The Obligation to Disclose to Employees of Defendant that the Person Interviewing Them is Plaintiff’s Counsel: The Conflict Between “Zealous Representation” and Avoidance of “Even the Appearance of Professional Impropriety”

The lawyer’s duties to his client and to the legal system within which he operates are the same: to represent his client zealously within the bounds of the law.1 The bounds of the law in a given case, however, are difficult to ascertain. Certainty of law ranges from well-settled rules, through areas of conflicting authority, to areas without precedent.2 The duty of a lawyer to represent his client with zeal, however, does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process,3 to “avoid even the appearance of professional impropriety,”4 “to uphold the integrity and honor of his profession,”5 and to act as a “minister of justice.”6 It is neither surprising nor uncommon that two or more of these loyalties can arise—and, hence, conflict—in a given case.

Such a case is Ceramco, Inc. v. Lee Pharmaceuticals,7 in which plaintiff sought recovery for alleged infringement of trademark rights. The District Court denied defendant’s motion to disqualify plaintiff’s attorneys on grounds of professional misconduct, and defendant appealed. In affirming the District Court, the Court of Appeals held that, although not to be commended, action of plaintiff’s counsel in telephoning defendant’s employees (who were not in-

1. ABA, Code of Professional Responsibility [hereinafter cited as ABA Code], Ethical Consideration [hereinafter cited as EC] 7-19. Canon 7 of the ABA Code provides “[a] lawyer should represent a client zealously within the bounds of the law.”
2. ABA Code, EC 7-2.
3. ABA Code, EC 7-10.
4. ABA Code, Canon 9; EC 9-6; State ex rel. Nebraska State Bar Ass’n v. Richards, 165 Neb. 80, 93, 84 N.W.2d 136, 145 (1957).
5. ABA Code, EC 9-6.
6. See People ex rel. Attorney General v. Beattie, 137 Ill. 553 (1891). For a discussion of the various loyalties of the lawyer, see E. Cheatham, Cases on the Legal Profession 72-73 (2d ed. 1955), and H. Drinker, Legal Ethics, 6-7 (1953) [hereinafter cited as Drinker].
7. 510 F.2d 268 (2d Cir. 1975).
formed of counsel’s identity or of his purpose) in order to obtain non-
privileged, relevant, and accurate information as to jurisdiction and
venue was not the kind of misconduct, if misconduct at all, which
warranted disqualification.8

The claim of professional misconduct in Ceramco stemmed
from two telephone calls made by Thomas W. Towell, an associate
of the firm of Rogers & Wells, attorneys for plaintiff Ceramco, to
ascertain whether jurisdiction and venue in the action could pro-
perly be established within the Eastern District of New York. Tow-
ell telephoned defendant Lee’s order department in California and,
without identifying himself or alluding to his capacity as opposing
counsel, requested the names of dental supply houses in the
Eastern District which were distributing “Genie” adhesive. On both occa-
sions, the requested information was freely provided. The elicited
facts were used by Ceramco’s counsel as basis for jurisdiction and
as support for an order to show cause why a preliminary injunction

