

**THE ZEALOUS ADVOCATE IN THE 21ST CENTURY:
CONCEPTS AND CONFLICTS FOR THE CRIMINAL DEFENCE LAWYER**

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Abstract

The criminal defence lawyer is perhaps the most publicly identifiable and controversial figure in the criminal justice system, and is considered by many to represent the cornerstone of adversarial criminal justice. However, there is significant evidence that the context within which criminal defence lawyers operate in England and Wales is rapidly, and fundamentally, changing. Using a wide range of theoretical literature and commentary, the thesis begins by exploring theoretical constructions of the defence lawyer's role, and proceeds to an assessment of whether the traditional, theoretical, conception of the role remains relevant and useful in the context of the 21st century. It continues with an extensive exploration of modern, formal, regulation governing criminal defence lawyers in England and Wales, including relevant legislation, case law and professional conduct rules. The thesis aims to explore ethical conflicts in criminal defence work by identifying and analysing tensions between the various obligations owed by the defence lawyer. All of these issues are explored in the context of 'real-life' criminal defence practice through an empirical study, using the novel 'vignette technique' to simulate ethical conflicts that defence lawyers might face. Having explored theoretical, formal and practical conceptions of the defence role, the thesis draws conclusions about the usefulness and relevance of theory to the modern role, whether that theory is reflected both in formal regulation and in practice, and whether ethical conflicts pose a significant barrier to the functioning of the defence lawyer's role. Finally, using the research data, the thesis raises questions about the continuing validity of adversarial conceptions of criminal procedure in England and Wales, and makes proposals concerning the future of theoretical debate relating to the role of the criminal defence lawyer.

Statement of Objectives

The thesis aims to broaden knowledge of and interest in the work of criminal defence lawyers.

The thesis aims to delineate the role of the 21st Century criminal defence lawyer working in an adversarial context and consider how it has changed in recent years.

The thesis aims to explore whether a coherent 'theoretical' conception of the role (consisting of traditional, ideal obligations described by academic theorists) can be identified.

The thesis aims to establish a link between traditional theory and the modern role by exploring whether recent regulation and current practice reflect any theoretical conception.

The thesis aims to explore the role that ethical conflict plays in the working life of the criminal defence lawyer.

The thesis aims to utilize appropriate empirical methodology to further analysis of role of the criminal defence lawyer.

The thesis aims to consider what implications recent changes have for the future of theorising in this area and for English and Welsh adversarial criminal justice in general.

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Glossary of Terms

ABS – Alternative Business Structure

BSB – Bar Standards Board

BVC – Bar Vocational Course

CJSSS – Criminal Justice: Simple, Speedy, Summary

CPD – Continuing Professional Development

CPR – Criminal Procedure Rules

EU – European Union

ICC – International Criminal Court

ICTY – International Criminal Tribunal for the former Yugoslavia

LDP – Legal Disciplinary Practice

LPC – Legal Practice Course

LSC – Legal Services Commission

MOJ – Ministry of Justice

PACE – Police and Criminal Evidence Act

SRA – Solicitors Regulation Authority

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CHAPTER 1 – Introduction

1. Introduction

The criminal defence lawyer exists to advance and protect some of the most fundamental rights of citizens in liberal democratic societies, and is considered a vital aspect of an accused person's right to a fair trial.¹ It is likely that most people in England and Wales automatically assume that, should they get into trouble with the law, they will be provided with a lawyer to defend them. It is also probable that citizens assume that said lawyer will be on 'their side', that he or she will be suitably qualified and competent to protect their interests, and that they will work diligently for them and them alone. Defence lawyers are entrusted with critical responsibilities within the criminal justice system; yet, those who require their services are unlikely to fully question their role or duties. Equally, as this thesis will demonstrate, few British academics have devoted attention to scrutinising the nature of the criminal defence lawyer's role, which is multi-faceted, complex, uncertain and debatable. Its definition is layered and derived from many sources. Furthermore, the role has been the subject of significant change in recent years. This thesis aims to examine the role of the adversarial criminal defence lawyer in depth, by critically analysing both academic and regulatory expressions of the role and empirically exploring the duties and dilemmas attached to this most ancient and unique symbol of adversarial legal culture.

2. Why explore the role of the criminal defence lawyer?

It is at least arguable that most practitioners working in the criminal justice system, and academics studying it, recognise the defence lawyer as a crucial component in an effective justice process. Yet, it is also arguable that a majority of those outside of this narrow section of the legal-academic community misunderstand and undervalue the importance of the role. This is particularly the case amongst the public:

"A Delegate of the Estate of Real People would probably ask "Aren't most good lawyers 'bad people.' Don't they represent horrible clients and use clever technicalities to thwart true justice?"²

¹ In England and Wales, this is guaranteed by Article 6 of the 'European Convention on Human Rights', which has effect through the *Human Rights Act 1999*.

² Brown R. (1999) *The 'Good Person' Question: Valid Query or Hobson's Choice?* – 2 J. Inst. For Study Legal Ethics, 154.

Many in the 'estate of real people' have little or no notion of what duties and obligations bind defence lawyers. The Roman poet Horace stated that "[l]awyers are men who hire out their words and anger",³ and such sentiments summarise the prevailing attitude of outsiders to lawyers. This animosity is even more acute when applied to criminal defence lawyers. As men and women paid to shield potential offenders, criminal defence lawyers are regarded almost as traitors to justice who "do a job that few people understand and many people revile."⁴ Raymond Brown described the profession as "disdained, mocked and unappreciated in both the popular and the legal culture".⁵

There appears to be at least some truth in these claims. Images of and references to the criminal defence lawyer are, and have been, part of popular culture for generations, depicting this iconic figure in a variety of ways, sometimes misleading, contradictory and confusing. Fictional American defender Perry Mason would almost always emerge victorious in trials, proving his client to have been falsely accused, something that is rare in reality. Mason described how rivals called him "a dangerous antagonist"⁶ and a "shyster",⁷ but claimed to "have never stuck up for a criminal"⁸ being only interested in "the orderly administration of an impartial justice".⁹ Whilst Perry Mason appears to be an heroic protector of the innocent, other examples are much less favourable. The classic thriller 'Cape Fear' tells the story of a criminal defence lawyer who is stalked by his former client because he deliberately botched the client's defence at trial. The film suggests that the lawyer, in betraying his client, was not only treacherous and cowardly, but in some ways responsible for his own plight. Yet, viewers are also encouraged to empathise with the lawyer; his actions caused the insane client to be incarcerated, which might be interpreted as a noble act. Another example is criminal justice drama 'Law and Order UK', in which one defence barrister is portrayed as "devious and without the burden of principles"¹⁰ who "uses every trick in the book to get his client off".¹¹ This image of the "louche, self-serving defence barrister" was described as being a "typically

³ Quotations of Wisdom: Horace - <http://www.quotationsofwisdom.com/view/Horace/6060.html>: **Last accessed 13/08/2010.**

⁴ Arguedas C. (1996-1997) *Duties of a Criminal Defense Lawyer* – 30 Loy. L.A.L. Rev., 9.

