

## Are Professionalism and Zealous Advocacy Compatible in the Legal Profession?

by Grant Dawson, CC '95

### INTRODUCTION

Lawyers are not monolithic figures who stand aloof from the world like a Howard Roark;<sup>1</sup> rather, lawyers are desperately engaged in the world — sometimes for good and sometimes for ill, but always engaged. The first sentence of the American Bar Association's Model Rules of Professional Conduct (hereinafter Model Rules) states, "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."<sup>2</sup> Being a lawyer necessitates contact with others; "no one would choose to have the whole world on condition of being alone; for humans are political creatures whose nature it is to live with others."<sup>3</sup> Lawyers are defined by their interaction with others, and it is at the nexus of this interaction that the duties of professionalism and zealous advocacy commingle.

The Model Rules make an attempt to draw a distinction between professionalism and zealous advocacy and to propose a compromise between these two competing demands on the conscience of a lawyer.<sup>4</sup> However, if the Model Rules' treatment were adequate, the topic of this essay would likely be unwarranted. The cliché holding that both professionalism and zealous advocacy are essential ingredients to a well-rounded and effective lawyer must yield to a deeper analysis of the compatibility of professionalism and zealous advocacy. The first section of this essay suggests a framework within which a more detailed inquiry into the concepts professionalism and zealous advocacy can proceed. The next section strives to define both these terms within this proposed framework. Finally, the third section compares these defined terms and attempts to determine the degree to which they may be mutually compatible.

### I. DEONTOLOGICAL REASONING AND THE ADVERSARIAL SYSTEM OF JUSTICE

A useful way in which to approach the task of defining zealous advocacy and professionalism is to apply an "ends" and "means" analysis to the legal system's pursuit of conflict resolution. Putting aside lawyers who engage in illegal activity in order to "win" a case, lawyers involved in

Thirty second- and third-year students contribute to the *University of Chicago Law Review*, which is a leading general-purpose legal periodical. Another thirty students are members of the University of Chicago Legal Forum. This forum publishes annual papers from a symposium on topics of current legal interest, along with student commentary. Still another 30 students participate in the University of Chicago Law School Roundtable, which focuses on interdisciplinary issues. More than eighty students take part in the Law School's Mandel Legal Aid Clinic, which represents destitute clients.

Located in ethnically-diverse Hyde Park, the University is surrounded by a wealth of cultural attractions. Museums in the area showcase art collections drawn from all artistic genres. On campus, the "University of Chicago Presents" series features a range of musical performances, including chamber and early music. Blues, jazz, rock and folk music can be found in clubs and auditoriums. The University also boasts award-winning repertory productions that are sure to entertain any audience. Perhaps the best aspect of the institution's location is the fifteen-minute ride by car, train or bus from downtown Chicago. There, one can visit the downtown Loop, Chicago's center of commerce. Chicago offers some of the finest shopping in the nation, as well as many galleries, clubs, bistros, restaurants and parks. The Chicago Architectural Foundation runs guided tours of Chicago's downtown and neighboring areas.

The University of Chicago Law School is recognized as a premier learning, teaching and research institution. It provides a rigorous professional education without sacrificing serious scholarship. It combines technical legal training with a focus on the connections between law and other academic disciplines, and is set in the heart of a city full of attractions. This provides Chicago students and alumni with a unique perspective on life, as well as on the study of law.

litigation abide which that system is based. This deontological subscription of the lawyer is framed within the adversary system of justice. But what is the goal of this adversary system: Is it to ascertain the truth or can the adversary system be an actual end, in and of itself, with worth apart from any valuation contingent upon external results?<sup>5</sup>

In an adversary system, the rights of the individual are protected, often at the expense of the larger community. For example, with everyone cherishing and protecting their individual rights, it is inevitable that those rights will often clash, and when this occurs, entitlements must be assigned in as fair a manner as possible. Even when the judicial system forces an individual to surrender an entitlement to another individual, the surrendering individual is given the dignity of being able to fight for her rights. In this way, the adversary system of justice is a process with intrinsic value because it demonstrates that individual rights are autonomous to the extent that they cannot be summarily curtailed without legitimate opposition.

