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A CAUSERIE ON LAWYERS' ETHICS IN NEGOTIATION

*Alvin B. Rubin**

I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. JOHNSON: 'Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge.' 2 BOSWELL'S LIFE OF JOHNSON 47 (G.B. Hill ed. 1934).

The philosopher of Mermaid Tavern did not discuss the morality expected when lawyers deal with other lawyers or with laymen. When a lawyer buys or sells a house or a horse or a used car, he is expected to bargain. When he becomes a Secretary of State — like Dean Acheson or John Foster Dulles — or a Governor, or a Senator, or a Congressman or a legislator, he will negotiate and compromise.

In such activities lawyers may be acting for themselves as principals, or they may be representing constituents. But they are not practicing their profession as attorneys-at-law. It may be assumed that the lawyer who is buying or selling a farm on his own behalf is expected to behave no differently from any other member of his society, that no special ethical principles command his adherence or govern his conduct. And while the lawyer-diplomat or lawyer-politician may conceive of himself as a professional, rather than as an amateur, he will not be practicing a profession, as that term is generally understood.

When the lawyer turns to his law practice and begins to represent his clients as attorney or advocate, he assumes the role of a professional. What constitutes a profession is difficult to define comprehensively, but all attempts include reference to a store of special training, knowledge, and skills and to the adoption of ethical standards governing the manner in which these should be employed. When acting as an advocate, the lawyer professes a complex set of ethical principles that regulate his conduct toward the courts, his own clients, other lawyers and their clients.

Litigation spawns compromise, and courtroom lawyers engage almost continually in settlement discussions in civil cases and plea bargains in criminal cases. We do not know what proportion of civil

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claims is settled by negotiation before the filing of suit, but it must be vastly greater than the number of cases actually filed. Neither does institution of suit mean an end to negotiations; 91% of all cases filed in the United States District Courts for the fiscal year ending June 30, 1974 were disposed of prior to the beginning of a trial on the merits, most of them by some sort of negotiated compromise. In the same year only 15% of the defendants in criminal cases in the federal courts went to trial; 61% of the charges terminated in pleas of guilty or *nolo contendere* and 24% were *nol* prossed or dismissed for some other reason.¹ In almost all of the cases that were disposed of without trials, there were likely negotiations of one kind or another, such as plea bargains or exchanges of information.

Although less than one fourth of the lawyers in practice today devote a majority of their time to litigation, and most spend none at all in the traditional courtroom,² there are few lawyers who do not negotiate regularly, indeed daily, in their practice. Some lawyers who handle little conventional litigation persist in saying that they do not act as negotiators. If there are a few at the bar who do not, they are *rarae aves*. Patent lawyers, tax counsellors and securities specialists and all those who perform the myriad tasks of office law practice may not dicker about the value of a case — though some assuredly do; but they constantly negotiate the settlement of disputed items.

Neither the Code of Professional Responsibility nor most of the writings about lawyers' ethics specifically mention any precepts that apply to this aspect of the profession. The few references to the lawyer's conduct in settlement negotiations relate to obtaining client approval³ and disclosing potentially conflicting interests.⁴ It is scant comfort to observe here, as apologists for the profession usually do, that lawyers are as honest as other men.⁵ If it is an inevitable professional duty that they negotiate, then as professionals they can be

1. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1973; 1974 SEMI-ANNUAL REPORT OF THE DIRECTOR—ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

2. This "fact" is derived from personal observation, conversation with lawyers, and discussions with managing partners of larger law firms, who usually report that about 25% of their lawyers are in the litigation section.

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7. The ABA Code, as adopted in Louisiana, is found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR Ass'n art. XVI, LA. R.S. 37, ch. 4, app.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-16, 5-17.

5. Ferdinand Lunberg, *quoted in* M. BLOOM, *THE TROUBLE WITH LAWYERS* 17 (1968).

expected to observe something more than the morality of the market place.

