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ZEOUS REPRESENTATION BOUND: THE INTERSECTION OF THE ETHICAL CODES AND THE CRIMINAL LAW

BRUCE A. GREEN*

Professional codes adopted by states and based on the Model Rules of Professional Conduct and the Model Code of Professional Responsibility govern lawyers' conduct. The ethical codes, however, fail to address many ethical questions confronting lawyers.

In this Article, Professor Bruce Green highlights the ethical codes' weaknesses, particularly as they relate to the conduct of criminal defense attorneys. As he describes, the ethical codes require advocates to represent their clients "zealously," but, at the same time, "within the bounds of the law." When the codes do not proscribe conduct that would advance their clients' causes, conscientious advocates must consider whether other laws, including the criminal laws, would forbid the proposed conduct. When the relevant criminal laws themselves are ambiguous, advocates face the further dilemma of whether to forego measures beneficial to their clients or to engage in potentially criminal conduct.

To illustrate the difficulties the ethical codes create, Professor Green focuses on a question that criminal defense attorneys sometimes encounter: Is it permissible to advise an unrepresented witness to assert the fifth amendment privilege instead of providing testimony harmful to the attorney's client? Professor Green argues that the ethical codes should explicitly forbid such conduct, which may violate obstruction-of-justice statutes, to prevent well-intentioned attorneys from unwittingly overstepping the bounds of the criminal law. He further argues that, in the absence of clear guidance, attorneys should not interpret the duty of "zealous representation" to compel conduct of doubtful legality.

I. INTRODUCTION

Attorneys have an ethical duty to represent their clients "zealously."1 At

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter MODEL CODE]; id. DR 7-101; id. EC 7-1; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1983) [hereinafter MODEL RULES]. The concept of "zealous representation" embraces the traditional view that the interests of the lawyer's client are generally paramount to the interest in the administration of justice and almost invariably paramount to the interests of third parties. See, e.g., Curtis, The Ethics of Advocacy, 4 STAN. L. REV. 3 (1951); Thode, The Ethical Standard for the Advocate, 39 TEX. L. REV. 575 (1961); see also Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 Wis. L. REV. 1529 (discussing the relationship between ethics and zealous representation). For commentary that questions the traditional conception of a lawyer's role, see

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the same time, they must proceed "within the bounds of the law." The law that sets the bounds of proper conduct for attorneys—what aptly has been called "the law governing lawyers"—must be sought not only in the "ethical codes" of the states in which a particular attorney practices and is licensed, but in a variety of other places as well. Lawyers are regulated by the rules of civil procedure and by the law of tort, contract, agency, and partnership. Moreover, the criminal law establishes limits on the manner in which an advocate may proceed.

One might expect state ethical codes to define the concept of "zealous representation" clearly, explicitly, and broadly enough to allow lawyers who comply with the ethical rules easily to avoid committing crimes on behalf of their clients. This expectation flows from the commonplace distinction between unethical and criminal conduct. In everyday parlance, we regard a great deal of behavior as "unethical," although not criminal; we think of the criminal law as reaching only the most egregious wrongdoing, leaving untouched a variety of wrongful conduct that may deserve public opprobrium but not punishment.

So, too, one might think that the lawyers' codes of ethics would define as "unethical" a broad range of professional (or unprofessional) conduct encompassing all the acts proscribed by the criminal law, as well as wrongdoing that falls short


2. MODEL CODE, supra note 1, Canon 7; id. DR 7-102; id. EC 7-1; see MODEL RULES, supra note 1, Rule 3.1 comment; In re Austern, 524 A.2d 680, 682-83 (D.C. 1987).


4. In most states, the applicable code is based on either the 1969 Model Code of Professional Responsibility or the 1983 Model Rules of Professional Conduct.


of being criminal. If that were the case, then as long as a lawyer complied with the prevailing professional rules of ethics, she could be confident of steering clear of criminal conduct. Unfortunately, that is not always the case. In some situations, the lawyers' codes leave lawyers at risk by failing to proscribe specifically conduct that may be criminal.

The first part of this Article focuses on one example of the ethical codes' surrender to the criminal codes of the task of defining the proper scope of zealous representation. It begins with a hypothetical that raises a simple question encountered often during the course of criminal investigations and occasionally during trial: May a criminal defense attorney advise a potential government witness to assert the privilege against self-incrimination rather than give testimony that may incriminate the attorney's client? As this Article describes, the ethical codes do not explicitly forbid this advice, even though discouraging a witness from testifying in this manner may constitute the crime of obstruction of justice.

The second part of this Article examines the difficulties advocates face when the ethical codes allow the criminal law to set the bounds of zealous representation, particularly when, as in the example given, the lines the criminal law draws are themselves uncertain. In a variety of situations, an advocate must decide whether to engage in potentially criminal conduct that would further his client's interests. The ethical codes give no guidance as to whether the duty of "zealous representation" requires an attorney to engage in conduct approaching the line of criminality, whether an attorney must refrain from such conduct, or whether an attorney has discretion to choose his course of conduct.

This Article concludes that, as a general matter, the ethical codes inappropriately rely on ambiguous criminal laws to set the bounds of zealous advocacy. The ethical codes should clearly and explicitly proscribe most professional con-


13. For an interesting and insightful look at other issues lying at the crossroads of the ethical codes and the criminal law of obstructing justice, see Uviller, Presumed Guilty: The Court of Appeals Versus Scott Turow, 136 U. PA. L. REV. 1879 (1988). Professor Uviller explores the unfair possibility that an ambiguous federal obstruction-of-justice statute might be interpreted in light of the proscriptions of the ethical codes:

The enforcement of the professional proscriptions by criminal sanctions must at least give us pause. Or, to put it the other way, filling the spaces in a loosely worded criminal statute by incorporating the tenets of a code of professional ethics raises interesting questions concerning the delegation of legislative authority to professional associations.

Id. at 1898; see also Podgor, Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession, 61 TEMPLE L. REV. 1323, 1336-39 (1988) (discussing obstruction-of-justice prosecutions of lawyers in which ethical rules have been admitted in evidence or included in a jury instruction). By contrast, the present Article deals with a reverse situation: the use of the criminal law to fill the spaces of the codes of professional ethics.
duct that may be criminal. Moreover, the ethical codes should specify that, in situations in which potentially criminal conduct is not explicitly deemed unethical, an advocate has discretion to refrain from the conduct, even if engaging in it would advance his client’s cause.

II. Zealous Representation and Obstruction of Justice

A. A Not-So-Hypothetical Question

Suppose you are a criminal defense attorney. Your client, Scrooge, owns a real estate development company. He has just received a subpoena to testify before a federal grand jury that is investigating improper payoffs that Scrooge’s company may have made to federal housing authorities. You have agreed to do whatever the law permits to forestall his indictment.

Your principal task at this stage “is to prevent the government from obtaining evidence that could be inculpatory of [your] client and used by the investigator or prosecutor to justify issuance of a formal criminal charge.” Toward this end, you caution Scrooge against discussing the case with anyone but you, because the government may later learn of statements he makes, even to trusted friends, and use them to his detriment. You also advise Scrooge to assert his fifth amendment right against self-incrimination, rather than answer questions when he is called before the grand jury.

The risk remains, however, that other individuals, including Scrooge’s employees, will provide the grand jury with information that incriminates him. Scrooge tells you that the company’s accountant, Cratchit, is aware of potentially damaging information. You would, therefore, want to do whatever you lawfully could do to limit Cratchit’s disclosures to the government or to ensure, at the very least, that Cratchit places Scrooge’s conduct in a light favorable to your client.

As a defense attorney, you have a variety of measures available to influence third parties’ disclosures to the government. For example, you might encourage your client to cultivate Cratchit’s loyalty. Or you might suggest that Scrooge try to influence Cratchit to keep quiet. You might also meet with Cratchit yourself to find out what he remembers and, ideally, to “flush out interpretations of facts that are favorable to the defense position.”

You decide, for starters, to meet with Cratchit yourself. At a meeting your

14. K. Mann, Defending White-Collar Crime 6 (1985). The white-collar defense attorney’s other main task is to gather information about the investigation. See generally id. at 37-100 (describing means by which white-collar defense attorneys gather information from their clients, from individuals subject to their clients’ control, and from adverse parties).

15. Id. at 124-56.

16. Id. at 157-80.

17. Id. at 158-60.

18. Id. at 159. Professor Mann observes: “In general, how a client achieves this is left up to him—whether he offers bonuses, threatens to fire an employee, or simply refrains from alienating someone who could do damage.” Id.

19. Id. at 162.
client arranges, you solicit Cratchit's version of the events. As Cratchit talks, it becomes clear that his information may incriminate himself as well as Scrooge. It obviously would further your client's interests for Cratchit to assert the fifth amendment privilege in the event the grand jury subpoenas him, and you believe that asserting the privilege would serve Cratchit's interests as well. Therefore, although Cratchit is not your client, you would like to give him essentially the same advice that you gave your own client, that is, to assert the fifth amendment privilege instead of cooperating with the government's investigation. In the alternative, at the very least, you would like to remind Cratchit that he has a right to refuse to cooperate. Is it proper for you to take steps such as these to discourage a third party from testifying before the grand jury? This question, which is of practical as well as theoretical significance, defies a simple answer.

B. The Ethical Standards

Because it is widely assumed that the ethical rules promulgated by the organized bar place the broadest restrictions on attorneys' conduct, an attorney logically would look first to those rules to determine whether it is proper to advise a witness to assert the fifth amendment privilege. Moreover, because this question arises with some frequency for criminal defense attorneys, one might reasonably expect that the ethical rules would answer it clearly and explicitly. Examination, however, reveals that the ethical rules provide no clear guidance on this question.

Before the American Bar Association (ABA) adopted the Model Code of Professional Responsibility (Model Code) in 1969, the prevailing view was that a criminal defense lawyer was allowed to apprise an unrepresented witness of the availability of the fifth amendment privilege. An informal opinion issued by an advisory committee of the ABA in 1962 concluded that warning a prosecution

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20. Meetings between a white-collar defense lawyer and his client's associates or employees typically are set up by the client. Id. at 161.

21. Professor Kenneth Mann provides the following example of a speech in which one defense attorney obliquely advised his client's employee to invoke the privilege against self-incrimination:

Now I'm not saying you to take the Fifth or anything like that, but just remember that the rights that the Supreme Court in the sixties made for blacks are for you also, those rights that the Supreme Court is erasing one by one now. The worst thing in the world that happens to middle-class people is that, where they had no problems, later they find themselves with more than they could handle because they talk too much.

Id. at 164.

As one reviewer observed, this speech was one of the most disturbing examples cited by Mann of the veiled communications made by lawyers to clients or third parties. Carberry, Book Review, 16 SETON HALL L. REV. 290, 296-97 & n.31 (1986). For additional reviews of this excellent contribution to our understanding of what defense attorneys do in white-collar cases, see Glassberg, DEFENDING WHITE COLLAR CRIME: A Game Without Rules (Book Note), 63 WASH. U.L.Q. 831 (1985); Hazard, Quis Custodiet Ipos Custodes (Book Review), 5 YALE L.J. 1523 (1986); Kostelanetz, Anatomy of a Legal Subspecialty: Looking at White Collar Crime (Book Review), 85 COLUM. L. REV. 1852 (1985); Schneyer, Getting from "Is" to "Ought" in Legal Ethics: Mann's DEFENDING WHITE COLLAR CRIME, 1986 A.B.F. RES. J. 903 (1986); Wade, Book Review, 9 CRIM. JUST. J. 193 (1986).

