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Eugene R. Gaetke

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Lawyers as Officers of the Court

*Eugene R. Gaetke**

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I. INTRODUCTION

Lawyers like to refer to themselves as officers of the court. Careful analysis of the role of the lawyer within the adversarial legal system reveals the characterization to be vacuous and unduly self-laudatory. It confuses lawyers and misleads the public. The profession, therefore, should either stop using the officer of the court characterization or give meaning to it. This Article proposes ways to infuse the term with meaning.

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II. BACKGROUND

Two antagonistic models describe the role of lawyers in our legal system. More familiar to the public, and more comfortable to lawyers, is the model of the lawyer as a "zealous advocate,"¹ the devoted champion of the client's cause.² Indeed, the image of the lawyer as loyal advocate for the beleaguered client is perpetuated by the bar itself³ and reinforced by the media,⁴ in literature,⁵ and in common lore.⁶

1. The term is derived from Canon 7 of the American Bar Association's (ABA) 1970 *Model Code of Professional Responsibility* which reads, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1970) [hereinafter 1970 CODE]. Canon 7 also appears in the 1981 *Model Code of Professional Responsibility*. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter CODE].

For the most part, legal commentators have defined the "zealous advocate" model in terms of agency principles. That is, lawyers as zealous advocates fulfill their professional responsibilities by providing a client with the legal knowledge, skills, and expertise to accomplish those objectives that the client could achieve if he were equally trained in the law. See Comment, *The Lawyer's Moral Paradox*, 1979 DUKE L.J. 1335, 1354, 1356. Some writers see the lawyer's role as a zealous advocate as a more modified form of agency. See Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 1979 DUKE L.J. 1251, 1268-69.

2. Patterson, *supra* note 1, at 1263 (stating that "[t]he lawyer's first and foremost concern is the interest of the client"). In Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978), the author notes that there are two primary principles of professional behavior for lawyers acting as zealous advocates. First, "[w]hen acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." *Id.* at 673. Second, "[w]hen acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." *Id.* According to Professor Schwartz, the presence of the impartial arbiter (the court or other decisionmaker in the adversary process) makes the zealous advocate's role appropriate. "Putting one's best foot forward by stepping on the feet of the other side makes sense because of the presence of an impartial arbiter. That presence legitimates the zealous advocate model of the lawyer and all that it entails." *Id.* at 677.

3. Each of the American Bar Association's three attempts at codifying the ethical obligations of lawyers has expressly promoted this model of lawyerly behavior. In the 1908 *Canons of Professional Ethics* the ABA asserted:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.

CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) [hereinafter CANONS], reprinted in T. MORGAN & R. ROTUNDA, 1988 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY 383 (1988).

As noted in note 1, *supra*, the 1970 *Code* broadly reaffirmed the role of the lawyer as a zealous advocate. The ABA also stated more specifically in the 1970 *Code* that a lawyer best serves his client and the judicial system by zealously representing the client: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . ." 1970 CODE, *supra* note 1, EC 7-1.

The most recent ABA effort at codifying principles of legal ethics, the 1983 *Model Rules of Professional Conduct*, notes that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) [hereinafter MODEL RULES].

4. See Schwartz, *supra* note 2, at 672 (arguing that the public is quite familiar with the adversary system and lawyers as advocates in that system, "as television reminds us almost every night"). Certainly the image of lawyers generally emphasized on television programs, such as *Perry*

In its public assertions, the legal profession promotes a different model: lawyers are officers of the court⁷ in the conduct of their professional, and even their personal,⁸ affairs. The organized bar has expressly emphasized this obligation in each of its major codifications of the ethical obligations of the profession,⁹ including the American Bar Association's most recent effort, the 1983 *Model Rules of Professional Conduct*.¹⁰

Mason, Petrocelli, and frequently *L.A. Law*, is that of the zealous advocate. The same is true for motion pictures, as evidenced in such recent films as *Jagged Edge*, *The Verdict*, and *The Last Innocent Man*, although the lawyer in the last movie, zealous though he was, succumbed to other pressures.

5. The role of lawyers as zealous advocates is the focus of a number of works. Recall the lawyers in Robert Bolt's *A Man for All Seasons*; *The Devil and Daniel Webster*, by Stephen Vincent Benet; *To Kill a Mockingbird*, by Harper Lee; Judge Traver's *Anatomy of a Murder*; and the whole series of Perry Mason mysteries by Earl Stanley Gardner. An interesting and less flattering summary of literary references to the legal profession is found in D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 1-15 (1973).

6. The common notion and description of lawyers as "hired guns" reflects the public's recognition of the zealous advocate model. The term suggests, of course, that the lawyer is merely the trained agent of the client. See Rotunda, *The Word "Profession" Is Only a Label—And Not a Very Useful One*, 4 LEARNING & L., Summer 1977, at 16, 53 (stating that "some argue that a prime characteristic of the legal profession is that its members are *only* hired guns and have duties primarily to the client" (emphasis in original)). Professor Roger Cramton refers to this perception as the "mercenary image" of lawyers. Cramton, *The Trouble With Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359, 369 (1985).

7. There is some variance in the terminology used to identify the characterization of lawyers as officers of the court. Under the ABA's *Canons*, for example, lawyers are variously referred to as "officer(s) of the law", *CANONS*, *supra* note 3, Canon 22, and "ministers" of the law, *id.* Canon 32. Additionally, the *Canons* view lawyers collectively as "a branch of the administration of justice." *Id.* Canon 12. The *Code* refers to lawyers as "guardians of the law." *CODE*, *supra* note 1, Preamble. The *Model Rules*, however, use the term "officer of the legal system." *MODEL RULES*, *supra* note 3, Preamble.

This Article uses the term "officer of the court" in its broadest sense to apply to lawyers' conduct, both as litigators and nonlitigators, and to suggest an obligation to the public interest as well as to the judicial system itself. For the Author's working definition of officer of the court for purposes of this Article, see *infra* text accompanying notes 47-57.

8. Certain ethical restrictions apply to lawyers' personal as well as professional conduct. Under the *Code*, for example, the broad prohibitions of DR 1-102(A) are not limited to conduct in the representation of clients. See *CODE*, *supra* note 1, DR 1-102(A)(3) (a lawyer shall not engage in "conduct involving moral turpitude"); *id.* DR 1-102(A)(4) (a lawyer shall not engage in "conduct involving dishonesty, fraud, deceit, or misrepresentation"); *id.* DR 1-102(A)(5) (a lawyer shall not engage in "conduct that is prejudicial to the administration of justice"); *id.* DR 1-102(A)(6) (a lawyer shall not engage in "any other conduct that adversely reflects on his fitness to practice law"). Certain other prohibitions within the *Code*, however, are limited expressly to the representation of clients. See, e.g., *id.* DR 7-102(A).

The more recent *Model Rules* contain prohibitions similarly applicable to the nonprofessional conduct of lawyers, see, e.g., *MODEL RULES*, *supra* note 3, Rule 8.4(a)-(f), as well as other prohibitions limited expressly to instances of representation of a client, see, e.g., *id.* Rule 4.1.

9. See *CANONS*, *supra* note 3, Canons 12, 22, 32; *CODE*, *supra* note 1, Preamble; *MODEL RULES*, *supra* note 3, Preamble.

10. In fact, the first sentence of the ABA's Preamble to the *Model Rules* states that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having

The precise image generated by the model of a lawyer as officer of the court is less clear than the image of the zealous advocate. Even the origin of the characterization is murky.¹¹ Some commentators suggest that the term "officer of the court" is rooted in the birth of the English courts, in which all nonparty participants in the judicial process actually were officers of the Crown and, therefore, of its court as well.¹² Other commentators note that the characterization derives from the long-standing requirement of English equity that litigants employ an equity clerk, an official of the court itself, in addition to a legal representative in order to prosecute a suit.¹³ Still other commentators trace the characterization of lawyers as officers of the court to the licensure of lawyers by courts.¹⁴ Inherently this licensure defines lawyers as official delegates of those institutions.

The current meaning of officer of the court is as elusive as its origins. Courts and commentators often use the term to refer generically and conveniently to all ethical responsibilities of lawyers. For example, some judges have stated that because lawyers are officers of the court they should not advertise distastefully,¹⁵ disobey rulings and orders of a tribunal,¹⁶ or assert frivolous claims or defenses,¹⁷ even though these actions are clearly prohibited by specific disciplinary provisions.¹⁸ In

special responsibility for the quality of justice." MODEL RULES, *supra* note 3, Preamble (emphasis added).

11. C. WOLFRAM, MODERN LEGAL ETHICS 17 (1986) (stating that the origins of the obligation are "obscure").

12. G. WARVELLE, ESSAYS IN LEGAL ETHICS 29-31 (2d ed. 1920). Warvelle notes that by the thirteenth century a trained class of advocates existed to represent litigants. The term "officer of the court" can be drawn from the terms of their licensure:

The first persons regularly licensed to appear as advocates in the king's courts were called "serjeants," although their full official title seems to have been *Servientes Domini Regis ad legum*, that is, "Servants at law of our Lord the King." Unlike all prior advocates, they were a part of the court itself; were regularly appointed by royal patent; were admitted only upon taking an oath; had a monopoly of all the practice, and were directly amenable to the king as parts of his judicial system. The fundamental ideas involved in the creation of this class have never been abandoned, and, notwithstanding that the class itself by the name "serjeants" has ceased to exist, they are still the distinguishing characteristics of the bar in all countries where the English common law prevails.

Id. at 28-29.

13. C. WOLFRAM, *supra* note 11, at 17.

14. Committee on Professional Ethics v. Humphrey, 377 N.W.2d 643, 648 (Iowa 1985) (Reynoldson, C.J., concurring) (citing 2 G. SHARWOOD, BLACKSTONE'S COMMENTARIES 25 (1864)). In *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 472, 162 N.E. 487, 490 (1928), Chief Judge Cardozo noted that barristers, being called to the bar by the inns of court, were not, strictly speaking, officers of the court.

15. *Humphrey*, 377 N.W.2d at 648.

16. See, e.g., *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979).

17. See, e.g., *Steinle v. Warren*, 765 F.2d 95, 101 (7th Cir. 1985); *Van Berkel v. Fox Farm & Rd. Mach.*, 581 F. Supp. 1248, 1251 (D. Minn. 1984).

18. Certain advertising is prohibited by DR 2-101 under the Code, CODE, *supra* note 1, DR 2-

this sense, the characterization of lawyers as officers of the court has no meaning independent of the term "lawyer" and even encompasses obligations which derive from the lawyer's duty as a zealous advocate.¹⁹ Thus, one fails to act as an officer of the court whenever he acts inappropriately as a lawyer.

Presumably, however, the profession's pronouncements on the lawyer's obligation as an officer of the court are intended to convey more than mere redundancy. The characterization inherently suggests that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe.²⁰ At least implicitly, this special duty elevates the interests of the judicial system or of the general public above those of the client or lawyer.²¹ So viewed, the officer of the court model contemplates that clients hire something other than a zealous advocate when they enlist the services of a lawyer. Rather, they hire a legal representative whose obligations to the judicial system at times supersede the undivided fidelity and enthusiasm an

101, and by Model Rules 7.1 and 7.2, MODEL RULES, *supra* note 3, Rule 7.1, 7.2. Lawyers are required to obey the rulings of tribunals by DR 7-106(A) under the Code, CODE, *supra* note 1, DR 7-106(A), and by Model Rule 3.4(c), and (d), MODEL RULES, *supra* note 3, Rule 3.4(c), (d). The assertion of frivolous claims and defenses is prohibited by the Code's DR 7-102(A)(1), and (2), CODE, *supra* note 1, DR 7-102(A)(1), (2), and by Model Rule 3.1, MODEL RULES, *supra* note 3, Rule 3.1, as well as by Federal Rule of Civil Procedure 11, FED. R. CIV. P. 11.

19. The Code expresses this view at one point. See CODE, *supra* note 1, EC 7-19 (stating that "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law"). This broad conception of the duty of the lawyer as officer of the court essentially obliterates any distinction between the two models. If a lawyer serves as an officer of the court merely by being a zealous advocate, then the difficult question of the logical stopping point for the lawyer's obligation of zeal is raised. See G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT 346 (1985). This treatment of lawyer and officer of the court as synonymous, however, has semantic appeal, because the courts rather than other branches of the government traditionally have licensed and regulated lawyers. In this sense, lawyers are officers of the court simply as a result of the courts' jurisdiction over them. See *supra* note 14.

20. The term "officer" suggests some form of principal-agent relationship between the court, or more broadly the judicial system, and lawyers. The United States Supreme Court, adopting the language of Chief Judge Cardozo in *Karlin v. Culkin*, 248 N.Y. at 470-71, 162 N.E. at 489, has noted that a lawyer admitted to practice "[w]as received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." His cooperation with the court was due, whenever justice would be imperiled if cooperation was withheld. See *Theard v. United States*, 354 U.S. 278, 281 (1957). For further discussion of this relationship, see *infra* text accompanying notes 49-51.

21. See *In re* Integration of Neb. State Bar Ass'n, 133 Neb. 283, 289, 275 N.W. 265, 268 (1937). The court noted:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

Id.

agent owes to his principal.²²

Neither of the two models alone accurately describes the role of lawyers in our legal system. That role actually is the result of a compromise between the two models, accomplished through the various bodies of law regulating the conduct of lawyers, most notably the disciplinary principles set forth by state supreme courts.²³ These statements of the ethical norms of the profession each represent a balance of the two models of lawyerly conduct, declaring the extent to which the obligations of the lawyer as a zealous advocate must yield to those of the lawyer as an officer of the court, and vice versa.²⁴

The organized bar's explicit and repeated characterization of lawyers as officers of the court clearly conveys the impression that the model strongly influences the balance created by the existing law of legal ethics.²⁵ Certainly that impression is an appealing one for the profession to create. The virtuous overtones of the officer of the court label and the positive public image that it generates accrue directly to the lawyers themselves.²⁶ By asserting that their profession is somehow im-

22. Patterson, *supra* note 1, at 1269. Professor Patterson writes:

When the lawyer acts as advocate, he is an agent of the client, but he is a special agent for a limited purpose who is not wholly subject to the will of the client. . . . [A]s an officer of the court, the lawyer has duties to others than the client: the duty of candor to the tribunal and of fairness to the adversary.

Id. (footnotes omitted). An earlier writer on legal ethics noted:

[T]he bar is an integral part of the judicial system, an assistant in the administration of justice, and as such it occupies a peculiar and unique position with reference both to the bench and the public. The oath of the ancient advocate bound him to serve both the king and "his people," thus prescribing, as it were, a divided allegiance, and this character, impressed upon the profession at its very inception, has never been changed . . . The [lawyer], being thus doubly bound, was required to act with absolute good faith towards both the judges and the clients, owing no more duty to one than to the other. As representing the king he was bound to avoid all deceit upon the court and to act uprightly in the conduct of his business; as representing the people he was bound to give honest advice and his best aid to the suitor. Time has changed the complexion of the bar in many respects, but these fundamental ideas of professional duty remain unaltered.

G. WARVELLE, *supra* note 12, at 29-30. Indeed, assuming that these restrictions on the duty of zealous advocacy continue to exist, persons appearing *pro se* in litigation have certain ethical latitude not available to those represented by lawyers.

23. Comment, *supra* note 1, at 1342-45. Professor Morgan recognizes this aspect of ethical codes and notes that "an analysis of the Code of Professional Responsibility can be approached as an inquiry into the role and function of this profession—and professions in general—in our society." Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977). For a discussion of the role of the state supreme courts in the regulation of lawyers and the practice of law, see C. WOLFRAM, *supra* note 11, at 22-32.

24. See Patterson, *supra* note 1, at 1254-55; Comment, *supra* note 1, at 1342-44.

25. The first sentence of the Preamble to the 1983 *Model Rules* demonstrates that the ABA continues to promote this impression: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES, *supra* note 3, Preamble (emphasis added).

26. A more direct benefit to lawyers from the officer of the court characterization was recog-

bued with a public or judicial element,²⁷ lawyers distinguish themselves favorably from other occupational groups that serve their own clientele as paid agents, concerned only with their principals' narrow private interests.²⁸ The characterization allows lawyers to emphasize to all who will listen the public nature of their calling,²⁹ as well as their critical role in the serious matters of society.³⁰

To the extent the characterization is accurate, the benefits that the legal profession derives from it are unobjectionable. If the professional obligations of lawyers in fact do make them officers of the court in some positive and meaningful sense, then lawyers deserve whatever public confidence and adulation that the label inspires. On the other hand, if the characterization bears little relationship to the actual obligations of lawyers, its repeated declaration by the courts, the organized bar, and individual lawyers is sheer professional puffery or, worse, deliberate deceit.³¹

The matter has become increasingly topical because of strenuous assertions from within as well as without the profession that the lawyer's role as officer of the court should not only be clarified but also strengthened.³² Critics urge, for example, that lawyers have a greater

nized by the Wisconsin Supreme Court in *Langen v. Borkowski*, 188 Wis. 277, 206 N.W. 181 (1925). After emphasizing that lawyers are officers of the court, the *Langen* court noted that "[t]here is no reason, therefore, that we can perceive, why an attorney at law, in the discharge of his professional duties, should not to a large degree, at least, be immune from liability in the same manner as it is herein held with respect to judicial officers." *Id.* at 302, 206 N.W. at 190.

27. The assertion sometimes is explicit. The ABA's 1908 *Canons*, for example, viewed lawyers collectively as "a branch of the administration of justice." *CANONS*, *supra* note 3, Canon 12, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 3, at 382. Writers have described the lawyer's relationship to the courts in a similar way. See, e.g., Lee, *The Constitutional Power of the Courts over Admission to the Bar*, 13 HARV. L. REV. 233, 240 (1899) (noting that "[s]ince attorneys are officers and members of the courts, the Legislature cannot deprive the courts of discretion as to whom they shall admit" (emphasis added)).

28. The 1908 *Canons* made this point explicitly in declaring that "[i]n fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." *CANONS*, *supra* note 3, Canon 12, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 3, at 382.

29. In fact, that lawyers have certain public interest obligations is frequently said to be characteristic of their status as "professionals." See, e.g., C. WOLFRAM, *supra* note 11, at 15. One commentator argues, however, that public interest obligations attach to many occupations not generally deemed "professions." See Rotunda, *supra* note 6, at 53.

30. Professor Wolfram has referred to the tendency of lawyers to engage in such self-flattery as "The Hero Mythology" of the legal profession. C. WOLFRAM, *supra* note 11, at 2-3.

31. The vagueness of the obligation that lawyers act as officers of the court results in confusion and cynicism among members of the public and ethical conflict for lawyers. Cf. Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100. For further discussion, see *infra* text accompanying notes 206-08.

32. See generally Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 203 (1978). Professor Schnapper argues:

obligation to the attainment of truth in the adversarial system than to the zealous representation of their clients,³³ that lawyers should be required to make their services available to greater segments of society,³⁴ that in some instances lawyers have the duty not to represent certain negative interests,³⁵ and that the attorney-client privilege should yield to a broader range of moral and societal concerns.³⁶ These contentions are premised implicitly on an expanded notion of the lawyer's obligation as officer of the court to further the interests of justice or of the public, despite the cost to the interests of the client and, frequently, to the interests of the lawyer as well.³⁷

Most recently, the American Bar Association formed a Commission on Professionalism to study criticisms of the level of professionalism within the bar.³⁸ The Commission's 1986 report, along with its broad

One searches in vain for a lawyer disciplined for failing to give free legal assistance to the indigent, for failing to disclose legal precedent contrary to his client's interests, for misrepresenting facts to judges, juries, or opposing counsel, or for using political office or connections to attract clients, although the frequency of these occurrences is common knowledge.

