ical norm of zealous advocacy properly applies to a prosecutor, to the extent that as an advocate he or she can work hard to persuade the trier of fact. Once again, however, we stress that this zeal must be exercised within proper limits, consistent with the primary duty to the public interest. One should perhaps therefore speak of a "controlled zeal," a modified version of the traditional zealous advocate.

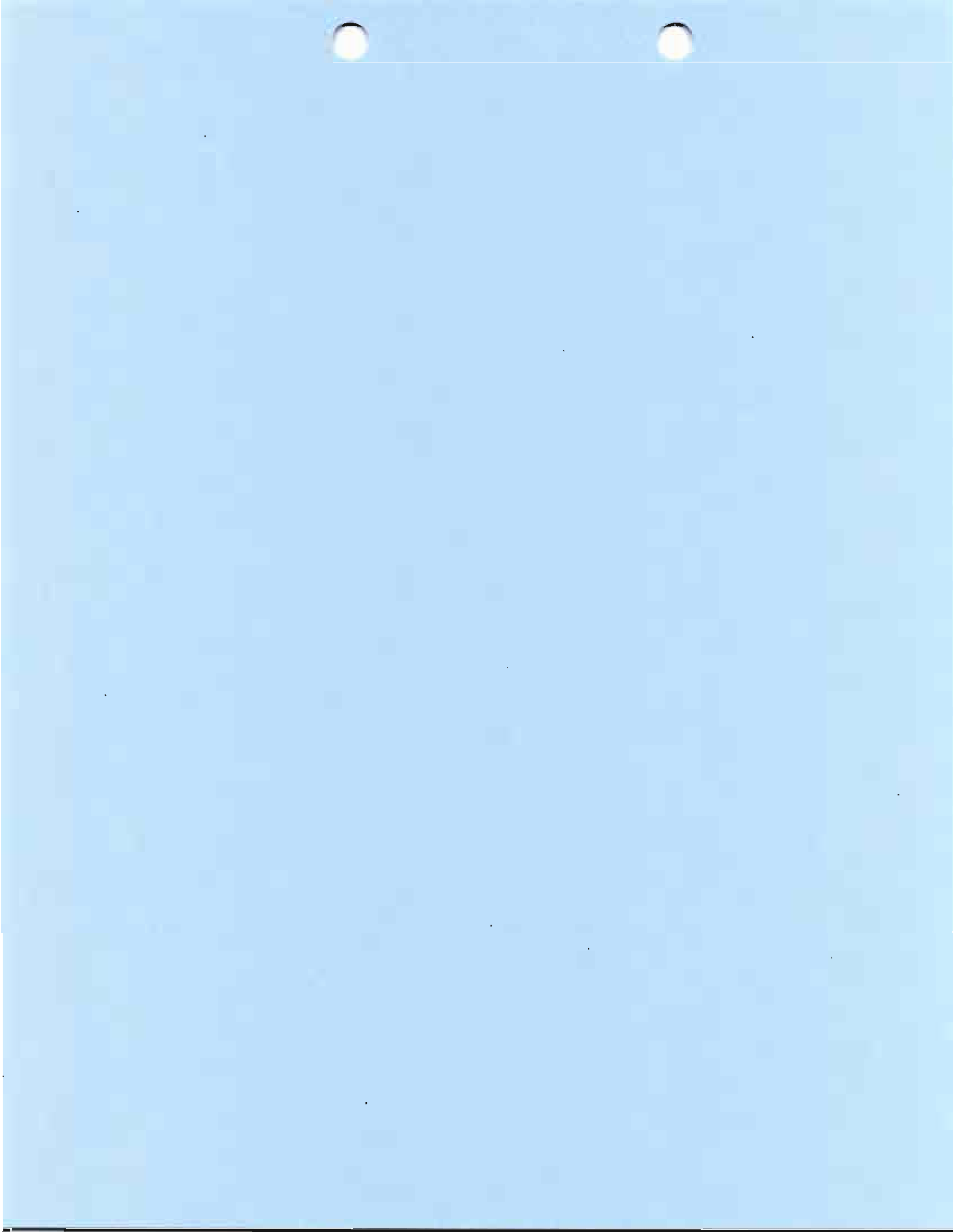
It might nonetheless be argued that prosecutors are sometimes justified in pushing the outer limits of zealousness in response to perceived truth-defeating tactics employed by defence counsel. Prosecutors may feel that they are sent into battle with a blunted sword, while their opponents' forensic weapons are sharpened to a razor's edge, and that self-defence can require aggressive measures.[47] There are two responses to this proposition. First, by relying upon the principle against self-incrimination, defence counsel is not defeating the truth but rather promoting his or her client's legitimate constitutional rights. To the extent that defence counsel obtains an advantage by reason of basic constitutional guarantees, the criminal justice system is simply operating as intended. Second, where defence counsel acts improperly, the idea that unethical retaliation by the prosecutor is justified should be rejected. For instance, how should a prosecutor respond to a personal attack by defence counsel in the summation to the jury? The tendency in Canada and in England is to discourage the "eye for an eye" response, because the result may be to create an impediment to a fair trial.[48] While the prosecutor can certainly respond to improper defence actions, the public interest does not allow a departure from normal ethical standards in doing so.