22. See K. MANN, supra note 14, at 16-18; Tigar, Crime Talk, Rights Talk, and Double Talk: Thoughts on Reading ENCYCLOPEDIA OF CRIME AND JUSTICE, 65 TEX. L. REV. 101, 111 (1986) (criminal convictions for advising witnesses validly to assert the fifth amendment privilege "are of intense theoretical and practical interest").
witness of his right against self-incrimination is permissible even "[i]f the defense attorney's primary motivation in so advising the prosecution witness is the desire to encourage or to persuade the prosecution witness not to testify against the accused." The advisory opinion did not address the question whether an attorney could go one step further and advise the unrepresented witness that he should assert his privilege.

The Model Code provision addressing communications between a lawyer and an unrepresented individual casts doubt on the earlier view that a defense attorney may properly advise a potential government witness about the availability of the fifth amendment privilege. That provision, Disciplinary Rule (DR) 7-104(A)(2), provides:

During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

This rule is directed primarily against the practice of giving advice to an unrepresented adversary or potential adversary. However, the reference to "person," rather than to "party," suggests that the rule sweeps more broadly to forbid giving advice to anyone, including a potential witness, if his interests potentially conflict with those of the lawyer's client.

In State v. Fosse, the Wisconsin Court of Appeals liberally interpreted DR 7-104(A)(2) to bar a defense attorney from advising prosecution witnesses of the availability of the fifth amendment privilege. Prior to trial, defense counsel in that case asked the court to advise three prosecution witnesses of both their privilege against self-incrimination and their right to counsel. Based on the prosecutor's representation that he had no intention of bringing charges against the witnesses, the trial court denied the motion and instructed defense counsel

23. ABA Comm. on Professional Ethics, Informal Op. 575 (1962); see also ABA Comm. on Professional Ethics, Informal Op. 498 (1962) (concluding that an attorney's duty to provide his client a zealous defense is not "nullified" by any restrictions on advising a witness that his answers may incriminate him). The 1908 Canons of Professional Ethics also suggested that giving this advice is proper. Canon 9 provided: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." ABA CANONS OF PROFESSIONAL ETHICS Canon 9 (Rev. ed. 1947). The implication was that it is proper to advise a nonparty witness as to the law. At the same time, however, lawyers understood that limits existed on what a lawyer might do to dissuade a witness from giving adverse testimony. See, e.g., H. DRINKER, LEGAL ETHICS 86 (1953) ("A lawyer for the defense may not try to close the mouths of witnesses in a murder case, or try to close those of disinterested persons who know the facts, or prevent counsel for the other side from learning such facts from them." (footnotes omitted)).

24. MODEL CODE, supra note 1, DR 7-104(A)(2).

25. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1140 (1976) [hereinafter ABA Comm. on Ethics] (DR 7-104(A)(2) "simply carries forward the meaning and intent" of Canon 9 of the ABA Canons of Professional Ethics.

26. See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 342 (1979) (reference in DR 7-104(A)(2) to "a person," rather than "a party," renders obsolete earlier informal opinions that permitted a defense lawyer to advise a government witness about the availability of the fifth amendment privilege.

27. 144 Wis. 2d 700, 424 N.W.2d 725 (Wis. App. 1988).

28. Id. at 702, 424 N.W.2d at 726-27.
not to advise the witnesses himself. Despite the court's ruling, the defense attorney subsequently apprised one witness of his fifth amendment privilege and his right to counsel and had his intern give similar advice to a second witness. When defense counsel's conduct was called to the trial court's attention after a jury was selected, the trial court declared a mistrial based on a finding that the lawyer had engaged in misconduct.

On appeal, the Wisconsin appellate court agreed that defense counsel in Fosse had acted unethically. It reasoned that DR 7-104(A)(2) was designed "to avoid situations where an unrepresented person may follow advice not in that person's best interest because such advice was given by an attorney whose loyalty lies not with the person to whom the advice is given, but to another." In this case, the court found that the interests of the unrepresented witnesses for the prosecution conflicted with the defendant's interests, and the statements of defense counsel and his intern, who were not disinterested, constituted "legal advice that may have misled the witnesses or caused them to act in a manner not in their own best interests."

In contrast, a number of arguments support reading DR 7-104(A)(2) consistently with the 1962 ABA advisory opinion that permitted defense lawyers to apprise witnesses of their fifth amendment privilege. If the drafters of the Model Code had intended to reject the view taken by another ABA committee less than a decade earlier, they would have done so explicitly. That they did not suggests that the drafters meant to preserve the prevailing view, of which they undoubtedly were aware.

Moreover, it is far from apparent that simply and accurately apprising Cratchit of the availability of the fifth amendment privilege constitutes the giving of "advice" as proscribed by the disciplinary rule. This conduct instead might be characterized as the giving of "information" that may be of some relevance to Cratchit. Going further and suggesting that it would be in Cratchit's best interest to assert the privilege would be giving legal advice; merely re-

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29. Id. at 702, 424 N.W.2d at 727.
30. Id. at 702-03, 424 N.W.2d at 727.
31. Id. at 704, 424 N.W.2d at 727.
32. Id. at 705, 424 N.W.2d at 728.
33. The rule on which the court relied, Wisconsin Supreme Court Rule 20.38(2), was virtually identical to DR 7-104(A)(2). Id. at 705, 424 N.W.2d at 728.
34. Id. at 706, 424 N.W.2d at 728.
35. Id. at 707, 424 N.W.2d at 729.
36. Whether the "intent" of the ABA drafters is ultimately what a court should focus on when interpreting ambiguous ethical rules is another question, and one on which I have previously expressed some doubt. See Green, Doe v. Grievance Committee: On the Interpretation of Ethical Rules, 55 BROOKLYN L. REV. 485, 530-52 (1989).
38. Cf. W.T. Grant Co. v. Haines, 531 F.2d 671, 676 n.3 (2d Cir. 1976) (DR 7-104(A)(2) has been read to prohibit giving advice as to the law.). Similarly, apprising Cratchit that his prospective testimony would incriminate him, so that he would be entitled to invoke the privilege against self-incrimination, would be giving advice, albeit advice that in many instances would be incontrovertible.
minding him of what is entirely incontrovertible and of what he almost undoubtedly knows already—that he has a right to refuse to give self-incriminatory testimony—may not be.

Even if apprising Cratchit of the fifth amendment privilege would be "giving advice," DR 7-104(A)(2) does not forbid you to do so unless there is at least a reasonable possibility that Cratchit's interests conflict with Scrooge's interests. Whether a possible adversity of interests exists varies from case to case. As defense counsel, you might reasonably conclude that at this stage Scrooge and Cratchit share a common interest in preventing the government from learning about their involvement in the bribery scheme under investigation. By keeping the government in the dark, they may both avoid having to face criminal charges.\(^39\)

An Illinois appellate court concluded in \textit{People v. Wolf}\(^40\) that DR 7-104(A)(2)\(^41\) does not forbid a defense lawyer from apprising a potential government witness that he may assert the fifth amendment privilege. In that case, the trial court held an attorney, Henry J. Romanski, in contempt of court for advising a prosecution witness—a codefendant who had already pleaded guilty—that his testimony could lead to additional criminal charges and that he had a fifth amendment right not to testify.\(^42\) On appeal from his contempt conviction, the

\(^{39}\) A similar question often arises when a single defense attorney is retained to represent multiple grand jury witnesses. See generally Moore, \textit{Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense}, 27 UCLA L. Rev. 1 (1980) (considering the ethical concerns of multiple representation and discussing possible standards for disqualification); Fedowitz & Price, \textit{Conflicts of Interest Arising From Multiple Representation in a Grand Jury Investigation}, 365 PLI Lit. & Admin. Prac. Ser. 137 (1988) (noting that there are many factors an attorney must weigh in this context); Tague, \textit{Multiple Representation of Targets and Witnesses during a Grand Jury Investigation}, 17 Am. Crim. L. Rev. 301, 306-07 (1980) (discussing the "root nature" of the conflict). From time to time, prosecutors move to disqualify the witnesses' attorney on the theory that the witnesses' interests conflict, so that the representation of more than one witness in the grand jury would violate the prevailing ethical standards. See, e.g., \textit{In re Grand Jury Proceedings}, 859 F.2d 1021, 1022 (1st Cir. 1988); \textit{In re Investigation Before the February 1977, Lynchburg Grand Jury}, 563 F.2d 652, 654 (4th Cir. 1977); \textit{In re Gopman}, 531 F.2d 262, 265 (5th Cir. 1976); \textit{In re Abrams}, 62 N.Y.2d 183, 190, 465 N.E.2d 1, 3-4, 476 N.Y.S.2d 494, 496-97 (1984); Pirillo v. Takiff, 462 Pa. 511, 517-18, 341 A.2d 896, 899 (1975), cert. denied, 423 U.S. 1083 (1976). In such cases, courts generally find that the witnesses' interests are at least potentially in conflict. See, e.g., Gopman, 531 F.2d at 266; \textit{In re Investigative Grand Jury Proceedings on April 10, 1979 and Continuing}, 480 F. Supp. 162, 171 (N.D. Ohio 1979); Pirillo, 462 Pa. at 530-31, 341 A.2d at 905-06. This is true even when, as often occurs, the court goes on to deny the prosecution's motion in light of the witnesses' overriding interest in counsel of choice. See, e.g., \textit{In re Taylor}, 567 F.2d 1183, 1191 (2d Cir. 1977); \textit{In re Grand Jury Emaneled Jan. 21, 1975 (National Maritime)}, 536 F.2d 1009, 1012-13 (3d Cir. 1976); \textit{In re Investigation Before the April 1975 Grand Jury (Washington Post)}, 531 F.2d 600, 606-08 (D.C. Cir. 1976); Abrams, 62 N.Y.2d at 197, 465 N.E.2d at 7-8, 476 N.Y.S.2d at 301. Even if the representation of multiple grand jury witnesses gives rise to a potential conflict of interest, however, it does not necessarily follow that, at a time before Cratchit is even contacted by federal investigators, his interest can be said to be potentially adverse to Scrooge's interests. See \textit{People v. Wolf}, 162 Ill. App. 3d 57, 60, 514 N.E.2d 1218, 1220 (1987), \textit{leave to appeal denied}, 118 Ill. 2d 551 (1988); see generally Green, "Through a Glass, Darkly": \textit{How the Court Sees Motions to Disqualify Criminal Defense Lawyers}, 89 Colum. L. Rev. 1201, 1217-18 & nn. 82-84 (1989) (in conflict-of-interest cases, courts take too broad a view of adversity between the defendant and a government witness).


\(^{41}\) The court actually was interpreting the comparable Illinois rule that is identical to the Model Code. \textit{Id.} at 60, 514 N.E.2d at 1219.