In 1969, after five years of study, the American Bar Association, to which 192,000 of the nation's more than 300,000 lawyers belong, adopted a Code of Professional Responsibility, superseding the archaic Canons of Ethics. The Code has, with minor changes, been adopted in forty-nine states and the District of Columbia.⁶ It purports to set forth the ethical standards that apply to the lawyer's professional conduct. It is lengthy and intricate. Its style is forbidding and is only slightly more lucid than the more formidable parts of the Internal Revenue Code. But its complex structure and apparent effort to be comprehensive induce the belief that it sets forth those general principles to which lawyers should adhere in every aspect of their professional engagements.

Its nine canons are preceptual; they purport to state "axiomatic norms,"⁷ and to express "in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession."⁸ From the Canons are derived 137 Ethical Considerations that are "aspirational in character."⁹ Both Canons and Ethical Considerations (EC) are reinforced by 38 mandatory Disciplinary Rules (DR), each with subparts, that set forth the sanctions for proscribed conduct. But these scriptures contain nothing that deals directly with the propriety of a lawyer's conduct or his ethical responsibilities when dealing as a negotiator with another lawyer, a layman or a government agency. Indeed, there are only a few texts that can be used to construct precepts by analogy.

The superseded Canons of Ethics contained a fine homiletic sentence: "The conduct of the lawyer before the Court *and with other lawyers* should be characterized by candor and fairness."¹⁰ The admonitions of duty to the Court — at least in some respects — remain explicit and elaborated in the Code; the general statement of a duty to other lawyers no longer appears.¹¹ The Code does not speak directly to the duty of a lawyer in dealing with laymen.

6. California adopted new Rules of Professional Conduct on January 1, 1975. They are based in part on the Disciplinary Rules of the new code but do not include the ethical considerations.

7. *Preliminary Statement* to ABA CODE OF PROFESSIONAL RESPONSIBILITY.

8. *Id.*

9. *Id.*

10. ABA CANONS OF PROFESSIONAL ETHICS No. 22 (emphasis added).

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-38 speaks to the lawyer's relationship with other lawyers in litigation: "A lawyer should be courteous to opposing

There are a few rules designed to apply to other relationships that touch peripherally the area we are discussing. A lawyer shall not:

- knowingly make a false statement of law or fact.¹²
- participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.¹³
- counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent,¹⁴ or
- knowingly engage in *other illegal conduct* or conduct contrary to a Disciplinary Rule.¹⁵
- conceal or knowingly fail to disclose that which he is *required by law* to reveal.¹⁶

In addition, he “should be temperate and dignified and . . . refrain from all illegal and morally reprehensible conduct.”¹⁷ The lawyer is admonished “to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”¹⁸

Taken together, these rules, interpreted in the light of that old but ever useful candle, *ejusdem generis*, imply that a lawyer shall not himself engage in illegal conduct, since the meaning of assisting a client in fraudulent conduct is later indicated by the proscription of *other illegal conduct*. As we perceive, the lawyer is forbidden to make a false statement of law or fact *knowingly*. But nowhere is it ordained that the lawyer owes any general duty of candor or fairness to members of the bar or to laymen with whom he may deal as a negotiator, or of honesty or of good faith insofar as that term denotes generally scrupulous activity.

Is the lawyer-negotiator entitled, like Metternich, to depend on “cunning, precise calculation, and a willingness to employ whatever means justify the end of policy?”¹⁹ Few are so bold as to say so. Yet some whose personal integrity and reputation are scrupulous have

counsel and should accede to reasonable requests regarding court proceedings, setting continuances, waiver of procedural formalities and similar matters which do not prejudice the rights of his client.” It concludes: “A lawyer should be *punctual* in fulfilling all professional commitments.” (Emphasis added.)

12. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(5).

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(6).

14. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(7). Presumably this implies, a fortiori, that a lawyer must not himself do anything fraudulent.

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(8) (emphasis added).

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(3) (emphasis added).

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 1-5.

18. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-10.