Id.

33. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). For further discussion of this assertion, see *infra* text accompanying notes 270-73.

34. The Discussion Draft of the *Model Rules* contained a provision requiring lawyers to provide "unpaid public interest legal service." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1980) [hereinafter Discussion Draft], reprinted in T. MORGAN & R. ROTUNDA, 1980 CALIFORNIA RULES SUPPLEMENT TO PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 67-160 (1980). Proposals for mandatory *pro bono* obligations and their opposition are noted in C. WOLFRAM, *supra* note 11, at 952-53. See also Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 736 (1980).

35. See M. GREEN, *THE OTHER GOVERNMENT* 270-88 (1975); Schwartz, *supra* note 2, at 685-90 (arguing that lawyers in nonadvocate roles, such as when drafting contracts, should be compelled to refuse to assist clients in attaining certain unconscionable or otherwise unenforceable results).

36. See Schnapper, *supra* note 32, at 203 (contending that "[i]f, as a former federal judge has urged, legal justice is a special type of truth finding, legal advocacy—urging a decision with knowledge of contrary facts hidden behind a claim of privilege—is, to coin a euphemism, a special type of truth telling").

37. Currently, the lawyer's primary responsibility is the loyal and zealous protection of the client's interests. See Petrowitz, *Some Thoughts About Current Problems in Legal Ethics and Professional Responsibility*, 1979 DUKE L.J. 1275, 1279. Some significant changes in the obligations of lawyers on behalf of the public interest, therefore, would be at the expense of the client. Expansion of the public interest duties of lawyers also could harm lawyers' interests. For example, a duty to expedite litigation might cause fewer billable hours to accrue in the representation of a client. A duty to reveal contrary material fact when an opponent fails to do so might cause a lawyer to lose a case, and a contingent fee, when he otherwise might win. Additionally, if lawyers' obligations are shifted significantly toward the public interest, the general demand for legal services might decline.

38. The Commission was formed at the urging of Chief Justice Burger and was premised on his observation and the observations of others that the standards of professionalism within the bar were deteriorating. American Bar Association Commission on Professionalism, ". . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism," v (1986) [hereinafter ABA Report]. The Commission was authorized at the direction of the ABA's Board of Governors in 1984. *Id.*

Not all commentators share the desire for greater levels of professionalism. One commentator,

range of recommendations for improving the level of professionalism within the bar,³⁹ urges increased emphasis on the role of lawyers as officers of the court.⁴⁰ Unfortunately, the report fails to assess the current obligation of a lawyer as officer of the court⁴¹ and also fails to describe specifically how the bar might emphasize the obligation further.⁴² Nevertheless, it asserts emphatically that “[w]here the two conflict, the [lawyer’s] duty to the system of justice must transcend the [lawyer’s] duty to the client.”⁴³ Depending on the current meaning of the obligation, that broad assertion could be revolutionary indeed.

These proposed expansions of the lawyer’s role as officer of the court suggest that careful review of the role is in order. This Article provides that review. It first assesses the true extent of the lawyer’s duties as an officer of the court under the existing law governing legal

for example, notes:

In the ideology of professionalism, more is better. If the profession is in trouble because individual lawyers provide inadequate services, misrepresent their clients, or abuse their responsibility through incompetence and negligence, then the cure is greater professionalism. If the profession is in trouble because it promotes the interest of the individual, pays too little attention to community and society, and ignores the harm that individuals are willing to perpetrate in pursuit of their own self-interest, then the cure is greater professionalism. How we are to resolve what are clearly social issues by more professionalism is unclear.

Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 Ky. L.J. 937, 939 (1984-85). The same author notes further:

Lawyers live in a simplified amoral universe partly because they are not compelled by the ethics of professionalism to reflect on whether what they do is good. Ethics fuels the hope, and perhaps the illusion that a professional life is by its very nature an ethical one. An ethics of professionalism is an ethics of complacency, a complacency that embraces the existing professional ethos, an ethos that blinds us to what we do in the name of truth and justice.

Id. at 948.

39. The Report’s recommendations, as summarized, are divided into four categories: Law schools, practicing bar and bar associations, judges, and general. ABA Report, *supra* note 38, at 12-15.

40. *Id.* at 13, 28-30 (Recommendation B.5).

41. *Id.* at 28-30.

42. The ABA Report deals with this potentially far-reaching suggestion in the briefest of fashions. It expressly notes only three limitations on the duty of zealous representation of clients. Lawyers should render independent professional advice. *Id.* at 28. Lawyers should inform their clients when their duties of candor to the court prevail over their duties to the client. *Id.* Lawyers must reveal adverse legal authority from the controlling jurisdiction when it is not disclosed by the opposing party. *Id.* at 29. The Report also notes that abusive discovery, misleading communications, the prosecution of frivolous claims and defenses, and the use of “scorched earth” tactics all detract from the role of lawyers as officers of the court. *Id.* at 29-30.

43. *Id.* at 30. The language is reminiscent of that used in *Langen v. Borkowski*, 188 Wis. 277, 206 N.W. 181 (1925), in which the court noted:

In every case that comes to [a lawyer] in his professional capacity, he must determine wherein lies his obligations of [sic] the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.

Id. at 301, 206 N.W. at 190.

ethics.⁴⁴ The Article then describes why those duties are deficient in giving content to the characterization.⁴⁵ Finally, the Article proposes certain modifications of the existing rules of professional responsibility that would bring lawyers' actual obligations more in line with those suggested by the label of officer of the court.⁴⁶

III. THE CURRENT EXTENT OF THE LAWYER'S OBLIGATION AS OFFICER OF THE COURT

A. *Identifying the Elements*

As noted above, the ethical obligations placed on lawyers are the result of a compromise between the two models of lawyerly behavior.⁴⁷ To discern the extent to which the law actually requires lawyers to conduct themselves as officers of the court, therefore, one must confront the definitional problem presented by the term.⁴⁸ There must be some basis for distinguishing between obligations that result from a lawyer's role as officer of the court and those that result from his role as zealous advocate.

The very words "officer of the court" connote a mandatory public interest role for lawyers⁴⁹ and suggest that lawyers sometimes must act in a quasi-judicial or quasi-official capacity despite duties owed to their clients.⁵⁰ The primary distinguishing characteristic of the duties making up the officer of the court obligation, therefore, must be their subordination of the interests of the client and the lawyer to those of the judicial system and the public.⁵¹

44. See *infra* notes 47-200 and accompanying text.

45. See *infra* notes 201-34 and accompanying text.

46. See *infra* notes 235-79 and accompanying text.

47. See *supra* text accompanying notes 23-24.

48. For reference to the definitional problem, see *supra* text accompanying notes 15-22.

49. The same can be said for the other labels used to describe the officer of the court role.

See *supra* note 7.

50. The label "officer of the court" by its terms describes an agency relationship between the court as principal and the lawyer as agent. A lawyer's obligation to act as an officer of the court implies that in those instances his primary allegiance is to the court rather than to the lawyer's other principal, the client. One court described the obligation in this way:

An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client. . . . He therefore occupies what may be termed a quasi judicial office. The office of an attorney is one which is inherent in our judicial system, and it is not created under our state or federal Constitution, but came to us at the time of the adoption of the Constitution, as a part of the judicial system then existing.

Langen, 188 Wis. at 301, 206 N.W. at 190. In addition, the ABA has described lawyers as public citizens "having special responsibility for the quality of justice." MODEL RULES, *supra* note 3, Preamble.

51. Commentators have used this form of interest analysis in a number of other contexts to

An additional distinction must be made, however. Because our concern is with the duties of the lawyer as officer of the court, our analysis must segregate those duties unique to lawyers from those equally applicable to all legal process participants.⁵² For example, under existing ethical restraints, lawyers must not conceal or knowingly fail to disclose evidence that they are required by law to reveal.⁵³ The requirement compels lawyers on occasion to act contrary to the interests of their clients⁵⁴ and perhaps themselves.⁵⁵ Laymen, however, share the obligation as well under other law.⁵⁶ For purposes of this discussion, the ethical requirement should not be classified as a component of the lawyer's role as an officer of the court. An ethical requirement is part of the lawyer's obligation as an officer of the court only if it compels conduct by a lawyer that subordinates the interests of the client and the lawyer to those of the judicial system or the public, and also is not coextensive with an obligation imposed on laymen participating in the legal process.⁵⁷ Using these characteristics, one can identify with some specificity the legal requirements that make up the lawyer's current obligation to act as an officer of the court.

B. *The Obligation Under the Code of Professional Responsibility*

The American Bar Association's *Code of Professional Responsibility*,⁵⁸ adopted in some form by virtually every state,⁵⁹ has been the pre-

evaluate issues of professional responsibility. Professor Morgan employs it in his critical analysis of the *Code of Professional Responsibility*. See Morgan, *supra* note 23, at 705-07. He and Professor Rotunda also offer the approach as helpful in the resolution of difficult ethical dilemmas in their leading casebook on professional responsibility. See T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 20 (4th ed. 1987).

52. Other participants might include parties and witnesses, who are members of the general public brought by circumstance into the operation of the judicial system.

53. See CODE, *supra* note 1, DR 7-102(A)(3), DR 7-109(A); MODEL RULES, *supra* note 3, Rule 3.4(a).

54. That is, in certain circumstances the client might gain an advantage if contrary evidence were destroyed or concealed.

55. The lawyer reduces the likelihood of winning his case when ethical obligations force him to reveal evidence harmful to his client. The obligation, therefore, could harm the lawyer's interests in a number of ways. It could hamper the lawyer's ability to charge or collect a suitable fee in the particular case. It could cause the client to look to another lawyer for future legal services. Indeed, the lawyer's failure to prevail on the issue for the client might affect the lawyer's general reputation for winning and cause potential clients to seek legal representation elsewhere.

56. The failure to disclose evidence that one is obligated by law to reveal is the obstruction of justice. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 558 (3d ed. 1982). Thus, the obligation embodied in DR 7-102(A)(3), CODE, *supra* note 1, DR 7-102(A)(3), and Model Rule 3.4(a), MODEL RULES, *supra* note 3, Rule 3.4(a), places no additional duty on lawyers beyond that applicable to all members of society.

57. These criteria form the working definition used throughout this work to identify various components of the lawyer's obligation as officer of the court.

58. See *supra* note 1. The ABA's official title for the work was the *Model Code of Profes-*

vailing codification of legal ethical principles since its approval by the ABA's House of Delegates in 1969.⁶⁰ The influence of the zealous advocate model of lawyerly behavior is immediately apparent in the *Code*. Among the broad statements of ethical norms in its nine general Canons, which categorize the lawyer's specific responsibilities,⁶¹ the *Code* declares that lawyers should preserve the confidences and secrets of their clients,⁶² exercise independent professional judgment on behalf of their clients,⁶³ and represent their clients competently⁶⁴ and zealously.⁶⁵ The precise dictates of the Disciplinary Rules further define these obligations of zealous advocacy on behalf of the client.⁶⁶ Thus, the *Code* provisions generally and specifically require lawyers to possess the same degree of knowledge, share the same fidelity to the client's cause, and exercise the same care and zeal as if the client and the lawyer were one.⁶⁷ Standing alone, these obligations, rather than being components of a lawyer's responsibility as officer of the court,⁶⁸ assure that the law-

sional Responsibility. Id. The common reference to the work, however, is the shorter *Code of Professional Responsibility* or the *Code*.

59. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976).

60. G. HAZARD & W. HODES, *supra* note 19, at xxix.

61. There are three types of statements contained in the *Code*. The nine Canons "are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." CODE, *supra* note 1, Preliminary Statement. The Canons also serve as headings for the organizational division of the specific provisions within the *Code*. The Disciplinary Rules (DR) "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* Thus, the drafters of the *Code* intended discipline to result only for the violation of a Disciplinary Rule. The Ethical Considerations (EC), on the other hand, "are aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.*

62. *Id.* Canon 4.

63. *Id.* Canon 5.

64. *Id.* Canon 6.

65. *Id.* Canon 7.

66. The Disciplinary Rules provide the specific minimum standards for acceptable lawyer behavior under the broad norms of the *Code's* Canons. See *supra* note 61.

67. These ethical restraints tend to place a lawyer in nearly the same position as the client for purposes of the representation, thus assuring the same zealous advocacy that a client could expect if he himself were trained and skilled in the law. The limits on disclosure of confidences and secrets of a client, for example, encourage the free exchange of information between the client and lawyer so that the lawyer can be as fully informed as the client on all factual matters pertinent to the representation. See CODE, *supra* note 1, DR 4-101. Similarly, the restrictions upon lawyer-client conflicts of interest assure clients that they are being represented by lawyers whose objectives are as single-minded as theirs. See *id.* DR 5-101 to 5-107. The *Code's* insistence that lawyers provide competent representation assures the client that the work done on his behalf will be as careful and professional as if a legally trained client were doing work for himself. See *id.* DR 6-101. Additionally, the broad obligation to represent a client zealously and the specific requirements making up that obligation direct a lawyer to apply the full range of legal assistance available on behalf of the client. See *id.* at DR 7-101(A).

68. For a definition of "officer of the court," see *supra* text accompanying note 57.

yer will act as an informed, devoted, and energetic agent of the client and will elevate the client's interests above those of the judicial system and the public.

On the other hand, the *Code's* Canons do not address broadly the lawyer's obligation to act as an officer of the court, other than to exhort the lawyer to "assist in improving the legal system."⁶⁹ To discern the influence of the officer of the court model within the *Code*, therefore, one must evaluate the content of each Disciplinary Rule. Several of these provisions arguably meet the criteria signifying them as a part of the lawyer's obligation as an officer of the court.⁷⁰ These provisions are:

1. A lawyer must not engage in conduct prejudicial to the administration of justice.⁷¹

2. A lawyer must disclose to the proper authorities actual knowledge of ethical violations by other lawyers.⁷²

3. A lawyer must disclose to the court knowledge of any directly adverse legal authority in the controlling jurisdiction that an opponent

69. CODE, *supra* note 1, Canon 8. The specific Disciplinary Rules under Canon 8, however, are narrow in their reach. They pertain to three specific instances that bear little relation to the broad topic of lawyers acting as officers of the court. The three obligations apply to lawyers holding public office, *id.* DR 8-101(A), lawyers knowingly making false statements regarding judges and candidates for judgeships, *id.* DR 8-102, and lawyers who are candidates for judgeships themselves, *id.* DR 8-103(A).

70. See *supra* note 57. Because this Article focuses on the obligations of lawyers to act as officers of the court, it does not include the aspirational norms of the *Code's* Ethical Considerations. Because the drafters of the *Code* did not intend the ECs to be mandatory, they did not intend the ECs to obligate lawyers to act as officers of the court. In some states, however, courts have ignored the intention of the drafters of the *Code* and have disciplined lawyers for failure to adhere to Ethical Considerations. See, e.g., Florida Bar v. Dawson, 318 So. 2d 385, 385 (Fla.), *cert. denied*, 423 U.S. 995 (1975); Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d 838, 846 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Kentucky Bar Ass'n v. DeCamillis, 547 S.W.2d 446, 447-48 (Ky. 1977); *In re* Disciplinary Action Against Prueter, 359 N.W.2d 613, 616 (Minn. 1984); see also Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386, 1387-88 (1980). In those jurisdictions, an inquiry into the obligation to act as an officer of the court would involve review of the ECs as well as the DRs. When a state supreme court considers all the ECs to be mandatory, as in Iowa, the inquiry is lengthier, but not conceptually more difficult. See, e.g., Behnke, 276 N.W.2d at 840; *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976); Note, *supra*, at 1391-93. In states that have chosen to enforce some ECs but not others, such as Florida, Kentucky, and Minnesota, the inquiry is more difficult. In those states the obligation to act as an officer of the court includes those ECs meeting the definition found at note 57, *supra*, which the state supreme court has deemed or would deem mandatory.

The inquiry is more difficult in those states that treat as mandatory the broad "axiomatic norms," see *supra* note 61, declared in the *Code's* Canons. See Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. Rev. 497, 514 (1979); see, e.g., *In re* Advisory Op. of Ky. Bar Ass'n, 613 S.W.2d 416 (Ky. 1981).

This Article follows the intent of the drafters of the *Code*. The Article examines only the Disciplinary Rules, all of which were intended to be mandatory, to determine the obligations that make up the lawyer's role as an officer of the court.

71. CODE, *supra* note 1, DR 1-102(A)(5).

72. *Id.* DR 1-103(A).

has failed to disclose.⁷³

4. A lawyer must not threaten to bring criminal charges when the sole purpose of that threat is to gain an advantage in a civil matter.⁷⁴

5. A lawyer must disclose non-privileged information indicating that a client has, in the course of the lawyer's representation, perpetrated a fraud on a person or tribunal, if the client refuses to reveal the fraud after being urged by the lawyer to do so.⁷⁵

6. A lawyer who is a candidate for judicial office must comply with the restrictions on political activities applicable to judges.⁷⁶

7. A lawyer must not utilize a contingent fee arrangement in a criminal matter.⁷⁷

8. A lawyer must not communicate directly with a party known to be represented by counsel⁷⁸ or give advice to an opposing party who is not represented by counsel.⁷⁹

9. A lawyer must reveal knowledge of improper conduct of or toward a juror.⁸⁰

10. A lawyer must disclose any information indicating that a person other than a client has perpetrated a fraud upon a tribunal.⁸¹

11. A lawyer must not state or imply that he is able to influence a judge or other government official on irrelevant grounds.⁸²

The list is brief. Even under a generous application of the criteria noted above, these provisions are the only requirements of the *Code* that can be fairly classified as an element of the lawyer's duty as officer of the court.⁸³ The other obligations contained in the *Code* fail one or both of the criteria. Some obligations further the interests of the client⁸⁴ or lawyer⁸⁵ or both⁸⁶ and thus do not elevate the interests of the

73. *Id.* DR 7-106(B)(1).

74. *Id.* DR 7-105(A).

75. *Id.* DR 7-102(B)(1).

76. *Id.* DR 8-103(A).

77. *Id.* DR 2-106(C).

78. *Id.* DR 7-104(A)(1).

79. *Id.* DR 7-104(A)(2).

80. *Id.* DR 7-108(G).

81. *Id.* DR 7-102(B)(2).

82. *Id.* DR 9-101(C).

83. Even assuming agreement with the criteria used here to identify the elements of the lawyer's obligation as an officer of the court, readers may reasonably disagree over their application to the precise requirements of the *Code's* Disciplinary Rules. The Author has attempted to be liberal in recognizing the presence of the officer of the court obligation in the DRs in order to avoid understatement of the true extent of that obligation. Others might choose to be even more lenient and find more Disciplinary Rules to reflect that obligation. This potential disagreement is itself a product of the elusive meaning of the label "officer of the court." See *supra* text accompanying notes 11-19.

84. A broad range of Disciplinary Rules furthers the client's interests. The restrictions on excessive fees under DR 2-106(A), (B) and the limitations on splitting fees under DR 2-107 are

judicial system or the public above those other interests. Some *Code*

clearly within this category. CODE, *supra* note 1, DR 2-106(A), (B), DR 2-107. Several of the requirements placed on lawyers who withdraw from the representation of clients also protect the clients' interests. CODE, *supra* note 1, DR 2-110(A)(2), (3) (when withdrawing, lawyer must take reasonable steps to avoid foreseeable prejudice to client and refund any unearned portion of a fee already paid). Protection of the client's interests also underlies two of the grounds for mandatory withdrawal. *Id.* DR 2-110(B)(3), (4) (the lawyer must withdraw if unable to carry out the representation effectively or if discharged by the client).

