ZEALOUS ADVOCACY AND THE SEARCH FOR TRUTH

Every attorney has an ethical obligation to zealously represent his client. Some argue that an attorney should have another, higher obligation to assist the judge or jury in the course of civil litigation to arrive at the truth — even at the expense of the client. The duty of the attorney to expose the "truth" in litigation, the role of the advocate in an adversarial system, and an attorney's conduct in fulfilling the role of an advocate have been the subject of much scholarly debate.

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Years ago, Lord Macaulay noted:

> [W]hether it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that not merely believing but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another to cause a jury to think that statement false.[1]

Thus, the criticism of the attorney's role in an adversarial system is neither particularly modern nor a reaction to current events like the Simpson murder trial in Los Angeles. Despite this historical criticism, fundamentally altering the lawyer's role from that of a zealous advocate to that of a truth seeker would be unworkable and counterproductive.

TRUTH AND THE U.S. JUSTICE SYSTEM

The first difficulty in imposing a duty upon attorneys to expose the truth is properly defining what is to be exposed. According to Immanuel Kant, truth is defined as "the accordance of the cognition with its object."[2] Under Kant's definition, one can only determine what is true by using one's awareness and judgment.[3] As experiences and conditions vary from person to person, truth necessarily becomes relative. In other words, in an effort to find the truth by reconciling cognition and object, each person views that object subjectively through the unique prism of his or her own existence. The absolute "truth" remains elusive, if not invisible, and may not even exist.

In the U.S. civil litigation system, the task of attempting to accord the cognition of a particular fact with its object is vested in a fact finder (most often, a jury).[4] However, the system recognizes that "truth" as some sort of metaphysical absolute is an unknown, and therefore defines truth as what the jury determines it to be. The role of the attorney in an adversarial system is not to reconcile the cognition for the fact finder but rather to convince the fact finder, using all lawful means, to adopt his or her client's cognition of a controversy's facts.[5] The fact finder then distills "truth" from competing versions of the same tale. The advocate's role was intentionally designed by our nation's founders to avoid the injustice of England's 17th century Court of the Star Chamber.[6]

The fact finder does not purport to know the "truth"; rather, the fact finder merely determines which version is more likely than the other. This truth does not profess to be more than what it is — namely, the fact finder's version of events.

This pragmatic definition of truth is required for the effective functioning of the U.S. civil justice system. Though this system which relies so heavily upon its judges and juries is not without its costs, it is preferable to one in which lawyers are forced to become the ultimate arbiters of truth.

TRUTH AS A SECONDARY CONCERN

Contrary to public perception, the goal of the U.S. civil justice system is not solely, or even principally, the search for the truth. The discovery of truth in our process is often incidental. Indeed, the adversarial system has numerous rules and procedures which hinder, if not thwart entirely, the exposure of truth. Evidentiary exclusions based on privilege and prejudice exemplify this premise. The rule in personal injury cases prohibiting introduction of evidence of a defendant's subsequent remedial measures treats "truth" as secondary. Because society does not wish to deter defendants from repairing dangerous conditions, such evidence is not admissible to help prove the original condition was dangerous and capable of remediation. The entire 400 series of the Federal Rules of Evidence concerning the admissibility of evidence (*i.e.*, offers of compromise, prejudicial evidence, prior bad acts, etc.) similarly embodies a struggle between truth and other societal goals. These rules convey a fundamental precept of our justice system: truth is not all-important but is an ancillary concern which may or may not be unearthed by the litigation vehicles.

Under the U.S. system, perfection and truth, in an absolute sense, are not guaranteed. In fact, the very notion of a perfect outcome is as difficult to define as a truthful one. When one acknowledges that civil trials frequently concern not who is responsible, but how responsible a particular defendant is; not who was hurt, but the extent of injury; it becomes apparent that searching for the "truth" in the civil justice system can be problematic at best.

The advantage of the U.S. civil justice system and other common law systems is that they allow for the peaceful regulation of conduct among citizens. In dictatorial and oppressive states, citizens have no neutral arbiters for their disputes. Whether one has a $100 landlord-tenant claim or a multi-million dollar contract dispute, every U.S. citizen has the right and opportunity to access the courts. Thus, even though the process is not a search for the truth, it does provide a valuable mechanism by which aggrieved citizens can settle their disputes peacefully. Before one can advocate change in lawyers' duties, we must decide what type of system we want: one in which the quest for the truth is the most important goal,[7] or one that focuses on the liberty of our citizens and peaceful dispute resolution as a more worthy goal.

The fact finder, when requested to make a final determination, frequently finds itself not reviewing the absolute blacks and whites of truths and falsehoods but shades of gray created by differing versions of the same events. Society's recognition of truth's different faces is one of the reasons the system does not engage itself principally with the purpose of truth seeking. Instead, the system has recognized its limitations and has offered the best human alternative to seeking "truth." The system's true virtue is found in its ability to provide its participants an efficient means to seek redress. The system functions efficiently by each attorney abiding by the rules and fulfilling the role of advocate to the best of his or her ability.

