Maine Law Review

Volume 53 | Number 2 Article 6

June 2001

Must the Interests of the Client Always Come First?

Alan B. Morrison

MUST THE INTERESTS OF THE CLIENT ALWAYS COME FIRST?

NINTH ANNUAL FRANK M. COFFIN LECTURE[1]

Alan B. Morrison[2]

It is a great pleasure to be here, not only because of the very kind and more or less truthful words that Dean Khoury used to introduce me. I really do appreciate this opportunity. I want to acknowledge my colleague, John Sims. I was prepared to say how pleased I was that he was here. I didn't realize that he was going to be the leading source for most of those stories about me. John is an example of one of our short-term colleagues in the Litigation Group; he lasted only eleven years. We always like to say that the people stayed so long even though we weren't paying them well because we were working them so hard that they had no time to spend their money anyway.

It is also a great honor to be here. The list of prior speakers, Justice William Brennan, my friend Joe Rauh, Justice Ruth Bader Ginsburg, Senator Warren Rudman, and Professor Arthur Schlesinger. It calls to mind a similar event at which I was asked to speak. The Harvard Legal Aid Bureau celebrated its seventy-fifth anniversary in 1988. Justice Brennan had spoken at the fiftieth anniversary, and he had agreed to speak again. Unfortunately, several months before he was scheduled to speak, he developed a bad case of shingles, and his doctor said to him, "You certainly should not travel or do anything more than you have to do. You are active on the bench and you should stay there and not travel to Boston." So he was forced to cancel. They tried Justice Marshall, but he declined. They tried Justice Blackmun, and he declined.

I had been on the Legal Aid Bureau, and the executive director of the Bureau called me and said, "We want you to come and speak." I agreed and told the audience that the invitation reminded me of the football story about when Y. A. Tittle was traded from the San Francisco 49ers to the New York Giants for an obscure left tackle by the name of Lou Cordeleone. When Cordeleone was called by the press to comment on the trade, he said, "Just me?" That is how I felt in 1988 when I gave the lecture for the Legal Aid Bureau and again here today.

There was a particular challenge in preparing for this lecture. I had to give the law school a title for my talk last summer to be used in the publicity, which meant that I actually had to think about what I was going to say several months in advance. This is far earlier preparation that I usually do. Once the topic was chosen,

---

1. This version is substantially the version that was delivered on October 12, 2000, with a few citations included, some grammar cleaned up, and a few phrases added to amplify a point made orally. In a few places, I have inserted textual footnotes to include items that I omitted because of time or decided to add later for one reason or another. The discussion of the yellow scrap of paper, on which I made notes of cases to bring, is as I delivered it; the footnote that follows it describes a discovery I made in March 2001 concerning that paper.

2. B.A. Yale University, 1959; J.D. Harvard University, 1966; Co-Founder (with Ralph Nader) in 1972 of the Public Citizen Litigation Group and Director from 1972-1993 and 1999-2000.

I had limited myself in what I was going to say, and then I had to figure out how I was going to put all of the thoughts into the title and deliver what I promised.

I want to say a word about the Public Citizen Litigation Group and some of our activities because they bear on what I am going to talk about here today. But I do have to make one small confession and that is that I am without the little yellow piece of paper containing my notes of the cases that I hoped the Litigation Group would bring and to which John referred. It was in my wallet. It may still be in my wallet, but unfortunately while I was in the hospital in Austin, Texas, recently, receiving treatment for a kidney stone attack, someone took my wallet. I didn't mind losing the credit cards, and I didn't even mind losing the money too much, but this little yellow piece of paper, which I had carried with me since before I started the job, was something that could never be replaced.[3]

In any event, my years at the Litigation Group have been wonderful. I really thank my boss Ralph Nader for essentially giving me free reign to do pretty much the work that I wanted to do. One of the things that Ralph and I agreed needed to be done was to look at the legal profession, because nobody was looking at it to see whether legal services were as affordable and available as they should be. We knew that certain things needed to be done, and so we developed a list of priorities. We successfully challenged minimum fee schedules. We wanted to deal with the restrictions on advertising that prevented information from being disseminated to the public. We went after residency requirements for bar admissions, restrictions on group legal services, rules against the unauthorized practice of law, and secrecy in the bar disciplinary process.

In my view, all of these particular activities shared one element in common: the rules governing them were made by lawyers and operated for the economic benefit of lawyers, or at least for the benefit of those lawyers who made the rules. Most of the time, of course, the rules had to be approved by judges. These judges had no particular economic interest in the outcome, but they were, of course, all once lawyers themselves. They had many friends who were lawyers. In some states, although not in Maine, judges get elected and re-elected. Because their principal supporters in their re-election campaigns are none other than lawyers, judges can never be fully divorced from the practicing bar.