19. Lapham, *The Easy Chair*, HARPER'S, November, 1974, at 30.

instructed students in negotiating tactics that appear tacitly to countenance that kind of conduct. In fairness it must be added that they say they do not "endorse the *propriety*" of this kind of conduct and indeed even indicate "grave reservations"²⁰ about such behavior; however, this sort of generalized disclaimer of sponsorship hardly appears forceful enough when the tactics suggested include:

- Use two negotiators who play different roles. (Illustrated by the "Mutt and Jeff" police technique; "Two lawyers for the same side feign an internal dispute. . . .")
- Be tough — especially against a patsy.
- Appear irrational when it seems helpful.
- Raise some of your demands as the negotiations progress.
- Claim* that you do not have authority to compromise. (Emphasis supplied.)
- After agreement has been reached, have your client reject it and raise his demands.²¹

Another text used in training young lawyers commendably counsels sincerity, capability, preparation, courage and flexibility. But it also suggests "a sound set of tools or tactics and the know-how to use (or not to use) them."²² One such tactic is, "Make false demands, bluffs, threats; even use irrationality."²³

Occasionally, an experienced legal practitioner comments on the strain the custom of the profession puts on conscience. An anonymous but reputedly experienced Delaware lawyer is quoted as saying, "The practice of tax law these days requires the constant taking of anti-emetics."²⁴

The concern of lawyers with problems that do not ostensibly involve either ethics or negotiations reveals assumptions regarding what attorneys assume to be professionally proper. Thus, the American Bar Association suggests that a major problem is raised by the question, "Must Attorneys Tell All to Accountants?"²⁵

The problem revolves around the growing demand by accoun-

20. M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY; MATERIALS FOR CLINICAL LEGAL EDUCATION 232 (1974) (emphasis in original).

21. *Id.* at 236-38. Regarding the tactic of having the client reject the agreement and raise his demand, the authors add, "This is the most ethically dubious of the tactics listed here, but there will be occasions where a lawyer will have to defend against it or even to employ it." *Id.* at 238.

22. H. FREEMAN & H. WEIHOFER, CLINICAL LAW TRAINING 122 (1972).

23. *Id.*

24. Hawley, *Morality v. Legality*, PA. BAR ASS'N Q. 230, 235 (1956).

25. AMERICAN BAR ASSOCIATION NEWS, September, 1974, at 9.

tants auditing corporate books that they be informed by corporate lawyers when a mutual client is facing or could be facing contingent liabilities through involvement in potentially costly lawsuits, possible tax claims, and so on.²⁶

This is not a negotiation situation, but the resistance to telling an auditor the truth about his client's affairs arises, we are told, "because revelations could weaken cases already in court. . . ."²⁷ Since the disclosure would certainly not be admissible in evidence, we must assume that the apprehended "weakening" is a softening of settlement posture if the real truth were told.

Honesty, as the oath administered to witnesses makes clear, implies not only telling literal truth but also disclosing the whole truth. The lawyer has no ethical duty to disclose information to an adversary that may be harmful to his client's cause; most lawyers shrink from the notion that morality requires a standard more demanding than duty to clients. EC 4-5 prohibits a lawyer from using information acquired in the representation of a client to the client's disadvantage, and this, together with the partisan nature of the lawyer's employment, indicates to the practitioner that nondisclosure is both a duty to the client and consistent with ethical norms.

While the lawyer who appears in court is said to owe a duty to disclose relevant legal authorities even if they harm his client's position, he need not disclose, and indeed most would say that he must conceal, evidence damaging to the client's cause. This fine analysis of what a lawyer should reveal to the judge in court doubtless inspired the observation by the Italian jurist, Piero Calamandrei, who, in his celebrated *Eulogy of Judges*, asked:

Why is it that when a judge meets a lawyer in a tram or in a café and converses with him, even if they discuss a pending case, the judge is more disposed to believe what the lawyer says than if he said the same thing in court during the trial? Why is there greater confidence and spiritual unity between man and man than between judge and lawyer?²⁸

Let us consider the proper role for a lawyer engaged in negotiations when he knows that the opposing side, whether as a result of poor legal representation or otherwise, is assuming a state of affairs that is incorrect. Hypothesize: *L.*, a lawyer, is negotiating the sale of

26. *Id.*

27. *Id.*

28. P. CALAMANDREI, *EULOGY OF JUDGES* 39 (1942).

his client's business to another businessman, who is likewise represented by counsel. Balance sheets and profit and loss statements prepared one month ago have been supplied. In the last month, sales have fallen dramatically. Counsel for the potential buyer has made no inquiry about current sales. Does *L* have a duty to disclose the change in sales volume?

