South Carolina Law Review

Volume 52 | Issue 3 Article 14

Spring 2001

Ethical Conflicts in Legal Practice: Creating Professional Responsibility

Christopher J. Whelan
University of Oxford

ETHICAL CONFLICTS IN LEGAL PRACTICE: CREATING PROFESSIONAL RESPONSIBILITY

CHRISTOPHER J. WHELAN*

I. INTRODUCTION

How should lawyers resolve conflicting professional duties? On the one hand, lawyers owe a duty to their clients;[1] on the other, a duty to the court.[2]

---

* Associate Director, International Law Programmes, University of Oxford. I am grateful to participants at workshops held at the University of Oklahoma and Washington & Lee Law Schools and to several barristers, especially Leon de Costa and Alex Mehta, for the opportunity to discuss drafts of this Article.

1. *See, e.g.*, THE GENERAL COUNCIL OF THE BAR, CODE OF CONDUCT OF THE BAR OF ENGLAND & WALES para. 203(iii) (1990) [hereinafter BAR CODE] (describing a barrister's duty to act for a client regardless of the type of case or his personal beliefs about the client); THE LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS annex 21A, at 386 (Nicola Taylor ed., 8th ed. 1999) [hereinafter GUIDE TO THE PROFESSIONAL CONDUCT] (stating that advocates "must promote and protect fearlessly and by all proper and lawful means the client's best interest"); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) [hereinafter MODEL CODE] (stating that lawyers should zealously represent clients while also complying with the law); SOLICITORS' PRACTICE RULES 1990 AND ASSOCIATED CODES, R. 1.01(c) (1990) [hereinafter SOLICITORS' RULES] (stating a solicitor must not take any action which impairs or is likely to impair her duty to act in the client's best interests).

2. *See, e.g.*, BAR CODE, *supra* note 1, at para. 208 ("A practising barrister must assist the court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court."); MODEL CODE, *supra* note 1, at EC 7-39 ("[P]roper functioning of the adversary system depends upon cooperation between lawyers and tribunals initializing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just."); SOLICITORS' RULES, *supra* note 1, at R. 1.01(f) (stating that a solicitor must not do anything that impairs the solicitor's duty to the court).

They also have responsibilities for the administration of justice,[3] the legal profession,[4] and the legal system itself.[5] Lawyers are inevitably confronted with many ethical dilemmas, and such conflicts are often "the most difficult."[6] In practice, economic and other pressures may influence lawyers' decisionmaking, sometimes to the detriment of their clients[7] and sometimes at the expense of courts and third parties.[8]

So, how can appropriate and effective incentives be created so that lawyers respond as "professionals"? Indeed, what conduct is "professional," given the complexity and dynamism of legal practice? If professional duties really are conflicting, can they be reconciled? When there are honest differences of opinion about what a lawyer should do in particular conflict scenarios, whose interpretation should be accepted?

---

3. *See, e.g.*, BAR CODE, *supra* note 1, at para. 201(a)(ii) (stating that all barristers cannot act in a way that prejudices the administration of justice); MODEL CODE, *supra* note 1, at DR 1-102(A)(5) ("A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."); MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1998) [hereinafter MODEL RULES] (stating that conduct that is prejudiced to the administration of justice is professional misconduct).

4. *See, e.g.*, BAR CODE, *supra* note 1, at para. 201(a)(iii) (stating that a barrister must not act in a manner "likely to diminish public confidence in the legal profession . . . or otherwise bring the legal profession into disrepute"); MODEL CODE, *supra* note 1, at Canon 1 (listing ethical considerations for lawyers for maintaining the integrity and competence of the legal profession); SOLICITORS' RULES, *supra* note 1, at R. 1.01(d) (stating that a solicitor must not do anything that compromises the good reputation of her profession).

5. *See, e.g.*, MODEL CODE, *supra* note 1, at Canon 8 (listing ethical considerations for lawyers in improving the legal system).

6. People v. Belge, 372 N.Y.S.2d 798, 800 (N.Y. Co. Ct. 1975); *see* W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 978 (2000) ("The acid test of ethical lawyering is rarely what to do in the face of crisis. . . . Instead, the excruciating difficulty of law practice is the *pervasiveness* of ethical challenges.").

7. *See, e.g.*, MIKE MCCONVILLE ET AL., STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN 10-11 (1994) (suggesting that the prosecutor's goal of winning the case often influences the construction of the case against the criminal defendants); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 22-23 (1974) (illustrating how critics of the legal profession feel lawyers give insufficient attention to the possibility of the professional's bias in determining the client's interest); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 21 (1995) ("In the standard analysis of the professions, lawyers are presented either as agents moving tactically toward their clients' . . . goals . . . [and] best interests or as opportunists using the client's case to work out their own agenda." (citations omitted)).

8. In highly competitive markets, lawyers' duties to courts or third parties are inevitably marginalized. ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 87-89 (1999).

In the United States, there seems to be a crisis of legal professionalism.[9] While some lawyers simply ignore any public service ideal, others rely on it to justify behavior regarded by many as unprofessional. These lawyers are said to be too client-centered, too legalistic, and too zealous at the expense of justice and the wider public interest.[10] The proliferation of civility codes and commissions on professionalism reflects these concerns.[11] But some believe that "more than vague exhortations to 'professionalism'" is needed to address bar leaders' "pervasive unwillingness" to acknowledge that lawyers have any public responsibilities.[12] In any case, professional regulation may be more about protecting lawyers from market pressures than about promoting justice.[13]

---

9. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 33 (1992) [hereinafter *Ethics by the Pervasive Method*] (citing concerns about the legal profession including "the frequency of incompetence, neglect, incivility, and adversarial abuse; and the inadequacy of institutional responses"); *see also* John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 563 (1994) ("[T]he public perception problems lawyers face today are deeper and more widespread than any the profession has ever faced before."); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV 949, 949 (1995) (noting that the decline in the legal profession has a negative effect on society); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("For sometime now, I have been deeply concerned about the growing disjunction between legal education and the legal profession. . . . This disjunction calls into question our status as an honorable profession."); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) ("Lawyers belong to a profession permanently in decline."); Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 707 (1998) (recognizing "the pressure on novice lawyers to act unethically" while senior lawyers and law professors have not assisted these lawyers in resisting such urges). *Contra* Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1450 (2000) (asserting "a far more positive opinion of private sector lawyering").

10. An example of this type of lawyer might be Michael Katz, "who operate[d] an eviction mill for Los Angeles landlords: . . . [and] boasted 'I'm a hired gun, bottom line. Somebody pays me money to go out there and fight their battle with this tenant. I like the fight.'" Richard L. Abel, *Revisioning Lawyers*, *in* LAWYERS IN SOCIETY: AN OVERVIEW 1, 15 (Richard L. Abel & Philip S.C. Lewis eds., 1995) [hereinafter *Revisioning Lawyers*]; *see also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 628 (1985) [hereinafter *Ethical Perspectives*] ("Reported cases and surveys reveal a striking incidence of overly zealous representation ranging from garden variety discovery abuse to suppression of evidence and complicity in fraud or perjury.").

11. *See Professionalism Initiatives*, 52 S.C. L. REV. 747 (2001) [hereinafter *Directory*].

12. Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 321-22 (1998).

13. See, for example, the work of Richard L. Abel, applying the theories of MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977) to the legal professions in the United States and England and Wales. *See* RICHARD L. ABEL, AMERICAN LAWYERS 227 (1989) [hereinafter ABEL, AMERICAN LAWYERS]; RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES 10-15 (1988); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?* 59 TEX. L. REV. 639, 653-67 (1981). *See also* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 702-06 (1981) (finding that minimizing competition from both external and internal sources has been a principal motivation behind professional regulation). According to Abel, professionalism is "a

But, what if there is a genuine desire to enhance the professionalism of lawyers? Mark J. Osiel claims that "the public service ideal of the independent professional functions simultaneously as an ideology, masking unpleasant institutional realities, and as a noble aspiration, prompting successful attempts at piecemeal improvement."[14] Lawyer decisionmaking in practice may well be influenced by "complex interactions" involving a "mix of ingredients," of which abstract professional ideals and narrow economic interests play only a part.[15] Could a change in the mixture produce a different ideology, a different reality?

Comparative analysis suggests that it could. In England and Wales,[16] the ideology of professionalism is not so client-centered as in the United States. For example, in the English bar there is a strong professional culture which serves to empower the individual lawyer to act independently of the client and to exercise "professional judgement" in conflict scenarios. As a result, the lawyers' duty to the court and the legal system plays a greater countervailing role than in the United States.

Comparative analysis does not, of course, tell you which system is better, but it may provide some insights into how a certain kind of professionalism can help to counterbalance competing pressures. Lawyers necessarily act in terms of "ethical conceptions that are shared with other members of the lawyer's reference groups."[17] Lawyers' decisionmaking is affected by a "'collegial influence' . . . the multiple and sometimes overlapping 'communities of

---

specific historical formation in which the members of an occupation exercise a substantial degree of control over the market for their services, usually through an occupational association." Richard L. Abel, *The Decline of Professionalism?*, 49 MOD. L. REV. 1, 1 (1986). Abel also maintains that the purpose of professional associations is to "seek or defend material benefits and social status" of lawyers. ABEL, AMERICAN LAWYERS, *supra*, at 305.

14. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2021 (1990) (reviewing 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD (Richard L. Abel & Phillip S.C. Lewis eds., 1988); 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard L. Abel & Phillip S.C. Lewis eds., 1988); 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES (Richard L. Abel & Phillip S.C. Lewis eds., 1989)); *see also* TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT (1987) (discussing the public-interest role played by bar associations).

