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## Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable

### Cover Page Footnote

Robert S. Stevens Professor of Law Emeritus, Cornell Law School. Comments and corrections are welcomed: .

# FURTHERING JUSTICE BY IMPROVING THE ADVERSARY SYSTEM AND MAKING LAWYERS MORE ACCOUNTABLE

*Roger C. Cramton\**

## I. THE INDIVIDUAL COMPONENT

Conceptions of legal ethics, William Simon tells us, are “dispiriting” to law students and lawyers because they fail to respond to the normative aspirations that led most of us to study and practice law.<sup>1</sup> The moral appeal of the lawyering role rests on the ideal that “lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice.”<sup>2</sup> Yet the most common conception of legal ethics equates being an ethical lawyer with conforming to the minimal requirements of the ethics codes (or at least those parts of the codes that the profession takes seriously and enforces). An alternate conception allows lawyers to express their personal values in representation by exercising the discretion conferred on them by such rules as those governing choice of client, exceptions to confidentiality, and withdrawal. Everyday practice, however, pushes the conscientious lawyer to engage in conduct that is unfair and unjust. Although the discretionary loopholes provide an out, they can be exercised only at great cost and must be taken on personal and subjective grounds exercised without the profession’s guidance or support.

The profession’s only answer to the lawyer’s frustration is the claim that in the long run the current conceptions of the lawyer’s role in the adversary system serve public values by producing socially desirable and “just” decisions. Justice is equated with the outcomes of process.

At the governmental level, justice depends primarily on two things: first, institutions, laws and procedures that produce reasonably fair outcomes through elections, lawmaking and dispute resolution; and second, a reasonably fair distribution of opportunities. We still have a long way to go in these respects even though, compared with many other societies, our situation is relatively favorable.

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1. William H. Simon, *The Trouble with Legal Ethics*, 41 J. Legal Educ. 65 (1991).  
2. *Id.* at 66.

It is wrong, however, to conceive of justice solely in terms of what the state does. Justice is furthered or hampered by the state's institutions, rules and practices, but justice is not limited to, or defined solely by, the institutions and actions of the state. Many years ago, I learned from Tom Shaffer's writing and example that justice is a gift that good people give one another by how they treat each other.<sup>3</sup> Each of us as individuals, and especially as lawyers, by acting justly and fairly, creates justice. Justice is created or destroyed in countless ways every day: by our actions; by how we treat others; by how we adapt to, or shape, or blindly conform to the familiar routines of our workplace. By putting the Golden Rule into action, while living a life dedicated to studying, living and improving the law, one helps "to repair the world."<sup>4</sup>

Thus, the individual component is a vital part of practicing law "in the interests of justice." Many law teachers, numerous law school courses and thousands of lawyers bring justice to life (and, I believe, restore God's presence in the world) by what they do in the every day practice of law. In every way possible we should attempt to inspire and encourage "good lawyers"<sup>5</sup> to have the passion, commitment and courage to repair the world as they practice law.

## II. THE INSTITUTIONAL COMPONENT

If all lawyers, except for a few bad apples, acted in a manner designed to result in a more perfect justice, nothing more would need to be said. But we know that most lawyers do not accept a responsibility to act in this manner. Instead, the operative goal of most practitioners (echoed by much of what is taught in law school) is to "win" for the client (and for one's own self-esteem and monetary reward) without getting sanctioned by a judge, disciplined by the bar,

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3. See Thomas L. Shaffer, *Justice in Everyday Life*, 22 Res Gestae 394, 397 (1978) ("Justice is the gift we give one another as we go about living under the law, and as we go about making the law fit our lives. Our truthfulness in doing this is where justice comes from."); Thomas L. Shaffer, *Some Problems in the Administration of Justice in a Secularized Society* (Response), 31 Mercer L. Rev. 459, 461-65 (1980).

4. *Tikkun olum*, "to repair the world," is a Jewish tradition concerning the responsibilities of a chosen people—the moral responsibility of the chosen to repair the world by everyday actions that are just. See Geoffrey C. Hazard, Jr., Susan P. Koniak & Roger C. Cramton, *The Law and Ethics of Lawyering* 1064 (3d ed. 1999). I believe that lawyers are also a chosen people in that they have a special responsibility to promote and maintain just legal institutions and further just results in legal proceedings.

5. Bruce Green restated the "ordinary morality" of the good lawyer in a conversation with his nine-year-old son describing what he was going to tell the attendees at a conference on lawyer professionalism: "treat each other with respect"; "be honest, keep your word, do your best, think about whether what you are doing is right or wrong"; "[d]o not neglect your family, do not spend all your time working"; and "[t]ry to make the world a better place." To each his son replied, "Doesn't everyone know that?" Conference Proceedings, *Transcript from Professionalism Conference*, 52 S.C. L. Rev. 481, 543 (2001) (remarks of Bruce Green).

or exposed to civil or criminal liabilities. In short, Holmes' "bad man"<sup>6</sup> is the typical American lawyer whose only concern is how far he can go in winning for the client without incurring the wrath of the law or harmful damage to reputation.