Some lawyers say, "I would notify my client and advise him that *he* has a duty to disclose," not because of ethical considerations but because the client's failure to do so might render the transaction voidable if completed. If the client refused to sanction disclosure, some of these lawyers would withdraw from representing him *in this matter* on ethical grounds. As a practical matter, (*i.e.*, to induce the client to accept their advice) they say, in consulting with the client, the lawyer is obliged to present the problem as one of possible fraud in the transaction rather than of lawyers' ethics.

In typical law school fashion, let us consider another hypothet. *L*, the lawyer is representing *C*, a client, in a suit for personal injuries. There have been active settlement negotiations with *LD*, the defendant's lawyer. The physician who has been treating *C* rendered a written report, containing a prognosis stating that it is unlikely that *C* can return to work at his former occupation. This has been furnished to *LD*. *L* learns from *C* that he has consulted another doctor, who has given him a new medication. *C* states that he is now feeling fine and thinks he can return to work, but he is reluctant to do so until the case is settled or tried. The next day *L* and *LD* again discuss settlement. Does *L* have a duty either to guard his client's secret or to make a full disclosure? Does he satisfy or violate either duty if, instead of mentioning *C*'s revelation he suggests that *D* require a new medical examination?²⁹

Some lawyers avoid this problem by saying that it is inconceivable that a competent *LD* would not ask again about *C*'s health. But if the question as to whether *L* should be frank is persistently presented, few lawyers can assure that they would disclose the true facts.

Lawyers whose primary practice is corporate tend to distinguish the two hypothets, finding a duty to disclose the downturn in earnings but not the improvement in health. They may explain the difference by resorting to a discussion of the lower standards (expectations?) of the bar when engaged in personal injury litigation. "That's why I stay away from that kind of work," one lawyer said. The esteem

29. "[P]laintiff should disclose as much information as he possibly can without harming his own case." H. BAER & A. BRODER, *HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT* 91 (1967).

of a lawyer for his own profession must be scant if he can rationalize the subclassifications this distinction implies. Yet this kind of gradation of professional ethics appears to permeate the bar.

Lawyers from Wall Street firms say that they and their counterparts observe scrupulous standards, but they attribute less morality to the personal injury lawyer, and he, in turn, will frequently point out the inferiority of the standards of those who spend much time in criminal litigation. The gradation of the ethics of the profession by the area of law becomes curiousest and curiousest the more it is examined, if one may purloin the words of another venturer in wonderland.

None would apparently deny that honesty and good faith in the sale of a house or a security implies telling the truth and not withholding information. But the Code does not exact that sort of integrity from lawyers who engage in negotiating the compromise of a law suit or other negotiations. Scant impetus to good faith is given by EC 7-9, which states, "When an action in the best interest of his client seems to him to be unjust, [the lawyer] may ask his client for permission to forego such action," for such a standard means that the client sets the ultimate ethical parameter for the lawyer's conduct. Neither is there much guidance for the negotiator in EC 7-10, "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid infliction of needless harm." EC 7-27 also palters with the issue: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a *legal* obligation to reveal or produce."³⁰ In context, this obviously applies to the presentation of evidence before a tribunal and not to out-of-court conversations. It likewise begs our present inquiry, for the issue in regard to EC 7-27 is whether there is a *legal* rather than an ethical obligation to reveal or produce the evidence.

The professional literature contains many instances indicating that, in the general opinion of the bar, there is no requirement that the lawyer disclose unfavorable evidence in the usual litigious situation.³¹ The *racontes* of lawyers and judges with their peers are full of

30. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-27 (in pertinent part) (emphasis added).