8. The Court of Appeals also held that the order denying defendant’s motion
to disqualify plaintiff’s counsel was appealable, and that the disqualification was
not required on the ground that counsel had become a witness for his clients when
counsel’s affidavit was not considered by the district court at the hearing to deter-
mine jurisdiction. A discussion of these issues is beyond the scope of this note. The
issue of attorney serving as witness for a client does, however, raise some thorny
ethical problems. For a treatment of ethical questions pertaining to this issue, see:
ABA CODE, EC 5-9, 5-10; ABA CODE, Disciplinary Rule [hereinafter cited as DR]
5-101(B), 5-102; DRINKER, supra note 6, at 158-59; V. COUNTRYMAN & T. FINMAN,
THE LAWYER IN MODERN SOCIETY 95-96, 243 (1966) [hereinafter cited as
COUNTRYMAN & FINMAN]; S. THURMAN, E. PHILLIPS, JR. & E. CHEATAM, THE LEGAL
PROFESSION 317-28 (1970); A Code of Trial Conduct: Promulgated by the American
College of Trial Lawyers, 43 A.B.A.J. 223, 224-25 (1957); Note, The Ethical Prop-
riety of An Attorney’s Testifying In Behalf of His Own Client, 38 IOWA L. REV.
139 (1952); Shirley, Right of Attorney to Participate in Trial After Testifying for
Client, 13 Neb. L. Bull. 334 (1935); Sutton, The Testifying Advocate, 41 Tex. L.
Rev. 477 (1963); Comment, The Lawyer As A Witness For His Client, 17 Ala. L.
Rev. 308 (1965); Annot., Attorney as Witness for Client in Federal Case, 9 A.L.R.
FED. 500; ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS [hereinafter cited as
ABA OPINIONS], No. 339 (1975); O. MARU, DIGEST OF BAR ASSOCIATION OPINIONS,
Nos. 50, 167, 185, 220, 446, 555, 641, 740, 783, 836, 945, 1033, 1123, 1531, 1643, 1679,
1691, 1716, 1927, 2121, 2282, 2314, 2627, 2952, 3012, 3213, 3334, 3347, 3369,
3486, 3529, 3696, 3765, 3884, 3927, 3962, 3981, 3995, 4214, 4261, 4265, 4291, 4365,
4416, 4628, 4686, 4693. See also ABA CANONS OF PROFESSIONAL ETHICS, No. 19;
Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 869 (1928);
Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N.W.2d 489, 492 (1963); Galarowicz
645, 649, 11 N.W. 17, 19 (1881).
restraining Lee from using the trademark “Genie” should not issue. Lee claimed that Towell’s direct communication with Lee’s order department, despite Towell’s knowledge that Lee had retained counsel, violated Canon 7 of the ABA Code of Professional Responsibility and associated Disciplinary Rule DR 7-104. He also argued that the inclusion of the information acquired by Towell’s telephone calls in supporting affidavits made Towell a “witness for his client” and, therefore, subject to disqualification under Canon 5 and DR 5-102(A). In addition, the conduct was alleged to have violated Canon 9, which proscribes “even the appearance of professional impropriety.”

In affirming the lower court’s denial of defendant’s motion to disqualify plaintiff’s counsel for professional misconduct, Judge Hays, writing for the court, indicated:

... while counsel’s behavior is not to be commended, it is not the kind of conduct which should result in disqualification of counsel or nullification of prior proceedings. Although it would have been better if Towell had identified himself in his calls or had used an independent investigation agency, it would be too harsh to rule that the action of counsel in telephoning defendant’s employees to obtain non-privileged, relevant, and accurate information as to jurisdiction and venue constituted actual wrongdoing. Ceramco’s inquiries were limited in scope to those items of information necessary to ascertain whether suit could be instituted in the chosen forum and there is no suggestion that counsel sought any unfair advantage by his inquiries. This is the

9. The same facts also provided the basis for opposing Lee’s motion to dismiss the complaint pursuant to Rule 12(b), Fed. R. Civ. P. in which Lee contested the personal and subject matter jurisdiction of the district court. Lee’s motion to dismiss was denied. Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 270 (2d Cir. 1975).

10. ABA Code, DR 7-104(A)(1) provides as follows:

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

11. The question of Towell’s having become a witness for his client is beyond the scope of this note. See supra note 8.

12. ABA Code, Canon 9. Canon 9 provides, in full, “[a] lawyer should avoid even the appearance of professional impropriety.”
kind of misconduct, if it is misconduct, which is technical in character, does no violence to any of the fundamental values which the canons were written to protect and certainly falls far short of justifying a grant of the relief requested. . . .