When the rules would come up to the courts, in many cases they would not be looked at with any kind of care at all. There were several states that had a rule that any changes recommended by the American Bar Association were automatically adopted. I am glad to say that those kinds of rules no longer exist. But they were certainly the norm back in 1972. And when these matters did come to the judges, if the bar did not point out that there was a problem with the rules, most of the time nobody else paid any attention to them. As part of the Litigation Group's work, we began a systematic effort aimed at changing the legal profession.

Whatever else you can say, there clearly have been major changes in the legal profession since 1972. I leave for others the question of whether we are better off, but I do know that there is still a long way to go before we achieve the goals of

3. In March 2001, as I was searching my not-very-well-organized files, for which I am fully responsible, I opened an envelope, and there was my little yellow piece of paper, quite badly torn, but still legible. Undoubtedly, in one of my more sensible moments, I threw tradition aside and placed the paper in a more secure spot than my wallet.

affordable and available legal services for all Americans and not just those at the very top of the economic ladder or the few at the very bottom who are able to obtain free, if limited, legal-aid services.[4]

This evening I want to look at the legal profession from a somewhat different perspective. I want to examine the fundamental precept of our profession that the interest of the client comes first. Often this is said with regard to the client's relationship to the lawyer. Thus, if the client wants to settle a case and the lawyer doesn't, the lawyer has no choice, whether the disagreement is over a matter of principle or dollars. Sometimes the client doesn't want to settle the case, and the lawyer does because he thinks that the client is going to lose, and the lawyer is thinking about his fees.

Most of my focus this evening is not on that kind of conflict, but rather the relation between clients and other people. In particular, I want to examine situations where the lawyer's duty to the client may cause injury or serious harm to third parties. I am going to begin with the case of a New York attorney named Frank Armani. Most of you have probably never heard of Mr. Armani, but some of you certainly will recall the story.

Mr. Armani occupies roughly twenty pages in an interesting book that I read last summer called *The Moral Compass of the American Lawyer* (1999), written by Richard A. Zitrin and Carol Langford who are lawyers and ethics scholars in San Francisco. Mr. Armani, who had previously represented Robert Garrow, agreed to represent him again on a charge of murder. In addition to the single charge of murder, for which he was then under indictment, Mr. Garrow was suspected of having killed at least two other young women. The problem was that the police had no proof. In fact, the bodies of these two young women had not yet been discovered.

During the course of the representation, Mr. Armani and his co-counsel learned of certain facts from which they discovered the location of the two women's bodies. It turned out that it was quite difficult to locate these bodies, even if you knew where to look. The person who had caused the deaths had gone to considerable trouble to be sure that you wouldn't find the place. The question Armani and his colleague faced was what could they, and should they, do about this information? The victims' families were very concerned, wanting to know whether their daughters were still alive and, of course, Mr. Armani and his co-counsel knew the answer to that question.

Assume for the moment that they had actually learned the location of the bodies from their client. There can be no doubt that under the attorney-client privilege, as embodied in all of our ethical rules, they were forbidden from disclosing that information.[5] But suppose instead that they had not learned it directly from the client, but simply by inference. They then located the bodies, as in fact was more likely the case here, based upon their own investigation. They are not revealing what their client said to them, and so they are not technically violating the attorney-client privilege. Does that change the outcome in any way?

---

4. For a fuller treatment of the issues raised in this talk, which unfortunately did not become available until after it was delivered, see Deborah Rhode, IN THE INTERESTS OF JUSTICE—REFORMING THE LEGAL PROFESSION (2000).

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999).

One begins by asking, where does the attorney's duty lie? It clearly lies with the client. Would disclosure be good for the client? "Well, why don't you ask the client," one might say. "How do you feel about telling the police where these bodies are buried? Think about the families after all. They really want to know. You will feel better if you have dealt with that." The client would say, quite probably, "No thanks, I am thinking about my body and about what is going to happen to me."

Suppose the attorney were to try to bargain with the prosecutors and, perhaps, tell them where the bodies are, trade information for leniency. This, of course, is a rather difficult trick to pull off without telling them what you know before you start to bargain with them. And, of course, Mr. Garrow was already the primary suspect in these murders anyway. So by telling them where the bodies were buried, the connection would be even more obvious than it was. Besides the fact that you are, after all, the lawyer for Mr. Garrow.

Could they tell the judge, or could they tip off the newspapers? All of the same kind of dangers lurk behind each of those options. So they didn't say anything, and subsequently the bodies were found. Before Mr. Garrow's trial took place, the location was known. Mr. Garrow testified at trial about the actual murders because his principal plea was an insanity defense. So one could say it all turned out all right in the end. Nothing serious happened. But that is not quite what happened to Mr. Armani. Although he was clear that the rules on ethical conduct commanded him to do what he did, the community did not view it that way at all. They did not think that lawyers should be doing things like this or, more precisely, *not* doing something the community thought he should do.

The Code of Professional Responsibility as it existed in 1973 really gave them no choice but to maintain their silence. The *Moral Compass* book has a long description of the series of events that I won't take the time to go into with you today. Some of the problems that Mr. Armani encountered were at least partially self-induced. But saying that the community had a negative reaction to these attorneys' nondisclosure would be a vast understatement of the feelings towards Mr. Armani and toward his ability to continue as a lawyer in a small town.

