

# LIMITATIONS ON ZEALOUS REPRESENTATION IN AN ADVERSARIAL SYSTEM

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## INTRODUCTION

For a number of years scholars of the legal profession have debated whether the role of lawyers in an adversarial system is morally defensible. According to one group, the traditional or standard conception of the lawyer's role is characterized by "neutral partisanship." Lawyers are bound to represent their clients zealously without incurring any moral responsibility for their actions.<sup>1</sup> Critical of this amoral position, these scholars have sought in various ways to introduce moral obligations into the lawyer's role.<sup>2</sup> A second group of scholars, defenders of the role of lawyers in an adversarial system, has attacked both the critics' description of this role and their claim that zealous representation in an adversarial system is morally unsound.<sup>3</sup>

The debate has provided important insights into the foundations of the adversarial system, the lawyer's role in that system, and the application of moral principles to professional behavior. But the debate has at the same time ignored a more obvious question: What limitations on zealous representation can be derived from the conception of an adversarial system itself, rather than from principles of morality? This question is the focus of this article.

This article has two goals, one conceptual, the other normative. The conceptual goal is to offer a theoretical framework for various rules<sup>4</sup> that limit lawyer zealousness. I argue that all or almost all

1. See Murray L. Schwartz, *Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 544; William H. Simon, *The Ideology of Advocacy, Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-35; see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 7 (1988) (relying on Schwartz's principles as the basis for a normative evaluation of the adversary system).

2. See, e.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991).

3. See, e.g., MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 13 (1990); Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529.

4. I use the term "rules" broadly to include rules of professional conduct, such as the MODEL RULES OF PROFESSIONAL CONDUCT, statutory law, rules of procedure, and common law decisions. Rules of professional conduct typically incorporate these other sources of law by reference. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1995) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").

of the rules that limit zealous representation can be understood as designed to maintain three principles that define the adversarial system. The normative goal is to offer a critical perspective on a number of these rules to demonstrate ways in which they could be improved. For example, current rules are quite vague about specifying when a claim or defense is "frivolous";<sup>5</sup> I offer a standard for frivolousness.<sup>6</sup> Similarly, I suggest modifications of the rules requiring lawyers to disclose adverse information to a tribunal.<sup>7</sup>

Part I of this article, the theoretical portion, develops three substantive principles central to the adversarial system. I refer to these principles in the article as (1) the bona fide dispute principle, (2) the impartial decisionmaker principle, and (3) the principle of qualified truth-maximizing rules. The theoretical section also examines the issue of what principles should guide the enforcement of rules dealing with limitations on zealous representation. Part II deals with the bona fide dispute principle, focusing on the issue of frivolous claims in litigation. Part III considers the impartial decisionmaker principle. This section examines how rules limiting zealous representation relate to three threats to the impartiality of decisionmakers: factual bias, relational bias, and group bias. Part IV develops the concept of qualified truth-maximizing rules. I argue that in an adversarial system procedural rules that lawyers are expected to follow should be designed to maximize the likelihood of truthful results unless qualified by a value that is more important than truth.

## I. A THEORY OF LIMITATIONS ON ZEALOUS REPRESENTATION: SUBSTANTIVE AND REMEDIAL PRINCIPLES

### A. *Substantive Principles*

Lawyers are legally and ethically required to represent their clients loyally and with zeal. Lawyers are agents of their clients.<sup>8</sup> Section 387 of the Second Restatement of Agency imposes a duty of loyalty on agents.<sup>9</sup> Canon 7 of the Code of Professional Responsibility states that "[a] lawyer should represent a client zealously within the bounds of the law."<sup>10</sup> Comment 1 to Rule 1.3 of the Model Rules of Professional Conduct provides that "[a] lawyer should act with commitment and dedication to the interests of the client and

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5. For a discussion of the current rules regulating frivolousness, see *infra* Part II.C.

6. For a discussion of the meaning of frivolousness, see *infra* Part II.B.

7. For a discussion of disclosure rules, see *infra* Part IV.B.

8. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 145 (Practitioner's ed. 1986) (characterizing lawyers as "fiduciary agents").

9. RESTATEMENT (SECOND) OF AGENCY § 387 (1957).

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981).

with zeal in advocacy upon the client's behalf."<sup>11</sup> While the principle that lawyers must represent their clients loyally and zealously is well established, what should be the limitations on that duty?

To begin to formulate an answer to this question, consider both the *purpose* of the American<sup>12</sup> judicial system and the *process* by which it functions. The fundamental *purpose* of our judicial system is the fair resolution of disputes. This objective serves an essential need of any society: maintenance of social stability. By providing parties involved in a dispute with a mechanism for resolving the controversy that the parties are likely to accept because of its fairness, a system of dispute resolution minimizes the possibility that individuals will take the law into their own hands.

The American legal system uses an adversarial method of presentation as its *process* for the fair resolution of disputes. In the ideal model of the adversarial system, impartial decisionmakers—judge, jury, or some combination thereof—render decisions based on evidence presented by competent advocates zealously representing their clients' interests in accordance with established rules.<sup>13</sup> This description is not meant to imply that only one model of the adversarial system exists, or that the adversarial system has remained constant. In the United States, the adversarial system has undergone tremendous change. During the nineteenth century, David Dudley Field championed procedural reform.<sup>14</sup> His efforts led to adoption in New York of the Field code, which replaced the stylized writ system of pleading with fact pleading.<sup>15</sup> Many other states used the Field Code as a model to reform their procedural systems.<sup>16</sup> Similarly, during the twentieth century, adoption of the Federal Rules of Civil Procedure dramatically modified the adversarial system by providing much broader discovery of information prior to trial than had previously existed.<sup>17</sup> As a result of these more liberal

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11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1995).

12. This article is limited to the American judicial system. Methods of dispute resolution reflect deeply held cultural values of a society. While consideration of other systems can provide insight into the practices of one's own society and can also offer new ways of handling disputes that a society may not have previously employed, it is foolish to attempt to consider methods of dispute resolution outside of their cultural context.

13. See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—Much Ado About Nothing?*, 46 HASTINGS L.J. 679, 762-66 (1995); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312-13 (1989).

14. See Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 9-10 (1989).

15. See *id.*; Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 371-86 (1990).

16. See Bone, *supra* note 14, at 10.

17. See Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to the Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1489-90 (1993).

discovery provisions, the Supreme Court was faced with the tension between access to information, which is central to the discovery process, and party control of information, which is fundamental to an adversarial presentation. In *Hickman v. Taylor*,<sup>18</sup> the Supreme Court resolved this tension by creating the work product doctrine.<sup>19</sup> The doctrine balances the principles of access and control by limiting access to information that is prepared by the lawyer or the lawyer's client in anticipation of litigation unless the party seeking the information establishes good cause for the information's disclosure.<sup>20</sup> Despite such revolutionary changes in procedure during American legal history, certain aspects of our dispute resolution process have remained unchanged, including the requirement of impartial decisionmakers, adversarial presentation by lawyers, and rules of procedure and evidence to order the presentations.

Lawyers representing clients engaged in disputes are important components of our system of dispute resolution. To the extent that lawyers act consistently with the underlying purpose and process of the system, the rules of the system should encourage their conduct. When lawyers undermine the purpose or process of the system, their conduct should be deterred.

When does a lawyer's conduct undermine either the purpose or process of the adversarial system of dispute resolution? Since the purpose of the judicial system is the resolution of disputes, lawyers violate that purpose if they present claims that do not involve bona fide disputes. I refer to this idea as the *bona fide dispute principle*. The adversarial system consists of dispute resolution by impartial decisionmakers. When lawyers interfere with the impartiality of decisionmakers, they undermine the adversarial process. I refer to this concept as the *impartial decisionmaker principle*. Any system of dispute resolution must be structured by rules. When lawyers violate established rules of procedure, they undermine the functioning of the system. The concept of rule compliance requires further analysis, however, because adherence to rules alone does not provide a standard for formulation of the rules. In the last section of this article I argue that rules for adversarial presentations should be designed to be truth maximizing; that is, a rule should exist if the presence of the rule makes it more likely that a dispute will be resolved truthfully than if the rule did not exist, subject to the qualification that any such rule must not violate fundamental rights, particularly constitutional provisions that embody individual rights. I refer to this concept as the *principle of qualified truth-maximizing rules*.

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18. 329 U.S. 495 (1947).

19. *Id.* at 513-14.

20. See FED. R. CIV. P. 26(b)(3); see generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 136-142 (Proposed Final Draft No. 1, 1996) (work product doctrine).

## B. Remedial Principles

A system of rules that imposes limitations on lawyers' zealous representation must address what remedies are appropriate for violations of those restrictions. A number of mechanisms are available for enforcing limitations on zealous representation: criminal prosecution, disciplinary enforcement, civil liability, and curative court order.<sup>21</sup>

Lawyers are subject to prosecution for conduct that exceeds the proper bounds of zealous representation and violates criminal law, such as counseling clients to destroy evidence<sup>22</sup> or jury tampering.<sup>23</sup> Lawyers may also be punished with criminal contempt for extreme overzealousness.<sup>24</sup> Disciplinary proceedings, which are quasi-criminal in nature,<sup>25</sup> can be instituted against lawyers when their overzealousness results in a violation of professional rules.<sup>26</sup>

Courts can impose a variety of civil sanctions on lawyers when lawyers' conduct exceeds the bounds of proper zealousness. One possible remedy is a civil action against a lawyer for violating a duty to the person harmed by the lawyer's conduct. For example, lawyers can be held civilly liable for malicious prosecution or abuse of process.<sup>27</sup> Some jurisdictions recognize a cause of action for negligent destruction or spoliation of evidence.<sup>28</sup> Lawyers can also be subject to civil sanction for violating the rules of civil procedure; the

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21. These four mechanisms for enforcement are ordered generally from the most serious, criminal prosecution, to the least damaging to the lawyer, curative order, although there are exceptions. For example, in some instances professional discipline may be less damaging than a civil sanction. If a lawyer is disqualified in a major case and loses a substantial fee, the lawyer may find this to be a more serious penalty than a minor reprimand in a disciplinary case.

22. See, e.g., *United States v. Perlstein*, 126 F.2d 789, 792, 798 (3d Cir. 1942) (lawyers convicted of conspiracy to obstruct justice when they advised clients to suppress evidence if proceeding was initiated).

23. See, e.g., 18 U.S.C. § 1503 (1994) (crime to attempt to influence juror in corrupt or threatening manner).

24. See, e.g., *Pounders v. Watson*, 117 S. Ct. 2359 (1997) (upholding power of summary contempt without need to show pattern of repeated violations by counsel); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 165 cmt. e (Tentative Draft No. 8, 1997) ("Advocacy ordinarily should not be punished as criminal contempt unless the lawyer's conduct constitutes an obstruction of justice.").

25. See *In re Ruffalo*, 390 U.S. 544, 551 (1968).

26. See, e.g., *Iowa Supreme Court Bd. of Prof'l Responsibility v. Hohnbaum*, 554 N.W.2d 550 (Iowa 1996) (lawyer disciplined for making defendant unavailable at trial when defendant had informed lawyer of erroneous police report showing plaintiff's car striking defendant's vehicle); *In re Barrow*, 294 S.E.2d 785, 786 (S.C. 1982) (public reprimand for removing warning label in products liability action).

27. For a discussion of lawyer civil liability, see *infra* Part II.D.

28. See, e.g., *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Ct. App. 1985); *Bondu v. Gurvich*, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436-37 (Minn. 1990).

most common basis for sanctions against lawyers is Rule 11 of the Federal Rules of Civil Procedure.<sup>29</sup> Issuing a curative court order is another remedy available for excessive zealousness. The nature of the order will, of course, vary depending on the circumstances, but may include disqualification of the lawyer, excluding evidence, instruction to the jury, or granting a new trial.<sup>30</sup>

Each of these sanctions has advantages and limitations. Disciplining a lawyer for misconduct can protect the public and the administration of justice from future misconduct by that lawyer, either by removing the lawyer from the practice of law, or by at least giving the lawyer a substantial incentive not to engage in the misconduct in the future.<sup>31</sup> On the other hand, professional discipline has no effect on the particular proceeding in which the offense has occurred. Discipline does not compensate the victim for any damage done by the lawyer and does not remedy any harm caused to the integrity of the proceedings. Similarly, civil sanctions have both advantages and disadvantages. A civil sanction may compensate the victim for harm and deter the lawyer from engaging in similar misconduct in the future, but the threat of civil sanctions can produce excessive deterrence, making some lawyers too cautious about taking controversial cases or asserting new positions. Curative court orders can be tailored to respond to the harm done by the specific misconduct, but such orders may not produce sufficient deterrence, leading some lawyers to believe that the worst sanction they face is the loss of any benefit from their misconduct.

Since each of these remedies serves a different purpose, the same misconduct can be subject to more than one remedy. In choosing a remedy, two questions should be paramount. First, does the use of this remedy serve the underlying purpose of the remedy, and second, what are the incentive effects of the remedy on the participants to the proceeding? In deciding whether a remedy is appropriate, the tribunal should consider these incentive effects and decide whether recognition of the remedy on balance improves the incentives to preserve the purpose and process of the system. For

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29. See Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbours: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257, 258-59 (1991) ("[The 1983 Rule 11 amendment] resulted in approximately 700 reported Rule 11 opinions in just four and a half years, a tremendous increase from the previous 43 years. . . . Federal Rules of Civil Procedure 26(g) and 16(f), which Congress also strengthened in 1983, saw relatively little use.") (footnotes omitted). For a discussion of the standard of conduct required by Rule 11, see *infra* Part II.C.

30. See *Berger v. United States*, 295 U.S. 78, 89 (1935) (new trial granted because of improper witness examination and argument by prosecutor); *Ferraro v. Koncal Ass'n*, 467 N.Y.S.2d 284, 285 (App. Div. 1983) (party barred from offering evidence in support of defense due to destruction of evidence relevant to defense that had been requested during discovery).

31. See ABA Standards for Imposing Lawyer Sanctions, § 1.1, *reprinted in* ABA/BNA *LAWYERS MANUAL ON PROFESSIONAL CONDUCT* 1:807 (1994).

example, in recent years it has become common for courts to disqualify lawyers because of a conflict of interest.<sup>32</sup> While disqualification is appropriate when the lawyer's continued representation involves a threat to the integrity of the proceeding, it is a poor remedy when no such threat is present.<sup>33</sup>

## II. THE BONA FIDE DISPUTE PRINCIPLE

### A. *Rationale*

The duty of lawyers not to engage in frivolous legal proceedings is an important limitation on zealous representation. American Bar Association (ABA) Model Rule 3.1 makes it unethical for lawyers to raise frivolous claims or defenses.<sup>34</sup> The Federal Rules of Civil Procedure, particularly Rule 11, also regulate frivolous conduct.<sup>35</sup>

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32. See, e.g., Kenneth L. Peneger, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831, 832 (1995) ("In the past two decades . . . the disqualification of law firms has become so frequent . . . and the doctrinal development associated with the phenomenon so complex, that the field of professional responsibility has become dominated by the topic of conflicts of interest.").

33. See Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 277-81 (1990).

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995).

35. FED. R. CIV. P. 11(b) (signing by lawyer constitutes certification of reasonable inquiry). For comprehensive treatments of the Rule, see GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES & PREVENTIVE MEASURES* (2d ed. 1995) (containing an extensive bibliography on Rule 11); GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (2d ed. 1994). See generally A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397 (1993) (discussing Rule 11 sanctions for frivolous lawsuits).

Although Rule 11 is the best known provision regulating improper litigation tactics, in fact it is only one of an arsenal of weapons that federal courts—or state courts whose procedural systems are based on the federal rules—can use to punish litigation abuse, either through the award of attorney fees or other sanctions. See FED. R. CIV. P. 16(f) (failure to abide by pretrial order); *id.* Rule 26(g) (improper discovery requests or objections); *id.* Rule 30(g) (failure to attend a deposition or serve a subpoena on a party to be deposed); *id.* Rule 37 (improper failure to respond to discovery); *id.* Rule 41(b) (dismissal of action or claim when a party fails to comply with the Federal Rules or order of the court); *id.* Rule 45(e) (failure to obey subpoena); *id.* Rule 56(g) (presentation of affidavit in summary judgment motion in bad faith or for the purpose of delay); FED. R. APP. P. 38 (power to award damages and costs for a frivolous appeal). In addition, title 28 of the United States Code provides as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1994).

