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## The Professionalism and Accountability of Lawyers

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*Discussions of the principles governing lawyers' professional behavior usually focus on the lawyer's function as advocate. In this Article, Professor Schwartz directs attention to the nonadvocate lawyer and argues that in a nonadversarial setting different principles should apply. In particular, Professor Schwartz proposes a professional rule that would restrain the nonadvocate lawyer from using "unconscionable" means or working for "unconscionable" ends. In addition, Professor Schwartz argues that nonadvocates cannot claim the immunity from moral accountability for their actions that is accorded to advocates operating within the adversary system.*

One of the more revealing features now appearing in the American Bar Association Journal is *Legal Ethics Forum*, conducted by Professor Stanley Kaplan. In this feature Professor Kaplan chooses a problem involving legal ethics and solicits two members of the bar to write opposing arguments about what would be proper professional behavior in the circumstances. As can be imagined, each view usually proves persuasive, leaving the reader with the firm conviction that a

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So may persons have reacted to earlier drafts of this Article in ways that should have improved it that, with one exception, it is impossible to accord individual recognition. I sincerely regret this, for not only does it deprive them of recognition that is properly their due, but it also makes it clear that the author bears sole responsibility for the product and the views expressed herein. The exception is Drew Pauly, UCLA Law '79, whose technical assistance is greatly appreciated.

lawyer would be justified in following either of two quite contradictory courses of action.

That alone would not be startling. Lawyers are familiar with the existence of problems at the margin. Law professors pride themselves in training their students to live with uncertainty and ambiguity. The essence of the common law is to leave the next case for the next time. It should be no more difficult to pick a problem in the "gray" area with respect to a lawyer's behavior than with respect to the behavior of anyone else, although lawyers, like other human beings, probably feel more comfortable in telling clients that the answers to the clients' questions are uncertain than in receiving the same response themselves.

Yet it is striking that the problems chosen by Professor Kaplan involve transactions which must occur daily in thousands of law offices throughout the United States. May a lawyer represent all of the several persons wishing to form a joint venture? What should a lawyer do upon learning that a client has failed to reveal to another party matters material to a buy-sell agreement? The lawyers assigned to comment on these problems readily mustered persuasive arguments for their conflicting responses.<sup>1</sup> It is startling that there are no institutionally approved answers to such common and basic questions of professional responsibility.

The lack of definite answers to professional questions can in large part be explained by the absence of a general, coherent theory of professional behavior for lawyers. Indeed, given the persistent and pervasive nature of the dilemmas, it is surprising that such a theory has only recently received systematic consideration. The American Bar Association's Code of Professional Responsibility<sup>2</sup> is the most prominent attempt to provide a guide for professional conduct. It has serious limitations, however, and it highlights the need for a general theory of professional behavior without satisfying it. One consequence of the absence of any general theory is that lawyers often respond to professional problems in ad hoc, pragmatic ways, redefining the issues to avoid reaching the ethical question. Such an approach, while not manifestly illegitimate, is a very limited and intellectually unsatisfactory way of responding to professional problems.

This Article represents a step toward the development of a comprehensive analytical framework for considering questions of professional behavior and responsibility. It addresses primarily situations

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1. See Kaplan, *Legal Ethics Forum: Representation of Multiple Clients*, 62 A.B.A.J. 648 (1976); Kaplan, *Legal Ethics Forum: The Case (against) and (for) Lawyer Laconic*, 62 A.B.A.J. 1049 (1976).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976). In this Article, the abbreviation EC will be used to refer to the Code's Ethical Considerations, and DR to refer to the Code's Disciplinary Rules.

where in the course of a lawyer's representation of a client the conduct of either will affect a third party, and examines principles that might properly govern the lawyer's actions in such situations when the ends sought or the means used, though not illegal, could be described as unfair, unjust, or unconscionable.

In considering these principles, it is necessary to distinguish between the lawyer acting as an *advocate* within the adversary system and the lawyer acting as *nonadvocate* (e.g., as negotiator or counselor) outside that system.<sup>3</sup> For the advocate, two principles are posited as necessary to the effective working of the adversary system: a Principle of Professionalism, which obliges the lawyer within professional constraints to maximize the likelihood that the client will prevail, and a Principle of Nonaccountability, which relieves the advocate of legal, professional, and moral accountability for proceeding according to the first principle. This Article suggests that these principles cannot be transferred automatically to the nonadvocate, because the absence of a third-party arbiter in the negotiating/counseling situation fundamentally changes the lawyer's role. This discrepancy calls for a different professional rule for the nonadvocate which would require that as a matter of professionalism the nonadvocate lawyer refrain from assisting a client by "unconscionable" means or from aiming to achieve "unconscionable" ends, with the term "unconscionable" drawing its meaning largely from the substantive law of rescission, reformation, and torts. Furthermore, while the advocate may claim to be insulated from moral accountability because of the necessary implications of the adversary system, the nonadvocate may not make that claim—the nonadvocate lawyer should be held morally accountable for assistance rendered the client even though the lawyer is neither legally nor professionally accountable.

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3. Differentiating between the advocate and the nonadvocate is not a new idea. The differences in function and responsibility were an important point in the 1958 Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and the American Bar Association. See *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958). The two roles are distinguished—as is more fully explored in the remainder of this Article—in the American Bar Association's current Code of Professional Responsibility. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-3, EC 7-4, EC 7-5, EC 7-8. Professor Richard Wasserstrom has recently considered the differences from the standpoint of a moral philosopher in *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975), and Judge Alvin Rubin has done so from the standpoint of an experienced lawyer-judge in *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975). In a substantial sense, this Article tracks Judge Rubin's. Considering the lawyer acting as negotiator, Judge Rubin proposes two professional rules to the effect that the lawyer should neither use unconscionable means nor help the client to achieve unconscionable ends, ideas which are at the core of this Article. Professor Louis Brown has prescribed improved methods of representation in nonlitigation contexts. See, e.g., Brown & Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. L. REV. 453 (1976).

## I

## THE ADVERSARY SYSTEM AND THE ADVOCATE

This discussion begins for several reasons with an examination of the lawyer-client relationship when the lawyer functions as an advocate within the adversary system. The adversary system looms large in our thinking about lawyers. Although the current ABA Code of Professional Responsibility recognizes to a larger extent than did the Canons of Professional Ethics, which preceded it, that all lawyers are not constantly litigating,<sup>4</sup> the advocate's role is still clearly the axis of the Code. Thus, even though most lawyers spend the bulk of their time acting in a representative capacity as negotiators and counselors outside the formal adversary system, these functions are treated almost as exceptions to the primary role of lawyers as advocates. Furthermore, the adversary system presents a coherent model from which it is possible to draw conclusions about the proper behavior and responsibility of the system's principal operators, the lawyers. It is, finally, a familiar system, as television reminds us almost every night.

What, then, is the adversary system? It is a system for adjudicating disputes, in which the essential elements are an impartial tribunal of defined jurisdiction, formal rules of procedure and governing substantive law, and assignment to the parties of the task of presenting their own best cases and of challenging the presentations of their opponents.<sup>5</sup>

The operators of this system are the lawyers. With minor exceptions, only lawyers may represent the parties, and when they do, they appear as advocates. In this role, lawyers must meet certain expectations about their behavior. Many of these expectations are embodied in the positive and negative imperatives of the ABA Code of Professional Responsibility, notably in canons 4, 5, and 7. The language of canon 7 reveals a principal emphasis of the Code: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." As expanded in the Code's Ethical Considerations and Disciplinary Rules, this precept requires that the lawyer "not intentionally fail to seek the lawful objectives of his client,"<sup>6</sup> and that in so doing, the lawyer may not, for example, knowingly use perjured testimony,<sup>7</sup> make a false statement of law or fact,<sup>8</sup> create evidence known to be false,<sup>9</sup> or assist

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4. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-3, which specifically acknowledges that "[a] lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different."