In the Garrow case, by the time the attorney learned of the two bodies, the two women were already dead. But suppose now that Mr. Garrow tells Mr. Armani that yes, he did assault the women, but he believes they are or may still be alive, and likely cannot survive much longer. Can the lawyer tell anyone in that situation? At the time of the actual events, the answer was pretty clearly no. Today, in some states, a lawyer is permitted to reveal that information in order to save a human life.[6] In others, the lawyer is still not permitted to give that information unless the client consents.[7] I am aware of only a few states in which the lawyer is obligated to provide that information to the public. Now, I would be willing to bet if you asked most non-lawyers what they would do in similar circumstances, they would come up with some rather different answers than the answers that the lawyers came up with in that situation.

---

6. *See, e.g.*, ALA. CODE OF PROFESSIONAL CONDUCT Rule 1.6 (b)(1) (2000); DEL. PROFESSIONAL CONDUCT Rule 1.6 (b)(1) (2000); ME. BAR RULES CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6 (H)(4) (2000).

7. *See, e.g.*, IND. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2001); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000).

I want to change my hypothetical around a little bit further. Suppose that we have a client who has placed a bacteria in the water system of a community. It turns out that the bacteria is not deadly in the sense that no one is likely to die from it, but that lots of people are going to get sick and be very uncomfortable for a period of time. It is already done, however, and there is no way to stop the contamination from happening. But if the city water department knows about it, there are things that they can put in the water system to reduce the impact, or the city could use other sources of water for the time being. In every state, unless the lawyer determines that serious bodily injury is likely to occur, he or she is forbidden from disclosing that information.

Taking an even more pointed example, suppose you are a lawyer in a divorce proceeding in which custody of a young child is at issue. Your client tells you that he or she has been abusing the child. Are you permitted to tell anyone about that statement if your client tells you he or she has reformed, has not done anything wrong in three months, and will never do it again? The answer here again is the same. The lawyer is forbidden from disclosing it. On and on, including major economic crimes such as fraud, the answer is clear: a lawyer may disclose a client's confidence only if doing so may prevent a death, or if the lawyer is asked for advice about committing a crime such that the lawyer could be considered to be a participant in the criminal activity, but not to prevent a client from fleeing with the fruits of a crime to a country like Cuba where the money could never be recovered for the victims.

Before outrage gets the better of us, I want to ask, "Are the results in all of the cases under the code wrong?" Or, more precisely, are they clearly wrong? Surely, most lawyers would say, "Oh these are difficult problems, but the attorney client privilege is a very important privilege." Lawyers would also say the Sixth Amendment to our Constitution guarantees the right to effective assistance of counsel in criminal cases. Changing these rules would seriously undermine both of those constitutional and common law rights. Do the lawyers who would say those things have a point? Are those values important values? My answer is yes. This is a valid point, and those values are important ones.

But the question is, are those the only values that we ought to be concerned about and, broadly speaking, whose values are they? They are, I suggest to you, principally values that the lawyer sees in his or her own professional outlook. They are values that give added importance to the lawyer and to his or her role in the profession and in society. It is, of course, perfectly natural for lawyers to have that viewpoint, and they should view their profession with importance and take a position that strengthens the profession. But the question I want to ask is this: Does or should that position make the rights or interests of lawyers controlling in these situations, or is that the correct outcome simply because lawyers think it is so?

No one could deny that there are clearly worthy interests on the other side. Those interests are obviously recognized by those states that at least permit lawyers to make disclosures under some circumstances. In those cases the state, principally the state's supreme court, has struck a somewhat different balance. It is surely not unthinkable that the examples I have given to you could come out differently, and that we would still have our basic adversarial system. We still would have zealous representation, but it would be within a different set of limits than we now have.

I want to shift now from the criminal side of the law to civil cases, and I want to talk about a current situation, which we have all been reading about in the newspapers and hearing on television. That is the controversy surrounding the Firestone tires and the Ford Explorer vehicles. Lots of lawsuits have been brought about the dangers of these two products. I assume at the beginning that the defendants' lawyers, like Mr. Armani, are sworn to silence, despite the continuing dangers from these products. I won't try to deal with their particular responsibilities, but what about the plaintiffs' lawyers? They don't have to worry about any attorney-client privilege. After all, the information that they have, they are learning from the defendants and from other people. They are not prohibited by the attorney-client privilege from saying anything to regulators or anyone else about what they know.

That, of course, leads us into the wonderful world of protective orders. Let me explain. In a lawsuit, the plaintiff asks for some documents. The plaintiff says that they are clearly relevant and they are; they are essential to the case, which they are; but the defendant says, "Oh, these are trade secrets" or "they are commercial information and you can't have them. They are confidential and are of great value to our competitors." But the law recognizes that in general there are privileges that preclude public disclosure of that kind of information.