In *Chambers v. Nasco*, 501 U.S. 32 (1991), the Supreme Court in a 5-4 decision ruled that federal courts have the inherent power to impose sanctions for



While Rule 11 only applies to actions in federal court, many states' rules of civil procedure are modeled after federal Rule 11.<sup>36</sup> State courts usually rely on federal court decisions when interpreting their rules.<sup>37</sup> These rules apply not only to frivolous complaints, but also to answers, motions, and other documents filed in a legal proceeding.<sup>38</sup>

Why should it be improper for a lawyer to present a frivolous claim to a tribunal? Suppose for the time being that a frivolous claim is defined as a claim that has no chance of success. If a lawyer fully advises the client that a claim has no merit, but the client nonetheless decides to proceed, why should the lawyer be subject to sanctions? While the presentation of such a position might be a waste of the client's money, our society generally allows people to use their assets as they see fit, whether wisely or foolishly. Further, the client will at least have had his "day in court," which may have emotional or political benefits to the client even when the client's chance of success is nonexistent. For example, a tax protester who wishes to use litigation as a political forum for expressing opposition to the government may receive satisfaction even though his claim has no chance of success.

The "right to use assets" argument, however, cannot justify lawyers representing clients bringing frivolous claims. When people waste their resources on foolish endeavors, others are generally not deprived of any legally-protected right. By contrast, if a person brings a frivolous legal proceeding, societal resources—court personnel and facilities, judicial time, jury time—must be devoted to the proceeding. Further, a legal proceeding imposes costs on the other party, including time, legal fees, and in some cases unwanted publicity. An analogy to nuisance law is appropriate. If a person misuses his property to create public or private harm, the person is subject to liability.<sup>39</sup> Similarly, if a person misuses the judicial system for purposes other than dispute resolution, he should be subject to sanctions.

Similarly, the "day in court" argument also fails to justify the litigation of frivolous claims. For example, a tax protester has a First Amendment right to protest against the government. How-

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bad faith conduct even when the conduct is not specifically covered by rules of procedure or statutory provisions, including fraud that occurs outside the court. *Id.* at 47.

36. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 170 reporter's note to cmt. c (Tentative Draft No. 8, 1997).

37. See, e.g., *Gray v. Washington*, 612 A.2d 839, 842 (D.C. 1992); *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992); *Bryant v. Joseph Tree, Inc.*, 829 P.2d 1099, 1104-05 (Wash. 1992) (en banc).

38. See FED. R. CIV. P. 11 ("pleading, written motion, or other paper" may serve as basis for Rule 11 sanctions).

39. See, e.g., *Mayor of Rockway v. Klockner & Klockner*, 811 F. Supp. 1039, 1056-57 (D.N.J. 1993) (public nuisance); *Crawford v. National Lead Co.*, 784 F. Supp. 439, 444-45 (S.D. Ohio 1989) (private nuisance).

ever, the exercise of that right is subject to reasonable time, place, and manner restrictions.<sup>40</sup> Prohibiting the use of the court system to present frivolous claims, while allowing the tax protester other outlets for expressing grievances, is a reasonable time, place, and manner restriction on speech.

While this analysis shows that the legal system may justifiably seek to control frivolous legal contentions, it does not indicate why the sanction of the professional rules and the rules of civil procedure are imposed on the lawyer, who is the mere agent of the client, rather than limited to the client, who is the principal in the relationship. There exist, however, several reasons that justify sanctioning lawyers. First, lawyers are officers of the court who have duties not only to their clients but also to the legal system.<sup>41</sup> Imposing sanctions on lawyers for participating in frivolous legal contentions reflects the principle that lawyers have obligations beyond their clients. Second, the lawyer is normally an active participant in the client's decisionmaking process. Imposing sanctions on both the lawyer and the client recognizes their joint responsibility. Indeed, with regard to certain tactical matters, the lawyer, rather than the client, has the authority to make the decision.<sup>42</sup> In these cases, the lawyer properly bears responsibility. Third, in some cases, clients may not have sufficient assets to satisfy any award of sanctions. Sanctions directed only against the client in these cases would be insufficient to deter frivolous legal contentions.

### B. *The Meaning of Frivolousness*

Assuming that in principle it is appropriate to impose sanctions on parties or their attorneys who participate in presenting frivolous legal contentions, when should a legal contention be treated as "frivolous?" Defining the concept of a frivolous legal contention requires answering two questions: First, will an objective or subjective standard be used, and second, what measurement of the probability of success of the contention is required for the contention not to be

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40. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

41. See, e.g., *Waters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988) ("As an officer-of-the-court, a lawyer has a fundamental duty to perform services pro bono for indigents when called upon by the court."); see generally *Quinn et al., Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEO. J. LEGAL ETHICS 901 (1995) (discussing inherent conflict between lawyers' obligations as officers of the court and as zealous advocates of clients' interests).

42. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995) ("A lawyer shall abide by a client's decisions concerning the objective of representation," but need only "consult with the client as to the means by which [the objectives] are to be pursued").

frivolous? The following chart summarizes several possible choices for defining frivolousness:

Standard (Subjective or Objective)	Measurement of Probability of Success
Good faith or reasonable	Any (greater than 0)
Good faith or reasonable	More than de minimis (greater than 5%?)
Good faith or reasonable	Substantial (greater than 25%?)
Good faith or reasonable	Probable (greater than 50%)

For example, one possible definition of frivolousness is that a lawyer makes a frivolous legal contention if the contention does not reasonably have a substantial chance of success, with substantial being defined as a probability of at least a twenty-five percent chance of success. While a contention's probability of success cannot be determined with mathematical precision, lawyers commonly make such probabilistic estimates of chances of success in evaluating their clients' legal positions.

Choosing a definition of a frivolous legal contention requires a balance between two competing values. On the one hand, the purpose of sanctioning frivolous contentions is to deter misuse of the judicial process. Thus, the "any chance of success" measurement should be rejected because it is too weak to deter misuse of the judicial process. Under this yardstick, almost no claim or defense would be frivolous, though some judges have indicated that this criteria should be used. For example, Judge Frank Easterbrook of the Seventh Circuit Court of Appeals has offered the following definition of frivolousness: "[S]omething is frivolous only when we've decided the very point, and recently, against the person reasserting it, or 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable."<sup>43</sup>

On the other hand, if the criteria for measuring a frivolous contention is too broad, the standard may overdeter. The fear of sanctions may discourage some clients and lawyers from using the judicial system even if they have legitimate disputes. Thus, it seems appropriate to reject the criteria that the success of the claim must be "probable." Indeed, this measurement is essentially identical to the burden of proof in civil cases. The criteria for presenting a contention should obviously be less than the ultimate burden of proof for that contention.

Based on this analysis, it appears that the appropriate measurement for defining the chance or probability of success of a frivolous claim is either a de minimis chance of success or less than a substantial chance of success. In theory, the choice between these

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43. Sanford Levinson, *Frivolous Cases: Do Lawyers Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 375 (1987) (quoting letter from Judge Easterbrook to Professor Levinson dated Jan. 29, 1986).

two measurements could be made by determining which measurement maximizes the differential between desirable deterrence—detering lawyers from presenting frivolous contentions—and undesirable deterrence—detering lawyers from presenting nonfrivolous contentions for fear of sanction. Unfortunately, there are no empirical studies on this issue. Historically, however, our society has strongly favored openness, particularly openness of the political and legal process. Based on this societal value, it seems appropriate to err on the side of a narrower criteria for determining frivolousness—the de minimis chance of success measure—at least until an empirical case is established that a broader standard is warranted.

When does a claim or defense have a de minimis chance of success? Internal Revenue Service (IRS) regulations regarding tax return positions asserted by tax practitioners draw a distinction between claims that have a “realistic possibility” of success and frivolous claims.<sup>44</sup> According to the IRS regulations, a claim has a realistic possibility of success if it has at least a one in three likelihood of being sustained on the merits.<sup>45</sup> Thus, it seems that a de minimis possibility of success would be significantly less than one in three. A one in twenty chance of success seems to be a reasonable level to set for a de minimis chance of success of a contention. This measurement of the probability of success seems to appropriately balance deterrence of misuse of the legal process with concern about overdeterrence.

Should frivolousness be defined subjectively or objectively? The good faith standard is a plausible standard for frivolousness. One might argue that because the purpose of the judicial system is the resolution of disputes, clients and lawyers should be allowed to present claims and defenses that they honestly hold. On the other hand, a good faith standard would allow almost any claim to be brought. Further, when people engage in activities that affect others, the law generally favors objective over subjective standards. A person who drives an automobile on the public highways, for example, must comply with an objective rather than a subjective standard of due care.<sup>46</sup> Moreover, the de minimis probability of success necessary to establish frivolousness is a fairly weak standard. It seems reasonable to balance this limited standard for measuring frivolousness by using an objective rather than a subjective standard. This analysis leads to the conclusion that the appropriate definition of a frivolous legal contention is one that objectively has less than a de minimis chance of success, with de minimis being defined as five percent.

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44. See, e.g., 31 C.F.R. § 10.34(a)(4)(i) (1997).

45. *Id.*

46. See, e.g., *Hodges v. American Bakeries Co.*, 412 S.W.2d 157 (Mo. 1967) (finding that an objective standard of care, and not a subjective standard, is applicable in a wrongful death action arising out of an automobile accident).

A fundamental problem in constructing a definition of frivolous legal contentions involves change in the law. Because the law does and must change to take into account changing social circumstances and values, a definition of frivolous contentions must allow for contentions that challenge existing legal doctrine. On the other hand, too broad an exception for contentions seeking to change existing law threatens to undermine the entire concept of frivolousness.<sup>47</sup> The objective *de minimis* definition of frivolousness should meet this problem. Under this definition, an argument by a lawyer for change in the law is not frivolous if the argument objectively has more than a *de minimis* chance of success. For example, if a jurisdiction's highest court adopted a particular legal doctrine many years ago, but courts in other jurisdictions have recently rejected or modified the doctrine, reasonable lawyers would almost certainly conclude that they have more than a *de minimis* chance of convincing courts in the jurisdiction following the old doctrine to change the law. On the other hand, if the highest court in the jurisdiction has recently rejected a particular legal theory, it would probably be frivolous for a lawyer to bring a suit based on that rejected theory.<sup>48</sup>

The above discussion of the definition of frivolousness has focused on the merits of legal contentions. In some cases, clients or lawyers may have an incentive to assert a meritorious contention, but for reasons other than dispute resolution. A person may wish to make a contention simply to inflict the costs of legal proceedings on the opposing party because of animosity or other motivation. Further, some claimants may engage in strategic behavior, concluding that the other party may be willing to pay to avoid the cost of defending against a contention, regardless of the contention's merits.<sup>49</sup>

Good arguments can be made both in favor of and against imposing sanctions for making a meritorious contention for an improper purpose. On the one hand, it seems sound as a matter of principle to impose sanctions when a contention is asserted for a purpose other than the resolution of a bona fide dispute. Such claims involve an attempt by parties to use the judicial system for their own ends rather than for the purpose for which the system was intended. On the other hand, imposing sanctions on meritorious contentions that are brought for an improper purpose will discourage the assertion of some claims that have social benefits because by definition such contentions have legal merit.<sup>50</sup> In addition,

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47. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 287-88 (1995).

48. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 170 cmt. d, illus. 1 & 2 (Tentative Draft No. 8, 1997).

49. The term "strike suit" is often used to refer to nonmeritorious claims brought for the purpose of extracting a payment to avoid the cost of defending the claim. See BLACK'S LAW DICTIONARY 741 (5th ed. 1983).

50. See, e.g., *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995) (holding that district court erred in awarding sanctions for improper purpose in

even if in principle it makes sense to discourage contentions brought for an improper purpose, the costs of administering such a rule may well outweigh the benefits of the rule. Determining a party's intentions is difficult and likely to be costly. Questions such as what constitutes an improper purpose, and whether the claimant's purpose is improper if the claimant has mixed motives—some of which are proper and some of which are not—must be answered in administering such a rule. On balance, therefore, it is probably sounder to focus only on the substantive merit of a legal contention rather than on the motivation for the contention.

C. *Analysis of Current Rules Regulating Frivolousness*

How do professional rules and legal standards regarding frivolous contentions compare with the analysis outlined above? Model Rule 3.1 provides as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>51</sup>

Several points about the Model Rule are worth noting. First, the concept of frivolousness applies not only to complaints but also to answers, motions, and other steps in a legal proceeding.<sup>52</sup> Thus, both counsel for plaintiffs and defendants are obligated not to engage in frivolous representation. Second, the rule contains an exception for the defense of criminal proceedings.<sup>53</sup> Presumably, this exception reflects the criminal defendant's constitutional right to a presumption of innocence.<sup>54</sup> Third, the rule does not contain a definition of frivolous, although the comments to the rule do provide some additional guidance. Comment 2 states that an action is not frivolous simply because the facts have not been fully developed or because the lawyer expects to develop facts in support of the contention during discovery.<sup>55</sup> Further, an action is not frivolous "even though the lawyer believes that the client's position ultimately will not prevail."<sup>56</sup> Fourth, a claim is not frivolous even if the claim is

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filing complaint—threatening negative publicity to force settlement of related litigation—when complaint had legal merit).

51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995).

52. *See id.*

53. *Id.*

54. *See* *Holbrook v. Flynn*, 475 U.S. 560 (1986) (stating that presumption of innocence is guaranteed by due process).

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2.

56. *Id.*

not warranted under existing law if the lawyer can make a "good faith argument for an extension, modification or reversal of existing law."<sup>57</sup> Finally, a claim may be frivolous if it is brought for an improper purpose, even if the claim has legal and factual merit.<sup>58</sup> Comment 2 to Model Rule 3.1 states: "The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person . . . ."<sup>59</sup>

Model Rule 3.1 fails to provide a clear definition of frivolousness. While the rule alludes to the concept of good faith, the Model Code comparison that accompanies the rule states that "the test in Rule 3.1 is an objective test."<sup>60</sup> The previous analysis suggests that the appropriate definition should be whether a reasonable lawyer would conclude that the contention has more than a de minimis—five percent—chance of success.<sup>61</sup>

Unlike Model Rule 3.1, Rule 11 of the Federal Rules of Civil Procedure lists four specific obligations that lawyers incur by presenting signed pleadings, motions, or other papers to a court.<sup>62</sup> First, the lawyer must believe that the document "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>63</sup> Second, the lawyer must believe that the legal contentions "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>64</sup> Third, the lawyer must believe that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."<sup>65</sup> Fourth, the lawyer must believe that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."<sup>66</sup> In each case, the lawyer's belief must be "formed after an inquiry reasonable under the circumstances."<sup>67</sup>

A lawyer's obligations under Rule 11 are governed by an objective rather than a subjective standard.<sup>68</sup> The Advisory Committee notes to the 1993 amendments to Rule 11 state that the purpose of

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57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.* Rule 3.1 Model Code comparison.

61. For a discussion of the de minimis chance of success standard, see *supra* Part II.B.

62. FED. R. CIV. P. 11(b).

63. *Id.* Rule 11(b)(1).

64. *Id.* Rule 11(b)(2).

65. *Id.* Rule 11(b)(3).

66. *Id.* Rule 11(b)(4).

67. *Id.* Rule 11(b).

68. *See id.*

the amendment was to eliminate the "empty-head pure-heart" justification for a frivolous argument.<sup>69</sup> While Rule 11 improves on the Model Rule by clearly specifying an objective standard, it still falls short of providing an adequate definition of frivolousness because it fails to include any yardstick for measuring the probability of success of the contention.

Section 170 of the American Law Institute's (ALI) proposed Restatement of the Law Governing Lawyers also contains a definition of frivolous claims that is almost identical to Model Rule 3.1.<sup>70</sup> Comment d to section 170, however, provides some additional guidance, stating that "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it."<sup>71</sup> This standard is very close to the standard of "objectively greater than a de minimis chance of success" argued for in this article. The standard suggested in this article, however, is more precise since it sets a five percent chance of success as the level for distinguishing frivolous from nonfrivolous claims.

