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Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good: Foreword

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FOREWORD

Lonnie T. Brown, Jr.*

In all types of law practice, attorneys are routinely called upon to make difficult ethical judgment calls. The ethical line-drawing that often takes place in the context of controversial or high-profile cases, however, can be uniquely challenging. Indeed, the very decision to undertake a representation of this nature is fraught with ethical and pragmatic concerns uncommon to typical legal matters.

Usually, in assessing whether or not to accept representation of a client, lawyers must address such issues as competency, conflicts

* Copyright © 2010 by Lonnie T. Brown, Jr. All rights reserved. Professor of Law, University of Georgia School of Law. B.A., Emory University, 1986; J.D., Vanderbilt Law School, 1989. Professor Brown thanks Jill Coveny Birch, Executive Director of Alumni Programs and Special Events, and Lisa C. Mathis, Event Coordinator, for all of their hard work and dedication in making the Symposium possible.
of interest, and fee structure. The character of these preliminary inquiries changes rather dramatically, though, when the prospective client is Saddam Hussein, for example. While the ethical rules proclaim that "a lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities," in reality, this platitude seems wishful, at best. As a practical matter, most attorneys must acknowledge and consider the potential negative effect that representing a vilified or infamous client may have on their law practice, or that of their firm. Two contemporary examples underscore the reality of this observation.

First, in 2007, then-Deputy Assistant Secretary of Defense for Detainee Affairs Charles D. Stimson strongly suggested that the corporate clients of attorneys who were representing Guantanamo detainees might consider finding other counsel. In particular, in reference to the major law firms carrying out such representations, Stimson stated: "I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms . . . ."

More recently, the conservative advocacy group "Keep America Safe"—co-founded by Liz Cheney, daughter of former Vice President Dick Cheney—similarly targeted certain attorneys within the

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1 For guidance on these issues, see MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) ("Competence"); id. R. 1.5 ("Fees"); id. R. 1.7 ("Conflict of Interest: Current Clients"); id. R. 1.8 ("Conflict of Interest: Current Clients: Specific Rules"); id. R. 1.10 ("Imputation of Conflicts of Interest: General Rule"); and id. R. 1.11 ("Special Conflicts of Interest for Former and Current Government Officers and Employees"). The Model Rules, promulgated by the American Bar Association (ABA), have been adopted in substantial part by virtually every U.S. jurisdiction as the governing ethical principles for attorneys. See Status of State Review of Professional Conduct Rules, http://www.abanet.org/cpr/jcll/ethics_2000_status_chart.pdf.

2 Featured Symposium speaker former U.S. Attorney General Ramsey Clark served as defense counsel for Saddam Hussein in connection with his prosecution before the Iraqi High Tribunal for various alleged war crimes, which culminated with Hussein's execution in December 2006. For a detailed discussion and analysis of Mr. Clark's representation, see Lonnie T. Brown, Jr., Representing Saddam Hussein: The Importance of Being Ramsey Clark, 42 GA. L. REV. 47, 91-129 (2007).

3 MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(b).

Department of Justice (DOJ) who represented detainees on a pro bono basis prior to joining the DOJ.\textsuperscript{5} In a now notorious internet video, the group refers to the DOJ as the “Department of Jihad,” ominously calls into question the allegiance of these lawyers, and demands the right to know their identities—“So who did President Obama’s Attorney General Eric Holder hire? [A]ttorneys who represented or advocated for terrorist detainees. Who are these government officials? . . . Whose values do they share? Tell Eric Holder Americans have a right to know the identities of the al Qaeda 7.”\textsuperscript{6}

In both instances, the overwhelming response from members of the legal profession was outrage.\textsuperscript{7} The fallout from Stimson’s unfortunate comments was severe enough to precipitate his resignation.\textsuperscript{8} The “Keep America Safe” video elicited an equally forceful rebuke from a number of influential conservative attorneys, including former Special Prosecutor and Solicitor General Kenneth Starr and former Deputy Attorney General Larry Thompson.\textsuperscript{9} In a letter responding to the video, these attorneys decried the attacks on the DOJ lawyers as “shameful” and maintained that:

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See Harry H. Schneider Jr. & Thomas P. Sullivan, Have You No Shame, Ms. Cheney?, CHI. TRIB., Mar. 17, 2010, at 21, available at http://www.chicagotribune.com/news/opinion/ct-oped-0317-lawyers-20100317,0,6883554.story (describing recently released video as “suggesting that certain Department of Justice lawyers were less than loyal and could not be trusted to represent the interests of the U.S. because they previously represented Guantanamo detainees”).
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See, e.g., Walter Dellinger, A Shameful Attack on the U.S. Legal System, WASH. POST, Mar. 5, 2010, at A19, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/04/AR2010030404181.html (“The only word that can do justice to the personal attacks on these fine lawyers—and on the integrity of our legal system—is shameful. Shameful.”: Lewis, supra note 4 (“Lawyers represent people in criminal cases to fulfill a core American value: the treatment of all people equally before the law. To impugn those who are doing this critical work—and doing it on a volunteer basis—is deeply offensive to members of the legal profession, and we hope to all Americans.” (quoting then-ABA President Karen J. Mathis) (internal quotation marks omitted)).
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To suggest that the Justice Department should not employ talented lawyers who have advocated on behalf of detainees maligns the patriotism of people who have taken honorable positions on contested questions. Whatever systems America develops to handle difficult detention questions will rely, at least some of the time, on an aggressive defense bar; those who take up that function do a service to the system.¹⁰

Notwithstanding the noble and spirited defense mounted on behalf of the maligned attorneys, these two episodes highlight the regrettable truism that lawyers who take on controversial cases may find themselves questioned or judged based upon the clients that they represent. Although many of us within the profession applaud those who are courageous enough to defend the seemingly indefensible, others may challenge the wisdom or morality of drawing the ethical line in that manner.¹¹

Similar questions can legitimately be raised with regard to the decisions of prosecutors in relation to when, whether, and with what crimes to charge a high-profile or controversial target.¹² Likewise,

¹¹ See, e.g., Monroe Freedman, Must You Be the Devil's Advocate, LEGAL TIMES, Aug. 23, 1993, at 19, reprinted in MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 383–85 (3d ed. 2004) (questioning Michael Tigar's decision to represent reputed Nazi war criminal John Demjanjuk and arguing that lawyers can and should be held morally accountable for their client representation choices); Ronald Goldfarb, Lawyers Should Be Judged by the Clients They Keep, WASH. POST, Apr. 6, 1997, at C3, reprinted in STEVEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 374 (8th ed. 2009) (discussing the decision of attorneys at Cravath, Swaine & Moore to represent a Swiss bank in a dispute with families of Holocaust victims and maintaining that lawyers "should sit in judgment of those who walk into [their] offices—or be prepared to be judged by the company [they] keep"). For a contrary perspective, see Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, LEGAL TIMES, Sept. 6, 1993, at 22, reprinted in FREEDMAN & SMITH, supra, at 385–88 (forcefully responding to Monroe Freedman's questioning of Tigar's decision to represent John Demjanjuk).
¹² In one of the articles that follow, Anthony Barkow and Beth George argue for raising the current federal charging threshold—"probable cause"—to "beyond a reasonable doubt" in an effort to enhance the public's perception of federal prosecutors, particularly in high-profile matters. See Anthony Barkow & Beth George, Prosecuting Political Defendants, 44 GA. L.
in the civil arena, one's choice of client—perhaps the manufacturer of a singularly dangerous or defective product—can subject a lawyer or a law firm to widespread public disdain.

Once the decision to accept a representation or to bring criminal charges has been made, the ethical line-drawing going forward can also present unique challenges. There are, of course, limits on how far a lawyer is permitted to go in advocating on behalf of a client, or in prosecuting a defendant. But are these limits more likely to be stretched or exceeded in controversial matters?