Leave aside for the moment the question of the extent to which these claims are valid; assume there are some things that are confidential or otherwise should be protected. So the defendant says, "Well, I realize that I can't keep the plaintiff from getting the documents necessary to prove the claim, so you, the plaintiff's lawyer, can have them, but you and your client will have to be under what is called a protective order, meaning you can't divulge anything that you learn from our documents unless you get the court's permission to do so or the court orders it to be made public. You may also only use this information in this litigation, and if you want to use the documents here, you have to file them under seal so that members of the public cannot get access to them. This, of course, applies to everything that you learn during the lawsuit, so that when you take the depositions of our witnesses, those depositions all become sealed as well. And, of course, it applies to all of your staff, your co-counsel, and your expert witnesses, and it applies to everything that we turnover because we do not want to bother all the time figuring out which documents are really confidential and which are not."

Does the plaintiff or, I should more accurately ask, the plaintiff's lawyer, really have much choice in that situation but to go along with the protective order? These documents are essential to proving the client's case. The lawyer could claim that they are not privileged. He could at least make an argument on that account, but that would take a very long time. There would be lots of money spent, the client would not be any better off, and, by the way, the lawyer, of course, wouldn't get paid until the client's case goes to trial or gets settled. In the end, even if they got everything with no restrictions on its use, it is likely to be a long and not very fruitful battle.

So the plaintiff's lawyer agrees and takes everything under the protective order. Sure enough the documents turn out to be dynamite. The depositions turn out to be even better because the lawyer has the documents and the witnesses who wrote the documents, and he gets everything he wants. All of which, of course, is under seal. The defendant at this point decides, "I think I had better settle this

lawsuit; things are not looking very good." He offers the plaintiff a very large amount of money. Indeed, there is actually a case involving Firestone where the lawyer told me that they offered much more than the case was worth. But there was, you see, this one condition, which is that the plaintiff's lawyers would have to give back all of the documents, and they could not reveal any of what they learned to anybody else.

The first question is, is this a legitimate position for the defendant's lawyers to take? I think we would all say that, under our current system, the defendant's lawyer can properly do that. Is it unethical for the plaintiff's lawyers to accept that kind of offer? It is clearly an offer in the best interest of their client, and if your job is to represent your client, and do the best you can for them, how can you not accept that offer when doing so truly is in the best interest of the client?

Suppose the plaintiff's lawyer were to say, "Well, I don't want to accept this secrecy. I don't believe in that secrecy stuff. Safety is too important, and so I am not going to accept the secrecy." Then the defendant might reply, "That's all right, you can have non-secrecy, but we are going to cut two-thirds off the price that we are willing to pay to your client." In the real world, of course, the defendant would never have to say that because the plaintiff understands that secrecy is part of the bargain.

"Well, at least," the plaintiff's lawyer asks, "What about other cases that I have or other cases that other lawyers have?" The defendant says, "Well, if the lawyer asks for the documents, I will be glad to give them to them, if they know what to ask for, of course." The defendant's lawyer doesn't quite say that because it is not necessary. The plaintiff's lawyer says, "What about other victims?" The defendant assures the plaintiff's lawyer that this is an isolated case. We are just keeping these secrets because we don't want all of this bad publicity to get out and there is nothing really wrong with the product. Besides, we have taken the product off the market or made some changes so it won't happen again."

Bringing it up to the present time, of course, the last statement about the Firestone tires is clearly no longer true. It is not an isolated problem. There are tens, scores, hundreds of victims; who knows how many people have been injured by them. What about the protective order that was in existence? Should the plaintiff's lawyer continue to agree to these protective orders knowing that there are other victims out there? Is there somebody else that needs to know this information? What about the officials at the National Highway Traffic Safety Administration? It has subpoena power, unlike some agencies like the Food and Drug Administration. NHTSA's problem is that they do not know what to ask for. They have a limited budget and too many other fish to fry. They are in a very difficult situation.

Lives are clearly at stake and yet under our system of ethical rules, the plaintiff's lawyer continues not to have any choice but to take the money for his or her client and keep the secrets. The rules are pretty clear on that. The client is the boss, and the lawyer must do what the client wants. Of course, the client could say, "Secrecy be damned. We are not going to take this secrecy order." But there are very few clients who are willing to say that.

The defendants do have a point about trade secret materials, bad publicity, and other things. The question again is, is their point controlling? Should the answer to the question be that zealous representation is enough when once again we have

a substantial interest of third parties who have no say in this litigation? Are they going to be harmed by this zealous representation?

Or take another case where defense counsel takes an aggressive but plainly ethical position in attempting to represent a client's interest zealously. Consider the facts from the 1986 Supreme Court case, *Evans v. Jeff D.*[8] This was a class action against the State of Idaho over the treatment of disabled children. Plaintiffs were represented by a public interest attorney. The clients had no money to pay anyone any fees. The only fees that the plaintiff's lawyers hoped to get were from the state—if they won—under a federal statute that provides for such fees to be paid by the defendant. A court victory would not award plaintiffs any money, but simply equitable relief changing the conditions under which certain children were being cared for.