Of course, the *Code* restrictions on the disclosure or misuse of client confidences and secrets further the client's interests, *see id.* DR 4-101(A), (B), as do the conflict of interest provisions that insure the lawyer's loyalty to the client's cause, *see id.* DR 5-101, DR 5-103 to 5-107. Those *Code* provisions also promote lawyers' interests and may be less pro-client than they appear. *See Morgan, supra* note 23, at 727-32, 737-39.

The restrictions on lawyers who serve as advocates in cases in which they should be called as witnesses, CODE, *supra* note 1, DR 5-101(B), DR 5-102, are not as easily categorized. By mandating the role of witness over that of advocate, the *Code* might further the interests of the judicial system at the expense of the client's interests. One justification for these provisions is that the trier of fact might be confused regarding when the testimony ends and the argument begins. The rule, therefore, requires the lawyer to serve as witness rather than as advocate. *Id.* Still, the exceptions to the *Code* restriction on being an advocate-witness make clear that if the lawyer's services are sufficiently critical to the client, the client's interests should prevail and the lawyer should be able to serve as both advocate and witness. *Id.* DR 5-101(B)(4), DR 5-102(A). Accordingly, the restriction primarily protects clients' interests. The rule, therefore, is not included in the list of officer of the court obligations. *See supra* text accompanying notes 71-82.

The Disciplinary Rules applicable to competent representation, *e.g.*, CODE, *supra* note 1, DR 6-101, and prohibiting attempts at limiting liability for malpractice, *e.g.*, *id.* DR 6-102(A), directly advance the interests of the client. This is also true for the *Code's* obligation to represent a client zealously. *Id.* DR 7-101(A).

The requirement imposed on prosecutors by DR 7-103(B) is less easily analyzed. *Id.* DR 7-103(B). That rule requires a prosecutor to reveal to the accused or opposing counsel evidence which would tend "to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Id.* The rule largely echoes the fifth amendment requirement set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and, therefore, is foremost a requirement imposed by the United States Constitution rather than a principle of legal ethics. Furthermore, the rule serves the interests of the client, at least if the client of the prosecutor is perceived appropriately to be the public in general. Because the prosecutor represents the public, which as a client is most interested in seeing that all rules of law are followed, the duty of disclosure furthers the interest of the client.

Finally, the rules pertaining to the use of trust accounts in handling client money are intended to protect the interest of clients in avoiding misappropriation by their lawyers. CODE, *supra* note 1, DR 9-102(A), (B).

85. Some of the Disciplinary Rules of the *Code* can only reasonably be viewed as furthering the interests of lawyers, both individually and collectively. These rules are difficult to categorize because, for most, there is a supportable contention that they serve a public interest function as well. Despite the public interest served, however, a number of these rules seem primarily protective of lawyers.

DR 1-101(B), for example, prohibits a lawyer from furthering the bar admission application of a person known by the lawyer to be unqualified. CODE, *supra* note 1, DR 1-101(B). To the extent that the rule only requires lawyers not to state falsely their view of a candidate's qualifications, the rule goes no further than generally applicable restrictions on false statements in dealing with the government. *See infra* note 87 (for further examples of such rules). The rule advances the public interest in keeping unqualified applicants from admission to the bar, but it also serves the interests of lawyers in two ways: the rule allows an individual lawyer to disassociate himself from undesirable bar applications and also shields the profession from the admission to its ranks of unqualified persons. Because the rule is protective of the profession, it is difficult to declare it to

requirements are merely coextensive with obligations resulting from law applicable to laymen as well.⁸⁷ A few *Code* provisions serve the interests

be unequivocally part of the lawyer's duty as an officer of the court. The same can be said for DR 1-102(A)(6), which prohibits lawyer conduct adversely reflecting on the fitness of the lawyer to practice law. *CODE*, *supra* note 1, DR 1-102(A)(6). The rule primarily serves the profession's interest in public image management, although it serves a legitimate public interest function as well. A similar self-protection motive can be ascribed to the *Code* restrictions on lawyer participation in prepaid legal insurance programs and group legal service plans under DR 2-103(D)(4), *id.* DR 2-103(D)(4). Morgan, *supra* note 23, at 722-25.

86. Certain Disciplinary Rules serve the interests of both clients and lawyers. The restrictions on lawyer advertising found in the Disciplinary Rules under Canon 2 of the *Code* are arguably within this category. *CODE*, *supra* note 1, Canon 2. The restrictions on lawyer publicity under DR 2-101, *id.* DR 2-101, and on the use of professional notices and other devices under DR 2-102, *id.* DR 2-102, presumably are based, at least in part, on the profession's desire to prevent potential clients from selecting lawyers based upon improper information. *Id.* EC 2-8 to 2-10; *see* Bates v. State Bar of Ariz., 433 U.S. 350, 372-75 (1977). Protection of clients also is an apparent rationale for the *Code* restrictions upon solicitation. *CODE*, *supra* note 1, DR 2-103, 2-104; *see also* *In re Primus*, 436 U.S. 412, 437 (1978). These rules, however, also serve the interests of established elements of the profession by reducing competition from other lawyers and by promoting the public image of lawyers as being above the commercialism of other businesses. *See* Morgan, *supra* note 23, at 712-16, 721-22.

Similarly, the restrictions under DR 2-105, *CODE*, *supra* note 1, DR 2-105, on advertising a specialty appear to protect clients and potential clients as well as segments of the profession not in need of publicity. *See* Morgan, *supra* note 23, at 717-19.

Disciplinary Rule 2-108's restriction on covenants not to compete also appears to protect primarily lawyers' career interests, although it might operate to make a greater number of lawyers available to the public, thus serving the interests of potential clients. *CODE*, *supra* note 1, DR 2-108.

87. Numerous Disciplinary Rules fall within this category and thus are not part of the lawyer's obligation as an officer of the court. The most obvious example of such a provision is DR 1-102(A)(3), which prohibits a lawyer from engaging in "illegal conduct involving moral turpitude." *Id.* DR 1-102(A)(3). Because lawyers, like everyone, are prohibited already by other law from engaging in such conduct, the Rule does not impose additional obligations upon lawyers. The same is true of DR 1-102(A)(4)'s prohibition on lawyer "dishonesty, fraud, deceit, and misrepresentation." *Id.* DR 1-102(A)(4). Disciplinary Rule 1-101(A) similarly prohibits fraud in a lawyer's application for admission to the bar, *id.* DR 1-101(A), but it is no more strenuous than typical restraints on laymen applying to governmental bodies for licenses or other governmental benefit. *See, e.g.*, 18 U.S.C. § 1001 (1982). Disciplinary Rule 1-103(B) requires a lawyer to reveal non-privileged information regarding another lawyer to an appropriate tribunal when requested to do so. *CODE*, *supra* note 1, DR 1-103(B). Because these tribunals generally have investigative and subpoena powers sufficient to require anyone to divulge the information, the rule does not impose significant additional or special obligations on lawyers. *But see* C. WOLFRAM, *supra* note 11, at 686.

The restrictions on lawyers' acceptance of employment found in DR 2-109(A) also constitute obligations applicable to the public. *CODE*, *supra* note 1, DR 2-109(A). Disciplinary Rule 2-109(A) prohibits a lawyer from accepting employment when the lawyer knows that the client asserts his position merely to harass or maliciously injure another or that the action is not "warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law." *Id.* DR 2-109(A)(2). These limits on lawyers' conduct are already provided by common-law prohibitions on malicious prosecution, wrongful civil proceedings, or abuse of process, *see* *Yost v. Torok*, 344 S.E.2d 414, 415, 417 (Ga. 1986); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 119, at 870-900 (5th ed. 1984) [hereinafter *PROSSER & KEETON*], and by most jurisdictions' rules of civil procedure, *see, e.g.*, *FED. R. CIV. P.* 11. While these rules of civil procedure primarily affect lawyers, they are applicable to parties and *pro se* litigants as well. *Id.* The same comments are applicable to DR 2-110 and DR 7-

102, which also restrict the use of frivolous litigation. CODE, *supra* note 1, DR 2-110, DR 7-107. Disciplinary Rule 2-110 (B)(1) states that a lawyer must attempt to withdraw from employment when he knows or it is obvious that the client's purpose is merely to harass or maliciously injure another. *Id.* DR 2-110(B)(1). Disciplinary Rules 7-102(A)(1) and (2) state that a lawyer must not take an action which would merely harass or maliciously injure another or would not be warranted under existing law, unless "it can be supported by good faith argument for an extension, modification, or reversal of existing law." *Id.* DR 7-102(A)(1), (2). Another specific application of the principle prohibiting actions that are vexatious or frivolous is found in DR 7-103(A), which prohibits prosecutors from instituting charges when they are not supported by probable cause. *Id.* DR 7-103(A).

The rule in DR 3-101(B), which prohibits lawyers from practicing in a jurisdiction in which they are not licensed, *id.* DR 3-101(B), reasserts the general prohibition on all members of society not to engage in the unauthorized practice of law, usually a criminal offense. *See* C. WOLFRAM, *supra* note 11, at 845-46. The same can be said of DR 3-102(A) and DR 3-103(A), which prohibit the sharing of legal fees and the forming of partnerships with laymen. CODE, *supra* note 1, DR 3-102(A), DR 3-103(A). Both of these Disciplinary Rules are part of the lawyer's obligation not to participate in the unauthorized practice of law, *see id.* EC 3-8, an obligation generally applicable to the public.

Under the Code's Canon 7, which requires lawyers to represent their clients zealously, *id.* Canon 7, lawyers are prohibited from engaging in a number of acts that are generally unlawful for members of the public as well. *See id.* DR 7-102(A)(3) (prohibiting the unlawful concealment of evidence or information); *id.* DR 7-102(A)(4) (prohibiting the use of perjured testimony or false evidence with knowledge of its false character); *id.* DR 7-102(A)(5) (prohibiting knowingly making false statements); *id.* DR 7-102(A)(6) (forbidding participation in the creation of false evidence); *id.* DR 7-102(A)(7) (prohibiting assisting a client in illegal or fraudulent conduct); *id.* DR 7-102(A)(8) (forbidding knowingly engaging in illegal conduct).

Even during a trial, many of the obligations of lawyers go no further than those imposed upon other participants in the process, such as *pro se* litigants, parties generally, or witnesses. *See id.* DR 7-106(A) (prohibiting the disregard of a rule or ruling of a tribunal except for good faith efforts to test validity); *id.* DR 7-106(B)(2) (requiring the disclosure of the identity of principal); *id.* DR 7-106(C)(1) (prohibiting stating or alluding to irrelevant or unsupportable matters during a proceeding); *id.* DR 7-106(C)(2) (prohibiting irrelevant questions asked for the purpose of degrading another); *id.* DR 7-106(C)(3) (prohibiting the assertion of personal knowledge when not testifying); *id.* DR 7-106(C)(6) (prohibiting engaging in unseemly conduct that is degrading to a tribunal); *id.* DR 7-106(C)(7) (prohibiting the intentional violation of rules of procedure or evidence).

The Code's rules prohibiting communication with jurors and potential jurors, e.g., *id.* DR 7-108, are largely coextensive with general criminal proscriptions on jury tampering. *See* R. PERKINS & R. BOYCE, *supra* note 56, at 552-53. Similarly, the restrictions upon lawyers' contact with witnesses found in DR 7-109 do not add much to the general obligations of all citizens restricting such conduct. *See id.* at 556-57.

The Code also prohibits lawyers from making certain public statements that are reasonably likely to interfere with a fair trial of a criminal matter. CODE, *supra* note 1, DR 7-107. The prohibition, of course, may require a lawyer to refrain from public speech that might help a client to avoid conviction. The Code restriction, however, goes no further than a court's general contempt power, which might be exercised to prevent those public statements. *See* R. PERKINS & R. BOYCE, *supra* note 56, at 597-600. Thus, while the Code provision operates prospectively as legislation against that conduct by lawyers, it does not significantly exceed the restriction that might be imposed in a given case against members of the general public.

Lawyers also are restricted in their contact with judges under DR 7-110(A) and (B). CODE, *supra* note 1, DR 7-110(A), (B). Those rules, however, prohibit conduct by lawyers that is also prohibited of judges in their contact with members of the public. *See id.* DR 7-110(A), DR 7-110(B)(4); CODE OF JUDICIAL CONDUCT Canon 3, § A(4), Canon 5, § C(4) (1972). Rules DR 7-110(A) and (B), CODE, *supra* note 1, DR 7-110(A), (B), therefore, do not impose an obligation unique to lawyers because these contacts are inappropriate even when made by laymen.

of clients and lawyers while also echoing obligations of laymen.⁸⁸ Finally, some *Code* rules fail to require any conduct at all.⁸⁹

Even a number of the *Code's* officer of the court obligations can favor the interests of the client and the lawyer. A lawyer's duty to report ethical violations of other lawyers may be triggered by the conduct of an adversary, thus permitting a lawyer to burden an opponent through the disciplinary complaint process. The prohibition on giving legal advice to an opposing party who is not represented by counsel allows a lawyer to promote the interests of his client without concern for the other party's lack of legal advice. When improper conduct of or toward a juror has harmed a client's cause, the lawyer's duty to disclose that conduct is consistent with the client's interests. Similarly, the lawyer's obligation to report the fraud of a nonclient may help a client's cause. Accordingly, some of the *Code* requirements listed above are truly officer of the court obligations only under certain circumstances. In other instances, they permit a lawyer to take actions in furtherance of the interests of the client and lawyer.

As a practical matter, the list of officer of the court obligations under the *Code* is even more restricted. The first two requirements are minimally effective. Because most conduct considered prejudicial to the administration of justice already is prohibited by the criminal law⁹⁰ or

The restrictions on lawyers' use of public positions to gain advantage for their clients under DR 8-101(A), *id.* DR 8-101(A), are largely coextensive with the restrictions limiting that conduct by public officials. *See, e.g.*, 18 U.S.C. § 208 (1982). The requirement that lawyers not knowingly make false statements about judges or candidates for judgeships, *e.g.*, *id.* DR 8-102(A) and (B), appears consistent with common-law standards of defamation. *See* PROSSER & KEETON, *supra*, at 805-07. Additionally, the restrictions on lawyers' participation in private employment in matters in which the lawyer has previously acted in a judicial or public capacity under DR 9-101(A) and (B), *CODE, supra* note 1, DR 9-101(A), (B), are similar to statutory proscriptions related to ethics in government. *See* Petrowitz, *supra* note 37, at 1280-82.

88. A few Disciplinary Rules serve the interests of clients and lawyers while mirroring obligations imposed on the public. The restriction prohibiting lawyers from aiding others in the unauthorized practice of law is an example. *See CODE, supra* note 1, DR 3-101(A). That prohibition, like the whole concept of a licensed monopoly on the provision of legal services, serves the interests of the legal profession. *See* Morgan, *supra* note 23, at 707-12; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 9, 97-99 (1981). In addition, most jurisdictions, if not all, have made the unauthorized practice of law a criminal offense, although it is seldom enforced. *C. WOLFRAM, supra* note 11, at 845. Assisting the unauthorized practice of law, therefore, would also be a crime.

89. Most notably, DR 4-101(C) defines circumstances that permit, but do not require, a lawyer to divulge the confidences and secrets of a client. *CODE, supra* note 1, DR 4-101(c). Additionally, DR 2-110(C) suggests grounds on which a lawyer may seek to withdraw from the representation of a client. *Id.* DR 2-110(c). Also, DR 7-101(B)(1) and (2) permit rather than require lawyers to waive some claims of a client and to refuse to engage in or assist conduct the lawyer believes to be unlawful "even though there is some support for an argument that the conduct is legal." *Id.* DR 7-101(B)(1), (2).

90. *See, e.g.*, MODEL PENAL CODE, §§ 240 (bribery and corrupt influence), 241 (perjury and other falsification in official matters), 242 (obstructing governmental operations) (Proposed Official

the rules of civil procedure,⁹¹ the first *Code* requirement provides no additional significant obligations.⁹² The second *Code* requirement of reporting ethical violations by other lawyers is notoriously ignored by practicing lawyers and disciplinary authorities and is seldom enforced.⁹³ Because a lawyer runs little risk of being disciplined for its violation, this requirement does not function as an effective part of the lawyer's obligation as an officer of the court. The first two requirements on the *Code* list, therefore, are largely meaningless obligations.

Additionally, requirements three through six on the list are too narrow in their reach to impose any significant obligations on lawyers. The duty to report adverse legal authority is the most noteworthy example of the *Code's* subordination of the interests of the client and the lawyer in favor of those of the judicial system.⁹⁴ The impact of this duty, however, is severely limited because the legal authority must not only be "directly adverse,"⁹⁵ but also from a controlling jurisdiction in

Draft 1962] [hereinafter MODEL PENAL CODE].

91. See, e.g., FED. R. CIV. P. 11 (certification of pleadings through signature). The rules apply to parties and other participants in the legal process and not just lawyers. See *supra* note 87.

92. The breadth of the requirement not to engage in conduct prejudicial to the administration of justice on its face reaches other conduct as well. The provision undoubtedly permits regulation of conduct not foreseen at the time of the adoption of the more specific Disciplinary Rules. See Note, *supra* note 70, at 1399. Unfortunately, these broad prohibitions also may be used to veil careless application of more specific rules. See *id.* at 1400; see also Gaetke, *Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky*, 70 Ky. L.J. 707, 709-13 (1981-82).

93. Thode, *supra* note 31, at 100. Additionally, some states have expressly amended this rule to make reporting of other lawyers' misconduct optional. See Petrowitz, *supra* note 37, at 1278.

94. The lawyer is required by DR 7-106(B) to provide the court with legal authority directly harmful to the client's interests when the opposing party has failed to do so on its own behalf. CODE, *supra* note 1, DR 7-106(B). This requirement provides the most glaring example of a lawyer being obligated to consider the interests of the court before those of the client or of the lawyer.

95. *Id.* The Disciplinary Rule gives no definition of what is "directly adverse" legal authority. The applicable Ethical Consideration merely mimics the same terminology and thus offers no additional assistance. See *id.* EC 7-23. The footnotes to DR 7-106(B), however, do provide some insight by reference to two pre-Code ABA ethics opinions. One of these, ABA Opinion 280 (1949), provides the following guidance:

We would not confine the Opinion to "controlling authorities"—i.e., those decisive of the pending case—but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

. . . . The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. DR 7-106(B) n.79 (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949)). The drafters of the *Code*, however, expressly cautioned the reader against relying on the footnotes when interpreting the *Code*. See *id.* Preamble n.1. The drafters intended the *Code* footnotes

order to mandate disclosure.⁹⁶ Thus, there is no obligation, for example, to reveal contrary legal authority from another jurisdiction, even when a reasonable lawyer would know that the court would find it compelling. Nor is there an obligation to reveal legal authority from the controlling jurisdiction overlooked by opposing counsel, no matter how persuasive, if it is contrary by analogy rather than directly adverse.

Similarly, the prohibition against threats of bringing criminal charges extends only to situations in which the lawyer is solely interested in gaining an advantage in a civil matter.⁹⁷ Presumably, a lawyer could make such threats or actions freely if he had another reason for doing so,⁹⁸ even if his primary purpose was to gain an advantage in a civil matter. Even the least imaginative in the profession should be able to skirt this prohibition by identifying other reasons for the threats.