15. Richard J. Maiman et al., *The Future of Legal Professionalism in Practice*, 2 LEGAL ETHICS 71, 71 (1999) (describing the mix as: "personal values, preferences and identities; formal and informal norms of groups of professional colleagues; local legal rules and institutions; the demands of work itself; and specific workplace and client characteristics"); *see also* HUBERT J. O'GORMAN, LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE 66-72 (1963) (stating that lawyers' reasons for accepting cases depend partly on whether the cases constitute a peripheral, minor, or major part of their practice).

16. There are three legal systems in the United Kingdom: England and Wales, Scotland, and Northern Ireland. This article focuses on the system in England and Wales.

17. Geoffrey C. Hazard, Jr., *A Lawyer's Moral and Ethical Discretion*, RESEARCHING LAW, Spring 1997, at 1; *see also* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7 (1999) (stating "a potentially productive approach to handling ethical dilemmas in lawyering is to turn to the values of the legal profession that derive from the social function of lawyers and from the traditions and practices of the legal profession").

practice' to which most lawyers belong."[18] A "central issue in examining professional practice is how collegial influence can be established and meaningful in the settings where professionals do their work."[19]

The English comparison provides an opportunity to evaluate these ideas. There are, of course, many differences between the two countries, especially the division of the English legal profession into solicitors and barristers.[20] However, there are many more similarities than differences. The "standard conception"[21] of the lawyer's role is the same in both countries.[22] Within adversarial legal systems, a lawyer's role is to put aside personal views and to abide by the client's decisions concerning the objectives of representation.[23] Representation of a client does not constitute approval of the client's views or activities.[24] An advocate's duty is to argue; it is for the court to decide the outcome.[25] Lawyers are expected to do the best they can for the client, so that "[t]he client's case should receive from the adviser the same level of care and

18. Maiman et al., *supra* note 15, at 71.

19. *Id.* at 83.

20. Traditionally, solicitors (currently around 90,000 in private practice) were viewed as generalists and barristers (around 9,000 in private practice) as specialists. RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES 114, 139. This view is increasingly difficult to sustain. While barristers had exclusive rights of audience in the higher courts and could only receive clients via a solicitor, *id.* at 35, these restrictions on practice have also been undermined in recent years. The Courts and Legal Services Act, c.41, § 17 (1990) abolished barristers' exclusive rights of audience, see Access to Justice Act, c. 22, § 36 (1999), and professional rules were relaxed in the 1990s to allow certain potential clients—such as accountants, surveyors, citizens' advice bureaus and certain organizations such as the police, trade unions, professional organizations and medical defense bodies—to approach barristers directly. However, entry into the two branches remains distinct as does professional regulation. *See* BOON & LEVIN, *supra* note 8, ch. 5 & 6.

21. *See* David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 84 (David Luban ed., 1984); DAVID LUBAN, LAWYERS AND JUSTICE xix (1988); *see also* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534 (explaining that the "standard conception" of lawyers is based on the principles of neutrality and partisanship).

22. *See* BOON & LEVIN, *supra* note 8, at 33, (stating "the narrative of the legal profession in the UK is remarkably similar to that described by Hazard" (referring to Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991)).

23. *See* MODEL CODE, *supra* note 1, at DR 7-101; MODEL RULES, *supra* note 3, at R. 1.2(a); BAR CODE, *supra* note 1, at para. 207(a); GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 2.3(a).

24. *See* MODEL RULES, *supra* note 3, at R. 1.2(b).

25. *See* LEO PAGE, FIRST STEPS IN ADVOCACY 16 (1943).

attention as the client would himself exert if he had the knowledge and the means."[26] In so doing, the lawyer will give priority to clients' interests.[27]

These characteristics of neutrality and partisanship are captured in the notion of zealous advocacy in Canon 7 of the *ABA Model Code*: "A [l]awyer [s]hould [r]epresent a [c]lient [z]ealously [w]ithin the [b]ounds of the [l]aw."[28] In American literature, a frequently cited example of the commitment a zealous lawyer should give to a client is Lord Brougham's defense of Queen Caroline against the King's charge of adultery in 1821.[29] Lord Brougham stated:

> [A]n 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 consequences, though it should be his unhappy fate to involve his country in confusion.[30]

Brougham's view captures nicely the ideal of zealous advocacy.

Many professional rules reinforce the standard conception of the lawyers' role.[31] In England, the standard conception of an advocate's role is reinforced

---

26. THE ROYAL COMM'N ON LEGAL SERVS., 1 FINAL REPORT para. 3.18(e) (1979) [hereinafter THE ROYAL COMM'N ON LEGAL SERVS.]; *see also* LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS para. 21.20 (Nicola Taylor ed., 8th ed. 1999) [hereinafter GUIDE TO THE PROFESSIONAL CONDUCT] (creating a duty for criminal defense solicitors "to say on behalf of the client what the client should properly say for himself or herself if the client possessed the requisite skill and knowledge").

27. *See* GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 26, at R. 1.01(c) (requiring a solicitor "to act in the best interests of the client"); *id.* at R. 12.08 (requiring a solicitor to exercise diligence in carrying out the client's instructions); *see also* BOON & LEVIN, *supra* note 8, at 183 ("The most basic premise of professional ethics is that the client's interests should take precedence over those of the lawyer.").

28. MODEL CODE, *supra* note 1, at Canon 7.

29. DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973).

30. *Id.*; *see also The Bench and the Bar*, 40 LAW TIMES 16, 17 (1864). In England, modern day advocates are required "to promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person," BAR CODE, *supra* note 1, at para. 207(a), including fellow advocates or members of the legal profession. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 2.3(a).

31. *See* LUBAN, *supra* note 21, at 11 ("[T]he principle of partisanship is generally taken as a credo by lawyers in nonadvocate roles just as much as by courtroom lawyers."); DONALD NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS 55 (1999) ("[A]dversarialism casts a long shadow over the legal system. Many conduct rules . . . reflect adversary assumptions . . . even in non-contentious matters.").

symbolically by the wearing of wigs and gowns,[32] which emphasize the professional rather than personal role being performed. A professional rule, known as the 'cab-rank' rule, requires barristers to take cases within their expertise.[33] This rule reinforces the legitimacy of the neutrality and partisanship roles—the barrister is not personally identified with the client or the cause.[34]

Despite the standard conception that a lawyer's professional duty is owed to the client, professional rules seek to further the goals of the adversary system in both countries by qualifying or even constraining the lawyers' duty of zealous advocacy to the client. In the United States, "proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law."[35] Thus, an "advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[36] Similarly, lawyers in England owe a duty to the court.[37] In both countries, advocates are expected to disclose to the court legal authority even if it is directly adverse to the client's position.[38]

Concerned with preventing the administration of justice from falling into disrepute, Rule 32 of the *Model Rules of Professional Conduct* states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[39] Lawyers therefore should not delay "for the purpose of frustrating an opposing party's attempt to obtain rightful redress or

---

32. The wearing of black gowns was introduced "as a temporary measure" in the 17th century. Solicitor-advocates wear gowns but not wigs. *Solicitor Advocates Do Not Wear Wigs*, THE TIMES, July 20, 1994, at 41.

33. In the interests of access to justice, a barrister must take a case within their field of expertise, subject only to the barrister having time to take the case and a reasonable fee being offered. BAR CODE, *supra* note 1, at para. 203, 501-03.

34. Arguably, attorneys and solicitors, who have freedom to reject clients, find it harder to justify representing unpopular clients or causes. Monroe Freedman argues that lawyers should have freedom to refuse a case "on any standard he or she deems appropriate." MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 49 (1990). *Contra* David Goldberger, *Clients Everyone Hates*, LITIG., Spring 1995, at 10, 10 (arguing that every attorney has an ethical obligation to represent unpopular clients); Michael Tigar, *Defending*, 74 TEX. L. REV. 101, 109 (1995) (explaining that when a lawyer represents an unpopular client, she is actually reaffirming justice); *but cf.* Hodes, *supra* note 6, at 990 (offering the author's experience of defending "an anti-semitic racist client"); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995) (illustrating the point by telling how an African-American lawyer represented the grand dragon of the Texas Knights of the Ku Klux Klan).

35. MODEL CODE, *supra* note 1, at EC 7-39.

36. MODEL RULES, *supra* note 3, at R. 3.1 cmt. 1.

37. *See* BAR CODE, *supra* note 1, at para. 208; SOLICITORS' RULES, *supra* note 1, at R. 1(f).

38. MODEL CODE, *supra* note 1, at DR 7-106(B)(1); MODEL RULES, *supra* note 3, at R. 3.3(a)(3); BAR CODE, *supra* note 1, at para. 610(c).

39. MODEL RULES, *supra* note 3, at R. 3.2

repose."[40] Professional misconduct includes conduct that is "prejudicial to the administration of justice."[41]

Lawyers also have responsibilities for the legal profession and the legal system. In the United States, lawyers should "[a]ssist in [m]aintaining the [i]ntegrity and [c]ompetence of the [l]egal [p]rofession"[42] and in "[i]mproving the [l]egal [s]ystem."[43] In England, a solicitor shall not do anything to compromise "the good repute of the solicitor or the solicitor's profession."[44] In the United States, the *Model Code of Professional Responsibility* states that a lawyer does not violate the lawyer's duty to represent a client zealously by "acceding to reasonable requests of opposing counsel" and thereby "being punctual in fulfilling all professional commitments."[45] Similarly, in England, solicitors are subject to a duty of fairness towards third parties.[46] They must not use their positions as solicitors to take unfair advantage, for example, by writing offensive letters to third parties. This principle modifies the general duty to act in the best interests of the client.

