Zealous Representation: The Pervasive Ethic

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Chapter 4

REPRESENTATION; THE PERSVATIVE ETHIC

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§ 4.01 INTRODUCTION

Closely related to the concept of client autonomy is the lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability." This ethic of zeal is a "traditional aspiration" that was already established in Abraham Lincoln's day, and continues today to be "the fundamental principle of the law of lawyering" and "the dominant standard of lawyerly excellence."

Client autonomy refers to the client's right to decide what her own interests are. Zeal refers to the dedication with which the lawyer furthers the client's interests. The ethic of zeal is, therefore, pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations with "entire devotion to the interest of the client."

The classic statement of that ideal is by Lord Henry Brougham in his representation of the Queen in Queen Caroline's Case in 1821. In an early instance of "graymail," Brougham threatened to defend his client on a ground that would have cost the King his crown and might well have caused a revolution:

[In advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.]

Let justice be done — that is, for my client let justice be done — though the

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1 ABA CANONS OF PROF'L ETHICS 15 (1908).
4 GEOFFREY C. HAZARD & WILLIAM W. HODGE, THE LAW OF LAWYERING 18 (1988 Supp.) (emphasis in the original). The authors wrote this five years after the Model Rules were adopted. In their third edition, the authors changed the phrasing, but expressly equate "diligence" in MR 1.3 with zeal, for example, referring to "the basic duty of diligence (or zealfulness)." Id. at § 6.2 (3d ed. 2001).
5 VI(1) REPORT FROM THE CENTER FOR PHILOSOPHY AND PUBLIC POLICY 1, 4 (Winter 1984). "The prevailing notion among lawyers seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer." Patterson, supra note 3, at 918, 947. See also Wolfram, supra note 3, at 550 (citing In re Griffiths, 413 U.S. 717, 724 n.14 (1973)).
6 TRIAL OF QUEEN CAROLINE 8 (1821). The Queen was charged with adultery of which, as Brougham knew, she was undoubtedly guilty. If convicted, she would have been divorced from the King and stripped of her title. Brougham's speech was a threat to reveal publicly that the King had been secretly married to a Roman Catholic, which, by statute, would have caused him to forfeit the crown "as if he were naturally dead." Moreover, Brougham's threat was particularly potent because of the dangerous social and political unrest at the time. See Monroe H. Freedman, Henry Lord Brougham, Written by Himself; 19 GEO. J. LEGAL ETHICS 1213, 1215-17 (2006); Monroe H. Freedman, Henry Lord Brougham and Zeal, 34 HOFSTRA L. REV. 1319 (2006).
heavens fall. This is the kind of representation we would want as clients, and it is what we feel bound to provide as lawyers. The rest of the picture, however, should not be ignored. In an adversary system, there is an advocate on the other side and an impartial judge over both.\(^7\) Despite the advocate's argument, therefore, the heavens do not really have to fall — not unless justice requires that they do.

The obligation of "entire devotion to the interest of the client [and] warm zeal in the maintenance and defense of his rights" is not limited to the lawyer's role as advocate in the courtroom.\(^8\) Undoubtedly, some of the most important, dramatic, and controversial issues of zealous representation arise in litigation, and these will be a principal focus of this chapter. It is important to remember, however, that any lawyer who counsels a client, negotiates on a client’s behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind. When a contract is negotiated, there is a party on the other side. A contract, a will, or a form submitted to a government agency may well be read at some later date with an adversary’s eye, and could become the subject of litigation. The advice given to a client and acted upon today may strengthen or weaken the client’s position in contentious negotiations or in litigation next year. In short, it is not just the advocate in the courtroom who functions in an adversary system, and it is not just the client currently in litigation who may both require and be entitled to “warm zeal in the maintenance and defense of his rights.”

\(\S\) 4.02 MORAL ACCOUNTABILITY IN CHOOSING CLIENTS

The obligation of zealous representation begins after the lawyer has decided to undertake responsibility for the client’s cause. What obligation does the lawyer have to accept every client who comes in the door?

Discussions of the ethic of zeal frequently assert that the lawyer has no choice regarding the acceptance of a client or a cause. Consider, for example, David Dudley Field’s defense of his representation of clients who have been called (with undue romanticism) robber barons. Field argued that he could not properly be criticized for his choice of clients because a lawyer is “bound to represent any person who has any rights to be asserted or defended.”\(^9\)

Similarly, Judge George Sharswood wrote that “[t]he lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.”\(^10\) Although such statements are frequently accepted without criticism, they do not represent either professional practice or professional rules. Judge Sharswood’s lectures on legal ethics were the principal source for the ABA’s Canons of Professional Ethics (1908), but Canon 81

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7 See Chapters 2 and 9.
8 As Professor David Luban has written, “The ethic of zealous representation is generally taken as a credo by lawyers in nonadvocate roles just as much as by courtroom lawyers.” DAVID LUBAN, LAWYERS AND JUSTICE 11 (1988).
9 DAVID LUBAN, LAWYERS AND JUSTICE 7 (1988).
10 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 83–84 (1854), quoted in DAVID LUBAN, LAWYERS AND JUSTICE 10 (1988).
expressly rejected the view that a lawyer is bound to accept any client who requests his services:

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, [and] what cases he will contest in Court for defendants.

Similarly, the Model Code stated that “[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client,”11 and the Model Rules state that “[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.”12 In fact, lawyers in private practice refuse to represent people for a variety of reasons, most commonly because the would-be client cannot afford the lawyer’s fees.13

If one begins with the erroneous notion that lawyers cannot exercise choice regarding clients, there is considerable compulsion to conclude that lawyers must have discretion regarding what rights are to be asserted. Otherwise, the lawyer’s working life could be devoted to using means that the lawyer regards as repugnant in order to achieve ends that the lawyer regards as repugnant on behalf of clients with whom the lawyer does not want to be associated. In order to avoid that result, Sharswood argued that the lawyer must not use lawful means that the lawyer believes would have unjust consequences. For example, Sharswood contended that a lawyer should refuse to plead the statute of limitations in defense of a debt that the client in fact owes.14

But Sharswood had it backwards. No lawyer is required to represent a client who owes a debt but seeks to resist paying it solely on the ground that the statute of limitations has run. The lawyer who is offended by such a cause can simply decline to take it on. If a lawyer chooses to commit herself to serve that client, however, then the lawyer is duty-bound “to seek the lawful objectives of [the] client through reasonably available means permitted by law,”15 and to “take whatever lawful and ethical measures [that] are required to vindicate a client’s cause or endeavor.”16 It is not for the lawyer to unilaterally deprive the client of a right that the legislature has seen fit to provide and that the courts are prepared to enforce.

We want to emphasize, however, an argument made in the previous chapter. The lawyer’s decision to accept or to reject a client is a moral decision for which the lawyer can properly be held morally accountable.17 Indeed, there are few decisions

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11 EC 2-26.
12 MR 6.2 cmt. [1]. The context is a rule that requires the lawyer to accept a court appointment “except for good cause.”
13 MR 6.1 urges the lawyer to “aspire” to provide at least fifty hours of pro bono services to people of limited means.
14 SHARswooo, supra note 3.
15 DR 7-101(A)(1).
16 MR 1.3 cmt. [1].
17 Freedman did not always feel this way. In 1975, Freedman argued that it is wrong to criticize a
a lawyer makes that are more significantly moral than whether she will dedicate her intellect, training, and skills to a particular client or cause. Thus, even the "purely financial" decision to accept only clients who can afford a $500-an-hour fee, and to turn away all others no matter how just their causes might be, is inescapably a moral decision.

One of the most important considerations in deciding to accept or reject a client is that the lawyer, in representing the client, might be required to use tactics that the lawyer finds offensive. For example, a lawyer might choose not to accept a rape case because of the likelihood that defending the case would require the lawyer to attack the character of a rape victim in order to discredit her testimony.19

The proper solution to the lawyer's moral objections to using such tactics, however, is not for the lawyer to take the case and then to deny the client his rights; rather, the lawyer should refuse to take the case.20 Also, the lawyer who believes that certain rights should not be recognized because they are morally unjustifiable, could be a persuasive voice in supporting legislation to change the applicable law.

Notwithstanding our belief that everyone is entitled to zealous representation, the authors would decline to undertake certain cases. For example, Freedman stopped representing clients accused of rape, because he did not want to have to engage in the sort of advocacy to which those clients are entitled.21 Smith would decline to represent police officers accused of brutality in the course of duty.22 However, both authors believe that public defenders ought not decline any case except on grounds of conflict of interest. The moral justification for public defenders representing all clients, no matter the charge or circumstance, is the right of the indigent accused to the same skill, zeal, and relationship of trust and confidence that

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18 The importance of accountability has been expressed in the following way: "Moral justification ... cannot be exclusive or hidden; it has to be capable of being made public. ... John Rawls has set it forth most explicitly, under the name of publicity, as a formal constraint on any moral principle worth considering. According to such a constraint, a moral principle must be capable of public statement and defense." Sissela Bok, LYING 92 (1978).

19 See Chapter 7, infra.

20 Lawyers can and do avoid certain general areas of practice altogether because of the nature of the representation or the associations it requires. You will find, for example, that clients lie, steal, and even kill other people out of pure greed. If you don't want to be associated with such clients, you should not go into corporate practice. See, e.g., William H. Shaw & Vincent E. Barry, MORAL ISSUES IN BUSINESS (4th ed. 1989).

21 For a similar view, see Cookie Ridolfi, Statement on Representing Rape Defendants, in LEGAL ETICS (Deborah L. Rhode & David Luban eds., 2004) (discussing her distress at defending rape cases after obtaining an acquittal for a client who raped again).

fee-paying clients can expect. 23

It has done no good to write rules that attempt to insulate lawyers from criticism for the clients and causes they represent. 24 Lawyers who have represented unpopular clients and causes have in fact been vilified, even by other lawyers and judges. 25 Nevertheless, the concern that people and causes will go unrepresented because lawyers fear criticism has proved to be baseless. 26 Despite predictable public condemnation, lawyers have come forward to defend the "meanest man in New York," 27 a Nazi death-camp guard, 28 and Osama bin Laden (within days of the destruction of the World Trade Center). 29 Moreover, in the unlikely event that no lawyer is available to represent someone because of the repugnance of the client or cause, an available solution is the appointment of an attorney by the court. 30

§ 4.03 THE NEED TO EARN A LIVING AS A MORAL CONSIDERATION

As the Supreme Court has noted, the "real-life fact [is] that lawyers earn their livelihood at the bar." 31 This is not a recent revelation nor a reason for embarrassment. More than a century earlier, Abraham Lincoln consistently referred to his law practice as a business rather than a profession. 32

Supporting oneself and one's family is a moral responsibility. Accordingly, any  

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24 See, e.g., MR 1.2(b): "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." As a practical matter, a rule forbidding criticism of a lawyer for representing a particular client or cause could not be enforced against lawyers, much less against citizens in general. U.S. CONST. amend. I.
26 Far more realistic, unfortunately, is the problem that justice is being denied to people for no better reason than that they cannot afford to pay lawyers' fees. See, e.g., MARVIN FRANKEL, PARTISAN JUSTICE ch. 9 (1980).
29 See There Is No Such Thing as Absolute Evil: Interview with Notorious Lawyer Jacques Verges, SPIEGEL ON INTERNATIONAL, Nov. 21, 2008, available at http://www.spiegel.de/international/world/0,1518,591048,00.html (lawyer who defended "Carlos the Jackal," Nazi war criminal Klaus Barbie, and former Khmer Rouge leader Khieu Samphan stating that he "would accept Osama bin Laden as a client").
30 See, e.g., MR 6.2; Rubin v. State, 490 So. 2d 1001 (Fla. Dist. Ct. App. 1986) (court-appointed defense attorney held in contempt for refusing to proceed after having been denied leave to withdraw); Sanborn v. State, 474 So. 2d 809 (Fla. Dist. Ct. App. 1985) (leave to withdraw denied to court-appointed defense attorney).
decision to turn down legal business for moral reasons has to be balanced against the effect that decision might have on one's ability to earning a living. To recognize that there are moral concerns on both sides of the issue serves to emphasize that the choice can be an extremely difficult one.

We celebrate lawyers who take on unpopular clients and causes, and rightly so. But we should also celebrate lawyers who turn down clients for reasons of conscience. One difference is that representing a notorious client can make a lawyer's reputation and career; turning down a client never does.

Ralph Temple was a partner in a law firm that was barely making enough money to stay in business. One day, one of the partners came in with an unusually lucrative client. In the midst of general jubilation, Temple raised the question of whether the firm really wanted to represent this client — the U.S. lobbyists for a dictator notorious for torture and murder of civilians. There was an extended and heated debate. Ultimately, the client was turned down. The firm broke up for financial reasons a year later. Temple never regretted his decision.

We do not believe that Temple's decision to turn down the lobbyists for the dictator was any less noble than, say, Clarence Darrow's decision to represent Leopold and Loeb, Michael Tigar's decision to represent the Nazi death-camp guard, John Demjanjuk, or Clive Stafford Smith and Joe Margulies' decision to represent Guantanamo detainees accused of being Al Qaeda fighters. Certainly, Temple's decision to turn down the lucrative client was costly and contributed nothing to Temple's fame as a lawyer.

Associates, of course, have less power than partners to make this kind of decision and are more vulnerable if they raise issues of conscience. Nevertheless, even in a difficult job market, young lawyers have exercised discretion in avoiding firms that specialize in certain areas of practice. Also, young lawyers have spoken out after joining firms. On occasion, associates have requested that they not be assigned to

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33 See Chapter 12, infra.


36 Another example of a lawyer exercising autonomy in choosing a client, even at a financial sacrifice, is Professor Laurence Tribe's representation of the estate of Rose Cipollone in a cigarette products-liability case. Tribe won a U.S. Supreme Court ruling that the warning label on cigarettes does not bar smokers from suing for damages. He represented Cipollone without a fee. He had previously turned down a seven-figure fee to represent the cigarette industry in the case. Jeffrey Toobin, Supreme Sacrifice, The New Yorker, July 8, 1996, at 43.

In contrast, Abraham Lincoln was indifferent to whether he represented a fugitive slave or a slaveholder. Years after he had begun to speak eloquently against the evils of slavery, Lincoln represented a slaveholder in an effort to recover run-away slaves. See Anton-Hermann Chroust, Abraham Lincoln Argues a Pro-Slavery Case, 5 Am. J. Legal Hist. 299 (1961). In Lincoln's view, "his business was law, not morality." David H. Donald, Lincoln 108–04 (1995).

37 This point is made in Teresa Stanton Collett, Understanding Freedman's Ethics, 33 Ariz. L. Rev. 455, 467 (1991).
particular cases. In a dramatic instance, a group of associates at a major firm in Washington D.C. protested the firm's representation of the apartheid government of South Africa. The fact that they were successful should not obscure the courage they showed in jeopardizing their advancement to partnerships.

An associate can also bring moral considerations to a client’s attention, sometimes at no personal risk at all. For example, as an associate in a large firm, Freedman was assigned to evict a tenant of a major real estate client. In reviewing the case, Freedman found that the tenant was a Korean War widow with a young child. The only reason for the eviction was that the child had had difficulty turning off her bath water one evening, the tub had overflowed, and the ceiling below had been damaged. Otherwise, there were no complaints about the tenant. “If you want to evict her, I’ll do it,” he said, “but I wasn’t sure you’d want to, given the facts.” The client thought it over and decided not to evict the woman.

Turning down clients on moral grounds (as distinguished from suggesting moral considerations to a client) can be costly and therefore can require considerable courage. However, the decision of whether to represent a client is the point at which the lawyer has the most scope for exercising autonomy. Once you have committed yourself to serve as your client’s zealous representative, your ability to act on conscientious grounds is, and should be, significantly limited.

§ 4.04 ARE THERE MORAL LIMITS ON ZEALOUS REPRESENTATION?

Some critics of zeal argue that clients are not always entitled morally to everything that the law allows them, and that the proper solution is that zealous representation be rationed in the lawyer’s discretion. The most influential analysis of this kind is Professor Murray Schwartz’s critique of what he calls the Principles of Professionalism and of Nonaccountability.


39 A courageous but unsuccessful attempt to reject a client was made by twelve lawyers at Cravath, Swaine & Moore. The client, Credit Suisse, had been identified in U.S. government documents as the most frequent violator of rules against laundering looted Nazi gold. Some of the gold on deposit had been extracted from the teeth of European Jews and other victims of Nazi death camps. The firm had been retained to represent the bank to oppose claims of the victims’ survivors. The lawyers wrote in part: “Credit Suisse earns through the Firm’s involvement a legitimacy worth more to it than the wealth it has hoarded. In other words, the fee they pay the Firm buys them that which one is most obliged not to give those implicated in Nazi crimes.” The Cravath firm nevertheless chose to represent Credit Suisse. But see Carrie Johnson, Arnett Fox Rejects a Client, Legal Times 14, Apr. 14, 1997 (law firm declined to represent insurance company which had been refusing for decades to honor insurance policies that had been taken out by people later killed in concentration camps).

40 To do this involved neither risk nor courage. Professor Shaffer argues that a lawyer should not avoid the risk by  saying that she will follow the client’s instructions even if the client decides to be ruthless. Thomas Shaffer, Legal Ethics and the Good Client, 36 Cath. U. L. Rev. 319, 327-28 (1987).