\(^{42}\) Id. at 58-59, 514 N.E.2d at 1219.
attorney conceded that his motive in giving this advice was to serve his client's interests, not the interests of the witness. Rominski argued, however, that the advice nevertheless was accurate and that he was entitled to give it.\textsuperscript{43} The appellate court agreed, finding, among other things, that DR 7-104(A)(2) did not forbid giving this advice because the witness's interests did not conflict with the interests of Rominski's client.\textsuperscript{44}

Although other provisions of the Model Code govern an attorney's communications with potential witnesses, none clearly forbids advising Cratchit to keep quiet. For example, a lawyer may neither advise a witness to leave the jurisdiction to avoid giving testimony\textsuperscript{45} nor pay a witness for giving helpful testimony.\textsuperscript{46} Provisions such as these, however, do not speak to the question whether a lawyer may properly apprise a witness of his fifth amendment privilege.

In 1983, when it adopted the Model Rules of Professional Conduct (Model Rules), the ABA failed to clarify whether a lawyer may properly advise a witness to assert the constitutional privilege. Under the Model Rules' counterpart to DR 7-104(A)(2), you could at least apprise Cratchit of the availability of the fifth amendment privilege. Model Rule (MR) 3.4(f) provides:

> A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.\textsuperscript{47}

The first part of the exception applies because Cratchit is an employee of Scrooge. Moreover, the second part of the exception applies because asserting the fifth amendment privilege probably would be in Cratchit's best interests; in any event, at this stage, asserting the privilege would not be adverse to Cratchit's interests. Accordingly, you would not appear to be violating this rule if you were to advise Cratchit directly and emphatically to refuse to cooperate with federal agents and to assert his privilege as a witness before the grand jury.

Although advising witnesses of the fifth amendment privilege could violate other provisions of the Code and the Model Rules, their terms are so general that they provide no clear guidance to lawyers. For example, both DR 1-102(A)(5) of the Model Code and Rule 8.4(d) of the Model Rules forbid an attorney from "[e]ngag[ing] in conduct that is prejudicial to the administration of justice."\textsuperscript{48} This is a "catch-all" or "residual" provision to which courts and

\textsuperscript{43} Id. at 60, 514 N.E.2d at 1219.

\textsuperscript{44} Id. at 60-61, 514 N.E.2d at 1219-20.

\textsuperscript{45} MODEL CODE, supra note 1, DR 7-109(B).

\textsuperscript{46} Id. DR 7-109(C).

\textsuperscript{47} MODEL RULES, supra note 1, Rule 3.4(f). Communications with unrepresented individuals also are addressed by Rule 4.3 of the Model Rules, which provides, in part: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." Although the comment accompanying Rule 4.3 states that "[d]uring the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to secure counsel," the rule itself does not forbid giving advice to an unrepresented witness as long as the lawyer ensures that the witness understands the lawyer's role in the matter.

\textsuperscript{48} MODEL CODE, supra note 1, DR 1-102(A)(5); MODEL RULES, supra note 1, Rule 8.4(d).
disciplinary bodies occasionally resort when they want to punish an advocate’s conduct that is not specifically proscribed by the ethical rules. Although the term “prejudicial to the administration of justice” is open ended, courts have not considered it so vague as to violate the due process clause.

One court has relied on this open-ended rule to punish a lawyer who counseled potential witnesses to remain silent. In the course of representing a target of a federal grand jury investigation into municipal corruption, the attorney in *In re Blatt* met with potential grand jury witnesses and suggested to them that, if they were questioned by federal authorities, they should be uncooperative and say as little as possible—or, in the recollection of one of those witnesses, “that we should keep our mouths shut.” The New Jersey Supreme Court found that this conduct could “only be understood as an attempt to deny evidence to law enforcement officials,” constituting “conduct prejudicial to the administration of justice,” in violation of DR 1-102(A)(5).

It is unclear whether the court would have reached the same conclusion had the lawyer merely advised the witnesses that they had a fifth amendment right to remain silent. Simply advising a witness of his constitutional right, without expressing a view as to whether or not he ought to assert that right, seems materially different from advising a witness to “keep [his] mouth shut.” Though the ends are the same, the means are different. Even if characterized as “legal advice,” informing a witness of her fifth amendment right merely supplies her with correct information to which she is entitled. As the Illinois court found in *People v. Wolf*, advising a witness about the fifth amendment privilege does not “obstruct the trial court in its administration of justice.”

When an attorney not only advises a prosecution witness that he has a fifth amendment right, but also urges the witness to assert that right, his conduct is more difficult to defend. One might argue that this conduct is no better than the

49. See, e.g., Uviller, *supra* note 13, at 1887 (DR 1-102(A)(5) “is broad to the point of formlessness.”).

50. See, e.g., Howell v. State Bar of Tex., 843 F.2d 205 (5th Cir.), cert. denied, 488 U.S. 982 (1988). Some courts have taken the reasonable view that lawyers should know what the term encompasses because lawyers are presumed to be familiar with “the lore of the profession.” See, e.g., *In re Snyder*, 472 U.S. 634, 645 (1985); *In re Finkelstein*, 901 F.2d 1560, 1565 (11th Cir. 1990); Howell, 843 F.2d at 208; see also *In re Bithoney*, 485 F.2d 319, 324 n.7 (1st Cir. 1973) (“We refer to the Code only as an illustration of the lore of the profession, which we assume is familiar or should be to all attorneys.”).


52. Id. at 542, 324 A.2d at 17.

53. Id. at 543, 324 A.2d at 18. For that and a variety of other misconduct, the state court ordered the attorney suspended from the practice of law. Id. at 548, 324 A.2d at 20.

54. 162 Ill. App. 3d 57, 514 N.E.2d 1218 (1987), leave to appeal denied, 118 Ill. 2d 551 (1988); see *supra* text accompanying notes 40-44.

55. 162 Ill. App. 3d at 61, 514 N.E.2d at 1221.

56. Id. at 61, 514 N.E.2d at 1220.
conduct condemned in *In re Blatt*, 57 because the advice to “assert the fifth amendment privilege” is simply a high-flown version of the advice to “keep your mouth shut.” In either case, the intended effect of the lawyer’s advice is to convince the witness to withhold evidence from the prosecution. A defense attorney might argue that, while the admonition to “keep your mouth shut” seems imbued with coercion, the lawyerly advice to “assert the privilege” is disinterested and unthreatening. Viewed in the context of an employer’s attorney counseling an employee, however, even the advice to assert the fifth amendment privilege seems coercive; a reasonably astute employee would perceive that, by rejecting the lawyer’s advice, he would be putting his job in jeopardy.

There is nevertheless some judicial support for the view that it is ethical to advise a witness to assert the constitutional privilege. In *McNeal v. Hollowell*, 58 a defense lawyer contacted a witness and the witness’s lawyer shortly before the witness was to testify for the government. The defendant’s lawyer successfully persuaded the witness to assert the fifth amendment privilege at trial. The Court of Appeals for the Fifth Circuit found that the lawyer had acted properly. In the court’s view, the lawyer’s conduct

was no more than the legitimate action of a defense counsel who was contacting an important witness . . . and his counsel to discuss a matter of mutual importance to them. While we need not go so far as to say that it was [defense counsel’s] duty to do this, we have no doubt that he was entitled to do it . . . .

The appellate court in *McNeal* might have taken a less charitable view if the lawyer had contacted an unrepresented witness, rather than a witness and his lawyer. 60 Yet the court’s reasoning might apply even when an unrepresented witness is contacted directly. In the court’s view, the witness’s decision whether to testify was a matter of mutual importance that could legitimately be broached and discussed by the defendant’s lawyer. If the witness had been unrepresented, there would have been no practical way for the defendant’s lawyer to initiate a

57. 65 N.J. 539, 324 A.2d 15 (1974); see supra notes 51-53 and accompanying text.
59. *Id.* at 1152. Because of the witness’s refusal to testify, the prosecutor sought an order of *nolle prosequi*, which was granted by the trial judge in the middle of defendant McNeal’s trial. The witness himself was subsequently tried and acquitted, which had the effect of immunizing him from further prosecution, then McNeal was reindicted and retried. On appeal, the Fifth Circuit concluded that, because defense counsel had not improperly procured the witness’s refusal to testify at the first trial, the order dismissing the charges during that trial was improper, and a retrial was barred by the double jeopardy clause of the fifth amendment. *Id.* at 1151-52.
60. In a case such as *McNeal*, the presence of the witness’s own attorney diminishes the coercive effect of a lawyer’s advice about the fifth amendment privilege and enables the witness to receive an evaluation of that advice by an attorney who has his own interests at heart. See Green, *Limits on a Prosecutor’s Communications With Prospective Defense Witnesses*, 25 CRIM. L. BULL. 139, 163 (1983). In addition, this makes the situation more like one in which the witness is receiving the advice from his own lawyer. Courts generally have not criticized arrangements between defense lawyers that are in the interests of their respective clients and, in fact, have recognized a “joint defense privilege” that encourages such arrangements by protecting the confidentiality of statements made by counsel or the codefendants in preparation of a joint defense. For discussions of the joint defense privilege, see Capra, *Attorney-Client Privilege When Parties Share Interests*, N.Y.L.J., Mar. 9, 1990, at 3, col. 1; Capra, *The Attorney-Client Privilege in Common Representations*, 20 TRIAL LAW. Q. 20 (1989).
discussion on this issue other than by communicating directly with the witness. To say that a defense lawyer cannot raise matters of mutual importance with a witness except when the witness had the foresight and resources to retain an attorney of his own seems unfair to both the defendant and the witness.

In interpreting vague or ambiguous provisions of the ethical rules, such as those proscribing "conduct prejudicial to the administration of justice," a lawyer might also look for guidance to other expressions by the organized bar of what it considers to be proper attorney conduct. In particular, the ABA Standards for Criminal Justice, first adopted in the late 1960s and early 1970s, although not enforceable in themselves, would be a logical place to seek guidance. These Standards, however, offer little help.

For example, the Standards Relating to the Defense Function, approved by the ABA Board of Delegates in 1971, address a defense lawyer's dealings with potential witnesses. Standard 4.3(c) provides: "A lawyer should not obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise a person, other than a client, to refuse to give information to the prosecutor . . . ." Although, standing alone, this provision might be read to apply to advice about a witness's fifth amendment privilege, the commentary to Standard 4.3 suggests that it was not meant to do so. The commentary notes, presumably with approval, that the ABA Ethics Committee decided in 1962 that discouraging a witness from testifying by warning him that his testimony might incriminate him is proper. Because of the seeming contradiction between the language of Standard 4.3 and the commentary that accompanies it, the ABA Standards provide no greater guidance than the ethical provisions that they are designed to supplement.

In sum, the ethical codes fail to speak clearly to the question whether a defense attorney may advise a witness to assert the fifth amendment privilege. Reasonable arguments might be made that such advice violates neither the specific rules governing communications with unrepresented individuals nor the general provisions proscribing "conduct that is prejudicial to the administration of justice." The few judicial opinions that relate to this question take conflicting approaches, and those opinions that have condemned advice about the fifth amendment privilege may be interpreted narrowly. Therefore, as Scrooge's counsel, you could fairly conclude that, unless some law outside the Code forbids advising Cratchit to "take the fifth," you can properly do so to ensure that Scrooge receives zealous representation.