Despite the similarities in the lawyer's role and in professional rules, when it comes to potentially conflicting duties, there seems to be a marked contrast in Anglo-American ideologies of professionalism, with direct consequences both for clients and the administration of justice. These different ideologies will be compared in Part II of this Article. In order to focus the discussion, particular attention will be paid to the role of the advocate in the courtroom. While by no means typical of what lawyers do, advocacy and litigation are areas in which potential conflicts arise very clearly.[47] The lawyer's advocacy role is in many ways the paradigm for much of the academic analysis of professional responsibility.[48]

Part III of this Article will consider some implications of the English approach. It is argued that professional responsibility must be based on the individual lawyer's exercise of professional judgment. To create this kind of professional responsibility requires a new approach to professional regulation based on the development of principles which are clear, appropriate, and enforceable within particular areas of legal practice. Part IV of this Article will conclude that to improve lawyer behavior, the profession must not rely on

40. *Id.* at R. 3.2 cmt. 1.

41. *Id.* at R. 8.4(d); MODEL CODE, *supra* note 1, at DR 1-102(A)(5).

42. MODEL CODE, *supra* note 1, at Canon 1.

43. *Id.* at Canon 8.

44. SOLICITORS' RULES, *supra* note 1, at R. 1(d).

45. MODEL CODE, *supra* note 1, at DR 7-101(A)(1).

46. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 26, at R. 17.01.

47. According to Boon and Levin, "[T]he economic interests of the advocate, the expectations of the advocate's clients and peers and, indeed, the logic of the adversarial system may encourage an aggressive amoral stance." BOON & LEVIN, *supra* note 8, at 32.

48. *See* NICOLSON & WEBB, *supra* note 31, at 182; DAVID PANNICK, ADVOCATES 127-69 (1992); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470-74 (1966).

changes or alterations in professional codes, but instead must impose a duty on each individual lawyer to exercise professional judgment.

II. ANGLO-AMERICAN IDEOLOGIES OF PROFESSIONALISM

A. The American Ideology of Advocacy[49]

In the United States, a "libertarian" ideology,[50] which includes the "image of the adversarial advocate who places [the] client's cause above every other consideration," predominates.[51] American lawyers "long ago abandoned all but a pretence of serving any wider interest than that of clients."[52] The libertarian ideology "privatizes the lawyer's role"[53] and undermines the "*norm* that part of the lawyer's role is to represent the public purposes of the legal system to the client, as well as the client to the legal system."[54] Robert Gordon states:

> [There has been an] uncontrolled expansion of libertarian ideology into lawyers' common consciousness—to the point where lawyers have come to feel genuinely affronted and indignant when any authority tries to articulate a public obligation of lawyers that may end up putting them at odds with clients. We have no public obligations, they claim; we are private agents for private parties . . .; our loyalties to clients must be absolute and undivided.[55]

Suggestions that clients might be denied their attorney's exclusive attention can produce a critical response from practitioners. For example, when Chief Justice Burger stated that "an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client

---

49. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter *Ideology*] (discussing the American ideology of advocacy at length).

50. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988) [hereinafter *Ethical Discretion*]; *see also Ideology*, *supra* note 49, at 34 (summarizing principles of advocate ideology).

51. BOON & LEVIN, *supra* note 8, at 107.

52. BOON & LEVIN, *supra* note 8, at 107 (citing Jonathan R. Macey, *Professor Simon on the Kaye Scholer Affair: Shock at the Gambling at Rick's Place in Casablanca*, 23 LAW & SOC. INQUIRY 323 (1998)).

53. Gordon, *supra* note 12, at 321.

54. *Id.* at 320-21.

55. *Id.* at 320.

may not use false evidence,"[56] his view was criticized in one of the leading texts of professional responsibility.[57]

Libertarians endorse "the traditional ethic"[58] of the American lawyer—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.'"[59] Zealousness, it is claimed, continues to be "'*the* fundamental principle of the law of lawyering.'"[60] Professionalism means zealous advocacy, the only caveat being that the means and ends should themselves be lawful.[61]

A classic example of the client-first approach occurred in *Sprung v. Negwer Materials, Inc.*,[62] where, after receiving a summons and petition, defendant's counsel took steps to obtain time to file an answer.[63] However, due to a clerical error the documents were mailed to the defendant's insurance company and not to the court or to plaintiff's counsel.[64] The plaintiff's counsel, upon receiving no response to the petition, "quite properly" sought and obtained a default judgment of $1.5 million.[65] This judgment was subject to being set aside within thirty days in the discretion of the trial court.[66]

During this thirty day period, plaintiff's counsel became aware that defense counsel was proceeding on the mistaken assumption that the case was properly pending.[67] He realized that "the extension papers must not have reached him or the courthouse."[68] He responded by calling his client to tell him that an answer had been filed within the thirty days.[69] He told the client that he could talk to the other side who would probably file a motion to set the default judgment aside.[70] The client, when informed that he could "lose his verdict" if this happened, told the lawyer not to contact the other side.[71] Accordingly, the lawyer waited the full thirty days, plus ten more, which would be the normal

---

56. Nix v. Whiteside, 475 U.S. 157, 168 (1986).

57. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 372-73 (3d ed. 1999).

58. Monroe H. Freedman, *The Ethical Danger of "'Civility' and 'Professionalism'"*, 6 CRIM. JUST. J., Spring 1998, at 17, 17 [hereinafter *Ethical Danger*].

59. CANONS OF PROF'L ETHICS EC 15 (1908).

60. *Ethical Danger*, *supra* note 58, at 17, 17 (citing G. C. HAZARD & W. W. HODES, THE LAW OF LAWYERING 17 (Supp. 1988)).

61. *See* MODEL CODE, *supra* note 1, at EC 7-19; Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 470 (1992).

62. 775 S.W.2d 97 (Mo. 1989).

63. *Id.* at 98.

64. *Id.*

65. *Id.* at 107 (Blackmar, C.J., dissenting).

66. *Id.*

67. *Id.*

68. *Sprung*, 775 S.W.2d at 109 (Blackmar, C.J., dissenting).

69. *Id.* at 107.

70. *Id.*

71. *Id.*

appeal time.[72] He knew that if the situation remained the same until the end of the thirty-day period, the default judgment "would be infinitely more difficult to set aside."[73] "Knowing these circumstances, [the lawyer] deliberately refrained from answering his mail, or even acknowledging the communication."[74]

Several of the justices expressed their strong disapproval of the plaintiff's lawyer's conduct. Chief Justice Blackmar was particularly critical, stating that the lawyer's conduct "should shock all right-thinking lawyers.... [T]his kind of conduct is unacceptable in our profession. The processing of civil litigation requires that lawyers deal with each other in accordance with the highest standards of trust and candor."[75] The Chief Justice was not denying that a lawyer has a duty to advance the client's interests—he himself wished to be remembered as a lawyer "who went all out for his clients."[76] Nor was the Chief Justice proposing that "professional courtesy" should prevail over a lawyer's duty to his client; nevertheless, a lawyer should use "honorable means."[77] He himself would "stop short of taking advantage of a mistake known to [him]" and would not "sanction a situation in which the Court permits other lawyers to get away with conduct which I consider the legal equivalent of fraud."[78]

However, the Missouri Supreme Court refused to set aside the default judgment, pointing to the clerical error as showing negligence on the part of the defendant's lawyer.[79] Monroe Freedman was critical of the Chief Justice and the other judges who criticized the lawyer.[80] Freedman argued that the lawyer was ethically required to obey his client's instructions,[81] and the judges' view and the whole idea of "civility" and "professionalism" constituted an ethical danger in itself.[82]

It has been argued that a libertarian ideology represents a slippery slope to excessive zeal and to uncontrolled instrumentalism.[83] While the ideology starts with a compelling and powerful image[84] of the criminal lawyer as a bastion between the individual and the power of the state—"the fearless advocate who

72. *Id.*
73. *Id.* at 109.
74. *Sprung*, 775 S.W.2d at 109 (Blackmar, C.J., dissenting).
75. *Id.*
76. *Id.* at 110.
77. *Id.*
78. *Id.*
79. *Id.* at 102.
80. *Ethical Danger*, *supra* note 58, at 18.
81. *Id.*
82. *Id.*
83. David J. Luban, *Milgram Revisited*, RESEARCHING LAW, Spring 1998, at 1, 9.
84. *See* BOON & LEVIN, *supra* note 8, at 317 ("Much of the rationale for the current ethics of lawyering is based on criminal representation.").

champions a client threatened with loss of life and liberty by government oppression"[85]—it is easily extended to civil litigation[86] and beyond.[87]

Doing all one can for a client within the bounds of the law—playing hardball "according to the rules"[88]—could be understood to mean doing almost anything. At one extreme, there are no bounds to the law[89] and at the other, law can be seen as indeterminate and open to almost any interpretation.[90] If giving an unresponsive, obstructionist, but literally true answer in the witness box does not constitute perjury,[91] why should a lawyer not advise a client on how to achieve this?

If lawyers make ethical choices, they do so at the time of appointment. Once they accept a client, though they may in certain circumstances withdraw if the client insists upon a "repugnant or imprudent" objective,[92] the lawyer will not generally view any lawful client objective in this way. Rather, a libertarian ethic demands that lawyers *should* do everything they can to win their client's case, including using any law or any procedural mechanism, regardless of its purpose, to their advantage; withholding from the court or the other side information not *legally* required to be disclosed; discrediting truthful witnesses in certain circumstances;[93] taking affirmative steps to discredit the

85. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1243 (1991).

