

The Lawyer's Ethical Responsibilities When Their Clients Face Unrepresented Adversaries

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Models of Lawyering

- Competing meanings of “Good” lawyering: serves the public interest; ethical aspirations; good skill/technique/performance; generate lots of business/\$\$\$.
- How do these roles and values conflict with, or complement, one another, especially as expressed in models of lawyering?
 - Loyal advocacy (traditional)
 - Moral agent in the pursuit of justice (aspirational)
 - Integrity (pragmatic)

Traditional Models

- **Emphasizes the relationship between the lawyer and the client,** prohibiting or restricting the extent to which the lawyer can consider the interests of stakeholders other than the client and factors other than advancing the interests of the client.

Traditional Models

Three key aspects of traditional models: principle of neutrality, principle of non-accountability, principle of partisanship.

- Principle of Neutrality: lawyer must not allow their own view of the moral merits of the client's objective or character to affect the diligence or zealousness with which they pursue the client's lawful objectives.
 - Personal opinions do not matter—should be banished from thought
- Principle of Non-Accountability: lawyers are not to be judged by the moral status of the client's projects
- Principle of Partisanship: lawyer must, within the established constraints on professional behaviour, maximize the likelihood that the client's objectives will be attained.

Traditional Models

- Key difference between traditional models: level of zealousness.
- Hyper-zeal: a lawyer will attempt to secure “any advantage obtainable for her client through the law”.
 - Lord Brougham: “[A]n 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, among 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”.
- It may be difficult (or even impossible) to practice the hyper-zealous model of lawyering while respecting rules of professional conduct
- Mere-zeal: the lawyer works to achieve for the client all that the client is legally entitled to obtain under law, with “no obligation to pursue interests that go beyond the law”.
 - Tim Dare, “Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers”

Alternative Models

Alternative models of lawyering

- Call for the lawyer to **take moral accountability** (or more moral accountability) for their own legal practice and for the legal services that they provide to the client.
- Lawyer's duties go beyond the duty to pursue the client's legal interests and also beyond certain minimal duties to the court (such as the duty to not present false evidence to the court). Even have a duty to consider **third parties and stakeholders**.

Alternative Models

- Consideration of the interests of other parties will usually involve some boundaries that the lawyer will not cross to pursue the client's interests.
- E.g. Legal ethicist **Allan Hutchinson** (in *Fighting Fair*) proposes that lawyers should consider concepts such as **collateral damage and proportionality** to avoid causing undue harm to third parties and even to adversaries.

Integrity

2.1 “A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity”.

Lawyer as Advocate

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Lawyer as Advocate Cont'd

- Rule 5.1-1, Comment [5], “A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.”
- Comment [6], “When opposing interests are not represented... the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.”
- Comment [7], “The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent”.

Lawyer's Oath

- LSO By Law 4, s. 21: required oath to practice law in Ontario

I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability.