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On the Ethics of Lawyers

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The fact of the matter is that law school education—and the fashionable, tax deductible, post admission education programs frequently held in plush places—cannot teach wisdom, or experience, or judgment, or dedication, or even morality. And it is essentially from deficiencies in these areas that the profession suffers.[1]

This fundamental complaint against lawyers is far and away the most serious in the eyes of the general public. For if this moral sense is missing, then the rest of the legal profession's code of ethics becomes a dead letter, for the spirit is gone. While this is important for any system of ethics, it is particularly so for a group of people whose professed objective in life is "justice under law." It is extremely important for jurists and lawyers not only that justice under law actually be done, but that it *seem* to be done as well.[2]

It is important to note that when discussing legal ethics, justice and law are always in tandem. They are as interrelated as man and woman; to attempt to understand one without the other is always disastrous. One cannot be intellectually, morally, or psychologically understood without the other. The history of legal thought is strewn with those who have attempted to do so, from the moralistic canonists and Calvinists who burned their adversaries without a scintilla of due process, to the Austin's and Holmes' whose juridical positivism emptied the law of its moral content and substituted the concept of force and power in its stead. In the final analysis, the relationship between law and justice is *the* problem of legal ethics. It is seldom even alluded to in legal education, and yet, after the Watergate scandal, this question eats at the entrails of the legal profession.

We cannot give more here than passing reference to that ancient yet still relevant question of whether our courts are tribunals of law or of justice. Historically, the dispute originates in the common law distinction between the courts of law and the Chancellor's court of equity.[3] The dis-

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[1] Kurland, *Polishing the Bar*, N.Y. Times, Apr. 24, 1975, at 35, col. 1.

[2] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 9-6, wherein it is stated: "Every lawyer owes a solemn duty . . . to avoid not only professional impropriety but also the appearance of impropriety."

[3] The equity courts accepted petitions wherein it was alleged that the law courts lacked

tinction was clumsy, but it did serve to highlight the essential problem of law and justice in the minds of lawyers. In the United States, this distinction became blurred and finally obliterated so that today lawyers never bother to ask the question, let alone be disturbed by it.[4] In three years of law school, this author heard not one professor or student even allude to the subject.

What is clear in the history of the common law during the past seven hundred years is that the freedom of man has its roots in the medieval notion of the *homo liber et legalis,* the man whose freedom *was* the age-old custom in which the nature of men expressed itself, and whose lawful freedoms were guaranteed by law and possessed in association with his fellows. The lawyer was always an essential catalyst in this whole legal process,[5] but one who at the same time betrayed the ongoing dynamic relationship between law and justice by establishing and perpetuating the conservative nature of every legal structure. It was not without truth that Shakespeare observed that in any revolution, the first thing to do is kill all the lawyers.[6] Perhaps. But, one thing that certainly cannot be done is to discuss legal ethics without examining this profound issue.

The American legal system is the product of a whole, known as the adversary system, whose supposed virtue is the attainment of justice by a truth-seeking method which places adverse parties before an impartial tribunal. This is no mean feat since the adversary system is a comparatively recent invention of jurisprudence, arising in the Anglo-Saxon tradition and extensively developed only since the 17th century. Of particular significance is that this adversary system was the conscious choice of a people who came to recognize its necessity, not from the teachings of theoreticians, but from the bloody pages of a history where tyranny and oppression abound infinitely more than justice and due process. The

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jurisdiction, the King's property interests were involved, the law courts were powerless to enforce their decision, and the common law remedy was either inadequate or nonexistent. G. KEETON, AN INTRODUCTION TO EQUITY 19-20 (4th ed. 1956). For a thorough discussion of the division between law and equity in England, see 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 278-85 (2d ed. 1937).

[4] At the beginning of this century, Professor Maitland predicted a time "when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice it that it is a well-established rule administered by the High Court of Justice." F. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW 20 (1909).

The distinction between law and equity was abandoned in the federal courts in 1938 by the enactment of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 1. Most states have also abolished the distinction between law and equity in their courts. *See, e.g.,* N.J. STAT. ANN. § 2A:15-1 (West 1952); N.Y. CIV. PRAC. LAW § 103(a) (McKinney 1972). Although New York statutory law had abolished the distinction between law and equity in 1848, the courts to some extent still adhered to the differentiation as late as 1949. *See* Kharas, *A Century of Law-Equity Merger in New York,* 1 SYRACUSE L. REV. 186 (1949); Note, *Law and Equity in New York—Still Unmerged,* 55 YALE L.J. 826 (1946).

[5] *See generally* J. BOWLE, WESTERN POLITICAL THOUGHT (1947).

[6] W. SHAKESPEARE, HENRY VI, PART 2, Act IV, Scene 2.

Magna Carta originally might have been the affair of the barons and King John, but its effect on history was the beginning of limitations on power by means of law as a control on tyranny. The implications of that revolution unfolded in the history of the common law.

All this is by way of introduction to a specific question of the ethics of particularity. Since, according to the Federal Rules of Evidence, the essence of any trial is "that the truth may be ascertained and proceedings justly determined,"[7] the relationship between justice and the truth-seeking process becomes vital in their relationship to law. To speak more bluntly, what rule of solid ethics permits a lawyer in the American adversary system to put on the stand a client whom he knows will perjure himself, or to attack the credibility of a witness he knows to be telling the truth or, even worse, to serve as advocate for a defendant who the lawyer knows to be guilty of the crime charged? This last situation is particularly agonizing for a conscientious lawyer because of the added danger that such a defendant may subsequently cause further harm to innocent persons if released through the lawyer's efforts.

It does not help to protest that the lawyer does not serve as judge and jury, since everyone judges and weighs every significant action he does against some value which he considers important, more important, most important, or, in the negative, insignificant. Nor does it help very much for a lawyer to say "I don't want to know" the truth in these examples, since that would be an abdication of responsibility to himself as a conscientious human being. Of course, if the lawyer's objective is money, prestige from winning cases, or the like, then his whole value system is perverted, and justice suffers immensely from such technicians of the trade. Such charlatans adopt the cynical definition of the lawyer as one who defends the poor, the orphan, and the widow unless, of course, he is attacking the poor, the orphan, and the widow, but the question remains for the conscientious lawyer. Once again, apparently the only answer is an historical one. Due process, both substantive and procedural, the rule of law, and similar basic principles were born of history and not of theory; men finally saw that trial by ordeal or by torture availed nothing as to truth and justice. So they tried a different route, that of rules to protect against unfairness, to guarantee rights, to find truth insofar as human truth can be found at all. This honing process took centuries and, indeed, it is still not complete. It provides a far better instrument, however, than that which mankind formerly had. It is the exalted function of lawyers in our society to perfect this instrument as much as possible, not to destroy it. To do otherwise would be to destroy the fragile safeguard of freedom.

The adversary system of truthfinding is not perfect by any means. It neither guarantees that all who are guilty will be punished nor ensures that all who are innocent will be exonerated. On the whole, however, the adver-

[7] FED. R. EVID. 102.

sary system is a far better protection for the dignity of the human person than any other means mankind has devised. For this reason alone, as the lesser of two evils, the lawyer may defend those who he knows to be guilty or to try to discredit those who he knows to be telling the truth. This is an uneasy answer, one sure to be rejected by the purists in our midst. But, it is a reason with which a lawyer can live in good conscience and with integrity.

The significance of the relationship between law and justice as an essential contributing factor to the ethical norm of the lawyer can also be seen in the honesty demanded of him in and by the court. This is reflected directly in the provisions of the *Code of Professional Responsibility* which require an attorney to make full disclosure to the court of any legal authority adverse to his client's position unless opposing counsel has already done so.[8] The difficulty here is not only that knowing failure to reveal a controlling case is an act of dishonesty to the court, but also that such an omission constitutes a failure of a sense of fair play where it is justice and truth which are sought. This situation is to be distinguished from a failure to disclose a fact, such as the existence of a witness whose testimony the attorney knows to be relevant and material. The authorities generally agree that an attorney has no ethical duty to reveal in the latter situations,[9]

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[8] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106 (B)(1) which states: "In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." The rationale underlying this ethical requirement is expressed in *id.*, EC 7-23:

> The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 146 (1935) reads in part:

> We are of the opinion that this Canon requires the lawyer to disclose . . . decisions [that are adverse to his client's interests] to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 280 (1949) discusses the prior *Opinion No.* 146 and concludes that:

> 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?

[9] *See, e.g.*, note 31 and accompanying text *infra*.

while they are divided with respect to the prior. But, does the lawyer, in fact, have a moral obligation to reveal in both instances?