31. "[I]n ordinary litigious controversy the bar has been told that it is entitled and perhaps required to take a tough, unyielding attitude with respect to the revelation of distasteful evidence. . . ." Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 6 TAX COUNSELOR'S Q. 493 (1962). In a footnote, Maguire continues: "Instance after instance can be adduced. Williston, *Life and Law* 271-272 (1940) (refraining from correcting judge's statement of fact, although Mr. Williston did and his opponents did

tales of how the other side failed to ask the one key question that would have revealed the truth and changed the result, or how one side cleverly avoided producing the critical document or the key witness whom the adversary had not discovered. The feeling that, in an adversary encounter, each side should develop its own case helps to insulate counsel from considering it a duty to disclose information unknown to the other side. Judge Marvin Frankel, an experienced and perceptive observer of the profession, comments, "Within these unconfining limits [of the Code] advocates freely employ time-honored tricks and stratagems to block or distort the truth."³²

The United States Supreme Court has developed a rule that requires the disclosure by the prosecutor in a criminal case of evidence favorable to the accused. But this is a duty owed by the government as a matter of due process, not a duty of the prosecutor as a lawyer. In all other respects in criminal cases, and in almost every aspect of the trial of civil cases, client loyalty appears to insulate the lawyer's conscience. Making fidelity to client the ultimate loyalty and the client himself the authority served appears to sanction the abdication of personal ethical responsibility, a kind of behavior described by psychologist Stanley Milgrim in *Obedience to Authority*. He discusses a series of experiments in which people are induced to inflict apparent physical pain on another person because someone in authority orders it. The lawyer permits obedience to the client's interest to provide the moral authority as well as the rationalized justification for his conduct.

Do the lawyer's ethics protest more strongly against giving false information? DR 7-102(A)(5), already quoted,³³ forbids the lawyer to "knowingly make" a false statement of law or fact. Most lawyers say it would be improper to prepare a false document to deceive an adversary or to make a factual statement known to be untrue with the intention of deceiving him. But almost every lawyer can recount repeated instances where an adversary of reasonable repute dealt with facts in such an imaginative or hyperbolic way as to make them appear to be different from what he knew they were.

Interesting answers are obtained if lawyers are asked whether it

not know the truth); Opinion 309, NYCLA 708 (1933) (not improper to refrain from revealing presence in court of eye witness vital to case of client's opponent, a three year old child). . . . cf. Opinion 307, NYCLA 706 (1933) (not improper to refrain from warning witness whose testimony would be helpful to client that witness by testifying may expose himself to prosecution). . . ."

32. Frankel, *The Search for Truth—An Umpireal View*, 30 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 21 (1975).

33. See text at note 12 *supra*.

is proper to make false statements that concern negotiating strategy rather than the facts in litigation. Counsel for a plaintiff appears quite comfortable in stating, when representing a plaintiff, "My client won't take a penny less than \$25,000," when in fact he knows that the client will happily settle for less; counsel for the defendant appears to have no qualms in representing that he has no authority to settle, or that a given figure exceeds his authority, when these are untrue statements. Many say that, as a matter of strategy, when they attend a pre-trial conference with a judge known to press settlements, they disclaim any settlement authority both to the judge and adversary although in fact they do have settlement instructions; estimable members of the bar support the thesis that a lawyer may not misrepresent a fact in controversy but may misrepresent matters that pertain to his authority or negotiating strategy because this is expected by the adversary.³⁴

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as the social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.

Consider the problems raised when a lawyer represents a client before a government agency, for example the Internal Revenue Service. Here special rules are thought to be applicable. A formal opinion of the ABA Committee on Ethics states:

In practice before the Internal Revenue Service, which is itself an adversary party rather than a judicial tribunal, the lawyer is under a duty not to mislead the Service, either by misstatement, silence, or through his client, but is under no duty to disclose the weaknesses of his client's case. He must be candid and fair, and his defense of his client must be exercised within the bounds of the law and without resort to any manner of fraud or chicanery.³⁵

The committee states that a lawyer engaged in handling a case before the Internal Revenue Service is not held to the principles of ethics that would apply to litigation in court because he is dealing with the IRS, which is the representative of one of the parties. The lawyer has an "absolute duty not to make false assertions of fact" but this does not "require the disclosure of weaknesses in the client's case . . .