The adversary system is also the most effective method of ascertaining the truth without, at the same time, suppressing cherished individual rights. In this regard, it is the "ends" of the adversary system with which we are concerned. America is the land of the "bottom line": We care about due process and its valuable protections described above, but we are equally, if not more, concerned with the end adjudicatory aspects of a dispute, namely, "who is right" and "who is wrong." Because the conflict of adversaries is necessary in order to reach this point of resolution and because zealous advocacy and professionalism are two of the main "ground rules" of this conflict, these terms should be understood so that they can serve unambiguous roles.

## H. DEFINITIONS

### A. Zealous Advocacy

Although zealous advocacy does not envision one breaking the law in order to win a case for one's client, a common definition of zealous advocacy involves doing everything that one can possibly imagine in order to further one's client's cause as long as those actions are technically within the letter of the law.<sup>6</sup> All tactics are fair game no matter how ethically suspect as long as they do not constitute a direct contravention of the rules.<sup>7</sup> This conception of zealous advocacy can be described as subjugating the means to the end.

What would a legal system look like in a world of unrestrained zealous advocacy? To a large extent, our own world reflects the effects of zealous advocacy. "Results-oriented" adjudication is a present day pejora-

tive term for what was once the cornerstone of an entire generation of lawyering aimed at creating social equality. Examples include the white primary cases,<sup>8</sup> *Shelley v. Kraemer*,<sup>9</sup> and *Brown v. Board of Education*.<sup>TM</sup> These cases were criticized by Professor Herbert Wechsler as contrary to the concept of "neutral principles."<sup>11</sup> Wechsler argued that, even if one agrees with the results of a particular case, results-oriented adjudication transmogrifies the court into a "naked power organ" with the ability to render arbitrary decisions.<sup>12</sup> The counter argument to this devotion to neutral principles is not academic, but pragmatic: The law might still today segregate black and white children in public schools had United States Supreme Court Justice William J. Brennan not employed his results-oriented scheme of jurisprudence, envisioned a better world, and then let the opinion in *Brown* flow from that vision.<sup>13</sup>

In contrast, zealous advocacy cannot always be assumed to be a positive force for progressive change. Because a result is not independent of its cause, the way by which one tries to reach one's goal can often affect what that goal looks like once it is ultimately attained. Lawyers often rationalize their unacceptable behavior by calling it zealous advocacy. Despite the fact that two lawyers are equal in their knowledge of the law and in the quality of their preparation, one may attempt to use her forceful speaking style to verbally overcome a timid opponent. Although an initial advantage maybe achieved, it is a Pyrrhic one.<sup>14</sup> This tactic can alienate juries and irritate judges. The lawyer could prevail, but hinder her future relationship with the judge. Moreover, if the more forceful lawyer wins and her client was the one liable or guilty, truth was not attained although her side won the case, and the result can scarcely be considered "correct." Traditionally, it is considered correct for the lawyer in these situations to exploit every possible advantage in order to win the case, but this answer is only valid if the opposing attorneys are equal in every way. But how often will opposing attorneys be equal in every way? Herein lies the danger of winning a case by every means which is technically within the rules, especially when those means militate against the creation of a level playing field for the pursuit of truth.

### B. Professionalism

A common synonym for professionalism is civility, and much has been written on this topic of late.<sup>15</sup> However, those who lament the legal profession's lost sense of civility and hearken back to the "good old days"<sup>16</sup> may need to reevaluate their view of history. There has never been a golden age of law. During a defense speech, it was standard practice for Cicero to

tongue-lash a political rival who had nothing to do with the facts of the case. In a case weak on its merits, Cicero would inundate the judges and jury with so much irrelevant information and unrelated digression that they were unable to understand the facts and issues of the case and were, thus, susceptible to his conclusory statements at the end of the speech (for no one wanted to admit that he could not follow and comprehend the oration).<sup>17</sup> Cicero was such a successful orator that the only case he ever lost was when his opponent's armed soldiers filed into the courtroom, thus intimidating Cicero into delivering a less robust defense.<sup>18</sup> So, let us put to rest our nostalgic notion of the "good old days."