In a perfect world, the boundary between acceptably zealous advocacy by the Crown and impermissible prosecutorial abuse would always be clear and not open to disagreement. But drawing fine lines in black and white is not realistic. The controversy over the acceptable degree of advocacy practised by Crown counsel will probably never cease, given the dynamics of the adversary system and the inherent tension between a prosecutor's dual roles as minister of justice and forceful advocate.

---

47 B. Civiletti, "Prosecutor as Advocate" (1979) 25 N.Y.L. Sch. L. Rev. 1 at 17–19.

48 See, for example, *R. v. Peruta* (1992), 78 C.C.C. (3d) 350 (Que. C.A.) [*Peruta*]; Pannick, *supra*, at 114–19. In contrast, it seems that in the United States the doctrine of "invited response" has been applied to justify vigorous reaction to aggressive defence behaviour.



Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

TAB 1B

The Role of the Crown Prosecutor as a Minister of Justice

The Law Society of Manitoba

La Société du Barreau du Manitoba

CODE OF

PROFESSIONAL CONDUCT

CODE DE

DÉONTOLOGIE PROFESSIONNELLE

Adopted by the Benchers of the
Law Society of Manitoba on February 1st, 1992

Adopté par les conseillers de
la Société du Barreau du Manitoba le 1er février 1992

Relevant Passages from the Manitoba Law Society *Code of Professional Conduct* (1992), ch. 9, "The Lawyer as Advocate"

...

Commentary

...

Duties of Prosecutor

9. When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.

21. Cf. CBA 1(2); N.B. C-12; ABA EC's 7-13, 7-14, DR 7-103; *Orkin* at pp. 116-20.
"It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.", per Rand, J. in *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24.
See also *Richard v. The Queen* (1960), 126 C.C.C. 255 per Bridges, J.A. at p. 280; *Regina v. Lalonde* (1972), 5 C.C.C. (2d) 168; and Martin, "Preparation for Trial", Law Soc. U.C. Special Lectures (1969) p. 221 at 235 *et seq.*

22. Cf. CBA 2(6); N.B. C-6; IBA B-5; ABA EC 7-24, DR 7-106(C)(4).

Relevant Passages from the Manitoba Law Society *Code of Professional Conduct* (1992), Appendix, "Canons of Ethics Legal Ethics"

...

CANONS OF LEGAL ETHICS

1. To the state

...

> 2. When engaged as a public prosecutor [a lawyer's] primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused.

...

Relevant Passages from the Canadian Bar Association *Code of Professional Conduct*, ch. IX, "The Lawyer as Advocate"

Commentary

...

Duties of Prosecutor

9. When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused. There is a clear distinction between prosecutorial discretion and professional conduct. Only the latter can be regulated by a law society. A law society has jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown prosecutors in connection with their prosecutorial discretion.

...

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Preamble", pp. 2-3

Crown Counsel as an Advocate

The role of Crown counsel as an advocate has historically been characterized as more a "part of the court" than an ordinary advocate.