In sum, Ceramco's counsel's actions, while demonstrating an unfortunate insensitivity to the etiquette of the bar, had no possibility of so prejudicing the opponent that the firm should be barred from the case entirely or the client punished by precluding reliance on counsel's work product. Accordingly, if any corrective action is to be taken, it should be accomplished under the auspices of the appropriate bar association and should in no way be permitted to affect the decision on the merits of the case.\textsuperscript{13} [Emphasis added.]

In a concurring opinion, Judge Mansfield indicated that he did not want his concurrence "to imply that Mr. Towell's telephone call amounted to misconduct, much less that it warrants any action by a bar association."\textsuperscript{14}

The decision in Ceramco is disturbing for two reasons. First, as discussed below, there seems to be a greater ethical conflict within the Ceramco facts than the court realized. Second, the court opened itself to criticism by suggesting, on the one hand, that the conduct in question might be unethical, but, on the other hand, that if this were the case, it would be a matter for "corrective action . . . [by] the appropriate bar association." The courts have "inherent common law jurisdiction over their officers,"\textsuperscript{15} and inherent power to insure compliance with prophylactic rules of ethical conduct.\textsuperscript{16} To the extent that it did not attempt to disclaim subject matter jurisdiction, the court in Ceramco did not seem unmindful of this power. As the same court has realized on a previous occasion, however,

\textsuperscript{13} Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). If, as the court suggested, "counsel sought [no] unfair advantage by his inquiries," it is not unfair to ask why counsel chose not to identify himself. Moreover, the Canons, Ethical Considerations and Disciplinary Rules make no distinction between confidential and unconfidential, relevant and irrelevant, information. The court suggested such a distinction exists. Id. And counsel's conduct is more than "an unfortunate insensitivity to the etiquette of the bar" when a decline in public confidence in the profession and the appearance of impropriety result from such conduct.

\textsuperscript{14} Id., at 272.

\textsuperscript{15} Note, 43 Cornell L. Q. 489, 490 (1958). See also Ex parte Thompson, 228 Ala. 113, 152 So. 229 (1933); In re Tracy, 197 Minn. 35, 266 N.W. 88 (1936).

\textsuperscript{16} See General Motors Corp. v. City of New York, 501 F.2d 639, 643 n. 11 (2d Cir. 1974).
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... the Code, like its predecessor the Canons of Professional Ethics, "set[s] up a high moral standard, akin to that applicable to a fiduciary... Without firm judicial support, the Canons of Ethics would be only reverberating generalities." Empire Linotype School v. United States, 143 F. Supp. 627, 633 (S.D. N.Y. 1956). We have said that our duty in this case is owed not only to the parties... but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct.17

In fact, counsel have been disqualified by the courts solely to avoid the appearance of impropriety.18 That the Ceramco court failed to exercise its leadership by deferring to the appropriate bar association and that one judge saw no basis for any finding of misconduct is alarming in light of repeated opinions of bar associations condemning practices similar to those employed by plaintiff's counsel in Ceramco. For example, in Opinion No. 613 of the Committee on Professional Ethics of the Association of the Bar of the City of New York (hereinafter N.Y. City Opinions), a decision was sought as to the propriety of plaintiff's attorney's request under the following facts: A corporation sued B corporation, and both parties were represented by counsel. The attorney for the plaintiff wished to interview employees of the defendant about facts involved in the litigation and to take their statements for the purpose of determining whether to subpoena them as witnesses at trial. With these facts, the Committee concluded:

We see no impropriety in a bona fide attempt by the plaintiff's attorney to ascertain the true facts involved in the litigation by questioning the employees of the defendant corporation, provided no deception is practiced in obtaining their statements, and they are informed that the person interviewing them is or represents the attorney for the plaintiff corporation.19 [Emphasis added.]