The defendant offered to settle the case and to give the plaintiffs everything that they could have ever hoped for in terms of equitable relief. But there was one condition: the plaintiff's attorneys have to waive their right to fees. The plaintiffs themselves, of course, did not care about attorney's fees since they were not going to get them or have to pay them. They were perfectly happy with the relief. The lawyer had no choice, because the client's interest comes first. The lawyer attempted to sign the agreement and then challenge it as unenforceable and unethical. The lower court held that it was unenforceable, but the Supreme Court reversed. The majority said that there is no statute or rule of procedure forbidding a defendant from making that kind of request, and there is no ethical prohibition against it. As a result, the lawyer is stuck in that situation.

Is it just the fees of the lawyers that we ought to be worried about in this particular case, or is there something else at stake? Think for a moment. If this is the law, what does it say to other lawyers who come along in the future and might want to take similar cases? If I know that the defendant at the end can offer my client everything, and I have no choice as an ethical lawyer but to agree to that settlement and lose all of my fees, I know how to answer the question when I am asked to take on such a case. I will not do it. I won't do it because as an ethical lawyer I have responsibilities to myself as well. So the real loser in these situations is not going to be the lawyers because the lawyers just won't take the cases. The real losers are going to be the next set of clients who are injured by the perfectly ethical conduct of defense counsel in the first case.

Lest anyone think that all of my objections apply only to defense counsel, here is an example of something from the other side of the table. In class actions, as many of your know, you are forbidden from settling a case without the approval of the court. This applies to both the merits of the settlement and to counsel's fees. The rules are there to protect the class members from having their cases sold out by litigating class members or class counsel.

In many cases there are objections to class action settlements. I want to make a disclosure here. Our office regularly represents objectors, and we are referred to by some class counsel as "officious intermeddlers." In some of these cases in which we and others object, there are not only legitimate objections, but there are actually quite compelling objections. On the other hand, in a number of cases the objections are, to put it charitably, dubious. Since the plaintiffs and defendants

8. 475 U.S. 717 (1986).

are, by definition, happy with the settlement (after all they have agreed), the objectors are seen as spoilers.

In a class action, only members of the class are permitted to object to the settlement. In many of these cases, their interest is quite small, a matter of a few dollars. But many of the class members object as a matter of principal if they see a sellout, even though they are not going to get (or lose) very much money. Some lawyers oppose class settlements as a matter of principal, but for others, the principal is less important than the fees. They have learned that, by objecting to class settlements, they are more likely to get paid off — or, put properly, bought off— since their objections might prevent the settlement from going ahead.

In a typical scenario, the objections are filed, and the class counsel buys the objectors off, literally paying the lawyer out of class counsel's own fees. The matter has become so routine that experienced counsel build in a little extra for objectors when they decide how much to request in fees. They will, of course, deny that this is the case, but once you understand the mechanics of this situation, you will see that it is almost inevitable under the current system.

Class counsel is supposed to represent the class. They believe it is proper to buy off these objectors because they think the settlement is a good settlement, and the class is going to get the money sooner that way. Of course, class counsel are also going to get their own fees sooner (if slightly reduced), and so they are happy also. They are zealously representing the interests of their clients and assuring that a settlement goes through, and that it goes through sooner rather than later. Sometimes these payoff agreements occur before the notice goes out to the class and sometimes not until after objections are filed, which are then withdrawn. Sometimes there are some cosmetic changes made in the settlement to justify paying the fees to the other lawyers, but not always.

The cases that became particularly poignant were two situations in which district courts approved settlements. While the cases were pending on appeal, the objectors settled the cases and disappeared, and the settlements went forward. It is unclear in these cases whether it was the defendant or the plaintiff's counsel that actually paid off the objectors. In my judgment, although the reasons for their doing so are different, there are similar problems either way.

In the first case there was a legitimate objection; I know since our office was co-counsel, but not lead counsel, for the objector, and we had made a compelling argument against the settlement. In fact, the Supreme Court ultimately decided in another nearly identical case that a settlement like this could not have been approved as a matter of law, because it violated Rule 23. It was an important legal issue and counsel went to the counsel who was the original lawyer for the objector (and still principal counsel), and offered substantially more than the client would have gotten in the settlement itself. Money was paid to the lawyer as well. There was no court approval. There was no disclosure, and since we were co-counsel, but not primary counsel, there was nothing we could do about the situation ourselves because we could not do anything that might harm the interest of our former client.

In the other case, the objector was bought off. The lawyer had filed plainly frivolous objections to which the judge had given the back of his hand. The only reason that the company (or plaintiff's counsel) paid off the objector was to get rid of the case. Defense counsel may well have considered that the cost of defending

even a frivolous appeal was going to be more than it was going to cost to pay the objector off. Whatever the reason, the objector was paid off and, this time, we didn't represent that objector, and so we objected. We argued that the matter had to come before the district court and that the district court had to receive full disclosure, just like it would have received from class counsel. We further argued that the court had to approve the amount of the fee because otherwise it was an end run around the class action process.