The apparently severe requirement of disclosing a client's past fraud upon a person or tribunal committed in the course of the lawyer's representation is also quite narrow, at least since the ABA amended the requirement in 1974.⁹⁹ Under the amendment, a lawyer has no obligation to disclose a client's past fraud if the information establishing the fraud is privileged.¹⁰⁰ This exception to the disclosure requirement ele-

merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee of Professional Ethics, and a limited number of other sources; *they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards* [which drafted the Code].

Id. (emphasis added).

96. *Id.* Presumably this factor is applied in the mechanical manner suggested by its terms. That is, one can determine whether directly adverse legal authority must be revealed by noting whether it is technically from the "controlling jurisdiction" according to accepted notions of assessing legal precedent.

97. *Id.* DR 7-105(A) (stating that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges *solely* to obtain an advantage in a civil matter" (emphasis added)).

98. A client, for example, might threaten to bring criminal charges for reasons typically associated with the criminal justice process, such as retribution or deterrence. Thus a client might have other reasons for instituting criminal charges, even if his motivation was in part, even in substantial part, the gaining of an advantage in a civil matter.

99. Prior to that amendment, DR 7-102(B)(1) provided that a lawyer receiving information clearly establishing that "[h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." CODE, *supra* note 1, DR 7-102(B)(1) (1970 version).

100. The 1974 amendment added to the language of the 1970 version, quoted *supra* note 99, "except when the information is protected as a privileged communication." CODE, *supra* note 1, DR 7-102(B)(1) (amended 1974). Thus, the express language of the rule as amended would not require a lawyer to reveal a client's fraud if the information establishing the client's fraud was within the attorney-client privilege. The 1974 amendment, therefore, pared down the officer of the court implications of the Disciplinary Rule. When the disclosure contemplated by the rule would compromise the confidentiality interests of the client, the lawyer's duty to the defrauded tribunal

vates the client's interest in confidentiality above the interests of the judicial system in having participants reveal past fraud. Furthermore, an ABA ethics opinion reads the term "privileged" in the 1974 amendment more broadly than is suggested by the law of evidence.¹⁰¹ The ABA opinion excepted from the disclosure requirement information that is merely the "secret"¹⁰² of a client in that it would be detrimental or embarrassing to the client if revealed.¹⁰³ This interpretation of the 1974 amendment largely consumes the lawyer's officer of the court obligation even to disclose the client's past fraud upon a tribunal committed during the lawyer's representation.¹⁰⁴

The sixth requirement listed, that of complying with the *Code of Judicial Conduct* when a lawyer is a candidate for judicial office, is also narrow in its reach. While it does meet the criteria for an officer of the court obligation,¹⁰⁵ it applies only to an insignificant number of lawyers at any particular time.

Finally, requirements seven and eight on the *Code* list, while meeting the criteria for officer of the court obligations, also serve lawyers' interests as well. The restriction on the use of contingent fees in criminal matters operates against the interests of clients and some lawyers by restricting permissible fee arrangements. Presumably the drafters of

or person is to yield to the client's interests. As interpreted in an ABA ethics opinion, the 1974 amendment restricts the duty of disclosure even further. See *infra* text accompanying notes 101-04. One commentator has noted that "[t]his Opinion makes it absolutely clear that confidentiality of privileged communications must be preserved even though the miscarriage of justice resulting from nondisclosure might be substantial." Petrowitz, *supra* note 37, at 1278-79.

The ABA's 1974 amendment to DR 7-102(B)(1) was adopted by only twelve states. The other states chose to mandate disclosure of client fraud even when the information indicating such fraud is privileged. G. HAZARD & W. HODES, *supra* note 19, at 355-56. For further discussion of this issue in regard to the *Model Rules* counterpart to DR 7-102(B)(1), CODE, *supra* note 1, DR 7-102(B)(1), see *infra* note 132.

101. Under the *Code's* terminology, information protected by the evidentiary privilege is considered a "confidence." CODE, *supra* note 1, DR 4-101(A).

102. A "secret" under the *Code* is nonprivileged information "gained in the professional relationship that the client has requested he held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.*

103. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

104. See Petrowitz, *supra* note 37, at 1278 (stating that "there can now be no doubt that the rule forbids the disclosure of client confidences and secrets even when the failure to disclose will result in a miscarriage of justice"); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 837 nn.105-06 (1977) (noting that in order to have an obligation to reveal the client's fraud under the 1974 amendment as interpreted in ABA Formal Opinion 341, the lawyer "must learn the information from a source other than the client and at a time before his representation of the client begins or after it ends"). But see Rotunda, *When the Client Lies: Unhelpful Guides from the ABA*, 1 CORP. L. REV. 34, 39 (1978) (reading ABA Formal Opinion 341's interpretation of the 1974 *Code* amendment to DR 7-102(B)(1), CODE, *supra* note 1, DR 7-102(B)(1), more narrowly).

105. The drafters may have designed the rule, however, to put judges and candidates for judgeships in an equal position during the election process. The rule, therefore, would primarily protect judges, an identifiable segment of the legal profession, rather than the public interest.

the *Code* intended this restriction to further the judicial system's interest in preventing illegal or otherwise unsavory conduct by counsel that might be encouraged by a contingent fee in criminal defense work.¹⁰⁶ The restriction, however, also legitimizes the criminal defense bar's preferred and established practice of requiring full fee payment prior to the commencement of work.¹⁰⁷ Thus, while having a public interest rationale, the prohibition also provides a unified and perpetual front against different forms of fee devices that criminal defendants might prefer. So viewed, the restriction is less clearly in the public interest.

Similar ambivalence underlies the restriction forbidding a lawyer to communicate directly with an opposing party known to be represented by counsel. The restriction does protect the interests of other parties rather than the interests of the lawyer's client,¹⁰⁸ and thus serves the public interest.¹⁰⁹ The restriction also protects the interests of the other parties' lawyer by preventing the subversion of that lawyer's representation.¹¹⁰ The rule, therefore, may be a product of professional courtesy among lawyers¹¹¹ as much as an obligation of an officer of the court.¹¹²

106. Cf. G. HAZARD & W. HODES, *supra* note 19, at 83-84 (discussing proscription on contingent fees in criminal matters under the *Model Rules*). Perhaps the bar is most concerned merely with the public's impression that defense lawyers would resort to such conduct to secure an acquittal in a contingent fee case. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1307.

A contingent fee in a criminal case could create conflicts of interest between the lawyer and his client during plea bargaining. For example, a lawyer whose fee was contingent on an acquittal might advise a client to reject an offered plea bargain. Similarly, a lawyer whose fee was contingent on a reduction of the charge or acquittal might advise a client to accept a plea bargain, even when a trial might be in the best interests of the client. Viewed this way, the restriction on contingent fees in criminal cases protects a client's interests more than the judicial system's interests.

107. See G. HAZARD & W. HODES, *supra* note 19, at 84; Morgan, *supra* note 23, at 734.

108. The rule, DR 7-104(A)(1), protects a party from attempts by another litigant's lawyer to communicate directly with the party regarding the representation. CODE, *supra* note 1, DR 7-104(A)(1). These communications, without the prior permission of the party's lawyer, frequently would advantage the communicating lawyer and his client.

109. See Morgan, *supra* note 23, at 733-34. Assuming that the provision of legal advice to those in need of such services is in the public interest, the circumvention of such legal advice by other lawyers would appear to be contrary to the public interest.

110. These communications interfere with the other party's receipt of legal services and interfere with the party's relationship with his lawyer. A lawyer representing a client might be irate at another lawyer's communication with that client about a matter without the former lawyer's consent.

111. There are other examples of rules in the *Code* that are primarily matters of courtesy among lawyers. See, e.g., CODE, *supra* note 1, DR 7-101(A)(1) (stating that a lawyer does not fail in his obligation to represent a client zealously by "acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process"); *id.* DR 7-106(C)(5) (stating that in a matter before a tribunal, a lawyer shall not "[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply").

112. In any event, the restriction is not particularly significant. See Morgan, *supra* note 23, at 734 (the restrictions on lawyer communications with other parties are "relatively collateral

Thus, interpretation and practical application have whittled down even further the number of officer of the court obligations in the *Code*. The first six requirements on the list are less obligatory than they appear, either because they are ineffective or because they are extremely narrow in their reach. The next two requirements, forbidding contingent fees in criminal cases and communications with other parties represented by counsel, serve the interests of lawyers directly, indicating that they do not function unambiguously as obligations of officers of the court.

The list of officer of the court obligations under the *Code* that are both practically effective and clearly in the public interest is short. Lawyers must not advise opposing parties unrepresented by counsel nor suggest an ability to influence judges or other officials improperly. Lawyers must disclose any information indicating that a person other than a client has perpetrated a fraud upon a tribunal and any knowledge of improper conduct of or toward a juror. These requirements are not professionally self-serving, nor are they redundant of legal obligations of laymen. This brief list of unequivocal officer of the court obligations, however, is not particularly demanding.¹¹³ In fact, the balance struck by the *Code* predominantly favors the model of the lawyer as zealous advocate.¹¹⁴

C. *The Obligation Under the Model Rules of Professional Conduct*

The 1983 *Model Rules of Professional Conduct* constitute the ABA's latest articulation of the ethical norms of the legal profession.¹¹⁵ Significantly, part of the ABA's motivation in preparing the *Model Rules* was to expand the role of the lawyer as officer of the court from the more limited role defined in the organization's *Code of Professional Responsibility*.¹¹⁶

matters").

113. *Id.* at 737 (noting that under the *Code*, "[a]n officer-of-the-court role may be assumed or rejected as the lawyer sees fit").

114. See Petrowitz, *supra* note 37, at 1279 (stating that "[t]he conclusion that must be drawn from [a] review of the tensions created by the lawyer's competing obligations to the client and to the justice system unmistakably indicates that the present ABA Code of Professional Responsibility makes the lawyer's duty to the client his paramount responsibility").

115. For a brief account of the process of adoption of the *Model Rules*, see C. WOLFRAM, *supra* note 11, at 60-63. The *Model Rules* were the ultimate product of an ABA Commission on Evaluation of Professional Standards, popularly known as the Kutak Commission, which was formed in 1977 to reconsider the vitality of the *Code*. *Id.* at 61. The legislative history of the *Model Rules* has been published by the ABA's Center for Professional Responsibility. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES* (1987).

116. See G. HAZARD & W. HODES, *supra* note 19, at 347-48; Petrowitz, *supra* note 37, at 1289. This intention is shown by the emphasis placed on the lawyer's role as an "officer of the legal

Like the *Code*,¹¹⁷ however, the *Model Rules* strongly emphasize the lawyer's obligations to his client while offering a list of officer of the court obligations that is quite brief:

1. A lawyer must not engage in conduct that is prejudicial to the administration of justice.¹¹⁸

2. A lawyer must disclose legal authority from the controlling jurisdiction directly adverse to his client's position if opposing counsel has failed to do so.¹¹⁹

3. A lawyer must not communicate with another party who is represented by counsel without the counsel's consent,¹²⁰ or mislead another person not represented by counsel as to the lawyer's role in a matter.¹²¹

4. A lawyer who is a candidate for judicial office must comply with the *Code of Judicial Conduct*.¹²²

5. A lawyer must not state or imply that he can influence a government official improperly.¹²³

6. A lawyer must not utilize a contingent fee arrangement in a

system" in the first sentence of the Preamble to the *Model Rules*. See *supra* note 10. The earlier drafts of the *Model Rules* indicated this shift even more clearly. See Petrowitz, *supra* note 37, at 1289.

The emphasis on greater officer of the court obligations under the *Model Rules* was apparent to others. The Association of Trial Lawyers of America reacted to the proposed *Model Rules* by forming the Commission on Professional Responsibility and offering its own code of ethical principles as an alternative to the ABA's *Code of Professional Responsibility* and the new *Model Rules*. ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AMERICAN LAWYER'S CODE OF CONDUCT Preface (Revised Draft 1982) [hereinafter ATLA CODE], reprinted in T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 205 (1987). That group's view of the Kutak Commission's approach is quite clear:

We have rejected one concept that the Kutak Commission apparently espouses, that lawyers have a general duty to do good for society that often overrides their specific duty to serve their clients.

. . . .

The Kutak Commission sees lawyers as ombudsmen, who serve the system as much as they serve clients. This is a collectivist, bureaucratic concept. It is the sort of thinking you get from a commission made up of lawyers who work for institutional clients, in institutional firms, and who have lost sight of the lawyer's basic function [as] the citizens' champions against official tyranny.

. . . .

. . . The Kutak Rules contain some useful changes in regulating peripheral aspects of law practice, but they embody a core conviction about the lawyer's role that is fundamentally at odds with the American constitutional system.

ATLA CODE, *supra*, Preface, reprinted in T. MORGAN & R. ROTUNDA, *supra*, at 205.

117. See *supra* text accompanying notes 61-68.

118. MODEL RULES, *supra* note 3, Rule 8.4(d).

119. *Id.* Rule 3.3(a)(3).

120. *Id.* Rule 4.2.

121. *Id.* Rule 4.3.

122. *Id.* Rule 8.2(b).

123. *Id.* Rule 8.4(e).

criminal or domestic relations case.¹²⁴

7. A lawyer must take reasonable remedial measures after learning that evidence previously offered by the lawyer was false.¹²⁵

8. A lawyer must report ethical violations by other lawyers and judges that sufficiently adversely reflect on their fitness to practice.¹²⁶

9. A lawyer must disclose those facts necessary to correct a misapprehension that has arisen in an application for admission to the practice of law or in a disciplinary matter.¹²⁷

10. In *ex parte* proceedings, a lawyer must disclose all material facts known to the lawyer that would be helpful to the tribunal in reaching a just conclusion in the proceeding.¹²⁸

11. Except for good cause, a lawyer must not seek to avoid his appointment by a tribunal to represent a person.¹²⁹

The *Model Rules* list of officer of the court obligations closely resembles the *Code* list.¹³⁰ Indeed, the first five of the *Model Rules* requirements listed above are nearly identical to the first five requirements on the *Code* list.¹³¹ The next three are substantially the

124. *Id.* Rule 1.5(d)(1), (2).

125. *Id.* Rule 3.3(a)(4). This obligation continues only to the conclusion of the proceeding in which the false evidence was offered. *Id.* Rule 3.3(b).

126. *Id.* Rule 8.3(a), (b).

127. *Id.* Rule 8.1(b).

128. *Id.* Rule 3.3(d).

129. *Id.* Rule 6.2.

130. For the *Code* list, see *supra* text accompanying notes 71-82.

131. The prohibition on engaging in conduct prejudicial to the administration of justice is virtually identical under the *Code* and the *Model Rules*. Compare *CODE*, *supra* note 1, DR 1-102(A)(5) with *MODEL RULES*, *supra* note 3, Rule 8.4(d). The same is true for the obligation to reveal directly adverse legal authority when an opponent has failed to do so, compare *CODE*, *supra* note 1, DR 7-106(B)(1) with *MODEL RULES*, *supra* note 3, Rule 3.3(a)(3), the requirement that lawyer candidates for judgeships comply with the *Code of Judicial Conduct*, compare *CODE*, *supra* note 1, DR 8-103(A) with *MODEL RULES*, *supra* note 3, Rule 8.2(b), and the prohibition on stating or implying that a lawyer can influence a judge or government official improperly, compare *CODE*, *supra* note 1, DR 9-101(C) with *MODEL RULES*, *supra* note 3, Rule 8.4(e).

The restrictions on lawyers' contacts with other parties are not identical under the *Code* and the *Model Rules*, but are nearly the same. Both ethical codes prohibit lawyer communications about the subject of a representation with another party known to be represented by counsel unless consented to by that counsel or otherwise authorized by law. Compare *CODE*, *supra* note 1, DR 7-104(A)(1) with *MODEL RULES*, *supra* note 3, Rule 4.2. The *Code* and *Model Rules*, however, use different language in restricting lawyers' communications with unrepresented parties. While the *Code* provision prohibits the giving of advice to unrepresented persons other than the advice to obtain legal counsel, the *Model Rule* prohibits the lawyer from giving the impression that he is disinterested. Compare *CODE*, *supra* note 1, DR 7-104(A)(2) with *MODEL RULES*, *supra* note 3, Rule 4.3. The *Code* prohibition, therefore, might be slightly broader in its reach because it prohibits any advice, even if the lawyer's interests are made clear. The focus of the two rules, however, appears to be the same. That is, the rules seek to prevent confusion of and prejudice to an unrepresented person resulting from advice given by another party's lawyer. The *Model Rule* merely focuses more precisely on the source of the problem, which is the possible ignorance of the other party regarding the lawyer's potentially conflicting interests. The comment to Rule 4.3 shows that

same as their counterparts on that list.¹³² Only the last three of the *Model Rules* obligations listed are new obligations or substantial enlargements of the officer of the court obligations under the *Code*. These include the obligations to correct any misapprehensions that are known to have arisen in an application for bar admission or in disciplinary matters,¹³³ to accept appointments to represent indigents except when

the focus of the *Model Rule* is the same as that of DR 7-104(A)(2), *CODE*, *supra* note 1, DR 7-104(A)(2), because it uses nearly the same language, *MODEL RULES*, *supra* note 3, Rule 4.3 comment.

132. The *Model Rules* prohibit contingent fees in domestic relations cases as well as criminal defense work, thus going beyond the *Code's* prohibition, which reached only criminal defense work. Compare *CODE*, *supra* note 1, DR 2-106(C) with *MODEL RULES*, *supra* note 3, Rule 1.5(d). Because the *Code's* EC 2-20 counseled against contingent fees in domestic relations matters, *CODE*, *supra* note 1, EC 2-20, however, the *Model Rules* have not brought about a great change in treatment.

The *Model Rule's* requirement to take "reasonable remedial measures" when a lawyer has offered evidence found to be false is similar to the requirements of the *Code's* counterpart, at least in the vast majority of states that did not adopt the 1974 amendment to the *Code* provision. See *supra* text accompanying notes 99-104. Prior to the 1974 amendment, DR 7-102(B)(1) required the revelation of client fraud against a person or tribunal committed during a lawyer's representation if the client refused to rectify the fraud after being called upon to do so by the lawyer. *CODE*, *supra* note 1, DR 7-102(B)(1) (1970 version). This procedure is similar to that suggested by the *Model Rule's* requirement that the lawyer take "reasonable remedial measures" in such circumstances. *MODEL RULES*, *supra* note 3, Rule 3.3(a)(4). In the states that adopted the 1974 amendment to DR 7-102(B)(1), the *Model Rules'* approach constitutes a significant change, because privilege no longer excuses the duty to disclose. See *id.* Rule 3.3(b). The amendment, however, was only adopted in twelve states. G. HAZARD & W. HODES, *supra* note 19, at 355-56.

The *Model Rules* change the duty of lawyers to report the misconduct of other lawyers from the *Code's* treatment of the subject. Compare *CODE*, *supra* note 1, DR 1-103(A) with *MODEL RULES*, *supra* note 3, Rule 8.3(a), (b). The *Code* provision requires a lawyer to report all unprivileged knowledge of any ethical violation of another lawyer. *CODE*, *supra* note 1, DR 1-103(A). Although this statement of the rule is unequivocal, the rule appears to be followed seldomly and even more seldomly enforced. See G. HAZARD & W. HODES, *supra* note 19, at 555-57; Thode, *supra* note 31, at 98-100. The *Model Rules* require the reporting of other lawyers' conduct only when the ethical violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." *MODEL RULES*, *supra* note 3, Rule 8.3(a). Thus, the *Model Rules* restrict the reporting requirement only to the most egregious misconduct. Given the virtual nonenforcement of the *Code's* strict approach, however, the *Model Rule's* step back to a more lenient requirement does comport with the *Code* as apparently enforced.

133. The *Code* subjects a lawyer to discipline for making "a materially false statement" in his bar application or for failing "to disclose a material fact requested in connection" with it. *CODE*, *supra* note 1, DR 1-101(A). Additionally, a lawyer is prohibited from furthering the application for admission of a person known by the lawyer to be unqualified. *Id.* DR 1-101(B). Regarding disciplinary proceedings, the *Code* requires a lawyer to "reveal fully" all unprivileged knowledge or evidence concerning another lawyer or judge when requested to do so by an appropriate disciplinary authority. *Id.* DR 1-103(B). Thus, the *Code* provision merely requires lawyers to follow requirements applicable to everyone (that is, to be truthful in a state license application and to respond to an appropriate request for information by a state agency). See *supra* note 87.

Model Rule 8.1, on the other hand, goes much further. See *MODEL RULES*, *supra* note 3, Rule 8.1. It prohibits false statements in bar applications and disciplinary proceedings and also mandates disclosure of any unprivileged information when "necessary to correct a misapprehension known" by the lawyer to have arisen in such a matter. *Id.* The lawyer's obligation to make this disclosure under Rule 8.1 does not require a request from the licensing or disciplinary agency, nor

good cause exists for refusal,¹³⁴ and to disclose all material facts known to the lawyer that might be helpful to the tribunal's decision in *ex parte* proceedings.¹³⁵

With these three exceptions, however, the *Model Rules* reassert the balance created earlier in the *Code* between the models of the lawyer as zealous advocate and as officer of the court.¹³⁶ Most of the *Model Rules* do not favor the interests of the judicial system, but serve primarily the interests of the client,¹³⁷ the lawyer,¹³⁸ or both.¹³⁹ Other *Model Rules*

is it relevant whether the misapprehension is the result of a statement that was truthful when made. *Id.* The drafters of the *Model Rules* clearly intended this obligation to reach beyond the *Code's* requirement of mere truthfulness. See G. HAZARD & W. HODES, *supra* note 19, at 544, 548.

134. The mandatory provision of the *Model Rules* regarding the acceptance of appointments to represent indigents has as a *Code* counterpart only an Ethical Consideration. Compare CODE, *supra* note 1, EC 2-29 with MODEL RULES, *supra* note 3, Rule 6.2. The Ethical Considerations were not intended by the drafters of the *Code* to be mandatory. See *supra* note 61. Thus, Rule 6.2 makes mandatory what was only precatory under the *Code*. MODEL RULES, *supra* note 3, Rule 6.2.

135. There is no *Code* counterpart to this requirement under Model Rule 3.3(d). MODEL RULES, *supra* note 3, Rule 3.3(d). The rule, however, may require little more than the law requires outside of the ethical context. Courts tend to demand more candor of lawyers in *ex parte* matters than in adversary proceedings. See C. WOLFRAM, *supra* note 11, at 678-79.

136. Two of the officer of the court obligations on the *Code* list, see *supra* text accompanying notes 71-82, have no counterpart in the *Model Rules*. These two are the obligation of lawyers to reveal knowledge of improper conduct of or towards a juror, and the prohibition against a lawyer bringing or threatening to bring criminal charges solely to gain an advantage in a civil matter. Thus, while the *Code's* officer of the court obligation has been increased slightly by the *Model Rules*, see *supra* text accompanying notes 130-35, it has also been decreased in other respects.

137. Part One of the *Model Rules* governs the "Client-Lawyer Relationship" and tends to place the interests of the client above the interests of the judicial system or the general public. Model Rule 1.1 requires lawyers to provide competent representation to their clients. MODEL RULES, *supra* note 3, Rule 1.1. Model Rule 1.2 protects the client's right to control the objectives of the representation. See *id.* Rule 1.2(a) (stating that client's decisions regarding objectives of representation and settlement control); *id.* Rule 1.2(c) (stating that a client must consent to any limitation on the objectives of the representation); *id.* Rule 1.2(e) (stating that a lawyer must advise a client when ethical restrictions prohibit the lawyer from giving assistance the client expects). Model Rule 1.3 requires a lawyer to act with "reasonable diligence and promptness" in representing a client, and the comment to that rule focuses upon the client's interest in avoiding procrastination by his lawyer. *Id.* Rule 1.3 comment. A lawyer must keep his client reasonably informed and sufficiently advised so that the client can make informed decisions. *Id.* Rule 1.4(a)-(b).

The fee provisions of the *Model Rules* protect the client's interests in terms of restrictions on the amount of the fee found in Model Rule 1.5(a), the disclosure requirements found in Model Rule 1.5(b), (c), and the restrictions on the use of fee sharing found in Model Rule 1.5(e). *Id.* Rule 1.5(a), (b), (c), (e). Similarly, the general requirement of confidentiality protects the client's interests, as do the conflict of interest provisions. *Id.* Rules 1.6(a), 1.7 to 1.10. The rule governing the conduct of former government lawyers also protects the client, when the public is appropriately viewed as the former client in that context, and the same might be said of the restrictions upon the actions of former judges or arbitrators. See *id.* Rules 1.11, 1.12.

Model Rule 1.13 protects the interests of the organizational client, such as a corporation, *id.* Rule 1.13, as does the provision governing a lawyer's conduct toward a client suffering from impaired capacity, *id.* Rule 1.14. The *Model Rules'* treatment of lawyer's trust accounts and the prohibition on the commingling of funds also protects the client's interests. *Id.* Rule 1.15. Finally, several of the provisions governing withdrawal under the *Model Rules* benefit the interests of clients. *Id.* Rules 1.16(a)(2) (stating that a lawyer must withdraw if his or her physical or mental

state obligations that are coextensive with legal duties of persons other

condition prevents adequate representation of the client), 1.16(d) (stating that when terminating representation, the lawyer must take reasonable steps to protect the client's interest).

Part Two of the *Model Rules* addresses the lawyer's role as counselor rather than as advocate. All these rules serve the interests of the client rather than those of the judicial system or the general public. Model Rule 2.1, for example, requires the lawyer to give the client "independent professional judgment" and "candid advice." *Id.* Rule 2.1. Additionally, Model Rule 2.2 creates a new role for lawyers, that of intermediary between multiple clients. *Id.* Rule 2.2. Under certain circumstances the rule permits a lawyer to serve clients with differing interests, thus allowing the lawyer to facilitate a reasonable and fair resolution of mutual concerns. That role is permissible, however, only when the clients consent and when the role is consistent with each client's best interests. *Id.* Rule 2.2(a). Model Rule 2.3 also permits a lawyer to render an opinion for the use of a nonclient when the client has consented and the client's interests in the representation will not be harmed. *Id.* Rule 2.3.

Part Three of the *Model Rules* confronts the role of the lawyer as advocate and articulates the lawyer's obligations to the judicial system most clearly. A number of the rules, however, protect clients' interests. Model Rule 3.2, for example, requires lawyers to make "reasonable efforts to expedite litigation." *Id.* Rule 3.2. That rule furthers the interests of the judicial system by encouraging prompt resolution of disputes. The rule contains the additional qualification, however, that the lawyer must expedite litigation only when "consistent with the interests of the client." *Id.* Thus the client's interests prevail over those of the judicial system. The prohibition on lawyers serving as advocates and as witnesses in certain matters also serves the interests of clients. *Id.* Rule 3.7. There are several justifications for this prohibition, for example, protecting the client from having the lawyer's testimony impeached when he discloses his financial interest in the outcome of the matter. *See supra* note 84 (discussing DR 5-101(B) and DR 5-102—*Code* counterparts to Model Rule 3.7). Furthermore, as under the *Code*, when the client has a strong interest in having a particular lawyer, the judicial system's interests in avoiding the advocate-witness situation are overridden. MODEL RULES, *supra* note 3, Rule 3.7(a)(3). Also similar to its *Code* counterpart is Model Rule 3.8's treatment of prosecutors. *Id.* Rule 3.8. As noted for the *Code* provision, if the "client" of the prosecutor is defined as the public, the obligations of the prosecutor generally further that client's interests. *See supra* note 84 (discussing DR 7-103). That is, as lawyer for the general public, the prosecutor may have an obligation to see that an accused is properly charged and fairly tried because the public's interest is in adhering to the rule of law. Thus, the obligations of Model Rule 3.8, MODEL RULES, *supra* note 3, Rule 3.8, can be viewed as protective of clients' interests.

Part Four of the *Model Rules* governs transactions with persons other than clients. One of the rules in this section appears at first glance to protect the interests of the public. Model Rule 4.4 prohibits a lawyer from taking certain actions that might be harmful to third persons. *Id.* Rule 4.4. But this rule only applies when the action has no "substantial purpose" other than embarrassing or burdening that person. *Id.* The comment to the rule makes clear that the rule does not require the lawyer to subordinate the interests of the client to those of third persons, but he should not wholly disregard the interests of third persons. *Id.* Rule 4.4 comment. Thus, the rule clearly prefers the legitimate interests of clients over the legitimate interests of other members of the public.

Part Five of the *Model Rules* deals with law firms and other associations. Model Rule 5.4 prohibits lawyers from sharing fees with laymen and accepting payment from nonclients except under certain circumstances. *Id.* Rule 5.4. The rule protects clients' interests because its provisions work to assure that the lawyer's judgment on behalf of his clients is not threatened by other people interested in the fees of the lawyer.

Part Six of the *Model Rules* contains the public service obligations of lawyers. Although the focus of this section obviously is the public interest, a number of the rules further the interests of clients as well. Model Rule 6.3, for example, allows a lawyer to serve as a member of a legal services organization even though the organization has interests adverse to those of clients of the lawyer. *Id.* Rule 6.3. The rule encourages lawyers' efforts in the public interest despite the apparent conflict of interest. The rule goes on, however, to prohibit the lawyer from harming the inter-

than lawyers.¹⁴⁰ Some *Model Rules* fail both of the criteria of officer of

ests of a client as a member of those organizations. *Id.* Rule 6.3(a). Thus, the interests of the client ultimately prevail over those of the legal services organization and, presumably, the public. Model Rule 6.4 treats similarly lawyers who serve as members of law reform organizations. *Id.* Rule 6.4. When a decision of the organization will benefit a client, the lawyer shall disclose that fact but need not disclose the identity of the client. *Id.* The rule, however, does not require the lawyer to abstain from participating in a decision of the organization that might benefit the client. *Id.*

Part Seven of the *Model Rules* pertains to information about legal services. These rules serve both the interests of clients (or, rather, potential clients) and lawyers, and are discussed below, *see infra* note 139.

The rules in Part Eight of the *Model Rules* govern a lawyer's obligation to maintain the integrity of the profession. These rules generally do not require conduct in furtherance of the interests of the client, although the duty to report ethical violations of other lawyers may operate in favor of a client under certain circumstances.

138. A few of the *Model Rules* protect primarily lawyers' interests. The rules governing permissive withdrawal from the representation of a client fall in this category. Model Rule 1.16(b) permits a lawyer to withdraw under certain circumstances from the representation of a client, even if withdrawal would have a material adverse effect on the interests of the client. MODEL RULES, *supra* note 3, Rule 1.16(b). Included in these circumstances are the client's failure to pay an agreed fee, *see id.* Rule 1.16(b)(4), the client's decision to pursue a course of conduct contrary to the lawyer's advice, *see id.* Rule 1.16(b)(3), and the client's apparent use of the lawyer's services to engage in fraud or criminal activity, *see id.* Rule 1.16(b)(1), (2). Furthermore, if representation has resulted in an unreasonable financial burden on the lawyer, or the client has made the representation unreasonably difficult, the lawyer is free to withdraw, despite the negative effect on the client's interests. *Id.* Rule 1.16(b)(5). The rule requires lawyers who withdraw to "take steps to the extent reasonably practicable to protect a client's interests." *Id.* Rule 1.16(d). The rules pertaining to permissive withdrawal do not compel withdrawal by a lawyer and, therefore, cannot be characterized as part of a lawyer's obligation as an officer of the court as defined above. *See supra* text accompanying note 57.

139. The ethical restrictions on covenants not to compete are in this category. The *Model Rules* prohibit a lawyer from making or offering any agreement that restricts the right of the lawyer to practice law, unless it is part of a retirement benefit agreement. MODEL RULES, *supra* note 3, Rule 5.6. As the comment to that rule shows, the drafters were mindful of both the interests of clients in having available counsel of their choosing and of the professional autonomy of lawyers. *Id.* Rule 5.6 comment. Thus the rule protects the interests of both clients and lawyers.

The rules on advertising and solicitation, like their counterparts under the *Code*, *see supra* note 86 (discussion of *Code*, DR 2-101 through DR 2-105), serve both the interests of clients and lawyers. *See* MODEL RULES, *supra* note 3, Rules 7.1 to 7.5. The rules protect potential clients from inappropriate information and pressures that might interfere with the careful selection of legal counsel. The rules also protect established lawyers from competition from other segments of the bar.

140. As under the *Code*, *see supra* note 87, many of the ethical requirements of the *Model Rules* only require lawyers to act in a manner required of the public generally. Lawyers must avoid certain criminal conduct. *See* MODEL RULES, *supra* note 3, Rules 3.3(a)(1) (referring to fraud against a tribunal), 3.3(a)(4) (referring to knowingly offering false evidence), 3.4(a) (referring to obstruction of justice), 3.4(b) (referring to falsifying evidence or suborning perjury), 3.4(f) (referring to tampering with a witness), 3.5 (referring to acting unlawfully to influence or disrupt a tribunal), 8.1(a) (referring to giving false statements to state agency regarding bar admissions), 8.4(b) (referring to committing criminal acts adversely reflecting on a lawyer's fitness to practice).

Similarly, lawyers must not assist clients in criminal conduct. *See id.* Rules 1.2(d) (proscribing counseling a client to engage in criminal or fraudulent activity), 3.3(a)(2) (proscribing failure to make a disclosure necessary to avoid assisting a client in criminal or fraudulent acts before a tribunal), 4.1(b) (proscribing failure to make a disclosure necessary to avoid assisting a client in a criminal or fraudulent act against a third person), 5.5(b) (proscribing assisting another in the

the court obligations.¹⁴¹

Comments similar to those made about the Code's list are applicable to the *Model Rules*'. Some of the Model Rules, although generally meeting the criteria for qualifying as officer of the court obligations, sometimes operate to the advantage of the client or the lawyer. For example, as under the *Code*, the lawyer's duty to report professional misconduct may allow a lawyer to act zealously on behalf of a client by imposing on opposing counsel. A lawyer also may act zealously for his client by following the restrictions on giving advice to other parties. These rules, therefore, are less clearly officer of the court obligations in some circumstances than they might appear at first.

The *Model Rules*' officer of the court obligations are similar in other respects to the *Code* list. The *Model Rules* list is as short as the latter, perhaps indicating the similar importance placed on the two models of lawyerly behavior. Some of the obligations, such as the *Model Rules*' requirements that lawyers avoid conduct which is prejudicial to the administration of justice and report ethical violations by other lawyers, are as ineffective in practice as their *Code* counterparts.¹⁴² Simi-

unauthorized practice of law), 8.4(f) (proscribing assisting a judicial officer in conduct violating applicable law).

Lawyers also must abstain from conduct that is a violation of a civil duty. *See id.* Rules 3.9 (referring to failure to disclose personal or representational capacity before a nonadjudicative tribunal), 4.1(a) (referring to fraud against a third person), 8.2(a) (referring to knowingly false or reckless statements as to the quality or integrity of the judiciary), 8.4(c) (referring to fraud and deceit generally).

Additionally, lawyers must obey the orders or rules of a tribunal, *see id.* Rules 1.16(c), 3.4(c), and established rules of procedure, *id.* Rules 3.1 (referring to asserting a claim or defense that is frivolous), 3.4(d) (referring to failure to make sufficient effort to comply with a valid discovery request), 3.4(e) (referring to the attempt to place irrelevant matter or improper opinion before tribunal); *cf.* FED. R. CIV. P. 11.

Like the *Code*, *see supra* note 89, a number of the *Model Rules* do not require any conduct at all. Most notable is Model Rule 6.1, which encourages but does not require lawyers to engage in some form of public interest work. MODEL RULES, *supra* note 3, Rule 6.1. Similarly, Model Rule 1.6(b) provides two exceptions to the lawyer's duty to maintain the confidentiality of information relating to a representation. *Id.* Rule 1.6(b). Neither of the exceptions is mandatory, although other rules might make certain disclosures necessary to avoid assisting a client in criminal or fraudulent acts. *See id.* Rules, 1.2(d), 4.1(b); G. HAZARD & W. HODES, *supra* note 19, at 428-31. Model Rule 3.3(c) also permits, but does not require, a lawyer to "refuse to offer evidence that the lawyer reasonably believes is false." MODEL RULES, *supra* note 3, Rule 3.3(c).

Finally, some of the *Model Rules* merely clarify the distribution of authority for ethical decisions within associations for the practice of law, such as law firms. *See id.* Rules 5.1 to 5.3.

141. As under the *Code*, *see supra* note 88, some *Model Rules* serve the interests of clients or lawyers and require only that conduct expected of nonlawyers. This is true, for example, for the prohibition on aiding the unauthorized practice of law. *See* MODEL RULES, *supra* note 3, Rule 5.5(b).

142. The obligation under the *Model Rules* to avoid conduct that is prejudicial to the administration of justice, *see supra* text accompanying note 118, suffers from the same problem as its counterpart under the *Code*, *see supra* text accompanying notes 90-92. The requirement does not impose significant practical obligations beyond those of the criminal law or rules of procedure

larly, a number of the listed *Model Rules* provisions are so narrowly applicable that their effect on the whole profession is as limited as under the *Code*.¹⁴³ For example, the *Model Rules* provisions regarding the disclosure of contrary legal authority,¹⁴⁴ the adherence to the *Code of Judicial Conduct* for lawyers who are candidates for judicial office¹⁴⁵ and, to a lesser extent, the taking of reasonable remedial measures when false evidence has been offered,¹⁴⁶ are all narrow in scope and effect. Additionally, some of the *Model Rules'* officer of the court obligations also serve the interests of lawyers. Examples are the *Model Rules'* restriction on contingent fees in certain kinds of cases¹⁴⁷ and the restriction on communicating directly with parties known to be represented by counsel.¹⁴⁸

The *Model Rules*, therefore, present a vision of the lawyer as officer of the court which is essentially the same as that offered by the *Code*. The three new requirements imposed by the *Model Rules*¹⁴⁹ are not insignificant, but neither are they indicative of a fundamental change in the role of the lawyer in our society.

Ironically, a significant motivation behind the new *Model Rules* was to expand the role of the lawyer as officer of the court beyond that provided by the *Code*.¹⁵⁰ The Kutak Commission's¹⁵¹ Discussion Draft

applicable to all. Similarly, the obligation to report misconduct of other lawyers under the *Model Rules*, see *supra* text accompanying note 126, may be as disregarded in practice as its counterpart under the *Code*, see *supra* text accompanying note 93, even though it purports to be narrower in reach, and thus more realistic than the duty under the *Code*.

143. See *supra* text accompanying notes 94-105.

144. MODEL RULES, *supra* note 3, Rule 3.3(a)(3). This was also the case under the identical duty to report under DR 7-106(B)(1). CODE, *supra* note 1, DR 7-106(B)(1); see also *supra* text accompanying notes 94-97.