A prosecutor's responsibilities are public in nature. As a prosecutor and public representative, Crown counsel's demeanor and actions should be fair, dispassionate and moderate; show no signs of partisanship; open to the possibility of the innocence of the accused person and avoid "tunnel vision." It is especially important that Crown counsel avoid personalizing their role in court. Objectionable cross-examination or immoderate jury addresses are the antithesis of the proper role of the Crown.

The adversarial system in which we operate requires our participation as strong advocates, but it also is seriously flawed if the "adversaries" are not evenly matched. We have, therefore, a special duty to the accused and his counsel so that they may fully and fairly place their evidence and arguments before the courts.

...

Relevant Passages from *R. v. Regan* (S.C.C., 2002), paras. 151-161

[2002] 1 S.C.R. 297 (Binnie J., dissenting on other grounds)

...

151 It is clear that Crown Attorneys perform an essential "Minister of Justice" role at all stages of their work. Their role in considering or carrying forward a prosecution is of the highest importance for the integrity of our criminal justice system, and was perhaps most famously described by Rand J. in Boucher, supra, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Many other statements of the highest authority can be found to the same effect. In Stinchcombe, supra, Sopinka J. for the Court stated as follows, at p. 341:

> The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high.

152 In R. v. Bain, [1992] 1 S.C.R. 91, Gonthier J. for himself, McLachlin and Iacobucci JJ., dissenting on other grounds, stated at p. 118:

> The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors.

153 In Nelles v. Ontario, [1989] 2 S.C.R. 170, Lamer J. (as he then was) for himself, Dickson C.J. and Wilson J., stated at p. 191:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate".

154 See also Lemay, supra, per Cartwright J., dissenting on other grounds, at p. 257: "[T]he sole object of the proceedings is to make certain that justice should be done".

155 The "Minister of Justice" responsibility is not confined to the courtroom and attaches to the Crown Attorney in all dealings in relation to an accused person whether before or after charges are laid. It is a responsibility "that should be conducted without feeling or animus on the part of the prosecution" (R. v. Chamandy (1934), 61 C.C.C. 224 (Ont. C.A.), per Riddell J.A., at p. 227).

156 These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus -- either negative or positive -- towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

...

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 8, "Independence and Accountability in Decision Making" (2005)

...

9.3 The Conduct of Criminal Litigation

The responsibilities placed on Crown counsel as law officers of the Crown flow from the special obligations resting on the office of the Attorney General of Canada. As a result, Crown counsel are subject to certain ethical obligations which may differ from those of defence counsel.

The Attorney General and his or her agents are vested with very substantial discretionary powers. Public interest considerations require Crown counsel to exercise judgment and discretion which go beyond functioning simply as advocates. Counsel appearing for the Attorney General are considered "ministers of justice", more part of the court than proponents of a cause. Fairness, moderation, and dignity should characterize the conduct of Crown counsel during criminal litigation. This does not mean that counsel cannot conduct vigorous and thorough prosecutions. Indeed, vigour and thoroughness are important qualities in Crown counsel. Criminal litigation on the part of the Crown, however, should not become a personal contest of skill or professional pre-eminence.

The conduct of criminal litigation is not restricted to the trial in open court. It also encompasses the prosecutorial authority of Crown counsel leading up to trial -- for example, the decision to prosecute, referring an alleged offender to an alternative measures program, disclosure, the right to stay proceedings or withdraw charges, elect the mode of trial, grant immunity to a witness, prefer indictments, join charges and accused, consent to re-elections, and consent to the waiver of charges between jurisdictions. Crown counsel's obligation to ensure the integrity of the prosecution continues throughout the litigation process.

Both in and out of court, Crown counsel exercise broad discretionary powers. Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or amounts to an abuse of process. Accordingly, counsel must exercise this discretion fairly, impartially, in good faith and according to the highest ethical standards. This is particularly so where decisions are made outside the public forum, as they may have far greater practical effect on the administration of justice than the public conduct of counsel in court.

In the conduct of criminal prosecutions, Crown counsel have many responsibilities. The following are among the most important.

