

1968

# Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course

Monroe H. Freedman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](http://scholarlycommons.law.hofstra.edu/faculty_scholarship)



Part of the [Contracts Commons](#), [Ethics and Professional Responsibility Commons](#), and the [Legal Education Commons](#)

---

## Recommended Citation

Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. Legal Educ. 569 (1968)

Available at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/7](http://scholarlycommons.law.hofstra.edu/faculty_scholarship/7)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# LAW SCHOOL DEVELOPMENTS

Once a year this department will carry figures on law school registration. In addition it will provide a medium for the description of experiments in curriculum, teaching method, and administration. Like "comments," the typical law school development note will be characterized by brevity and informality; unlike them, it will be descriptive rather than argumentative and will deal primarily with devices which have been tested in actual operation. As a general rule, the authors will gladly answer inquiries and, to the extent available, upon request supply copies of materials referred to.

## PROFESSIONAL RESPONSIBILITY OF THE CIVIL PRACTITIONER: TEACHING LEGAL ETHICS IN THE CONTRACTS COURSE

MONROE H. FREEDMAN \*

In two earlier papers I have written about the professional responsibility of the attorney in criminal practice.<sup>1</sup> Surprisingly, a number of intelligent and experienced lawyers have suggested that problems of the same kind and complexity do not arise, at least with the same frequency, in the work of the civil practitioner. This is a serious misconception, although there are certainly important differences in the civil practitioner's role. For example, unlike the criminal defense lawyer, the civil practitioner does not have the same problems relating to the presumption of innocence, the constitutional right to counsel, and the constitutional privilege against self-incrimination.<sup>2</sup>

Similarly, unlike the prosecutor, the civil practitioner is not faced with the weighty problems of exercising discretion regarding the initiation of

\* Professor of Law, National Law Center, George Washington University. A.B., 1951, LL.B., 1954, LL.M., 1956, Harvard University. This paper was originally prepared for presentation at the National Conference on Education in the Professional Responsibilities of the Lawyer, at the University of Colorado Law School, June 11, 1968.

<sup>1</sup> Freedman, *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich.L.Rev. 1469 (1966), reprinted, Hall & Kamisar, *Modern Criminal Procedure* 783 (West, 1966), reprinted, N.Y.L.Jour., Aug. 23-24, 1966, p. 1; Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 Gtwn.L.Jour. 1030 (1967), reprinted, 3 Cr.L.Bull. 554 (1967), reprinted, 4 Trial 34 (Dec./Jan., 1967-1968). See also, Freedman, Book Review: Carlin, *Lawyers' Ethics*, 16 Amer.U.L.Rev. 177 (1966), reprinted, 38 N.Y. State Bar Jour. 552 (1966).

<sup>2</sup> The civil practitioner's work sometimes overlaps the criminal law area, e. g., in cases of tax fraud, anti-trust violations, and conspiracies to fix prices in government bids. In those cases, it appears, no civil practitioner would seriously consider informing the authorities of the "announced intention of a client to commit a crime," referred to in Canon 37. Cf. Freedman, *supra* n. 1, 64 Mich.L.Rev. 1469, 1478. Nor does it appear that professional representation of such felons is thereafter terminated. Cf. Canon 16.

prosecution and similar matters that present unique difficulties in professional responsibility for the prosecutor.

Even so, the civil practitioner is frequently confronted with a significant number of difficult ethical problems, many of which are not identified as such in the day-to-day pressure of practice, and most of which have been rarely raised, if at all, in law school classrooms. The purpose of this paper will not be to resolve these problems, but to identify some of them and to indicate how they can be brought to the attention of law students in the first-year course in Contracts. The discussion will relate to my Contracts course, for which I use my own casebook.<sup>3</sup> However, similar problems can be readily introduced through any of the standard Contracts casebooks.

Essential to understanding the nature and complexity of problems of professional responsibility, is an appreciation of the adversary system as the framework within which justice is administered and within which the lawyer functions. The adversary system presupposes that the most effective means of determining truth is by placing upon a skilled advocate for each side the responsibility for investigating and presenting the facts from a partisan perspective. Thus, the likelihood is maximized that all relevant facts will be ferreted out and placed before the ultimate fact-finder in as persuasive a manner as possible. In this way an objective, impartial end is sought through self-interested partisanship, and thereby the attorney, in Mr. Justice Harlan's words, "of necessity may become an obstacle to truthfinding in fulfilling his professional responsibilities."<sup>4</sup> It is this anomaly that creates some of the most vexing problems of professional ethics, but which, at the same time, might be most important to keep in mind in attempting to resolve them.

