Method In Legal-Ethical Reasoning: The Criminal Lawyer's Conscience, the Client and the Court

By

Sean Campbell Brennan

A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements For the Degree of

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ABSTRACT

A legal-ethical dilemma occurs when two legal duties conflict or, in the alternative, when a legal duty conflicts with a moral duty. Such dilemmas are inherent in the current regime for lawyers governing legal ethics in Manitoba. The problem is how best to resolve these dilemmas.

In solving this problem, the secondary literature provides the theoretical framework. Four writers exemplify four different models of the adversarial system, the lawyer-client relationship and the context of criminal defence. The framework gleaned from the secondary literature is then used to analyse the primary sources of legal ethics in the Province of Manitoba.

The Manitoba Law Society Act and Code of Professional Conduct are researched to their historical origins. The current Code of Conduct is compared with not only its antecedent but also its correlatives in other Canadian jurisdictions.

The conclusion reached is that legal-ethical dilemmas are best resolved by lawyers with reference to common morality. Lawyers are to be held publicly accountable for decisions made and results obtained in their course of representing a client. To facilitate the transition to this method in legal-ethical reasoning there will have to be legislative and regulatory changes.

PREFACE

Any discussion of legal ethics should begin with a declaration of the author's meta-ethic of legal ethical reasoning. This has to do as much with one's experience and rational capacity as with one's view of the applicable positive law to any given situation. I believe that in encountering an ethical dilemma the starting point requires reasoning from the position of the involved individuals. An analysis must involve an assessment of any duties, legal and moral, owing between the parties. I attempt to balance faith, reason, personal experience and an adherence, but not a slavish devotion to universalism. As will become clear I find suspect any meta-ethic rooted in situationalism or relativism.

In spite of this adherence to universalism, or perhaps because of it, I recognise the need for a description of common or universal reasoning. In the legal-ethical literature many authors assume the existence and the particulars of a common morality. I recognise that there is controversy around the particulars, and perhaps even the existence, of a common morality. I believe that there is indeed something that can be called a common or universal morality. When applied to a system, it would be composed of values inherent in religious traditions and secular humanist philosophy. I do not propose in this thesis to establish the existence or a description of a common morality. I do however recognise that there are issues that are not fully explored within the legal literature, as they more often are in the philosophical, sociological or social-psychological literatures.

Regarding the inclusion of Chapter 4, The Role of the Courts, the main point is how a legal-ethical dilemma is to be resolved. This begs the question of who performs such resolutions. This case law chapter therefore attempts to locate who in practice currently resolves legal-ethical dilemmas and, more importantly, who should. This chapter, therefore, does not speak to how per sé a legal-ethical dilemma is resolved.

The examples and legal perspectives ingrained throughout the thesis derive from my five-year practice as a criminal defence counsel. This experiential bias is in no way meant to dismiss or diminish the importance of the difficult legal-ethical issues that may arise in civil or family litigation or solicitor's practice.

ACKNOWLEDGEMENTS

This thesis is dedicated to my wife, Joanne. Without her love, support and contributions, this thesis would not have been possible.

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Chapter 1: Introduction

(1) The Legal-Ethical Dilemma: Public and Professional Views of Lawyers' Ethics

We are each a whole person, despite our multiplicity of roles: spouse, son or daughter, employee, colleague, friend, parent.* No matter our area of endeavour, our acts reflect these essential realities. In essence, this is the role morality method of ethical reasoning. This methodology entails a recognition that conflicts will inevitably arise between our various roles, or in the alternative, between the dictates of a role and the dictates of universally held values (common morality). For example, as an employee of a logging company you may be committed to the financial viability of the corporation while as a parent you may be committed to maintenance of the environment for the enjoyment of your children. By way of further example, as a friend you prize your loyalty to those around you; then one of your friends asks your assistance in a morally questionable enterprise. We may or may not take a principled approach to decide how best to resolve these conflicts. It is important here to explore exactly what these conflicts are and how they are best resolved, in the legal culture of the Province of Manitoba.

The classic expression of legal-ethical dilemmas is in the conflicting values and duties exemplified by Monroe Freedman's "Trilemma" of the criminal defence attorney:

(i) do you discredit a witness who you know to be truthful?

(ii) do you let your client take the stand knowing he will offer perjured testimony?

(iii) do you give advice that may tempt the client to commit perjury?[1]

These questions are difficult because of the value conflicts that they present. Each is about truth-telling and about loyalty to the client, both commendable values that often require special efforts on behalf of certain individuals. Values such as honesty, fairness, and empathy too often, however, have been subordinated to client loyalty by lawyers.[2]

> Legitimate interests compete with one another – those of the client, the public, the court, and the truth.... The competing interests are weighed differently by different constituencies. Few member of the public, for instance, would assign sufficient weight to the interests of the client or the administration of justice in maintaining confidentiality that the jeopardization of the life or well-being of innocent persons would be justified.[3]

A legal-ethical dilemma occurs, therefore, when the duties of the lawyer conflict either with each other or with the lawyer's personal beliefs. It is the search for a resolution of these types of conflict that motivates this thesis. To do so you have to decide where you stand in the debate over the different types of ethical methods, common or general, legal or role ethics. After all, "[w]hen moral values are in conflict, the ways in which we resolve those conflicts show what our true moral priorities are."[4] Too often the way lawyers have resolved these conflicts has inspired public shock and dismay over the state of their ethics.[5]

There is a perceived lack of public confidence in legal ethics.[6] This conclusion is supported by a number of factors. First, let it be noted that in the eyes of many today the legal profession is a self-interested and non-accountable elite. Further, the methodology most legal commentators advocate, and most lawyers apply, is markedly different from the method that most members of the public would apply to an ethical dilemma. It is ingrained throughout the literature that there are two main methods in legal ethics. At one end of the spectrum are the common and universal moralities. These methods would have individuals act wholly as individuals and follow universal precepts of ethical standards. At the other end of the spectrum is role morality. This method would have the lawyer, for our purposes, resolve an ethical dilemma with regard exclusively to values inherent in the role that the lawyer occupies. The lack of public confidence in legal ethics arises because the public would occupy the common or universal morality end of the spectrum; while the legal profession, for the most part, would occupy the role morality position at the other end of the spectrum. To bridge this gap, lawyers either have to adopt the position of the public's common morality in resolving their ethical dilemmas or they have to change how they envision their ethics stemming from their diverse roles as lawyers. On the way to this conclusion, it will be necessary to examine not only the methodological positions in the legal literature, but also the enabling provincial legislation, the formal Codes of Professional Conduct, and the role of the courts.

(a) Community Views

> Lawyers' ethics matter; not simply to lawyers, but to everyone because erosion of lawyers' ethical standards redounds upon the quality of the criminal and civil justice systems and ultimately upon the quality of life.[7]

A Gallup Survey conducted in the United States of America, in 1992, concluded that lawyers were among the least honoured of American professionals.[8] The poll asked respondents to rate various professions in respect of "honesty & ethical standards". The ratings were on a sliding scale culminating in ratings of "high" and "very high". A mere twenty-two percent of respondents rated lawyers "high" or "very high" in this respect.

This placed lawyers atop used car salesmen at six percent and advertisers at twelve percent. Lawyers, in terms of their ethics, were seen as roughly on par with newspaper reporters, who rated at high or very high with twenty-four percent of respondents, building contractors rated at twenty percent and real estate agents rated at sixteen percent.[9] This rating occurred irrespective of the advances made in the field of professional responsibility: the new Rules of Professional Conduct adopted by the American Bar Association in 1983, "Professional Responsibility" courses required in all law schools, and numerous, often required, legal ethics seminars in Continuing Legal Education programs across the United States.[10]

Irrespective of the well-documented formal progress of legal ethics, the image of the legal profession still suffers from within and without. This is due to an increasing view of the public and the profession that law is no longer a profession of public service but merely a business for profit.[11] In Canada, Donald Buckingham criticises the idea of law as business and the primacy of the billable client over values of truth and public service. Jerome Bickenbach also recognises the conflicting values of profit-seeking and integrity:

> The profession of law is a public service, not merely a business. Lawyers are entrusted to serve their clients faithfully, loyally and competently; yet as professionals they also owe an equivalently onerous obligation to preserve and sustain the integrity of the legal system itself.[12]

Buckingham embraces the common morality method of legal reasoning by calling for a reform of the teaching of legal ethics to include both professional responsibility and personal moral development.

(b) Other Lawyers

Lawyers also recognise and indeed criticise the historical and current state of legal ethics. In 1882, Theodore Bacon wrote:

> No one can have been for twenty years in active and varied legal practice without becoming convinced that the profession to which he belongs harbours within itself examples of as base, deliberate and ingenuous depravity as any that, less favoured by fortune or cunning, have gravitated into the penitentiary.[13]

In 1993, Gavin MacKenzie disapprovingly cited the sentiment:

> If you take dough from a murderer for helping him beat the rap you must be admitted to the bar.[14]

Lawyers are in all likelihood the objects of more stinging and unrelenting criticism than are members of any other profession. Professor Lieberman, in Crisis at the Bar: Lawyers' Unethical Ethics and What to do About It, argued in 1978 that the legal-ethical system was in complete disarray. He wrote that a basic tenet of the lawyer's creed is that it is ethical to aid those bent on acting unethically. The lawyer is not morally responsible for the act of the party in maintaining an unjust cause. Lawyers justify this seeming perversity by noting that a free society makes a sharp distinction between a legally and a morally permissible act.[15] These examples of the profession's own contempt for lawyers, Professor Lieberman argued, stems from their adherence to an "unethical code of ethics". Some lawyers simply use, a method of ethical reasoning foreign to other members of the bar:

> There is significant sentiment within the bar ... that a lawyer has both a moral and a professional duty to conduct a client's matter in accordance with the lawyer's morality even though the client's moral judgments are contrary. Oddly enough, most critics of the legal profession argue NOT that such attitudes and practices are paternalistic, elitist, and even arrogant; rather, they complain that not enough lawyers abide by them.[16]

The criminal defence bar in particular has an image problem. Jeremy Bentham (1748 – 1832) considered criminal lawyers who successfully defended accused persons whom they believed to be guilty to be little better than accessories after the fact.[17] Criminal lawyers have often been regarded by other lawyers as being somewhat on the shady side of the practice of law.[18]

(2) Towards a Solution: Legal Ethics as Fettered Discretion

The typical formulation of a provincial code of conduct is a setting out of rules. The provincial law societies are concerned with the setting of minimum standards of conduct for lawyers. This structure of a rule based code of conduct places little control on the activities of lawyers. Lawyers may be tempted to read the rules contained in the code of conduct to look for loopholes or to determine what actions they would be disciplined for, rather than looking to the code of conduct for guidance into the proper conduct expected of a member of the profession. Rather than, or perhaps as well as, the rules that set out minimum standards, there should be directions that mandate the proper conduct of lawyers. These directions should be designed to advance the moral utility of the profession. Adherence to these aspirations should be mandated and non-compliance sanctioned. The realm of lawyers ethics will always be an exercise of discretion, however, this discretion should be fettered by provincial legislators and law societies to ensure ethical and moral leadership by the profession within society.

(3) Examples From Practice

The following illustrations are indicative of value conflicts that I encountered in my criminal defence practice. They are meant to exemplify the importance but not pre-eminence of the role value of loyalty to the client. All of these feature loyalty conflicting with other values, such as moral duties to others, moral duties to society and to truth itself.

(a) Loyalty to Client Instruction v. The Moral Duty to Protect the Vulnerable

(i) The Self-Destructive J.W.M.

J.W.M. was a young offender whom I met in custody as an articled lawyer. He was convicted of a robbery, the violence of which shook the community. When sixteen years of age, J.W.M. had an explosion of rage directed at a younger boy who would not part with the skateboard that he had worked so hard for. J.W.M. chased the boy through traffic very near the downtown area of the city of Winnipeg. J.W.M. was wielding a very realistic looking pellet gun. All the while he was shouting threats to kill. The chase ended with J.W.M. catching the complainant. J.W.M. savagely beat the young person about the head and body with the gun. Other youths who had been with J.W.M. also caught up and the complainant was set upon by the group. The complainant suffered a fractured skull, eye damage, and unconsciousness, and was left in a pool of his own blood. The brutality of the attack turned the complainant's mother into an outspoken activist protesting youth violence. This fact kept this story newsworthy throughout the proceedings and even through the final reviews of judicial resolution.

To his credit and despite his dreadful upbringing, J.W.M. managed a very positive pre-disposition report from Probation Services. In the youth court he received what may be seen as a slap on the wrist: a brief period of open custody with a period of supervised probation to follow.

J.W.M. was committed to a youth institution. The serving of his sentence began uneventfully. To this point he was a typical, perhaps a little better than average, inmate. The crown then appealed the sentence. An exhaustive review of the case law showed that the crown appeal was sound in law. I attended the appeal as a spectator and watched the panel raise the sentence to thirty months of secure custody, to be followed by six months of supervised probation.

As may be expected, the reaction of J.W.M. was negative. He began acting out. The problem escalated until he was segregated from the population of the institution and its staff encouraged him to bring application to court to allow him to serve his sentence in an adult facility. The lawyer for J.W.M. dispatched me to persuade him that the application to serve the balance of his sentence in an adult facility was not in his best interest.

I discovered a very angry young boy. He had the attitude that he was being persecuted by the courts and the staff. He had the common complaints about life in the youth system. He was in a structured environment where his days were filled with activities. He was not allowed to be lazy or hang out with friends. He was not allowed to smoke. He could not telephone his girlfriend whenever he wanted. He had to ask to go to the restroom. He had had enough. He was tough. He was sixteen. He wanted to be treated like an adult. He was also showing first signs of institutionalisation. He was adamant that life in the youth system was not for him. I arrived at the institution an hour before the court docket was to begin.

I secured an interview room and sent for J.W.M. Despite my involvement in some of the research for his appeal and attending it, this was our first meeting. I recall not liking him. My instructions from his counsel were to assist him in withdrawing his application. The foundation of this instruction was the idea that this young person did not know what was best for him and we did. After all, young people, not universally, but often have a difficult time in gaol, especially when alone. They are targets of abuse and mistreatment by other inmates, are in a formative period of their lives and can harden negative attitudes and activities. Many young people in gaol end up in protective custody.

I spent three hours talking and attempting to persuade J.W.M. to withdraw his application. He showed understanding of my arguments. He understood that in the youth system there was still the possibility of earning open custody after a successful disposition review. He understood that there would be no early exit from gaol. Yet his anger and bravado remained paramount. Finally, we were advised that J.W.M. was the last matter on the docket and the court was waiting for us. I took a final minute with the hope of confirming my instructions from counsel to withdraw the application. J.W.M. was adamant that he would rather serve his time in gaol.

At this point, I stood before J.W.M. and in a stern manner advised him that he was making the wrong decision. I told him that I was not going to play a role in his self-destruction. I told him that I was withdrawing his application and if he really wanted it he would have to tell the judge himself. As it turned out, I withdrew the application and J.W.M. did not speak out.

J.W.M. went on, with the help of a wonderful priest, to become a model inmate. He acted appropriately, took his courses and programs. He participated in activities and groups in the centre. Ultimately, he began to help other inmates. His disposition review was successful and he earned open custody just over a year later. From there he earned passes, then probation, and eventually served out the remainder of his sentence in the community. Of note is that within approximately ten days of the withdrawal of his application the infamous Headingley Gaol riot occurred. J.W.M. has been in the community for the last five years. He works full time, volunteers, lives independently and remains clean.

This example from practice represents a conflict between my role duties of candour to the court, loyalty to the client and zealous advocacy versus my personal belief that I, not the client in his youth and anger, "knew" what was best. In Manitoba, the Code of Professional Conduct is instructive in dealing with this situation. Chapter Nine is the rule "The Lawyer as Advocate".[19] This rule contains the duties of candour to the court and what are commonly described as the requirements of loyalty to the client and zealous advocacy. The difficulty that I faced is that I knew what I was supposed to do as an advocate but I disagreed with it. This is representative of a conflict between role duty and common morality. Just as I knew what was expected of me as an advocate, I "knew" what was best for J.W.M., or at least I "knew" that it was not Headingley Gaol.

At the time, I did not consider my actions, or indeed my instructions from his counsel, to be paternalistic. I do now but I would not change the way in which I conducted myself. I have remained in touch with this individual and he now thanks me for acting as I did. In the view of David Luban then, I can justify my paternalistic action as being based on anticipated future consent.[20] It does not feel like justification, merely a precarious rationalisation of the conflicting duties of loyalty to the client and my own values that disallowed me to participate in what I perceived as a horrible mistake by a young person, that had to be resolved that afternoon at the youth institution.

(b) Loyalty to the Violent Client and the Protection of Innocents

(i) The Mentally Ill and Conflicting Duties to Client and Community: The Violent R.M.M.

I met R.M.M. in the sheriff's lockup in the Law Courts Complex. I was with his legal aid lawyer who had discovered a conflict of interest. I was to take over the case. R.M.M. was denied bail, despite a compete lack of a criminal record, after two bizarre but strikingly similar violent outbursts. The first incident had taken place approximately two months earlier. R.M.M. was a man in his late fifties. He lived in a Main Street hotel and received social assistance. One day after the government cheques were distributed, R.M.M. attended to the local grocery for food and supplies. Upon his return, he went to the hotel bar, groceries in hand. He sat down alone with a glass of beer. He attended to the restroom, still with groceries in hand. He met up with another individual who he said had a knife and who wished to relieve him of his groceries. R.M.M. pulled the bowie knife out of his boot and stabbed the other person in the abdomen. Ultimately, medical and police authorities were summoned. The complainant lived and, after being treated for his injuries, was released from hospital. R.M.M. was arrested and charged with assault with a weapon. He made a statement to police admitting the stabbing but indicating that the complainant, too, had a knife and was robbing him. He was then released on a promise to appear.

Two weeks passed. Again R.M.M. was sitting alone. This time it was in his apartment. He was watching television, apparently very loudly. A resident of the hotel knocked on the apartment door to ask that the television volume be reduced. R.M.M. opened the door and perceived a threat to himself and his meagre belongings. Again R.M.M. reached for the knife in his boot and stabbed the man in the abdomen. This individual lost an immense amount of blood. He was taken to hospital where he underwent emergency surgery. He was recuperating in hospital when the sutures in his intestine burst. A second emergency surgery resulted. He survived even though he had to be resuscitated during this second surgery. R.M.M. was arrested and charged with assault with a weapon. This time he was detained in custody. Again, he provided police with a statement admitting the stabbing but claiming the positive defence of self-defence.

My first meeting with R.M.M. was uneventful. I had, at this point, received the files from the lawyer who was withdrawing. I reviewed both incidents briefly with a view to obtaining instructions. R.M.M. presented well and was consistent with the statements that he provided to the police. I accepted instructions to set the matters for separate preliminary inquiry dates. As R.M.M. was in custody, early dates were set. I reviewed the files in detail preparing for the first preliminary inquiry. A day or two before the scheduled hearing, I attended the Provincial Remand Centre to review the files with the client. This meeting was not as uneventful as the last.

R.M.M. indicated that he had acted in self-defence in both instances. I counselled him that the physical evidence did not support his version of events. There was no knife found on the fellow in the bar and the blood of the fellow said to be in R.M.M.'s apartment was only in the hallway. I then counselled him that his violent responses may not have been proportional in all of the circumstances. He insisted that he had acted in self-defence. I took written instructions to proceed. By the end of the meeting I was convinced that there were some mental health issues at work. The preliminary inquiry began into the incident where the complainant was stabbed near the apartment door of R.M.M. The evidence went in and the crown asked for a committal to stand trial on the charge of aggravated assault. I was able to defeat the argument, at least in part, and R.M.M. was committed to stand trial in the Court of Queen's Bench on the charge of assault with a weapon. This charge was adjourned to assignment court for the setting of a date. The next preliminary inquiry was scheduled to proceed in the days that followed. Over these days, I became increasingly convinced that R.M.M. was suffering from significant mental illness.

Because of the seriousness of the two stabbings and their proximity in time, the crown was seeking a period of incarceration. I recognised the need for psychiatric assessment and care. The second preliminary inquiry was adjourned for a court ordered psychiatric assessment. It came back indicating that R.M.M. was criminally responsible and that he was fit to instruct counsel.

The trial date in the Court of Queen's Bench was fast approaching. A second crown attorney had assumed conduct of the prosecution. We met in chambers with the judge. The new crown attorney was agreeable to my offer of time in custody to be followed by three years of supervised probation with conditions to, inter alia, remain under psychiatric care, to take all medicines as prescribed and to report to a probation officer. R.M.M. was getting out of custody. He was not being sent to a psychiatric hospital as would have likely been appropriate. I took the deal to the client. He approved it and it was ultimately ordered by the court. In the days and weeks that followed, I read the newspaper while holding my breath for fear that R.M.M. had acted out violently again. To my knowledge he never has and I hope he never will. This case placed my role as counsel for R.M.M. squarely at odds with what I perceived to be my duty to the public as a citizen and fellow human, being concerned about the physical safety of the next person that R.M.M. thought was a robber. I acted as counsel, achieved the best result I could for my client, so I suppose that I should be satisfied. I was not. The end result was that a violent individual with mental health issues was returned to the street, without what I perceived as adequate medical intervention. This case called for an evaluation of individual and community interests. It also can be seen in terms of a conflict between the role duty of loyalty to the client and the common morality precept of protecting others from the possibility of physical violence.

(ii) Privilege In Conflict With Duties to the Court and Other Counsel: The Case of G.A.A.

G.A.A. was denied bail on a host of offences against property, the individual and the court. I was appointed by counsel after the previous lawyer withdrew due to a complete breakdown in the lawyer-client relationship. I took over the case and set dates for the trial of some matters in the Court of Queen's Bench and others in the Provincial Court of Manitoba. In the times that followed, the client became increasingly agitated. Soon I would no longer meet with him in person. All of our contact was over the telephone. G.A.A. called into the office one day when he was very angry. In his state, he threatened to kill the crown attorney. He blamed the crown personally for the police execution of a search warrant that left his home in a shambles, for being in custody, for the miscarriage of his common law partner and for his pain in general. The anger subsided at the utterance of the threat. Cool detached objectivity took over as G.A.A. outlined for me how he was going to attack the crown at the next court appearance. He outlined how he would get past the sheriff and set upon the crown attorney. I believed that he would attempt to make good on his threat. I further believed that it was possible that he would succeed.

I reviewed Chapter 4 of the Code of Professional Conduct dealing with privilege.[21] I made the determination that I was in a position of mandatory disclosure.[22] I further recognised that I must protect privilege to the extent that I could. I requested and received the advice of other senior counsel. The crown in question was away from his office. I chose to wait until his return and make the disclosure to him directly. As

G.A.A. was appearing on the Queen's Bench bail review docket, I waived his appearances until the situation could be exposed.

I made the disclosure to the crown attorney in the hallway outside the Queen's Bench chambers as we awaited a pre-trial conference. The crown attorney made light of the situation and I responded by indicating that I had fulfilled my obligations under the Code of Professional Conduct. During the course of the pre-trial, I notified the judge that extra security would be required for the trial. Almost at the end of the pre-trial, the crown attorney brought forward the information about the threat to the judge. It was decided that I would bring an application to withdraw as counsel and that the crown would not oppose this. The motion succeeded. But that was not the end of the matter.

I had boxed the file and marked it as subject to the solicitor-client privilege. I then awaited the arrival of the Winnipeg Police Services. I indicated to them on their arrival that I would obey any subpoena and answer questions on the order of a judge or the Law Society of Manitoba. I indicated that the file was the subject of the solicitor-client privilege and that it would not be disclosed without a warrant to bring the file before a judge.

This case raises the difficult issues involved in determining the scope of the solicitor-client privilege and the regulatory balance achieved by the Benchers of the Law Society of Manitoba between the privilege and the duties to protect individuals from future acts of bodily harm.

(c) Loyalty to Client v. The Moral and Legal Duties to Truth

(i) The Untruthful T.W.M.

The case of T.W.M. was an interesting exercise in the balancing of duties of zealous representation and candour to the court.[23] T.W.M. was a young offender at the time of this case. He was charged with the theft and destruction of a late model Chevrolet Corvette. The crown's case was circumstantial and at least in part rested on a weak eye-witness identification that placed T.W.M. in the vicinity of the crime shortly after it had occurred. I took the case in midstream, after it had already been set down for trial. In reviewing the file I met with the client on a number of occasions to prepare him for trial. He had always been consistent in his account of what had transpired that day and in his specific denials regarding the theft and destruction of the car.

We went to trial. As I had anticipated the crown was unable to prove its case. T.W.M. and I left the courtroom together. As we were walking down the aisle in the empty gallery he turned to me and under his breath whispered "not bad for stealing and torching that 'vette, eh?" I had been completely prepared to put T.W.M. on the stand. I certainly did not know he was lying nor in fact did I even suspect it. I felt less concerned about judging the truth of clients when I read the views of Edward L. Greenspan, the prominent Canadian defence counsel. When he met a client who attended his office and confessed to a murder and purported to have the murder weapon in a brown bag in his lap, Greenspan reacted by writing the following:

> I knew nothing but a story he told me, and that the police were looking for him.. I had no idea if he was guilty of any offence in law – that's impossible to know until after a trial. Guilt or innocence can't be determined until a court has

> weighed all the evidence for the prosecution and the defence. I had no idea, as I was sitting in my office, what Coluccio's defence might be. Whatever he told me could have been true or a fantasy; he could have been sane or crazy; and whatever was in his bag could have been the gun involved in the shooting or not. I didn't know.[24]

This is a radical example of identifying with the role of criminal defence counsel in approaching legal-ethical dilemmas, rather than with common morality.

(ii) Zealous Advocacy and The Truthful Witness: The Expensive Tryst of M.M.M.

This case brings to the fore the complex issues raised in the first question of Freedman's trilemma, do you discredit a witness you know to be truthful?[25] M.M.M. was a retired but still high profile member of the community. He was married, had raised a family and was enjoying his grandchildren. Our paths crossed when he was charged with sexual assault. The allegations were that he befriended a local woman at a local meeting place. He ultimately suggested a drive; they parked and things progressed past the comfort level of the complainant. She finally got the accused to stop the groping and she requested a ride home. The accused complied with this request and asked to join her in her apartment. She declined the request. The accused left without further incident. She ultimately complained to the police. After some investigation a charge was laid. M.M.M. was arrested and released on a promise to appear. M.M.M. was deathly afraid that this story would attract media attention. He was, of course, also afraid that his wife, children and grandchildren might find out.

Pursuant to his fears he retained our office to defend the charges. He wanted an all out attack on the complainant in the hope that she or the crown would back away from the prosecution. Upon a review of the relevant particulars there was an indication that the complainant was suffering from some description of mental infirmity and was in therapy. Believing that the complainant was telling the truth, M.M.M. had found her achilles heel. He instructed that we bring application to court to get records of the complainant's therapist in the hopes of finding material that could be used to impugn her credibility. Fortunately, the matter proceeded to mediation and was diverted out of the court system. Instead of having to be put in the situation of impugning a witness I believed to be truthful, I merely had to approve the delivery to the crown attorney of a rather large cheque in favour of the complainant.

The stage is set. The ethical dilemma arises due to conflicts either between role duties or in the alternative, between a role duty and a common morality precept. The context of the resolution of legal-ethical dilemmas is the provincial legislation, the Code of Professional Conduct and the cases decided under instruments. We must now turn to an analysis and evaluation of the guidance provided to lawyers by the legislator, the regulator and the judiciary.

Chapter 2: The Theoretical Framework

1. Role Morality and Common Morality, the Definitions

Commentators such as Monroe Freedman and Vincent Luizzi focus on the standard conception of the lawyer's role as advocate for their starting point in legal-ethical discourse. For these role-based theorists, the lawyer's role as advocate is flexible, bound only by the legal limits prescribed by law. Viewed historically, the role can be seen as open to re-examination and ultimately, re-definition. From the role definition, as set out by the appropriate governing body of the particular legal community, the constructs guiding ethical principles are established. These principles naturally focus on and enhance the objects or goals inherent to the role:

> I observe that legal ethics involves an ongoing process in which lawyers think about how best to conceive of themselves as attorneys and the rules of conduct to these conceptions. For example, when lawyers thought of themselves not as people in business but as people who were responding to a noble calling of public service, they formulated and observed rules restricting advertising. As they rethought their role, so too did they change the rules governing advertising to accord with the new conception. Notice how the question of whether to advertise is answered by reference to how lawyers conceive of themselves, and notice how that conception is open for all of us to employ in thinking about ourselves and the governance of our conduct.[26]

Unique to the thought of Luizzi is the idea that his theorising about the method in current legal-ethical reasoning is relevant to the study of ethics generally. He recognises the novel and unlikely nature of this thesis: "little would seem more contrary to common sense than a suggestion that lawyers could have something to teach humanity about ethics."[27]

The nature of role morality is to emphasise one role in an individual's "bundle of roles", thereby subordinating the values inherent in others in a particular situation. The lawyer's role as advocate is guided by the relevant codal prescriptions which typically include duties of zeal and loyalty. The duties ascribed to the lawyer as advocate have the potential to conflict with other role values of the lawyer such as candour to the court. They may also conflict with values inherent to other roles that the lawyer ordinarily occupies such as family member or friend.

To further define role morality in the legal context, most legal theorists suggest that there are qualities that distinguish legal-ethical reasoning from universal ethical reasoning. Some such qualities include:

(i) the adversary system, in which environment the legal system has rules beyond the purview of ordinary morality, such as for the withholding of information, the defence of those who have confessed to wrongdoing, and the discrediting of witnesses;

(ii) the preferential treatment of clients for remuneration;

(iii) the professional codes of conduct that govern lawyers' actions;

(iv) substantive law rules unique to the role of lawyer, such as disclosing an unfavourable precedent in the context of litigation;

(v) the idea that legal ethics may potentially benefit lawyers financially;

(vi) the fact that lawyers have "knowledge resources" that they use to help others;

(vii) lawyers have duties that people do not voluntarily assume;

(viii) law is a self-regulating profession;

(ix) the ethics of the lawyer have the force of law;

(x) lawyers have responsibilities to persons and entities, their clientele, profession, public which are not commanded by ordinary morality; and,

(xi) a presumption that ordinary morality governs acts of individuals, while lawyers' ethics govern a group of lawyers[28]

Opposite to this, the nature of common or universal morality is to focus on an individual holistically. This indicates a different object for ethical reasoning, the object here being a holistic expression of individuality rather than adherence to an artificially created role. This method, rather than subordinating one value to another in a particular circumstance, instead weighs values and determines after comprehensive value-oriented-reasoning how best to respond. The process is qualitatively different. The values that may be used in this process are subjective and may include philosophical or religious beliefs. The values used in this process are not artificially limited to the state of acting in a particular capacity. Finally, the sources are different. Irrespective of these differences, or perhaps because of them, it is role theory and not the common morality method of legal-ethical reasoning that is the current foundation for the standard conception of legal ethics.