⁵ Brown R. (1996) *A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer* – 30 Loy. LAL Rev., at p.21

⁶ Gardner E.S. (1933) *The Case of the Velvet Claws*.

⁷ Ibid.

⁸ Gardner E.S. (1943) *The Case of the Drowsy Mosquito*.

⁹ Ibid.

¹⁰ 'Law and Order UK: Season 1 Episode Guide' - <http://www.universal-playback.com/law-order-uk/season-1>: **Last accessed 13/08/2010.**

¹¹ Ibid.

British legal-drama trap”.¹² In contrast, recent BBC drama ‘Garrow's Law’ portrayed defence lawyer William Garrow as righteous, brave and ethical, as well as stubborn and disobedient. These fictional examples have helped shape the public image of the criminal defence lawyer. They are dramatic exaggerations of certain aspects of criminal defence, which is to some extent understandable. However, the majority tend to perpetuate the enduring image of defence lawyers as deceptive, untrustworthy and enemies of *real* justice, stifling more balanced and realistic accounts of the work of criminal defenders. In addition, this negative conception of the defence lawyer discourages people from learning more about their role - they are simply dismissed. This situation should be redressed.

Alongside the general public are the worlds of legal practice and legal academia. Outside of the circles of specialists in legal professional ethics and criminal justice, one would strongly suspect that there is a lack of detailed knowledge about the role of the criminal defence lawyer. In England and Wales, this has been perpetuated by a lack of focused research into criminal defence lawyers and their work. American writers have dominated the debate about legal ethics. David Luban, Monroe H. Freedman and William H. Simon, amongst others, have written extensively on the obligations and duties of adversarial lawyers over the past forty years. Of those, only Freedman has written with specific reference to criminal defence lawyers, a seminal example being ‘Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions’.¹³ In addition, no concerted attempt has been made to espouse a robust framework of principles defining the role.¹⁴ In contrast, few British academics have endeavoured to explore the concept of the criminal defence lawyer, resulting in a severely under-developed body of academic discourse. In their exploration of ethics and ideals central to the adversarial legal profession, Donald Nicholson and Julian Webb¹⁵ stressed that “[i]n order that these principles do not remain at the level of pure aspiration without much meaningful content, they need to be fleshed out by commentaries setting out their rationale and underlying values.”¹⁶ That is a primary aim

¹² Graham A. (2009) *Law & Order: UK - Monday 23 February - Programme Details - Radio Times* – www.radiotimes.com.

¹³ Freedman M. (1965-1966) 64 Mich. L.R., 1469.

¹⁴ Of course, a variety of formal codes of conduct exist in adversarial jurisdictions. However, no codes exist purely for guiding defence lawyers and there has yet to be a comprehensive catalogue of traditional principles underpinning the defence role. See Chapter 3 for more about the codes of conduct in England and Wales.

¹⁵ Nicholson D., Webb J., (1999) *Professional Legal Ethics* – Oxford: Oxford University Press.

¹⁶ *Ibid.*, 281.

of this thesis.

The criminal defence profession itself has, to an extent, contributed to this situation by failing to educate outsiders about the role they play. It has been suggested that "[t]he typical practicing lawyer barely has time to breathe much less the leisure to contemplate abstract theoretical questions"¹⁷ and "that questions about the moral conduct of lawyers and broader issues affecting the entire justice system are frequently evaded."¹⁸ Arguably, this has allowed popular misconceptions about defence lawyers to germinate in the minds of the public and the broader legal profession. More crucially, a lack of self-definition has granted government the opportunity to shape the future of criminal defence with little resistance from anyone outside of the criminal defence profession; this is well-exemplified by the raft of high-profile legislation, such as the *Criminal Procedure Rules 2010*, which has directly affected criminal defence work. As such, it is argued that "[t]he thinking criminal lawyer must reject the notion that she lives in a separate, self-governing ethical world".¹⁹ The days of exclusive self-regulation by the legal profession are long dead, and if defence lawyers are to counter-act any detrimental change to the nature of their work, then they must take responsibility for defining their role. I hope that this thesis will promote debate about the criminal defence lawyer's role and encourage this sort of action, by both academics and professionals.

The criminal defence lawyer's role has undergone significant change, particularly in the last decade. To some extent, this has generated confusion and uncertainty about what the defence lawyer's role is in the 21st Century. There are now more potential ethical conflicts for defence lawyers to resolve than ever before. Some academics have also suggested that many of the changes to the defence lawyer's role herald a shift away from an adversarial criminal process, towards a more inquisitorial, continental style of criminal justice. Whether such claims have credence or not, it seems timely to explore the modern defence lawyer's role and assess whether it has altered and what the implications of any change are. Moreover, the broader question of whether adversarialism is being undermined in England and Wales is undoubtedly worthy of attention. This thesis aims to shed some light on these issues.

¹⁷ Brown R. (1999) *The 'Good Person' Question: Valid Query or Hobson's Choice?* – 2 J. Inst. For Study Legal Ethics, 156.

¹⁸ Ibid.

¹⁹ Ibid., 160.

3. Research Questions

This thesis has one overarching question:

What is the role of the criminal defence lawyer in the modern era?

In answering this, I have identified three guiding research questions:

1. Is there a coherent 'theoretical' conception of the role of the adversarial criminal defence lawyer?
 - In relation to this question, I intend to explore three issues: why one should look at 'theoretical' conceptions of the adversarial of the role; where one looks for 'theoretical' conceptions of the role; and what principles define any coherent 'theoretical' conception of the role.
2. Does any coherent 'theoretical' conception constitute a useful and relevant reflection of the role of the modern practitioner?
 - In relation to this question, I intend to explore six issues: what 'formal' conceptions of the role exist in England and Wales; how do 'formal' conceptions compare with any 'theoretical' conception of the role; do 'conflict points' exist within 'theoretical' and 'formal' conceptions of the role; are any 'conflict points' resolved by regulation in England and Wales; what 'practical' conceptions of the role exist in England and Wales; and how, if at all, do practitioners resolve any 'conflict points' in their everyday role.
3. What implications do my findings have for any 'theoretical' conception of the role?
 - In relation to this question, I will consider what the future of theorizing the criminal defence lawyer's role holds and explore what implications my findings have for the wider adversarial tradition in England and Wales.

4. Thesis Structure

Answering these research questions will involve five stages, spread over seven chapters:

- STAGE 1 - Chapter 2 will propose and critique a coherent, theoretical conception of the role; this framework of ideal principles is entitled the 'zealous advocate' model. The model will be a foundation for the rest of this thesis, acting as a reference point for examination and analysis of formal and practical conceptions and conflict points.
- STAGE 2 - Chapter 3 will examine formal conceptions of the role; formal regulation will be compared with the 'zealous advocate' model, with the aim of assessing whether formal duties and obligations reflect theoretical ones.
- STAGE 3 - Chapter 4 will explore tensions between the principles of the 'zealous advocate' model, referred to throughout this thesis as 'conflict points'. The chapter will examine conflict between the theoretical principles and whether they are resolved by academic discussion. Second, the chapter will examine conflicts between the principles as manifested in formal regulation, and whether these conflict points are resolved.
- STAGE 4 – Chapters 5, 6 and 7 will focus on an empirical study aimed at assessing how defence lawyers conceive of their role in practice and how, if at all, they resolve practical conflict points. Chapter 5 will explain the methodology employed in the study. Chapter 6 will analyse the opinions of practitioners about the duties that define their practical role, and compare their practical conceptions with both the theoretical model and formal conceptions. Chapter 7 will analyse the approach of practitioners to conflict points and will compare this with theoretical and formal resolutions.
- STAGE 5 – Chapter 8 will draw conclusions based on the research questions identified in this chapter; it will also outline implications for future theorising of the role of the criminal defence lawyer.

This thesis will focus on the importance and efficacy of 'theory'. In exploring this, it

can be said that three 'layers' of the criminal defence lawyer's role are examined – theoretical, formal, and practical.

5. 'Theoretical' conceptions of the role of the criminal defence lawyer

Theoretical conceptions of the role embody what might be called the 'soul' of criminal defence work. Theoretical duties and obligations are historic, traditional and abstract; they represent an ideal version of the role of the criminal defence lawyer, rather than an accurate account of the reality of the role. Theory is not meant to be prescriptive in the same way that codes of conduct or legislation are; theoretical discourse does not bind defence lawyers. Theoretical discussion is therefore normative, setting standards that are intended to shape and influence the regulation and practice of criminal defence work. It is designed to provide practitioners and academics with a knowledge and appreciation of the fundamental values underpinning the criminal defence role. The importance of the theory underlying the criminal defence lawyer's role is underestimated. Theory has defined and documented values which remain fundamental to criminal defence work today. On some level, all of the principles in this thesis pervade the modern regulation and practice of criminal defence lawyers. Theory is the foundation. For practitioners to only be aware of and refer to formal regulation is "to suggest that they function in a closed system that adequately defines their roles"²⁰ and as such "isolates them from the important ethical debates of the day."²¹ The role of the criminal defence lawyer does not operate in a vacuum. As Albert Alschuler suggested, "a system of justice must depend in substantial part on norms that cannot be captured in either procedural rules or rules of professional conduct"²² and quoted Lord Moulton, saying:

"True civilization is measured by the extent of obedience to the unenforceable."²³

The development of the criminal defence lawyer's role has been and should be influenced by theoretical, academic discussion. William Simon asserted that adversarial advocates have "a duty to understand the practices of advocacy in the light of their

²⁰ Ibid., 159.

²¹ Ibid.

²² Alschuler A. (1997-1998) *How to Win the Trial of the Century: The Ethics of Lord Brougham and the OJ Simpson Defense Team* – 29 McGeorge L. Rev., 319.

²³ Ibid.

underlying principles and to re-shape the practices to keep them consistent with these principles in the particular contexts in which the lawyer finds herself."²⁴ This thesis aims to promote such understanding. Its exploration of theory and its search for a coherent theoretical conception are designed to foster debate amongst academics and practitioners, in the hope that awareness of underlying theoretical values might strengthen criminal defence lawyers' sense of identity and act as an anchor during the role's inevitable evolution. Debate about theoretical legal ethics makes a positive contribution to the improvement of legal regulation and practice. Geoffrey Hazard suggested that the alleged public view that "lawyers are simply a plague on society"²⁵ was the result of the belief that "[l]awyers should have 'better' ethics".²⁶ He believed this could be achieved through "more-exacting requirements for education in 'professional responsibility'", "burgeoning of legal ethics as a subject of judicial decisions", "legal treatises" and "academic discourse".²⁷ Again, this thesis attempts to engage in this kind of debate.

Beyond theoretical discussion, the comparison of theoretical conceptions with formal regulation and practice is also important. Doing so represents a holistic approach to the study of the role of the criminal defence lawyer. It endeavours to integrate all potential definitions of the role, treating theoretical, formal and practical conceptions of the role as inter-related. It also recognises the importance of studying the influence of theoretical conceptions on the formal regulation and everyday practice of criminal defence work. In relation to social work professionals, Tom Wilks argued that "[q]uestions about the nature of the relationship between values and action are central to the study of social work ethics".²⁸

Similarly, Hugman and Smith suggested:

"Value statements may draw upon abstract or ideal notions, but at the same time they necessarily carry with them implications for the way in which individuals act".²⁹

²⁴ Simon W. (1998-1999) 'Thinking Like a Lawyer' *About Ethical Questions* – 27 Hofstra L.R., 9.

²⁵ Hazard G. (1990-1991) *The Future of Legal Ethics* – 100 Yale L.J., 1240.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 Qualitative Social Work 1, 79.

²⁹ Hugman R., Smith D. (1995) *Ethical Issues in Social Work* - London: Routledge, 2.

This thesis adopts a similar approach, seeking to understand the often unrecognised relationship between theoretical ideals, formal conceptions of the role and practice. Wilks continued:

"A certain philosophical perspective generates certain moral principles. These principles are then adopted as part of a system of operating rules by social workers, incorporated into their belief system, their thinking about what is right or wrong, and then used as guides for action."³⁰

The above process reflects the 'layers' explored in this thesis: a 'philosophical perspective' (theoretical conceptions) filters down to a 'system of operating rules' (formal conceptions), which are 'used as guides for action' (practical conceptions). In exploring the influence of theoretical conceptions on formal rules and everyday practice, it is important to remember that theoretical ethics are not necessarily the sole or even the primary driver behind formal or practical conceptions of the role. It would be naïve to expect rules to entirely reflect ideals; the two are distinct. In comparing theory with rules and practice, the influence of other factors, such as politics and economics, should be borne in mind. However, this thesis works on the premise that modelling formal and practical conceptions of the role on theoretical values is a beneficial pursuit, even if it is not entirely achievable. Exploring theoretical conceptions of the role is thus an important, interesting, influential and dynamic contribution to the clarification and improvement of criminal defence work.

6. 'Formal' conceptions of the role of the criminal defence lawyer

Formal conceptions of role exist in regulatory resources such as legislation and codes of conduct. Hazard argued that "traditional norms have undergone important changes . . . [o]ne important development is that those norms have become 'legalized'".³¹ This "legalization process"³² and the division it has arguably created between formal and theoretical conceptions are significant subjects of discussion. 'Legalization' translated traditional values and principles into finite, binding rules governing the work of

³⁰ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 Qualitative Social Work 1, 79.