42 Murray L. Schwartz, The Zeal of the Civil Advocate, in The Good Lawyer 151 (David Luban ed.,
His Principle of Professionalism states: "When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."

Professor Schwartz's Principle of Nonaccountability states: "When acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."

Our focus is on the reference to moral accountability. (If the lawyer is acting "within the established constraints upon professional behavior," then by definition she is neither legally nor professionally accountable for what she does.) In moral terms, Schwartz's principles posit that the lawyer "can properly refuse to be called to account with respect to the morality of the means used or ends achieved on behalf of the client." In the next two sentences, however, Schwartz states the proposition differently: the lawyer, he says, "is beyond reproach for acting on behalf of the client," and the lawyer has become totally "immune from [moral] accountability." Understandably, Schwartz disapproves of the idea that lawyers should be entirely free from any moral accountability whatsoever in their professional role.

However, Schwartz confuses two issues that should be considered separately. It is one thing to say that a lawyer can properly be held morally accountable for choosing to "act[] on behalf of" a particular client. It is quite another to say that a lawyer can properly be subjected to moral censure for using lawful means to achieve a client's lawful ends. As discussed earlier, Schwartz is correct in concluding that a lawyer can be held morally accountable for accepting an immoral cause. He is wrong, however, in suggesting that the advocate's zeal on behalf of a client should be constrained by moral standards that have not been enacted into law by the legislature or recognized by the courts.

Because Freedman's position has been misunderstood in the past, let us reiterate it. Lawyers are morally accountable. A lawyer can be "called to account" and is not "beyond reproach" for the decision to accept a particular client or cause. Also, while representing a client, the lawyer should counsel the client regarding the moral aspects of the representation. If a lawyer chooses to represent a client, he should counsel the client on the moral implications of the representation.


43 Schwartz, The Zeal of the Civil Advocate, supra note 42 (emphasis added).

44 Id. (emphasis added).

45 To guard against the remote possibility that a client with a legal right to litigate might be denied that right altogether, Schwartz recognizes that "the last lawyer in town" should be required to take the case.

46 Along the same line, Luban has argued that the ethical rules be redrafted "to allow lawyers to forgo immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends." David Luban, Lawyers and Justice (1988). Professor William Simon has gone further, arguing that lawyers ought to pursue their personal view of justice over the client's interest. See generally William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (1998).

47 These views have been in print since at least 1975. See note 25, supra. Nevertheless, critics purporting to analyze Professor Freedman's position on lawyers' ethics often fail to take them into account. See, e.g., David Luban, Lawyers and Justice (1988); The Good Lawyer (David Luban ed., 1984).
however, it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue after appropriate counseling.

The O.J. Simpson case produced a renewed onslaught of criticism of zealous representation, focusing particularly on criminal defense advocacy.\(^48\) Defense strategies and tactics that had traditionally been regarded as consistent with the ethic of zealous advocacy\(^49\) were attacked as overly aggressive, immoral, or insensitive,\(^50\) and defense lawyers found themselves repeatedly having to explain or justify their role.\(^51\)

One criticism of the defense in Simpson’s case is that they “played the race card.” They did this by stressing the virulent racism of Mark Fuhrman, the police detective who was a principal witness for the prosecution. For example, the defense showed that Fuhrman had lied when he had claimed that he did not use the word “nigger.” The defense also revealed that Fuhrman had boasted of arresting African-American men in the company of white women. Although the defense did indeed “play the race card,” it was the state that had dealt it, by knowingly employing and promoting an outspoken racist on the police force and by showcasing him as a witness for the prosecution.\(^52\)

For our own part, we would rather live in a society in which a guilty O.J. Simpson


\(^{49}\) See Chapter 4, infra.


\(^{52}\) The phrase, “play the race card” belittles racism (as it is intended to do) when it is used to describe justified efforts by the defense to counter racism inherent in the prosecution’s case. An interesting variation on this theme is recounted in Steven Lubet, Storytelling and Trials: Playing the “Race Card” in Nineteenth-Century Italy, 48 UCLA L. Rev. 49 (2001) (describing an effort to counter anti-Semitism in a prosecution).
goes free than one that tolerates police officers like Mark Fuhrman. Moreover, as Professor Alan Dershowitz (a member of the O.J. Simpson defense team) has said, "I have been accused several times of overzealousness. I confess my guilt. In a world full of underzealous, lazy, and incompetent defense lawyers, I am proud to be regarded as overzealous on behalf of my clients.'

Two especially disturbing critiques of criminal defense advocacy have been offered by William Simon and Anthony Alfieri. In Simon's article, "The Ethics of Criminal Defense," he argues that defense lawyers routinely engage in overly aggressive and "ethically questionable" practices, such as delaying a case in order to frustrate government witnesses, presenting perjured testimony by defendants, and embarrassing or blaming alleged victims. Simon acknowledges that the tactics he refers to are not prohibited by either law or ethical rules. But he thinks such tactics are wrong.

Simon also rejects the argument that criminal defense is "different," from other law practice, in a way that justifies a more aggressive level of advocacy. He dismisses as empty rhetoric the suggestion that the state is powerful and potentially dangerous to individual liberties by asserting that there is no state, only "harassed, overworked bureaucrats." Thus, with a few fatuous phrases, Simon minimizes the enormous resources of the prosecution, including police investigators and the backup facilities of the FBI, and rejects the need for meaningful checks and balances.

53 A senior Los Angeles police officer admitted: "Sure, they knew about Fuhrman; they had to know. Lots of people knew . . . and they turned the other way." Kenneth B. Noble, Many Black Officers Say Bias Is Rampant in Los Angeles Police Force, N.Y. Times, Sept. 4, 1995, at 6. A salutary result of the "race card" is that the L.A.P.D. Chief of Police is now "determined to root out racist cops, as urged [four years before] by the special commission headed by Warren Christopher." Editorial, N.Y. Times, Aug. 25, 1995. It is highly unlikely that this would ever have happened had it not been for Simon's acquittal.

54 ALAN DERSHOWITZ, THE BEST DEFENSE 410 (1982). See also JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? 256 ("I do think it's better to be overzealous than underzealous. Overzealousness can be corrected by the prosecution. . . . Underzealousness cannot be corrected by anyone.").

55 Simon and Alfieri are both former poverty lawyers, now academics, who have written extensively on lawyers' ethics. Neither has ever been a criminal defense lawyer.

56 Simon, supra note 50.

57 Id. at 1704-22.

58 See id. at 1704.

59 See United States v. Wade, 388 U.S. 216, 256 (1967) (White, J., dissenting in part and concurring in part) (describing the defense lawyer's "different mission," which requires a defender to "put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth"); see also DAVID LUBAN, LAWYERS AND JUSTICE, supra note 46, at 58-66 (exempting criminal defense from a critique of adversary ethics); David Luban, Are Criminal Defenders Different?, supra note 50 (arguing that criminal defenders are different from civil lawyers); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 605 (1985) (acknowledging that "the case for undiluted partisanship is most compelling" in criminal defense); Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 12 (1976) ("[I]t makes sense to charge the defense counsel with the job of making the best possible case for the accused — without regard . . . for the merits . . . But this does not, however, justify a comparable perspective on the part of lawyers generally.").

60 Simon, supra note 50, at 1707-78; cf. Luban, Are Criminal Defenders Different?, supra note 50, at 1785.
balances in the administration of justice.\textsuperscript{61}

Alfieri's critique is more limited than Simon's.\textsuperscript{62} He has no objection to zealous advocacy on behalf of criminal defendants,\textsuperscript{63} so long as the advocacy does not perpetuate "dominant narratives"\textsuperscript{64} about race, or "exploit racial difference."\textsuperscript{65} He acknowledges the high risk of "state violence"\textsuperscript{66} in the criminal justice system, but is less concerned with the power of the state to prosecute and to abuse individuals than with the power of individuals to injure "the community."\textsuperscript{67}

Alfieri illustrates what he considers to be the use of racism in criminal defense with a defense theory used by lawyers on behalf of two African-American men prosecuted for crimes arising out of the riots following the Rodney King verdict in Los Angeles in 1992.\textsuperscript{68} The defense lawyers maintained that their clients' state of mind had been affected by the "group contagion of mob violence."\textsuperscript{69} Because the defendants were African-American, Alfieri contends that this defense strategy perpetuated racism, by reinforcing the stereotype of the deviant, out-of-control black man.\textsuperscript{70}

Whatever one thinks of the group-contagion defense, it does not depend upon racist stereotypes since it could also be used in a case of violence during rioting by whites.\textsuperscript{71} In fact, that is precisely what Atticus Finch, the lawyer-hero of To Kill a Mockingbird, did when he portrayed Walter Cunningham, the leader of a white

\textsuperscript{61} See Luban, Are Criminal Defenders Different?, supra note 50, 1730-44, 1762-66 (discussing the prosecution advantage in resources, procedure, and legitimacy, and noting the "two worlds" of criminal defense, one for poor clients with overburdened public defenders and the other for the small minority of well-to-do clients with private lawyers).


\textsuperscript{63} See Alfieri, Defending Racial Violence, supra note 50, at 1321 n.149.

\textsuperscript{64} Id. at 1305. Alfieri defines "narratives" as the "rhetorical structure of criminal defense stories." Id. at 1304. When he refers to "dominant narratives" about race, he means defense theories, or "stories," that comport with prevailing racial stereotypes. His essay "challenges criminal defense lawyers' freedom in story-telling," id. at 1306, by placing ethical limits on the theories defense lawyers may advance. See id. at 1381-42. See also Anthony V. Alfieri, Lynching Ethics: Toward a Theory of Racialized Defense, 95 Mich. L. Rev. 1083 (1997) (continuing Alfieri's critical examination of race-based defense practices); Anthony V. Alfieri, Race Trials, 76 Tex. L. Rev. 1298 (1998) (discussing the way in which "race-trials" perpetuate racial status distinctions and hierarchies).

\textsuperscript{65} Alfieri, Defending Racial Violence, supra note 50, at 1321. For a thoughtful discussion of the use of race and ethnic bias in criminal defense advocacy from a defense perspective, see Eva Nilsen, The Criminal Defense Lawyer's Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1 (1994).

\textsuperscript{66} Alfieri, Defending Racial Violence, supra note 50, at 1321.

\textsuperscript{67} Id. at 1306, 1326-31.

\textsuperscript{68} Police officers were acquitted of brutality charges in state court despite a videotape of them persistently beating a prostrate King.

\textsuperscript{69} Alfieri, Defending Racial Violence, supra note 50, at 1301-03.

\textsuperscript{70} Id. at 1301-06.

lych gang, as "basically a good man." Finch explained Cunningham's attempted murder of Tom Robinson by saying that Cunningham had just been "part of a mob."72

Alfieri does want criminal defense lawyers to defend the "subordinated" from the powerful,73 and acknowledges that this is a "great burden."74 Nevertheless, he insists that defense lawyers not only carry this burden, but that they combat ignorance and advance racial harmony at the same time. Since defense lawyers inevitably fail this quixotic challenge,75 Alfieri singles them out for blame76 in a criminal justice system that is pervasively racist, from arrest to punishment.77

§ 4.05 ZEAL UNDER THE ETHICAL RULES

Just as some language in the Model Rules gives an incorrect impression of modifying the tradition of client-centered representation,78 other language in the Model Rules gives a misleading impression of tempering the profession's tradition of zealous representation.

The Model Code expressed the axiomatic professional norm of zeal in Canon 7: "A Lawyer Should Represent a Client Zealously Within the Bounds of Law."79 In addition, the Code recognized that the lawyer's duty of zealous representation to individual clients is an essential component of the administration of justice.80 As the Code explained: "In our government of laws . . . each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense."81 Thus, the Code expressly

72 Harper Lee, To Kill a Mockingbird 168 (1960). For critical views of Atticus Finch, see generally Malcolm Gladwell, The Courthouse Ring, New Yorker, Aug. 10, 2009. See also Monroe H. Freedman, Atticus Finch — Right and Wrong, 45 ALA. L. REV. 473 (1994) (arguing that Finch is not a role model for today's lawyer because he participated in and minimized racism, and because he never voluntarily used his skills as a lawyer to ameliorate the pervasive racism in his community); Steven Lubet, On Reconstructing Atticus Finch, 97 Mich L. REV. 1389 (1999) (arguing that Finch used sexist tactics in his cross-examination of Mayella Ewell).
73 Alfieri, Defending Racial Violence, supra note 50, at 1304.
74 Id. at 1305.
A lawyer . . . has lower standards of conduct toward outsiders than he has toward his clients. . . . He is required to treat outsiders as if they were barbarians and enemies. The more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client. It is as if a man had only so much virtue, and the more he gives to one, the less he has available for anyone else.
76 Id.
78 Chapter 3, § 3.09, supra, "Lawyer-Client Decision-Making Under the Model Rules."
79 The Preliminary Statement to the Model Code describes the canons that head each of its divisions as "axiomatic norms."
80 EC 7-1.
81 Id.
recognized that, in serving individual clients, the lawyer serves the interests of justice in a free society.

Accordingly, a disciplinary rule forbade a lawyer to "intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." Moreover, that rule was not limited to the lawyer as advocate, but was headed in general terms: "Representing a Client Zealously." The message of the Model Code was therefore "clear: loyalty to the client, regardless of . . . other restraints, [was] the all-encompassing duty."

The Model Rules do not include a specific rule that enjoins the lawyer to zealous representation. Zeal is mentioned twice in the Preamble, each time expressly with reference to the lawyer as advocate. The other reference to zeal is in Rule 1.3. Rule 1.3 itself says simply that, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." That is rather tepid language, and the comment says permissively that "a lawyer is not bound . . . to press for every advantage that might be realized for a client."

Significantly, however, Comment [1] to Rule 1.3 adds the express command that "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Also, Comment [1] begins with the important injunction, which is not restricted to advocacy: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."

In addition, Professor Geoffrey C. Hazard, Jr., the Reporter for the Model Rules, has written that Lord Brougham's statement continues to be the "classic articulation" of the lawyer's duty of zeal, and that it is "at the core of the profession's soul." Moreover, although "[t]he Model Rules contain no single rule that explicitly posits the lawyer's duty to the client in such sharp terms as in the Model Code, the overall approach has not changed."

Despite some ambivalent language in the Model Rules, therefore, it is clear that the obligation of zealous representation continues to be the profession's pervasive ethic, or, in Professor Hazard's words, "the core of the profession's soul."

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82 DR 7-101(A)(1).
83 Patterson, supra note 3, at 947.
84 There is also little mention of zealous representation in the Restatement. However, Restatement § 16, comment d, recognizes zealous representation as a "traditional aspiration" of the bar.
85 Model Rule 1.3 cmt. [1]. Presumably, this refers to matters "not affecting the merits of the cause or substantially prejudicing the rights of a client." See Model Code EC 7-7.
Consider *In re McAlevy*:

He sprang from his chair screaming, grabbed opposing counsel by the throat and began to choke him. The judge and the law clerk tried to separate the two men who were now locked in combat, and at one point all four persons — the judge, his law clerk and the two attorneys — were rolling on the floor. The judge suffered minor injuries before the two combatants could be separated.

The New Jersey Supreme Court was more than justified in issuing a “severe reprimand” to the lawyer responsible for this unseemly courtroom fracas. Although “a trial is not a minuet,”

there is clearly a limit to lawyerly zeal. Model Rule 3.5(d) sets that limit for courtroom lawyers. It forbids a lawyer to “engage in conduct intended to disrupt a tribunal.”

Unfortunately, however, there is a tendency among some judges to abuse their power to hold lawyers in contempt. In a recent case in Georgia, for example, a trial court held a lawyer in criminal contempt and sentenced her to thirty days in jail and a $500 fine.

The charges included “repeatedly challeng[ing] the trial court’s rulings . . . [and] inappropriate facial expressions [and a] disrespectful tone of voice.”

The lawyer was found guilty of making statements that “impugned, disparaged, and attacked the impartiality of the court and thereby undermined its authority, respect, and dignity.”

The Supreme Court of Georgia reversed the lawyer’s conviction. In doing so, the court overruled its own prior standard that statements by counsel could be found contemptuous if they posed a “clear and present danger to the administration of justice,” in part because the vagueness of that standard had led to inconsistent results.

In addition, the standard had not given adequate regard to “the represented party’s rights to counsel and due process of law.”

Accordingly, the court held that a lawyer cannot be held in contempt without a finding, beyond a reasonable doubt, that (1) the lawyer has created an actual or an imminent threat of interference with the administration of justice, and (2) that the lawyer knew or should have known that her statements and conduct exceeded the outermost bounds of permissible advocacy.

Moreover, the court held that “doubts should be resolved

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90 *In re Jefferson*, 657 S.E.2d 830 (Ga. 2008).

91 Id. at 830–31.

92 Id. at 831.

93 Id. at 831–32.

94 Id., relying on *In re McConnell*, 370 U.S. 230, 236 (1962) (strenuous and persistent advocacy should not constitute contempt unless it blocks court’s performance of judicial duty, as “it is [] essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client’s cases”).

95 Id. at 833. The court added a number of factors that should be considered, including notice to the
in favor of vigorous advocacy.\textsuperscript{96}

The problem is, in part, one of perspective. Along with a great deal of mutual respect between judges and the lawyers who appear before them, there is also a considerable amount of tension. One reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is not entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client is entitled. In the words of Professor Louis Raveson, “some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural processes of trial advocacy.”\textsuperscript{97}

Moreover, a judge’s concern with moving the court’s calendar expeditiously is not always compatible with what a litigant considers to be necessary for a full and fair hearing. Frequently, therefore, judges and advocates have differing views about how much process is due in a particular matter.