The first thing to determine is whether a civil or a criminal case is involved. This distinction is not irrelevant; indeed, it is quite important to the disposition of the case. The object of any civil proceeding is the clear establishment of the truth so that maximum justice—or perhaps simply the *modicum justitiae,* as the medieval canonists used to phrase it—will be brought about in a particular case. Although this is certainly true in a criminal case as well, there exists one important distinction: the truth in a criminal case occupies a secondary role to the prosecution's burden of proving the accused's guilt. In the words of a prominent American criminologist: "The criminal defense lawyer must understand that the criminal trial as we know it in the Anglo-American system, is not so much a search for truth, but rather the occasion for the prosecution to prove the accused's guilt beyond a reasonable doubt."[10]

Even in a criminal case, however, if lawyers are seeking the truth there must be an interrelationship between law and justice or there is no way to escape the rank cynicism that it is not so much the quality of the case but a knowledge of the mores, attitude, and goodwill of the judge and jury which finally determines the outcome of a particular case. While one ought not to be naive in thinking that such factors do not influence a judge or jury, it is submitted that to surrender to such a mentality in order to be "realistic" is to destroy the spirit of the code of ethics as well as to mutilate the lawyer's sense of integrity.

In both situations described above, it is fair to say that the defense is entitled under our juridical system to put the prosecution to the test of its proof. It is self-evident that a trial is, in some way, a discovery of truth for the ends of justice, and thus the adversary parties are bound by "all fair and honorable means, to present every defense that the law of the land permits, to the end that no person be deprived of life or liberty, but by due process of law."[11] In the words of the Supreme Court, "guilt shall not escape or innocence suffer."[12] Although such "honorable means" would at the very least require revelation of a possibly controlling court decision, this same obligation does not necessarily require disclosure of the existence of a witness. The dilemma was stated well by Dean Freedman:

> The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence . . . seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial. Such actions are permissible because there are policy considera-

[10] Starrs, *Professional Responsibility: Three Basic Propositions,* 5 AM. CRIM. L.Q. 17 (1966).
[11] ABA CANONS OF PROFESSIONAL ETHICS No. 5.
[12] Berger v. United States, 295 U.S. 78, 88 (1935).

> tions that at times justify frustrating the search for truth and the prosecution of a just claim.[13]

The term "policy considerations" understates the importance of the basic safeguards of human dignity, inferiority, integrity, and self-possessiveness. As mentioned earlier, the American consensus on the adversary system was the product of historical experience, a reaction against a system of the King's justice which obtained truth by torture, self-incrimination, and dictatorial power. To safeguard human dignity and rights, the burden of proof has been placed not on the defendant but on the prosecution in criminal cases and on the plaintiff in civil cases. It is for them to plead and prove by the necessary quantum of evidence.

This system represents a value choice in history, ratified by each succeeding generation which adheres to it, perfects it, and uses it. The lawyer is essentially and by oath dedicated *par excellence* to the furtherance and perfection of this truth-seeking process by procedural rules for the purpose of justice in an adversary system before an impartial tribunal. Defense counsel must fight vigorously, but he must always do so within the framework of the prescribed standards of conduct. "He owes loyalty to his client—no doubt—but he cannot be disloyal to the profession. All lawyers must remember that the basic purpose of the trial is the determination of truth."[14] Truth, however, is not the end but is rather the means *ad justitiam faciendam,* which is the fundamental virtue of the city.

This is why it is so important for a lawyer to understand the virtue of justice as recognized by the ancient authors Plato, Socrates, and Aristotle. For them, the climate of the *civitas* is distinctive. It is not feral or familial, but forensic. It is not hot and humid like the climate of the animal kingdom. It lacks the cordial warmth of love and unreasoning loyalty that pervades the family. It is cool and dry, with the coolness and dryness that characterize good argument among informed and reasonable men. Civic amity gives to this climate its vital quality. Ideally, there should be but one passion in the city—the passion for justice. But the *will* to justice, though it engages the heart, finds it measure, as it finds its origin, in intelligence, in a clear understanding of what is due to the equal citizen from the city and to the city from the citizenry according to the mode of their equality. This unity, qualified by amity, is the highest good of the civic multitude and the perfection of its civility. That is why it is so important for lawyers to be utterly ethical, to possess a passionate scrupulosity for truthfulness for the ends of justice. This is, as Mr. Kurland has suggested, much more a basic moral sense than an ethical code.[15] The code, in fact, presupposes this moral sense as matter to form.[16]

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[13] Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469, 1482 (1966).

[14] Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint,* 5 AM. CRIM. L.Q. 23, 24 (1966).

[15] Kurland, *Polishing the Bar,* N.Y. Times, Apr. 24, 1975, at 35, col. 1.

