

Control and the Lawyer-Client Relationship

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I. *Independence and Morality*

A. *The Principle of Independence*

A recent newspaper article quoted a Japanese lawyer as saying: "As a lawyer, one's time is one's own. You can help people. You get a sense of justice, and you have the pride of knowing that you are not being used by anyone. As an individual you can even take on the nation."¹ The combination of power, prestige, independence and a good income combined with the satisfaction of helping others, all in the service of the highest social values, sounds like an ideal job description. While it is an ideal, the elements referred to are present to a greater or lesser degree in the work of the lawyer and account, no doubt, for the numbers seeking to swell the ranks of an already bloated occupation.

The key concept in this description is independence—independence from employers, the government and even from those one serves. The importance and the validity of this concept is constantly being publicly reaffirmed, in this country and the rest of the common law world, by senior members of the profession. Consider, for example, the following statement of Chief Justice Burger: "The overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counsellor that renders him a lackey to the client and the alien idea that he is an agent of the government."²

This latter statement suggests that the ideal is not without its theoretical critics, and in reality, independence can only be a matter of degree, subject to a wide variety of limiting factors. Lawyers

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1. *Using a Lawyer in Japan is Embarrassing*, Los Angeles Times, Oct. 29, 1978, § IV (Magazine), at 1.

2. *In re Griffiths* 413 U.S. 717, 732 (1973), (Burger, C.J., dissenting).

are not exempt from the dictates of self-interest, ideological commitment and other pressures, both subtle and blatant, and as in other situations, a degree of economic independence also tends to be a precondition to the exercise of other freedoms. Furthermore, the organization of the profession is no longer consistent with the image of the independent private practitioner sallying forth in the protection of individual rights.

Many lawyers are now employed by government departments and by corporations. Many more in private practice work for similar clients. Lawyers do not generally see themselves as under any public obligation to protect the rights of individual citizens.³ Indeed, such work is not seen to offer even the intangible rewards of a sense of power, responsibility and personal prestige that corporate law practices provide, let alone the financial rewards.

In recent years, the structure of the profession has changed in ways that tend to decrease the individual lawyer's independence. Increasing numbers of lawyers are employees. If they are employed in law firms, ultimate responsibility vests in lawyers, but in the partner, not the employee who does the work.⁴ Those working for government agencies or private corporate employers may have a high degree of theoretical responsibility if they are in charge of their departments, but they will be subject to the demands of a single employer, which are likely to amount to a more significant influence than that which any single client of a private law firm can exercise.⁵

The independence of lawyers is further being reduced by increasing outside intervention in the government of the profession as a whole. In the past the legal profession enjoyed a high degree of self-government within a statutory framework. The setting of standards, their enforcement, and discipline for their breach were allowed to rest in the hands of the professional organizations, which were typically immune from public oversight and from public accountability. This is now changing throughout most of the common

3. See Christopher, *The Lawyer's Duty to Himself*, 1 J. LEGAL PROFESSION 55 (1976).

4. There is still some doubt as to the theoretical and practical responsibility of partner and employee; see Brill, *When a Lawyer Lies*, ESQUIRE, Dec. 19, 1978, at 23-24.

5. For a discussion of structural models of occupational control, see T. JOHNSON, *PROFESSIONS AND POWER* (1972). Consumer control by large corporations Johnson describes as "patronage."

law world. The regulatory and trade association functions of bar associations sit uncomfortably in the one body. Demands for public participation in the former function will tend to lead to the separation of the two.⁶

Yet at a time when the profession as a body is being subjected to demands for greater public accountability, lawyers themselves are expressing concern that their public image will suffer unless they maintain greater independence from their lay clients. The question I want to examine here is the extent to which lawyers should properly maintain a professional distance from their clients and the degree of control they should, or are entitled to, exercise over their clients' affairs. Can lawyers, in the words of the Japanese lawyer quoted above, properly avoid being "used" by anyone? Should they be allowed to exercise a personal discretion in determining who to act for and what sort of action to take? Should they be limited in the exercise of their discretion, and if so, on the basis of what criteria?

In the past, most of the discussion relating to these issues has concentrated on the difficult decisions which a criminal defence lawyer may be required to make in the course of the defence, although attention has also focussed on non-litigious activity, especially in the commercial field.⁷ A review of recent literature reveals a high level of concern about the moral position of the lawyer, especially the criminal defense lawyer, and the proper elements of a healthy lawyer-client relationship.⁸ Underlying the various contri-

6. The process is clearly illustrated in California, where the unified State Bar is a public corporation with six public members on its twenty-one person Board of Governors: there are pressures for the establishment of an organization of local voluntary bar associations to lobby for lawyers' self-interests. It should, of course, be appreciated that the dichotomy referred to is not absolute: regulatory functions often do further lawyers interests, as, for example, the control of unauthorized practice of law.

7. See, e.g., *Conference Report: Ethical Responsibilities of Corporate Lawyers*, 33 BUS. LAW. 1173 (March, 1978.) Schwartz, *The Professionalism and Accountability of Lawyers*, 66 COLUM. L. REV. 669 (1978); *SEC v. National Student Marketing*, 360 F. Supp. 284 (D. D.C. 1973).

8. See, e.g., Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978); Fried, *The Lawyer as a Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Seliger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking about Ethics of Untruthful Practices by Lawyers for Innocent Defendants*, 6 HOFSTRA L. REV. 631 (1978); Seliger, *Criminal Lawyers' Truth: A Dialogue on Putting the*

contributions to this discussion there appear to be three models of the relationship, which I will call the "lawyer-control (or traditional) model," the "client-control model" and the "co-operative model".⁹ I will set out the principal characteristics of each model and consider the significance of their differences by examining their responses in a specific situation, namely the commencement of the relationship. By concentrating on the point of commencement of the relationship, I will not be looking specifically at the actual conduct of the defence, nor questions arising in that context, nor at the important distinctions between the functions of a lawyer as advocate, negotiator and counsellor, although my conclusions will clearly need to be tested in these various situations. Nor will I be concerned with the proper function of lawyers engaged in personal injury, S.E.C. or other forms of legal work.¹⁰ The discussion will focus on the role of the criminal defence advocate, partly because it is in this area that much debate has centred over the lawyer's proper role and also because the client will frequently be from a lower economic, educational and social background than the lawyer—a factor which will tend to heighten the lawyer's perception of "moral" difficulties. Before considering the substantial issues involved, it may be helpful to look more closely at the basis of concern in professional circles over the unpopularity of lawyers and its alleged link with lack of proper moral standards in the profession.

B. Unpopularity of the Profession

One abiding concern of lawyers is with their public image, and for whatever reason, they have always received their share of scorn, hatred and derision. None have suffered worse at the hands of public opinion than the criminal lawyers. While some are heroes, others are villains; indeed, one may be both at different times or even at the same time with different sections of the population. When in 1924 Clarence Darrow, a legendary hero of the poor and

Prosecution to its Proof of Admittedly Guilty Clients, 3 J. LEGAL PROFESSION 57 (1978); Simon, *The Ideology of Advocacy*, 1978 WISC. L. REV. 29; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

9. See also Szasz & Hollender, *A Contribution to the Philosophy of Medicine: The Basic Models of the Doctor-Patient Relationship*, 97 A.M.A. ARCHIVES INTERNAL MED. 585 (1956).