Unfortunately for us, the First Circuit did not agree. In *Duhaine v. Hancock*,[9] the court said that the objectors had no fiduciary responsibility to the class—that the lawyer only represented the objecting party—and there was no rule requiring class counsel or defense counsel to disclose anything or to have the court approve anything. All counsel said was that they were representing their clients zealously. That was surely true as to the frivolous objection because it probably would have cost more to litigate and there would have been delays.

As to the meritorious objection, I am sure that defense counsel could say that they were representing the best interest of the client. After all, they secured for themselves a very satisfactory settlement that might have been overturned. They undoubtedly believed that they were right, but they were not anxious to have the rightness of their opinion tested out in a higher court. After all, who is ever sure of whether you are right or wrong?

But if you examine the situation from the outside, those practices, I suggest to you, are clearly undesirable in many respects. If the objection is truly frivolous, what we are doing is sanctioning extortion by lawyers who are taking money for themselves and for their clients to which, under the settlement applicable to everybody else, they are not entitled. They are doing it because they are using the leverage of the class action. They are representing their clients zealously. They are doing a wonderful job for their clients and also a good job for themselves. But if the objection has merit, then the people who are injured are the members of the class who are being deprived of rights under the law to which they would otherwise be entitled.

Now we do not suggest that in situations like this that the answer is to forbid all of these additional payments. We only want a rather modest change to guarantee that the interests of third parties are taken care of, that extortion is not allowed, and that valid objections go forward: payments to the objectors and to their lawyers should be subjected to the same requirements of disclosure and court approval as payments to class counsel. That will not happen, of course, if zealous representation is the only criteria by which lawyers and courts evaluate such activities.[10]

---

9. 183 F.3d 1 (1st Cir. 1999).

10. Although the federal courts have not been hospitable to claims that payoffs like this should not be allowed, the disciplinary authorities in the District of Columbia have brought a proceeding against Mark Hager, a law professor at American University who has a part-time law practice. Briefly stated, Prof. Hager and a lawyer from Boston were contacted by two women who had used a product designed to get rid of head lice in their children, but did not work, and who wanted a class action brought against the manufacturer. Instead of filing suit, the lawyers worked out a settlement under which the two women, and approximately ninety others who had expressed interest in the case, would receive their money back, without proof of purchase, and everyone else could get their money back with proof of purchase; no purchaser was precluded

The notion that something other than zealous representation may be relevant is not, contrary to what you may be thinking from my prior remarks, something that is totally foreign to our code of ethics as it now exists. For example, it is plainly unethical for a lawyer to allow a witness or, indeed, even a client, to lie under oath.[11] There are, of course, many questions in specific cases about whether the lawyer "knows" the client is lying. However, there is no question as to the basic proposition that a lawyer acts unethically by allowing the client to lie.

But for a defendant in a criminal case, whose life may be at stake, a lie may be the only chance for acquittal. And yet the rules clearly do not allow a lawyer to aid the client when the client wishes to lie. Why should that be? I submit it is because our rules recognize that in some situations there are higher values at stake than simply zealous representation of the client's interest, that the system depends on truth and on lawyers not cooperating in bringing deliberate falsehoods into court.

Could you imagine a system in which truth has a lesser role? The lawyer for a defendant in a criminal case would not be subject to the rule about lies in the courtroom. Is that an unimaginable situation? I think not. Some would say that the rule is not followed now anyway. Lawyers routinely violate it, although they pretend not to do so. My point is not whether it is a desirable or an undesirable rule, but to recognize that in both situations we have a trade off between zealous representation on the one hand and other values which we, as a society, also recognize have an important role. The balance has simply come out differently.

Consider as well the obligation of a lawyer over the disclosure of facts. A lawyer is not allowed to mislead in litigation or in negotiation.[12] There is, of course, no obligation of the lawyer to volunteer the facts even when the other side appears to be operating under a misapprehension as to the state of the facts. The lawyer simply has an obligation not to affirmatively mislead. Of course, if the lawyer is a prosecutor in a criminal case, laws like the Jencks Act[13] and the Supreme Court decision in *Brady*[14] impose on the prosecutor an affirmative obligation to bring forward facts known to him or her that may exonerate the defendant.

The rule also makes silence permissible even in the face of an obvious mistake. In the context of litigation, that is probably a defensible rule. After all, both sides have full access to discovery. They can put witnesses under oath and ask for documents. If you don't ask, then perhaps it is your fault. That, of course, is not true in the non-litigation bargaining situation. Whether you are buying a house or selling a car or whatever else you are doing, the duty of disclosure is the same as it would be in litigation. Although the reasons behind that tradeoff seem to me to be a little bit different, the result is the same.