How far, then, should an advocate go in pressing a point before a judge who would prefer not to hear more? Ordinarily, the answer is tactical rather than ethical. The purpose of argument is to persuade, and tactics that are offensive to the judge are not likely to aid in persuasion.

There are occasions, however, when a judge appears to have decided an issue without a full appreciation of the facts of law, or when there is no hope of changing a judge’s ruling but when it is necessary to establish an adequate record for purposes of appeal. In such cases, the advocate’s responsibility is to represent the client’s interests effectively, even in the face of improper judicial efforts to pressure the lawyer to forbear. As Chief Justice Warren Burger has emphasized, the advocate; although an “officer of the court,” must nevertheless “repudiate any external effort to direct how the obligations to the client are to be carried out.”\textsuperscript{98} It is “crucial,” the Chief Justice noted, that a professionally qualified advocate be “wholly independent of the government.”\textsuperscript{99}

Chief Justice Burger has also pointed to an important source for guidance, as to the appropriate limits of deference to the court. In \textit{In re Snyder},\textsuperscript{100} a lawyer was suspended from practice for six months for conduct that was “unbecoming a lawyer prior to the contempt citation, the likely impact on a jury of the lawyer’s conduct, whether there has been a pattern of such behavior, the significance of the conduct to case as a whole, and the extent to which, if any, the court had provoked the lawyer’s conduct. \textit{Id.} at 833.

\textsuperscript{96} \textit{Id.} at 833-34 (citing United States \textit{ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972)).

\textsuperscript{97} Louis Raveson, \textit{Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt, 65 Wash. L. Rev. 477, 514 (1990). Professor Raveson’s articles are extremely important and have been influential in this area. See, e.g., \textit{In re Jefferson, supra note 90}.


\textsuperscript{99} \textit{Id.}

\textsuperscript{100} 472 U.S. 634 (1985).
member of the bar”101 and “prejudicial to the administration of justice.”102 The substance of the charge was that Snyder had written a letter to a judge that was “totally disrespectful to the federal courts and to the judicial system” and that “demonstrate[d] a total lack of respect for the legal process and the courts.”103 In an opinion by the Chief Justice, the Supreme Court unanimously reversed the disciplinary action against Snyder.104

The Court held that phrases like “unbecoming a member of the bar” and “prejudicial to the administration of justice,” must be read in the light of “traditional duties imposed on an attorney.”105 “More specific guidance,” the Court said, “is provided by case law, applicable court rules, and ‘the lore of the profession,’ as embodied in codes of professional conduct.”106 Insofar as the codes of professional conduct embody the “lore of the profession,” it is worth relating some of that lore in seeking to understand the rules of ethics, including the ethic of zeal.

Consider, for example, the following exchange between court and counsel:

"JUDGE: You know that is a most improper question to ask.
ATTORNEY: I know when a person has his mind made up, it is not easy to change it.
JUDGE: I do not want you to make a speech now.
ATTORNEY: I am going to make a speech — that is what I am paid for."

In another case, after a series of contentious exchanges between the judge and counsel over how the language of the jury’s verdict should be recorded, the following occurred:

"JUDGE: "Sir, I will not be interrupted."
ATTORNEY: "I stand here as an advocate for a brother citizen, and I desire that the [record be complete]."
JUDGE: "Sit down, Sir; remember your duty or I shall be obliged to proceed in another manner [i.e., with imprisonment for contempt of court].
ATTORNEY: "Your [Honor] may proceed in what manner you think fit; I know my duty as well as your [Honor] knows yours. I shall not alter my

101 FED. R. APP. P. 46.
102 See MR 8.4(d).
103 Snyder, 472 U.S. at 637.
104 See also Lawyer’s Profane Remarks about Judge in Personal Matter Don’t Constitute Contempt, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) § 18:10 (Jan. 2, 2002) (following criticism of the lawyer by the judge in court, the lawyer told the judge’s law clerk that the judge was “a f**king bitch and that she should not be on the bench”). In re Conway, No. 79615 (Ohio Ct. App. Dec. 13, 2001).
105 Snyder, 472 U.S. at 645. Phrases like “unbecoming a member of the bar” and “prejudicial to the administration of justice” are inherently vague and are subject to abusive enforcement. Unless they are narrowly and clearly defined in advance, they do not give the kind of notice required by due process. See, e.g., Gentile v. State Bar of Nev., 501 U.S. 1030 (1991). The Court in Snyder did not reach this constitutional issue. 472 U.S. at 642.
106 Snyder, 472 U.S. at 642.
Each of those incidents has come down in our professional lore from the tradition of the English barrister. Neither case resulted in disciplinary action. On the contrary, each episode has been cited as representing the ideal of an independent bar. For example, the advocate who insisted upon making a speech was Sir Marshall Hall, a noted barrister of the earlier part of the twentieth century. His biographer relates that Sir Marshall not only made his speech but "won the day."108

The lawyer in the second instance was no less a figure in English law than Lord Erskine (later to become Lord Chancellor of England). According to Lord Campbell:

This noble stand for the independence of the Bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. . . . The example has had a salutary effect in illustrating and establishing the relative duties of Judge and Advocate in England.109

Professors David Louisell and Geoffrey Hazard introduced the episode in their casebook with the comment: "So much emphasis is currently placed upon avoidance of improper argument that it seems amiss not to remind today's young lawyer of his duty of effective representation of his client in an adversary system."110 Similarly, one of the most highly regarded of American jurists, Chief Justice Roger J. Traynor of the California Supreme Court,111 cited Lord Erskine's defiance of the court to illustrate the attorney's "duty to protect the interests of his client" and his "right to press legitimate argument and to protest an erroneous ruling."112

Recall, too, Lord Brougham's classic graymail threat, quoted at the beginning of this chapter. It came during his opening statement in the trial of Queen Caroline for adultery. According to Fraser, Lord Brougham's opening was "a masterly performance."113 As he finished, "the aged Lord Erskine, former Lord Chancellor, [was so moved that he] rushed from the chamber in tears."114 Another barrister declared that Lord Brougham's opening statement was "one of the most powerful orations that ever proceeded from human lips."115

Although Brougham's client, Queen Caroline, was undoubtedly guilty as charged (and was widely believed to be guilty), she was ultimately exonerated. Nor was

109 The full episode is recorded in CAMPBELL, supra note 107, at vol. VIII, 272-79.
110 DAVID LOUISELL & GEOFFREY C. HAZARD, CASES AND MATERIAL ON PLEADING AND PROCEDURE, STATE AND FEDERAL (2d ed. 1968).
111 Chief Justice Traynor was Chairman of the Special Committee that drafted the ABA Code of Judicial Conduct (1972).
112 Gallagher v. Municipal Court of Los Angeles, 192 P.2d 905, 913 (Cal. 1948).
114 Id.
115 Id.
everyone favorably impressed with Brougham’s performance. Lord Chancellor Eldon later “rebuked Brougham most weightily for his threats to the House” — that is, for what Eldon saw as Brougham’s overzealousness on behalf of his client. Nevertheless, Brougham was “the hero of the hour,” and he subsequently succeeded Eldon as Lord Chancellor of England.

New York lawyer Barry Slotnick provides another version of Hall and Erskine’s insistence on zealous representation. Slotnick was representing Bernard Goetz, a white vigilante who had shot three young black men who had been harassing him on a subway. The judge admonished Slotnick, first in front of the jury and later at a bench conference, for asking questions that included facts that were not supported by the evidence. The following colloquy then occurred at the bench after the prosecutor’s objection to another question:

Slotnick: Judge, you can speak a little louder and the jury can hear you.

Judge: I’m upset with your conduct.

Slotnick: I’m upset with your conduct.

Judge: You know where you can go with that.

But Mr. Slotnick continued arguing and eventually the judge came around to Slotnick’s position, and permitted him to ask the question.

Consistent with this tradition of zealous representation, a lawyer cannot constitutionally be held in contempt of court so long as she does not create an obstruction that “blocks the judge in the performance of his judicial duty.” As Professor Louis Raveson has found, “The opinions reveal repeated caution that a judge’s overreaction to the unavoidable contentiousness of trial advocacy — the confusion of ‘offenses to their sensibilities’ with ‘obstruction to the administration of justice’ — does not define contempt.”

Unquestionably, however, a judge must be able to protect against “actual obstruction,” either in the courtroom or so nearby as “actually to obstruct justice.” Moreover, ‘obstruction can include deliberately frustrating a legitimate ruling of the court, as by putting information before a jury that the judge has ruled inadmissible.

“Actual obstruction” did not occur, however, when counsel, having been ordered

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116 Id. at 438.
117 Id. at 443.
118 Id. at 465.
121 Raveson, supra note 97, at 514.
122 In re McConnell, 370 U.S. at 236.
86 ZEALOUS REPRESENTATION: THE PERSASIVE ETHIC CH. 4

to stop asking questions, replied: "[W]e have a right to ask the questions, and we propose to do so unless some bailiff stops us."\(^{124}\) In that case the Supreme Court held that it is "essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases."\(^{125}\) The Court added that "[a]n independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."\(^{126}\)

§ 4.07 LAWYERS' SPEECH — CRITICIZING JUDGES\(^ {127}\).

The problem is not that too many lawyers are publicly criticizing judges. Unfortunately, too few lawyers are willing to do so, even when a judge has committed serious ethical violations and should be held accountable, and even though lawyers have a "special responsibility for the quality of justice."\(^ {128}\)

Model Rule 8.3(b) requires a lawyer to volunteer knowledge about serious violations of judicial ethics to the appropriate authority.\(^ {129}\) In other words, a lawyer has an ethical duty to report judicial misconduct and failing to do so could face disciplinary charges. With regard to public criticism of judges, MR 8.2(a) forbids a lawyer to make a statement about a judge that the lawyer "knows to be false or with reckless disregard as to its truth or falsity." That is, lawyers are properly subject to a *New York Times v. Sullivan*\(^ {130}\) "actual malice" standard in their public criticism of judges.

Lawyers, of course, are particularly knowledgeable about judges' conduct, and are therefore in a position to inform the public about abuses of judicial power. Moreover, as the Supreme Court has held, judges are not "anointed priests," entitled to special protection from the "public clamor" of democratic society.\(^ {131}\) The law gives judges and the institutional reputation of courts "no greater immunity from criticism than other persons or institutions." Judges, after all, are not "flabby creatures."\(^ {132}\) Rather, they are expected to be "[p]eople of fortitude, able to thrive in a hardy climate."\(^ {133}\) Thus, we have a practice, "familiar in the long history of Anglo-American litigation, whereby unsuccessful... lawyers give vent to their

\(^{124}\) *In re McConnell*, 370 U.S. at 235.

\(^{125}\) *Id.*

\(^{126}\) *Id.*

\(^{127}\) This topic is relevant to zealous representation because effective representation of the client may require the lawyer to criticize the conduct of a judge. Also, a lawyer may be required to report seriously unethical conduct by a judge even though the lawyer might be justifiably concerned that the judge might retaliate by rulings that are contrary to the interests of future clients.


\(^{129}\) New York does require a lawyer to reveal knowledge of judicial misconduct, but only,"upon proper request of a tribunal or other authority empowered to investigate or act upon" the conduct of judges. DR 1-108(B).

\(^{130}\) 376 U.S. 254 (1964).


\(^{132}\) *United States v. Morgan*, 313 U.S. 409, 421 (1941).

\(^{133}\) *Craig v. Harney*, 331 U.S. 367, 376 (1947).
disappointment in tavern or press.”

Consider, then, the following cases:

Case One. The judge’s opinion is “irrational” and “cannot be taken seriously.”

Case Two. “This judge sitting on the bench is a danger to the people of this city.”

Case Three. “I have had more than enough of judicial opinions that . . . falsify the facts of the cases that have been argued, . . . that make disingenuous use or omission of material authorities, . . . that cover up these things.”

Case Four. The state’s appellate judges are “whores who became madams. I would like to [be a judge]. . . . But the only way you can get it is to be in politics or buy it — and I don’t even know the going price.”

Case Five. The judge’s decision is “overt racism,” and the defendants “have no more chance of having a fair hearing in front of [the judge] than they would being judged by the Ku Klux Klan.”

Case Six. The judge is “dishonest,” “ignorant,” a “buffoon,” a “bully,” “drunk on the bench,” and shows “evidence of anti-Semitism.”

Do any of those criticisms warrant professional discipline of the lawyer?

The quotation in Case One will be familiar to most readers as what passes for civil discourse among Supreme Court Justices. The particular quotation (“irrational,” “cannot be taken seriously”) was directed against Justice Sandra Day O’Connor by Justice Antonia Scalia. No professional disciplinary action has been reported against Scalia, or any other justice, for these or other uncivil remarks.

The second quotation (the judge is a “danger to the people”) is a criticism of a New York City criminal court judge by then Mayor Rudolph Giuliani. It is similar to other remarks about the judge by then Governor George Pataki (also a lawyer). The Mayor and Governor were castigating the judge on the basis of two decisions. Similarly, former New York criminal court judge Harold Rothwax used to tell his students at Columbia Law School, “The court of appeals is in session; we are all in danger.” Further ridiculing the administration of justice, Rothwax wrote that a jury trial is a “crapshoot” and that New York’s highest court is a

134 Morgan, 313 U.S. at 421.
140 Id. at 162.
"lottery."\textsuperscript{141} No professional disciplinary action was ever reported against Giuliani, Pataki, or Rothwax for these public attacks on judges and the judicial system.\textsuperscript{142}

The intemperate and broad-scale attack on the integrity of judges in Case Three (complaining that judges too often falsify facts and use authorities dishonestly) is from a talk that Freedman gave to the Judicial Conference for the Federal Circuit.\textsuperscript{143} Fortunately, no disciplinary action was taken on that occasion.

Case Four ("whores," "madams," and the going price for a judgeship) is from a \textit{Life} magazine article about a New York public defender named Martin Erdmann. Erdmann was subjected to disciplinary proceedings and censured for his comments, but the discipline was reversed by the New York Court of Appeals.\textsuperscript{144} Yet, as pointed out by a dissenting judge, Erdmann's comments had been published in a magazine with a circulation of several million copies, and "[i]t is difficult to read the article . . . without coming to the conclusion that neither the legal system nor the legal profession possesses integrity."\textsuperscript{145} Nevertheless, New York's highest court held that "isolated instances of disrespect for the law, judges, and courts expressed by vulgar and insulting words or other incivility . . . committed outside the precincts of a court are not subject to professional discipline."\textsuperscript{146} "Nor is the matter substantially altered," the court added, "if there is hyperbole expressed in the impoverished vocabulary of the streets."\textsuperscript{147}

The quotation in Case Five (comparing the judge to the Ku Klux Klan) was by criminal defense lawyer Ronald L. Kuby. The disciplinary committee dismissed a complaint against Kuby, and the United States District Court for the District of Connecticut, affirmed. The court said that Kuby's statement "concerning a highly respected judge . . . was, to be charitable, intemperate, incivil and immature. It was not, however, actionable under the Disciplinary Rules . . . and First Amendment jurisprudence,"\textsuperscript{148}

The charge in Case Six ("dishonest," "buffoon," "drunk," and so on) resulted, initially, in suspension of the lawyer from practice before the federal district court for two years. The grounds were that the criminal defense lawyer, Stephen Yagman, had violated local rules forbidding a lawyer to engage in conduct that "degrades or impugns the integrity of the Court" and that "interferes with the administration of justice." But that disciplinary action was reversed in an opinion by federal appeals

\textsuperscript{141} \textit{Id.} at 31.

\textsuperscript{142} \textit{See} Monroe Freedman, \textit{The Threat to Judicial Independence by Criticism of Judges — A Proposed Solution to the Real Problem}, 25 Hofstra L. Rev. 729 (1997) (arguing that judicial independence is not threatened by criticism of judges by practicing lawyers, but by public officials, who have the power to affect the judges' careers).

\textsuperscript{143} \textit{128 F.R.D. 437, 439} (1990); \textit{see also} Monroe Freedman, \textit{When Judges Tamper with the Evidence}, \textit{Legal Times}, Nov. 19, 1990, at 22.

\textsuperscript{144} Justices of Appellate Div., First Dep't v. Erdmann, 301 N.E.2d 425 (N.Y. 1973).

\textsuperscript{145} \textit{Id.} at 428.

\textsuperscript{146} \textit{Id.} at 426.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{In re} Ronald L. Kuby, G.F.-86-10, Order dated Aug. 18, 1993.
court judge Alex Kozinski.149

'Bound by prior authority in the Ninth Circuit, Judge Kozinski was not able to apply New York Times v Sullivan.150 The New York Times "actual malice" standard protects even false charges against a public official unless made with knowledge of falsity or in reckless disregard of the truth. As applied by the Ninth Circuit in disciplinary cases against lawyers, however, recklessness is determined objectively, by reference to the kind of investigation that would be made by "a reasonable attorney, considered in the light of all his professional functions . . . in the same or similar circumstances." The court's inquiry focuses on whether the attorney had a "reasonable factual basis for making the statements, considering their nature and the context in which they were made," including whether the attorney "pursued readily available avenues of investigation." Truth is, of course, an absolute defense, and the burden of proving falsity is on the disciplinary committee.151

As Judge Kozinski noted, that standard is consistent with cases like In re Holtzman.152 There, then Queens District Attorney Elizabeth Holtzman was reprimanded for issuing a press release that falsely accused a judge of requiring the victim of a sexual assault to demonstrate the position she had been in at the time of the assault. Before making her charges public, Holtzman had not obtained the minutes of the proceedings, had not made any effort to speak to court officers, the court reporter, defense counsel, or any other person present during the alleged misconduct, including the trial assistant in her office who had originally reported it. Thus, she had been reckless in not "pursuing readily available avenues of investigation" before making false charges against the judge.153

Unlike allegations of fact, opinions are not subject to proof or disproof. This means, Judge Kozinski noted, that an expression of opinion (like an allegation of intellectual dishonesty, or being the worst judge on the bench) cannot be punished unless it implies a false assertion of fact.154 "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."155

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149 Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430 (9th Cir. 1995).


151 Yagman, 55 F.3d at 1437-38.


153 Holtzman's lawyer, Norman Redlich, has noted, however, that she acted only after she had a sworn statement from the prosecutor who had been present at the hearing. Letter from Norman Redlich to Monroe Freedman (Apr. 19, 1996). This fact does not appear in the court's opinion. See Case Three, supra.

154 With regard to anti-Semitism, Yagman had said that the judge "has a penchant for sanctioning Jewish lawyers: me, David Kemper and Hugh Manes." I find this to be evidence of anti-Semitism.

In rejecting the charge against Yagman on this count, Kozinski relied in part on the Restatement (Second) of Torts § 666 cmt. c: "A simple expression of opinion based on disclosed . . . nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."

155 Yagman, 55 F.3d at 1441 (quoting Haynes v Alfred A. Knopf, Inc.).
Yagman's statement that the judge had been "drunk on the bench," however, "could be interpreted as suggesting that [the judge] had actually, on at least one occasion, taken the bench while intoxicated." It therefore implies facts that are capable of objective verification. However, the committee presenting disciplinary charges against Yagman had the burden to prove the falsity of Yagman's statement about the judge's drunkenness, and it failed to present any evidence at all on that issue. Accordingly, Yagman could not be disciplined for that statement either.

Those who argue that lawyers are entitled to less freedom of speech than other citizens rely principally on two Supreme Court decisions. One case, *Florida Bar v. Went for It*, involved solicitation of clients, which is commercial speech, and therefore receives only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." By contrast, criticism of a public official is core First Amendment speech.

The other Supreme Court case limiting lawyer's speech is *Gentile v. State Bar of Nevada*. The five-member majority there emphasized that the case involved not only speech, but the conflicting right to a fair trial. In that context, the majority held: "The regulation of attorneys' speech is limited — it applies only to speech that is substantially likely to have a materially prejudicial effect on a fair trial."

Judge Kozinski concluded his opinion in *Yagman* with a quotation from Justice Hugo Black: "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

Like Justice Scalia, Judge Rothwax, Governor Pataki, and Mayor Giuliani, therefore, lawyers in general do not forfeit their First Amendment rights when they become members of the bar.

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156 *Id.* at 1441.
157 *Id.* at 1441-42.
159 *Id.* at 623; *see Chapter 10, infra.*
161 *Id.* at 1075.
163 Nor do judges forfeit their right to respond to public criticism of themselves or each other, although it is frequently said that they are forbidden to do so. In fact, Rule 2.10(E), of the ABA Model Code of Judicial Conduct (2007), expressly recognizes the propriety of a judge's response "in the media or elsewhere" to allegations concerning the judge's conduct in a matter. The pertinent limitation on a judge's response is that the judge "shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." Rule 2.10(A). *See also Republican Party v. White*, 536 U.S. 765 (2002); Mark I. Harrison & Keith Swisher, *When Judges Should Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the*
§ 4.08 FRIVOLOUS ARGUMENTS

Lawyers are generally familiar with the ethical rule forbidding frivolous arguments, principally because of sanctions imposed under rules of civil procedure for making such arguments. Not all lawyers are aware, however, of two ways in which the prohibitions of frivolous arguments are restricted in both the rules themselves and in their enforcement. First, the term “frivolous” is narrowed by the way it is defined and explained in the ethical rules and in court decisions. Second, the ethical rules have express limitations with respect to arguments made on behalf of criminal defendants, and courts are generally loath to sanction criminal defense lawyers.

[1] Sanctions in Civil Cases Under Rule 11 and Similar Rules

During the decade after the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, a dangerous tendency developed to impose severe sanctions against lawyers under various federal and state rules. This excessive use of sanctions for allegedly frivolous filings prior to the 1993 amendment of Rule 11 has left a misleadingly broad impression of the meaning of “frivolous.”

Rule 11 is similar to the ethical codes (discussed below) in permitting a claim or defense that is “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Giving added emphasis to the italicized language, the Advisory Committee’s Notes to the 1983 version of Rule 11 cautioned that the rule is “not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” Nevertheless, there is significant evidence that creativity has been chilled by


In a highly publicized 1996 case, President Bill Clinton, Senate Majority Leader Robert Dole, and members of Congress attacked United States District Court judge Harold Baer, threatening him with impeachment because of his decision to suppress evidence in a drug case. In response to those attacks, and while the proceeding was still pending before Judge Baer, the Chief Judge and three other judges of the Second Circuit Court of Appeals published a defense of the judge. Referring to Canon 3B(9) of the 1990 Model Code of Judicial Conduct, the judges said: “[T]he Code also places on judges an affirmative duty to uphold the integrity and independence of the judiciary. In this instance, we believe our duty under this latter provision overrides whatever indirect comment on a pending case might be inferred from this statement (and we intend none).” Don Van Natta, Judges Defend a Colleague from Attacks, N.Y. Times, Mar. 29, 1996, at B1. Nevertheless, in response to the criticism, Judge Baer reversed the decision. See Monroe H. Freedman, The Threat to Judicial Independence by Criticism of Judges — A Proposed Solution to the Real Problem, 25 Hofstra L. Rev. 729 (1997).

164 MR 3.1; ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110.


166 See MR 3.1 cmt. [3]; RESTATEMENT § 110 cmt. f.


168 Emphasis added.

sanctions under Rule 11. In addition, judicial enforcement of the rule has had a disproportionate impact on plaintiffs' attorneys in civil rights cases, impaired lawyer-client confidentiality, and caused serious conflicts of interest between lawyers and clients.170

In an important article, “Rule 11 in the Real World,” Mark Stein explained, from his experience as a litigator, that lawyers were most inclined to threaten sanctions when an adversary’s position is “not frivolous, but [rather, when it is] simultaneously dangerous and vulnerable.”171 That is, the unwarranted charge that an argument is frivolous has been used to distract the court from the merits of the argument. Moreover, even if the adversary lawyer is aware that his position is meritorious, “he may still be cowed by the threat of sanctions because of the unpredictable way in which courts award them.”172

In response to broad criticism of the 1983 version of Rule 11, the rule was amended in 1993.173 Since then, the volume of cases involving charges of frivolous filings has been substantially reduced. However, the reason for that decrease is not clear. One reason could be that the amendment made imposition of sanctions discretionary with the judge, rather than mandatory, and an order imposing sanctions “must describe the sanctioned conduct and explain the basis for the sanction.” Another possible reason is that a motion for sanctions can no longer be simply an afterthought to another motion (e.g., a motion for summary judgment), but must be made and supported in a separate pleading. Also, the 1993 Rule 11 has a “safe harbor” provision, under which a lawyer whose filing is challenged as frivolous has twenty-one days to withdraw the filing without sanction. In one


171 Id.

172 See Joseph, supra note 170, at 21–34. The FRCP was amended again in 2007 “as part of the general restyling of the Civil Rules to make them more easily understood.” According to the Committee notes, the changes to Rule 11 were “intended to be stylistic only.” The proposed changes were approved by the Supreme Court in April 2007. The current version of the FRCP includes revisions that took effect in 2009.
respect, this “safe-harbor” can be a potent threat, coercing withdrawal of arguments that Stein characterizes as “not frivolous, but . . . simultaneously dangerous and vulnerable.”174 A positive effect of the safe-harbor amendment, however, is that a motion for sanctions cannot be filed at the end of litigation, because at that point it is no longer possible to make use of the safe-harbor withdrawal.

There is still reason for concern, therefore, that Rule 11, and similar rules in state courts, are continuing to have a deleterious effect on creative lawyering in civil cases. This is so in part because of the abuse of the rule by some judges, especially prior to the 1993 amendments, and because of the continuing in terrorem effect of possible sanctions under Rule 11 and similar rules. Nevertheless, the reduction in Rule 11 sanctions in federal courts since 1993 is a good sign.


Despite the abuses under Rule 11 and similar rules, the definition of “frivolous” has been an extremely narrow one. The traditional legal definition of frivolous is “obviously false on the face of the pleading,” as when something was pleaded that “conflicted with a judicially noticeable fact or was logically impossible, such as a plea of judgment recovered before the accrual of the cause of action.”175 Surely, a lawyer could properly be subjected to sanctions for filing a pleading that is frivolous in the sense of being “obviously false on [its] face.” Moreover, lawyers can properly be punished for filing or maintaining pleadings that are “sham” or “baseless,” that is, those that appear to state proper claims or defenses, but that are known to the lawyer to be false in fact.176

The Supreme Court has gone somewhat further, by unanimously defining a “frivolous” claim as one based on an “indisputably meritless” or “outlandish” legal theory, or one whose factual contentions are “clearly baseless,” such as a claim describing “fantastic or delusional scenarios.”177 Elaborating on that definition, the Court held that frivolousness can be found when the facts alleged “rise to the level of the irrational or the wholly incredible.”178

In addition to establishing this highly restrictive definition, the Supreme Court has cautioned judges against finding arguments to be frivolous. “Some improbable allegations might properly be disposed of on summary judgment,” the Court explained, “but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be ‘strange, but true; for truth is always strange, Stranger than fiction.’”179

174 Supra note 171.
176 Id. at 26–29.
179 Id. at 33 (quoting LORD BYRON, DON JUAN, Canto XIV, stanza 101 (Truman Steffan, Esther Steffand, & Willis Pratt eds., 1977)).

Some judges have tended to ignore the narrow definition of what constitutes a frivolous argument, and have imposed sanctions against lawyers who file pleadings or make arguments that have proven to be unavailing. When that happens, zealous advocacy is not the only value that is placed at risk. The genius of our common law is also jeopardized.

For example, Justice Cardozo noted that nine out of ten cases taken to the New York Court of Appeals during his time on that bench were “predetermined,” their fate “preestablished” by “inevitable laws” from the moment of their filing. MacPherson v. Buick Motor Co. appears to be a perfect example. In 1908, the Court of Appeals of New York had reaffirmed the long-established rule that a consumer cannot recover against the manufacturer of a product for negligence. Not long thereafter, MacPherson, who had been injured while driving a car with a defective wheel, sued the Buick Motor Company for negligent manufacture. Surely, MacPherson’s case was one of those that, Cardozo called “predetermined.” The result of MacPherson’s appeal, however, was Cardozo’s most celebrated torts opinion, reversing long-established law by allowing a consumer to sue a manufacturer for a defective product, and demonstrating the creative common-law judging for which he has been so highly regarded.

As Professor Grant Gilmore observed, the MacPherson decision “imposed liability on [a defendant] who would almost certainly not have been liable if anyone but Cardozo had been stating and analyzing the prior case law.” At the time of filing the complaint, however, MacPherson’s lawyer could not have known that Cardozo would choose to reverse a century of unbroken precedent that had only recently been reaffirmed. Much less could he have known that Cardozo would be able to carry a majority of the court with him. Without that frivolous-appearing complaint, however, Cardozo could not have changed the common law of manufacturer’s liability as he did.

Even Cardozo, the great innovator, observed that “the range of free activity for judges is relatively small,” in part because judges are limited to the issues that are brought before them by counsel. Behind every innovative judge, therefore, is a lawyer whose creative (and, arguably, frivolous) litigating opened up that, small range of judicial opportunity, thereby making the precedent-shattering decision possible.

Innovative judging (and lawyering) is not restricted to common law cases. Depending on how one counts the cases, the Supreme Court has overruled its own decisions hundreds of times. On at least sixteen occasions, this has happened

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180 217 N.Y. 382 (1916).
181 Torgeson v. Schultz, 192 N.Y. 156 (1906).
182 The point is underscored by Cadillac Motor Car Co. v. Johnson, 221 F. 801 (2d Cir. 1915).
183 See G. Edward White, Tort Law in America 210 (1960).
within three years. At other times, the most venerable of precedents have fallen, including at least ten cases that were overruled after as many as 94 to 126 years. For example, in *Erie Railroad v. Tompkins*, the Supreme Court overruled a precedent that had been applied every day in every federal trial court for nearly a century. On the occasion of one about-face by the Court, Justice Owen Roberts protested that "[n]ot a fact differentiates [the overruled case] from this [one] except the names of the parties." Indeed, the majority itself acknowledged in that case, "The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*,” which the Court then proceeded to overrule.

The Rehnquist Court overruled prior authority in over forty cases. For example, in *Lawrence v. Texas*, the Court struck down state legislation outlawing private, consensual homosexual conduct. In doing so, the Court overturned *Bowers v. Hardwick*, decided seventeen years before. In *Bowers*, a majority of the Court had described the legal argument that ultimately prevailed in *Lawrence* as “at best, facetious.” Since the dictionary definition of “facetious” is “not meant to be taken seriously or literally,” the Court was characterizing that argument in a way that was perhaps even more pejorative than the word “frivolous.”

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187 Stein v. Bowman (decided, 1839; overruled in part, 1839); Swift v. Tyson (decided, 1842; overruled, 1893); Schooner Catherine v. Dickenson (decided, 1854; overruled, 1775); Pennwey v. Neff (decided, 1878; overruled, 1777); Rolston v. Missouri Fund Commrs (decided, 1887; overruled in part, 1884); Coffey v. U.S. (decided, 1886; overruled, 1884); Ex Parte Bain (decided, 1887; overruled in part, 1885); Kentucky v. Dennison (decided, 1861; overruled, 1987); Kring v. Missouri (decided, 1883; overruled, 1960); Ex Parte Bain (decided 1887; overruled, 1885).


189 Swift v. Tyson, 41 U.S. 1 (1842).


191 Id. at 652.


195 Id. at 194.

The Roberts Court has not been reluctant to reverse precedent, though sometimes the Court is less than candid about the reversal. Tom Goldstein, founder of SCOTUSBlog, has called this the "John Roberts Method." Goldstein believes that the Roberts Court is "moving steadily in the direction of rolling back Warren Court-era precedents that conservatives view as significant overreaching of the judicial role."

The Court has candidly acknowledged that its precedents are "not sacrosanct." In Ring v. Arizona, a case that overturned a twelve-year-old Supreme Court case allowing a judge to make a requisite finding of fact underlying a death sentence, Justice Scalia remarked, "I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.


Recognizing how creative lawyering can dispel "old ignorance" and impart "new wisdom" to judges, the American Bar Association has taken care in its ethical rules not to discourage lawyers from challenging established precedent or otherwise seeking to make new law on behalf of their clients. For example, Model Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." Under such a rule, of course, MacPherson's lawyer would be subject to professional discipline, along with countless other lawyers whose creative litigating helped to shape our law. However, a contention is not frivolous within the rule if it is made as "a good faith argument for an extension, modification or reversal of existing law." Also, the Comment notes that "the law is not always clear and never is static." Accordingly, "in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Moreover, filing an action or defense is not frivolous under the Model Rules "even though the lawyer believes that the client's position ultimately will not prevail."

The Restatement of the Law Governing Lawyers has almost identical language to the Model Rules. In addition, the Comment to Section 110 urges judges to exercise restraint in disciplining lawyers for frivolous advocacy, noting that "[a]dministration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid over-enforcement."
Constitutional Limits on Sanctions for Frivolous Law Suits

Moreover, judges who have imposed sanctions against lawyers have typically ignored the constitutional limitations on sanctioning lawyers for filing frivolous pleadings. As the Supreme Court has reiterated in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., there is a First Amendment right to petition for redress of grievances by litigating civil cases. That right has, of course, been purposefully chilled by sanctions intended to discourage litigation.

A "sham" lawsuit is an exception to the constitutional right to petition through the courts. However, the "sham" exception does not apply unless the suit is "objectively baseless" or "objectively meritless." To satisfy that test, the litigation must be "so baseless that no reasonable litigant could realistically expect to secure favorable relief." All that is necessary to establish the constitutional right is an objective "chance" that a claim "may" be held valid. In that event, the First Amendment right is secure, even if the litigant has no subjective expectation of success and has a malicious motive for pursuing the claim.

The Rarity of Sanctions for Frivolous Arguments in Criminal Cases

Criminal defense lawyers are rarely disciplined or otherwise sanctioned for asserting frivolous positions in advocacy. One reason is that criminal defense is different from other types of advocacy. As stated in the comment to Model Rule 3.1, which relates to frivolous arguments: "The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by the Rule." Also, a comment in the Restatement of the Law Governing Lawyers notes that while the section on frivolous arguments applies "generally" to criminal defense lawyers, they may nevertheless take "any step" that is either "required or permitted" by the constitutional guarantee of the effective assistance of counsel.