5. The first successful attempt to analyze the adversary system is Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30 (H. Berman ed. 1961). See also Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101(A)(1).

7. *Id.* DR 7-102(A)(4).

8. *Id.* DR 7-102(A)(5).

9. *Id.* DR 7-102(A)(6).

the client in conduct known to be fraudulent.<sup>10</sup> Other rules, such as the rule against communicating with another party known to be represented by counsel,<sup>11</sup> impose restraints on the lawyer's advancement of the client's interest even though the proscribed behavior might otherwise be lawful.

These rules apply most directly, if not exclusively, to the lawyer functioning as advocate. From them a principle of professional behavior for the advocate can fairly be distilled:

*When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail.*

This Principle of Professionalism for the Advocate requires the advocate to maximize the client's interest. In so doing, the lawyer's only obligation is to abide by the established constraints on professional behavior.

Does this principle fully comprehend the dimensions and limitations of the advocate's role? Clearly not. We have only to ask the layman's question, "How can you defend him when you know he's guilty?," to see the need for a second, corollary principle dealing with the advocate's accountability:

*When acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.*

This principle acknowledges the generally accepted notion that as long as a lawyer is acting as an advocate to maximize the client's likelihood of prevailing, the lawyer will incur neither civil or criminal liability nor professional criticism or sanction. The lawyer, to the contrary, is performing precisely as the system demands. But the Principle of Nonaccountability for the Advocate proposed here goes further in asserting that the same demands of the system also justify the *moral* nonaccountability of the advocate. The advocate might well reply to the "how-can-you-defend-him" question:

I represent him because the system demands that I do so. Moreover, I must cross-examine and try to impeach truthful witnesses,<sup>12</sup> make arguments with which I personally disagree, decline to introduce probative, adverse evidence against my client, and attempt to present matter

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

11. *Id.* DR 7-104(A)(1).

12. The ABA Project on Minimum Standards for Criminal Justice suggests that a lawyer's knowledge that the witness is testifying truthfully "may affect the method and scope of cross-examination or impeachment," STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 7.6(b) at 132 (1974), and the Commentary implies that the lawyer should not impeach a truthful witness (Approved Draft, at 272). These prescriptions, however, stand alone in the literature, which generally treats the issue as a tactical question rather than a professional one. See A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES II 327 (1972).

in ways I think personally are inaccurate, because the system demands that. You may not hold me substantively, professionally, or morally accountable for that behavior. Indeed, were I not to behave in this way, I would truly be subject to criticism on all three grounds of accountability.

In procedural terms, the concept of moral nonaccountability is equivalent to the filing of a demurrer, rather than an answer, to the charge of immorality. In effect, as long as the charge does not allege a violation of the established constraints upon professional behavior, the lawyer is beyond reproof for acting on behalf of the client.

While there is no question that the positive law can limit the lawyer's substantive and professional accountability, a principle which relieves the advocate of moral accountability is open to objection. It might be argued that the law cannot convert an immoral act to a moral one, nor a moral act to an immoral one, by simple fiat. Or, more fundamentally, the lawyer's nonaccountability might be illusory if it depends upon the morality of the adversary system and if that system is immoral.

Each of these challenges implicates major philosophical or empirical issues. If either were to prove persuasive, the justification for the application of the Principle of Nonaccountability to moral accountability would disappear.

These issues are not addressed here. Instead, this Article proceeds on the assumption that the Advocate's Principle of Nonaccountability in all of its dimensions is necessary for the effective operation of the adversary system. If advocates could be called personally to account for representing clients fully within established professional restraints, they might give less than full commitment to their clients. Such a result would undercut the very assumptions of the adversary system. This Article proceeds on the hypothesis that in order to provide maximum opportunity to resolve disputes fairly, correctly, efficiently, and promptly, the adjudicatory system requires a corps of professionals committed to giving their best efforts to represent their clients.

This Article adopts this hypothesis as applied to advocates, without attempting to prove it, in order to distinguish and consider the professionalism and accountability of lawyers functioning in a nonadvocate capacity. It is argued that whatever the validity of the Principle of Nonaccountability for advocates, its legitimacy rests on the particular structures and functions of the adversary system, and that the circumstances of nonadvocate lawyers require a different predicate for analysis of their professionalism and accountability. If the arguments justifying advocates' nonaccountability fall short, and the distinction between the advocate and the nonadvocate proves insufficient to warrant different analysis, the moral problems that inhere in the ad-

versary system would have to be confronted for both the advocate and the nonadvocate. It may also be that the following discussion of the nonadvocate's principles will raise doubts about the advocate's principles. In that case, an important issue would be whether, in the procedural language used earlier, the advocate should be entitled to file a demurrer in response to an attempt to impose moral accountability for professional behavior. The approach of this Article precludes treating these issues here.

## II

### THE NONADVOCATE FUNCTIONS OF THE LAWYER

The task of finding principles of professional behavior and responsibility for the vast world outside the adversary system requires both a description of that world and an identification of those universal features within it that warrant the prescription of common principles. The description offered here takes the form of a typology of lawyers' functions which draws distinctions by reference to the adversary system. This reference is deliberate, since to the extent that lawyers' nonadvocate functions resemble those of the advocate, it may be reasonable to apply similar principles of professionalism and nonaccountability to both.

#### *A. Typology of Nonadvocate Functions*

The principal nonadvocate functions of the lawyer fall into three major categories: compelled negotiations, voluntary negotiations, and counseling.<sup>13</sup> Compelled negotiations may be further classified according to whether or not the agreement reached in the negotiations requires judicial approval.

##### *1. Compelled Negotiations*

Compelled negotiations are those in which either party can force the other to a third-party resolution. In other words, negotiations are compelled whenever the controversy is litigable if the parties fail to reach an agreement.

Compelled negotiations requiring judicial approval of the outcome would include plea bargains, settlements of the legal claims of minors, and settlements of class action suits. In negotiations of this type, the lawyer must play two roles. Prior to agreement, the role is similar to that of the advocate, in that the lawyer is to negotiate "zealously" on behalf of the client in opposition to the other party. In con-

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13. For a comprehensive analysis of negotiations from a different perspective, see Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rule-Making*, 89 HARV. L. REV. 637 (1976).

trast to the adversary system, however, there is no tribunal before which the evidence and arguments are put for resolution of disagreements, nor is there a panoply of rules of professional behavior, although limited rules of process may govern such special procedures as mandatory pretrial settlement conferences.

Once the bargain has been reached, the functions change. There may be formal rules of process, and there is an impartial third party, the judge, to whom arguments and evidence are presented. At this point, the lawyers cease to be adversaries and take a common position in seeking the judge's approval of the bargain, in effect vouchsafing the fairness or correctness of the outcome.<sup>14</sup> The role of the lawyer has changed from that of "zealous" advocate for the client to that of advocate for the consensus.

Where the parties do not need judicial approval, the role of the lawyers is similar to that in the preagreement stage of negotiations which must be approved by a judge, with lawyers for both parties trying to maximize their clients' positions in the final resolution. The possibility of litigation if they fail to arrive at a settlement may force the lawyers to keep in mind the persuasiveness of their polar claims to a potential third-party arbiter, but by definition no tribunal sits to resolve disagreements between the parties. Once again, except where rules of process govern such procedures as compulsory pretrial settlement conferences, there are few professional rules of conduct.