Early in the course, therefore, I try to suggest to the student the complexity of the lawyer's role as an advocate in an adversary system, emphasizing the creative responsibilities and the limitations that that system places upon him, and also the essentially ethical nature of the legal rule-making process in which the adversary plays his part:<sup>5</sup>

In the course of the first year in law school, it should become apparent to the student that "the law" is substantially more than a set of rules or principles, to be mechanically memorized and automatically applied. Unquestionably, there are rules of law. But whether the rule that apparently governed one or more cases yesterday will be held determinative of a new case tomorrow, is one of the problems that makes the law an intellectual adventure. To learn "the rules" is an essential, but elementary, aspect of legal training. To attempt to understand the functional value of any given rule or set of rules, and to carry this learning forward into new problem areas, is the real challenge of legal study and practice.

\* \* \*

. . . Bear in mind that in every litigated case, at least two members of the bar disagree as to the controlling rules, and not infrequently there is a dissenting view on the court as well.

<sup>3</sup> Freedman, *Cases on Contracts* (2 ed., 1967); cited hereafter as Casebook.

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 514 (1966) (dissenting opinion).

<sup>5</sup> Casebook, pp. 7-11.

One reason for this uncertainty in applying legal rules lies in the unfortunate way that the rules have of impinging upon each other's territory. As Justice Holmes observed:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." [Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) ]

Thus, logical consistency may create problems rather than solve them. As much as we may prize "neutrality" in decision-making, logic alone may be neutral to the point of impotency in solving the problems of justice. In Felix S. Cohen's words:

"To the cold eyes of logic the difference between the names of the parties in the two decisions bulks as large as the difference between care and negligence. The question for the judge is: 'Granted that there are differences between the cited precedent and the case at bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?'" [Cohen F.S., *Ethical Systems and Legal Ideas* 36-37 (1933) ]

As this passage suggests, legal rules must be applied in varying factual contexts, and the significance to be accorded to factual variations must depend upon the social functions that the rules were designed to serve, and the ethical values that they embody. . . .

\* \* \*

In addition to indicating that learning legal rules is only a small part of legal analysis, the foregoing discussion should suggest the creative responsibility of the attorney in the development of those rules. The lawyer must decide not only what cases to cite in his brief, and what rules to support or attack, but also whether to advise his client to litigate the case at all. Within the limits of the adversary system, therefore, you, as counsel, will take a hand in shaping the law in the area in which your case arises. In your study of the cases that follow, note the success or failure of counsel in the exercise of this creative responsibility.

The "limits of the adversary system" referred to in this note can be illustrated in a number of ways. For example, *Hochster v. De la Tour*,<sup>6</sup> is the leading case for the rule that when one party to a contract repudiates it, the other party may sue immediately, even though the time for performance has not yet arrived. In arguing that case, Hugh Hill, Barrister for the defendant, ignored the prematurity of the suit. Instead, he contended that repudiation was an offer to rescind the contract, and that the plaintiff had accepted this offer to rescind by taking another job, even though at less income. This argument by Hill has been widely criticized by commentators on the *Hochster* case. Professor Corbin<sup>7</sup> for example, says that Hill thereby lost

<sup>6</sup> 3 El. & Bl. 678, 118 Eng.Rep. 922 (1853), Casebook, pp. 1066, 1074.

<sup>7</sup> IV Corbin, *Contracts* § 960.

his case and contributed to the development of bad law as well. Instead, says Professor Corbin, Hill should have argued that upon repudiation by the defendant, the plaintiff was at once legally privileged to take another job (rather than having to hold himself ready and willing to render the agreed service under the repudiated contract) but that the plaintiff could not bring suit against the defendant prior to the date set for performance under the contract.

It is, of course, beyond dispute that Hill lost his case. Whether another argument would have better served his purpose as an advocate for a client in a law suit, is another matter. If Hill had made the argument recommended by Professor Corbin, a better rule of law might have been adopted by the court, but Hill's client, having won only a non-suit, would thereafter have been liable to a new action.<sup>8</sup> On the other hand, if Hill had prevailed on the argument he in fact made, his client would have escaped liability altogether. Thus, counsel's partisan interest induced him to refrain from making a particular argument to the court, and thereby contributed to the establishment of a "bad" rule.<sup>9</sup>

None would contend that it is proper for an attorney to argue for a rule of law that is contrary to his client's interests.<sup>10</sup> Would it then be correct for an attorney to refrain from citing a relevant statute or case that holds against his client's position? There is always at least one student who will answer this question affirmatively.<sup>11</sup> The next question might be: How far are you prepared to go, as an officer of the court, to further your client's cause at the expense of full candor to the court?