In 1820 Lord Henry Brougham, in defending Queen Caroline against a charge of adultery, famously proclaimed that:

[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, 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.

See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."); id. R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."); id. R. 3.4(a) ("[A lawyer shall not] unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."); id. R. 3.4(b) ("[A lawyer shall not] falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."); id. R. 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

See, e.g., id. R. 3.8(a) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."); id. R. 3.8(g) (delineating prosecutor's responsibilities to disclose exculpatory evidence); id. R. 3.8(h) ("When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."); see also Lonnie T. Brown, Jr., "May It Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 112-17 (2004) (discussing Rule 3.8's special limitations on prosecutors).

See FREEDMAN & SMITH, supra note 11, at 71–72 (alteration in original) (quoting LORD HENRY BROUGHAM, TRIAL OF QUEEN CAROLINE 8 (1821)).
More recently, noted criminal defense attorney and law professor Abbe Smith wrote that: “No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients.”

Are these the types of line-drawing standards that should govern one’s zealous representation of a criminal defendant? If so, do they have any place outside of the criminal defense context—in the prosecutorial arena, for example? Are lawyers handling controversial matters justified in being myopically fixated upon achieving their client’s or the state’s objectives, whatever the costs? Or is there a point at which the interests of the system or perhaps even the public must take precedence, requiring that unbridled zeal and loyalty take a backseat?

Such fascinating questions were skillfully examined during the 10th Annual Legal Ethics and Professionalism Symposium, “Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good.”

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17 In one of the articles that follow, Professor Laurie Levenson critically examines the expanding problem of prosecutors publicly advocating in the media regarding their cases. See generally Laurie L. Levenson, Prosecutorial Sound Bites: When Do They Cross the Line?, 44 GA. L. REV. 1021 (2010).

18 An example discussed by the Symposium Panel devoted to the “Public Good” was the well-publicized case of Alton Logan. Logan was convicted in 1982 for first degree murder and sentenced to life in prison. Public defenders Dale Coventry and Jamie Kunz represented Andrew Wilson, who confessed to them that he was actually the perpetrator of the murder for which Logan had been convicted. Bound by the attorney–client privilege, the lawyers remained silent for twenty-six years, until Wilson died, which freed them to disclose the information based on Wilson’s prior consent. Was the lawyers’ adherence to the attorney–client privilege and their duty of confidentiality appropriate under the circumstances, or should the “public good” have required that some sort of an exception be made? For a discussion of the Logan case and a proposal for reform, see Colin Miller, Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney–Client Privilege, 102 NW. U. L. REV. COLLOQUIY 391 (2008), available at http://www.law.northweste rn.edu/lawreview/colloquy/2008/22.

19 This annual Symposium rotates between the University of Georgia School of Law, Mercer University Walter F. George School of Law, Emory University School of Law, and Georgia State University College of Law, and is made possible through an endowment created by a consent decree entered by the Honorable Hugh Lawson of the U.S. District Court for the Middle District of Georgia. That decree settled allegations of litigation misconduct in exchange for a substantial financial contribution that helps fund the annual ethics and professionalism symposia.
follow provide a glimpse into the difficult ethical line-drawing that was engaged in by a distinguished and, at times, passionate array of panelists and presenters during the daylong event, which took place on October 16, 2009. Of particular note were the two featured speakers for the program—former U.S. Attorney General Ramsey Clark and former U.S. Attorney David C. Iglesias—both of whom are the very embodiment of central components of the Symposium’s theme.

During his tenure as U.S. Attorney, David Iglesias exhibited great character and resolve in steadfastly maintaining his integrity and independence as a prosecutor in the face of intense political pressure. Indeed, it seems that his uncompromising adherence to these ideals ultimately cost him his job, as he was among the seven U.S. Attorneys controversially removed from office by the Bush Administration in December 2006. Mr. Iglesias’s remarks, entitled A Prosecutor’s Non-negotiables: Integrity and Independence, provide a unique and captivating eyewitness portrayal of this disheartening episode within the DOJ.