## 2. *Voluntary Negotiations*

This category includes transactions which are not litigable if the parties fail to agree. For example, in the ordinary buy-sell agreement, if the buyer and seller do not reach an agreement as to the terms of the transaction, that is the end of the matter. No agreement will be forced on them by compulsory reference to a third-party arbiter.

The presence of two parties both attempting to maximize their respective positions resembles the structure of the adversary system. But here there are ordinarily no rules of procedure, no special rules of professional behavior, and no third party tribunal.

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14. It is interesting to speculate why there are controversies which require judicial approval even when the parties are in agreement about the resolution of the dispute. In the case of minors' settlements, the reason may be that the client is considered unable to make a reasoned decision whether to accept a specific bargain (or, in other words, that the system lacks trust in the attorney's ability to make the decision in the best interests of the client), so that the court must be the client's surrogate. In class actions, there is the added concern about the identity and representation of all those who may be affected by the outcome. In the case of plea bargains, that same distrust may apply to both defense counsel and prosecuting attorney; in addition, there is the possible consideration of an independent interest of society, which only the judge can vindicate.



### 3. *Counseling*

Examples of the counseling functions of a lawyer include preparing a will, drafting a general bill of sale for a merchant, and advising a client about the probable tax consequences of a proposed course of action.<sup>15</sup> The absence of an immediate second party in these situations leads to a significant difference in dynamics compared to the context of negotiations described above. In the context of counseling, there is no adversary to challenge the client's statement of the facts, to sharpen the issues, to seek clarification of positions, or to point to countervailing considerations. Thus, all the major elements of the adversary system are lacking. There is no third-party tribunal, no adverse party, and no rules of procedure; the lawyer and the client are on their own.

#### *B. Applicability of Advocate's Principles*

Each of the contexts described above (with the exception of the latter stages of compulsory negotiations subject to judicial approval) lacks at least one essential element of the adversary system: the impartial arbiter. We must consider whether this basic difference renders the principles derived for the adversary system inapplicable in these other contexts.

In the adversary system, the presence of the impartial arbiter has two important effects. First, it assures that there is one—and only one—part of the system charged with the responsibility of reaching the correct decision under the law (here the impartiality is non-partisanship and freedom from bias). Second, it makes it possible to entrust the parties with the presentation of issues, evidence, and arguments and with the challenges to them (here the impartiality is non-participation). The arbiter sees to it that the rules of the contest are followed, and then decides who has prevailed.<sup>16</sup> Putting one's best foot forward by stepping on the feet of the other side makes sense because of the presence of an impartial arbiter. That presence legitimates the zealous advocate model of the lawyer and all that it entails. Lawyers are justified in using methods and seeking results with which they may personally disagree because of faith in the ability of the arbiter to reach a correct decision.

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15. In some situations, clearly, the counseling and negotiating functions of a lawyer overlap. A lawyer cannot negotiate very well without also counseling the client. The client must be advised of the positions to be taken and their probable consequences; the client must be given an opportunity to decide about terms and conditions of settlement or to decide whether the controversy is to be settled at all. For present purposes, however, counseling refers to a different lawyer activity, the lawyer as counselor outside the context of negotiation.

16. This analysis ignores the fact, of course, that one function of the arbiter is to review and alter the procedural and substantive rules themselves, as experience and changing circumstances seem to require. The exercise of this function depends upon the nature and level of the particular forum.

Should these expectations of lawyer behavior change when the arbiter is removed? A simple parallel may be found in an athletic contest such as a basketball game. When a game is formally refereed, our expectations of the players and coaches are very different than in a "pick-up" game. In the refereed contest it is the referee's job to spot the fouls, to interpret and apply the rules, and to decide who has won. We therefore expect the coaches and players to argue, to the extent permitted, those positions which are in their own best interests. The pick-up game, on the other hand, requires self-policing, since by definition there is no referee. If each team is adamant in adhering to its position in any controversy, the game cannot proceed. The teams and coaches must, therefore, exercise more restraint in the pick-up game than in the refereed contest.

A similar comparison may be made between lawyers operating within and without the adversary system—removal of the arbiter leads to substantially different expectations of the other parties. Within the adversary system all proceedings are ultimately directed toward the impartial arbiter. The function of lawyers is to bring about a rough equality between the parties to aid the arbiter in making fair determinations. The lawyers assure that both sides follow the rules and that the best possible case is presented for each client.

Viewed in this light, the absence of the impartial arbiter in nonadversarial contexts has two distinct significances. The first is that there is no longer any one to point to for ultimate resolution of disputes; the only point of contact is the other party, or, in counseling situations, the client. Attention is no longer focused on the arbiter. The second has to do with the social implications of removing the coercive impartiality of the state from the decisionmaking processes. The absence of the arbiter moves the proceedings away from the theoretical conception of evenhanded justice.

Lawyers outside the adversary system face different environments and different expectations. It is therefore necessary to consider, independently of the parallel issues within the adversary system, what principles of professionalism and accountability should apply to the lawyer representing clients in a nonadvocate role.

### III

#### THE PROFESSIONALISM OF THE NONADVOCATE LAWYER

Whatever other differences in role there may be for the lawyer serving in a nonadvocate capacity, the client's expectations of the lawyer would no doubt be the same as for the advocate. These expectations might warrant a Principle of Professionalism for the nonadvocate

which would track closely the advocate's Principle of Professionalism. For example:

*When acting in a nonadvocate capacity on behalf of a client, a lawyer must, within the established constraints upon professional behavior, attempt to achieve the client's objectives.*

It must be stressed that such a principle need not be derived solely from the advocate's principle proposed earlier,<sup>17</sup> nor from the advocate's role. It could be derived independently from the nature of the lawyer-client relationship, which may present a set of general expectations regardless of context. But the problem nonetheless remains: since the advocate's principle was validated by the adversary system in which the advocate functions, the absence of that system may mean that a parallel principle for the nonadvocate, however derived, is not as readily or completely validated. The adversary system obliges the advocate to assist the client even though the means used or the ends sought may be unjust. Is the same obligation properly applied to the nonadvocate's professional conduct?

Two considerations suggest a negative answer. First, the basic difference between the environment of the adversary system on the one hand, and the range of nonadversary environments on the other, indicates that identical professional requirements might be inappropriate. Second, while the "established constraints upon professional behavior" for the advocate are specific and extensive, for the nonadvocate they are neither. The two general professional principles might, therefore, have to differ in order to compensate for the difference in the extent to which lawyers in the two roles are subject to special rules of professional behavior.

As a preliminary step in constructing an appropriate guide to professional behavior for the nonadvocate, consider the following alternative formulations:

- (1) When acting in a nonadvocate capacity on behalf of a client, a lawyer must, within the established constraints upon professional behavior, attempt to achieve the client's objectives, unless to do so would require that the lawyer use unfair, unconscionable, or unjust, though not unlawful,<sup>18</sup> means or that the client achieve unfair, unconscionable, or unjust, though not unlawful, ends, in

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17. See text following note 11 *supra*.

18. As used here, the meaning of the word "unlawful" is that given to it in the ABA Code of Professional Responsibility. With respect to the conduct of the client, it means criminal or fraudulent. With respect to the conduct of the lawyer, it means criminal, fraudulent, or in violation of a Disciplinary Rule. Conduct that might be described as unfair, unjust, or unconscionable is not "unlawful" within this definition as long as it is neither criminal, fraudulent, nor a violation of a Disciplinary Rule. This is the necessary implication of the ABA Code of Professional Responsibility, EC 7-8 and 7-9, which urge the lawyer to request the client's permission to forgo unjust behavior, but leave the ultimate decision to the client and permit the lawyer to assist in the unjust behavior without incurring sanction. See note 20 *infra*.

which event the lawyer *need* not accept or continue the representation.