145. MODEL RULES, *supra* note 3, Rule 8.2(b). The *Code* also requires such adherence under DR 8-103(A). CODE, *supra* note 1, DR 8-103(A); see also *supra* text accompanying note 105.

146. MODEL RULES, *supra* note 3, Rule 3.3(a)(4). Compare this rule to its *Code* counterpart cited *supra* note 132. The *Model Rule* is narrower than its *Code* counterpart in one respect: the duty to reveal the falsity of evidence already offered expires at the "conclusion of the proceedings." MODEL RULES, *supra* note 3, Rule 3.3(b). No such time limit is contained in DR 7-102(B). CODE, *supra* note 1, DR 7-102(B).

147. Model Rule 1.5(d) prohibits the use of contingent fees in criminal cases or domestic relations work. MODEL RULES, *supra* note 3, Rule 1.5(d). These prohibitions serve the public interest of preventing overly zealous conduct in criminal cases, see *supra* text accompanying note 106, and preventing conduct that might discourage reconciliation in divorce cases. The rule's restriction also permits lawyers in both fields to charge their clients in advance for all work without fear of competition from other lawyers willing to use more creative fee arrangements. See *supra* text accompanying note 107.

148. Model Rule 4.2's restriction on lawyers communicating directly with another party known by the lawyer to be represented by counsel protects the interests of that party but, like its *Code* counterpart, also protects the interests of lawyers by preventing the subversion of their authority. See MODEL RULES, *supra* note 3, Rule 4.2; see also *supra* text accompanying notes 108-12.

149. See *supra* text accompanying notes 133-35.

150. See *supra* text accompanying note 116.

151. See *supra* note 115.

of the proposed *Model Rules*¹⁵² initially included a number of provisions that would have increased significantly the influence of the officer of the court model had they been adopted. The Discussion Draft required lawyers to disclose even privileged information if necessary to prevent a client from committing an act that would result in death or serious bodily harm of another.¹⁵³ Additionally, the draft required lawyers to disclose to a court "legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue," regardless of its effect on the client's cause.¹⁵⁴ A number of proposed rules required lawyers to act in a "fair" manner in dealing with opposing parties and counsel,¹⁵⁵ unrepresented parties,¹⁵⁶ legislative and administrative tribunals,¹⁵⁷ and fellow participants in negotiations.¹⁵⁸

Another proposed rule required lawyers to assist tribunals in "maintaining impartiality and conducting the proceedings with decorum."¹⁵⁹ The Kutak Commission's Discussion Draft also prohibited criminal defense lawyers from agreeing to represent persons who proposed to commit a crime, unless the crime was a good faith effort to test the validity or application of a law.¹⁶⁰ Additionally, a proposed rule prohibited a lawyer from participating in or assisting an unconscionable or fraudulent agreement.¹⁶¹ The Discussion Draft rules also imposed a duty on all lawyers¹⁶² to provide legal services in the public interest, with enforcement through an annual reporting requirement.¹⁶³

Each of these proposed rules would have expanded considerably the officer of the court obligations of lawyers beyond those in the *Code*. Each of the proposed rules, however, was deleted during the redrafting

152. See *supra* note 34.

153. Discussion Draft, *supra* note 34, Rule 1.7(b), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 83. Under a 1979 draft of the Kutak proposal, which preceded even the 1980 Discussion Draft, the disclosure obligation also applied to acts of clients that would destroy property or result in wrongful confinement. See Petrowitz, *supra* note 37, at 1285 n.29, 1286.

154. Discussion Draft, *supra* note 34, Rule 3.1(c), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 106. The earlier 1979 draft of the Kutak proposal contained a requirement to disclose adverse facts that "would probably have a substantial effect on the determination of a material issue of fact" except in criminal cases. See Petrowitz, *supra* note 37, at 1288 n.35.

155. Discussion Draft, *supra* note 34, Rule 3.2(a), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 112.

156. *Id.* Rule 3.6, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 115.

157. *Id.* Rule 3.12(a), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 121.

158. *Id.* Rule 4.2(a), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 123.

159. *Id.* Rule 3.7(a), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 116.

160. *Id.* Rule 3.11(a), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 120.

161. *Id.* Rule 4.3, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 125.

162. *Id.* Rule 8.1, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 142.

163. *Id.*

process and adoption of the *Model Rules*.¹⁶⁴ The Kutak Commission's early inclination to expand the lawyer's role as officer of the court lost resoundingly during the ABA's re-evaluation of the profession's ethical standards. The *Model Rules* now reflect essentially the same balance between the lawyer as zealous advocate and the lawyer as officer of the court as in the *Code of Professional Responsibility*.

The disciplinary standards for lawyers under the *Code* and the *Model Rules*, therefore, provide few obligations that are products of the officer of the court model of lawyerly behavior. Nonetheless, both bodies of disciplinary law emphatically reassert the profession's claim that lawyers are officers of the court.¹⁶⁵ The analysis above renders the assertion suspect.¹⁶⁶

D. *The Obligation in the Nondisciplinary Context*

Although articulated most directly in the disciplinary law promulgated by state supreme courts, the lawyer's obligation as an officer of the court is occasionally declared, and at times more forcefully proclaimed, in other contexts. An appraisal of the current obligation of lawyers as officers of the court, therefore, must include application of the obligation outside the disciplinary context.

The most notable application outside that context occurs when a criminal defense lawyer has taken possession of the fruits or instrumentalities of a crime.¹⁶⁷ While the setting of the issue varies,¹⁶⁸ the courts have declared consistently that a lawyer is under a duty as an officer of

164. The controversy over these and other rules in the Discussion Draft is noted in C. WOLFRAM, *supra* note 11, at 61-62.

165. See *supra* text accompanying notes 9-10.

166. For a discussion of the deficiencies of the current officer of the court obligation, see *infra* text accompanying notes 201-34.

167. The duty of a lawyer as an officer of the court in these circumstances also arises in the disciplinary context. A leading case pertaining to the lawyer's duty to disclose the fruits and instrumentalities of a client's crime is *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967). That decision was rendered in a proceeding to determine whether the lawyer should be removed from the roll of lawyers authorized to practice in a federal district court. *Id.* at 361. The duty is discussed, therefore, in the context of a federal court's disciplinary proceeding.

168. Frequently the context is the admissibility as evidence of the fruits and instrumentalities of the crime or testimony about observations regarding them. See, e.g., *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); *People v. Nash*, 418 Mich. 196, 215-25, 341 N.W.2d 439, 446-51 (1983). The issue also arises in the context of a subpoena enforcement proceeding. See, e.g., *In re 1976 Grand Jury*, 534 F.2d 719 (7th Cir. 1976); *Anderson v. State*, 297 So. 2d 871 (Fla. App. 1974); *State v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964). Occasionally the context may be the criminal prosecution of the defense lawyer for failing to deliver the physical evidence of a crime to the proper authorities. See, e.g., *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975) (concerning failure to report location of dead bodies); *Commonwealth v. Stenhach*, 356 Pa. Super. 5, 514 A.2d 114 (1986) (concerning hindering prosecution).

the court to disclose the evidence to the prosecution.¹⁶⁹ At first glance, this obligation is startling. One cannot imagine a clearer example of a lawyer acting contrary to the interests of the client. That this obligation arises in the criminal defense context, in light of the protections usually afforded the accused, makes it more remarkable. Furthermore, the obligation goes beyond that imposed on laymen in society. While the receipt of stolen property and the obstruction of justice are crimes,¹⁷⁰ the failure to surrender the property or evidence to a prosecutor or court does not compound the sanction.¹⁷¹ Thus, the obligation to disclose fruits or instrumentalities of a client's crime qualifies as part of the lawyer's duty as officer of the court, even though it may arise outside the disciplinary context.

The lawyer's obligation to reveal the fruits and instrumentalities of a crime, however, must not be unduly emphasized as a component of the duty of an officer of the court. Because the obligation arises only when a lawyer actually has taken possession of the physical evidence of a client's crime,¹⁷² the lawyer can avoid the duty by refusing possession.¹⁷³ The case law does not require a lawyer to seek out possession of

169. See, e.g., *Anderson*, 297 So. 2d at 875; *Nash*, 418 Mich. at 219-25, 341 N.W.2d at 448-50; *Stenhach*, 356 Pa. Super. at 16, 514 A.2d at 119; *Ollwell*, 64 Wash. 2d at 833, 394 P.2d at 684-85.

170. See MODEL PENAL CODE, *supra* note 90, § 223.6. In *Ryder*, 263 F. Supp. at 360, for example, the defense lawyer had taken possession of cash and a sawed-off shotgun from a client's safe deposit box and placed them in his own safe deposit box. The trial court, in considering whether to discipline the lawyer, noted that "the law against concealing stolen property and the law forbidding receipt and possession of a sawed-off shotgun contain no exemptions for a lawyer who takes possession with the intent of protecting a criminal from the consequences of his crime." *Id.* at 369. Thus, lawyers are subject to the same prohibitions on the possession of contraband as are nonlawyers.

171. See MODEL PENAL CODE, *supra* note 90, §§ 242.0, 242.3.

172. In one case, however, a court held that a criminal statute prohibiting hindering prosecution and tampering with evidence was unconstitutionally overbroad as applied to criminal defense lawyers. *Stenhach*, 356 Pa. Super. at 25-27, 514 A.2d at 123-25. In *Stenhach*, the court found that the criminal defense lawyer in possession of the fruits and instrumentalities of a crime had a duty to deliver the evidence to a prosecutor under certain circumstances. *Id.* at 23-24, 514 A.2d at 123. The court, however, noted:

The functions of the attorney counseling a criminal defendant have a constitutional dimension. In opposing unreasonable searches and seizures, in preventing self-incrimination and in rendering effective assistance of counsel, the defense attorney is charged with the protection of fourth, fifth and sixth amendment rights. In performing these functions, the defense attorney might run afoul of the statutes against hindering prosecution and tampering with evidence; thus he may not have adequate notice of what conduct might be a crime, and he is subject to the threat of arbitrary and discriminatory prosecution. *Id.* at 27, 514 A.2d at 125. The court in *Stenhach*, therefore, reached the seemingly odd conclusion that lawyers, unlike nonlawyers, have an obligation to deliver evidence of a crime to a prosecutor, but that lawyers, unlike nonlawyers, may not be prosecuted for their continued possession of such evidence. Conceivably, the lawyer could be disciplined or subjected to the sanction of contempt for failing to disclose the evidence.

173. If a criminal defense lawyer locates physical evidence of a client's crime but does not take possession of it, the lawyer has no obligation to reveal his observations. See *Clutchette v.*

the evidence in order to disclose it. In addition, some courts permit a lawyer to return the fruits and instrumentalities of a crime to his client in order to avoid the duty of disclosure.¹⁷⁴ As a component of the officer of the court obligation, therefore, the duty is narrow and arises largely when the lawyer has accepted the evidence in ignorance or as the result of poor advice.¹⁷⁵

Courts occasionally recognize greater duties on the part of lawyers who are themselves criminal defendants. For example, in *United States v. DeLucca*,¹⁷⁶ the defendant lawyer was convicted of conspiracy to distribute cocaine. He argued that, although he was present during the relevant meetings of the other defendants, he took no part in the discussions and was not a participant in the conspiracy.¹⁷⁷ The court rejected this argument and required more than inaction to avoid the inference of conspiracy, especially when the defendant is a lawyer.¹⁷⁸ The court may have been noting merely a potential conspirator's duty to disassociate himself from the conspiracy of others in order to avoid criminal liability.¹⁷⁹ Nevertheless, the court's repeated reference

Rushen, 770 F.2d 1469, 1472 (9th Cir. 1985); *People v. Meredith*, 29 Cal. 3d 682, 696, 631 P.2d 46, 54, 175 Cal. Rptr. 612, 620 (1981).

174. In *Stenhach*, 356 Pa. Super. at 23-24, 514 A.2d at 123, the court noted:

[A] criminal defense attorney in possession of physical evidence incriminating his client may, after a reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another and without altering, destroying or concealing it or impairing its verity or availability in any pending or imminent investigation or proceeding. Otherwise, he must deliver it to the prosecution on his own motion.

Id.; see also *Hitch v. Pima County Superior Court*, 146 Ariz. 588, 708 P.2d 72 (1985).

The corresponding advice to the client is tricky to avoid counseling or assisting illegal activity, but the disclosure duty can be readily averted. Both the *Code*, DR 7-102(A)(7), *Code*, *supra* note 1, DR 7-102(A)(7), and Model Rule 1.2(d), MODEL RULES, *supra* note 1, Rule 1.2(d), prohibit a lawyer from counseling or assisting a client to engage in illegal conduct. Thus, the criminal defense lawyer, confronted with a client in possession of the fruits or instrumentalities of a crime, must avoid advising the client to engage in the obstruction of justice by the destruction or concealment of the evidence. The dilemma, of course, is a favorite sport in law school professional responsibility courses. See, e.g., T. MORGAN & R. ROTUNTA, *supra* note 51, at 222.

175. In the leading case of *Ryder*, 263 F. Supp. at 360, the criminal defense lawyer discussed with a former local bar official and a "retired judge and distinguished professor of law" the propriety of taking possession of his client's cash and sawed-off shotgun. *Id.* at 363. Both individuals erroneously gave the defense lawyer advice that his course of action was appropriate. *Id.* at 362-64.

176. 630 F.2d 294 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

177. *Id.* at 300-01.

178. *Id.* at 301. The court noted:

If he did not intend to take part in the conspiracy, he had a duty, as an attorney, to report the matter to the proper parties and tell the members of the conspiracy that he wanted to withdraw and have nothing to do with their plan to purchase and distribute cocaine.

Id. (emphasis added). The court further noted that: "[The defendant lawyer], as an attorney, had a high duty to take some affirmative action to defeat or disavow the purpose of the conspiracy before an overt act was committed in furtherance of the conspiracy." *Id.* (emphasis added).

179. See MODEL PENAL CODE, *supra* note 90, § 5.03(6), (7); *United States v. Jimenez*, 622

to the higher duty of a lawyer suggests that the court expected more from the defendant lawyer than from members of the general public. In fact, the court declared expressly that "it is appropriate to consider *the canons of professional responsibility* as a factor in determining [the defendant lawyer's] willing participation in crime."¹⁸⁰ The court did not explain how the canons ought to be considered in those cases.

Courts have referred to lawyers' officer of the court obligations in the nondisciplinary context in civil litigation as well. For example, in *Minority Police Officers Association v. City of South Bend*,¹⁸¹ Judge Posner reminded the parties' counsel that lawyers, as officers of the court, have a "professional obligation" to assist the federal courts in policing the constitutional and statutory limitations on the courts' subject matter jurisdiction.¹⁸² The case does not make clear whether the defendant's lawyer, who admitted having doubts about the appealability of the district court's order but consented to the appeal for tactical reasons, had any good faith basis for his consent.¹⁸³ If he did, then the duty of zealous representation under either the *Code*¹⁸⁴ or the *Model Rules*¹⁸⁵ would have compelled his pursuit of the appeal. Under those circumstances, Judge Posner's declaration would be startling, because it would require a lawyer to have greater fidelity to the principles of jurisdiction than to the client's interests, even when a good faith argument for the client's jurisdictional position exists. Given the brevity of the facts presented in the opinion on the issue, however, the extent of Judge Posner's view is merely a matter of speculation.

A few civil cases also have noted an obligation of lawyers to reveal adverse facts to their opponents. In *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*,¹⁸⁶ for example, a plaintiff's lawyer failed to disclose to the defendant's counsel that the plaintiff had died after filing the suit but prior to the settlement of the case.¹⁸⁷ The court recognized that the plaintiff's lawyer had a duty of zealous representation, but con-

F.2d 753, 755 (5th Cir. 1980).

180. *DeLucca*, 630 F.2d at 301 (emphasis added).

181. 721 F.2d 197 (7th Cir. 1983).

182. *Id.* at 199. Judge Posner declared:

We therefore take this opportunity to remind the bar that a federal court does not acquire subject-matter jurisdiction by the consent of the parties, that we have an independent obligation to police the constitutional and statutory limitations on our jurisdiction, and that *counsel, as officers of the court, have a professional obligation to assist us in this task.*

Id. (citation omitted) (emphasis added).

183. *Id.*

184. *CODE*, *supra* note 1, DR 7-101(A).

185. *MODEL RULES*, *supra* note 3, Rule 1.1.

186. 571 F. Supp. 507 (E.D. Mich. 1983).

187. *Id.* at 508.

demned his failure to disclose the death of the plaintiff.¹⁸⁸ In the court's view, this failure approached fraud because the opposing counsel had settled in part because of the strong impression that the plaintiff would have made upon the jury at trial.¹⁸⁹

Another court similarly condemned a lawyer's conduct as approaching fraud in *Kath v. Western Media, Inc.*¹⁹⁰ Appellee's lawyer possessed a letter from a witness, also a lawyer, which indicated that the witness's deposition might have been false.¹⁹¹ Appellee's lawyer did not reveal this letter to appellant's counsel prior to settling the dispute at the trial level.¹⁹² The Wyoming Supreme Court reversed the trial court's confirmation of the settlement, declaring that appellee's lawyer had a duty to reveal the letter.¹⁹³ The court seemed to view the conduct of the lawyer in refusing to disclose adverse facts as approaching fraud, especially because the parties had intended to use the deposition as evidence at trial.¹⁹⁴

If the *Virzi* and *Kath* courts were truly concerned with the nondisclosure of facts because they were important to the settlements reached, rather than because of the lawyers' potential deception, the cases expand the officer of the court obligation in civil litigation beyond that stated in the law of legal ethics.¹⁹⁵ The courts in these cases emphasize, however, the deliberate deception the lawyers apparently intended by nondisclosure. Both the *Code*¹⁹⁶ and *Model Rules*¹⁹⁷ already prohibit

188. *Id.* at 512.

189. *Id.* The court recognized that plaintiff's lawyer had a duty of zealous representation, but also noted a duty of "candor and fairness" both to the court and to opposing counsel. *Id.* The court stated:

There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel. At the same time, counsel has a duty to zealously represent his client's interests. That zealous representation of interest, however, does not justify a withholding of essential information, such as the death of the client, when the settlement of the case is based largely upon the defense attorney's assessment of the impact the plaintiff would make upon a jury, because of his appearance at depositions. Plaintiff's attorney clearly had a duty to disclose the death of his client both to the Court and to opposing counsel prior to negotiating the final agreement.

Id. at 512.

190. 684 P.2d 98 (Wyo. 1984).

191. *Id.* at 98-100.

192. *Id.* at 100.

193. *Id.* at 101-02.

194. *Id.* at 99, 101-02.

195. The *Code* only requires disclosure of certain adverse legal authority and of facts that are required by law to be revealed. See *CODE*, *supra* note 1, DR 7-102(A)(3), DR 7-106(B)(1). The *Model Rules* similarly require disclosure of the same legal authority, see *MODEL RULES*, *supra* note 3, Rule 3.3(a)(3), and of facts lawfully sought by an opponent, see *id.* Rule 3.4(a), (c), as well as certain adverse facts in *ex parte* proceedings, see *id.* Rules 3.3(a)(3), 3.3(d), 3.4(a),(c).

196. *CODE*, *supra* note 1, DR 7-102(A)(6), (7).

197. *MODEL RULES*, *supra* note 3, Rule 3.3(a)(2).

this deception on the parties and the court.