---

from bringing suit. What caused the problem for Prof. Hager was that he and his co-counsel accepted a fee totaling $225,000, and they agreed to keep both the fact of the payment and its amount secret from everyone, including the clients. A hearing committee found a number of violations of a number of the District's ethics rules and recommended that Hager be suspended from practice for three years. District of Columbia Bar Docket No. 31-98, decided Nov. 30, 2000. The appeal was heard by the Board of Professional Responsibility in February 2001 (our office filed a brief in support of the findings of the disciplinary recommendations), and a decision is expected shortly, with a further appeal to the District of Columbia Court of Appeals a high likelihood.

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) & cmt. 4-14 (1999).
12. *Id.* Rule 3.3-3.4.
13. 18 U.S.C. § 3500 (2001).
14. Brady v. Maryland, 373 U.S. 83 (1963).

Interestingly, the ethical rules take a different approach on questions of law where a different balance is struck. In our code of ethics, there is an affirmative obligation on lawyers to call to the court's attention, even if the adversary does not, controlling precedent in that jurisdiction, even if it is adverse to the interest of the client.[15]

Why should that be the case? Why should you have to disclose adverse legal precedent when you have no affirmative obligation to disclose unfavorable facts? It surely cannot be based upon the difficulty of discovering the information. After all, every lawyer has access to the same law books, or I should now say Lexis-Nexis, or Westlaw, to which every other lawyer has access. In theory, anyone can find the law, but anyone could not find the facts, because access is not always equal in those situations. Why should it only be controlling precedent that a lawyer has to disclose? What if it is not controlling in this jurisdiction, but there is very strong precedent in other states that would surely influence the judge's thinking? Yet there is no duty to disclose that important information as well.

Perhaps the rule can be justified on the grounds that, after all, the courts are making the law. They have an obligation to get the law right, and they cannot do that unless they have all of the law in front of them. One could, however, say the same thing about deciding lawsuits. The obligation is to get it right, and the only way to get it right is to have all of the facts in front of the court. I am not here to attack or, for that matter, defend either of those two sets of rules. But I offer them to point out that even our current rules do not say that zealous representation is the only value that we as lawyers must follow.

Let me return for a moment to the rules on confidentiality, which I discussed earlier. They are very strict. There is, however, one exception that I have not mentioned before. The confidentiality rules do not apply where litigation is between a lawyer and a client, and the issue is fees.[16] As a result of this exception, the lawyer involved in such litigation is permitted to make disclosures that he or she would otherwise be forbidden from making. Thus, if you are the lawyer in a divorce case, the potential is there to spill all of the nasty secrets that you have learned, as a means of assuring that you get paid in full. Now the courts may well, in some cases, construe this rule to apply to disclosures only to the extent necessary to collect your fees. The question is not whether this is a good rule or a bad rule, or whether it was written by lawyers for the benefit of lawyers, but simply to observe once again that our system has other values beside zealous representation.

My final set of examples do not deal with the code of ethics, but with the rules on admission to the bar. They illustrate how lawyers can sometimes put the interest of clients—albeit not their own clients—in second place, at least in the view of some people.

There is a long history of state residency requirements in order to obtain admission to the bar. My colleague, John Sims, and others brought and eventually won a great many cases challenging these requirements, and finally the Supreme Court declared these requirements were unconstitutional under the Privileges and Immunities Clause.[17] The claim was made that those rules were intended to pro-

15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3).
16. *Id.* Rule 1.6(b)(2).
17. Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

tect clients from lawyers who were not qualified to practice law. But most of us who looked at the rules saw that they were principally there to prevent lawyers from other states from coming in and encroaching on the business of the lawyers who resided in the state where the client needed the legal services.

Today, residence requirements are outlawed, and so there is another means of getting at this same kind of worry. That is requiring lawyers to take bar exams after they have been in practice for ten, twenty, or thirty years and refusing to grant waivers of any kind. It will come as no surprise to many of you that two of the states that have been most vehement on this issue are Florida and California, where many northern lawyers have decided they would like to retire; not completely retire, but retire and do a little law practice on the side. But they become rather discouraged when they find that after thirty years they have to take a take a two-and-one-half day bar exam, and not simply have to bone up on California community property law. This rule, of course, has been defended in the name of consumer or client protection, but, in my judgment, the rule has a considerable element of self-protection in it as well.

Surprisingly, I read recently that things may be changing in California.[18] A bill was passed in the California legislature requiring the California Supreme Court to review the situation and who should be behind it—at least the major element of it—but a group called the American Corporate Counsel Association, made up of lawyers. Why are they all upset about it? Well, when you think about it for a second, these are lawyers, but they are really clients. They are hiring lawyers, and they are suddenly finding out that they are running up against obstacles. They want to transfer their lawyers from one corporate office to another, and they suddenly find that the lawyer has to take the bar exam. Because of the costs involved—money lost because of time spent studying for the bar exam, instead of working—this requirement becomes a major impediment.