How do I know that this is the prevailing ethic? The finding cannot be based on extensive and reliable social science studies. Most of the relevant conduct takes place in private and is protected by the professional duty of confidentiality; and law schools, foundations and governments have evidenced little interest in studying what lawyers actually do. Yet the legal profession itself provides evidence convincing to me by telling us how it behaves in various contexts. In negotiation, actual fraud is to be avoided, but there is no duty to be candid and deception abounds.<sup>7</sup> It is permissible for a lawyer representing a business client to include provisions known to be illegal or unenforceable in adhesion contracts drafted for use in consumer transactions.<sup>8</sup> In litigation, taking advantage of a palsy, using delay as a litigation tactic, running up the costs of an opposing party to achieve a more favorable settlement, and so forth, are acceptable and pervasive conduct.<sup>9</sup> Although "zealous advocacy" has been banished from the black letter of the ABA Model Rules, the concept is

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6. Oliver Wendell Holmes, Jr., *The Path of the Law* (Jan. 8, 1897), in 10 *Harv. L. Rev.* 457, 459 (1897).

7. See Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 *Inside Litig.* 1 (1988), reprinted in Deborah L. Rhode & David Luban, *Legal Ethics* 421 (1995) (describing the views of several negotiation experts on a number of common situations involving deception and lack of candor); see also Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 *Geo. J. Legal Ethics* 411 (1988); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 *Am. B. Found. Res. J.* 926.

8. See William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 *Geo. J. Legal Ethics* 799, 833 (1993) (criticizing the ABA's rejection of a rule that would have prohibited inclusion of a provision in an agreement that "the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law") (emphasis omitted)); see also Hazard, Koniak & Cramton, *supra* note 4, at 1127-56.

9. See, e.g., Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession 82-95* (2000) [hereinafter Rhode, *Interests of Justice*]. One empirical study contains an even grimmer finding. A substantial group of Michigan and federal court litigators were asked about their behavior when learning, shortly before entering settlement negotiations with the opposing lawyer, that the client gave knowingly false evidence on a material issue in his deposition. Sixty percent of the litigators responded that this information need not be disclosed to the other side if the client refused to authorize the disclosure. Steven D. Pepe, *Standards of Legal Negotiations: Interim Report for ABA Commission on Evaluation of Professional Standards and ABA House of Delegates* (1983), reprinted in Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 206 (1985). The situation, of course, is one in which the prevailing ethics rules require the lawyer to disclose the perjury if the client refuses to do so. See *Model Rules of Prof'l Conduct R. 3.3(a)(4)* (1983).

considered by most lawyers to be the lawyer's most sacred duty.<sup>10</sup> True, older attitudes of cooperation with the adversary continue in some arenas of small-stakes litigation or in criminal defense of the non-wealthy, but these settings involve individual clients, usually inexperienced and poor. Numerous studies show that plaintiffs' lawyers in civil cases<sup>11</sup> and underpaid defense counsel in criminal cases<sup>12</sup> often sacrifice their clients' interests in favor of quick settlements or guilty pleas that maximize the lawyer's effort/earnings calculus.

The tide of practice today, whatever it was in the past, is toward a "total commitment to client" hired-gun model that abandons conscience and runs rough-shod over the older notion that the lawyer is an officer of the court who is concerned with the maintenance and improvement of the sound administration of justice. The profession's formal ethics rules "represent nothing more than 'the lowest common denominator of conduct that a highly self-interested group will tolerate'";<sup>13</sup> they place little restraint on abusive litigation conduct and provide little guidance on what is appropriate moral conduct in any practice setting.

This "demoralization" of the professional role<sup>14</sup> is evidenced in a 1998 study of the ethics of corporate defense litigators.<sup>15</sup> The purpose

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10. Model Rule 1.3 states, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." R. 1.3. The comment to Rule 1.3 adds that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." R. 1.3 cmt.

11. See Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 96-116 (1974) (describing the common process by which contingent fee lawyers persuade their clients to accept an early settlement that is in the lawyer's interest but not the client's).

12. See, e.g., Abraham S. Blumberg, *Criminal Justice: Issues and Ironies* 242-46 (2d ed. 1979) (describing defense counsel in criminal cases as engaged in a "confidence game"); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. Conflict Resol. 52, 68-69 (1967) (describing the cooperation between prosecutors and defense attorneys, cooperation that may become destructive "where cooperation may shade off into collusion"); see also Rhode, *Interests of Justice*, *supra* note 9, at 61-63.

13. Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 909 (1999); see also Hazard, Koniak & Cramton, *supra* note 4, at 1211.