10. For a seminal empirical study of control in the lawyer-client relationship in personal injury cases, see D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

dispossessed, represented two sons of Chicago millionaires on murder charges he was accused of "disgracing the criminal lawyers of the country. . . .The practice of criminal law in America fell into its greatest disfavour and disrepute in decades."¹¹ The belief in such a downward trend has apparently continued, for in 1973 the President of the A.B.A. felt able to declare that "the lawyer in America is more generally disliked and distrusted than ever before in the history of our profession in the United States."¹² The involvement of a number of lawyers in the Watergate scandal apparently caused the depths of public disapproval to descend even further.¹³

Although surveys indicate that the public is typically concerned about negligence, delay, incompetence and high cost,¹⁴ lawyers continue to discuss issues of morality. However, the fact that these moral questions may have little significance for the public image of the professional in no way lessens their real importance, and there are exceptional cases which do lead to public attacks on the morality of the profession. The celebrated cases which polarize public opinion do so because they vividly illustrate the lawyers' political role, a factor which is present to some extent in all cases, though usually in more muted form.¹⁵ Since this facet of the lawyer's function is incompatible with the traditional image of a professional function as one of political neutrality, such cases tend to make the leaders of the bar uncomfortable.

On the other hand, there are two more general, if less sensational, respects (not irrelevant, though, to the public image) in

11. I. STONE, *CLARENCE DARROW FOR THE DEFENSE* 450 (1971) (quoting W.R. Kellogg).

12. *Serve, President's Page*, 59 A.B.A.J. 863 (1973).

13. See Harris polls cited in Burbank & Dubott, *Ethics and the Legal Profession: A survey of Boston Lawyers*, 9 SUFFOLK L. REV. 66, (1974-75). See also Jacobs & Wagoner, *Public and Professional Assessment of the Nebraska Bar*, 55 NEB. L. REV. 57, (1975).

14. See Marks & Cathcart, *Discipline within the Legal Profession: Is it Self-Regulation?* 1974 U. ILL. L. FORUM 193, 225. For a well-researched Australian study, see the New South Wales Law Reform Commission's *The Legal Profession*, Discussion Paper No.2, "Complaints, Discipline and Professional Standards Part 1" and Background Paper No.1, which contains a sample of case-studies.

15. *E.g.*, cases discussed by J. AUERBACH, *UNEQUAL JUSTICE*, (1976); Ernst & Schwartz, *The Right to Counsel and the Unpopular Cause*, 20 U. PITT. L. REV. 727 (1959); Rockwell, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L.L. REV. 301 (1970).

which the lawyer's activities can give rise to accusations of amorality, if not immorality. First, there is the belief that lawyers are "bred up from their youth in the art of proving, by words multiplied for the purpose that white is black and black is white, according to what they are paid."¹⁶ This criticism assumes that lawyers should be concerned with moral values such as trust and justice and that, in most cases, these will lie on one side rather than the other and the lawyer will know on which, but will not care. Alternatively, lawyers may be attacked because they believe in the causes for which they fight. To refuse to pick and choose cases is to adopt a position of studied amorality, while to select will ensure that the lawyer's reputation stands or falls with that of his or her clients.

The first line of attack can be countered by arguing that the lawyer's conduct is justified by his or her role in the adversary system, thereby distinguishing the lawyer's action from support for the substance of the client's cause. Hence the cry, "I may disagree with what you say, but I will defend to the death your right to say it." If, on the other hand, the lawyer comes to be identified with a particular cause through express public statements or regular (or even exclusive) representation of it, that line of argument loses much, though not necessarily all, of its force.

Before considering the validity of this traditional justification, we may note that it is of limited popular effect. The very occurrence of a public attack on lawyers defending an unpopular cause will often indicate an unwillingness to make the distinction suggested. And indeed, the organized bar in this country has historically shown little stomach for a fight based on this defence.

As David Rockwell noted in 1970, "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities and the politically unpopular. . . . [In the] battle for good public relations, the conservative leadership of the bar has been careful to dissociate itself from unpopular political ideas and has found it both expedient and desirable to attack the lawyers representing the dissidents."¹⁷ Thus the bar itself seems to accept that the traditional model of independence from the client and emotional detachment from the client's cause is something of a

16. Swift, *A Voyage to the Houyhnhnms*, GULLIVER'S TRAVELS 295 (1947).

17. Rockwell, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L.L. REV. 301 (1970).

myth. If that is the case, then it appears to follow that identification of the lawyer with the client properly invites moral criticism on the basis of the cause. However, there are difficulties, especially in the context of the criminal defence or the assertion of constitutional rights, as to what aspect of the client's activities is properly under consideration. Is it the fact (assuming the client to be guilty) of the criminal act charged, the client's present attitude or wish to plead not guilty, or even the nature of the defence? Furthermore, distinctions need to be made in regard to the particular function of the lawyer which is being criticized.

C. *Amorality and Criminal Defence*

An attorney in a criminal case performs three separate functions, any of which can involve decisions which may involve suspension of moral judgement by the attorney. First, the lawyer is a recipient of information which he or she may feel compelled to withhold, although to do so will cause further avoidable suffering or will allow a criminal to escape conviction. The second function is to impart information about the law, which may in some cases be used to evade legal sanctions which properly should apply. Knowledge of a possible defence to a crime may enable a defendant to fabricate evidence. Thirdly, the lawyer may be required to take action on behalf of a client, which ultimately achieves an unjust result.

The lawyer's response to an accusation that his or her conduct was amoral, if not immoral, will be to assert that the conduct in question was legal and that the lawyer's role in the system requires a suspension of moral judgement. The validity of such a justification, based on what Richard Wasserstrom calls "role-differentiated behaviour,"¹⁸ is accepted in many occupations, but since and despite Dr. Johnson's famous defence of the lawyer's activities, its applicability to lawyers has been questioned. Unfortunately, Dr. Johnson's own arguments sometimes left something to be desired. He was asked by Boswell, "Does not affecting a warmth when you have no warmth and appearing to be of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his

18. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 3 (1975).

friends?" Johnson replied,

Why, no, Sir. Everybody knows you are paid for affecting a warmth for your client, and it is therefore properly no dissimulation; the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk upon his feet.¹⁹

The question expresses concern not only with the limits of the behaviour justified by a special role, but also the effects of such behaviour on the lawyer's character, concerns which are being repeated today.

The tumbling analogy is an inadequate answer, because tumbling is a morally neutral activity; if the tumbler failed to keep the roles separate the results would be ridiculous rather than immoral. The same is not true of the lawyer's activities. In addition, the fact that the lawyer has a special role and is paid to dissemble does not quiet doubts about the propriety of such action. Soldiers are paid to organize and fight wars and judges and prison wardens are paid to deprive people of their liberty. These activities are accepted as being necessary for the preservation of the common good in a particular society. Criminal defence counsel, on the contrary, appear to be acting for private interests against the common good. The argument that the defence lawyer is also performing a desirable public function cannot be justified without showing that the whole adversary process operates for the public good. Dr. Johnson's answers to Boswell assume the desirability of the system, while many who are dissatisfied with those answers are in fact doubting the propriety of the system. Thus, William Simon argues that the internal inconsistencies of the adversary system, which effectively pervert the substantive values its procedures are allegedly designed to further, render the lawyer's role in that system morally unsupportable.²⁰ Others take exception to the second part of the answer and wonder if lawyers are really able to adopt the schizophrenic existence which Johnson so blithely assumes, and if they do, whether there may not be unacceptable costs (both to themselves as individuals and, on occasion, to society) in requiring them to act in this

19. 1 BOSWELL, *THE LIFE OF JOHNSON* 34 (1906) (Dent's Two Vol. ed.).