For example, the first case in the Casebook involves an action against a doctor by a former patient whom the doctor had guaranteed to sterilize through a vasectomy; seventeen months after the operation, the plaintiff's wife gave birth to a child, and the plaintiff sought damages for the expenses that he had sought to avoid through the operation.<sup>12</sup> In such a case, if the lawyer knows from the beginning that the operation was successful, can he properly take the case in hope of achieving a settlement before the other side finds out? Is this different from taking a case that is barred by the statute of limitations, in the hope that the other attorney will not realize it? If the lawyer discovers, only after negotiations have progressed substantially with the other attorney, that his client is in fact sterile, should he withhold this information and continue negotiating? Is the case significantly different where the husband is not in fact sterile, but where the plaintiff's lawyer dis-

<sup>8</sup> A non-suit is not a judgment on the merits, and therefore is not *res judicata*. II Freeman, *Judgments* §§ 741, 755, (1925).

<sup>9</sup> The rule of *Hochster v. De la Tour* is, in fact, a perfectly sound one. However, this is not the place to argue that point, nor does the correctness of the rule detract from the usefulness of the case as an illustration.

<sup>10</sup> Cf. *Davis v. Jacoby*, 1 Cal.2d 370, 34 P.2d 1026 (1934), Casebook p. 64, where neither party raised the factual issue of a decedent's mental incompetence—the defendants because they were relying upon his will, and the plaintiffs because they were relying upon a contract with him.

<sup>11</sup> Those who consider the student's answer to be clearly wrong will be interested in Levanthal, *What the Court Expects of the Federal Lawyer*, 27 Fed.Bar Assn. Jour. 1, 4 (1967). Judge Levanthal concludes that an attorney for the government must cite adverse authority, but expresses doubts as to whether counsel for a private party has the same obligation.

<sup>12</sup> *Shaheen v. Knight*, 11 D. & C.2d 41 (Pa., 1957), Casebook p. 1.

covers that another man, as well as the husband, had sexual relations with the wife after the operation? Should the lawyer disclose this information to the defendant's attorney? If the wife lies on deposition or in court, and denies sexual relations with anyone other than her husband, should the attorney reveal to the other side or to the court that his client's wife is a perjurer and an adulteress?

A common technique for avoiding difficult ethical issues is to argue that the lawyer never really "knows" the truth, and that he therefore need never feel any moral compunction to contradict an apparent perjury on the part of his client. For example, the lawyer cannot really "know" that a man other than her husband actually had sexual relations with the wife, even if she says so in the lawyer's office. After all, she might have said this only out of a desire to spite her husband, or perhaps to lay the basis for a false claim against the putative father. Similarly, it is often contended that the criminal defense lawyer never "knows" that his client is guilty until and unless the jury returns a guilty verdict. For this reason, the following case is useful.<sup>13</sup> B borrows a gun from L. L subsequently demands its return, explaining in obvious anger that he needs it to kill someone who has wronged him. B returns the gun, L uses it to commit the murder, and B is prosecuted as an accessory before the fact. Whatever defenses B might have, few would seriously contend that he did not "know" that L would use the gun to commit a murder. Similarly, no experienced lawyer would advise a client (for example, in a case of receiving stolen goods) that he can act without risk because he does not really "know" what he has been expressly told or can reasonably infer. The essential point is, of course, that there is such a thing as knowing to a legal or to a moral certainty. To maintain the contrary is legally unsound and morally irresponsible.

In discussing the factors that enter into a decision to settle a case at a particular figure, a number of ethical questions can be raised. In the case of *Hawkins v. McGee*,<sup>14</sup> a surgeon was sued for having failed to make a deformed hand one hundred percent perfect, as he had allegedly guaranteed to do. The jury returned a verdict for \$3,000, the judge ordered a remittitur to \$500, and the plaintiff refused to accept it. On appeal, the court disapproved of instructions bearing upon the measure of damages, and ordered a new trial. Assume that just after this decision, counsel for the defendant calls counsel for the plaintiff to discuss settlement of the case. Would it be proper for the doctor's attorney to take advantage of delays in litigation to negotiate a settlement for less than the plaintiff could expect if the case were relitigated? For example, a recent opinion begins as follows:<sup>15</sup>

"This defendant is represented by an attorney whose associate frankly stated in the course of the current pre-trial hearings that he is "running a business." He indicated the generally known policy of his insurance carrier to offer payment in settlements of personal injury suits of sums less than what may reasonably be anticipated as the probable

<sup>13</sup> *State v. Farley*, Casebook p. 19. This case is a factitious one, written by Professor Alan Schefflin primarily to explore the justification and limits of the idea that promises should be fulfilled.