14. Two old-fashioned professional models—the wise counselor in law office transactions and the prudent and effective advocate in the court—emphasized the moral content and public aspect of these roles. The ABA Canons of Professional Ethics stated that it was a "false claim . . . that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause." Canons of Prof'l Ethics Canon 15 (1908). The lawyer, Canon 15 said, "must obey his own conscience and not that of his client." *Id.* Moral aspirations were carried forward in the Ethical Considerations of the ABA Model Code of Professional Responsibility, see, e.g., Model Code of Prof'l Responsibility EC 7-8, 7-9, & 7-10 (1981); however, it is by no means clear that these aspirations have been met in everyday practice.

15. Report, *Ethics: Beyond the Rules*, 67 Fordham L. Rev. 691 (1998). For especially insightful portions of the study, see Douglas N. Frenkel et al., *Introduction:*

of the study, funded by the ABA Section of Litigation, was to gain a better understanding of the forces that shape decision-making by large firm corporate defense litigators and lead them to engage in problematic or improper conduct. The ethical climate in which these lawyers work is not one of frequent violations of clear law, except with respect to the common practice of fee padding.<sup>16</sup> A clear law violation occurs from time to time, as in the many reported instances of lawyers cheating their partners or clients or being sanctioned for egregious discovery abuses.<sup>17</sup> But such deviance, apart from bill padding, is relatively rare in large law firms and is viewed as a problem of individual aberration, a "bad apples" problem. What does occur is a constant pushing of the envelope with respect to the norms of practice. The vague limits of the partisan norms of the adversary system result in a continuing effort to gain an advantage, to suppress the truth from coming out, and to win for the client.<sup>18</sup>

Attention to the functioning of the system or to the justice of outcomes is secondary at best. Ethics is a matter of steering, if necessary, just clear of the few unambiguous prohibitions found in rules governing lawyers, i.e., that which is not unlawful is required if the client wants it.<sup>19</sup>

Why does this happen? Both partners and associates are terribly insecure in a highly competitive world of demanding and transient clients. Lawyers who are considered to be among the most powerful in the profession talk of themselves as helpless victims of forces they cannot control.<sup>20</sup> They are caught in a rat race that makes money and status the only shared goals. Because clients are uninterested in moral

*Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 *Fordham L. Rev.* 697 (1998), and the more detailed individual reports of Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *Fordham L. Rev.* 709 (1998), Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *Fordham L. Rev.* 773 (1998), and Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *Fordham L. Rev.* 809 (1998).

16. See, e.g., Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 *Geo. J. Legal Ethics* 205 (1998) (discussing sixteen cases in which prominent lawyers were punished for billing and expense fraud); William G. Ross, *The Ethics of Time Based Billing by Attorneys*, 58 *Ala. Law.* 40, 41 (1997) ("[H]alf of outside counsel and two-thirds of inside counsel estimated that at least ten percent of the work done by lawyers is motivated more by a desire to inflate hours than by a desire to service the real needs of the client."); see also Rhode, *Interests of Justice*, *supra* note 9, at 168-78.

17. See Lerman, *supra* note 16. One frequently discussed judicial decision involving discovery abuse is *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993).

18. For discussion of the full range of adversarial excesses, see Marvin E. Frankel, *Partisan Justice* (1980).

19. Frenkel et al., *supra* note 15, at 703.

20. Nelson, *supra* note 15, at 778; Sarat, *supra* note 15, at 828.

dialogue and firms are motivated to please clients, the relative autonomy of the outside law firm lawyer has shrunk radically from the idealized model of wise counselor to the purveyor of technical services on behalf of narrowly defined client interests.

The Litigation Section study finds that lawyers in high-stakes cases operate by a default rule of toughness.<sup>21</sup> The "culture" of large law firms, cited by partners, is not detectable to associates, who lack any clue of its content except that one is rewarded for being tough (e.g., not revealing a harmful document if there is a hint of plausibility to a claim that the document is privileged or was not requested with sufficient precision). On the other hand, an associate who raises ethical or moral questions may be treated as a troublemaker, and producing a harmful document when a partner or the client thinks that an argument could be made for non-production may be fatal to promotion.<sup>22</sup> Incentives and rewards are all aligned to the default position of "be tough."

Hyper-adversarialism is not our only problem. Even though our society is more affluent than it was a generation ago and the ratio of lawyers to population is much larger, access to justice on the part of lower income or poor Americans is little better (and perhaps worse for those below the poverty line). From 1975 to 1995, the portion of the profession that serves business clients has grown substantially in numbers and earnings. During the same period, solo practitioners and small firm lawyers serving individual clients lost ground in earnings while also increasing in numbers.<sup>23</sup> Increased competition in legal service markets has improved the variety and quality of many services offered to middle-class and upper-class Americans, but has provided little help for the poor. In some respects the access problems are worse than they were twenty-five years ago, when the profession was much smaller in size but more resources, in real dollar terms, were devoted to publicly-funded legal assistance.<sup>24</sup> Access problems clearly

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21. Sarat, *supra* note 15, at 819 ("[B]eing 'tough' and being ready to fight for the interests of their client is . . . the first prerequisite to being a good lawyer. 'Tough,' as one judge observed about the behavior of lawyers in litigation, 'is the default position.'").