61. See Model Code, supra note 1, DR 1-102(A)(5); Model Rules, supra note 1, Rule 8.4(d); supra notes 48-50 and accompanying text.


64. Id. at 230. The Standards were amended, but neither this standard nor the commentary were changed materially. See 1 ABA Standards for Criminal Justice chs. 3,4 (2d ed. 1982).
C. Obstruction of Justice

Although the ethical rules do not plainly forbid advising your client's employee about the fifth amendment privilege, you would have to consider whether that advice is forbidden by some other law. The particular law that casts doubt on the propriety of this advice is the criminal law dealing with obstruction of justice. Under the federal obstruction-of-justice statutes, it is clearly a crime for you or anyone else to use force, threats, promises, or other undue influence to try to coerce Cratchit, a potential federal grand jury witness, to assert the fifth amendment privilege. But it is far from certain whether it would be improper for you to advise Cratchit truthfully that he has a constitutional right not to cooperate with the federal investigation, or, even to go further, and suggest that, in your opinion, it is in his interest to exercise that right. When it comes to this question, the bounds of zealous advocacy set by the criminal law appear no clearer than those set by the ethical codes themselves.

The earliest judicial decisions took the view that it is not a crime for a lawyer to advise a witness to assert the fifth amendment privilege. A federal district court in 1928 issued the first opinion to address this question. In United States v. Herron, the court held the federal obstruction statute would not apply to a lawyer who persuaded a witness to assert a valid claim of privilege. The court reasoned that an attorney could not properly be convicted of obstructing justice simply for “advising a witness to do that which was lawful and would in fact have protected the witness from disclosing self-incriminating matter.” Likewise, the Fifth Circuit's 1973 decision in McNeal v. Hollowell found that it is not a federal crime for a defense lawyer to persuade a witness to assert the fifth amendment privilege, at least as long as that witness is represented by his own attorney. The lawfulness of this practice is also supported by United States v. Metcalf, in which the Ninth Circuit held that the obstruction statute does not apply when one merely advises a witness to remain silent, but instead only applies where the attempt to silence a witness is made through some type of intimidation.

Other decisions raise doubts, however, about the legality of this practice. For example, several courts have upheld criminal convictions of nonlawyers who, with “corrupt” motives, advised others to “take the fifth.” While not

66. If this advice were criminal, it could also be the basis of professional discipline under any of a number of provisions of the Code that forbid lawyers from engaging in illegal conduct. See, e.g., MODEL CODE, supra note 1, DR 1-102(A)(3), (5) & (6); id. DR 7-102(A)(8).
67. 28 F.2d 122 (N.D. Cal. 1928).
68. Id. at 123.
69. 481 F.2d 1145 (5th Cir. 1973), cert. denied, 415 U.S. 951 (1974); see supra text accompanying notes 58-60.
70. 435 F.2d 754 (9th Cir. 1970).
71. Id. at 756-57. The court observed that “the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions.” Id. at 757.
72. See United States v. Baker, 611 F.2d 964, 968 (4th Cir. 1979) (affirming defendant’s conviction for obstruction of justice where defendant urged witnesses not to testify and supplied them with sedatives to impede their testimony and conceal his crime); Cole v. United States, 329 F.2d 437, 440
expressly addressing the question whether the obstruction statute extends to lawyers in a similar situation, the courts' opinions do not suggest any obvious distinction between nonlawyers and lawyers. These decisions reflect the view that attempts to influence a witness, although otherwise lawful, are proscribed by the obstruction statute when the "defendant had the requisite corrupt intent to improperly influence the investigation." A nonlawyer who advises a witness to assert the fifth amendment privilege has the requisite "corrupt intent" when his motive is not to protect the witness, but to further his own interest in concealing his crime. These opinions leave open the possibility that when a criminal defense lawyer's advice to a potential government witness is designed to further a client's penal interests rather than the witness's interests, the lawyer will similarly be deemed to have acted in violation of the obstruction statute.

Far more important, and more worrisome, is the Court of Appeals for the Second Circuit's 1975 decision in United States v. Fayer. Fayer involved an attorney who served as a director of a corporation and who also represented both the corporation and two of its principals. His clients became targets of an investigation of corruption at the Federal Housing Authority (FHA). In the course of the representation, Fayer and his clients met with Goodwin, an FHA appraiser who allegedly had received a bribe from Fayer's clients. During their conversation, Fayer disparaged Goodwin's attorney and tried to convince Goodwin not to testify before the grand jury. Unknown to Fayer, Goodwin was already cooperating with the investigation and was wearing a tape recorder.

At the time of Fayer's conversation with Goodwin, the federal obstruction-of-justice statute contained general, open-ended language. Witness tampering

(9th Cir.) (affirming defendant's obstruction of justice conviction where defendant insisted, with corrupt motive, that witness invoke fifth amendment), cert. denied, 377 U.S. 954 (1964).

73. See, e.g., Cole, 329 F.2d at 440 (expressly leaving this question open).


75. Baker, 611 F.2d at 966-68.

76. 523 F.2d 661 (2d Cir. 1975); see also United States v. Cintolo, 818 F.2d 980 (1st Cir.) (affirming conviction for conspiracy to obstruct grand jury investigation where defendant attorney, seeking to assist the targets of a grand jury investigation, dissuaded a client who was granted immunity from testifying before the grand jury or cooperating with the investigation, obtained unauthorized information about grand jury investigation by abusing his position as attorney of record for a witness), cert. denied, 484 U.S. 913 (1987). But see McNeal v. Holloway, 481 F.2d 1145, 1152 (5th Cir. 1973) (defense counsel did not violate the obstruction-of-justice statute, 18 U.S.C. § 1503, where he prevailed upon a witness and the witness's lawyer, but did not use bribery, coercion, force, or threats to induce the witness to claim the privilege), cert. denied, 415 U.S. 951 (1974).

77. Fayer, 523 F.2d at 662.

78. Id.

79. In a later opinion upholding Fayer's conviction for committing perjury at the trial before Judge Weinstein, the Second Circuit characterized Fayer's interchange with Goodwin as follows:

A fair reading of the transcript of the recorded conversation establishes clearly that both the Bernsteins and Fayer repeatedly urged Goodwin not to talk before the grand jury. They also urged Goodwin to discharge his attorney, who had recommended that Goodwin cooperate with the Government, and replace him with another attorney who would be paid by the Bernsteins. Finally, the Bernsteins, with Fayer's apparent approval, offered Goodwin a job in their Florida office if his refusal to cooperate cost him his F.H.A. job.


80. Fayer, 523 F.2d at 662.
was governed by 18 U.S.C. § 1503, which criminalized any endeavor "corruptly" to influence any witness or "corruptly" to impede "the due administration of justice." Based on his recorded statements to Goodwin, Fayer was charged with endeavoring "corruptly" to influence a witness.

Fayer waived his right to a jury and tried the case to Judge Weinstein in the Eastern District of New York. His defense was that he had not acted with a "corrupt" motive, but instead had been led by his clients to believe that Goodwin wanted his legal advice about whether or not to retain a new lawyer. Judge Weinstein acquitted Fayer, finding that there was a reasonable doubt as to whether he had a corrupt motive. The court of appeals subsequently dismissed the government's appeal. In so doing, however, the appellate court made clear that the evidence amply would have supported a conviction.

In his opinion for the court of appeals in Fayer, Judge Oakes took the view that the obstruction-of-justice statute provides no exemption for lawyers who "corruptly" advise potential witnesses to assert the fifth amendment privilege. The opinion explained that, as long as at least one of Fayer's motives was "corrupt" when he advised the potential witness not to testify before the grand jury, the defense attorney's conduct would have violated the obstruction-of-justice

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81. 18 U.S.C. § 1503 (1976). Section 1503 then provided, in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, [shall be guilty of a crime].

Id.

82. Id. The current law relating to witness tampering is 18 U.S.C. § 1512, which makes it a crime to "corruptly" attempt to persuade another person to withhold testimony from an official proceeding. Section 1512(b) provides, in part:

> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

> (1) influence, delay, or prevent the testimony of any person in an official proceeding; [or]

> (2) cause or induce any person to—

> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding . . .

[shall be guilty of a crime].


When this provision was added in 1982, § 1503 was amended to delete references to witness tampering. Witness tampering has nevertheless continued to be prosecuted under the earlier provision. See, e.g., United States v. Cintolo, 818 F.2d 980, 990 (1st Cir.) ("altogether clear that interference with a [witness in a] grand jury investigation fits snugly within the contemplation of § 1503"); cert. denied, 484 U.S. 913 (1987).

83. Fayer, 523 F.2d at 662. The charge was brought under 18 U.S.C. § 1503 as it existed prior to the 1982 amendment. Id.

84. Id. at 661 & n.1.

85. Id. at 663.

86. Id. at 663-64. Fayer subsequently was tried and convicted of perjury in connection with his testimony before Judge Weinstein. United States v. Fayer, 573 F.2d 741 (2d Cir.), cert. denied, 439 U.S. 831 (1978).

87. Fayer, 523 F.2d at 664.
 statute. "Corrupt" intent, as understood by both the district and appellate courts, was an intent not to benefit the witness, but to protect the lawyer's own clients from having their crimes discovered. As interpreted in Fayer, lawyers seeking to serve the penal interests of their clients are treated no more solicitously under the criminal statute than clients seeking to serve their own penal interests. Recently, the Court of Appeals for the First Circuit expressed a similar view in United States v. Cintolo and concluded that lawyers ought to adhere to higher standards of conduct regardless of their subjective intent.

In 1982 Congress amended the federal obstruction statute to remove the provision dealing with witness tampering. At the same time, Congress created a new witness-tampering statute to deal with that problem. That statute, 18 U.S.C. § 1512, criminalizes any attempt to "corruptly persuade[] another person" with intent to "cause or induce" that person to withhold testimony. While it may be that section 1503, as amended, no longer applies to attempts to silence witnesses, a lawyer's advice to a witness to "take the fifth" might still be ille-

88. Id. at 663-64. Thus, in the court's view, even a partially innocent motive on the lawyer's part would not negate the element of "corrupt" intent. Id.

89. Id. at 663. The appellate court quoted the district judge's observation that "if the whole thing were set up to protect the Bernsteins rather than Goodwin, I would have found [Fayer] guilty" and that to convict Fayer, "[i]t would have to be found that protection of [his clients] was 'corrupt,' i.e., that Fayer was acting with knowledge of crimes committed, as opposed to giving innocent counsel." Id. at 664.

Commentators discussing the lawfulness of lawyers' communications with witnesses have not acknowledged fully the possibility that advising a witness about the privilege against self-incrimination may be a crime when the lawyer's motive is to advance her client's penal interests. For example, one treatise on the ethics of criminal defense practice advises:

It is not a crime for a lawyer to merely suggest to a person he should refuse to talk to the government or invoke the privilege against self-incrimination. If, however, the advice is with a corrupt intent (e.g., bribery) to cause the witness to remain silent, a crime would have occurred.

J. HALL, PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 21.11, at 616 (1987) (footnotes omitted). The parenthetical reference to bribery suggests erroneously that, except when otherwise illegal means are employed to procure a witness's silence, the lawyer's intent will not be deemed to be "corrupt."