By way of example, a lawyer is retained to defend an individual charged with murder. The client reveals to the lawyer the location or locations of the remains of other victims. This communication is privileged. It is in respect of past acts, not the one for which he is charged, and is protected communication. There is, therefore, an affirmative duty compelling the lawyer at this point to maintain the confidence of the client. The duty of confidentiality is a role duty within the lawyer-client relationship. Values such as compassion for the families of the missing, or respect for the proper treatment of human remains, are outside the purview or scope of the lawyer acting as advocate for the client. Now, if an individual was out jogging, or by some other serendipitous occurrence discovered the remains, one would think that an immediate report to the proper authorities would follow. This individual would not be acting in accordance with a role that excludes values foreign to it.

Despite the apparent limits of role theory in artificially creating the object of ethical reasoning and in artificially limiting the sources that inform ethical reasoning, in spite of the different thought process involved in a role-based ethical dilemma, Luizzi takes the unique approach of suggesting that the developmental re-evaluating and re-defining nature of role theory can be utilised to enhance universal ethics.

In suggesting that legal ethics can add methodologically to universal ethics, Luizzi uses a role-theory analysis. He focuses on the lawyer's specific role as dictated by a specific situation and opines that the lawyer then allows that role to inform his legal-ethical reasoning. In a brief survey of legal-ethical writings, Luizzi cites a number of authors and commentators and their views of the role analysis. He writes that David Luban is putting forth in his writings a role centred theory where the lawyer assumes the role of "moral activist".[29] Luizzi and I disagree on our classification of Professor Luban. I see Luban as utilising the "moral activist" paradigm to expand the sources of ethical reasoning, as will be seen later in this chapter. Next, Luizzi discusses Gary Bellow, the author of an article in The Social Responsibility of Lawyers.[30] Bellow criticises the "service model" as a source of legal ethics. The service model begins with the assumption that a lawyer serving a client in a particular way has a correspondingly particular set of ethics. Luizzi explains that, for example, a criminal defence attorney has different rules than a lawyer for Wall Street, the poor, government, individuals, corporations and so on.[31] Instead of functioning on a service model, Bellow advocates that the lawyer is to function as "part of the community organization". As exponents of the role morality method, Luizzi next encounters the thought of John F. Sutton Jr. and John Dzienkowski in their course materials on Professional Responsibility.[32] They consider a multiplicity of lawyers' roles and how the different roles bring different duties. The roles they cite are agent, fiduciary, trustee, advocate, negotiator, lobbyist, counsellor, politician, to name a few.[33] Luizzi adopts a role approach that is constantly re-evaluating and re-defining the role. This re-evaluation of the foundational element of the role morality method is important for Luizzi because:

> There is no single touchstone of truth in ethics and that, as we have observed about legal ethics, a pragmatic ethics seems to embrace a developmental approach about how best to deal with ethical problems.[34]

Luizzi, in his discussion of human nature, indicates that as individuals we are comprised of a number of roles. Further, he writes that these roles combine to define ourselves and our actions:

> The theory, simply put, is this. Our nature allows us to construct, in an ongoing process, conceptions of ourselves ranging from our specific roles to our humanity itself, with these conceptions suggesting guidelines for our conduct.[35]

To sum up, Luizzi's philosophy of individuality is that "human persons are ... constructors of rule-referring conceptions of themselves."[36] Luizzi explains that there are certain elements or "raw materials" of ethical decision-making that individuals utilise in their universal ethical reasoning:

> As for the raw materials from which to choose, I point to the ideas or phenomena that underlie the various issues surrounding what it is to be human, a professional, a mother, a lawyer, and so on. For example, with regard to whether we choose to see ourselves as self-interested or social we can say that this particular competition presents a value issue, with the ideas or phenomena of being self-interested or social underlying the issue and being the raw materials from which to choose in constructing a view of our nature. The particular choice that is made both creates a value and shows what we do value.[37]

Luizzi continues his reflections on role morality by examining three attitudes that can be implemented in a role. First, is the unreflective acceptance of role values that arise due to situations one finds oneself in. Second, there is the partially reflective attitude that sees an attempt being made to understand what is entailed by the situation. The individual begins by amassing information about the role and the role values inherent to the situation, thereby gaining an understanding of how to act. Finally, there is the attitude that is critical of the role. In this context, the role agent becomes familiar with the above mentioned information, "reflects on it, then constructs in an ongoing process what one considers to be the best conception to guide one's actions."[38] Luizzi turns from an examination of the individual to an examination of the concept of a profession. He lists and describes the key elements of a profession as follows:

1. special obligations to the public
2. specialised knowledge/skills
3. orientation of service
4. objects/practice symbolic of the work involved
5. special relationship with the client
6. high degree of autonomy
7. members assume roles of leadership
8. code of ethics
9. professional association

For Luizzi, this list contains the raw material with which an individual can construct his own conception of a professional.[39]

As mentioned earlier, the common versus role method distinction is the simplest of the moral spectrums. For a more fleshed out version of this theme, we will now turn to a consideration of a spectrum presented by Jack and Jack. They are a married couple whose book demonstrates a marriage of fields of endeavour. Rand Jack is a lawyer, now law professor, and Dana Crowley Jack is a developmental psychologist. Together they bring a unique analysis to bear on the subject of methods in moral reasoning. Their analysis takes an expansive view of the distinction between common or universal morality and role morality, and sets out a spectrum of moral reasoning positions:[40]

(i) Maximum Role Identification (iii) Recognition of Moral Cost

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(ii) Subjugation of Personal Morality (iv) Recognition of Moral Cost

The first position on the Jacks' spectrum is that of "maximum role identification". In this position the lawyer identifies with a role, e.g. negotiator, and experiences little or no moral conflict in discharging the obligations of an advocate. This position features a complete subordination of the lawyer's subjectively held values that are external to the role of advocate. The Jacks' analysis seems simplistic in terms of modern ethical codes that govern lawyer conduct. It is a universal assumption in these codes that there will indeed be potentially conflicting role duties. Most obvious among these are zealous advocacy versus candour to the court or confidentiality versus a duty of candour to other counsel. This position has a moral cost because it ceases to be morally responsible. This is, at least in part, due to the artificial restriction of the sources of legal-ethical reasoning, because lawyers believe that "the lens of responsibility focuses narrowly, and consequences of professional conduct rest with the system and not with the individual." This is commonly referred to as the adversarial excuse.

This concept of the adversarial excuse is meant to refer to the idea that an individual's role in the justice system may allow conduct that would not be ordinarily condoned in society. The deviation from ordinary expectations is justified because the role is important to the system whose goal is truthful dispute resolution. Another associated cost is that the professional role narrows the range of relevant moral considerations that an attorney must take into account in evaluating conduct. For example, the standard conception of the lawyer's role is that the lawyer would not be expected to draw from such sources of ethics as religious belief, philosophical belief or other personally held beliefs. The classic example of this type of legal-ethical reasoning is made by Freedman who comes to the conclusion that a lawyer may allow perjured testimony rather than withdrawing and pointing out to the court the client's untruthful position. Because role ethics (to role theorists, at least) adequately answers moral questions, considerations that might engage a lay person are systematically ignored.[41]

The second position along the spectrum is "subjugation of personal morality". This position is similar to the first, in that the primary value in both is commitment to the client:

> The chief difficulty between positions one and two is that in position two a lawyer recognizes disagreement between the world of personal morality [Common or universal morality] and imperatives of professional role [role morality]. <u>Resolution of conflict comes through the subjugation of personal values</u>....[42] [emphasis added]

The Jacks conclude that this position has greater costs to the individual than the first because "... with subjugation of personal morality there comes disavowal of responsibility."[43] They say "the gap between the relevant concerns of professional ethics and the relevant concerns of personal morality is called "moral distance" and people who occupy this role choose to be untrue to themselves in favour of a strict adherence to professional values."[44] They note that a method involving moral distance not only has costs for the individual but also for the system. "A conflict of personal and professional morality creates dilemmas for individuals and also brings pressure to bear on institutions."[45] An advocate in this position may, for example, maintain client confidence by not revealing the location of the remains of a murder victim despite the advocate's belief in the sanctity of human remains and the importance of a proper burial. Positions One and Two are both founded on role morality, while positions Three and Four are based on common morality.

Position Three is referred to by the Jacks as the "recognition of moral cost." Lawyers here use the presence of personal morality as a continuing touchstone for decision-making. The Jacks argue that individuals in this position are not only coming to more holistic decisions but are healthier psychologically, because their entire person is involved and developing, as opposed to the second position where an individual's personal moral sensibilities are subjugated. The cost is borne by the system. The method of the third position brings a breakdown of the role morality tunnel vision and adds a richer mix of moral options. With this method, lawyers give personal morality considerations an increased presence and tenacity, so their personal morality is "less easily pushed aside by institutionally supported values of ... [role] morality."[46] This method recognises and indeed embraces the ideal of personal responsibility and features "a subtle erosion in traditional concepts of unqualified partisanship and unquestioning neutrality."[47] Lawyers in this group take on a more morally responsive way of practising law which involves both an active assessment of the moral stance of the client and an acceptance of moral responsibility for the client's goals and means used in pursuit of such goals.[48] In short, this position is characterised by a rejection of the adversarial system's doctrine of moral non-accountability. An example may be a lawyer who counsels the client to pay a certain and fixed debt irrespective of the fact that the limitation on enforcement has elapsed.

Method Four is "minimum role identification". This subjugates the role morality in the same way that the second method subjugated personal morality. This method is used infrequently by the small percentage of those who employ it. The Jacks criticise this role because "the functioning of the legal system presupposes the lawyer role, and if enough lawyers were to fail in their role, the system, together with all of its social value, would flounder." They concede that occasionally in extreme factual contexts it may be ethically proper to utilise this method. The factual situation in which they would seem most comfortable for allowing this exception is where there would be a prevention of harm to others. In their empirical research they found that lawyers will only employ this method after an extreme moral conflict.[49]

What do we use to construct our conception of ourselves? The answer will be the foundation for the norms used in the common morality method of ethical reasoning. As a person, one might use notions of self-interest, familial interest, a societal or community interest. One may also use memories of past personal experience or lessons learned of our shared experience of history. Finally, we might choose to bring religious values to bear on an ethical dilemma. As lawyers faced with legal-ethical dilemmas, we construct our conception of ourselves somewhat differently than a lay person. The values that lawyers bring to bear on an ethical dilemma come from the adversarial system and the complementary values of zealous advocacy and loyalty to the client.[50] This is the difference between common and role morality in a nutshell.

Common morality is based on the acceptance of the precepts shared by most people whereas role morality is based on values inherent to the system the role functions within. Some commentators argue that there are universal moral precepts which are assumed by the commentators to be universally accepted such as the inherent, as opposed to circumstantial, wrongfulness of particular acts, like murder or physical violence or the social inappropriateness of certain behaviours like lying. Lord Devlin wrote that "what makes a society ... is a community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals."[51] He commented elsewhere that "the judges of England have rarely been original thinkers or great jurists. They have been craftsmen rather than creators. They have needed the stuff of morals to be provided to them so that out of it they could fashion the law ...".[52]

Some commentators dismiss common morality as merely a role morality, the role being that of human.[53] This is still acceptable because we are analysing any divergence of a lawyers' ethics and a "normal person's" ethics. Other critics argue that even different religious moralities are just different brands of role morality.[54] This criticism, denying the positive existence of a common morality, has met with powerful rebuttals.

Professor Luban, for example, in his work states that role moralities cannot adequately account for a common morality because it refuses to abstract people from their roles:

> It is hard to imagine that in a society in which many roles can be assumed or discarded at will that people would think that all morality is role morality. For then people would think of morality also as something that can be assumed or discarded at will.[55] [emphasis added]

Lord Devlin used a common morality type of reasoning to explain the basis of the entire administration of criminal justice:

> There is only one explanation of ... the basis of the criminal law and that is that there are certain standards of behaviours or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.[56]

The logical extension is that criminal lawyers should be using common morality as a foundation for their legal-ethical reasoning. Professor Freedman cites Chief Justice Burger of the Supreme Court of the United States as reasoning that as lawyers we are given a monopolistic right to represent others in the courts. The incidents of our monopoly carry burdens which must not be forgotten. The Chief Justice then asks whether the unique powers vested in lawyers by the public can be used to pervert truth and frustrate justice.[57]

> He gives to his client the benefit of his learning, his talents and his judgment, but he never forgets what he owes to himself and to others. ... He has a prior and perpetual retainer on behalf of truth and justice. He is the professional representative but not the alter ego of his client.[58] [emphasis added]

Common morality is alive and well here and has some powerful and cogent arguments on behalf of its application to legal-ethical reasoning. Despite these arguments, the role morality method dominates the literature and indeed the practice of law.

In reviewing the major commentators in the area of professional responsibility each is being used as demonstrative of a particular orientation toward legal ethics. The constructs of the four main commentators will be reviewed in general, followed by a specific examination of key underlying themes that influence the resolution of conflicts of values which create legal-ethical dilemmas. These themes are the adversarial system, the lawyer-client relationship and the context of criminal defence counsel. One's views of these foundational themes will have an enormous impact on the process by which one competing ethical value is chosen over another.

2. Four Perspectives Embodied by Four Leading Commentators

(a) Monroe Freeman[59]

Like no other commentator on legal ethics in Canada, the United States, or the United Kingdom, Monroe Freedman has constructed a paradigm that has become synonymous with the so-called standard or dominant view of legal ethics. Key to Freedman's construction are that its values derive from the American Bill of Rights and the context of the adversarial system of justice.[60] Freedman's analysis of ethical dilemmas, and trilemmas, focuses on conflicting ethical values facing lawyers in different situations. He resolves these conflicts in a classically liberal manner, featuring the paramountcy of individual interest or autonomy over communal utility and goals.

His ethical dilemmas feature conflicting values or duties. This, for Freedman, is true not only of legal ethics but of ethics in general. The resolution of conflicts of values or duties for Freedman is indicative of an individual's true moral priorities. For example:

> Several years ago, a friend expressed his disappointment that he could never serve on a jury. At that time, the Jury Commission used a questionnaire that asked,

among other things, whether the potential juror had moral objections to the death penalty. Anyone answering yes to that question was automatically disqualified from serving. Since my friend believed, as a matter of religious conviction, that human life is sacred and paramount to all other moral values, he was disqualified each time he submitted the questionnaire.

I suggested to my friend that his conduct was inconsistent with his asserted moral priorities. Human life was not paramount for him – telling the truth to the Jury Commission was. Because of his scruples about answering the questionnaire truthfully, he had been making it impossible for himself to serve on a jury and, as a juror, to vote against death.

On reflection, my friend decided to lie on the next jury questionnaire.

My point here is not that my friend's decision was right or wrong. What I want to illustrate is that when moral values are in conflict, the ways in which we resolve those conflicts show what our true moral priorities are. In that sense, ethics is applied morality, or morality in action. In a series of ethical decisions, we create a kind of moral profile of ourselves.[61]

Freedman begins his legal-ethical analysis with a specific predilection, with an account of the prevailing (and historical) rules that govern lawyers' behaviour. In the American context this necessitates an intellectual encounter with the 1908 Canons of Professional Responsibility, the 1969 Model Code, and finally, the 1983 Model Rules. The purpose of such codes of lawyers ethics for Freedman is to set boundaries for lawyers who are acting to further the interests of another individual, the client. In essence, for Freedman, these codes are nothing less than a state sponsored articulation of the shape, breadth and content of the lawyer-client relationship.

Unlike other commentators, the role of the lawyer is to assist the client in maximising individual autonomy. Other commentators, like Freedman with his allegiance to personal autonomy, have developed models of the lawyer-client relationship. Examples includes Charles Fried, David Luban and Thomas Shaffer. While these commentators seem pre-occupied with the lawyer's role in the promotion of the goodness of another (Shaffer's phrase), Freedman is pre-occupied only with individual freedom and self-realisation. This is in direct contrast to the model lawyer-client relationship developed by Shaffer. Shaffer focuses on power inequality in the lawyer-client relationship, as well as on the assumption that the client can corrupt the lawyer. Freedman sees the client as an individual that the lawyer is empowered to be of assistance to, rather than as merely the individual over whom the lawyer has power. This orientation toward the client leads Freedman to not be concerned with promoting client goodness; instead Freedman is more concerned with the question of "how far I can ethically go – or how far I should be required to go – to achieve for my client full and equal rights under law". Despite this disagreement of orientation toward the client, Freedman considers his difference with Shaffer on this point to be "only differences of emphasis, but nevertheless of import in the drafting of rules of ethics." For Freedman, the rules establish the parameters of the lawyer-client relationship. He therefore views the Model Rules conception of a lawyer as an officer of the legal system as a move away from the client centred values of the Model Code.[62]

While the rules of professional conduct strive to deliver an example of the lawyer-client relationship, the values extolled therein inevitably come into conflict with one another. Freedman is critical of codes of conduct that simply ignore this basic situation.[63] Important for him is the lawyer counselling a client within the professional relationship. This area of client counselling for Freedman is most ethically difficult and challenging, because for a lawyer to properly counsel a client on the applicable law, the lawyer must be appraised of all relevant facts. This appraisal of all of the relevant facts takes place within the sphere of the solicitor-client privilege. The duty of confidentiality is owing to the client. For Freedman, confidentiality and zeal are the cornerstones of the lawyer-client relationship. He recognises too that these duties will inevitably come into conflict with other ethical duties owed by the lawyer. As an example, Freedman raises the issue of when it becomes wrong for a lawyer to give legal advice knowing it will be put to "illegal purposes".[64] This problem becomes particularly poignant when one considers perjury as the illegal purpose, when the lawyer has a duty of candour to the court or tribunal. Of course, the easy situation is specifically resolved in codes of professional conduct that forbid lawyers to counsel or assist in illegal acts. Freedman views "counselling" and "assisting" as the lawyer taking an active role above and beyond the mere provision of legal information. Beyond the minimal assistance that code of conduct may provide, Freedman begins with an examination of the gravity and nature of the offence contemplated. Violence is another clear example that is dealt with by most codes by the provision of an exception to the duty of confidentiality. The difficult issues in this area revolve around the client bent on providing perjured testimony to the court or tribunal. The perjury problem, Freedman opines, is a complex problem that is dealt with in a superficial way by codes of conduct.[65]

Complicating the issue of counselling a client in a manner that may tempt perjury, or being faced with a client with a settled intention to commit perjury, is the fact of modern practice in North America that lawyers must prepare their witnesses for trial.[66] Interviewing and counselling witnesses, and client witnesses, is essential because it allows the lawyer to ascertain the relevant facts and assist the client and other potential witnesses to be clear and articulate. In resolving this ethical dilemma, Freedman takes into account the realities of legal practice and the psychology involved in recollection or reconstruction of events in issue:

> In interviewing, therefore, the attorney must take into account the practical psychological realities of the situation. That means, at least at the earlier stages of eliciting the client's story, that the attorney should assume a skeptical attitude, and that the attorney should give the client legal advice that might help in drawing out useful information that the client consciously or unconsciously, might be withholding. To that extent – but on a different, and more limiting, rationale – I adhere to my earlier position that there are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury. There does come a point, however, where nothing less than "brute rationalization" can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury.[67]

This ethical dilemma is part of Freedman's famous "trilemma" of the criminal defense attorney. It will be dealt with in greater detail herein.

(b) David Luban[68]

A major exponent of the common morality method in legal-ethical reasoning, Luban recognises that the past fifteen years have been a renaissance for the jurisprudential subject of legal ethics. He has seen the lawyer's perception of ethics change from the regulation of the size and content of business cards to the emergence of a new area of discourse.

Luban bases his definition of the "New Legal Ethics" on four assumptions that presuppose the conditions in which a legal system exists:

(i) Lawyers aim to advance their client's interests over those of non-clients;

(ii) Lawyers sometimes do this even though they disapprove of their client's aims;

(iii) Lawyers advance their client's interests through persuasive argument; and,

(iv) Lawyers operate under formal legal constraints, aiming to preserve the integrity of the legal system.

These assumptions contain tensions that equate with the tensions present in the Codes of Professional Conduct that establish a lawyer's conflicting duties of confidentiality, zealous advocacy, and truth. The first assumption poses a professional duty of zealous advocacy against the common morality precept of the equality of individuals. These values are in potential tension depending on the moral content of client instruction, goals and means. In essence, a lawyer is preferring the advancement of the interests and rights of a specific individual over another, or perhaps irrespective of interests of those outside the scope of litigation, for money. The second assumption poses the role morality duty of loyalty to client against the common morality duty to act in accordance with your own beliefs. The third includes the struggle between persuasion and adherence to the truth. Finally, the fourth assumption begs the question as to which laws lawyers should be faithful: laws as they are, or laws as they should be? To Luban, the New Legal Ethics is about the very philosophical assumptions that underlie the society in which the legal profession functions.[69]

For him, there are two conflicting views of the legal system. These express how the legal system is to operate within the community, as a guide to or a restraint on the social interrelations of individuals. The first view for Luban is the "Normative View". Luban describes this as the social contract by which individuals live with one another. It is a protection of individual rights and liberties. As such, the law enables society to exist peacefully. Therefore, it exerts a moral authority to adhere. In contrast, Luban indicated that the other view of the legal system is the "Instrumental View". While Luban describes this system as also governing the relationships of individuals, it does so in a much different manner. In this system, the law is used as a tool of oppression, which may be of one class or group of individuals or oppression in a specific case. Not surprisingly, Luban attributes no moral authority to the system in this context.[70] An adjunct of this instrumental view of law is the adversary system. Luban concludes that in the adversary system it is frequently the lawyer's job to treat the law as instrumental, to use the law to achieve the goals of the client. Decreasing the moral authority of the system in this way, Luban concludes that an appeal to the intrinsic moral value of the system will not excuse a departure from common morality in the resolution of a legal-ethical dilemma.

> If it is true that the lawyer's role transforms law from a normative to an instrumental system, then it would be mystification to call such behavior "enforcing the authority of the law;" it is strategic behavior designed to win, with little more to be said. In that case the argument designed to assimilate role morality to ordinary morality does not succeed.[71]

For Luban then, the lawyer functions within a legal system that was created to not only govern but essentially to allow for the existence of a peaceful society. From this starting point, Luban views the legal profession as occupying an elite monopolistic position replete with both peril and social responsibility. Among these responsibilities for Luban is the special responsibility of the lawyer for issues of access to justice. These "devolve from the idea that lawyers are in the business of vindicating legal rights due to a state created monopoly".[72] For Luban this is the foundation of a positive duty to society to perform pro bono work.[73]

Along with the duty of promoting access to justice, the lawyer's duty of good judgment is of paramount importance to the proper functioning of society. Luban opines that good judgment is "the lawyer's best asset, better than knowledge of law, system, or skillful analysis."[74] For Luban, the less than stellar public perception of the legal profession and legal ethics is what makes good judgment of paramount importance. It is foundational to both the proper functioning of the legal system and also to legal ethics. In describing what Luban calls the "dark times", or the current crisis of professional responsibility, he concludes that it "has no specific cause" but instead is marked by "a more diffuse erosion of values – from "professionalism" to "commercialism"."[75]

(c) Thomas Shaffer[76]

A paradigmatic exponent of the common morality method in legal-ethical reasoning is Thomas Shaffer. Based on Christian moral philosophy, Shaffer's writing has been characterised as multi-disciplinary in scope. The key sources of Shaffer's writing are neo-orthodox theology, narrative theology, Biblical scholarship, an historical analysis of Anglo-American legal-ethical concepts, the Christian writer C.S. Lewis, the existential philosopher Martin Buber, the philosopher Aristotle, and St. Thomas Aquinas.[77]

Drawing on these extra-legal sources, Shaffer asserts that there are two languages of moral discourse. The first is "utilitarian individualism" wherein the individual's drive for success primarily informs the ethical decision-making process.[78] The second language of moral discourse is "Biblical and Republican" language. This language for him has been shaped and extended by "religious bodies, ethnic and racial groups, families ... (and) neighbourhoods...".[79] These groups for Shaffer are "communities of memory".

With this emphasis on community as shaper of the second language of moral discourse, it should not be surprising that he views the individual, or good person, as the starting point in analysis of ethical dilemmas.

From the alternative or second language of moral discourse Shaffer has constructed what he entitles "Narrative Legal Ethics". Shaffer's writing is not only based upon several key sources but is built on several key themes. Shaffer's "Narrative Legal Ethics" has six key features:

(i) a focus on persons and processes, i.e. people are viewed in the context of their relationships; he writes that "we belong before we make choices; we make the choices we make because we belong";[80]

(ii) good persons are good because they possess virtues;

(iii) virtues must be discussed in relation to their historic communities;

(iv) historic communities are to be analysed through the narratives that structure their existence;

(v) professions are communities where virtues are specified; and,

(vi) churches and synagogues are "communities of memory".[81]

Shaffer's "Narrative Legal Ethics" form a method of advocacy he calls the ethic of care or friendship. This paradigm is founded on an analysis of prevailing rules of advocacy. He contends that advocacy is constrained only by rules mandating zeal within the bounds of law and prohibiting a lawyer from vouching for a client. The former is a role oriented mandate that does not consider the personal morality of the lawyer. The latter, however, assumes the credibility and veracity of the lawyer and disallows these attributes from being misused to benefit the client.[82] These rules are coupled with the doctrine of moral non-accountability, which is meant as a justification of the lawyer's endeavours that conflict with personal or common morality tenets. However, for Shaffer, the proper role of the lawyer is participation with the client in moral discourse. This method allows personal morality to inform their decisions. The emphasis is on honesty and goodness, of both the goals set and the methods used.

The ethic of care or friendship is presented as a replacement for the standard conception of the lawyer's role. The standard conception is to be replaced due to its potentially disingenuous and "advertently deceitful" nature.[83] When seeking truth is the goal of the system it is only appropriate that the methods used should have the same object. Shaffer looks to alternate methods of advocacy which do not sacrifice an allegiance to truth. The truth alternative he examines, and ultimately dismisses as unprofessional, is selective zeal. He then looks back historically to what he calls the "republican" model:

> Hoffman was a republican lawyer, he believed lawyers were responsible for justice. If lawyers are responsible for justice, their clients must either be right or be made by their lawyers to do right.[84]

This model is criticised for what Shaffer calls "parentalism". His view is that the lawyer is taking the role of parent within the lawyer-client relationship. The dishonesty in this model consists of a lack of client participation, the exact opposite result of the standard conception where the lawyer, or at a minimum the lawyer's conscience, is disallowed participation in the relationship. Shaffer's paradigm calls for full and honest participation of both lawyer and client. The lawyer-client relationship in this way becomes analogous to friendship:

> The way to avoid pretense in advocacy is to say what you mean and to mean both what you say and what you seem to mean in what you say and do. We come to

> mean what we say about the subjects and the objects of our advocacy – the people involved, rather than the words – by approaching them with benevolence. We are then, in the ordinary meaning of the word, friendly, rather than either self-deceived or cynical, as we weigh the stories and claims of our clients and make or seem to make a decision about whether to accord them the benefit of a doubt.[85]

This relationship involves a mutual journey toward goodness and righteousness. He refers to the practice of the ethics of friendship as the practice of virtue, or simply moral discourse. This model provides a role for full participation of both lawyer and client. Shaffer, however, recognises that his paradigm will necessitate an abandonment of the rule against vouching for the client.[86] These changes fundamentally alter the standard conception of the lawyer-client relationship. "Friends decide together what their common interests are"; through a process of collaborating good ... [i]t is not that the lawyer's professional task is to see to it that her client does the right thing; it is that two friends are mutually concerned that both of them be and become good persons."[87]

(d) William Simon[88]

For Simon, the predominant, prevailing or dominant view of legal ethics is categorical, comprised of rigid adherence to rules, with a narrow focus irrespective of the result. These rules as I will show are mere minimum requirements of lawyer conduct. Simon writes that the principle which best encapsulates the "Dominant View" is zeal, i.e., that the lawyer must pursue any client goal or aim through any legal means.[89] Loyalty to a client is the underlying value of this paradigm. The exemplar of this model is Monroe Freedman. Simon sets out the dominant view in his writings as a backdrop to his emerging theory of legal ethics. He diagnoses problems, analyses and criticises the dominant view of lawyers' ethics.

Simon begins his text by espousing the popular sentiment that lawyers and their ethics are in a state of disrepute. He writes that lawyers' ethics are under fire from both within and without the profession. Seemingly, he attributes these difficulties with high ethical expectations of lawyers. "No social role encourages such ambitious moral aspirations as the lawyer's , and no social role so consistently disappoints the aspirations it encourages".[90]

Professor Simon explains overall discontentment with lawyers' ethics by indicating that there is a "structural tension in the lawyers' role" which has been always present but in the modern context is becoming "more acute".[91] The main thrust of his argument is that this dichotomy is not only composed of conflicting values, such as loyalty to client and being an officer of the court, but it has real ability to perpetrate substantive injustice. He indicates substantive injustice in a particular case may occur even though systemic values, roles and rules are intended to promote justice in the overall scheme. "If I am right, the key source of moral anxiety is the perceived tenuousness of the connection between the concrete immediate injustices of practice and the remote justice that is supposed to redeem them".[92] Simon expands this theme to include both conflicts of values inherent in the legal system and also in the parties:

> The kind of moral decisions that implicate the profession's most fundamental commitments to legality and justice are those that arise from conflicts between client interest on the one hand and third-party and public interests on the other.[93]

Simon next turns to his criticism of the dominant view. He begins by citing various dominant view critics who give too little attention to lawyers' morality and values. This is a criticism based on role morality, wherein role values come into conflict with personal values of lawyers.[94] Dissonance between a lawyer's personal and professional values is not the disease but merely a symptom. For Simon, the extension of this problem is the resulting substantive injustice, not only in the case being considered but also in respect of rights and positions of third parties. Simon philosophises that the legal system is the source and protection of individual legal rights. He then points out the irony of the system, with its categorical rules and values, perpetrating injustice. Simon's favourite example is the use of a passed limitation date to relieve a debtor of a legal obligation to pay a fixed and certain debt. In sum, his view is that because the system is the source and protection of rights, it is logically inconsistent to hold the view that an individual has the right to behave unjustly toward another party within the system. He calls this argument the "Entitlement Argument".[95]

This argument is the key criticism that Simon levels at the dominant view of legal ethics. It is, therefore, the foundation on which he creates his replacement paradigm, the Contextual View. Simon argues the entitlement argument rests on two fundamental tenets: the justice system was created to safeguard the rights, liberty and autonomy of the citizenry, and that laws are distinct from personal morality. The latter tenet is founded on the idea that laws are passed by a representative body of citizens pursuant to fixed procedures and, once enacted, enforce a subjection of the citizenry to punishment for any infraction.[96] Simon views these tenets not only as the foundation of the entitlement argument but constitutive of zealous advocacy.