- (2) When acting in a nonadvocate capacity on behalf of a client, a lawyer must, within the established constraints upon professional behavior, attempt to achieve the client's objectives, unless to do so would require that the lawyer use unfair, unconscionable, or unjust, though not unlawful, means or that the client achieve unfair, unconscionable, or unjust, though not unlawful, ends, in which event the lawyer *must not* accept or continue the representation.

The first of these rules<sup>19</sup> presents the options currently afforded a lawyer functioning in a nonadvocate capacity under Ethical Considerations 7-8 and 7-9 of the ABA Code.<sup>20</sup> These options allow the lawyer either to go forward or to withdraw if the result the client seeks is morally unjust. The second rule would prohibit the lawyer from going forward; it has no counterpart in the Code of Professional Responsibility.<sup>21</sup> Note that neither rule permits the lawyer to subvert the client's interests without the client's consent—the lawyer's option is to decline or discontinue the representation.

The questions raised by these rules are most usefully discussed with reference to the second rule. The first, inasmuch as it creates an option for the lawyer, raises primarily issues of accountability which will be discussed later.<sup>22</sup> Moreover, if we grant that in the absence of the adversary system no overriding policy is advanced by a lawyer's use of unfair, unjust, or unconscionable means or by a client's obtaining such ends, it is worth considering why lawyers *as a professional matter*

19. The term "rule" is used here rather than "principle" because of the greater specificity of the proposals.

20. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 and 7-9, read as follows:

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

21. A prohibition of this kind has, however, been proposed by commentators. See, e.g., Rubin, *supra* note 3.

22. See text accompanying note 47 *infra*.

should not be prohibited from using their skills for these purposes even though their clients might wish them to do so.

The arguments against the kind of prohibition contained in the second rule fall into three categories: the first has to do with unfairness to lawyers, the second with the impact of such a prohibition on the integrity of the lawyer-client relationship, and the third with unfairness to the client.

### *A. Unfairness to Lawyers*

One immediate objection is that terms like "unfair," "unconscionable," or "unjust" are too vague to be used in a rule of professional responsibility. One lawyer's concept of unconscionability may be another's consummation devoutly to be wish'd. It would be unconscionable, the argument might run, to discipline a lawyer for behavior that others—but not the individual lawyer—might regard as unconscionable in retrospect.

Such terms, however, are familiar both to the substantive law and to the various professional codes, including the ABA Code of Professional Responsibility.<sup>23</sup> Indeed, in a sense Ethical Consideration 7-8 requires the nonadvocate to make just such a determination of "unjustness" since it permits the lawyer to withdraw when the client refuses to abide by the lawyer's advice and pursues a course of conduct the lawyer believes is "morally unjust."<sup>24</sup> Whether a lawyer in those circumstances does withdraw depends on a number of considerations, but a necessary condition is that the lawyer believes that the client's ends are unjust. Lawyers who take this aspiration of the bar seriously thus already are forced to make the very determinations which could be challenged as being measured by too vague a standard.

Another possible response to the argument of vagueness would be to define "unconscionability" not in terms of a lawyer's subjective assessment, but rather by reference to an objective body of law, that is, by measuring a lawyer's conduct against a standard of how others in similar circumstances would regard the proposed transaction. Courts are not unfamiliar with an "unconscionability" standard, and lawyers may refer to an existing body of law for an explanation of the term.<sup>25</sup> If the standard explicitly posed the question "Would a court of equity regard this course of action as 'unconscionable'?", the vagueness objection, though not eliminated, would have less force.

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23. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 and 7-9. See also EC 1-5 ("morally reprehensible conduct"); EC 7-13 (duty of government lawyer to avoid "unfair litigation," "to seek justice," and not "to bring about unjust settlements or results").

24. See note 20 *supra*.

25. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). See also U.C.C. § 2-302 (unconscionability provisions).

Closely related to the objection of vagueness is the objection that such a standard would be arbitrarily enforced or even be unenforceable. That objection has several facets.

First, the contribution of a lawyer acting in a nonadvocate capacity is must less visible than that of the advocate. In most cases, the lawyer's conduct will not surface at all. To impose discipline in the few cases where it does surface would be to create an arbitrary system of enforcement.

Second, use of such a standard may result in abusive discrimination against lawyers who represent unpopular causes or oppressed persons, or who themselves are for personal, political, or other reasons *personae non gratae* at the bar. Whatever safeguard against this kind of abuse is obtained by limiting the scope of the professional rule to criminal or fraudulent conduct is lost *pro tanto* by expanding its scope to reach other kinds of conduct. The argument is not without force. Its persuasiveness depends upon the extent to which the disciplinary process is seen as concentrating unfairly on these types of lawyers. Expanding the grounds for discipline necessarily increases opportunities for using enforcement as a harassment device.

On the other hand, it may well be that concepts like unfairness, injustice, and unconscionability are just as likely to run in favor of poor or oppressed clients as against them, for the concepts as substantive law have for the most part aided these groups. Confining the reach of the terms to established legal understandings could further reduce the possibility of discriminatory enforcement.

A third facet is the question of whether professional disciplinary and enforcement systems can handle such types of conduct. Imposition of discipline upon lawyers for criminal and fraudulent conduct, both of which are now professional violations, is rare. How much will be gained or lost by the addition of an "unconscionable" category?

In answering this question it is necessary to consider the functions of a professional code apart from actual enforcement. One such function is analogous to the use of the criminal law for deterrence. Although the incidence of actual professional discipline is, like the use of criminal sanctions, remarkably low, the existence of sanctions itself has a deterrent effect. Moreover, the professional code serves an important reinforcement function. It enables lawyers who do not want to assist clients in questionable transactions to decline on the grounds that the Code does not permit them to go forward, and thus to avoid the unpleasantness of refusing to assist on a basis that is seen by the client as a personal condemnation. A professional code is also an informational document. It tells lawyers how to behave. More than one lawyer has wanted to know the answer to the question, "What should I

do?," in circumstances which would be covered by the prohibitory rule being considered here.

### *B. Integrity of the Lawyer-Client Relationship*

A different set of objections to a rule prohibiting a lawyer from using unconscionable means or pursuing unconscionable ends has to do with the integrity of the lawyer-client relationship.

First, there is the negative impact upon the trust and confidence necessary to that relationship if the lawyer is cast as the "conscience" of the client. Clients come to lawyers for help and assistance, not moral lectures, it may be said. Yet the aspiration of the bar now is for the lawyer "to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions."<sup>26</sup> From the point of view of the client, there may be little difference between a mandatory rule and a mere permissive caution; a mandatory rule might, therefore, be expected to have only minimal impact upon the lawyer-client relationship.

At least as important is the objection that clients will not tell lawyers all that is relevant to the proposed course of action out of fear that the lawyer will conclude that the proposal is unconscionable and refuse to assist. This argument is similar to, and often confused with, the doctrine justifying a testimonial privilege for lawyer-client communications. Whether such client concerns are actually reflected in the extent to which clients make full and frank disclosure to their lawyers is unclear. There is evidence that professional and legal rules have little effect on the willingness or unwillingness of clients to talk to their lawyers. For example, Professor Uviller asserts that the testimonial privilege is rarely the factor that determines the client's decision to talk freely to the criminal defense lawyer.<sup>27</sup> Lawyers may have more trouble convincing clients not to talk to other people than establishing open communications within the lawyer-client relationship. It is reported that defendants who have been given the *Miranda* warnings and admonished by their own lawyers not to talk with the police nevertheless do so to their own detriment.<sup>28</sup> The Code of Professional Responsibility now permits a lawyer to breach the confidence wall by disclosing the client's intention to commit a crime and the information necessary to prevent it.<sup>29</sup> Yet how many clients are aware of this ex-

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26. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8.

27. Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1073 (1975).

28. See the review of three empirical studies in Y. KAMISAR, W. LA FAVE & J. ISRAEL, *BASIC CRIMINAL PROCEDURE* 592-96 (4th ed. 1974).

29. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C)(3).

ception and because of it do not talk to lawyers about their criminal intentions? With respect to a different client group, in today's world of increased liability of corporate officers, directors, accountants, and lawyers, it is doubtful that lawyers will be satisfied with incomplete answers or clients will be willing to risk liability due to insufficient disclosure because of their concern that lawyers will refuse to aid in their proposed courses of action.

Suppose, however, that some clients will be less than fully candid out of fear of their lawyers' reluctance to proceed. How undesirable would that be? Presumably, there is a danger that the client who mistakenly believes that the lawyer will regard the proposed course of action as "unjust" will make incomplete disclosures and consequently will receive inadequate counsel. Yet the alternative of allowing lawyers to cooperate in bringing about unjust results may be too high a price to pay to relieve the minds of clients who have those concerns.

Finally, whatever the justification for the application of an evidentiary privilege to lawyer-client communications outside the context of litigation, a privilege that excuses lawyers from revealing what a client has told them need not oblige lawyers to behave as if they never heard the client's story. The testimonial privilege of the advocate stands upon a different footing than the nonadvocate lawyer's general obligation not to disclose the client's confidences; there is no necessary reason for the two to be treated as coextensive for these purposes. Thus, while it may be wrong to urge lawyers to reveal to the investing public confidences obtained from the client which might disclose the inaccuracy of a financial statement,<sup>30</sup> it is a different question whether the securities lawyer should continue to assist the client as if the information were accurate.

### *C. Unfairness to the Client*

This third set of challenges to the proposed prohibitory rule derives from the claim of lawyers to preempt the field of negotiating and counseling under the doctrine of unauthorized practice. If that doctrine were rigidly enforced, only lawyers could perform these functions. Thus a rule that prohibited lawyers under any circumstances from assisting clients could result in depriving those clients of rights to which they are presumably entitled under the law.

There are two ways in which such a result would arguably be unfair to clients. One is that to deny a client assistance even though the transaction involved is neither criminal nor fraudulent would be to

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30. Cf. Sommer, *The Emerging Responsibilities of the Securities Lawyer*, 1974-75 FED. SEC. L. REP. 79,631, with *Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW. 543, 544 (1975).



prohibit the client from reaching conceded legal objectives. The other is that to require that lawyers refrain from assisting clients when they view the proposed course of action as "unconscionable" is to run the danger of imposing the standards of an elite upon segments of the population that are not fairly represented at the bar, since lawyers are hardly a cross-section of the community in socio-economic, racial, ethnic, or political terms.

The first of these objections can be at least partly answered by acknowledging that not all outcomes which are neither criminal nor fraudulent are "legal." There is a range of agreements, for example, which, though they are neither criminal nor fraudulent, the law regards as either unenforceable or subject to rescission or reformation.<sup>31</sup> It would not be a great extension to generalize that body of law into a professional rule which limits the lawyer's ability to assist the client where the ends are unconscionable. Moreover, if what is regarded as "unconscionable" is limited to existing judicial interpretation of the term, the limitation upon those who would represent minority or indigent clients seems less severe. Indeed, as previously suggested, the standard could be more often a shield for protecting such clients from oppressive action than a sword to wield against them.

As the preceding discussion reveals, there are a number of legitimate objections to be made to a professional rule which would prohibit a nonadvocate lawyer from engaging in "unconscionable" conduct. But that discussion also points to an appropriate way to take the force out of those objections—to define the professional limitation in terms of a body of substantive law. This is the approach recommended here.

The proposed Professional Rule for the Nonadvocate reads:

- (A) *When acting in a professional capacity other than that of advocate, a lawyer shall not render assistance to a client when the lawyer knows or it is obvious that such assistance is intended or will be used:*
  - (1) *to facilitate the client in entering into an agreement with another person if the other person is unaware*
    - (a) *of facts known to the lawyer such that under the law the agreement would be unenforceable or could be avoided by the other person, or*
    - (b) *that the agreement is unenforceable or could be avoided under the policy of the law governing such agreements; or*
  - (2) *to aid the client in committing a tort upon another person, provided that this rule applies in business or commercial transactions only to torts as to which it is probable that the other person will in the circumstances be unable to obtain the remedy provided by the law; or*

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31. See, e.g., D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES §§ 11.4, 11.6 (1973); 3A A. CORBIN, CONTRACTS § 610 (1960).

(3) *to allow the client to obtain an unconscionable advantage over another person.*

(B) *For the purpose of this rule, "assistance" does not include advice to a client that a particular course of action is not unlawful.*

The general purpose of this rule is to prohibit a lawyer from assisting a client to achieve an advantage over a third party which the law would regard as illegitimate in that it would render an agreement unenforceable. The rule's provisions are phrased in terms of existing substantive law.<sup>32</sup>

An important feature of the proposed rule, which significantly limits its reach, is its *mens rea* requirement. It could be argued that the appropriate *mens rea* element would be the "belief" of the lawyer; such a requirement is, in fact, used in some of the Disciplinary Rules of the ABA Code of Professional Responsibility.<sup>33</sup> But the phrase "knows or it is obvious that" also is used in the Code, notably in the rules under canon 7 mandating that a lawyer represent the client "Within the Bounds of the Law."<sup>34</sup> The difference is not metaphysical. A lawyer may believe that a proposed course of conduct is tortious, for example, but recognize that there are reasonable arguments to the contrary. Such a situation is posited by Disciplinary Rule 7-101(B)(2), which provides that a lawyer may—and impliedly may not—"refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."<sup>35</sup> As long as the professional code permits lawyers to assist clients when they believe (but do not know) that the client's proposed course of conduct is unlawful, it would be inconsistent to prohibit assistance in "lawful" but unenforceable transactions where the lawyer merely believes but does not know that the transactions would be unenforceable. The limitation of the *mens rea* requirement in the proposed rule thus accords with existing provisions of the ABA Code and also with the rule's reference to the substantive law.

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32. References to substantive law are also used in the ABA CODE OF PROFESSIONAL RESPONSIBILITY in important rules. Thus, the prohibitions against unauthorized practice of law necessarily refer to the substantive law of unauthorized practice (DR 3-101); the definition of "confidence" is that information "protected by the attorney-client privilege under applicable law" (DR 4-101(A)) and the circumstances in which a lawyer may reveal such confidences expressly include the occasions on which a lawyer is "required by law" to do so; canon 7 of the Code consistently refers to the substantive or procedural law in defining the limits of a lawyer's behavior when representing a client—what lawsuits to file (DR 7-102(A)(2)), the lawfulness of client behavior (DR 7-102(A)(7)), concealment of what is required by law to be revealed (DR 7-102(A)(3)), perjury (DR 7-102(A)(4)), and making false statements of law or fact (DR 7-102(A)(5)).

33. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101(B)(2), DR 7-106(C)(1), and DR 7-106(C)(2).

34. *Id.* DR 7-102(A)(1).

35. *Id.* DR 7-101(B)(2).