Similarly, a treatise on white-collar crime advises that counselling a witness to remain silent is unlawful when the lawyer's intent is "merely to prevent the witness from disclosing information that is incriminating to the lawyer," but it is lawful for a lawyer to give "honest, uncorrupt and disinterested advice to assert the privilege." 3 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 12.08, at 102-03 (1984) (citations omitted). This commentary fails to clarify that the lawyer's advice may be deemed "corrupt" and "interested" not only when the lawyer's purpose is to protect herself from incrimination, but also when her motive is to protect her client.

90. 818 F.2d 980 (1st Cir.), cert. denied, 484 U.S. 913 (1987). The circuit court stated: [W]e emphatically reject the notion that a law degree, like some sorcerer's amulet, can ward off the rigors of the criminal law. No spells of this sort are cast by the acceptance of a defendant's retainer. We decline to chip some sort of special exception for lawyers into the brickwork of § 1503. By our reckoning, attorneys cannot be relieved of obligations of lawfulness imposed on the citizenry at large. Acceptable notions of evenhanded justice require that statutes like § 1503 apply to all persons, without preferment or favor. As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct. To the exact contrary, they should be held to the very highest standards in promoting the cause of justice.

Id. at 996.

gal, albeit under section 1512. The Fayer court's view of "corrupt" intent undoubtedly would be relevant to the more recent statute.

One might reason, however, that as Scrooge's lawyer, your motive in advising Cratchit about the fifth amendment privilege would not be "corrupt." To begin with, unlike Fayer, who was a director of the corporation under investigation, and whose fortunes, therefore, might have risen and fallen with those of the corporation itself, you have no relationship with the target of the investigation other than as attorney. Therefore, unlike Fayer, you will not obtain any personal benefit from the witness's assertion of the privilege. The problem with this theory, however, is that, in the Fayer court's view, a lawyer's motive does not have to be self-interested to be "corrupt."

The Second Circuit's definition of "corrupt" intent might assist you in your decision. In Fayer the court stated: "It would have to be found that protection of [Fayer's clients] itself was "corrupt," that is, Fayer was acting with knowledge of crimes committed, as opposed to giving innocent counsel."92 In your own situation, as you perceive it, your motives may be "innocent" for two reasons. First, unless Scrooge confessed to you,93 you might not have actual knowledge94 that Scrooge committed a crime.95 Moreover, the person whom you are advising is not just a third party; Cratchit is your client's employee. You and your client, therefore, could claim to have Cratchit's interests at heart.96

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92. Fayer, 523 F.2d at 664.
93. According to Professor Kenneth Mann, some white-collar defense lawyers will refrain from asking their clients whether they committed the crime under investigation. See K. MANN, supra note 14, at 103-11.
94. For a recent decision of the Second Circuit explaining what it means for a lawyer to have "knowledge" of someone else's criminal activity, see Doe v. Grievance Committee, 847 F.2d 57, 62 (2d Cir. 1988). For commentary critical of that decision, see Green, supra note 36.
95. The Second Circuit's interpretation of "corrupt" intent may be unduly narrow. To find "corrupt" intent on the part of an attorney, Fayer requires a finding "that [the attorney] was acting with knowledge of crimes committed, as opposed to giving innocent counsel." Fayer, 523 F.2d at 664. Under this interpretation, a lawyer who advises a witness to assert the fifth amendment privilege does not have "corrupt" intent if she knows only that her client is suspected of a crime, but does not know that her client is actually guilty. The lawyer's intent is innocent for purposes of the obstruction statute even if the lawyer's true motive is not to advance the witness's interests, but solely to protect her own client by inducing the witness to withhold testimony that inculpates her client. This interpretation encourages lawyers to avoid learning the full scope of their clients' past behavior. Cf. K. MANN, supra note 14, at 104-11 (describing how and why white-collar defense lawyers sometimes avoid learning information from their clients).

The First Circuit appears to have adopted a broader interpretation of "corrupt" intent for purposes of the obstruction statute. See Cintolo, 818 F.2d at 991-95. Within its definition of "corrupt motive," the Cintolo court appears to have included an intent "to hinder the due administration of justice" by influencing a witness to withhold truthful testimony. Id. at 991-92. If the lawyer's advice is not designed to enable the witness "to invoke legitimate rights for his own benefit," id. at 993 (emphasis added), but is intended for the benefit of a third party, then the lawyer's motive would be deemed corrupt.

96. This, presumably, is the basis for the distinction in Rule 3.4(f) of the Model Rules, which permits a lawyer to give legal advice to a client's employee or relative, although not to other third parties. See supra note 47 and accompanying text. Under Fayer, however, a lawyer's desire, in part, to promote the witness's interests, would not negate the element of "corrupt" intent. If the lawyer's...
You also might decide to limit your advice in a manner that arguably distinguishes your own proposed conduct from that of Fayer. At Fayer's meeting with the potential government witness, he and his clients placed substantial pressure on the witness to assert the privilege.97 In contrast, you might simply remind Cratchit of what he probably knows already, namely, that he has a constitutional right not to incriminate himself. To be sure, a witness might reasonably infer from this reminder that you believe he ought to avail himself of the fifth amendment privilege. This is true even if you sprinkle your advice with disclaimers such as, "I'm not telling you what to do," or "you can testify or not testify, it's up to you." Why else, a witness might ponder, would you have mentioned the fifth amendment privilege in the first place, if you did not want him to assert it? Nevertheless, it could be argued that this advice is permissible, because you did not actually "persuade" Cratchit to assert the privilege or intend to "cause or induce" him not to testify. You simply meant to enable him to make an informed choice among legally available options.

For these reasons, notwithstanding the Fayer decision, you could reasonably conclude that the federal obstruction-of-justice statutes do not make it a crime to advance your client Scrooge's interests by advising his employee, Cratchit, of his fifth amendment right to remain silent. This conclusion, however, is no more than a prediction of how a later court in your jurisdiction would apply the federal criminal law to your conduct.98 Having made this prediction, you would still have to acknowledge the significant, and sobering, possibility that a federal prosecutor would consider your conduct illegal and that the federal courts would agree.

III. ZEALOUS REPRESENTATION AND THE AMBIGUOUS BOUNDS OF THE CRIMINAL LAW

The first part of this Article described a scenario in which you, as a criminal defense lawyer, are faced with the question whether, to promote your client's interests, you may properly advise a potential witness to assert the fifth amendment privilege. It would be fair for you to conclude that neither the ethical codes nor the obstruction-of-justice provisions of the criminal law forbid giving this advice. At the same time, however, you would have to acknowledge some possibility that the criminal laws would be interpreted expansively to reach the proposed conduct.

This situation is far from unique. There are many instances, besides encounters with the opposing party's witnesses, when an advocate who fully intends to act lawfully risks engaging in obstruction of justice because of the silence or ambiguity of the ethical codes. For example, because the Code does not specifically establish when it is wrong for a lawyer to counsel a client to

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97. See supra note 79.
98. Cf. J. Frank, COURTS ON TRIAL 9-12 (1950) (observing that the only way one can determine his "legal rights" is to "see what a [particular] court will do about [them]").
destroy records that may be of evidentiary significance in a case,\textsuperscript{99} the propriety of this conduct is largely determined by the criminal law.\textsuperscript{100} The Code also leaves it largely to the criminal law to determine when a lawyer must take the initiative to disclose evidence of a crime that he has in his possession.\textsuperscript{101} The Code fails to impose any significant limit on a lawyer's conduct in preparing his own witnesses for trial,\textsuperscript{102} with the result that the propriety of a lawyer's conduct must be defined primarily by criminal laws dealing with subornation of perjury.\textsuperscript{103} Similarly, the most significant limits on the advice a lawyer may give a client are established, not by the ethical codes,\textsuperscript{104} but by the laws that make it a crime to aid and abet unlawful conduct.\textsuperscript{105}

The obstruction-of-justice provisions are not the only criminal laws with which advocates contend. Additionally, lawyers must consider whether the failure to disclose facts of consequence to a court or to an individual other than the client will be construed as a criminal fraud, even where the ethical codes do not clearly require disclosure. In many jurisdictions, a lawyer's ethical duty to disclose a client's fraud on a court or on another person, or to disclose a third party's fraud on a court, arises only in the extraordinarily rare event that the lawyer has "knowledge" of the fraud and that the source of the knowledge is neither privileged nor confidential.\textsuperscript{106} A lawyer runs the risk that criminal fraud provisions will be read more broadly, to proscribe material omissions even where the ethical rules require no disclosure.\textsuperscript{107}


\textsuperscript{100} See generally id. at 169-99 (discussing the application of criminal law to the destruction of records).

\textsuperscript{101} See Lefstein, Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules, 64 N.C.L. REV. 897, 918-21 (1986).

\textsuperscript{102} See Appelgate, Witness Preparation, 68 TEX. L. REV. 277, 279-80, 302-04, 328-34 (1989). The most substantial limit is contained in DR 7-102(A)(6), which prohibits a lawyer from "[p]articipating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." MODEL CODE, supra note 1, DR 7-102(A)(6).

\textsuperscript{103} See K. MANN, supra note 14, at 16-18; R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS 205-06 n.1 (1988) ("Experienced lawyers advise that one 'get to the witness first.' This is sound advice, whether or not counsel has an improper motive in mind, because a witness can be subtly recruited to the client's position or point of view before opposing counsel makes his or her rounds."); see also In re Eldridge, 82 N.Y. 161, 171 (1880) (stating that an attorney's "duty is to extract the facts from the witness, not pour them into him"); H. DRINKER, supra note 23, at 86 ("Just where is the line between developing all the facts known to the witness and indirectly coaching him by repeated statements of facts and conclusions of fact which counsel desires to establish, is, of course, a question of good faith.").

\textsuperscript{104} See, e.g., MODEL CODE, supra note 1, DR 7-102(A)(7) (lawyer may not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

\textsuperscript{105} See generally Hazard, How Far May A Lawyer Go in Assisting a Client in Legally Wrongful Conduct?, 35 U. MIAMI L. REV. 669, 681-82 (1981) (discussing guidance provided by criminal law in defining when an attorney wrongfully counsels or assists a client in acting illegally).

\textsuperscript{106} See MODEL CODE, supra note 1, DR 7-102(B); see generally Brazil, Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law, 44 Mo. L. REV. 601 (1979) (discussing the lawyer's ethical duty when a client commits perjury); Callan & Davis, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 RUTGERS L. REV. 332 (1976) (discussing the lawyer's ethical duty to reveal client misconduct); Green, supra note 36 (discussing the lawyer's ethical duty to reveal fraudulent conduct by nonclients). The lawyer sometimes has a greater duty of disclosure where the fraud is ongoing.

\textsuperscript{107} One criminal prosecution that illustrated this risk was brought in 1988 against a prominent
Likewise, lawyers must be concerned that when they participate aggressively in negotiations, threats about which the ethical rules are silent may be proscribed by the criminal law of extortion. Other than forbidding the making of false statements of law or fact, the ethical codes scarcely speak to the issue of what is proper in negotiations. The only type of threat that is forbidden explicitly by the Model Code is a threat to expose someone's criminal conduct made "solely to obtain an advantage in a civil matter." With respect to other types of threats that lawyers make in the course of negotiations, the lawyers' codes leave it to the criminal law to make distinctions between what is and what is not proper.