9.3.1 The duty to ensure that the responsibilities of the office of the Attorney General are carried out with integrity and dignity

Counsel can fulfil this duty:

* by complying with applicable rules of ethics established by their bar association;

* by exercising careful judgment in presenting the case for the Crown, deciding what witnesses to call, and what evidence to tender;

* by acting with moderation, fairness, and impartiality;

* by not discriminating on any basis prohibited by s. 15 of the Charter;

* by adequately preparing for each case;

* by not becoming simply an extension of a client department or investigative agency; and

* by conducting plea and sentence negotiations in a manner consistent with the policy set out in this deskbook.

9.3.2 The duty to preserve judicial independence

Counsel can fulfil this duty:

* by not discussing matters relating to a case with the presiding judge without the participation of defence counsel;

* by not dealing with matters in chambers that should properly be dealt with in open court;

* by avoiding personal or private discussions with a judge in chambers while presenting a case before that judge; and

* by refraining from appearing before a judge on a contentious matter when a personal friendship exists between Crown counsel and the judge.

9.3.3 The duty to be fair and to appear to be fair

Counsel can fulfil this duty:

* by making disclosure in accordance with the policy set out in this manual;26

* by bringing all relevant cases and authorities known to counsel to the attention of the court, even if they may be contrary to the Crown's position;

* by not expressing personal opinions on the evidence, including the credibility of witnesses, in court or in public;

* by being conscious of the factors that can lead to wrongful convictions, such as false confessions and mistaken eyewitness identification;

* by zealously guarding against the possibility of being afflicted by "tunnel vision"27, through close identification with the investigative agency and/or victim, or through pressure by the media and/or special interest groups;

* by remaining open to alternative theories put forward by the defence;

* by not expressing personal opinions on the guilt or innocence of the accused in court or in public;

* by asking relevant and proper questions during the examination of a witness and by not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skilful and probing, yet still show respect for the witness;

* by respecting the court, defence counsel, the accused, and the proceedings while vigorously asserting the Crown's position; and

* by never permitting personal interests or partisan political considerations to interfere with the proper exercise of prosecutorial discretion.

Lawyers and Ethics

Professional Responsibility and Discipline

Gavin MacKenzie
of the Ontario Bar

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6.2 WHO IS THE CLIENT?

Prosecutors often make decisions that, in civil litigation, would be made by clients rather than lawyers.[23] Their duty is to serve the public interest. They do not have clients in the conventional sense.

Prosecutors do, however, have constituencies. These include, most importantly, the police, victims of crime, other government officials, and the judiciary. Each of these constituencies attempts to influence prosecutorial decisions in much the same way clients attempt to influence the decisions that must be made in any litigation. None, however, can accurately be described as the prosecutor's client.

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20 James Mills, *The Prosecutor* (New York: Farrar, Straus and Giroux, 1968), p. 25.

21 Charles Wolfram, *Modern Legal Ethics* (St. Paul, Minnesota: West, 1986), pp. 759-760.

22 25 Law Notes 228 at 231, quoted by Mark Orkin, *Legal Ethics: A Study in Professional Conduct* (Toronto: Cartwright & Sons, 1957), p. 120.

22.1 *R. v. Moscuzza*, 54 O.R. (3d) 459. The roles of the Crown and the police in relation to the laying of criminal charges is discussed in section 6.3, *infra*.

23 Monroe H. Freedman, *Lawyers' Ethics In An Adversary System* (New York: Bobbs-Merrill, 1975), p. 79.

Prosecutors in subordinate roles should regard the prosecutor to whom they report as their client in relation to matters on which policies have been established or specific directions given. Subject to that qualification, the prosecutor's client is the public.[24]

6.3 THE CHARGING DECISION

In three Canadian jurisdictions, namely British Columbia, Quebec, and New Brunswick, Crown Attorneys decide whether criminal prosecutions should be initiated. In all other Canadian jurisdictions, this decision is made by the police.[25] In all jurisdictions, the decision whether to continue a prosecution or ask that charges be stayed, withdrawn, or dismissed, is made by prosecutors.