[16] *Cf.* J. MURRAY, WE HOLD THESE TRUTHS, 79-95 (1960). There the author describes the need

It is within this context that the whole American adversary system begins to make some rather profound sense. As suggested earlier, what is important is to conserve this *system* of justice while seeking to prevent its more profound abuses. In other words, to the greatest possible degree, the adversary system serves to protect a system of historical choice by a whole people. It is a system which best guarantees the rights and dignity of the person, or at least, as a people, we *believe* that it does so. At the bottom of Dean Freedman's "policy considerations"[17] is this basic *belief* of each and every lawyer who takes an oath to uphold and defend the Constitution—the primary rule[18]—of the United States. Without this fundamental dedication to truth and justice as expressed in the history of the common law, the lawyer is at odds with the system itself.

All this does not as yet answer the ethical dilemma of the lawyer who is aware of a witness unknown to his adversary. But the discussion thus far does serve to lay the moral groundwork which will provide the outlines of a solution to the problem. Certainly, to lie to the court is a destruction of the entire system, and the lawyer is under a firm and absolute duty never to lie to the court.[19] But, on occasion it may be the attorney's duty not to speak[20] if he is to conserve and protect the essence of the adversary system. This was clearly shown in a case narrated by the eminent jurist Samuel Williston.[21] He tells of a client who was sued over a financial matter. In preparing for trial, Williston obtained his client's letter file. At trial, the plaintiff's lawyer did not demand production of the correspondence, and Williston did not feel bound to disclose the letters. The case

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for a public philosophy of morality in the United States. He bases this philosophy upon universal truths which guarantee mankind certain immunities and powers, and applies it to foreign policy.

[17] *See* note 13 and accompanying text *supra*.

[18] *Cf.* H. HART, THE CONCEPT OF LAW 89-96 (1961). Primary rules are the basic obligations and rights of individuals as defined by a cohesive society. They are the bases of the society, without which social organization would fail. As a social structure becomes increasingly complex, these rules must become more clearly defined while maintaining their authority and adaptability to social change.

[19] This Article does not consider the ethical problem of the lawyer who allows a client to testify after the client has told the lawyer of his intention to perjure himself in court. For a full discussion of this area, see M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 27-42 (1975). Dean Freedman states that it would be a breach of lawyer-client confidentiality to inform the court of the client's perjury or to allow the client to give perjured testimony. He also believes that the client may be deprived of adequate counsel and a fair trial if his attorney, upon learning of the perjured testimony, either withdraws from the case or omits reference to it in his summation. *Id.* at 33-34. Although it is contrary to the principles set forth in the *ABA Code of Professional Responsibility*, Freedman concludes that most lawyers would knowingly treat the perjured testimony of their client in the same manner as they would any other favorable testimony. *Id.* at 40-41.

[20] The distinction between omission and commission, which is even today widely debated in legal circles, was discussed long ago. *See* ARISTOTLE, NICOMACHEAN ETHICS, Book VII, chs. 6, 8; T. AQUINAS, SUMMA THEOLOGIAE, Ia. 8, 3 ad 2-3.

[21] S. WILLISTON, LIFE AND LAW 270-71 (1940).

resulted in a verdict for the defendant.[22] The deciding judge based his decision, *inter alia,* on a presumed "fact" which Williston knew to be unfounded,[23] for he was in possession of a letter which contradicted this "fact."[24] While Williston was aware that he had no ethical duty to disclose this crucial piece of evidence, he felt "somewhat uncomfortable at the time."[25] It has been suggested that

> Mr. Williston clearly saw the evil of an advocate voluntarily giving up a position tenable under the law and to the interest of his client. This is not to say that he thought that the system was perfect, but he clearly saw the force of the primary obligation to the client to represent him fully within the legal framework of the American adversary system.[26]

This letter was evidence of a matter of fact to be proven by the plaintiff in an adversary system. The defense attorney was not morally obligated to inform the plaintiff of the existence of this evidence since it is the plaintiff who bears the burden of proof as it is he who seeks relief. Thus, an attorney is under no positive obligation to aid the opposing counsel with his case in discovery.

The question as to the obligation of counsel to inform the court of some precedent affecting the case should be answered in the affirmative. An attorney, even if he argues the inapplicability of a precedent to the facts at bar, has a definite moral-ethical obligation to reveal its existence to the judge, for otherwise the *system* itself is subverted. In this respect, a quote from Lord Birkenhead is in point:

> Their Lordships were therefore very much in the hands of counsel and those who instructed counsel in these matters, and the House expected, and indeed insisted, that authorities which bear one way or the other upon matters under debate should be brought to the attention of their Lordships by those who are aware of those authorities. That observation was irrespective of whether or not the particular authority assisted the party who was aware of it. It was an obligation of confidence between their Lordships and all those who assisted in the debates in this house in the capacity of counsel.[27]