86. *See, e.g.*, Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962) (stating that there is no duty to notify the other side in a personal injury claim of an immediate life-threatening condition).

87. *See, e.g.*, Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992) (discussing ethical considerations in negotiations); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1255-61 (1990) (discussing loyalty and zeal as justification for lying in negotiations); *see also* BOON & LEVIN, *supra* note 8, at 327-35 (stating "adversarial litigation encourages adversarial bargaining"); PANNICK, *supra* note 48, at 127-69 (discussing the morality of advocates).

88. W. William Hodes, *Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1032 (1999) [hereinafter *Rethinking the Way Law is Taught*].

89. *See, e.g.*, William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 237-38 (1996) (analyzing the unethical actions of the lawyer played by Paul Newman in "The Verdict" to locate a key witness).

90. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES *passim* (1987) (discussing the role of liberalism in law); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing the aversion to formalism in decisionmaking).

91. *See* Bronston v. United States, 409 U.S. 352, 361-62 (1973).

92. MODEL RULES, *supra* note 3, at R. 1.16(b)(3) (assuming withdrawal does not have a materially adverse affect on clients' interests).

93. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 43-49 (1975).

prosecution's case even when the lawyer knows it is accurate;[94] making factual assertions to exploit the jury's possible prejudice;[95] and facilitating perjury.[96]

Defying everything they know about law and about how legal decisions are understood by others in the legal system, when it comes to making ethical judgments, libertarian lawyers feel they have no choice[97] because the client comes first.[98] No wonder libertarian lawyers such as Monroe Freedman and William Hodes resist the professionalism movement. Hodes accused a judge of being an "equal opportunity lawyer bash[er]" for claiming it was unethical for criminal defense lawyers to actively defend "factually guilty" clients on other than technical grounds.[99] For Freedman, the professionalism movement constitutes an attempt to subordinate zealous representation which, if successful, would leave zealous advocacy "'dead in the water.'"[100]

B. The English Approach

The instinctive response of the English barrister in professional conflict situations is very different from that of the American lawyer. Barristers easily get "professionally embarrassed." The *Bar Code* defines the circumstances in which, due to professional embarrassment,[101] a barrister should cease to act for a client.[102] They include circumstances where continuing to act would involve a breach of professional conduct rules.[103]

---

94. *See* Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 128 (1987).

95. *See* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 931 (2000).

96. *See Ethical Danger*, *supra* note 58, at 1478-82; *see also* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 631 (1986) (challenging the belief that discrediting a truthful witness is permissible in all circumstances). However, many would draw the line at perjury. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 168 (1986) (holding Sixth Amendment not violated when attorney refuses to assist client in perjury); Hazard, *supra* note 85, at 1257 n.94 (noting that such advice to a client "warrants disbarment"). But, as potentially with any law, what constitutes perjury may be arguable. *See* Simon, *supra* note 89, at 230-33; *see also Bronston*, 409 U.S. at 361 (attempting to interpret the federal perjury statute). Lying is just as ambiguous. *See* William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433 (1999).

97. *See, e.g.*, ALAN DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) ("What a defense attorney 'may' do, he must do, if it is necessary to defend his client.").

98. Professor Simon describes this as "a style of reasoning that is widely regarded as discredited." *Ethical Discretion*, *supra* note 50, at 1121; *see also* Wendel, *supra* note 17, at 5-6 (stating "lawyers' understanding of legal ethics is, jurisprudentially speaking, decades behind their conception of the law as it applies to everyone else").

99. *Rethinking the Way Law is Taught*, *supra* note 88, at 1024-25.

100. *Ethical Danger*, *supra* note 58, at 18 (quoting Allen v. Lefkoff, Duncan, Grimes & Dermer, 453 S.E.2d 719, 735 (Ga. 1995)).

101. BAR CODE, *supra* note 1, para. 201(a)(iii), (b).

102. The same goes for solicitor-advocates. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at R. 5.1.

103. BAR CODE, *supra* note 1, para. 209(c).

As a result, in England and Wales,[104] the collective norm, or instinctive response, in conflict situations is significantly modified as: "Zeal and efficiency alone . . . do not ensure the doing of justice. The just operation of the legal system depends upon lawyers acting honestly and ethically, and not deliberately delaying or lengthening the proceedings or employing obstructionist tactics."[105] Although a professional person's "first and particular responsibility *is* to his client," and for lawyers "this professional duty of maintaining the client's interests is paramount," it is "*subject* only to their direct responsibility to the court."[106] A barrister, "as an officer of the court concerned in the administration of justice, . . . has an overriding duty to the court,"[107] and an overriding obligation to promote justice, including a duty not to mislead the court.[108]

The same is true for solicitors. Where their duty to act in the best interests of the client conflicts with the duty to the court, "the determining factor in deciding which principle should take precedence must be the public interest, and especially the public interest in the administration of justice."[109] Solicitor advocates have "an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved: they must assist the court in the administration of justice and must not deceive or knowingly or recklessly mislead the court."[110] Lawyers' duties to the court are: "[I]n reality owed to the larger community which has a vital public interest in the proper administration of justice. That public interest is indeed the source of these duties."[111]

In England, the two principles—duty to the court and duty to the client—are reconciled as follows: "The litigant aims to obtain a favourable result. The advocate aims to persuade the judge to reach a result favourable to his client by fair means. The advocate, not the litigant must decide which means are fair in the light of the advocate's training and experience in the law."[112] Thus, "[a] barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts."[113] An advocate must not "mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the court facts which ought to be drawn to the

104. And it is likely an instinctive response in certain other common law countries, such as Australia. *See* D. A. Ipp, *Lawyers' Duties to the Court*, 114 L. Q. REV. 63, 65 (1998).

105. *Id.* at 64.

106. THE ROYAL COMM'N ON LEGAL SERVS., *supra* note 26, para. 3.18(e) (emphasis added).

107. Rondel v. Worsley, 1 A.C. 191, 227 (1969) (quoting Lord Reid's opinion).

108. BAR CODE, *supra* note 1, at para. 208.

109. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 26, at para. 1.02(6).

110. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 2.2.

111. Ipp, *supra* note 104, at 63 (citing Rondel v. Worsley, 1 A.C. 191, 227 (1969) per Lord Morris of Borth-y-Gest).

112. Lord Templeman, *The Advocate and the Judge*, 2 LEGAL ETHICS 11 (1999).

113. Saif Ali v. Sydney Mitchell & Co., 3 All E.R. 1033, 1042-43 (1978).

judge's attention."[114] Barristers must not "connive at a court being wilfully misled."[115]

The scope of representation depends entirely on the client's instructions; the advocate's duty "depends on what he is told."[116] While the case presented by one side in court will often be based on inaccurate and occasionally false evidence, none of this is the advocate's responsibility "so long as his instructions are to the effect that his case is genuine."[117] Under this theory, if a client, having proclaimed innocence, instructs counsel to undertake a vigorous defense and if the result is counsel seeking to discredit truthful witnesses, counsel is blameless. However, counsel should advise the client of the risks of undertaking such a defense if it is not valid.

Basing the scope of the representation on clients' instructions leaves plenty of scope for zealous advocacy. When counsel for multiple defendants cross-examined the victim of a gang rape over a period of twelve days, the judge stated, when convicting the defendants "'[f]or over thirty hours this girl had to relive the ordeal in a public court in front of total strangers. Outrageous suggestions were put to her on your instructions. You, not your counsel, added insult to injury and heaped further humiliation on her.'"[118]

But, there are limits. An advocate has a "duty to put before the court the facts with which he is instructed but it is not his duty to invent a defence, or to tamper with facts."[119] For example, in the case of a client who confesses to the lawyer and admits guilt, it follows from the principles that the lawyer, "embarrassed by his client's confidential disclosures,"[120] may not proceed with a positive defense. If the client confesses prior to trial, many commentators would advise the advocate to withdraw unless the client is content, after the position has been explained, to put forward a negative defense.[121] The reason for this advice is that the lawyer "would most certainly be seriously embarrassed in the conduct of the case and no harm can be done to the accused by requesting him to retain another advocate."[122]

Modern commentators have questioned the propriety of advocates' withdrawing and telling the client to seek other representation, suggesting that "it might amount to encouragement by the first advocate to the client to deceive the court by giving evidence as to his innocence, with the aid of a second advocate who commits no breach of professional duty because he is not

114. Ipp, *supra* note 104, at 67.
115. PAGE, *supra* note 25, at 16.
116. MARCUS STONE, CROSS-EXAMINATION IN CRIMINAL TRIALS 2 (2d ed. 1995).
117. *Id.*
118. BOON & LEVIN, *supra* note 8, at 364 (quoting J. Boal, from *The Guardian*, Aug. 24, 1996 & Sept. 5, 7, 1996).
119. PAGE, *supra* note 25, at 16.
120. STONE, *supra* note 116, at 3.
121. *See* JOHN MUNKMAN, THE TECHNIQUE OF ADVOCACY 12 (1991).
122. PAGE, *supra* note 25, at 18.

informed as to his guilt."[123] In any case, if the admission comes after the trial has commenced, the advocate may not be able to withdraw without seriously compromising the position of the accused.