Simon attacks the philosophical underpinnings of zealous advocacy as internally inconsistent. Zealous advocacy is founded on the value of personal autonomy, which protects the client against all others, including the lawyer. He demonstrates an inconsistency of zealous advocacy by pointing out that one individual acting in a certain way to the full extent allowed by the law may detract from another's autonomy. In my view, Simon has diagnosed the key difficulty with the thought of Freedman. For example, an accused criminal fighting for acquittal, when factually guilty, would interfere with the autonomy of the victim awaiting vindication from the justice system. Simon concludes zealous advocacy does not contribute to the overall value of autonomy; instead, it merely prioritises one individual's autonomy at the expense of another's.[97] He indicates that the values of zealous advocacy, including solicitor-client privilege and loyalty, not only impact on the overall value of autonomy but they may also contribute to substantive injustice. The lawyer for example cannot act on correct information in his possession to the detriment of his client. In this way, the lawyer may be significantly changing or over shooting the natural entitlement of the client. Simon indicates that this possibility flies in the face of the values which underpin the justice system.[98] The zeal that typifies the dominant view is unacceptable to Simon, whether on the grounds of autonomy or equality.

The legal system, and the dominant view of legal ethics, are founded on the fundamental principle that all individuals are equal. Simon says that in fact, zealous advocacy works contrary to this principle because equality in the legal system is dependent upon access to counsel and the ability to litigate.[99] The adversary system is the system in which the dominant view was created and has flourished, and as such is in need of reform to accommodate a shift to the contextual view of legal ethics.

3. The Adversarial System of Justice

One's view of the importance of the adversarial system will impact on the resolution of value conflicts that form legal-ethical dilemmas. Adherence to the adversarial ethic will see the decision-maker favour client-centred duties such as zeal or confidentiality over non-legal duties and legal duties to third parties such as candour to other counsel or the court. The system's scope and justification, in terms of its own goals, of dispute resolution and rights protection, are important themes for its critics.

(a) Monroe Freedman

For Freedman, the adversarial system derives its meaning from two foundational ideals. First, the adversarial system is composed of values enshrined in the American Constitution and Bill of Rights. These values include personal freedom, the right to counsel, the right to trial by jury, the right to confront accusers, the presumption of innocence, the right against self-incrimination, and, in general, due process. Further, the adversarial system is composed of values used to resolve disputes arising from people coming together to live as a community.[100] The rights enshrined in the adversarial process are for Freedman the most compelling feature of it. He then extrapolates from constitutional values to professional responsibility by indicating that the "professional responsibilities of the lawyer within such a system must be determined, in major part, by the same civil libertarian values that are embodied in the Constitution".[101]

After inextricably binding lawyers' ethics and the adversarial system of justice, Freedman recognises that this system has been criticised in the context of criticisms of lawyers' ethics. He writes that critics of lawyers' ethics discontented with zeal and client centred duties believe changes to these duties can only accompany a major restructuring of the adversarial system of justice.[102] This type of restructuring may be extremely difficult due to potential constitutional impediments to reform of the adversarial system.[103]

For Freedman, the adversarial system is of pivotal importance to lawyers' ethics because of the values enshrined therein. The lawyers' role within this system should be in harmony with its underlying values. "The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.[104]

(b) David Luban

Luban views the adversarial system as the main hurdle to lay understanding of lawyers' ethics.[105] It is the centrepiece of public discontent. Luban recognises the adversarial system as a context or forum, both for the litigation of issues and for the resolution of issues in any situation where the client's loss is another's gain.[106] He therefore raises concern about the scope of the adversarial system in that it was created as an arena of litigation but it has been expanded by lawyers who define it broadly to encompass counselling and negotiation. This extends the influence of the values of zeal, partisanship and non-accountability.[107]

True to his philosophical analytical framework, Luban's definition of the adversarial system proceeds to an examination of potential justifications for the adversarial system. For Luban, these justifications must be powerful enough to justify lawyers' deviations from common morality due to adherence to systemic values.

He sees two fundamental principles behind the adversarial system: partisanship and moral non-accountability of the lawyer.[108] The latter refers to the ideal that "a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved"[109] in the legal directives of the client. Luban approvingly cites Murray Schwartz from his article "The Profession and Accountability of Lawyers";[110]

> ... the law cannot convert an immoral act into a moral one, nor a moral act into an immoral one, by simple fiat. Or, more fundamentally, the lawyer's nonaccountability might be illusory if it depends upon the morality of the adversary system and if that system is immoral. ... If either [of these challenges] were to prove persuasive, the justification for the application of the Principle of Nonaccountability to moral accountability would disappear.[111]

The standard conception of the lawyer's role therefore is that the lawyer's duty must be partisan zeal.[112] Further, the lawyer's duty of zeal, a fundamental ingredient of partisanship, will invariably lead the lawyer to ethical dilemmas and, in some circumstances, the temptation for the role duty to deviate from common morality. As part of Luban's institutional excuse analysis, "unless zealous representation could be justified by relating it to some larger social good, the lawyer's role would be morally impossible."[113] This construction of the lawyer's role demands a zeal that can only be seen in a professional role morality, as in Lord Brougham's defence of Queen Caroline.[114] Luban concludes that both principles of partisanship and moral non-accountability depend on the adversarial system for their justification.[115] "The appeal to the adversary system to underwrite the principle of partisanship and nonaccountability is an example of a more general moral strategy, which I shall call the strategy of institutional excuses."[116] Luban postulates that for an institutional excuse to be valid the role must be justified.

Luban writes that there are two varieties of potential justification for the adversarial system, consequentialist and non-consequentialist. The consequentialist goals are the discovery of truth, the protection of rights and the fairness mechanism which works via a series of checks and balances. The non-consequentialist goals are the promotion of individuality, autonomy and dignity.[117] In terms of the adversarial system being justified, Luban is skeptical. Beginning with whether the system can be justified as a method for the furtherance of truth and justice, he recognises as an assumption that the adversarial system is the best method to arrive at truth, designed as a dialectical mimicking of the scientific method.[118]

Luban questions and rejects these assumptions. He does not believe the adversarial system of the common law to be necessarily superior to the civil law system of Europe, for example.[119] Luban discusses whether the adversarial system can be justified as a tool of individual rights protection. If truth is not the goal of the adversarial system, then the system's protection of individual rights should be.[120] Luban believes that this rights focus is crucial to proceedings which have an impact on personal autonomy. It is therefore the key justification for the adversarial system's existence in the criminal justice system. Despite Luban's assertion that adversarial aggressive defence[121] is justified in the criminal justice system, he shows no such charity to the adversarial system in this portion of his analysis. He criticises whether the adversarial system is justified as a vanguard of rights because they are legal and not moral rights.

This distinction is crucial because he ultimately rejects the protection of individual legal rights as a justification for the adversarial system.

Finally, Luban examines the fairness of the adversarial system by examining what he refers to as the "checks and balances theory".[122] Procedural fairness is achieved by pitting opposing, zealous advocates to advance their positions and disparage the other's before an impartial decision maker.[123] Luban finds no justification for the adversarial system to allow departures from common morality in terms of its consequentialist goals. Similarly, he finds no similar justification for the adversarial system from the view that it promotes such non-consequentialist goals as human dignity, the system as reflective of the "fabric of society, or that it is inherently good".[124] It cannot support the weight of the institutional excuse that it justifies a deviation from common morality by an appeal to role. In his words: "[i]t appears, then, that the existence of the system cannot morally justify inequitable acts undertaken within it. The system is not the solution."[125]

(c) Thomas Shaffer

For Shaffer, the adversarial ethic is at least in part a system that justifies lawyers' acts on behalf of clients where such acts depart from common morality.[126] Despite that the adversarial ethic having been the prevalent doctrinal system in America since the industrial revolution, Shaffer views it as unsound. In reaching this conclusion, he examines three traditional justifications for the adversarial ethic.

The "service to the state" justification is personified by the civil rights lawyer that advocates the freedom of a politically unpopular group or cause. The lawyer in this model serves justice at a universal level, immunising him from criticism from common morality adherents. Shaffer cites himself as defending the free speech of a member of the American Nazi Party. In this context Shaffer indicated that he never met his client and his professional influence on the client was therefore "indirect, if at all."[127] The "autonomy of the client" justification is identified with Monroe Freedman. It features the lawyers' protection and furtherance of the client's legal goals as a moral good that justifies departures from common morality. Finally, Shaffer describes the phenomena of "service to the goodness of one's neighbor", where essentially the lawyer is entitled to act in one manner for a client yet expected to act in another for himself. Shaffer calls this the theology of the two kingdoms. It is the excuse of those who claim to only be doing their jobs or to be only following orders. Shaffer characterises the adversary ethic as either a justification of or an excuse for lawyer immorality.[128]

The adversarial ethic has become part of a community sanctioned division of labour. Here, the lawyer assists an individual with one aspect of his life, e.g., the realisation of legal rights while ignoring another, i.e., goodness. This ethic arose in conjunction with four events that Shaffer views as historically significant:

(i) the justification of lawyers representing the "robber barons" of the industrial revolution;

(ii) the emergence and growth of law firms;

(iii) the founding of the [American] Bar Association; and,

(iv) emergence of codes of professional conduct.[129]

The adversarial ethic for Shaffer emerged from a period when lawyers were not conducting themselves in accordance with common morality precepts or in accordance with the furtherance of justice universally or the building of the common good within their communities. The ethic has become a limit on what lawyers do wrong rather than exaltations to do right or good. The ethic has created a group that excuses or consoles their own malfeasance without reference to those outside. The bar association and its codes are then little more than minimum requirements and excuses for lawyers' conduct.

Instead of the current adversarial ethic, Shaffer calls for a system featuring lawyers who are morally accountable for their acts and their impact on justice. He refers to this system as the ethic of friendship.

The context of the ethic of friendship is moral values. This begs the questions of whose moral values and which moral values? Shaffer views the creation of the legal system as a means for facilitating the very existence of society through the peaceful maintenance of individual relationships. In this vein, when lawyer and client discuss legal rights, morality becomes the pre-eminent concern. By contrast, as we shall see, Simon has a different idea of the starting point of lawyer-client discussion. For Simon, legal, not moral, values are the ingredients out of which the lawyer and client make decisions about representation.[130] Shaffer is critical of Simon's approach, noting that Simon's paradigm neither considers the personal morality of the lawyer nor that legal values do not provide for "a clear resolution of moral issues".[131] In dismissing the law and what he calls "conventional values", Shaffer opines that law and conventional morality are "internally incoherent, difficult to discern, and not the best source of moral values".[132] In so doing, he points historically to law and conventional morality supporting slavery, segregation and even Nazism. The question then remains: whose moral values?

Moral discourse envisions moral values as those of lawyer and client. Shaffer opines that, due at least in part to their shared geographic community, lawyer and client potentially share most or at least some moral values.[133] He also recognises the possibility that lawyer and client may both individually look to religious belief as a source of moral values.[134] Now that the question of whose moral values is answered, the question then remains, what moral values?

Justice, mercy and truth are three values Shaffer proposes for the making of moral decisions related to or in the context of the lawyer-client relationship.[135] These may be potentially both or either religious and secular:

> They are part of the religious and moral values of people in almost all cultures, and we believe that there is an intuitive attraction to each of them that is likely to influence clients and lawyers.[136]

Aristotelian philosophy indicates two varieties of justice:

(i) distributive, which refers to "the just distribution of goods within a society"; and

(ii) corrective, which refers to "placing the parties where they were before one wronged the other".[137]

The distributive view of justice is concerned with proper distribution of goods in accordance with an individual's contribution to society. This view of justice was practised by the ancient Hebrews and early Christians. Distributive justice is important to the lawyer-client relationship: "distributive justice is a legitimate concern of powerful clients and their lawyers in making decisions that affect those who have no power".[138] Corrective justice is the model most often invoked in legal disputes. These conflicting theories of justice lead Shaffer to conclude that "clients can often obtain a legal result that is inconsistent with [distributive] justice".[139] The consideration of distributive justice should be initiated by the lawyer who then leads the client into moral discourse.

> The client should be able to participate fully in the decision, and experience the moral development that we feel is an important part of the attorney-client relationship (or the autonomy that others feel is at the heart of it). Lawyers must be careful not just to announce their perception of justice. (Lawyers often have enough power to impose their moral perceptions.) The client must be an active participant. Why? Because we believe that the lawyer's concern is not just that the client do the right thing but that the client be, become, continue to be, a good person.[140]

In a distributive theory, justice is not a commodity meted out by the state. Instead, it is a way in which one acts towards others. This view of justice as interpersonal emphasises the importance of the virtues of mercy and caring.

Mercy and care are prominent New Testament values. Traditionally, mercy is a value not associated with justice.[141] Mercy is a different orientation towards others than lawyers are trained to have. Mercy views others as neighbours, family members, not merely as a collection of legal rights. Grounding the values of caring and mercy in the secular, Shaffer chooses to equate them with the feminist "ethic of care".[142] As he describes it, "moral requirements consequent on an ethic of mercy emerge from the needs of others irrespective of what is fair, irrespective of what they may deserve."[143] In other words, Shaffer's paradigm calls on the lawyer to potentially not assert all valid legal rights, to be more than fair in the interest of conducting the litigation in a manner consistent with this outlook. He recognises that this is not part of the standard conception of the lawyer's role. Nevertheless, he does not view the mere raising of these issues as paternalistic or subordinating the will of the client. When ethics of mercy and rights conflict, Shaffer views the resolution of the conflict as a matter for moral discourse. Hand in hand with the ethic of mercy is the value of truthfulness.

The justice system was created to search for truth in the context of dispute resolution. Adherence to the value of truth is therefore not only a value inherent to the New Testament but it is also a value inherent to the justice system and most, if not all, other systems of personal, professional and social morality.[144] Shaffer describes the environment for moral discourse, focused on the promotion of mercy and truth, as having four main ingredients:

1. client involvement;
2. moral sensitivity;
3. moral judgment; and,
4. moral motivation.[145]

Client involvement is a defense mechanism to criticisms of paternalism and the outright subordination of the client's will. The involvement of the client is not limited to decision making as in the standard conception of the lawyer's role. The client is also involved in the decision-making process, the moral discourse.

Moral sensitivity is a recognition of the impact of tactics and results on the other side of the litigation or dispute as well as on third parties. The complementary nature of the lawyer-client relationship is that it is expected that the lawyer is to bring an overall experience and expertise while the client is to bring a specific knowledge of the particular individuals and situation involved.[146]

Moral judgment is a result oriented decision. It is "the determination of a moral course of action."[147] Shaffer's view is that lawyers are to help clients exercise moral judgment not merely to impose their values.[148] The lawyer's contribution at this stage is systemic expertise and, perhaps as importantly, objectivity.

For Shaffer, moral motivation addresses the question of why the client should "do the right thing."[149] The theories that Shaffer raises in response to this query are gratitude, fear of sanction, empathy and persuasion.[150]

(d) William Simon

The adversarial system has as its raison d'être the solution of conflict in a just manner. Simon focuses on the duty that a lawyer has to the client in the adversarial system and juxtaposes it with duties to third parties, such as the duty of candour to the court.[151] These are conflicting duties and in his assessment will always be so. "There has never been any consensus on where to draw the line between these two aspects of the lawyer's role and the two have always been in tension within the professional culture".[152] The adversarial system has become the justification to prefer duties of loyalty to client over responsibilities to third parties: "proposals that increase lawyers' responsibilities to nonclients are often attacked as inconsistent with the adversary system".[153] Simon points to advances in the law of civil procedure that mandate disclosure of all relevant materials to which privilege does not apply as legislation striking a balance closer to the ideal of resolution of issues on their merits, and further from the ideals of zeal, loyalty and confidentiality. He goes so far as to raise the issue of whether such legislative line-drawing was in response to the legislator not approving of the rules of the local bar association.[154] He focuses on the tension between duties to clients and to third parties as a major criticism of the adversarial system. He does, however, progress beyond this argument to question whether the adversarial system is indeed the best mechanism for the just resolution of conflict. Simon argues that the adversarial system has traditionally set two parties before an independent trier of fact, each putting forward their respective cases with as much vigour as they can muster. He states that "the proponents of the [adversarial] theory have been unable to explain why a procedure substantially controlled by willfully biased partisans is the one best calculated to produce good decisions".[155]

4. The Lawyer-Client Relationship

How a lawyer interacts with a client will have a significant impact on the way in which the lawyer resolves legal-ethical dilemmas. The lawyer may, for example, take the view that he is a zealous advocate; he may take the view that his own personal morality must not be deviated from in the course of representation; or the lawyer may feel that he has strong duties to third parties such as other counsel, the court and the community.

(a) Monroe Freedman

Zeal is the standard for advocacy owed by a lawyer to a client pursuant to every current common code of professional conduct, according to which the lawyer must advance the interests of the client. While zeal is commonly regarded as an adversarial value, it speaks to the very foundation of the lawyer-client relationship. The classic expression of zeal comes from Lord Brougham in Queen Caroline's Case, which Freedman cites approvingly:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and

> at all hazards and costs to other persons, and, amongst them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.[156]

Zeal, for Freedman, is owing to a client only upon retainer. Zeal, therefore, is a value from which potential clients and third parties derive no benefit. Prior to the formal retainer, Freedman prizes the personal autonomy of the lawyer. In other words, an individual lawyer has the right to decline employment.[157] This right may even become a positive duty when the lawyer's "... feelings are so strongly adverse to the client's interest that the attorney's effectiveness might be impaired."[158] The bounds of zeal are set out in lawyers' codes of conduct.

The usual constraint is that the lawyer may utilise any means allowed by law. Freedman turns to a discussion of whether there are moral limits on the professional duty of zealous representation. This discussion is short and arrives at the conclusion that the lawyer acts morally in furthering the autonomy of the client. The lawyer then is to be seen as morally responsible for neither the ends achieved nor the means used. This is the doctrine of moral non-accountability and it typically accompanies zeal in client-centred advocacy. Despite the pre-eminence of these doctrines, Freedman makes room for the lawyer to exert personal conscience within client-centred advocacy by counselling the client with respect to the moral aspects of representation.[159]

Freedman is more concerned with legal than moral limits on a lawyer's zeal on behalf of a client. The sources of legal limitation on lawyer zeal are statutory, regulatory and common law including disciplinary rules of lawyers' governing bodies. In determining what the legal limits on zeal, as set by legislators and regulators, should be, Freedman engages in a purposive analysis of the duty of zeal.

Zeal for Freedman is an essential ingredient in the proper functioning of the adversarial system, wherein two competing parties put the strongest factual and legal versions of their cases forward before an impartial judge, as a means to finding truth and achieving just resolutions of disputes.[160] For Freedman, zeal is imperative to the adversarial system and critical to the protection of the public interest in the efficient and proper administration of the justice system.[161] Corresponding to the place of zeal is the value of client autonomy in the lawyer-client relationship.

There is no greater value than client autonomy for Freedman within the scope of the lawyer-client relationship. Freedman employs the model of lawyer-as-agent in the context of moral non-accountability. It is the client's autonomy that is being furthered, not the lawyer's. The furtherance of client autonomy is indicative of client control of the lawyer-client relationship:

> At the heart of [this] issue is whether it is the lawyer or the client who should exercise control in the relationship between them. As it is frequently put: Is the lawyer just a "hired gun" or must the lawyer obey his own conscience, not that of his client?[162]

While Freedman clearly comes down on the side of client autonomy and control over the lawyer-client relationship, he also analyses other models. The first he refers to as the "Lawyer as Moral Master" paradigm. Here the lawyer is loyal to the client but in control of the relationship, setting the agenda and the path to be followed. It is the lawyer's sense of personal morality that will prevail in this model. He cites disapprovingly a quotation of Clement F. Haynsworth, Jr., then Chief Judge of the United States Court of Appeal:

> The lawyer serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, as a professional he cannot give in to a client's attempt to persuade him to take some other stand. ... The lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them. During my years of practice... I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper....[163]

This model is fraught with paternalism for Freedman: the lawyer substituting his own views of the clients' interests and how to best achieve those interests are the most unethical actions that a lawyer can undertake. His belief is that denying another's autonomy is tantamount to denying their humanity. Freedman cites religious and philosophical writers in support of his position on this point.[164] It is Freedman's agency-centred analysis and emphasis on personal autonomy that leads him to advocate role-based ethics. By contrast, Professor Wasserstrom writes that the very problem with lawyers' ethics is role differentiated behaviour. Further, Wasserstrom argues that the public "... might all be better served if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of the moral point of view".[165]

Freedman next examines the model of lawyer as friend as constructed by Professor Charles Fried, where a "special-purpose friendship" is justified by the promotion of client autonomy, thereby developing and furthering within the client a "sense of self, ... personality, identity, and liberty".[166] With personal autonomy a seemingly inalienable right, Freedman is quick to allow a lawyer to suppress his own autonomy for a retainer, for money.

Money becomes the point of disagreement for Fried and Freedman. Freedman rejects the friendship model of the lawyer-client relationship because it is merely contractual and its emotional characteristics artificial. Freedman instead relies on his agency model, with the contract or retainer being the tool necessary to subordinate the autonomy of the lawyer to that of the client, albeit the lawyer's personal autonomy is in the decision of whether or not to accept a particular client's retainer. Freedman, however, takes pains to point out that once the retainer is signed and presumably the money is in the lawyer's trust account, "the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."[167] In other words, from the time money changes hands, the lawyer becomes a morally neutral tool of the client, the zeal for which is constrained only by the limits of the law. The only other concession that Freedman provides for lawyer autonomy is the limited allowance that the lawyer can withdraw from the relationship if the client's conduct or goals become morally repugnant to the lawyer. He allows this only in the limited situation where either the client consents, or in the alternative, where withdrawal does not harm the client significantly. When withdrawing the lawyer remains constrained by the duty of confidentiality. This makes the situation of the criminal defence counsel precarious, as we will see later in this section.

In Freedman's maximising client autonomy, lawyer autonomy is a casualty. To remedy this, he turns to the standby of common morality commentators, the obligation of moral consultation. This provides the lawyer with an opportunity to attempt to influence client means and ends when he is in disagreement with them. For Freedman, moral consultation is an opportunity for the lawyer to outline client options comprehensively, both legal and moral. For him, the scope of this moral consultation even extends to client input into the legal-ethical dilemmas faced by the lawyer.[168] Freedman gives greater breadth to client autonomy than even the Model Rules of the American Bar Association. The Rules feature client choice of objectives to be pursued and the lawyer has sole choice of the means. The rules however require the lawyer to consult with the client as to means, i.e., the lawyer decides the means only after consultation with the client.

(b) David Luban

For Luban, the first issue in dealing with the lawyer-client relationship is whether or not to accept a retainer. He regards the refusal of a retainer as only the avoidance of a potential legal-ethical dilemma. He points out that withdrawal or refusal does not speak to the merits of the resolution of conflicting duties because the fact that such a strategy is available does not resolve the moral issue itself: *some* lawyer will have to take the case. The choice of accepting a retainer is important where ethical dilemmas arise due to moral dubiousness in the substantive law, such as pleading a limitation to bar an action for a certain and undisputed debt. Luban writes that in this circumstance "... it is too simple to blame the law rather than the lawyer, for in every case the lawyer must decide to be the agent who brings about the outcome. It is the lawyer who pushes the red button. He cannot escape the fundamental conflict between ordinary and role morality...."[169] This leaves Luban in the situation of having to address the proper resolution of legal-ethical dilemmas. He recognises that solutions are not to be found in written codes of professional responsibility.[170] As if the resolution of these conflicting moral directives were not complex enough, Luban is able to find more factors to be considered from the lawyer-client relationship itself.

Luban identifies the lawyer's pecuniary gain as a fundamental truth about the relationship. The lawyer is paid by the client to advance his interests. He concludes that this reality may lead the lawyer into the temptation of regarding ethical codes as mere indicators of what he can properly "get away with".[171] Money is not the only hazard, or potential hazard, in the lawyer-client relationship. Another possible side effect of the relationship is lawyer paternalism. Despite concerns about it, Luban recognises that lawyers have the ability to override client wishes in certain areas, e.g., the courts' upholding a lawyer's tactical decisions over the client's objection.[172] His focus, not surprisingly, is whether lawyer paternalism may be justifiable in certain circumstances.

Luban defines paternalism as constraining a person's liberty for that person's own good.[173] The objection he raises is that society, built on liberal philosophy, prizes individual autonomy.[174] Irrespective of the pre-eminence of the value of individual autonomy, Luban recognises that situations may arise where paternalistic action is justified. Consent is a justification for paternalism. This situation would presumably be illustrated by a situation where an individual has chosen a particular course of action and has foreseen it as a difficult path. For example, a friend advises that he intends to quit smoking cigarettes and asks for assistance. Later, he goes to light up but you disallow his want for a cigarette.[175] The second justification for paternalism is no different than all the others offered by Luban because it also stems from the notion of consent. He indicates that it is justifiable paternalism to determine the client's course of action and then seek his approval. Paternalistic or manipulative difficulties may arise here if the client is not fully informed, because, after all, informed consent is the only effective consent. His third justification of paternalism is where an act is in anticipation of future consent.

Finally, Luban also considers it justified to act with "subjective consent", a consent that he describes as being attributed by one individual to another who is not currently competent to decide.[176]

While consent is the foundation of all possible justifications of paternalism for Luban, individual autonomy is the value that is to be scrutinised. He therefore examines whether or not consent is forthcoming in one form or another but he also examines whether or not client autonomy is intact. Luban cites the example of Spinoza. In Spinoza's community there was a brutal crime for which a lynch mob sought retribution on a pair of exceptionally unsophisticated brothers. Spinoza knew these brothers and was outraged that the lynch mob would harm such weak and potentially non-culpable individuals. Spinoza created a placard critical of the lynch mob and he announced to his landlord his intention to confront the mob. The landlord, realising the danger, forced Spinoza into a locked room and refused to release him until he regained his senses. Luban argues that Spinoza's passion was having a deleterious impact on his own autonomy and therefore the landlord was justified in refusing to allow him to confront the angry mob. In this scenario, the landlord was justified in acting in hope of future consent and also in protecting Spinoza against his own anger.[177] Just as Luban recognises several justifications for paternalism, he also recognises several types of paternalism.

Luban recognises four distinct types of paternalism. These are based on the consent based justifications outlined above. By way of example, one type of paternalism is what Luban calls "Values over Wants". This type of activity features a constraining on behalf of another individual's values, his freedom to do what he wants.[178] In criticising this type of paternalism he recognises that it would seem to require a clear and correct knowledge of that other person's values and ultimately the hierarchy of, or weight attached to, each of the values. A lack of knowledge or an incorrect assumption would then, by definition, lead to an unjustified act of paternalism, what Luban refers to as "an attack on an individual's autonomy".[179] Presumably, this particular type of paternalism can only be justified by an appeal to anticipated future consent. Luban next discusses this philosophical analysis in the context of the lawyer-client relationship.

In the lawyer-client relationship the client is the decision maker. If decisions made by the client are legal, then they must be followed by the lawyer. Luban thus envisions the standard conception of the lawyer-client relationship.[180] In his construction, while the client is still a decision maker, the counselling role of the lawyer is expanded as are the constraints within which the relationship exists. These constraints are the "within the bounds of the law" doctrine and the rule against revealing client confidences. Luban begins with the assertion that client decisions should be made after a careful consideration of relevant factors including the lawyer's experience and objectivity.[181] The expanded counselling role of the lawyer can be found in Luban's endorsement of the lawyer's "good judgment" as previously discussed, where Luban ranks "good judgment" as "the lawyer's best asset, better than knowledge of law, system or skillful analysis."[182] From an outline of the lawyer's role he progresses to a discussion of the constraints thereon.

Luban's view of confidentiality is that it should be significantly restricted. He provides a rudimentary assessment of the content and breadth of the duty. He indicates that confidentiality is a role duty of the lawyer and it sets the lawyer apart from other "employees" and imposes a duty not required of others.[183] Luban recognises that the traditional justification of confidentiality as the promotion of complete and effective communication between lawyer and client. He realises that this traditional justification of the duty goes to the heart of the issue of whether or not the lawyer can ably represent the client:

> It is agreed on all sides that the purpose of confidentiality is to permit clients to "tell all" to their lawyers without fear that the lawyers will disclose unpleasant facts; the reason for affording clients this protection is to allow their lawyers to represent them effectively, which would presumably be impossible if lawyers did not know all the facts.[184]

Luban, in spite of the recognition that the duty of confidentiality is a guarantee of trust and loyalty within the relationship, remains steadfast that it must be reined in.[185] Luban's desire to restrain confidentiality stems from his distaste of the doctrine of moral non-accountability. As a potential alternative, Luban looks to the evidentiary attorney-client privilege. He argues that the evidentiary privilege pertains only to eliciting information at trial while clearly the ethical duty is broader in scope.[186] He reasons that historically the privilege belonged to the attorney to protect him from being forced to compromise his integrity, yet it evolved to the unrestricted privilege belonging to the client in Greenough v. Gaskell.[187] The dicta envisioned privilege as belonging to the client but ultimately benefiting justice. Luban classifies this as an argument of Benthamite utilitarianism.[188] This sets the stage for his restructuring of confidentiality.

Luban indicates that a lawyer should reveal client confidences "... when a client cannot be stopped from a course that significantly damages third parties."[189] Luban recognises such a breach of confidence to be "client betrayal".[190] Nevertheless, Luban argues that restrictions on another's autonomy are often mandated, for example, in accordance with classical liberal thought, when one's autonomy has a deleterious impact on another.[191] Luban argues such constraints are neither paternalistic nor subordinating as they do not fix on one individual or another, but instead are of equal application to all members of society, much like laws that prohibit certain acts that harm others such as theft or assault.[192] He takes this position in opposition to critics such as Ellmann who argue that the client is improperly subordinated to the morally activist lawyer.[193] To address the seeming power imbalance between client and lawyer (especially the moral activist lawyer), Luban counters by pointing out the reality that lawyers are dependent on clients for livelihood:

> It is ... misleading to regard moral activism as "subordinating clients to third-party or "public" interests. Morally activist lawyers interfere with client autonomy only in the sense that they decline to carry out a client's wishes when those wishes or the means needed to fulfill them are immoral – most typically, because they unjustifiably harm other people. It is absurd to claim that a lawyer's refusal to harm others on your behalf "subordinates" you to them ...[194]

Luban begins a philosophical analysis of the idea of personal autonomy indicating that autonomy is "... a precondition for things of great value, (responsibility, creativity and authenticity) but it has no value of its own."[195] He then concludes his analysis of autonomy (and his defence of the morally active lawyer) by claiming that "... if a client's choice is morally wrong and promotes none of the values that make autonomy important, then "interference with client autonomy" is simply not an objection to moral activism."[196] Finally, as a logical outcropping of this attack on personal autonomy or perhaps in spite of it, Luban controversially concludes that institutional clients should not gain from confidentiality. He cites the example of a business corporation and questions who is the client: the shareholders, the directors, the employees? And whose benefit the duty really serve?

Luban cites the Brandeis concept of the "opportunity of law" as a pillar of the moral activist paradigm:

> His notion of "the opportunity in the law" is this: lawyers have the opportunity to make the law better by law reform activity, and to make their clients better by using their advisory role to awaken the clients to the public dimension of their activities, to steer them in the direction of the public good.[197]

Put another way, in Brandeis' own words, as a practitioner he scrawled a note on a legal memo in one of his files, "[a]dvise client what he should have – not what he wants."[198] This simple admonition has become the guiding principle of "moral activism". Moral activism is the name Luban has given to the system of lawyering that he offers as an alternate to the standard conception of lawyers' ethics.