The courts' use of the officer of the court obligation in the nondisciplinary context exhibits two characteristics. First, the courts use the concept in a general and vague manner. Thus, when a court concludes that a lawyer has an obligation to reveal a fact relevant to a civil case,¹⁹⁸ it may declare that the duty arises out of the lawyer's duty as an officer of the court, even though ethical provisions specifically require disclosure by lawyers¹⁹⁹ and even though certain rules of civil procedure require disclosure by laymen as well.²⁰⁰ Second, as in the disciplinary context, these additional officer of the court obligations are quite narrow in their effect. Courts rely on the officer of the court obligation in the most extreme situations, such as when lawyers possess criminal evidence or engage in intentional deception.

IV. THE DEFICIENCIES OF THE CURRENT OBLIGATION OF LAWYERS AS OFFICERS OF THE COURT

Surprisingly few of the current ethical duties of lawyers derive from the officer of the court model of lawyerly behavior. Additionally, most of these few officer of the court obligations are vague, seldom enforced, or narrow in their application, or serve primarily lawyers' interests while merely appearing to further the interests of society or of the judicial system.²⁰¹ The same is true of the lawyer's duties outside of the disciplinary context.²⁰² Lawyers, frankly, are not obligated to serve as officers of the court in any meaningful sense. Whether in the ethical or nondisciplinary context, the law applicable to lawyers leans conclusively, if not exclusively, in favor of the lawyer's duty to the client.²⁰³

Despite the predominance of the lawyer's duty of zealous advocacy, the profession continues to characterize itself publicly as a body of officers of the court. This characterization is present even in the *Model*

198. For a discussion of two such cases, see *supra* text accompanying notes 186-97.

199. See *supra* notes 196-97.

200. See FED. R. CIV. P. 26(e)(2). Rule 26(e)(2) states:

A party is under a duty seasonably to amend a prior response [to a request for discovery] if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Id. (emphasis added).

201. See *supra* text accompanying notes 90-112 (*Code*), 136-48 (*Model Rules*).

202. See *supra* text accompanying notes 167-200.

203. Indeed, under existing law the ABA Committee on Professionalism was wrong when it declared that "[w]here the two conflict, the duty to the system of justice must transcend the duty to the client." ABA Report, *supra* note 38, at 30. There are few situations under the *Code* or the *Model Rules* in which the lawyer's duty to the client is subordinated to the lawyer's duty to the court.

Rules, the latest manifestation of the organized profession's rejection of a greater public interest role for lawyers.²⁰⁴ Thus, the profession reaps public esteem, self-satisfaction, and other benefits from its allegedly critical and quasi-official role in the judicial system,²⁰⁵ while being obligated to act nearly exclusively as zealous agents of its clients.

The officer of the court characterization has other unfortunate effects. For the general public, the label creates the legitimate expectation that lawyers will act in a principled, quasi-public capacity. Because the actual ethical requirements of lawyers compel members of the profession to act primarily in favor of their clients, it is not surprising that lawyers' professional and personal conduct frequently disappoints the public. The label thus results in public confusion and cynicism.²⁰⁶ It is ironic that the ABA, in asserting repeatedly that lawyers are officers of the court, potentially misleads the public in violation of the spirit of its own rules on truthful advertising.²⁰⁷

For the profession, the officer of the court characterization engenders ethical conflict when this vague, but palpable, obligation collides with the concrete ethical duties of zealous advocacy. The label thus creates confusion and cynicism within the bar itself as lawyers labor under the broad directive to serve as officers of the court while furthering the interests of their clients.²⁰⁸

The predominance of the role of zealous advocate is not as disturbing as the professional hypocrisy that obscures it. The bar could resolve this dilemma by eliminating any reference to the characterization of lawyers as officers of the court from its public proclamations regarding the role of lawyers. This approach would recognize candidly that the zealous advocate model of lawyerly behavior has prevailed. The argument has been made that lawyers best serve society by being zealous advocates on behalf of their clients.²⁰⁹ A choice of that model by the

204. See *supra* text accompanying notes 150-64.

205. See *supra* text accompanying notes 26-30.

206. See Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1140 (1978); cf. Thode, *supra* note 31, at 100.

207. Under the *Code*, a lawyer must not "use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." CODE, *supra* note 1, DR 2-101(A); see also MODEL RULES, *supra* note 3, Rule 7.1. If the characterization of lawyers as officers of the court has little meaning, the bar itself is publicly disseminating a statement that violates this ethical principle.

208. The obligation of lawyers to act as officers of the court receives clear expression only in the preambles to the *Code* and *Model Rules*. See *supra* note 9. The duties of loyal and zealous representation of the client, however, are clearly stated in the language of the disciplinary standards themselves. See, e.g., CODE, *supra* note 1, DR 5-101, DR 5-105, DR 7-101; MODEL RULES, *supra* note 3, Rules 1.1, 1.3, 1.7.

209. At one point the *Code* provides that the lawyer's duty to the judicial system is merely to represent the client zealously. See CODE, *supra* note 1, EC 7-19. As noted above, see *supra* note

bar at least would mitigate the confusion and cynicism generated by the present public description of lawyers.

The organized bar, however, evidences no inclination to abandon the characterization of lawyers as officers of the court. As noted above, the ABA began its recent revision of the *Code*, which eventually resulted in the *Model Rules*, with the intention of expanding the lawyer's role as an officer of the court.²¹⁰ The process of compromise in drafting and adopting the *Model Rules* removed much of that tenor from the earliest drafts.²¹¹ What was not removed, however, was the ABA's prominent reassertion in the first sentence of the Preamble to the *Model Rules* that lawyers remain officers of the court.²¹² Additional evidence that the bar intends to adhere to this image of lawyers is the report of the ABA Committee on Professionalism, which recently concluded that the bar should place greater emphasis on the role of lawyers as officers of the court.²¹³

116, the Association of Trial Lawyers of America has taken this position in its proposed *Code of Conduct*, which it offered as an alternative to the ABA's *Code* and *Model Rules*. That document notes:

Serving clients is the lawyer's basic reason for being a lawyer, and the exceptions to the fundamental rule of absolute loyalty to clients must be minimal, and must be strictly construed.

. . . .

We continue to disagree with the Kutak Commission in our basic approach to legal ethics. We believe that a code of lawyers' conduct is important legislation for the entire community, because it affects every person's ability to exercise basic rights. We believe that the basic purpose of such a code should be to enable lawyers to help people—to leave the individual lawyer free to help the individual client.

. . . .

. . . We are licensed to represent people in court, which often means people in trouble with the law, and with the government. We are the citizens' champions against official tyranny.

We cannot continue to have a democratic system, as we know it, without a legal profession whose members are free to perform that function.

ATLA CODE, *supra* note 116, Preface, *reprinted in* T. MORGAN & R. ROTUNDA, *supra* note 116, at 205.

210. *See supra* note 116.

211. *See* C. WOLFRAM, *supra* note 11, at 61-62; *see also supra* text accompanying notes 150-64.

212. MODEL RULES, *supra* note 3, Preamble. That sentence reads: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* (emphasis added). Interestingly, the Kutak Commission's original Discussion Draft of the *Model Rules* used similar terminology to describe the role of lawyers but in a different sequence, suggesting a different emphasis upon the two models of lawyerly behavior. The Discussion Draft's Preamble read: "A lawyer is an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the quality of justice." Discussion Draft, *supra* note 34, Preamble (emphasis added), *reprinted in* T. MORGAN & R. ROTUNDA, *supra* note 34, at 71. Thus, the ABA, in adopting the *Model Rules*, candidly moved the characterization of lawyers as officers of the legal system to a secondary position behind that of lawyers as zealous advocates. What the ABA failed to indicate, however, was how distant a second place the former is to the latter under the *Model Rules*.

213. *See supra* text accompanying notes 38-43.

Given the bar's determination to preserve its characterization of lawyers as officers of the court, the profession should consider changing the ethical obligations of lawyers to permit the ingenuous use of the label. To imbue the officer of the court label with even minimal substance, the bar must ensure that lawyers' duties serve in a significant way two pre-eminent concerns: The fair and efficient operation of the judicial system and the protection of innocent persons from harm. If lawyers are not required to address these fundamental concerns in their professional behavior, then it is difficult to justify their collective characterization as quasi-official participants in the judicial process and as members of a public profession.

A number of the existing responsibilities of lawyers do serve these concerns. The ethical obligations to reveal certain adverse legal authority,²¹⁴ to disclose certain fraud,²¹⁵ and to avoid prejudicing the administration of justice²¹⁶ all further the fair and efficient operation of the judicial system and the protection of innocent people from harm. Review of lawyers' current obligations, however, indicates that the law does not require what the public reasonably might expect of the profession to justify its officer of the court characterization. This failure can best be examined by dividing lawyers' officer of the court obligations²¹⁷ into two categories. The first category consists of those obligations that require lawyers to subordinate their own interests in favor of the interests of the judicial system or of the public. The second category is made up of officer of the court obligations that require lawyers to subordinate the interests of their clients in favor of the interests of the judicial system or the public.

The officer of the court obligations that primarily require the subordination of the lawyer's interests are few.²¹⁸ Under the *Code*, only three of the officer of the court duties fall clearly in this category: The obligation of all lawyers to report the ethical violations of other lawyers,²¹⁹ the obligation to refrain from stating or implying that they can influence a judge or other governmental official improperly,²²⁰ and the obligation of lawyers who are candidates for judgeships to comply with the restrictions on political activities applicable to incumbent judges.²²¹

214. See *supra* text accompanying notes 73, 119.

215. See *supra* text accompanying notes 75, 81, 125.

216. See *supra* text accompanying notes 71, 118.

217. See *supra* text accompanying notes 71-82 (*Code*) and 118-29 (*Model Rules*) for lists of these obligations.

218. As noted above in a narrower context, see *supra* note 55, when a lawyer is required to subordinate the interests of the client, his own interests are affected as well.

219. See *supra* text accompanying note 72.

220. See *supra* text accompanying note 82.

221. See *supra* text accompanying note 76.

The *Model Rules* list adds the duty of lawyers to correct misapprehensions known to have arisen in an application for admission to the practice of law or in a disciplinary matter²²² and the duty to refrain from attempting to avoid appointment by a court to represent people in need of legal services.²²³

The law of legal ethics thus expects lawyers to subordinate their own interests to those of the judicial system and the public in only minimal ways. The codes of ethics do not obligate lawyers to provide free legal services to the poor for the benefit of the fair and efficient operation of the judicial system.²²⁴ Nor must lawyers protect innocent persons from harm by disclosing even unprivileged information showing conclusively that the wrong person has been arrested or convicted of a crime,²²⁵ even when the client's interests would not be harmed by this disclosure.²²⁶ What is so deplorable about the present dearth of requirements which subordinate the interests of lawyers to those of the judicial system is that society might well expect more of those publicly professing themselves to be officers of the court. Lawyers could expand their ethical duties here without significantly infringing on their duties to their clients. Their obligation to serve as zealous advocates cannot justify their refusal. Only the profession's collective self-interest explains the narrowness and prevents the expansion of the officer of the court obligations that subordinate the interests of lawyers to those of the judicial system and the public.²²⁷

222. See *supra* text accompanying note 127.

223. See *supra* text accompanying note 129.

224. The *Code* urges but does not require lawyers to provide *pro bono* legal services. See *CODE*, *supra* note 1, EC 2-25. Similarly, Model Rule 6.1 merely encourages lawyers to render public interest legal services. MODEL RULES, *supra* note 3, Rule 6.1. The obligation, however, was part of the Kutak Commission's Discussion Draft. Proposed Model Rule 8.1 mandated *pro bono* legal services and annual reporting to show that the obligation had been fulfilled. Discussion Draft, *supra* note 34, Rule 8.1, reprinted in T. MORGAN & R. ROTUNDA, *supra* note 34, at 142. The ABA House of Delegates did not adopt the mandatory approach as part of the *Model Rules*. See C. WOLFRAM, *supra* note 11, at 952-53.

225. Both the *Code* and the *Model Rules* provide exceptions to the confidentiality provisions that permit disclosures, even of confidential material, when necessary to prevent certain crimes. See *CODE*, *supra* note 1, DR 4-101(C)(3); MODEL RULES, *supra* note 3, Rule 1.6(b)(1). Neither body of disciplinary law, however, mandates disclosure, even when the information is not viewed as confidential.

226. A lawyer might have information regarding a particular crime that is not related to the representation of any client. For example, the lawyer may have witnessed the event or have learned information from a reliable source regarding it. Disclosure of such information might not be detrimental to any client.

227. In this category it is not possible for lawyers to explain the narrowness of their officer of the court obligations as resulting from their primary duty to clients as zealous advocates. There has been considerable discussion among commentators about the reasons for the organized bar's persistent preference for its own interests and minimal concern for the public interest in formulating its ethical principles. Professor Morgan views the prolawyer skewing of the ethical rules as the

More of the officer of the court obligations under current law²²⁸ subordinate the interests of clients in favor of the interests of the judicial system.²²⁹ Each of these obligations infringes on the lawyer's duty of zealous advocacy.²³⁰ Thus, the profession has been willing to impose on the interests of clients more frequently in the name of the officer of the court characterization than it has been willing to impose on its own interests.

Although the obligations that subordinate the interests of clients are more numerous, they too fail to warrant the profession's continued self-characterization as officers of the court. The narrowness of several of the individual requirements, such as the duties to reveal adverse legal authority²³¹ and to disclose the fraudulent testimony of a client,²³² was described above.²³³ The lack of any duty to disclose even unprivileged information necessary to prevent the commission of a violent crime exemplifies the collective narrowness of these obligations.²³⁴ The

result of lawyers' unintentional biases in viewing and resolving practical problems. See Morgan, *supra* note 23, at 739-40. Professor Rhode is less forgiving of lawyers. See Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); see also Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

228. This Article's definition of officer of the court obligations includes only those ethical requirements that compel lawyers to subordinate their own interests and those of their clients to the interests of the judicial system and of the public. See *supra* note 57. The first category of officer of the court obligations, discussed *supra* text accompanying notes 218-27, involved those obligations that primarily require the subordination of the lawyer's interests. The second category is made up of the lists of officer of the court obligations, see *supra* text accompanying notes 71-82 (*Code*) and 118-29 (*Model Rules*), less those contained in the first category that pertained to the obligations which subordinated the interests of the lawyer, see *supra* text accompanying notes 218-23.

229. By sheer arithmetic it can be seen that three of the *Code's* officer of the court obligations fall into the first category, see *supra* text accompanying notes 219-21, and the eight remaining obligations fall within the second, see *supra* text accompanying notes 71-82. Under the *Model Rules*, there are five officer of the court obligations within the first category, see *supra* text accompanying notes 219-23, and only the remaining six in the second category, see *supra* text accompanying notes 118-29.

230. To the extent that an officer of the court obligation requires the subordination of the client's interests to those of the judicial system or of the public, the lawyer's duty to pursue the objectives of the client is necessarily diminished. Thus, the client's expectation of zealous representation from his lawyer also is diminished.

231. See *supra* text accompanying notes 73, 119.

232. See *supra* text accompanying notes 75, 81, 125.

233. For discussion of the narrowness of the duty to disclose adverse legal authority, see *supra* text accompanying notes 94-96, 144. The narrow range of the lawyer's duty to reveal a client's fraud is discussed above, see *supra* text accompanying notes 99-104, 146.

234. Both the *Code* and the *Model Rules* provide exceptions to the confidentiality provisions that permit disclosures, even of confidential material, when necessary to prevent certain crimes. *CODE*, *supra* note 1, DR 4-101(C)(3); *MODEL RULES*, *supra* note 3, Rule 1.6(b)(1). Neither body of disciplinary law, however, mandates disclosure, even when the information is not confidential. As some professions are learning, however, this duty of disclosure may be developing in the law of torts. See *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), *vacating* 13 Cal. 3d 177, 529 P.2d 552, 118 Cal. Rptr. 129 (1974).

bar could expand these obligations to better protect the fair and efficient operation of the judicial system and the defense of innocent people from harm without undue infringement on the lawyer's duty to represent clients zealously.

Because the officer of the court obligations in both categories are too lax to further these fundamental societal concerns, the profession does not warrant the use of that characterization. Thus, the ABA should revise the ethical responsibilities of lawyers to give substance to the officer of the court label.

V. PROPOSALS FOR INVIGORATING THE OFFICER OF THE COURT OBLIGATION

The law governing lawyers' behavior could achieve a more meaningful officer of the court obligation. The obligation largely is manifested in the law of legal ethics, which is always subject to change by the courts that govern the practice of law.²³⁵ Clearly the legal profession insists on maintaining²³⁶ and even expanding²³⁷ the public image of lawyers as officers of the court. What is uncertain, however, is whether the profession also intends to render its self-characterization accurate by giving meaning to the lawyer's role as officer of the court.

There is ample reason to doubt the organized bar's resolve, despite its repeated public proclamations to the contrary. The process of re-drafting and adoption removed most of the early officer of the court flavor from the ABA's *Model Rules*.²³⁸ Additionally, a significant segment of the bar is convinced that both the *Code* and the *Model Rules* already go too far in furthering the officer of the court role to the detriment of the zealous advocate role.²³⁹ In the face of this apparent resistance to adding substance to the role of lawyers as officers of the court, the efficacy of the ABA Committee on Professionalism's recent recommendation that the role receive greater emphasis in the regulation of the bar is doubtful.²⁴⁰ The question becomes, therefore, whether significant adjustments could be made to permit the candid characterization of lawyers as officers of the court without so fundamental a change to the role of lawyers in society that the proposal would fail to win the

235. See C. WOLFRAM, *supra* note 11, at 22-32. State legislatures occasionally attempt to expand the officer of the court duties of lawyers. A Minnesota statute provides that lawyers who have deceived or colluded against clients are guilty of a misdemeanor and must forfeit treble damages to the client or other parties harmed. MINN. STAT. § 481.071 (1984). See also MONT. CODE ANN. § 37-61-406 (1987).

236. See MODEL RULES, *supra* note 3, Preamble (quoted *supra* note 212).

237. See *supra* text accompanying note 38-43, 213.

238. See *supra* text accompanying notes 210-13.

239. See ATLA CODE, *supra* note 116, Preamble.

240. ABA Report, *supra* note 38, at 28-30.

approval of the organized bar.

If the law of legal ethics is to give substance to the obligation of lawyers to act as officers of the court, it must address adequately the concerns of the fair and efficient operation of the judicial system and the protection of innocent persons from harm. Any adjustment of the current obligations of lawyers in favor of these concerns will require subordination of certain interests of lawyers or clients or both. Nevertheless, a significant expansion of the officer of the court obligation could be accomplished without undue disruption of the present relationship between lawyers and their clients.

A. *Subordination of the Lawyer's Interests*

If the only interests harmed by expansion of the officer of the court role are those of lawyers themselves, then more sacrifice should be expected of the profession. No reference to the lawyer's duty of zealous advocacy excuses the refusal to expand this category of officer of the court obligations.