20. Simon, *The Ideology of Advocacy in Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29.

way.²¹

While both lines of criticism are valid in their own terms, both suffer from limitations. The first correctly identifies tensions between the theory and the actual operation of the adversary system, but then sees the way to reform through a redefinition of the lawyer's role. The second concentrates on the effects of the system on the attitudes and values internalized by the lawyer as an operator of the system. I believe it is dangerous to isolate the legal system (or more narrowly, the litigious process) and try to reform it from inside without attention to the political and economic factors which determine its structure. The particular danger in this instance is that the demands for greater moral accountability on the part of lawyers made by these critics will result in a further diminution of the degree of control exercised by clients, especially by clients from disadvantaged groups. On the other hand, recognition of internal tensions may lead to pressure for systemic change so long as lawyers are not able to effectively defuse the tensions in a way that simply eases their own working consciences.

Before leaving this topic one other comment is called for, namely that those who accuse lawyers of amorality are themselves exercising moral judgement. Refusal to judge may be benighted amorality or praiseworthy tolerance. The following view expressed, if a little self-righteously, by Clarence Darrow would probably receive concurrence from many criminal law practitioners today. "I have never judged anyone. I have had sympathy for all. I have done my best to understand the manifold conditions that surround and control each human life. You know it is said, 'Judge not, that ye be not judged'. I do not judge a man; I defend him."²² Alternatively, the lawyer's action in defending someone known to be guilty may be justified, as Richard Wasserstrom suggests, on other grounds including "a serious scepticism about the rightness of punishment even when wrongdoing has occurred".²³ Given the existence of our criminal justice system, it could be argued that such scepticism should be repressed by functionaries within that system. On the other hand, to acknowledge it may at a personal level help them to perform their social role with a properly easier conscience.

21. Wasserstrom, *supra* note 18, at pt. 1.

22. I. STONE, *supra* note 11, at 501.

23. Wasserstrom, *supra* note 18, at 12.

II. Three Models of Control

The fundamental issue in analyzing the lawyer-client relationship is to determine where control lies or should lie, and hence, where responsibility for the lawyer's actions belongs. In this section I will suggest three alternative models of the relationship which reflect different theories on the proper role of professionals in our society. Starting with a traditional lawyer-control model, it is possible to identify two alternatives, the client-control and co-operative models, implicit in criticisms of the traditional model.

While most codes of ethics do not expressly adopt any model in its entirety—indeed the models are heuristic rather than descriptive—their rules generally conform to the traditional model, with limited concessions to the client-control model. As we shall see, the third model is inconsistent with any generalized code of ethics. The decision to have a code of ethics and the determination of its contents will depend on which model, if any, is accepted and mandated. There is no necessity to require lawyers to conform to any particular model of behaviour; indeed, they almost certainly do not do so now. Differences in their own backgrounds, experience, areas of work and the nature of their clientele will influence different lawyers to adopt disparate approaches, and even suggest degrees of difference in one lawyer's handling of his or her own clients. Ethical codes, insofar as they impose one model or another gloss over these factors.

A fourth model is conceivable in which control lies with neither lawyer nor client but with a third party. For example, an employer or government agency could say to a defendant, "we will provide you with a lawyer, but he or she will only take such action as we deem appropriate." If the third party is really dictating action in individual cases, we have a system which is foreign to certain basic values of our criminal justice system which I do not wish to call into question here. If on the other hand, the third party is merely laying down general policies and practices which the lawyer must follow, these will form elements of a lawyer-control model which will affect what criteria the lawyer applies and what decisions the lawyer makes, but not necessarily a fourth model.

A similar problem could arise on the client's side if, for example, the client is a member of a political group and allows the group to dictate tactics for the defence case. Again, that could merely constitute influencing the client within the client-control model, although in an extreme form it could amount to third party

dictation to both lawyer and client. While third party control, on either the lawyer's side or the client's, raises important problems, their resolution is in part at least contingent on the outcome of the conflict of power within the two party situation.

A. *The Lawyer-Control Model*

The natural corollary of espousing independence from the client would be a rule that the lawyer makes all the decisions about what legal steps are to be taken and how and when. This attitude may be seen in the following statement of a leading Canadian lawyer:

Once the decision to plead not guilty has been made, it is for the defence counsel to decide how the case is to be conducted in accordance with his best judgement as to what is in the best interest of the client. It is for the defence counsel, for example, to decide whether the case should be tried with or without a jury, whether a particular witness should or should not be cross-examined; if he is cross-examined, how the cross-examination should be conducted. If I might draw a comparison from the world of medicine, it is for the patient to decide whether he wishes to submit to surgery or not, but once he has decided to submit to a surgical operation, he can't tell the doctor how to perform the operation.²⁴

On this approach control is vested in the lawyer, first and foremost because the lawyer has the training and expertise to assess what is in the client's best interests, which is the reason why the client sought professional help in the first place. The second justification put forward is that the lawyer as an outside observer, whose judgement will not be disturbed by emotional involvement, will see more clearly the client's real interests. This last point leads to a second major strand in the traditional model, namely that the lawyer must maintain a maximum level of "professional detachment." This ideal has been nicely parodied by the novelist Trollope in depicting the attitude of an English judge to an emotive plea by counsel: "To his way of thinking, a great lawyer, even a good lawyer, would be incapable of enthusiasm as to any case in which he was employed."²⁵

24. L. SOC'Y UPPER CANADA, *DEFENDING A CRIMINAL CASE* 282 (1969) (quoted in J. DISNEY, *LAWYERS* 556 (1977)).

25. 2 A. TROLLOPE, *JOHN CALDIGATE* 297 (1923) (quoted in Rostow, *The Law-*

Detachment demands neutrality: it is said, therefore, to be improper for a lawyer to be committed to a client's cause. It is even preferable that a lawyer avoid acting consistently for one side in a particular class of cases, lest that give an impression of commitment. By the same token, it is improper for a lawyer to express his or her personal belief in the justice of a client's case.²⁶ Although the purpose of the legal profession is to assist in the search for justice, this goal is best served by non-committed advocacy for all parties. What is and is not appropriate conduct should be determined by the profession itself through the collective judgement of its senior members, who best understand the workings and requirements of the adversary process.

Even the traditional model purports to leave two key areas of decision to the client. First, in criminal cases it is up to the client to decide how to plead,²⁷ although the lawyer should fully advise the client before any decision is reached.²⁸ In theory the criminal justice system allows any defendant to plead not guilty and put the prosecution to the proof. It would undermine the system for the lawyer to deny the defendant this option, yet in a large number of cases even that small degree of client autonomy is usurped by the lawyer. For example, most public defenders will decide which cases require a contest and what clients will have to plead, whether because of the limited resources of the office or for other reasons. In any case, the plea is not an issue easily divorced from other aspects of the conduct of the case and the lawyer can effectively, if indirectly, dictate a plea by, say, refusing to run a particular defence. Finally, in the common plea-bargain situation lawyers tend to assume a certain latitude for negotiation, which is often more than the client intended to give if the surveys of client dissatisfaction with the results are any indication.²⁹

yer and His Client, A.B.A.J. 25, 26 (1962)).

26. See, e.g., A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as A.B.A. CODE], DR 7-106 (C)(4); DR 7-107 (B)(86), (G)(4) and (H)(4). The significance of this rule for the independence of the lawyer is discussed in D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 261 (1973).

27. See also the odd case of *United States v. Baker* 514 F.2d 208 (D.C. Cir. 1975); see generally *Winters v. Cook* 489 F.2d 174 (5th Cir. 1974) and cases noted in D. MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* 755-57 (1976).