#### *D. Sanctions and Tort Liability for Frivolous Contentions*

The disciplinary process is designed to protect the public from lawyers who engage in conduct that falls below professional standards. If a lawyer engages in isolated instances of making frivolous claims or defenses, it does not appear that public protection warrants imposing disciplinary sanctions on the lawyer. A lawyer who engages in a pattern or practice of presenting frivolous claims or defenses, or who commits a particularly egregious violation, however, should be subject to disciplinary action.

Improper use of the judicial process imposes costs both on the legal system and on the opposing party. Thus, a compensatory sanction seems appropriate for presenting frivolous claims. In principle, sanctions should be imposed in two amounts: one amount paid to the court and equal to the administrative cost of the frivolous legal contention, and the other amount paid to the opposing party and equal to the costs incurred in responding to the frivolous legal contention. This measure of sanctions would not only compensate for injury done both to the judicial system and to the opposing party, but would also create an appropriate level of deterrence against misuse of the legal process, without overdetering use of the system for bringing legitimate claims. Determination of the actual administrative cost of a frivolous contention could be made in a variety of

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69. FED. R. CIV. P. 11 advisory committee's note.

70. Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 170 (Tentative Draft No. 8, 1997), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995).

71. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 170 (Tentative Draft No. 8, 1997).



ways. One possibility would be to establish an hourly rate for judicial time, taking into account not only the judge's time, but also other administrative costs associated with the judicial process. The costs incurred by the opposing party will normally consist of attorneys' fees, but could involve other provable damages as well.

Should lawyers and their clients be subject to tort liability for bringing frivolous claims? A person is liable for the tort of malicious prosecution if the person brings a civil proceeding or initiates a criminal proceeding without probable cause, primarily for a purpose other than adjudication of the person's rights, and the proceedings are terminated in favor of the person against whom the proceedings were brought.<sup>72</sup>

Related to malicious prosecution is the tort of abuse of process. Section 682 of the Second Restatement of Torts defines abuse of process as the use of criminal or civil process "primarily to accomplish a purpose for which it is not designed."<sup>73</sup> Comparison of the elements of the two torts indicates that it should be easier to establish a claim for abuse of process than a claim for malicious prosecution.<sup>74</sup> Both torts call for an improper purpose.<sup>75</sup> Malicious prosecution, however, requires termination of the proceeding in favor of the plaintiff, while abuse of process does not.<sup>76</sup> In addition, malicious prosecution requires that the proceeding be brought without probable cause.<sup>77</sup> Abuse of process does not have this requirement; the tort occurs when process is used for a purpose other than that for which it was intended.<sup>78</sup>

With increasing frequency, disgruntled defendants have brought claims for malicious prosecution and abuse of process against attorneys for opposing parties.<sup>79</sup> Such claims involve a ten-

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72. See RESTATEMENT (SECOND) OF TORTS § 674 (1976). The tort in section 674 is actually entitled "wrongful use of civil proceedings." *Id.* The Restatement restricts the tort of "malicious prosecution" to improper initiation of criminal proceedings. *Id.* Many courts, however, refer to both wrongful use of either the criminal or the civil process as malicious prosecution, and that terminology is adopted here. See 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 6.10, at 418 (4th ed. 1996).

73. RESTATEMENT (SECOND) OF TORTS § 682 (1976).

74. Compare *id.* § 674 (malicious prosecution), with *id.* § 682 (abuse of process).

75. See *id.* § 674 (action must be initiated "primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based"); *id.* § 682 (action must be brought "against another primarily to accomplish a purpose for which it is not designed").

76. Compare *id.* § 674, with *id.* § 682.

77. See *id.* § 674.

78. See *id.* § 682.

79. For a discussion of attorney liability for malicious prosecution and abuse of process, see Debra E. Wax, Annotation, *Liability of Attorney, Acting for Client, for Malicious Prosecution*, 46 A.L.R.4th 249 (1986); Debra T. Landis, Annotation, *Civil Liability of Attorney for Abuse of Process*, 97 A.L.R.3d 688 (1980). See also 1 MALLIN & SMITH, *supra* note 72, §§ 6.6-6.22, at 410-74.

sion between two important public policies. On the one hand, the public has an interest in open access to courts. If courts hold attorneys liable for actions that they bring on behalf of clients, a "chilling effect" on the use of the judicial process may result. On the other hand, the judicial process should be used to resolve bona fide disputes, not as a weapon to coerce defendants into paying money or for other improper purposes. Not surprisingly, the courts have struck a balance between these two policies, recognizing the possibility of attorney liability for malicious prosecution or abuse of process, but indicating that liability will be imposed only in extreme cases.<sup>80</sup>

The courts would do well to limit the torts of abuse of process and malicious prosecution to cases in which the person who instituted the proceedings is not subject to sanctions. Normally, this will occur in criminal cases in which the complaining person is not a party. In cases in which the person who instituted the proceedings is a party, the injured party can seek compensation for the improper proceeding by a motion for sanctions. Sanctions motions have efficiency advantages over tort claims because motions avoid duplicative legal proceedings. Further, the recognition of tort claims in addition to sanctions imposes the risk of overdetering legitimate claims. An example of this approach is *Detenbeck v. Koester*,<sup>81</sup> where the Texas Court of Appeals held that the plaintiff-doctor failed to state an abuse of process cause of action against the defendant and his attorneys for bringing a medical malpractice action against the plaintiff.<sup>82</sup> The court ruled that bringing the suit was the purpose for which the process was intended.<sup>83</sup> The court also stated that if the suit was groundless the defendant could seek appropriate sanctions.<sup>84</sup> By contrast, the California Supreme Court's decision in *Crowley v. Katleman*<sup>85</sup> seems wrong. In *Crowley*, the court held that the plaintiff, an attorney, stated a cause of action for malicious prosecution against the defendant and her attorneys for challenging a will that left the defendant's husband's estate to the plaintiff.<sup>86</sup> The plaintiff and the decedent had been good friends; the plaintiff had not drafted the will; the decedent executed the will before he married the defendant; and the decedent did not revoke or revise the will during their marriage.<sup>87</sup> The defendant challenged the will on multiple grounds, including fraud, undue influence, and lack of

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80. See Debra E. Wax, Annotation, *Liability of Attorney, Acting for Client, for Malicious Prosecution*, 46 A.L.R.4th 249, 255 (1986).

81. 886 S.W.2d 477 (Tex. Ct. App. 1994).

82. *Id.* at 481.

83. *Id.*

84. *Id.* at 482.

85. 881 P.2d 1083 (Cal. 1994) (en banc).

86. *Id.* at 1089.

87. See *id.* at 1084.

mental capacity.<sup>88</sup> The California Supreme Court found that a malicious prosecution claim could still be brought even though not all of the grounds were without probable cause.<sup>89</sup> In addition, the court rejected the defendants' arguments that the appropriate remedy for frivolous claims was court-imposed sanctions rather than a tort action.<sup>90</sup>

### III. THE IMPARTIAL DECISIONMAKER PRINCIPLE

#### A. *The Meaning of Impartiality*

Our ideal of the adversarial system of justice envisions impartial decisionmakers. Indeed, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."<sup>91</sup> What does it mean for a decisionmaker to be impartial? The Supreme Court has said that "[i]mpartiality is not a technical conception. It is a state of mind . . . of *appropriate indifference*."<sup>92</sup> Consider three ways in which a decisionmaker might not be impartial.<sup>93</sup> First, a juror might have a "factual bias," an inclination to favor one side based on knowledge of the particular facts involved in the dispute. Factual bias could result from personal knowledge or it could flow from exposure to media coverage of a case. Note that factual knowledge of a case is not the same as factual bias: A juror might have knowledge about a case, but might still have the ability to put that knowledge aside and decide the case impartially.

Second, a juror might have "relational bias." Relational bias can be defined as an inclination to favor one side in the case based on a specific relationship with the matter,<sup>94</sup> or with one of the parties,<sup>95</sup> or with one of the attorneys.<sup>96</sup> As is true with factual knowledge, a juror could have a relationship to the case without having relational bias. For example, a juror might have been represented by one of the lawyers in the case, but might also believe and be willing to state under oath that this relationship would not affect her ability to decide the case fairly.

Finally, the term "group bias" refers to attitudes that are more likely to be present in a member of a group than in the population

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88. See *id.* at 1085.

89. *Id.* at 1093-94.

90. *Id.* at 1096.

91. U.S. CONST. amend. VI.

92. *United States v. Wood*, 299 U.S. 123, 145-46 (1936) (emphasis added).

93. I will often refer to jurors rather than using the more general term of decisionmaker, but the same analysis generally applies to judges.

94. For example, stock ownership the value of which could be affected by the outcome of the matter.

95. For example, a relative of a party.

96. For example, prior representation of a juror by an attorney of record.

as a whole and which may cause a person to tend to favor a party to a proceeding. For example, African Americans may be more likely to identify racial discrimination as a major problem in our society than the population as a whole.<sup>97</sup> African American jurors may thus tend to favor African American defendants in cases in which discrimination may have been a factor. Republicans as a whole may be more likely to exhibit probusiness attitudes than the population as a whole.<sup>98</sup> Jurors with Republican affiliations, therefore, may be more sympathetic to the claims of business interests. Perceptions of group bias, however, may be inaccurate. Individual members of a group may not hold a bias that some members of the group have, and membership in other groups may counteract group bias. For example, when selected for a jury, a juror becomes a member of a group that is bound by oath to uphold the law. This oath of office may counteract to some extent any group bias that members of the jury may have.

*B. Control of Factual Bias: Direct Communication with Jurors and Judges*

Jurors or judges who have personal knowledge of the facts of a case are more likely to have an opinion about the outcome of the case than if they had not been exposed to these facts. An adversarial system of dispute resolution that is based on a principle of impartial decisionmakers must, therefore, adopt rules to control factual bias.

In rare cases, a juror or judge may have been personally exposed to the facts of the case prior to being selected to serve as a juror or assigned to the case as a judge. For example, a juror or a judge may have been a witness to an automobile accident. In these rare cases, the juror or judge should be disqualified from participating in the case,<sup>99</sup> even if the judge or juror believes that she would be able to decide the case impartially. The risk that the decisionmaker's impartiality has been undermined from personal exposure to the facts of the case is too great to rely on the decisionmaker's assertion of impartiality.

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97. See Paul Shepard, *Poll Finds Whites More Positive than Blacks on Race Relations*, ASSOCIATED PRESS, June 10, 1997, available in 1997 WL 4870084.

98. See Susan B. Garland & Mary Beth Regan, *Workers Unite . . . Against the GOP*, BUSINESS WEEK, June 24, 1996 (discussing Republican positions favoring business interests).

99. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a), (b) (1990) (judge disqualified when he has personal knowledge of disputed evidentiary facts or when the judge will be a material witness in the matter). *But see* State v. Thornton, 929 P.2d 676, 681 (Ariz. 1996) (en banc) (prospective juror who had listened to the defendant's escape and capture on a scanner set on police frequency was not a "witness in the action" within the meaning of the statute), cert. denied, 117 S. Ct. 1706 (1997).

Cases in which the juror or judge has some preexisting personal knowledge or involvement in the case are rare. A more substantial risk of factual bias comes from direct contact between jurors or judges and the lawyers in the case outside of official proceedings. Such *ex parte* communications pose several risks. Lawyers may relate facts that would be inadmissible under the rules of evidence. Moreover, *ex parte* communications do not provide an opportunity for cross examination or rebuttal evidence. Thus, it is clearly inconsistent with the adversarial model for a lawyer to communicate about the facts of the case with a member of the jury or the judge, except as part of the normal procedures for handling the case in court.

Communications that do not involve the facts of the case should also be prohibited. For example, a lawyer should not engage in a conversation with a juror that does not relate to the facts of the case. While social conversation does not involve the same danger associated with substantive conversation, danger does exist that the conversation will drift into discussion of the case itself. Even if the conversation were limited to nonsubstantive matters, the very existence of the conversation creates an appearance of impropriety that could undermine the perceived fairness of the process. Imagine the public reaction, for example, if one of the jurors in the O.J. Simpson case had been seen having lunch with a lawyer for either the prosecution or the defense. Moreover, if lawyers were allowed to have social conversations with jurors, lawyers would have an incentive to engage in such conversations either in the hope of obtaining some advantage over the other side, or of counteracting an advantage that the other lawyer might have obtained. As a result, rules allowing social communication would promote contacts that neither jurors nor lawyers necessarily wanted and would distract lawyers and jurors from their primary roles.

The rules of professional conduct are consistent with this analysis. Model Rule 3.5(b) provides that a lawyer shall not "communicate *ex parte* with such a person [referring to a judge, juror, prospective juror or other official] except as permitted by law."<sup>100</sup> The Restatement of the Law Governing Lawyers contains similar restrictions.<sup>101</sup> Canon 3(B)(7) of the Code of Judicial Conduct also generally prohibits judges from participating in *ex parte* communications.<sup>102</sup> Such communications include any communication between the judge and any other person regarding the case except a

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100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(b) (1995).

101. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 173(1) (Tentative Draft No. 8, 1997) (prohibiting *ex parte* communications with judge or official before whom the case is pending); *id.* § 175(1), (2) (prohibiting communications with prospective and sitting jurors).

102. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7).

communication in the course of official proceedings.<sup>103</sup> The prohibition applies to parties, their lawyers, witnesses, and even third persons unconnected with the litigation.<sup>104</sup>

The Code of Judicial Conduct provides several practical exceptions to the prohibition on ex parte communications with judges.<sup>105</sup> For example, the Code allows ex parte communications "for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits."<sup>106</sup> Even in these situations, however, the judge must reasonably believe that no party will gain a tactical advantage because of the ex parte communication, and the judge must promptly notify all parties of the ex parte communication and give them an opportunity to respond.<sup>107</sup>

What should be the remedy if a lawyer violates the prohibition on ex parte communications with either jurors or judges? Depending on the circumstances of the communication and the lawyer's intention, some form of disciplinary action may be appropriate.<sup>108</sup> Ex parte communications, however, probably do not warrant reversal absent a showing of prejudice.<sup>109</sup>

The rule on ex parte communications should not prohibit lawyers from gathering information about jurors prior to trial. Lawyers or their representatives can gather information about prospective jurors without personally contacting them. Further, lawyers need information about jurors to exercise their peremptory challenges intelligently. Thus, information gathering about jurors, so long as it is done without contact with the prospective juror, seems consistent with the impartial decisionmaker principle. Under DR 7-108(E) of the Code of Professional Responsibility, lawyers were permitted to investigate jurors so long as the inquiry was not "vexatious or harassing."<sup>110</sup> While the Model Rules do not specifically authorize in-

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103. *See id.*

104. *See id.* Canon 3(B)(7) cmt. 1.

105. *Id.* Canon 3(B)(7)(a)-(d).

106. *Id.* Canon 3(B)(7)(a).

107. *Id.* Canon 3(B)(7)(a)(i), (ii).

108. *See In re Rivers*, 331 S.E.2d 332, 333 (S.C. 1984) (lawyer disciplined when investigator communicated with members of civil jury panel prior to trial).

109. *Compare* *McElhanon v. Hing*, 728 P.2d 273, 283 (Ariz. 1986) (en banc) (holding that reversal was not warranted because verdict was "not the result of passion or prejudice"); *Love v. State*, 569 So. 2d 807, 810 (Fla. Dist. Ct. App. 1990) (holding that reversal was not warranted because the inappropriate behavior of the trial judge did not prejudice the defendant); *and* *Burgess v. Stern*, 428 S.E.2d 880, 884 (S.C. 1993) (holding that reversal was not warranted because of no showing of prejudice), *with* *Strothers v. Strothers*, 567 N.E.2d 222, 225 (Mass. Ct. App. 1991) (holding that reversal was warranted when ex parte communication had effect on judge's decision in divorce case).

110. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(E) (1981).

vestigation of jurors, that authorization is implicit from the fact that Rule 3.5(b) only prohibits communications.<sup>111</sup>

Should lawyers be prohibited from communicating with jurors after the conclusion of the case? The risk of undermining the impartiality of the jury does not exist with post-trial communications because the jury has already rendered its decision. In addition, legitimate reasons for post-trial communications exist. Lawyers may want to obtain jury impressions to improve their trial skills. Further, when the case is one of many similar cases—products liability cases, for example—lawyers can gather information that may help them improve their presentations in future cases. On the other hand, post-trial communications run the risk that jurors may be harassed or that their privacy may be invaded. However, the trial judge can control this risk through directions at the end of the case that once jurors are discharged, they are free to talk about the case, but also have the right to refuse to discuss the case with anyone, including the lawyers. On balance, therefore, it seems proper for lawyers to be able to interview jurors after the case is over, so long as lawyers do not harass the jurors.

Disciplinary Rule 7-108(D) of the Code of Professional Responsibility allowed lawyers to contact jurors after the conclusion of the case, provided they did not harass the former jurors or attempt to influence their conduct in future jury service.<sup>112</sup> Model Rule 3.5 does not address this issue.<sup>113</sup> In *State v. Furutani*,<sup>114</sup> the Hawaii Supreme Court held that post-trial contacts with the jury could only take place in the presence of all parties or their representatives.<sup>115</sup> *Furutani* seems wrongly decided. Sound reasons for post-trial contact exist, while the risk to the adversarial process is small. A prohibition on harassing contacts, like that found in the Model Code,<sup>116</sup> seems sufficient to protect the privacy of jurors, and this is the position adopted by the Restatement of the Law Governing Lawyers.<sup>117</sup>

While post-trial communication with jurors does not involve any significant threat to the adversarial process, post-trial employment of former jurors to serve as trial consultants in future cases

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111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(b) (1995); see also 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 3.5:201, at 655 n.1 (2d ed. Supp. 1991).

112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D).

113. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(b).

114. 873 P.2d 51 (Haw. 1994).

115. *Id.* at 56 n.8. But see *Rapp v. Disciplinary Bd.*, 916 F. Supp. 1525, 1538 (D. Haw. 1996) (declaring Rule 3.5, which prohibits communications with jurors "except as permitted by law," unconstitutionally vague).

116. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D).

117. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 175(3) (Tentative Draft No. 8, 1997). By contrast, the Supreme Judicial Court of Massachusetts recently adopted rules of professional conduct that prohibited lawyers from contacting jurors after they have been discharged from the case. MASS. RULES OF PROFESSIONAL CONDUCT Rule 3.5(d) (1997).

does. The argument for permitting such employment is that jury members will have insights about similar cases and can share these insights with lawyers to improve the lawyer's presentation in subsequent cases. The problem with hiring former jurors as consultants, however, is that the possibility of future employment may sway jurors in their deliberations. The situation is analogous to that of the former government lawyer. A lawyer who moves from government to private practice may not undertake representation in a matter in which the lawyer has "participated personally and substantially" while a public officer or employee.<sup>118</sup> The rule applies even if the lawyer is not acting adversely to the government.<sup>119</sup> The rule is designed to prevent the prospect of private employment from affecting decisionmaking by government employees.<sup>120</sup> The same policy should bar jurors from consulting on future cases.

*C. Control of Factual Bias: Indirect Contact with Jurors and Judges Through Trial Publicity*

Media coverage of pending cases may compromise the impartiality of jurors or judges or influence the testimony of witnesses. Thus, if the integrity of the adversarial process was the only value involved in determining whether media coverage of pending cases should be restricted, media coverage would be prohibited until the conclusion of the case. However, the risk to the adversarial process posed by trial publicity is in tension with constitutional rights of freedom of the press and free expression.

The Supreme Court has established several basic principles regarding the tension between the First Amendment rights of the press and the due process rights of parties to a fair trial. First, the press has virtually an unlimited right to publish what it considers important about legal proceedings.<sup>121</sup> Courts will almost never grant prior restraints on publication.<sup>122</sup> After publication, the press may be subject to a damage action for libel, but in the case of public figures, the plaintiff must meet a higher standard than in an ordinary libel action.<sup>123</sup> The plaintiff must prove that the publication

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118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a).

119. *Id.* Rule 1.11(a)-(e).

120. *Id.* Rule 1.11 cmt. 3.

121. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (per curiam) (declaring that the press has wide discretion in what is published); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.").

122. *See, e.g., Vance*, 445 U.S. at 316 (1980) (stating that Texas public nuisance statute authorizing state judges to enjoin exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (refusing to enjoin publication of the "Pentagon Papers").

123. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964).



was false and made with "actual malice," rather than mere negligence.<sup>124</sup>

Second, courts have broad power to control the conduct of anyone who appears in court, including members of the press, both to assure order and to protect the rights of the parties. *Sheppard v. Maxwell*<sup>125</sup> is the leading case dealing with the constitutional obligation of courts to control their proceedings. In *Sheppard*, Doctor Sam Sheppard was accused of bludgeoning his pregnant wife, Marilyn, to death.<sup>126</sup> He claimed that he was innocent and that his wife had been killed by an unidentified intruder.<sup>127</sup> The case appealed to the public's interest because of the wealth of the defendant, the mystery surrounding the case, and the fact that the defendant was having an affair.<sup>128</sup> In describing the extent of publicity in the case, the Supreme Court referred to five volumes of clippings from Cleveland newspapers, almost all of which were incriminating;<sup>129</sup> the Court also noted that the record did not reflect radio and television coverage, which it assumed to be at least as extensive as the newspaper publicity.<sup>130</sup> The Supreme Court reversed Dr. Sheppard's conviction.<sup>131</sup> Referring to the "carnival atmosphere" at trial, the Court held that the trial judge had failed to protect the defendant's right to due process of law.<sup>132</sup> The Court outlined various measures that the trial judge should have taken, including stricter rules governing the use of the courtroom by the media; insulation of witnesses from press contacts; and some control over the "release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."<sup>133</sup>

Thus, Supreme Court decisions establish two poles for the regulation of pretrial publicity. In court, judges have very broad authority to control the conduct of their proceedings.<sup>134</sup> Out of court, the press has virtually absolute freedom to publish what it determines to be newsworthy.<sup>135</sup> Between these two poles lies an important class of cases involving extrajudicial statements by officials, parties, witnesses, and their lawyers. In *Sheppard*, the Court's principal focus was on the trial judge's failure to control the conduct

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124. See *id.* (allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice).

125. 384 U.S. 333 (1966).

126. *Id.* at 335-37. The murder later became the basis for a highly popular television show, *The Fugitive*, and the 1993 movie by the same name.

127. See *id.* at 336.

128. See *id.* at 338-42.

129. *Id.*

130. *Id.* at 340-42.

131. *Id.* at 363.

132. *Id.* at 357-58, 363.

133. *Id.* at 359.

134. See *id.* at 357-63.

135. See, e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (*per curiam*) (declaring that the press has wide discretion in what is published).

of the media in court.<sup>136</sup> While the Court referred to the problem of extrajudicial statements, it did not explore the scope of this issue.<sup>137</sup> The focus here is on the issue of the extent to which lawyers' extrajudicial statements about pending cases should be subject to control.

Consider two models for regulating lawyers' extrajudicial statements concerning pending proceedings: the officer-of-the-court model and the client representative model. The officer-of-the-court model begins with the proposition that courts have the power to protect the integrity of their proceedings. This power includes control over all court officials and employees, including lawyers who are officers of the court.<sup>138</sup> Since extrajudicial statements during the pendency of a proceeding pose a risk that the impartiality of decisionmakers will be compromised, courts may by rule or order prohibit lawyers from making such extrajudicial statements. Further, such control does not seriously impact on the public interest in information about judicial proceedings because the press has practically unlimited freedom to gather and publish information about judicial proceedings.

Under the client representative model, lawyers' primary obligations are to their clients. In many instances clients will have an interest in reducing trial publicity to protect their right to a fair trial. The *Sheppard*<sup>139</sup> case is a clear example. In other cases, however, clients may have an interest in promoting publicity about their cases, particularly when they feel that existing public information or perceptions may be inaccurate, or when they feel that vindication in the public forum is essential to their defense. Under the client representative model, whether a lawyer participates in making extrajudicial statements should largely be determined by the client after consultation with the lawyer.

When two fundamental values are in tension with each other, it is sensible to try to resolve the tension by searching for some accommodation or balance between the two values. The drafters of the Model Rules attempted to construct a trial publicity rule that balanced fair trial and free expression rights.<sup>140</sup> Model Rule 3.6(a), as originally adopted in 1983,<sup>141</sup> stated that a lawyer could not make an extrajudicial statement if the statement had a "substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>142</sup> Rule 3.6(b) listed a number of statements that "ordinarily" would have

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136. *Sheppard*, 384 U.S. at 357.

137. *Id.* at 360-61.

138. See, e.g., *Waters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988) (discussing lawyers as officers of the court).

139. For a discussion of the *Sheppard* case, see *supra* notes 125-33 and accompanying text.

140. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 1 (1995).

141. For a discussion of 1994 amendment to Model Rule 3.6, see *infra* notes 173-84 and accompanying text.

142. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1983).

such an effect.<sup>143</sup> The presumptively-improper statements under Rule 3.6(b) applied to civil jury cases, criminal cases, and any other proceedings that could result in incarceration.<sup>144</sup> Rule 3.6(c) provided a "safe haven" for lawyers: a list of statements that lawyers were allowed to make, including statements referring to matters reflected in the public record.<sup>145</sup>

The constitutionality of Rule 3.6 and the tension between the officer-of-the-court and the client representative models came before the Supreme Court in *Gentile v. State Bar of Nevada*.<sup>146</sup> *Gentile* grew out of a prosecution of the owner of a Las Vegas vault company for the theft of money and cocaine that had been used by the police in an undercover operation.<sup>147</sup> The investigation originally focused on the owner of the vault company and the undercover officers as suspects, but the sheriff soon issued a statement that the officers had been cleared.<sup>148</sup> The media continued to report evidence pointing to the owner's guilt, and he was ultimately indicted for the crime.<sup>149</sup>

Gentile, the owner's attorney, was a well-known criminal defense lawyer in the Las Vegas area and the former Associate Dean of the National College for Criminal Defense Lawyers and Public Defenders.<sup>150</sup> Hours after his client's indictment, Gentile called a press conference and delivered a statement in which he reviewed in detail the evidence that he would present at trial to show that his client was innocent.<sup>151</sup> Gentile claimed that the evidence would show that one of the police officers rather than his client was the guilty party.<sup>152</sup> This was the first time in Gentile's professional career that he had called a formal press conference.<sup>153</sup> He testified at his subsequent disciplinary hearing that he decided to call the conference because of

concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors, in particular the repeated press reports about polygraph tests and the fact that the two police officers were no longer suspects.<sup>154</sup>

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143. *Id.* Rule 3.6(b).

144. *Id.*

145. *Id.* Rule 3.6(c).

146. 501 U.S. 1030 (1991).

147. *Id.* at 1039-40.

148. *See id.* at 1040.

149. *See id.*

150. *See id.* at 1041.

151. *See id.*

152. *See id.* app. A.

153. *See id.* at 1042.

154. *Id.*

Gentile gave as a second reason for calling the press conference the serious toll that the investigation had taken on his client.<sup>155</sup>

Before calling the press conference, Gentile researched the issue of whether the press conference would be likely to prejudice the trial.<sup>156</sup> Considering that the trial was not scheduled to begin for six months, the size of the community, and prior First Amendment cases, he concluded that his statements would not be prejudicial.<sup>157</sup> The case went to trial on schedule six months later.<sup>158</sup> All of the evidence referred to in Gentile's press conference was admitted, and his client was acquitted.<sup>159</sup>

The state bar subsequently instituted disciplinary proceedings against Gentile for violating Nevada Supreme Court Rule 177, which was practically identical to the 1983 version of Model Rule 3.6.<sup>160</sup> The Nevada Disciplinary Board found that Gentile had violated the rule, and the Nevada Supreme Court affirmed.<sup>161</sup> The United States Supreme Court reversed in a 5-4 decision.<sup>162</sup>

Justice Kennedy and Chief Justice Rehnquist largely agreed that the "substantial likelihood of materially prejudicing an adjudicative proceeding" standard in Model Rule 3.6 was constitutional.<sup>163</sup> The opinions differed on the constitutionality of the application of this standard, and on the significance of due process—fair notice—to the facts of the case.<sup>164</sup> Four members of the Court would allow a state to impose discipline for pretrial statements by a lawyer only if there was a clear showing of the likelihood of material prejudice.<sup>165</sup> The four members would have found Rule 3.6 unconstitutional as applied to the facts because the likelihood of prejudice was small.<sup>166</sup> These four justices also found an independent due process basis for setting aside the decision of the Nevada Supreme Court.<sup>167</sup> They found that Rule 3.6(c) "misled petitioner into thinking that he could give his press conference without fear of discipline. . . . [because the rule] provide[d] that a lawyer 'may state without elaboration . . . the general nature of the . . . defense.'"<sup>168</sup>

155. *See id.* at 1043.

156. *See id.* at 1044.

157. *See id.*

158. *See id.* at 1047.

159. *See id.*

160. *See id.* at 1033.

161. *See id.*

162. *Id.* at 1032.

163. *Id.* at 1036-37 (Kennedy, J.); *id.* at 1075 (Rehnquist, C.J., dissenting).

164. *Id.* at 1037-48 (Kennedy, J.); *id.* at 1076-81 (Rehnquist, C.J., dissenting).

165. *Id.* at 1037-48 (Kennedy, J., joined by Blackmun, Marshall, and Stevens, J.J.).

166. *Id.*

167. *Id.* at 1048-49.

168. *Id.* at 1048 (quoting NEV. RULES OF PROFESSIONAL CONDUCT Rule 177(3)(a) (1996)).

Four other members of the Court would have given the states practically blanket authority to regulate pretrial speech by attorneys.<sup>169</sup> Rather than requiring a clear showing of material prejudice, these justices focused on the special role of attorneys and the substantial state interest in protecting the integrity of criminal trials.<sup>170</sup> In light of the greater leeway that these justices would have given to the states, they found no due process violation in the wording of the Nevada rule.<sup>171</sup>

Justice O'Connor cast the deciding vote in the case. While agreeing with the Rehnquist opinion that states should be given substantial leeway in regulating pretrial speech by lawyers, she agreed with the Kennedy opinion that the wording of Rule 3.6 did not give Gentile fair notice that he would be subject to discipline.<sup>172</sup>

What conclusions can one draw from the *Gentile* case? First, the standard of "substantial likelihood of materially prejudicing an adjudicative proceeding" is clearly constitutional, having been accepted by all nine justices. Second, it also seems reasonably clear that a lawyer who gave a press conference like the conference given by Gentile could be subject to discipline if the applicable disciplinary rule did not have the due process infirmity that troubled Justice O'Connor. As a result, it appears that a majority of the Supreme Court in *Gentile* has adopted the officer-of-the-court model, at least in criminal cases. Lawyers may be constitutionally prevented from engaging in extrajudicial statements even if the statements are made with the consent of their clients to respond to what the lawyer and client consider to be a highly damaging public atmosphere surrounding the case.

While the Supreme Court upheld the constitutionality of the officer-of-the-court model for restricting lawyers' public statements about pending cases, the decision did not prohibit states from allowing lawyers greater leeway in making public comments about pending cases. In fact, amendments to Model Rule 3.6 show a movement in that direction.

In response to the Supreme Court's decision in *Gentile*, the ABA adopted a revised version of Model Rule 3.6.<sup>173</sup> The new rule continues to use the "substantial likelihood of material prejudice" standard that was approved by the Supreme Court in *Gentile*.<sup>174</sup> Revised Rule 3.6(b) creates a "safe harbor" of statements that lawyers may make.<sup>175</sup> These statements are substantially the same as under the

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169. *Id.* at 1065-76 (Rehnquist, C.J., dissenting, joined by Scalia, Souter, and White, J.J.).

170. *Id.* (Rehnquist, C.J., dissenting).

171. *Id.* at 1078-79 (Rehnquist, C.J., dissenting).

172. *Id.* at 1081-82 (O'Connor, J., concurring).