The profession's duty to provide free legal assistance to the needy is compelling and fundamental to the role of an officer of the court. The duty would further society's concerns about the fair and efficient operation of the judicial system and the protection of innocent persons from harm. Nevertheless, the Kutak Commission's proposed obligation to provide free legal assistance failed to win support from the ABA House of Delegates in its adoption of the *Model Rules*.²⁴¹

Even the ABA's Commission on Professionalism,²⁴² which recently urged greater emphasis on the role of lawyers as officers of the court, recommended that *pro bono* activities by lawyers only be encouraged rather than mandated.²⁴³ The reasoning supporting the recommendation is unconvincing. The Commission believed that "it would be antithetical to the tenets of public service to have to conscript lawyers" to assist the poor.²⁴⁴ Of course, it would be preferable if all lawyers freely fulfilled their ethical duties. Rules dictating conduct tend to degrade the professionalism of lawyers who would act rightly anyway. Ethical dictates are necessary, however, to bring the less conscientious in the profession up to minimum levels of expected behavior. If *pro bono* service is an important component of a lawyer's obligation to society, the law must oblige all lawyers to conform. The rule's existence may embar-

241. See C. WOLFRAM, *supra* note 11, at 952-53. For an argument that the voluntary approach is preferable, see Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980).

242. See *supra* text accompanying note 38.

243. ABA Report, *supra* note 38, at 47-50.

244. *Id.* at 49.

ness the profession as a public admission that coercion is necessary, but the alternative is to leave those responsibilities largely unfulfilled.

The Commission on Professionalism also asserted that a *pro bono* obligation might require lawyers to represent clients "unwillingly" and to the "detriment of those clients."²⁴⁵ That some lawyers are unwilling to perform *pro bono* service is true. It is also true that some types of *pro bono* service, such as the representation of an accused felon, would be beyond the competence of many lawyers with no experience in criminal matters.²⁴⁶ These limitations should not excuse lawyers from providing the *pro bono* services they are competent to handle and should not relieve the entire profession of its obligation to provide legal services to the needy. The only candid justification for the lack of a *pro bono* obligation is the profession's self-interest in avoiding it.²⁴⁷

It is also inexcusable that the law of legal ethics does not obligate lawyers to come forward with information, even if unprivileged²⁴⁸ and unrelated to the representation of a client, that is material to a serious judicial proceeding, such as a felony prosecution. If no client interests are involved, the absence of such an obligation can only be deemed an omission in favor of lawyers' interests in remaining uninvolved. That a lawyer with firsthand knowledge of an innocent person's arrest or conviction has no professional duty to reveal that information to the authorities should be a source of embarrassment to the profession. Of course, other members of society have no legal duty to volunteer similar information, but neither do they publicly describe themselves as officers of the court. This obligation could be applicable to civil as well as crimi-

245. *Id.*

246. Both DR 6-101 of the *Code*, *CODE*, *supra* note 1, DR 6-101, and Model Rule 1.1 MODEL RULES, *supra* note 3, Rule 1.1, require competent representation of the client. Thus, the representation of a client in an area in which the lawyer is incompetent subjects the lawyer to discipline. In *United States v. Wendy*, 575 F.2d 1025, 1030-31 (2d Cir. 1978), the court recognized that a lawyer should not be placed in the position of risking sanction for refusing to proceed or for proceeding in a matter in which he was not competent. There the lawyer was competent in tax matters but refused to accept an appointment to represent a client in a felony tax case because he had never tried any type of case, civil or criminal. *Id.* at 1026.

247. For additional arguments made in opposition to the notion of mandatory *pro bono* representation for lawyers, see C. WOLFRAM, *supra* note 11, at 952-53. These arguments, however, express a selfish preference for not having to provide free services when other professions have no similar obligation.

248. The term "unprivileged" is used loosely here and would need further definition in any standard describing this obligation. The *Code* distinguishes between "confidences," which are communications that fall within the concept of privilege under the law of evidence, and "secrets," which are any "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *CODE*, *supra* note 1, DR 4-101(A). The *Model Rules* abandon that distinction and restrict disclosure of any "information relating to representation of a client." MODEL RULES, *supra* note 1, Rule 1.6(a).

nal proceedings,²⁴⁹ and to offenses against the fair and efficient operation of the judicial system.²⁵⁰ Additionally, the degree of knowledge of the lawyer necessary to trigger the obligation remains to be defined.²⁵¹

Properly phrased, a duty of disclosure would have little impact on the lawyer's obligation as a zealous advocate on behalf of clients. Indeed, the obligation might be stated so that a lawyer need only disclose to the proper authorities all information that is unprivileged, that would not be detrimental to a client if revealed, and that has convinced the lawyer beyond a reasonable doubt that an innocent person has been arrested, convicted, or sentenced in a criminal matter. Even in this narrow form, the disclosure obligation would give meaning to the lawyer's characterization as an officer of the court.

Officers of the court also should reveal some information indicating that a serious crime or fraud is about to be committed. Both the *Code*²⁵² and the *Model Rules*²⁵³ contain provisions that allow disclosure even of confidential information when certain crimes²⁵⁴ are imminent. Neither body of ethical law, however, obligates a lawyer to reveal any information when only the lawyer's interests in remaining silent are implicated. Again, this disclosure obligation could be phrased narrowly, both in terms of the degree of knowledge that a lawyer need possess to incur the duty and in terms of the seriousness of the crime or fraud that would warrant disclosure. If carefully drawn, the obligation would safeguard the interests of clients and still protect innocent persons from harm.²⁵⁵

Lawyers also can do more to protect the public from unqualified members of the profession. The *Code*²⁵⁶ and the *Model Rules*²⁵⁷ do

249. A serious judicial proceeding might be variously defined. One view is that these proceedings expose a defendant to possible incarceration. This view removes from the disclosure obligation proceedings of a civil or minor criminal nature. A broader view of serious proceedings would broaden the disclosure obligation as well.

250. These offenses would include perjury, jury tampering, alteration of evidence, and other crimes relative to the judicial process.

251. For example, a lawyer might be required only to reveal information when he is convinced beyond a reasonable doubt that an innocent person has been arrested or convicted relative to a serious judicial proceeding.

252. *CODE*, *supra* note 1, DR 4-101(C)(3).

253. *MODEL RULES*, *supra* note 3, Rule 1.6(b)(1) & comment.

254. The *Code* provision allows disclosure for any crime that a client intends to commit. *CODE*, *supra* note 1, DR 4-101(C)(3). The *Model Rules* permit disclosure only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *MODEL RULES*, *supra* note 3, Rule 1.6(b)(1).

255. This disclosure obligation protects innocent persons from harm even if limited to instances in which the person intending to commit the crime is not a client and the disclosure would not be detrimental to the client in any way. The interests of the client would be protected by drawing the obligation narrowly.

256. *CODE*, *supra* note 1, DR 1-103(A).

257. *MODEL RULES*, *supra* note 3, Rule 8.3(a).

mandate the disclosure of ethical violations of other lawyers, but these rules are seldom enforced.²⁵⁸ Regular enforcement of these provisions would be a start toward enhancing the officer of the court obligations of lawyers. Similarly, both the *Code* and the *Model Rules* require lawyers to reveal certain information regarding applicants for admission to the bar. Under the *Code*, a lawyer shall not further the application of a person the lawyer knows to be unqualified for admission.²⁵⁹ The *Model Rules*, on the other hand, require lawyers to disclose facts necessary to correct misapprehensions known to have arisen in another's application for admission to the bar.²⁶⁰ Lawyers who are officers of the court, however, should have an obligation to report any information which suggests that an applicant is unsuited to be a lawyer.²⁶¹ The obligation could be phrased broadly or narrowly,²⁶² but some enlargement of the duty could be reasonably expected of officers of the court.

Finally, lawyers as officers of the court should contribute to a client security fund adequate to reimburse those clients whose lawyers have absconded with their money.²⁶³ Most states have these funds,²⁶⁴ although typically they are severely restricted in the aid they offer to clients.²⁶⁵ While the contribution requirement would affect directly the private interests of lawyers, an adequate fund would protect innocent clients from harm at the hands of their delinquent lawyers, a legitimate concern of the judicial system and the public at large. Significantly, the obligation also would give lawyers an economic incentive to police their own profession more diligently, both in terms of admissions to the profession and the disciplinary process. It is understandable that lawyers

258. See *supra* text accompanying notes 93, 142.

259. CODE, *supra* note 1, DR 1-101(B).

260. MODEL RULES, *supra* note 3, Rule 8.1(b).

261. This approach is urged upon lawyers by the *Code's* EC 1-3, which provides that a lawyer "should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant." CODE, *supra* note 1, EC 1-3.

262. Broadly stated, the disclosure obligation might reach all information that a lawyer possesses which raises a reasonable question as to the applicant's fitness for the practice of law. Narrowly stated, the obligation could apply only when the information convinces the lawyer beyond a reasonable doubt that the applicant is unfit.

263. See C. WOLFRAM, *supra* note 11, at 183; Law. Man. on Prof. Conduct (ABA/BNA) 45:2001 to 06 (1985) (Model Rules for Clients' Security Funds). The Comments to the *Model Rules* urge lawyer participation in these funds. MODEL RULES, *supra* note 3, Rule 1.15 comment. Furthermore, the ABA has adopted additional rules pertaining specifically to the maintenance of these funds by the states. See Law. Man. on Prof. Conduct (ABA/BNA) 01:5001 to 10 (1986) (Model Rules for Clients' Security Funds).

264. Law. Man. on Prof. Conduct (ABA/BNA), 45:2001 (1985) (Model Rules for Clients' Security Funds).

265. See C. WOLFRAM, *supra* note 11, at 183; Law. Man. on Prof. Conduct (ABA/BNA), 45:2004 to 05 (1984) (Model Rules for Clients' Security Funds).

as private citizens would oppose adequate contributions to such a fund. It is not understandable that lawyers as officers of the court would do so.

B. Subordination of the Client's Interests

While only the self-interest of lawyers explains the profession's unwillingness to expand officer of the court obligations above, more defensible reasons justify a restrictive view when clients' interests are involved. The roles of zealous advocate and officer of the court conflict on this issue, for an expansion of one role necessitates a restriction on the other. Nevertheless, if lawyers wish to refer to themselves as officers of the court, then the present balance is weighted too heavily in favor of the zealous advocate role.

In certain situations the law should require a lawyer to reveal even privileged information to prevent violent harm to another. The *Code* and *Model Rules* currently permit disclosure in various circumstances and thus recognize the subordination of the clients' interests in those situations. If the profession's balance of the zealous advocate and officer of the court roles allows disclosure of that information, it is difficult to understand why disclosure is not required.²⁶⁶ Some lawyers, of course, would prefer not to sit in judgment of their clients or act contrary to their clients' interests. The law of legal ethics, however, protects lawyers who do precisely these things by disclosing prejudicial information. The profession evades the issue by leaving disclosure within the discretion of the individual lawyer.

The duty to disclose information necessary to prevent violent harm could be phrased narrowly, requiring a lawyer to reveal information that convinces him beyond a reasonable doubt that a client or other person is about to commit a crime likely to result in the death or seri-

266. By adopting the *Code* and *Model Rules* provisions allowing disclosure of imminent criminal conduct, the organized bar apparently has concluded that the interests of the client may be subordinated to the public interest in preventing certain criminal conduct. It is not clear, however, why the client's interests should not be subordinated in every such case through a disclosure requirement.

A possible explanation is that the *Code* provision, allowing disclosure of a client's intention to commit any crime, gives a lawyer some latitude in deciding whether the crime is serious enough to warrant infringing on the professional relationship with a client. *CODE*, *supra* note 1, DR 4-101(C)(3). This explanation does not explain, however, the lack of any obligation to disclose when the crime is clearly serious. It also does not explain why the *Model Rules* restrict disclosures to crimes that are "likely to result in imminent death or substantial bodily harm," and do not make these disclosures mandatory. *MODEL RULES*, *supra* note 3, Rule 1.6(b)(1). The 1980 Discussion Draft of the *Model Rules*, *see supra* note 34, made disclosure mandatory when necessary to prevent serious violent crimes. Discussion Draft, *supra* note 34, Rule 1.7(b), *reprinted in* T. MORGAN & R. ROTUNDA, *supra* note 34, at 83.

ous physical harm of another.²⁶⁷ Some authorities prefer a broader disclosure obligation.²⁶⁸ The choice depends on the degree to which the duties of confidentiality and loyalty to a client yield to the protection of innocent persons from harm. Since the profession already has chosen to subordinate the client's interests to those of the public by making disclosure permissible, the public should reasonably expect the profession to make disclosure mandatory if lawyers are to be labeled as officers of the court.

To give further meaning to the officer of the court obligation, the bar could impose other duties on lawyers that would affect clients' interests. For example, a lawyer's present duty to reveal legal authority that is contrary to his client's position and that an opponent has failed to reveal is unduly narrow and should be expanded. A better standard would require disclosure when a reasonable lawyer would know that the court should consider the legal authority in making its decision. This standard would supplant the law's present focus on the legal authority's direct adverseness and the jurisdiction where it originated.²⁶⁹

One commentator has proposed a similar duty of disclosure for adverse facts.²⁷⁰ It is not immediately obvious why, at least in civil pro-

267. By requiring a high degree of knowledge by the lawyer and a serious potential crime, this definition of the disclosure requirement minimizes the imposition on the interests of the client to that clearly necessary to protect innocent victims. The ABA's House of Delegates adopted a similar mandatory disclosure rule for criminal defense lawyers in its 1979 *Standards Relating to the Administration of Criminal Justice*. The provision declares:

[A] lawyer may reveal the expressed intention of a client to commit a crime and the information necessary to prevent the crime, and the lawyer must do so if the contemplated crime is one which would seriously endanger the life or safety of any person . . . and the lawyer believes such action on his or her part is necessary to prevent it.

ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (THE DEFENSE FUNCTION) Standard 4-3.7(d) (2d ed. 1979), reprinted in T. MORGAN & R. ROTUNDA, *supra* note 116, at 301. Because they have not been adopted categorically by state supreme courts, however, these standards do not possess the same legal status as the *Code* or *Model Rules*. See C. WOLFRAM, *supra* note 11, at 589 n.35. It is curious that the ABA views a mandatory disclosure rule to be acceptable in the criminal defense context but not in the broader context of rules applicable to all lawyers.

268. The obligation might be broadened both in the degree of knowledge needed for the lawyer to incur the obligation and in the severity of the crime. The obligation might also be defined to reach crimes involving property, such as fraud and theft. The Revised Final Draft of the Kutak Commission, for example, permitted disclosure of information relating to the representation of a client in order to prevent a criminal or fraudulent act which the lawyer reasonably believed would "result in substantial injury to the financial interests or property of another." MODEL RULES, *supra* note 3, Rule 1.6(b)(1) (Revised Final Draft 1982).

269. The footnotes to the *Code* disclosure obligation demonstrate this approach, viewing the matter from the position of the judge. See CODE, *supra* note 1, DR 7-106(B)(1) n.79; see also *supra* note 95. For example, a lawyer might be required to disclose adverse legal authority when a reasonable judge would "consider himself misled by an implied representation that the lawyer knew of no adverse authority." For a discussion of ABA Opinion 280 (1949), see *supra* note 95. Footnotes to the *Code*, however, were not intended by the drafters to be authoritative. See *supra* note 95.

270. See Frankel, *supra* note 33, at 1057-59. Judge Frankel was a member of the Kutak

ceedings,²⁷¹ the law of legal ethics should treat adverse law and adverse fact differently. A duty to disclose either law or fact compromises the lawyer's duty of zealous advocacy. A judicial decision based on a misimpression of the facts may be as unjust to the parties as one based on a misimpression of law. In both cases the mechanics of the adversary system have broken down because of one advocate's failure.²⁷² The opposing advocate, having complete knowledge, must take action if the unjust result is to be averted. If lawyers are merely zealous advocates, no action is warranted. If they are also officers of the court, a duty of disclosure is appropriate.²⁷³

In addition, the bar could state more emphatically a lawyer's duty to expedite legal proceedings, eliminating as a legitimate objective a client's preference for interminable delay. The bar²⁷⁴ and the courts²⁷⁵ have recognized the costs, both economic and psychic, resulting from the characteristic delay of contemporary litigation. An ethical obligation to avoid delay²⁷⁶ would help to alleviate these costs. Delay is a productive strategy for some clients, but not one that officers of the court should embrace.

Finally, the law should require lawyers as officers of the court to disclose to appropriate authorities misconduct by any participants in the judicial process. Disclosure would promote efficiency and fairness in the judicial system, although a client's interests occasionally might be

Commission.

271. This disclosure requirement in criminal cases may present constitutional questions not present in civil proceedings. See Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063-66 (1975).

272. C. WOLFRAM, *supra* note 11, at 681-82. Professor Wolfram also counters the argument that a judicial decision based on an inadequate presentation of fact is less harmful because of its limited stare decisis effect. *Id.* at 682.

273. This obligation would further the fair and efficient administration of justice and would tend to protect innocent persons from harm.

274. MODEL RULES, *supra* note 3, Rule 3.2 comment (noting that "[d]ilatory practices bring the administration of justice into disrepute").

275. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980) (stating that "[t]he glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law").

276. Both the *Code* and the *Model Rules* contain provisions dealing with delay. Under the *Code*, a lawyer shall not "delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." CODE, *supra* note 1, DR 7-102(A)(1). Thus, the focus of the *Code* is on the propriety of the lawyer's motive in delaying a matter. C. WOLFRAM, *supra* note 11, at 600. The *Model Rules*, however, require lawyers to make "reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES, *supra* note 3, Rule 3.2. The comment to the rule notes that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." *Id.* Rule 3.2 comment. The *Model Rule*, therefore, is stricter on the issue of delay than is the *Code*. See C. WOLFRAM, *supra* note 11, at 600. It would be preferable, however, if the Comment's clarification about the financial interests of the client were contained in the rule itself.

harmed.²⁷⁷ Both the *Code* and the *Model Rules* require disclosure of certain unethical conduct by lawyers and judges. The *Code* also requires disclosure of improper conduct of or toward a juror,²⁷⁸ although the *Model Rules* contain no such requirement. This duty should be expanded to include disclosure of misconduct that affects the fair and efficient operation of the judicial process by other participants, such as bailiffs, court clerks, court reporters, witnesses, and observers. Lawyers as officers of the court should be expected to reveal their knowledge of this misconduct, even at the expense of their clients' interests.

Other commentators have proposed many of these suggestions for expanding the officer of the court obligations of lawyers. In fact, several were part of the Kutak Commission's Discussion Draft of the ABA *Model Rules*.²⁷⁹ The suggestions are not novel, but they are fundamental to the continued characterization of lawyers as officers of the court. Particularly when clients' interests are involved, the profession must exercise caution in discarding the role of zealous advocate too readily in favor of the role of officer of the court. Nevertheless, the profession could expand considerably the officer of the court role by the adoption of these proposals without unreasonable disruption of the present balance of the lawyer's two fundamental roles. To the extent lawyers continue to profess to be officers of the court, candor compels this action.

VI. CONCLUSION

The characterization of lawyers as officers of the court under contemporary law is largely disingenuous. The law generally does not require lawyers to act in a manner that subordinates their own and their clients' interests in favor of the interests of the judicial system and the general public. Lawyers enjoy the public image generated by their collective self-characterization as officers of the court without being obligated to act in a manner consistent with that image.

The law should not allow the profession to have it both ways. If lawyers are indeed officers of the court, their duties should include responsibilities commensurate with that label. The profession might conclude that these responsibilities are incompatible with the proper functioning of lawyers in our society because they infringe on the interests of clients, or that these responsibilities impose too severely on the interests of lawyers. If so, the profession should abandon the characterization of its members as officers of the court. Alternatively, the profes-

277. The misconduct observed by the lawyer, however, might have favored the client's interests.

278. See *supra* text accompanying note 80.

279. See *supra* text accompanying notes 150-64.

sion could adopt the duties described in this Article and give meaning to the role of officer of the court.