Therefore, the right course is to tell the client the limitations that the admission places on the defense. The defense has the right to have the charge proved beyond a reasonable doubt. Consistent with this, the advocate "may passively stand by and watch the court being misled by reason of its failure to ascertain facts that are within the barrister's knowledge."[124] The lawyer may take:

> [A]ny objection to the competency of the court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted; but it would be absolutely wrong for the advocate to suggest that some other person had committed the offence, or to call any evidence which he must know to be false having regard to the confession.[125]

It would be equally wrong to protest the client's innocence in any way. If the client consequently "decides to seek the services of another advocate that is his affair."[126]

Thus, the only type of defense that can be mounted is "a 'legal' type of defense independent[] of the facts, where this has some prima facie basis in law, [e.g.] by objecting to the admissibility of crucial evidence or by making a submission that there is no case to answer."[127] The advocate may "test [the prosecution's] evidence for accuracy, or reliability, but he must not challenge it as inaccurate, [e.g.] by denying the crime, unless this is based on his information."[128] An advocate "must not challenge, or try to disprove, facts which he knows to be accurate."[129]

The classic statement is that of Lord Justice Denning. After acknowledging that zealous advocacy is appropriate, he emphasized that the barrister must not knowingly mislead the court and while not judging the correctness of the case presented, must judge its "honesty."[130] The obvious example here would be a client's prior convictions which the lawyer knows about, but the court and the other side do not. The lawyer may conceal this information, but may not assert anything false such as a statement that the client is a "man of good character"[131]

---

123. SIR DAVID NAPLEY, THE TECHNIQUE OF PERSUASION 59 (4th ed. 1991).
124. Saif Ali v. Sydney Mitchell & Co., 3 All E.R. 1033, 1043 (1978).
125. PAGE, *supra* note 25, at 18-19 (quoting a decision of the Bar Council).
126. NAPLEY, *supra* note 123, at 59.
127. STONE, *supra* note 116, at 3.
128. *Id.* at 2.
129. *Id.*
130. Tombling v. Universal Bulb Co., 2 T.L.R. 289, 297 (Eng. C.A. 1951).
131. Vernon v. Bosley (No. 2), 1 All E.R. 614, 630 (1996).

or a good driver, if he has previous motoring convictions. However, it would be unprofessional to advise a client on how to give an unresponsive, obstructionist, but literally true answer in the witness box.[132]

In short, "[Counsel] must not take any positive steps or make any positive statements which mislead the court. A lawyer may not directly or indirectly, lend himself knowingly to any false story being put before the court." Similarly, a barrister must not "devise facts which will assist in advancing [his] client's case."[133] The advocate must not "devise a defence";[134] "call the prisoner into the witness-box to give evidence that he is innocent";[135] or call any other witness "to prove an alibi or any other positive defence which cannot be true, having regard to the prisoner's admitted guilt."[136]

Some of the few cases to go to court illustrate the English ideology of advocacy. In *Meek v. Fleming*[137] a press photographer claimed damages for assault and wrongful prosecution against a police officer.[138] Between the time the writ was issued and the trial, the defendant police officer had been reduced in rank from chief inspector to station sergeant because he had been a party to a deception on a court while in the course of his duty as a police officer.[139] The defendant's lawyers knew of the demotion in rank, but leading counsel decided not to inform the court.[140] The defendant testified as to his career up to the time he was a chief inspector, but said nothing about subsequent events.[141] In cross-examination, when he was asked whether he was a chief inspector, he answered affirmatively, even though it was untrue.[142] The plaintiff's counsel and the judge frequently referred to him as chief inspector, and nothing was done to disabuse them, though the defense counsel referred to him as Mister.[143] It was held that the court had been misled and the judgment should be set aside.[144]

In *Ernst & Young v. Butte Mining*[145] a default judgment had been set aside by the court, thus enabling the defendant to serve a defense and counterclaim

---

132. In *Tombling v. Universal Bulb Co.*, 2 T.L.R. 289 (Eng. C.A. 1951) a prisoner was asked by his lawyer in court not where he lived—the answer being prison—but instead was asked if he lived at the prison's address. *Id. Contra* Bronston v. United States, 409 U.S. 352, 361 (1973) (holding that the federal perjury statute does not cover literally true answers that are unresponsive "but untrue only by 'negative implication'").

133. BAR CODE, *supra* note 1, para. 610(d); *see also* GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 6.6 (indicating support for professionalism in client questioning).

134. STONE, *supra* note 116, at 2.

135. MUNKMAN, *supra* note 121, at 11 (indicating that "such a course would make counsel an accessory to the prisoner's perjury").

136. *Id.*

137. 2 Q.B. 366 (Eng. C.A. 1961).

138. *Id.* at 374.

139. *Id.* at 375.

140. *Id.*

141. *Id.* at 376.

142. *Id.*

143. *Meek*, 2 Q.B. at 396.

144. *Id.* at 380, 383-84.

145. 2 All E.R. 623 (Ch. 1996).

within a set time.[146] However, the defendants did not file a counterclaim because the plaintiff filed a notice to discontinue the action.[147] The plaintiff's solicitors had misled the defendants and sought an unfair advantage. According to the judge:

> Heavy, hostile commercial litigation is a serious business. It is not a form of indoor sport, and litigation solicitors do not owe each other duties to be friendly (so far as that goes beyond politeness) or to be chivalrous or sportsmanlike (so far as that goes beyond being fair). Nevertheless even in the most hostile litigation . . . solicitors must be scrupulously fair and not take unfair advantage of obvious mistakes. This duty is intensified if the solicitor in question has been a major contributing cause of the mistake.[148]

In *Haiselden v. P & O Properties, Ltd.*[149] a case was mistakenly set for trial in the county court where the so-called "English" rule applied, which would normally require the loser to pay the winner's legal costs.[150] The case should have been sent to small claims court, where a no-costs rule applied.[151] The defendant solicitors, aware of the error, did not inform the court, which was responsible for the error, nor the plaintiff, who was unrepresented.[152] At the trial, the plaintiff lost, and costs were awarded against him.[153] The plaintiff had the costs order set aside on the basis that there should never have been a court trial, but a small claims arbitration instead.[154]

In *Vernon v. Bosley (No. 2)*[155] the plaintiff claimed damages for post-traumatic stress disorder after witnessing the death of two children in an accident.[156] Evidence in separate family proceedings, the judgment of which was delivered prior to the personal injury litigation judgment, revealed that the plaintiff had substantially, if not fully, recovered.[157] This changed prognosis was not communicated to the defendant, the judge, or the Court of Appeal in the personal injury litigation.[158] The question was whether the plaintiff was under a duty to disclose the changes.

---

146. *Id.*
147. *Id.*
148. *Id.* at 639.
149. 149 S.J.L.B. 158 (Eng. C.A. 1998).
150. *Law Reports: Costs*, LAW SOC'Y GAZETTE (London), May 28, 1998, at 37.
151. *Haiselden*, 149 S.J.L.B. at 158.
152. *Id.*
153. *Id.*
154. *Id.*
155. 1 All E.R. 614 (C.A. 1997).
156. *Id.* at 617-18.
157. *Id.* at 619.
158. *Id.* at 620-21.

Lord Justice Stuart-Smith explained that "where the case has been conducted on the basis of certain material facts which are an essential part of the party's case," that party's lawyers have a duty to correct the court's understanding where, before judgment, the facts are discovered to be different.[159] The court held that counsel has a duty to advise a client that disclosure should be made.[160] If the client refuses, the lawyer should not, according to Lord Justice Stuart-Smith, make the disclosure himself, but should withdraw.[161] According to Lord Justice Thorpe, in those circumstances, the lawyer has a duty to disclose the relevant material to opposing counsel and, unless the parties agree not to, to the judge.[162] In short, it is the "duty of every litigant not to mislead the court or his opponent."[163]

C. *Using the English Experience as a Way to Create Professional Responsibility*

Despite similar professional rules in the United States and England,[164] the two countries do appear to have different ethos regarding conflict scenarios. In England, "winning at all costs is unacceptable."[165] The English duty not to mislead on the facts and, indeed, to disclose facts which ought to be drawn to the court's attention, may conflict with the lawyer's duty of confidentiality to the client. As far as judges are concerned, "When this [conflict] occurs, the duty to the court is paramount."[166] Accordingly, "tactical concealment of the truth" is difficult to justify.[167] A duty is owed to the court, and independent judgment in the conduct and management of a case is needed because the adversarial administration of justice is based upon the faithful exercise of that

---

159. *Id.* at 630.

160. *Id.* at 631, 654.

161. *Vernon*, 1 All E.R. at 631.

162. *Id.* at 654.

163. *Id.* at 629; *see also* Ipp, *supra* note 104, at 68-69 ("On this reasoning, it is arguable by analogy that counsel is not entitled to conceal from the court statements from expert witnesses which are inconsistent with the positive case presented by them.").

164. *Model Rule* 1.2(d) states that a lawyer shall not assist a client in conduct that the lawyer knows is fraudulent. MODEL RULES, *supra* note 3, at R. 1.2(d). A comment to *Model Rule* 3.3 suggests that if a lawyer cooperates with a client in deceiving the court, the lawyer thereby subverts the "truth-finding process." MODEL RULES, *supra* note 3, at R. 3.3 cmt. 6. Another rule states that a lawyer shall not assert an issue that is frivolous, but can defend in a criminal proceeding so "as to require that every element of the case be established." MODEL RULES, *supra* note 3, at R. 3.1. Further, the *Model Rules* also hold that a lawyer shall not knowingly make a false statement of fact or law, fail to disclose legal authority known to be directly adverse to the client's position and not disclosed by opposing counsel, or offer evidence that the lawyer knows to be false. MODEL RULES, *supra* note 3, at R. 3.3(a)(1), (3), (4); *see also* MODEL CODE, *supra* note 1, at EC 7-23. The *Model Code* provides that a lawyer shall not "[k]nowingly make a false statement of law or fact." MODEL CODE, *supra* note 1, at DR 7-102(A)(5).