173. See Randall Sanborn, *ABA Avoids Conflict at Its Big Easy Meeting*, NAT'L L.J., Aug. 22, 1994, at A6.

174. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1995).

175. *Id.*

former rule.<sup>176</sup> Among other permissible communications, lawyers are allowed to state "the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved"; and may state the "the information contained in a public record."<sup>177</sup>

The most significant change made in the new rule, however, is the addition of Rule 3.6(c), which provides lawyers with a "right of reply":

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.<sup>178</sup>

The right to reply found in revised Rule 3.6(c) goes a long way toward adopting the client representative model for extrajudicial statements, but does not permit lawyers to initiate the publicity.<sup>179</sup> If Rule 3.6(c) had been in effect at the time of the *Gentile* case, it appears that Gentile would not have been subject to discipline for his press conference since he was responding to widespread reports that were adverse to his client's case.<sup>180</sup>

Revised Model Rule 3.6 reflects an appropriate balance of the constitutional issues involved in trial publicity. While the rule does limit public commentary by lawyers participating in the proceeding, the public interest in information about pending proceedings still seems adequately protected by the press' virtually unlimited right to publish about pending proceedings.<sup>181</sup> The rule allows lawyers involved in the case to provide basic information about the case.<sup>182</sup> At the conclusion of the case, lawyers involved in the case can speak freely about nonprivileged matters.<sup>183</sup> Moreover, even during the case lawyers who are not involved in the proceeding may comment publicly on the issues raised by the case, and an abundance of such commentators appear regularly in the media. In most cases, parties' interests in fair trials are served by restrictions on trial publicity. Recognition of the right to reply seems sufficient to address legitimate concerns that a party may have about unfair or prejudicial pretrial publicity.

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176. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1993), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1995).

177. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a)(1)-(2) (1995).

178. *Id.* Rule 3.6(c).

179. *Id.* Rule 3.6 cmt. 7 (stating that lawyers may respond to prejudicial statements).

180. See *Gentile*, 501 U.S. at 1042.

181. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 3 (1995).

182. *Id.* Rule 3.6 cmt. 1.

183. *Id.*

It is unclear, however, whether most states will adopt the ABA's revised Model Rule 3.6 with its right to reply. For example, in response to the extensive publicity surrounding the O.J. Simpson case, the California Supreme Court adopted a trial publicity rule modeled after revised ABA Model Rule 3.6, but did not include the right to reply.<sup>184</sup> In states that have not adopted the ABA's amendment to Model Rule 3.6, a lawyer who makes an extrajudicial statement like the one made by Gentile is at disciplinary risk.

Some states are considering giving lawyers more protection than found in revised ABA Rule 3.6. For example, the Professional Responsibility Committee of the New York City Bar has recommended that the New York Code of Professional Responsibility be amended to adopt a "clear and present danger" standard for punishing lawyers for extrajudicial statements, rather than the "substantial likelihood" standard of Model Rule 3.6(a).<sup>185</sup> This approach seems unsound because it gives insufficient weight to the integrity of trial proceedings. The "substantial likelihood of material prejudice" standard coupled with a right to reply strikes a better balance.

Public comment by prosecutors poses a greater risk of danger to the impartiality of decisionmakers because the public is more likely to give credence to statements by public officials than by defense counsel. The ABA has attempted to mitigate this risk by amending Model Rule 3.8 to include a new provision. The Rule, which deals with the ethical obligations of prosecutors, provides that

[t]he prosecutor in a criminal case shall

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... except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.<sup>186</sup>

Comment 5 to the Rule, however, backs away from this approach by stating that prosecutors may ethically make statements allowed by revised Rule 3.6.<sup>187</sup>

*Gentile* dealt with the constitutionality of disciplinary action against an attorney for engaging in trial publicity.<sup>188</sup> To prevent prejudicial pretrial publicity from occurring, many judges will con-

184. CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-120 (1995).

185. See Comm. on Prof'l Responsibility, N.Y. City Bar Ass'n, *The Need for Fair Trials Does Not Justify a Disciplinary Rule that Broadly Restricts an Attorney's Speech*, 20 FORDHAM URB. L.J. 881, 893 (1993).

186. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(g).

187. *Id.* Rule 3.8 cmt. 5.

188. *Gentile*, 501 U.S. at 1074-75 (Rehnquist, C.J., dissenting).

sider imposing "gag" orders on all counsel involved in the proceeding. Because a gag order amounts to a prior restraint on free speech, the standard for imposition of a gag order is quite high. In *United States v. Salameh*,<sup>189</sup> the trial judge in the New York World Trade Center bombing case issued an order prohibiting defense counsel from making statements in the press or media that "may have something to do with the case."<sup>190</sup> The Second Circuit ruled that prior restraints on speech carry a "heavy presumption" against their constitutionality.<sup>191</sup> The court stated that limitations on speech must be "no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial."<sup>192</sup> In addition, the court must explore other available remedies.<sup>193</sup> The Second Circuit vacated the trial judge's order because it failed to meet these standards.<sup>194</sup>

Despite the stringent legal standard for upholding gag orders, many trial judges will consider issuing such orders to prevent publicity about significant pending cases.<sup>195</sup> Increased use of gag orders is unfortunate for two reasons. First, if Rule 3.6 strikes an appropriate balance between the contending constitutional interests, then use of a gag order should be presumptively inappropriate because it upsets this balance. Second, judges usually impose gag orders only after substantial publicity has taken place, which is often adverse to the defendant. As a result, gag orders normally operate to the disadvantage of the defendant. Trial judges should refrain from imposing gag orders except in extreme cases. Instead, judges should allow the lawyers to make public comments about pending cases so long as they comply with the standards of Rule 3.6.

#### *D. Control of Relational Bias: Disqualification of Judges and Reporting Juror Misconduct*

This section began by identifying three forms of bias that can undermine the impartiality of decisionmakers: factual, relational, and group bias. Factual bias can result when lawyers bring facts to the attention of the judge or a juror outside of normal procedures,

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189. 992 F.2d 445 (2d Cir. 1993).

190. *Id.* at 446.

191. *Id.* at 446-47.

192. *Id.* at 447.

193. *See id.*

194. *Id.*; see generally Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977) (discussing the constitutionality of prior restraints).

195. See Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, 311 ("As judges have struggled with the media in high profile cases, one technique has become increasingly common: gag orders precluding lawyers and parties from speaking with the press.").



either by ex parte communication or trial publicity. Relational bias occurs when the decisionmaker has a tendency to favor one side in the case because of some relationship between the decisionmaker and the subject matter of the case (such as a financial interest in the case), one of the parties to the case (such as a family relationship), or one of the attorneys appearing in the case (such as prior representation by the lawyer of one of the jurors).

Relational bias of jurors is controlled through the process of voir dire. During voir dire, jurors may be challenged for "cause or favor." A challenge for cause applies when the juror does not meet statutorily defined requirements for jury service. For example, federal law provides that a juror may be challenged for cause if the prospective juror:

- (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
- (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
- (3) is unable to speak the English language;
- (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
- (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.<sup>196</sup>

A challenge for favor applies if the juror is unable to decide the case fairly because of bias, prejudice, interest in the case, or other factors.<sup>197</sup> While challenges for cause or favor refer to different concepts, it is common today to use the term "challenge for cause" to refer to both. Sometimes statutes will define circumstances in which jurors may be disqualified for favor.<sup>198</sup> Typically, however, the court determines whether a juror should be excused based on the juror's answers to various questions posed by the court during voir dire about the juror's background, relationship to the case, and relationship to the parties and their counsel. For example, federal law provides no specific grounds for disqualifying jurors for favor, leaving the matter instead for court determination. The law states that "[a]ll challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."<sup>199</sup>

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196. 28 U.S.C. § 1865(b)(1)-(5) (1994).

197. See, e.g., ARIZ. R. CRIM. P. 18.4(b) cmt. (stating that a juror may be stricken "on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties").

198. See, e.g., S.D. CODIFIED LAWS § 15-14-6 (Michie Supp. 1997).

199. 28 U.S.C. § 1870 (1994).

Similarly, judges are disqualified from hearing a case if the judge, the judge's spouse, or certain close relatives of the judge have a significant financial interest in the case or a relationship with either a party or a lawyer in the case.<sup>200</sup> While detailed discussion of these disqualification rules is beyond the scope of this article, the disqualification of judges because of financial interest provides a useful example of issues involved in relational disqualification.

Under the 1990 Code of Judicial Conduct, judges are subject to disqualification when the judge personally or as a fiduciary, or the judge's parent or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.<sup>201</sup> The 1990 Judicial Code made a substantial change from the 1972 Judicial Code regarding judges' disqualification because of an economic interest.<sup>202</sup> Under the 1972 Judicial Code, a judge's financial interest in a party or in the subject matter of a proceeding, *no matter how small*, required disqualification.<sup>203</sup> Thus, under the 1972 Judicial Code, if a judge, or the judge's spouse, or one of the judge's close relatives, held one share of stock in a party, the judge was disqualified. Unlike the 1972 Judicial Code, the 1990 Judicial Code provides that "economic interest" means "ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party,"<sup>204</sup> subject to certain exceptions.<sup>205</sup> The 1990 Judicial Code defines a

200. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c), (d) (1990); 28 U.S.C. § 455(b)(4), (5) (1994) (disqualification of federal judges).

201. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c).

202. Compare MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1972), with MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c) (1990). The 1972 Model Judicial Code used the term "financial interest." MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1972).

203. MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1972).

204. MODEL CODE OF JUDICIAL CONDUCT terminology (1990) (defining "economic interest").

205. The 1990 Judicial Code lists certain exceptions to what constitutes an economic interest:

- (i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;
- (ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;
- (iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization

de minimis interest as "an insignificant interest that could not raise reasonable question as to a judge's impartiality."<sup>206</sup>

While the Code of Judicial Conduct applies in most states,<sup>207</sup> 28 U.S.C. § 455 governs the disqualification of federal judges.<sup>208</sup> Similar to the 1972 Code of Judicial Conduct, the federal statute includes the "however small" rule.<sup>209</sup> Thus, if a federal judge—or the judge's spouse, or a minor child residing in the judge's household—owns one share of stock in a party to the proceeding, the judge is disqualified from hearing the matter. For example, in *In re Cement Antitrust Litigation*,<sup>210</sup> a federal judge who had been handling a class action antitrust case for more than five years was required to disqualify himself because his wife owned stock in seven of the 210,235 members of the plaintiff class.<sup>211</sup> The Ninth Circuit Court of Appeals bemoaned the statute's strictness and called for legislative evaluation of the reasonableness and consequences of the per se rule.<sup>212</sup>

In 1988, Congress attempted to ameliorate the harshness of the "however small" rule by adding 28 U.S.C. § 455(f), which allows judges to avoid disqualification by divesting a financial interests in a party when the disqualifying interest appears or is discovered after substantial judicial time has been devoted to the matter.<sup>213</sup> The divestiture rule also applies to financial interests held by a judge's spouse and minor children.<sup>214</sup> The section does not apply, however, if the interest could be substantially affected by the outcome of the case.<sup>215</sup> The Code of Judicial Conduct has no equivalent rule.

The changes made by the 1990 Judicial Code and the 1988 amendment to the federal statute both seem sound. Modern litigation is becoming increasingly complex; cases with hundreds or even thousands of parties are not uncommon. At the same time, stock ownership is becoming more widespread. Given these trends, the

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unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

MODEL CODE OF JUDICIAL CONDUCT terminology (1990). These exceptions are sensibly designed to allow judges to have routine financial interests without forcing their disqualification.

206. *Id.* (definition of "de minimis").

207. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 950 (1996).

208. 28 U.S.C. § 455 (1994).

209. 28 U.S.C. § 455.

210. 688 F.2d 1297 (9th Cir. 1982), *aff'd for absence of quorum sub nom.*, *Arizona v. United States Dist. Court*, 459 U.S. 1191 (1993).

211. *Id.* at 1300.

212. *Id.* at 1315.

213. 28 U.S.C. § 455(f).

214. *Id.*

215. *Id.*

probability is increasing that judges will have disqualifying financial interests. Judges could minimize the problem of financial disqualification by divesting themselves of stock ownership when they ascend the bench. However, for tax or other reasons, divestiture is sometimes not practical. Further, divestiture by the judge fails to address disqualification problems arising from stock ownership by the judge's spouse or minor child; nor does it address stock inheritances by the judge's spouse or minor child. Little risk to the judge's impartiality exists when stock ownership is *de minimis*, or when the interest can be divested and the outcome of the case would have no substantial impact on the interest. Both the Model Judicial Code and the federal statute should be amended to incorporate the *de minimis* and divestiture exceptions.

Jurors have a duty to answer truthfully questions asked of them during voir dire.<sup>216</sup> Judges have a duty under both the Code of Judicial Conduct and the federal statute to raise matters of disqualification on their own motion.<sup>217</sup> Suppose a lawyer learns of facts that may disqualify a juror or judge, but that the juror or judge has not raised. Should lawyers have a duty to raise this matter? Strategically, lawyers might prefer not to raise a disqualification matter if the lawyer believes the juror or judge would be favorable to the client's case.

Under the Model Code of Professional Responsibility, lawyers were obligated to disclose juror misconduct to tribunals. Disciplinary Rule 7-108(G) stated that "[a] lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge."<sup>218</sup> For example, in *In re R.*,<sup>219</sup> the accused lawyer represented the plaintiff in a personal injury case.<sup>220</sup> During the trial, the plaintiff gave a hitchhiking juror a ride to court.<sup>221</sup> The plaintiff and the juror did not immediately recognize each other; when they did, they were both embarrassed.<sup>222</sup> From the opinion, it appears that the plaintiff did not inform his lawyers of the contact until after a verdict was returned and then set aside on unrelated grounds.<sup>223</sup> The plaintiff's lawyer, after consulting his partners, decided not to inform the court because the verdict had

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216. See, e.g., *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (stating that a new trial may be granted if jurors do not respond truthfully to voir dire questions).

217. See 28 U.S.C. § 455 (stating that a judge "shall disqualify himself" under certain circumstances); MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c) (1990) (stating the same).

218. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108 (1981).

219. 554 P.2d 522 (Or. 1976) (en banc).

220. *Id.* at 523.

221. See *id.*

222. See *id.*

223. *Id.* at 524.

been set aside, and because the plaintiff and the juror had not discussed the case.<sup>224</sup> The Oregon Supreme Court disagreed:

We are of the opinion that it is immaterial when the accused learned of the juror contact because if an attorney learns of improper conduct at any time that any court can rectify the effect of that conduct, the attorney has an obligation to inform such court.

Another reason the accused did not inform any court was his opinion, fortified by a like opinion of his partners, that there was no improper conduct because the client and juror had met inadvertently and had not discussed the case. This is a decision that the attorney makes at his peril; that is, despite a reasonable belief that the conduct of the juror was proper, and, therefore, the attorney does not inform the court, if it develops subsequently that the conduct was improper, the attorney is guilty of unethical conduct for not earlier informing the court. The reason for such a rule is that, otherwise, the attorney can make a unilateral decision that the conduct was proper and, therefore, not inform the court. Because of this lack of disclosure the conduct may never be known although it turns out to be highly improper and highly prejudicial to a party to the lawsuit. If there is the slightest bit of doubt in an attorney's mind whether he is obligated to inform the court of juror misconduct, that doubt should be resolved in favor of disclosure.<sup>225</sup>

The court dismissed the complaint, however, because it found no improper conduct by the plaintiff and the juror.<sup>226</sup>

It is unclear whether the duty to disclose juror misconduct found in the Model Code survived the adoption of the Model Rules, which have no provision equivalent to DR 7-108(G). One court, however, has held that a prosecutor has a duty to disclose to the trial court information that the prosecutor has received regarding juror misconduct during trial.<sup>227</sup>

For several reasons, the Model Rules should be changed to make it clear that lawyers must disclose to the tribunal information regarding juror misconduct.<sup>228</sup> First, the client has no legitimate right to a result based on juror misconduct. Second, the client's confidentiality interest in such information is minimal or nonexistent, at least in cases where the misconduct does not involve wrongdoing by the client. Third, juror misconduct is a serious violation of the

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224. *See id.*

225. *Id.*

226. *Id.*

227. *State v. Cady*, 811 P.2d 1130, 1141 (Kan. 1991).