34. See, e.g., Voorhies, *Law Office Training: The Art of Negotiation*, 13 *PRAC. LAW.*, no. 4, at 61 (April, 1967).

35. AMERICAN BAR ASSOCIATION, *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS*, FORMAL OPINION 314, at 690 (April 27, 1965).

unless the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed. A wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy is not a crime."³⁶ This kind of juxtaposition of the permissible and the criminal leads inevitably to the conclusion that all that is not criminal is acceptable.

A different distinction is drawn by Calamandrei:

The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.³⁷

The courts have seldom had occasion to consider these ethical problems, for disciplinary proceedings have rarely been invoked on any charge of misconduct in the area. But where settlements have in fact been made when one party acted on the basis of a factual error known to the other and this error induced the compromise, courts have set releases aside³⁸ on the basis of mistake, or, in some cases, fraud.

In Louisiana "fraud" is defined as "an assertion of what is false, or a suppression of what is true. . . ." ³⁹ Such assertion or suppression embraces "not only an affirmation or negation by words either written or spoken, but any other means calculated to produce a belief of what is false, or an ignorance or disbelief of what is true."⁴⁰ This codification is much the same as the prevailing view at common law.⁴¹ It is embraced within the concept of good faith in the negotiation and performance of contracts under the Uniform Commercial Code.⁴² Obviously a contract negotiated on the basis of misrepresentation of fact may be set aside; there is precedent, too, for invalidating the release of a personal injury claim entered into as a result of misrepresentation of matters of law.⁴³ These authorities fix limits on the con-

36. *Id.* at 691.

37. P. CALAMANDREI, *EULOGY OF JUDGES* 62 (1942).

38. *See, e.g.,* *Cole v. Lumbermens Mut. Cas. Co.*, 160 So. 2d 785 (La. App. 3d Cir. 1964).

39. LA. CIV. CODE art. 1847(5).

40. LA. CIV. CODE art. 1847(6).

41. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

42. *See* UNIFORM COMMERCIAL CODE §§ 1-201, 1-203, 2-103.

43. Annot., 21 A.L.R.2d 272 (1952). *See also* Annot., 71 A.L.R.2d 82 (1960). In addition, there may be a tort claim against the person who induces the release. *See* Annot., 58 A.L.R.2d 500 (1958).

duct of the principal whether he acts in person or through a lawyer.

The profession seldom confronts the necessity Vern Countryman and Ted Finman say the attorney-at-law must consider: "the need, if conflicting interests are to be protected, for the lawyer to serve as a source of restraint on his client, and, indeed, on himself."⁴⁴ The lawyer is a professional because his role is not merely to represent his client as a mercenary in the client's war; he is also "a guardian of society's interests."⁴⁵

In an unpublished paper, Dean Murray L. Schwartz, of the University of California Law School,⁴⁶ succinctly proposed three possible standards of the relationship of the lawyer's value structure to that of his client:

- (1) A lawyer should do everything for his client that is lawful and that the client would do for himself if he had the lawyer's skill;
- (2) A lawyer *need not* do for his client that which the lawyer thinks is unfair, unconscionable or over-reaching, even if lawful;
- (3) A lawyer *must not* do for his client that which the lawyer thinks is unfair, unconscionable or over-reaching, even if lawful.⁴⁷

"It will be giving away no professional secrets," he continues, "to tell you that the first standard of behavior is the one that is largely applied in a contested judicial matter."⁴⁸ He thinks that the second standard is "officially recognized as appropriate for non-litigated matters"⁴⁹ though the authorities cited in this paper and my own experience make me think this observation overly generous to the profession. The third, he correctly finds, "no part of official doctrine."⁵⁰

A lawyer should not be restrained only by the legal inhibitions on his client. He enjoys a monopoly on the practice of law protected by sanctions against unauthorized practice. Through a subpart of the profession, lawyer-educators, the lawyer controls access to legal education. He licenses practitioners by exacting bar examinations. He controls access to the courts save in those limited instances when a litigant may appear *pro se*, and then he aptly characterizes this liti-

44. V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 185 (1966).

45. *Id.* at 186.

46. M. Schwartz, *Moral Development, Ethics and the Professional Education of Lawyers*, October 14, 1974 (unpublished paper on file in office of *Louisiana Law Review*).