18. See General Motors Corp. v. City of New York, supra note 16, in which the court justified its decision in light of the provisions of DR 9-101(B).
In Informal Opinion No. 670 of the ABA Committee on Professional Ethics, the Committee was asked whether it would be proper for plaintiff’s attorney who had not yet placed a negligence matter in suit to make inquiry, either personally or through a private investigator, of the prospective defendant concerning the limits of his liability insurance coverage. The Committee determined such inquiry, either through plaintiff’s attorney or a private investigator, would be permissible provided the party was advised upon whose behalf the inquiry was made.20 Likewise, in Opinion No. 117 of the ABA Committee on Professional Ethics, the Committee was asked if it were unethical for an attorney who has a claim against the owner of a store on behalf of a party injured by falling therein to interview the store’s clerks who were the only witnesses to the accident. The Committee saw no impropriety in a bona fide attempt to ascertain the truth as to the condition of the floor by questioning the clerks, “provided . . . they are informed that the person interviewing them is the attorney for the claimant or represents him.”21 And, in an opinion which resembles the facts of Ceramco, an answer was sought to the following question:

I am an attorney for a mercantile house some of whose customers have disappeared. I am contemplating writing a form letter to their last known addresses, stating that I have something of importance for them and would like to obtain their new addresses.

If the replies disclose the new addresses, I will then be able to serve process on them in an effort to collect the money due my client, and this is the only purpose of the communication. In the opinion of the Committee, would this course be professionally improper?22

The answer by the Committee was unmistakably clear, and in full consisted of the following: “In the opinion of the Committee, the practice proposed is a form of trickery calculated to bring the practitioner and the Bar generally into disrepute. The proposed course is condemned.”23 It is arguable that an attorney who fails to disclose

21. ABA OPINIONS, No. 117 (1934).
22. NEW YORK COUNTY LAWYERS ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited as N.Y. COUNTY OPINIONS], No. 254 (1927).
23. Id. For additional opinions addressing these same questions under similar facts, see ABA OPINIONS No. 66 (1932), and N.Y. CITY OPINIONS No. 331 (1935) and
the party whom he represents or the purpose for which he writes, when motivated solely for purposes of serving process on the party, is no different from the attorney in Ceramco who failed to disclose the party whom he represented or the purpose for which he called, when motivated solely for purposes of determining jurisdiction and venue in a pending action. If the former is "condemned" as "trickery calculated to bring the practitioner and the Bar generally into disrepute," why not the latter?

This note began with the observation that a lawyer has a duty to represent his client zealously within the bounds of the law. Counsel in Ceramco was representing plaintiff zealously, and there was no violation of the law—in the sense of legislative enactments prescribing certain conduct or acts. This interpretation of "the law," however, is too restrictive. The "bounds of the law" for purposes of Canon 7 include "Disciplinary Rules and enforceable professional regulations." It is within this broader definition that problems arise in determining, as did the Ceramco court, that the facts of the case evidence no zealous representation by counsel beyond the "bounds of the law." For example, DR 1-102 provides that a lawyer shall not engage in conduct involving "dishonesty, fraud, deceit, or misrepresentation." Was counsel for plaintiff in Ceramco

No. 625 (1942). It is beyond the scope of this note to deal with direct communications by counsel when the adverse party is represented by counsel. Interested readers, however, are directed to the following: ABA CANONS OF PROFESSIONAL ETHICS Nos. 9, 39; ABA CODE, DR 7-104(A); CAL. BUSINESS AND PROFESSIONS CODE § 6076 (West 1962); ABA OPINIONS Nos. 55, 66, 95, 108, 117, 124, 187; INFORMAL OPINIONS Nos. 249, 250, 425, 426, 517, 523, 570, 663, 827; NEW YORK STATE BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited as N.Y. OPINIONS], Nos. 101, 160, 245; N.Y. CITY OPINIONS Nos. 99, 302, 624, 625, 683; N.Y. COUNTY OPINIONS Nos. 85, 531; DRINKER, supra note 6, at 201. For state opinions exclusive of New York, see O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970), Nos. 325 (Ark.); 456 (Cal.); 1098 (La.); 1215, 1356 (Mich.); 1470 (Mo.); 3324 (N.C.); 3781 (Okla.); 4174 (Tex.); 4492 (Va.); 4678, 4693, 4697 (W. Va.). For cases dealing with negotiations or communications with unrepresented adverse parties, see ABA OPINIONS Nos. 58, 102, 160, 178; INFORMAL OPINIONS Nos. 303, 734, 879.