22. See Gordon, *supra* note 15, at 718 ("An associate who raises an ethical objection, or even just a question, about what a partner or client wants is taking a risk of being perceived as a difficult or obstructive person . . . . An associate whose ethical fastidiousness poses the risk of displeasing or even losing a client will not last long.").

23. See Conference Proceedings, *Professionalism From a Social Science Perspective*, 52 S.C. L. Rev. 473, 478 (2001) (remarks of Robert L. Nelson) (summarizing the findings of the 1995 update of the Chicago Lawyers study).

24. Two examples come readily to mind: (1) funding of indigent criminal defense is scandalous (the federal rate of \$75 per hour has been in effect since 1986 and most states provide an even lower rate of compensation); and (2) federal funding of civil legal assistance for the poor is currently at about the same dollar level reached in the 1980 appropriation, about \$300 million. The 1980 figure, in current dollars, would be worth \$646,238,000, indicating that funding has gone down more than fifty percent while the population needing service has substantially increased. See Rhode, *Interests*



need a fresh look. The problems are legion and I worry that the entrenched attitudes and views of the organized bar will continue to stand in the way of measures that would improve either (1) the excesses of the adversarial system, (2) the accountability of lawyers to clients, third parties or the courts, or (3) the continuing problems of access to justice. The high court judges who largely regulate the legal profession are primarily engaged in adjudication; when they shift hats to perform the executive and legislative functions of regulating lawyers and administering professional discipline, they tend to reflect the entrenched attitudes, interests and constant influence of the organized bar. In violation of the American commitment to separation of powers, other branches of government are largely excluded. The closed system may ultimately require legislative rebellion in the states and federal legislative preemption if needed reforms are to be considered and adopted.

In an earlier article I surveyed the problems ordinary Americans have in obtaining competent legal services at reasonable cost.<sup>25</sup> Nearly everything said there in terms of greater accountability of lawyers and improved access to legal services remains true seven years later. It is worth noting that even problems that appear to be amenable of solution are little improved. For example, consider the frequent situations in which a lawyer steals client funds from the lawyer's trust account. Professional discipline has been firm and unyielding in punishing such egregious intentional wrongs. But what about those whose property has been stolen? Every jurisdiction has a client protection fund providing reimbursement for some of these lawyer thefts, but everyone agrees that the reimbursement is slow and inadequate.<sup>26</sup> A few states use random audits of lawyer trust accounts, a step that is effective in deterring misconduct and catching those lawyers who violate this basic trust. No state requires lawyers to obtain a fidelity bond covering loss or embezzlement of client funds. Why don't all states solve the problem by adopting random audit procedures *and* requiring lawyers to obtain fidelity bonds to cover the amounts commonly held in the lawyer's trust account? The treasurers of banks and other organizations, public and private, are routinely covered by fidelity bonds at modest cost.

My earlier article discusses a broad range of issues and makes a large number of recommendations. Here I confine myself to two related issues: first, deterring abusive litigation conduct by modifications in the adversary system and greater use of judicial

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of Justice, *supra* note 9, at 124-25.

25. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531 (1994).

26. See Hazard, Koniak & Cramton, *supra* note 4, at 555-56. As of 1998, only four states did not have limits on reimbursement.

sanctions in proceedings; and second, improving the accountability of lawyers to clients, courts and third persons.

*A. Modifying the Adversary System to Combat Hyper-Adversarialism*

The American addiction to an extreme form of the adversarial system needs serious attention and reform. The three key concerns are (1) hyper-adversarialism, (2) the subordination of fair, truthful and cost-efficient outcomes, and (3) the dominance of money, lawyer ego and winning.

Hyper-adversarialism expresses the norm that appears to govern American lawyers in high-stakes, complex litigation: a vision of lawyering that puts an expansive spin on Lord Brougham's classic but flawed statement of an advocate's role. Brougham stated:

An [advocate's first and only duty is to] save that client by all means and expedients, and at all hazards and costs to other persons . . . he must not regard the alarm, the torments, the destruction which he may bring upon others . . . [but] go on reckless of consequences though it should be his unhappy fate to involve his country in confusion.<sup>27</sup>

In short, a lawyer should be a diligent partisan for her client, but she should also be amoral or immoral with respect to courts or third persons. A dutiful lawyer should regard everything not clearly forbidden by law as required if it serves the client's interest. Nor is it the lawyer's job to express moral concerns to the client in an effort to change the client's goals or means. The lawyer seeks to win for the client whatever the consequences to the institutions of law or the effects on third persons. This is the modern disease of hyper-adversarialism.