Each of these decisions has important consequences. Because the process becomes public when a charge is laid, the charging decision is particularly crucial. A public announcement that a person has been charged with an offence often causes as much damage to that person as does a conviction. The expense of defending a criminal case can be considerable, but in most cases, considerations of cost pale in significance in comparison to the personal trauma and damage to reputation sustained by the accused person.[26]

In British Columbia, the sole function of some Crown Attorneys is to review investigative reports to decide whether charges recommended by the police should be approved. The Crown Attorneys who perform this function have been directed as a matter of policy to approve charges only if they are satisfied on the evidence available (including evidence reflecting the likely defence, if available) that (i) there is a substantial likelihood of conviction and (ii) it is in the public interest that a prosecution should be undertaken.

The Ministry of the Attorney General policy in which this two-pronged test is articulated makes it clear that the substantial likelihood of conviction standard is significantly stricter than either the *Criminal Code*'s reasonable and probable grounds test or a *prima facie* case test. Factors that the policy requires the Crown Attorney to weigh in considering the second prong of the test include the nature and seriousness of the allegations, the personal circumstances of the accused (including his or her criminal record), the likelihood of achieving the desired result by means other than a criminal prosecution (such as an established diversion process), the harm suffered by the victim, and the cost of the prosecution compared to the social benefit to be gained by it.[27]

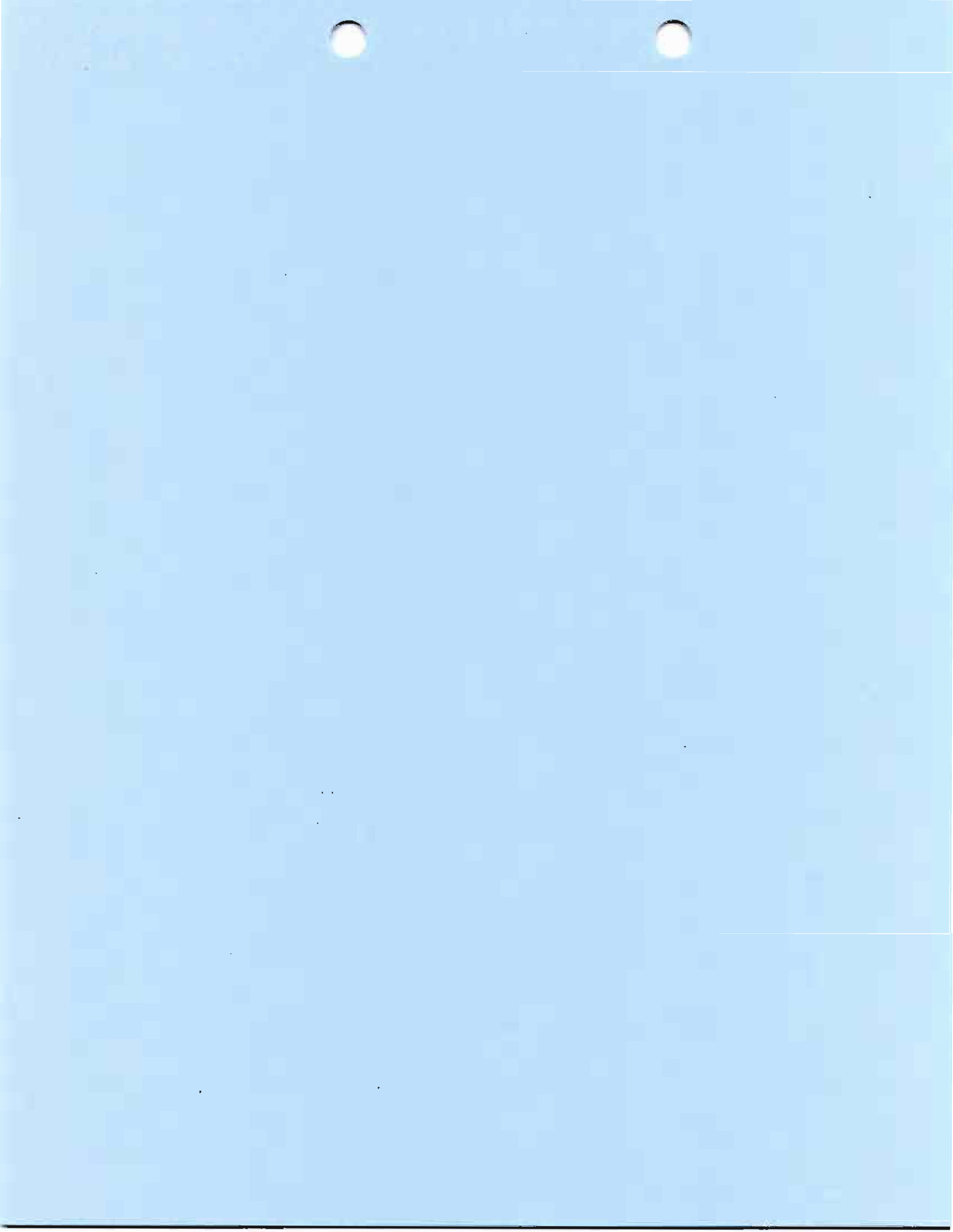
Proponents of the traditional system, which remains in place in most other provinces, contend that the British Columbia charge approval system erodes the independence of the police. Proponents of the British Columbia system argue that