³¹ Hazard G. (1990-1991) *The Future of Legal Ethics* – 100 Yale L.J., 1241.

³² *Ibid.*, 1242.

criminal defence lawyers. As Zacharias and Green summarised, "code drafters undertook the task of memorializing professional norms almost from scratch".³³ This thesis intends to assess whether elements of these theoretical norms have been lost in translation, and whether, as Hazard argues, this has resulted in "the disintegration of the profession's sense of self and of the 'narrative' that helped to define and defend its social boundaries."³⁴ In exploring the formal conception of the role of the defence lawyer, this thesis will focus on England and Wales. No jurisdiction operates a 'pure' adversarial system, but several can be classed as belonging to an adversarial tradition. Formal regulation varies between different adversarial jurisdictions; professional codes of conduct in the United States are not the same as those governing English and Welsh defence practitioners, even if they do have similarities. To consider the many jurisdictional variations of formal regulation would be untenable in terms of both space and time, thus it is necessary to focus on a specific adversarial jurisdiction. England and Wales is generally regarded as the archetypal adversarial system; it was therefore logical to focus on formal conceptions of the role in the jurisdiction that might be deemed the home of adversarialism. England and Wales was also a pragmatic choice, linguistically, financially and geographically.

Over the last 50 years, the legalization of traditional, theoretical norms has been the primary example of the regulation and definition of the role of the criminal defence lawyer and continues to be today. Hazard acknowledged this situation in 1991, stating that:

"'Legalized' regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. As a consequence, the dominant normative institution for the legal profession will no longer be . . . the profession as a substantially inclusive fraternal group."³⁵

He continued by suggesting that "[i]n the emergent 'legalized' era, increasingly dominant power reposes in government regulatory authorities, including courts, legislatures, and disciplinary agencies."³⁶ These public and private regulatory bodies

³³ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 *Geo. Wash. L. Rev.*, 47.

³⁴ Hazard G. (1990-1991) *The Future of Legal Ethics* – 100 *Yale L.J.*, 1242.

³⁵ *Ibid.*, 1279.

³⁶ *Ibid.*

are to some extent officially designated with the regulation of the legal profession. It is important to explore formal conceptions of the role because they represent a collection of authoritative definitions, both explicit and implicit, of the duties of criminal defence lawyers. Formal regulation goes beyond commentary; it is largely prescriptive, requiring certain behaviour of defence lawyers, and is intended to have practical application. As such, it would be remiss not to place formal conceptions of the role at the centre of any analysis of criminal defence work.

7. 'Practical' conceptions of the role of the criminal defence lawyer

Practical conceptions are not derived from written sources, but from the accounts of practitioners, that is, the everyday, real-life duties and obligations that they identify as describing (or prescribing) their working role. In this thesis, practical conceptions were explored through an empirical study, involving interviews with a sample of practicing defence lawyers. Further details of this study will be discussed in Chapters 5, 6 and 7. Exploring practical conceptions recognises that theoretical and formal conceptions do not necessarily reflect reality. It cannot be assumed that the requirements of codes of conduct or the principles in academic commentary carry into practice. Several questions may be answered by an exploration of the reality of criminal defence: do practical conceptions of the defence role reflect traditional conceptions? Is day-to-day practice influenced by such principles? Do practitioners have a sense of the theoretical roots of their profession? How different, if at all, are formal rules and real-life practice? Do practitioners encounter ethical conflicts and can they resolve them? Comparing theory and formal regulation with practical conceptions is a crucial test of their relevance and usefulness. After all, if they bear no resemblance to practice, then normative debate and 'binding' rules are essentially insignificant. Furthermore, the inclusion of a practical perspective in this analysis grounds theoretical and formal conceptions in reality. This makes them more relevant to some of the people this thesis is directed toward, including academics, legal practitioners, legislators, regulators and ordinary people with an interest in criminal justice issues. Examination of practical conceptions forms a link between the abstract and the concrete.

8. 'Conflict points'

In Chapter 2, I will construct a framework of principles representing a single, coherent account of the duties and obligations which make up the traditional defence role. Equally, this theoretical model will be used as a basis for comparison when exploring formal and practical conceptions of the role. The 'conflict points' that I identify are inconsistencies and clashes between these principles. The different principles are comparable with tectonic plates; when plates collide, the result can be destructive. Similarly, where principles contradict each other, the result can be counter-productive for the defence lawyer, defendant, court, the public and other affected parties. Conflict points have significant implications for theoretical, formal and practical conceptions of the criminal defence lawyer's role; what that role is depends on whether such conflicts can be resolved and, if so, how. Where the duties of the defence lawyer are undisputed, the role is clear. This allows easy comparison of theoretical, formal and practical conceptions of the role. However, where a conflict exists and its resolution is uncertain, defining the defence lawyer's role is more difficult. Furthermore, conflict points represent weakness in the integrity of the theoretical model; as in physics, placing a structure under pressure reveals its true strength.

Conflict points represent pressure points in the role and are signifiers of what is truly required of criminal defence lawyers. Wilk explained, "[i]t is the moral decision that reveals the nature of the values that underlie it . . . [m]oral dilemmas have therefore been regarded as key in understanding social work ethics".³⁷ They have influenced the direction of academic debate about the defence lawyer's theoretical role, and should continue to do so. Conflict points affect each conceptual layer of the role, but have essential practical significance. The identification of unresolved ethical conflicts should undoubtedly inform any future changes in legislation, professional codes, and regulatory materials which affect the role of defence lawyers in England and Wales. Formal guidance should make the role clearer and defence work easier to perform - vague or contradictory obligations are counter-productive in this sense. Practitioners must balance a variety of duties, like spinning plates: attending to all and dropping none. Conflict points present a direct challenge to this task and demand attention. Additionally, attempts at resolving ethical conflicts arguably represent a changing

³⁷ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 Qualitative Social Work 1, 79.

attitude toward the core adversarial principles in England and Wales, and a "weakening of the professional autonomy of defence lawyers".³⁸ It is now uncertain how far a defence lawyer can push the boundaries of rights such as the presumption of innocence and the right against self-incrimination to aid their client. This thesis will engage with the vital debate about the implications of conflict resolution for these rights.

