

EXCERPTS FROM FREEDMAN & SMITH,
UNDERSTANDING LAWYERS' ETHICS (3D ED., 2004)

Chapter 4. Zealous Representation: The Pervasive Ethic

A lawyer is required to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability."¹ This ethic of zeal is a "traditional aspiration"² that was already established in Abraham Lincoln's day,³ and zealousness continues today to be "the fundamental principle of the law of lawyering"⁴ and "the dominant standard of lawyerly excellence."⁵

The classic statement of that ideal is by Lord Henry Brougham in his representation of the Queen in *Queen Caroline's Case*. In an early instance of "graymail," Brougham threatened to defend his client on a ground that would have cost the King his crown and that might well have caused a revolution:¹

[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, amongst 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

¹LORD HENRY BROUGHAM, TRIAL OF QUEEN CAROLINE 8 (1821).

advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.²

Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of representation that we would want as clients, and it is what we feel bound to provide as lawyers. The rest of the picture, however, should not be ignored. In an adversary system there is an advocate on the other side and an impartial judge over both.³ Despite the advocate’s argument, therefore, the heavens do not really have to fall—not unless justice requires that they do.

Chapter 3. The Client’s Autonomy

The Restatement Third of the Law Governing Lawyers explains that the lawyer is required "to proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation."⁶ Also, the "manner" of proceeding toward that goal must be "reasonably calculated to advance [the] client’s lawful objectives."⁷

²The Queen was charged with adultery (of which, as Brougham knew, she was undoubtedly guilty). If convicted, she would have been divorced from the King and stripped of her title. Brougham’s speech was a threat to reveal publicly that the King had been secretly married to a Roman Catholic, which, by statute, would have caused him to forfeit the crown “as if he were naturally dead.” Moreover, Brougham’s threat was particularly potent because of the dangerous social and political unrest at the time. The story is well told in FLORA FRASER, *THE UNRULY QUEEN* (1996).

³*See* Chapters Two and Nine.

Moreover, the "Authority Reserved to a Lawyer" by the Restatement includes only the authority to (1) refuse to participate in acts that the lawyer reasonably believes to be unlawful, and (2) make decisions or take action that the lawyer reasonably believes to be required by law or by an order of the court.⁸

The Restatement lists five useful criteria for determining when the lawyer is required to defer to the client's "general control":⁹

- (a) How important the decision is for the client;
- (b) Whether the client can reach an informed decision on authorizing the lawyer;
- (c) Whether reserving decision to the client would necessitate interrupting trials or constant consultations;
- (d) Whether reasonable persons would disagree about how the decision should be made;
- (e) Whether the lawyer's interests may conflict with the client's.

Summing up the issue of ultimate control, the Restatement explains that "the client has general control over what the lawyer does, because "a representation concerns a client's affairs and is intended to advance the client's lawful objectives as the client defines them."¹⁰

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A vivid example of the difficulty that can arise in balancing client autonomy and lawyer responsibility is the "Unibomber" case in the late 1990s.⁴ Confessed Unibomber Theodore Kaczynski was

⁴For a fascinating and occasionally troubling account of the process of decision-making by lawyers and client in the Unibomber

charged with capital murder arising out of his campaign against “technology,” which he carried out by sending bombs through the mail to various academics and scientists.

Defense lawyers representing Kaczynski — experienced and skilled career public defenders Judy Clarke and Quin Denver — believed that the only way to avoid the death penalty was to put forward a mental illness defense. However, Kaczynski steadfastly resisted being portrayed as mentally ill, because he did not believe he had a mental illness and found such a portrayal personally humiliating. The ethical system that is urged throughout this book assumes a rational, competent client who is able to assert his autonomous interests. Kaczynski had been found competent to stand trial. By all accounts, Clarke and Denver were devoted to their client and wanted only to act in his best interests. They believed that they would best serve their client’s best interests by demonstrating that he was not in his right mind — thereby mitigating his wrongdoing in order to save his life. But Kaczynski cared more about the sanctity of his ideas than the sanctity of his life, and did not want his ideas to be depicted as those of a crazy man. The vexing question raised by this case is whether a client-centered defense lawyer must go along with a client-driven strategy that will likely lead to the client’s execution. In the end, Kaczynski pled guilty to several charges, in exchange for which he was spared a death sentence.