24. ABA CODE, EC 7-1.
25. ABA CODE, DR 1-102(A)(4). Drinker states (at 150-51), that a lawyer is not to engage in fraud or trickery, nor is he to employ underhanded means to get evidence or disreputable tactics to further his case (at 155). Concerning adoption of underhanded means to get evidence, see G. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER, 140-41 (1910). Concerning use of false pretenses to get evidence, see N.Y. CITY OPINIONS No. 774 (1952).
dishonest? Not in the sense of telling a falsehood. Possibly counsel was guilty of a misrepresentation of fact because counsel did not inform the employees of defendant as to his identity. Perhaps fraud or deceit were involved to the extent defendant’s employees believed they were answering a routine inquiry, unrelated to a pending legal action. But what is important is not whether the court found evidence of dishonesty, fraud, deceit, or misrepresentation, but whether, given that “bounds of the law” encompasses all enforceable professional regulations, and given that Canon 9 provides that a lawyer should avoid even the appearance of professional impropriety, a court could find that counsel for the plaintiff in Ceramco conducted himself in a way which appeared to be professionally improper.

Under the conditions of modern legal practice, it is peculiarly necessary that each practitioner understand not only the established standards of professional conduct, but also the reasons underlying these standards. When this is done, with regard to the Canons in general and Canon 9 in particular, it becomes easier to assess the conduct of plaintiff’s counsel in Ceramco.

Underlying the Canons is the need to preserve the integrity of the legal profession. Action which the organized bar has taken to


28. Continuation of the American concept that we are to be governed by rules of law requires that people have faith that justice can be obtained through our legal system. Pursuant to this goal, a lawyer should promote public confidence in our system and in the legal profession. ABA CODE, EC 9-1. That a strong nexus exists between maintaining the integrity of the legal profession and public confidence in the profession has received judicial recognition. In Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928), the court said: “Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity.” Maintaining the integrity of the profession “is the ethical responsibility of every lawyer.” ABA CODE, EC 1-1. See also Matter of Gluck, 299 App. Div. 490, 243 N.Y.S. 334 (1st Dep't 1930); ABA, CANONS OF PROFESSIONAL ETHICS Canon 29; Note, 42 CORNELL L. Q. 489 (1958). It is widely believed that “it is only through the action of the organized bar that the high standards lawyers are entitled to can
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maintain the integrity of the profession includes establishment of the Canons which govern professional conduct, which "must be enforced by the Courts and must be respected by the members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice." The Ethical Considerations under Canon 9 specifically provide that when explicit ethical guidance does not exist—as arguably was the case for plaintiff's attorney in Ceramco—"a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." Had Towell followed this test, rather than the test of what will enable his client to prevail, he would have met his obligation under the Code of Professional Responsibility. It matters not in this regard that the lawyer himself thought his actions did not reflect unfavorably on the profession. A lawyer's good faith, although essential in his professional activity, is nevertheless an inadequate safeguard when standing alone.

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31. "Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause." ABA CANONS OF PROFESSIONAL ETHICS, Canon 15 (modeled upon Section 10 of the ALABAMA CODE OF ETHICS of 1887 — with both owing their origin to Judge Sharswood).

32. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973). As Drinker put it, the lawyer must not only be honest and upright in fact, but "must be believed to be so by clients, court, colleagues, and by his fellow citizens. Nor can he prove himself thus deserving of the confidence of the community which he served merely by observing scrupulously the letter of the law. He must be recognized as one of those exponents of true civilization who, by their lives, continually render 'Obedience to the Unenforceable.'" DRINKER, supra note 6, at 3-4. In a widely quoted article on Law and Manners, 134 ATLANTIC MTHLY 1 (1924), The Right Honorable Lord Moulton extolled "Obedience to the Unenforceable" as the
Also underlying the Canons is each lawyer’s obligation to his fellow members of the bar. This obligation has been assumed by mutual understanding, and it arises in addition to and distinct from the obligations imposed on members of the bar by reason of the special privileges granted them by the public. It is a recognized custom of the bar over a long period, and it constitutes “the most significant part of the lawyers’ distinctive code of etiquette and ethics.” Drinker included in this obligation the duty not to deal directly with the clients of other lawyers. If Drinker’s inclusion was proper, such an obligation should extend to the employees of clients of other lawyers—at least absent notice to the other lawyers or to the parties being dealt with.

There are numerous other reasons which could be advanced to justify a higher standard of conduct than that sanctioned by the court in Ceramco. It can even be contended that the course employed by plaintiff’s counsel in Ceramco was not, in the long run, in the best interest of the client. An advocate must be guided not by a shortsighted view of temporary successes garnered by taking advantage of the existing framework of the law to its fullest limit, but by the long term view of how his decision will actually affect what is of most importance to his client. Since protracted litigation

goal of man. This phrase has been suggested as the ethical standard for lawyers. See Shaw, Professional Conduct—Obedience to the Unenforceable, 46 Ill. B. J. 82 (1956); Davis, Foreward to Drinker, supra note 6, at vii.

33. Drinker, supra note 6, at 190. It has even been suggested that the highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honest performance of professional duty.

From the address by Chief Justice Hughes at the meeting of the American Law Institute, Wash., D.C., May 7, 1936, quoted in Drinker, supra note 6, at 192.

34. Id., at 190.

35. The lawyer is not merely the agent of his client, but is also an officer of the court. Sharswood, Professional Ethics, 32 A.B.A. Rep. 81, 83-84 (1907). Moreover, membership in the bar is not a right but a privilege, and one which is open only to those possessing good professional character. Note, 43 Cornell L.Q. 489 (1958); see also Matter of Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).

is more costly to the client, or since it could conceivably have a psychological effect upon the client,\textsuperscript{37} the client could become difficult to represent.

Perhaps the most compelling basis for the ethical obligation of attorneys is also its most traditional: the concept of the "service ideal," i.e., "that a profession exists to serve the community rather than merely to provide an economic livelihood. . . ."\textsuperscript{38} Indeed, the Report of the Joint Conference of the American Bar Association concluded that "[p]rivate legal practice, properly pursued, is . . . itself a public service."\textsuperscript{39}

It can be argued that an accused lawyer "may expect that he will not be condemned out of a capricious self-righteousness. . . ."\textsuperscript{40} It is equally true, however, that in a profession with such public obligations there must be exacted "granite discretion."\textsuperscript{41} We must keep in mind what the Report of the Joint Conference chose to call the "larger framework" within which all lawyers operate and within which each lawyer "must seek the answer to what he must do, the limits of what he may do."\textsuperscript{42}

\textsuperscript{37} Id., at 594.

\textsuperscript{38} Note, Confidential Communications and the ABA Code of Professional Responsibility, 1 J. LEG. PROF. 79, 82 (1976). See also Wilensky, The Professionalization of Everyone, AM. J. SOCIOLOGY 137, 140 (Sept. 1964).

\textsuperscript{39} Report of the Joint Conference, supra note 27, at 1162. Our conception of the lawyer's role must be dualistic. While we recognize client-representation as the lawyer's primary duty, we have also assigned him a role as a guardian of society's interests. COUNTRYMAN & FINMAN, supra note 8, at 185-86. Society's interests lie in three directions: (1) promoting fair, just treatment of individual parties involved in a particular matter; (2) encouraging patterns of behavior consistent with society's basic values; and (3) maintaining the integrity of the processes through which lawyers solve their clients' problems. We have come to place great value on these processes. They are, if not absolutely essential to the entire scheme of social order, highly effective means for promoting desired social objectives. It is these goals society is interested in preserving. Id., at 186-87. The relationship between attorney conduct and the promotion of these societal interests is recognized by the Code: "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standard of ethical conduct." ABA CODE, Preamble. It is clear the lawyer works against the public interest when he seeks petty advantages to the detriment of the larger processes in which he participates. Report of the Joint Conference, supra note 27, at 1162.