9. Methodology

9.1 The Thesis Process

The thesis process has been evolutionary, originally taking a cross-jurisdictional approach aimed at capturing a multi-traditional snapshot of the defence lawyer's role. The thesis was also intended to focus more on formal regulation and definition of the role. However, as I undertook primarily preparatory research into the theoretical roots of adversarial and inquisitorial defence lawyers, my interest in and appreciation for the depth of the debate grew. Gradually, focus shifted toward an exploration of theoretical conceptions of the role, inspiring the desire to identify a coherent set of traditional principles underpinning the criminal defence role. My starting aim was to assess the role across two traditions and multiple jurisdictions using both black letter and empirical methodology. It became clear this would be practically difficult. I thus took the decision to concentrate on the adversarial tradition in one jurisdiction – England and Wales. Despite the narrowed scope, I believe this thesis has benefited; the analysis is richer, the range of materials and issues examined broader, and the questions posed and raised more incisive. Exciting as the original approach was, it was wise to choose pragmatism over idealism in researching one of the most fascinating figures in the criminal justice system.

9.2 Overview of Methodology

In approaching the task of characterising the role of the criminal defence lawyer in an adversarial system, I aimed to acquire as full a picture as possible. I wished to go beyond a mere recital of rules of conduct and statutes. In formulating the methodology for this research project, I paid attention to the advice of other academics on the pitfalls

³⁸ Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 Legal Ethics 1, 61.

of legal scholarship. Terence Daintith criticised legal education for creating mechanical scholars, unable to look beyond legislation and case law:

"Students are able to refer to whole catalogues of new legislation . . . [but] are incapable of reflecting on their activities at a theoretical, comparative and historical level."³⁹

This observation is particularly relevant to this thesis, given its extensive theoretical and historical basis, and its original focus. I did not want to become 'trapped' within the law in studying the criminal defence lawyer. For example, a positivist approach works on the premise that "law is autonomous, that there are discernible boundaries between law and morality, law and politics, and law and other disciplines" and that "law is a self-referential system that is capable of producing 'right' answers."⁴⁰ A positivist approach would provide only a partial insight into the role and might "fail . . . to capture the pragmatic, the instrumental, the institutional, and the bureaucratic elements that shape the law in action."⁴¹ The latter phrase summarises the focus of the empirical study, which was designed to capture the defence lawyer 'in action'.

One could describe this thesis as a form of 'gap study'. Roger Brownsword asserted that "gap studies focus on the ways in which the law-in-action deviates from the law-in-the-books (that is, from the image of law that is projected by the law-in-the-books)."⁴² Gap studies can expose "that the *de jure* position is one thing, the *de facto* practice sometimes quite another story",⁴³ and appropriately, Brownsword described how "the major contributions made by gap studies have been to highlight the gap in relation to . . . the practice of officials, regulators, and the like (where one might expect there to be a culture of compliance)."⁴⁴ This thesis aims to explore whether 'gaps' exist between different conceptions of the defence lawyer's role; the role in theory, the role in formal regulation and the role in practice.

³⁹ Daintith, T. (1989) *Legal Research and Legal Values* - 52 *Modern Law Review*, 362.

⁴⁰ Thornton M. (1998) *Technocentrism in the Law School* - 36 *Osgoode Hall Law Journal* 2, 372.

⁴¹ *Ibid.*

⁴² Brownsword R. (2006) *An Introduction to Legal Research* -

http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf: Last accessed 16/08/2010, 19.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

The methodology used to achieve this drew on social science research, as described by Nigel Gilbert:

"There are three ingredients in social research: the construction of theory, the collection of data and, no less important, the design of methods for gathering data."⁴⁵

Similarly, I constructed a theoretical framework and collected data about formal and practical conceptions in order to assess whether any gaps exist. The third 'ingredient' was pervasive, guiding the entire research process. However, my approach was more *ad hoc* than it was designed.

It is perhaps worth quoting Brownsword again, who in some ways describes the process in this thesis:

"Legal researchers rarely start with a sharply specified research question; they do not have some hypothesis to be tested; they do not have a clearly articulated methodology; and they do not have a clear sense of where their inquiry might lead. Much of the time they are reacting to a rapidly changing legal landscape and trying to say something helpful or interesting about what is going on; but they will often be able to put their research into some recognisable mould only when they have pretty much completed their inquiry."⁴⁶

The research process comprised three, broad methodological approaches: Doctrinal, socio-legal and empirical. Doctrinal, or 'black-letter', scholarship primarily involves the "exposition and analysis of legislation and case-law, the integration of statutory provisions and judicial pronouncements into a coherent and workable body of doctrine."⁴⁷ Its focus is on the strict letter of the law and the extraction of principles from it. As Brownsword explained:

"So-called 'black-letter' lawyers stick pretty close to the primary source materials, to the Constitution (where legal systems have one), to legislation

⁴⁵ Gilbert N. (2001) *Researching Social Life (2nd Ed.)* – London: SAGE, 14.

⁴⁶ Brownsword R. (2006) *An Introduction to Legal Research* – http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf: Last accessed 16/08/2010, 23.

⁴⁷ *Ibid.*, 3.

(statutes, statutory instruments, and so on) and to the leading case decisions (the precedents)."⁴⁸

Doctrinal analysis was mostly limited to Chapter 3 – the examination of formal conceptions of the role. Socio-legal research is "guided by a multi-disciplinary perspective"⁴⁹ and as such "may be more complex than traditional legal analyses".⁵⁰ Other disciplines include sociology, economics, political science, psychology, history, anthropology and others. In 1983, Harris noted that a burgeoning socio-legal community had been using "sociological methods of research . . . to study the legal profession"⁵¹ as well as "the provision of legal services",⁵² and claimed that "[t]here is still considerable scope for empirical, sociological studies of the legal profession".⁵³ This thesis reflects that tradition; much of the research conducted in the following chapters involves historical and moral perspectives on the role of the criminal defence lawyer. Importantly, Brownsword underlined that socio-legal studies "advocat[e] . . . empirical engagement with legal practice".⁵⁴ This thesis involved an empirical study of practical conceptions of the role, utilizing a method known as the 'vignette technique', which will be fully discussed in Chapter 5.

⁴⁸ Ibid., 4.

⁴⁹ Selznick, P. (2003) *Law in Context Revisited* - 30 *Journal of Law and Society* 2, 179.

⁵⁰ Ibid.

⁵¹ Harris D. (1983) *The Development of Socio-Legal Studies in the United Kingdom* – 3 *Legal Stud.*, 320.

⁵² Ibid., 321.

⁵³ Ibid.

⁵⁴ Brownsword R. (2006) *An Introduction to Legal Research* –

http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf: Last accessed 16/08/2010, 19.