24 Wolfram, *supra*, note 21, pp. 759-760.

25 Stephen Owen, *Report of the Discretion to Prosecute Inquiry (the Owen Report)*, vol. 1 (Vancouver: British Columbia Ministry of the Attorney General, 1990), p. 29.

26 *Ibid.*, p. 25.

27 *Ibid.*, pp. 13-15.



Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

TAB 1C

The Role of the Crown Prosecutor as an "Officer of the Court"

The Law Society of Manitoba

La Société du Barreau du Manitoba

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Adopté par les conseillers de
la Société du Barreau du Manitoba le 1er février 1992

Chapter 9

THE LAWYER AS ADVOCATE

RULE

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.[1]

Commentary

Guiding Principles

1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law"[2] must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.[3]

Prohibited Conduct

2. The lawyer must not, for example:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party;[4]

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;[5]

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer that give rise to real or apparent pressure, influence or inducement affecting the impartiality of such officer;[6]

(d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a tribunal or any of its officials by any means except open persuasion as an advocate;[7]

(e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;[8]

45

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;[9]

(g) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established;[10]

(h) deliberately refrain from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;[11]

(i) dissuade a material witness from giving evidence, or advise such a witness to be absent;[12]

(j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another;

(k) needlessly abuse, hector or harass a witness;

(l) needlessly inconvenience a witness.

Relevant Passages from the Manitoba Law Society *Code of Professional Conduct* (1992), Appendix, "Canons of Legal Ethics"

...

CANONS OF LEGAL ETHICS

...

2. To The Court

1. His conduct should at all times be characterized by candor and fairness. He should maintain towards the Judges of the Courts a courteous and respectful attitude and insist on similar conduct on the part of his client, at the same time maintaining a self-respecting independence in the discharge of his professional duties to his client.

2. Judges, not being free to defend themselves, are entitled to receive the support of the Bar against unjust criticism and complaint. Whenever there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities.

3. He should not offer evidence which he knows the Court should not admit. He should not, either in argument to the Court or in address to the jury, assert his personal belief in his client's innocence, or in the justice of his cause, or as to any of the facts involved in the matter under investigation.

4. He should never seek to privately influence, directly or indirectly, the judges of the Court in his favor, or in that of his client, nor should he attempt to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort.

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ESSENTIALS OF
CANADIAN LAW

LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

SECOND EDITION

ALLAN C. HUTCHINSON

Distinguished Research Professor
Osgoode Hall Law School, York University

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D. DUTY TO COURT AND PROFESSION

Although the professional rules are permeated with reminders that lawyers should be zealous partisans of their clients' cause and that they should place their clients' interests ahead of all others, there are also limits to such obligations. The two primary ones are based on lawyers' duties to the courts and to the profession generally. While these requirements are accepted and established, their precise reach and force are predictably uncertain. Indeed, the Rules give little guidance as to how lawyers should resolve any competing demands and duties. This difficulty is shared with constitutions, statutes, and other regulatory schemes (see chapter 3). However, it seems reasonable and fair to suggest that the wording and structure of the professional rules, as well as the ethical pull of a less traditional and more subtle account of professional responsibility, would recommend that the duties to court and profession trump those to clients. Accordingly, it is crucial that lawyers have a firm grasp of the overarching responsibilities they owe to institutions and persons other than their clients.