\textsuperscript{40} Kingsland v. Dorsey, 338 U.S. 318, 320 (1949) (Jackson, J., dissenting).

\textsuperscript{41} Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

\textsuperscript{42} Report of the Joint Conference, supra note 27, at 1162.
No general ethical document can be formulated which would encompass every situation in which a practicing attorney might find himself. Each attorney-client context has its own unique characteristics and peculiar demands. The lawyer must clarify these demands for himself in light of the particular role in which he serves.\(^{43}\) But regardless of his role, the attorney's highest loyalty is at the same time the most intangible. It is, quite simply, a loyalty that runs not to persons but to procedures and institutions.\(^{44}\)

The notion of some "higher" standard to which every lawyer must conform is implicit within the concept of avoiding "even the appearance of professional impropriety."\(^{45}\) As one court expressed it,

\(^{43}\) Id., at 1218.

\(^{44}\) Id., at 1162. If we are to maintain the traditions, procedures and institutions on which our social structure rests, given the lawyer's unique role within the broad scheme of things, anything less than "granite discretion" is insufficient. As Drinker put it, "we lawyers must live and act in the way which we know is right, irrespective of statutes, court decisions, canons of ethics, and disbarment proceedings." Drinker, supra note 6, at 4. It is possible the lawyer is bound to a higher, more abstract duty, one difficult to define and more difficult to attain, but one toward which every lawyer must strive. Drinker wrote of it, id., at 3, and the Code recognizes it: "Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards." ABA Code, Preamble. Perhaps the best expression of the ultimate ethical test for the legal practitioner is: "[o]ne must always ask, 'what are the possible consequences of the lawyer's action?'" Countryman & Pinman, supra note 8, at 187.

\(^{45}\) When a lawyer seeks to avoid even the appearance of impropriety, he may from time to time avoid conduct which is clearly ethical. This possibility is recognized in the Ethical Considerations to the Code. ABA Code, EC 9-2. But unlike other lines which may be drawn in the law (in Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930), Justice Holmes wrote: ". . . 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. . . . It is a matter of proximity and degree as to which minds will differ. . . ."), the line which separates ethical conduct from unethical conduct is one which the attorney must not only not cross, but one which, in some instances, he must not even get close to. And, unlike those areas of the law of which Holmes was writing, in the field of legal ethics there is scant latitude for the difference of minds. The profession is interested not so much in the intent with which an act is done "as the probable fitness it demonstrates." Note, 43 Cornell L.Q. 489, 494 (1958). Nor will it profit an individual lawyer to point to the fact opposing counsel has already drawn the line with greater latitude than did he: "[v]iolation of a canon of ethics by one counsel does not justify violation of another canon by his adversary." N.Y. Opinions No. 47 (1967). Thus the higher standard of conduct which must be met
[t]he dynamics of litigation are far too subtle, the attorney’s role in that process is far too critical, and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer’s representation in a given case.46

All institutions present temptations to exploitation, abusive short cuts, and corroding or compromising misinterpretations.47 It has been pointed out that the advent of broadened discovery rules has brought with it the possibility of abuse. Unfortunately,

[perhaps out of a fear that they might unduly circumscribe the legitimate use of discovery, the courts have been reluctant to find that a party has misused discovery, and the sanctions imposed for misconduct seldom are severe. . . . Whether the courts have been too cautious and lenient is not an easy matter to decide, for the possibility that less caution and lenience might hinder proper discovery is a real one. In all events, it seems clear that often a lawyer’s self-restraint is the only significant barrier to perversion of the discovery process.48