206 Id. at 60.
207 Id. at 62.
208 Id.
209 Id. at 56, 61.
210 Restatement § 110, Reporter's Note to cmt. f: "Advocacy in a criminal-defense representation.") See also United States v. Nelson (In re Bechert), 885 F.2d 547, 550 (9th Cir. 1989) (noting "the absence of authority imposing sanctions against defense counsel").
211 Emphasis added.
212 Id., cmt. f.
Illustrating the rare cases in which criminal defense counsel have been sanctioned, the Restatement\(^{213}\) cites *In re Becraft*.\(^{214}\) In *Becraft*, the Ninth Circuit imposed a sanction against a lawyer in a criminal appeal who had repeatedly raised an argument that the court characterized as a "patent absurdity" and that the Eleventh Circuit had previously found to be "utterly without merit."\(^{215}\) Even in such a case, however, the court emphasized its reluctance to sanction a criminal defense lawyer.\(^{216}\)

The court noted that because significant deprivation of liberty is often at stake in a criminal prosecution, "courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding."\(^{217}\)

[7] The Necessity to Make "Frivolous" Arguments in Death Penalty Cases\(^{218}\)

As we have seen, even in civil cases, lawyers have considerable range, both ethically and constitutionally, in raising issues that are arguably frivolous. With respect to criminal defense, moreover; courts are loath to impose sanctions against lawyers in any case in which the defendant's liberty is at stake.\(^{219}\)

Furthermore, as serious as is loss of liberty, our jurisprudence recognizes that death is different.\(^{220}\) This is so not only as a fact of life and death, but also for the practical reason that appellate and post-conviction remedies are pursued in almost

\(^{213}\) *Id.*, Reporter's Note to cmt. f.

\(^{214}\) 885 F.2d 547 (9th Cir. 1989).

\(^{215}\) *Id.*, at 548, 549. In a number of tax evasion cases, *Becraft* had unsuccessfully contended that the Sixteenth Amendment does not authorize a direct nonapportioned income tax on resident United States citizens, and thus the federal income tax laws are unconstitutional with respect to such citizens. *Id.*, at 548. It is difficult to contemplate the national chaos that would follow a decision that the collection of income taxes from resident citizens is unconstitutional, and that it has been so for almost a century.

*Becraft* had also argued that state citizens are not subject to federal jurisdiction, on the ground that federal authority is limited to the United States territories and the District of Columbia (*id.*, at 549) — an argument that makes one wonder how prescient *Becraft* was with respect to the Rehnquist Court's views on federalism.

\(^{216}\) *Id.*, at 550 (citing United States v. Cronic, 466 U.S. 648, 656 (1984)).

\[^{217}\] We are hesitant to exercise our power to sanction under Rule 38 against criminal defendants and their counsel. With respect to counsel, such reluctance, as evidenced by the lack of authority imposing sanctions against defense counsel, primarily stems from our concern that the threat of sanctions may chill a defense counsel's willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client's conviction. Indeed, whether or not the prosecution's case is forced to survive the "crucible of meaningful adversarial testing" may often depend upon defense counsel's willingness and ability to press forward with a claim of first impression.


\(^{219}\) *In re Becraft*, 885 F.2d at 550.

100% of cases in which the death penalty is imposed.\textsuperscript{221} It is therefore crucial that in any capital case, "any and all conceivable errors" be preserved for review.\textsuperscript{222} The alternative is that a client may be put to death by the state, despite reversible error, because counsel has waived the issue or defaulted on it.

An example is \textit{Smith v. Kemp}.\textsuperscript{223} This was one of two prosecutions for the same murder. In the case involving codefendant Machetti, who was the "mastermind" in the crime,\textsuperscript{224} the lawyers timely raised the issue that women had been unconstitutionally under-represented in the jury pool.\textsuperscript{225} As a result, Machetti's conviction and death sentence were overturned, resulting in a new trial and a sentence of life in prison.\textsuperscript{226}

Codefendant John Eldon Smith was tried in the same county, by a jury drawn from the same jury pool. However, Smith's lawyers did not timely raise the constitutional issue, because they had overlooked authority that gave support to the argument.\textsuperscript{227} Since his lawyers' failure to raise the issue was not adequate to overcome nonconstitutional reasons of comity, finality, and agency, Smith was electrocuted.

The agency issue is an essential part of the jurisprudence of death. The Supreme Court, in an opinion by Justice O'Connor, expressly relied upon the Restatement of Agency § 242, for the "well-settled principle of agency law" that a master is subject to liability for harm caused by the negligent conduct of a servant within the scope of the employment.\textsuperscript{228} Thus, the Court could "discern no inequity" in requiring a criminal defendant ("the master") to "bear the risk of attorney error."\textsuperscript{229} The error in that case was that the attorney ("the servant") was seventy-two hours late in filing a "purely ministerial" notice of appeal in the state court.\textsuperscript{230} Accordingly, Roger Coleman was precluded from raising eleven constitutional challenges to his conviction, and he too was put to death by the state.\textsuperscript{231}

\textsuperscript{221} ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.8, History of Guideline (Feb. 2003).
\textsuperscript{222} Id., Commentary (quoting Steven B. Bright, Preserving Error at Capital Trials, The Champion, Apr. 1997, at 42-43).
\textsuperscript{223} 715 F.2d 1459 (1983).
\textsuperscript{224} Id. at 1476 (Hatchett, J., concurring in part and dissenting in part).
\textsuperscript{225} Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).
\textsuperscript{226} Kemp, 715 F.2d at 1476 (Hatchett, J., concurring in part and dissenting in part).
\textsuperscript{227} Id. at 1470-71 (citing Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979)).
\textsuperscript{229} Id. at 753.
\textsuperscript{230} Id. at 742.
\textsuperscript{231} Justice O'Connor also relied on federalism to support her opinion. Indeed, the first words of her opinion, in a case involving whether a person will live or die, are: "This is a case about federalism." Id. at 726. But see Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1991), where Justice O'Connor chose to ignore the federalism issue (raised by her dissenting colleagues) to allow a cause of action for sexist harassment of a schoolgirl — an important issue, but not one as compelling as death by electrocution.
A similar agency problem arises when a lawyer makes the tactical decision to omit an argument that appears to be weak (or when a lawyer claims to have done so when challenged with ineffective assistance of counsel). *Smith v. Murray* provides an illustration.232 There the lawyer chose to forgo an argument that was contrary to an opinion that the Virginia Supreme Court had handed down only two years before. Writing for the United States Supreme Court, Justice O'Connor praised the lawyer for "winnowing out" the weak argument and focusing on those more likely to prevail, and lauded this practice as the "hallmark of effective appellate advocacy."233

As a result of this model of effective appellate advocacy in the state court, however, the lawyer's client was precluded from raising a winning constitutional issue in the federal courts.234 As Justice O'Connor held, the lawyer's "deliberate, tactical decision" to winnow out what appeared to him to have been a weak argument in the state appeal, made it "self-evident" that the lawyer's client had given up his right to have the argument heard on federal habeas corpus.235

The conclusion is clear. Counsel in a capital case must, as a matter of professional responsibility, raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court or in the Supreme Court, in a direct appeal or in a collateral attack on a conviction or sentence. This is the essence of the Guideline 10.8 in the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.236 In addition, as noted in the Commentary to Guideline 10.8(A)(3)(d), assertion of a claim (even a "frivolous" one) might increase the chances of a desirable plea agreement or might favorably influence a governor or other official in making a decision regarding clemency.

In short, particularly in a capital case, the lawyer for the accused has a professional obligation to assert at every level of the proceedings what otherwise might be deemed a frivolous claim. Moreover, the same is true in any case involving potential deprivation of liberty in which an appeal or collateral attack might be contemplated.

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233 Id. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). This position is not universally accepted. See, e.g., Monroe Freedman, *Wiener's Briefing and Arguing Federal Appeals*, 30 Geo. Wash. L. Rev. 146 (1961) (book review) (arguing that effective advocacy requires that the lawyer raise every issue that might conceivably attract even one vote on a multi-judge panel).
234 Murray, 477 U.S. at 551-53 (Stevens, J., dissenting).
235 Id. at 533-34. Justice O'Connor also noted "the profound societal costs that attend the exercise of habeas jurisdiction," but had nothing to say about the costs to society and to the individual when a hearing on a legitimate constitutional claim is denied in a death case. Id. at 539.
§ 4.09 SPEECH — TRIAL PUBLICITY

The First Amendment right to freedom of speech is never more important than when an individual has been publicly accused of wrongful conduct in a criminal prosecution or a civil complaint. A prosecutor or civil litigant is privileged to publish to the world — including one's family, friends, neighbors, business associates, and potential customers — what in most other circumstances would be grounds for a libel action. In a criminal case, "the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment." In a civil case it may be no less urgent to respond publicly to allegations of shameful conduct like fraud, malpractice, spousal or child abuse, or selling products that can maim or kill. Also, the delay before ultimate vindication may be many months, if not years, and a good name earned during a lifetime can be destroyed. There can be no more pressing occasion for immediate, effective public rebuttal. Moreover; the ordinary citizen can gain access to the news media only when the allegations have first been made on public record.

It could be disastrous, however, for an unskilled defendant to confront the

237 Trial publicity by prosecutors is treated separately, in Chapter 10 on "Prosecutors' Ethics."
240 Two years after extensive condemnation of Dr. Bernard Bergman in the news media, in which he was described as "The Meanest Man in New York," the federal judge who heard the case said: "It appears to be undisputed that the media (and people desiring to be featured in the media) have vilified him for many kinds of evildoing of which he has in fact been innocent." United States v. Bergman, 416 F. Supp. 496, 502 (S.D.N.Y. 1976) (Sentencing Memorandum).
241 After he was acquitted of criminal charges involving dishonesty, former Secretary of Labor Ray Donovan bitterly commented, "Now tell me where I can go to get my good name back." See How Do I Repair Reputation? Donovan After His Trial, Cm. Temp., May 27, 1987, at C4. The same can be said about Captain James J. Yee, a former Muslim chaplain at the U.S. Naval Base in Guantanamo Bay, Cuba. Captain Yee was initially charged with espionage and aiding the enemy, which resulted in his being held for seventy-six days in the naval brig, much of the time in leg irons. Although these charges were dropped, Captain Yee was then charged with adultery and downloading pornography. Those charges were ultimately thrown out on appeal. See Reuters, Convictions Dropped for Muslim Chaplain at Guantanamo Bay, N.Y. Times, Apr. 15, 2004, at A24; Editorial, Military Injustice, N.Y. Times, Mar. 24, 2004, at A20.
242 "I... would shudder at the prospect of being charged with some crime, especially one of moral turpitude, and being condemned to suffer silence until some distant day when even an acquittal would not be recompense." Vermont Royster, The Free Press and a Fair Trial, 43 N.C.L. Rev. 364, 369 (1965).
243 United States v. Ford, 429 F.2d 596, 599 (6th Cir. 1970). The court continued:

The defendant's interest in replying to the charges and to the associated adverse publicity, thus, is at a peak. So is the public's interest in the proper functioning of the judicial machinery. The "accused has a First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it."

cacophony and confusion of a press conference. Even sophisticated and articulate people have been known to flounder in the face of a press corps eager for an embarrassing sound bite or unflattering photo. Also, as Justice Brennan has noted, public statements by the defendant that appeared to be incriminatory could be admissible at trial. Defense counsel, by virtue of her knowledge about the case and her training as an advocate, is frequently the most appropriate person to speak publicly on behalf of the defendant.

As Congressman (later President) James Buchanan said, in a case involving the imprisonment of a lawyer, for criticizing a judge, it is “the imperative duty of an attorney to protect the interests of his client out of court as well as in court.” Former White House counsel Leonard Garment has commented on his duty to represent his clients in the court of public opinion as well as in the courtroom. Moreover, the defense lawyer’s public explanation of what is at stake in the case can be important to raising the funds that are necessary to mounting an effective defense. Thus, zealous representation may well require the lawyer to speak out publicly on the client’s behalf.

The principal reason given for restricting trial publicity is that it can interfere with the constitutional right to a fair trial. But the Supreme Court has made it clear that it is virtually impossible to make a trial constitutionally unfair by trial publicity, even by pervasive prejudicial publicity that has been purposefully instigated by the prosecution.

During a brief five-year period during the 1960s, the Supreme Court did overturn four criminal convictions on grounds of prejudicial trial publicity. However, in Murphy v. Florida, the Supreme Court distinguished those cases away, describing the trials themselves with phrases like “circus atmosphere,” “carnival,” “utterly corrupted by press coverage,” and “the verdict of a mob.” Further, the Court held that even a showing that a juror had a “preconceived notion as to the guilt . . . of an accused” because of pretrial publicity is not sufficient to establish that a trial is

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244 Also, in a criminal case, the defendant may be held without bail and unable to speak out effectively.

Another compelling reason for the defense lawyer to exercise his or her right of free speech about the case is that the lawyer might be the target of news media criticism relating to the case.

248 A case in point is given in Stern, supra note 239, at 80.
249 The decision for the lawyer to do so is the client’s, after proper counseling by the lawyer. See Chapter 3, supra. But compare MR 1.2(a), which would appear to allow the lawyer to engage in publicity over the client’s objections, on the ground that trial publicity is a “means” or “tactic” rather than an “objective.”
252 Id. at 797–99.
Thus, after Murphy, no trial can be found unfair unless it has been "utterly corrupted" by publicity. 254

The virtual impossibility of meeting the "utterly corrupted" or "verdict of a mob" standard is illustrated by Murphy itself. Before the trial, the jurors were exposed to extensive prejudicial publicity about Murphy and his criminal record. Murphy's record included the theft of the Star of India sapphire and a conviction for murder. This was known to all members of the jury, one of whom "freely admitted that he was predisposed to convict" Murphy. 255 Also, the trial court denied a motion for a change of venue. Even Chief Justice Burger characterized the media coverage as "bizarre" and criticized the trial judge for having failed to prevent pretrial discussion of the prejudicial publicity among the jurors. 256 Nevertheless, the Court rejected Murphy's claim that his trial had been prejudiced. Thereafter, in Mu'Min v Virginia, 257 the Court found no prejudice in a capital murder case where the publicity included numerous references to evidence that was both inflammatory and inadmissible.

In light of Murphy, Mu'Min, and others, 258 it seems fanciful to suggest that the defense could so taint a trial with pretrial publicity as to deny the government a fair trial. Consider, for example, Gentile v State Bar of Nevada, a disciplinary matter arising out of a criminal prosecution. 259 The underlying case involved the prosecution of Grady Sanders for theft of nearly $300,000 and nine pounds of cocaine from a safety deposit box being used by undercover police officers for sting operations. Early suspects were two police officers who had had access to the box. Almost immediately, however, law enforcement officials announced that the officers had been cleared, and identified Sanders, who owned the safety deposit company, as the prime suspect.

The prosecution then issued extensive praise for the officers and condemnation of Sanders. Prosecutors announced that the officers were cooperating with the investigation but that Sanders was not. They described the officers as "two of the most daring and respected cops on the force," while Sanders was accused of being

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253 Id. at 800.
254 Id. at 798.
255 Id. at 804 (Brennan, J., dissenting).
256 Id. at 803 (Burger, C.J., concurring).
258 Another extreme case in which no prejudice was found is Patton v. Yount, 467 U.S. 1025 (1984). See also Beck v. Washington, 369 U.S. 581 (1962) (extensive reporting of a U.S. Senate investigation and of the grand jury indictment of the accused did not deprive defendant of fair trial); United States v. Haldeman, 559 F.2d 31, 50–71 (D.C. Cir.), reh'g denied (1976), cert. denied, 97 S. Ct. 2641 (1977) (the "extraordinarily heavy coverage" of the Watergate conspiracy did not deprive the defendants of a fair trial).

For an earlier case in which the Court found no prejudice despite pervasive adverse publicity that was actively promoted by the prosecution, see Stroble v. California, 343 U.S. 181 (1952). The pretrial publicity in Stroble included the defendant's confession to the sexual molestation and murder of a six-year-old girl. It was published along with headlined descriptions of the defendant as a "werewolf," a "fiend," and a "sex-mad killer."

linked to organized crime. This kind of prejudicial publicity, orchestrated by the prosecution, went on for a year before Sanders was indicted.

Oddly enough, the Gentile case was not a disciplinary action against the Sanders prosecutors for engaging in pretrial publicity in violation of Model Rule 3.6. Instead, the target was Sanders’ defense lawyer, Dominic Gentile. Just after his client’s indictment, and following the year of prejudicial publicity about his client, Gentile had held a short press conference to offer Sanders’ side of the case. If he had not done so, there would have been another six months of unanswered attacks before Sanders’ trial. Gentile said that Sanders was innocent, that four of the witnesses against him were known drug-dealers and convicted money-launderers, that the likely thief was one of the undercover officers, and that Sanders was a scapegoat. Six months later, the jury agreed.

The Nevada Supreme Court, in upholding the disciplinary action against Gentile, specifically found that he had not prejudiced the case. Moreover, the U.S. Supreme Court has been unable to find prejudice even in cases like Murphy and Mu’Min. With striking inconsistency, however, a majority of five justices, in an opinion by Chief Justice Rehnquist, held that Gentile had violated what was then MR 3.6 by creating a “substantial likelihood of materially prejudicing the trial.” Also, the majority upheld the constitutionality of the “substantial likelihood of material prejudice” standard for lawyer discipline, even though the Nevada court had interpreted this clause to be less stringent than a “clear and present danger” standard.

