should not serve as the basis of *criminal* liability. A basic principle of criminal jurisprudence is that not every moral or ethical transgression should be a crime;⁵³ nor

(1997-98); Susan Taylor Wall & Joseph R. Weston, *An Analysis of Current Theories of Liability*, 45 S.C. L. Rev. 851 (1994); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 Harv. L. Rev. 1102 (1996); Ann Peters, Note, *The Model Rules as a Guide for Legal Malpractice*, 6 Geo. J. Legal Ethics 609 (1993).

Courts have sometimes found that civil liability may not be predicated in any way on disciplinary misconduct. A leading case in point is *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991). The Maryland law firm charged with malpractice in that case had represented the purchaser of two companies. *See id.* at 488. In the course of the negotiations, the firm's client misrepresented its net worth. *See id.* After the transaction was concluded, the client failed to make full payment and filed for bankruptcy. *See id.* The seller's civil lawsuit against the purchaser's law firm contained various theories of liability. *See id.* The plaintiffs acknowledged that the firm itself had made no affirmative misrepresentations. *See id.* They alleged, however, that the law firm had known about its clients' misrepresentations but had remained silent, while continuing to assist in closing the deal. *See id.* at 489. The plaintiffs secured an opinion from the Maryland State Bar Association's Committee on Ethics to the effect that in this situation the law firm had a duty under Maryland's Code of Professional Responsibility either to withdraw from the representation or to make the truth known to the sellers. *See id.* The Fourth Circuit, however, rejected the plaintiffs' argument that the law firm's ethical violation should suffice to establish civil liability under Rule 10b-5, under Maryland common law of negligence, or as a matter of public policy. *See id.* at 492-94. Rejecting all three claims, the court found that public policy counseled *against* the imposition of civil liability. *See id.* at 493-94. It explained:

Any other result may prevent a client from reposing complete trust in his lawyer for fear that he might reveal a fact which would trigger the lawyer's duty to the third party. Similarly, if attorneys had a duty to disclose information to third parties, attorneys would have an incentive not to press clients for information. The net result would not be less securities fraud. Instead, attorneys would more often be unwitting accomplices to the fraud as a result of being kept in the dark by their clients or by their own reluctance to obtain information. The better rule—that attorneys have no duty to “blow the whistle” on their clients—allows clients to repose complete trust in their lawyers. Under those circumstances, the client is more likely to disclose damaging or problematic information, and the lawyer will more likely be able to counsel his client against misconduct.

Id. at 493.

53. *See* United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996), *rev'd*, 117 S. Ct. 2199 (1997). The defendant in *O'Hagan*, a lawyer, was a partner of a Minneapolis firm that was retained as local counsel by a large British company called Grand Met that was interested in acquiring Pillsbury Company, a Minneapolis company. *Id.* at 614. Aware of this confidential information, O'Hagan purchased call options for the Pillsbury stock. *See id.* When Grand Met publicly announced its tender offer for Pillsbury stock, and Pillsbury stock rose from \$39 to almost \$60 a share, O'Hagan exercised his options, netting a profit of over \$4 million. *See id.* He was convicted of 57 counts of securities fraud, mail fraud, and money laundering. *See id.* The Eighth Circuit overturned O'Hagan's convictions, essentially because (contrary to other federal circuit courts) it construed the securities fraud statute in a manner that did not reach this conduct. *See id.* at 622. In the Eighth Circuit's view, O'Hagan had no fiduciary duty to Pillsbury or its shareholders. *See id.* at 627. Although O'Hagan did have a fiduciary duty to Grand Met and to his law firm and had breached his duty to each in exploiting nonpublic information about the proposed acquisition of Pillsbury, the

should every regulatory violation.⁵⁴ Disciplinary rules often fail to provide sufficiently clear notice of the proscribed conduct and, more importantly, even where particular conduct is clearly proscribed, a criminal sanction will often be unduly harsh.

The conflict rules in particular are not meant to codify or to establish fiduciary duties owed by lawyers to their clients for purposes of civil or criminal law. Although the conflict rules establish restrictions and might be said to establish duties owed to the public, these rules are not coextensive with the lawyer's fiduciary duty of loyalty derived from the common law of agency. The conflict rules are more restrictive than agency law partly because they are rules of risk avoidance⁵⁵ and partly because they are designed to avoid public appearances of improper conduct.⁵⁶

DR 5-105, the rule cited in *Bronston*, serves as an illustration. DR 5-105(A) and (B) govern the concurrent representation of clients with inconsistent interests, forbidding an individual lawyer from beginning or continuing to represent multiple clients if the representation of one "will be or is likely to be adversely affected" by the lawyer's representation of another, or "if it would be likely to be adversely affected by [the lawyer's] representation of another client."⁵⁷ The vicarious disqualification provision, DR 5-105(D), provides in turn that when any

Eighth Circuit believed that securities fraud liability may not be premised on this impropriety. *See id.* In its opinion, the court took pains to conclude:

Our ruling today should in no manner be understood as condoning O'Hagan's conduct. . . . Such conduct is certainly unethical and immoral and must be condemned, which we make haste to do. . . . However, it is a fundamental principle of the criminal law that not every ethical or moral transgression falls within its realm. This case is a prime example of that principle.

Id. at 628. Although the Supreme Court reversed, it did not reject this general principle. *See O'Hagan*, 117 S. Ct. at 2213.

54. Consistent with this limitation, in *United States v. Rabbitt*, 583 F.2d 1014, 1025 (8th Cir. 1978), a disciplinary violation was held to be irrelevant to the prosecution of a state legislator who had assisted an architectural firm in obtaining contracts for state construction work in exchange for a fee. Although Rabbitt had clearly violated DR 8-101, which governs the conduct of lawyers in their role as public officials, the court found that he had not acted fraudulently. *See id.* Since Rabbitt had no official duty regarding awarding contracts, the court found, he did not deprive the public of honesty in his official duties. *See id.* Further, disregarding the disciplinary rule as a source of a disclosure obligation, it found that he had no affirmative duty to disclose his interest in the architectural contracts. *See id.*

55. *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.7:101, at 223 (2d ed. 1990 & Supp. 1996) (observing that "[i]n the modern view, a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is 'at risk,' even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates"); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *Fordham L. Rev.* 71, 71-72 (1996).

56. *See* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—Or Revived Everywhere Else?*, 28 *Seton Hall L. Rev.* 315 (1997).

57. Model Code of Professional Responsibility DR 5-105 (1981).

one member of a firm is forbidden by DR 5-105(A) or (B) from "accept[ing] or continu[ing] such employment," no other lawyer in the firm may knowingly do so.⁵⁸ These are prophylactic rules. They are intended in part to prevent violations of a lawyer's fiduciary duties of confidentiality and competence. But a lawyer who violates these rules has not necessarily breached a confidence or rendered substandard assistance; indeed, in *Bronston*, the government did not seek to establish that Bronston misused client confidences of the BusTop investors, or that Bronston caused the law firm to render them inadequate legal assistance.

The conflict rules are also intended in part to prevent violations of the duty of loyalty, but they do so by expanding on lawyers' fiduciary duty of loyalty under agency law. Consequently, a conflict violation is not invariably a breach of the duty of loyalty any more than it is invariably a breach of the duties of confidentiality and competence. This was true even under the earlier ABA Canons of Professional Ethics, which deemed it "unprofessional to represent conflicting interests" without consent, and explained that "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."⁵⁹ One implication was that the restriction recognized by the Canon is a matter of professional ethics, but not necessarily civil law. Another was that, as traditionally understood, the fiduciary duty of loyalty was no greater than the restriction against contending for that which the lawyer is duty-bound to oppose. The later Code of Professional Responsibility, which also did not speak in terms of the fiduciary duty of loyalty, imposed a broader professional limitation than the Canons by restricting any representation that was "likely" to involve representing differing interests. Even if one were to equate the representation of "differing interests" with a breach of the fiduciary duty of loyalty, not every disciplinary violation under the Code would eventuate in disloyalty.

It would surely have been a fiduciary breach, as well as a disciplinary violation that went to the core of the conflict rule, if Bronston or Rosenman & Colin secretly undertook to help C&S obtain the New York City franchise after agreeing to assist BusTop to obtain the same franchise.⁶⁰ But what took place in *Bronston* was considerably removed from that. Rosenman & Colin did not represent BusTop in seeking to renew the New York City franchise; it represented individ-

58. *Id.* at DR 5-105(D).

59. Canons of Professional Ethics Canon 6 (1947).

60. See Model Code of Professional Responsibility DR 5-105 (restricting a lawyer from undertaking representation where the lawyer's representation of one client may be impaired because of the lawyer's duty to the other client); see also *Greene v. Greene*, 391 N.E.2d 1355, 1357-58 (N.Y. 1979) (observing that, even with the consent of both clients, it would rarely be permissible for a lawyer to request two adverse parties with respect to the same subject matter of a legal proceeding "[b]ecause dual representation is fraught with the potential for irreconcilable conflict").

ual minority investors in their relationship with majority investors in BusTop. There was room to argue that Bronston, as a member of the firm, was not barred from providing some assistance to C&S simply because his law firm was providing investment assistance to individuals who were investing in a different company that was competing for the same franchise.⁶¹ Rosenman & Colin's advice to the BusTop investors and its assistance in their negotiations was not likely to be "adversely affected" by Bronston's work for C&S. Additionally, although BusTop and C&S had different interests, the concurrent representation may not have involved "*representing* differing interests," since the interests of C&S in obtaining the New York City franchise were not necessarily inconsistent with the limited interest of the minority investors that Rosenman & Colin was representing—namely, the interest in investing in BusTop on favorable terms.⁶² But even assuming that

61. The trial court refused to admit expert testimony on behalf of Bronston concerning the application of the disciplinary rules. *See* *United States v. Bronston*, 658 F.2d 920, 930 (2d Cir. 1981).

62. It has been understood that the restriction on "representing differing interests" is not implicated when two clients have differing interests with regard to a particular matter unless each client has retained the law firm to represent the relevant interests. *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 350 (1974) (stating that a lawyer representing a bank may undertake to represent a borrower in an unrelated transaction with the bank and that the bank's consent is not required "[s]ince the lawyer would not be representing the bank in this transaction").

There is an additional restriction, however, that is implicit in DR 5-101(A) & (B) and that may have applied in *Bronston*. That is, a lawyer may not represent a client if the representation will be directly adverse to another client, even if the two representations are entirely unrelated. *See, e.g.,* *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 794 (S.D.N.Y. 1991) (holding that a law firm may not represent the plaintiff corporation in a lawsuit against the defendant corporation while simultaneously representing a subsidiary of the defendant corporation in unrelated labor matters). In general, this means that "a lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained." Restatement (Third) of the Law Governing Lawyers § 209 cmt. e (Proposed Final Draft No. 1, 1996). This principle is codified in Rule 1.7(a) of the ABA Model Rules of Professional Conduct. The underlying premise is that, when a lawyer's activities are directly adverse to a current client, as is true when a lawyer appears in litigation against a client, the client will reasonably perceive that the lawyer is acting disloyally and the client's trust and confidence in the lawyer will be harmed as a result. This does not mean, however, that a lawyer must refrain from all activities unrelated to the representation of a particular client that may undermine that client's interests or frustrate his or her objectives. Such a broad restriction would contravene other important public interests, including the interest in enabling others to obtain counsel of choice. Consequently, some understand that the restriction applies only in the limited circumstances where a lawyer seeks to represent a client in litigation or equivalent adversarial proceedings against another client. *See* Charles W. Wolfram, *Modern Legal Ethics* 357 (1986) [hereinafter *Wolfram, Legal Ethics*] (discussing *In re Ainsworth*, 614 P.2d 1127 (1980)); *see also* Model Rules of Professional Conduct Rule 1.7(a) cmt. (1989) ("[S]imultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."). *Bronston* might have argued that this implicit restriction was inapplicable because, although C&S was in competition with BusTop for a business opportunity, the companies were not direct adversaries as would be

Bronston violated the disciplinary rule, it does not follow that his conduct was a fiduciary breach for purposes of civil liability, much less that it should be punished criminally. As Jack Coffee argued shortly after Bronston's conviction, as a matter of everyday morality, "prophylactic rules, such as the prohibition on accepting clients with conflicting interests, constitute a penumbra around the essential criminal activity they are designed to prevent, such as fraud and deceit, but are not themselves the subject of criminal prohibitions."⁶³ Thus, to predicate a criminal conviction on a disciplinary violation "overlooks the basic distinction evident to the ordinary citizen between a failure to observe a prophylactic rule designed to prevent fiduciary misconduct and actual predatory conduct."⁶⁴

In the end, the *Bronston* decision is troubling both from a regulatory perspective because it seems to criminalize virtually any violation of the conflict rules, thereby leaving it to the discretion of prosecutors to decide whether or not to bring criminal charges against a lawyer who had an impermissible conflict, and from a doctrinal perspective because it appears to assume that disciplinary rules generally, and the conflict-of-interest rules in particular, establish fiduciary duties that lawyers owe to their clients. Perhaps in part for these reasons, few subsequent criminal prosecutions have been brought against lawyers for failing to disclose a conflict of interest.⁶⁵

true of opposing litigants and, even if they were, C&S was not directly adverse to the BusTop minority investors whom Rosenman Colin represented.

63. Coffee, *supra* note 6, at 137.

64. *Id.*

65. In the early 1990s, in a case reminiscent of *Bronston*, the government prosecuted law partners, Melvin Miller and Jay Adolf, who were Speaker of the New York State Assembly and counsel to the Speaker, respectively, on mail fraud charges. The government alleged that, in breach of their fiduciary duties, they used confidential client information to take advantage of an investment opportunity that might otherwise have been available to their clients. Their convictions were overturned based on the Supreme Court's post-*Bronston* decision in *McNally v. United States*, 483 U.S. 350 (1987), which interpreted the mail fraud statute to apply only where there is proof of a scheme to defraud someone of money or property. *See United States v. Miller*, 997 F.2d 1010, 1016 (2d Cir. 1993). The Second Circuit found that, although the defendants' dealings "may not have been a model of candor and disclosure," they had not committed the crime of mail fraud, because they had not been proven to have deprived their clients of money or property within the meaning of the mail fraud statute as interpreted in *McNally*. *See id.* at 1023.

More recently, a highly publicized prosecution, resulting in a criminal conviction, was brought against John Gellene, a New York lawyer, for making false statements relating to his law firm's conflict of interest in a bankruptcy proceeding. *See Karen Donovan, John Gellene Sentenced to 15 Months*, Nat'l L.J., Aug. 10, 1998, at A6; Anna Snider, *Milbank Ex-Partner Convicted of Fraud: Firm Faces \$100 Million Malpractice Suit*, Nat'l L.J., Mar. 4, 1998, at A1. Gellene was convicted under 18 U.S.C. § 152(3), which proscribes "knowingly and fraudulently mak[ing] a false declaration" in a bankruptcy proceeding, based on allegations that he made false filings to conceal that his firm, while representing the debtor in Chapter 11 proceedings, had also represented a creditor. It is unclear whether this prosecution posed the same dangers as *Bronston*. Insofar as the gravamen of the charge was that Gellene deliberately made false state-

B. *Criminal Law and the Standard of Conduct for Lawyers*

Criminal law defines the standard of conduct for lawyers both directly and indirectly. First, it may establish standards of conduct independently of the disciplinary norms. Additionally, it may influence the development of disciplinary standards.

1. Defining the Standard of Conduct

Criminal law may play a role not only in encouraging compliance with professional norms that happen to coincide with the dictates of criminal law, but in establishing professional norms by proscribing conduct that might otherwise be professionally permissible.⁶⁶ For example, in the nineteenth century, the norms governing lawyers' business relations with clients and prospective clients were established in part by the common-law crimes of champerty, barratry, and maintenance.⁶⁷ Current examples include criminal provisions, typically misdemeanors, governing the unauthorized practice of law and the solicitation of clients. Although these provisions are most often enforced against nonlawyers, who are beyond the reach of lawyer disciplinary codes and the lawyer disciplinary process, they apply to lawyers as well. Other criminal law provisions, although not specifically directed at legal practice, nonetheless may bear on how lawyers conduct their work. For example, federal money laundering statutes

ments of fact in a court filing, the theory of this prosecution would not seem to present the issues that made *Bronston* controversial. However, the prosecution's theory appears to have been that Gellene's filings were false in that they contained material omissions—namely, that they omitted disclosure of his law firm's "connections" to the creditor. One might view the omission not as a false factual assertion that the law firm had no connection with any creditor, but as an erroneous legal assertion to that effect. Ordinarily, lawyers may assert any legal position that is not frivolous. *See, e.g.*, Model Code of Professional Responsibility DR 7-102(A)(2) (1981) (stating that a lawyer shall not knowingly advance a claim or defense which is not warranted under existing law and which cannot be supported by a good faith argument for extension, modification, or reversal of existing law). Further, a lawyer who asserts a frivolous legal position is ordinarily subject to judicial or disciplinary sanctions, not criminal sanctions. *See, e.g.*, Fed. R. Civ. P. 11 (1997) (providing that an attorney may be subject to disciplinary action for willfully asserting a frivolous legal question). To the extent that the gravamen of Gellene's offense was that he impliedly asserted an erroneous, and ultimately frivolous, legal position to the effect that his firm's relationship with a particular creditor was not a connection that had to be disclosed under the bankruptcy rules, the criminal prosecution might seem to involve a danger of overcriminalization.

66. *See* Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 57-75 (2d ed. 1994) [hereinafter Hazard et al., *Ethics of Lawyering*].