228. Fifteen jurisdictions currently require lawyers to disclose juror misconduct. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 175 reporter's note to cmt. a (Tentative Draft No. 8, 1997).

adversarial process. Even when the client is involved, there is a strong argument for requiring lawyers to disclose the misconduct. For example, while lawyers are required to disclose perjury by a criminal defendant, there is no such disclosure requirement for bribery of a juror. Arguably, the case for disclosure of juror bribery is even more compelling than disclosure of criminal defendant perjury. The rules of professional conduct should be amended to restore the obligation found under the Model Code to report juror misconduct to the tribunal.

The Model Rules do not address whether lawyers have a duty to inform the court of facts that may be grounds for disqualifying the judge. The disqualification rules are designed to protect the parties' right to an impartial judge, and to protect the public interest in having a dispute resolution process that commands public acceptance because of its fairness. In addition, both the Code of Judicial Conduct and the federal statute allow waiver of disqualification, though they differ on when waiver is permissible.<sup>229</sup> Implicit in the waiver procedure is the assumption that disqualifying facts will be brought to the attention of the court so that a waiver can be obtained where appropriate. Except in rare cases, the client will not have a confidentiality interest in the facts that would establish disqualification of the judge. Even in those cases, the client's interest can be protected by making the motion under seal. The rules of professional conduct should be amended to require lawyers to disclose to the court facts known to the lawyer that raise a substantial question of whether the judge should be disqualified.

#### *E. Control of Group Bias: The Process of Jury Selection*

Previous sections have examined rules for controlling factual and relational bias by jurors and judges. Should an adversarial system of dispute resolution attempt to control for group bias or preju-

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229. The Model Judicial Code uses the term "remittal," while the federal statute uses the term "waiver." Compare 28 U.S.C. § 455(e) (1994), with MODEL CODE OF JUDICIAL CONDUCT Canon 3(F) (1990). Under the Model Judicial Code, disqualification may be remitted in all cases except those in which the judge is disqualified because of personal bias or prejudice concerning a party. MODEL CODE OF JUDICIAL CONDUCT Canon 3(F). Such remittals would include disqualifications due to an economic interest. *Id.* The procedure for remittal is as follows: The judge discloses the basis for disqualification on the record and asks the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. *Id.* If all parties and the judge agree to waive disqualification, the judge may continue in the case. *Id.* The agreement waiving the disqualification should be made part of the record in the case. *Id.*

Under the federal statute, waiver is allowed only when the sole ground for disqualification is that the judge's impartiality might reasonably be questioned. See 28 U.S.C. § 455(e). Waiver is not allowed when the rules specifically provide for disqualification, including disqualification because of financial interest. *Id.*

dice, as opposed to factual or relational bias or prejudice? If so, how?

One possibility could be to expand the rules of juror disqualification for cause to allow a juror to be removed if the juror exhibited a general bias or prejudice.<sup>230</sup> Such a rule would be unworkable. Since everyone, to a greater or lesser degree, has a wide variety of biases and prejudices, an attempt to remove jurors who had these characteristics would leave us with few, if any, decisionmakers. Further, such a system would dramatically increase the administrative cost of selecting jurors: it would require extensive inquiry into a juror's background and psychological makeup.

Rather than removing jurors for cause if they have a group bias or prejudice, we could strive to have a jury that was representative of the community. This approach, however, also suffers from significant problems. Community members have a staggering range of characteristics and attitudes. Which ones would be chosen to represent in the jury, and how would selection occur? If the concern is assuring representation based on race, what of gender and economic background? The list of characteristics is long and the criteria for selection controversial. Further, the representational approach would not work with trial judges since single judges, not panels, preside over cases at the trial level.

Instead of addressing the issue of group bias or prejudice directly, our system attempts to deal with this problem in two ways. First, jury pool selection methods are made as open and nondiscriminatory as possible. For example, in 1968 Congress passed the Jury Selection and Service Act, which was designed to establish procedures to eliminate discrimination in jury service.<sup>231</sup> Second, parties to litigation are entitled to remove a certain number of jurors by peremptory challenge. Peremptory challenges may be exercised for any reason<sup>232</sup> and are in addition to any challenges for cause.<sup>233</sup> By exercising peremptory challenges, lawyers can remove jurors that they believe exhibit a group bias or prejudice against their clients for whatever reason.

The system of peremptory challenges suffers, however, from a fundamental problem. Lawyers, rightly or wrongly, typically believe that bias or prejudice by jurors is associated with characteristics such as race or gender. Because it allows lawyers to strike ju-

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230. For example, certain attitudes toward women or minorities.

231. 28 U.S.C. § 1862 (1994).

232. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.") (citation omitted).

233. See Darrell W. Contreras & Charles H. Whitebread, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'min Remedy*, 69 S. CAL. L. REV. 1587, 1600 (1996).

rors for any reason, the system of peremptory challenges thus promotes the use of challenges based on these characteristics. In other words, the system tends to promote the very stereotyping that it is designed to control.

In a series of cases beginning with *Batson v. Kentucky*,<sup>234</sup> the Supreme Court attempted to address the discriminatory exercise of peremptory challenges. The *Batson* Court held that the prosecution violates the defendant's rights to equal protection when it exercises peremptory challenges to remove jurors solely on the ground of race.<sup>235</sup> In subsequent cases, the Court has dramatically expanded its scrutiny of the use of peremptory challenges, although the rationale for the decisions has shifted. The Court has held that private litigants' exercise of peremptory challenges based on race in civil cases violates the equal protection rights of *jurors*.<sup>236</sup> Similarly, the Court has held that the defendant's exercise of peremptory challenges based on race in criminal cases also infringes upon the jurors' right to equal protection.<sup>237</sup> The Court found that the restriction on the defendant's use of peremptory challenges did not violate the defendant's constitutional right to due process, reasoning that the defendant did not have a constitutional right to any particular system of peremptory challenges.<sup>238</sup> The Court has expanded the prohibition on the discriminatory use of peremptory challenges to include strikes based on gender as well as race,<sup>239</sup> but has refused to extend the right to the use of peremptory challenges based on religion.<sup>240</sup>

The Court's approach to the discriminatory exercise of peremptory challenges is flawed. Attempting to draw a distinction between race and gender on the one hand, and religion on the other, seems arbitrary. Moreover, lawyers can avoid the current restrictions by carefully developing nondiscriminatory reasons when exercising their peremptory challenges.<sup>241</sup> As some scholars have suggested, a better approach is to eliminate peremptory challenges.<sup>242</sup> Under

234. 476 U.S. 79 (1986).

235. *Id.* at 89.

236. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

237. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

238. *Id.* at 57.

239. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994).

240. *See Davis v. Minnesota*, 511 U.S. 1115, 1116 (1994) (Scalia, J., dissenting) (denying certiorari in case involving the exercise of peremptory challenge based on religion).

241. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (race-neutral explanation of peremptory challenge need not be "persuasive, or even plausible").

242. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 247 (1994); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 429-23 (1992); Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325, 346-48 (1996) (arguing for a change to majority vote rather than unanimity with abolition of peremptory challenge).



such a system, a jury is more likely to be representative of the community, the constitutional right of jurors to serve is protected, and the cost of administering the current system of peremptory challenges is eliminated.

#### IV. THE PRINCIPLE OF QUALIFIED TRUTH-MAXIMIZING RULES

##### A. *The Frankel / Freedman Debate*

In 1975, federal Judge Marvin Frankel argued that the adversarial system did not give sufficient weight to the importance of truth:

The advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth. The advocate's prime loyalty is to his client, not to truth as such. All of us remember some stirring and defiant declarations by advocates of their heroic, selfless devotion to The Client. . . .<sup>243</sup>

Judge Frankel recalled Lord Brougham's familiar words:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>244</sup>

Continuing, Judge Fankel stated that

[t]here are, I think, no comparable lyrics by lawyers to The Truth.

. . . .

. . . The litigator's devices, let us be clear, have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains. It is worth stressing, therefore, that the gladiator

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243. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035-36 (1975).

244. *Id.* at 1036 (quoting 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

using the weapons in the courtroom is not primarily crusading after truth, but seeking to win.<sup>245</sup>

Judge Frankel contended that we should consider modifying our adversarial ideal to give greater weight to the truth.<sup>246</sup> He offered a draft of a new rule of professional conduct that would incorporate this ideal:

(1) In his representation of a client, unless prevented from doing so by a privilege reasonably believed to apply, a lawyer shall:

(a) Report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses.

(b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.

(c) Question witnesses with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate, intelligible, or fair than it otherwise would be.

(2) In the construction and application of the rules in subdivision (1), a lawyer will be held to possess knowledge he actually has or, in the exercise of reasonable diligence, should have.<sup>247</sup>

In response to Judge Frankel's view that lawyers should have an obligation to foster the truth, Professor Monroe Freedman set out a two-fold defense of the adversarial system.<sup>248</sup> First, the adversarial system is a better mechanism for producing truth than the inquisitorial system.<sup>249</sup> In particular, adversarial presentations tend to counteract the natural tendency of decisionmakers to reach conclusions on incomplete evidence.<sup>250</sup> Second, even if the adver-

245. Frankel, *supra* note 243, at 1036, 1039. See generally MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) (making similar observations).

246. Frankel, *supra* note 243, at 1056.

247. *Id.* at 1057-58.

248. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975).

249. See *id.* at 1063.

250. See *id.*; see also FREEDMAN, *supra* note 3, at 26-33; see generally Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313 (1991) (discussing the different theories of reforming the adversary system).

serial system were not the best method for arriving at truth, it reflects values that are more important than truth:

A trial is, in part, a search for truth . . . . We are concerned, however, with far more than a search for truth, and the constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it. What more effective way is there to expose a defendant's guilt than to require self-incrimination, at least to the extent of compelling the defendant to take the stand and respond to interrogation before the jury? The defendant, however, is presumed innocent, the burden is on the prosecution to prove guilt beyond a reasonable doubt, and even the guilty accused has an "absolute constitutional right to remain silent" and to put the government to its proof.<sup>251</sup>

While Freedman's argument applies most strongly in the criminal defense setting, he extends the analysis to civil litigation as well, because the civil system also has a constitutional foundation.<sup>252</sup>

Frankel and Freedman were both right. This can be shown by drawing a distinction between two ways in which lawyers could have an obligation to promote truth in litigation: through direct responsibility and by rule compliance. A lawyer with direct responsibility to promote truth would conduct all aspects of the litigation with a view toward producing what the lawyer believes to be a truthful outcome. Section 1(c) of Frankel's proposed rule illustrates a direct obligation to promote truth by requiring lawyers to question witnesses with "a purpose and design to elicit the whole truth."<sup>253</sup> Questioning witnesses is obviously not the only aspect of litigation in which lawyers could have an obligation to promote truth; the duty could be extended to other steps in the litigation process, including client interviewing, pleading, investigation, negotiation, and appeal. By contrast, a lawyer may be responsible to promote the truth through compliance with rules. Whether compliance with rules promotes truth depends, of course, on the rules themselves. If the rules on the whole are designed to maximize the likelihood that truthful results will occur in litigation,

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251. Freedman, *supra* note 248, at 1063-64; *see also* FREEDMAN, *supra* note 3, at 13 ("[T]he adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.").

252. FREEDMAN, *supra* note 3, at 20.

253. Frankel, *supra* note 243, at 1058.

then it is reasonable to characterize rule compliance as promoting truth.<sup>254</sup>

Frankel was correct to point out that advocates are concerned primarily with winning and only incidentally with the truth.<sup>255</sup> He was also correct to emphasize that truth should be given a greater value in our judicial system.<sup>256</sup> On the other hand, Freedman was right to emphasize that the adversarial system is a better means of achieving truth than a system that places direct responsibility on an official or lawyer to determine the truth.<sup>257</sup> The checks and balances of the adversarial system control the deficiencies in fact finding and judgment by any one individual.<sup>258</sup> Freedman was also right to emphasize that while truth may be an important value, individual rights, particularly those that have been constitutionalized, are more important in our society than the truthful resolution of disputes.<sup>259</sup>

The term "qualified truth-maximizing rules" blends Frankel's and Freedman's insights. A truth-maximizing rule increases the likelihood of a truthful outcome of a dispute over a situation that exists in the absence of a truth-maximizing rule. In determining whether a rule will produce a truth-maximizing result, we must project the consequences of adopting the rule, particularly the incentive effects on the parties and the lawyers. By focusing on the truth-maximizing consequences of rules, the system of rules incorporates Frankel's concern that the legal system should give greater weight to truth.

At the same time, the concept of truth-maximizing rules incorporates Freedman's points about the importance of the adversarial system and individual rights. Under a regime of qualified truth-maximizing rules, lawyers do not have direct responsibility to promote the truth. The lawyer's obligation is to follow the established rules of procedure, except in those cases where a challenge is being made to the rules on nonfrivolous grounds.<sup>260</sup> Moreover, the term "qualified" is intended to recognize that truth is not the only value at stake, and that truth-maximizing rules are sometimes limited by our concern for individual rights.

I do not claim that applying the concept of qualified truth-maximizing rules will be straightforward or uncontroversial. Reasonable people can disagree over whether a rule is truth maximizing. For example, does a rule that requires lawyers to

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254. This distinction between direct responsibility and rule compliance parallels a distinction in philosophy between act and rule utilitarianism. See generally DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

255. Frankel, *supra* note 243, at 1035-36.

256. *Id.*

257. Freedman, *supra* note 248, at 1063-64.

258. See *id.*

259. *Id.*

260. For a discussion of frivolousness, see *supra* Part II.

disclose a criminal defendant's perjury promote truth?<sup>261</sup> Further, people also dispute when individual rights should qualify truth-maximizing rules. However, the concept does provide both a standard and a framework for analyzing existing or proposed rules for limiting zealous representation.

### B. *Disclosure Rules*

This section considers a group of rules addressing the general question of whether lawyers are obligated to disclose to a tribunal information that may be damaging to the lawyer's client but which at the same time may be material to a truthful resolution of the dispute. Specifically, the section discusses the disclosure of adverse evidence,<sup>262</sup> the disclosure of information to save a life,<sup>263</sup> the disclosure of perjury,<sup>264</sup> the disclosure of exculpatory material by the prosecution,<sup>265</sup> and the disclosure of adverse law.<sup>266</sup>

#### 1. *Disclosure of adverse evidence*

It is a well-established doctrine that lawyers have no obligation to disclose voluntarily—as opposed to disclosure in compliance with discovery rules or court order—to opposing parties or to the tribunal evidence that is material to the case, even if nondisclosure would produce a result that is inconsistent with the truth.<sup>267</sup> The Model Rules reflect this principle by silence. Because of the absence of a disclosure rule, a lawyer's general duty of confidentiality prevents the lawyer from disclosing adverse evidence.<sup>268</sup> Comment b to section 180 of the proposed Restatement of the Law Governing Lawyers expresses the same principle:

A lawyer might know of testimony or other evidence vital to the other party, but unknown to that party or their advocate. The advocate who knows of the evidence, and who has complied with applicable rules concerning pretrial discovery and other applicable disclosure requirements . . . has no legal obligation to reveal the evidence, even though the proceeding

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261. For a discussion of whether various disclosure and nondisclosure rules in litigation are truth maximizing, see *infra* Part IV.B.

262. See *infra* Part IV.B.1.

263. See *infra* Part IV.B.2.

264. See *infra* Part IV.B.3.

265. See *infra* Part IV.B.4.

266. See *infra* Part IV.B.5.

267. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 1 (1995) ("A lawyer . . . generally has no affirmative duty to inform an opposing party of relevant facts.").

268. See WOLFRAM, *supra* note 8, § 12.3.2, at 639.

thereby may fail to ascertain the facts as the lawyer knows them.<sup>269</sup>

Section 1(a) of Judge Frankel's proposed rule would have required lawyers to disclose material evidence that they did not plan to offer.<sup>270</sup> Adoption of Frankel's rule, therefore, would have reversed long-standing doctrine regarding a lawyer's obligations to disclose adverse evidence.