COMPETING CONSIDERATIONS

A system which promotes liberty and peace among its citizens is not without costs. In a struggle between adversaries, the ultimate truth may not be discovered or recognized by the fact finder. But "a simplistic preference for the truth may not comport with more fundamental ideals — including notably the ideal that generally values individual freedom and dignity above order and efficiency in government."[8]

Arguably, the rules of civil litigation do not restrict an attorney's conduct as much during the discovery phase of litigation when the rules of evidence do not apply in their entirety. In the pretrial period, when opposing sides exchange information and evidence pertaining to the claims at issue, many argue it is the ethical obligation of the attorney to turn over evidence and documents in his or her client's possession which are not merely responsive to the opposition's requests, but any documents and pieces of physical evidence which are clearly relevant to the resolution of the issues and not otherwise privileged.

Indeed, the Federal Rules of Civil Procedure (as amended in 1993) require an attorney to disclose all relevant facts and turn over all documents relevant not only to his or her client's claims, but also to the other side's defenses.[9] The so-called "full disclosure" requirements open the door to excessive and improper litigation obligations, threaten to usurp the role of the fact finder, and provide perverse incentives for clients.[10] The disclosure rules could be misinterpreted — or eventually broadened by the rule-makers — to compel attorneys to produce and disclose all information probative of the "truth" of a claim. Worse, attorneys could face sanctions for failing to produce documents or evidence which the opposing side believes probative of the "truth" of a claim.

Obviously, this duty would force lawyers to determine what the "truth" of a matter is as early as possible during the discovery process so that the attorney could ensure documents and information reflecting that "truth" would be made available to the opposition. Given that the U.S. adversarial system largely defines "truth" as the result reached by the fact finder, this requirement would place attorneys in the impossible position of having to guess how 12 citizens from the community in which the court sits will decide a given issue before the first word of a lawyer's opening statement at trial is spoken. Presumably, concerns like these have prompted many federal district courts and judges to opt out of the mandatory disclosure rules.

HOW TO BEST FACILITATE AMERICAN CIVIL JUSTICE

It is perhaps counter-intuitive, but a rule requiring full disclosure could actually hamper the search for truth. Full disclosure obligations would be inappropriate because they discourage candor between attorneys and their clients.[11] Clients would quickly learn that their lawyers were required to give their adversaries all facts they know and all documents they see, no matter how harmful to the clients' interests.[12] Clients, predictably, would routinely lie to their attorneys and hide or spoliate evidence to preserve the chance of prevailing at trial. Such a system of "full disclosure" effectively places clients in

charge of the information available for trials and keeps lawyers (and the judge and jury) in the dark.[13]

Moreover, imposing broad discovery obligations on attorneys will not necessarily facilitate the judge or jury's search for "truth." Clients, upon discovering their counsel's "truth-furthering" obligation, would likely opt not to disclose to the attorney the existence of incriminating documents or evidence. Trials would then be conducted by counsel lacking the requisite substantive information. In such a system, trials would become elaborate charades where uninformed attorneys confuse the fact finder, rather than our current system which allows a fact finder to reach an outcome based on two complete, albeit different, versions of events.

Some may argue that "the visionary role of two highly qualified, equally armed warriors of the law, meeting in a public forum, each fighting for his own measure of justice under rules rigorously enforced by an impartial judge, is hardly a typical model of the every day practice of law."[14] That may be so, but the U.S. government has provided its citizenry a forum in which peaceful dispute resolution is possible. From *pro se* claims involving nominal damages to billion-dollar lawsuits between international conglomerates, access to the courts of this country is available.

Implementing this system are various actors: judges, who enforce the rules of procedure and interpret the law in dispute; jurors, who attempt to impartially resolve the case; clients who initiate the process and serve as its lifeblood; and lawyers, through whom the clients are heard. Simply stated, the lawyer's role in our system is *not* to decide, but to persuade. In fact, the successful operation of the adversarial system depends upon the functions of the advocate and the fact finder being kept separate and apart.[15]

At the core of this operation is the attorney-client relationship, and the corresponding privilege which treats communications within that relationship as inviolate. Individuals and entities in this relationship share a unique bond. It is a tie which is both facilitated by and dependent upon complete, unbridled candor; however, the attorney-client relationship could be effectively severed by imposing an absolute duty on a client's advocate to uncover the truth.