67. *See* Wolfram, *supra* note 62, at 489-90; Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935); Percy H. Winfield, *The History of Maintenance and Champerty*, 35 L.Q. Rev. 50 (1919).

restrict lawyers' fee-arrangements and other financial dealings with clients.⁶⁸

When criminal laws apply to lawyers' professional conduct, criminal prosecutors may give effect to them directly by invoking them as the basis for prosecuting a lawyer or by various indirect means that may require the lawyer to defend against an accusation of criminal wrongdoing. For example, the criminal law may justify a criminal investigation of a lawyer that does not eventuate in the filing of criminal charges, because the allegations against the lawyer prove to be inadequately substantiated or entirely unfounded,⁶⁹ because the lawyer agrees to assist in a criminal investigation of clients or other third parties in exchange for leniency,⁷⁰ or because the prosecutor simply decides as a matter of discretion not to bring charges. Alternatively, during a criminal investigation of the lawyer's client or former client, the prosecutor may present allegations that a lawyer assisted a client in criminal wrongdoing as a ground for seeking the lawyer's disclosure of otherwise privileged information under the crime-fraud exception to the attorney-client privilege or work-product privilege.⁷¹ The prosecutor may also present such allegations in support of a motion to disqualify the lawyer from representing a criminal defendant.⁷² In

68. See 18 U.S.C. §§ 1956, 1957 (1994); see generally Hazard et al., Ethics of Lawyering, *supra* note 66, at 74 (discussing the effects of legislative enactments aimed at organized crime and drug trafficking on lawyer behavior).

69. See, e.g., United States v. Van Engel, 15 F.3d 623 (7th Cir. 1993) (holding that an investigation of the defendant's lawyer, although unwarranted, was not a proper ground for dismissing the indictment). For a further discussion of this case, see *infra* notes 164-67 and accompanying text.

70. See, e.g., Committee on Prof'l Ethics v. Mollman, 488 N.W.2d 168 (Iowa 1992) (suspending an attorney who, in exchange for the government's agreement not to prosecute him on drug charges, secretly tape-recorded a conversation with a former client).

71. See, e.g., *In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998) (determining that the crime-fraud exception to the attorney-client privilege applied in the present case and, thus, that the district court properly held that the attorneys must testify "as to any act, communication, document or other matter" concerning the parties' relationships (citation omitted)). The prosecution does not need to establish that the lawyer intentionally assisted the client's criminal conduct, and so, a court's application of the crime-fraud exception does not necessarily mean that the lawyer acted criminally. See *id.* at 660. On the other hand, the crime-fraud exception may be established by showing that, although the client was innocent, the lawyer acted criminally. See *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985).

72. The prosecutor may argue that, in light of the allegations, the lawyer has an interest in currying favor with the prosecution, at the expense of the client. If the allegations involve wrongdoing together with the particular defendant, then the prosecutor may also argue that the lawyer's defense may be adversely influenced by the lawyer's interest in suppressing evidence of the lawyer's own wrongdoing. See, e.g., *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984) ("[I]t is unrealistic for this court to assume that Zepp's attorney vigorously pursued his client's best interest entirely free from the influence of his concern to avoid his own incrimination."); *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir. 1980) (holding that the trial judge may disqualify a retained attorney where the judge believes the attorney is the target of an investigation concerning the events for which he was in-

none of these contexts is the impact of the criminal law as severe as when the lawyer faces criminal prosecution. Nevertheless, even absent prosecution, the accusations may cause the lawyer to experience anxiety, incur cost and expend time in defending his conduct, and suffer harm to his professional reputation and, as a consequence, his livelihood.

A criminal provision that sets a standard of lawyer conduct may have force even if it is not invoked by criminal prosecutors. Criminal prosecutions are only rarely brought against lawyers for violating solicitation laws,⁷³ but such violations may serve as a ground for disbarment.⁷⁴ Similarly, lawyers are only rarely prosecuted for engaging in unauthorized practice of law by practicing law outside the jurisdiction in which they are licensed,⁷⁵ but the criminal provision may serve as the basis for disciplining,⁷⁶ enjoining,⁷⁷ or, as in a well-publicized California case last year, denying legal fees to lawyers who violate an unauthorized practice provision.⁷⁸ And, as Professor Perillo discusses in

dicted); *In re Investigation Before Feb., 1997, Lynchburg Grand Jury*, 563 F.2d 652, 656-57 (4th Cir. 1977) (stating that a lawyer was properly disqualified from representing a criminal defendant because of suspicions of his involvement in wrongdoing); *United States v. Kerlegon*, 690 F. Supp. 541, 544-46 (W.D. La. 1988) (disqualifying a criminal defendant's attorney where the attorney was a subject of the investigation that led to the defendant's indictment, because of the risk that the attorney's self-interest would influence his conduct of plea negotiations and other aspects of the representation). With respect to disqualification motions in criminal cases, see generally Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323 (1989) (exploring the responsibilities of prosecutors when criminal defense lawyers have conflicts of interests); Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (1989) (arguing that the Supreme Court's decision on pretrial disqualification was inconsistent with its prior decisions on conflicts of interest).

73. A highly publicized example was the South Carolina prosecution of John O'Quinn, an extremely well-known and successful Texas personal injury lawyer, relating to his alleged role in soliciting clients in connection with a USAir crash. Both the solicitation charge and a fee-splitting charge were ultimately dismissed against O'Quinn and two other defendants in exchange for their guilty plea to the charge of practicing law in the state without a South Carolina license. See Susan Borreson, *So What? The Bar's Out Topple to Tort King John O'Quinn for Chasing Cases. Why Don't His Clients Give a Damn?*, Tex. Law., Mar. 9, 1998, at 1.

74. See, e.g., *State Bar v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) (disbarring attorneys for an isolated act of solicitation).

75. See *supra* note 73 (noting the recent guilty plea of personal injury lawyer John O'Quinn).

76. See, e.g., *In re Washington*, 489 A.2d 452, 453 (D.C. 1985) (disciplining a lawyer for practicing law outside of the state in which he was licensed).

77. See, e.g., *Florida Bar v. Kaiser*, 397 So. 2d 1132, 1134 (Fla. 1981) (enjoining a lawyer from placing advertisements in a state in which he was not licensed).

78. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 13 (Cal. 1998). The New York law firm in this case had represented a California corporation, ESQ Business Services, Inc., ("ESQ") and its principals for a number of years, including in connection with an agreement allowing Tandem Computers to distribute software created by ESQ. See *id.* at 3. The agreement provided for disputes to be arbitrated and governed by California law. See *id.* at 2-3. In 1993, a dispute

his contribution to this special issue, to the extent that champerty laws remain in effect, they are not often enforced criminally, but may be enforced in civil lawsuits to justify a denial of attorneys' fees.⁷⁹ In these ways, lawyers may be encouraged to comply with the standards set by criminal law, even if not as strongly as if there were a serious risk of criminal prosecution.

The Tenth Circuit's recent decision in *United States v. Singleton*,⁸⁰ although short-lived, illustrates how professional norms established by criminal law (if only inadvertently) may have force even if prosecutors publicly take the position that the law is inapplicable to the conduct in question. In that case, the government, through a federal prosecutor, entered into a guilty plea agreement providing that if the defendant testified truthfully against his co-defendant, then the government would support his motion for a reduced sentence.⁸¹ The court found that the prosecutor's promise constituted a bribe in violation of federal law and that, to deter official misconduct, the remedy would be the exclusion of the cooperating defendant's testimony.⁸²

In some cases, the legislature may consider it to be a matter of indifference whether the criminal provision defining a standard of professional conduct is enforced at all, because the legislature's intent is primarily to make a public statement of some nature. For example, as Dean Griswold once described, in the early years of the republic, a number of states adopted statutes making it a crime for lawyers to cite English law that post-dated July 1, 1776.⁸³ One might suppose that the motivation was less to influence lawyers' conduct than to express hostility to England. In other contexts, just as the legal profession expresses its understandings in part through civility codes and other aspirational statements that are not meant to be enforced, the legislature, as a body representing the public, may express through the criminal law its own understandings—or counter-understandings—about how lawyers should conduct themselves. One illustration is a Mary-

arose under the agreement and the law firm was hired to resolve the dispute by both the New York corporation and by a sister corporation of the same name that was incorporated in California. *See id.* at 5. In addition to performing work in New York, lawyers from the firm held some meetings in California and filed an arbitration claim in California, eventually settling the case before an arbitration was held. *See id.* at 3. In the context of a subsequent fee dispute between the sister corporations and its lawyers, the California Supreme Court held that the New York law firm could not collect its fee for work performed within California's borders because its lawyers had violated a misdemeanor provision forbidding persons who were not members of the California state bar from practicing law in the state. *See id.* at 13.

79. *See* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 *Fordham L. Rev.* 443, 474 (1998).

80. 144 F.3d 1343 (10th Cir. 1998), *vacated on grant of reh'g en banc*, July 10, 1998.

81. *See id.* at 1344.

82. *See id.* at 1359-61.

83. *See* Erwin N. Griswold, *Law and Lawyers in the United States: The Common Law Under Stress* 13 (1964) (citing statutes from New Jersey, Pennsylvania, and Kentucky).

land criminal law, enacted in 1996 and struck down that same year on constitutional grounds, restricting a lawyer's use of the mail to solicit clients in cases involving crimes or traffic offenses.⁸⁴ The state legislature may have fully expected the law to be struck down but nevertheless considered it important to express public hostility to lawyers' solicitation of clients in criminal cases.

2. Influencing the Drafting of Professional Norms

Criminal law influences the content of disciplinary codes.⁸⁵ Several bases of criminal liability have been particularly significant. Most important are the principles of accomplice liability and conspiracy under which lawyers may be criminally liable for intentionally assisting clients or agreeing with clients to commit a crime.⁸⁶ Additionally, of special relevance to lawyers in an adversary role are crimes relating to obstruction of justice, such as those dealing with witness tampering,⁸⁷ witness bribery,⁸⁸ subornation of perjury,⁸⁹ contempt of court,⁹⁰ and obstruction of justice generally.⁹¹

In response to concern about lawyers' potential criminal liability, the lawyer codes encourage lawyers to comply with criminal laws that are especially likely to bear on their professional conduct or, in the very least, the lawyer codes make it possible for lawyers to do so. This is most evident in disciplinary provisions that incorporate criminal law by reference. Some of them are designed to prevent lawyers from assisting clients in criminal and other wrongdoing. For example, the ABA Model Rules require lawyers to withdraw from a representation

84. *See Ficker v. Curran*, 950 F. Supp. 123 (D. Md. 1996); *see also Babkes v. Satz*, 944 F. Supp. 909, 914 (S.D. Fla. 1996) (enjoining the enforcement of a Florida criminal law that proscribed the solicitation of clients based on information regarding traffic citations contained in public records).

85. *See* Restatement (Third) of the Law Governing Lawyers § 1 cmt. b (Proposed Final Draft No. 2, 1998) ("The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes.").

86. *See id.* § 8 cmt. e.

87. *See, e.g.*, 18 U.S.C. § 1512(b) (1994) (forbidding corrupt attempts at witness persuasion and "knowingly us[ing] intimidation or physical force, threaten[ing] . . . or engag[ing] in misleading conduct toward another person, with intent to influence . . . the testimony of any person").

88. *See, e.g., id.* § 201(a)(3) (making it a crime to "corruptly give[], offer[], or promise[] anything of value to any person . . . with intent to influence the testimony under oath or affirmation of such . . . person as a witness").

89. *See, e.g., id.* § 1622 (making it a crime to "procure[] another to commit any perjury").

90. *See, e.g., id.* § 402 (forbidding "willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States . . .").

91. *See, e.g., id.* § 1510(a) (making it a crime to "willfully endeavor[] by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator").

that will result in a violation of criminal or other law⁹² and to disclose material facts to the court or to a third person where "necessary to avoid assisting a criminal . . . act by the client."⁹³ Other disciplinary provisions require advocates to comply with obstruction-of-justice laws. Thus, the Model Rules forbid lawyers from "unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value,"⁹⁴ "offer[ing] an inducement to a witness that is prohibited by law,"⁹⁵ or "seek[ing] to influence a judge, juror, prospective juror or other official by means prohibited by law."⁹⁶

Other disciplinary provisions, although not incorporating criminal law by reference, essentially codify restrictions that exist in the criminal law. Examples in the ABA Model Rules include provisions forbidding a lawyer from knowingly making false statements to the court,⁹⁷ offering false evidence,⁹⁸ or "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal"⁹⁹ Examples in the predecessor ABA Model Code of Professional Responsibility include rules forbidding lawyers from "advis[ing] or caus[ing] a person to secrete himself . . . for the purpose of making him unavailable as a witness,"¹⁰⁰ compensating a witness "contingent upon the content of his testimony or the outcome of the case,"¹⁰¹ or "threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter."¹⁰² It is unclear to what extent these provisions are more restrictive than the criminal law. Insofar as disciplinary provisions simply incorporate or codify criminal law proscriptions, they serve primarily to remind lawyers what the law requires and to allow discipline of lawyers who fail to comply.

With respect to certain areas of professional conduct, the criminal law has influenced the development of disciplinary rules that are unquestionably more restrictive than the criminal law and that are designed to prevent lawyers from engaging in practices that may lead to criminal conduct. For example, the ABA Model Rule dealing with safekeeping client property requires lawyers to separate funds belonging to a client or third party from those of the lawyer.¹⁰³ Commingling client and personal funds would not otherwise be wrongful in itself,

92. See Model Rules of Professional Conduct Rule 1.16(a)(1) (1995).

93. *Id.* Rules 3.3(a)(2), 4.1(b).

94. *Id.* Rule 3.4(a).

95. *Id.* Rule 3.4(b).

96. *Id.* Rule 3.5(a).

97. See *id.* Rule 3.3(a)(1).

98. See *id.* Rule 3.3(a)(4).

99. *Id.* Rule 1.2(d).

100. Model Code of Professional Responsibility DR 7-109(B) (1981).

101. *Id.* DR 7-109(C).

102. *Id.* DR 7-105(A).

103. See Model Code of Professional Responsibility DR 9-102; Model Rules of Professional Conduct Rule 1.15(a).

but when lawyers commingle funds, they are more susceptible to the temptation to misappropriate client funds. The purpose of the rule is thus "to ensure that client funds are used only on the client's behalf and not for the lawyer's personal or business purposes"¹⁰⁴ in violation of criminal law. By defining an area of professional conduct that is forbidden by the disciplinary rule but not the criminal law, the rule by design establishes precisely the "penumbra" to which Professor Coffee has referred.

Finally, some disciplinary rules authorize lawyers to avoid assisting, or appearing to assist, a client's criminal conduct, even at the expense of the client's interests. For example, the ABA Model Rules allow a lawyer to withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal"¹⁰⁵ or if "the client has used the lawyer's services to perpetrate a crime or fraud."¹⁰⁶ The confidentiality rules in many states, such as New York, allow a lawyer to disclose "[t]he intention of a client to commit a crime and the information necessary to prevent the crime,"¹⁰⁷ to disclose client confidences to the extent necessary to defend against a criminal charge,¹⁰⁸ and to withdraw the lawyer's previous written or oral opinion or representation that might be relied on by a third party when the lawyer learns that the opinion or representation is being used to further a crime.¹⁰⁹ Although these provisions serve various ends, an important one is to permit risk avoidance by lawyers.

What these provisions allow lawyers to avoid is the risk of erroneous accusations. In situations in which the lawyer's assistance was unwitting, and therefore innocent, the lawyer may nevertheless be subject to investigation and prosecution, because the prosecutor may erroneously infer that the lawyer knew of the client's criminal conduct and intentionally assisted in it. In order to protect themselves, then, lawyers are permitted (though not required) to withdraw from the representation or to disclose client confidences under certain circumstances in which they might otherwise appear to have joined with their clients in committing crimes.

C. *The Role in the Licensing Process*

The commission of certain crimes has traditionally been a possible ground for a court to deny an individual a license to practice law,¹¹⁰ or

104. Annotated Model Rules of Professional Conduct 237 (3d ed. 1996).

105. Model Rules of Professional Conduct Rule 1.16(b)(1).

106. *Id.* Rule 1.16(b)(2).

107. New York Lawyer's Code of Professional Responsibility DR 4-101(C)(3) (1990).

108. *See id.* DR 4-101(C)(4).

109. *See id.* DR 4-101(C)(5).

110. *See, e.g., State ex rel. Ayamo v. State Bd. of Governors of Wash. State Bar Ass'n*, 167 P.2d 674, 676 (Wash. 1946) (denying an Indiana lawyer admission to prac-

to suspend or revoke a lawyer's license to practice law.¹¹¹ Consequently, the criminal law plays a role in the attorney licensing process.

Criminal conduct that occurs in connection with a lawyer's professional practice may be a ground for disbarment or other professional discipline for obvious reasons. Professional discipline is principally intended to protect the public from individuals who will engage in improper professional practices. A lawyer who has acted wrongfully and, indeed, criminally, in the course of law practice might be expected to do so again in the future.

Courts deem certain criminal conduct to be relevant to an individual's fitness to practice law, however, even where it occurred outside the individual's legal practice. For example, President Richard Nixon was disbarred for failing to answer disciplinary charges relating to the allegations of obstructing justice that had led to his resignation from the presidency.¹¹² In some cases, disciplining lawyers for criminal conduct outside the practice of law can be justified on the theory that certain wrongdoing demonstrates a deficiency in traits of character, such as honesty, expected of a lawyer. Traditionally, the commission of only certain "infamous" crimes or crimes involving dishonest conduct or "moral turpitude" was thought to reflect adversely on one's qualification for law practice.¹¹³

tice law in Washington because he had engaged in the unauthorized practice of law in violation of Washington's criminal law).