47. *Id.* at 7.

48. *Id.*

49. *Id.*

50. *Id.*

gant as being his own lawyer, hence having a fool for his client.

The monopoly on the practice of law does not arise from the presumed advantages of an attorney's education or social status: it stems from the concept that, as professionals, lawyers serve society's interests by participating in the process of achieving the just termination of disputes. That an adversary system is the basic means to this end does not crown it with supreme value. It is means, not end.⁵¹

If he is a professional and not merely a hired, albeit skilled hand, the lawyer is not free to do anything his client might do in the same circumstances. The corollary of that proposition does set a minimum standard: the lawyer must be at least as candid and honest as his client would be required to be. The agent of the client, that is, his attorney-at-law, must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his principal. Beyond that, the profession should embrace an affirmative ethical standard for attorneys' professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith.* Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule. Good conduct exacts more than mere convenience. It is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.

Patterson and Cheatham⁵² correctly assert that the basic standard for the negotiator is honesty. "In terms of the standards of the profession, honesty is candor. . . ." ⁵³ Candor is not inconsistent with striking a deal on terms favorable to the client,⁵⁴ for it is known to all that, at least within limits, that is the purpose to be served. Substantial rules of law in some areas already exact of principals the duty to perform legal obligations honestly and in good faith. Equivalent standards should pervade the lawyer's professional environment.

51. For a recent illuminating reappraisal of the adversary process as a means to truth, see Frankel, *supra* note 32.

52. L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 121 (1971).

53. *Id.* at 123.

54. *Id.*

The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty.

Since bona fides and truthfulness do not inevitably lead to fairness in negotiations, an entirely truthful lawyer might be able to make an unconscionable deal when negotiating with a government agency, or a layman or another attorney who is representing his own client. Few lawyers would presently deny themselves and their clients the privilege of driving a hard bargain against any of these adversaries though the opponent's ability to negotiate effectively in his own interest may not be equal to that of the lawyer in question. The American Bar Association Committee on Ethics does not consider it improper for a lawyer to gain an unjust result in a tax controversy. Young lawyers, among the most idealistic in the profession, about to represent indigents, are advised that they be tough, especially against a patsy.^{54.1}

There is an occasional Micah crying in the wilderness:

One should go into conference realizing that he is an instrument for the furtherance of justice and is under no obligation to aid his client in obtaining an unconscionable advantage. Of course, in the zone of doubt an attorney may and probably should get all possible for his client.⁵⁵

This raises the problem inevitable in an adversary profession if one opponent obeys a standard the other defies. As Countryman and Finman inquire,

How is a lawyer who looks at himself as 'an instrument for the furtherance of justice' likely to fare when pitted against an attorney willing to take whatever he can get and use any means he can get away with?⁵⁶

In criminal trial matters, *Brady v. Maryland*⁵⁷ imposes constraints on the prosecutor as a matter of constitutional due process by requiring that he divulge evidence favorable to the accused. The

54.1. See text at notes 20-21, *supra*.

55. Herrington, *Compromise v. Contest in Legal Controversies*, 16 A.B.A.J. 795, 798 (1930).

56. V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 281 (1966). See also Mathews, *Negotiation: A Pedagogical Challenge*, 6 J. LEGAL ED. 93, 95 (1953), observing that in negotiation a lawyer "endowed with shrewdness and a sportive sense of outmaneuvering his opponent" has "an opportunity to indulge his proclivity almost devoid of risk of detection" provided he limits himself to "sharp practice" and does not step over into fraud, coercion or violations of law "or public policy." See Note, 112 U. PA. L. REV. 865 (1964).

57. 373 U.S. 83 (1962).

only limitations in the Code of Professional Responsibility on sharp practice in plea bargaining are on the public prosecutor, who

shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.⁵⁸

It is obvious, as has already been pointed out, that this does not stem from an ethical standard for lawyers but on the duty of the government, a duty the government's lawyer performs as alter ego for his employer.