<sup>14</sup> 84 N.H. 114, 146 Atl. 641 (1928), Casebook pp. 12, 17.

<sup>15</sup> *Abramson v. Kenwood Laboratories, Inc.*, 223 N.Y.S.2d 1005 (1961), Casebook p. 1101.

recovery upon trial. I believe this purely business attitude to be inconsistent with public policy since liability insurance companies are not ordinary businesses. . . .

\* \* \*

“ . . . The carrier's refusal to cooperate and its insistence upon trial of a readily disposable litigation is to me evidence of bad faith where, as here, negligence and freedom from contributory fault are prima facie provable and the probable recovery quite disproportionate to the sum offered.”

Accordingly, the trial judge advanced the case on the docket so that it could be tried more promptly. This action was reversed on appeal,<sup>16</sup> thereby providing the defendant with more than a year of additional delay through the interlocutory appeal.

If we conclude that such tactics are permissible (they are, of course, universal) on the part of defendants' attorneys, what light does this throw on the related question of whether it is proper for a plaintiff's lawyer to advance his client money during the course of litigation? This is generally said to be improper,<sup>17</sup> but why should an attorney not help to relieve some of the pressure that his client is under to settle the case for reasons that result from faults in the administration of justice and that have no relation to the merits of the case?

Also raised in the context of the *Hawkins* case is the question of preparing witnesses. Most students appear to share the layman's misconception that there is something improper about coaching your own witness prior to his testifying in court. A thorough attorney, however, would not permit a client to take the stand without assisting him to present his testimony in as persuasive a manner as possible.<sup>18</sup> The inarticulate witness, for example, who can say of a painful and debilitating injury only that “it hurts bad,” must be helped to articulate precisely what the sensation is, where and when it occurs, and how it interferes with sleep, work, recreation, etc. Moreover, he should be rehearsed so that he remembers these details and can testify to them as persuasively as possible without the assistance in court of leading questions.

However, what about preparing a witness to respond to an apparently innocuous question in such a way as to get before the jury evidence that the lawyer knows the court should reject? Canon 22 is explicit on this: “A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility. . . .” At the same time, however, the client is entitled, under Canon 15, to the benefit of “any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.”

<sup>16</sup> 17 App.Div. 626, 230 N.Y.S.2d 247 (1962), Casebook p. 1103.

<sup>17</sup> See, e. g., *Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 190 N.E.2d 396, cert. denied 379 U.S. 931 (1964), where a lawyer was disbarred for advancing small sums as necessary living expenses to two railroad workers' wives who were his clients in suits against the railroad. The decision is criticized in the excellent article by Prof. Philip Shuchman, *Ethics and Legal Ethics*, 37 Geo.Wash.L. Rev. 244, 263-265 (1968). See also, *In re Ruffalo*, 390 U.S. 544 (1968).

<sup>18</sup> See, e. g., Morrill, *Anatomy of a Trial* 70-83 (1968).

In *Hawkins v. McGee*, the appellate court held that the proper measure of damages was the difference between the injured condition of the plaintiff's hand subsequent to the operation, as compared with the perfect hand that the doctor had promised him. The court went on to hold that the pain and suffering that the plaintiff had undergone in the operation furnished "no test of the value of a good hand." Thus, it would appear that the plaintiff's attorney would be precluded on retrial from making the jury aware of the pain and suffering that the plaintiff had undergone in the course of the operation.

What then if the plaintiff's attorney should ask him on direct examination, "Mr. Plaintiff, what is the value to you of a perfect hand, as compared with the injured hand you have?" The plaintiff might then be prepared to answer, "It would be worth it to me to go through a similar operation, if I thought it would cure me, even though I now know that the pain of such an operation is excruciating. I could feel it shooting up my arm like a terrible electric shock, and I screamed and screamed, but he just kept on cutting me."—What if the attorney is satisfied that the court "should reject" such evidence, and yet the attorney can devise a colorable argument in support of admitting it? Is the advocate's job to judge his client's case, or merely to present it as effectively as he can?<sup>19</sup>