**CHAPTER 2 - Theoretical Conceptions of the Role of the Criminal
Defence Lawyer: The 'Zealous Advocate' Model**

1. Introduction

This chapter will propose that one can identify a single, coherent theoretical conception of the criminal defence role in an adversarial system, embodied in a framework of traditional duties that the ‘classical’ criminal defence lawyer should uphold. Titled the ‘zealous advocate’ model, it is based on ethics and obligations discussed in a wide range of academic literature from adversarial jurisdictions (primarily the USA and UK). The ‘zealous advocate’ model has been built around the "standard conception"⁵⁵ of the defence lawyer's role, a theoretical construct emphasising the importance of loyal and non-judgmental defence of a client, otherwise known as "neutral partisanship".⁵⁶ The ‘standard conception’ forms the core of the ‘zealous advocate’ model. The term ‘zealous advocate’ derives from the body of doctrine urging defence lawyers to vigorously and single-mindedly pursue client interests, as espoused by Lord Brougham (see below at section 2). This aspect of the theoretical role is central. However, the ‘standard conception’ is in some respects a narrow interpretation of the traditional role ascribed to defence lawyers, only describing more widely recognised aspects of criminal defence theory. This chapter argues that other elements demand to be included in any theoretical conception of the defence lawyer’s role. Furthermore, no attempt has been made to construct a single, coherent model describing the traditional criminal defence role. Thus far, the ‘standard conception’ and other disparate theoretical ideas have simply constituted "fragmentary conceptions of the lawyer's role vying inconclusively for dominance".⁵⁷ The ‘zealous advocate’ model aims to draw together all theoretical conceptions of the defence lawyer’s role, describing a robust set of traditional principles. The model thus aims to expand upon the foundation of the ‘standard conception’. Whilst accepting that academic discussion and normative frameworks are always subject to debate, this chapter intends to challenge the notion that theory is inconclusive.

It seems imperative to define certain terms and expressions that will be used throughout this thesis. ‘Criminal defence lawyers’ are *any* qualified professionals engaged to advise or represent clients suspected of or charged with criminal offences. The terms ‘criminal justice’ and ‘criminal justice process’ include all situations where a criminal

⁵⁵ Luban D. (1988) *Lawyers and Justice* – Princeton: Princeton University Press, 51.

⁵⁶ Nicolson D., Webb J. (2004) *Lawyer's Duties, Adversarialism and Partisanship in UK Legal Ethics* – 7 Legal Ethics 2, 134.

⁵⁷ Schneyer T. (1984) *Moral Philosophy's Standard Misconception of Legal Ethics* – Wis. L. Rev., 1569.

defence lawyer might be required to provide representation and advice to a client, for example a police station or trial. The 'adversarial' legal tradition is an 'ideal' conception. Classical adversarial systems, best exemplified by England and Wales and the USA, are based on the concept of a contest between "two equal parties, seeking to resolve a dispute".⁵⁸ Each side presents a partisan account of the events in open court after which a tribunal of fact will decide which version they believe to be the truth. This contest is 'refereed' by a neutral and passive judge, whose role is to ensure that the rules of the contest are respected. The rationale behind this system is that through "free and open competition of the facts"⁵⁹ the jury can reach the right decision. The adversarial culture assumes that "real equality of parties and the dialectical process of persuasion"⁶⁰ regulated by objective enforcement of the rules, will lead to 'the truth'.

2. The Historical Foundations of Theoretical Conceptions

The 'zealous advocate' model is derived from the modern (20th and 21st Century) and historical commentary and opinion of academics, philosophers and legal practitioners. It is important to consider the historical literature, statute and cases which first established the principles that are today regarded as vital to the effectiveness of criminal defence, and which started a lengthy and spirited debate about legal ethics. The concept of the criminal defence lawyer was a necessary development in the adversarial culture of two opposing parties and the English legal system represents the oldest, archetypal model. Involvement of defence counsel is a relatively recent feature of adversarial justice; as Langbein states, "the lawyer-conducted criminal trial appeared late in English legal history, and quite rapidly".⁶¹ Throughout most of the 17th Century, representation by "defence counsel was still forbidden . . . [and] . . . prosecution counsel was virtually never employed".⁶² Yet, some of the founding duties of defence lawyers were openly discussed. In 1648, Law Commissioner Whitelock stated that the duties of an advocate ". . . consist in three things; secrecy, diligence and fidelity."⁶³ He elaborated, describing 'secrecy' as a duty to act as someone to whom a client could "lay open his evidences,

⁵⁸ Harding C. (1995) *Criminal Justice in Europe: A Comparative Study* - Oxford: Oxford University Press, 42.

⁵⁹ Samaha (1988), in Reichel P. (2005) *Comparative Criminal Justice Systems* - New Jersey: Pearson/Prentice Hall, 169.

⁶⁰ Harding C. (1995) *Criminal Justice in Europe: A Comparative Study* - Oxford: Oxford University Press, 42.

⁶¹ Langbein J. (2003) *The Origins of Adversary Criminal Trial* - Oxford: Oxford University Press, 2.

⁶² Ibid.

⁶³ Cranston R. (1995) *Legal Ethics and Professional Responsibility* - Oxford: Clarendon Press, 6.

and the naked truth of his case",⁶⁴ 'diligence' as the requirement to give "a constant and careful attendance and endeavour in his clients' causes"⁶⁵ and 'fidelity' as a duty to act as someone "the client trusts with his livelihood".⁶⁶ This early, definitive statement laid the foundations for emerging theoretical conceptions of the role of defence counsel. By the late 17th Century, a series of treason trials saw innocent defendants convicted due to judicial impartiality and perjury, leading to the conclusion that the accused should have "partisan helpers".⁶⁷ The resultant *Treason Trials Act 1696* allowed the accused, under s.1, "to make his full Defense, by Counsel learned in the law", but in treason trials only. This symbolised a significant rejection of the rationale that defence counsel "would interfere with the court's ability to have the accused serve as an informational resource"⁶⁸ and lent weight to the importance of the duties identified by Commissioner Whitelock.

By the 1730s, defence lawyers were allowed in common felony trials, a policy designed to "correct the imbalance that had opened between the unaided accused and a criminal prosecution that increasingly reflected the hand of lawyers and quasi-professional thieftakers".⁶⁹ The approach of defence lawyers became aggressively partisan and "[this] growing intensity of counsel's activity bespoke a changed ethos of defensive representation".⁷⁰ This also saw the emergence of conflict between the duty of fidelity to the client and "[the] view of advocacy in which fidelity to the truth should have placed bounds upon counsel's service to the client."⁷¹ The rise of the partisan defender was exemplified by William Garrow, described as "one of the finest criminal lawyers of the day."⁷² Garrow spent 10 years at the Old Bailey in the 1780s establishing a notorious reputation, "especially as a defense counsel."⁷³

Garrow was "the archetype of the contentious advocate, zealous on his client's behalf and merciless to his opponents",⁷⁴ adopting an approach to criminal defence which

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Langbein J. (2003) *The Origins of Adversary Criminal Trial* – Oxford: Oxford University Press, 3.

⁶⁸ Ibid., 2.

⁶⁹ Ibid., 168.

⁷⁰ Ibid., 306.

⁷¹ Ibid., 307.