While it might strain present concepts of the role of the lawyer in an adversary system, surely the professional standards must ultimately impose upon him a duty not to accept an unconscionable deal. While some difficulty in line-drawing is inevitable when such a distinction is sought to be made, there must be a point at which the lawyer cannot ethically accept an arrangement that is completely unfair to the other side, be that opponent a patsy or a tax collector. So I posit a second precept: *The lawyer may not accept a result that is unconscionably unfair to the other party.*⁵⁹

A settlement that is unconscionable may result from a variety of circumstances. There may be a vast difference in the bargaining power of the principals so that, regardless of the adequacy of representation by counsel, one party may simply not be able to withstand the expense and bear the delay and uncertainty inherent in a protracted suit. There may be a vast difference in the bargaining skill of counsel so that one is able to manipulate the other virtually at will despite the fact that their framed certificates of admission to the bar contain the same words.

The unconscionable result in these circumstances is in part created by the relative power, knowledge and skill of the principals and their negotiators. While it is the unconscionable result that is to be avoided, the question of whether the result is indeed intolerable depends in part on examination of the relative status of the parties. The imposition of a duty to tell the truth and to bargain in good faith would reduce their relative inequality, and tend to produce negotiation results that are within relatively tolerable bounds.

But part of the test must be in result alone: whether the lesion is so unbearable that it represents a sacrifice of value that an ethical

58. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103(B).

59. Compare Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

person cannot in conscience impose upon another. The civil law has long had a principle that a sale of land would be set aside if made for less than half its value, regardless of circumstance.⁶⁰ This doctrine, called lesion beyond moiety, looks purely to result. If the professional ethic is *caveat negotiator*, then we could not tolerate such a burden. But there certainly comes a time when a deal is too good to be true, where what has been accomplished passes the line of simply-a-good-deal and becomes a cheat.

The lawyer should not be free to negotiate an unconscionable result, however pleasing to his client, merely because it is possible, any more than he is free to do other reprobated acts. He is not to commit perjury or pay a bribe or give advice about how to commit embezzlement. These examples refer to advice concerning illegal conduct, but we do already, in at least some instances, accept the principle that some acts are proscribed though not criminal: the lawyer is forbidden to testify as a witness in his client's cause,⁶¹ or to assert a defense merely to harass his opponent;⁶² he is enjoined to point out to his client "those factors that may lead to a decision that is morally just."⁶³ Whether a mode of conduct available to the lawyer is illegal or merely unconscionably unfair, the attorney must refuse to participate. This duty of fairness is one owed to the profession and to society; it must supersede any duty owed to the client.

One who has actively practiced law for over 20 years and been a federal trial judge for eight years knows that the theses he has set forth are vulnerable to charges that they are impractical, visionary, or radical. Old friends will shake their heads and say that years on the bench tend to addle brains and lead to doddering homilies.

But, like other lawyers, judges hear not only of the low repute the public has for the bench but also of the even lower regard it has for the bar. We have been told so in innumerable speeches but, more important, our friends, neighbors and acquaintances tell us on every hand that they think little of the morality of our profession. They like us; indeed some of their best friends are lawyers. But they deplore the conduct of our colleagues. This is not merely an aftermath of Watergate: it is, in major part, because many members of the public, not without some support in the facts, view our profession as one that adopts ethics as cant, pays lip service to DR's and on behalf of clients stoops to almost any chicane that is not patently unlawful. We will

60. See, e.g., LA. CIV. CODE art. 2589.

61. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102(A). See also EC 5-9, DR 5-101(B).

62. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1).

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

not change that attitude by Law Days alone. It is to serve society's needs that professions are licensed and the unlicensed prohibited from performing professional functions. It is inherent in the concept of professionalism that the profession will regulate itself, adhering to an ethos that imposes standards higher than mere law observance. Client avarice and hostility neither control the lawyer's conscience nor measure his ethics. Surely if its practitioners are principled, a profession that dominates the legal process in our law-oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: Negotiate honestly and in good faith; and do not take unfair advantage of another — regardless of his relative expertise or sophistication. This is inherent in the oath the ABA recommends be taken by all who are admitted to the bar: "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor."⁶⁴

64. Oath of Admission recommended by ABA, modeled after the one in use in the State of Washington.