THE ZEALOUS ADVOCATE

Zealous advocacy is paramount among a lawyer's obligations, but attorneys today face a more diverse economy of interests than was the case during Lord Macaulay's time.[16] Today, lawyers operate under the purview of the Model Rules of Professional Conduct and face professional sanctions for failure to abide by the ethical standards set forth in those rules. While a lawyer is still expected to ardently present his or her client's case, he or she must balance that goal with other responsibilities. Significantly, for instance, an attorney must refrain from making false statements to a court and may not offer evidence known by him or her to be false.[17] Further, where an attorney offers material evidence and later learns of the evidence's falsity, the attorney must correct the error in any reasonable manner including disclosing the fraud upon the court.[18] Thus, an attorney's obligation to be a zealous advocate for his or her client is not unchecked.[19]

The Model Code of Professional Responsibility recognizes that the zealous representation of the client is both the lawyer's "obligation" and "the heart of the adversarial process."[20] Thus, an attorney's ethical obligation to assist the judge or jury in arriving at its distillation of the "truth" is best fulfilled through the zealous advocacy of the client's position under the existing paradigm of civil litigation. The attorney's primary obligation is to pursue — to the fullest extent of the law — his or her client's rights.

LIMITS OF ZEALOUSNESS

Just how far an attorney's duty of zealous advocacy can be extended has been considered by the U.S. Supreme Court. In *Nix v. Whiteside*,[21] a criminal defendant claimed that he had been denied the right to effective assistance of counsel because his attorney refused to assist him in presenting perjured testimony.[22] The court rejected that argument, and held that an attorney does not have a duty to assist a client in perjuring himself.[23] Thus, the Supreme Court effectively prioritized the ethical obligations of an attorney as: first, a duty not to suborn perjury; and second, a duty to zealously represent a client.[24]

The duty to avoid the subornation of perjury cannot be equated with a duty to uncover the truth. The obligation to be truthful in the litigation process is independent of any supposed general obligation to reveal truth. Assume for example that one's opponent in a case properly requests a potentially harmful document or asks a question the answer to which could devastate a client's claim. Not only must an advocate be truthful in his or her response, but he or she is also prohibited from knowingly permitting his or her client to be untruthful.[25] This obligation of a lawyer remains unaffected by the negative impact any such revelation may have on the client or the case.

A regime which requires an attorney to fully disclose all relevant facts regardless of the client's best interests in order to

pursue what the lawyer perceives as the truth has ramifications well beyond the pretrial phases of litigation. For instance, assume that the chief executive officer of an attorney's corporate client is on the stand suffering under the withering cross-examination of opposing counsel. Assume further that the corporation's attorney knows that if his or her opponent asks just one more question, he or she will force the executive into admitting liability or fault on the company's part. If the opponent fails to ask that question, or asks it in a manner which allows the executive to "escape," full disclosure requirements could arguably require the corporation's counsel to alert opposing counsel to the oversight. This type of disclosure requirement might further the metaphysical search for "truth," but is obviously impractical. Further, this type of disclosure requirement places the lawyer beyond the control of the client. A system which does not allow the client to control his or her advocate fails to protect the individual dignity and autonomy of the client. The imposition on attorneys of an independent obligation to seek "truth" — at least during trial — is both counter-productive and inappropriate in our adversarial system.

THE ROLE OF THE LITIGATOR

The synergy that can occur between a lawyer and jury is exemplified by the case of *Texaco, Inc. v. Pennzoil, Co.*[26] In that case, attorney Joe Jamail convinced a jury, after presenting little more than evidence of a handshake deal, coupled with his compelling style of argument, that two multi-billion dollar companies had entered into a contract. The jury awarded Pennzoil more than $10 billion as damages for the breach.[27] While some might be left questioning whether this deal was actually agreed upon in a metaphysical sense, others — true litigators — dismiss the query as irrelevant. Simply put, once the jury concluded the handshake occurred, based on the evidence and argument before them, the inquiry was over. The "truth" was found.

The zealous advocate's role is to similarly present all evidence and argument in support of his or her position that the handshake happened. The advocate's job is to forcefully argue to the jury that the facts support his or her client's version of the tale. The founding fathers of the United States of America decided long ago that it is up to a jury of one's peers to weigh the evidence and arguments and arrive at a decision that will be just. Society's decision to leave the determination of what is "true" to the jury is supported philosophically by more than 200 years of a largely peaceful and productive civil resolution process.

Client controlled litigation preserves the dignity and autonomy of the client and enables each person to present his or her good faith position to the trier of fact when the client's life, liberty, or property is threatened. The advocate assists the client's presentation because modern complexities can prevent the layperson from adequately presenting his or her position. The biased advocate, lending his or her skills to the client, allows the client's position to be fully and properly presented to the court.

Perhaps the answer is that those who shy away from the adversarial process and prefer a truth-oriented judicial system have experienced substandard legal representation. Indeed, inequities in the abilities of trial counsel can and do affect outcomes in our justice system. Clients with mediocre representation are sometimes penalized because their adversary's counsel is more thorough, more eloquent when addressing the jury, or is generally a superior advocate.