Although it is plainly proper for a lawyer to counsel a client about a legal strategy or decision, it is sometimes difficult to know how hard to press a client in the course of counseling. This is especially true when the lawyer believes there is a “right decision.” The lawyer must balance respect for client autonomy against her

case, see William Finnegan, *Defending the Unibomber*, *The New Yorker*, Mar. 6, 1998, at 52.

professional responsibility to effectively advise the client.⁵ This dilemma arises frequently in the context of advising criminal defendants about plea offers. Sometimes both respect for the client and professional duty will cause a criminal lawyer to lean extremely hard to persuade a client to take a plea.⁶ On the other hand, the final decision whether to plead guilty or go to trial is clearly the client's.⁷

⁵See Stephen Ellman, *Lawyers and Clients*, 34 *UCLA L. Rev.* 717, 733-53 (1987) (discussing client autonomy and the lawyer's responsibility in view of the power imbalance between lawyers and clients); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 132-33, 139-42 (discussing client autonomy and lawyer responsibility in poverty law practice).

⁶See 1 Anthony Amsterdam et al., *ALI/ABA Committee on Continuing Professional Education, Trial Manual 5 For the Defense of Criminal Cases* § 201, at 339 (1988):

But counsel may and must give the client the benefit of counsel's professional advice on this crucial decision [of whether to plead guilty]; and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive. The limits of allowable persuasion are fixed by the lawyer's conscience. [emphasis added].

See also David Luban, *Paternalism and the Legal Profession*, 1981 *Wis. L. Rev.* 545 (arguing that lawyers should properly engage in paternalistic coercion when a client's goal fails to meet a minimal test of objective reasonableness); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education*, 28 *Harv. C.R.-C.L. L. Rev.* 1, 37

Nevertheless, it is not always easy for lawyers to accept a client's decision. Lawyers often see the world in terms of costs and benefits (as evaluated "objectively" by the lawyer). Clients sometimes have their own subjective interests and values.⁸

In the Unibomber case, we would have pressed Kaczynski hard to pursue the legal strategy that would have allowed him to live, as urged by his lawyers Clarke and Denvir. However, if Kaczynski could not be moved, and insisted that we not put forward an insanity defense at trial and not argue mental illness as mitigation at the penalty phase, we would have proceeded as follows: If it would not have hurt the client, we would have suggested that the client seek other counsel and we would have withdrawn. If it was not possible for the client to obtain other counsel, or withdrawing would otherwise have hurt the client, we would have remained as counsel and put forward the client's

(1993) ("There are times when a criminal lawyer, if he or she is a caring and zealous advocate, must lean hard on a client to do the right thing. The clearer the right thing is ... the stronger the advice.").

⁷MR 1.2(a); EC 7-7; ABA Standards for Criminal Justice, Std. 4-5.2; Restatement §22.

⁸See Abbe Smith, *Defending the Innocent*, 32 Conn. L. Rev. 485, 498-500 (2000) (discussing the decision of Patsy Kelly Jarrett, a woman serving a life sentence, to refuse a time-served sentence, when she had already served ten years, because she could not plead guilty to a crime she did not do); Jim Dwyer, *Testimony of Priest and Lawyer Frees Man Jailed for '87 Murder*, N.Y. Times, July 25, 2001, at A1 (reporting that exonerated prisoner Jose Morales, who served thirteen years in prison, had "no regrets" about turning down a plea offer: "I would only have had to serve one and a half to three years.... If I had to do it all over again, I still would not take the plea. I had nothing to do with this.")).

chosen defense. However, if we believed that our client was urging something so untenable that no reasonable lawyer would do it — and we consider this to be a rare event and not the case with Kaczynski — we would ask the court to appoint a guardian.⁹ Of course, a legal guardian might then experience the same dilemma in determining whether to advance the client’s wishes or what the guardian believes to be in the client’s best interests.