A different majority of the Supreme Court reversed the disciplinary action against Gentile, however, on the ground that MR 3.6 was void for vagueness under the Due Process Clause. On this issue, Justice Sandra Day O’Connor broke from the Rehnquist opinion, giving Justice Anthony Kennedy a majority of five. The Court’s focus in dealing with the vagueness issue was MR 3.6(c), the “safe harbor” provision. This provision said that even though the lawyer’s speech has a substantial likelihood of materially prejudicing the trial, he may nevertheless state, “without elaboration,” the “general” nature of the defense. The Kennedy majority held that the words “elaboration” and “general” are “classic terms of degree” which, in the context of MR 3.6, “have no settled usage or tradition of interpretation.” For those reasons, lawyers could only “guess at its contours.” Accordingly, the rule was unconstitutionally void for vagueness.

The ABA responded to Gentile with an amended MR 3.6. Subsection (a) again forbids a lawyer to make an out-of-court statement that the lawyer “knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” However, adopting the

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260 The Rehnquist majority found this potential prejudice in Gentile’s statement of his client’s innocence and the detective’s guilt, and in his reference to the character, credibility, and criminal records of witnesses against Sanders. In short, they found that Gentile had prejudiced a fair trial by responding directly to the publicity that had already been broadcast by the prosecution.

261 MR 3.8, which relates to prosecutors’ ethics, was also amended with regard to trial publicity. See Chapter 10, infra.

262 The restriction applies, of course, only to a lawyer who is “participating or has participated in the
position recommended in the first edition of this book, the new rule has a subsection that renders the proscription almost entirely ineffective. MR 3.6(c) says that notwithstanding subsection (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."

That means that the lawyer may, with impunity, defend her client's reputation, regardless of whether the harmful statements about the client have been made by the other side or by third persons. Moreover, a lawyer for a criminal defendant is permitted to respond publicly to the indictment whenever the charges have been publicized.

In addition, notwithstanding subsection MR 3.6(a), MR 3.6(b)(2) permits the lawyer to state publicly any information "contained in a public record." For many years, prosecutors have created a fulsome public record with a "speaking indictment," which details the charges and any other defamatory information that the prosecutor wants to trumpet in press conferences. Although criminal defense lawyers and civil lawyers have been slow to realize it, they too can create public records that can effectively exempt them from MR 3.6(a). For example, criminal defense lawyers can file bail applications, motions to dismiss the indictment, motions in limine, and motions to suppress evidence, all of which can include information that the lawyer wants to discuss publicly. Similarly, lawyers in civil cases can freely discuss any information contained in complaints, answers, motions to dismiss, motions for summary judgment, and any other pleadings or discovery documents that have been filed with the court and that are not subject to a protective order.

For practical purposes, therefore, MR 3.6 does not restrict criminal or civil lawyers from zealously representing their clients in the public forum as well as in court. Indeed, for a lawyer to do so, as noted by Justice Anthony Kennedy, is not just permitted but can be a lawyer's duty:

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment. . . . A defense attorney may pursue lawful strategies . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

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264 This is clear from a plain reading of MR 3.6(c) and from Comment [7].

265 An exception, of course, would be a document that is subject to a protective order.

266 See Chapter 10, § 10.10, infra (on "Trial Publicity by Prosecutors"). We use the word "fulsome" intending both dictionary meanings.

§ 4.10 COMMUNICATING WITH OTHER PERSONS ON BEHALF OF A CLIENT

A premise of the adversary system is that anyone who is or may be involved in a legal matter is entitled to have the benefit of a trained and skilled lawyer. In addition, there is a possibility of unfairness when a lawyer communicates with a person who is or who may be involved in a legal matter and who does not have legal representation. Ethical rules therefore limit lawyers in their communications with non-lawyers when representing clients. The underlying concern is that the non-lawyer could be at a significant disadvantage because of ignorance of the law and of lawyering skills. In addition, there are rules forbidding lawyers to mislead third parties.

The rules therefore deal with two categories of cases, those in which the person with whom the lawyer communicates is unrepresented, and those in which the person is represented by another lawyer. These rules are often thought of as protecting persons whose interests are "adverse" to those of a lawyer's client, but they are not limited to protecting the interests of parties who are opposed to each other in litigation or across a bargaining table. For example, the rules protect potential witnesses from being misled regarding the lawyer's partisan role in a matter that the lawyer is investigating.

[1] Communicating with Unrepresented Persons

We begin with lawyers who communicate with non-lawyers who have no legal representation. Under Rule 4.3 of the Model Rules, a lawyer dealing on behalf of a client with an unrepresented person is forbidden to state or imply that the lawyer is disinterested. In addition, if the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. The lawyer is permitted to interview the unrepresented person to investigate the matter, but she may have an affirmative obligation to clarify her role even if she has done nothing affirmatively to mislead the person.

MR 4.3 forbids a lawyer to give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the person are, or have a reasonable possibility of being, in conflict with the interests of the client. Moreover, entirely apart from that rule, lawyers should be cautious about giving legal advice to anyone whom they do not represent. The Scope section of the Model Rules notes that the existence of a lawyer-client relationship depends on state substantive law, which will turn on the facts of particular cases. If a lawyer does give legal advice to an unrepresented person, therefore, the lawyer runs the risk of a finding that the person has reasonably understood that the lawyer has become that person's lawyer. This can expose the lawyer to malpractice liability to that person, based on a charge of

268 MODEL RULES scope [17].
269 Such a finding would be based on the formation of a contract implied in fact.
incompetent representation and/or of a conflict of interest.\textsuperscript{270}

In addition, the lawyer is forbidden by MR 4.1(a) to make a false statement of material fact or law to a third person, and by MR 8.4(c) to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.\textsuperscript{271} Also, under MR 8.4(a), the lawyer may not violate a rule through the acts of another. MR 5.3 goes further, requiring lawyers to "make reasonable efforts" to ensure that non-lawyers who are associated with them act in ways consistent with the lawyers' professional responsibilities. Moreover, MR 5.3(c) expressly makes a lawyer responsible for conduct by a non-lawyer that the lawyer ratifies.

These rules seem sensible and desirable, but can have undesirable consequences. In the 1960s, Freedman was involved in efforts on behalf of a fair housing group to enforce the District of Columbia's rules against racial discrimination in housing. The only way to make a case of discrimination was through "testers." An African-American couple would purport to be interested in buying or renting a house in a particular neighborhood. They would claim to be married and to have two children and a particular income level. Immediately after they were told that no houses were available for sale or rent in the neighborhood, a white couple purporting to have the same family and income would apply for a house. When the white couple was then shown two or three available houses, there would be persuasive evidence of racial discrimination.

This was a reasonable — in fact, necessary — way to carry the burden of proving discrimination. The problem is that under the Model Rules, and under the ethical rules at the time, Freedman's conduct was unethical. Acting through others (the testers), he made material misrepresentations of fact to the real estate brokers and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation.\textsuperscript{272}

The same issue can arise, of course, in any litigation. In a case involving a coverage dispute between an insurer (Aetna) and its insured (Monsanto), Aetna’s lawyers sent out investigators to interview former employees of Monsanto.\textsuperscript{273} Affidavits of the former employees (which the judge credited) included a variety of ways in which Aetna investigators had misled them. For example, some said that investigators had told them that they represented Monsanto’s insurance company but had not said that Monsanto was suing the insurance company; the investigators thereby gave the false impression that they were aligned with Monsanto. Other affidavits related more direct forms of misrepresentation.

\textsuperscript{270} With regard to conflicts of interest, see Chapter 9, infra.

\textsuperscript{271} MR 4.1 cmt. [1] says that 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."

\textsuperscript{272} The same was true then under Canon 15 of Canons of Professional Ethics, which proscribed "any manner of fraud or chicanery."

\textsuperscript{273} Monsanto Co. v. Aetna Casualty & Surety Co., 598 A.2d 1018 (Del. Super. Ct. 1990). The defendants were not just Aetna but several insurers, and related to their liability for environmental pollution litigation against Monsanto across the country.
The court’s opinion is headed with a quotation from oral argument by Aetna’s counsel:274 “[Telling the truth in civil litigation] is, of course, a very attractive proposition. But, I would like to visit with your Honor further examination of that proposition, because while that might be nice in a perfect world, it is not the way the system operates in litigation in this country.” That was a questionable way to argue the issue that was before the court, and it gave rise to a questionable response from an angry judge: “One who is in search of the truth must tell the truth.”275

If the judge’s proposition were accepted, no undercover or sting operation would be permitted, and much activity that is more seriously antisocial than misrepresenting one’s true role in an investigation would be virtually impossible to uncover and to prove.276 Nevertheless, on the facts as found by the judge, he was correct in concluding that the conduct had violated the Model Rules.277

Some commentators have contended, though, that the Model Rules do not in any case preclude “undercover investigators” — those who “disguise identity or purpose” in dealing with others.278 Others argue that the rules of lawyers’ ethics take the categorical position, in effect, that “lying is never justified,” and these commentators recommend appropriate amendments to take account of cases where deception is morally justifiable.279

David B. Isbell and Lucantonio N. Salvi contend that the Model Rules, “properly read, ... do not prohibit the use of misrepresentations solely with regard to identity and purpose, and solely for evidence-gathering purposes, by investigators and testers acting under the direction of lawyers.”280

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274 Id. at 1015.
275 Id. at 1016. The judge’s direct response was “in the strongest way possible to reject counsel’s observations as being so repugnant and so odious to fair minded people that it can only be considered as anathema to any system of civil justice under law.” Id. at 1015.

Finding that the investigators’ misleading conduct had tainted the trial, the judge issued an order scripting the information investigator’s would have to provide to any other potential witnesses in the case. Id. at 1021.

276 See, e.g., Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983):

This court and others have repeatedly approved and sanctioned the role of “testers” in racial discrimination cases. [Citing cases.] It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. ... [W]e have long ago recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.


277 Monsanto, 593 A.2d at 1020–21. The conduct would also have violated the Model Code; see discussion, supra.

278 Isbell & Salvi, supra note 276, at 795.


280 Isbell & Salvi, supra note 276, at 795.
Here is the central part of their analysis. Rule 4.1(a) does forbid a lawyer to “make a false statement of material fact” to a third person. However, the rule is prefaced by the phrase, “[i]n the course of representing a client.” This phrase does not refer, they say, to the existence of a lawyer-client relationship, but means “that the lawyer must be “functioning as a lawyer,” and not as a “private citizen” in the activity in question. But, they assert, “[i]nvestigators and testers are not ordinarily lawyers and in any event do not function as such.” Accordingly, if a lawyer were to act as an investigator, she would not be “functioning as a lawyer” and therefore would not be “in the course of representing a client.” Moreover, a lawyer supervising or ratifying the conduct of the investigator would not be acting improperly under MR 5.3 for the same reason, that is, the conduct that is being supervised or ratified would not be unethical if engaged in by the lawyer.282

As much as we would like to reach the same conclusion, we cannot reconcile the analysis with the text. In ordinary usage, the phrase “in representing a client” clearly refers to activity on behalf of a client in the course of a lawyer-client relationship. This is so even if the activity is something that can be done by a private citizen, like reading a book, or writing a letter, or for that matter, interviewing a potential witness.283 Not surprisingly, therefore, ABA Formal Opinion 95-396 says flatly, “if the investigator acts as the lawyer’s ‘alter ego,’ the lawyer is ethically responsible for the investigator’s conduct.”284

Moreover, in commercial cases, we are confident that lawyers charge their engaging in or clients fees for the lawyers’ “professional services” for time that is devoted to supervising undercover or sting operations. Also, we would expect that, in appropriate circumstances, lawyers would assert a work-product privilege for communications with their investigators/testers. Finally, a decisive refutation of the Isbell-Salvi position is that it is irrelevant whether the lawyer who engages in conduct involving dishonesty, fraud, deceit, or misrepresentation is acting “as a private citizen,” rather than on behalf of a client. As properly noted in ABA Formal Opinion 336, the ethical rules forbidding such conduct are not limited to acts by lawyers in their capacity as lawyers.

281 Id. at 814–15.
282 Id. at 818–19.
283 Also, the authors assert that a distinction cannot properly be drawn that would allow prosecutors but not civil practitioners to conduct undercover activities. Such a distinction, they say, “would find no anchor in the text of the rule.” Id. at 796.
284 See also MR 5.3, which requires lawyers to “make reasonable efforts” to ensure that non-lawyers who are associated with them act in ways consistent with the lawyers’ professional responsibilities. In addition, MR 5.3(c) expressly makes a lawyer responsible for conduct by a non-lawyer that the lawyer ratifies.
We agree, therefore, with those who urge that the Model Rules be amended to permit deception when certain criteria have been met. We propose the following criteria: (1) there must be a good faith reason, consistent with truth-seeking, to perpetrate the deception; (2) there must be no alternative means reasonably available to achieve the result; (3) if the deception involves a tribunal, it must be revealed within a reasonable time after it has occurred; and (4) no person may be caused to suffer significant and irreparable injury (other than exposure of wrongful conduct) by the deception.

[2] Communicating with Children

The Model Rules relating to transactions on behalf of clients with persons other than clients do not distinguish between adults and children. Children are essential witnesses in many civil and criminal cases, and proper trial preparation requires that they be interviewed like any other witnesses.

For children as well as adults, therefore, the essential limitation of MR 4.4(a) is that the lawyer not use any means that have "no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights" of that person. Short of that limitation, however, Comment [1] to MR 4.4 recognizes that "[r]esponsibility to a client requires a

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285 See, e.g., Shine, supra note 279, at 750. Our criteria are similar in some respects to Shine's, but are significantly different overall.

286 This would involve consideration of the expense and delay required by formal discovery. Also, it recognizes that before litigation is filed, formal discovery is unavailable; yet a potential plaintiff is under an obligation to have some factual basis before filing an action or else to risk sanctions, as under Rule 11.

287 See, e.g., discussion of In re Friedman, infra note 288.

288 In re Friedman, 392 N.E.2d 1338 (Ill. 1979), was a disciplinary action against a prosecutor. The case illustrates the four criteria, but we also believe that Professor Freedman's analysis of the applicable rules (discussed below) was correct on the facts of the case.

A police officer had told the prosecutor that the officer had been offered a bribe by a defense lawyer if the officer testified falsely that the victim of an assault was unwilling to come to court. The only way to make a case against the corrupt lawyer was to go forward with the scheme so that the bribe would be paid. The prosecutor was subjected to discipline for presenting the officer's perjury and related violations.

Professor Freedman submitted an affidavit in the case saying, in part, that the prosecutor had not committed a disciplinary violation because his compelling motive had been to expose corruption in the administration of justice, and because the relevant rules contemplate cases in which there is no intention to reveal the deception to the tribunal (as the prosecutor had promptly done). See id. at 1336 (Underwood, J., concurring). Freedman analogized the case to a firefighter setting a backfire to stop a conflagration that threatens to destroy a city, and then being prosecuted for arson.

The Illinois Supreme Court split three ways, with a majority holding that the prosecutor had violated the rules, but a different majority holding that he should not be disciplined.

289 See MR 4.1 (Truthfulness in Statements to Others), MR 4.2 (Communication with Person Represented by Counsel), MR 4.3 (Dealing with Unrepresented Person), and MR 4.4 (Respect for Rights of Third Persons).

290 Cf. Davis v. Alaska, 415 U.S. 308 (1974). The Supreme Court held that an accused's Sixth Amendment right of confrontation outweighs a state's interest in protecting the privacy and encouraging the rehabilitation of a juvenile. Accordingly, the state is forbidden to prevent cross-examination of a witness about his probation for a juvenile offense.
lawyer to subordinate the interests of others to those of the client.”

Also, MR 4.1 forbids a lawyer to make a false statement of fact or law to a third person. As previously noted, MR 4.3 forbids a lawyer to give legal advice to an unrepresented person other than the advice to secure counsel. The comment to MR 4.3 adds that “[w]hether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.” Thus, the comment assumes that a lawyer may be interviewing a person of limited experience and sophistication, and restricts only the nature of any advice that the lawyer might give to such a person. There is no limitation, however, on the information that the lawyer might seek from that person.291

[3] Communicating with Represented Persons (Civil)

Model Rule 4.2 forbids a lawyer to communicate about the representation with a person the lawyer knows to be represented by another attorney in the matter. The two exceptions are when the person’s attorney has authorized the lawyer to make the contact, or when the lawyer is authorized by law.

In civil cases, controversy over this rule has centered around the issue of which employees of a represented corporate party are included in the ban. The issue is important because of the importance of fact investigation and the considerable expense of formal discovery, which can be prohibitive for many plaintiffs. This is particularly true of depositions, which are the formal counterpart to informal interviewing, and which can be made extremely expensive by defendants who have the resources to prolong them.

First, with regard to former employees, ABA Formal Opinion 91-359 has held them to be outside MR 4.2, noting that “[n]either the Rule nor its comment purports to deal with former employees of a corporate party.”292 The committee reasoned that “the effect of the Rule is to inhibit the acquisition of information about one’s case,” and therefore “the Committee is loath . . . to expand [the Rule’s] coverage to former employees by means of liberal interpretation.”

With regard to current employees, Comment [7] to MR 4.2 says that the prohibition extends to (1) “a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter,” or (2) one who “has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability.”

Comment [8] adds that this restriction applies only when the lawyer “knows that the person is in fact represented in the matter to be discussed. This means that the

291 Nevertheless, some judges mistakenly believe that lawyers are forbidden to interview children. In one case, for example, a judge contended that it was “really egregious” for a lawyer to “talk[] directly” to a child, and held the lawyer in contempt. See Gwen Filosa, Defender, Investigator found in Contempt; They Tried to Interview Children in Rape Case, TIMES-PICAYUNE, July 16, 2009, at A1. The contempt was reversed in an unpublished opinion by the U.S. Court of Appeals for the Fourth Circuit.