In *Hawkins*, for example, the court on appeal also held that the proper measure of damages is "the value to [the plaintiff] of a perfect hand." It might well be contended, therefore, that the question as stated was entirely proper and that the answer was responsive. Of course, counsel might seek guidance from the bench prior to asking any question that might be objected to, but this certainly is not the general practice (perhaps because, contrary to the client's interest, this course suggests doubt in the lawyer's mind as to the correctness of his position). Does the proscription of Canon 22 therefore relate only to an attempt to introduce evidence for which counsel can devise no colorable argument in support of admissibility? As the illustration from *Hawkins* suggests, it would be the extraordinary case indeed in which imaginative counsel could not develop some colorable support for admissibility.<sup>20</sup>

Subsequent to reversal for retrial in *Hawkins v. McGee*, the doctor settled with the plaintiff for \$1400. His malpractice insurance carrier then refused to reimburse him, on the ground that his policy did not cover liability for breach of contract. How could the doctor have been protected against this result? His lawyer could have drafted the settlement and release agreement to make it appear to relate to a claim for malpractice, or he might have arranged for the plaintiff's attorney to file a new complaint for malpractice, which would then have been disposed of by settlement. Would it be ethical to attempt in this way to mislead the insurance company? If not, was it ethical for the insurance company's lawyers to rely on the technical distinction between malpractice and breach of contract, at least in a case in which the operative facts would have supported either cause of action, and

<sup>19</sup> On the obligation to make any contention that is "at least arguable and therefore not frivolous," see *Suggs v. United States*, 91 F.2d 971 (D.C. Cir. 1968).

<sup>20</sup> This point is made in the Casebook, p. 73, through an argument that the "no smoking" sign in the classroom can be construed to permit smoking in the classroom.



in which the plaintiff's choice of a contract action was very likely dictated by considerations having nothing to do with the substance of his claim?

Other defenses may be even further removed from the merits of a case. For example, is it ethical to plead the statute of limitations or the Statute of Frauds in defense of a claim that is otherwise entirely just and beyond honest dispute? Is such a statutory technicality, where it has no bearing on the admitted merits of the case, a "questionable" defense, forbidden by Canon 31, or is the lawyer nevertheless bound by Canon 15 to assert "any and every . . . defense" authorized by law?<sup>21</sup> If the latter, how can such a tactic be squared with the attorney's role as a participant in a search for truth and the pursuit of justice?

What of the case where the client has a claim that is provable according to rules of law, but is essentially unjustified? In *Sanders v. Pottlitzer Bros. Fruit Company*,<sup>22</sup> the plaintiff recovered on a contract that had been established by a series of negotiations in which numerous terms had been settled, but where both parties had anticipated that the final agreement would be reduced to a single writing that was never executed. If the plaintiff had confided to his attorney that he had not in fact considered himself to have been bound prior to execution of the final writing, would it have been improper for the attorney to take the case? It is true that the court ordinarily relies upon objective manifestations of intent to contract, but the essential truth that is thus sought is the subjective intent of the parties. Is it, then, the lawyer's duty, in the words of Canon 30, "to insist upon the judgment of the Court as to the legal merits of his client's claim," or would this, under the same Canon, "work oppression or wrong" against a defendant who had not really contracted?

If the lawyer takes the case in ignorance of his client's subjective intent, but finds out about it after the case is well under way, is his ethical obligation different? If the client should be asked on cross-examination about his subjective intent, should the attorney attempt to block the testimony (e. g., as irrelevant)? If the question is permitted and the client lies in response to it, what should the lawyer do? Should he argue the lie to the jury on summation as evidence in the case? Should he reveal the perjury to opposing counsel, to the court, and to the public prosecutor? In such a context, is it possible to reconcile the obligation of candor to the court and to other attorneys, which is required by Canon 22, with the obligation of confidentiality, which is required by Canon 37?

A further question that can be raised is whether it is ethical for an attorney to assist his client to do something that is not unlawful, but that is unconscionable. (Is there a difference between "unethical" and "unconscionable"?) For example, under Section 2-719(3) of the Uniform Commercial Code, it is "prima facie unconscionable" for a party to seek contractually to exculpate himself from liability for personal injuries caused by defects in goods that he is selling. Such clauses are nevertheless drafted. For one thing, a colorable argument might be made in a given case that the statutory provision is inapplicable or that it does not mean what it appears to say. Even if such an argument is not likely to be accepted by a court, the plaintiff's

<sup>21</sup> See also Canon 30.