Subsection (A)(1)(a) comprehends transactions in which the lawyer is aware of a mistake made by the other party which, if it subsequently became known to the other party and the matter were litigated, would render the agreement unenforceable or avoidable. The position taken in the rule is that the client has no "legal right" to a noncriminal or nonfraudulent result which would nonetheless be unenforceable or which could be avoided were a court to review the transaction, and that, therefore, the client has no right to receive professional assistance for this purpose. A lawyer has a professional responsibility to decline to accomplish on behalf of a client that which the formal processes of the law themselves would not tolerate.<sup>36</sup>

To the extent that such a restriction precludes fraud and deceit, its substance is already incorporated in Disciplinary Rule 7-102(A)(7) of the current Code of Professional Responsibility: "A lawyer shall not counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent."<sup>37</sup> The proposed rule goes further. By focusing on the other party's unawareness of facts which would render the transaction unenforceable, subsection (a) both avoids controversies over the definition of "fraud,"<sup>38</sup> and also reaches transactions which are unenforceable on grounds other than fraud. For example, the proposed rule would apply where a unilateral mistake of one party known to the other results in a contract that does not reflect the "true intent" of the contracting parties.<sup>39</sup>

Subsection (A)(1)(b) is addressed to those circumstances where all the parties are aware of the facts, but a court would nonetheless declare the agreement unenforceable or voidable because of an overriding social policy such as that underlying the Statute of Frauds. Where the other party, although aware of the facts, is unaware of the unenforce-

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36. This concept is not a new one. In Opinion 722 (1948), the Committee on Professional Ethics of the Association of the Bar of the City of New York stated that it would be unethical under the relevant canons for a lawyer to insert in a lease on behalf of a landlord a waiver of the defendant's right to a sixty-day period in which to cancel an agreed-upon rent increase, a waiver which had previously been held void as against public policy. See also New York County Lawyers' Association Committee on Professional Ethics, QUESTIONS RESPECTING PROPER PROFESSIONAL CONDUCT SUBMITTED TO THE COMMITTEE WITH ITS ANSWERS, Question and Answer 27, at 48 (1913); *Stare v. Tate*, 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (2d Dist. 1971).

37. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(7).

38. The New York State Bar Association recently added a new definition to the Code of Professional Responsibility as applicable to the New York bar:

"Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 32 BUS. LAW. 1879, 1898-99 n.24 (1977). See also New York State Bar Association Special Committee to Review the Code of Professional Responsibility, *Report No. 4* (October 12, 1976).

39. See note 29 *supra*.

ability or avoidability of the transaction, the rule would prohibit the lawyer from assisting the client to take advantage of that unawareness. Where the other party is aware of the unenforceability of the agreement but nevertheless desires to proceed—as, for example, in an industry practice of closing a deal with a handshake rather than a formal writing—the lawyer may assist the client. Of course, in today's world of professional liability, a lawyer who assists a client in entering into an unenforceable or voidable transaction without being aware or advising the client of that potential outcome would be risking a substantial lawsuit from the client.

The first clause of subsection (A)(2) (“to commit a tort upon another person”) casts the professional responsibility of the lawyer in terms of substantive tort law. That law already imposes civil liability upon a lawyer who knowingly assists a client to commit a tort for which the client is liable to a third person.<sup>40</sup> No immediate reason appears why such a provision should not be incorporated in a professional code,<sup>41</sup> except perhaps in the circumstances addressed in the proviso. Certain types of conduct in the business and commercial world are classified as either torts or breaches of contract, depending upon the purposes of the classification (*e.g.*, measure of damages, statute of limitations). Inasmuch as a substantial, if not dominant, body of opinion would hold that there is nothing improper about an intentional breach of contract since the law provides ample remedies, it would be unfortunate to let the lash of professional rules fall upon the shoulders of a lawyer because a particular breach of contract happens to carry tortious implications. On the other hand, lawyers should not be immunized from professional liability for assisting in tortious conduct merely because for some purposes the tort could also be regarded as a breach of contract. The proviso in the rule therefore imposes restrictions on a lawyer's ability to assist a client to commit a tort even in the business and commercial world, but limits those restrictions to circumstances in which the tort remedy is not practicable.

Subsection (A)(3) of the proposed rule would bar a lawyer from assisting a client to gain “an unconscionable advantage over another person.” At first glance, this subsection would seem to raise the objections to an unconscionability standard reviewed above. But its context takes much of the force from those objections—in a rule that refers to areas of substantive law, the term “unconscionable” is to be understood

40. *E.g.*, *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (2d Dist. 1976); *Warner v. Roadshow Attractions Co.*, 56 Cal. App. 2d 1, 132 P.2d 35 (2d Dist. 1942); *Hoppe v. Klapperish*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Hahn v. Wylie*, 54 App. Div. 2d 629, 387 N.Y.S.2d 855 (1976).

41. It is arguable that the word “unlawful” includes tortious conduct; if so, subsection (2) is at worst redundant.

first of all as referring to means and ends which have been specifically condemned under that term in statutes and judicial opinions. Its applicability, then, depends not upon whether a lawyer personally regards the transaction as unconscionable, but rather upon an objective determination of whether the means and ends would be regarded as unconscionable under existing law. This interpretation of "unconscionable" is further mandated by the *mens rea* requirement of the rule: discipline is to be imposed only when the lawyer "knows or it is obvious that" the proposed conduct is unconscionable.

Yet at the same time as the *mens rea* requirement lends precision to the term "unconscionable," it is flexible enough to adjust to future developments in substantive law. Judicial or legislative definitions of unconscionability would be included as they become clearly established. There is room, too, for developments of the concept in less traditional ways, for example, through the reflections of committees on professional ethics. Ethics committees might serve the noncoercive functions of a professional code—the reinforcing and informing functions—by responding to lawyers' inquiries about whether proposed behavior would result in an "unconscionable advantage" over another person.

Of course, it is open to question whether ethics committees composed of legal practitioners should have the authority to opine on issues of unconscionability where legislatures and courts have not yet spoken. But the suggestion may be less objectionable if it is seen as a device for evaluating lawyer tactics rather than as a means of determining the unconscionability of client objectives, for lawyers may possess special competence to assess the "procedural" conscionability of their own techniques of negotiating and counseling.

Assignment to ethics committees of the task of explicating "substantive" unconscionability is more difficult to justify. Is it fair to assume that a group of lawyers serving in an advisory capacity, drawing on well-accepted sources of law and their own familiarity with the customs of the community, will reach reasonable conclusions as to whether a proposed course of conduct is "unconscionable"? Would it be easier to endorse this approach if such committees were to include nonlawyers? At the least, it would be illuminating to lawyers to have designated bodies to advise them on matters of this kind. Promulgation of subsection (A)(3) with the understanding that the term "unconscionable" is somewhat openended would provide an opportunity to gain experience with this type of advisory committee.

Subsection (B) of the proposed rule is intended to distinguish between advising clients that their proposed course of action is not unlawful, which the rule would permit, and assisting clients in that course of action through active participation, which the rule would prohibit.

The subsection may be unnecessary, for a lawyer would not face the problems contemplated by the rule until after determining that the proposed transaction was not unlawful.

Whatever the client's own moral standards, the client is entitled to expect an honest response from the lawyer. Thus, the proper response under the proposed rule to a client's unenforceable or avoidable, but otherwise lawful, proposal is for the lawyer to tell the client that although the proposal is not unlawful, professional standards prohibit the lawyer from assisting the client in pursuing that course of action.