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19 See S. Ellmann, "Client Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups" (1992) 78 Virginia L. Rev. 1103.

Loyalty to the client is tempered by lawyers' duty to be honest. If the adversary system is to have any chance of working, the court must be able to rely on the fact that it is not being fed out-and-out lies. As advocates, lawyers are under a duty to use tactics that are legal, honest, and respectful of courts and other tribunals. They must be courteous to the court and the opposing party. In particular, they ought not to employ strategies that are intended to mislead the court or to influence decisions by anything other than open persuasion. Lawyers should not mislead courts about clients' agreements with one or more parties (see IX, Commentary, ss. 1, 2, 14, 17, and 18), though difficulties arise when it comes to "omissions"—in the sense of failing to bring relevant evidence before the court. Speaking generally about the barrister's duty, Lord Denning framed the issue in characteristic grandiloquent style:

> [The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. . . . He must produce ~~all the relevant authorities, even those that are~~ against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.[20]

20 *Rondel v. Worsley*, [1966] 3 W.L.R. 950 at 962–63 (C.A.), and *Rondel v. Worsley*, [1969] 1 A.C. 191 at 227 (H.L.), Reid L.J.

21 *Meek v. Fleming*, [1961] 2 Q.B. 366 (C.A.).

CRIMINAL LAW ETHICS

Michael Code*

A. INTRODUCTION: COUNSEL'S "DUAL ROLE" IN THE ADVERSARY SYSTEM

The criminal law is executed, almost exclusively, through the medium of court room trials. The form of trial adopted in this country is the adversary system where the case is presented to the trier by two opposing parties, each entitled to be represented by counsel. The trial can be shortened, for example, by a guilty plea where certain essential facts are admitted, but the means of resolving a criminal accusation is still some kind of adversarial trial, leaving aside exceptional practises such as mediation and diversion.

Given this context, it is not surprising that the most important ethical duties and dilemmas in the criminal law can all be traced back to the roles that counsel for the Crown and counsel for the defence are expected to play in the adversarial system of trial. The simplistic view is that the Crown is not entitled to take a purely adversarial position but must act as a quasi-judicial minister of justice whereas defence counsel is entitled to take a purely adversarial approach. For example, in the case of *R. v. Boucher*,[1] Justice Rand famously described the Crown's role in these non-adversarial terms:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [Emphasis added.]

In a similar vein, Justice Sopinka described defence counsel's contrasting role as "purely adversarial" in *R. v. Stinchcombe*:[2]

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* Assistant Professor, University of Toronto, Faculty of Law. I wish to thank Mr. Justice M. Rosenberg, Professor T. Farrow and David Layton who provided helpful comments on an earlier draft of this chapter.

[1] (1954), 110 C.C.C. 263 at 270 (S.C.C.).

[2] (1992), 68 C.C.C. (3d) 1 at 7 (S.C.C.).

conform to the known evidence; questions about the detailed facts underlying the accused's criminal record, especially a prior conviction for assault; and questions about alleged welfare fraud that had not resulted in any criminal conviction. What principles relating to ethical conduct by Crown counsel were or were not violated in this cross-examination? See: *R. v. Schell* (2000) 148 C.C.C. (3d) 219 (Ont. C.A.).