<sup>22</sup> 144 N.Y. 209, 39 N.E. 75 (1894), Casebook p. 554.

attorney can never be certain of this. Accordingly, the presence of such a clause can be worth many thousands of dollars to the defendant in negotiating settlements. Moreover, the plaintiff's lawyer might overlook the statutory provision, or the plaintiff might well be induced to settle the case, in the light of the contract's exculpatory clause, without even consulting an attorney. Should such a clause be drafted with these considerations in mind? Certainly if some other lawyer should draft such a clause and later convince a court that the statutory language was inapplicable or did not mean what it appeared to say, the obligation of attorneys thereafter would be to provide their clients with the same protection wherever possible. Is not each client then entitled to his own day in court, without having to wait for some other lawyer to litigate the issue for someone else? Further, is the lawyer's responsibility toward his client different when adverse parties are commonly not represented by counsel, and there is therefore a *de facto* breakdown of the adversary system?

In discussing mitigation of damages, the question can be raised as to the extent of the attorney's obligation of candor to fellow members of the Bar. Assume you represent the plaintiff in an action for breach of contract. Your client has been unable to mitigate his damages. You negotiate an extremely favorable offer of settlement from the other attorney, and call your client to obtain his approval of it. He tells you that he is delighted to accept the settlement, particularly since he has just obtained a far better job, at a far better salary than he had under the broken contract. Can you properly continue to negotiate the settlement to a conclusion without revealing this fact to opposing counsel? What if you call to accept the offer of settlement, but opposing counsel asks directly whether the plaintiff has been successful in mitigating damages? Must you answer candidly, violating your client's confidences, and losing the settlement, or should you say that there has been no mitigation, and recover damages in the absence of legally cognizable injury? If to answer falsely constitutes a fraud on the other party, is it any less a fraud (ethically, if not legally) to negotiate the settlement, withholding the information simply because the question has not been asked? Is this case any different from representing the plaintiff in the hypothetical vasectomy case, where the plaintiff has been successfully sterilized? Is it different from representing the plaintiff who did not have the subjective intent to contract? Is it different from seeking compensatory damages in a case of libel *per se*, when there has in fact been no injury, or from seeking punitive damages in the absence of injury?

Finally, conflicts of interest may arise in various forms. [For example, an insurance policy may require that the insured accept legal representation by the company's attorneys. Assume that you are an insurance company attorney representing an insured defendant whose potential liability in the particular case might run as high as \$100,000, and the plaintiff offers to settle the case for \$10,000. If the policy limit is \$10,000, there may well be a conflict between the interests of the insured and those of the company. If the company should litigate the case, it can lose no more than the figure it will pay on the settlement proposal.<sup>23</sup> On the other hand, if the judgment is in excess of \$10,000, the insured would have to make a payment that could

<sup>23</sup> But see Casebook, p. 1102.

be entirely avoided by accepting the settlement. To whom does the attorney owe his primary allegiance, to the client he is representing in the particular litigation, or to the client who pays his salary throughout the year?

The same situation can be further complicated by confidential disclosures from the insured defendant to the company lawyer who is representing him. What if, in the course of the confidential relationship, the insured reveals to the attorney a fact that would restrict the company's liability or invalidate the insurance policy entirely?

The foregoing discussion has not been intended to suggest all of the ethical problems that can be raised in the first-year Contracts course, or to develop analytically any of the problems that have been raised. It should be clear at this point, however, that there are frequent and substantial ethical problems for the civil practitioner in his relations with the courts, with other attorneys, with adverse parties, and with his client. Moreover, these issues do not appear to have been settled satisfactorily by the Canons of Professional Ethics. Indeed, several problems seem in fact to be created, or at least to be brought into sharper focus, by self-contradictions in the Canons themselves.

Whether these problems are capable of definitive resolution may be open to question, but the effort should certainly be made. One thing that we do know from experience, is that ignoring the really tough questions of professional ethics in our law schools has produced a Bar that is largely indifferent to solving them, or that is incapable even of recognizing their existence. It is past time to stop concentrating upon such trivia as whether it is ethical to mail out Christmas cards to clients, and to stop dealing with the really important ethical issues with superficial generalities. The difficult task of answering hard questions will not be undertaken, it would seem, until an entire generation of law students is exposed to ethical problems in the classroom in a way that makes it clear to them that these issues are as important as the substantive law relating to damages, anticipatory breach, statutes of limitations and frauds, or written integration of contracts. If there are indeed answers to the ethical questions, we will not find them until we have succeeded in stimulating sufficient awareness of, and interest in, the questions themselves.