Since a template of civility is not to be found in the past, it is the task of the present to design its own meaning of the concept of professionalism. If zealous advocacy is subjugating the mean to the end, then professionalism can be described as subjugating the end to the mean. A duty to advocate substantive issues in good faith can be gleaned from the Model Rules: A lawyer is instructed to seek "a result advantageous to the client but consistent with the requirements of honest dealing" and to be "guided by personal conscience and the approbation of professional peers."<sup>19</sup> A good faith effort to obey the plain meaning of procedural rules and ethical codes would result in a decrease of procedural law and an increase of substantive law as cases were argued on their merits rather than on points of administrative minutia. Procedural law is created and continually amended because intelligent lawyers are constantly finding ways to circumvent the law in order to win. It even has been suggested that, if lawyers treated each other with more civility and in a more professional manner, they would not only rehabilitate their image, but also emerge as exemplary beacons for society's *own* civility crisis.<sup>20</sup>

### HI. COMPARISON

No one can foretell the future, and pivotal moments in history can occur from inaction as well as from action. Zealous advocacy is not an infallibly divine vehicle for progressive social change; zealous advocacy is capable of forwarding positive social change as well as impeding it. Of central importance is what one considers a "positive" social change. Victors do not only write history; they also create the moral values of the people reading that history. A less zealous lawyer probably could have secured Rosa Parks a seat somewhere in the middle of the bus,<sup>21</sup> but the valuation of Rosa Park's victory is affected by the very fact that she won. If she had lost, we might think that she should have lost because our perceptions would have been shaped by that different result. Our perception of justice and

injustice is the product of past victories and losses, an amalgam of various environmental archives of societal information, not divine decree.

In *Olmstead v. United States*,<sup>22</sup> the Supreme Court held that wire tapping did not violate the Fourth Amendment. The heinous crime that the federal agents in this case were fighting to eradicate was "a conspiracy of amazing magnitude to import, possess [,] and sell liquor unlawfully."<sup>23</sup> How many lives were lost in America's abortive attempt to eradicate the moral scourge of alcohol? And for this cause, the Supreme Court was willing to curtail constitutionally protected freedoms. United States Supreme Court Justice Louis D. Brandeis in his dissenting opinion warned: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . The greatest dangers to liberty lurk in insidious encroachment by men of *zeal*, well-meaning but without understanding."<sup>24</sup> The historical posture of *Olmstead* admonishes members of society to be cautious of utilizing expedient means to achieve an end we "know" to be right.

A dedication to professionalism does not mean etherizing the legal system like a patient on an operating table. Zeal is warranted as long as it does not serve to undermine the system within which it must function, a system originally devised so that warring parties could resolve their disputes without resorting to physical violence.

The entire idea of civilized society and the administration of laws is the rejection of the notion that "might is right." Whoever is the strongest should not necessarily prevail; the playing field should be leveled, and the winner determined by a different set of values and criteria. Zeal should be exercised only up to, and not beyond, the point where justice ends and injustice begins. In the late classical period of Rome, the most famous of the jurists was Ulpian; for him, justice consisted of giving to each person that which she deserved.<sup>25</sup> Similarly, our legal system strives to award to each party not what each can afford, but what each deserves. If law is to remain an engine of justice and not a mere forum for verbal combat, there must be rules that are followed. If the practice of law were nothing more than a war of words, then the lawyer with slight of tongue would always win.

The human mind will always be able to circumvent the law with ingenious logistical gymnastics because laws are necessarily general and, thus, applicable to multiple situations and behaviors.<sup>26</sup> Attempting to win by getting around the rules and with disregard of societal ramifications is destructive of the very system which awards one victory. Violence toward the rules, instead of violence toward the merits of one's opponent's arguments, is ultimately violence toward one's self.