A leading authority, Professor Charles W. Wolfram, has pointed out that the Model Code's silence results in substantial uncertainty about what types of threats an attorney properly may make in the course of negotiating on behalf of a client. On the one hand, it clearly is permissible to threaten to bring a legitimate lawsuit if a debt is not paid; on the other hand, it clearly is improper to threaten to take action that would not be lawful, such as to "break a debtor's thumbs in the absence of prompt payment." In between these extremes, however, a substantial area of uncertainty creates "a potential quagmire for overly aggressive negotiators." For example, it is unclear whether a plaintiff's lawyer may threaten that, unless the case is settled on favorable terms, she will reveal embarrassing information to the defendant's competitor or disclose to other plaintiffs information that may be useful to them.

Manhattan attorney who had represented a plaintiff in a wrongful death action. The attorney, who ultimately was acquitted, was accused of committing a "deceit" on the court during the course of the representation because of his failure to disclose that one of the plaintiff's witnesses had lied on cross-examination. See Friedman Acquitted in Perjury Case, N.Y.L.J., Nov. 3, 1988, at 1, col. 3.


109. Model Code, supra note 1, DR 7-105(A) provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The attorneys' codes of at least two states expand this rule to prohibit threats to present "administrative or disciplinary" charges as well as criminal charges. See Calif. R. 5-100; Me. Bar Rule 3.6(d); see generally C. Wolfram, Modern Legal Ethics 716-19 (1986) (discussing the propriety of threats by lawyers).

In contrast, the Model Rules do not contain even this prohibition. See infra note 133.

110. See C. Wolfram, supra note 109, at 715.

111. Id. at 714-15.

112. Id. at 714. There is ample case law upholding criminal convictions of individuals who, for pecuniary gain, threatened to take action that would be entirely legal. See, e.g., Moore v. Newell, 401 F. Supp. 1018, 1021 (E.D. Tenn. 1975) (representative of charity properly convicted of violating state extortion statute by picketing business establishment of merchant who declined to contribute to charity), aff'd, 548 F.2d 671 (6th Cir. 1977); Carricarte v. State, 384 So. 2d 1261 (Fla.) (l仅yer properly convicted of felonious extortion for threatening to give statements to the press), cert. denied, 449 U.S. 874 (1980). How far the law should extend as a general matter has been the subject of substantial scholarly debate. See, e.g., Lindgren, Unraveling the Paradox of Blackmail, 84 Colum. L. Rev. 670 (1984) (setting forth a theory of blackmail explaining the illegality of combining otherwise legal ends and means). The line between proper and improper threats is no more clear insofar as the conduct of lawyers in particular is concerned. See Livermore, Lawyer Extortion, 20 Ariz. L. Rev. 403, 406 (1978).

113. The well-known case of State v. Harrington, 128 Vt. 242, 260 A.2d 692 (1969), illustrates the risk that an attorney may be charged with the crime of extortion for having made threats in
Whenever a lawyer encounters a situation such as one of these in which the bounds of zealous representation are set by the criminal law, he faces a series of questions about the scope of his ethical duty. For example, as the lawyer for Scrooge, trying to decide whether to advise Cratchit to "take the fifth," you would have to ask: Does the duty of "zealous representation" require me to engage in the proposed conduct that I believe to be lawful, but which a court may later find to be unlawful? Does the duty to remain "within the bounds of the law" require me to refrain from this conduct which may be unlawful, although I believe it not to be so? Does the ethical code give me discretion whether or not to engage in this borderline conduct and, if so, how should I exercise that discretion? These questions arise because the ethical codes do not explicitly proscribe conduct that may run afoul of a provision of the criminal law whose scope is uncertain. An attorney, therefore, must decide whether to take the risk that conduct which he believes to be lawful will later be found to be unlawful—with all the adverse consequences that flow from such a finding.

Although it is not a rare occurrence for the bounds of zealous representation to be set by ambiguous criminal provisions, and although the questions that an attorney faces in this situation are created largely by the ethical codes, the ethical codes provide little guidance about how to deal with the ambiguity of the criminal laws. The failure of the ethical codes to address this problem is especially surprising given the codes' recognition that lawyers frequently must deal with legal ambiguity. For example, one Ethical Consideration of the Model Code of Professional Responsibility recognizes:

The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.\(^{114}\)

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settlement negotiations that are not proscribed by the attorneys' codes. Harrington represented a woman seeking to divorce her husband on the grounds of adultery. He arranged for a woman to seduce the client's husband and for photographs to be taken of their tryst. Afterwards, Harrington wrote the husband a letter offering to settle the case. The letter stated that, in exchange for $175,000, the client would give up any claim on her husband's other property. In addition, all embarrassing recordings and photographs would be returned. And, finally, the client would not divulge any embarrassing information about her husband, including information that might be of interest to the Internal Revenue Service, the Customs Service, or other government agencies. \(\text{Id. at 244-49, 260 A.2d at 693-96.}\)

Based on the letter, Harrington was tried and convicted of attempted extortion. In upholding his conviction, the Vermont Supreme Court found that it was within the province of the jury to read the contents of Harrington's letter as "veiled threats" to expose the husband to income tax liability, and found that any attempt to extort money by threatening to expose someone's incriminating conduct is extortionate. \(\text{Id. at 253-54, 260 A.2d at 699.}\)

\(^{114}\) Model Code, supra note 1, EC 7-2; see also Model Rules, supra note 1, Rule 3.1 comment, which provides the following:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not
The Ethical Considerations go on to address how a lawyer should deal with legal ambiguity in two contexts: when he is called on as an advocate to justify past conduct of a client that may have been unlawful, and when he is called on as an advisor to give advice to a client about the client's proposed future conduct:

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.\(^{115}\)

Although these Ethical Considerations are designed to constitute "principles upon which the lawyer can rely for guidance,"\(^{116}\) they provide no guidance to a lawyer who is trying to decide whether to engage in conduct that might possibly turn out to be criminal. In some senses, a lawyer in this situation is an "adviser" to himself. He must predict whether his proposed conduct is lawful. He has no duty to resolve all doubts in favor of his client; that duty applies when a lawyer is advancing questionable legal justifications for a client's past conduct,\(^{117}\) but not when a lawyer is considering whether to undertake future conduct himself.\(^{118}\) Instead, the lawyer must make a disinterested assessment of the

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always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

115. Model Code, supra note 1, EC 7-3.
116. Id. Preliminary Statement.
117. See, e.g., State Bar v. Corace, 390 Mich. 419, 434, 213 N.W.2d 124, 132 (1973) (the court stated:

There are a larger number of gray areas in the law. When a question is doubtful, the lawyer's obligation to his client [when advancing claims of defenses] permits him to assert the view of the law most favorable to his client's position. . . . [O]ur adversary system 'intends, and expects, lawyers to probe the outer bounds of the law, ever searching for a more efficacious remedy or a more successful defense.].

118. The Supreme Court of Tennessee has described the inapplicability of this duty in the following manner:

Appellant directs our attention to the lawyer's duty to represent his client zealously within the bounds of the law, as justifying his action. In his brief he cites the Code of Professional Responsibility, Canon 7, EC 7-2 wherein this sentence appears: "The bounds of the law in a given case are often difficult to ascertain." Appellant says, in substance, that in this case he was determined to represent his client as zealously as possible and while his actions may have been marginal he was justified in resolving the doubt in favor of the advantage to his client. We are cited to a single sentence in EC 7-3 to that effect: "While serving as advocate, a lawyer should resolve in favor to his client doubts as to the bounds of the law."

Neither EC 7-2 nor EC 7-3 are concerned with the type of ethical conduct involved in this case. Those sections deal with questions involved in the advocacy of principles of law to wit: the line between urging frivolous interpretations of statutes, constitutional law and judicial opinions versus responsible, though perhaps unique interpretations.
lawfulness of his own proposed conduct, just as he would if he were advising a client about the lawfulness of the client's future conduct.

If a lawyer concludes that proposed conduct that might advance a client's interests probably is not a crime, but that there is a risk that an ambiguous criminal law will be interpreted to the contrary, does the requirement of zealous advocacy require her to go up to the line of criminality, as she perceives it? Some high-minded lawyers may view it as improper to engage in conduct of "doubtful legality" even if the lawyer reasonably predicts that a court ultimately would resolve the doubts in favor of the legality of the conduct. A cautious approach is the one most consistent with "the obligation of lawyers to maintain the highest standards of ethical conduct," and, thus, the one that best promotes the bar's interest in preserving public confidence in and respect for the legal profession.

On the other side, however, many lawyers, including criminal defense lawyers in particular, espouse the view that an attorney has an ethical obligation to engage in borderline conduct when she believes that the proposed conduct ultimately is not unlawful and that it will benefit the client. DR 7-101 of the Model Code supports this view, providing that "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means," except that he may "[r]efuse to . . . participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." The implication is that a lawyer must seek his client's objectives through means that he believes to be legal, even if there is some support for an argument that the conduct is unlawful.

The view that makes the most sense, however, is that while lawyers may at their own peril approach the line of criminality, they have no obligation to do so, particularly when the line is drawn unclearly. An absolute duty to go up

Wright v. Roberts, 573 S.W.2d 468, 473 (Tenn. 1978).
119. See, e.g., Friedman v. Dozorc, 412 Mich. 1, 54, 312 N.W.2d 585, 606 (1981) ("Zealous representation" contemplates that the lawyer will go to the limits for his client.").
120. Cf. Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958) ("The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is . . . of doubtful legality.").
121. MODEL CODE, supra note 1, Preamble.
122. See id. ("[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.").
123. See K. MANN, supra note 14, at 17-18 ("Providing the best available defense to a client—in a criminal case as well as a civil case—requires an acute sense of how to approach as close as possible to the margin of legitimate action, without going over it."); see also Carberry, supra note 21, at 301 ("While certain conduct appears ethically questionable and raises difficult issues in the abstract, there is really no gray area of ethical conduct for many practitioners. The only conduct considered prohibited is that which is expressly forbidden; everything else is justified as zealous advocacy.").
124. MODEL CODE, supra note 1, DR 7-101(A)(1).
125. Id. DR 7-101(B)(2).
126. Cf. Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930) ("The very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.").
127. This is probably the view that most lawyers, including most defense lawyers, actually hold. See, e.g., Tigar, One Man's Freedom, One Man's Faith, 16 LITIGATION, No. 3, 63 (1990) ("Just
to the line of an ambiguous criminal law poses unjustifiable risks to lawyers. It rarely would be a defense to criminal charges that the lawyer mistakenly believed his conduct was lawful.\textsuperscript{128} Nor would the existence of the ethical duty itself provide a defense, because judges, in adopting ethical rules, have no authority to preempt provisions of the criminal law.\textsuperscript{129} It would be anomalous to suppose that the ethical codes require lawyers to risk their liberty and livelihoods while representing a client. As a general rule, the ethical codes give lawyers discretion to protect themselves in the course of helping their clients.\textsuperscript{130} Moreover, such a requirement would undermine the bar's interest in ensuring that lawyers obey the criminal law. A lawyer who customarily engages in conduct of "doubtful legality" faces a substantial likelihood that, sooner or later, he will find himself on the wrong side of the line.\textsuperscript{131} For these reasons, it is fair to conclude that conduct that might further a client's objectives is not "reasonably available" within the meaning of DR 7-101 when there is a significant possibility that the conduct might be deemed illegal by a court.