For client-centered lawyers who are deeply opposed to the death penalty, the Unibomber case is impossible to resolve in a principled way. Our view, ultimately, is that someone ought to be representing the client’s desires. The problem with that however, is that important facts and legal issues may never be presented to the fact finder, and in this case that would likely result in the client’s death. Kaczynski’s lawyers might well have felt that if they refrained from putting forward a mental illness defense they would be engaging in “lawyer assisted suicide” — and this would be no ordinary suicide, but suicide at the hands of the state. Still, how strongly should a lawyer fight to sustain

⁹See MR 1.14(b) (“A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interests.”); Restatement § 24(4) (“A lawyer representing a client with diminished capacity ... may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client’s objectives or interests....”).

Note that the Model Rule allows the lawyer to seek a guardian “only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interests,” while the Restatement turns on whether appointment of a guardian “will advance the client’s objectives or interests.” The Restatement clearly does not apply in the Unibomber case, and the Model Rule probably doesn’t.

life when the client is competent and clearly doesn't want that life?¹⁰

Chapter 5. Lawyer-Client Trust and Confidence

Competent representation requires that a lawyer be "fully informed of all the facts of the matter he is handling."¹¹ A client is not likely to give her lawyer facts that could be incriminating or embarrassing, however, unless she is assured that the lawyer will keep the information confidential.¹² Trust between lawyer and client is, therefore, the "cornerstone of the adversary system and effective assistance of counsel,"¹³ and fidelity to that trust is "the glory of our profession."¹⁴

The ethic of lawyer-client trust and confidence emphasizes the need of the individual client for effective representation. Thus, like other essential aspects of the adversary system such as client autonomy and zealous representation, the ethic of trust and confidence is client-centered. That emphasis on the interests of the individual client is consistent with the broader public interest because, in a free society, the public interest is served when individual dignity is respected, when autonomy is fostered, and when equal protection before the law is enhanced through professional assistance.

Chapter 10. Conflicts of Interest

Conflicts of interest are among the most frequent and difficult problems that a lawyer confronts. Sanctions for conflicts of interest include disciplinary action, disqualification from representing a client,

¹⁰See Matthew Purdy, *Crime, Punishment and the Brothers K.*, N.Y. Times, Aug. 5, 2001, at A25 (quoting a letter from Kaczynski in which he states that he "would unhesitatingly chose death over incarceration").

and malpractice liability, which can result in compensatory damages, forfeiture of fees, and even punitive damages.

The term conflict of interest refers to a situation where there is a reasonable possibility that you will not be able to fulfill all of the legitimate demands on your time, attention, and loyalty. Professors Hazard and Hodes refer to this focus "on the potential for harm rather than the harm itself" as the "modern approach" to conflicts of interest.¹⁵ That is, a conflict of interest exists "whenever the attorney-client relationship or the quality of the representation is 'at risk,' even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates."¹⁶ They add, however, that this modern approach is entirely consistent with earlier authority.

The Restatement Third of the Law Governing Lawyers adopts the same analysis.¹⁷ For example, §121 provides that there is a conflict of interest whenever there is a "substantial risk" that the lawyer's "representation" of the client will be "materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."

To be "substantial," the risk of an adverse effect on the representation must be "more than a mere possibility."¹⁸ However, it need not be "immediate, actual, and apparent."¹⁹ On the contrary, as explained in the Restatement, a risk can be substantial, within the meaning of the rule, even if it is "potential or contingent," and despite the fact that it is neither "certain or even probable" that it will occur.²⁰ The ultimate test is that there be a "significant and plausible" risk of adverse effect on the representation of the client.²¹

The conflict of interest rules follow from the role of the lawyer as the client's fiduciary. Justice Cardozo explained the obligation of a fiduciary this way:

“Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. ...”