Within moral activism the lawyer is accountable for both the means used and the ends obtained on behalf of the client. The lawyer must therefore refrain from immoral tactics as well as the pursuit of improper client ends. The principle of partisanship has thereby been greatly constrained. The morally activist lawyer does not seek client ends zealously within the bounds of the law. Instead he seeks client ends within the constraints of common morality.[199]

Luban envisions the lawyer confronting clients with objections to legal yet immoral projects. The result of the shift to moral activism would effect a transformation of the legal profession from a "mere conduit" of the client's will to a "positive moral force" in society. Luban does not view his construct as a vast departure: "... the moral activism I aim to promote is not simply a kind of philosopher's pipe-dream; instead, it is a reaffirmation of one of the bar's own vital traditions." Moral activism is required because the standard conception cannot justify immoral tactics or ends.[200] Further, the tangible result for Luban would be the profession's reclaiming a role in society of public service and social justice, rather than the modern day focus of client service and monetary gain.[201]

Under the veil of the system of moral activism, the rules and duties of the standard conception remain in full force and effect until a legal-ethical dilemma occurs.[202] Luban refers to this as the idea of "lawyer civil disobedience". The goal of this disobedience restricts tactics that violate common morality:

(i) ... modes of practice that inflict morally unjustifiable damage on other people, especially innocent people;

(ii) ... deceit, i.e., actions that obscure truths or that lure people into doing business under misapprehensions, even if these are legally permissible;

(iii) ... manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit; and, in general

(iv) ... the pursuit of substantively unjust results.[203]

Luban views a legal-ethical dilemma as occurring because "... the lawyer's role seems to be governed by standards different from and in fact inconsistent with the demands of common morality."[204] He has concluded that the institutional excuse, that is, an appeal to the importance of the lawyer's role in justifying a departure from common morality, is unjustifiable in the practice of law in all areas save the practice of criminal defence. It is at the point of an ethical dilemma that Luban's morally activist lawyer becomes distinct from the practitioner in the standard conception.[205]

In the face of an ethical dilemma, Luban directs the moral activist to put into use the fourfold root of sufficient reasoning[206] analysis, to determine whether a departure from common morality is justified by appealing to the importance of the lawyer's role.[207] This analysis must be utilised because the morally active lawyer is accountable for the means used and ends achieved on behalf of the client:

> The various demands of partisanship are no longer blanket demurrers from moral responsibility, as in the standard conception; the moral activist treats them instead as rebuttable presumptions, whose weights are determined by the fourfold root argument. The slighter their weight, the more likely it will be that the presumptions of partisanship will be overridden by the demands of common morality.[208]

Luban views the net effect of this as resulting in the lawyer addressing with the client the discrepancies between precepts of common morality and the client's otherwise legal means and ends. The corollary may be refusal to be retained or withdrawal and refusal to pursue specific goals. Because he insists that withdrawal or refusal tends to avoid the merits of resolving the ethical dilemma, the lawyer must have attempted to influence the client in a positive manner before withdrawing.[209] The emphasis of the morally active lawyer-client relationship is counselling.

This counselling for Luban is a discussion of the rightness or wrongness of the client's projects as well as the potential impact of them on third parties. Luban envisions these discussions taking place "in the same matter-of-fact and ... unmoralistic manner that one discusses the financial aspects of a representation."[210] The emphasis on counselling and moral reform indicate that moral non-accountability has an extremely limited function within Luban's construct:

> ... we understand that the moral ideal of the lawyer for a principle has nothing whatever to do with the principle of nonaccountability. Rather, it has to do with the famous just war principle called the "doctrine of double effect", which excuses soldiers whose actions in pursuit of a just cause inevitably kill some innocent noncombatants. The doctrine of double effect says that it is permissible to perform an act likely to have evil indirect consequences ... only if its direct

> effect ... is morally acceptable and the intention of the actor aims only at the acceptable effect, the evil effect not being one of her ends.[211]

Because of this limitation on moral non-accountability, lawyers will be measured by the same "moral yardstick" as every other member of society.[212] The only recognition that Luban gives the principle of moral non-accountability is in the context of what he calls "the lawyer for the damned", the lawyer who takes the case that no other lawyer would because of its "extreme repugnance".[213] The lawyer for the damned, however, is not exempt from Luban's admonition to counsel the client toward the morally appropriate ends and means.

> ... the lawyer for the damned has not done her job if she does not try to redeem the client, and in that sense the lawyer for the damned *is* morally accountable for the client's evildoing. It is not that she is an accomplice in the evil; it is that she cannot be neutral toward it. If she may ultimately be brought to forgive, at any rate she cannot permit herself to forget. Without morally activist lawyering – the lawyers attempt at a moral regeneration of her client – the lawyer for the damned is not the uplifting figure we take her to be; and so the lawyer for the damned, like the lawyer for a principle, is an ideal only on a morally activist vision of lawyering.[214]

The idea of the morally active lawyer not becoming an accomplice in evil is of vital concern to Luban, as in the model of hired gun lawyering. This position is morally untenable due to its focus on future acts rather than past acts. The concern is that a hired gun lawyer involved at the planning stages of an activity can become entwined in its moral value or more importantly the lack thereof.[215]

(c) Thomas Shaffer

For Shaffer there are three models of the lawyer-client relationship. He sets out and criticises three models before exposing his view of the paradigm. In identifying these models, he begins with an examination of the historical development of the lawyer-client relationship in the United States. Historically, the American lawyer was morally sensitive to client purposes and tactics. Shaffer cites the words of American legal ethics pioneer David Hoffman:

> If I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see it as he does, and do not press it and should the principle [the client depends on] be at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country.[216]

For Hoffman, there was a place in legal ethics for the lawyer's morality, but little place for the client's. The lawyer-client relationship has come full circle. Today, in the standard conception, there is little place for the lawyer's personal morality. This shift is foundational to the public's poor perception of the ethics of the profession. The stature of the profession is lost in identification with disreputable client goals. Accompanying the shift in the lawyer-client relationship is a shift in the regulation of lawyers. Regulation has regressed to the point of mandating minimum standards.[217] The models featuring the lawyer's morality are "Lawyer as Godfather" and "Lawyer as Guru" while the model limiting lawyer conscience is called "Lawyer as Hired Gun".

The Godfather lawyer determines the client's interest, controls the relationship and the case, and works to maximise results. The shortcomings of this model are lawyer paternalism threatening client autonomy, the lawyer's focus ignoring the interests of third parties:

> Godfather lawyers either decide what their client's interests are, without consulting their clients, or they persuade their clients to accept lawyers' views on what their interests are. They pursue client interests with their own "technical" devices, without much interest in their client's moral reservations.[218]

Shaffer recognises the tendency in lawyers to assume that client interests are invariably equated with the maximisation of wealth or property rights. He refers to this tendency as "acquisitive parentalism". He defines parentalism as "limiting someone's freedom for the sake of his or her own good." In criticising lawyer "parentalism" he cites Professor Luban:

> "[V]alues are definitive of the person" and, therefore, "attempting to ... override them directly assaults the integrity of his or her personality". Parentalism does not provide sufficient respect for the client's mind and conscience. Parentalism assaults the client's dignity.[219]

For Shaffer, paternalistic assumptions not only assault the individuality of the client, they also are susceptible to being misrepresentative of client wants and needs.

The "Lawyer as Hired Gun" is the standard conception of the lawyer's role. It features virtually unfettered client control of objectives, results and lawyer conscience. The client controls the relationship. This control occurs irrespective of whether or not the client has even considered the morality of his instructions.[220] The lawyer's role is to further the client's ends, not to question the client's values. Here, client autonomy is paramount.

Autonomy is defined by Shaffer as "the ability to control one's life, the power to live independently."[221] He cites Freedman as an exponent of the value of personal autonomy. Freedman envisions furtherance of client autonomy as a moral goal of the lawyer. The hired gun acts neutrally, non-judgmentally, and in a manner that respects the client's desires. The obvious criticism of this method, other than the lack of moral participation by the lawyer, is that it does not, unless the client is inclined to, address the potential impact on third parties or on the relationship with the opposing party. This model disingenuously denies that the lawyer-client relationship has a moral dimension and that both lawyer and client are morally accountable for the interests furthered, the methods used and the results obtained.[222]

Even though the hired gun's zeal dictates the pursuit of the client's goals within the bounds of the law, Shaffer finds a place for lawyer conscience in this model. The lawyer can discuss moral objections with a client. When moral disagreement occurs the possibilities are to allow the client to placate the objection, discuss possible alternatives or withdraw. Shaffer predictably recognises a disagreement between lawyer and client as an opportunity for moral discourse. Freedman instructs that the lawyer must effect client directions even if they are contrary to the lawyer's morality. Shaffer summarises Freedman's position by citing, "... I will tell you what I think you should do, but if you decide to do something else—even something I regard as immoral—I will help you do it". Shaffer, as the tone of his summary suggests, is critical of a lawyer who surrenders autonomy and conscience within the lawyer-client relationship.[223]

The "Lawyer as Guru" determines client interest, not with a parental concern, but rather with a moral concern for client action that is fit and proper. Decisions are based on the lawyer's sense of personal morality.[224] The client's role is compliance. The lawyer, through sound moral judgment, mandates the rectitude of the client. This model for Shaffer represents the "contextual ethics" of Professor William Simon.

This model exemplifies an extreme common morality method of legal-ethical reasoning and is a stern rejection of role morality.[225] The exemplar of the lawyer as guru is Atticus Finch who, in Harper Lee's words, was "the same person in town and at home".[226] This model also rejects the doctrine of moral non-accountability. The lawyer directs the client to act morally and the client complies. In this way, the relationship is a limited collaboration working to promote substantive justice. Like Atticus Finch, the guru is morally responsible for advice given, tactics used and results achieved. The lawyer's use of personal morality in legal-ethical reasoning expands its sources to include influences of family, friends, communities and religious congregations.[227]

The criticism of this model is that the client is virtually excluded from participation in the relationship. This lack of client participation is addressed in Shaffer's creation of the "Lawyer as Friend" model of the lawyer-client relationship, which features participation by both lawyer and client in moral discourse. In essence, it is a further expansion of the sources of legal-ethical reasoning to include the client, and thereby the influences of the client's family, friends, communities and religious congregation. The hope is that the client's participation in moral discourse will ensure the evolution of the client into a better person. In the model of "Lawyer as Guru", the lawyer takes moral responsibility for the interests, methods and results. In the model of the "Lawyer as Friend", both lawyer and client bear this moral responsibility.[228]

The "Lawyer as Friend" or the ethics of care begin, as is characteristic of Shaffer's thought, with a focus on the persons, the lawyer and the client. The "gentleman lawyer", who is to Shaffer's ethics as the "man on the Clapham Omnibus" is to reasonableness, is the starting point of the "Lawyer as Friend". The "gentleman lawyer" has four gentlemanly qualities: civility, self-possession, discrimination and diffidence. After all, "character turns on virtues more than on rules and principles".[229] He clearly expounds that a lawyer is more than a mouthpiece blindly advocating for the client. Rather than by a recipe of virtues, the gentleman is described by reference to characters that are widely recognised and admired.

Shaffer finds examples of the gentleman in characters from popular culture. These include Dr. Mark Craig from television's "St. Elsewhere", Atticus Finch from To Kill a Mockingbird and Preston from The Defenders.[230] These characters share one trait, definitive of the gentleman: they conduct themselves in their professional endeavours without forgetting who they are. They dance with the devil and it does not change them. This ideal is the guiding principle that sets out the manner in which the gentleman interacts with his clients and others. Crucial for Shaffer is the idea that the community is the context within which the practice of law occurs.[231]

The ideal lawyer-client relationship for Shaffer is moral colleagueship. This involves the "gentleman lawyer" practicing law from a common morality perspective, concerned for not only the client but also all members of the community. Shaffer envisions that the gentleman practices justice, i.e., he treats others justly and in so doing becomes a source of justice in the community. Shaffer believes that justice originates in an individual's interaction with others, not from government in its control.[232]

Moral colleagueship occurs between lawyer and client, yet a fundamental reality of the relationship is power imbalance. Legal ethics, therefore, "... speaks to the unequal encounter of two moral persons".[233] The lawyer occupies a position of power. The client occupies a position of vulnerability or need. The lawyer has education, expertise and experience. Nevertheless, the client must have a voice and an active role, especially with regard to the morality of the decisions being made. Shaffer recognises that this is not the standard conception of practice:

> Legal Ethics is complicated by the fact that the discussion of this other person's morals is focused not in his conscience but in mine. Legal ethics is thinking about my client's morals, but I am the one who is thinking. Most of our discussions - in

> committees of lawyers, in bull sessions, in law school, and with our spouses at dinner - are on what a lawyer should do about his client's morals.[234]

What should a lawyer do about his client's morals? The answer is the provision of rectitude, freedom and goodness.

Rectitude is the lawyer's desire for the client to act in a morally unimpugnable manner. Judge George Sharswood (Chief Justice of Pennsylvania and founder of the University of Pennsylvania Law School) wrote that "it is the duty of the counsel to be the keeper of the conscience of the client; not to suffer him through the influence of his feelings or interest to do or say anything wrong in itself, of which he would afterward repent."[235] It is the lawyer's task to ensure that the client does the right thing. Rectitude is not to occur through compulsion or the use of power within the relationship. The provision of rectitude to the client is to occur through the process of moral discourse. In this way, the lawyer is protected from criticisms of parentalism and arrogance.

The freedom of the client is protected by moral discourse. It is neither a tool of the client nor does it sacrifice the conscience of the lawyer. Valuing client freedom, empowerment and autonomy protects against undue interference and the possibility of lawyer paternalism, arrogance or hubris.[236] Client autonomy is not the pinnacle of human virtue, for Shaffer:

> Freedman's argument is based not on statism but on the proposition that the highest good of a human person-at least the highest good that is of social or professional importance-is that he be free. That he be autonomous. That he live according to moral principles that are his own, not his lawyer's.[237]

The paramount virtue for Shaffer is that the client is capable of "being and becoming" a good person, and is worthy of moral advice.[238] Moral advice may be influenced by religious belief.

To achieve the provision of rectitude, freedom and goodness, moral discourse is informed by religious belief. This is especially important where lawyer and client are within a shared community. Historically American legal ethics flowed from the common law and the values of the "American Republic".[239] The lawyers who advanced legal ethics in the early days of the American profession were Christians. Legal ethics were never expressly rooted in religious teaching. It was those that designed, implemented and adhered to the ethical systems of the profession that encouraged values consistent with their religious belief. Shaffer envisions moral discourse accommodating religious values for lawyers who are believers. Religious belief is to be integrated in the professional ethic by a believer who happens to be a lawyer and not by a lawyer who happens to be a believer:

> The theological proposition is this: Faithfulness to the tradition of Israel and of the Cross means that the lawyer stands in the community of the faithful and looks from there at the law. Faithfulness means that a lawyer imagines that she is first of all a believer and is then a lawyer.[240]

In this model religious life informs professional life. The religious community is therefore a potential source of legal ethics. In fact, Shaffer goes so far as to say that the religious community is where for the believer their legal ethics should originate.[241] Rather than discussing the implementation of religious belief, the lack of uniformity of religious belief in the modern community, the lack of religious belief in the secularised modern world, or a conflict between a lawyer's and a client's religious belief, Shaffer instead focuses his attention on setting an analytical agenda with the goal of viewing legal ethics from the perspective of religious values. In part I believe this is so because Shaffer is aware that he is in fact making a controversial and even a revolutionary argument in indicating that religious belief is a potential source of legal ethics:

> Our part of the academy, more than any other, has systematically discouraged and disapproved of invoking the religious tradition as important or even interesting. It ignores the community of the faithful so resolutely that even its students who have come to law school from the community of the faithful learn to look at the particular people from the courthouse, rather than at the courthouse from among the particular people.[242]

The way in which a believer, who happens to be a lawyer, practices law, according to Shaffer, is through moral discourse and the invocation of the "ethics of care".

The ethics of care is a person centred model. Mutual participation is expected. It is not a role theory paradigm where the lawyer's conscience is subordinated to that of the client so long as the instruction is within the bounds of the law. The ethics of care is not like role-based systems where the adversary system is used as a rationalisation for deviations from common morality. The ethics of care is not a system of moral isolation where the client makes a moral assertion followed by the lawyer's acceptance or rejection. Instead, the ethics of care is a moral conversation.[243] In the conversation, lawyer and client are both mutually open to influence from one another. The necessary ingredients are time, space and environment for reflection. Reflection must be informed. The information is provided by the lawyer in a process of collaboration and openness to change, the object being "... legal-counselling tactics which seek out the authenticity of the client over tactics of influence ..."[244] In this way, the ethics of care is a coupling of influence and autonomy without subordinating autonomy to influence. Inevitably conflicts will arise and they will become the subject of moral discourse. Just as inevitably the lawyer and client may ultimately disagree. Shaffer allows for the situation where moral discourse leaves lawyer and client in an unsolvable conflict. He is adamant that when moral discourse fails and the lawyer conscientiously objects, it is not a return to the ethics of isolation. After all, his position is that the lawyer has "already left the island". He sees value in the lawyer speaking his piece in moral discourse even if it does not effect change.[245]

Along with the argument that religious belief may become a source of legal ethics for the believer, Shaffer also examines the possibility of moral theology as a source in the study of legal ethics.[246] His writing demonstrates that he feels a need for an intellectual justification for utilising moral theology as a source in the study of ethics. Shaffer looks to moral theology as a source for legal ethics and not merely supporting arguments or authorities for moral positions. He values the fact that moral theology brings a way of life, a different perspective.[247]

To meet the objection that legal ethics should not use moral theology as a source because it is inappropriate and doesn't belong or is irrelevant, Shaffer argues that: "... theology is a useful-and-traditional discipline in moral science, and, ...law is a moral science."[248] Shaffer argues moral theology is therefore relevant because it is a part of the whole, i.e., the study of ethics. After all, legal ethics are ethics and ethics is thinking about morals just as legal education is thinking about law.[249] In as much as ethics talks about what we ought to do, Shaffer argues that moral theology should be a source:

> My student says she would not help her client lie in court. She says, "that's just the way I feel. I suppose it has to do with my having gone to a Southern Baptist Sunday School." That is either where ethical argument begins or my question and her answer have no place in the university.[250]

To further justify the conclusion that moral theology should be a source of the study of legal ethics, Shaffer observes that he has not found that unbelievers are a problem. "The secular humanists and agnostics that I work with agree that Hebraic moral tradition is a principal source of morals for Americans and that it would be bad history and bad ethics to leave it out of legal ethics."[251]

(d) William Simon

Simon compares and contrasts two visions of the lawyer-client relationship. These perspectives are "the professional vision" and the "critical legal vision". The professional vision is representative of the dominant view of legal ethics. This vision favours categorical role-inspired rules, rather than guidelines premised on the lawyer's individual value system:

> The professional vision appeals to an ideal of practice as an activity that transcends both personal ethics and politics. In this ideal, practice takes place in a realm between public and private where personal responsibility is attenuated and fundamental social conflicts have been resolved.[252]

By contrast, the critical legal vision of practice is based on personal responsibility, requiring the transformation of both lawyer and system. The former is a role-based system, while the latter is a common morality system.

The client within the realm of the professional (role) vision is a bundle of interests, that only the client determines.[253] Counsel furthers these interests. This subjective enunciation and furtherance of interests, is important because it is founded on the values of personal autonomy and dignity. "The lawyer violates her duty when she substitutes her own judgment about the client's well being for the client's judgment (paternalism) or when she takes advantage of the client to further her own interests (exploitation)."[254] The critical legal view is skeptical of this definition of a client, attributed to the professional vision.

The critical legal vision is founded upon a recognition that client instructions and interests are overly indeterminate and potentially impacted by the lawyer-client relationship.[255] This criticism is founded on two competing interpretations of the definition of a client. In the first, the client is a full and equal participant in the lawyer-client relationship. This interpretation focuses on the fulfillment and empowerment of the client and therefore envisions the dispute resolution function of the justice system as a method of "social integration".[256] In the second interpretation, a client is an isolated individual. This interpretation views social rules as tantamount to the potential oppression and vulnerability of the client. Therefore, the dispute resolution function of the justice system is viewed as a "safeguard against oppression".[257] The concern for the client's position in the world external to the lawyer-client relationship is further analysed by Simon.

Irrespective of these perspectives on the function of the justice system, the client is not only a bundle of interests but more properly a bundle of relationships. These relationships must be scrutinised to determine their relative worth. A conservative view of the lawyer-client relationship involves the lawyer at least impacting on and at most dominating the client's view and scrutiny of the social relationships of which he is a part:

> ... the lawyer's intervention may affect the client's perception of his interests. Intact social relations depend to a significant extent on their taken-for-granted character. By introducing the perspective of egoistic interest calculation and aggressive instrumental strategizing, the lawyer subverts this character and thus threatens the relations. Legality and lawyering can play a productive role only where social relations have broken down.[258]

The conservative view begins this extrapolation from the foundational belief that the social relations of the client are worthy of protection and are not oppressive in themselves.[259] For Simon the importance of all of this exists in the idea that only the critical view is aware of and responds to the notion that the lawyer-client relationship impacts on the values of the client.

> The critical view recognizes that social relations are part of the individual identity of the client and further that the lawyer-client relationship, as a social relationship is potentially constitutive of the client's identity. And further that this should not be perceived as a threat to the personal autonomy of the client but instead should be seen as an opportunity to be embraced.[260]

Simon begins his description of his view of the lawyer's duties in the "contextual view" of lawyers' ethics by contrasting it with the role and common morality views. "The basic objection to the [d]ominant [v]iew is that it excessively attenuates the lawyer's responsibility for her conduct and requires her to participate in injustice."[261] The role of lawyer in contextual ethics is a morally responsible and collaborative one. Lawyers, here, pursue substantive justice while being guided by a personal internal value system.[262] By contrast, in the dominant view, lawyers' activities are bound only by the law. Simon questions this adherence to categorical rules of law and the reluctance to prize non-legal duties:

> At the same time that it denies authority to nonlegal norms, the Dominant View insists on deference to legal ones. "Zealous advocacy" stops at the "bounds of the law". By and large, critics of the Dominant View have not challenged this categorical duty of obedience to law. They typically want to add further public regarding duties, but they are as insistent on this one as the Dominant View.[263]

In the contextual view lawyers act only with regard to just resolutions of issues on their merits, so long as the means used where they deviate from the lawyer's values, do not outweigh the substantive justice sought.

Simon concocts and justifies a type of situational ethics where the only seeming criteria for judging the righteousness of an act is whether it would lead to a substantively just result.[264] This seemingly ludicrous position is meant as an indictment of blind adherence to categorical (role or common morality) precepts which place a blanket prohibition on certain types of acts irrespective of their intents, circumstances and outcomes. Simon explicitly states that he would endorse malfeasance that is specifically intended to "mitigate or prevent injustice".[265]

In narrow circumstances, Simon says, e.g., that it may not be wrong to lie, irrespective of role duties of candour or integrity and a common morality prohibition. In short, Simon may be prepared to accept the ethical goodness of lying after an examination of the circumstances, background, and of course merits of the particular case. In "Virtuous Lying: A Critique of Quasi-Categorical Moralism," his contextual judgment about whether it may be ethically permissible in a given situation to lie amounts to little more than cost-benefit analysis. "We should recognize that there are often moral costs to lying and should lie only when these costs are exceeded by the morally relevant benefits."[266] In fairness, Simon takes an expansive view of what constitutes a morally relevant cost and includes therein damage to the lawyer's own personal integrity, as well as damage occasioned to the autonomy of the individual deceived by the lie.

(e) The Context of Criminal Defence

In the context of the criminal justice system, as in no other context, there is a battle or balancing of rights. The rights of the state and of the individual are put on a collision course. The state has the right to peaceful existence and to identify, denounce, deter and otherwise sanction those who would breach that peace. In the process individuals have rights, many constitutionally guaranteed. One's view of the primary function of the criminal justice system and of the defence counsel will have significant impact on how one resolves legal-ethical dilemmas.

(a) Monroe Freedman

Freedman has constructed his view of lawyer's ethics requiring the strongest degree of role differentiated behaviour. This being so, his paradigm, the standard conception of lawyer's ethics, is employed without variation in the criminal defence context. Freedman's view of criminal defence focuses on the jeopardy to the accused and the importance of individual autonomy. The role of defence counsel, for Freedman, justifies deviation from common morality because of its importance in furthering the systemic goals of rights protection and truth seeking. Importantly, Freedman cites the doctrine of moral non-accountability to excuse the lawyer from moral responsibility for the legal means and ends of the client, whatever they may be.

For Freedman and his client centred advocacy, zeal knows only the bounds of the law. The conflict of legal duties and client centred duties as well as the conflict between common morality duties and client centred duties can be seen in Freedman's "trilemma" of the three hardest questions for the criminal defence counsel:

(i) do you discredit a witness you know to be truthful?

(ii) do you let your client take the stand knowing he will offer perjured testimony?

(iii) do you give advice that may tempt the client to commit perjury?[267]

The first question involves the legal duty of loyalty to the client and zealous advocacy against the legal system's goal of finding truth against the common morality precept of honesty. Other than candour to the court and integrity, the criminal defence counsel does not have a specific duty to truth, like for example, a crown attorney. Freedman resolves this question by citing a number of reasons that all focus on loyalty to the client over candour to the court, e.g., the witness may be mistaken or the client may be not guilty but the witness gives damning circumstantial evidence. Whatever the reason, Freedman chooses loyalty to the client over candour to the court. He maintains that this is the only viable option because the lawyer not seeking all of the relevant facts leads to selective ignorance, the lawyer not maintaining client confidence leads to clients not trusting lawyers and dishonesty ultimately being advanced in any event.[268]

Freedman employs similar reasoning in the resolution of the latter two questions of the trilemma involving client perjury. Freedman reaches the extreme and controversial conclusion that there are circumstances where a lawyer can do no other than allow perjured testimony and even argue it to a jury, lest the lawyer breach confidence or otherwise prejudice the accused by withdrawal or notifying the court of the client's perjury.[269]

(b) David Luban

Luban concludes, in his text Lawyers & Justice: An Ethical Study[270] and also in his subsequent article "Are Criminal Defenders Different?,"[271] that deviations from common morality, due to values inherent to the standard conception of the lawyer's role, are justified in the context of criminal defence practice. Despite striking similarities in the thought of Luban and Simon, the two come to diametrically opposed conclusions in this area. Further, each employs a different starting point of analysis. Luban credits Simon for exposing the jurisprudential incoherence of zeal within the adversarial system in the context of criminal defence.[272] Luban accepts Simon's diagnosis of the problem of whether appeals to role justify deviation from common morality. In this regard, as we have seen, Simon constructs a method of independent judgment called contextual judgment. Simon's construct applies to both the civil and criminal areas of practice. Luban has similar arguments that take the form of his construct of the lawyer as moral activist. The application of the moral activist paradigm in the civil but not in the criminal context begs the question of what is different about criminal defence practice that would justify an institutional excuse.

For Luban, the difference between civil and criminal practice is the existence of a power imbalance within the criminal justice system. Simply put, is the state more powerful than an individual accused to the extent that the defence counsel must be empowered to rectify the imbalance?[273] Luban examines four factors to determine the relative power of state and accused:

1. Resources;
2. Procedural Advantage;
3. Political/Psychological Advantage; and,
4. Bargaining Power.[274]

In considering relative resources, Luban offers empirical evidence indicating that there are more full time equivalent prosecutors than defenders in the United States of America.[275] He then concludes after reviewing statistical information that there is a "slight to immaterial" funding advantage for prosecutors in cases that are handled by the government employed public defenders.[276] With no statistical or empirical evidence, Luban opines that, when the private bar is factored in, there is likely more money spent on defence than prosecution.[277] Despite this hasty and somewhat unsupported conclusion, Luban progresses in his analysis to recognise that the prosecution has at its disposal police forces, crime labs, psychologists, DNA testing, and fingerprint analysis.[278] This is a clear acknowledgement that the prosecution has a substantial advantage in investigating and prosecuting its citizens. Coupled with the prosecutorial and investigative war-chest of the state, Luban cites statistics demonstrating a lack of factual investigation by defence lawyers. He notes few defence counsel visit crime scenes, interview prosecution witnesses, defence witnesses or even the client before trial or guilty plea.[279] He then cites statistics showing the percentage of defendants denied or unable to make bail, which precludes their assisting in their own defence.[280] At this point, Luban is no longer merely analysing the resource disparity between prosecution and defence, he is also revealing the foundational difference in starting points between himself and Professor Simon. Luban begins his analysis of the criminal justice system by assuming that criminally accused individuals get little if any actual or effective defence. By contrast, Simon begins his analysis assuming zealous advocacy in defence of all criminally accused.[281]

The second factor Luban considers in determining the existence and extent of the power imbalance is the substantive law of criminal procedure. Luban concludes that the prosecutor has "overwhelming procedural advantages".[282] Although the particulars of various state laws of criminal procedure are not the same as the Canadian law, as it applies to the position of the criminal defence lawyer in Manitoba, a cursory examination will show similarities. Luban observes that defendants have "virtually no discovery rights against the prosecution in most [American] jurisdictions."[283] Canada has disclosure rules finding their origin in the Supreme Court of Canada decision of R. v. Stinchcombe.[284] In neither country does the defence have a right to depose prosecution witnesses outside of court under oath.[285] Further, Luban recognises that despite rights against self-incrimination the prosecution has extraordinary investigative powers.

The means by which police can gather evidence include investigation, warrant searches, searches by consent and searches incident to arrest. Further, though it may raise some triable issues, the prosecution can place informants in prisoner's cells. Prosecutors can also use the tactic of divide and conquer by offering grants of immunity to entice a co-accused to testify. Finally, despite the right against self-incrimination, interrogation and the psychological impact of authority still produces confessions.[286] In addition to advantage procedurally at the investigative stages, Luban indicates advantages present at both the trial and appeal stages.

At trial the distrust of court appointed lawyers may harm the defence of the criminally accused.[287] Also, at trial defendants suffer from what Luban calls legitimacy concerns. This concern is that prosecutors and police have more credibility than defence counsel and criminal accuseds. This coupled with jury predisposition to believe that the accused is guilty as charged places accused persons in a difficult position.[288] Luban concludes his procedural analysis by observing that the prosecution has the advantage on appeal too because of the doctrines of curial deference to the finder of fact and harmless error. Luban does recognise in his examination of the criminal procedure that only approximately ten per cent of cases are indeed litigated.[289]

The procedural power imbalance, Luban says, is even more extreme in the context of plea-agreements. In the context of negotiating plea-agreements, Luban again argues that the prosecution has the upper hand procedurally. He begins with the proposition that the prosecution can overcharge to gain bargaining power or leverage. Also providing leverage to the prosecution are high sentences. Luban argues that high sentences have the potential to make defendants less likely to gamble whereas the prosecution has "nothing to lose if negotiations fail".[290] Another factor that provides leverage to the prosecution are concessions respecting bail negotiation. In total, Luban points to a significant power imbalance procedurally in the investigation, negotiation, and litigation stages of the criminal procedure. To offset this imbalance, Luban recommends that zealous advocacy can be an effective control on the prosecution:

> We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained ex ante, our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention.[291]

Once Luban has concluded the standard conception of the criminal defender is justified, he begins construction of the role of the defender and the place of the lawyer within the adversarial system.