However, the answer to poor advocacy is not to dilute or alter the process. We, as lawyers, must demand more of ourselves and more of our peers. We must make ourselves more available to clients who cannot ordinarily afford our services through increased commitment to low-cost or pro bono representation. By raising the performance bar for all attorneys, we raise the substantive level of justice for all.[28]

CONCLUSION

Despite its weaknesses, the adversarial system works to redress people's grievances in the most efficient and fairest manner known. As the process works

now, participants have well-defined roles. The attorney, as the zealous representative, diligently strives to do everything within the lawful bounds of his or her abilities to bring about a result favorable to the client. The judge ensures that the parties to the proceeding comply with the rules and regulations which govern the system. The jury, or fact finder, is the sole arbiter of facts. The attorney can best assist the jury in this sometimes onerous task by aggressively and confidently investigating and presenting his or her client's side of the story. That lawyer, and the system, must rely upon the adversary to do at least as much. It is only through the crucible of the adversarial system that the jury is most able to forge an objectively defensible version of truth.

The attorney is the zealous representative of the client, and he or she must diligently strive to do everything within the lawful bounds of his or her abilities to bring about a result favorable to his or her client. Placing a requirement on attorneys to disclose the "truth" so that the fact finder may better make its decision only confuses the roles of the players. The only result that can occur from such confusion is the dilution and perversion of justice.

1. Marvin E. Frankel, *In Search for the Truth*, 123 U. Pa. L. Rev. 1031, 1056-57 (1975).
2. Immanuel Kant, *Critique Of Pure Reason* 36 (J.M.D. Meiklejohn trans., Robert M. Maynard, ed., William Benton 1990) (1781).
3. *Id.*
4. Debra Rhode, *Ethical Perspectives & Legal Practice*, 37 Stan. L. Rev. 589, 595 (1995) (noting that "the role of the lawyers as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a large ordering of affairs.")
5. *Id.* at 595.
6. Helen K. Michael, *The Role of National Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten Rights,* 69 N.C. L. Rev. 421, 480 (1991) The advocate's role in "truth finding" in the Star Chamber was such that if a legal representative failed to vouch for his client's version of the truth, the client was precluded from presenting his version of the truth and was deemed to have confessed. *Id.*
7. *Id.* at 480.
8. Frankel, *supra* note 1, at 1040.
9. Fed. R. Civ. P. 26 (West 1997).
10. Rhode, *supra* note 4, at 585 ("Only when [the trier of fact] has the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of [its] decision.") Others have noted that only where advocates take full responsibility for preparing their case can the tribunal retain neutrality. John Thibaut & Laurens Walker, Procedural Analysis: A Procedural Analysis 49-51 (1975).
11. David S. Nyberg, *The Varnished Truth* 181-182 (1993) (noting that a lawyer needs the absolute promise of confidentiality to build trust with the client).
12. *See id.* at 182.
13. *See id.*
14. Richard K. Burke, *"Truth In Lawyering": An Essay on Lying and Deceit in the Practice of Law*, 38 Ark. L. Rev. 1, 12-13 (1984).
15. J. Kevin Quinn, *et al., Resisting the Individualistic Flavor of Opposition to Model Rule* 3.3, 8 Geo. J. Legal Ethics 901, 951 (1995) citing *Lon Fuller, The Adversary System*, in Talks on American Law 30, 30 (Howard Berman, ed. 1971).
16. *See supra* note 1 and accompanying text.
17. Tex. Dis. R. Prof. Conduct Rule 3.03 (West 1996) ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal;"); Model Code of Professional Responsibility Rule 3.3 (1992).
18. Tex. Dis. R. Prof. Conduct Rule 3.03(b); Model Code of Professional Responsibility Rule 3.3 (1992).
19. Tex. Dis. R. Prof. Conduct Rule 3.03; Model Code of Professional Responsibility Rule 3.3 (1992).
20. Tex. Dis. R. Prof. Conduct Rule 1.01 cmt 6; Model Code of Professional Responsibility Canon 7, n.3 (1983).
21. 475 U.S. 157 (1986).
22. *Id.* at 160.
23. *Id.*
24. This hierarchy of duties is not without criticism. *See Quinn, supra* note 15, at 901-48.
25. Tex. Dis. R. Prof. Conduct Rule 3.03(b); Model Code of Professional Responsibility Rule 3.3 (1992).
26. 729 S.W.2d 768 (Tex. App. — Houston [1st Dist.] 1987, writ ref'd n.r.e.).
27. *Id.*
28. *See* David Hume, Concerning Human Understanding 497 (Robert M. Hutchins ed., William Benton 1990) (1749) ("[P]hilosophy requires entire liberty above all other privileges and chiefly flourishes from the free opposition of sentiments and argumentation.").

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