One importance in the lawyer’s role as a fiduciary is that the breach of a fiduciary duty – as in a conflict of interest – can result in punitive damages, as well as in forfeiture of fees.

1ABA Canons of Professional Ethics 15 (1908).

2Restatement Third of the Law Governing Lawyers, §16, Cmt. d (2000).

3Charles Wolfram, *Modern Legal Ethics* 578 n. 73 (1986); citing George Sharswood, *An Essay on Professional Ethics* 24 (2d ed., 1860); L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 *Emory L. J.* 909 (1980); Monroe Freedman, *Abraham Lincoln—Lawyer for the Twenty-First Century?*, *Legal Times*, Feb. 12, 1996, at 26 (discussing David H. Donald, *Lincoln* (1995)).

4Geoffrey C. Hazard & William W. Hodes, *The Law of Lawyering* 17 (1988 Supp.) (emphasis in the original). The authors wrote this five years after Model Rules were adopted. In their third edition the authors have changed the phrasing, but expressly equate "diligence" in MR 1.3 with zeal, for example, referring to "the basic duty of diligence (or zealousness)." *Id.*, §6.2 (3d ed., 2001).

5V(1) Report from the Center for Philosophy and Public Policy 1, 4 (Winter 1984). "The prevailing notion among lawyers seems to be that

the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer." Paterson, *supra* note 2, at 918, 947. Accord, Wolfram, *supra* note 2, at 580, citing *In re Griffiths*, 413 U.S. 717, 724 n. 14, 93 S.Ct. 2851, 2856 (1973).

6Restatement Third of the Law Governing Lawyers § 16(1) (emphasis added). The Restatement is particularly significant in interpreting the Model Rules because the Reporter for the Model Rules was Professor Geoffrey C. Hazard, Jr., who was also the Director of the American Law Institute when the Restatement was drafted and adopted.

7 *Id.*, § 22, Cmt. b.

8 *Id.*, § 23.

9 *Id.*, § 22, Cmt. e.

10 *Id.*, § 22, Cmt. b.

11 *Upjohn v. United States*, 449 U.S. 383, 391, 101 S.Ct. 677,683 (1981), quoting Model Code EC 4-1.

12 *Upjohn Co. v. United States*, 449 U.S. 383, 389, 391, 101 S.Ct. 677, 682, 683 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127 (1888). See also, Geoffrey C. Hazard, Jr. & W.Wm. Hodes, *The Law and Ethics of Lawyering* 268-69 (3d ed. 1999).

13 *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981), quoted with approval, *Morris v. Slappy*, 461 U.S. 1, 21, 103 S.Ct. 1610, 1621 n.4 (1983)(Brennan, J., concurring).

14 *United States v. Costen*, 38 Fed. 24 (1889) (upholding the disbarment of a lawyer for violating his client's confidences). The author of the opinion, Justice David J. Brewer, was appointed to the

Supreme Court shortly thereafter, and later served as a member of the committee that drafted the ABA's Canons of Professional Ethics (1908).

Justice Brewer went on to say that the profession and the community can tolerate overzealousness by a lawyer on behalf of a client but "cannot tolerate for a moment...disloyalty on the part of a lawyer to his client." *Id.*

151 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* §10.4 (3d ed., 2001). The authors note that "the first explicit use of this approach" was in Monroe H. Freedman, *Understanding Lawyers' Ethics* 174-179 (1st ed. 1990)). *Id.*, n. 1. See also Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 *Geo. J. Legal Ethics* 823 (1992).

16 *Id.*

17 *Restatement Third of the Law Governing Lawyers of the Law Governing Lawyers* §§121 (2000).

18 *Id.*, Cmt. c(iii).

19 *Id.*

20 *Id.*

21 *Id.*