28. See, e.g., A.B.A. CODE, EC 7-7. See also, *CRIMINAL DEFENSE STANDARDS*, No. 5.2

29. For an interesting English study, see BALDWIN & McCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* (1977).

The second area remaining within the client's control relates to the waiver of other fundamental constitutional rights. Beyond that, there is disagreement amongst commentators and a progression towards the client-control model. Although some traditionalists would also allow the client to decide whether or not to testify, that freedom may be restricted by requiring the lawyer to decide whether or not the testimony is true and to try to prevent false testimony. The next step along the road concerns the general approach the defender should adopt: for example, whether a defendant charged with murder should attempt to establish an alibi thereby denying his or her presence at the scene of the crime, or admit involvement in the incident and rely on a plea of self-defence. This factual situation arose in *Taylor v. State*,³⁰ causing a split in the Alabama judiciary. The Alabama Supreme Court ultimately resolved that the client should make this decision, but only on the ground that it was intimately involved in determining the plea.

B. *The Client-Control Model*

While some writers seem to espouse a fairly pure form of the traditional model, it is harder to find an exponent of a pure client-control model, although it may be fairly widely practised and is certainly vigorously criticized in the literature.³¹ One explanation for this may be that the discussion has tended to be problem-oriented and concentrated on the fuzzy edges of permissible conduct. Basically the client-control model requires that all significant decisions be made by the client: the lawyer should not refuse to carry them out so long as they do not require illegal or unethical conduct. The disputes arise in relation to the definition of unethical conduct and the extent to which the lawyer should assist a client who is acting illegally; the answers depend on the priorities allocated to conflicting principles within the framework of the adversary system.³²

30. 51 Ala. App. 573, 287 So. 2d 901 (1973) (discusses in Christopher, *Attorney and Client-Control of the Case-Who Decides What Theory of Defense to Use?*, 1 J. LEGAL PROFESSION 121 (1976)).

31. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

32. The courts and critics have been particularly troubled by the problem of the perjurious defendant: see, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 63 (1975) and more recently, *Lowery v. Cardwell* 575 F.2d. 727 (9th

The client-control model does not attempt to deny that the lawyer has special knowledge and skills, nor that he or she is generally better able than the client to predict what a court will do in a specific case. Rather, it hopes to prevent the lawyer in this position of relative power from overbearing the client. First, there is a danger that the lawyers will tend to equate a client's best and legal interests, within the narrow confines of the case presented. If, for example, in personal injury cases the courts can only offer monetary compensation, lawyers will tend to ignore other values, such as rehabilitation.³³

At the same time, lawyers who are emotionally detached from their clients may take a highly paternalistic view of their clients' interests. In the criminal courts, it is not unheard of for defence counsel on occasion to indicate that he or she thinks a short stretch of gaol will not do the defendant any harm. Of course that may be a correct judgement, but that is beside the point. Indeed, it is plausible that the less the demand for the lawyer to obey the client's instructions, the greater the likelihood that the lawyer will place wider interests before the client's individual interests. On the other hand, the lawyer may assume, for example, that gaol is the worst fate that can befall a client, while the client might actually prefer a short period of imprisonment to a heavy fine or a lengthy period of probation.

In *Faretta v. State of California*³⁴ the Supreme Court held that a defendant must be allowed to make the crucial decision of whether to seek the assistance of counsel or not. Justice Stewart, speaking for the majority in that case, said:

The defendant, and not his lawyers or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honoured out of that respect for the individual which is the lifeblood of the law.³⁵

Cir. 1978).

33. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 42 (1974) (illustrates ways in which this occurs in personal injury litigation). See also Gilbert, *Workers' Compensation: The Defense of Tunnel Vision?*, 3 *LEGAL SERVICE BULL* 180 (1978).

34. 422 U.S. 806 (1975).

35. *Id.* at 834.

The same argument can be applied to questions relating to the calling of witnesses, general lines of cross-examination, and the decision for the defendant to give evidence. If a defendant has a right to obtain the "assistance" of counsel, it is hard to see why that should necessitate a total surrender of control. The traditionalist might argue that many vital decisions must be made in court and on the spur of the moment and that it is just not feasible for counsel to articulate the various options and arguments for adopting one course rather than another. The ability to make such decisions is part of the lawyer's professional skill and judgement. Obviously there is an element of truth in that position, and the response must be that the difference between the operation of the two models will be a matter of degree and will depend as much on the attitude of the lawyer as on any variation of conduct in court.

A second and related criticism is that those same elements of the judicial process which call for special expertise, training and skills tend to distort the defendant's view of reality. One of the lawyer's functions is to explain the unfamiliar procedures of the court to the client and to translate the client's case into the language of the legal system. Unless the lawyer goes out of the way to identify with the client, he or she will be seen by the client to be actually assisting in creating the feelings of alienation and distortion of reality. If that happens it will be impossible for the lawyer to maintain the confidence and trust of his or her client and remain an effective advocate. This problem is reflected in the colorful language of an English litigant:

When we stumble into the courtroom nightmare, designed as it is to baffle and confuse us, it is no wonder most of us are scared and timid and do whatever the old dinosaurs in wigs and gowns advise us to do. Lawyers are so buried in all this legal bull-shit that they have a fine record of selling our interests down the river and conning the innocent into pleading guilty. . . . Lawyers argue around remote legal technicalities and procedures . . . and the real concerns of the defendant are either hopelessly confused or ignored. Every trial is a conspiracy to silence the real life interests of the people in the dock.³⁶

A traditionalist might reply that it is indeed part of the defence lawyer's duty to help bottle up the tensions in a trial, despite the

36. *How to Handle Lawyers*, 2 UP AGAINST THE LAW 15 (1974) (quoted in J. DISNEY, *LAWYERS* 485 (1977)).

fact that such a function will often be inconsistent with the lawyer's role as a partisan advocate.³⁷

A third criticism of the traditional model is based on the width of discretion which it accords to the lawyer. The pressures of the system and the opinions of state officials with whom the lawyer must maintain working relations, the danger of offending other clients, the possibility of furthering the lawyer's own reputation or ideological beliefs, as well as simple pecuniary interest are all factors which affect the lawyer, but are of no concern to the client. It is impossible to rid the lawyer of such extraneous influences, but their effects can be mitigated by limiting the mandate of the lawyer alone to make crucial decisions.

Finally, the traditional model has been criticized for the social values it propogates. For example, Richard Wasserstrom has argued that,

the relationship between the lawyer and the client is typically, if not inevitably, a morally defective one in which the client is not treated with the respect and dignity which he or she deserves. . . . The point is not that the professional is merely dominant within the relationship. Rather it is that from the professional's point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult.³⁸

There is a tendency in any group of people with special skills and the ability to help others who are vulnerable to adopt a position of superiority and to treat the other in a paternalistic way. This tendency is augmented by the prestige and status accorded to the professional which is in turn crystallized in the traditional model of professional ethics. By the same toke, the lawyer's skills are useful only in relation to that aspect of the client's problem susceptible to legal assistance and hence the tendency to see a "case" rather than a person. Again, the emotional detachment demanded by the traditional model both reflects and approves the impersonal nature of the relationship.

37. Am. C. Trial Law., *DISRUPTION OF THE JUDICIAL PROCESS* 6 (1970). See also N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* 145 (1973).

38. Wasserstrom, *supra* note 18, at 15-16. See also Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1062 (1970) (where the author correctly identifies the early indications of such a view: "The dominant attitude of law school is that the client is a troublesome pain-in-the-neck").