In constructing the criminal defense counsel, Luban considers three criteria:

(i) the societal importance of punishing the guilty;

(ii) the importance of the use of fit and proper procedure to determine the issue of guilt or innocence; and

(iii) that punishment after conviction must not diminish the human dignity of the defendant.[292]

Luban concludes that the role of the defender is critical to the realisation of these worthy systemic goals and that deviation from common morality to do so must therefore be justified.

> ... [T]he defining feature of the defender's role is that defenders act on behalf of persons accused of crimes; a fact about the world in which we live is that often those persons are guilty of the crimes – sometimes heinous crimes – of which they are accused. Thus, it is inherent in the defender's role that its duties will deviate to at least some degree from common moral requirements not to assist wrongdoers or aid in frustrating legitimate social efforts to control them. The defender's morality will inevitably deviate from common morality ....[293]

The moral worth of a deviation from common morality, but in accordance with the role of the defence counsel, can be justified by what Luban terms an "institutional excuse". In this context, Luban describes the institutional excuse in a series of related postulates. These postulates are first that the "role act" must be a required ethical duty of the lawyer in the circumstances. Second, the duty requiring the role act must be central to the role. Third, the role must be integral to the system. Finally, the system must fulfil societal goals and objectives.[294] In Luban's own words, the justification of the institutional excuse "... proceeds from action to duty, from duty to role, from role to system and from system to its goal or end."[295] This is the analysis that leads Luban to the conclusion that zealous advocacy is not justified in the civil context but it is justified in the criminal context to protect the individual against the more powerful state.[296] While Luban concludes that aggressive defence is justified in the criminal context, he concedes that it is not mandated. Essentially he allows for the discretion of counsel to determine when aggressive defence is appropriate and, by inference, when it is not. Despite this conclusion, Luban is firmly of the belief that aggressive defence to protect the individual in the face of overwhelming state power is justified.[297]

(c) Thomas Shaffer

Shaffer does not distinguish between criminal defence and any other legal practice. Instead he advocates a holistic approach to lawyers' ethics. This is so irrespective of the position of the client. There are clients who are more in need of moral discourse to bring them to do or choose to do right. These clients are in need of deliverance.[298] As the name suggests this process has religious significance. The foundational theme here is Jesus teaching that however one treats the leper, the prisoner or the impoverished is how one treats the Lord.[299] In secular terms this is a recognition of the goodness and dignity of the individual, irrespective of his stead as corporate raider, denouncer of contractual obligation or criminally accused.

Sometimes associated with the client is the problem of revulsion. This occurs when the lawyer has difficulty in dealing with those who have done wrong, those who continue to do wrong, or those who are determined to do wrong. The primary response to these individuals must be forgiveness.[300] Obviously this response has religious significance and motivation. Shaffer's doctrine of forgiveness is meant as a replacement for the standard conception doctrine of moral non-accountability.[301] With the dual doctrines of "doing unto others" and forgiveness, Shaffer has set the stage for what he calls the representation of the guilty.

He examines the limits, in accordance with the operative codes of professional responsibility, of the representation of the guilty. He summarises these limits or rules as mandating that the lawyer must not have a personal relationship with the client, that the lawyer must control the presentation of the case and that the lawyer may be entitled to withdraw in the face of improper instruction, client perjury or some similar act.

Unsatisfied with these codal answers, Shaffer looks historically for alternatives. The first such alternative is diminished representation. Shaffer cites Hoffman for the model of "diminished representation" as an historical response to the question of representing the guilty in the United States.[302] As this model can not be rationally supported in the current legal system, Shaffer examines the model of Sharswood, featuring the doctrine of moral non-accountability for both client ends, means and the ultimate result of the court process.[303] As discussed above, Shaffer rejects this position because it amounts to little more than an adversarial excuse. In terms then of a solution, Shaffer looks to the current climate within the system. The model that Shaffer advocates focuses on the constitutional and procedural rights of the accused.[304] Shaffer sees that the current ethic is born of the starting point of zeal within the bounds of the law. It seems that these boundaries are objectionable to Shaffer.

In moral discourse, or the ethics of care or friendship, the boundaries are set in a conversational meeting between the conscience and value systems of lawyer and client. The problem in this model is the definition of those boundaries that are to be set by collaboration. In analysing the standard conception of the lawyer-client relationship, Shaffer focuses on the distinction between the denotation and connotation of the codal words, loyalty and fidelity.[305] For Shaffer, fidelity is the relational value of friendship and a part of the ethics of care whereas loyalty is merely a role value.[306] Loyalty in the standard conception has led theorists such as Freedman to embrace a model of lawyer ignorance allowing the highest degree of latitude in the conduct of the particular case. Shaffer dismisses this development of the role value of loyalty as "untruthful representation".[307] Instead of untruthful representation, Shaffer calls for a model of advocacy which focuses on the reconciliation of the client to the other side, the trier of fact and third parties including the larger community.[308]

In the practice of reconciliation, advocacy becomes a tension, like that between "being a public servant and a companion for one's client."[309] In a nutshell, Shaffer has put his finger on the conflicting role duties as set out in the code of loyalty to the client and as an officer to the court. The object of the practice of reconciliation is the advocating on behalf of the person of the client rather than advocating from the client's mere interests or legal rights.[310]

> Advocacy as moral discourse reconciles advocate to client, advocate to those who listen to advocacy, and those who hear advocacy to the client. It reconciles those otherwise seen to be at war. It does this ... by exalting care over professionalism, through arguing to the consciences of those it addresses, and through arguing from the persons of those whose cause is advocated. Advocacy as moral discourse also radiates into the community, into consideration of social justice, because of four features that distinguish moral discourse from adversary discourse: Moral discourse is interpersonal; moral discourse argues from the person of the client; moral discourse is addressed to the conscience of those who hear it; moral discourse, because it is a form of reconciliation, binds the community together.[311]

Moral discourse is not mandated or disallowed in the Code; instead, in Shaffer's view it is not addressed.[312]

(d) William Simon

In his prescription for the ethics of criminal defence, Simon surveys the literature conceding that the dominant view of legal ethics is appropriate for criminal defence practice:

> A large literature has emerged in recent years challenging the standard conception of adversary advocacy that justifies the lawyer in doing anything arguably legal to

> advance the client's ends. This literature has proposed variations on an ethic that would increase the lawyer's responsibilities to third parties, the public, and substantive ideals of legal merit and justice... [w]ith striking consistency, this literature exempts criminal defense from its critique and concedes that the standard adversary ethic may be viable there.[313]

Despite the view of the majority of authors in this area, Simon remains convinced that contextual ethics is appropriately applied to the practice of criminal defence.[314] In this arena the contextual approach mandates counsel to strive for resolutions of issues by the trier of fact, possessing all relevant legally obtained information.[315]

Here, Simon specifically joins issue with Luban, who maintains that the dominant view of criminal defence is justifiable.[316] Simon's disagreement with Luban stems from a philosophical difference in orientation. Luban is content with the dominant view or standard conception of lawyers' ethics being applied in the area of criminal defence to act as a balance against state power, whereas Simon begins with his assumption that substantive justice is to be served in each and every case that a lawyer handles:

> I remain convinced that Luban is mistaken in excepting criminal defense from much of the responsibility to substantive justice that we both think appropriate in every other sphere of lawyering.... Luban argues that liberalism starts with the idea of checking state abuse of rights. I think it is more plausible to assert that liberalism starts with the idea of rights. You cannot derive aggressive defense from this notion of rights because aggressive defense often aims to achieve goals that are inconsistent with rights: either to help the defendant achieve a result to which she is not substantively entitled or to help her escape the consequences of her violation of the victim's rights. The traditional public ambivalence or hostility toward aggressive defense is solidly grounded in the liberal conception of rights.[317]

In explaining the compatibility of contextual ethics and criminal defence practice, Simon analyses aggressive defence. It is strategies and tactics that, while aiding the accused do not aid the trier of fact in achieving a just determination of issues. Such tactics which frustrate justice and are inappropriate and unseemly include unnecessary delay for the purpose of frustrating the will and recall of prosecutorial witnesses, the impeachment of witnesses known to be truthful, the presentation of perjured testimony, or the arguing of factual inferences from evidence that are known to be untrue.[318] Simon rejects aggressive defence for the simple reason that "it impedes the state's ability to convict the guilty without affording any significant protection to the innocent."[319] Despite his condemnation of the dominant view of legal ethics in this area, Simon recognises the rights of the accused as central to the penal law.

In the criminal arena, Simon recognises a lawyer can plead a client not-guilty even if he knows him to be factually guilty. This stems from the presumption of innocence, i.e., that the accused has the right to put the prosecution to the strict proof of all elements of the offence charged. Further, he recognises the propriety of an accused successfully objecting to the use of illegally obtained evidence.[320]

Simon defends the application of contextual ethics in criminal defence by attacking the traditional justifications of aggressive defence. Simon rejects the notion that state powers of prosecution and investigation need to be equaled by the allowance of aggressive defence tactics.[321] This is so due to the fact that not all or even most defendants face the full brunt of state power: "yet, aggressive defence treats all defendants as if they faced the full concentrated power of the state."[322] Further, Simon rejects the justification of aggressive defence that claims it makes the police and prosecution better by acquitting for sloppiness or inappropriate methods.[323] He does, however, recognise the propriety of arguing the inadequacy of prosecution, such as police tactics, so long as there is no misguiding. Misguiding is a tactic of aggressive defence. It is not helpful to the trier of fact in making informed decisions on the merits.[324]

> The fact that there are unsound procedures that disadvantage defendants is a matter for concern. The reason for concern, however, is not that the situation violates some abstract notion of procedural equality, but that it creates a risk of substantively unjust conviction ... where abuse is manifest, justifying aggressive defense as a counterweight to specific bad rules and practice is quite different from justifying it as a response to some general potential for state abuse. The potential for state abuse is eternal, but the bad rules and practices could, and some day might, be specifically reformed.[325]

Further, in attacking aggressive defence, Simon opines that it promotes the individual dignity of neither the accused nor the defence lawyer:

> ... urging a lawyer to use less than all his technical abilities for some clients would subvert professional pride in the same way that authorizing a blacksmith to turn out an occasional shoddy horseshoe would do. But this assumes that the lawyer considers her ultimate product acquittal, rather than justice. In fact, there is reason to believe that some defenders are demoralized when they are forced to use their advocacy skills in ways that subvert substantively just resolutions.[326]

Simon questions the impact that contextual ethics would have on communications within the lawyer-client relationship. He questions whether the rejection of aggressive defence will limit what clients will tell counsel to the point of impacting on counsel's ability to effective representation. The concern is the client's withholding information for fear that the lawyer will give up a strategic edge. Even though Simon concedes that this tendency may creep to the point where information is not disclosed, which may constitute a defence, thus impacting on the substantively just result strived for in the contextual approach; he nevertheless justifies the contextual approach.[327] Finally, Simon justifies the contextual approach in criminal defence because the only distinguishing factor that sets a criminal defence apart from civil litigation is the possibility of excessive sentences.[328] Simon concludes that contextual ethics should be applied to criminal defence practice.

Chapter 3: The Statutory and Regulatory Position of Legal Ethics in Manitoba, An Historical and Comparative View

1. The Primary Sources of Legal Ethics

The Canadian federation is composed of two levels of government, federal and provincial. The Constitution Act, 1867, confers jurisdiction to both levels of government over different legislative spheres.[329] In accordance with these provisions, while the federal government has jurisdiction over criminal law and procedure, provincial governments alone have jurisdiction in the areas of the administration of justice, the imposition of penalty for breach of provincial law, property and civil rights and all matters of a local nature. Pursuant to these constitutional jurisdictions, the provinces have enacted legislation creating and empowering the various Canadian law societies.

As the governing bodies of lawyers, the provincial law societies have been delegated regulatory function. In legal ethics the most important regulations of the respective societies are the codes of professional conduct. Because of a lack of federal jurisdiction in the area of legal ethics, we are left to contend with various provincial regimes highlighting different themes and directions. The only unifying presence in the area is the Canadian Bar Association [hereinafter CBA]. The CBA has passed codes of professional conduct in 1920,[330] 1974,[331] and most recently in 1987.[332] These codes do not have the force of law until they are formally adopted by a provincial law society. Manitoba has always adopted the Canadian Bar Association Codes of Professional Conduct. Not all jurisdictions do, and increasingly changes or different emphases are being added, detracting from the national unity on professional ethics.

2. The Historical Development of the Manitoba Law Society Act

When Manitoba entered federation in 1870, the laws of England as of July 15, 1870 were received. This included the laws governing both barristers and solicitors. The English Law Society was formed by Royal Charter in 1825 to govern only solicitors. The early period of its history saw struggles for identity and membership. Its first projects were the erection of a building and the creation of a library. The Law Society was, in this period, little more than a club to differentiate its members in terms of their class and social standing.[333] This changed with its first recognition by statute in 1843[334] and the Royal Charter of 1845. This second charter, which remains the foundational document of the English Law Society today, transformed it from a club to "...an independent, private, proactive body...."[335] The 1845 Charter empowered the Society in disciplinary matters over solicitors and attorneys, while the four Inns of Court were still responsible for the admission and conduct of barristers.

The first statute passed by the Manitoba legislature in the area of professional responsibility concerned the admission of individuals to the bar, and to the practice of attorneys.[336] The Law Society of Manitoba, which made the legal profession a self-governing monopoly, was not created until 1877.[337] Between 1870 and 1877, the Court of Queen's Bench of Manitoba was responsible for the admission and discipline of barristers and attorneys. In the enabling legislation of the Law Society of Manitoba, the justices were given continued involvement by way of their appointment to the common law office of visitors of the society.[338] This involvement continued, despite an early problematic ruling, until the provision's ultimate repeal in 1972.[339]

The Law Society Act empowered the Society to administer admission to the profession. In law, all practitioners had to be members of the society. In this era, admission was the issue of prime import.[340] Admission was the means to the goal of ensuring the survival of the newly created, or at least newly statutorily recognised, monopoly. The accomplishment of this was twofold. First, the members received a relatively inexpensive labour pool, and second, it created a fixed period of time where the addition of people to the practice could be, at least in part, controlled. The act left the discipline of barristers and attorneys to the court[341], allowing the Society the power to disbar only for the non-payment of fees.[342] The act, however, did empower the Society's Benchers to enact by-laws on the limited topics of the governance of the society, admission, call fees, annual fees, and the non-payment of fees.[343] The act did not specifically envision the Society passing by-laws impacting on lawyer conduct. Instead, this occurred under the umbrella power to govern the society. The act contained mere seeds of modern regulation of professional conduct. Barristers and attorneys, to be admitted to the Society, had to prove "...sufficient good character...."[344] Further, attorneys alone, were required by the act to swear or affirm an oath as a prerequisite to admission.[345] This early legislation, like all of its successors, neither mandated nor defined the protection of the public interest by the Society. Instead, it created a monopoly, jealously guarded by the upper class of its membership. At this point, the pecuniary interest of the profession seemed to outweigh the protection of the public interest in the administration of justice.

In 1891, the legislature repealed the 1877 statute, as amended, and enacted a new version of the enabling legislation of the Law Society of Manitoba.[346] The act kept many of the same provisions. The focus of the new legislation was expanded from admission to include bencher elections, officer positions and terms of office. The Law Society was continued with a generic reference to its "objects and designs" with no corresponding enumeration or definition.[347]

The legislation continued the theme of the protection of the profession's pecuniary interest with a corresponding lack of public orientation. For the first time, the number of individuals working toward admission as attorneys was arbitrarily limited.[348] Another example of the degree to which the legislation went to protect the monopoly of the profession was that attorneys who assisted in unauthorised practice, i.e., practice by non-members were subject, on conviction, to up to one year in gaol.[349] While there is, an albeit undefined, public interest in prohibiting those not qualified to practise, this provision goes beyond that to the draconian punishment of those who would challenge the profession's monopoly. Other pecuniary interests of the profession advanced in the new legislation were that barristers and attorneys were specifically allowed to sue for fees, subject to Queen's Bench taxation, and barristers were allowed to enter into contractual retainers, including contingency agreements.[350]

Between 1891 and 1956, there were many varied amendments, a number of consolidations, but no new acts per sé. In 1911, there was an amendment that attempted to balance the rights of clients with the pecuniary interests of members by empowering the taxation officer of the Court of King's Bench to either set aside an unfair retainer agreement or, in the alternative, to order a lesser fee.[351] In 1912, the legislature by amendment overruled a previous Society policy by specifically allowing women to become members.[352] Other amendments in this era saw the creation of King's Counsel, as well as the setting of the order of precedence by which members would be heard in the courts. The 1913 consolidation of the act saw the Court of King's Bench with disciplinary powers that were soon to be shifted to the Society's benchers.

In 1915 an amendment purported to give the benchers disbarment powers for "misconduct" or "conduct unbecoming" (a barrister, solicitor or student-at-law).[353] A committee of benchers was to inquire into the conduct or misconduct of a member. They, on conviction, could disbar, strike, or expel, as the case may be, or suspend from practice. The member could apply to the King's Bench for restoration to practice.[354] Oddly, the final section of the amendment indicated that these new provisions did not interfere with the King's Bench disciplinary powers. The power to restore was not transferred to the benchers until 1926.[355] These disciplinary inquiries could proceed only after notice to the member setting out the charges, subject matter, and time and place of hearing.[356] A right of appeal to the Manitoba Court of Appeal was granted to members who were disbarred, struck, suspended or whose application for reinstatement was denied.[357]

In 1943, the public interest was protected by an amendment expanding the rule and regulation making powers of the Society.[358] The benchers were empowered to enact rules for the creation and maintenance of trust accounts, related record keeping, inquiry and investigation to ensure compliance and sanction for non-compliance.[359] The public interest was then furthered by the Law Society becoming empowered to, in its discretion, create and maintain a reimbursement fund to repay clients whose lawyers had absconded with monies received in their professional capacities.[360] This fund continues in existence.

These historical acts created a state sanctioned non-accountable, self-governing elite profession with no corresponding specifically enumerated public duties. Despite the lack of guiding principles, amendments were passed to begin to define the public interest in the working of the profession.

3. **The Current Manitoba Law Society Act**

The current legislation was first enacted in 1956.[361] While there was no specific recognition of the public interest to be protected by the Society, the act attempted to balance the pecuniary interests of the profession with the protection of the public. The Society, for example, was empowered to promote "legal education, or research... in the interests of the legal profession or the public...."[362] Of particular significance to the protection of the public was the polishing of provisions requiring barristers and solicitors to create and maintain trust accounts for client monies, and by later amendment, other valuable property.[363] To ensure compliance with these new provisions, lawyers had to keep detailed accountings of monies received and disbursed on behalf of clients.[364] Later, lawyers had to provide the society with a certificate in statutorily prescribed form indicating their fiscal year end, auditor, and institution holding their trust accounts.[365] This act continued bencher power to make inquiry or investigation, determine compliance and sanction.[366] Non-compliance was characterised in the legislation as conduct unbecoming a barrister or solicitor.[367] The act marked an important improvement in other Law Society powers as well.

The legislation transferred disciplinary powers from the court to the Society.[368] The Society was to prescribe consequences for non-compliance with Society rules, regulations and by-laws, as well as order costs.[369] In 1964, the benchers gained the power to fine or reprimand members for non-compliance with any rule, regulation or by-law.[370] Appeals, continued in the 1956 enactment to present, from bencher disciplinary decisions involving disbarment, striking from the rolls, suspension or the refusal of a reinstatement application, lay to the Manitoba Court of Appeal.[371] Among other miscellaneous changes were that the barristers were statutorily required to swear or affirm the oath, on call to the bar, that solicitors have sworn since the original 1877 legislation.[372]

The current act was consolidated in the 1970 and 1987 Statutes of Manitoba. There have, however, been important amendments throughout this period. In 1974, the benchers, the governing body of the Society, were recomposed. Additional benchers mandated were four lay members, a student from the bar admission course, a student from the faculty of law, two full time faculty members,[373] later the Dean of Robson Hall was also included as an ex officio bencher.[374] These amendments were intended to enhance the representativeness and accountability of the benchers. Another improvement in the Society's ability to protect the public was the empowerment of sanctioning members for incompetence. Disbarment, striking from the rolls of solicitors, expulsion as a student, the mandating of further study, suspension or practicing under conditions, were all possible orders that the benchers could effect after a finding of member incompetence.[375]

Amendments since the 1987 consolidation have continued to balance the pecuniary interests of the profession with the protection of the public interest in the administration of justice. The oath of barristers and solicitors was amended in 1987 and again in 1991 to modernise the language.[376] In 1990, the jealously guarded monopoly was invaded, at least to a minor extent. Agents who were not members of the Society were permitted to represent and provide legal advice to individuals for remuneration. The scope of this representation was limited to highway traffic proceedings on summary conviction, where there was no bodily injury, and the prosecution was not seeking a custodial disposition. The requirements of agents were that they had never been disbarred, or convicted of an indictable offence for which they had not been pardoned.[377] This serves the public interest in providing for less expensive counsel for relatively minor matters. The public was also protected from lawyer malfeasance by a 1994 amendment that allows the Society to suspend a member pending the investigation of a complaint.[378] The same amendment mandated the disclosure of illegal activities discovered to law enforcement.[379] In 1994, lawyers' rights were updated to correspond to the Society's disciplinary remedies. Rights of appeal, to the Manitoba Court of Appeal, were created for rulings ordering interim suspensions (where the Queen's Bench justice denied the initial appeal) as well as for the imposition of fines, reprimands, conditions restricting areas of practice, or the issuance of a conditional practicing certificate.[380] Most recently, lawyers gained the right to practise in professional corporations.[381]

At the time of the celebrations marking the centennial of the Law Society, the then Chief Justice of Manitoba wrote that the "... self-government of the legal profession is justifiable only to the degree that it serves the public interest."[382] The Law Society has never had the benefit of the legislature defining this elusive idea of the public interest in the administration of justice. A setting out of the public interest may well have an explicit impact on legal ethics and the ways in which lawyers resolve legal-ethical dilemmas. It may bridge the gulf between legal role-based ethics and precepts of common morality. It may well be that the public interest may prefer systemic values such as truth over individual values such as zeal within the bounds of law. At the very least, such an exposition of objectives would hold the Society accountable to pursue a specific agenda. The legislation has also never directly impacted on lawyers' ethics. It does not mandate one's view of the adversarial system, the lawyer-client relationship or the context of criminal defence. In short, there is nothing in the legislation that would preclude a Manitoba lawyer from reasoning from a common morality perspective when resolving a legal-ethical dilemma. Despite the lack of direction from the legislature, the ethics born of the lawyers (to use Shaffer's characterisation), who justified their representation of the robber barons of the industrial revolution, has been continued to this day by a profession that remains in the upper echelon of socio-economic status.

The legislature has created the environment in which the pecuniary interest of the profession has thrived. It may be time for the legislature to mandate that lawyers' ethics be defined to serve the public, rather than leaving this too often to individual cases before the courts. This will be examined after a description and an historical and comparative analysis of Manitoba's Code of Professional Conduct, which speak directly to the resolution of legal-ethical dilemmas. They, therefore, must be reviewed both in terms of whether they support a common-morality or a role-based theory, and their specific constructs of the adversarial system, the lawyer-client relationship and the context of criminal defence.

4. The Historical Development of the Canadian Bar Association and Manitoba Codes of Professional Conduct

The Canadian Bar Association in 1920 at its fifth annual meeting adopted a set of principles to guide practitioners.[383] These principles, based on the 1908 American Bar Association Canons of Professional Ethics,[384] were intended as "... a correct, though not exhaustive, statement of some of the ethical principles which should be observed by the members of the legal profession."[385] The Canons, adopted by the Law Society of Manitoba, are organised under five headings. These headings indicate the various stations to which a lawyer owes a duty: to the state, the court, the client, fellow lawyers, and one's self. Thus began the sort of schizophrenia that has plagued legal-ethical reasoning in Manitoba.

The Canons contained potentially conflicting duties with no guidance for how to resolve such conflicts. The Canons added to this difficulty, not only by making the concession that it was not an exhaustive enumeration of lawyers' duties, but also by indicating that duties not mentioned may be as important as those specifically included.[386] The justification for this organisational scheme was an indication that one could not frame a set of rules that specified and weighed all of a lawyer's duties in every specific situation that may arise in "professional life".[387] The CBA was attempting to set out a list of duties indicating the way a lawyer should conduct himself while avoiding the possibility that the regime governing lawyer conduct could evolve into a sort of "lawyers' law" that would become as exhaustive, and potentially technical, e.g., as the criminal law. Despite its conflicting duties, or perhaps because of them, the Canons represented the closest that the profession in Manitoba has come to an embrace of a common morality perspective in legal-ethical reasoning.

The introduction describes the office of lawyer as a set of roles that nevertheless may defy a role-based theory of conduct. The lawyer is "more than a mere citizen", a "minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honourable and learned profession."[388] The description enumerates the various interests to be advanced by the lawyer working in the aforementioned capacities. These interests also defy a role-based theory. They include the universal interests of the state in the administration of justice, of the cause of justice generally, and of the dignity of the courts. Also included are the specific interests of faithfulness to the client, and the lawyer's interest in maintaining his own conscience and sense of self.[389] The recognition of lawyer conscience can only be seen as an explicit acceptance of personal morality, and thereby one's religious belief as potential sources for legal-ethical reasoning. If this is the nearest that the profession in Manitoba has come to embracing the common morality method of legal-ethical reasoning, it will be instructive to review the Canons in terms of their construction of the adversarial system of justice, the lawyer-client relationship, and the context of the criminal defence counsel.

Duties to the state, to the court and to fellow lawyers represent the view of the adversarial system expressed by the 1920 Canons. Instead of zeal and moral non-accountability, the Canons envisioned the adversarial system being composed of restrained zeal and the personal consciences of lawyers. Zeal was defined as the exertion of counsel's "best efforts on behalf of the person,"[390] and the constraints of zeal were described in these ways:

> No client has a right to demand that his counsel shall be illiberal or that he shall do anything repugnant to his own sense of honour and propriety. [emphasis added][391]
>
> He should endeavour by all fair and honourable means to obtain for his client the benefit of any remedy and defence which is authorized by law. [emphasis added][392]
>
> He should also bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman. [emphasis added][393]

The adversarial system in this age projects the ethics called for by Luban and Shaffer. The universal values of the adversarial system herein reflect its purpose rather than its function. The system serves its purpose within society, by maintaining harmony among those who gather and choose to live in community. It does not merely extrapolate its functions of truth seeking and rights protection into its universal values. This is how the adversarial system prizes the values of the community and keeps those values as its own, without deifying the functional values that lead inevitably to the acceptance of role-based theory.

The model of the lawyer-client relationship in the Canons, to use Shaffer's classification, is that of the "lawyer as guru". Lawyer personal conscience is given a place in legal ethics, so much so that the morality of the client may well become subordinate.

The Canons that relate directly to the practice of criminal law are two: the public prosecutor is said to have a duty to justice rather than conviction, and the defender has a right to represent an accused irrespective of the lawyer's opinion as to factual guilt. It cannot be said that this is an invitation to the acceptance of the doctrine of moral non-accountability in criminal defence practice. The Canons go on to say of the criminal defence counsel:

> ... he is bound by all fair and honourable means to present every defence that the law of the land permits to the end that no person may be deprived of life or liberty but by due process of law.[394]

These duties specific to the context of criminal defence do nothing to derogate from the idea that criminal defence counsel are held to the same standard of ethical practice as any other practitioner. These Canons remained the prevailing code for lawyer conduct in Manitoba until its benchers resolved to adopt the 1974 CBA Code of Professional Conduct in January 1976.[395]

The 1974 code represents a marked departure from the Canons in two significant respects. First, it is far more complex, lengthy and technical than the Canons. Second, it moves further from the common morality method of legal-ethical reasoning. The 1974 Code is composed of 17 chapters, each with accompanying commentaries and notes. It also contains a preface and an interpretation section. The code does not disallow a lawyer from resolving a legal-ethical dilemma from a common morality perspective; however, it is neither mandated, encouraged, nor scarcely mentioned.

The preface and chapter one, the general rule of integrity (defined in the notes as soundness of moral principle; in relation to truth, fair dealing, uprightness, honesty, sincerity and candour) are the last vestiges of the common morality method in legal-ethical reasoning. Integrity, competence, loyalty to client, and the protection of the public interest emerge as important themes in the code. The preface illustrates this:

> In order adequately to meet this need for legal services, lawyers and the quality of the service they provide must command the confidence and respect of the public, and that can only be achieved by their establishing and maintaining a reputation for integrity and for high standards of legal skill and care. The lawyers of many

> countries in the world, despite the differences in legal systems, practices, procedures and customs, have imposed upon themselves substantially the same basic standards, and these standards place the main emphasis upon integrity.[396]

The remnants of the common morality method of legal-ethical reasoning remain in the aspirational nature of certain standards. The code, after all, only "aspires" to mandate anything beyond the bare minimum standards of lawyer conduct.[397] The code does, however, explicitly recognise the variety of differing roles, with corresponding duties that a lawyer must balance.[398] The emergence of a role-based theory of legal ethics can be seen in the areas of the construction of the adversarial system, the lawyer-client relationship and the position of criminal defence counsel.

In the 1974 code the adversarial system is composed of resolve rather than zeal. The resolute representation of the client is to be accomplished "honourably and within the limits of the law.[399] This word, honourably, is the only reference in the "Lawyer as Advocate" chapter that could, in any way, be interpreted as allowing a role for lawyer conscience in ethical decision-making. The word also appears in the commentary for the chapter. In its use therein the lawyer is prohibited from knowingly assisting or permitting the client to act in a manner that the lawyer considers dishonourable.[400]

The model of the lawyer-client relationship established by the 1974 Code also represents a retreat from the Canons prizing of lawyer conscience. In the chapter on advising clients, the CBA comments that only the legal advice of the lawyer should be relied on by the client. The comment requires that, where advice falls into another category of endeavour, the lawyer is bound to caution the client that he is not expert in that area. The CBA uses the specific example of a lawyer giving a client entrepreneurial advice. The commentary however can be clearly read to require the lawyer to give such a qualification when speaking on a matter of conscience or concern for third parties. The lawyer-client relationship is also the subject of very specific commentaries that seem to be comfortable in weighing one legal value over another. In this way, the code could be seen as involved in value judgments while at the same time restricting the values under consideration to the purely legal. Other detailed rules impacting on the lawyer-client relationship are withdrawal and confidentiality. The withdrawal rules require the lawyer to withdraw only for good cause with notice proper to the circumstances. The commentary takes an approach similar to Freedman in disallowing withdrawal to prejudice the client.[401] In terms of confidentiality, there is no mandatory disclosure rule to deal with situations of potential violence. Instead, the commentary merely indicates that the lawyer would be justified in breaching confidence to prevent a crime.[402] These rules and commentaries show the emergence of the agency analysis of Freedman coupled with the over-riding role value of loyalty to client irrespective of conflicting legal and extra-legal values. The context of the practice of criminal defence is also subjected to these more complex and technical rules, coupled with an emphasis on loyalty to the client.