111. See, e.g., *Slemmer v. Wright*, 6 N.W. 181, 182 (Iowa 1880) (suspending a lawyer following a guilty plea to the charge of making false statements to clients in order to defraud them of funds); *In re McCarthy*, 51 N.W. 963, 963 (Mich. 1879) (involving a disbarment following a guilty plea to the charge of obtaining money under false pretenses); *Ex parte Brown*, 2 Miss. (1 Howard) 303, 306-07 (Miss. 1836) (holding that falsifying documents, which is criminal conduct, is grounds for disbarment). See generally Restatement (Third) of the Law Governing Lawyers § 5(g) (Proposed Final Draft No. 2, 1998) ("An act constituting a violation of criminal law is also a disciplinary offense when the act either violates a specific prohibition in an applicable lawyer code . . . or reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer . . .").

112. See *In re Nixon*, 385 N.Y.S.2d 305 (App. Div. 1976); *In re Nixon*, 305 N.Y.S.2d 373 (App. Div. 1969). Disciplinary proceedings growing out of Watergate were brought against approximately nine other lawyers who had been connected with the Nixon administration. See Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in *Verdicts on Lawyers* 47, 47 (Ralph Nader & Mark Green eds., 1976).

113. See *Ex parte Burr*, 4 F. Cas. 791, 794 (C.C.D.C. 1823) (No. 2186) (stating that a court may disbar a lawyer convicted of highway robbery, larceny, forgery, "other infamous crime," or "grossly dishonest conduct," because "the purity of the administration of justice demands that the bar should be pure and honest"); *In re Fahey*, 505 P.2d 1369, 1376 (Cal. 1973). See generally John S. Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 Cal. L. Rev. 9, 19-22 (1935) (arguing that courts have found no principles to determine which crimes involve "moral turpitude" and that the concept should therefore be abandoned as the basis for distinguishing crimes for which disbarment is a proper sanction); Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 Tex. L. Rev. 267,

Many courts now consider a wider range of criminal conduct to be relevant on the theory that lawyers are, in a sense, legal (if not moral) exemplars and must therefore abide by the criminal law.¹¹⁴ This theory reflects an observation made by the Supreme Court more than a century ago when it affirmed an order disbaring a lawyer who had participated in a lynch mob. The Court noted that “[o]f all classes and professions, the lawyer is most sacredly bound to uphold the laws,” and that a lawyer’s criminal conduct “sets a pernicious example” and “manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.”¹¹⁵ Consistent with this rationale, it might be thought that the commission of virtually any crime (and certainly any involving intentional wrongdoing) casts doubt on one’s professional qualifications. The ABA Model Rules of Professional Conduct, however, do not subject a lawyer to professional discipline for all criminal conduct outside the context of legal practice. They allow discipline only if the “criminal act . . . reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹¹⁶ This limiting concept is not substantially clearer than the “moral turpitude” concept that it supplants.

Although a court may suspend or disbar a lawyer whose criminal conduct is proven independently in a disciplinary proceeding,¹¹⁷ for the most part courts rely on criminal convictions as proof that a lawyer or applicant for a law license committed a crime. Some state statutes provide for the automatic disbarment of a lawyer who is convicted of certain crimes.¹¹⁸ Whether or not disbarment necessarily results, disciplinary proceedings are generally initiated following a lawyer’s criminal conviction. Thus, by convicting a lawyer of a crime, a prosecutor increases the likelihood, and sometimes all but guarantees, that the lawyer-defendant will be denied the right to continue practicing law for at least some time, if not permanently.

The extent to which criminal law ought to have collateral consequences in the lawyer licensing context has drawn some attention in

276 (1970) (arguing that the concept of “moral turpitude” . . . is both too vague and too broad to be effectively employed as a standard for professional discipline”).

114. See *St. Pierre’s Case*, 304 A.2d 88, 89 (N.H. 1973); *In re Krogh*, 536 P.2d 578, 589-90 (Wash. 1975).

115. *Ex parte Wall*, 107 U.S. 265, 274 (1882).

116. Model Rules of Professional Conduct Rule 8.4(b) (1995). The ABA Model Rules also provide for discipline for specified criminal conduct relating to law practice. See *supra* Part I.B.2.

117. See, e.g., *In re Friedman*, 609 N.Y.S.2d 578, 586-87 (App. Div. 1994) (disbaring an attorney for intentionally dishonest conduct).

118. See, e.g., N.Y. Jud. Law § 90(4)(b) (McKinney 1983) (providing for automatic disbarment upon the conviction of a crime that would be classified as a felony under state law).

the academic and professional literature.¹¹⁹ Commentators have questioned whether the commission of a crime is a reliable predictor of future professional misconduct and, to the extent it is not, whether, to promote the image or integrity of the legal profession, it is legitimate to deny an individual admission to the bar or suspend or disbar a lawyer because of the commission of a crime.¹²⁰

For purposes of this Article, the more important question is whether, and in what way, a criminal prosecutor should take the collateral consequences of a criminal conviction into account in deciding whether to bring charges against a lawyer.¹²¹ On one hand, an individual's status as a lawyer may weigh against prosecution, either because, where culpability is uncertain, a lawyer ought to receive the benefit of the doubt or because, taking into account the collateral impact on the individual's livelihood, a criminal conviction would be undeservedly harsh and justice would be adequately served by professional discipline. On the other hand, an individual's status as a lawyer may be viewed as a factor weighing in favor of prosecution, because wrongdoing by one in a position of public trust may be taken more seriously, because it may be important to avoid the appearance that those with higher professional status (particularly one shared by the prosecutor) are treated more leniently than others, or because of a perceived need to compensate for the limitations of the disciplinary process. As discussed later, the question of how to account for the potential defendant's status as a lawyer has particular significance in cases in which the lawyer's questionable conduct might be defended on the basis of professional norms.¹²²

119. See Bradway, *supra* note 113, at 23 (arguing that a disciplinary sanction should be available where criminal conduct "has lowered the prestige of the legal profession and rendered less efficient the administration of justice").

120. See, e.g., Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, *passim* (1985) (arguing that a criminal conviction does not necessarily predict future professional misconduct and that the force of the legal profession's regulatory process "should be conserved for acts bearing directly on professional practice"); Weckstein, *supra* note 113, at 279 (questioning the validity of the assumption that a lawyer's criminal conduct outside of the practice of law "tends to show a disposition to violate the rules of society, which might find expression in his professional affairs").

121. A criminal conviction may have any number of collateral consequences. For example, under immigration law, a conviction may lead to the deportation of a non-citizen defendant. Or, a conviction may result in debarring a corporation from doing business with the government or debarring an individual from engaging in a regulated business, such as securities trading. In many cases, prosecutors take collateral consequences such as these into account in making decisions about whether to bring criminal charges, what charges to bring, and what plea bargain to enter, although there is no professional consensus about how they should be weighed.

122. See *infra* Part IV.

II. THE TENSION BETWEEN CRIMINAL LAW AND OTHER PROFESSIONAL NORMS

In many situations in which criminal law serves a regulatory role, the criminal law is consistent with professional norms derived from other sources. This is most especially true of criminal provisions that have the effect of protecting lawyers' clients, as in the case of laws forbidding the misappropriation of client funds or fraudulent billing. It may, however, also be true of provisions protecting third parties or the adjudicative process. Consider, for example, the criminal law in issue in the prosecution of Clarence Darrow—the law forbidding the bribery of jurors. Although, in his day, Darrow may have believed that bribing jurors in certain cases was proper as a matter of social, political, or personal morality,¹²³ even Darrow could not have defended this conduct based on professional norms, either as they were then understood or as they should be understood. Bribing jurors or assisting others in doing so on behalf of a client is a professionally impermissible distortion of the adjudicative process.

In some situations, however, there is a tension between the criminal law and professional norms derived from other sources. In the rare case, this occurs because the criminal law proscribes conduct that would otherwise be not only encouraged, but required by professional norms. An illustration is a 1996 federal law,¹²⁴ recently held unconstitutional,¹²⁵ which would subject lawyers, among others, to imprisonment for up to five years if they receive a fee for counseling or assisting elderly clients in lawfully transferring assets in order to meet the poverty levels to become eligible for Medicaid. Lawyers retained by older clients seeking legal advice about their financial plans would be required to refrain from explaining how disposing of assets in certain legally permissible ways would affect the client's eligibility for Medicaid. This law is at odds with professional norms governing client counseling. The legal profession's ethical codes express the understanding that lawyers should counsel clients fully concerning legal and non-legal aspects of decisions about which their clients seek advice.¹²⁶

123. See Cowan, *supra* note 24, at 438-40. For a discussion of the tension between personal values and professional norms, see generally Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *Geo. J. Legal Ethics* 19 (1997) [hereinafter Green, *Personal Values*].

124. See 42 U.S.C. § 1320a-7b(a) (1994). For a discussion of this law and the organized bar's opposition to it, see Dean S. Bress, *Now the Lawyer is the Criminal*, N.Y. St. B.J., Dec. 1997, at 43.

125. See *New York State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

126. See, e.g., Model Code of Professional Responsibility EC 7-8 (1981) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . Advice of a lawyer to his client need not be confined to purely legal considerations."); Model Rules of Professional Conduct Rule 1.4(b) (1995) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); see also Eleanor M. Crosby & Ira M. Lefk, *Ethical Considerations in*

One might view this criminal provision as evidence of what Susan Koniak describes as the ongoing battle between the state's law and professional legal ethics.¹²⁷ In this instance, the Attorney General declined to defend the constitutionality of the criminal statute and, thus, the bar prevailed.

In most cases, however, the tension between the criminal law and professional norms derived from other sources is far less direct because the criminal law, the other professional norms, or both are unclear. Sometimes, the criminal law proscribes professional conduct that would otherwise be professionally permissible, and even praiseworthy, but does so in such an unclear way that a lawyer might understandably act in conformity with other professional norms. This creates a danger of overcriminalization—that the lawyer's conduct does not deserve criminal punishment.

Criminal provisions may also overdeter, discouraging lawyers from engaging in lawful, praiseworthy conduct out of fear that a prosecutor who misconstrues the conduct will launch a criminal investigation or prosecution. The risk of prosecutorial error arises in part because the relevant criminal provisions are fairly open-textured and because their applicability depends primarily on the actor's (in this case, the lawyer's) state of mind, which is generally determined inferentially. The facts relevant to the lawyer's state of mind are likely to be disputed, uncertain, or open to competing inferences. Thus, the outcome of a criminal trial of a lawyer for illegal conduct will often be hard to predict. Regardless of the outcome of a trial, or even whether a criminal prosecution is ever initiated, simply being investigated criminally is burdensome and expensive. The mere prospect of being investigated may therefore "chill" a lawyer from undertaking particular conduct.

The tension between the criminal law and professional norms is particularly likely to arise in the context of advocacy, and especially criminal defense advocacy. Criminal defense lawyers have the strongest justification to promote their clients' interests in accordance with an expansive concept of "zealous advocacy," yet are the likeliest subjects of a criminal investigation when they do so, both because their questionable conduct is especially likely to be known to a prosecutor and because a prosecutor is likely to feel most aggrieved by a criminal defense lawyer's apparent misconduct. The result is that, especially for criminal defense lawyers, the criminal law may serve indirectly to restrain conduct that might otherwise be considered professionally praiseworthy.

Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct, 62 Fordham L. Rev. 1503, 1511-12 (1994) (discussing the importance of assuring that clients are well-informed about all options and their implications regarding asset divestiture and Medicaid eligibility).

127. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1390-91 (1992).

Two sets of examples are discussed below, the first arising out of the criminal law relating to accessorial liability, and the second growing out of obstruction-of-justice provisions.

A. Accessorial Liability

The criminal law of accessorial liability generally forbids a lawyer from intentionally assisting a client in committing a crime.¹²⁸ The professional norms appear to be consistent with the criminal law, inasmuch as the ethical rules forbid a lawyer from knowingly assisting a client in the commission of a crime.¹²⁹ There may nevertheless be a tension between the professional norms and the criminal law regarding accessorial liability. Certainly, lawyers themselves profess to perceive such a tension, as reflected in some lawyers' response to several highly publicized prosecutions of Miami criminal defense lawyers, some of whom were former federal prosecutors, for allegedly assisting members of the Cali drug cartel. According to the ABA Journal, the indictments "sent shock waves throughout the defense bar, and left many wondering where good lawyering ends and criminal activity begins."¹³⁰ The cries of alarm arose again some time later when two of the lawyers who had gone to trial were convicted of some, although not all, of the charges.¹³¹

One aspect of this perceived tension reflects a difference between how the criminal law and the lawyer codes might be understood to answer the question of when a lawyer becomes an accomplice or, in the language of federal criminal law, an "aider and abetter," by giving legal advice, drafting documents, making court appearances, or providing other law-related assistance to individuals engaged in ongoing criminal conduct. Under the criminal law, one is generally liable as an accomplice for giving any kind of assistance or encouragement—even standing by silently ready to give some aid if needed¹³²—if one acts with the intent to promote the crime. Under one construction, an individual may be criminally liable even if his purpose is not to assist the crime, if he knows his conduct will have that effect.¹³³ Further, under

128. See Restatement (Third) of the Law Governing Lawyers § 8 cmt. e (Proposed Final Draft No. 2, 1998).

129. See Model Rules of Professional Conduct Rule 1.2(d).

130. Henry J. Reske, *Defense Lawyers Fear Impact of Cali Case: Attorneys' Indictment for Aiding Drug Clients Could Chill Advocacy, Critics Claim*, A.B.A. J., Sept. 1995, at 16, 16.

131. See Mireya Navarro, *Lawyers Weigh Effect of Conviction of Missing Colleague*, N.Y. Times, Aug. 9, 1998, § 1, at 24.

132. See Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.7(d) (2d ed. 1996).

133. See *id.*; see also Darryl Van Duch, *Lawyers Called Conspirators*, Nat'l L.J., Aug. 17, 1998, at A6 (describing indictments of hospitals' lawyers who allegedly drafted consulting agreements between the hospitals and nursing home executives knowing that the agreements involved illegal bribes, rather than legitimate consulting fees).

the criminal law, "knowledge" may be established by showing that the defendant ignored his suspicions and "consciously avoided" the truth about another's wrongdoing.¹³⁴ Thus, in some jurisdictions, a pawnbroker may be liable as an accessory to a murder if he sold a gun with reason to know that the purchaser sought it for that use, even if the pawnbroker's only purpose was to make a sale.¹³⁵

In contrast, when certain ethical rules speak of the obligation to avoid assisting a client in the commission of a crime, they may be understood to contemplate affirmative assistance in aspects of the client's conduct that are wrongful (e.g., in planning the crime or drafting fraudulent documents), while permitting the rendition of services that do not in themselves directly promote the client's criminal ends. Further, when these restrictions speak of the lawyer's knowledge of a client's wrongdoing, they may be understood to contemplate that the lawyer possesses either first-hand knowledge or an admission of guilt by the malefactor.¹³⁶ Many lawyers understand that some degree of conscious avoidance is permitted, if not essential to effective advocacy.¹³⁷

The tension between criminal law and professional legal ethics with respect to accessorial liability may arise in any number of situations. For one, consider a story told about Earl Rogers, the turn-of-the-century California criminal defense lawyer who represented Darrow in his first bribery trial. One day, according to Rogers's daughter, a well-heeled gentleman entered Rogers's office and asked the price of a de-

134. See *United States v. Wilson*, 134 F.3d 855, 868 (7th Cir. 1998).

135. See LaFave & Scott, *supra* note 132, at § 6.7(d).

136. See *In re Grievance Comm. of U.S. Dist. Court, Dist. of Conn.*, 847 F.2d 57, 63 (2d Cir. 1988); *State v. Skjonsby*, 417 N.W.2d 818, 825-28 (N.D. 1987); see generally Wayne D. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 Mo. L. Rev. 601, 609 (1979) (arguing that a lawyer should not conclude that a client is engaging in wrongdoing absent "completely indisputable" proof); Monroe H. Freedman, *But Only If You "Know," in Ethical Problems Facing the Criminal Defense Lawyer* 135-41 (Rodney J. Uphoff ed., 1995) (stating that a high degree of knowledge about a client's conduct is required for punishment). *But see* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. Miami L. Rev. 669, 675, 682 (1981) (citing authority that, for purposes of the ethical rule forbidding a lawyer from knowingly assisting a client in illegal or fraudulent conduct, "liability results from actual knowledge of the client's illegal purpose, but also that it results from knowledge of facts that reasonably should excite suspicion").

137. See, e.g., Monroe H. Freedman, *Understanding Lawyers' Ethics* 109-10, 119 (1990) [hereinafter Freedman, *Lawyers' Ethics*] (criticizing two approaches to the problem of client perjury—"selective ignorance" and the "Roy Cohn Solution" which involves "knowing while not knowing"); Kenneth Mann, *Defending White-Collar Crime* 104-11 (1985) (describing white-collar defense attorneys' techniques for avoiding knowledge of their clients' criminal conduct). *But see* Standards Relating to the Admin. of Criminal Justice, The Defense Function Standard 4-3.2(b) (1991) ("Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.").

fense for murder. Upon receiving his answer, the gentleman counted out the fee in gold and started for the door. When asked why he was leaving, the client replied that he was going off to "kill the man now" and then would "be back." Was Rogers, by his willingness to defend the client, guilty of assisting the murder? If so, what of a criminal defense lawyer who indicates a willingness to defend members of an ongoing criminal organization who are arrested or indicted? The government has taken the position that a lawyer who thus serves as "house counsel" for a criminal organization, as it alleged that Bruce Cutler did for the Gambino Crime Family, is criminally culpable as a co-conspirator, although it has only sought Cutler's disqualification but never prosecuted him on this theory.¹³⁸ The much-loved, albeit fictional barrister, Horace Rumpole, would seem to play the same role for the Timson family of petty thieves,¹³⁹ thus raising the question of whether a United States prosecutor would bring charges against Rumpole as an accessory to the Timsons.

As a matter of professional ethics (viewed independently of the criminal law), the lawyers in these examples are likely to conclude that, as long as they do not advise their clients about how to commit crimes or avoid capture, but simply provide a vigorous courtroom defense, they may represent the future (and, in some cases, former) criminals. Thus, in Rogers's case, although knowing first-hand of the client's intention to commit a murder, Rogers would not have been assisting in the crime merely by making himself available thereafter to render a courtroom defense. Further, in the case of the alleged "house counsel" to a criminal organization, it might be argued that as long as the lawyer is not privy to the organization's planned future crimes, the lawyer lacks sufficiently specific "knowledge" that his willingness to wage a defense on behalf of a later-accused individual will assist the organization in future criminal activity.

Yet, under ordinary criminal law principles, it might appear to be a crime to render an otherwise legitimate defense, or even to make oneself available to do so, when the defense lawyer is on notice that doing so may indirectly aid the individual or his organization in future

138. See *United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993). Allegations that a lawyer served as "house counsel" for a criminal organization typically center on the assertion that the lawyer was paid by a higher-up in the organization to represent a lower-level employee. See *id.*; *United States v. Gotti*, 9 F. Supp. 2d 320 (S.D.N.Y. 1998).

139. See John Mortimer, *Rumpole and the Summer of Discontent*, in *The Third Rumpole Omnibus* 269, 290 (1998) ("Fred [Timson] was the undoubted chief of the Timsons, that large clan of South London villains who, by their selfless application to petty crime, had managed to keep the Rumpoles in such basic necessities of life as sliced bread, Vim, Château Fleet Street and the odd small cigar."); John Mortimer, *Rumpole and the Tap End*, in *The Third Rumpole Omnibus* 111, 112 (1998) ("I have spoken elsewhere, and on frequent occasions, of my patrons the Timsons, that extended family of South London villains for whom, over the years, I have acted as Attorney-General.").

crimes by giving them some confidence that if caught, they may escape through the lawyer's skillful defense. For members of an ongoing criminal conspiracy (e.g., a drug cartel, a gambling ring, or an organized crime family), obtaining an arrested member's release on bail or acquittal, thus enabling him to avoid punishment for prior criminal acts and resume criminal conduct, might be a plausible object of the conspiracy. A lawyer who wages a vigorous defense, knowing that the criminal conspirators are seeking to secure his client's release, might seem thereby to become a co-conspirator himself, since he is acting with knowledge of the conspiracy and in furtherance of one of its aims. Indeed, one might say that the lawyer *intends* to further one of the conspiracy's objectives, although the reason that this is so is that his own objective as a defense lawyer simply happens to coincide with this objective of the conspiracy. The lawyer's knowledge of the criminal conspiracy and his intent to join generally will not be proven directly, but circumstantially from proof of the facts made known to the lawyer and the lawyer's conduct. Once it is inferred that the lawyer acted with criminal intent, all his otherwise lawful acts, such as investigating the case for trial or filing motions, would seem to become acts in furtherance of the conspiracy. Indeed, that is how the government apparently conceptualized its prosecution of defense lawyers who had represented members of the Cali cartel. According to a federal prosecutor responsible for the case, once the defense lawyers joined the conspiracy, anything they did was in furtherance of it.¹⁴⁰

In addition to allowing the possibility of punishing lawyers criminally for professional conduct that seems proper when viewed exclusively through the lens of professional ethics, the criminal law of accessorial liability discourages lawyers from lawful professional conduct in order to avoid unintentionally and unwittingly assisting in a crime. In this respect, the criminal law is in tension with professional norms that generally favor assisting individuals with their legal problems. Suppose, for example, that a client with questionable intentions asks the lawyer's advice. The professional norms encourage lawyers to advise clients concerning the lawfulness of their future conduct, even recognizing that the clients may then opt to act unlawfully.¹⁴¹ The Code of Professional Responsibility is explicit that, if the

140. See Navarro, *supra* note 131, at 24.

141. Model Rule 1.2 cmt. 6 states:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Model Rules of Professional Conduct Rule 1.2 cmt. 6 (1995); *cf.* Professional Ethics Comm. of the Fla. Bar, Op. 90-1 (1990) (opining that where a criminal defendant

client chooses to transgress, “[the lawyer] may continue in the representation of [the] client . . . so long as [the lawyer] does not thereby knowingly assist the client to engage in illegal conduct”¹⁴² Or, suppose that the lawyer suspects that a client seeking assistance in drafting legal documents intends to commit a crime. For example, there may be reason to suspect that the client intends to defraud his counterpart in a business transaction, to collect on an insurance policy by making false submissions to the insurer, or to lie on an application for an immigration. Although disciplinary rules would not require the lawyer to represent the client, some lawyers might understand that professional norms encourage doing so where the lawyer’s suspicion is unconfirmed. First, there is a general understanding that those in need of legal assistance should have access to lawyers.¹⁴³ Additionally, there is a professional understanding that lawyers are generally entitled to believe a client, to give a client the benefit of the doubt, or to be agnostic about the truth or falsity of the client’s account, at least in the absence of extraordinarily compelling evidence that the client is acting unlawfully.¹⁴⁴

In these examples, the criminal law strongly discourages a lawyer from assisting a client’s questionable conduct or from giving advice to a client who may subsequently act criminally. If the lawyer lends assistance, and it turns out that the client was engaged in criminal conduct or subsequently commits a crime, then the lawyer should not be criminally culpable, because the lawyer’s state of mind would have been innocent. Yet, viewing the lawyer’s conduct after the fact, a prosecutor may suspect that the lawyer knew of the client’s intent to commit a crime and may therefore initiate an investigation or even commence a prosecution. The prosecutor is unlikely to receive a com-

reveals an intent to flee the jurisdiction, experience teaches and ethics requires that rather than disclosing the client’s intent to the court, the lawyer should instead attempt to persuade the client to appear in court as required).

142. Model Code of Professional Responsibility EC 7-5 (1981).

143. See, e.g., Model Code of Professional Responsibility EC 1-1 (“A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.”); *id.* EC 7-18 (“The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.”).

144. See, e.g., Hazard & Hodes, *supra* note 55, § 3.3:201, at 581 (allowing lawyers to give their clients the benefit of the doubt in matters that are not known to be false); cf. *Ultramares v. Touche*, 174 N.E. 441, 444-49 (N.Y. 1931) (stating that a lawyer has no independent duty to be suspicious of the client for the benefit of non-clients).

Although it might be argued that this understanding is deluded or that it is applied only in the context of advocacy, or perhaps only in the context of criminal defense advocacy, many non-litigators undoubtedly share this understanding; moreover, the obligations of loyalty, confidentiality and zealous representation from which it derives are not limited to courtroom lawyers. Cf. Freedman, *Lawyers’ Ethics*, *supra* note 137, at 66 (noting that all clients are entitled to “warm zeal” in the promotion of their interests).

plete and accurate version of what took place. Indeed, the prosecutor may receive false evidence from the now-former client in exchange for leniency. In any event, what the Restatement terms "the divide between appropriate counseling and criminal activity"¹⁴⁵ is an indistinct one which turns on the lawyer's information, and the lawyer's past state of mind and level of knowledge can be determined only inferentially. Prosecutors may be unduly likely to draw the most negative inferences for any of several reasons, including that they are occupationally disposed to be suspicious or skeptical and that they perceive criminal defense lawyers to be adversaries rather than professional brethren. The criminal process does not invariably check prosecutorial prejudices. Even if it receives an accurate account of the lawyer's conduct, a grand jury applying a "probable cause" standard, and even a jury applying a "reasonable doubt" standard, may infer erroneously that the lawyer, in whom the client might have been expected to confide, had full knowledge of the client's criminal wrongdoing, when in reality the lawyer had but a suspicion. Thus, criminal law principles of accomplice liability might encourage a lawyer to refuse lawfully to assist a client who is suspected of wrongdoing in order to avoid the possibilities of being investigated, prosecuted, and perhaps even wrongfully convicted.

B. *Obstruction of Justice*

The tension between criminal law and other sources of professional norms pervades the work of advocates. On one hand, the predominant ethic of "zealous advocacy" is understood to permit, and sometimes even require, a lawyer to promote the client's ends without regard to the ultimate justness of the client's cause as, for example, when a lawyer defends a guilty client in a criminal trial.¹⁴⁶ In the process of doing so, it is understood that a lawyer (other than a government lawyer) may deliberately engage in certain conduct that seems calculated to mislead the fact-finder. For example, a criminal defense lawyer may argue to the jury that his client is innocent, even though he knows the client to be guilty, or cross-examine a truthful witness to make it appear that she is untruthful.¹⁴⁷ Further, as Monroe Freedman has pointed out, it may be difficult to draw a principled distinction between this adversarial conduct which is almost universally deemed professionally acceptable and other conduct in advocacy, such as presenting perjured testimony, which most lawyers and judges,

145. Restatement (Third) of the Law Governing Lawyers § 8 cmt. b (Proposed Final Draft No. 2, 1998).

146. See generally Freedman, *Lawyers' Ethics*, *supra* note 137, at 13-42, 65-86 (describing the adversary system and the ethic of zealous representation).

147. See *id.* at 163.

although not Freedman himself,¹⁴⁸ consider to be invariably unethical.¹⁴⁹

On the other hand, criminal laws protect against deliberate efforts to undermine the truth-seeking process. Criminal provisions specifically proscribe destroying, falsifying or secreting evidence, secreting witnesses, or influencing witnesses to testify falsely, but the boundaries of the relevant law are ill-defined. For example, federal law makes it a crime to “corruptly . . . [endeavor] to influence . . . obstruct, or impede, the due administration of justice.”¹⁵⁰ This is an inchoate crime: The individual need not actually “obstruct” but need only “endeavor” (that is, attempt) to do so. Further, the obstruction of “the due administration of justice” (unlike, say, the obstruction of the IRS in its collection of income taxes) involves interference with an abstract process in ways that are neither defined nor delimited by the statute. The mental element provides no greater clarity or limitation. Courts have held that “corruptly” means to act with the purpose of obstructing justice, that it is enough if the obstruction of justice is a reasonably foreseeable consequence of the defendant’s act and not his main purpose, and that the corrupt intent may be inferred from the circumstances.¹⁵¹ As applied to criminal defense lawyers, it is unclear what difference there is between the purpose of obstructing justice, which the criminal law proscribes, and the purpose of discouraging the prosecution or securing the acquittal of a guilty client for a fee, which is considered professionally praiseworthy.

The crime of obstruction applies even to generally lawful acts undertaken in furtherance of the forbidden objective of obstructing justice. For example, a lawyer who puts evidence in a drawer with the intent to safeguard it until it must be produced presumably would not be guilty of obstruction, while a lawyer who engaged in the same conduct with the intent of hiding the evidence permanently from criminal investigators probably would be. Because the criminal law itself does not draw a line between proscribed and permissible conduct in de-

148. *See id.* at 120 (arguing that when a client decides to testify falsely, despite being advised not to do so, “the lawyer should go forward in the ordinary way,” that is, “the lawyer should examine the client in the normal professional manner and should argue the client’s testimony to the jury in summation to the extent that sound tactics justify doing so”); *id.* at 123-24 (observing that he would put the defendant’s spouse or parent on the stand to corroborate the defendant’s false testimony if he could not dissuade them from falsely testifying).

149. *See id.* at 164. Freedman asserts that both in presenting the defendant’s perjured alibi and impeaching the truthful victim, a lawyer participates in misleading the finder of fact with the aim of freeing a guilty defendant and that the difference in practical effect is that the lawyer takes a less active role when eliciting the defendant’s false testimony than when attacking the witness in cross-examination. He suggests that the distinction made by critics of the former practice turns on their deontological understanding that lying is wrong while cross-examination is good. *See id.*

150. 18 U.S.C. § 1503 (1994).

151. *See United States v. Machi*, 811 F.2d 991, 996 (7th Cir. 1987).

fense of a guilty client and allows a lawyer to be prosecuted for engaging in conduct that is innocent on its face, or susceptible to an innocent explanation, if his intent is "corrupt," a criminal defense lawyer might plausibly be accused of endeavoring to obstruct justice when he acts in virtually any way to secure the acquittal of a client who committed the crime charged.¹⁵² For example, a lawyer's motion to suppress evidence or his advice to the client to assert the Fifth Amendment privilege would appear to be calculated to deprive the fact-finder of relevant, inculpatory evidence. A lawyer's cross-examination of a truthful witness may be designed to induce the witness to give an erroneous account of relevant events. One might respond that no reasonable prosecutor would think to bring charges against a lawyer for acts such as these, which are commonly understood to be consistent with the due administration of justice and possibly required by the Sixth Amendment right to effective assistance of counsel. As noted earlier, however, in prosecuting Miami lawyers who had defended members of the Cali drug cartel, the government professed that even commonplace aspects of a criminal defense become acts of obstruction if the lawyer possessed "corrupt" intent.¹⁵³

The criminal law may influence lawyers' understanding of the bounds of legitimate advocacy not only by clearly proscribing certain conduct, but also by its ambiguity.¹⁵⁴ For example, Monroe Freedman describes commentators' belief that a lawyer would be committing the crime of subornation of perjury if he were to call as a witness a client or third party whom the lawyer knows will testify falsely.¹⁵⁵ Professor Freedman believes that these commentators misinterpret the law and that the lawyer acts lawfully as long as he has discouraged the witness from testifying falsely.¹⁵⁶ Although Professor Freedman may be right, a lawyer who knowingly presents false testimony runs the risk of being investigated or prosecuted by a prosecutor who interprets the criminal law differently, who does not know that the lawyer counseled the witness against taking the stand and lying, or who receives false testimony from the witness to the effect that the lawyer encouraged and helped fashion the false testimony. Thus, even if one were otherwise

152. Cf. *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962) (holding that neither Congress nor the Supreme Court intended to "include traditional trial tactics within the statutory terms 'conceals or covers up'").

153. This was also the government's theory in *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998), discussed *infra* at part III.A.

154. Lawyers may also take steps to reduce the risk that legitimate advocacy will later be misperceived by the prosecution because prosecution witnesses (typically, former clients) misconstrue, misremember, or deliberately lie about the lawyer's conduct. See, e.g., Joseph B. Cheshire V, *Ethics and the Criminal Lawyer: The Perils of Obstruction of Justice*, *Champion*, Jan.-Feb. 1989, at 12, 12 (listing suggestions for avoiding the problem of prosecution witnesses who "misconstrue or misinterpret the defense counsel's conduct or comments during an interview").

155. See Freedman, *Lawyers' Ethics*, *supra* note 137, at 122-23.

156. See *id.*

convinced by Freedman's argument that, independent of the criminal law, the optimal professional response to the problem of a client who insists on testifying falsely is both to present the false testimony and to rely on it in summation, the ambiguous criminal law might lead one to a different understanding.

This example and three other sets of illustrations offered below suggest that, in the hands of aggressive prosecutors, the criminal law could come to have a profound influence not only on how advocates for private parties, and especially criminal defense lawyers, act in specific ways within the confines of existing professional norms, but on how the legal profession in general comes to understand the professional role of an advocate. The vigorous advocacy of criminal defense lawyers on behalf of guilty clients is generally accepted even by those who might consider equal devotion to the questionable ends of private clients unacceptable in the civil context.¹⁵⁷ There is room to debate the implications of this role, however, both for the content of professional norms and for how lawyers should act where existing norms are unclear. One plausible conception, with which Monroe Freedman is associated, would place greater weight on client confidentiality and zealous advocacy, even where the interests of an accurate fact-finding would be compromised in the individual case. A competing conception would emphasize candor to the tribunal and the immediate interests of the truth-seeking process.¹⁵⁸ Although lawyers have considerable discretion "to construct a philosophy of legal practice within the porous construct of professional norms,"¹⁵⁹ criminal law has the potential to make untenable the most robust conception of zealous advocacy by forbidding or strongly discouraging lawyers from acting in accordance with such a conception.

1. Dealing with Documents and Physical Evidence

How should advocates deal with documents or physical evidence that may be relevant to a civil lawsuit or criminal prosecution but that, if revealed, will undermine the client's legal position or other interests? Under obstruction-of-justice provisions, it may be a crime to conceal or destroy documents that are relevant to a criminal or civil proceeding or to cause someone else to do so.¹⁶⁰ A line of judicial decisions has held that obstruction provisions may require lawyers voluntarily to preserve incriminating physical evidence or writings, to alert the state to their existence, or to produce them to the state, even

157. See David Luban, *Lawyers and Justice: An Ethical Study* 197-201 (1988); David Luban, *Are Criminal Defenders Different?* 91 Mich. L. Rev. 1729, 1756 (1993); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 605-06 (1985).

158. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031 (1975).

159. Green, *Personal Values*, *supra* note 123, at 56.

160. See 18 U.S.C. §§ 1505, 1510(a), 1512(b)(2)(A)-(B) (1994).

absent a court order, legally enforceable discovery request, or procedural rule explicitly requiring disclosure.¹⁶¹

Yet, the ethic of zealous advocacy counsels against preserving or disclosing harmful materials. Absent a law or court order affirmatively requiring such disclosure, the lawyer representing a party to litigation ordinarily has no ethical duty to disclose information that is contrary to the client's legal position.¹⁶² Further, disclosing contrary evidence without the client's consent may itself be professionally improper in the absence of an affirmative legal or ethical duty of disclosure. The lawyer's duties of zealous advocacy and confidentiality may preclude the lawyer from disclosing information that the client seeks

161. See *In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967); *Morrell v. State*, 575 P.2d 1200, 1211-12 & n.18 (Alaska 1978); *People v. Superior Court*, 237 Cal. Rptr. 158 (Ct. App. 1987). See generally Standards Relating to the Admin. of Criminal Justice, The Defense Function Standard 4-1.6 (1991) (addressing the conduct of defense counsel upon receiving physical evidence); Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 Fordham Urb. L.J. 11, 25-26 (1985) ("Once a client shows incriminating evidence to a lawyer, the lawyer becomes obligated to advise the client to surrender it to him so that he may deliver it to the authorities."); Deborah Abramovsky, *A Case for Increased Disclosure*, 13 Fordham Urb. L.J. 43, 59-60 (1985) ("[I]f a lawyer is asked by the court to explain the circumstances under which he came to possess [incriminating] evidence, he is ethically bound to assert the attorney-client privilege and refuse to answer."); Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C. L. Rev. 897 (1986) (examining the need for rules governing the disclosure of incriminating physical evidence); James N. Bostic, Comment, *A Criminal Defense Attorney's Duty to Produce Damaging Physical Evidence: It Is Not as it Seems*, 1987 Det. C.L. Rev. 819 (1987) (proposing requirements for criminal defense attorneys to produce damaging physical evidence); Jane M. Graffeo, Note, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 Stan. L. Rev. 977, 998 (1980) (suggesting that the "states adopt a rule providing a limited evidentiary privilege allowing attorneys to possess incriminating physical evidence under certain conditions").

162. See, e.g., *Brown v. County of Genesee*, 872 F.2d 169, 175 (6th Cir. 1989) (holding that in settlement negotiations, counsel for the defendant in an employment discrimination case had no duty to correct the plaintiff's mistaken belief about the rate of pay to which she would have been eligible had she been hired); *Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980) (stating that the plaintiff's lawyer had no duty to disclose facts from which a defense could be fashioned); Model Rules of Professional Conduct Rule 4.1 cmt. 1 (1995) ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); New York County Lawyers' Association, Formal Op. 309 (1933), in *Olavi Maru & Roger L. Clough, Digest of Bar Association Ethics Opinions 217* (1970) (stating that defendant's counsel may move to dismiss negligence claim for lack of proof without disclosing the existence of an eyewitness, unknown to the plaintiff, who would testify to the unproven element of the claim). See generally Wolfram, *Legal Ethics*, *supra* note 62, at 639-40 (observing that "[a] general operating principle for American litigators is that evidence known to them is private and proprietary. . . . [N]either lawyer nor client is under any obligation to come forward unbidden with information that is unknown to the other side, even if the other side will surely lose its case in the absence of knowledge of that evidence" (citations omitted)).

to keep confidential and that, if disclosed, would undermine the client's cause.¹⁶³

While the lawyer may believe that the "zealous advocacy" principle justifies withholding evidence that would be harmful to the client's case, a prosecutor who later examines his conduct may conclude otherwise, as a Wisconsin case illustrates.¹⁶⁴ Kravit, a lawyer, defended Van Engel in a civil RICO action brought by two of Van Engel's former business partners who charged him with insurance fraud, embezzling funds, and other criminal conduct.¹⁶⁵ At a time when federal prosecutors had expressed no interest in investigating the matter, Kravit negotiated a settlement between his client and one of the plaintiffs which included a requirement that the plaintiff turn over evidence, including tape recordings, on which the lawsuit had been based.¹⁶⁶ Shortly thereafter, a young federal prosecutor commenced an investigation of Van Engel triggered by new allegations that Van Engel had bribed a purchasing agent.¹⁶⁷ Upon learning of the provision in the RICO settlement, and hearing third-hand that Kravit had sought the tapes in order to destroy them, the prosecutor commenced a criminal investigation of Kravit.¹⁶⁸ Over the course of the two-year investigation, which proved fruitless, the prosecutor made Kravit the target of a sting operation, issued him a grand jury subpoena, and informed others that he was a target of an investigation.¹⁶⁹

In subsequent decisions dealing with criminal charges brought against Van Engel, both the federal district court¹⁷⁰ and the Seventh Circuit¹⁷¹ criticized the prosecutor for investigating Kravit. The appellate court explained that the settlement provision that had excited the prosecutor's suspicions was common in civil RICO cases and that it was unclear in any event whether, before a criminal investigation of Van Engel had begun, the obstruction provisions would have forbidden Kravit from intentionally destroying evidence.¹⁷² Yet, there had been no procedural means by which a court could have terminated the criminal investigation. Further, one might imagine that Kravit's ultimate judicial vindication was cold comfort after having endured a two-year criminal investigation with its attendant anxiety and cost. Thus, the lesson of the case is not unambiguous. On one hand, a lawyer might view the investigation of Kravit as aberrational and be encouraged by the investigation's denouement to engage in borderline

163. See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 387 (1994).

164. See *United States v. Van Engel*, 15 F.3d 623, 627 (7th Cir. 1993).

165. See *id.* at 626.

166. See *id.* at 627.

167. See *id.*

168. See *id.*

169. See *id.* at 627-28.

170. See *United States v. Van Engel*, 809 F. Supp. 1360, 1369-70 (E.D. Wis. 1992).

171. See *United States v. Van Engel*, 15 F.3d 623, 627-28 (7th Cir. 1993).

172. See *id.* at 627-28.

conduct.¹⁷³ On the other hand, a cautious lawyer might derive the lesson that his own interests, if not those of the client, may be best served by avoiding conduct that, although lawful, could be misconstrued as an attempt to conceal or destroy incriminating material.¹⁷⁴

2. Misleading Advocacy

In the context of courtroom advocacy, there is a similar tension between criminal laws that protect the integrity of the truth-seeking function and professional norms relating to zealous advocacy. A lawyer's statements or conduct designed to mislead the court, jury, or opposing counsel may violate obstruction or fraud provisions or constitute criminal contempt of court.¹⁷⁵ Yet, the professional norms

173. See Kenneth Mann, *Defending White Collar Crime* 153-55 (1985). Mann presents various examples of borderline conduct undertaken by white-collar criminal defense lawyers. As an example of aggressive conduct in dealing with incriminating documents, Mann discusses a criminal investigation of a company that produced a product that injured a high number of users. *See id.* After receiving a grand jury subpoena for all records of tests or opinions about the product's effects, safety, and side effects and any other information related to product testing "done by" or "acted on" by the company, the company reviewed its files and found a set of very damaging reports by an independent lab issued before the product was manufactured. *See id.* The reports showed that materials used in the product caused the precise negative effects that the product allegedly caused. *See id.* Although the subpoena was broadly worded, the corporation's counsel decided not to produce the reports on the dubious legal theory that they were not called for by the subpoena because they were not "done by" the company but by an independent lab and were not "acted on" by the company but ignored. *See id.* The conduct Mann describes reflects a professional understanding that, as an aspect of zealous advocacy, lawyers should resolve legal uncertainties in their clients' favor.

174. Other cases suggesting the virtue of caution include *Commonwealth v. Stenhach*, 514 A.2d 114, 126 (Pa. Super. Ct. 1986), and *People v. Sandy*, 666 N.Y.S.2d 565, 569-70 (App. Div. 1997). The latter case involves the prosecution of David Sandy, a London solicitor, based on professional conduct undertaken in Abu Dhabi on behalf of citizens of that country with an interest in the Bank of Credit and Commerce International (BCCI). The three-count indictment, charging Sandy with conspiracy and evidence tampering, alleges that he retrieved and removed material contained on computer disks stored in an Abu Dhabi office in order to prevent their discovery by an accounting firm which might in turn have produced them to New York prosecutors who were then engaged in a grand jury investigation of BCCI. *See Sandy*, 666 N.Y.S.2d at 567. Although a trial court dismissed the indictment based on an absence of evidence that Sandy's conduct had a materially harmful impact in New York State, the intermediate appellate court overturned its ruling and allowed the prosecution to continue, finding that there would be sufficient evidence to allow a jury to infer that Sandy "intended and knew that his actions were interfering with the production of evidence before a sitting grand jury," and that, consequently, "the circumstances of this case present the archetype of a criminal offense for which extraterritorial jurisdiction is designed." *Id.* at 568. The implication of the court's ruling is that the dictates of New York criminal law govern the professional conduct of English solicitors when they are engaged in the representation of Abu Dhabi clients in Abu Dhabi, without apparent regard for the possibility that proscribed conduct may be consistent with professional norms applicable to lawyers in England or Abu Dhabi (or, for that matter, New York) relating to zealous advocacy and client confidentiality.

175. *See, e.g., United States v. Ford*, 9 F.2d 990, 991 (D. Mont. 1925) (holding that the lawyer's presentation of false evidence constituted contempt of court).

contemplate that lawyers may sometimes act misleadingly in order to serve the client's interests.¹⁷⁶

Consider, for example, a Washington lawyer named Thoreen whose client in a criminal trial was accused of violating an injunction against salmon fishing.¹⁷⁷ Hoping that government witnesses would be unable to identify the client, Thoreen directed the defendant to dress in a business suit and sit in the area of the courtroom ordinarily reserved for the press, then placed at counsel table a look-alike dressed in outdoor clothing.¹⁷⁸ After the ruse was revealed, and the trial concluded, Thoreen himself was tried and convicted of criminal contempt.¹⁷⁹ In upholding the conviction, the Ninth Circuit interpreted criminal contempt of court to include "conduct inappropriate" to a lawyer's role that obstructs the administration of justice.¹⁸⁰

Like the *Bronston* case, the criminal contempt prosecution initiated by the district court in *Thoreen* was predicated on the lawyer's purported disciplinary violation. Both the trial and appellate courts cited disciplinary rules forbidding deceitful conduct, the creation of false testimony, and the failure to comply with known customs or practices of the court to establish the inappropriateness of Thoreen's conduct.¹⁸¹ These rules, together with an informal bar association opinion, were said to have put Thoreen on notice that his proposed conduct was professionally improper.¹⁸² Yet, none of the disciplinary provisions explicitly addressed Thoreen's ruse, and Thoreen might have derived the opposite conclusion from other evidence of the professional norms.

As courts have noted, lawyers' professional conduct is guided by "the lore of the profession" as well as the lawyer codes.¹⁸³ The professional lore glorifies criminal defense lawyers who engage successfully

176. In their treatise on the ABA Model Rules, Professors Hazard and Hodes give the example of a lawyer defending a criminal defendant who is guilty of a robbery: At trial, although the defense lawyer is aware that the robbery took place at 2:00 p.m., the victim testifies unequivocally that the crime occurred at 4:00 p.m., a time for which the defendant has a truthful and unshakeable alibi. A Michigan bar association ethics committee has opined that, under these circumstances, there would be no ethical impediment to presenting the alibi testimony, "even though it plainly had the potential to mislead the trier of fact"—a conclusion which, the commentators conclude, "is clearly correct" because "the case does not involve presentation of false evidence by the defense lawyer." Hazard & Hodes, *supra* note 55, § 3.3:210, at 596.1 (citing Michigan State Bar Comm. on Prof'l and Judicial Ethics, Op. CI-1164).

177. See *United States v. Thoreen*, 653 F.2d 1332, 1336 (9th Cir. 1981).

178. See *id.*

179. See *id.* at 1337.

180. *Id.* at 1339.

181. See *id.* at 1338-41.

182. See *id.* at 1342.

183. See, e.g., *In re Snyder*, 472 U.S. 634, 645 (1985) (reasoning that specific guidance for the professional standards of a lawyer is provided by case law, court rules, and custom); *In re Finkelstein*, 901 F.2d 1560, 1564-65 (11th Cir. 1990) (same); *Howell v. State Bar*, 843 F.2d 205, 208 (5th Cir. 1988) (same).

in trickery of various sorts. For example, Earl Rogers became legendary not only, and perhaps not primarily, for his forensic skill and medical knowledge, but for his inventiveness and deviousness. The tale is told of how Rogers successfully defended a man accused of stealing a horse from a prosperous farmer by replacing the defendant at counsel table with a similarly dressed confederate, thereby causing the farmer to make a misidentification.¹⁸⁴ Had he heard this tale, Thoreen might have believed that his misleading conduct, later held to be proscribed by the open-textured criminal contempt statute, was professionally acceptable, and even admirable, as a matter of zealous representation. Assuming that, in hindsight, Thoreen's conduct was wrongful and deserved to be sanctioned, it is doubtful whether it was worthy of being sanctioned criminally, rather than by professional discipline. Further, given the high price paid by Thoreen, a cautious lawyer might hesitate not only to switch the defendant with a look-alike,¹⁸⁵ but also to employ other misleading tactics, even if more defensible, in order to stay far clear of the criminal law.¹⁸⁶

More recently, Patrick Hallinan, a well-regarded criminal defense lawyer from San Francisco, was prosecuted unsuccessfully for allegedly committing crimes in service of a client, Mancuso, who was said to be a Nevada drug kingpin.¹⁸⁷ One charge, which was dismissed

184. See Alfred Cohn & Joe Chisholm, *Take the Witness* 40-41 (1934).

185. Not all lawyers have done so, however. See *United States v. Sabater*, 830 F.2d 7, 8 (2d Cir. 1987); *People v. Simac*, 641 N.E.2d 416, 421-22 (Ill. 1994).

186. A decision that might be similarly chilling is *State v. Casby*, 348 N.W.2d 736 (Minn. 1984), which upheld a lawyer's misdemeanor conviction for attorney misconduct where, acting on behalf of a criminal defendant who had falsely identified himself at the time of his arrest, the lawyer negotiated with the prosecutor without disclosing the client's fraud. The opinion suggested that, insofar as the lawyer sought to preserve the client's confidences, she had little choice but to withdraw from the representation, because "it is difficult to see how [she] could have continued to represent [the client], even under the most passive conditions, without the danger of assisting the client's fraudulent conduct and preserving false evidence . . ." *Id.* at 739. Independent of the criminal law, lawyers might plausibly conclude that professional norms permit, and even encourage, the lawyer to continue the representation as long as the lawyer does not affirmatively perpetuate the client's fraud. See Eva S. Nilsen, *Disclose or Not: The Client with a False Identity*, in *Ethical Problems Facing the Criminal Defense Lawyer* 214, 225 (Rodney J. Uphoff ed., 1995) (discussing National Association of Criminal Defense Lawyers Op. 90-2). The risk of criminal prosecution, however, strongly discourages relying on this understanding of the professional norms. See *id.* at 223 (opining that "[a]lthough counsel can point to constitutional considerations as justification for nondisclosure of a client's true identity, cases such as *Casby* . . . make it clear that continued representation of a client with a false name presents potentially serious problems for defense counsel"); see also William Talley, Jr., *Setting the Record Straight: The Client with Undisclosed Prior Convictions*, in *Ethical Problems Facing the Criminal Defense Lawyer* 194, 207 (Rodney J. Uphoff ed., 1995) (opining that, where the client has undisclosed prior convictions, given cases such as *Casby*, "it may be unwise for a lawyer to do anything but ask to withdraw from representation in those instances where the court poses a direct inquiry to the lawyer about the client's prior record").

187. See John W. Kecker & Steven A. Hirsch, *Partisan Arguments*, *Recorder*, Jan. 29, 1996, at 6, 6.

before trial, reportedly alleged that Hallinan had obstructed justice in part by making false statements at Mancuso's bail hearing.¹⁸⁸ These included Hallinan's arguments that the Government would be unable to prove that Mancuso committed any criminal acts within the applicable statute of limitations, that the indictment alleged a "great sweeping" conspiracy that included individuals unrelated to Mancuso, and that Mancuso was not a flight risk because upstanding professionals in the community would attest to his having engaged in legitimately-financed construction projects in the community.¹⁸⁹ Under the professional norms, it might be considered proper for a lawyer to make arguments such as these even if he disbelieves them, since the arguments would not be taken as representations of fact concerning matters within the lawyer's personal knowledge. Like a criminal defense lawyer's jury summation arguing for the acquittal of a client whom he knows to be guilty, these statements would instead be viewed as assertions of the client's legal position or of conclusions that arguably should be drawn from the facts put before the court. The prosecution's view that a criminal defense lawyer may be criminally liable for making such assertions if he knows them to be false suggests that, as interpreted by the government, the obstruction provision is at odds with conventional professional understandings.

Although the charge against Hallinan was dismissed, the line between legitimate and unlawful arguments to the tribunal remains obscure. John Kecker, who successfully defended Hallinan, has argued that criminal defense lawyers may therefore be chilled from making legitimate arguments by the possibility of being prosecuted based on statements made in the context of advocacy.¹⁹⁰ Kecker acknowledges that some false statements may be wrongful, and therefore serve as a basis for professional discipline, but he asserts that the additional risk of prosecution at the hands of one's opposing counsel (who lacks the disinterestedness of a disciplinary agency) will lead lawyers to be excessively timid in making arguments.¹⁹¹

3. Relations with Witnesses

The tension between criminal obstruction provisions and professional norms may also arise when advocates deal with witnesses. An earlier article examined the example of a criminal defense lawyer dealing with an unrepresented witness who might provide testimony

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* Apparently recognizing the problem, Congress recently amended 18 U.S.C. § 1001—which makes it a crime to make a false statement in a matter within federal jurisdiction—to exempt statements made by a party or a party's counsel in a judicial proceeding. *See* 18 U.S.C. § 1001(b) (Supp. II 1996).

harmful to the lawyer's client.¹⁹² The disciplinary rules could be read to allow the lawyer to advise the witness about the possibility of asserting the fifth amendment privilege rather than testifying.¹⁹³ Further, the general principle of "zealous advocacy" could be understood to mean that a lawyer should provide such advice if doing so will promote the client's interests.¹⁹⁴ Yet, advising a non-client to "take the Fifth" might constitute obstruction of justice. Even if it does not, a prosecutor might believe that it does and investigate or even prosecute a lawyer who is discovered to have given this advice.¹⁹⁵

A similar tension might exist when representing a client who seeks to bring a civil lawsuit against an individual who has accused the client of criminal wrongdoing. For example, a few years ago, Archer Daniels Midland Company was the subject of a federal price-fixing investigation during which Whitacre, a former executive of the company, secretly tape-recorded meetings for government investigators. While the investigation was underway, and after the government informed the company that it was facing imminent indictment, the company filed civil charges against Whitacre, accusing him of embezzling millions of dollars from the company.¹⁹⁶ Under the disciplinary rules, a lawyer could properly represent the company in this lawsuit as long as it was not frivolous¹⁹⁷ and was not being brought *solely* to harass Whitacre.¹⁹⁸ Further, the Model Code of Professional Responsibility stresses that "[i]n our government of laws and not of men, each member of our society is entitled . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim"¹⁹⁹ Thus, as long as the lawsuit was colorable, and the lawyers believed that one part of the company's motive was simply to redress an alleged embezzlement, the lawyer codes would seem to permit the company's lawyers to bring lawsuit and, indeed, encourage them to do so. But, at the same time, criminal law forbids the use of intimidation with the intent to prevent a witness from testifying.²⁰⁰ The corporation's lawyers might have hesitated to prosecute the law-

192. See Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. Rev. 687, 690-704 (1991) [hereinafter Green, *Zealous Representation*].