Perhaps this dilemma was operative in Ceramco, for the court attached some significance to the fact that the information plaintiff’s counsel sought was “non-privileged, relevant, and accurate . . . as to jurisdiction and venue. . . .”49 Arguably the court decided as it did in order not to hinder discovery of essential facts for trial. If this is the case, perhaps the only solution is the lawyer’s self-restraint. More basically, the problem may be one which inheres in the adversary system itself. Questions dealing with the justification of means by ends are always difficult, especially in the context of the adversary system. Assuming that both the dilemma of the courts regarding abuse versus hindrance of discovery, and the dilemma of zealous representation within the bounds of the law versus avoidance of even the appearance of impropriety inhere within the adversary

49. Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). That the information sought by plaintiff’s counsel was relevant is immaterial to the consideration of the ethical propriety of counsel’s conduct. See the discussion supra, note 13.
system, the contention that preservation of the system's adversary character is a socially desirable objective needs consideration. Whether the adversary approach is appropriate in all arenas of advocacy is likewise unclear.\textsuperscript{50}

In the final analysis, perhaps the authors of the Report of the Joint Conference were correct in observing that "the integrity of the adjudicative process itself depends upon the participation of the advocate."\textsuperscript{51} Such a conclusion, however, leaves determinations of ethical conduct with little guidance. The Code, as one court has suggested, is not designed for Holmes' proverbial "bad man" who wants to know just how many corners he may cut or how close to the line he may play without running into trouble with the law. Rather, it is drawn for the "good man," as a "beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct."\textsuperscript{52} Ultimately lawyers should be compelled by a higher standard to ask, "what is right in this instance?" or "will this give rise to a possible inference of impropriety?" But this standard, too, provides little guidance.

The historical purpose of canons of ethics is to impose positive prohibitions on the attorney by providing him "in advance with a workable criteria for dealing with each particular case."\textsuperscript{53} When the canons fail to provide such advance criteria, the remedy is not to invite uncertainty by use of a test which requires, in each instance, a determination of what is ethically permissible. The wiser solution would be to clarify the ethical standards so that at all times the lawyer may act with maximum certainty in the promotion of his

\textsuperscript{50} These questions were first suggested in \textit{Finman}, supra note 48, at 188.
\textsuperscript{51} Report of the Joint Conference, supra note 27, at 1159.
\textsuperscript{52} \textit{General Motors Corp. v. City of New York}, 501 F.2d 639, 649 (2d Cir. 1974).
\textsuperscript{53} Note, 38 \textit{Tex. L. Rev.} 107, 110 (1959). \textit{See also Drinker}, supra note 6, at 25-26. It is possible that positive prohibitions which would have provided ample guidance to plaintiff's attorney in \textit{Ceramco} existed under the earlier canons. \textit{See ABA Canons of Professional Ethics}, Canon 22, which provided in pertinent part: Candor and Fairness:

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of abiding in the administration of justice.
client’s interest. Perhaps maximum certainty regarding ethical conduct is the ultimate goal of any code of professional responsibility. Such certainty is not possible under the current Code, however, in which the conflict between avoiding even the appearance of professional impropriety and zealous representation within the bounds of the law is inherent or institutionalized. Maybe the profession should direct its efforts toward resolving this conflict. At a minimum, this is something the court in Ceramco could have attempted.

As it is, the court’s holding in Ceramco leaves uncertain the propriety of any particular professional conduct under the facts and circumstances of any given case. A more concrete standard of conduct could have been established if the court had recognized the problem as one of reconciling the competing loyalties of the trial lawyer and had prescribed definite and workable criteria which would have enabled the advocate to act with greater assurance that his actions conformed to the ethical norm. Finally, because decisions imputing unprofessional conduct to an attorney are tantamount to a public reprimand, the desirability of establishing more definite standards for such conduct is further underlined.

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