Of course, many things that are perfectly legal are immoral and wrong. Self-interested actions that erode the social fabric of trust and legitimacy will ultimately produce a society in which none of us wants to live.<sup>28</sup>

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27. Quoted in Charles W. Wolfram, *Modern Legal Ethics* 580 (1986). In the situation in which Lord Brougham was involved in 1820 (defending Queen Caroline, who was charged with adultery in a legislative divorce proceeding initiated by King George IV), a veiled reference to the indiscretions of the King was called for. Today, however, it suggests that a lawyer should take steps in a client's interest even though those steps will undermine the legitimacy and soundness of the administration of justice. In effect, Brougham's warning to the opposing party—who happened to be the King of the Realm—is viewed, erroneously, as a statement that lawyers have no responsibility to courts, third parties or the public other than the avoidance of clearly unlawful conduct. See David Mellinkoff, *The Conscience of a Lawyer* 188-89 (1973).

28. See Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *Ethics in Practice* 42 (Deborah L. Rhode ed., 2000). Gordon argues that "lawyers' work on behalf of clients positively requires—both for its justification and its successful functioning for the benefit of those same clients in the long run—that lawyers also help maintain and refresh the public sphere, the infrastructure of law and cultural

In the small-stakes matters that make up the bulk of civil litigation, clients cannot afford hyper-adversarialism and it is relatively rare. It is also usually absent in any criminal case involving an indigent defendant or one of moderate means. (As suggested earlier, these areas of practice are characterized by other serious problems of inadequate representation that deserve attention.) But scorched-earth litigation tactics prevail when one or both sides can afford them and the stakes are high. Information is marshaled competitively and unfavorable evidence is suppressed if possible.<sup>29</sup> Advantages in resources or ability are exploited; as one wag said with the criminal context in mind, “money talks and O.J. walks.” Trial lawyers increasingly do not recognize any responsibility for the sound functioning of the justice system or for the correctness or fairness of outcomes. “Ethics” becomes a matter of steering just clear of the unambiguous and enforced pronouncements in the law governing lawyers. The language of morality has no place; standards are viewed as external and as defined solely by legal rules and their potential enforcement.

The lack of interest in truthful outcomes threatens the long-term faith that the American people have in the legitimacy of the justice system. As Jonathan Harr said in his masterful description of one mass tort action:

Each trial is . . . a morality play watched by a public audience. “Through trials, society seeks not only to discover the truth about a past event, but also to forge a link between . . . wrong and liability.” The judgments of the courts are meant to reinforce social rules and values and, at the same time, to deter behavior contrary to those rules and values. To achieve this end, the public has to believe that jury verdicts are statements about the truth of actual events, not

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convention that constitute the cement of society.” *Id.* He treats the “legal-social framework” as a “common good,” which can be destroyed by self-interested behavior. *Id.* at 46. “Lawyers have to help preserve the commons—to help clients comply with the letter and purpose of the frameworks of law and custom that sustain them all . . .” *Id.* at 47.

29. The ABA Section of Litigation study discussed earlier suggests that discovery abuse and document concealment are increasingly common practices. *See, e.g.,* Nelson, *supra* note 15, at 774. The major case study, Report, *Ethics: Beyond the Rules*, 67 Fordham L. Rev. 691, app. at 885-86 (1998), was based on *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993), in which Bogle & Gates exercised elaborate and undisclosed casuistry to interpret discovery requests as not requiring two “smoking gun” documents. *See* 858 P.2d at 1080. In that case, fourteen prominent litigators and academic experts testified that Bogle & Gates had done nothing wrong—the firm did only what was common practice in civil litigation today. The Washington court imposed a \$325,000 sanction, which was followed a few years later with an even larger one for similar conduct in another case. When the firm dissolved in 2000, the ethics violations were mentioned as one contributing factor. *See* Stuart Taylor, Jr., *Sleazy in Seattle*, Am. Law., Apr. 1994, at 5.

mere probabilities. If that belief is ever lost, a society based on the rule of law would ultimately collapse into anarchy.<sup>30</sup>

Hyper-adversarialism prevails in high-stakes cases, however, because it serves the pocket books and egos of lawyers. The large attorney's fees earned by plaintiffs' lawyers reflect the great skill and effort they expend on these cases. Defense lawyers receive comparable sums: the hourly meter is running at a high rate and driving the discovery games, pre-trial motions, elaborate coaching of witnesses and almost endless cross-examination. It is not surprising that victorious tort victims receive only a small share of the total expense of such litigation.<sup>31</sup> Economists say that the situation is a classic prisoner's dilemma problem. The massive and matching expenditures of both sides are not in the best interests of either the parties or the public, and the inability of the parties to cooperate in keeping transaction costs down results in each spending additional amounts that are offset by the increased spending of the opposing party.<sup>32</sup>

Under this analysis, if resources and abilities are equally matched, outcomes are largely unchanged but come at great cost to the parties, the court system and the public. But often resources and abilities are not equally matched and equal justice under the law becomes an illusion. Hence, the rule of law is threatened by the growing public recognition that the rich fare better in the civil and criminal courts than do those with less wealth. All of us agree that a person's wealth ought not be one of the factors determining liability or severity of punishment, and that we should strive to minimize the advantages of wealth. As Lloyd Weinreb has said, even if some wealth-based disparity is an inevitable concomitant of a private bar, "[i]t is quite another thing to let the decisions of lawyers privately retained and compensated so overwhelm the criminal process that the influence of wealth is palpable and pervasive."<sup>33</sup>

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30. Jonathan Harr, *A Civil Action* 236 (1995).

31. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1281-84 (1992) (summarizing the cost-of-litigation studies of the Rand Institute of Civil Justice). The studies indicate that in automobile negligence litigation, the plaintiff receives about one-half of the award and the other one-half pays attorneys' fees and litigation expenses. In asbestos litigation, less than forty percent of the award was received by plaintiffs with the remainder constituting transaction costs. Rand estimates that the total cost of tort litigation in 1985 was about \$29 to \$36 billion; of that total, more than half was spent on transaction costs and about \$14 to \$16 million was received by injury victims. When insurance costs of \$35 million are added, the division of the total tort system cost of \$68 billion is as follows: insurers (fifty-one percent), lawyers (twenty-seven percent) and injured victims (twenty-three percent). See *id.* at 1282.

32. See Hazard, Koniak & Cramton, *supra* note 4, at 432-34 (summarizing the game theory view of high-stakes litigation as a "prisoners' dilemma").

33. Lloyd L. Weinreb, *The Adversary Process Is Not an End in Itself*, 2 J. Inst. for Study Legal Ethics 59, 62 (1999).

The adversarial process has become an end in itself. Trials have become sporting contests in which the lawyers are on center stage and everyone else (the parties, the court, the jury) is barely visible. The required arts or tricks of persuasion—extensive coaching of witnesses, suppression of unfavorable evidence, the dust in the eyes that comes from questions that assume facts the lawyer knows are untrue or unprovable, and so on—are constantly testing the limits of the law and come perilously close to deliberate distortion and concealment. As one prominent defense lawyer said, “The truth? . . . The truth is at the bottom of a bottomless pit.”<sup>34</sup> The search for truth is often overwhelmed by obfuscation and concealment.

These comments should not be taken as a plea to abandon the right of parties to participate in and substantially control civil litigation. But the adversarial system should be modified in ways that will serve the goals of the justice system: the accurate, efficient and fair resolution of disputes. Lawyers should be passionately committed to advancing their client’s interests. However, steps should be taken to civilize the process in ways that will be more likely to let the truth emerge, reduce transaction costs, and maintain the integrity of judicial institutions and procedures.

A starting point would be a study of the experience of those jurisdictions that have taken the following notable steps in this direction:<sup>35</sup>

- requiring up-front disclosure of information relevant to claims and defenses;<sup>36</sup>
- requiring that contentions be well-grounded in fact and warranted in law;<sup>37</sup>
- sanctioning lawyer or party conduct that violates procedural rules;
- allowing jurors to be more active participants (for example, by taking notes and asking questions of witnesses).

Further modifications of the adversarial system should be considered and studied.<sup>38</sup> Here are a few suggestions:

- Reduce adversarial histrionics by requiring lawyers, like everyone else in the courtroom, to remain seated at all times. An atmosphere that is concerned with the merits of the case rather than that of a contest between lawyers is more likely to reach fair and truthful results.
- Require lawyers to disclose in advance any evidence that

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34. Harr, *supra* note 30, at 340.

35. Arizona, for example, has adopted all of the measures listed.

36. Compare the half-hearted and soon-abandoned requirements of Rule 26 of the Federal Rules of Civil Procedure.

37. Cf. Fed. R. Civ. P. 11.

38. For suggestions concerning criminal trials, see Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403 (1992).

raises admissibility questions so that these issues are handled, before the trial, out of the presence of the jury.

- Permit only one lawyer per side to participate at any given time.
- Exercise more judicial control of cross-examination and foreclose any argument that seeks to introduce falsity by stating premises for which no admissible evidence has been disclosed or offered.<sup>39</sup>
- Police the extent to which witness coaching has the effect of creating a coordinated or fabricated story.<sup>40</sup>
- Finally, and most importantly, provide the courts with sufficient personnel and resources to intervene earlier, more often and more forcefully to settle discovery disputes and sanction tactics of concealment, delay or other abuse.

### B. *Making Lawyers More Accountable for Their Conduct*

Mechanisms for making lawyers accountable to clients, courts and third persons start with the conscience of the individual lawyer and the informal peer review of the practice unit and of professional colleagues more generally. Individual conscience is alive and well with a minority of lawyers, but is subverted for the profession as a whole by the rewards and incentives of practice within law firms and by the ideology of hyper-adversarialism. Professionalism or civility codes will have little substantial effect on current abuses of adversarialism, which are driven by deeply ingrained attitudes of adversarial duty that are economically and psychologically rewarding to trial lawyers in a society that is increasingly self-interested rather than public-interested. Consequently, serious attention must be given to improving accountability through formal sanctions: professional discipline, sanctions in proceedings, and civil liability.

Lawyers fear the application of these sanctions. If there is a likelihood one or more of them will be brought to bear, lawyer behavior is affected. This explains why the organized bar is and has been engaged in seeing to it that each of these sanctions has a restricted role.