193. See *id.* at 691-98.

194. See *id.* at 709.

195. See *id.* at 699-704.

196. See Kurt Eichenwald, *Archer Sues Ex-Executive Who Became U.S. Informer*, N.Y. Times, Sept. 21, 1996, Metro Section, at 45.

197. See, e.g., Model Code of Professional Responsibility DR 7-102(A)(2) (1981) (stating that an attorney may only advance a defense that is unwarranted under existing law if there is a good faith argument for extending, modifying, or reversing existing law).

198. See, e.g., *id.* DR 7-102(A)(1) (stating that a lawyer shall not take "action on behalf of his client when he knows . . . that such action would serve merely to harass . . . another").

199. *Id.* EC 7-1 (footnotes omitted).

200. See 18 U.S.C. § 1512(b)(1) (1994).

suit against Whitacre, lest they expose themselves to a possible prosecution on the theory that part of their motive, as inferred from the circumstantial evidence, was to dissuade a potential witness from testifying against their corporate client.²⁰¹

III. SHOULD THE CRIMINAL LAW ACCOMMODATE COMPETING PROFESSIONAL NORMS?

When the criminal law is in tension with professional norms derived from other sources, a question arises whether the criminal law should accommodate the professional norms and, if so, how and to what extent. As described below, there is a range of possible approaches to this question.

A. Discounting the Professional Norms

At one extreme, courts have sometimes considered the lawyer's status to be essentially irrelevant, on the ground that lawyers do not have a privilege to commit crimes. On the contrary, sounding the theme underlying disciplinary decisions involving lawyers' criminal conduct, it is argued that the criminal law should apply to lawyers especially sharply because of their professional duty to be law abiding. The opinion making this rhetorical point most strongly was *United States v. Cintolo*,²⁰² in which a lawyer was convicted of obstruction of justice for counseling a grand jury witness to refuse to testify after receiving immunity from the adverse use of his testimony.

On the facts presented by the government, Cintolo's conduct was clearly professionally blameworthy, because he was acting for the benefit of another client who feared the witness's testimony and contrary to the interests of the witness himself.²⁰³ Nonetheless, the conviction

201. In 1990, a Virginia lawyer was tried and convicted on multiple counts of a federal criminal indictment, including one alleging witness intimidation by filing an apparently colorable civil complaint against a potential witness in violation of Section 1512(b). See *United States v. McGough*, No. 91-5511, 1991 U.S. App. LEXIS 28977 (4th Cir. Dec. 12, 1991) (per curiam). Her conviction was upheld on appeal without a published opinion. See *id.* Prior reported decisions had suggested that filing a civil complaint would not be obstruction of justice unless the complaint was known to be frivolous. See *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985); *United States v. Hylton*, 710 F.2d 1106, 1110 (5th Cir. 1983). That the complaint was frivolous, however, did not appear to be part of the prosecution's proof in the Virginia case.

202. 818 F.2d 980 (1st Cir. 1987). For a discussion of *Cintolo*, see Koniak, *supra* note 127, at 1476-78.

203. As described in the appellate court's decision, Cintolo was the lawyer for Angiulo, the leader of organized crime group involved in illegal gambling and loan-sharking. When a gambler, LaFreniere, received a grand jury subpoena, Angiulo became concerned that he might testify truthfully about gambling debts he incurred and pressure to which Angiulo's subordinates had subjected him to repay overdue debts. Angiulo pressured LaFreniere to go to jail rather than testify truthfully and enlisted Cintolo to assist in the effort. Angiulo sent LaFreniere to Cintolo who undertook to serve as LaFreniere's lawyer and to do Angiulo's bidding. When LaFreniere was granted immunity and ordered to testify, Cintolo counseled him to refuse. Upon re-

had troubling implications, because there was no obvious principle to distinguish those cases where advising a client to decline to testify in the grand jury would be obstruction of justice. Suppose that the client faced a risk of prosecution and had not been granted immunity. Would a lawyer be guilty of obstruction if, to protect the client from incriminating himself, he advised the client not to testify in the grand jury? Criminal liability seems unthinkable in this situation. Ordinarily, a lawyer would be considered inept if he failed to give this advice. Yet, it is not obvious why the advice does not comprise obstruction of justice, given that an aspect of the lawyer's intent is to deprive the grand jury of relevant evidence.²⁰⁴

Assume that, consistent with the contemporary understanding, the obstruction provision does not generally forbid a lawyer from rendering this advice. That is, the lawyer's intent is not "corrupt" when the lawyer's sole aim is to promote the client's penal interests. Suppose, however, that the fees of the lawyer who gave this advice were being paid by a third party (e.g., a corporation) that might be implicated by the client's testimony²⁰⁵ or that the client had been referred by the lawyer for that third party. Or, suppose that the client's testimony might implicate a third party whom the lawyer formerly represented or hopes to represent in the future. As in *Cintolo*, could the lawyer be convicted of obstruction on the theory that he was seeking to further the interests of a third party rather than the interests of the client? Suppose that the client made it plain to the lawyer that the client did not wish to implicate others and that he would rather go to jail himself than do so or that the lawyer's motive was to protect the client from physical retaliation by other conspirators. If the lawyer advised the client not to testify after receiving immunity, could the lawyer be convicted of obstructing justice on the theory, as in *Cintolo*, that he was acting contrary to the client's penal interests? The lawyer's advice in each of these examples would have the likely effect of obstructing the grand jury's access to truthful testimony. The only question is whether the lawyer would be acting with "corrupt," rather than innocent, intent—a question that has not been resolved by judicial decisions interpreting the obstruction statute.

fusing, LaFreniere was held in contempt of court. In doing so, *Cintolo* was serving at the direction of a third party without regard for the interests of his purported client. In defense, *Cintolo* argued that, contrary to appearances, he was acting to serve LaFreniere by obtaining information from Angiulo that would help in counseling his client. However, evidence, including tape-recorded conversations between him and Angiulo, belied this claimed innocent motivation. See *Cintolo*, 818 F.2d at 983-89.

204. See, e.g., *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942) (upholding lawyers' convictions for conspiring to obstruct justice based on evidence that they took part in attempts to keep their clients from disclosing the clients' participation in bootlegging activities to criminal investigators and the grand jury).

205. Cf. *United States v. Weissman*, No. S2 94 CR. 760 CSH, 1997 WL 539774 (S.D.N.Y. Aug. 28, 1997) (ordering a corporation to pay its officer's legal fees in connection with a criminal investigation).

Out of concern for the implications of the prosecution, several bar groups filed amicus briefs on appeal, supporting Cintolo's argument that, to prevent incursions into legitimate advocacy, any facially legitimate explanation for a lawyer's conduct should suffice. That is, a lawyer should not be convicted for obstruction of justice where a possible motivation for his conduct was innocent. The court rejected this suggestion as unsupported in precedent, principle, or policy.²⁰⁶ Further, it rejected the more modest defense argument that the jury should not be permitted to infer that a lawyer acted with corrupt intent where he performed a traditional lawyering function.²⁰⁷ The court labeled the proposed principle as "surrealistic" and regarded it, in any event, as irrelevant, because Cintolo was not performing a traditional lawyering function: He was laboring to get his client into jail, rather than to keep him out.²⁰⁸ Most notable was the court's strong language sounding the theme that lawyers should have higher, not lower duties,²⁰⁹ and rejecting the idea that Cintolo's conviction might "chill" legitimate advocacy.²¹⁰

Relying heavily on *Cintolo*, the Seventh Circuit recently issued an opinion in *United States v. Cueto*²¹¹ that was rhetorically more restrained, yet more troubling in its implications. In *Cueto*, the court upheld a lawyer's conviction on one conspiracy count and three obstruction counts for using court processes to interfere with a federal investigation of illegal gambling operations.²¹² The prosecution was predicated on traditional (although not necessarily typical) lawyering activity—namely, civil litigation—undertaken on behalf of a client who was the subject of a pending investigation.²¹³ *Cueto* had been

206. See *Cintolo*, 818 F.2d at 990.

207. See *id.* at 995.

208. See *id.*

209. The *Cintolo* court wrote:

[W]e emphatically reject the notion that a law degree, like some sorcerer's amulet, can ward off the rigors of the criminal law. . . . By our reckoning, attorneys cannot be relieved of obligations of lawfulness imposed on the citizenry at large. . . . As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct. To the exact contrary, they should be held to the very highest standards in promoting the cause of justice.

Id.

210. The court stated:

We have carefully examined the avowed fears . . . that a decision upholding Cintolo's conviction in this case may . . . somehow chill the criminal defense bar in zealous advocacy on behalf of clients. We find such concerns to be grossly overstated. . . . We see nothing to recommend the proposition that attorneys can be of easier virtue than the rest of society in terms of the criminal code. As citizens of the Republic equal under law, all must comply with the same statute in the same manner.

Id.

211. 151 F.3d 620 (7th Cir. 1998).

212. *Id.* at 624.

213. See *id.*

retained by Venezia, the owner of a vending and amusement corporation that operated an illegal video gambling business in taverns in Illinois.²¹⁴ In the course of an investigation, Robinson, an agent of the state liquor authorities who was acting in an undercover capacity for the FBI, solicited a bribe from Venezia.²¹⁵ Venezia consulted with Cueto and his law partner, who reported the bribe offer to the state liquor authorities.²¹⁶ After Venezia met again with Robinson, Cueto lodged a complaint against Robinson with the State's Attorney and filed a state court action against Robinson on Venezia's behalf.²¹⁷ Cueto also obtained a court order in a pending case requiring Robinson to show cause why he should not be enjoined from investigating Venezia's business.²¹⁸ After the hearing, at which Cueto elicited information from Robinson about the FBI investigation, the state court preliminarily enjoined Robinson from interfering with Venezia's business operations.²¹⁹ When Robinson continued to participate in investigative activities, Cueto threatened to file a lawsuit against the liquor authorities and filed an order seeking contempt sanctions against Robinson.²²⁰ Now represented by the United States Attorney's Office, Robinson removed the proceeding to federal court, which vacated the injunction.²²¹ Cueto unsuccessfully appealed the decision, then filed an unsuccessful petition for certiorari.²²² The conspiracy and obstruction counts were based on Cueto's efforts to use the legal process to forestall the investigation of Venezia's business, including by complaining to the State's Attorney, by filing motions attacking the FBI and the United States Attorney's Office and seeking a judge's disqualification, and by filing pleadings in the district court action as well as the subsequent appellate brief and petition for certiorari.

In upholding Cueto's conviction, the court determined that the obstruction statute covers any conduct of a lawyer, including traditional litigation-related lawyering activities such as filing colorable motions or appeals, if the lawyer's intention is corrupt.²²³ It explained that the statute was meant to cover novel and original methods of obstructing justice in addition to those that were specifically proscribed and that an otherwise innocent act becomes criminal if it is a step in a plot to obstruct justice.²²⁴ Thus, the statute does not prohibit any particular

214. *See id.* at 625.

215. *See id.*

216. *See id.*

217. *See id.* at 626.

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.* at 626-27.

222. *See id.* at 627. *See generally* Venezia v. Robinson, 16 F.3d 209 (7th Cir.), cert. denied, 513 U.S. 815 (1994) (detailing the underlying facts).

223. *See Cueto*, 151 F.3d at 631.

224. *See id.*

acts, but the corrupt endeavor.²²⁵ In this case, the court further found, Cueto's otherwise legal conduct to defend his client comprised obstruction of justice because the conduct was motivated by the corrupt endeavor to protect the illegal gambling operation and to safeguard Cueto's own financial interest.²²⁶

Two aspects of *Cueto* distinguish this case from *Cintolo* and bring it far closer to a prosecution of a criminal defense lawyer who is engaged in traditional advocacy. First, unlike *Cintolo*, who secretly sought to further a third party's interests by advising his ostensible client to violate his legal obligation to testify, Cueto's general conduct as a litigator was consistent with the steps that a competent, zealous advocate might take on behalf of a client. His acts were public and involved the traditional tools of zealous advocacy—motions, appeals, petitions, and the like.²²⁷ In response to the concern that the obstruction statute provided inadequate notice of what conduct by a lawyer on behalf of a client is proscribed, the court explained that:

As a lawyer, [Cueto] possessed a heightened awareness of the law and its scope, and he cannot claim lack of fair notice as to what conduct is proscribed by [section] 1503 More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law.²²⁸

225. *See id.*

226. *See id.*

227. There are suggestions in the Seventh Circuit's opinion that some of Cueto's court filings may have been frivolous. *See id.* at 633 ("The evidence demonstrates that Cueto . . . continued to file frivolous appeals . . ."). There is, however, no indication that this was an essential part of the government's proof, that the jury was charged that it must find that the filings were frivolous in order to find Cueto guilty of obstruction, or that the court of appeals considered this necessary to justify upholding Cueto's conviction.

Even if the court were to limit the reach of the obstruction statute to court filings that were frivolous, concerns might be raised about the risk of chilling effective criminal advocacy. Civil sanctions for frivolous legal filings, although available in civil proceedings, are unavailable in criminal proceedings precisely because of this danger. *See United States ex rel. Potts v. Chrans*, 700 F. Supp. 1505, 1524 (N.D. Ill. 1988) (noting that "[i]n criminal cases [Federal Rules of Civil Procedure] Rule 11 does not apply" because "the (minimal) danger that new Rule 11 may chill creative advocacy and impede the development of the law, though acceptable in the civil forum, make it inappropriate in the criminal context"); Georgene M. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* § 3.02[f] (2d ed. 1992) (discussing the applicability of Rule 11 in criminal cases). *But see Young v. Ninth Judicial Dist. Court*, 818 P.2d 844 (Nev. 1991) (upholding the \$250 sanction imposed on a public defender for filing a motion to strike the State's request for the death penalty in a murder trial, where the court found no evidentiary support for the allegation that the prosecution's decision to seek the death penalty was politically motivated). Obviously, the possibility of being punished criminally for obstruction of justice because a legal filing was frivolous would chill legitimate advocacy to a far greater extent than the possibility of civil sanctions.

228. *Cueto*, 151 F.3d at 631-32.

But this explanation makes no sense, given the court's conclusion that the obstruction law proscribes *all* professional conduct, including "traditional litigation-related conduct," if undertaken with corrupt intent.²²⁹

Second, unlike Cintolo, whose purpose was to promote the penal interests of a third party at his client's expense, Cueto's purpose was to promote his client's interests. The court nevertheless characterized Cueto's purpose as corrupt, describing it in part as an attempt "to protect [his client] . . . from criminal prosecution"²³⁰ and elsewhere as "the corrupt purpose of impairing, impeding, and obstructing the investigation, indictment, and prosecution of the illegal gambling and racketeering enterprise."²³¹ The court purported to see a difference between these impermissible purposes and a criminal defense lawyer's legitimate "attempt to advocate his client's interests within the scope of the law"²³² and thereby "to affect the outcome of the proceedings."²³³ But, as a practical matter, either characterization could be applied to the purposes of an ordinary white-collar criminal defense lawyer who, in the course of representing the subject or target of a criminal investigation, seeks aggressively, but through lawful means, to keep abreast of the government's investigation and to protect the client, if possible, from being indicted. The opinion suggests that what may have distinguished Cueto from an ordinary criminal defense lawyer was that Cueto held an indirect "personal financial interest in [protecting] the illegal gambling operation,"²³⁴ so that his goal was in part to "safeguard his [own] financial interest."²³⁵ But the opinion does not explain why, as a consequence, Cueto's purpose deviated from that of an ordinary criminal defense lawyer who serves a client for a fee. Cueto may have been motivated by his financial relationship with Venezia, as well as by whatever fee he was receiving for his legal services, but there is no indication in the opinion that, as a conse-

229. Elsewhere, the court observed that "[t]here is a discernable difference between an honest lawyer who unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial proceedings." *Id.* at 632. As the court construed the obstruction statute, however, the jury would not have been required to find that Cueto knowingly made false submissions to the court or filed frivolous legal papers. On the contrary, Cueto's alleged acts of obstruction included filing a preliminary injunction motion that was initially victorious and a subsequent appeal after the action was removed and the state court's order was vacated. *See id.* Nothing in the opinion suggests that Cueto made any false submissions in the context of these proceedings.

230. *Id.* at 633.

231. *Id.* at 636.

232. *Id.* at 632.

233. *Id.*

234. *Id.* at 631. Cueto had entered into several presumably legitimate business deals with Venezia, who funded the ventures with money from his illegal gambling operation. *See id.* at 627.