165. STONE, *supra* note 116, at 2.

166. Ipp, *supra* note 104, at 67 (citing Rondel v. Worsley, 1 A.C. 191, 227 (1969)).

167. *Id.* at 71.

judgment.[168] By contrast, in the United States, the potentially conflicting duties to the client and to the legal system "are the same: to represent [the] client zealously within the bounds of the law."[169]

The different ethos are reflected in Freedman's analysis of the *Sprung* case.[170] According to Freedman, the client's instructions not to tell the defendant's lawyer meant that the lawyer was ethically obliged to obey.[171] In support, he cited *Model Rule* 1.6, concerning confidentiality of information, and *Model Code Disciplinary Rule* 4-101 concerning preservation of confidences and secrets of a client.[172]

By contrast, in England and Wales the rule, set in the wider context of professional principles, leads to exactly the opposite conclusion as to what the lawyer should do. "Because of the doctrine of legal professional privilege, which shields from outside eyes what passes between lawyer and client, the observance by the lawyer of his duty to the court is of particular importance."[173]

How has this different ethos developed? If it is not a product of professional rules, nor of a different conception of the lawyer's role, could it be the product of a different culture operating within a similar adversary system? And if so, is it an example of the role of "collegial influence" in professional practice?

Barristers are members of a close-knit professional community made up of fellow barristers and judges (most of whom, at the senior level, are ex-barristers). Each barrister must join one of the four Inns of Court in London, where the vast majority of practicing barristers are located. The Inns are small

---

168. *See* Lord Templeman, *The Advocate and the Judge*, 2 LEGAL ETHICS 11 (1999).

169. MODEL CODE, *supra* note 1, at EC 7-19; *see also* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 350 (2000) ("[I]n our adversary system the lawyer's duty to the court is almost entirely harmonious with the lawyer's duty as agent for her client.").

170. *Ethical Danger*, *supra* note 58, at 18.

171. *Id.*

172. *Id.* I find it very difficult, on any reading of these rules, to see how confidentiality justifies the decision not to communicate with the other side. *Model Rule* 1.6 states that a lawyer shall not reveal information "relating to the representation of a client." MODEL RULES, *supra* note 3, at R. 1.6(a). Disciplinary Rule 4-101 refers to information protected by the attorney-client privilege or other information gained in the professional relationship. MODEL CODE, *supra* note 1, at DR 4-101. Arguably, the crucial "information" here—that the defendant lawyer was proceeding on an erroneous assumption—had nothing to do with the lawyer-client relationship: it was not the client's information. Confidentiality was also the "card" played by the "legal establishment" to defend the law firm of Kaye, Scholer, Fierman, Hays, & Handler in the Lincoln Savings & Loan liquidation. *See* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 259 (1998) [hereinafter *The Kaye Scholer Affair*].

173. COMM. ON THE FUTURE OF THE LEGAL PROFESSION, A TIME FOR CHANGE para. 6.6 (1988). This report was the product of an inquiry into the legal profession sponsored jointly by the Bar Council (barristers) and the Law Society (solicitors). *Id.* at para. 2.2; *see also* Tombling v. Universal Bulb Co., 2 T.L.R. 289 (Eng. C.A. 1951) (discussing the lawyer's duty to inform the court of certain facts).

and within them, collective norms are expressed overtly—via interaction within the community—and symbolically—via the wearing of the wig and the gown, representing the advocates' independence and their role as officers of the court. Norms are created not just in the form of professional codes, but also as part of a collective culture.

While it is up to the individual advocate to exercise professional judgment, the norms are clear and well understood. Indeed, "if there is any legal profession whose culture can be identified with some precision, it is surely this one."[174] In ideological terms, the spirit of the *Bar Code* is strictly adhered to. Even though there may be noncompliance with symbolic as well as substantive aspects in practice,[175] barristers know what they should do. They know when they and their colleagues are not in compliance with their professional duties. In short, "[n]owhere is the notion of legal culture stronger than at the English Bar."[176]

In this environment, the foundations of professionalism lie *within* the collective community culture. Through this culture, norms are established, professional values absorbed, and lawyer behavior monitored. Of course, the structure and organization of the English bar cannot be replicated in the United States,[177] but this comparison with the English experience does suggest a way to view professionalism and thereby to create professional responsibility.

III. CREATING PROFESSIONAL RESPONSIBILITY

Professional responsibility should be based upon an individual lawyer's exercise of professional judgment. The exercise of professional judgment, by definition, constitutes a rejection of legalism and narrow rule-following. In *Vernon v. Bosley (No. 2)*[178] it was submitted by counsel that, in determining what to do when faced with a conflict between client and court, counsel must only look to the authorities and apply them to the circumstances—the counsel was not to be guided by his own feelings on the issue in question.[179] Lord Justice Thorpe disagreed. He could not "accept that counsel's approach should

174. BOON & LEVIN, *supra* note 8, at 69 (quoting H. W. Arthurs, *Lawyering in Canada in the 21st Century*, 15 WINDSOR Y.B. ACCESS TO JUST. 202, 223). If there are doubts as to the right thing to do, barristers can ask for advice on the telephone "Helpline" which offers expert practical guidance on ethical conflicts.

175. The cab-rank rule, for one, is certainly not always complied with. *See* PANNICK, *supra* note 48, at 135-47.

176. BOON & LEVIN, *supra* note 8, at 69.

177. Several structural factors may enhance the independence of barristers. For example, barristers are self-employed independent contractors: they work for themselves and are not allowed to form partnerships. Their relationship with clients is mediated by solicitors. Many barristers aspire to the bench. And until last year, they could not be sued for negligent advocacy. Arthur J.S. Hall & Co. v. Simons, 3 All E.R. 673, 685-86, 707, 751 (H.L. 2000).

178. 1 All E.R. 614 (C.A. 1997).

179. *Id.* at 653.

be so strictly cerebral."[180] Instead, he stated, "There is a value in instinctive and intuitive judgment. The more difficult the decision the greater that value. The course that feels wrong is unlikely to be the safe course to follow."[181] In other words, the judge trusted the lawyer and had confidence in the decision the barrister would make instinctively and intuitively. An "advocate is expected to sense when his or her behaviour might undermine justice."[182]

This approach endorses the view that professional codes cannot, in complex scenarios, provide definitive answers to ethical conflicts.[183] It is a recognition that values sometimes conflict and there is not a single solution to an ethical dilemma.[184] "Professional" choices in complex conflict of duty scenarios cannot be resolved by following a simple rule. If they could, there would be no conflict. The professional response depends upon the circumstances, and it is for the individual barrister to weigh the factors and determine the matter. The barrister "is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities."[185] In court, the barrister is "personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked."[186]

To some, this may sound less like professional responsibility and more like a *personal* ethic[187] or "ethical discretion in lawyering."[188] William H. Simon argued that lawyers should use their own individual judgment and discretion in selecting and representing clients, including determining for themselves how to do justice—a kind of "non-professional advocacy."[189] Critics of Simon warn of the possible dangers, both to clients in the form of lawyer paternalism[190] and to lawyers in the form of exposure to malpractice suits.[191]

---

180. *Id.*

181. *Id.*

182. BOON & LEVIN, *supra* note 8, at 355-56.

183. *See, e.g.*, *Ideology*, *supra* note 49, at 121 (discussing the "tension between individuality and stability"); Wendel, *supra* note 17, at 11 ("The rules do not cover the waterfront.").

184. *See* W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L. J. 667 (2001) (review essay).

185. BAR CODE, *supra* note 1, at para. 206.

186. *Id.* at para. 610(a).

187. *See, e.g.*, MODEL CODE, *supra* note 1, at *Preamble* ("Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.").

188. *Ethical Discretion*, *supra* note 50, at 1085-86; *see also* BOON & LEVIN, *supra* note 8, at 355.

189. *Ideology*, *supra* note 49, at 130-31.

190. *Ethics by the Pervasive Method*, *supra* note 9, at 48-49.

191. *See, e.g.*, Griffiths v. Dawson, 2 Fam. 315 (1993) (holding that a solicitor who failed to oppose a divorce petition because it would be "unsporting" was held to be negligent). Note, too, that in the United States, there is a trend towards using ethical standards to determine the standard of professional care.

Arguably, this is the essence of professional responsibility. The exercise of professional judgment by an individual lawyer demands the mindful application of professional norms in difficult, grey, unpredictable, idiosyncratic, and complex areas where honest differences and real conflicts of opinion are legitimate. It means making judgments guided not exclusively by money, convenience, or what the client wants, but also by a professional ethic. Arguably, true professionalism is: lawyer "independence [as] a matter of ethos, professional discipline and frame of mind, rather than a matter of how a lawyer is engaged or paid."[192]

Thus professional misconduct by a barrister is not just noncompliance with a rule, but "something which was dishonourable to him as a man and dishonourable in the profession."[193] An advocate's duty is "not to fight unfairly, and that [duty] arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour."[194] This may seem anachronistic at best, naive at worst. Many would not trust professionals to do the right thing unless it also benefitted the professional.[195] It seems to ignore economics and assume that all lawyers are scrupulous.[196]

Yet, at the English bar, it seems to work, at least when it comes to the resolution of conflicting professional duties. Barristers have managed to attain an "'extremely high' 'standard of honour.'"[197] Professional judgment can be required of a barrister and effectively enforced. Could the exercise of professional judgment be extended to other areas of legal practice in England and in the United States? Recently in England, reforms to the legal profession have enabled solicitors, who so wish, to obtain rights of audience and full advocacy rights in all the courts where barristers traditionally held exclusive rights.[198] Although they do not join an Inn of Court, nor are they socialized in the same way as barristers, solicitors are expected to adhere to the same professional norms and to exercise professional judgment in the same way in their role as advocates.