#### IV

##### THE ACCOUNTABILITY OF THE NONADVOCATE LAWYER

The proposed Professional Rule for the Nonadvocate is limited at least initially to those types of transactions that have been recognized by positive law as being unenforceable and unconscionable. The rule does not reach other areas of behavior which would be considered "immoral" or "unjust," and leaves open questions of the nonadvocate's accountability for the course of action chosen. In the earlier discussion of the advocate's role, it was argued that the effective operation of the adversary system required a Principle of Professionalism which obliges the advocate to proceed in ways and toward ends that might be morally questionable. A second principle was, therefore, appropriate to provide that the advocate who adheres to the Principle of Professionalism is neither legally, professionally, nor morally accountable for the means used or the ends achieved. Should there be a similar principle for the nonadvocate who adheres to the limitations imposed by the proposed Professional Rule? In other words, may the nonadvocate demur to a charge of accountability, particularly *moral* accountability, for assisting a client in immoral conduct which is not prohibited by substantive law nor by a professional rule?

The issue is highlighted by comparing the moral accountability of the lawyer under the current ABA Code of Professional Responsibility with that of the nonlawyer representative. Generally, the nonlawyer representative is viewed as an agent of the principal, and thus is held morally accountable for any result to which the representative substantially contributes. A defense of duress may be available to the representative where the principal has threatened to subject the agent to pain, punishment, or other sanction sufficient to overcome the fortitude of a reasonable person in those circumstances. The representative might also claim a defense of "replacement"—that nothing would have been gained by refusing the principal since the agent would have been easily replaced with a willing substitute—though this argument is singularly unpersuasive in moral terms.

In contrast, Ethical Considerations 7-8 and 7-9 of the Code of Professional Responsibility appear to claim immunity from moral accountability for all lawyers.<sup>42</sup> The key language in Ethical Consideration 7-8 is the admonition that "the decision whether to forego legally available objectives or methods . . . is ultimately for the client . . . ."<sup>43</sup> Ethical Consideration 7-9 recognizes that actions "in the best interest of the client" may seem to the lawyer "to be unjust."<sup>44</sup> Both ethical considerations permit but do not require the lawyer to withdraw in these circumstances.<sup>45</sup>

The provision that the lawyer may but need not withdraw necessarily implies that either decision is correct as a matter of professional as well as legal accountability. With respect to moral accountability, if the provision may be read as taking any position at all on the issue, it is that as long as neither lawyer nor client does anything illegal, there is no moral accountability for the lawyer.

The stated purpose of the ethical considerations is to set forth principles that are "aspirational in character and represent the objectives toward which every member of the profession should strive."<sup>46</sup> Use of the word "unjust" in the Code suggests an implicit recognition that there are problems of moral accountability. Thus, it is probably accurate to infer that by allowing the lawyer some latitude in deciding whether to withdraw, the Code is attempting to provide the nonadvocate with the same immunity from moral accountability that it accords the advocate. At the very least, there is something odd about a code of professional behavior which admonishes lawyers to attempt to prevent their clients from engaging in "unjust" conduct (impliedly conceding that this is an identifiable genus), and yet permits them to go forward without fear of reproach if the client is adamant.

Is there any reason why lawyers who have a right to withdraw should not be personally accountable for their conduct if they continue to pursue their clients' ends, merely because those ends are not proscribed by professional rule? For the advocate, the demands of the adversary system were sufficient to justify moral nonaccountability. It is now necessary to consider whether in the absence of that system there are attributes inherent in the nonadvocate rule that independently justify an immunity for the lawyer which is not granted to lay representatives.

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42. See note 20 *supra*.

43. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8.

44. *Id.* EC 7-9.

45. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 1-5, which states that a lawyer should "refrain from all illegal or reprehensible conduct," seems to apply to lawyers acting in nonlawyer roles, and, to the extent that it does apply to professional behavior, gives way before the more specific provisions of EC 7-8 and 7-9.

46. ABA CODE OF PROFESSIONAL RESPONSIBILITY, at 1.

Much of the earlier discussion of the nonadvocate's Professional Rule is relevant to this question, particularly the implications of the first alternative version of the rule which, like the Code of Professional Responsibility, would allow the lawyer either to withdraw or to continue.<sup>47</sup> It will be recalled that the objections surveyed earlier fell into three categories: unfairness to the lawyer, damage to the integrity of the lawyer-client relationship, and unfairness to the client.

The objection of unfairness to the lawyer rested on grounds of vagueness and unenforceability. Such considerations are not germane to questions of moral accountability. Since neither formal sanctions nor external enforcement agencies are involved, issues of fair notice and arbitrary enforcement simply do not arise.

The second objection, that the integrity of the lawyer-client relationship would be impaired, was based on two independent concerns. The first was that the client would resent the lawyer's presenting himself as a moral rather than purely legal advisor. Yet, as was previously noted, the Code of Professional Responsibility already encourages lawyers to tell their clients when they think their proposals are unjust. Recognition that lawyers have a moral obligation to do so, and will be held morally accountable for their own conduct or the achievement of their clients' goals, is not likely to have any further significant impact upon the lawyer-client relationship.

Another concern about the integrity of the lawyer-client relationship was that the client might make insufficient disclosure out of fear that the lawyer would conclude that the proposal was unjust and withhold assistance. But since the proposed Professional Rule does not oblige the nonadvocate to withdraw when the proposals are unjust (rather than unenforceable or substantively unconscionable), the impact of accountability is no more than this: lawyers must be prepared to defend, if they choose to do so, the morality of their own behavior and of their clients' objectives.

The final objection was that it would be unfair to the client to allow or oblige the lawyer to refrain from activity that the lawyer thought unconscionable, since the effect might be to deny legal assistance to clients whose sense of justness did not conform to the legal profession's arguably limited norm. That objection is just as valid here. Lawyers might hesitate to represent such clients if they could be held morally accountable even for ends which are neither criminal, fraudulent, nor unconscionable in the sense of the Professional Rule.

It is, of course, precisely this fear which in the context of the adversary system justifies obliging advocates to proceed without regard to the morality of the client's ends or the lawyer's means even when they

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47. See text accompanying note 22 *supra*.



believe that what they are doing is unjust. To justify the same immunity for the nonadvocate, we would have to find a social need for the technical assistance of nonadvocates that would take priority over moral considerations—a special need of men and women to have available persons in whom they may freely confide and who are professionally obliged to put their clients' interests above their own scruples.

Such a need, and such a justification, have recently been claimed by Professor Charles Fried.<sup>48</sup> He argues that the moral justification for a lawyer's seemingly immoral behavior is analogous to the moral justification for one friend's behavior on behalf of another. Although the aptness of the analogy has been questioned,<sup>49</sup> the core of the argument remains: the continued societal protection of the nonadvocate functions of the legal profession may depend in significant part upon the need for a morally insulated body of professionals who perform the social function of acting for others in this confidential, committed way. Professor Fried attempts further to justify nonaccountability by arguing that the lawyer's principal social function is to preserve the client's autonomy under the law.<sup>50</sup> Without the lawyer's technical assistance, the argument goes, the client would suffer unjustified loss of autonomy since the client would no longer obtain all that the law allows. Practically all of Professor Fried's illustrations, however, especially of this second argument, are drawn from the context of litigation. The moral justification for enabling a client to obtain an immoral or unjust advantage when no third-party tribunal is available to review the transaction is far less clear.

From the standpoint of moral accountability, when a client seeks to retain a lawyer for help with a transaction, the lawyer may or may not believe that what is sought is immoral or unjust. A lawyer who does not believe that what is sought is immoral has no problem about proceeding; one who believes that what is sought is immoral still has a choice of whether to assist or not. The lawyer is not prohibited legally or professionally from assisting. The assignment of moral accountability means only that the lawyer who proceeds must answer to the charge of immoral behavior. That lawyer may not demur.

Consider, however, the worst case from the client's point of view—that all reasonably available lawyers refuse to assist because they have concluded that the client's proposal entails immoral ends or means. How undesirable would that outcome be? In the advocate's context, such a result would undercut the important social policy of

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48. Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

49. Dauer & Leff, *Correspondence—The Lawyer As Friend*, 86 YALE L.J. 573 (1977). But see Fried, *Reply*, 86 YALE L.J. 584 (1977).