⁷² Landsman S. (1989-1990) *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England* – 75 Cornell L.R., 532.

⁷³ Beattie J. (1991) *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* – 9 Law & Hist. Rev., 239.

⁷⁴ Landsman S. (1989-1990) *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth*

"helped to establish a new tone, a new intention, in the defense of prisoners in the criminal courts in this period."⁷⁵ Garrow would defend a prisoner "with impressive zeal and vigor"⁷⁶ and rarely hesitated in using "brutal and nasty tactics to advance a client's cause."⁷⁷ On occasion, Garrow did recognise that he owed duties not only to the client but to the court, accepting in one case that "he had acted 'with improper zeal on the part of my client' but he had intended no disrespect to the 'great and brave and venerable and learned judges of the law of England'".⁷⁸ Garrow's legacy was his single-minded and unyielding defence of those accused of criminal offences, which represented "the clearest demonstration that adversarial attitudes and methods had come to dominate the courtroom."⁷⁹

The now renowned words of Henry Lord Brougham are widely regarded as the "classic articulation"⁸⁰ of defence advocacy, and permeate all modern descriptions of the role of the traditional criminal defence lawyer:

"[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."⁸¹

Brougham was charged with the defence of Queen Caroline, the estranged wife of George IV. On ascending to the throne in 1820, the King sought to have Caroline stripped of her title by introducing the *Bill of Pains and Penalties* in the House of Lords; the ensuing debate in the House is popularly referred to as 'the Trial of Queen

Century England – 75 Cornell L.R., 565.

⁷⁵ Beattie J. (1991) *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* – 9 Law & Hist. Rev., 239.

⁷⁶ Landsman S. (1989-1990) *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England* – 75 Cornell L.R., 562.

⁷⁷ *Ibid.*, 553.

⁷⁸ Beattie J. (1991) *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* – 9 Law & Hist. Rev., 246.

⁷⁹ Landsman S. (1989-1990) *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England* – 75 Cornell L.R., 565.

⁸⁰ Hazard G. (1990-1991) *The Future of Legal Ethics* – 100 Yale L.J., 1244.

⁸¹ 2 The Trial of Queen Caroline 3 (1821).

Caroline'.⁸² Brougham, acting as the Queen's counsel, conducted her defence against accusations of adultery. The above statement "has stood as the ideal of zealous representation for English and American lawyers for almost two centuries since then",⁸³ and has undoubtedly coloured academic commentary, case law and legislation relating to criminal defence. For example, in *Queen v. O'Connell*⁸⁴, defence counsel were required to exercise zeal as "warm as [their] heart's blood"⁸⁵, whilst in *Kennedy v. Broun*⁸⁶, they were described as being bound to "exert every faculty and privilege and power in order that [they] may maintain [their] client's right".⁸⁷

The philosophy has attracted criticism as well as praise. Ray Patterson described it as having done "more to corrupt the concept of the lawyer's duty to the client than any other single comment"⁸⁸ while Dos Passos believed that "the great name of Lord Brougham is still used . . . to sustain many ridiculous and false positions of advocates."⁸⁹ David Field described it as "unsound in theory and pernicious in practice" and concluded that "a more revolting doctrine scarcely ever fell from any man's lips".⁹⁰ Claude Savage questioned the single-minded nature of Brougham's philosophy in less dramatic fashion, claiming that "[the] viewpoint, with the greatest respect, cannot be accepted in its entirety without any reservation or delimitation."⁹¹ Gerald Gold concluded that Brougham's philosophy was "not in the mainstream of English thinking even in 1846".⁹² In 1859, Brougham himself described his famous speech as "anything rather than a deliberate and well-considered opinion. It was a menace, and addressed chiefly to George IV".⁹³ Some theorists⁹⁴ have interpreted this as a retraction of the

⁸² For further discussion, see Lacquer T. (1982) *The Queen Caroline Affair: Politics as Art in the Reign of George IV* – 54 *The Journal of Modern History* 3.

⁸³ Freedman M. (2006) *Henry Lord Brougham, Written By Himself* – 19 *Geo. J. Legal Ethics*, 1215.

⁸⁴ (1844) 7 *Ir. L.R.*, 261.

⁸⁵ *Ibid.*, 312.

⁸⁶ (1863) 13 *CB(NS)* 677.

⁸⁷ *Ibid.*, 737.

⁸⁸ Patterson R. (1980) *Legal Ethics and the Lawyer's Duty of Loyalty* – 29 *Emory Law Journal* 909, 910.

⁸⁹ Dos Passos J. (1907) *The American Lawyer: As He Was, As He Is, As He Could Be* – New York: The Banks Law Publishing Co., 134. It should be noted that Dos Passos was a commercial lawyer. Although much of the general discourse on lawyer ethics is also applicable to criminal defence, in this instance (and others) the discussion is not focused on whether Brougham's ethic was appropriate for criminal defence lawyers, but for lawyers more generally. Thus, such criticism should perhaps be regarded as less valuable as a commentary on the criminal defence lawyer's role.

⁹⁰ 'The Study and Practice of the Law' (originally published in the *Democratic Review* (1844)), in Haar C. (1965) *The Golden Age of American Law* – New York: George Braziller, 33.

⁹¹ Savage C. (1958-1959) *The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial* – 1 *Crim. L.Q.*, 166.

⁹² Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 *Clev. Marshall L. Rev.*, 65.

⁹³ Forsyth W. (1875) *The History of Lawyers Ancient and Modern* – Reprinted by the Lawbook Exchange (1998), 380.

ethic of partisanship, arguing that, "[it] surely sounds like a repudiation, not an endorsement".⁹⁵ In contrast, Freedman argued that "the fact that the statement had been delivered as a 'political menace' was precisely what made it so powerful and, at the same time, demonstrated just how far a lawyer should be prepared to go on behalf of the client."⁹⁶ However, Brougham later restated his philosophy in his autobiography with slightly different, but significant, wording. He seemingly retracted the claim that protection of the client was "his first and only duty", replacing it with the phrase, "the highest and most unquestioned of his duties".⁹⁷ This telling departure seemed to be a fairly unambiguous signal that Brougham regarded the traditional role of the criminal defence lawyer as comprising several duties – not, as has been suggested many times, singular fealty to the client.