This argument can lead to the rejection of the client-control model also, in so far as it will produce a relationship based on something less than mutual understanding and respect. While a lawyer who is prepared to relinquish a dominant role in the relationship will treat clients with more respect and less paternalism, only a co-operative model will achieve complete mutuality.

C. *The Co-operative Model*

The third model requires lawyer and client to attempt to reach as full an understanding as possible of each other's attitudes and goals and, where possible, to share them. This approach is most likely to be found in overtly political trials and is relected in the comment of California lawyer Fay Stender, made in 1970 in relation to her defence of members of the Black Panther Party: "I don't even use the expression 'my clients' any more. . . . That expression is going out of my vocabulary and is certainly going out of my thinking."³⁹ More recently it has been advocated as a model of general application, as the only model consistent with the ultimate goals of the legal system.⁴⁰ It states that the function of the advocate in the legal system will not be irrelevant to any ethical decisions that must be made by the parties, but neither will it be determinative. Action will only be taken which is morally acceptable to both lawyer and client. While it is probable that where opinions differ one will defer to the other, deference is not required of either. Where the differences are irreconcilable, the relationship has broken down.

It is tempting, but inaccurate, to see the cooperative model as a compromise between the lawyer-control and client-control models. Proponents of the cooperative model see both the other two as defective in that each denies the right of one side or the other to make and act on personal judgements. The first model denies the lawyer the right to identify with the client's cause, whereas the second is silent on this point; the third requires a degree of identification.

The first advantage of the cooperative model is that it preserves the autonomy, responsibility and dignity of both parties. Lawyers are not permitted to use their knowledge and expertise to dominate the relationship, but neither can clients demand that

39. Quoted in A. GINGER, *THE RELEVANT LAWYERS* 285 (1972).

40. William H. Simon, *supra* note 8, pt. VI, at 130-44.

their lawyers suspend all moral judgement and act as amoral technicians.

Secondly, while the model sacrifices the alleged advantages of the lawyer's emotional detachment based on professional distance, it substitutes the possibility of more informed, comprehensible and relevant advice based on a fuller understanding of the client's position.⁴¹ The lawyer will also have the psychological pressure of a greater feeling of responsibility for the outcome of the case. This aspect has a further significance in that it will help to overcome the lessening of the sense of moral responsibility which occurs when responsibility and action are divided between two people.

One consequence of adopting such a model would be the death of generalized codes of professional conduct. Action would be dependant on individual personal judgements.

The cooperative model found considerable support amongst legal services lawyers of the '60s and '70s who saw a grave danger that the flow of helping professionals into disadvantaged communities could lead to a further reduction in the degree of control that individuals exercised over their own lives.⁴² The perceived need to restore a portion of personal dignity through self-management led to a call for commitment and for cooperation between client-communities and lawyers.

D. A Brief Evaluation

Critics of the traditional model call it elitist, paternalistic and undemocratic. Monroe Freedman recently suggested that "the real reason lawyers prefer to make the final decision, and judges are inclined to give it to them, is professional pride, with the emphasis on the word pride."⁴³ The traditional approach also contains an element of hypocrisy, as illustrated by the unwillingness of the profession and the judiciary to equate responsibility with power.⁴⁴ Indeed, the history of malpractice suits suggests a direct correlation between the degree of control vested in the individual lawyers

41. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1063 (1970).

42. *Id.* at 1053.

43. Freedman, *Personal Responsibility in a Professional System* 27 CATH. U.L. REV. 191, 203 (1978).

44. Mazor, *Power and Responsibility in the Attorney-Client Relationship*, 20 STAN. L. REV. 1120 (1968).

and *immunity* from liability for incompetence and neglect.⁴⁵

On the other hand, critics of the client-control model say that it places too much weight on the lawyer's duty to the client at the expense of the public interest duties flowing from the advocate's role in the adversary process. It is not coincidental that the strongest critics of this model are frequently judges whose role is to attempt to ascertain the "truth;" criticism of strong partisan advocacy may be combined with a demand for realignment of the system which presently justifies the advocate's function as the mouthpiece of his or her client.⁴⁶

The organized bar has also resisted the client control model: "it would be difficult to imagine anything that would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defence lawyer should be simply a conduit for his client's desires."⁴⁷ Those who depreciate this model refer to it as the "hired gun," "mercenary," or "alter ego" theory.

The cooperative model has faced even more hostile criticism, probably because it is often associated with political trials and also because it attempts a real redistribution of power—at least when it is put to service for disadvantaged or unpopular groups and causes. Then it is inconsistent with the official myth of the political neutrality of lawyering. Nevertheless, while bar associations preach professional detachment, senior members of the profession happily sit on the boards of directors of client companies and dine with corporate executives and individual clients. This is far less likely to happen at the other end of the social scale and may lead to disciplinary proceedings if it does occur and comes to the notice of the bar.⁴⁸

Despite the disapproval of the professional establishment, the poverty lawyers in the last decade frequently adopted a coopera-

45. The best example is undoubtedly the legal immunity of the English barrister: see *Rondel v. Worsley*, 1 A.C. 191 (1969) and *Saif Ali v. Sydney Mitchell & Co.*, 3 W.L.R. 849 (1978). However, there is also a noticeable lack of reported malpractice involving trial conduct in this country; see *Mazor*, *supra* note 44.

46. *E.g.*, Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

47. A.B.A. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 110 (1974). See also the critique in Rosenthal, *supra* note 33, at 19, of advice given by the Wisconsin Bar Association to its members on communicating with clients.

48. For a sad example, see the Australian case, *Re Foster*, 50 S.R. (N.S.W.) 149 (1950).

tive model. The commitment and involvement which this required has undoubtedly contributed to the "burn-out" phenomenon and the high turnover of lawyers, thus providing evidence that the cooperative model is only likely to survive where there is a strong commonality of goals and values between lawyers and clients.⁴⁹

III. A Duty to Accept Clients?

A. *Grounds for Declining Work.*

Independence from client control ultimately entails the power to refuse to act for a client. Even, and perhaps especially, those who espouse the client-control model demand that attorneys exercise a discretion and select their clients. This is ironical because it denies client control at the very stage when, from the client's point of view, it may be vital. If the lawyer refuses to accept the client there are no further decisions for the client to make. There is a further irony here in that the attempt to preserve a degree of personal discretion in the hands of the attorney gives substance to the argument that the lawyer is morally accountable for his or her actions in a professional capacity.

Before examining the attitudes which could be held on this topic consistently with each of the models outlined above, it is helpful to isolate the criteria which might be relevant for a lawyer in deciding whether or not to accept work. There are two general considerations which, although they do not logically entail a duty on individual attorneys to accept whatever work is offered, do at least place the burden on the lawyer to justify refusal to act.

First, there is the monopoly vested in licensed attorneys with respect to the provision of some legal services. With respect to court advocacy, the limitations on lay representation usually stem not so much from the statutory unauthorized practice provisions as from the courts' control of their own proceedings. Nevertheless, in most jurisdictions courts will only permit lay representation in extraordinary circumstances, and in practice almost never in serious criminal trials. In practice, therefore, licensed attorneys hold an exclusive right to appear in the courts on behalf of litigants.