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39. See, e.g., Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 Dick. L. Rev. 563 (1996); Carl M. Selinger, *The "Law" on Lawyer Efforts to Discredit Truthful Testimony*, 46 Okla. L. Rev. 99, 99-100 (1993) (arguing that such conduct may violate current ethics rules and that, if not, the rules should be clarified to prohibit the practice).

40. See *Witness Preparation Memos Raise Questions About Ethical Limits*, 14 Laws. Man. on Prof. Conduct (ABA/BNA) No. 2, at 48, 48-53 (Feb. 18, 1998) (discussing incidents in which witness preparation raised questions about ethical limits); Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, Wash. Post, Jan. 13, 1998, at A15.

## 1. Professional Discipline

Under present resource limitations and the often ambiguous standards of ethics rules, professional discipline has little or no role in preventing misconduct in litigation and only a limited role in protecting clients in other contexts. Discipline fails to deal with many of the issues most important to clients: the competence of a lawyer's work for a client is left to the possibility of a legal malpractice action; the appropriateness of the legal fee is left to the market place or to arbitration by a bar-created process; failures of communication are left unattended except as an add-on to more serious ethics violations; and abusive litigation practices are not addressed because the standards expressed in the applicable rules are stated in ambiguous generalities and hence are unenforceable.<sup>41</sup>

The organized bar resists more specific requirements. The initiative in this area must come from judges or legislators, who are more willing to create such standards in procedure codes and, at least sometimes, to enforce them once put in place. Standards embodied in procedural rules and subsequently enforced can have a powerful effect on lawyer conduct. The basic limitation, especially in jurisdictions where judges are subject to frequent elections, is that judges do not like to devote time to matters of lawyer conduct and hate to criticize members of the bar.

## 2. Sanctions in Proceedings

Judges have inherent authority to punish an attorney's bad faith conduct in litigation, of which contempt law is but one of the ingredients. In addition, court decisions, procedural rules and statutes in the federal courts and in many states empower a judge to order a party and/or the party's lawyer to pay the legal fees of an adversary oppressed by bad-faith litigation. Rule 11 of the Federal Rules of Civil Procedure moves beyond subjective bad faith and applies an objective test to lawyer and party litigation abuse. As amended in 1993, Rule 11 requires that any assertion presented to the court

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41. The ethics rules governing frivolous assertions, delay and harassment are illustrative. Model Rule 3.1, dealing with "meritorious claims and contentions," uses a double negative (an assertion is prohibited "unless there is a basis for doing so that is not frivolous") and the Comment states an "action . . . is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Model Rules of Prof'l Conduct R. 3.1 & cmt. (1983). Compare the more rigorous requirements of Rule 11 of the Federal Rules of Civil Procedure. Model Rule 3.2 prohibits the use of delaying tactics unless "consistent with the interests of the client." R. 3.2. Model Rule 4.4 prohibits harassment when the "means . . . have no substantial purpose other than to embarrass, delay, or burden a third person . . ." R. 4.4. Given the rules' ambiguity, it is not surprising that they do not provide the basis for professional discipline of abusive litigation conduct.

certifies to the court "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that, among other things:

(1) [the representation] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and] (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.<sup>42</sup>

A number of states have followed the federal lead in prohibiting conduct that fails to meet either the objective standard of being warranted by law or the subjective standard of improper purpose. Other states require courts to make a finding of subjective bad faith (similar to the pre-1983 federal rule), a requirement that limits the effectiveness of the rule in controlling abusive litigation conduct. Still other states, including New York, have no counterpart to Rule 11, leaving abusive litigation conduct to vaguer and generally unenforced boundaries of the ethics rules. Adoption of a rule based on the federal model, and an increased willingness on the part of judges to enforce existing rules, would be desirable steps in many states.

### 3. Civil Liability to Clients and Third Persons

Professional malpractice provides a useful deterrent to incompetent lawyering despite its many limitations.<sup>43</sup> Because malpractice cases are strongly defended and difficult to prove, a malpractice specialist will undertake a case only if the client's harm is large, the breach of duty fairly clear, and the causal connection between breach and harm can be established. Moreover, the malpractice remedy is meaningful only if the lawyer has adequate malpractice insurance. A large number of lawyers, perhaps as many as fifty percent in some states, have no malpractice insurance coverage; these are also the lawyers who are most unlikely to have substantial personal assets subject to execution of a judgment. Every state should join Oregon in requiring all lawyers in active practice to purchase malpractice coverage sufficient to cover anticipated awards.<sup>44</sup>

In my view, one of the welcome developments in recent years is the broadening of the tort liability of lawyers to third persons who are harmed in a fairly predictable manner by a lawyer's work for a client.

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42. Fed. R. Civ. P. 11.

43. See generally Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 San Diego L. Rev. 401 (2000); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101 (1995).

44. See Hazard, Koniak & Cramton, *supra* note 4, at 172-74; see also Rhode, *Interests of Justice*, *supra* note 9, at 165-68.