## CONCLUSION: TOWARD A NEW DEFINITION

An effective lawyer does not use tricks to win; rather, an effective lawyer and the lawyers who most often win cases and dominate their peers are the ones who have extensively prepared their case and who possess a thorough knowledge of their facts and law. Civility is not weakness. Although it was argued that zealous advocacy is the subjugation of the means to the end, this is not the only way in which to perceive this concept. Zealous advocacy can be subsumed under the larger heading of professionalism as an integral component of any effective advocate's expertise.<sup>27</sup> One of the duties of an advocate is to represent her client with the proper level of zeal; in fact, not to do so would be considered unprofessional. Only when zealous advocacy becomes a goal in and of itself and independent of the requirement of professionalism it has reached the point of diminishing returns for all the parties involved in a dispute. For a lawyer to behave in a way which is not in accordance with professional behavior is a self-defeating act that robs the legal profession of its fundamental justification for the power which lawyers are granted in our society.

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### Notes

<sup>1</sup> See AYN RAND, *THE FOUNTAINHEAD* 1 (1943) (depicting perhaps the most individualistic and self-reliant character ever to appear in a work of fiction).

<sup>2</sup> *MODEL RULES OF PROFESSIONAL CONDUCT* preamble (1997).

<sup>3</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 1169b17-19 (I.IX.3) (translation mine).

<sup>4</sup> *Model Rule* 1.3, entitled "Diligence," provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.3 (1997). Comment [1] goes on to state the following:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction [ ] or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for the client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

*MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.3 cmt. [1] (1997).

<sup>5</sup> Professor Frankel points out.

We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. . . . Employed by interested parties, the process often achieves truth only as a convenience, a byproduct, or an accidental approximation. The business of the advocate, simply stated,

is to win if possible without violating the law. . . His is not the search for truth. To put that thought more exactly, the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.

Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036-37 (1975).

<sup>6</sup> See generally Michelle S. Jacobs, *Legal Proliferation*; Martha Middleton, *7th Circuit OKs Rules on Civility*, NAT'L L.J., January 11, 1993, at 18 (stating that the Seventh Circuit was the first to adopt a code of civility); Gail D. Cox, *Lawyers Still Wage Uncivil War*, NAT'L L.J., July 17, 1995, at A1 (stating that eight different codes have been adopted in eighty-eight jurisdictions).

<sup>16</sup> For a view of the "good old days," which does not sound all that good, see Harry T. Edwards, *Speech: A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 571-72 (1997) (recalling interviews with several partners from prominent law firms who told the (now) Chief Judge of the United States Court of Appeals for the District of Columbia Circuit that, although they were impressed with his record, their firms would not hire a "Negro").

<sup>17</sup> "Indeed, there is such authority in all he says that one is ashamed to contradict him, and his zealous advocacy elicits the sworn testimony of witnesses and the credulity of judges." QUINTILIAN, *INSTITUTIO ORATORIA* I.109-11 (translation mine). Quintilian also reports that Cicero boasted that he had thrown dust in the eyes of the judges during his speech, *In Defense of Aulus Cluentius Habitus*. QUINTILIAN, *INSTITUTIO ORATORIA* II. 17.21.

<sup>18</sup> This occurred during his speech, *In Defense of Titus Annius Milo*. MICHAEL GRANT, *CICERO: SELECTED POLITICAL SPEECHES* 216 (1989); MICHAEL GRANT, *CICERO: MURDER TRIALS* 295 (1990).

<sup>19</sup> *MODEL RULES OF PROFESSIONAL CONDUCT* preamble (1997).

<sup>20</sup> N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 938 (1995-96).

<sup>21</sup> Brewer & Bickel, *Etiquette of the Advocate*? TEXAS LAWYER, March 21, 1994, at 20, 21.

<sup>22</sup> 277 U.S. 438 (1928). *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347 (1967).

<sup>23</sup> *Id.* at 455-56.

<sup>24</sup> *Id.* at 479 (Brandeis, J. dissenting) (emphasis added).

"The precepts of justice are these: to live properly, not to hurt others, and to render to each person that which is his." DOMITIUS ULPIANUS, *83-BOOK COMMENTARY ON THE PRAETOR'S EDICT* 1.1.10.1 (translation mine).