IV. THE NEED FOR EXPLICIT ETHICAL LIMITS ON ZEALOUS ADVOCACY

By permitting ambiguous criminal laws to set the bounds of zealous advo-

\begin{itemize}
  \item remember, when times are tough and it looks like someone's going to jail, make sure it's your client."
  \end{itemize}

\textsuperscript{128} As a general rule, a mistake of law is not a defense unless knowledge of the law is an element of the criminal offense. See W. LAFAVE & A. SCOTT, CRIMINAL LAW \textsection 5.1(g) (2nd ed. 1986). In contrast, in disciplinary proceedings, a lawyer generally will not be sanctioned for violating an ambiguous disciplinary provision that he reasonably believed did not apply to his conduct. See, e.g., In re Hinds, 90 N.J. 604, 635-36, 449 A.2d 483, 500 (1982) (The court declined to find attorney in violation of any ethical rule in part because, in a case involving an ethical precept rather than a criminal law, the decision itself is a sufficient explanation of the ethical responsibility of attorneys.)

\textsuperscript{129} The famous "buried bodies" case provides a rare example of a case in which the reach of a criminal law was found to be circumscribed by a lawyer's ethical duty, in this instance, the duty to preserve client confidences. See People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798, aff'd, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), aff'd, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976). For commentary on this case, see Chamberlain, \textit{Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers}, 25 BUFFALO L. REV. 211 (1975); Freedman, \textit{Where the Bodies Are Buried: The Adversary System and the Obligation of Confidentiality}, 10 CRIM. L. BULL. 979 (1974).

\textsuperscript{130} For example, the ethical codes always have provided that a lawyer may divulge client confidences when necessary to collect a fee or to defend against accusations of wrongful conduct. MODEL CODE, supra note 1, DR 4-101(C)(4); MODEL RULES, supra note 1, Rule 1.6(b)(2). Similarly, the codes allow a lawyer to withdraw from the representation of a client when the client stops paying the lawyer's fee. MODEL CODE, supra note 1, DR 2-110(C)(1)(f); MODEL RULES, supra note 1, Rule 1.16(b)(4).

\textsuperscript{131} Suppose, for example, that a lawyer engages in four different acts, each of which, under different criminal laws, is of questionable legality. Suppose, further, that in the lawyer's view, although each act would most likely be found lawful, there is a 20\% chance that it would be found unlawful by a court. In such a case, based on the lawyer's own predictions, there would be almost a 60\% likelihood that at least one of the acts would be found to be unlawful.

Moreover, it might reasonably be expected that the lawyer's predictions will understate the likelihood that his own future behavior will be found unlawful, since, in making that assessment, he will be influenced, consciously or unconsciously, by the desire to further the client's interests. Cf. Wheat v. United States, 486 U.S. 153, 163 (1988) (attorney may be reluctant to convey to his client a disinterested assessment of the likelihood that the lawyer will have a conflict of interest). This problem can be addressed by obtaining the assessment of a lawyer who is not involved in the case. Cf. United States v. Curcio, 680 F.2d 881, 890 (2d Cir. 1982) (defendant should be allowed to consult with independent counsel about the likelihood that retained counsel will have a conflict of interest).
cacy, the ethical rules induce lawyers to engage in borderline, if not criminal, conduct. The duty of zealous advocacy exerts pressure on lawyers to take risks on behalf of clients that they ordinarily might not take on behalf of themselves.\(^{132}\) This pressure is particularly palpable in areas of practice such as criminal defense work. A criminal defense attorney will often find that his client's interests would be well served by conduct that, though not specifically proscribed by the ethical codes, approaches the gray line drawn by ambiguous criminal laws. For this lawyer, the apparent willingness to defend a client aggressively is often necessary to attract clients, especially if the lawyer seeks to be retained by white-collar clients who have the financial resources and expertise to shop around for able counsel. To a sophisticated person who is or may be facing criminal charges, aggressiveness in defense is likely to be considered an important qualification for a lawyer. A lawyer will not receive many clients if he develops a reputation for deliberately declining to take steps that he believes to be lawful and that would advance his clients' interests. Therefore, defense lawyers may feel compelled to skirt the edge of legality as a way of attracting clients.

When attorneys feel compelled to engage in borderline conduct, a problem is created not only for those attorneys, but for the organized bar as well. That attorneys engage in borderline conduct on a regular basis, and can point to the ethical codes as a justification for doing so, invariably breeds public disrespect for the legal profession. This phenomenon is compounded by the inevitability that, from time to time, attorneys who are trying to act lawfully will predict erroneously the direction of the criminal law and engage in conduct that is in fact criminal.

Why do the ethical codes engender these problems? In a limited number of situations, the drafters of the ethical codes may have believed that they were justified in not proscribing particular conduct that approaches the line of criminality. For example, in some situations, the silence of the Model Code or the Model Rules may have reflected the drafters' judgment that the conduct in question is in fact improper, but that it would be duplicative to restate clear criminal provisions in the ethical codes. This judgment apparently prompted the drafters of the Model Rules not to include a counterpart to DR 7-105(A) of the Model Code, which deems it improper to "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."\(^{133}\)

\(^{132}\) Ordinarily, an individual has no justification that society recognizes as acceptable for approaching the line of criminality. It is therefore fair "to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). In contrast, a lawyer has a duty, recognized as important by society, to provide zealous representation to his clients. The existence of this duty may be thought to justify a lawyer, in defense of a client, to come closer to the area of proscribed conduct than he might ordinarily do when simply acting on his own behalf.

\(^{133}\) The conduct proscribed by this disciplinary rule is also a crime. It would constitute extortion or, in some jurisdictions, the ancient crime of "compounding a crime." See, e.g., N.Y. PENAL L. § 215.45 (1988) ("A person is guilty of compounding a crime when: (a) He solicits, accepts or agrees to accept any benefit upon an agreement or understanding that he will refrain from initiating a prosecution for a crime"); In re Abrahams, 158 A.D. 595, 596-97, 143 N.Y.S. 927, 929-30 (1st
In other instances, the drafters of the ethical codes may have decided that, wherever the criminal law may draw lines and no matter how fuzzy those lines may be, the codes should not impose any further restrictions on what a lawyer may do on behalf of a client. For example, as noted earlier, the Model Code’s only guidance regarding the propriety of threats made in negotiations is in forbidding a threat to expose someone’s criminal conduct that is made “solely to obtain an advantage in a civil matter.”134 Despite uncertainties about the scope of the law of extortion, the drafters of the ethical codes deliberately may have opted to let the criminal law set the bounds of proper conduct in negotiations. If the ethical codes imposed special restrictions on lawyers involved in negotiations, the value of lawyers would diminish relative to self-representation or the representation of nonlawyers. Deferral to the criminal code, therefore, encourages clients to retain attorneys to render a service that clients might otherwise perform themselves or retain nonlawyers to perform.135 Because virtually the only limits imposed on a lawyer in business negotiations are those under which nonlawyers would similarly labor, the lawyer’s services are much more attractive. The lawyer can do everything that anyone else could do on behalf of a client, and presumably she will do it more skillfully.

In still other situations, the limits imposed by the ethical codes may be less restrictive than those imposed by the criminal law because many in the organized bar do not believe that the additional restraints are appropriate. This belief may explain the manner in which the ethical rules deal with the disclosure of fraudulent conduct. The disclosure provisions of the ethical codes are the product of considerable debate and deliberation, and apparently reflect a consensus about when disclosure should and should not be required of lawyers. Presumably, the drafters believed that, because of concerns for preserving client confidences and for protecting client interests in general, lawyers should have only a limited duty under the ethical codes to disclose frauds by clients and third parties. Lawyers simply must be alert to the possibility that, in their jurisdiction, courts could read the criminal fraud provisions to impose an obligation of disclosure that exceeds the ethical codes.

In most instances, however, it is extremely doubtful that the drafters of the ethical codes had any credible justification for relying on ambiguous criminal provisions. Of course, the drafters’ reasons for failing to address clearly the propriety of any particular type of professional conduct is usually just a matter of speculation, because the drafting process was essentially private and unrecorded.136 But it is reasonable to conclude that, for the most part, the ABA drafters either did not consider at all the questions that are relegated to the

Dept. 1913). Apparently, the drafters of the Model Rules believed that a rule on this subject would be superfluous, since threats to present criminal charges already were forbidden by the criminal law of extortion, and a lawyer who made extortionate threats could be disciplined for violating that law. See C. Wolfram, supra note 109, at 718.

134. Model Code, supra note 1, DR 7-105(A); see supra note 109 and accompanying text.

135. See C. Wolfram, supra note 109, at 714.

136. For a discussion of the problems of interpretation created by the absence of a record of the drafters’ deliberations, see Green, supra note 36, at 539-42.
criminal law or declined to resolve those questions clearly and explicitly for reasons that had nothing to do with their beliefs concerning the propriety of the particular conduct.

The ethical codes' failure to deal explicitly with the question raised at the outset of this Article—namely, whether it is proper to advise a witness to "take the fifth"—illustrates the drafters' unjustified reliance on the criminal law. They could not have concluded, for example, that the criminal law resolves this question so clearly as to eliminate the need to address it in the ethical codes. On the contrary, as discussed above, the scope of the law against obstruction of justice is extremely unclear.137 Because the drafters could not know precisely how the obstruction-of-justice provision applied to lawyers, they could not have concluded reasonably that the criminal law was a good one, and that no further restrictions were warranted. Nor could they have concluded that the criminal law provides enough guidance to make an ethical rule on the subject unnecessary.

It is equally implausible that the drafters wanted to limit the restrictions imposed on criminal defense attorneys to encourage clients to retain attorneys. This rationale makes no sense when applied in the area of advocacy, as distinguished from business negotiations. While clients may consider themselves and their nonlawyer agents well qualified to negotiate many commercial matters without assistance, and so might refrain from employing a lawyer who could not negotiate as vigorously as the client could on his own,138 nonlawyer agents are not permitted to represent clients in litigation, and few clients would feel competent representing themselves. Therefore, clients retain attorneys to represent them in litigation—and particularly in criminal litigation—without regard to the ethical restraints under which attorneys labor.

Nor can it be concluded that the failure to address this question explicitly reflected the drafters' affirmative conclusion that, unless the conduct is otherwise proscribed by the criminal law, lawyers should be permitted to advise witnesses to assert the fifth amendment privilege. The wisdom of allowing lawyers to give this advice is, in the very least, debatable. It is hard to imagine that the drafters of the ethical codes deliberately would have endorsed this questionable conduct—and thereby placed lawyers at risk of violating the criminal law—without first making it clear that they were doing so and inviting comment. Nothing in the professional literature indicates that prior to the adoption of the ethical codes there was any serious discussion of this subject either among the drafters themselves or within the legal profession generally.139

137. See supra notes 65-98 and accompanying text; see also Uviller, supra note 13, at 1883 ("The statutory definition of the crime of obstruction of justice is a model of imprecision.").