---

192. LORD CHANCELLOR'S DEPARTMENT, RIGHTS OF AUDIENCE AND RIGHTS TO CONDUCT LITIGATION IN ENGLAND AND WALES: THE WAY AHEAD, R. 2.9 (June 1998), *available at* http://www.open.gov.uk/lcd/consult/general/rofa/rofafr.htm.

193. *In re* G. Mayor-Cooke, 5 T.L.R. 407, 408 (1889).

194. *Id.*

195. *See* ABEL, AMERICAN LAWYERS, *supra* note 13, at 35-39.

196. Nathan M. Crystal, Remarks at the *National Conference on Enhancing the Professionalism of Lawyers: Can Commissions, Committees, and Centers Make a Difference?* (Oct. 20-21, 2000) ("[I]f professionalism ignores market forces, it is doomed to be irrelevant."); *see also Ethical Perspectives*, *supra* note 10, at 635 ("[M]ost lawyers will prefer to leave no stone unturned, provided, of course, they can charge by the stone.").

197. *Revisioning Lawyers*, *supra* note 10, at 17 (citing PROFESSION IN THEORY AND HISTORY: RETHINKING THE STUDY OF THE PROFESSIONS (Michael Burrage & Rolf Torstendahl eds., 1990)).

198. *See* COURTS AND LEGAL SERVICES ACT, c.41, §§ 31-33 (1990) (Eng.), *amended by* ACCESS TO JUSTICE ACT, c.22, § 36 (1999) (Eng.). This is subject to meeting prescribed training before or after qualification. *Id.*

Solicitors must not permit their absolute independence and freedom from external pressures to be compromised or compromise their professional standards in order to please their clients, the court, or third parties.[199] Though the solicitor may be an employee or a partner within a law firm, the *Law Society's Code* stresses that solicitor advocates are "individually and personally responsible for their own conduct and for professional work: they must exercise their own professional judgment in all their professional activities and must not delegate such responsibility to another advocate."[200] The cab-rank principle applies.[201] Solicitor advocates can be professionally embarrassed and should not take a case or should withdraw from one if an obligation is imposed on the advocate to act other than in conformity with the provisions of the *Law Society's Code*.[202]

It is too early to say for sure whether or not solicitor advocates will act with the same high degree of honor as barristers do; relatively few solicitors have so far qualified as advocates. However, there is certainly no evidence so far of any shortfall in behavior by those who have qualified. Apparently, solicitors have encountered few problems in their transition to solicitor advocates. In other areas of legal practice, solicitors have constructed their own professionalism based on a clear perspective of what a good lawyer looks like.

For example, in personal injury cases, a culture of cooperation had developed between general practice solicitors and insurance companies; settlement-oriented bargaining rather than "zealous advocacy for the client" had become the norm.[203] However, expert plaintiff solicitors have now rejected the cooperative culture, and "stung by criticisms of the handling of personal injury work by non-specialists," the Law Society has set up a Personal Injury Panel, dominated by leading firms.[204] There are economic incentives to join, including access to cases referred from the Law Society's "Accident Line" service and to the Law Society's organized insurance schemes for no-win, no-fee cases.[205] However, applicants to the Panel are vetted, to ensure they meet quality thresholds.[206] More importantly, they also have to accept a different culture if they wish to remain accredited.

---

199. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 2.6.

200. *Id.* at para. 2.7.

201. *See supra* notes 33-34 and accompanying text.

202. GUIDE TO THE PROFESSIONAL CONDUCT, *supra* note 1, at para. 4.1(c).

203. HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS 27-28 (1987).

204. BOON & LEVIN, *supra* note 8, at 83.

205. *See id.* at 323; Andy Boon, *Ethics and Strategy in Personal Injury Litigation*, 22 J. L. & SOC'Y 353, 355 (1995).

206. To get on to the Panel, applicants must show that they have conducted at least sixty personal injury cases within the previous five years, or at least thirty-six within the previous three, and that at least ten cases must have been set down for trial. BOON & LEVIN, *supra* note 8, at 323 n.43. However, the requirement that applicants take at least five cases to trial during the preceding five years was dropped in February of 1995. *Id.* at 322 n.41; Boon, *supra* note 204, at 356.

The Personal Injury Panel "selection criteria included norms which reflected and reinforced the norms of this elite practitioner group."[207] Applicants must be ready to go to trial if need be and should proceed on the basis that the case will reach trial and not be settled.[208] In other words, the Panel "sought to establish powerful practice norms. Indeed, by using the power of exclusion the Panel set up norms which were arguably more powerful than the ethical rules of the Law Society."[209] It chose "the adversarial ethic and the litigation first strategy as its practical manifestation."[210] The Panel thus endorses or creates professional norms which form part of the ethical framework of practice.[211] The Law Society has also established other panels in which other practice norms have been established.[212]

This is professionalism at work—the creation of a practice norm which can be imposed on the professional community. Also in the United States, there apparently is "an extraordinarily rich self-regulatory system that has grown up 'on the ground' in varied legal practice settings."[213] It is thus not only in the rarefied atmosphere of the English bar that a professional culture and a collegial community can be created, though it might be more difficult to achieve elsewhere. If this kind of professional responsibility—the requirement to exercise professional judgment—is deemed appropriate, how can it be achieved in other areas of legal practice? What are the challenges that must be overcome?

First, the bar will have to develop professional principles. The practice norms thus created will inevitably reflect the community context of the particular area of practice. How lawyers respond to conflicts will differ from one area of practice to another. As Lord Justice Thorpe explained, "Differing practices and procedures in the family justice system, the criminal justice system, and the civil justice system must be reflected in different requirements in, for instance, a criminal trial and a Children Act hearing."[214]

---

207. BOON & LEVIN, *supra* note 8, at 83.

208. *Id.* at 322-23.

209. *Id.* at 323.

210. *Id.*

211. *Id.*

212. Medical negligence, family law, planning, children and mental health review tribunals have been established. *Id.* at 83 n.77.

213. Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 LAW & SOC. INQUIRY 237, 240 (1998) (referring to a study undertaken by Susan Shapiro for the American Bar Foundation).

214. Vernon v. Bosley (No. 2), 1 All E.R. 614, 653 (C.A. 1997).

This is not surprising; the world of legal practice is extremely diverse.[215] The legal profession is stratified and heterogeneous.[216] It is not surprising that, in both the United States and England, lawyers' groups have established associations, usually reflecting the area in which they work.[217] Although these lawyers' groups serve a variety of functions—social, intellectual, representative—some, as we have seen, have also begun to develop their own codes of ethics.[218] Since "lawyers' decisions about their work appear to be rooted in the varying work contexts themselves,"[219] there needs to be "ethical pluralism."[220] Ethical norms must reflect the environment in which professions operate.[221] Within discrete professional communities, the principles of practice should be determined and guidance provided to fill out the meaning and to help interpretation. Professionalism, as defined in this Article, acknowledges and legitimates this professional diversity. Professionalism is a way to establish a sense of collective responsibility to empower the individual lawyer in the lawyer-client relationship.

Second, these principles must be imposed on the professional community. This might be done through controls over the admission to specialist panels, the licensing of particular areas of practice, or other forms of goverance. It is beyond the scope of this Article to evaluate alternative approaches, but the issue of who should regulate lawyers, while always important, is particularly crucial if the aim is to enhance professionalism.[222]

Finally, as a professional ethos, all lawyers within the group should be compelled to adhere to the proposed principles.[223] This may be difficult to achieve for two reasons. First, lawyers may resist the principles. For example, when efforts were made to impose a duty of frankness and disclosure in family

---

215. *See, e.g.*, JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966); MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE GROWTH AND TRANSFORMATION OF THE BIG LAW FIRM (1991); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1994); CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS (1996); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985); Jerry Van Hoy, *Selling and Processing Law: Legal Work at Franchise Law Firms*, 29 LAW & SOC'Y REV. 703 (1995).

216. *See* ABEL, AMERICAN LAWYERS, *supra* note 13, at 202-11.

217. Examples in England include the Association of Personal Injury Lawyers (APIL) and the Healthcare Lawyers Association. Examples in the United States include the Association of Trial Lawyers of America, the American Corporate Counsel Association, the National Association of Criminal Defense Lawyers, and the Association of Professional Responsibility Lawyers.

218. APIL is one example. *See* BOON & LEVIN, *supra* note 8, at 92.

219. Maiman et al., *supra* note 15, at 74.

220. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 677 (1989).

221. BOON & LEVIN, *supra* note 8, at 69-70 (referring to Hazard, *supra* note 85, at 1241).

222. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV L. REV. 799, 801-87 (1992) (addressing the issue of which systems should enforce the ethical duties of lawyers).

223. Osiel, *supra* note 14, at 2016.

disputes and disputes involving children, they were "met with strenuous resistance, being described as 'the attempt to convert the lawyer routinely into an informer against his client.'"[224] Second, lawyers may challenge the legal enforceability of professional judgment.