It seems unlikely that a disclosure rule would be truth maximizing when compared to a rule of nondisclosure. Liberal discovery under the federal rules of civil procedure and state systems modeled after the federal rules allows parties to obtain almost any nonprivileged evidence that could be material to the case.<sup>271</sup> It is unclear whether adding a disclosure obligation to the already-existing discovery system would increase truthful outcomes.<sup>272</sup> In criminal cases, the prosecution already has a duty to disclose exculpatory evidence.<sup>273</sup> It seems doubtful that imposing a general disclosure obligation on the defense in criminal cases would increase truthful outcomes. More importantly, imposing such a duty on defense counsel would violate fundamental rights.<sup>274</sup>

Consider also the incentive effects of a disclosure rule. Attorneys would be wary of gathering adverse evidence for fear of triggering a disclosure obligation. As a result, the quality of adversarial presentations, and ultimately the accuracy of legal proceedings, might suffer. Further, lawyers might attempt to "free ride" on the investigative efforts of opposing counsel to obtain the fruits of opposing counsel's work without incurring the costs. Rules governing the timing of disclosure could be created to minimize free rider effects, but the addition of such rules would increase the complexity of litigation and generate collateral disputes.

In many cases, a disclosure rule would violate basic rights. Clients often communicate adverse evidence to their lawyers in confidence. A duty to disclose would, therefore, undermine the

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269. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 180 cmt. b (Tentative Draft No. 8, 1997).

270. Frankel, *supra* note 243, at 1057.

271. See FED. R. CIV. P. 26(b)(1).

272. Lawyers may have difficulty obtaining information in response to discovery requests because of discovery abuse by the other side. It seems unlikely, however, that adding a disclosure obligation to the existing rules of discovery will be an effective way of controlling discovery abuse. For a discussion of discovery abuse, see *infra* Part IV.C.

273. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1995) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . ."). For a discussion of the prosecution's duty to disclose exculpatory evidence, see *infra* Part IV.B.4.

274. For a discussion of why such a duty to disclose would violate basic rights of the defense, see *infra* notes 275-76 and accompanying text.

attorney-client privilege.<sup>275</sup> Imposing a general disclosure obligation on the defense in criminal cases might well violate the privilege against self-incrimination. The Supreme Court has held that when the government seeks to compel information from an attorney, the government violates the defendant's privilege against self-incrimination if two elements are satisfied: (1) the defendant conveyed the information to the lawyer in a communication that was subject to the attorney-client privilege, and (2) the information would have been subject to the privilege against self-incrimination if the government had sought to compel the information directly from the defendant rather than indirectly from the lawyer.<sup>276</sup> Given these consequences, a general duty to disclose adverse evidence is unsound under the principles of qualified truth-maximizing rules.

## 2. *Disclosure of information to save a life*

If a general duty of disclosure is unwarranted, can a more limited duty of disclosure be justified? *Spaulding v. Zimmerman*<sup>277</sup> provides a good example. In *Spaulding*, the Minnesota Supreme Court set aside a court-approved settlement of a minor's personal injury claim because the defendant's lawyer failed to disclose to the plaintiff a doctor's report the defendant had received showing that the plaintiff suffered from a life-threatening aneurysm.<sup>278</sup> *Spaulding* is clearly correct on the facts. The interest in disclosure went beyond a mere concern with truth; it involved the sanctity of life. Further, disclosure of the report would not have violated any fundamental right of the defendant. The report was not subject to the attorney-client privilege since it did not involve a confidential communication by the client to his lawyer.<sup>279</sup> While the report would have been work product, protection of work product is not absolute. A court may order disclosure of work product if the moving party shows substantial need coupled with an inability to obtain the evidence without undue expense or hardship.<sup>280</sup>

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275. The THIRD RESTATEMENT OF THE LAW GOVERNING LAWYERS states that the attorney-client privilege may be invoked with respect to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (Proposed Final Draft No. 1, 1996).

276. *United States v. Doe*, 465 U.S. 605, 617 (1984); *Fisher v. United States*, 425 U.S. 391, 402-05 (1976).

277. 116 N.W.2d 704 (Minn. 1962).

278. *Id.* at 707-11.

279. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (Proposed Final Draft No. 1, 1996) (stating that communication must be in confidence).

280. See FED. R. CIV. P. 26(b)(3) (work product may be obtained on a showing of substantial need and inability of moving party to obtain substantial equivalent of material without undue hardship). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 137 (Proposed Final Draft No. 1, 1996) (adopting standard of federal rule for obtaining ordinary work product).

Translating the *Spaulding* decision into a disclosure rule is difficult. One possibility is to focus on the two central aspects of the case: the serious threat to the plaintiff's life and the unprivileged nature of the report. A plausible disclosure rule could then be formulated as follows: A lawyer must disclose information received during the course of representation that shows a substantial risk to the life of another person, provided the information is not subject to the attorney-client privilege. This rule is sound under the principle of qualified truth-maximizing rules because the disclosure does not violate any fundamental rights while promoting a value even greater than truth: the sanctity of human life.

But does this disclosure rule go far enough? Should the attorney-client privilege give way only to the sanctity of human life? Consider cases in which a lawyer learns in confidence from his client that the client has committed a crime for which another person has been convicted.<sup>281</sup> One of the most famous examples of such a situation is *Frank v. State*.<sup>282</sup>

In 1914, Leo Frank, the Jewish manager of an Atlanta pencil factory, awaited execution for the rape and murder of a fourteen-year-old factory employee, Mary Phagan.<sup>283</sup> Frank was innocent.<sup>284</sup> His conviction occurred in an atmosphere of rampant anti-Semitism, inflamed by the press.<sup>285</sup> The actual murderer was James Conley, a factory employee.<sup>286</sup> After both the Georgia and United States Supreme Courts denied relief, Arthur Gray Powell, a prominent Georgia lawyer and later a judge, learned from a prospective client the identity of the actual murderer.<sup>287</sup> Powell kept his client's confidence and remained silent about Frank's innocence.<sup>288</sup> In his memoirs published in 1943, Powell stated:

I am one of the few people who know that Leo Frank was innocent of the crime for which he was convicted and lynched. Subsequent to the trial, and after his conviction had been affirmed by the Supreme Court, I learned who killed Mary Phagan, but the information came to me in such a way that,

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281. The obligations of lawyers, psychiatrists, and clergy when they learn in confidence that an innocent person is about to be executed are explored in Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996).

282. 80 S.E. 1016 (Ga. 1914).

283. See *id.* at 1018-19.

284. See Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim Is Cleared*, N.Y. TIMES, Mar. 8, 1982, at A12.

285. See ARTHUR G. POWELL, I CAN GO HOME AGAIN 287-88 (1943).

286. In 1982, Alonzo Mann, a young office boy when the crime was committed, came forward to admit that he had seen Conley carrying Phagan's body, but had remained silent because Conley threatened to kill him. See Rawls, *supra* note 284, at A12.

287. See POWELL, *supra* note 285, at 291.

288. See *id.*



though I wish I could do so, I can never reveal it so long as certain persons are alive. We lawyers, when we are admitted to the bar, take an oath never to reveal the communications made to us by our clients; and this includes facts revealed in an attempt to employ the lawyer, though he refuses the employment . . . . The law on this subject may or may not be a wise law—there are some who think that it is not—but naturally since it is the law, we lawyers and the judges cannot honorably disobey it.<sup>289</sup>

A short time after the Supreme Court denied Frank's appeal, Georgia's Governor John Stanton commuted Frank's sentence to life in prison.<sup>290</sup> In response to Stanton's decision, a mob attacked the Governor's mansion.<sup>291</sup> The mob then turned on Frank, kidnapping him from prison and lynching him.<sup>292</sup>

The *Frank* case is a horrible story of injustice, the pain of which still reverberates in the Atlanta Jewish community. If the Frank case were to arise today, however, Powell would still be required to keep his client's confidences. Should this be the rule? For two reasons, the answer must be "yes." First, disclosure in *Spaulding* would not have violated any fundamental rights of the defendant. By contrast, if Powell had disclosed Conley's guilt, Powell would have violated Conley's attorney-client privilege and his privilege against self-incrimination.<sup>293</sup> Second, it is unlikely that the disclosure of confidential information in situations like the *Frank* case would prevent a miscarriage of justice. If the client denies that he has committed the crime, disclosure by the lawyer becomes a swearing contest between the lawyer and the client, unless the lawyer has some evidence that the client committed the crime other than the client's confession to the lawyer. Even if the lawyer were allowed to testify against the client, which seems doubtful given the applicable privileges, it is very unlikely that a court would overturn a conviction simply because a lawyer is willing to swear that his client, rather than an already-convicted defendant, committed the crime.

One can imagine cases, however, in which a lawyer's disclosure of confidential information might prevent a miscarriage of justice and in which the client's constitutional rights could be protected. For example, suppose Powell had tangible evidence showing Conley's guilt and Frank's innocence. Power could agree to disclose

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289. *Id.*

290. *See id.* at 289.

291. *See id.* at 290.

292. *See id.* at 291.

293. Powell did not identify the source of his information in his memoirs, but for the purposes of this article I am treating Powell as if he had received the information directly from Conley.

this evidence in exchange for use immunity<sup>294</sup> with regard to the evidence. This approach would protect Conley's privilege against self-incrimination and avoid a miscarriage of justice.

This analysis shows that a rule requiring disclosure of privileged information—even to prevent an innocent person from being executed—is problematic, but that situations could arise in which disclosure would be appropriate. A rule giving lawyers discretion to reveal privileged information to prevent a serious miscarriage of justice would meet this concern. Indeed, the ALI recently adopted essentially this position. Section 117A of the proposed Restatement of the Law Governing Lawyers, entitled "Using or Disclosing Information to Prevent Death [or] Serious Bodily Injury," provides that "[a] lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to prevent . . . death or serious bodily injury to a person."<sup>295</sup> This provision was adopted after a vigorous debate, and over the opposition of the chief reporter, who contended the provision was inconsistent with prevailing doctrine.<sup>296</sup>

### 3. *Disclosure of perjury*

What should a lawyer's professional obligations be when the lawyer learns that a criminal defendant intends to commit or has committed perjury? Courts, bar committees, and scholars have considered a variety of solutions to this hotly-debated issue: withdrawal without disclosure, narrative testimony, avoidance of knowledge, full representation without disclosure, and disclosure if necessary to rectify the perjury.<sup>297</sup> The current prevailing view, adopted by both the Model Rules and the Restatement of the Law Governing Lawyers, is that lawyers should counsel their clients against committing perjury and must take "reasonable remedial measures" when they discover that perjury has been committed, including disclosure of the perjury to the tribunal if other ways of remedying the perjury are unsuccessful.<sup>298</sup>

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294. "Use immunity, as the term implies, prevents the government from using the witness's immunized testimony, or any information directly or indirectly obtained from that testimony, against the witness in a criminal proceeding." William R. McLucas et al., *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53, 74 (1997).

295. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 1, 1996), reprinted in Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, The Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1639 (1996).

296. For the history of the debate leading up to approval of § 117A, see *id.* at 1638-39.

297. For a discussion of the ethical, constitutional, and policy aspects of the issue, see NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 96-109 (1996).

298. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1995) (reasonable remedial measures). "If withdrawal will not remedy the situation

The principle of qualified truth-maximizing rules provides insight into this issue. Is a disclosure obligation truth maximizing? It seems doubtful that imposing an obligation on lawyers to disclose perjury by a criminal defendant will have a significant impact on the truthful outcome of criminal cases. Few criminal defendants testify on their own behalf. Those who do will almost always be counseled by their lawyers of the risks they face through cross-examination.<sup>299</sup> Vigorous cross-examination by the prosecution and scrutiny of the defendant's testimony by the jury minimize the risk that perjury will be successful.

Moreover, imposing an obligation on defense counsel to disclose perjury by the defendant may violate the defendant's constitutional rights. In *Nix v. Whiteside*,<sup>300</sup> the Supreme Court held that a criminal defendant's Sixth and Fourteenth Amendment rights to effective assistance of counsel were not violated when the defendant did not testify on his own behalf because defense counsel threatened to take various steps if the defendant testified perjurally.<sup>301</sup> *Nix* does not answer, however, all of the constitutional questions raised by the issue of perjury by the criminal defendant, particularly the question of whether disclosure by defense counsel would violate the defendant's privilege against self-incrimination.<sup>302</sup>

If a disclosure rule is not truth maximizing, why has the bar adopted it? One reason might be a "slippery slope" concern. If lawyers are allowed to continue to represent defendants when they know the defendant is committing perjury, lawyers may slip gradually into actively assisting and promoting the perjury. But a disclosure rule is a very poor way to deal with the slippery slope problem. Lawyers who are willing to become active participants in perjury are unlikely to be deterred by a rule that requires them to disclose perjury.

The disclosure rule might be explained by deference to lawyers' personal values. If lawyers are required to represent in the normal fashion defendants who commit perjury, many lawyers will be

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or is impossible, the advocate should make disclosure to the court." *Id.* Rule 3.3 cmt. 11. The Restatement provides that "[i]f a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 180(2) (Tentative Draft No. 8, 1997). Further, "[i]f no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps." *Id.* § 180 cmt. h.

299. By testifying on his own behalf, a criminal defendant waives his Fifth Amendment privilege with respect to questions asked by the prosecution on cross-examination. See, e.g., *Brown v. United States*, 356 U.S. 148, 154-56 (1958).

300. 475 U.S. 157 (1986).

301. *Id.* at 175-76.

302. See *supra* note 276 and accompanying text.

forced into conduct that they consider morally wrong and personally repugnant. Several responses can be made to this concern. First, eliminating the disclosure rule is not the same as directing lawyers to ignore the issue of perjury. Lawyers would still have an obligation to counsel their clients about the strategic and moral objections to perjury.<sup>303</sup> The counseling role would, in other words, serve as an outlet for the lawyer's moral objections. Second, when a person voluntarily undertakes a role with designated responsibilities, the person is not morally accountable for acting in accordance with that role, if the role itself is morally justified. For example, intentional killing is normally morally wrong, but when a soldier kills in a justified war he is not subject to moral sanction.<sup>304</sup> The same is true of criminal defense counsel.

The reason for the disclosure rule probably has more to do with the image of the bar than with the benefits of the rule. Neither criminal defendants nor their lawyers enjoy much public esteem. It is difficult for the bar to defend publicly the position that lawyers may continue to represent a defendant when the lawyer knows the defendant has committed perjury. But it is cowardly for the bar to continue to advocate a rule that has no significant benefits and which erodes constitutional protections simply because the alternative makes bad press.

#### 4. *Disclosure of exculpatory material by the prosecution*

While criminal defense counsel do not have an obligation to disclose facts adverse to their clients, even to prevent a miscarriage of justice, the opposite is true for prosecutors. Prosecutors have both a constitutional and a professional obligation to disclose "exculpatory" material. In a series of cases beginning with *Brady v. Maryland*,<sup>305</sup> the Supreme Court held that a prosecutor violates the right of a criminal defendant to due process of law when the prosecutor fails to reveal information known to the prosecutor that is material to the defendant's guilt or punishment.<sup>306</sup> Moreover, the prosecutor has a duty to disclose exculpatory information voluntarily even if the defendant has not made a "*Brady* request."<sup>307</sup>

The Model Rules of Professional Conduct also require prosecutors to disclose exculpatory material. Model Rule 3.8(d) provides that a prosecutor in a criminal case shall

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303. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (discussing the lawyer as advisor, including advice on nonlegal considerations).

304. See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (discussing the moral justification for conduct in accordance with a role when the institution creating the role is morally justified).

305. 373 U.S. 83 (1963).