138. See C. Wolfram, supra note 109, at 714.

139. Similarly, the failure to establish additional bounds around zealous representation cannot be ascribed purely to a philosophical view that there should be no ethical restraints on advocates. Although the view might have been taken that the appropriate role of an advocate is to do on behalf of the client precisely what the client would do for himself if he were trained in the law, it is clear that the drafters of the Code did not take this laissez faire approach, but, at least in some circumstances, imposed restraints on advocates that would not apply to laymen. To take just two examples: A lawyer is forbidden to communicate directly with an opposing party who has retained counsel, but
If the drafters of the ethical codes had any reason, other than inattention, for failing to deal with this question in the ethical codes, their reason undoubtedly did not reflect a considered view of whether or not it is proper to advise a witness to assert the constitutional privilege. The drafters of the ethical codes may have believed that this and similar questions involving the propriety of conduct in the course of criminal advocacy were not important enough to address in a code of general applicability to lawyers.\textsuperscript{140} Or, while recognizing the importance of these issues, the drafters may have decided not to address them to save themselves time, or for reasons of political expedience.\textsuperscript{141} The most likely explanation, however, is probably the cynical one that Professor Geoffrey Hazard suggested: The drafters largely ignored questionable, secretive acts of criminal defense lawyers simply to deny the reality that lawyers regularly engage in such conduct.\textsuperscript{142}

The profession should not continue to ignore borderline professional conduct. As a general rule, the ethical codes should proscribe clearly and explicitly professional conduct that comes close to the line drawn by ambiguous criminal laws. This approach should be taken for at least two reasons. The first, and more pragmatic, reason is that by proscribing conduct that approaches the line of criminality, the ethical codes would clarify the bounds of zealous advocacy in a manner that prevents lawyers from unintentionally engaging in criminal conduct. Lawyers would not have to rely on a potentially erroneous prediction about the scope of the criminal law in order to vigorously represent their clients.

The second reason is that this approach would enable the moral judgments of the organized bar to conform, where appropriate, with the moral judgments of society in general. The criminal law generally reflects a societal expression that particular conduct is not only unethical, but so wrongful that it should be punished. When professional conduct approaches the line of criminality, the public likely would view it as unethical, whether or not it should be punished. Absent a compelling reason for viewing the conduct differently, the organized bar ought to rely on the popular conception and condemn the particular conduct by adopting an ethical rule that procribes it.

One example of an ethical question that should be resolved in light of this

\textsuperscript{140} For example, the drafters may have believed that the propriety of advising witnesses about the fifth amendment privilege is an issue that does not often arise and that relates to only a small group of lawyers, namely, defense attorneys. A similar expression of the perceived unimportance of the issue apparently was reflected in the decision of the ABA Committee on Professional Ethics to deal with this issue informally in ABA Comm. on Professional Ethics, Informal Op. 575 (1962), rather than in a formal opinion. See \textit{STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS} 6 (1967) ("Informal Opinions are responses to questions that are comparatively narrow in scope and arise infrequently.").

\textsuperscript{141} The Code of Professional Responsibility was criticized for dealing almost exclusively with the issues that were the concern of its predecessor Canons of Professional Ethics and failing to deal with many additional problems of contemporary law practice. The more recent Model Rules of Professional Conduct, although intended to redress that shortcoming, have received much the same criticism. See C. WOLFRAM, supra note 109, at 59-60.

\textsuperscript{142} Hazard, supra note 21, at 1534.
approach is the one with which this Article began: the question whether it is proper to advise someone other than a client to assert the fifth amendment privilege. In the absence of concerns about the legality of this conduct, attorneys reasonably might be permitted to engage in it. This is true largely because the criminal law and the ethical codes approach this question from vastly different perspectives.

From the perspective of the criminal law, there is little reason to distinguish a lawyer from anyone else who desires to block the prosecution's access to testimony. The overarching purpose of the obstruction-of-justice provisions of the criminal law is to preserve evidence and truthful testimony for the prosecution's use in judicial proceedings. The preservation of truthful testimony is undermined when a lawyer acts with the design of convincing a witness not to testify, even when he gives legally accurate advice. In contrast, the attorneys' codes reflect a view of proper attorney conduct that revolves primarily around the interests of individual clients, rather than the interests of the administration of justice. The advocate's overarching function is the protection of the client. One means of serving that function is to control information that otherwise might be used to the client's detriment by the opposing party. Thus, the very aim that the obstruction-of-justice statute deems "corrupt"—namely, the protection of a guilty person from having his crimes discovered—is often the principal aim of a defense attorney whose client is under investigation. From an attorney's perspective, there is no reason why this aim should not be furthered by advising an unrepresented witness to assert a constitutionally available privilege.

Moreover, from the advocate's viewpoint, advising a witness to assert the fifth amendment privilege furthers the legitimate interests not just of the attorney's client, but of the witness as well. As the Illinois court noted in People v. Wolf, the availability of the fifth amendment privilege is something that an unrepresented witness has an interest in knowing. While an attorney may suggest that the witness secure his own counsel, or may even offer to assist him in doing so, these alternatives are not always viable. When the witness cannot secure independent representation, the only alternative to letting the witness go without the necessary advice about his rights is to permit the representative of an interested party to advise him.

144. Id. at 61, 514 N.E.2d at 1220-21; see supra notes 40-44 and accompanying text.
145. In many cases, prudent white-collar defense attorneys avoid the need to communicate directly with their clients' employees or associates by arranging for other cooperative attorneys to represent these individuals. See K. MANN, supra note 14, at 174-80.
146. Not all witnesses can afford counsel during the course of an investigation, and although counsel may sometimes be appointed to represent grand jury witnesses, there is not a constitutional right to appointed counsel at that stage. See United States v. Mandujano, 425 U.S. 564, 581 (1976). Likewise, although it is not uncommon for large corporations to retain attorneys to represent its employees who, along with the corporation, are under investigation, see, e.g., United States v. Jones, 900 F.2d 512, 515-18 (2d Cir. 1990), not all businesses reasonably can afford to do so.
147. Prosecutors would undoubtedly argue that they are the less interested, and therefore the more appropriate party, to give advice about the fifth amendment privilege to potential witnesses. Their advice would, however, be less extensive than that which might be provided by defense counsel. While a prosecutor or his agent might advise a potential government witness about the availabili-
However reasonable these arguments are when viewed independently of the criminal law, they are not sufficiently persuasive when the uncertain scope of the obstruction-of-justice provisions is taken into account. The ethical view underlying these provisions—that individuals should not obstruct the government's efforts to procure incriminating evidence and testimony from others—is worthy of respect by the organized bar. An ethical rule forbidding defense attorneys to advise nonclients to "take the fifth" would accord appropriate respect without substantially impinging on the interests of clients and witnesses. At the same time, such a rule would diminish the risk that lawyers, while attempting to remain within the bounds of zealous advocacy, will violate the criminal law.

This is not to say that there will never be a persuasive, countervailing justification for allowing the criminal law to continue to set the bounds of zealous advocacy. But reliance should be placed on the criminal law only after informed deliberation, not as a consequence of inattention or unconcern, and only when the justification for doing so is especially compelling. Moreover, the ethical codes should make it clear that, when the criminal law does set the bounds of "zealous representation," there is no ethical duty to engage in potentially criminal conduct. Attorneys should have discretion not to approach the line of the criminal law, even if they believe that their conduct would be deemed lawful if the question were presented to a court.148

148. The recognition of such discretion would raise an additional question: If a lawyer decides not to engage in borderline conduct on behalf of a client, does he have a duty to apprise his client of that, so that the client has an opportunity to seek more aggressive counsel? If the lawyer's decision is viewed simply as a matter of tactics or strategy, the answer is probably not, at least under the Model Code. A lawyer is instructed to "fully and promptly inform his client of material developments in the matters being handled for the client." MODEL CODE, supra note 1, EC 9-2. It is unlikely, however, that a lawyer's decision to refrain from conduct that is close to the line of criminality would be considered a "material development" in the case.

Under the Model Rules, the answer is less clear. A lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES, supra note 1, Rule 1.4(b). It may be argued that, when a lawyer deliberately refrains from taking steps that he believes to be both lawful and helpful to the client, the client has the right to make an "informed decision" whether to seek a less cautious lawyer. But the reference in the Model Rules to "informed decisions" probably refers to those types of decisions that are traditionally or legally entrusted to the client, such as the decision whether to settle a civil lawsuit, or, in a criminal case, the decisions whether to plead guilty or to testify at trial.

There would be a duty to consult with the client, however, if the attorney's decision not to engage in conduct of questionable legality is viewed, as perhaps it should be, as the product of a conflict of interest. The conflict is between the lawyer's own penal and professional interests and the interests of the client. The decision to refrain from borderline conduct that is believed to be legal and that would advance the client's interests is designed as a matter of prudence to safeguard the attorney's own interest in avoiding illegal acts. Courts have recognized in other contexts that an attorney—for example, a criminal defense attorney who is himself under investigation—may have a conflict between his own penal interests and those of his client. See, e.g., United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984); Solina v. United States, 709 F.2d 160, 164 (2d Cir. 1983); cf. United States v. Jones, 900 F.2d 512, 519 (2d Cir. 1990) ("An actual conflict of interest exists when an attorney engages in wrongful conduct related to the client's trial. In such a situation, the fear of prompting a government investigation into the attorney's own wrongdoing would preclude an attorney from asserting a vigorous defense in behalf of his client.") (citations omitted). Although this conflict would not be of a magnitude to require a lawyer to withdraw from the representation, it might require the attorney to obtain the client's informed consent before continuing in the representation. See MODEL RULES, supra note 1, Rule 1.7(b); cf. MODEL CODE, supra note 1, DR 5-101.
V. Conclusion

The ethical codes of the legal profession instruct attorneys to represent their clients zealously within the bounds of law. For many attorneys, and especially criminal defense attorneys, the bounds of "zealous representation" often are set not by clear ethical provisions, but by ambiguous criminal laws. When the criminal law sets the limits, attorneys seeking to serve their clients' interests zealously invariably will feel pressure to engage in conduct that approaches the line of criminality. Because of the ambiguity of the criminal law, the risk arises that attorneys inadvertently will cross the line and act in ways that a court could consider to be illegal.

The ethical codes should not place attorneys in this position. As a general matter, the ethical codes should address the aspects of professional representation that the criminal laws affect, rather than relegate to the criminal codes the task of imposing appropriate limits on attorneys. In most instances, a restrictive approach should be taken. By establishing clear and explicit ethical rules that proscribe professional conduct which conceivably could be held to be illegal, the codes would promote public respect for the profession and protect ethical attorneys from engaging in practices of doubtful legality. At the very least, as an important first step, those professional practices coming close to violating obstruction-of-justice, fraud, and extortion laws should be acknowledged and made the subject of informed debate and discussion by the organized bar.149

The ethical codes wrongfully place attorneys in a risky position by failing to provide guidance about how to deal with the ambiguous limits set by the criminal law. The ethical codes currently acknowledge the legal ambiguities that confront attorneys. They should go further to clarify that, when the lines drawn by the criminal laws are ambiguous, the duty of zealous representation implies no duty to put oneself at risk.

149. See Hazard, supra note 21, at 1534.