A recent case illustrates the problem. Finkelstein, a plaintiff's attorney, represented eleven employees in an employment discrimination suit.[225] At trial, the jury found in favor of two of the eleven employees.[226] A hearing date was set for the damages portion of the trial, and the court invited the parties to discuss settlement in the interim.[227] Finkelstein, bypassing the trial defense lawyers, wrote to the general counsel of the defendant company.[228] The letter contained a variety of statements, which a federal district court found to be threatening and an attempt to remove the resolution of the case from the court.[229]

As a result of his "unprofessional conduct," Finkelstein was suspended from practice for a period of six months.[230] However, the Court of Appeals for the Eleventh Circuit (Senior District Judge Lynne, sitting by designation) vacated the order of suspension on appeal.[231] The judge stated that, although the letter "displayed a gross misunderstanding of true professionalism,"[232] "[i]n order to satisfy traditional notions of due process, the conduct prohibited must be ascertainable."[233] Rather than relying upon a specific rule, the district court "depended entirely upon a 'code by which an attorney practices which transcends any written code of professional conduct.'"[234] According to Judge Lynne, "The fatal flaw with this transcendental code of conduct is that it existed only in the subjective opinion of the court, of which appellant had no

224. Ipp, *supra* note 104, at 71 (citing Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. ASS'N B. CITY N.Y. 534, 542 (1975)).

225. *In re* Finkelstein, 901 F.2d 1560, 1562 (11th Cir. 1990).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 1563. The letter stated the terms of settlement relative to each of the eleven plaintiffs. *Id.* at 1562. Finkelstein requested $500,000 in attorney's fees or an amount equal to the amount paid by the company to its defense counsel. *Id.* According to the district court, Finkelstein then "injected the judicial process with pressure group politics." *Id.* at 1565. Statements included the following: that further litigation would tarnish the public image of the company (the attorney stated he would seek damages); that the NAACP and SCLC might find it interesting to hear of the testimony that the company successfully kept from the jury; that Finkelstein's childhood friend is a producer for ABC news and is interested in good stories; that there are "more cases coming"; that if a settlement is not reached, Finkelstein's clients plan to sue; and Finkelstein plans to contact the local union organizers and send them to the company's plant. *Id.* at 1562-63.

230. *Id.* at 1563.

231. *In re Finkelstein*, 901 F.2d at 1565.

232. *Id.* at 1564 n.4.

233. *Id.* at 1564 (citing NAACP v. Button, 371 U.S. 415, 432-33 (1963)).

234. *Id.* at 1565.

notice, and was the sole basis of the sanction administered *after* the conduct had occurred."[235]

The difficulties apparent in *Finkelstein* reinforce, rather than undermine, the argument presented here. To overcome resistance and challenge, a clear professional culture must be constructed. This can only be effectively done within appropriate professional communities or subdivisions. When these communities or subdivisions are identified, clear principles must be established. Because no one admits to acting in bad faith or unprofessionally, regulators and enforcers need to be able to see through and reject such counter-claims without being overbearing or arbitrary. The transcendental code needs to exist in the subjective opinion of the *lawyer*. If the community is appropriate and the principles are clear, there is a greater chance that the principles will be legally enforceable.

Achieving this goal will not be easy. "[L]ocal communities of practice are typically fluid and informal. They are not *organised* to promote *collegial* influence in any *formalised*, self-conscious sense."[236] But it may not be impossible.[237] There are examples in the United Kingdom of what might be called "transcendental regulation," which clearly set out exactly what kind of professional judgment should be exercised by professionals advising clients of their legal duties. It specifically attacks legalism and "creative compliance,"[238] the attempt to escape legal obligations by playing with the letter of the law or with the absence of prescriptive rules.[239] This kind of regulation can certainly achieve a significant change in practice.[240] However, its ultimate legal enforceability remains to be determined, as does the question of whether such regulation can be sustained in the face of strong opposition.[241]

IV. CONCLUSION

Demanding the exercise of professional judgment by lawyers should not be seen as an add-on to professional conduct or just another professional

---

235. *Id.*

236. Maiman et al., *supra* note 15, at 83.

237. *See, e.g.*, Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000) (addressing conflicts between traditional ethics rules and the values of community lawyering and advocating development of an ethical framework resolving these conflicts).

238. *See* Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848 (1991) (discussing new antiformalistic approaches to accounting practices regulation).

239. *Id.* at 849.

240. *See* DOREEN MCBARNET & CHRISTOPHER WHELAN, CREATIVE ACCOUNTING AND THE CROSS-EYED JAVELIN THROWER (1999).

241. *See* McBarnet & Whelan, *supra* note 238, at 870-71.

aspiration.[242] It is the very nature of being a professional. When we talk about reconciling conflicting duties, we are not, generally, talking about flagrant abuse of professional rules or ethics, but about the need to "do the right thing." In other words, no matter how mighty the sanctions, powerful the enforcement, or zero tolerance used, it is difficult to make regulations effective in gray areas or where there are honest differences of opinion. These are the areas in which all lawyers will argue that they acted professionally and in good faith even when they know they did not.

Therefore, professional responsibility entails the mindful application of principles. The recent trend for ethical norms to become legalized as narrow rules[243] may thus serve to undermine, rather than enhance, the professionalism of lawyers.[244] Principles are the only way to capture complex areas that cannot be reduced to simple rules. Principles can be used to fill regulatory gaps and to deal with situations not seen before, including innovations in practice or procedure. Indeed, principles may be the only way.[245]

Much of the argument in this Article is by no means new.[246] Over sixty years ago, Judge Robert N. Wilkin told students at the Ohio State College of Law that the spirit of the legal profession "is transmitted, now as always, by association. It cannot be taught like the rule in Shelley's case, or the definition of murder. It is too great and too vital for definition."[247] Of course, since then, individual autonomy of lawyer, law firm, and client has grown and the "spirit of the profession" has declined.[248] However, comparative analysis does remind

---

242. *See* MODEL RULES, *supra* note 3, at R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer *not only to the law* but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." (emphasis added)); MODEL CODE, *supra* note 1, at Canon 5 ("A [l]awyer [s]hould [e]xercise [i]ndependent [p]rofessional [j]udgment on [b]ehalf of a [c]lient.); *see also id.* at DR 7-101(B)(1) (stating that an attorney may exercise professional judgment in waiving or failing to assert a client's right or position).

243. Hazard, *supra* note 85, at 1241; *see also* Smith v. Haden, 872 F. Supp. 1040, 1045 (D.D.C. 1994) (denying defendant's motion to strike expert testimony as to standard of care based on ethics rules).

244. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1138 (1999).

245. *See* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 3 (1995) (observing that the covert inducement of witnesses to testify falsely "must therefore be controlled by a lawyer's own informed conscience").

246. *See* Maiman et al., *supra* note 15, at 83, 85 ("Workplace communities of practice are potentially much more powerful devices of control than the bar as a whole.... The challenge for professionalism is to find ways to support and institutionalise deliberative judgement in practice and to provide collegial support for it.").

247. ROBERT N. WILKIN, THE SPIRIT OF THE LEGAL PROFESSION 173 (1938).

248. The American Corporate Counsel Association illustrates this well. It represents over 10,000 lawyers who work in 4,500 private sector organizations and has a branch in Europe. *See* Mary C. Daly, *The Cultural, Ethical and Legal Challenges in Lawyers for a Global Organization: The Role of the General Counsel*, 46 EMORY L. REV. 1057 (arguing the importance of these lawyers retaining professional identities).

us that lawyer behavior can be changed, not by rule changes in professional codes, but by creating a professional responsibility in which the individual has the duty to exercise professional judgment.

The exercise of professional judgment has to be guided by principles. These principles have to be agreed upon (though ultimately choices may have to be made between competing understandings), understood (and contextualized), imposed (to catch "bad lawyers"), enforced (and be seen to be enforced), and enforceable. None of this will be easy. More research is needed to better understand "how practicing attorneys identify, negotiate around, and respond to ethical dilemmas in their everyday experiences. . . . [I]t is only through a conversation that brings together many threads—empirical, theoretical, practical—that the next generation of legal ethicists can move the debate to a new level."[249]

But the aim should be clear—to require the exercise of professional judgment. As Roscoe Pound stated:

> In order to further justice, in order to insure that the machinery of justice is not *perverted*, those who operate the machinery must not merely *know* how to *operate* it, they must have *a deep sense of things that are done and things that are not done.* They need the guiding restraint of the professional *spirit* to prevent misuse of the machinery, to prevent waste of public time in useless wrangling, to promote proper forensic treatment of witnesses so that witnesses will not be unwilling to come forward to testify.[250]

Translating this aim into an operational reality appears to have been realized at the English bar, and it is a model to which many commentators have implicitly lent support.

Creating, or re-creating, professional responsibility in the twenty-first century is undoubtedly a daunting challenge. There is little prospect of a return to some kind of aristocratic ideal, where higher, non-commercial values and a public spirit predominate. Economic realities may preclude the return, though such pressures make the task even more important.[251] Political motivation may

---

249. Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 LAW & SOC. INQUIRY 237, 241 (1998); *see also* Donald C. Langevoort, *What Was Kaye Scholer Thinking?*, 23 LAW & SOC. INQUIRY 297, 302 (1998) (stating it is important to know how "lawyers think in practice, especially on matters relating to ethics and social responsibility.... When we understand lawyering better, we will have more insight into what it will take to improve the prevailing ethos.").

250. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES 26 (1953) (emphasis added).

251. BOON & LEVIN, *supra* note 8, at 89 ("A competitive environment reinforces the need for support.").

also be lacking.[252] In any case, maybe the ideal never really existed, at least not in any pure form, either here or in England. However, demanding the exercise of professional judgment and grounding it in principles developed, though not necessarily determined, by lawyers in practice may be a small step in the right direction, at least as far as ethical conflicts in legal practice are concerned.

252. See *The Kaye Scholer Affair*, *supra* note 172, at 276-80, and Gordon, *supra* note 12, for a discussion of the questions raised about the "legal establishment" after the Kaye Scholer "affair."

*