235. *Id.* at 628.

quence, his purpose was anything other than to defend Venezia and his business against a possible criminal prosecution.²³⁶

Unlike the First Circuit in *Cintolo*, the Seventh Circuit in *Cueto* did not ridicule the possibility that the prosecution of the defendant-lawyer would deter legitimate advocacy. It noted that the "theory of prosecution brings us some pause"²³⁷ and acknowledged that the amicus brief of the National Association of Criminal Defense Lawyers "discusse[d] valid policy concerns and assert[ed] legitimate arguments"²³⁸ and that "it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation."²³⁹ Yet, taking the view that the paramount policy consideration was to deter "corrupt endeavors to manipulate the administration of justice,"²⁴⁰ the court offered no accommodation to the lawyer's professional status and the professional norms. It took no account of the danger that lawyers might be overdeterred because of the possibility that their conduct or intentions would be misconstrued. As in the ordinary criminal case, it trusted the jury to assess the evidence, subject to limited judicial review to ensure that, "viewing the evidence in the light most favorable to the prosecution,"²⁴¹ a rational jury could have found the elements of the crime—a standard that, the court noted, poses a "nearly insurmountable hurdle"²⁴² for the defendant-lawyer. Nor did the court account for the danger of overdeterrence created by the obstruction statute's failure to draw a clear line—or any line at all—between legitimate and proscribed acts. It took the view that "the contours of the line between traditional lawyering and criminal conduct . . . must inevitably be drawn case-by-case,"²⁴³ and that "[n]othing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the maddening [sic] crowd and sheltered from the rigors of"²⁴⁴ the obstruction statute.

B. *Privileging Professional Norms*

On the other end of the spectrum, courts have sometimes held that, in light of competing professional norms, some criminal provisions may not be invoked against a lawyer for certain conduct undertaken

236. Another fact that distinguishes *Cueto's* situation from that of most white-collar defense lawyers is that his client's criminal conduct was not past, but ongoing. Nothing in the opinion, however, suggests that this was an important consideration.

237. *Id.* at 631 n.10.

238. *Id.* at 632.

239. *Id.*

240. *Id.*

241. *Id.* at 630 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

242. *Id.* at 629 (quoting *United States v. Moore*, 115 F.3d 1348, 1363 (7th Cir. 1997)).

243. *Id.* at 634.

244. *Id.* at 632 (quoting *United States v. Cintolo*, 818 F.2d 980, 993-94 (1st Cir. 1987)).

in the course of the professional representation. The best-known example is *People v. Belge*,²⁴⁵ the so-called "buried bodies case," in which a lawyer representing a defendant in a murder case learned that his client had committed other, uncharged murders.²⁴⁶ Based on the client's information, Belge located and inspected the body of one of the victims, but never disclosed its existence and whereabouts until the trial when Belge revealed the client's other murders in the context of an unsuccessful insanity defense.²⁴⁷ Belge was subsequently prosecuted under misdemeanor provisions of the public health law requiring that a burial be accorded the dead and that a death occurring without medical attendance be reported.²⁴⁸ The reporting obligation under the misdemeanor provisions was clearly in tension with Belge's ethical duty as a lawyer to preserve client confidences.²⁴⁹ Finding that "Belge conducted himself as an officer of the Court with all the zeal at his command to protect the constitutional rights of his client," the trial court dismissed the prosecution principally under a provision of state law allowing the court to do so "in the interest[] of justice."²⁵⁰ At the same time, however, the trial court indicated that its decision would have been more difficult if Belge had been indicted for obstruction of justice, rather than under what it characterized as "pseudo-criminal statute[s]."²⁵¹

In other cases, the prosecution of a lawyer has been dismissed not because the particular lawyer was found to have acted in accordance with the dictates of professional ethics, but because the applicable criminal statute was thought to be overbroad or vague as applied to lawyers, in that it would reach some professionally acceptable as well as unacceptable behavior. The most noted example is *Commonwealth v. Stenhach*,²⁵² which involved two criminal defense lawyers who, in

245. 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976). For commentary on this case, see Jeffrey Frank Chamberlain, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 *Buff. L. Rev.* 211 (1975); Monroe H. Freedman, *Where the Bodies are Buried: The Adversary System and the Obligation of Confidentiality*, 10 *Crim. L. Bull.* 979 (1974).

246. *See Belge*, 372 N.Y.S.2d at 799.

247. *See id.*

248. *See id.* (citing sections 4200(1) and 4143 of the Public Health Law).

249. This was only a tension, not a direct conflict, since a lawyer in New York, as in all other states, may disclose client confidences where "required by law or court order." New York Lawyer's Code of Professional Responsibility DR 4-101(C)(2) (1996).

250. *Belge*, 372 N.Y.S.2d at 803. Additionally, the court suggested that the reporting obligation was superseded by the attorney-client privilege, which applied to the information that the lawyer received from the client. *See id.*

251. *Id.*

252. 514 A.2d 114 (Pa. Super. Ct. 1985); *see also* Hazard et al., *Ethics of Lawyering*, *supra* note 66, at 37-47 (excerpting *Stenhach* as the principal case); Rodney J. Uphoff, *Introduction to Ethical Problems Facing the Criminal Defense Lawyer* at xix, xix-xx (Rodney J. Uphoff ed., 1995) (using *Stenhach* in part to illustrate that "the criminal defense lawyer who makes a difficult ethical choice may also be subject to criminal

the course of representing a defendant on murder charges, recovered the rifle stock used in the murder and kept possession of it, erroneously believing it to be protected by the attorney-client privilege.²⁵³ The prosecution learned about the rifle stock through cross-examination of the defense investigator who had found it and the court then ordered the lawyers to produce it, which they did.²⁵⁴ After the trial, the prosecutor charged the defense lawyers with hindering prosecution and tampering with physical evidence.²⁵⁵ They were convicted, but the convictions were overturned.²⁵⁶

The appellate court in *Stenhach* found that it was unethical for the defense lawyers to retain the rifle stock, and that they were plainly subject to professional discipline for having done so,²⁵⁷ but that the statutes under which they were convicted were unconstitutionally vague and overbroad as applied to lawyers.²⁵⁸ The court acknowledged that, as a policy matter, exempting lawyers from the criminal provisions will undermine the "public perception of lawyers as a positive force in the administration of justice, but will cast them in the public mind more as accessories to crime."²⁵⁹ Nonetheless, unlike the *Cintolo* court, it concluded that lawyers merited different treatment because "there is little or no guidance for an attorney to know when he has crossed the invisible line into an area of criminal behavior."²⁶⁰ The hindering prosecution statute made it a crime to conceal evidence of a crime "with intent to hinder the . . . conviction . . . of another for crime,"²⁶¹ while the tampering statute made it a crime to conceal a document or thing with intent to impair its availability in an official proceeding.²⁶² The court observed that conduct universally perceived as ethically proper, indeed essential, would fall within the language of these statutes.²⁶³ For example, if the client gave the lawyer a handwritten account of his involvement in the charged crime, the writing would be protected from disclosure by the attorney-client privilege, and the lawyer would be derelict if he gave it to the prosecutor. Yet, failing to do so would come within the language of these statutes. Consequently, as applied to criminal defense lawyers dealing with in-

prosecution as well as a disciplinary proceeding if someone disagrees with that choice"); Koniak, *supra* note 127, at 1468-76 (discussing *Stenhach*).

253. See *Stenhach*, 514 A.2d at 116.

254. See *id.*

255. See *id.*

256. See *id.* at 117, 127.

257. See *id.* at 118.

258. See *id.* at 125.

259. *Id.* at 118.

260. *Id.* at 125.

261. *Id.* (citation omitted).

262. See *id.*

263. See *id.*

criminating evidence, the court concluded that the statutes failed to give clear notice of what was and was not proscribed.²⁶⁴

A more recent example is *State v. Mark Marks, P.A.*,²⁶⁵ in which several individuals, including some lawyers, were charged with defrauding an insurance company under a Florida statute that makes it a crime, among other things, to submit a statement in support of an insurance claim that contains "incomplete" information.²⁶⁶ The statute specifically makes it a felony for a lawyer to assist or conspire in such conduct.²⁶⁷ The court found, however, that as applied to lawyers in the course of representing clients, the provision criminalizing fraudulent omissions was unconstitutionally vague.²⁶⁸ The court reasoned that under the various laws "dealing with the atypical obligations of an attorney in an advocate role,"²⁶⁹ lawyers owe their clients a duty of confidentiality "which includes constraints upon information that can be disclosed to others."²⁷⁰ In light of the applicable authorities, lawyers are taught that in some contexts, such as settlement negotiations, withholding information is proper.²⁷¹ Given that "less than complete disclosure by an attorney in the representation of his or her client is considered acceptable practice in certain instances"²⁷² and that the criminal statute did not distinguish between appropriate and inappropriate omissions, the court found that "the statute [does not] provide adequate notice of the conduct" by lawyers that it proscribes.²⁷³

C. *A Middle Ground: Relating Professional Norms to the Fact Finder's Determination*

Some decisions recognize that the professional norms may be relevant to the jury's assessment of whether the lawyer-defendant acted unlawfully and, therefore, allow the jury to be apprised of the relevant norms, either through expert testimony where the norms are contested, or through a jury instruction where the norms are essentially undisputed. Allowing expert testimony or instructing the jury on the content of relevant professional norms does not presuppose, however, that the jury must give these norms any particular weight or significance in assessing the accused lawyer's state of mind or conduct for purposes of the criminal law.

Professor Freedman has written about the prosecution of Theodore Friedman, a New York case in which Professor Hazard provided ex-

264. *See id.*

265. 698 So. 2d 533 (Fla. 1997).

266. *See id.* at 534.

267. *See id.*

268. *See id.*

269. *Id.* at 538 (citation omitted).

270. *Id.* (citation omitted).

271. *See id.*

272. *Id.*

273. *Id.* at 537.

pert testimony concerning relevant professional norms. Friedman, a well-known plaintiffs' personal injury lawyer, was essentially accused of deceiving the court by failing to disclose that one of his witnesses in a civil suit had lied on cross-examination.²⁷⁴ Professor Hazard testified in Friedman's defense that the lawyer's nondisclosure was consistent with the applicable disciplinary rules,²⁷⁵ and Friedman was acquitted.²⁷⁶

*United States v. Wuliger*²⁷⁷ is a case in which a judicial instruction on the applicable professional norms was deemed appropriate. Wuliger, an Ohio divorce lawyer, represented a husband who spent a week intercepting and recording his wife's telephone conversations, including conversations with her lawyer, priest, marriage counselor, and friends.²⁷⁸ Under federal criminal law, if the wiretapping occurred without the wife's consent, the recordings would be illegal and it would also be a crime to use the tapes, knowing or having reason to know that they had been made illegally.²⁷⁹ However, when the client gave the tapes to Wuliger for use in the divorce action, he represented that he had recorded the telephone conversations with his wife's knowledge.²⁸⁰ Thereafter, Wuliger used the tapes as a basis of questions in deposing both the wife and the man with whom she was allegedly then involved.²⁸¹ On appeal from his conviction for thereby violating the federal wiretapping law, Wuliger argued that the jury should have been instructed that, as a lawyer, he had an absolute right to believe what his client told him, so that he could rely on the client's representation that the tapes were made with the wife's consent, even if the nature of the conversations tended to belie that representation.²⁸² The court did not accept this claim in its entirety, but did agree that the professional norms were relevant to determining what a lawyer has reason to know, because an attorney "should be able to give his clients the benefit of the doubt."²⁸³

274. See Daniel Wise, *Friedman Acquitted in Perjury Case*, N.Y. L.J., Nov. 3, 1988, at 1.

275. See Freedman, *Lawyers' Ethics*, *supra* note 137, at 128 & n.75.

276. See *id.* at 128 n.77. Friedman was subsequently disbarred based in minor part on the very conduct that had been in issue in the criminal case. See *In re Friedman*, 609 N.Y.S.2d 578 (App. Div. 1994).

277. 981 F.2d 1497 (6th Cir. 1992).

278. See *id.* at 1499.

279. See 18 U.S.C. § 2511 (1994).

280. See *Wuliger*, 981 F.2d at 1500.

281. See *id.*

282. See *id.* at 1500-01.

283. *Wuliger*, 981 F.2d at 1505. The court reasoned:

The defendant argues that he should be able to rely on the factual representations of his client regardless of his personal opinion as to the client's credibility. He points to his professional duty to present any evidence or theory which is arguably viable, subject to standards of good faith and reasonableness. Because he proceeded on the belief his client was telling the truth, the

D. *The Restatement's Approach: Relating Professional Norms to the Court's Interpretation of the Criminal Law*

The Restatement of the Law Governing Lawyers focuses on the court's role in interpreting the criminal provision under which the lawyer is charged. Under its formulation, "[t]he traditional and appropriate activities of lawyers in representing clients consistent with the requirements of the applicable lawyer code are relevant factors for the tribunal in assessing [the] propriety of a lawyer's conduct under the law of crimes."²⁸⁴ The accompanying Comment states that the traditions of the legal profession, as reflected in the lawyer codes, would not supersede clearly applicable criminal provisions, since provisions of the lawyer codes "do not purport to displace duties imposed on lawyers and others by criminal law, but are drafted assuming the applicability of such law."²⁸⁵ The Comment indicates, however, that courts should construe a criminal provision "so as to make it consistent with an applicable lawyer code provision" to the extent that a court can do so "consistent with precedent and with accepted norms governing construction of a criminal statute."²⁸⁶

The Restatement's formulation presupposes that courts possess limited authority to interpret criminal provisions to accommodate professional norms. The formulation does not speak to the question of whether, as in *Stenhach* and *Mark Marks*, a court should hold that criminal provisions are constitutionally deficient where they fail adequately to distinguish between permissible and impermissible conduct by lawyers. However, it does not strongly encourage the possibility of interpreting a criminal provision to achieve the same result by reading into the criminal law an exemption of lawyers' professional conduct. On the contrary, the Restatement suggests that, if the lawyer-defendant cannot make a persuasive case that his own alleged conduct was appropriate under the lawyer code, he cannot seek to avoid criminal liability on the ground that other lawyers might be discouraged from acting in professionally appropriate ways.

defendant contends he had no "reason to know" Mrs. Ricupero did not in fact consent to the recordings.

There is nothing in the Act which affords attorneys special treatment. Accordingly, we find that the defendant was not entitled to a special instruction on the reason to know standard solely because he used the tapes in his role as attorney. However, an attorney's professional duties may be a factor in determining whether there is reason to know that recorded information, given by the client, was illegally obtained. Although an attorney must not turn a blind eye to the obvious, he should be able to give his clients the benefit of the doubt. This countervailing duty is one the jury may take into account in deciding whether defendant had reason to know.

Id.

284. Restatement (Third) of the Law Governing Lawyers § 8 (Proposed Final Draft No. 2, 1998).

285. *Id.* § 8 cmt. c.

286. *Id.*

A lawyer-defendant's argument that he acted in a professionally appropriate manner, which the criminal law should be construed to accommodate, will face several obstacles under the Restatement's formulation. The first is that the relevant professional norms are often contested. Thus, the lawyer may have acted in accordance with his own reasonable, widely-shared understanding of what is professionally appropriate behavior, yet that understanding may not be sufficiently well embedded to be deemed "traditional." Another problem is that even if there is a strong consensus as to their content, the relevant professional norms may not be captured by provisions of the lawyer code, which generally speak in terms that are restrictive, rather than prescriptive. For example, the lawyer codes forbid lawyers from knowingly presenting false testimony, but do not explicitly require lawyers, as a matter of zealous advocacy, to present testimony helpful to the client's case that is not known to be false. A third problem is that, to the extent that the lawyer codes might be read to prescribe particular conduct, their prescriptions are almost invariably limited by the criminal law, as discussed earlier and as the Comment acknowledges.

Thus, the relationship between criminal law and inconsistent professional norms is somewhat paradoxical. If lawyers could contend that the professional norms had the force of law, they would have a strong claim of exemption from competing criminal law. After all, how can one be criminally culpable for acting as another law requires? Yet, the professional norms—even as embodied plainly in the lawyer codes—are not "law" in the strong sense and, in any event, they accommodate other law.²⁸⁷ The Restatement makes only the weaker claim that, where the applicable criminal provision is particularly unclear, it should be construed to allow the lawyer to act in accordance with relatively clear professional norms. Even this attenuated claim is not particularly sympathetic insofar as it is understood to be merely an argument about fair notice. Open-textured criminal provisions are routinely applied to the conduct of non-lawyers, and, as the court observed in *Cueto*, if anyone should be aware of the dictates of the criminal law, lawyers should be.

A final problem is that precedent and traditional rules of statutory construction may not appear to leave courts much leeway to interpret a particular criminal provision to accommodate professional norms. Even where it seems to be universally understood that a professional practice is lawful, traditional techniques of statutory construction may make it hard to reach that conclusion. Consider the example of a corporation's lawyer who, in an arm's length interview with an employee prior to her appearance in the grand jury, seeks aggressively to persuade her that her initial version of a certain fact situation was not

287. See *supra* Part I.B.2.

accurate and that an alternative version, which had been given to the lawyer by another employee and was more favorable to the corporation, was more correct.²⁸⁸ Unless the lawyer was seeking to persuade the witness to swear to a version of events that the lawyer knew to be false, the lawyer's conduct would be consistent with the lawyer codes.²⁸⁹ Thus, in the likely event that the lawyer did not know or care which, if either, version was true, the lawyer would have been acting in a professionally appropriate manner. Suppose, however, that the lawyer is charged under the federal witness tampering provision, 18 U.S.C. § 1512, with attempting to "corruptly persuade" another person with intent to "influence" that person's testimony in an official proceeding.²⁹⁰ It is unclear that conventional principles of interpretation would enable the court to conclude that the law was inapplicable simply because the lawyer did not *know* that his alternative version was false. Past precedent would not support the argument that, as a matter of law, the lawyer's intent would not have been "corrupt" in that event. Further, this interpretation would seem to be inconsistent with a provision making it an affirmative defense that "the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully."²⁹¹ It is questionable whether a lawyer can establish this defense when he did not know that the witness's initial version was false and the alternative account was true. A lawyer might argue that his motivation for aggressively asserting the alternative version of events was ultimately to determine the truth, but it is doubtful a court would conclude that the lawyer's intent was therefore innocent as a matter of law.