Secondly, defendants in criminal cases have a right to the assistance of counsel, which has been specifically held to mean a

49. See, e.g., S. TERKEL, WORKING 694 (1975); Fox, *Goodbye to Gameplaying*, 1978 JURIS DOCTOR 37, 40.

properly licensed attorney.⁵⁰ That constitutional provision has been held not to require that defendants have counsel of their own choice, but it does mean they are entitled to some competent counsel. That provision of the Constitution has been understood by the profession to impose a corporate duty on lawyers as a body to see that no defendant goes without assistance and implies that courts and bar associations will arrange representation when all else fails. However, the ABA Code goes further and states quite explicitly that there is *no* duty on individual lawyers to accept work, except at the request of a bar association or upon court order. The Code states that "a lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client;"⁵¹ criminal defence work is not deemed to warrant separate treatment. After a rather confusing and incomplete survey of the considerations relevant to the "acceptance and retention of employment," the Code, until 1975, expressed concern that some group legal service plans (designed to assist potential clients in finding a lawyer) may deny such potential clients "free choice in the selection of an attorney."⁵² There is no recognition of the fact that the right to decline to act is a direct restriction on the aspiring client's freedom of choice.

If there is to be any restriction on the attorney's right to reject work, it will be necessary to identify and evaluate the relevant criteria in relation to specific cases.

1. *Time*.—This is clearly relevant. A lawyer cannot be in two places at once, nor prepare two cases at once. But while a prior commitment seems an unexceptional reason for refusing new work, and might even justify a duty to do so, the issue is rarely so simple. Dates of hearings can be changed, private work schedules rearranged and outside assistance obtained. Even prior commitments may not be sacrosanct. Suppose a leading criminal advocate undertakes a fairly routine case for a particular day and is later asked to defend a difficult murder charge on the same date. Assuming that neither case can be re-scheduled, it is arguable that the lawyer should take the murder case on the basis that it will be easier for the client with the routine case to find acceptable alternative coun-

50. *United States v. Wilhelm*, 570 F.2d. 461 (3d Cir. 1978).

51. A.B.A. CODE, EC 2-26.

52. A.B.A. CODE, EC 2-33. The current provisions emphasize the *lawyer's* freedom to serve the client without interference from any third party.

sel (and the lawyer involved can help do that) whereas it may be impossible to find another experienced attorney to handle the difficult and serious charge.

2. *Money.*—The client may be impecunious. Even though lawyers as a group are comparatively affluent, it would not be politically acceptable to require them to accept clients regardless of whether the client could pay for the services or not. Since the majority of criminal defendants are poor and would usually seek lawyers who specialize in criminal work, such an obligation would soon bankrupt the criminal defence bar. It might be possible to achieve a compromise which would help some clients obtain lawyers of their choice, while spreading the load within the profession, by requiring that all trial attorneys do a certain volume of free work each year. This suggestion, sometimes called "mandatory pro bono," has been made before, but it has hardly swept through the profession with enthusiastic acceptance. The ABA Code becomes almost evangelical on this topic: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon individual lawyers, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."⁵³ This Florence Nightingale approach, unsupported by any substantive duty or mechanism for sharing the burden, failed long ago. A partial answer is now to be found in the institution of the public defender, where, incidentally, neither lawyer nor client has any freedom of choice.

The totally impecunious client provides an extreme example from the much larger class of clients who would be unable to pay a full lawyer's fee. Should a lawyer be able to refuse a client who can make some payment, though not a 'normal' fee? It would be possible for a public body to set a specific level of remuneration, below which an attorney would not be entitled to refuse a client for money reasons.

3. *Competence.*—Lack of competence in the relevant area entails a duty not to accept employment.⁵⁴ While this rule provides a unique professional recognition of the fraudulent nature of the licensing process, it is really a consideration of peripheral relevance

53. A.B.A. CODE, EC 2-25.

54. A.B.A. CODE, EC 2-30.

to the present inquiry. Where the lawyer has no real competence, it is hardly of assistance to either party to impose on him or her the duty to accept work. The real problem is in formulating a stand to prevent lack of competence being used as an escape to avoid an otherwise desirable duty. A restrictive approach would be to impose a duty to act only in areas in which the lawyer normally practices. This approach would allow a lawyer who was in court every week doing civil cases to properly refuse a case in a criminal court. As Barbara Babcock has argued, there is really nothing so esoteric about criminal work that it lies beyond the capability of any competent trial lawyer.⁵⁵ One would like to be able to formulate a rule along the following lines (perhaps it could be called the "fat fee" test): a lawyer may not refuse a criminal defence case for lack of competence even though the work is novel, when, had the case been novel, but in a potentially remunerative area of interest to the lawyer, it would have been accepted.

4. *Fear that Acceptance of the Case Will Hurt the Lawyer's Established Practice, Social Standing or Reputation.*

5. *Personal Distaste For the Client, His or Her Past action or the Proposed Line of Defence.*

These categories are theoretically distinguishable and are distinguished by the ABA Code, which concludes that they have different consequences in relation to voluntary work as opposed to court-ordered and bar association requested representation. This part of the Code is confusing both in its layout and in the inconsistency of its terminology, but states, at least in the case of voluntary employment, that "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from community attitude, may impair his effective representation of the prospective client".⁵⁶ This position is presumably justified on the basis that it is similar to a conflict of interests and the lawyer will be unable to provide wholehearted and committed representation.⁵⁷ Yet, why the lawyer should be expected to fight the influence of community feelings, but not his or her own prejudices, is not made clear. The rationale could be that intense but personal feelings are not likely

55. Babcock, *Problems in Professional Responsibility*, 55 NEB. L. REV. 42 (1975).

56. A.B.A. CODE, EC 2-30.

57. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 10-11, n.5 (1975).

to be shared by the rest of the bar and so the prospective client will be able to find alternative counsel. Yet despite this duty to refuse voluntary employment (where by definition lawyer and client can talk things over and try to reach some form of consensus), court-ordered representation may not be resisted on the ground of "the repugnance of the subject-matter, [or] the identity or position of a person involved in the case . . ." ⁵⁸

The real justification for distinguishing (4) and (5) must be that in the former case, self-interest persuades the lawyer to decline to act, whereas in the latter, the lawyer's own moral scruples are at stake. In this way, it appears that the profession is adopting a standing of high-minded altruism. However, that position is in fact highly anomalous: it is extremely doubtful that lawyers as a body would approve such conduct in other occupations. For example, and although they might grumble, I doubt if most lawyers would think it improper for railway workers to go on strike for higher wages (i.e. self-interest). But one can imagine the cries of outrage if the same workers refused to operate trains carrying, say, material for the manufacture of nerve gas (i.e. moral scruples).

Furthermore, in times of social stress even the distinction between personal scruples and community attitudes may be unworkable. The stronger the public feeling, the greater the pressure for individual lawyers to adopt the popularly accepted position, so that during the cold war hysteria of the 1950's professional organizations, far from urging lawyers to resist the pressures of popular prejudice, themselves succumbed to the very same prejudices. It became socially unacceptable for a lawyer *not* to have personal distaste for clients with left-wing political views. ⁵⁹

Although McCarthyism provided an extreme test of ethical principles, the reaction of the legal profession was not necessarily anomalous. Much of the danger in the ABA position stems from the fact that lawyers are, on the whole, respectable and responsible members of a profession. Class and cultural ties will tend to align them with dominant social attitudes and values; thus, they will tend to exercise their personal judgements to refuse assistance to social deviants and anti-social elements, as they see them. This will no doubt result in individual lawyers feeling more comfortable and the public image of the profession not being harmed by the ap-

58. A.B.A. CODE, EC 2-29.

59. J. AUERBACH, ch.8, *Cold War Conformity, UNEQUAL JUSTICE* (1976).

pearance of lawyers voluntarily aligning themselves with unpopular causes or clients. Short term professional interests may be satisfied, but at the expense of the client and public interests.