306. *Id.* at 86. The duty broadly applies to evidence that would impeach one of the prosecution's witnesses. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

307. See *United States v. Agurs*, 427 U.S. 97, 107 (1976).

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>308</sup>

Prosecutorial disclosure obligations are sound under the principle of qualified truth-maximizing rules. Because of the greater resources of the prosecution in most criminal cases,<sup>309</sup> and the limited amount of discovery allowed in such cases,<sup>310</sup> a more substantial risk exists in criminal cases than in civil cases that exculpatory material may not be found by the defense. A disclosure rule would, therefore, increase the likelihood of truthful results in more than a de minimis number of cases. Further, imposing a duty of disclosure on the prosecution poses no risk to any fundamental rights, unlike imposing such a duty on defense counsel. Indeed, as the Supreme Court has held in the *Brady* line of cases, disclosure of exculpatory information is necessary to protect the defendant's right to due process.<sup>311</sup>

The scope of the specific disclosure rules incorporated in the Model Rules and in the Supreme Court decisions, however, is subject to criticism. The Model Rules provide that a prosecutor must disclose any information that "tends to" be exculpatory.<sup>312</sup> While the disclosure rule is tempered by a knowledge requirement,<sup>313</sup> the "tends to" standard is vague and seems too demanding on prosecutors for a disciplinary rule. Although disciplinary enforcement actions against prosecutors have been relatively weak in the past,<sup>314</sup> courts are now beginning to scrutinize the conduct of prosecutors more carefully.<sup>315</sup> On the other hand, the

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308. CRYSTAL, *supra* note 297, at 154-55.

309. See Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. REV. 887, 891 (1994) ("[A]t least in many urban centers, the great majority of criminal defendants today are represented by appointed counsel, whether designated ad hoc by the court or enlisted in more routine, orderly, and effective fashion through state, federal, and local public-defender services.").

310. See David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1396-97 (1997).

311. See *United States v. Bagley*, 473 U.S. 667, 674-78 (1985); *Agurs*, 427 U.S. at 103-114; *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

312. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1995).

313. See *id.*

314. A study of disciplinary sanctions against prosecutors for *Brady* violations found that cases are rarely brought and sanctions are light. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (recommending independent review of reported criminal cases by bar counsel for *Brady* violations and automatic reversal when prosecutors act in bad faith).

315. See, e.g., *United States v. Taylor*, 956 F. Supp. 622, 661 (D.S.C. 1997) (dismissing indictments of legislators in vote-buying scandal because of prose-

Supreme Court has adopted a "materiality" test for disclosure.<sup>316</sup> The prosecution's failure to disclose evidence should be treated as material only if there is a "reasonable probability" that the outcome would have been different if the evidence had been disclosed.<sup>317</sup> This standard seems too weak.

A better approach is a single standard for both constitutional and disciplinary purposes. In *United States v. Bagley*,<sup>318</sup> dissenting Justices Marshall and Brennan argued that the prosecution should have a duty to reveal "all information known to the government that might reasonably be considered favorable to the defendant's case."<sup>319</sup> If a prosecutor fails to comply with this duty, Marshall and Brennan would uphold a conviction only if "the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have affected the outcome of the trial."<sup>320</sup>

### 5. *Disclosure of adverse law*

While the Model Rules do not generally require lawyers to disclose adverse factual information, the rules do impose a limited obligation to disclose adverse law. Model Rule 3.3(a)(3) states that a lawyer must disclose legal authority in the controlling jurisdiction that is directly adverse to the position of the client and not disclosed by the opposing lawyer.<sup>321</sup> Disciplinary Rule 7-106(B)(1) of the Code of Professional Responsibility is identical.<sup>322</sup> Is a duty to disclose adverse law justified under the principle of qualified truth-maximizing rules?

If a court renders a decision without taking into account legal authority that is directly on point, the risk of an erroneous decision is substantial. Moreover, an erroneous legal decision has an adverse impact not only on the parties to the dispute, but also on other lawyers and their clients who plan transactions based on decisions made by courts. While a duty to disclose adverse legal authority might produce adverse free rider effects, these effects are unlikely to be great because legal research is not very costly. Even lawyers who do not have the time or temperament for research can farm projects out to clerks or research services that will do competent work for a modest fee. Thus, on balance it appears that a

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cutorial misconduct); Committee on Prof'l Ethics & Conduct v. Ramey, 512 N.W.2d 569, 572 (Iowa 1994) (prosecutor's license suspended for making false statements to court and for failing to disclose material exculpatory evidence).

316. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

317. *See id.*; *see also* *Kyles v. Whitley*, 514 U.S. 419, 441 (1995) (reaffirming the reasonable probability test).

318. 473 U.S. 667.

319. *Id.* at 696 (Marshall, J., dissenting).

320. *Id.* at 707 (Marshall, J., dissenting).

321. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1995).

322. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1981).

duty to disclose adverse legal authority is truth maximizing. Further, unlike a duty to disclose adverse facts, fundamental rights such as the attorney-client privilege are not implicated by a duty to disclose adverse law.

The Model Rules define the scope of the duty to disclose adverse legal authority quite narrowly. The duty to disclose is limited to authority in the "controlling jurisdiction" and to authority that is "directly adverse."<sup>323</sup> Both of these limitations are questionable. Hazard and Hodes state that "[t]he 'controlling jurisdiction' normally means the same state as the pending case for state law issues, and the same District or Circuit for federal law issues. In either event, of course, applicable decisions of the United States Supreme Court would be considered controlling."<sup>324</sup> The "controlling jurisdiction" requirement means, therefore, that lawyers do not have an obligation to disclose adverse decisions from the highest courts of other states or from other federal circuits. This limitation seems unsound because decisions from sister jurisdictions on similar points are often the most important authorities.

The meaning of the term "directly adverse" in Model Rule 3.3(a)(3)<sup>325</sup> is somewhat unclear. One interpretation—probably the one that lawyers seeking to avoid the rule are likely to follow—is that an authority is not directly adverse if it can be distinguished in a nonfrivolous way. This interpretation effectively guts the disclosure rule, however, because lawyers can create a plausible distinction for any authority. Another possible interpretation is that an authority is directly adverse if a reasonable judge would attach importance to the authority. As the ABA Committee on Ethics and Professional Responsibility has argued:

An attorney should advise the court of decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself misled by the attorney's silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him.<sup>326</sup>

The difficulty with this interpretation is that it seems inconsistent with the legislative history of the Model Rules. The Discussion Draft of the Model Rules contained the following proposed rule: "If a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the

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323. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3).

324. 1 HAZARD & HODES, *supra* note 111, § 3.3:207, at 588 (Supp. 1991).

325. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3).

326. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 280 (1949).

lawyer shall advise the tribunal of that authority."<sup>327</sup> This proposal, which seems sound as a matter of principle, was withdrawn, apparently because opponents believed that it imposed too broad a disclosure obligation on lawyers.<sup>328</sup> Unfortunately, the proposed Restatement of the Law Governing Lawyers continues the limited disclosure rule found in the Model Rules.<sup>329</sup>

### C. *Investigation and Discovery*

Informal fact investigation and formal discovery are designed to allow parties to gather information they can use in settlement negotiations or at trial. Quite clearly, the rules structuring this process are designed to increase the likelihood of truthful results.

But the investigation and discovery processes suffer from a fundamental problem. Because investigation and discovery, unlike trial, do not take place under the direct scrutiny of judges, lawyers have an incentive to engage in opportunistic behavior: attempting to gain as much information, while sharing as little, as is possible. Discovery abuse has been defined as "(1) propounding unnecessarily broad discovery requests; and (2) withholding information from the propounding party to which that party is entitled."<sup>330</sup> How extensive is the problem of discovery abuse? Studies conducted in 1978 and 1980-81 found discovery abuse to be a significant problem, particularly in large cases.<sup>331</sup> A Harris poll conducted in 1989 of 200

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327. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(c) (Discussion Draft, 1980), quoted in Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 826 (1982).

328. See Hazard, *supra* note 327, at 826-27.

329. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 171(2) (Tentative Draft No. 8, 1997).

330. Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 194 (1992).

331. See PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (Federal Judicial Ctr. ed., 1978); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790-93; Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management & Sanctions*, 1981 AM. B. FOUND. RES. J. 875, 876; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 229-35.



federal judges and 800 state judges produced the following results:<sup>332</sup>

Q: Would you say that there are a lot, some, not many, or no problems with the discovery process in your jurisdiction?		
	<i>Federal Judges</i>	<i>State Judges</i>
<i>Base</i>	200	800
<i>Yes, A Lot of Problems</i>	33%	30%
<i>Yes, Some Problems</i>	50%	50%
<i>No, Not Many Problems</i>	16%	16%
<i>No, No Problems</i>	3%	4%

Other writers, however, have argued that the view that the judicial system is infected by pervasive discovery abuse is unsupported.<sup>333</sup>

Assuming discovery abuse is a problem, what steps can be taken to address the issue? To the extent that part of the problem lies in lack of clarity of the rules governing discovery, the rules can be amended to provide lawyers with more specific guidance. For example, before 1993 the Federal Rules of Civil Procedure failed to define improper conduct by lawyers during depositions. In 1993, the Federal Rules of Civil Procedure were amended to provide greater specificity regarding proper deposition conduct.<sup>334</sup> Rule 30(d)(1) now provides as follows:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3) [dealing with deposition conducted in bad faith].<sup>335</sup>

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332. Louis Harris and Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 737 tbl.2.1 (1989).

333. See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (arguing that discovery abuse is a manifestation created by the media and public perception); Jack B. Weinstein, *What Discovery Abuse?*, 69 B.U. L. REV. 649 (1989) (commenting on John Setar, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence and Discovery Abuse*, 69 B.U. L. REV. 649 (1989)).

334. See FED. R. CIV. P. 30 advisory committee's note to 1993 amendment.

335. FED. R. CIV. P. 30(d)(1).

A number of federal district courts have gone even further, adopting detailed guidelines for conducting depositions to address problems that have arisen.<sup>336</sup>

Many cases of discovery abuse, however, do not flow from any lack of clarity in the rules. In *Paramount Communications Inc. v. QVC Network Inc.*,<sup>337</sup> the Delaware Supreme Court strongly condemned the conduct of well-known Texas attorney Joseph Jamail during a deposition in which Jamail used an expletive to refer to opposing counsel and told him that he could "gag a maggot off a meat wagon."<sup>338</sup> While the court was unable to impose sanctions on Mr. Jamail because he was not admitted to practice in Delaware either by regular or pro hac vice admission, the court expressed its strong opposition to such tactics and warned Delaware lawyers against engaging in such misconduct.<sup>339</sup>

Another significant case of discovery abuse is *Washington State Physicians Insurance Exchange & Ass'n. v. Fisons Corp.*<sup>340</sup> In *Fisons*, a products liability and medical malpractice case, the plaintiffs claimed that a two-year old girl suffered seizures and permanent brain damage caused by excessive amounts of the drug theophylline in her system.<sup>341</sup> The defendant doctor cross-claimed against Fisons.<sup>342</sup> Both the plaintiffs and the doctor served interrogatories and requests for production of documents on Fisons seeking correspondence between Fisons and other doctors about the hazards of the drug.<sup>343</sup> Fisons failed to produce "dear doctor" letters warning other doctors of the drug's dangers.<sup>344</sup> The company objected to the requests on spurious grounds while stating that, without waiving its objections, it would produce letters at times that were convenient to it.<sup>345</sup> The Washington Supreme Court characterized Fisons conduct as follows:

It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general

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336. See, e.g., *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993); *Standing Orders of the Court on Effective Discovery in Civil Cases*, 102 F.R.D. 339 (E.D.N.Y. 1984).

337. 637 A.2d 34 (Del. 1994).

338. *Id.* at 54.

339. *Id.* at 52-57. See also *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981) (ruling on misconduct by both the plaintiff and defense counsel during deposition).

340. 858 P.2d 1054 (Wash. 1993) (en banc).

341. *Id.* at 1058.

342. See *id.*

343. See *id.*

344. See *id.* at 1058-59.

345. See *id.* at 1083-84.

objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement.<sup>346</sup>

In both *Paramount Communications* and *Fisons* it appears that the lawyers were intentionally ignoring rules and standards of conduct because they believed that their actions served the interests of their clients. What can be done about the flagrant disregard of rules of procedure? The professionalism movement represents one attempt to deal with what some lawyers and judges consider to be excessive zealousness. In broad terms, the professionalism movement refers to the promulgation by national, state, or local bar associations of a set of principles that the drafters believe embody the ideal of professional behavior for lawyers.<sup>347</sup> Unlike the Model Rules, these standards are not binding, but are instead intended to guide lawyers in the conduct of the practice of law.<sup>348</sup> Professionalism standards focus on a wide range of problems that the drafters view as afflicting the legal profession, including commercialization, lack of competency, and excessive zeal.<sup>349</sup>

The ABA has not itself adopted standards of professionalism, but it did give approval to the Lawyer's Creed of Professionalism prepared by the Torts and Insurance Practice Section of the ABA.<sup>350</sup> At its August, 1988, meeting, the ABA House of Delegates adopted as ABA policy the recommendation of that section that state and local bar associations "encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers' creed of professionalism."<sup>351</sup> The House of Delegates made clear, however, that

nothing in such a creed shall be deemed to supersede or in any way amend the Model Rules of Professional Conduct or other disciplinary codes, alter existing standards of conduct against which lawyer negligence might be judged or become a basis for the imposition of civil liability of any kind.<sup>352</sup>

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346. *Id.* at 1083.

347. See PROFESSIONALISM COMMITTEE, AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 5-6 (1996).

348. See Lawyer's Creed of Professionalism, reprinted in ABA/BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT 1:401 (1994).

349. See PROFESSIONALISM COMMITTEE, AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 2-5 (1996).

350. Lawyer's Creed of Professionalism, reprinted in ABA/BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT 1:401 (1994).

351. *Id.*

352. *Id.*

The ABA also authorized for dissemination to the profession the Lawyers' Pledge of Professionalism prepared by the ABA Young Lawyers Division.<sup>353</sup>

The professionalism movement seems to be based on three assumptions: First, professionalism has in fact declined. Second, the cause of the decline is a lack of knowledge by lawyers, particularly young lawyers, of basic standards of professional behavior. Third, developing a set of broad standards to supplement the Model Rules can improve professionalism. All three propositions are doubtful. First, the legal profession has undergone considerable change during the last twenty-five years, but much change has been for the better. The legal profession is more open to women and minorities and more competitive than it has been in the past. Openness and free markets are principles that our society values highly. Second, the drafters of professionalism creeds have offered no evidence to show that the lack of knowledge of behavior standards is the cause of any decline in professionalism. Many of the reported cases of professional abuse like *Paramount Communications*<sup>354</sup> and *Fisons*<sup>355</sup> involve established members of the bar, not novices who are unfamiliar with the rules. It is more plausible to believe that lawyers engage in marginal behavior because they decide that it serves their own interests and those of their clients, and because the risk of significant sanctions is small. Third, the remedy proposed by the professionalism movement is almost certain to be ineffective. Broad standards of behavior like those found in most professionalism standards provide little guidance in difficult cases. Moreover, these standards are expressly stated to be nonbinding.

The ultimate answer to discovery abuse lies in addressing the basic cause: Absence of judicial oversight has meant that lawyers have the incentive and opportunity to use the rules for their own interest rather than to live by the spirit of the rules.<sup>356</sup> *Paramount Communications*<sup>357</sup> and *Fisons*<sup>358</sup> may be examples of a changing judicial attitude toward overzealousness, but, unfortunately, many trial judges probably still remain reluctant to become involved in

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353. See *id.*

354. For a discussion of *Paramount Communications*, see *supra* notes 337-39 and accompanying text.

355. For a discussion of *Fisons*, see *supra* notes 340-46 and accompanying text.

356. See Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1640-44 (1996) (calling for more aggressive action by judges in responding to discovery abuse).

357. For a discussion of *Paramount Communications*, see *supra* notes 337-39 and accompanying text.

358. For a discussion of *Fisons*, see *supra* notes 340-46 and accompanying text.

discovery disputes except in extreme cases. Until this judicial attitude changes, discovery abuse will continue to plague litigation.

#### CONCLUSION

In this article, I have not attempted a comprehensive treatment of the rules limiting zealous representation; such an examination would require a book-length analysis. What I have tried to do, however, is to develop three principles that are central to our conception of the adversarial system: the bona fide dispute principle, the impartial decision-maker principle, and the principle of qualified truth-maximizing rules. These three principles provide a useful conceptual framework for understanding the rules limiting zealous representation and a standard by which those rules can be critically examined and improved.