Liability is most common where the lawyer has given a legal opinion to facilitate a client transaction and the lawyer knows or reasonably should know that the opinion will be relied upon by that person.<sup>45</sup> Liability is also developing in other situations lacking privity of contract, such as when a lawyer's negligence in drafting testamentary documents results in a harm to the intended beneficiaries.<sup>46</sup> But many jurisdictions restrict liability in numerous situations in which a lawyer knows or reasonably should know that the work for a client is intended to influence or benefit a third person.<sup>47</sup> In these situations, the client has not been injured (or is dead), and a denial of recovery to the person who was the intended beneficiary means that estate planners, for example, are not subject to the deterrent effect of any enforceable standard of care.

It is ironic that a profession which opposes any restrictions on tort liability for physicians or others is so worried about the application of the negligence standard to itself.<sup>48</sup> Even more troubling is the trend to exempt many criminal defense lawyers from malpractice liability. Decisions in a number of states require that the convicted defendant must establish actual innocence of the crime charged, even if the lawyer's error, such as failure to seek the exclusion of illegally

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45. Texas, apparently the only state in which a lawyer had no duty of care to a person to whom the lawyer has given an opinion at the direction of the client to facilitate a client transaction with that person, joined the parade in 1999. See generally Hazard, Koniak & Cramton, *supra* note 4, at 88-92.

46. See, e.g., *Guy v. Liederbach*, 459 A.2d 744, 752 (Pa. 1983) (holding that a lawyer who drafts a will owes a duty of care to intended beneficiaries). *But see Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) (holding that a lawyer drafting a trust instrument owes no duty of care to trust beneficiaries).

47. The leading case is *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987) (Posner, J.) (applying Illinois law). See also Restatement (Third) of The Law Governing Lawyers § 51 (2000) (specifying a number of situations in which a lawyer owes a duty of care to a nonclient).

48. One of the profession's responses to the threat of third-party liability has been a successful push for the enactment of state legislation eliminating the traditional rule that a law partner's assets are at risk when a firm member's negligence lead to a malpractice or third-party award. In any setting in which lawyer professionalism is discussed, the profession laments the decline of mentoring in law firms and urges greater quality control measures. Yet it rejected the principles of monitoring, group responsibility and quality control that underlie the traditional partnership rule. Pocket-book interests have prevailed over "traditional professional values." Also, the organized bar usually takes the position that state legislatures have no business regulating the profession. But when the common law rule proved threatening, the bar sought and obtained immediate legislative action in many states. For a review of this subject, see Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. Tex. L. Rev. 359 (1998) (arguing that limited liability statutes should not be viewed by courts as invading their exclusive "inherent" authority to regulate the profession; but, conversely, such lawyer-protective legislation should be accompanied by requirements that law firms carry adequate malpractice insurance).

obtained evidence, probably would have resulted in a not-guilty outcome.<sup>49</sup>

Malpractice liability is not a factor in deterring litigation misconduct (unlike the role of third party liability in assuring care to third parties who are influenced by, or the intended beneficiaries of, the lawyer's work for a client on a business transaction). Abusive litigation practices serve presumed or actual client interests. Even in situations in which a lawyer's decisions harm the client by losing the case, most courts apply a standard of care that gives a virtual immunity to professional judgments or missteps in the course of litigation.<sup>50</sup> Lawyer liability to third persons in a litigation context is close to non-existent. There is no duty of care to the opposing party, hence no negligence remedy; and intentional torts such as abuse of process and malicious prosecution are rarely available against the opposing party's lawyer even for pursuit of wholly frivolous claims.<sup>51</sup> In order to curb litigation misconduct, the intentional torts of abuse of process and malicious prosecution should be applied to lawyers in the same manner as they are to other agents. In addition, defamation immunity should be restricted to speech in, or closely related to, courtroom assertions.

My thesis is clear: In the absence of professional discipline, sanctions in proceedings and adequate civil liability, lawyers are insufficiently accountable to their clients, third persons and the courts. Legislatures and courts should create standards that define prohibited conduct as clearly as is feasible and misconduct should be punished by appropriate techniques. In practice, civil liability and sanctions in proceedings are likely to be the most effective remedies. The perception is becoming widespread that outcomes in litigation frequently turn as much on the aggressiveness and skills of the lawyers and the resources available to them as they do on the merits of the case. If this belief becomes thoroughly accepted, the American dream of equal justice under law will become a bad joke, a mockery—a shadow land in which truth and reality have only a vague presence. We can and should do better!

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49. See Hazard, Koniak & Cramton, *supra* note 4, at 201 n.62.

50. A small but growing number of jurisdictions permit a client to recover when the lawyer rejects a settlement offer that the client would accept without communicating it to the client. Since a clear violation of an important professional duty is involved, liability in this situation is appropriate. See Model Rules of Prof'l Responsibility R. 1.2(a), R. 1.4 (1983).

51. See Hazard, Koniak & Cramton, *supra* note 4, at 387-404.