B. The Three Models and Refusal to Act

In America, the ABA Code adopts an approach which is consistent with, though not required by, the traditional model. The Code imposes a corporate duty on lawyers as a group to provide representation for all litigants, a duty which is ultimately dependant on the use of publically funded agencies and court appointments. The problem of the unpopular defendant or cause will not, in the view of the drafters of the Code, be adequately solved by imposing a duty to act on individual lawyers, and indeed the existence of any such duty is specifically negated. In contrast the English bar, which adopts a more extreme version of the traditional model, imposes a duty to act which is considered in the next section.⁶⁰

One might expect that proponents of the client-control model would accept a duty to accept work, but this is not necessarily the case. For example, Professor Monroe Freedman has written: "Although it is occasionally suggested that they attorney has an obligation to take any client who requests legal services, nothing could be further from the truth or practice. There is no rule and never has been, that the attorney must serve as a 'hired gun,' and cannot elect to serve only selected clients or causes."⁶¹

The "no-duty-to-act" position is a highly legalistic and even artificial one for proponents of client-oriented ethics to take. It places great emphasis on the time of accepting the retainer, when personal attitudes of the lawyer may be given full sway; whereas once the relationship is established, the lawyer loses that freedom.

60. This topic has been one of continuing concern over decades of legal writing. See, e.g., H. SACKS, *DEFENDING THE UNPOPULAR CLIENT* (Nat'l Council on Legal Clinics 1961); Cooper, *Representation of the Unpopular: What Can the Profession Do About the Eternal Problem?*, 22 *CHITTY'S L.J.* 333 (1974); Ernst & Schwartz, *The Right to Counsel and the "Unpopular Cause,"* 20 *U. PITT. L. REV.* 727 (1959); GOLDBERGER, *Would You Defend an Unpopular Cause?*, 5 *BARRISTER* 46 (Winter 1978); Nagle & Champagne, *The Risks of Defending Unpopular Clients*, 2 *STUDENT LAW.* 41 (1973-74); Jaworski, *The Unpopular Cause*, 47 *A.B.A.J.* 714 (1961); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 *HARV. C.R.—C.L.L. REV.* 301 (1970).

61. M. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 10 (1975).

Superficially, the line seems to depend on the completion of a contract, which, once entered into, cannot be reneged from. In fact, the contract is not significant, because as Freedman's critics have pointed out in the past, if it is a matter of keeping faith to the client which requires the lawyer to put the client's interest before all others, this could easily be taken care of by stipulating at the outset the limits of the lawyer's permissible loyalty to the client. The duty to the client depends not on the terms of any contract, but rather on the priority given to certain principles implicit in the adversary system, especially the duty of confidentiality. If the potential client is charged with a criminal offence, he or she is already within the system and is entitled to certain benefits. If that person came to me and said, "Will you defend me? I have been charged with rape and I believe you will be prepared to allow me a say in my own defence and will not try to tell me what is best for me?", would he not be entitled to think me a trifle hypocritical if I were to reply, "Well, what you say would be true if I agreed to take your case, but I dislike rape trials and I'm not prepared to help you unless you can show me no one else will."?

Alternatively, if one wants to give the lawyer a choice of which clients to represent, why draw the line at the time the retainer is accepted? Must the lawyer try to establish, at a stage when the necessary degree of trust for frank discussion is almost certainly lacking, whether or not the case or client is acceptable? May not relevant factors appear only when the lawyer is fully committed to represent the client? Of course some factors will be readily apparent at the outset, but others will not. Professor Freedman's statement envisages no limit on the lawyer's power of selection, so it is impossible to say that the lawyer will have all the necessary information at the crucial time.

The vehemence of the denial of any form of duty to act may itself be revealing. As Professor Carl Selinger has noted, one of the attractive facets of Freedman's arguments stems from the fact that his (hypothetical) clients are "virtuous."⁶² Is it possible that the theory of client-oriented ethics is only acceptable if all the clients are "virtuous" and to ensure this we must give the lawyer the power to pick and choose clients?

62. Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking about the Ethics of Untruthful Practices by Lawyers for "Innocent" Defendants*, 6 HOFSTRA L. REV. 631 (1978).

While the rejection of a duty to act sits awkwardly with the second model, it is a necessary concomitant of the third. Commitment to a particular cause or group of clients is in general inconsistent with representing either side, although that alone may leave unanswered questions. Lawyer Charles Garry, discussing whether he would be willing to represent a fascist or a nazi, stated, "The answer is, I will not. Not that I don't think that person should have representation, but he's not going to have *my* representation. I don't know what I would do if there were no other lawyer but me. I hope I don't have to decide that question."⁶³ While the cooperative model rejects the idea that the client has an unfettered freedom to demand representation of any individual lawyer, it also leaves the lawyer free to accept clients on any basis he or she wishes. "In an ordinary criminal case," Garry notes, "with no political or racial overtones, I don't have to like my client or dislike him You've got to have empathy for him, though; you have to understand him, so that you can start relating to and explaining him."⁶⁴

C. *The English Rule*

For the British, the ultimate guarantee of the Independence of the Bar in all its functions—the accepted symbol of professional detachment—is the rule that a barrister is bound to accept any brief in the courts in which he professes to practise under the protection of [that] rule, the Bar can perform its basic task of representation or counsel on a stiffly professional and independent footing."⁶⁵

I recall an Australian barrister explaining the operation of the rule to a legal ethics class. He referred to the case of a young man who had come to him for assistance in a draft evasion prosecution. The prospective client objected in principle to conscription, but did not qualify as a conscientious objector. The barrister, who did criminal work, informed the defendant that he was an ex-service-man and a staunch believer in conscription and therefore disapproved strongly of the defendant's action. He told the prospective client that he thought he would be well advised to go elsewhere, but that if he insisted on him handling the case he would do the

63. Quoted in GINGER, *THE RELEVANT LAWYERS* 73 (1972).

64. *Id.*

65. E. Rostow, *The Lawyer and His Client*, 48 A.B.A.J. 25, 29 (1962).

best he could. The client did insist, and the lawyer took the case.

The English rule is often traced back to the rhetorical words of Erskine in justifying his defence of the unpopular Tom Paine near the end of the eighteenth century: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."⁶⁶

The rule, now generalized beyond the criminal jurisdiction, is frequently referred to as the "cab-rank" principle, indicating that barristers, like cab drivers, must act on a 'first come, first served' basis in accepting work. That is seen as an appropriate condition for the privilege of being licensed to provide a public service. The analogy can be criticized: while cab drivers are licensed to ensure that an adequate service is provided at a proper charge, lawyers are licensed for the entirely different purpose of ensuring competence, and hence that the service provided is of an acceptable standard. Furthermore, lawyers, unlike cab drivers, have to establish a relationship of trust with their clients and thus, while it may be appropriate to require cabbies to accept all comers, the same reasoning does not apply to lawyers.

The response is, I believe, inadequate because it ignores the fact that the beneficiary of the relationship, the client, is the one who is to be permitted the freedom to choose. If lawyers are to be free to refuse work there is a danger that less prestigious clients and less remunerative work will be denied access to the better lawyers. As one member of the English House of Lords said in 1969:

It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients.⁶⁷

66. 1 THE SPEECHES OF LORD ERSKINE 415 (1847).