It remains to be seen whether the California Supreme Court will change its admission requirements or whether, if it does not, the California legislature will do what they were threatening to do: actually impose a change in the bar admission requirements. It is also not clear whether, if the legislature does act, the California Supreme Court might follow the Arizona Supreme Court's decision in a comparable situation involving the legislature's attempt to define what activities do not constitute the practice of law and declare such legislative action to be in violation of separation of powers, because only the court can control the activities of lawyers.[19]

---

18. NAT'L L. J., Oct. 2, 2000, at C8; *see also* 69 U.S.L.W. 2181 (Oct. 3, 2001).

19. *See* State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (1961). The reaction to the November 1, 1961 decision was immediate: an initiative to allow real estate brokers to do what the Arizona Supreme Court said they could not do was drafted and appeared on the ballot on November 6, 1962. Our office has been involved in a number of cases in which the bar charged individuals who were not attorneys with the unauthorized practice of law, even though the only complaints were lawyers, not unhappy clients. The most famous of these involved Rosemary Furman, a legal secretary in Florida, who not only had the temerity to do uncontested divorces for $50, when lawyers were charging at least $350, but also spoke her mind loudly and often about what the she thought of most members of the bar. She was eventually enjoined from carrying on her business, *Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979), then held in contempt of court, and avoided going to jail only when she promised to close up shop completely. Thereafter, under pressure of a constitutional challenge brought by persons who could

There are many more examples that I could give from the ethics and other rules governing the conduct of lawyers that illustrate my point that all of these situations involve a series of tradeoffs between competing interests. I want to be clear that I don't think that all of these judgments are necessarily wrong. But I do think that there are clearly interests at stake besides those of the bar, the courts, and the zealous representation of clients.

Yet it is equally clear that the interests of these other parties are not adequately represented in the course of the process by which the rules that we lawyers live under are promulgated and changed. Persons who are not lawyers are not given an opportunity to participate in decisions about which rules are going to be adopted. If we had meaningful outside participation, in my view, we would have a rather different debate about many of the rules under which lawyers live, and perhaps we would have a different outcome.

What do I think we should do about this? We need to find another way, a better way, to get non-lawyers into the process. We lawyers are wonderful. We refer to everybody else in the universe as non-lawyers. When the guy comes to my house to fix my air-conditioner or repair my sink, he does not refer to me as a non-electrician or a non-plumber, although he surely should. I am far less qualified at that than he is to practice law, yet lawyers routinely play down the fact that many persons who are not members of the bar can provide substantial and valuable assistance to others who have problems that lawyers might also be called upon to solve.

The bottom line is that we need to find new ways to get the public involved. We need to have individuals who are not members of the bar sit on bar boards. We need to give them votes and not simply the right to speak. The ethics committee should be composed of persons who are not members of the bar, as well as lawyers. Not only should we have a differently-constituted committee to propose changes to the ethics rules for the bar, but the ethics committee, which interprets the rules, ought to include non-lawyers as well. We need input from consumers, business people, and individuals who would compete with the bar for the delivery of services to potential clients.

not afford

---

legal services and could not obtain legal aid for proceedings, such as divorce, adoption, and name change—over which the State maintained a monopoly—the State authorized the use of certain forms and allowed non-lawyers to help people fill them out, which has eased the problem in some respects. *In re* Amendment to Rules Regulating the Florida Bar, 510 So. 2d 596 (1987). Our most recent lawsuit in this area involves the Delaware Supreme Court ruling that prevents Marilyn Arons from providing essential help, free of charge, to parents of children in need of special education services, which members of the bar lack the experience to handle. Because the proceedings are trial-type adjudications, the court said that Ms. Arons cannot provide the essential assistance that parents need because she is not a lawyer. *In re* Arons, 756 A.2d 867 (Del. 2000), *cert. denied* (U.S. June 4, 2001) (No. 00-509). In these and many other cases, the bar's attitude is that it is better for clients to go without the assistance that a non-lawyer might provide, but that lawyers are either unable or unwilling to provide at a price that the client can afford, even if there are non-lawyers who can help at a price the client is able to pay. Imagine what reaction the public would have if Congress decided that the only cars that were safe enough to drive were Mercedes, Volvos, and Cadillacs, and that all Volkswagens, Fords, and Chevrolets (not to mention bicycles and motor scooters) had to come off the road. Whether the bar and the state courts that approve the bar's positions are acting out of protectionism or paternalism, or some of both, does not matter, because either way, the interest of the client, which is

The details of such plans are open to debate, and perhaps might be the subject of another lecture. But it is hard to debate the general proposition that, if we want the rules governing the bar to reflect the values of the community at large, we cannot limit the input to lawyers. If war is too important to be left to the generals, the business of regulating lawyers is too important to be left only to lawyers, especially because those regulations have such dramatic impacts on third parties.[20]

supposed to be paramount, is undercut if not disregarded entirely.

20. A very sensible suggestion for improving the process is that of Professor Andrew Kaufman, who wants the American Bar Association to be replaced (it would never step down) as the entity that does the drafting of the model rules on which state rules are based, in favor of a group appointed by the Conference of State Court Chief Justices. Andrew L. Kaufman, *Who Should Make the Rules Governing the Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 163 (2000).