C. THE ETHICAL DUTIES OF "OFFICERS OF THE COURT"

Both parties to a criminal proceeding, when represented by Crown counsel and defence counsel, are constrained from engaging in certain forms of highly adversarial behaviour. This is because both counsel are "officers of the court". As Mark Orkin explains in the passage from his text on *Legal Ethics*, quoted earlier in this chapter, lawyers were regarded as part of the apparatus of the courts from earliest times. Indeed, the courts and the legal profession both began to emerge in the 13th century in England, in tandem, as independent component parts of a single institution committed to the administration of justice.[22]

The high standards of conduct in court proceedings, imposed on all members of the legal profession by virtue of their status as "officers of the court", were famously described by Crompton J. in the Irish seditious conspiracy case, *R. v. O'Connell et al.*:[23]

> This Court in which we sit is a temple of justice; and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertainment of the truth, and the instrument which our law presents to us for the ascertainment of the truth or falsehood of a criminous charge is the trial by Jury; the trial is the process by which we endeavour to find out the truth. ... That learned Counsel described the Advocate as the mere mouth-piece of his client; he told us that the speech of the Counsel was to be taken as that of the client; and thence seemed to conclude that the client only was answerable for its language and sentiments.
>
> Such, I do conceive, is not the office of an Advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons—he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law—he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet

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[22] *Supra* note 7 at pp. 4-13.

[23] (1844), 7 I.L.R. 261 at 312-313 (Q.B.).

he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer.

The best known modern statement of the duties of an "officer of the court" is Lord Reid's speech in *Rondel v. Worsley*, already quoted above.[24] The speech of Lord Upjohn, in the same case,[25] helpfully catalogues some of the additional duties of "officers of the court", not mentioned by Crompton J. in *O'Connell*:

I may, however, mention some duties cast on the barrister; if in a civil case the client produces a document which may be nearly fatal to his case it is the duty of counsel to insist on its production before the court; the client may want counsel to drag his opponent through the mire by asking a number of questions in cross-examination in the hope that the opposition may be frightened into submission. Counsel here has equally a duty to the court not to cross-examine the opposition save in accordance with the usual principles and practice of the Bar. In a criminal case it is the duty of counsel not to note an irregularity and keep it as a ground of appeal to the Court of Appeal (Criminal Division) but to take the point then and there. This may be seriously prejudicial to his client's case (see *R. v. Neal*). Counsel is equally under a duty with a view to the proper and speedy administration of justice to refuse to call witnesses, though his client may desire him to do so, if counsel believes that they will do nothing to advance his client's case or retard that of his opponent. So it is clear that counsel is in a very special position and owes a duty not merely to his client but to the true administration of justice. It is because his duty is to the court in the public interest that he must take this attitude.

In the leading Australian case, *Giannarelli v. Wraith*, Chief Justice Mason provided a similar description of counsel's duties as "officers of the court":[26]

The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest.

...

The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.

It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.

[24] *Supra* note 6.
[25] *Supra* note 6 at p. 1034.
[26] (1988), 165 C.L.R. 543 at paras. 10-12 (H.C. Aust.).

It can be seen that all of the above descriptions of counsel's duties as "officers of the court" tend to place a premium on counsel's honesty and integrity. The reason for this focus is that a lack of honesty and integrity, amongst lawyers who are empowered to call the case in an adversarial system of justice, will quickly undermine the search for truth and justice which is posited as the primary goal of the court system. As Lord Morris explained in his speech in *Rondel v. Worsley*:[27]

> I think that it must be true to say, as was said in *Swinfen v. Lord Chelmsford*, that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern. The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices. To a certain extent every advocate is an amicus curiae. [Emphasis added.]

In conclusion, it can be seen that there are a number of ethical rules that all fall under the broad umbrella of duties of "officers of the court". They include at least the following:

- Counsel must not knowingly mislead the court on the facts applicable to a case, either by leading false evidence or, more commonly, by misstating the evidence when making argument;
- Counsel must not knowingly mislead the court on the law applicable to a case, either by misstating the governing authorities or, more commonly, by omitting a relevant case or statutory provision that is against the position being advanced;
- Counsel must not note an error of fact or law made by the trial judge and then keep it secret, to be used later as a ground of appeal, instead of drawing the matter to the trial judge's attention so that it can be corrected at trial;
- Counsel must not make frivolous arguments or call unnecessary witnesses or ask unnecessary questions of a witness or unduly protract the proceedings in any manner, for example, for the purpose of wearing down an opponent;

[32] For a more detailed discussion of the rule against "incivility", see: Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97.