67. *Rondel v. Worsley*, 1 A.C. 191, 274 (1969). This view has been dismissed as a fiction by Prof. H.H.A. Cooper in *Representation of the Unpopular: What can the Profession do about this Eternal Problem?*, 22 CHITTY'S L.J. 333 (1974). To point out, as Cooper does that the rule is easily and regularly evaded and that

It also seems unfair to insist on such freedom of choice for private practitioners when it is clearly not available to salaried public defenders. And even in the case of attorneys in private practice, the power to refuse is no doubt more real to those with many clients than those who are not so successful.

A duty to act allows lawyers to demur to demands for accountability for their clients, while lawyers who exercise a right to refuse clients cannot avoid responsibility for their choices. This dilemma has been perceived by American commentators. Professor Freedman once noted, "if lawyers were to be vilified for accepting unpopular clients or causes then those individuals who are most in need of representation would find it difficult if not impossible to obtain counsel, and a fundamental rationale for the adversary system would be nullified."⁶⁸ But the fact that lawyers can and do refuse to act for such clients increases the degree of villification suffered by those who accept. Thus Erskine's protest that he defended Paine because it was his duty was intended to deflect public criticism. It would, no doubt, have been more successful had the existence of the duty been more widely accepted at the time.

Irving Stone wrote of Darrow's defence of members of the Communist Labour Party in Chicago in 1920, "As always throughout his career, he was accused of believing in and advocating the theories of the people he was defending. Few would believe him when he said he was merely acting as a mechanism of defence." This is hardly surprising if, as Stone asserts elsewhere, "[Darrow] rarely took a case in which he did not believe his client to be right."⁶⁹ Furthermore, he was prepared to assert to the jury his personal belief in his client's cause.⁷⁰

The difficulty of finding a lawyer to support an unpopular cause was illustrated recently during the attempts in 1976 of the Nazis to hold public meetings in Skokie, Illinois. When it became clear that no attorney in private practice would represent the Nazis in their attempt to stop Skokie Village's obtaining an injunc-

it alone cannot account for the greater independence of the English bar from their clients is undoubtedly correct, but does not reduce the rule, or at least its perceived effects, to insignificance.

68. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM*, 10 (1975).

69. STONE, *supra* note 11 at 35, 427.

70. See, e.g., his speech in the same Communist Labour Party case; C DARRROW, *ATTORNEY FOR THE DAMNED* 125 n.126 (A. Weinberg ed. 1957) (discussing the rule against expressing such opinions).

tion against their meeting, the local ACLU stepped in. The sad story of vituperation and abuse, tacitly supported by the silence of the Chicago bar, indicates the difficulty lawyers still face in representing unpopular causes. Efforts to protest that the ACLU attorneys concerned did not agree with what the Nazis wanted to say, nor even necessarily believe that the Nazis had a right to say it, were largely unsuccessful in a community, both legal and lay, which did not recognize any obligation to act for unpopular clients.⁷¹ The ACLU action might have been more readily accepted if a general duty to act existed, so that it would not be only with unpopular clients that lawyers claim immunity from moral accountability.

There is one other objection which can be raised against the English rule, (though lawyers might think it an advantage). Its adoption could encourage courts to grant trial advocates immunity from malpractice actions for their conduct during the trial. In the leading English case affirming the existence of the immunity, some of the judges referred to the duty to act.⁷² The link is a little obscure, but it could be argued that advocates would try to evade that duty if they thought they were dealing with the type of client who would turn against and sue his or her lawyer if the case were lost. The duty to act emphasises the public responsibilities of the lawyer, while the immunity from suit resembles the quasi-public officer's immunity granted to prosecutors in this country. The linkage is, therefore, not coincidental.

Since the immunity amounts to a privileged status, the connection might render one wary of establishing the suggested duty. On the other hand, there are other disincentives which establish a virtual immunity for American defence counsel now. Such evidence as we have, suggests that courts are quite willing to protect members of the profession from such actions, and the client will in many cases be dissuaded from attacking counsel when to do so allows the lawyer to reveal confidential communications in defence.⁷³

71. David Goldberger, *Would you Defend an Unpopular Cause*, 5 BARRISTER 46 (Winter 1978).

72. *Rondel v. Worsley* 1 A.C. 191, 227 (L. Reid), 264 (L. Pearce) (1969).

73. See, e.g., F. Lee Bailey's threat to reveal confidences of Patricia Hearst if she attacked the competence of the defense he provided. Arguably, his public threat itself involved an improper element of revelation.

IV. Conclusion

There are two distinct, if interwoven, strands running through the preceding discussion. One is the need for all citizens to have access to the legal system. For criminal defendants, this right is enshrined in the Constitution. The problem there is how to ensure the provision of competent advocates for all who need them. The second strand relates to the nature of the relationship established between lawyer and client, regardless of how they came together. In criminal defence work it will generally be a relationship of marked inequality, with power resting with the lawyer.

Rules regulating lawyers' conduct are to be found not only in the general law, but also in special codes of professional ethics. However, in difficult and controversial areas the codes are often unhelpful. For example, the ABA Code is vague and confusing in its comments on the selection of clients. It is clear only in holding that the public's right of access to counsel should not be facilitated through the imposition on individual lawyers of a duty to act. Is the Code wrong on this point?

I do not believe this question can usefully be decided in isolation from wider issues. Most importantly, it is necessary to determine to what model, if any, the lawyer-client relationship should conform. Unless that issue is faced, it will be impossible to formulate a coherent code of ethics. On the other hand, one may not want to force all lawyers to adopt a uniform approach to all cases and all clients. Should any particular approach be either proscribed or prescribed? The answers to these questions lie in the values implicit in the criminal justice system which are in turn embodied in the Constitution. The lawyer's role is inextricably bound up with and defined by the operation of that system; but by the same token redefinition of what is proper behaviour on the part of lawyers will affect the operation of the system. Rules of professional ethics are not simply matters of private concern for lawyers and their professional organizations. Lawyers are only human, and dress up their decisions how they will, they will inevitably reflect to some extent the perceived self-interest of the profession, or at least of the dominant groups within its professional organizations.

While in areas not concerned with criminal defence or the court enforcement of constitutional rights there may be good arguments for allowing, or even requiring lawyers not to take any and every legal point on behalf of clients, similar considerations do not apply in the criminal arena. But if the client-control model is ac-

cepted in relation to the conduct of the case it is difficult to see why a lawyer should be free to refuse to accept a client at all merely on the grounds of the distastefulness or unpopularity of the client or the cause.

If it were understood to be improper for lawyers to exercise such personal judgments in accepting clients, then they should not be criticized for accepting any particular client, nor have to bear responsibility for the client's views and actions. In one sense, a full-fledged client-control model is most likely to allow lawyers that appearance of independence in the service of others which is associated with professional status.

Finally the limited scope of operation of these conclusions must be emphasized. First, it seems that in the past, the litigious tail has tended to wag the dog of generalized ethical codes: this has been unfortunate. Yet as more attention is paid to the ethical questions arising in legal counselling, negotiating and planning activities there is a danger that the peculiar situation of the criminal defence attorney will be overlooked. The diversity of functions performed by lawyers is increasingly being reflected in the structure of the profession and should also be reflected in the codes of conduct.

Secondly, critics have expressed grave doubts both about the values embodied in the criminal justice system and in the ability of that system to further even its own professed goals. However, the solution to such problems is not, as William Simon seems to suggest, to change the ways lawyers behave through changes in codes of behaviour laid down by professional organizations. That approach may help lawyers feel more moral; they may even appear to act more morally, but all at the expense of the autonomy and legal rights of their lawyer class and unpopular criminal defendant clients. In this area no restrictions beyond the requirements of the general law should be imposed on lawyers or be permitted of them.