<sup>26</sup> "All law is general, but concerning some things it is not possible to make a general statement that is correct. In those cases, then, in which it is necessary to speak generally, but not possible to do so correctly, the law takes the usual case, even though it is not ignorant of the possibility of error." ARISTOTLE, *NICOMACHEAN ETHICS* 1137b13-16 (E.X.4) (translation mine).

<sup>27</sup> John Stuart Smith points out that "[professional conduct is not inconsistent with your duty of zealous advocacy because your effectiveness as advocate will depend upon this reputation." John Stuart Smith, *Civility in the Courtroom: From a Litigator's Perspective*, 69-JUN N.Y. ST. B.J. 28, 30 (1997). See James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 739 (1992) (arguing that "zealousness is internalized . . . and embedded in our sense of professionalism"); Patricia L. Rizzo, *Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator*, 35 CATH. LAW. 79, 85-86 (1991) (calling zealous advocacy the "Principle of Professionalism").

*Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97 (1995); Kathleen P. Browe, *A Critique of the Civility Movement: Why*

litigation); Martha Middleton, *7th Circuit OKs Rules on Civility*, NAT'L L.J., January 11, 1993, at 18 (stating that the Seventh Circuit was the first to adopt a code of civility); Gail D. Cox, *Lawyers Still Wage Uncivil War*, NAT'L L.J., July 17, 1995, at A1 (stating that eight different codes have been adopted in eighty-eight jurisdictions).

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<sup>19</sup> MODEL RULES OF PROFESSIONAL CONDUCT preamble (1997).

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<sup>21</sup> Brewer & Bickel, *Etiquette of the Advocate?*, TEXAS LAWYER, March 21, 1994, at 20, 21.

<sup>22</sup> 277 U.S. 438 (1928). *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347 (1967).

<sup>23</sup> *Id.* at 455-56.

<sup>24</sup> *Id.* at 479 (Brandeis, J. dissenting) (emphasis added).

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<sup>26</sup> "All law is general, but concerning some things it is not possible to make a general statement that is correct. In those cases, then, in which it is necessary to speak generally, but not possible to do so correctly, the law takes the usual case, even though it is not ignorant of the possibility of error." ARISTOTLE, *NKOMACHEANETHICS* 1137b13-16 (E.X.4) (translation mine).

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## Corporate Taxation: CEN and CIN

by Nam Tran Thi Nguyen, CC '98

### INTRODUCTION

Even as Europe progresses towards a more economically unified community, the issue of corporate taxation still remains as diverse as ever. Within the European community today, there are twelve different corporate tax systems. With such variations in tax rates, the question of economic efficiency arises. In explaining the effects of the disharmonious tax rates on economic efficiency, economists utilize the concept of Capital Export Neutrality (CEN) and Capital Import Neutrality (CIN). Conventionally, economists have claimed that the absence of CEN and CIN results in economic inefficiency. Hence, understanding the concepts of CEN and CIN is imperative in understanding the debate that surrounds the issue of corporate taxation in Europe.

### WHAT IS CIN?

The conventional definition of CIN, as defined by Musgrave, states that the tax rate on all companies investing in a particular country be the same regardless of the nationality of the investor.<sup>1</sup> In the absence of CIN, a less efficient company facing a lower tax rate would be more likely to invest in the particular country than a more efficient company facing a higher tax rate. If a company faces a lower tax rate, then it is logical for the company to lower its bid for a project, such as building a bridge, to win the contract over a company that is more efficient but faces a higher tax rate. Consequently, inefficiency arises because the less efficient company, which won the contract because of its lower bid, would utilize more resources than the more efficient company in completing the project. In re-examining the definition of CIN, Devereux and Pearson claim that even though Musgrave's definition applies to goods such as bridges, tunnels and similar industries, the definition fails to encompass goods that can be produced in one country and exported to other countries.<sup>2</sup> For example, in a situation where there are no tax distortions, Compaq produces computers more cheaply than Toshiba, meaning Compaq is the more efficient computer company. However, if Compaq computers are taxed more heavily than Toshiba computers whenever computers are sold, then Toshiba could lower its slightly price to sell more computers than Compaq. In this hypothetical situation, inefficiency arises because without the distortion of the tax system more computers