Ramsey Clark, both as the chief prosecutor of the United States and as a private attorney, has never shied away from controversy.

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20 The lineup of panelists and moderators for the Symposium included: Anthony S. Barkow (Executive Director, New York University Law School’s Center on the Administration of Criminal Law); Ramsey Clark (former U.S. Attorney General); C. Ronald Ellington (A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism and Josiah Meigs Distinguished Teaching Professor Emeritus, University of Georgia School of Law); Lawrence J. Fox (Drinker, Biddle & Reath, Philadelphia, PA); Russell C. Gabriel (Director, Criminal Defense Clinic, University of Georgia School of Law); George C. Harris (Morrison & Foerster LLP, San Francisco, CA); Erica J. Hashimoto (Associate Professor, University of Georgia School of Law); Laura D. Hogue (Hogue & Hogue, Macon, GA); David C. Iglesias (former U.S. Attorney for the District of New Mexico); Laurie L. Levenson (Professor of Law & William M. Rains Fellow and David W. Burcham Chair in Ethical Advocacy, Loyola Law School, Los Angeles, CA); Clinton Keith Rucker (Senior Assistant District Attorney, Fulton County, GA); Donald F. Samuel (Garland, Samuel & Loeb, P.C., Atlanta, GA); Hon. Lawton Evans Stephens (Judge, Superior Court, Western Judicial Circuit, Athens, GA); John E. Stephenson, Jr. (Alston & Bird LLP, Atlanta, GA); Hon. Richard W. Story (Judge, U.S. District Court for the Northern District of Georgia, Atlanta, GA); Andrew W. Vail (Jenner & Block LLP, Chicago, IL); and Sally Quillian Yates (U.S. Attorney for the Northern District of Georgia, Atlanta, GA).


22 See id. at 942.

23 For a comprehensive discussion of circumstances surrounding Mr. Iglesias’s dismissal and that of the other U.S. Attorneys, see generally DAVID IGLESIAS, IN JUSTICE: INSIDE THE SCANDAL THAT ROCKED THE BUSH ADMINISTRATION (2008).
The strength of his character and commitment to preservation of the rule of law led him, as Attorney General, to prosecute the Boston Five, which included beloved pediatrician Dr. Benjamin Spock and respected clergyman Rev. William Sloane Coffin, for conspiracy to aid and abet draft evasion.\footnote{See Ramsey Clark, "How Can You Represent That Man?: Ethics, the Rule of Law, and Defending the Indefensible, 44 GA. L. REV. 921, 923–25 (2010).} At the other extreme, during his post-Attorney General career, Mr. Clark has represented a veritable "who's who" of individuals that many would categorize as "indefensible." Notable members of this lengthy list include Bosnian Serb leader Radovan Karadžić, deposed Yugoslavian President Slobodan Milošević, and perhaps most notorious of all, former Iraqi President Saddam Hussein.\footnote{See id. at 933–37. For further discussion of these and other of Ramsey Clark's many controversial representations, see Brown, supra note 2, at 91–129.} In his remarks, How Can You Represent That Man?: Ethics, the Rule of Law, and Defending the Indefensible, Mr. Clark sheds a revealing light on the ethical and legal importance of undertaking such controversial representations.

In view of the current controversy surrounding certain DOJ attorneys,\footnote{See supra text accompanying notes 5–6, 9–10.} the remarks of both Mr. Iglesias and Mr. Clark are all the more pertinent and enlightening, and the timeliness of the Symposium's theme is underscored. The reflections and insights offered in the pieces that follow, as well as those expressed during the live portion of the Symposium, vividly expose the myriad issues that can arise in controversial representations, and demonstrate the necessity for very thoughtful drawing of the proverbial ethical line in this context.