The criminal defence counsel is to protect the accused from conviction "as far as possible except from a tribunal of competent jurisdiction and on sufficient evidence."[403] The limits of this are specific knowledge, on the part of the lawyer, that a tactic or argument is false or fraudulent. In sum, the prosecutor serves justice while defence counsel cannot willfully mislead the court. This is clearly holding criminal defenders to a lower ethical standard than other lawyers, irrespective of admonitions such as the general duty of integrity and the obeying of the rules in their spirit as well as their letter.[404]

While the Canons saw the sources of legal-ethical reasoning inclusive of lawyer conscience, the 1974 code saw the emergence of client centred values, devotion to which typifies the standard conception of the lawyer's role in the role-based theories of ethical reasoning. Coupled with this shift was a move toward a far more complex, yet far less aspirational, set of minimum standards of lawyer conduct.

5. The Current Canadian Bar Association and Manitoba Codes of Conduct

The current Manitoba Code is based on the 1987 CBA code. It was adopted and came into force in Manitoba on 1 February 1992.[405] There were deviations made by the benchers in the adoption of the CBA model. The benchers included rules dealing specifically with conflicts of interest, as between law firms where a lawyer moves from one firm to another and thereby from one side of litigation to the other, the prohibition of harassment and of lawyers acting as mediators.[406] The changes from the 1974 Code to the 1987 Code and, in turn to the current Manitoba code, were minor in terms of their impact on the key areas of the definition of the adversarial system and the position of the criminal defence counsel.

In terms of the lawyer-client relationship, there was a significant change to the rule of confidentiality. The rule in the 1987 code, as adopted by the benchers of the Manitoba Law Society, contained an erosion of the scope of confidentiality. There was a recognition that there could arise situations of mandatory disclosure. These situations were when ordered by a court or to prevent a crime of violence.[407] Likewise, it is mandatory to advise those responsible for security if a lawyer has reasonable grounds to believe that a dangerous situation may arise.[408] When the lawyer is in these situations of mandatory disclosure the lawyer must be careful to divulge only the information that is required.[409] This is something of an erosion of the client-centred values of the 1974 code.

In terms of the common morality method of legal-ethical reasoning, the preface of both codes of conduct feature the admonition that lawyers are to deal with the court, client, other lawyers and the public in the "utmost good faith". Both codes also have this sentiment reaffirmed in their rule respecting integrity. This rule is the same as it was in the 1974 version of the CBA code. The rule states that the lawyer is to "discharge with integrity, all duties owed to clients, the court, other members of the profession and the public."[410] These admonitions establish the possibility of legal duties to one of the enumerated parties conflicting with another. Neither the commentaries related to this rule, nor any other rule, discuss or establish a method for the resolution of such conflicts.

6. Provincial Codal Perspectives

It is not my intention in this section to engage in detailed exegeses of the current codes regulating professional conduct in each of the provincial jurisdictions. Instead, I mean only to highlight those containing differences in orientation, direction or substance that can be considered in the context of reforming the Manitoba regime.

Alberta, in 1995, proclaimed a Code of Conduct[411] that sought to eliminate conflict between legal-ethical duties or values:

> The rules are sufficiently specific that a conflict among ethical rules should not arise. A lawyer may perceive an apparent conflict when considering ethical obligations in general terms or as absolutes. However, examining the applicable

> provisions of the Code and analyzing how various duties and obligations interact should resolve any apparent conflict.[412]

Distinct from the 1987 CBA code, the Alberta Code seeks this lofty goal through a unique format. Instead of nebulous rules and aspirational commentaries, the Alberta code begins its chapters with a general statement of principle. The principle is then illustrated by mandatory rules. Each rule has its own related commentary. Rather than mandating a minimum standard of lawyer conduct, the Alberta code sets out to resolve legal-ethical dilemmas for its members, thereby setting a high level of professional conduct. In essence, the Law Society of Alberta becomes the legal-ethical decision-maker, rather than the individual member as under the Manitoba and or CBA regimes.

The Alberta Code envisions communal morality as a foundational source of legal ethics.[413] Instead of justifying or excusing lawyer conduct, role-theory is used to place additional responsibilities on Alberta lawyers. The statement of principle from chapter 6 reads as follows:

> A lawyer shares the responsibilities of all persons to society and, in addition, has certain special duties as an officer of the court and by virtue of the privileges accorded the legal profession.[414]

The overall scheme of the Alberta Code features a favouring of systemic values such as truth and the fair resolution of issues on the merits, over client-centred values such as loyalty, zeal and confidentiality. In this way, despite its explicit acceptance of the importance of non-legal values, the code resembles the contextual ethics of Professor Simon.

An illustrative example of both this line drawing and the preference of systemic duties to truth can be seen in the interaction of the requirements of honesty toward another lawyer (Chapter 4), and confidentiality (Chapter 7). The first rule in Chapter 4 is that a lawyer must not lie or mislead another lawyer.[415] The second rule of Chapter 4 contemplates circumstances where inadvertent or intentional misleading by the lawyer is discovered or a change has occurred that makes a material representation no longer accurate.[416] The rule of confidentiality begins with the fundamental protection of all information, whether or not a matter of public record, transmitted to the lawyer in the course of the professional relationship. The rule lists a number of justifications for a breach of privilege, among which is consent of the client.[417] The interaction of these rules revolves around this consent. The Alberta lawyer in any of the aforementioned circumstances is to seek the client's consent to correct the misleading information. Where consent is given, no more information is to be provided to the other side than is required to correct the misleading information. If such consent is withheld the lawyer is in a position of mandatory withdrawal, irrespective of any prejudice that may arise.[418]

This example from the Alberta Code represents a favouring of systemic values over truth that drastically amends the client-centred, standard conception of partisan zeal and loyalty. The limits of zeal and loyalty, rather than being the limits of the law, have become the limits of the law, and the ethics of the profession.[419]

British Columbia proclaimed its code of professional responsibility in 1993.[420] Unique is its incorporation, as the first chapter, of a modernised, gender-neutral version of the 1920 Canons of the Canadian Bar Association.[421] The B.C. Handbook is not an adaptation of the 1987 CBA Code. While its overall composition is similar, its structure is different. The B.C. Handbook contains several rules relating to the theme of each chapter. It attempts a comprehensive statement of legal ethics like that established by the Alberta Code, but lacks the weighing and line drawing features of the latter.

The Law Society of Upper Canada has recently enacted new Rules of Professional Conduct[422] to replace their previous code[423] which, in turn, was based on the 1987 CBA Code. Ontario's Rules are similar in structure to British Columbia in that they have many specific rules related to the central theme of each chapter. Ontario's Rules also lack the weighing and line drawing features of the Alberta Code. Unlike the British Columbia Handbook, though, the new Ontario Rules have commentaries intended to be explanatory. In substance, the Ontario rules are similar to both the British Columbia and CBA models. Ontario and British Columbia, for example, both feature discretion to breach confidence to avoid substantial harm to or the death of another. Other provincial jurisdictions follow the CBA model to set this situation out as an instance of mandatory disclosure.

The Northwest Territory adopted the 1987 CBA Code.[424] Unlike other provincial jurisdictions, however, the territory has taken the additional step of adding policy directives as a supplement. These policies prevail where they conflict with the CBA Code. The particular policies enacted by the Territory do not impact on our themes of the adversarial system, the lawyer-client relationship, or the context of criminal defence.

While provincial legislators have delegated authority over legal ethics to the various law societies, they are not the only sources of legal ethics. The superior courts have asserted jurisdiction to review decisions and procedures of the law societies, in addition to the hearing of statutory appeals therefrom.

Judges have not constructed issues involving the morality or philosophy of lawyers' ethics; instead they focus on jurisdictional questions. The main line of authority demonstrates the courts' willingness to usurp the statutorily delegated authority of the

Law Society of Manitoba. In reducing ethical dilemmas to jurisdictional questions, the courts do not attempt to locate the lawyer's conscience. The courts have provided no guidance as to the preferred method, common or role, of legal-ethical reasoning.

Chapter 4: The Role of Courts: Authoritative Interpretation and Judicial Review

The centre of any legal-ethical dilemma is in conflicting values. Within the law, these may be legal or moral. This, of course, begs the question of who is best situated and equipped to resolve these conflicts. The legislature of Manitoba has created and empowered the Law Society of Manitoba to inter alia pass rules governing the practice of law in the province and to adjudicate complaints of breaches of such rules.[425] In essence, the legislature has delegated its judgment to that of a specialised board, the Law Society of Manitoba, to both legislate and act as an administrative tribunal. The Society's purpose is twofold. First, such tribunals are created because they possess a vast repository of knowledge and experience; secondly, these bodies are created to handle what is expected to be a significant volume of cases.[426]

The Law Society has exercised its powers in passing its Rules of the Law Society of Manitoba as well as its Manitoba Code of Professional Conduct.[427] However, the Law Society and the provincial legislature are not the only institutions that authoritatively speak to the matter of legal ethics. The legislation enabling the Law Society of Manitoba provides that members who have their rights affected by as little as a reprimand from the Law Society have a statutory right of appeal to the Manitoba Court of Appeal.[428] Further, the Society itself can appeal the order of one of its own committees on a question of law.[429] Thus, the superior courts of the province are involved in the creation of legal ethics. This intervention is characteristic of all Canadian superior courts who also assert an inherent jurisdiction to review administrative tribunals.

Administrative tribunals generally expect courts to review their decisions, whether or not their enabling legislation provides for it, for a number of reasons. A breach of the common law duty of fairness is one reason that courts cite for reviewing decisions of administrative tribunals. The major elements of that duty are the right to be heard, a lack of even a reasonable apprehension of bias, the right to counsel, the right of disclosure of the case to be met, and the duty to provide reasons for a decision. Further to reviewing for a breach of the duty of fairness, courts will also review decisions where there is an allegation of a finding of fact based on no evidence, where there is a question of law, where there is a question relating to the exercise of discretion by the tribunal, and where there is a question of whether the tribunal in making its decision has exceeded its statutory jurisdiction.[430]

The courts have become involved in a process that the legislature has specifically delegated to the Law Society of Manitoba. The reasons militating against court involvement in the creation and policing of legal ethics can be characterised as systemic or institutional. First, court review of Law Society proceedings may be significantly delayed to the prejudice of a party complaining of a lawyer's malfeasance, thereby potentially bringing the administration of justice into disrepute. Second, a corollary of the delay argument is that judicial time is scarce and valuable. Third, it may be argued that generalist common law judges are not as specialised as the relevant decision-making body of the Law Society. Finally, the ultimate responsibility for proper functioning of the Law Society continues to reside with the provincial government. The province, despite its authority to delegate powers to the Law Society, remains responsible for the proper administration of justice and the protection of the public interest within our system of justice. The provincial government, namely the cabinet within the legislature, is accountable to the people of Manitoba in a way that the federally appointed justices of the Court of Queen's Bench are not.

Superior courts of the province have another important role to play in the creation and policing of legal ethics: jurisdiction to grant relief to a litigant who claims a violation of right under the Canadian Charter of Rights and Freedoms.[431] Further, the courts are expert in statutory interpretation, in ways that the cumulative knowledge and experience of the Society's benchers are not. The justices are more experienced in dealing with individual rights than the benchers may be, and the justices are independent of the political process, interest groups and public opinion. In sum, the courts are involved in the creation and policing of legal ethics, and therefore it is important to canvass their contributions. Attention must be paid to whether the case that is before the courts is there by way of the right of appeal, as provided in the enabling legislation, or whether it is due to the court's self-proclaimed inherent jurisdiction to review decisions of administrative tribunals.

This chapter is meant to examine the role of superior courts in the formation of legal ethics. That the courts have a voice in the creation of legal ethics speaks to the questions of who does and who should be resolving the value conflicts inherent in legal-ethical dilemmas. The position of the superior courts, in the Manitoba jurisprudence, does not indicate the substantive merits of such resolutions. Instead, the courts have asserted an inherent jurisdiction to review and, in effect, supervise the statutorily delegated powers of the Law Society of Manitoba. The courts have ultimately assumed a position of curial deference toward the Society: however, they have not merely become a rubber stamp of Society decisions.

In 1886, the first case considered in this province under the Law Society Act[432] was Re Miller,[433] involving a retired justice, later called to the bar, disputing the Law Society's ability to charge him a fee. The Society was brought before the Court of Queen's Bench after their decision to disbar the retired judge for the nonpayment of fees. The values in conflict herein were the Law Society's statutory jurisdiction to disbar for nonpayment against the alleged right of retired justices to admission to the bar without a fee. The disbarment power had been delegated by the legislature to the courts at this time, save for the limited power delegated to the Society empowering disbarment of members for nonpayment of fees. In the end, the court prevented the Society from exercising its statutory jurisdiction because it disagreed with the Society decision. The case was heard before a panel of three justices, including Chief Justice Wallbridge who wrote the majority judgment with Dubuc J. concurring.

The case centred on a strict interpretation of the Law Society Act[434] as well as a review of the common law concept that justices of the Court of Queen's Bench were "visitors" of the society. The majority held that the Court of Queen's Bench justices were "visitors" of the Law Society, and as such could substitute their judgment for that of the society, claiming for themselves a standard for correctness that transcended mere administrative law analysis. The majority struck down the Law Society decision to disbar Miller for nonpayment of fees. The ratio decidendi of the judgment was that justices of the Court of Queen's Bench have a common law jurisdiction to review those decisions of the Law Society based on a mistake of fact, using a correctness standard.

Wallbridge C.J. wrote that "[t]his society has the right to remove the name of a barrister from the roll, but the facts upon which they assume so to act are fit subjects for inquiry by the visitors."[435] The dissenting judgment by Taylor J. (later to become the Chief Justice of Manitoba) demonstrated the first attempt at curial deference by the Queen's Bench toward a decision of the Law Society of Manitoba.

Taylor J. held that the justices do not have jurisdiction to interfere with a decision of the Law Society, based on the common law relating to the office of "visitor" to a corporation. The enabling legislation of the Society did not enumerate specific powers to be attributed to the Queen's Bench as visitors and further it did not limit Bencher authority to the supervision of the court. In short, Taylor J. viewed the appointment of the justices as visitors of the Society as a courtesy or a sign of respect, but not a delegation of authority by the legislature to the court. He wrote that, for the justices of the Queen's Bench to be justified in interfering with a decision within the purview of the Law Society, the legislature would have had to grant the court "... clear and unambiguous [powers] to be exercised."[436]

This case put the jurisdiction of the court to interfere with Law Society decisions in issue. The majority assumed an inherent jurisdiction while the minority called for an express legislative intent to be present. The majority decision completely lacked any conception of curial deference. It set the dangerous precedent that courts could not only review decisions of the Society but that they could impose their own correctness standard. Further, the court seemingly established its role as a guardian of lawyers' rights as against the Society. This agenda was antagonistic to the legislative intent that created the Law Society specifically to protect the public interest from lawyers when necessary.

The influence of Taylor J. (as he was then) as an advocate of curial deference was to be overshadowed by a subsequent decision which the legislature had to specifically correct by statutory amendment.

From 1877 the court alone had statutory jurisdiction to disbar. This power of the court was ultimately transferred to the Benchers of the Law Society, but not until 1956. This information supplies the legislative context for the important decision of Re J.B.[437] It featured the conflicting values of the Law Society being able to define and control its membership, to further its mission of protecting the public interest in the administration of justice, against the courts' exercise of its statutory disbarment power. The highest court of the province unanimously disallowed the Law Society application to disbar a barrister for stealing client monies from a trust account. Instead, the court struck the individual from the rolls as an attorney but declined to disbar him. The reasoning revolved around a hairsplitting and anomalous distinction that the barrister in question had been acting in his capacity as an attorney, not as a barrister, when the malfeasance occurred. The leading decision was that of Taylor C.J.M.

The decision in this case continued the trend that saw the court as the vanguard of individual (lawyer's) rights. To be sure, the disbarment power was granted to the courts and not to the Law Society, albeit the latter was created by statute to further the public interest in the proper administration of justice. Instead of interpreting the legislation providing the court with jurisdiction to disbar in accordance with this broad legislative intent, the court instead narrowly construed the statute as if it were adjudicating a criminal rather than a regulatory prosecution. In highly technical reasoning, the court ruled as a criminal court would, giving the accused the benefit of every doubt in the interpretation of the legislation. The ability to practice law was then, and remains today, a privilege, not a right. The court was not protecting an individual's right in a criminal prosecution. The court, in failing to appreciate this distinction, failed to ensure that justice was seen to be done. Instead, the court simply found that there was a lack of jurisdiction to strike a barrister for the misdeeds he committed as a solicitor. The court so ruled, irrespective of the fact that it was maintaining the untenable position that an individual unfit to practice as an attorney or solicitor could nevertheless hold the higher, more dignified, more trusted office of barrister, allowing him to still plead before the court that had just disbarred him as a solicitor.

As mentioned earlier, the legislature intervened to correct the ruling of the Manitoba Court of Appeal in Re J.B. This amendment[438] allowing for disbarment for misconduct in either barrister or attorney role was in full force and effect at the time of the decision of Re P.E.H.[439] It involved a barrister (incidentally not called as a solicitor) overcharging a vulnerable client and then misleading the court to attempt to collect that exorbitant fee. The conflicting values herein were the ability of the Law Society to control its membership in furtherance of the public interest in the administration of justice against the court's exercise of its statutory jurisdiction to disbar. The Law Society brought application to the court to have the individual disbarred. The application was before Mathers C.J.

The facts of the case were as follows. An illiterate person received a letter from overseas lawyers detailing that the person had been named as beneficiary in the will of a now deceased relative. The correspondence provided that the beneficiary need only supply an executed discharge to receive entitlement of approximately twenty-five hundred dollars. The illiterate took the letter to the barrister, P.E.H., who demanded one half of the inheritance. P.E.H., preying upon the fragility of the client, manipulated him into believing that there could be extensive litigation involved with the realisation of the monies. The client resisted the demand of the lawyer, but agreed that the lawyer would have as his fee one third of the inheritance. The lawyer executed the requisite discharge and received approximately eight-hundred and twenty dollars. The client ultimately grieved and had the fee agreement taxed, as was his right. The taxing officer set aside the agreement because fifty dollars was then the highest fee that could be demanded for execution of a discharge. During the course of the hearing, P.E.H. withheld the letter from the overseas lawyers and misrepresented its contents to the taxation officer. To protect the public interest and to ensure the integrity of the profession, the Law Society of Manitoba applied to the Court of King's Bench to have P.E.H. disbarred. P.E.H. resisted the application on the ground that the court lacked jurisdiction to do so because the misconduct arose out of work that was typically regarded as being solicitor's work. P.E.H. relied on the decision in Re J.B.

As mentioned, the court had the benefit of a legislative amendment subject to Re J.B. The amended legislation provided the court power to disbar for misconduct in either role. Interestingly, by this time, the Ontario legislature had vested disbarment powers in the Law Society of Upper Canada. The legislation had not developed to that point in Manitoba and would not for another forty-five years. Nevertheless, one might think that a Manitoba court would give careful consideration to the governing body when it requested the removal of one of its own members. The Benchers of the Law Society, despite their lack of empowerment to disbar, were uniquely situated in this case to judge what conduct was professional misconduct and worthy of disbarment. The Law Society obviously made this assessment. The decision is evident in the fact that it brought the required court proceedings to effect disbarment. There was no judicial deference to the recommendation of the Law Society. While the court agreed that it had the jurisdiction to disbar P.E.H. for what amounted to extortion, withholding evidence and lying to the court, it did not exercise its discretion in accordance with the wishes of the Law Society. The court merely suspended the member (restitution had already been made) for a period of nine months. The Law Society was put in the difficult position of being responsible for the public interest in the administration of justice without having the ability to control its own membership. The Court of Queen's Bench order had the effect that the Law Society had to continue to allow a barrister to practice after it had declared its loss of confidence in him.

Some years later, Mathers C.J. gave the force of law to Law Society wishes over membership. In Re B,[440] he had to consider the issue of the public interest in the Society's control of its membership against the court's disciplinary powers. In so doing, he broadly interpreted the Law Society Act[441] to mandate that the Benchers investigate and make a recommendation to the court before a previously disbarred member could be ordered reinstated by the court. Section 86 gave to the Court of King's Bench power to reinstate a barrister to practice upon application and "... upon sufficient cause being shown ...."[442] The Benchers in this case had not taken the required action under the new provisions. The court gave force to their non-participation by interpreting the status to necessitate Law Society involvement before a disbarred member could be reinstated. While some progress in terms of Law Society control over membership was made with this decision, the Society was still left in the unenviable position that a member it felt should be disbarred could remain in practice, yet a member already disbarred could not return without the consent, and indeed active participation, of the Society.

The Law Society, by statute, was given the power to disbar a barrister for non-payment of prescribed fees.[443] That same provision allowed the Benchers to reinstate the member so disbarred for the non-payment of fees. The decision features the competing values of the Society to control its membership against the court's assertion of inherent jurisdiction to review decisions specifically delegated to administrative tribunals by the legislature. In Cutler v. Law Society (Manitoba)[444] a barrister disbarred for non-payment of fees remitted the required fees after his disbarment and demanded the issuance of a practicing certificate. When the Law Society refused, the barrister sued mandamus, to command the Society to accept his tardy fees and issue a practicing certificate, on the ground that the Society lacked statutory jurisdiction to effect the disbarment. The decision of the court, written by Robson J.A., upheld the jurisdiction of the Benchers to disbar for the non-payment of fees. Despite the finding affirming the jurisdiction of the Law Society, the court reviewed the procedure used by the Law Society in any event. After the review, the decision of the Society was upheld. Because of this result, the reasons are silent as to what standard of review was used. The Manitoba courts willingness to review Law Society decisions, where the Society acted in good faith and the decision was properly within their jurisdiction, continued into the more recent past.

In Re Kessiloff and Law Society (Manitoba)[445] the issue was the standard of review of Society control over membership where the court has statutory jurisdiction to review. The case featured a lawyer who had not held a practicing certificate for a number of years, applied for one and was referred to the admissions and education committee. When the applicant appeared, he made pejorative comments about the integrity of certain members of the judiciary. Proceedings before the committee had been transcribed. The committee recommended that the applicant undergo a psychiatric assessment, a comprehensive medical evaluation and complete the bar admission course. The Benchers reviewed the committee recommendation, heard from the applicant, and later accepted the committee recommendations. The lawyer appealed the Benchers' decision.

In the Manitoba Court of Appeal, Matas and Hall JJ.A. constituted the majority, with O'Sullivan J.A., dissenting. The majority reviewed the record of proceedings before the Law Society. Matas J.A. wrote that the Law Society had acted in good faith toward the applicant. He further held that the decision was properly within the jurisdiction of the Society. Despite these findings the justices then reviewed the Law Society proceedings on what amounted to a procedural fairness basis. The court noted that neither the enabling legislation nor the rules set out a specific procedure for dealing with this type of application. With certainty as a concern, the majority then ruled that, in the proper exercise of discretion, the Law Society must be governed by a proper procedure. Citing a lack of certainty in procedure, the court set aside the decision of the Benchers and instructed the lawyer to re-apply for a certificate. The analysis demonstrated the court protecting the individual rights of the lawyer, as it did in Re J.B. The court arrived at these protections by using an analysis that would be more appropriate in a criminal prosecution. The standard of review for procedural fairness then was correctness. In using this standard, the court substituted its judgment for that of the Benchers. In fairness though, it must be noted that the courts acted with deference in instructing that the lawyer must re-apply to the Society, rather than simply ordering his re-admission.

The minority view of O'Sullivan J.A., properly focused on the merits of the case instead of substituting judgment for the Society after holding that they acted in good faith. O'Sullivan wrote that the applicant was not currently suitable to practice before the courts. Further, he wrote that the arguments of the applicant that were ultimately accepted by the majority were mere "technical points".[446] The majority ruling put the Society in a very difficult position. Apparently it was not good enough that the Society dealt in the utmost good faith in fulfilling the role delegated to it by the legislature. The Society instead had to have a set procedure for every conceivable exercise of its discretion. The lack of a clear procedure resulted in the court substituting judgment on a standard of correctness. The courts continued in this vein in dealing with the statutory interpretation and application of the provisions empowering the society to establish the reimbursement fund.

The reimbursement fund case was that of Eckstein (nee MacDonald) that went to the Court of Appeal. This case, in a more concrete manner than the membership control cases, demonstrated the conflict between the Society's responsibility for public interest in the administration of justice and the court's assertion of their inherent jurisdiction to supervise Society decisions where no right of appeal was envisioned. The facts were not in issue. The plaintiff, Eckstein, retained a lawyer in an estate matter. The plaintiff received monies that were held by the lawyer. The plaintiff gave the lawyer instructions to invest the money. The lawyer advised the client that he was the owner of a company and that the company would provide a handsome return on investment. The client acceded to the request and agreed to invest twenty-thousand dollars in the company owned by the lawyer. The lawyer then misappropriated the money and was unable to repay the client. The client applied to the Law Society for reimbursement. The Society refused on the alternate grounds that the applicant did not meet the criteria set out in the legislation[447], and that the legislation did not mandate that the Society pay claimants even where they had met the enumerated criteria.[448] The applicant sued the Law Society and the lawyer civilly. As well, the client sought judicial review of the decision of the Law Society. The judicial review was dismissed pending determination of the civil action.[449] Both the application and the action were heard by Solomon J. The civil action saw the plaintiff seeking the remedy of a declaration that the Law Society was under a legal obligation to pay the claim of the plaintiff out of its reimbursement fund. The Law Society stood by its ruling that the claimant had not met the s. 30(1) criteria, in that the money was not provided to the lawyer in his professional capacity; as well, the Society argued that it did not have a legal obligation to pay any amount to any claimant who met the statutory criteria for the reimbursement fund. Solomon J. wrote the decision for the Court of Queen's Bench.[450]

In it he found that the decision was within the proper jurisdiction of the Law Society. Nevertheless, he applied a correctness standard substituting his decision for that of the Law Society, on the issue of whether the monies were given to the lawyer in his professional capacity. Again one must wonder which institution is better able to make the decision of what activities lawyers perform in their professional capacities: a panel of senior practitioners or a single judge who no longer carries on legal practice. The issue of reviewing the Law Society's statutory interpretations continued as to the issue of whether the Law Society had a legal obligation to pay a claimant meeting the statutory criteria. The Society in their judgment found that they had no such duty. The legislation was clear on a plain reading. The Law Society was empowered to make the fund, but not mandated to do so. Never mind the mandating of the payment of every claim! Nevertheless, Solomon J. held as he did and the Law Society took their arguments to the province's highest court.

In the Manitoba Court of Appeal, there were three separate judgments: the lead judgment written by Hall J.A., while Huband J.A. wrote a separate concurring judgment and Matas J.A. dissented. Hall J.A. began with an issue that Solomon J. determined: whether the courts had jurisdiction to hear the appeal of a claimant whose claim on the reimbursement fund had been refused by the Law Society. Hall J.A. noted that neither the enabling legislation nor the rules of the Law Society allowed for such an appeal. He then turned to the Queen's Bench Rule 536, and held that the action for a declaration was properly brought for a determination of rights derived from statute. Hall J.A. then reviewed the provision of the enabling legislation and found that it was not mandatory that the Society pay out even those claims that satisfied the legislative criteria. In short, the Society is empowered but not mandated to pay such claims. Huband J.A. agreed that the application for declaration was properly brought. He concurred with the reasoning and result of Hall J.A. He also referred to the rules of the Law Society passed in connection with the reimbursement fund that clearly indicated that clients do not have an absolute right to restitution from the fund. In dissent, Matas J.A. held that the money was given to the lawyer in his professional capacity, substituting his judgment for that of the Law Society. He then held that the obligation to pay was mandatory, irrespective of what the rules provided. Because the statute and rules were in conflict the legislation was to be paramount. The central importance of these decisions was that the courts would still review, on a correctness standard, any statutory interpretation of the Society, even where its jurisdiction was not in issue.

In Rosenbaum v. Law Society[451], the conflicting values were the Society's ability to control its procedure in disciplining its members competing with the court's inherent jurisdiction to review the Society decisions respecting questions of law. The Society's ability to discipline its members when necessary is of paramount importance to the Society in protecting the public interest in the administration of justice. The member sought the prohibition of the Law Society decision to allow a finding of a Queen's Bench justice into evidence in disciplinary proceedings. In a civil proceeding, in which the lawyer was a defendant, the court found him to have been untruthful, in that he denied falsifying corporate records to alter the share structure of a particular corporation.

The Law Society brought disciplinary proceedings against the lawyer for professional misconduct, essentially alleging perjury, although the act of prevarication before a court of which one is an officer seems all the more egregious. During the course of these proceedings, the discipline committee indicated that it would admit the finding of the Queen's Bench justice as evidence of the perjurious testimony alleged. Before Scollin J., the Society's counsel candidly conceded that the committee had found only with respect to the admissibility and not with respect to the weight to be attributed to the evidence. Counsel for the Society then asked Scollin J. to proceed as if the Law Society intended to view the civil decision as conclusory of the issue of whether the lawyer had, as an officer of the court, perjured himself.

The lawyer, in the prohibition hearing, argued that the conduct alleged by the Law Society was criminal in nature and, therefore, ultra vires the Society. Scollin J. dismissed the argument, indicating that the conduct could indeed be the substance of both a criminal and a disciplinary prosecution. In other words, Scollin J. upheld the jurisdiction of the Society to discipline a member for what amounts to criminal misconduct. The lawyer argued next that the acceptance of the civil finding by the discipline committee was a breach of natural justice. The court held that no such breach occurred:

> Subject only to observance of its paramount duty to be fair to the lawyer, the Committee is entitled to arrive at its decision on any reliable source of facts of which the lawyer is made aware in advance and can challenge, and it is for the committee to assess the weight or cogency to be accorded to the evidence given in a prior proceeding to which the lawyer was a party and to take proper account of the conclusions of fact arrived at by the judge.[452]

Seemingly, Scollin J. reviewed the decision of the Law Society on a question of procedural fairness. Because the conclusion of the court matched the conclusion reached by the Society, it is difficult to determine the standard of review applied. From the tone of the reasons for judgment and especially the above citation, one may well take the position that the court deferred to the judgment of the Society even if the court had not agreed, but still found the Society decision to be not patently unreasonable. The lawyer appealed to the Manitoba Court of Appeal.[453]

The panel hearing the case was Monnin C.J.M., Hall and Huband JJ.A. The decision, written by the Chief Justice, briefly upheld Scollin J. The only deviation made by the appellate court was that the Law Society was allowed to rely on the finding of the civil trial judge only as prima facie evidence in support of the charge. Considering the obiter dicta of Scollin J., who indicated that the previous holding should not be determinative of the issue before the judicial committee of the Law Society, but could certainly be relied on as evidence in support of the charge, the court of appeal ruling would have little real impact. The insertion of the phrase prima facie would merely suggest that the previous finding was indeed not determinative of the issue, because at most, it became a refutable presumption that the lawyer had the right to challenge, clarify or explain.

In any event, the appellate court reviewed the decision of the Society. It is difficult on the face of the brief reasons to determine whether the review was for a question of procedural fairness or a question of law. It is impossible to determine the standard of review employed because the appeal court happened to agree with the decision of the committee. The increasingly deferential approach of the Manitoba Court of Appeal in this case marked a departure from decisions previously discussed.

Monnin C.J.M. and Huband J.A. (O'Sullivan J.A. dissenting) composed the panel of the appellate court in the decision in Savino v. Law Society (Manitoba).[454] The competing values in this case were the Law Society's ability to effectively control the activities of its members, to further the public interest, and the court exercising its statutory review of the Society decision. In short, the standard of review can be seen as the central issue of this decision. The lawyer was charged with professional misconduct for carrying on advertising relating to his firm's preferred areas of practice, subsequent to a Law Society notice to the profession requiring the cessation of such, pending a committee report. The lawyer, convicted of three counts of professional misconduct before the Law Society, exercised his statutory right of appeal to the Manitoba Court of Appeal.[455] An important aspect of this case was that the lawyer argued that his rights under subsection 11 (d) of the Charter had been violated by the disciplinary committee.

The lawyer argued that since the committee passed the rules prohibiting the advertising of preferred practice areas it was not an impartial tribunal. The lawyer also argued that his Charter right was violated by the legislation that provided that the proceedings could be either open to the members of the society or held in camera, and that only a public hearing would satisfy the Charter requirements. The court of appeal held that subsection 11 (d) had no application to the disciplinary proceedings of the Law Society. This finding was based on the reasoning that subsection 11 (d) only applies to persons charged with an offence. The appeal court held that a Law Society citation alleging professional misconduct did not amount to an offence for purposes of the Charter.

Another reason why the case was important was that it marked a departure from the court being oriented to the protection of the lawyer's rights by benefiting the lawyer with every possible doubt, analogous to a criminal prosecution. The notice to the profession read that there "should" be no advertising of preferred areas of practice. The lawyer argued that this did not amount to a mandatory prohibition, and that it was a mere expression of a wish. The appeal court read the notice in its entirety and arrived at the functional interpretation that in all of the circumstances it was indeed mandatory. The court then held that determination of the issue, of whether the lawyer's advertising in the face of the ban amounted to professional misconduct, was within the jurisdiction of the Society. In a deferential tone, Monnin C.J.M. wrote that "[n]o one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body."[456]

The court next considered whether the lawyer's freedom of expression was violated by the Society notice. The court held that while this fundamental freedom indeed applied to the actions of the Society, any limits on the freedoms enshrined in 2 (b) of the Charter were "demonstrably justified in a free and democratic society" under section 1, in an explicitly deferential statement:

> The *Law Society Act* authorizes the Benchers to do what they have done. It is not the function of the courts to scrutinize the policy of advertising as such. That is the field of the Law Society and courts must not interfere.[457]

The dissenting judgment of O'Sullivan J.A. was not marked with the curial deference that characterised the others. He continued the previous theme of the courts' protection of the individual lawyer's rights in the way that a criminally accused's rights would be protected by the court. O'Sullivan J.A. held that the notice was too vague to suspend the previously enforced rules on advertising. Further, the notice did not provide that non-compliance would amount to professional misconduct. This dissent indicated that the doctrine of curial deference, at this point in the Manitoba jurisprudence, had become precarious at best.

Huband J.A., in the same year, reviewed a decision of the Law Society that a lawyer was acting in a conflict of interest. The Society's ability to enforce its own Code of Conduct were implicated in this case competing with the courts statutory jurisdiction to review such findings. It is difficult to imagine an issue more squarely within the jurisdiction of the Society. Nevertheless, Huband J.A., with Philp J.A. concurring, reviewed this decision using a correctness standard. On this occasion it was the dissenting judgment that forwarded the banner of curial deference. Hall J.A. wrote:

> ... a decision of the Benchers of the Law Society should not lightly be interfered with if it has been reasonably exercised and is fairly founded on evidence.... [T]here is a tendency to exercise the disciplinary or appellate power not in terms of the public interest but rather in terms of the members' interest. In the present case I think the Benchers well recognized their primary concern for the public interest for which they are to be commended.[458]

Curial deference as an issue for the Manitoba Law Society was given paramount precedential value when a Manitoba decision reached the Supreme Court of Canada.[459]

The case involved inter alia the constitutionality of the provision of the Law Society Act that allows the Society to award costs against a lawyer found guilty of professional misconduct[460] and the non-application of s. 11 of the Charter to disciplinary proceedings of the Law Society. Iacobucci J. held that the ability of the Society to order costs against a lawyer convicted by the judicial committee did not impact on the impartiality of the Society. In regard to deference to be shown to the Society, Iacobucci J. approvingly cited the words of Monnin C.J.M. in Savino v. Law Society (Manitoba),[461] as determinative of the jurisdiction of the Society to adjudicate the point in issue. Iacobucci J. went on to hold that the statutorily delegated ability to award costs against a convicted lawyer did not raise a reasonable apprehension of bias. Despite the fact the Supreme Court of Canada approvingly cited the words of the Chief Justice of Manitoba, the amount and quality of curial deference to the Law Society continued to swing like a pendulum.

Monnin C.J.M. as the dissenting justice in Law Society (Manitoba) v. Malburg[462] remained consistent in his deferential posture toward the Law Society. The majority decision, however, did not represent an example of the courts taking a position of deference with respect to a decision of the Law Society. The value conflict again featured the Society's ability to control the actions of its members in the public interest against the court's implicit agenda to be the vanguard of individual lawyer's rights. The facts of this decision were not in issue. The Society was supervising a member who was establishing a sole proprietorship. In so doing, the Law Society required that the member provide certain pieces of information including, but not limited to, the name of the member's accountant and the date of the member's fiscal year end. The Society asked for this information for some months. The member was then sent a fourteen day letter. In response the lawyer telephoned the Society but did not respond in writing and did not provide the information sought. This resulted in the lawyer being cited for professional misconduct. On 25 April 1989, the date set for the hearing of the charge, the lawyer provided his Solicitor's Report for the period of 1 January 1988 to 31 December 1988. In the report the member indicated the name, firm and contact information pertaining to his auditor as well as an indication of 31 December as his fiscal year end. This report was filed in a timely manner pursuant to Law Society Rule 66 which required the report to be filed within four months of the fiscal year end of the previous year. The lawyer then at the hearing argued that he had complied with Rule 66 and was therefore not guilty of professional misconduct. The judicial committee convicted the lawyer on a vote of 4 to 3 for his failure to respond appropriately to a 14 day letter. A reprimand was issued and the lawyer exercised his right of appeal to the Court of Appeal.

In dissent Monnin C.J.M. reflected on the fair hearing and the narrow margin by which the judicial committee convicted the member. He then wrote that the member had acted with "serious disrespect for his professional association."[463] In dismissing the appeal, the Chief Justice of Manitoba approvingly cited one of his own previous rulings:

> I must remind myself that the Association is a self-governing professional body with statutory powers of self-discipline for its members. Members of that profession are uniquely qualified to establish the standards of professional practice and conduct. Its members are better qualified than legally trained judges in determining whether the conduct and/or practice of fellow members are below the requisite standards and what sanctions must be imposed upon their colleagues because of such low or diminished standards.[464]

The majority was not persuaded by any such sentiment.

Helper and Philp JJ.A. began their judgment, written by Helper J.A., with an analysis of the citation issued to the member for professional misconduct. The citation, the majority held, did not specify the lack of written response to the 14 day letter, but only alleged a lack of response. The majority then noted the telephone call from the member to the Society indicating that he had neither appointed an auditor nor chosen a year end. The majority held that Rule 66 did not require the member to make such elections at the time of the 14 day letter. They noted that the Solicitor's Report had indeed been filed in a timely manner pursuant to Rule 66. The focus of the majority decision was obviously on the significance of the impact of the charge on the individual member. The majority there took a strict individual rights approach to their review of the process and findings of the judicial committee. They then substituted their own judgment for that of the majority of the judicial committee. The basis that the majority cited for their substitution of judgment was that the judicial committee had not acted judiciously in reading the word "written" in reference to the word "response" in the citation of professional misconduct. In obiter the majority also focused on the lawyer's compliance with Rule 66 irrespective of his failure to, what I would consider, maintain a good faith dialogue with his governing body in the critical period of his establishment of a new law firm. In its extreme, this obiter of the majority of the Manitoba Court of Appeal would allow a member to ignore a 14 day letter if he felt that he did not otherwise have a legal duty to respond. This is a completely unacceptable position to put the Society vis-à-vis its members and the administration of its statutory duties. In focusing on the impact to the individual lawyer rather than on, for example, the public interest, the Manitoba Court of Appeal had a significant impact on the Law Society to carry out its statutorily delegated functions.

In Bunn v. Law Society (Manitoba)[465] the value conflict was the same as in the preceding decision. The Law Society suspended a member on an interim basis with neither notice nor a hearing. The Society then successfully moved for an order empowering it to seize the member's files. The member sought the remedy of certiorari to set aside the rulings of the Queen's Bench. With respect to the court's review of the interim suspension, Hanssen J. reviewed both the jurisdiction of the Society to make such an order as well as the procedural fairness, based on section 50 (1)(a) of the Law Society Act:

> 50 (1) Notwithstanding anything herein, where the governing body or the discipline committee thereof has directed an inquiry into the conduct of a member, the governing body or the discipline committee thereof may, if it determines it to be in the public interest,
>
> (a) suspend the member from practice and thereupon the member stands suspended from practice until the suspension is lifted, superseded, or annulled by the governing body or the discipline committee thereof; [emphasis added][466]

The Law Society was empowered, and in fact created, to ensure protection of the public interest in the administration of justice. The ability to suspend on an interim basis is specifically delegated to the Benchers or their discipline committee in the legislation. Once suspended, the member receives notice that the Law Society will hear him if he brings an application to resume practice until the charges are disposed of. The Law Society obviously needs the power to suspend a member's practice without notice and to apply without notice for an order empowering the seizure of a member's files, when to do so protects clients from the lawyer's incompetence or malfeasance. Let us not forget that the member here was ultimately disbarred for the appropriation of client trust funds. Notice to the lawyer who has so acted may precipitate his flight with the trust funds. After all, the Society did advise the member he had a right to be heard with the object of having his suspension superseded. It is with these principles in mind that Hanssen J. held that the Law Society indeed had the statutory jurisdiction to act as it did, and further, that it exercised its decision-making role in a procedurally fair manner. The Manitoba Court of Appeal again focused on the individual rights of the member and the seriousness of the Law Society actions.

The unanimous decision on appeal was written by Huband J.A., with Philp and Lyon J.A. concurring. Again, both the interim suspension and the order for the seizure of the member's files were in issue on appeal. Both orders were struck down. The court held that the suspension was harsh on all of the evidence, and further, that the Law Society had to inquire into the conduct of the member prior to issuing the interim suspension. The court noted that the citation charging professional misconduct issued after the suspension and seizure; and they seemingly found this determinative of whether the Society had inquired into the conduct of the member. The reasoning of the court was fundamentally flawed in this decision. The court would tie the hands of the Society by denying them the ability to suspend without notice and seek seizure of client files, and then insist that they act to protect the public and client interests in not having a lawyer practicing who steals from his clients. The court substituted its view for that of the Law Society.

The issue of standard of review had not been specifically set out and addressed in Manitoba until the Court of Appeal decision in Law Society (Manitoba) v. Frolingher[467].

That case held that the standard of review, where there is a question of mixed law and fact, and a statutory right of appeal, is one of reasonableness. In reaching this decision, the court followed a Supreme Court of Canada precedent in Director of Investigation and Research, Competition Act v. Southam Inc. et al.[468] The Court of Appeal held that the Law Society was created to inter alia protect the public and that it was expert in so doing. The court of appeal later set out the standard of review for a question of statutory interpretation as that of correctness.[469] This means that if the courts find that the Law Society has not answered as they would, then they will substitute their judgment. In short, the courts have held that they are more expert and that they are better situated than the Benchers to interpret the legislation creating the Society and giving it its powers and duties.

The end result of the exegesis of the Manitoba jurisprudence involving the courts' review of Law Society decisions is that the courts have a strong voice in the creation of legal ethics in the province, irrespective of whether this has ever been intended by the legislature. The courts and the Law Society seem to have conflicting agendas. For the most part, the Law Society is concerned with the public interest in the justice system while the courts have taken the role as protector of the individual lawyer's rights.

Chapter 5: Conclusions

The legal-ethical dilemma is founded on the conflict between legal values, or between legal and moral values. This hypothesis begs a number of questions. Who, in our present legal situation in Manitoba, resolves these value conflicts? Who ideally is best situated to? How are these value conflicts resolved? How should they be? The initial question however, paraphrasing Shaffer, is: are you a lawyer who actively works to do right or good, or are you a lawyer who merely acts in a manner so as to avoid the attention of the disciplinary committee of the local law society?[470] The answer to this question will beg the further questions of one's orientation toward the adversarial system, the lawyer-client relationship, and the context of criminal defence counsel.

1. The Adversarial System

The view that you have of the adversarial system will significantly impact on how you resolve the value conflicts inherent in legal-ethical dilemmas. Favouring the adversarial ethic will result in the favouring of client-centred values over legal duties to non-clients and moral duties. The exemplar of this is Monroe Freedman.

As we have seen, Freedman envisions the adversarial system as deriving from the Constitution of the United States of America. There the adversarial system derives from enshrined rights to individual liberty, counsel, trial by jury, silence, and due process. This rights protection view of the adversarial system predestines Freedman's resolution of legal-ethical dilemmas in favour of client-centred values. This is not my view.

Freedman does not satisfactorily deal with whether or not the adversarial system provides the moral justification to favour client-centred legal values over all other values. This theme of justification is, for me, fully explored by David Luban.

For Luban, the adversarial system, composed of partisanship and moral non-accountability, is the context and forum for litigation and the resolution of any issue where the client's gain is another's loss. The systemic goals are the seeking of truth and the protection of individual rights. Luban's concern about the adversarial system is whether or not the system, vis-à-vis its own goals of truth and rights protection, is justified. That is, can the system justify lawyers' departure from common morality or lawyers favouring client-centred over non-client legal values? As we have seen in his institutional excuse analysis, Luban concludes that the adversarial system cannot underwrite moral non-accountability, other than in the context of criminal defence. I agree with the analysis used by Luban. I recognise, however, that where Luban's analysis of the justification of the adversarial system is internal to the legal system, Shaffer instead criticises the system from the perspective of morality external to the legal system, a view that I sympathise with.

I agree with Shaffer characterising the adversarial system as an excuse for or a justification of lawyer immorality in favouring client-centred values over others. What Shaffer does not say, at least expressly, is that client loyalty, i.e., deviation from common morality, non-observance of systemic values, non-furthering of communal goals, is bought. Lawyers act immorally for money. They then justify their self-serving actions with reference to the adversarial system. Shaffer calls for lawyers to be morally accountable for their actions within the justice system, just as every individual is morally responsible for his own acts. Moral accountability is the foundation of legal-ethical reasoning for Shaffer, as it should be for us all.

Simon concurs with the reasoning of Luban and Shaffer in their recognition of the role of the system in creating value conflicts and in resolving those conflicts in favour of client-centred values. Simon brings the unique suggestion forward, true to his adherence to legal values, that the legislator is the instrument to effect change in this area. In Manitoba, the legislature is responsible for this area of law; and rather than providing direction itself, it has delegated its authority to the Law Society of Manitoba.

2. The Lawyer-Client Relationship

The models of lawyer-client relationship feature either the subordination of the lawyer's conscience to that of the client, the subordination of the client's conscience to that of the lawyer, or conversation between the lawyer and client. The manner in which a lawyer relates to the client will have a significant impact on the way in which the lawyer resolves legal-ethical dilemmas. Where lawyer conscience is subordinated, the principle of moral non-accountability immunises the lawyer for his or her role in the furtherance of client decisions. Where client conscience is subordinated the lawyer must grapple with the perils of paternalism. Finally, where the two individuals converse about moral and legal dilemmas they both contribute and are both responsible for the substantive justice and morality of the decision reached.

Freedman favours the subordination of lawyer conscience subsequent to formal retainer, with the requisite funds in the trust account to be sure. Prior to being retained, lawyer autonomy is in tact. Once retained, however, the lawyer owes zeal within the bounds of law to the client. Zeal is coupled with the moral non-accountability of the lawyer for client defined purposes. For Freedman, the lawyer acts morally in furthering the individual autonomy of the client. This is so because autonomy for Freedman is the paramount right of all; yet he allows lawyers to sell theirs. The lawyer in this model is reduced to a morally neutral tool. This is taken to the extreme in Freedman's resolution of his trilemma where he allows client centred values such as loyalty, confidentiality and zeal to outweigh duties of integrity generally, candour to the court, and truth. I have already concluded that, as Luban does, the adversarial system cannot justify this deviation from systemic values and from common morality precepts.

For Luban, the lawyer is morally accountable for actions undertaken and results achieved in the course of the representation of a client. Autonomy is merely a means to virtue for Luban; it is not a virtue in and of itself. Client autonomy then becomes a non-issue in terms of the criticism of the morally active lawyer. The constraints of lawyer zeal for Luban are the bounds of common morality. Lawyers are thus transformed from morally neutral tools to a "positive moral force" within society. Lawyers must determine, by way of the fourfold root analysis, whether or not a deviation from common morality is justified in the course of the representation of a client. Important for Luban, in moral accountability, is that the impact on third parties is considered. Moral accountability is key for Shaffer, too.

Shaffer views the lawyer-client relationship historically and concludes that it has been drastically transformed. In the beginning of American law practice the lawyer and his conscience were in control of the lawyer-client relationship. Today the relationship has come full circle and it is the client and his conscience who are now in control. I agree with Shaffer's diagnosis of this problem and his conclusion that the stature of the profession has declined as well as his prescription to cure it. To remedy this situation, Shaffer widens the sources of legal-ethical reasoning to include not only the law and client values but also common morality precepts including religious belief and impact on third parties. He envisions client participation in this process that he refers to as moral discourse. Where, after moral discourse, lawyer and client still disagree and the lawyer has attempted to persuade the client to do or to choose right, the lawyer is entitled to conscientiously object and withdraw.

Simon, too, values the accountability of the lawyer. He also makes room for the "internal value system" of the lawyer to play a role in the relationship. He envisions lawyers acting to promote the substantively just resolution of issues. While I agree that the just resolution of issues is a paramount concern of the lawyer, I do not agree with Simon's prescription. Simon's construct is a cost-benefit analysis that potentially condones deviations from common morality where just results are reached. I would allow no such consolation.

3. The Context of Criminal Defence

The rights protection aspect of the criminal process is held in tension with the other systemic goal of truth seeking. This context of competing systemic goals typifies the ethical dilemma. The weight that a lawyer attributes to the protection of rights as against the weight he attributes to truth seeking will determine how he will resolve legal-ethical dilemmas. A focus on the protection of rights will lead the lawyer to resolve an ethical dilemma in favour of client centred values. A focus on the seeking of truth will lead the lawyer to resolve an ethical dilemma in favour of systemic legal values or in favour of common morality precepts.

Freedman focuses on the jeopardy of the accused and, therefore, the protection of the rights aspect of the system. Freedman takes the role duties to the clients to the extreme of negating the role and universal duties to truth. He also prefers role duties to the client over moral duties to non-clients. In his preference of rights protection over truth and common morality precepts, Freedman and I disagree. Common morality and the systemic value of truth seeking must have a place in criminal defence and must not be arbitrarily subordinated irrespective of circumstance.

Luban begins his analysis where Freedman leaves off. Luban questions whether or not deviations from common morality are justified in the furtherance of individual rights protection. The power imbalance in the criminal justice system, favouring the prosecution, may allow Luban in certain circumstances to underwrite deviations from common morality. The role of criminal defender, for Luban, is important in the systemic objectives of punishing the guilty after a fair hearing and imposition of a fair sentence. In this context, Luban may justify the resolution of ethical dilemmas in favour of client centred values where he would not make such an allowance in the civil litigation system. I agree with the analysis of Luban in respect of when deviations from common morality will be justified. I do not, however, agree with his reluctance to apply his moral activism paradigm to criminal defence practice.

Shaffer's calls for lawyer moral accountability extend, in my view correctly, to the practice of criminal defence. I also agree with Shaffer in his recognition of the importance of the constitutional and procedural rights of the accused. Shaffer discusses the role of the criminal defence counsel in terms of his relationship to the accused. The Christian teaching of doing unto others replaces the doctrine of zeal; forgiveness replaces the doctrine of moral non-accountability. Moral discourse in this context is meant as deliverance. As is ideal, criminal defence practice in this way allows for the lawyer to protect client rights, search for truth, and consider the common good.

Simon prescribes contextual ethics to the context of criminal defence. The defence lawyer in this context must strive toward the trier of fact reaching a just resolution of the issues having regard to all admissible information. Simon concludes that aggressive defence impedes the state's ability to properly prosecute criminally accused individuals unjustifiably as it affords no protection to the innocent. Simon is more likely to resolve a legal-ethical dilemma in favour of truth because the decision would then contribute to substantive justice. While substantive results must be of concern, the means to those ends must also be of concern. The lawyer must act in adherence to truth in means as well as ends.

4. Who Currently Resolves Legal-Ethical Dilemmas in Manitoba?

In Canada, the provinces have jurisdiction over the administration of justice. This constitutional provision gives the Manitoba legislature jurisdiction over legal ethics. By virtue of the Law Society Act, the provincial legislature has delegated its decision-making powers to the Law Society of Manitoba. In effect, the Law Society has in turn delegated decision-making authority to individual lawyers. Lawyers make decisions, informed by the Law Society Act, the Code of Professional Conduct, Practice Directions, and the decisions of the Society and the courts. The courts have exclusive jurisdiction to grant relief under the Charter. Further, the courts have voiced an inherent jurisdiction to review Law Society decisions for jurisdictional control, procedural fairness and errors of law and statutory interpretation.

Lawyers resolve ethical dilemmas essentially following the Code of Conduct. The code, however, has evolved to the point where it prescribes minimum standards of lawyer conduct. Legal ethics are becoming lawyers' law. Lawyers are as likely to argue technicalities in defence of regulatory charges as they would in defence of a criminally accused individual. Perhaps, lost are the days of the moral aspirations of the legal profession. This has allowed role-based theory to become the standard conception of lawyers' ethics in Manitoba.

5. Who Should Resolve Legal-Ethical Dilemmas in Manitoba?

As Shaffer has indicated, the stature of the legal profession has been in decline since lawyers began identifying strongly with clients' interests to the exclusion of other legal and moral duties. If the people are dissatisfied then change should be affected. The provincial legislature can pass an amendment to the Law Society Act mandating, for example, return to a common morality method of legal-ethical reasoning. The legislature could provide for a community presence in lawyer disciplinary proceedings or have community members alone judging the conduct of lawyers. The act could specifically define the public interest in the administration of justice to be advanced by all lawyers in their practice. The Law Society can amend its code of conduct, adopted from the Canadian Bar Association, or they could strike out on their own and create a new code reflective of public sentiment in the province. The code could return to the heady days of the past where conduct admonitions were aspirational. They could include public consultations in the process of adopting a new code. Having lawyers making ethical decisions, in accordance with Society codes of minimum standards, has not worked and has resulted in public dismay over legal ethics. Change is required and these are some suggestions.

6. How Are Legal-Ethical Dilemmas Best Resolved?

Legal-ethical dilemmas are best resolved with values that promote the individual dignity of those involved, with values that are in accordance with common morality and with values that enhance the operation of the system. Lawyers must be held publicly accountable for their actions within the justice system. Clients can no longer override the values and consciences of lawyers so long as their instructions are merely legal. Lawyers must return to being positive moral forces in society.

7. A Final Comment on the Introductory Anecdotes

(a) The Self-Destructive J.W.M.

This scenario featured conflicting values. Loyalty to the client would have had me further the application of the young person. My own paternalistic views would have me acting as I did in withdrawing the application. My duty to the court would have had me informing the presiding judge that I was withdrawing the application, on direction from my principal, without the support of client instruction. I recognise that I acted in a paternalistic manner. I realise, too, that I did not fulfill my role duties to the client. I did, however, act in harmony with my own conscience. I decided the matter from an extreme common morality perspective. I was, and remain, morally accountable for this decision. My action in overruling the client had neither the support of the code of conduct nor the commentators that I have cited. The only possible endorsement of this decision comes from the thought of Luban who opines that paternalism may be justified when based on the future anticipated consent of the client.

(b) (i) The Violent R.M.M.

Common morality mandates the consideration of the possible impact of any decision on the community as well as any other party. The role duty of loyalty to the client seems inconsequential compared to the protection of the public from the brutal violence of an unstable individual. The decision to plead the client guilty for concurrent time certainly satisfied the role duty to the client and the assumption that the client wants his interests maximised. The decision to not provide for the proper aftercare of this individual was a systemic failure. Simon would say that irrespective of potential substantive injustice, counsel must strive for the just resolution of the trier of fact with all admissible information. This is what occurred.

(b) (ii) Privilege and G.A.A.

The code of conduct provided a clear answer to this case even though there were conflicting duties of confidentiality, loyalty to the client and legal and moral duties to the court and the other counsel involved. The lesson to be learned here is that either a code of conduct or even the enabling legislation of the Law Society can mandate specific weighing of values.

(c) (i) The Untruthful T.W.M.

Clearly Simon would be critical of the outcome of this case. One wonders whether the client had made specific admissions to the previous lawyer that disallowed the lawyer from using certain tactics in response to which the client ended the relationship. The common morality precept of truth, and the legal and communal value of the punishment of the guilty, were not served by this result. The failure here was in my inability to get the truth from the client so that it could guide the conduct of the prosecution, rather than subvert it.

(c) (ii) The Expensive Tryst of M.M.M.

The trilemma conflict of discrediting a truthful witness was not realised in this case because of its diversion from the court process. Pointing out that a witness may be mistaken is a far cry from calling a person a liar when you know that they are not. This case represents an opportunity for moral discourse, an opportunity to forgive, and potentially reconcile the accused to the victim and the community. That, in a manner of thinking, was what occurred through the mediation process.

8. Closing Thoughts

Manitoba is in need of reform in the area of professional ethics. A single method, featuring the moral accountability of lawyers and encompassing consideration of common morality precepts, religious values and the impact of actions on third parties, must be adopted. Legislative or regulatory weighing of values and a mandating of their specific applications may bring lawyers' ethics back in line with public morality.

ENDNOTES

* Throughout this thesis the masculine form of pronouns is used for the sake of simplicity. It is my intention that these masculine pronouns be understood in a universal, gender-neutral sense.

[1] Monroe Freedman, Understanding Lawyers' Ethics (New York: Matthew Bender & Co., 1990) at 111.

[2] Gavin MacKenzie, Lawyers and Ethics: Professional Responsibility and Discipline, 2d ed. (Canada: Thompson Canada Limited, 2000) at 1 – 9 [hereinafter Lawyers and Ethics].

[3] ***Ibid***. at 3 – 13.

[4] Vincent Luizzi, A Case for Legal Ethics: Legal Ethics as a Source for a Universal Ethic (New York: State University of New York Press, 1993) at xii [hereinafter A Case for Legal Ethics].

[5] Lawyers and Ethics, *supra* note 2 at 7 – 2; see also A Case for Legal Ethics, *supra* note 4 at 4; generally, Canadian Bar Association – Ontario, Solicitor Client Relationships (Toronto: Continuing Legal Education Department, 1987) at 8; and especially, Understanding Lawyers Ethics, *supra* note 1 at 10.

[6] Lawyers and Ethics, *supra* note 2 at 1, see also James Pike, Beyond the Law: The Religious and Ethical Meaning of the Lawyer's Vocation (New York: Doubleday & Company, Inc., 1963) at 23.

[7] Donald Buckingham, "Rules & Roles: Casting Off Legal Education's Moral Blinders for an Approach that Encourages Moral Development" (1996) 9 Can. J. Law & Jur. 111 at 112 [hereinafter Rules & Roles].

[8] Leslie E. Gerber, "Can Lawyers Be Saved? The Theological Legal Ethics of Thomas Shaffer" (1994) 10 Journal of Law & Religion 347 at 348 [hereinafter Saved?].

[9] ***Ibid***. at 348.

[10] ***Ibid***. at 348.

[11] Rules & Roles, *supra* note 7 at 111.

[12] Jerome Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 Can. J. Law & Jur. 51 at 52.

[13] Quoted in Jethro Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What to do About It (New York: W.W. Norton & Co., Inc., 1978) at 7 [hereinafter Crisis at the Bar].

[14] Lawyers and Ethics, *supra* note 2 at 1.

[15] Crisis at the Bar, *supra* note 13 at 125.

[16] Understanding Lawyers' Ethics, *supra* note 1 at 13.

[17] Lawyers and Ethics, *supra* note 2 at 7 – 1.

[18] ***Ibid.*** at 7 – 3.

[19] Law Society of Manitoba, Code of Professional Conduct (Winnipeg: The Law Society of Manitoba, 1992) at 28 [hereinafter Current Manitoba Code]. Chapter 9, The Lawyer as Advocate states the rule as follows:

> When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.

[20] David Luban, "Paternalism and the Legal Profession" (1981) 1981 Wis. L. Rev. 454 at 462 – 463.

[21] Current Manitoba Code, *supra* note 19 at 11.

[22] ***Ibid.*** at 13. Guiding Principle 11 reads as follows:

> Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence.

Also instructive, Guiding Principle 13 states:

> When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should always be careful not to divulge more information than is required.

[23] ***Ibid.*** at 28.

[24] Edward L. Greenspan and George Jonas, Greenspan: The Case for the Defence (Canada: Macmillan of Canada, 1987) at 51.

[25] Understanding Lawyers' Ethics, *supra* note 1 at 111.

[26] A Case for Legal Ethics, *supra* note 4 at xviii.

[27] ***Ibid.*** at 1.

[28] ***Ibid***. at 3 – 6.

[29] ***Ibid***. at 15.

[30] Phillip Heymann and Lance Liebermann, The Social Responsibility of Lawyers: Case Studies (United States of America: Foundation Press, 1988) at 24.

[31] A Case for Legal Ethics, *supra* note 4 at 17.

[32] John F. Sutton Jr. and John S. Dzienkowski, Cases and Materials on Professional Responsibilities of Lawyers (St. Paul: West Publishing Co., 1989).

[33] A Case for Legal Ethics, *supra* note 4 at 17.

[34] ***Ibid***. at 28.

[35] ***Ibid***. at 37.

[36] ***Ibid***. at 38.

[37] ***Ibid***. at 59 – 60.

[38] ***Ibid***. at 68 – 69.

[39] ***Ibid***. at 75 – 96.

[40] Rand Jack and Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers (New York: Cambridge University Press, 1989) at 101-122.