292 Emphasis in the original.
lawyer has actual knowledge of the fact of the representation." Otherwise, the lawyer's communication with that person would be governed by MR 4.3.


As just discussed, MR 4.2 forbids a lawyer to communicate about the representation with a person the lawyer knows to be represented in the matter, except when the lawyer has been authorized by the person's attorney or when authorized to do so by law or a court order.

There has been controversy regarding whether prosecutors are bound by the no-contact rule of MR 4.2.\textsuperscript{293} For example, prior to 1995 MR 4.2 forbade contact only with a represented "party." The argument was made, therefore, that prosecutors could freely contact a criminal suspect through an undercover agent—even if the suspect had a lawyer with regard to that matter—because until there was an indictment, there was no case, and the suspect was therefore not a "party" within the rule.\textsuperscript{294} Only by amending the rule to change "party" to "person," it was argued, could pre-indictment contacts be included in the rule.\textsuperscript{295} In 1995 that argument was eliminated by amendment of MR 4.2, which changed "party" to "person." That, however, did not end the debate.

There has always been general agreement that prosecutors are governed by ethical codes applicable to other lawyers. Any doubt about whether that includes federal prosecutors acting within particular states was answered by Congress in 1998 by the Ethical Standards for Attorneys for the Government Act (The McDade Amendment).\textsuperscript{296} The Act provides that government attorneys are subject to the ethics rules of "each state where such attorneys engage in their duties, to the same extent and in the same manner as other attorneys in that State."

That has not ended the debate over the applicability of MR 4.2 to federal prosecutors, however, because of the exception for contacts with represented parties that are "authorized by law." Unfortunately, that phrase is ambiguous (perhaps intentionally so), and commentators tend to find whatever meaning they look for.

One argument in support of prosecutors' contacts with represented persons is that courts have held that a wide range of such contacts do not violate constitutional protections relating to the right to counsel, self-incrimination, and due process.\textsuperscript{297} The contention is that those holdings mean that the courts have


\textsuperscript{294} See, e.g., ABA Op. 95-396 (dissent by Ralph B. Elliot).

\textsuperscript{295} Id.


\textsuperscript{297} For further discussion of prosecutors violating ethical rules relating to truthfulness (MR 4.1 and 8.4(c)) and communication with persons known to be represented by lawyers (MR 4.2); see infra in this chapter, Breaking Rules in Criminal Cases. See esp. Moran v. Burbine, 475 U.S. 412 (1986).
given “authorization by law” to prosecutors to engage in such contacts. However, holding that particular prosecutorial conduct does not violate the Constitution is not the same as holding that it is “authorized by law” for purposes of state ethical requirements.

The Supreme Court has emphasized this point. In *Mabry v. Johnson*, for example, a unanimous court noted that the concern of the Due Process Clause is with “the manner in which persons are deprived of their liberty,” and is not “a code of ethics for prosecutors.”298 Also, in *Nix v. Whiteside*, Chief Justice Warren Burger cautioned that courts must be careful not to “constitutionalize particular standards of professional conduct and thereby intrude into the State’s proper authority.”299 Burger thereafter emphasized and elaborated on that point, saying, “[t]he fact that the Constitution permits particular conduct does not mean that it’s professionally appropriate to engage in that conduct.”300 That is, when a court says, “[i]t’s not unconstitutional,” the court does not mean, “[i]t’s ethical,” or “[w]e think you ought to do it.”301

Consistent with those Supreme Court pronouncements, comment [5] to MR 4.2 says that “[t]he fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.”

Nevertheless, the same comment includes some equivocal language that is calculated to continue the debate. The comment says that communications authorized by law “may” include (note that it does not say that they “do” include) investigative activities of lawyers representing governmental agencies, directly or through investigative agents, “prior to the commencement of criminal or enforcement proceedings.” Also, the comment says that when communicating with “the accused in a criminal matter,” a government lawyer must comply with MR 4.2. By negative implication, the quoted phrase can be taken to mean that until there is a “criminal matter,” and until the person being investigated has formally become “the accused,” a government lawyer is not bound by MR 4.2.

One final point, which is addressed by ABA Opinion 95-396, deserves mention here. There are situations in which a criminal defendant’s lawyer is selected and paid by those for whom the defendant is employed. When that happens, there is a significant and plausible risk that the lawyer’s loyalty is more to the employers than to the defendant. In short, there is a conflict of interest.302 In such cases, the defendant is “represented,” but not necessarily willingly and as he should be represented. Nevertheless, the defendant may be reluctant to discharge the lawyer

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301 Id. See also ABA Op. 95-396 (Constitutional protections establish only “minimal historic standards” that defendants must receive, while ethics rules “seek to regulate the conduct of lawyers according to the standards of professionalism”).
302 See Chapter 9, infra, on Conflicts of Interest, especially § 9.05 headed “The Preventive Rationale.”
and obtain independent representation. It would be improper, even in such a case, for a prosecutor to bypass the lawyer and communicate directly with the defendant. On occasion, though, a defendant will initiate contact with the prosecutor. What then?

Because of our emphasis on client autonomy, we are concerned that no criminal defendant have a lawyer imposed upon him by others. We agree with Opinion 95-396, therefore, that an appropriate course of action would be for the prosecutor to request that a court (if there is one with jurisdiction) speak with the defendant on the record but without the presence of either defense counsel or prosecutor. The purpose of such a hearing would be to determine whether the defendant is satisfied with his lawyer or wants independent counsel and, if he does, to have the court appoint a new lawyer. As also noted in Opinion 95-396; the prosecutor, even though she has been approached by the defendant, should refrain from offering any advice or engaging in any substantive discussions with him.

§ 4.11 DOES ZEAL EVER JUSTIFY BREAKING OTHER ETHICAL RULES?

The outer limit of zealous representation is clear. Zealous representation must be carried out only “within the bounds of the law, which includes Disciplinary Rules.” Thus, we would not advise a lawyer-client, much less a law student, to risk professional discipline by violating a disciplinary rule, even if our view was that particular circumstances warranted doing so. The fiduciary obligations of a lawyer to a client, and a professor to a student, would trump any personal views we might have about the desirability of following a particular rule.

Nevertheless, some of the preceding discussion in this chapter, and specifically that relating to undercover operations, raises a question that is seldom if ever addressed in discussions of lawyers’ ethics. Does zealous representation ever justify breaking the ethical rules? 

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303 However, it would be appropriate for a judge, sua sponte, to assure herself that the defendant has voluntarily waived the conflict of interest.

304 See Chapter 3, supra.

305 See ABA Op. 95-396. We have modified the language in the opinion to make it clear that neither a prosecutor nor the defense lawyer should be present at the hearing. Also, we disagree with the suggestion in the opinion that the court might authorize the prosecutor to communicate directly with the defendant rather than appoint new defense counsel. In order to assure an informed waiver, a defendant should have the advice of counsel before waiving counsel and dealing directly with the prosecutor.

306 Model Code EC 7-1, DR 7-101. This well-known language in the Model Code is mirrored in the Model Rules in Comment 1 to Rule 1.3:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.


307 See discussion, supra.

308 See Monroe Freedman, In Praise of Overzealous Representation — Lying to Judges, Deceiving
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[1] Breaking Rules in Civil Cases

We have mentioned that Freedman, in preparing housing discrimination litigation, sent out investigators/testers who misrepresented their identities and desire to buy a house. This would violate ethical rules forbidding a lawyer to make a false statement of material fact to another person or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In similar circumstances, we would do so again.

Would this be unethical? On a plain-meaning reading of the rules, yes. As recognized by Second Circuit Judge James L. Oakes, in an opinion cited with apparent approval by the ABA Center for Professional Responsibility, "[T]he private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics." Oakes went on to explain that a lawyer is forbidden to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," and that lawyers are subject to this duty even when they are not acting in their capacity as lawyers.

Despite the plain meaning of the ethical rules, however, courts regularly accept evidence that is produced by undercover or sting operations. For example, two years before Judge Oakes' observations, the Seventh Circuit stated:

This court and others have repeatedly approved and sanctioned the role of "testers" in racial discrimination cases. It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. [W]e have long ago recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.

This judicial disposition to admit the fruits of sting operations is not restricted to cases of racial discrimination, but extends to commercial cases as well. For example, in a case involving testers who misrepresented themselves in order to expose trademark violations by a client's competitor, the court held that excluding the evidence obtained by the testers "would not serve the public interest or promote the goals of the disciplinary rules." Also, in another unfair trade case, the court relied

Third Parties, and Other Ethical Conduct, 34 Hofstra L. Rev. 771 (2006). In addition to the ethic of zeal, Professor Freedman's analysis relies on inconsistencies in the Model Rules, the Scope section of the Model Rules, the client's constitutional rights, court decisions, biblical authorities, and moral philosophy.

309 MR 4.1(a), 4.3, 8.4(a) and (c), 5.3.

310 We are using the word "unethical" here to refer to a violation of one or more disciplinary rules, and not to refer more generally to conduct that we would consider to be wrongful in a moral sense.

311 United States ex rel. Vuitton et Fils S.A. v. Klayminc, 780 F.2d 179, 186, 187-88 (2d Cir. 1985) (Oakes, J. dissenting), rev'd sub nom. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). Judge Oakes objected to privately run sting operations that do not have prior judicial approval from a court; this issue was not reached by the Supreme Court, which reversed the majority decision on broader grounds.

312 Id. (citing Model Code, DR 1-102(A)(4) (1980); MR 8.4(c) (1983)).

313 Id. (citing ABA Formal Op. 336 (1974)).

314 Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983).

on an affidavit of Professor Bruce Green, who stated: "The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means." Again, the court admitted the evidence developed through a sting operation involving misrepresentations.

What, then, is a conscientious lawyer to do? Can she, consistent with zealous (or even diligent) representation, fail to develop essential evidence that is only available through a sting operation? Indeed, if "the prevailing view in the legal profession" is that such conduct is not ethically proscribed, can a lawyer competently fail to conduct the sting?

A similar issue has arisen regarding a lawyer's tape recording of a conversation without disclosing to the other person that the taping is going on (a practice that frequently accompanies sting operations). In 1974, the ABA Ethics Committee held that such taping was a violation of Model Code DR 1-102(A)(4), as conduct involving dishonesty, fraud, deceit, or misrepresentation. There are good reasons for such a restriction: (1) people tend to choose their words with greater care when a recording is being made; (2) the person who knows a recording is being made has an unfair advantage in choosing how to control the conversation and even in creating misleading impressions; (3) the person who knows a recording is being made has an unfair advantage in being able to decide, unilaterally, not to use the recording at all; and (4) some people would prefer not to speak under such circumstances, but are denied the choice. Nevertheless, twenty-five years later: the ABA committee overruled itself, holding that surreptitious taping does not violate ethical rules, as long as doing so is not illegal in the jurisdiction.

This raises the question of whether lawyers who conducted surreptitious taping before the ABA committee changed its opinion about the meaning of the ethical rules were acting unethically. It would appear, on the contrary, that those lawyers were properly engaged in zealous and competent representation, since courts were regularly admitting evidence obtained in violation of ethical rules.

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the article by Isbell and Salvi, which is criticized above.

317 Competence requires "the legal . . . preparation reasonably necessary for the representation." MR 1.1.
318 ABA Formal Op. 387. The committee also cited other ethical rules.
320 See Ass'n of the Bar of the City of N.Y., Formal Op. 2003-02. Also, although taping of conversations has become common in many business contexts, we are accustomed to being given an automatic announcement when it is being done.
322 See, e.g., Stagg v. New York City Health & Hosp. Corp., 162 A.D.2d 595 (N.Y. 1990) ("New York follows the common-law rule that the admissibility of evidence is not affected by the means through which it is obtained. Hence, absent some constitutional, statutory, or overriding policy basis requiring a departure from the common-law rule in this case, we would discern no error in the admission of the
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The Supreme Court has sanctioned admission of evidence obtained by prosecution conduct that was admittedly “objectionable as a matter of ethics.” In *Moran v. Burbine*, the police lied to the defendant’s lawyer, assuring her that she need not come to the police station that night because her client would not be interrogated. Less than an hour later, however, the police began a series of interrogations that resulted in a confession. Writing for the Court, Justice O’Connor expressed distaste for the “deliberate deception” of “an officer of the court.” Nevertheless, the Court rejected claims under the *Miranda* rule, the privilege against self-incrimination, the right to counsel, and due process, and admitted the evidence that the prosecution had wrongfully obtained. Thus, the Supreme Court has condoned what it has explicitly recognized to be unethical prosecutorial conduct.

Further, the Supreme Court has held that prosecutors are forbidden to use peremptory challenges to exclude jurors on grounds of race or gender. But if a prosecutor is challenged for doing so, his justification on race-neutral grounds can suffice regardless of whether it is “persuasive, or even plausible.” Indeed, a judge is permitted to accept a prosecutor’s justification even if it is “fantastic . . . silly, or superstitious.”

Moreover, the prosecutor is permitted to use both race and gender as grounds for disqualifying jurors, as long as he can assert “legitimate reasons tangentially connected with their race.” In *Galbert v. Merkle*, for example, the prosecutor asserted that he had excluded black women who were young and obese (the only African-Americans on the jury panel), because they are “really dangerous to me.” Because the prosecutor claimed to have used youth and obesity along with race and gender, his peremptory challenges were upheld.

The same prohibition against using race or gender as a basis for peremptory challenges applies to defense counsel. Smith has argued, however, that the obligation of zealous advocacy ought to trump the prohibition against race-based jury selection by criminal defendants. She takes this position notwithstanding her personal dislike of racial and gender stereotyping, and her concern that, in the

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challenged testimony even if an ethical violation were established.


324 *Id.* at 423, 424.


327 *Id.*

328 *United States v. Brown*, 817 F.2d 674, 676 (10th Cir. 1987).


330 *Id.* at *3.


name of effective advocacy, she may be teaching students to engaged in bigoted or at least stereotypical thinking. Smith believes that her ethical obligation to defend the accused means that she must make use of research regarding race and gender in juror decision-making, even if doing so results in excluding prospective jurors because of race or gender. It is not that she believes that racial or demographic stereotypes are an accurate proxy for the attitudes and life experience of prospective jurors. Rather, in view of limited voir dire in most criminal trials, it would be less than diligent lawyering to disregard what is known about the influence of race and gender on jurors’ attitudes.

At the beginning of this section, we raised the question of whether zealous representation ever justifies breaking other ethical rules. We do not advise others to do so. For ourselves, however, the answer is yes — “when justified by inconsistencies in the Model Rules, the Scope section of the Model Rules, the client’s constitutional rights, court decisions, biblical authorities, and moral philosophy.”

§ 4.12 CIVILITY/COURTESY/PROFESSIONALISM

One of the most serious attacks on the traditional ethic of zeal goes under the deceptively benign banner of increasing civility, courtesy, and professionalism among lawyers. The proponents of these notions mean a variety of very different things, but the end result is the subordination of zealous representation to vague and sometimes unethical notions of civility. In addition, the enormous amounts of time and resources that have gone into the “civility movement” have distracted the profession from dealing with the severe ethical and constitutional problems

333 See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 605 (1985) (acknowledging that “the case for undiluted partisanship is most compelling” in criminal defense).

334 See JEFFREY ABRAMSON, WE THE JURY 171 (1994) (“[Social science data] generates probabilistic statements about the attitudes or biases of a specific group. Within limits, probabilistic theorems may be of use to lawyers, enabling them to play the odds or make educated bets.”).

335 See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 220-27 (1997) (discussing the deficiencies of voir dire as it is typically conducted); see also Nancy Gertner, Is the Jury Worth Saving?, 75 B.U. L. Rev. 923, 930 (1995) (reviewing STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (1994)) (“As long as voir dire is limited and counsel is prevented from exploring juror predispositions in a meaningful way, peremptory challenges are an important safety valve.”).


337 Typically, proponents hark back nostalgically to a golden age when, they say, lawyers were universally respected and law was an honored profession. The golden age, however, is a myth. See MONROE FREEDMAN, A BRIEF “PROFESSIONAL” HISTORY, LEGAL TIMES, Dec. 17, 1990, at 22; Monroe Freedman, The Good Old Days, for Good Old Boys, LEGAL TIMES, Feb. 28, 1994, at 31; Monroe Freedman, Abraham Lincoln: Lawyer for the Twenty-First Century?, LEGAL TIMES, Feb. 12, 1996, at 26; Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 Dick. L. Rev. 549 (1996).