Given all these obstacles, it is not surprising that few reported cases appear to employ the Restatement's formulation. Although the Reporter's Note accompanying the Restatement provision identifies *Belge* as one of two examples in which a lawyer code provision was employed "to limit an interpretation of a criminal statute,"²⁹² a different reading of *Belge* is more plausible. The trial court in *Belge* did not interpret the applicable public health laws to accommodate the professional norms governing lawyer-client confidentiality, but rather dismissed the prosecution principally on the basis of a state law (which

288. See, e.g., *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982) (involving the prosecution of an attorney charged with obstruction of justice where the attorney allegedly counseled former employees of her client to lie to the grand jury).

289. See, e.g., *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) (holding that while it is impermissible to "ask a witness to swear to facts which are knowingly false," it is permissible "in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate").

290. 18 U.S.C. § 1512(b)(1) (1994).

291. *Id.* § 1512(d).

292. Restatement (Third) of the Law Governing Lawyers § 8 Reporter's Note (Proposed Final Draft No. 2, 1998).

has no federal counterpart) authorizing courts to dismiss a prosecution in the interests of justice.²⁹³ Had it been called on to do so, it is uncertain that the court would have concluded that the public health laws exempted lawyers from reporting client confidences. In preserving the client's confidences rather than disclosing the whereabouts of his victim's corpse, Belge acted consistently with the ethical duty of confidentiality, and insofar as the relevant public health laws were ambiguous, the court might therefore have interpreted them to include an implied exception where the information that would otherwise have had to be reported was subject to a lawyer's duty of confidentiality. But the language of the public health laws were not necessarily ambiguous, in the sense that they were open to a construction that would exempt lawyers from disclosing client confidences.

IV. TWO MODEST PROPOSALS

So far, this Article has been essentially descriptive. It has described the ways in which criminal law may regulate lawyers, the criminal law's relationship to other professional norms concerning lawyers, how the application of the criminal law to lawyers' professional conduct might be considered excessively harsh in certain cases, and how the criminal law potentially deters lawyers from engaging in lawful, legitimate advocacy. This Article has made no claim, however, about the extent to which prosecutors' decision-making, or the criminal law generally, has actually influenced lawyers' professional work. It is unclear whether the criminal law's influence is precisely measurable. For example, although members of the bar sometimes complain that prosecutions of lawyers have a "chilling" effect—indeed, federal prosecutors have themselves made this argument about disciplinary prosecutions²⁹⁴—there is no reason to accept these complaints at face value, and it would be difficult, if not impossible, to gauge the extent to which criminal defense lawyers are in fact "chilled" from engaging in particular conduct because of the threat of a criminal investigation or prosecution. It should be clear, however, that there are various ways in which the criminal law may have some influence on lawyers, that the potential influence of the criminal law is substantial, and that, as institutional enforcers of criminal provisions that bear on lawyers'

293. *People v. Belge*, 372 N.Y.S.2d 798, 803 (Sup. Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

294. See *Communications with Represented Persons*, 59 Fed. Reg. 39,910, 39,911 (1994) (codified at 28 C.F.R. pt. 77) (proposed Aug. 4, 1994) (observing with respect to judicial decisions holding that disciplinary rules regulating communications with represented parties are applicable to federal prosecutors and their investigators that "the heightened threat of disciplinary action that accompanies the expansive application of these [disciplinary] rules [to federal prosecutors] has created a chilling effect on prosecutors responsible for directing these legitimate activities [i.e., preindictment interviews and undercover investigations]").

professional conduct, criminal prosecutors possess considerable power to determine the nature and extent of the criminal law's impact.

Nor has this Article argued, thus far, that overdetering lawyers is necessarily a bad thing. As the *Cintolo* decision suggests, it is far from self-evident why lawyers should be treated differently from others in this regard. Principles of accessorial liability and obstruction-of-justice provisions are no less vague when applied to other professionals—bankers and doctors, for example—than when applied to lawyers, and, thus, in theory have the same potential to “chill” other professionals' conduct. The complaints of the criminal defense bar may appear to be special pleading for lawyers; even the modest accommodation proposed by the Restatement, and certainly the dismissal of prosecutions in cases such as *Mark Marks* and *Stenhach*, beg the question of why lawyers should be treated differently from everyone else. Why shouldn't lawyers take particular care to avoid committing crimes, even if this means forgoing certain lawful conduct? Others approach the lines drawn by the criminal law at their own risk. Why not lawyers?

Several elements, taken together, distinguish lawyers' professional conduct from that of most others. First, lawyers are engaged in a pursuit that society believes to be particularly valuable. The professional participation of lawyers promotes the fair resolution of criminal cases and civil disputes and better enables “members of the public to secure and protect available legal rights and benefits.”²⁹⁵ That is why communications between an attorney and a client are privileged under the law of evidence, while most other communications among individuals are not. At least in the case of criminal defense lawyers, this professional undertaking has a constitutional dimension as well. Second, the very nature of this pursuit places lawyers at risk because they deal more often than others with individuals who are themselves engaged in wrongdoing, and, especially in the case of criminal defense lawyers, an aspect of the risk is that the lawyer's conduct or intentions may be misperceived.²⁹⁶ Third, lawyers are regulated in various ways other than by criminal law. Disciplinary rules and other professional norms are directed specifically at the conduct of lawyers, while open-tex-

295. Model Code of Professional Responsibility EC 7-1 (1981).

296. As previously discussed, there are various reasons for this risk. Because lawyers' conduct occurs largely in a confidential setting, only limited aspects of their conduct are made known to a prosecutor. Prosecutors, therefore, must rely on the accounts of individuals whose credibility may be questionable and draw inferences concerning aspects of the lawyers' conduct that cannot be known. Particularly in dealing with defense lawyers, who may be viewed as professional adversaries, prosecutors may be uncharitable in resolving credibility questions and drawing inferences. Cf. *Hubbard v. United States*, 514 U.S. 695, 717 (1995) (Scalia, J., concurring) (noting “a serious concern that the *threat* of criminal prosecution under the capacious provisions of [18 U.S.C.] § 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution”).

tured criminal-law provisions generally are not. Where professional norms are clear, they are presumptively worthy of respect. Particularly as they mediate between the interests of the lawyer's client and the interests of third parties and the adjudicative system, the professional norms do not deserve to be dismissed out of hand, as they sometimes are by prosecutors, as if they were the product of a self-protecting trade association.

If one accepts that the professional norms, particularly as embodied in the lawyer codes, are a reasonable articulation of the elements of effective legal assistance, then criminal prosecutions that are in tension with professional norms should be a cause for concern. Depending on how the criminal law is understood, it may become difficult for a lawyer to be effective, and thus serve the role that society and the Sixth Amendment envision, while avoiding all risk. This is very different from, for example, the situation of a surgeon who is concerned about the risk of being prosecuted for negligent homicide as a result of an unsuccessful medical procedure. There is a risk that prosecutors and juries, lacking expertise in medical procedure, will make mistakes, causing a doctor to be punished criminally when he does not deserve to be. But there is no reason to assume that if doctors who perform surgery take particular care to avoid this risk, they will be discouraged from complying with established norms of the medical profession that describe how to provide medical services effectively.

This Article offers two proposals to address the danger that the criminal law may overregulate lawyers. The first, like the Restatement provision, is directed at judges' interpretation of the criminal law. The second is directed at prosecutors' exercise of discretion.

A. *Interpreting Criminal Provisions*

When interpreting provisions that are not clear about whether they proscribe the professional conduct that is in issue in a case, courts should be more accommodating of professional norms than the Restatement contemplates. Courts are not precluded by traditional techniques of statutory construction from adopting limiting constructions of the criminal law in cases involving lawyers. Courts regularly craft laws to fill in the gaps of open-textured criminal provisions and legislatures contemplate that they will do so. As Dan Kahan has demonstrated, federal courts underutilize the rule of lenity precisely because they have criminal lawmaking authority.²⁹⁷ There is no reason for courts to leave it to prosecutors and juries to draw these lines.

The Supreme Court's interpretation of federal extortion law to accommodate elected officials' campaign finance activity serves as an

297. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345.

analogy. In *McCormick v. United States*,²⁹⁸ the Court held that a public official could not be convicted under the Hobbs Act for accepting a campaign contribution with the knowledge that the contributor expected his official conduct to be influenced by the contribution. It recognized that because fund raising is part of an elected official's everyday business, and officials regularly act for their constituents' benefit, elected officials would face an unavoidable risk of prosecution, with the outcome turning solely on the jury's assessment of the parties' intentions. The Court concluded that "[i]t would require statutory language more explicit than the Hobbs Act contains to justify" this result.

There is no reason why criminal law should be more accommodating of political fund raising than of criminal defense advocacy or other areas of legal practice. Both are examples of socially desirable conduct that would be easily chilled by a criminal provision that hinged primarily on the actor's state of mind, because lawful conduct is easily susceptible to erroneous inferences regarding the actor's intent or knowledge. When a legislature seeks to criminalize conduct that is deemed to be professionally desirable by the legal profession and the courts (which generally promulgate the lawyer codes), the legislature should do so clearly, and when it does not do so clearly, it is fair to presume that it did not intend to do so at all. A similar presumption is no less appropriate in addressing lawyers' professional conduct that would reasonably be understood to be consistent with the professional norms, even when the professional norms are subject to different understandings or are not firmly rooted in mandatory provisions of the lawyer codes. There is no reason to believe that legislatures generally intend for uncertain questions of professional conduct to be resolved by prosecutors and juries through the application of open-textured criminal provisions, rather than by courts through the promulgation or interpretation of disciplinary rules. Accordingly, drawing on the example of *McCormick*, courts should require clear statutory language before interpreting a criminal provision to reach lawyers' professional conduct, at least where the conduct comprises traditional advocacy in accordance with a plausible construction of the professional norms and the line between innocence and guilt therefore turns exclusively on the lawyer's intentions, which a jury can determine only inferentially.

B. *Exercising Prosecutorial Discretion*

To date, there does not appear to have been significant public discussion either among prosecutors themselves or between prosecutors and other representatives of the organized bar concerning the exercise of prosecutorial discretion in cases involving lawyers' professional

298. 500 U.S. 257 (1991).

conduct. It may be assumed that prosecutors' decisions about whether to accuse a lawyer of criminal wrongdoing, or to investigate or prosecute a lawyer, are made on an ad hoc basis, as are most decisions of this nature. Because the prosecution's deliberative process is not public, and often the results (e.g., a decision not to investigate or prosecute) are not publicly stated, it cannot be discerned whether prosecutors are generally inclined to defer to the disciplinary process in cases in which lawyers engaged in questionable conduct. Perhaps most prosecutors give lawyers the benefit of the doubt. But there have been enough cases in which the prosecution's factual allegations or legal theories were questionable to make clear that not all do so.

There is not much that judges or anyone else can do to influence prosecutors in this area. Criminal prosecutors have vast, and largely unreviewable discretion to decide whom to investigate, what investigative techniques to employ, whom to charge, and what charges to bring. A court is unlikely to intervene until late in the process, after criminal charges are filed, and even then, its authority is limited. Thus, it is largely left to prosecutors to decide how the criminal law will deal in general with lawyers and in particular with lawyers who act in ways that may be justified by the norms ordinarily applicable to lawyers' professional conduct. Prosecutors should proceed with restraint in addressing areas of lawyers' professional conduct where the dictates of open-textured criminal provisions such as those dealing with accomplice liability and obstruction of justice are in tension with understandings embodied in other sources of professional norms such as the lawyer codes. Prosecutors should consider the two dangers on which this Article has focused. The first is the danger of overcriminalization—that lawyers may be prosecuted in cases where their conduct is wrongful but criminal punishment is nevertheless undeservedly harsh in light of the criminal law's lack of clarity and the availability of professional justifications for the proscribed conduct. The second is the danger of overdeterrence—that, out of fear of an investigation or conviction, lawyers will avoid certain professional conduct that is lawful and professionally praiseworthy.

These problems are not entirely avoidable given the existence of multiple sets of less-than-clear laws or standards, including those embodied in criminal law and lawyer codes, bearing on lawyers' professional conduct, as well as the existence of multiple enforcers of professional standards.²⁹⁹ But suppose that all the sources of professional norms were integrated and that a single agency was responsible for enforcing provisions of law—be they criminal, civil, or disciplinary provisions—applicable to lawyers. What would be the characteristics

299. Cf. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69 (1995) (arguing that the existence of multiple regulators leads to underenforcement of professional norms relating to federal prosecutors).

of a rational body of law, rationally enforced? The answers might provide some guidance to prosecutors even under the present regime.

Integrating the law and ethics of lawyering would allow the law more clearly to embody rational distinctions between criminal law and prophylactic disciplinary provisions that establish, in Professor Coffee's term, a "penumbra" around the criminal law.³⁰⁰ While criminal conduct should be subject to disciplinary sanctions, disciplinary violations should not generally serve as the predicate of criminal prosecutions. For example, the disciplinary prohibition on assisting clients' criminal conduct should be broader than the criminal prohibition, not the other way around.³⁰¹ The criminal law should set a standard of conduct independent of lawyers' ethical or fiduciary obligations.

Integrating the processes by which the law and ethics of lawyering is enforced would permit enforcement agencies to reserve criminal prosecutions for cases in which the lawyer's misconduct was clearly wrongful. In a case where there was uncertainty, the propriety of the lawyer's conduct would be resolved in a disciplinary proceeding rather than a criminal prosecution. Resolving factual ambiguities in disciplinary proceedings would reduce the risk of overdeterrence, because lawyers would have less need to refrain from conduct that is lawful and professionally desirable to avoid the risk of an erroneous criminal investigation or prosecution; resolving legal ambiguities in disciplinary proceedings would reduce the risk of overcriminalization by providing courts an opportunity outside the criminal context to clarify the scope of the criminal law while avoiding the criminal prosecution of lawyers for conduct that does not deserve such harsh treatment given the then-unresolved state of the law. When the ambiguity was resolved against the lawyer, he would be disbarred, suspended, or otherwise sanctioned in disciplinary proceedings for the commission of a crime, and the disciplinary sanction would satisfy the purposes of criminal punishment.³⁰²

300. See John C. Coffe, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1887 (1992).

301. See Hazard et al., *Ethics of Lawyering*, *supra* note 66, at 676-77 (asserting that the lawyer's responsibility to refrain from aiding a client in illegal acts is more stringent due to DR 7-101(B)(2)); Green, *Zealous Representation*, *supra* note 182, at 716 (stating that lawyers should have the discretion not to approach the line of the criminal law).

302. From the perspective of lawyer regulation, disciplinary sanctions are not traditionally regarded as punishments but as measures to protect the public from an unqualified lawyer, which is why a lawyer who has been convicted of a crime and punished criminally may fairly be subject to a disciplinary sanction. See Bradway, *supra* note 113, at 22 & nn.47-48 (noting that courts have held that a disbarment proceeding "is not a criminal matter" but is undertaken "for the purification of the profession"). From the criminal law's perspective, however, a disciplinary sanction such as disbarment should surely be viewed as fulfilling the purposes of criminal punishment since it extracts significant cost, expresses condemnation of the lawyer's conduct, and deters future professional misconduct. Cf. Dan M. Kahan, *Punishment Incommensurability*, 1 Buff. Crim. L. Rev. 691 (1998) (arguing that penalties, in con-

Given the disaggregation of both the law and the enforcement mechanisms relevant to lawyers' professional conduct, dealing with lawyers' criminal conduct rationally may be difficult. Under the present regime, professional ethics will not always create a penumbra around the criminal law, either because the criminal law may be read to incorporate whatever restrictions are embodied in ethics rules or because the drafters of ethics rules, believing that the criminal law is already too restrictive, are reluctant to impose further restrictions by means of ethics rules. Further, a disciplinary proceeding will not always be a realistic alternative to a criminal prosecution in a case where the facts or law are unclear, because the disciplinary agency may not have the same access to evidence as a criminal prosecutor or may be unwilling to expend limited resources in an ambiguous case. Thus, a prosecutor may perceive that the only feasible way of regulating the lawyer is through a criminal prosecution.

Even under the present regime, however, prosecutors should not invoke the criminal law as a way of resolving disagreements within the legal profession concerning how lawyers should properly act on behalf of clients or as a way of choosing among competing conceptions of the private lawyer's appropriate professional role. It is a questionable and highly controversial venture even for prosecutors unilaterally to make the ethical rules governing their own conduct, as they have done selectively.³⁰³ While the open-textured criminal provisions dealing with accessorial liability and obstruction of justice were not intended to incorporate the philosophy of the American Bar Association or the National Association of Criminal Defense Lawyers, neither were they intended to incorporate the philosophy of the Attorney General or the District Attorney.

CONCLUSION

The criminal law has significance in regulating lawyers' professional conduct both because it provides an effective means of enforcing certain professional norms and because it establishes or influences the content of certain professional norms. The criminal law's regulatory role is most interesting, and potentially troubling, in situations where the criminal law points lawyers in one direction but other professional norms, such as those embodied in the lawyer codes, appear to point

junction with fines and community service, provide an acceptable alternative to prison); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996) (describing how sanctions can be reformed to make them a feasible alternative to imprisonment).

303. See generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 Geo. Wash. L. Rev. 460, 486-89 (1996) (arguing that the process by which the Department of Justice promulgated its regulation governing communications with represented individuals suffered from a lack of objectivity on the part of the government lawyers responsible for the regulation).

lawyers in the opposite direction. This problem has drawn attention from the American Law Institute, the criminal defense bar, and courts, among others, without anything approaching a consensus emerging. This Article has offered two modest, and by no means complete or completely satisfying, responses. First, courts should interpret open-textured criminal provisions to accommodate professional conduct that is consistent with a reasonable understanding of the professional norms, thus putting the burden on the legislature to manifest its intent to forbid such conduct. Second, prosecutors should exercise restraint in conducting criminal investigations and prosecutions of lawyers based on factually or legally ambiguous conduct.