[41] ***Ibid***. at 102 –103.

[42] ***Ibid***. at 106.

[43] ***Ibid***. at 109.

[44] ***Ibid***. at 35.

[45] ***Ibid***. at 1.

[46] ***Ibid***. at 111.

[47] ***Ibid***. at 113.

[48] ***Ibid***. at 118.

[49] ***Ibid***. at 120 –123.

[50] Monroe H. Freedman, Lawyers' Ethics in an Adversary System (Indianapolis: Bobbs-Merrill, 1995) at 60.

[51] Patrick Devlin, The Enforcement of Morals (London: Oxford University Press, 1959) at 10 [hereinafter Enforcement of Morals]; see also, David Luban, The Good Lawyer: Lawyers' Roles and Lawyers' Ethics (United States of America: Rowman & Allanheld, 1984) at 28 [hereinafter The Good Lawyer].

[52] Patrick Devlin, Law and Morals (London: The Birmingham Press, 1961) at 36. The assumption that there are universally accepted values is never questioned in the literature but met with a barrage of questions when the preliminary ideas for this essay were presented for the Faculty of Law, Graduate Studies Seminar, University of Manitoba.

[53] David Luban, Lawyers and Justice: An Ethical Study (United States of America: Princeton University Press, 1988) at 107 – 109 [hereinafter Lawyers and Justice].

[54] A Case For Legal Ethics, *supra* note 4 at 59 – 60.

[55] Lawyers and Justice, *supra* note 53 at 110.

[56] Enforcement of Morals, *supra* note 51 at 8.

[57] Understanding Lawyers' Ethics, *supra* note 1 at 23.

[58] ***Ibid***. at 25 – 26.

[59] Freedman received his education at Harvard. He earned a B.A. in 1951, and LL.B. in 1954, and an LL.M. in 1956. He was called to the Massachusetts bar in 1956. He worked in private practice from 1956 to 1973. He was also on faculty at George Washington University between 1958 and 1973. He then became Dean of Law at Hofstra Law School between 1973 and 1977, and he remains a professor of law there.

[60] Understanding Lawyers' Ethics, *supra* note 1 at ix.

[61] ***Ibid***. at 10.

[62] ***Ibid***. at 8 – 10.

[63] Lawyers' Ethics in an Adversary System, *supra* note 50 at 10.

[64] ***Ibid***. at 59.

[65] ***Ibid***. at 61.

[66] ***Ibid***. at 62.

[67] ***Ibid***. at 75.

[68] Born in 1949, David Jay Luban was educated at the University of Chicago and Yale University in the early nineteen seventies. He received his Bachelor Arts at Chicago. He then received his Master of Arts, Master of Philosophy and Ph.D. from Yale.

Upon graduating Luban moved directly into an academic position at Kent State University, teaching philosophy, 1975 – 1979. Luban then became the Morton and Sophia Macht Professor of Legal Ethics at the University of Maryland, 1979 – 1997, and is currently the Frederick Haas Professor of Law and Philosophy at Georgetown University.

[69] David Luban, "Introduction: A New Canadian Legal Ethics" (1996) 9 Can. J. Law & Jur. 3 at 3 – 4.

[70] David Luban, "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics" (1981) 40 Maryland L. Rev. 451 at 463 [hereinafter Hearse Horse].

[71] ***Ibid***. at 464.

[72] ***Ibid***. at 471.

[73] David Luban, "Mandatory Pro Bono: A Workable (and Moral) Plan" (1985) 64 Mich. B.J. 280 at 280 – 281.

[74] David Luban and Michael Milleman, "Good Judgment: Ethics Teaching in Dark Times" (1995) 9 Georgetown J. of Legal Ethics 31 at 31 [hereinafter Good Judgment].

[75] ***Ibid***. at 31 – 32.

[76] Shaffer graduated 1958 from the University of Albuquerque with a Bachelor of Arts. Subsequently, in 1961, he graduated cum laude from Notre Dame with the degree of J.D. He was called to the bar in Indiana where he practiced before entering academics. He taught at Washington & Lee University between 1980 and 1988, and is currently an emeritus professor of the Notre Dame Law School, practising in its Legal Aid Clinic.

[77] Saved?, *supra* note 8 at 347.

[78] ***Ibid***. at 351.

[79] ***Ibid***. at 351.

[80] Thomas Shaffer, American Lawyers and their Communities: Ethics in the Legal Profession (Notre Dame: University of Notre Dame Press, 1991) at 21 [hereinafter American Lawyers].

[81] Saved?, *supra* note 8 at 353 – 354.

[82] Thomas Shaffer, "The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner that is the Man Himself"" (1993) 7 Notre Dame J. L. E. & Pub. Pol. 145 at 146 [hereinafter Vouching].

[83] ***Ibid.***

[84] ***Ibid.*** at 167.

[85] ***Ibid.*** at 169 – 170.

[86] ***Ibid.*** at 173.

[87] ***Ibid.*** at 175.

[88] William Simon was educated in Princeton and Harvard in the late 1960s and early 1970s. He began practice as a member of the private bar in Boston. He practised privately for three years between 1974 and 1977 and then took a staff attorney position with the Legal Services Institute, 1979 – 1981. In 1981, Simon became a member of the Faculty of Law at Stanford University. He has held various academic posts at Stanford, including the Montgomery Professorship and is currently the Saunders Professor of Law. During this period, he was also a visiting professor at Harvard and U.C. Berkeley. Simon has been on staff at the National Center for Economic Development and Law. He is a member of the Massachusetts Bar. Further, he remains an active member of the Stanford Faculty of Law where he currently teaches in the areas of Business Associations, Legal Profession and Civil Procedure.

[89] William Simon, "Visions of Practice in Legal Thought" (1984) 36 Stan. L. Rev. 469 at 489 [hereinafter Visions].

[90] William Simon, The Practice of Justice: A Theory of Lawyers' Ethics, (United States of America: Harvard University Press, 1998) at 1 [hereinafter The Practice of Justice].

[91] ***Ibid.*** at 2.

[92] ***Ibid.*** at 2.

[93] ***Ibid.*** at 4.

[94] ***Ibid.*** at 15 – 16.

[95] ***Ibid***. at 26.

[96] ***Ibid***. at 27.

[97] ***Ibid***. at 30.

[98] ***Ibid***. at 33.

[99] ***Ibid***. at 33 – 34.

[100] Understanding Lawyers' Ethics, *supra* note 1 at 13.

[101] ***Ibid***. at 14.

[102] ***Ibid***. at 14.

[103] ***Ibid***. at 26.

[104] ***Ibid***. at 46.

[105] David Luban, "Rediscovering Fuller's Legal Ethics" (1977) 11 Georgetown J. of Legal Ethics at 820 [hereinafter Rediscovering Fuller].

[106] Hearse Horse, *supra* note 70 at 468.

[107] Lawyers & Justice, *supra* note 53 at 57 – 58.

[108] ***Ibid***. at 52.

[109] ***Ibid***.

[110] (1978) 66 Calif. L.R. 669.

[111] Lawyers & Justice, *supra* note 53 at 55.

[112] ***Ibid***. at 57.

[113] ***Ibid***. at 54. To determine whether a role act may be justified by an appeal to the adversarial system, Luban employs an analytical model that he calls the "Fourfold Root of Sufficient Reasoning" which he formulates as follows:

(i) Can the institution (adversarial system) be justified by demonstrating its moral goodness?
(ii) Can the role (of lawyer) be justified by appealing to the structure of the institution?
(iii) Can the role obligation be justified by showing that it is essential to the role?

(iv) Can the role act be justified by showing that the role obligations require it?

See also Lawyers & Justice, *supra* note 53 at 131.

[114] The Trial of Queen Caroline, (1821) 1 Reports of State Trials 949 (P.C.).

[115] Lawyers & Justice, *supra* note 53 at 55.

[116] ***Ibid***. at 56.

[117] ***Ibid***. at 67 – 68.

[118] Hearse Horse, *supra* note 70 at 468.

[119] ***Ibid***. at 469; see also Rediscovering Fuller, *supra* note 105 at 821 – 824.

[120] Hearse Horse, *supra* note 70 at 469.

[121] Aggressive defence is a term of art of Luban that will be described in a later section of this essay.

[122] Hearse Horse, *supra* note 70 at 470.

[123] ***Ibid***.; see also Rediscovering Fuller, *supra* note 105 at 820.

[124] Lawyers & Justice, *supra* note 53 at 67 – 68.

[125] Hearse Horse, *supra* note 70 at 470.

[126] Thomas Shaffer "The Unique, Novel and Unsound Adversary Ethic" (1988) 41 Van. L. Rev. 697 at 697 [hereinafter Adversary Ethic].

[127] ***Ibid.*** at 698.

[128] ***Ibid.*** at 699.

[129] ***Ibid.*** at 703 – 704.

[130] Thomas Shaffer & Robert F. Cochran Jr., Lawyers, Clients, and Moral Responsibility (United States of America: West Publishing Co., 1994) at 56 – 57 [hereinafter Moral Responsibility].

[131] ***Ibid***. at 57.

[132] ***Ibid***. at 58 – 59.

[133] ***Ibid.*** at 59.

[134] ***Ibid.*** at 60.

[135] ***Ibid.*** at 61.

[136] ***Ibid.***

[137] ***Ibid.*** at 62.

[138] ***Ibid.*** at 63.

[139] ***Ibid.*** at 65.

[140] ***Ibid.*** at 66 – 67.

[141] ***Ibid.*** at 71.

[142] ***Ibid.***

[143] ***Ibid.***

[144] ***Ibid.*** at 85.

[145] ***Ibid.*** at 113 – 114.

[146] ***Ibid.*** at 120.

[147] ***Ibid.*** at 125.

[148] ***Ibid.*** at 126.

[149] ***Ibid.*** at 129.

[150] ***Ibid.*** at 128 – 133.

[151] The Practice of Justice, *supra* note 90 at 62.

[152] ***Ibid.***

[153] ***Ibid.***

[154] ***Ibid.*** at 65.

[155] ***Ibid.*** at 69.

[156] Cited, *supra* note 114.

[157] Understanding Lawyers' Ethics, *supra* note 1 at 67; see also Lawyers Ethics in an Adversary System, *supra* note 50 at 10.

[158] Lawyers Ethics in An Adversary System, *supra* note 50 at 10 – 11.

[159] ***Ibid***. at 71.

[160] ***Ibid***. at 9.

[161] ***Ibid***. at 24.

[162] ***Ibid***. at 43; see also American Bar Association, Canons of Professional Ethics (Chicago: Center for Professional Responsibility, 1908) at 15.

[163] Lawyers Ethics in an Adversary System, *supra* note 50 at 43 – 44.

[164] ***Ibid***. at 47.

[165] Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5 Human Rights 1 at 12.

[166] Lawyers Ethics in an Adversary System, *supra* note 50 at 44; see also Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale L.J. 1060 at 1061.

[167] Lawyers Ethics in an Adversary System, *supra* note 50 at 49 – 50.

[168] ***Ibid***. at 50 – 52.

[169] Hearse Horse, *supra* note 70 at 456.

[170] ***Ibid***. at 459.

[171] ***Ibid***.

[172] ***Ibid***. at 458 – 459.

[173] ***Ibid***. at 461.

[174] ***Ibid***. at 462.

[175] I question whether this is true paternalism because the individual has chosen his path and enlisted assistance because he foresaw the hardship. The other's [the client's] will is still being served. I realise, however, that ultimately the individual may have a genuine

change of heart and decide to smoke cigarettes with reckless abandon. The individual, in my submission, is not being paternalistic if he is assisting the other to fight temptation but the peril is that he may become paternalistic in disallowing the individual in question to change his mind.

[176] Hearse Horse, *supra* note 70 at 462 – 463.

[177] ***Ibid***. at 455 – 456.

[178] ***Ibid***. at 472.

[179] ***Ibid***. at 473 – 474.

[180] ***Ibid***. at 489.

[181] ***Ibid***. at 489 – 490.

[182] Good Judgment, *supra* note 74 at 31.

[183] Lawyers & Justice, *supra* note 53 at 180.

[184] ***Ibid***. at 181.

[185] ***Ibid***. at 186.

[186] ***Ibid***. at 187.

[187] (1833), 39 Eng. Rep. 618 (H.L.).

[188] ***Ibid***. at 192.

[189] David Luban, "Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum. L. Rev. 1004 at 1026 [hereinafter Partisanship].

[190] ***Ibid***.

[191] ***Ibid***. at 1035 – 1036.

[192] ***Ibid***. at 1036.

[193] ***Ibid***.

[194] ***Ibid***. at 1037.

[195] ***Ibid***.

[196] ***Ibid***. at 1038.

[197] Lawyers & Justice, *supra* note 53 at 171.

[198] Partisanship, *supra* note 189 at 1004.

[199] ***Ibid***.

[200] ***Ibid***. at 1005 – 1018.

[201] Lawyers & Justice, *supra* note 53 at xvii – xviii.

[202] ***Ibid***. at 155 – 156.

[203] ***Ibid***. at 157.

[204] Partisanship, *supra* note 189 at 1018.

[205] ***Ibid***.

[206] This concept is discussed infra at page 91.

[207] ***Ibid***. at 1018 – 1019.

[208] ***Ibid***. at 1021.

[209] ***Ibid***. at 1022; see also Lawyers & Justice, *supra* note 53 at 160.

[210] Partisanship, *supra* note 189 at 1026.

[211] Lawyers & Justice, *supra* note 53 at 162.

[212] ***Ibid***. at 155.

[213] ***Ibid***. at 162.

[214] ***Ibid***. at 166.

[215] ***Ibid***.

[216] Moral Responsibility, *supra* note 130 at v.

[217] ***Ibid***.

[218] ***Ibid***. at 8.

[219] ***Ibid***. at 9.

[220] ***Ibid***. at 16.

[221] ***Ibid***. at 17.

[222] ***Ibid***. at 22.

[223] ***Ibid***. at 23 - 25.

[224] ***Ibid***. at 31.

[225] ***Ibid***. at 33.

[226] Harper Lee, To Kill a Mockingbird (United States of America: Warner Books, Inc., 1960) at 157.

[227] Moral Responsibility, *supra* note 130 at 33.

[228] ***Ibid***. at 33 – 39.

[229] Saved?, *supra* note 8 at 355; see also Thomas Shaffer, "The Gentleman in Professional Ethics" (1984) 10 Queen's L. J. 1 at 5 – 9 [hereinafter The Gentleman].

[230] The Gentleman, *supra* note 229 at 1 – 3.

[231] Thomas Shaffer, "On Being a Professional Elder" (1987) 62 Notre Dame L. Rev. 624 at 627.

[232] Saved?, *supra* note 8 at 362; see also The Gentleman, *supra* note 229 at 9.

[233] Thomas Shaffer, "Legal Ethics and the Good Client" (1987) 36 Cath. U. L. Rev. 319 at 319.

[234] ***Ibid***.

[235] ***Ibid***. at 321.

[236] ***Ibid***. at 322.

[237] ***Ibid***. at 324.

[238] ***Ibid***. at 329.

[239] Thomas Shaffer & Mary Shaffer, American Lawyers and their Communities: Ethics in the Legal Profession (New York, New York: M. Bender, 1985) at 196.

[240] ***Ibid***. at 198.

[241] ***Ibid***. at 200.

[242] ***Ibid***. at 214.

[243] Thomas Shaffer, On Being a Christian and a Lawyer (Provo, Utah: Brigham Young University Press, 1981) at 21 [hereinafter Christian].

[244] ***Ibid***. at 26.

[245] ***Ibid***. at 29.

[246] Thomas Shaffer, "Moral Theology in Legal Ethics" (1982) 12 Cap. U. L. Rev. 179 at 179.

[247] ***Ibid***. at 184.

[248] ***Ibid***. at 186.

[249] ***Ibid***. at 187.

[250] ***Ibid***. at 188 – 189.

[251] ***Ibid***. at 192.

[252] Visions, *supra* note 89 at 469.

[253] ***Ibid***. at 470.

[254] ***Ibid***.

[255] ***Ibid***. at 470 – 471.

[256] ***Ibid***. at 471.

[257] ***Ibid***.

[258] ***Ibid***. at 471 – 475.

[259] ***Ibid***. at 473 – 474.

[260] ***Ibid***. at 485.

[261] The Practice of Justice, *supra* note 90 at 109.

[262] ***Ibid***. at 128.

[263] ***Ibid***. at 77.

[264] William Simon, "Virtuous Lying: A Critique of Quasi-Categorical Moralism" (1999) 12 no. 3 Georgetown J. of Legal Ethics 433 at 433 – 435.

[265] ***Ibid***. at 435.

[266] ***Ibid***. at 436.

[267] Understanding Lawyers' Ethics, *supra* note 1 at 111.

[268] ***Ibid***.

[269] ***Ibid***. at 117.

[270] Lawyers & Justice, *supra* note 53.

[271] David Luban, "Are Criminal Defenders Different?" (1993) 91 Mich. L. Rev. 1729 [hereinafter Criminal Defenders].

[272] ***Ibid***. at 1729.

[273] ***Ibid***. at 1731.

[274] ***Ibid***.

[275] ***Ibid***. at 1731 – 1733.

[276] ***Ibid***. at 1732 – 1733.

[277] ***Ibid***. at 1733.

[278] ***Ibid***. at 1734.

[279] ***Ibid***. at 1734 – 1735.

[280] ***Ibid***. at 1735.

[281] ***Ibid***. at 1762 – 1763.

[282] ***Ibid***. at 1736.

[283] ***Ibid***. at 1737.

[284] [1991] 3 S.C.R. 326.

[285] Criminal Defenders, *supra* note 271 at 1737.

[286] ***Ibid***. at 1738 – 1739.

[287] ***Ibid***. at 1739.

[288] ***Ibid***. at 1740 – 1741.

[289] ***Ibid***. at 1744.

[290] ***Ibid***.

[291] Lawyers & Justice, *supra* note 53 at 60; see also Criminal Defenders, *supra* note 271 at 1749.

[292] Criminal Defenders, *supra* note 271 at 74.

[293] ***Ibid***. at 1755.

[294] ***Ibid***. at 1755 – 1756.

[295] ***Ibid***. at 1756.

[296] ***Ibid***.

[297] ***Ibid***. at 1755.

[298] Christian, *supra* note 243 at 71.

[299] Good News Bible (Canada: United Bible Society, 1978) at Matthew 25: 42 – 45 reads as follows:

> I was hungry but you would not feed me, thirsty but you would not give me a drink; I was a stranger but you would not welcome me in your homes, naked but you would not clothe me; I was sick and in prison but you would not take care of me." Then they will answer him, "When Lord, did we ever see you hungry or thirsty or a stranger or naked or sick or in prison, and we would not help you?" The King will reply, "I tell you, whenever you refused to help one of these least important ones, you refused to help me."

[300] Christian, *supra* note 243 at 51 – 52.

[301] ***Ibid***. at 53.

[302] ***Ibid***. at 62.

[303] ***Ibid***. at 63.

[304] ***Ibid***. at 64.

[305] ***Ibid***. at 85.

[306] ***Ibid***. at 88 – 89.

[307] ***Ibid***. at 94.

[308] ***Ibid***. at 112.

[309] ***Ibid***. at 111.

[310] ***Ibid***. at 121 – 123.

[311] ***Ibid***. at 127.

[312] ***Ibid***. at 134 – 135.

[313] The Practice of Justice, *supra* note 90 at 170; see also William Simon, "The Ethics of Criminal Defense" (1993) 91 Mich. L. Rev. 1703 at 1703 [hereinafter Criminal Defense].

[314] The Practice of Justice, *supra* note 90 at 170, see also Criminal Defense, *supra* note 313 at 1728.

[315] Criminal Defense, *supra* note 313 at 1706.

[316] Criminal Defenders, *supra* note 271 at 1766.

[317] William Simon, "Reply: Further Reflections on Libertarian Criminal Defense" (1993) 91 Mich. L. Rev. 1767 at 1767 [hereinafter Reply].

[318] Criminal Defense, *supra* note 313 at 1704 – 1705.

[319] The Practice of Justice, *supra* note 90 at 175, see also Criminal Defense, *supra* note 313 at 1708.

[320] The Practice of Justice, *supra* note 90 at 170 – 171.

[321] Criminal Defense, *supra* note 313 at 1707.

[322] ***Ibid***. at 1707 – 1708.

[323] ***Ibid***. at 1711 – 1712.

[324] ***Ibid***. at 1712.

[325] Reply, *supra* note 317 at 1769.

[326] ***Ibid***. at 1770.

[327] Criminal Defense, *supra* note 313 at 1719.

[328] The Practice of Justice, *supra* note 90 at 189 – 190; see also Criminal Defense, *supra* note 313 at 1728.

[329] 1867, (U.K.), 30 & 31 Vict. c.3, ss. 91 – 92.

[330] Canadian Bar Association, Canons of Legal Ethics (Canada: The Canadian Bar Association, 1920) [hereinafter Canons].

[331] Canadian Bar Association, Code of Professional Conduct (Canada: The Canadian Bar Association, 1974) [hereinafter 1974 Code].

[332] Canadian Bar Association, Code of Professional Conduct (Canada: The Canadian Bar Association, 1987) [hereinafter 1987 Code].

[333] David Sugarman, A Brief History of the Law Society (London: The Law Society, 1995) at 5 [hereinafter Brief History].

[334] 6 & 7 Vict. c. 73.

[335] Brief History, *supra* note 333 at 5.

[336] Legal Profession Act, 34 Vict. c.10.

[337] Law Society Act, 40 Vict. c. 14, S.M. 1877, c. 14, s. I [hereinafter 1877 Act].

[338] ***Ibid.*** at s. VIII.

[339] S.M. 1972, c. 55, s. 4.

[340] Cameron Harvey, ed., The Law Society of Manitoba, 1877 – 1977 (Winnipeg: Peguis Publishers, 1977) at 31 [hereinafter Law Society].

[341] 1877 Act, *supra* note 337 at s. XXX.

[342] ***Ibid.*** at s. XXIX.

[343] ***Ibid.*** at s. IX.

[344] ***Ibid.*** at s. II (3) and XV (4).

[345] ***Ibid.*** at s. XIX; the oath for attorneys read as follows:

> I, A.B., do swear (or solemnly affirm, as the case may be,) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability. So help me God.

[346] Law Society Act, S.M. 1891, c. 83.

[347] ***Ibid.*** at s. 3.

[348] ***Ibid.*** at s. 54.

[349] ***Ibid.*** at s. 62.

[350] ***Ibid.*** at ss. 66 – 68.

[351] 1 Geo. V. c.23, s.1.

[352] 2 Geo. V. c.32, s. 2.

[353] 5 Geo. V. c. 37, s. 85.

[354] ***Ibid.*** at ss. 86, 87.

[355] 16 Geo. V. c. 26, s. 89.

[356] ***Ibid.***

[357] ***Ibid.*** at s. 90.

[358] S.M. 1943, c. 29.

[359] ***Ibid.*** at s. 38 (h) – (k).

[360] ***Ibid.*** at s. 38A.

[361] Law Society Act, S.M. 1956, c. 39.

[362] ***Ibid.*** at s. 4 (1) (l).

[363] ***Ibid.*** at s. 4 (1) (s); see also S.M. 1961, c. 32, s. 1 (s).

[364] Law Society Act, *supra* note 361 at 4 (1) (s).

[365] S.M. 1961, c. 32.

[366] Law Society Act, *supra* note 361 at s. 4 (1) (t) – (u).

[367] ***Ibid.*** at s. 4 (1) (w).

[368] ***Ibid.*** at s. 29 (1) (q).

[369] ***Ibid.*** at s. 29 (1) (w), and s. 44 (2).

[370] S.M. 1964, c. 25, s. 5.

[371] Law Society Act, *supra* note 361 at s. 45.

[372] ***Ibid.*** at s. 36; see also 1877 Act, *supra* note 337 at XIX.

[373] S.M. 1974, c. 2, ss. 7 – 8; see also S.M. 1980, c. 8, s. 1.

[374] S.M. 1984, c. 20, s. 1.

[375] S.M. 1980, c. 8, s. 45.1; see also S.M. 1982-83-84, c. 87, s. 45 (g).

[376] R.S.M. 1987, c. 4, s. 44; see also S.M. 1991-92, c. 37.

[377] S.M. 1990, c. 35, s. 57.1 (2).

[378] S.M. 1994, c. 13.

[379] ***Ibid.*** at s. 52 (8).

[380] ***Ibid.*** at s. 54 (1).

[381] S.M., 2000, c. 76.

[382] Law Society, *supra* note 340 at vii.

[383] Canons, *supra* note 330.

[384] Mark Orkin, Legal Ethics: A Study of Professional Conduct (Toronto: Cartwright & Sons Limited, 1957) at 9 – 10.

[385] Canons, *supra* note 330 at 3.

[386] ***Ibid.***

[387] ***Ibid.***

[388] ***Ibid.***

[389] ***Ibid.***

[390] ***Ibid.*** at 4.

[391] ***Ibid.*** at 6.

[392] ***Ibid.*** at 5.

[393] ***Ibid.*** at 7.

[394] ***Ibid.*** at 5.

[395] 1974 Code, *supra* note 331.

[396] ***Ibid.*** at iv.

[397] ***Ibid.*** at v, where the preface reads as follows:

> Although each lawyer must decide for himself the extent to which his conduct should rise above the minimum standards, the desire for the respect and confidence of the members of the society which he serves and of the members of his profession should motivate him to maintain the highest possible degree of ethical conduct.

[398] ***Ibid.***

[399] ***Ibid.*** at 33.

[400] ***Ibid.***

[401] ***Ibid.*** at 54.

[402] ***Ibid.*** at 17.

[403] ***Ibid.*** at 37.

[404] ***Ibid.*** at 1 and 81.

[405] The Law Society of Manitoba, Code of Professional Conduct (Winnipeg: The Law Society of Manitoba, 1992) at ii [hereinafter Manitoba Code].

[406] ***Ibid***. at 21.1 and 69.7.

[407] ***Ibid.*** at 13; see also 1987 Code, *supra* note 332 at 15.

[408] Manitoba Code, *supra* note 405 at 13; see also 1987 Code, *supra* note 332 at 15.

[409] Manitoba Code, *supra* note 405 at 13; see also 1987 Code, *supra* note 332 at 15.

[410] ***Ibid.*** at 1.

[411] Law Society of Alberta, Code of Professional Conduct (Calgary: The Law Society of Alberta, 1995).

[412] ***Ibid.*** at 2-3.

[413] ***Ibid.*** at 1.

[414] ***Ibid***. at 6.

[415] ***Ibid.*** at 19.

[416] ***Ibid.***

[417] ***Ibid.*** at 41.

[418] ***Ibid.*** at 19 and 42.

[419] This is explicitly set out in the statement of principle in Chapter 10, "The Lawyer as Advocate":

> When acting as advocate, a lawyer has a duty to advance the client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics.

[420] Law Society of British Columbia, Professional Conduct Handbook (Vancouver: The Law Society of British Columbia, 1993).

[421] ***Ibid.*** at 1-4 .

[422] Law Society of Upper Canada, Rules of Professional Conduct (Toronto: The Law Society of Upper Canada, 2000).

[423] Law Society of Upper Canada, Professional Conduct Handbook (Toronto: The Law Society of Upper Canada, 1994).

[424] The Law Society of the Northwest Territories, Policy Directives (Northwest Territories: The Law Society of the Northwest Territories, 1989).

[425] Law Society Act, R.S.M. 1987, c. L100 as amended.

[426] John M. Evans, et al., Administrative Law: Cases, Text and Materials (Canada: Emond Montgomery Publications Limited, 1989) at 7 [hereinafter Administrative Law].

[427] Law Society Act, *supra* note 425 at s. 36.

[428] ***Ibid***. at s. 54 (1). There is also a statutory right of appeal to the Court of Queen's Bench where a member has been suspended by the Society on an interim basis, s. 50.

[429] ***Ibid***. at s. 54.1 (1).

[430] Administrative Law, *supra* note 426 at 21.

[431] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[432] Law Society Act, S.M. 1877, c.1.

[433] [1886] 3 Man. R. 367 (Q.B.).

[434] Law Society Act, *supra* note 432.

[435] Re Miller, [1886] 3 Man. R. 367 at 372 (Q.B.).

[436] ***Ibid***. at 376.

[437] [1889] 6 Man. R. 19 (C.A.).

[438] S.M. 1892, c. 23; 55 Vict. c. 23, s. 77.

[439] [1912] 22 Man. R. 746 (K.B.).

[440] [1923] 3 W.W.R. 558 (Man. K.B.).

[441] Law Society Act, R.S.M. 1913, c. 11, s. 86.

[442] ***Ibid***. at s. 85.

[443] ***Ibid***. at s. 39 (e).

[444] [1931] 39 Man. R. 535 (C.A.).

[445] (1979), 102 D.L.R. (3d) 540 (Man. C.A.).

[446] ***Ibid***. at 546.

[447] The criteria as set out in the Law Society Act, R.S.M. 1970, c L100, s. 30(1) are as follows:

- (i) that the money to be reimbursed was given to the lawyer in his professional capacity;
- (ii) that the lawyer misappropriated the monies; and,
- (iii) that the client has suffered a corresponding pecuniary loss.

[448] Law Society Act, R.S.M. 1970, c. L100, ss. 30(1), 59, 60 and 60(a).

[449] Re MacDonald (1975), 54 D.L.R. (3d) 372 (Man. Q.B.).

[450] Eckstein v. Law Society (Manitoba), [1981] 1 W.W.R. 566 (Man. Q.B.).

[451] (1983), 22 Man. R. (2d) 260 (Q.B.), aff'd (1983), 25 Man. R. (2d) 154 (C.A.).

[452] Rosenbaum v. Law Society (Manitoba) (1983), 22 Man. R. (2d) 260 at 263 (Q.B.).

[453] Rosenbaum v. Law Society (Manitoba) (1983), 25 Man. R. (2d) 154 (C.A.).

[454] (1983), 23 Man. R. (2d) 293 (C.A.).

[455] Law Society Act, R.S.M. 1970, c. L100, s. 46.

[456] Savino v. Law Society (Manitoba) (1983), 23 Man. R. (2d) 293 at 299 (C.A.).

[457] ***Ibid***. at 300.

[458] Giesbrecht v. Law Society (Manitoba) (1983), 24 Man. R. (2d) 228 at 233 (C.A.).

[459] Pearlman v. Law Society (Manitoba), [1991] 2 S.C.R. 869.

[460] Law Society Act, R.S.M. 1987 c. L100, s. 54(2).

[461] Savino v. Law Society (Manitoba), *supra* note 456 at 299.

[462] (1989), 60 Man. R. (2d) 119 (C.A.).

[463] ***Ibid***. at 123.

[464] Laba v. Manitoba Dental Association (1989), 61 Man. R. (2d) 24 at 26 (C.A.).

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[466] Law Society Act, *supra* note 425.

[467] (1997), 118 Man. R. (2d) 89 (C.A.).

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[470] Thomas Shaffer, American Legal Ethics: Text, Readings and Discussion Topics (New York, New York: M. Bender, 1985) at xxi.

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