50. Fried, *supra* note 48, at 1073.

remitting disputes to the adversary system. Is there an equally important policy to be vindicated outside the adversary system?

Suppose that all machinists refused to accept employment in a factory manufacturing "Saturday-night specials" because they were generally opposed to the use of firearms or believed that the particular weapon, though not unlawful, was too dangerous to be sold. Could it be said that the manufacturer had been improperly deprived of a legal right to manufacture "Saturday-night specials"? To make this claim would imply a judgment that the right of the manufacturer to produce the weapon was superior to that of the employees not to produce it. In general, we do not make such judgments about individual behavior.

The problem becomes more acute when those who refuse to work are the only ones the law permits to work. This is the case with professions whose practitioners are licensed by the state—engineers, architects, lawyers. Should it be a condition of retaining a license to engage in these professions that the licensee forgo the right to refuse to aid a client in achieving ends that are not illegal, fraudulent, or "unconscionable"? Attaching such a condition to professional licenses would import into each of these fields a public utility obligation without the protective controls and regulations that normally accompany that obligation.<sup>51</sup> Yet failing to impose that obligation to serve, with its concomitant stance of neutrality or amorality, may violate an important affirmative political value. Particularly in the case of lawyers, compelling arguments can be made that no person should be unable to realize his or her legal rights because of an inability to procure the assistance of a licensed legal practitioner.

A compromise may be possible. Assume that all available lawyers refuse to assist in an undertaking because each has concluded that the proposed course of action is immoral or unjust and none wishes to assume moral accountability for immoral or unjust conduct. In that situation, there could be a group obligation to provide assistance, with the individual lawyer selected by lot, rotation, or special qualification, as is done in appointing counsel for an unpopular criminal defendant. The lawyer should then properly be able to claim immunity from moral accountability.

On the other hand, if it is clear from the outset that the client ultimately *will* be able to obtain the professional assistance needed to achieve the immoral end, there is little to be gained from holding lawyers morally accountable for voluntarily agreeing to assist. This could indeed argue for a general principle of moral nonaccountability for the

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51. It would also run counter to some traditional concepts which the legal profession still embraces: "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client . . . ." ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-26.

nonadvocate similar to that which has been hypothesized for the advocate.

An ultimate resolution must turn on the balance to be struck between the social value of requiring nonadvocate lawyers to bear moral responsibility for their professional behavior and the political value of preventing government from exercising its licensing power in a way that frustrates citizens in the realization of their legal rights. In this light, the initial question of whether a nonadvocate should be granted the extraordinary insulation from moral accountability provided the advocate becomes clearer. The analysis outlined in this Article suggests that the answer to the question should be negative, so long as it is recognized that the answer is based on an essentially political judgment that lawyers outside the adversary system should not be obliged to assist all clients as a condition of being licensed to practice law. Furthermore, this conclusion is conditioned upon the validity of the basic assumptions which have informed this discussion that every client is entitled to be told whether a proposed course of action is or is not unlawful (lawyers may properly claim immunity from moral accountability if that is all they do); that clients may proceed to undertake the proposed course of action without the professional assistance of lawyers; and that all that is required of lawyers is that they be prepared to justify their conduct in moral terms—they may not demur to a charge of immorality in their professional behavior as nonadvocates.<sup>52</sup>

#### EPILOGUE

Although this Article focuses on the nonadvocate lawyer, the point of departure is the advocate representing a client within the adversary system. When a lawyer functions as an advocate, the Advocate's Principles of Professionalism and of Nonaccountability apply. The first of these principles requires that the advocate maximize the position of the client within established constraints. The second provides that while so doing, the advocate is neither legally, professionally nor morally accountable for the means used or the ends obtained—the advocate may demur to an accusation of immoral or unjust behavior. The validity of

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52. The difficulties with this conclusion may be aggravated in the case of a lawyer who, having undertaken a nonadvocate representation, is confronted with a client demand for assistance in a specific immoral or unjust activity. It is conceivable that abandonment of the client in some circumstances would amount to a greater injustice than that which the client seeks. If that is the case, the lawyer may decide that the moral calculus permits him to continue. The point is that the lawyer must confront the problem squarely and may not refuse to answer the question of the morality of the lawyer's behavior. The typology of lawyers' functions described earlier in the article may be relevant to the merits of the moral decision the lawyer makes in these circumstances: the further from the adversary system and its structural elements the lawyer's situation is, the heavier is the burden of supporting the morality of that lawyer's behavior.

these principles depends upon the validity of other value judgments relating to the nature of the society, its legal institutions and the adversary system. These value judgments are accepted for the sake of argument in order to consider whether, if these principles are proper for the advocate, they also apply to the nonadvocate.

The boundary between advocate and nonadvocate is defined in terms of the presence or absence of the impartial arbiter of the adversary system. This structural distinction between advocate and nonadvocate contexts suggests that the advocate's principles are not necessarily applicable to the nonadvocate. The question is then whether similar principles can and should be derived for the lawyer operating in nonadvocate contexts.

The Article recommends a new rule of professional behavior for nonadvocates which prohibits the lawyer from assisting a client to achieve results which would be set aside in judicial proceedings, importing into the professional rule the substantive law of reformation, rescission, torts, and unconscionability. On the issue of moral accountability, the Article concludes that the nonadvocate, unlike the advocate, is not entitled to demur to the question of whether the assistance given in the circumstances was moral or just. This conclusion does not prevent a lawyer from advising a client that a proposed course of conduct is not unlawful and imposes no substantive or professional liability if the nonadvocate proceeds to assist the client, even though the lawyer believes that the behavior is immoral or unjust. It is not suggested that such moral dilemmas will be many, but only that each nonadvocate lawyer must face the issue; there is no insulation from moral accountability when the lawyer is functioning in nonadvocate capacities.

What the Article does not pursue is the set of assumptions about the advocate and the adversary system with which it began; nor does it consider whether the analysis which leads to its conclusions about the nonadvocate might lead to similar conclusions for the advocate. Much of the discussion about the nonadvocate invites analogies to the advocate, and it is tempting to conclude, for example, that the advocate should not engage in tactics which upon reexamination would require the granting of a new trial or a reversal of the favorable result obtained, thus importing into the litigation context the same concept of avoidability that underlies the professional rule proposed for the nonadvocate. So, too, it is tempting to argue that where the system provides a discretionary choice for the advocate, which may adversely affect the client or other parties, the advocate is morally accountable for that choice.<sup>53</sup> Finally, the analysis of the nonadvocate's general

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53. An illustrative instance would be a lawyer's choice of whether to advise a favorable witness that the testimony of the witness may be self-incriminatory. *See, e.g.*, ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 4.3(b), at 126 (1974); New

moral accountability could be applied to the advocate. But the structural and functional differences between the adversary system with its impartial arbiter and the environments within which the nonadvocate functions are sufficiently great to caution against accepting these conclusions too readily; a more extensive analysis is required than this Article undertakes. In short, those matters are left to another day.

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York County Lawyers' Association Committee on Professional Ethics, *QUESTIONS RESPECTING PROPER PROFESSIONAL CONDUCT SUBMITTED TO THE COMMITTEE WITH ITS ANSWERS*, Question and Answer 307 (1913); ABA Comm. on Professional Ethics, *INF. OP. 575* (1962). The general problem is raised by A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 612-17 (1976). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(C) (permissive withdrawal) and DR 4-101(C)(3) (disclosure of client's intent to commit a crime).