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[22] *Id.* at 271.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Thode, *The Ethical Standard for the Advocate,* 39 TEX. L. REV. 575 (1961). Professor Thode raised the more difficult question of whether Williston would have been able to ethically remain silent if the judge had asked whether either attorney had information concerning the particular issue to which the undisclosed letter in Williston's possession related. *Id.* at 588. According to the professor, the answer would turn on "whether the court's question was reasonably within the scope of its power to control and direct the trial . . . ." *Id.* If such power exists, then the law would require the attorney to divulge the pertinent information. *Id.* If on the other hand, the court lacked the authority to direct such disclosure, the attorney should remain silent. *Id.* However, Professor Thode, as well as this author, remains uneasy with this solution since the court thereby seemingly violates the "internal morality" of its own system. *See id. See also* C. CURTIS, IT'S YOUR LAW 13 (1954).

[27] Glebe Sugar Ref. Co. v. Trustees of Port and Harbours, [1921] 37 T.L.R. 436 (H.L.) (Scot.).

The Committee on Professional Ethics of the American Bar Association has declared that a lawyer has the duty to advise the court of judicial "decisions adverse to his client's contentions."[28] The committee stated that "a lawyer is an officer of the court. His obligations to the public are no less significant than his obligation to his client. It is his duty to aid the court in the due administration of justice."[29] This canon expresses the basic thesis of this Article; namely, that the end of the judicial process is justice under law by means of truthfinding under safeguarding rules, not trickery and procedural obfuscation. As Charles P. Curtis has properly expressed it: "The court has priority over the client in matters of law and the client has a priority over the court in matters of fact."[30] Although Curtis bases this distinction on a matter of loyalties, it can better be justified as a defense of the very system of common law in adversary advocacy.[31]

In conclusion, it may be stated that a defendant's lawyer need not reveal the name of a witness or document known to him, but unknown by the court or the plaintiff, and he does not act unethically in keeping silent.[32] The plaintiff is put to his burden of persuasion. This case falls within the duty to represent the client fully within the framework of the law. The second situation—making known to the court an applicable appellate decision—is a very different matter. The attorney must reveal such a decision to the court even at the expense of his client because to do otherwise is to pervert the system. A question of determining the applicable law is involved, and there is no obligation to the client to withhold knowledge of the applicable law. The attorney's obligation is to present the applicable, or possibly applicable, law to the court. This is not to say that the lawyer should not do his best to distinguish precedent or even advocate the overruling of prior law. While his obligation is to represent his client fully in obtaining a determination of the law, to conceal the law would be to distort the judicial process which relies upon stare decisis as a cornerstone.[33] This obligation to report controlling law, of course, does not extend to any

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[28] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 146 (1935).

[29] *Id.*

[30] Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 11 (1951).

[31] *See In re* Greenberg, 15 N.J. 132, 104 A.2d 46 (1954) (attorney's duty to inform court of adverse decisions not limited to controlling authorities); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 280 (1949) (attorney's duty to inform the court of adverse decisions). *Cf. The Attorney's Duties of Disclosure*, 31 ST. JOHN'S L. REV. 283 (1957) (attorney has obligation to expose perjury as well as to disclose adverse authority). *But see* Tunstall, *Ethics in Citations: A Plea for Re-Interpretation of a Canon*, 35 A.B.A.J. 5 (1949), in which the author asserts that the obligation to disclose adverse authority should be narrowly defined and should extend only so far as the authority is controlling.

[32] If, however, a controlling decision had held that the names of all witnesses must be disclosed by either party, then it would no longer be a matter of fact, but of law, and the lawyer would then be under a positive obligation to reveal the name of the witness as well as the controlling authority in the case.

[33] *See generally* Re, *Stare Decisis and the Judicial Process*, 22 CATH. LAW. 38 (1976).

obligation to advance new theories on behalf of the other party to the lawsuit.[34] Such an obligation would be an abandonment of the adversary system and must therefore be rejected.

As a final note, it is important for the lawyer to remember his great freedom in challenging any "settled" line of decisions. It has been the courage of a few daring lawyers that has led to some fundamental legal breakthroughs in our society. In important questions, the conscientious lawyer must be prepared to challenge the law with courage for the sake of justice. He then can address the court: "If such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter."[35] As the public servant of justice, that moment does proud to any lawyer.[36]

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[34] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 280 (1949).

[35] Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952).

[36] Historically, the bench and bar have been much more interested in conserving established case law than in modernizing legal doctrine. Whether this is due to an instinctive distrust of anything new which could jeopardize the entrenched position of the legal profession or to a legitimate conserving force in society is difficult to determine.