338 For example, in a panel discussion among four lawyers, two law professors, and a judge, Professor Freedman was “the only one who believed that zealous client advocacy is more important than being civil.” AMY TRAVISON, ZEALOUSNESS MAY BE TOO RAMPANT IN THE LEGAL PROFESSION, N.Y. STATE BAR NEWS, Mar/Apr. 1996, at 22; see also Abbe Smith, Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense, 77 Tex. L. Rev. 1599-1601 (1999) (lamenting the call for restraint over passion in criminal defense advocacy).
resulting from the underfunding and overloading of public defenders' and prosecutors' offices and of the administration of justice in general.339

The civility movement began in hysteria in the early 1970s in a series of speeches by then Chief Justice Warren Burger. His immediate targets were lawyers representing unpopular clients in civil rights, civil liberties, and criminal cases. Chief Justice Burger charged that "adrenalin-fueled lawyers" were engaged in wide-ranging improprieties, from disruption of court proceedings to seeing how loud they could shout or how many people, including judges, they could insult. As a result, Burger claimed, "rules of evidence, canons of ethics and codes of professional conduct — the necessity for civility — all become irrelevant."340

The facts were otherwise. In 1971, the New York Times conducted a survey and interviews with legal authorities around the country. It found that courtroom disorder was "not a serious or growing problem."341 Similarly, an extensive study sponsored by the Association of the Bar of the City of New York concluded that "there is no serious quantitative problem of disruption in American Courts."342 But the facts did not matter. Chief Justice Burger continued his crusade and by 1984 was successful in promoting an ABA Commission on Professionalism. As a result, we now have an ABA Creed of Professionalism and about 100 similar courtesy codes and civility guidelines throughout the country.

The supporters of these creeds, codes, and guidelines insist that they simply exhort lawyers to behave with civility and that they are not intended to be enforced. Increasingly, however, judges are enforcing civility with a variety of sanctions against both lawyers and clients.343 For example, judges have explicitly threatened sanctions against lawyers who violate civility codes.344 Judges have also censured lawyers, by name, for conduct that is required by ethical rules but that the judges nevertheless consider "unprofessional."345 The most pernicious sanction, and the one calculated most effectively to chill zealous advocacy, was described by Chief Judge Marvin Aspen of the United States District Court for the Northern District of Illinois.346 If a lawyer does something "unseemly" in court, the judge will gossip about it over lunch with other judges, identifying the lawyer by name. As a result, Aspen has said, the lawyer's reputation will be "tremendously" and "irreparably" damaged — and thereafter all the judges will take the opportunity to decide against

342 Norman Dorsen & Leon Friedman, Disorder in the Court 6 (1974).
343 Federal District Court Chief Judge Marvin Aspen, a leader in the civility movement, has acknowledged that "moral exhortations are not going to be enough" to ensure civility. Jeffrey Cole, Searching for Collegiality: An Interview with Judge Aspen, 22 A.B.A. Litig. 34, 37 (1996).
the lawyer's clients any time a "close question" arises. There is, of course, no due process for either the lawyer or her clients when judges engage in this kind of lunchroom Star Chamber.

Nor are the standards clear for what Judge Aspen calls "unseemly" conduct. In a survey on civility conducted by a Seventh Circuit committee chaired by Judge Aspen, civility was defined expansively as "professional conduct in litigating proceedings," and expressly included "good manners or social grace." Thus, a lawyer responding that she had seen incivility in litigation could be referring to anything from incompetence to loud ties or garish lipstick.

Just how misguided and misleading the rules of civility can be is illustrated by a panel discussion before the Chicago Bar Association. The moderator, Robert Cummins, posed the following hypothetical: Opposing counsel calls you to request a short extension of time to file a pleading so that he can attend his son's graduation. It would not prejudice your client in any material way to grant the extension. Would you grant it to him?

Five members of the panel said they would refuse to grant the extension. The five included not only the then current and past presidents of the Bar, but also Judge Aspen, the leading proponent of civility. Professor Freedman was the only dissenter, explaining that because the extension would not prejudice the client, there was no reason to deprive opposing counsel and his son of sharing an important event in their lives. Judge Aspen and the other panelists offered no cogent reason for saying that they would refuse the extension.

Unfortunately, however, incivility can also mean representing one's client competently and zealously. Consider, for example, the remarks of Federal District Judge William Schwartzter, then Director of the Federal Judicial center. At an ABA conference, Judge Schwartzter illustrated professionalism by recalling that, when he was a young lawyer, his research revealed that his client could win a case because the lawyer on the other side had missed a statute of limitations. When he reported the good news to the partner in charge of the case, however, the older lawyer sternly admonished the neophyte that "we don't practice law like that in this office." That is, the firm would not rely on the statute on its client's behalf because it would embarrass the lawyers on the other side to do so. The judge concluded the anecdote with the approving comment: "That made a great impression on me."

The leading case on enforcing courtesy codes is Dondi Properties v Commerce

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347 Id. at 36. Aspen repeated these threats at an ABA conference in Chicago on May 31, 1996.
349 In a series of exchanges on Lexis/Counsel Connect, for example, definitions of civility ranged widely, from fraud and deceit to not returning telephone calls. In between were: being a junk-yard dog; being sneaky, mean or misleading; not being ethical; failing to provide discovery; obstructing discovery; badgering witnesses; ignoring deadlines; being rude; and being a jerk.
352 For a discussion of taking advantage of an adversary's mistake, see App. B, infra.
Savings & Loan Ass'n. 353 There, the U.S. District Court for the Northern District of Texas, sitting en banc, announced its intention to impose sanctions against lawyers who failed to abide by an aspirational courtesy code adopted by the bar. In one of the cases under Dondi, the plaintiff was suing for the defendant's alleged bad faith refusal to pay off an insurance claim. The defense lawyers were apparently emulating their client in using delay to avoid their client's legal obligation. They not only filed an untimely reply brief, but they failed to get consent of the plaintiff and failed to get leave of the court — both required by court rules. In responding to a motion to dismiss the improper reply brief, therefore, the court expressed its concern that justice delayed is justice denied, and it criticized the "sharp practices" of counsel. 354

Who could disagree with that judicial response? The court went on, however, to express its intention to impose sanctions against lawyers, like the plaintiff's lawyer, who had "failed to cooperate [with defendant's lawyers] when he filed the motion to strike the reply." 355 That is, by asserting his client's right under the rules of the court to move to strike the untimely brief, the plaintiff's lawyer had invited sanctions against himself under the courtesy code. A particular irony is that a principal target of courtesy codes are lawyers who ignore deadlines and delay cases.

A Missouri case echoes Judge Schwartz's understanding of professionalism. In Sprung v. Neuwer Materials, Inc., 356 the plaintiff had suffered severe back and leg injuries when a cart supplied by the defendant fell over, throwing a load of dry wall on him. After receiving service of a complaint, the defendant's lawyer negligently failed to serve or file an answer. At the appropriate time, the plaintiff's lawyer moved for a default judgment, which was granted.

Fourteen days after the default, the defendant's lawyer filed an untimely answer to the complaint. The plaintiff asked his lawyer what that meant. The lawyer explained that the answer was too late to affect the default, that the default would become final within thirty days after its entry, and that there was no legal obligation to inform the defense about the default. The plaintiff then instructed his lawyer not to tell the defendant's lawyer about the default until after the thirty days had run, and the lawyer obeyed his client's instructions, as he was ethically required to do. 357

The court could have vacated the judgment, of course, but declined to do so, on the ground that the defendant's lawyer had been negligent. Nevertheless, the Chief Judge and three other judges on the Missouri Supreme Court castigated the plaintiff's lawyer (who was identified by name) for his lack of professionalism in giving his client the lawful benefit of the default. These opinions make it clear that the judges expected the lawyer to place courtesy to his "brother lawyer" over the rights of his client. One opinion refers to ethical rules, like zealous representation,

354 Id. at 286.
355 Id. at 291.
356 727 S.W.2d 883 (1987), aff'd, 775 S.W.2d 97 (1989).
357 MR 1.6.
358 Sprung, 727 S.W.2d at 895.
359 Id. at 894.
as "jargon" that should not supersede "courtesy and consideration" to opposing counsel.\footnote{Id. at 893.} Another opinion refers to the plaintiff's lawyer as a "sharp practitioner"\footnote{Sprung, 775 S.W.2d at 110.} whose conduct "should shock all right-thinking lawyers."\footnote{Id. at 109.} The judges conclude: "There are members of the bench and bar who can remember when [professional courtesy] would have included advance warning to a dilatory attorney adversary of intent to seek a default and immediate notice that one had been obtained."\footnote{Id. at 111.}

There are two ironies in these opinions. One is that the judges expected the plaintiff's lawyer to give the defendant greater rights than the court itself was willing to give.\footnote{The opposite result was reached in Kleinecke v. Montecito Water Dist., 147 Cal. App. 3d 240 (1988) (Gilbert, J.) (The court tolled a statute of limitations to correct an error by plaintiff's lawyer, but said: "Our holding is not an indictment of defense counsel who by fortuitous circumstances had the opportunity to represent his client in a manner sanctioned by [prior case law].")} The second is that the judges had no problem with a lawyer's enforcing the default against an unrepresented defendant; it was only when a "brother lawyer" entered the picture that counsel's conduct became shocking, dishonorable, and unprofessional.\footnote{See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, Proposed Standards, \textsuperscript{1} 18, 143 F.R.D. 441 (1992): "We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity." (emphasis added).} An example of a jurisdiction attempting to subordinate zealous representation to notions of professionalism and courtesy is Georgia.\footnote{See Allen v. Lefkoff, Duncan, Grimes & Dermer P.C., 453 S.E.2d 719 (Ga. 1995); Green v. Green, 487 S.E.2d 457 (Ga. 1993); Evanoff v. Evanoff, 418 S.E.2d 82 (Ga.'1992).} As one Georgia judge has stated, enforcement of ethical rules requiring zealous advocacy could leave the professionalism movement "dead in the water."\footnote{Allen, 453 S.E.2d at 726.} It follows, of course, that the success of the professionalism movement could destroy zealous advocacy.

There are lawyers we respect who promote creeds of professionalism and civility. They assume that these creeds are harmless. Perhaps they are relying on typical clauses in such creeds that say that they are not intended to supersede or amend the Rules of Professional Conduct or other disciplinary codes. But "aspirational" creeds are increasingly being given the force of law by judges who value courtesy to "brother lawyers" above "entire devotion to the interests of the client [and] warm zeal in the maintenance and defense of his rights."\footnote{For a critique of civility codes, see Amy R. Mashburn, Professionalism as Class Ideology: Civility Codes and Bar Hierarchy, 28 VA. U. L. Rev. 557 (1994).}
§ 4.13 UNETHICAL REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS

The most serious and widespread violations of professional ethics occur in the failure to provide competent, conflict-free representation to indigent criminal defendants.\(^{370}\)

In *Gideon v. Wainwright*,\(^{371}\) the Supreme Court held that before a state can imprison an indigent person as a felon, due process requires that the state provide him with "the guiding hand of counsel at every step of the proceedings against him."\(^{372}\) Without that guiding hand of counsel, "though [the accused] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."\(^{373}\) Nevertheless, as Steven Bright, Director of the Southern Center for Human Rights has said, "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."\(^{374}\)

One way the states have purported to meet their constitutional obligation to provide counsel to poor people accused of crimes has been through court-appointed lawyers. However, the paltry compensation paid for these services has generally been inadequate to attract competent lawyers.\(^{375}\) In addition, judges have too often selected court-appointed lawyers precisely because the lawyers are incompetent, and can be counted on to move the courts' calendars quickly by entering hasty guilty pleas in virtually all cases.\(^{376}\) In those few cases in which the accused insists on his right to trial, the trials move rapidly because these court-appointed lawyers file no motions, conduct no investigations, and do little else to put the state to its burden of proof.

For example, an extensive study under the auspices of NYU Law School's Center


\(^{373}\) Id.


\(^{375}\) Id.

for Research in Crime and Justice found that New York's court-appointed lawyer system has failed to provide any semblance of effective assistance of counsel to indigent defendants. The lawyers are paid on the basis of vouchers for the time spent on each case. There is therefore every incentive for the lawyers to record faithfully, if not to exaggerate, the time they have spent. Yet the vouchers reveal the following statistics:

- **Interviewing and counseling**
  No time recorded for interviewing and counseling the client in 75% of the homicide cases, or in 82% of other felony cases;\(^{376}\)

- **Discovery**
  No time recorded for discovery in 92% of the homicide cases or in 93.6% of other felony cases;\(^{379}\)

- **Investigation**
  No time recorded for investigations in 72.8% of the homicide cases or in 87.8% of other felonies;\(^{380}\) and

- **Pre-Trial Motions**
  No time recorded for written pre-trial motions in 74.5% of the homicide cases or in 80.4% of other felonies;\(^{381}\)

The same study nevertheless concluded that this system of court-appointed lawyers "must be understood as a success from the perspective of those who designed the system and now maintain it," that is, "to make the criminal law a more effective means for securing social control at minimal expense to the state and to the private bar . . . by compelling guilty pleas and by other non-trial dispositions."\(^{382}\)

The other means of providing lawyers to poor people has been through public defender and legal aid offices.\(^{383}\) There, the problem has not been so much the incompetence of the lawyers, but the fact that the offices typically are seriously underfunded. This leads to overloading lawyers with far more clients than any lawyer could competently represent.\(^{384}\)

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377 Chester Mirsky & M. McConville, Criminal Defense of the Poor in New York City, 15 N.Y.U. Rev. L. & Soc. Chan.ge 581 (1987). This research was conducted in 1987, but there is no reason to believe that circumstances have changed for the better since then. See generally Justice Denied, supra note 370.

376 Id. at 758.

379 Id. at 761.

380 Id. at 762.

381 Id. at 767.

382 Id. at 876-77, 902.

383 Legal aid offices are private organizations that contract with the government to provide legal assistance to poor people; public defenders, like prosecutors, are funded directly by the government.

384 "Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls [and] excessive caseloads . . . many are truly falling. Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (2009). The entire criminal justice system is starved for resources." ABA, Criminal Justice in Crisis: A Report to the American People and the American Bar on
Under universally recognized rules and standards, lawyers are forbidden to represent indigent criminal defendants when the lawyers are burdened by underfunding and overloading. Accordingly, when lawyers are assigned to represent defendants under circumstances in which they cannot perform competently and free of conflicts of interest, they are required to take the following actions.

First, a lawyer who is assigned to represent a client in a criminal case, and who is unable to give competent and unconflicted representation to that client, is ethically required to decline the representation.

Second, if the lawyer has a supervisor who nevertheless orders her to take the case, the supervisor has committed a serious ethical violation, and the lawyer has an ethical obligation to report the supervisor’s unethical conduct to the appropriate disciplinary authority.

Third, the lawyer may be required under rules of the court, and therefore under ethical rules, to obtain permission of the court to decline the assignment. However, it would be an ethical violation for a judge to order the lawyer to undertake a case in which the lawyer would necessarily be violating both the Sixth Amendment and ethical rules relating to competent, unconflicted representation, or to proceed with a criminal proceeding knowing that the defendant had not been competently counseled. The lawyer would therefore be required to report the judge’s unethical conduct to the appropriate judicial disciplinary authority.

Fourth, the lawyer would be required to put on the record in the case the fact that, because of obligations to other clients, the lawyer cannot give competent, conflict-free representation to the new client. This would establish a violation of the Sixth Amendment, because the entry of a guilty plea is a critical stage, regardless of whether the charge is a felony or a misdemeanor.

Fifth, the lawyer would be required to inform the client of any plea offer from the prosecutor. However, the lawyer would also be required to inform the client that her representation of the client cannot be performed competently and, specifically...
cally, that she does not know enough about the case to give the client any legal advice. Further, she would be forbidden to advise the client to accept the plea offer.

Sixth, if the client chooses to accept the plea offer, the lawyer would be required to put on the record that she has not advised the client with regard to the plea because to do so would violate her ethical obligations of competent and conflict-free representation.

If court-appointed lawyers acted in accordance with these ethical obligations, they would: first, establish compelling records of the extent to which the constitutional promise of Gideon is being broken; second, give individual clients grounds to attack their sentences directly and collaterally; third, establish the basis for class actions on behalf of their clients and other defendants who have similarly been denied the right to counsel; fourth, provide the news media with dramatic source material for informing the public about the failures of the administration of criminal justice; and, fifth, make it more difficult for society and for the established bar to continue to deny due process and the effective assistance of counsel to indigent criminal defendants.

Moreover, by honoring their ethical obligations, assigned counsel would cease to serve as an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional, and intolerably cruel. Half a century of constitutional and ethical hypocrisy is enough.

396 Id.
397 ABA Standards Relating to the Defense Function § 4-6.1(b); ABA Standards Relating to Pleas of Guilty § 14-3.2(b).
398 ABA Standards Relating to the Defense Function §§ 4-8.2(b), 8.6(c).
399 Johnson v. United States, 520 U.S. 461, 468-69 (1997) (a total deprivation of counsel is a structural violation requiring reversal without harmless error analysis).
400 See, e.g., Kowalski v. Tesmer, 543 U.S. 125 (2004) (Rehnquist, C.J.), 136 (Ginsburg, J.), where the Supreme Court was unanimous in recognizing that criminal defendants who plead guilty without the benefit of counsel have the right to challenge their sentences and (at least after exhausting state remedies) to seek injunctions against the practice under 42 U.S.C. § 1983. See also Gardner v. Florida, 430 U.S. 349, 358 (1977).
401 Every time a lawyer falsely gives the impression in court that a client who is pleading guilty has received effective, competent, conflict-free representation, she is violating MR 8.4(c) by engaging in dishonest conduct.
402 Although Smith shares Freedman’s concerns about the quality of indigent defense in the United States, and agrees that there are circumstances under which individual public defenders should take the steps suggested in the text, she understands how difficult this may be in practice. She believes that directors of public defender offices have an institutional responsibility to resist excessive caseloads. See Editorial, More Public Defenders, Cour. Jour., Oct. 25, 2006, at 8A (noting the successful effort of Louisville, Kentucky Public Defender Dan Goyette to obtain funding for additional defenders).