By the early 19th Century, theoretical conceptions of the role of the criminal defence lawyer as a 'zealous advocate' were well developed. The criminal trial had become much more than "an opportunity for defense counsel to test the prosecution case";⁹⁸ it was an arena for vigorous and steadfast defence advocacy on behalf of the accused. However, it is arguable that the concept of the 'zealous advocate' had only partly evolved. As the criticisms of Brougham's philosophy indicate, theoretical obligations to justice and morality were emerging alongside those owed to the client. The American case of *Rush v. Cavanaugh*⁹⁹ "helps explain early developments in professional responsibility."¹⁰⁰ The attorney, Rush, prosecuted a third party for forgery on behalf of Cavanaugh. However, at an early point, Rush concluded that Cavanaugh's accusations were false and consequently withdrew the forgery charge. Cavanaugh branded his lawyer a "cheat"¹⁰¹ and Rush commenced slander proceedings against his former client. At the crux of *Rush v. Cavanaugh* was the issue of whether the latter was justified in calling the former a 'cheat', a matter which hinged upon how well Rush had fulfilled his role as a prosecutor. Although the case applies most directly to prosecutors, Pennsylvanian Chief Justice John Gibson's words have application to the legal profession generally. He suggested that "[i]t is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the

⁹⁴ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 2.

⁹⁵ Zacharias F., Green B. (2006) *Reconsidering Brougham* – 74 Geo. J. Legal Ethics, 1223.

⁹⁶ Freedman M. (2006) *Henry Lord Brougham, Written By Himself* – 19 Geo. J. Legal Ethics, 1215.

⁹⁷ Brougham H. (1871) *The Life and Times of Henry Lord Brougham* – London: Blackwood, 309.

⁹⁸ Langbein J. (2003) *The Origins of Adversary Criminal Trial* – Oxford: Oxford University Press, 310.

⁹⁹ (1845) 2 Pa. 187.

¹⁰⁰ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 21.

¹⁰¹ *Rush v. Cavanaugh* (1845) 2 Pa. 187, 189.

keeper of his professional conscience."¹⁰² Gibson described the lawyer as being "expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client",¹⁰³ suggesting an equal, if not paramount, duty. He went further, implying that lawyers must discharge their duties in accordance with acceptable standards of morality and empathy, explaining that "[t]he high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience."¹⁰⁴ The introduction of such language into descriptions of the lawyer's role was influential, particularly in application to criminal defence lawyers.

George Sharswood borrowed the above quotations from *Rush v. Cavanaugh* in discussing the importance of morality in the advocate's role. In his 1860 work, "*An Essay on Professional Ethics*",¹⁰⁵ Sharswood suggested that it was "an immoral act to afford . . . assistance, when [the lawyer's] conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him",¹⁰⁶ and that instead a lawyer should "throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins."¹⁰⁷ In referring specifically to "the mode of conducting defence",¹⁰⁸ he stated:

"Counsel . . . may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading – in short, by any other means than a fair trial on the merits in open court."¹⁰⁹

Although respectful of Brougham's defence of Queen Caroline, Sharswood believed that he was "led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve."¹¹⁰ That being said, Sharswood recognised the importance of the defence lawyer's role as a partisan for the defendant. He stated

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Sharswood G. (1860) – University of Michigan.

¹⁰⁶ Ibid., 40.

¹⁰⁷ Ibid., 43.

¹⁰⁸ Ibid., 41.

¹⁰⁹ Ibid., 42.

¹¹⁰ Ibid., 30.

that "the great duty which the counsel owes to his client, is an immovable fidelity",¹¹¹ and criticised the suggestion that vigorously defending the guilty was immoral:

"It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner."¹¹²

The publication of David Hoffman's 'Fifty Resolutions in Regard to Professional Department'¹¹³ represented a landmark in the development of legal ethics generally. It described a collection of ideal principles that should guide the conduct of practitioners, several having particular relevance to criminal defence. Resolution I supported criticism of Brougham's philosophy, stating, "I will never permit zeal to carry me beyond the limits of sobriety and decorum".¹¹⁴ From the outset, Hoffman suggested that limits should apply to partisanship. Resolution II indicated that a lawyer should remain emotionally detached in conducting their work, saying, "I will espouse no man's cause out of envy, hatred or malice, towards his antagonist."¹¹⁵ Hoffman also asserted that a defence lawyer should refrain from exploiting the mistakes of opponents, stating, "[n]o man's ignorance or folly shall induce me to take any advantage of him".¹¹⁶

Other rules introduced duties of honesty, truthfulness and justice which seemingly outrank the obligation to defend a client 'at all hazards and costs':

"Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me." - Resolution X¹¹⁷

"If, after duly examining a case, I am persuaded that my client's claim or defence . . . cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case . . . would be lending myself to a dishonourable use of legal means" - Resolution XI¹¹⁸

¹¹¹ Ibid., 61.

¹¹² Ibid., 35.

¹¹³ Published in Hoffman D., (1836) *A Course of Legal Study* – Baltimore: Joseph Neal, 752.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Resolution V - Ibid.

¹¹⁷ Ibid., 754.

¹¹⁸ Ibid.

More compelling still was Resolution XV, addressing the morality of defending "[p]ersons of atrocious character, who have violated the laws of God and man":¹¹⁹

"When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest or to impede the course of justice, by special resorts to ingenuity- the artifices of eloquence- to appeals to the morbid and fleeting sympathies of weak juries".¹²⁰

This doctrine stands in contrast to that of single-minded partisanship, even suggesting that testing a prosecution is unacceptable where the client is undeserving of "special exertions from any member of our pure and honourable profession".¹²¹ Indeed, Hoffman later contradicted the suggestion that lawyers should remain detached, claiming:

"Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as judges, responsible to God and to man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability – though the certain consequence be the loss of large prospective gains." - Resolution XXXI¹²²

However, to some extent Hoffman reflects the ethic of Brougham, stating, "[t]o my clients I will be faithful; and in their causes, zealous and industrious."¹²³ Although an important theoretical milestone, these resolutions were not "didactic rules"¹²⁴ binding practitioners, thus distinguishing them from modern professional regulation.

Hoffman and Sharswood started a debate that continues to divide academic opinion today: "[The] question as to the duties of an advocate *in foro conscientiae* – his ethical as distinguished from his forensic duty, and whether the two are reconcilable or

¹¹⁹ Ibid., 756.

¹²⁰ Ibid., 755.

¹²¹ Ibid., 756.

¹²² Ibid., 764.

¹²³ Resolution XVIII – Ibid., 758.

¹²⁴ Ibid., 751.

mutually exclusive."¹²⁵ The criminal defender's duties *in foro conscientiae* ('before the tribunal of conscience') potentially conflict with his or her obligations not only to zealously defend a client but to even represent them; which of these obligations prevails was subject to vociferous academic argument in the 19th Century. Both sides of the conflict were well-documented in Showell Rogers' 1899 work, 'The Ethics of Advocacy'.¹²⁶ Several commentators quoted in the article argued that it was not the place of the defence lawyer to engage in moral judgment of a client or cause. For example, Sir Harry Poland QC stated that a defence lawyer should endeavour "to get an acquittal if he can, whatever the merits of the case may be",¹²⁷ while Sydney Smith claimed:

"The decided duty of an advocate [is] to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others."¹²⁸

When asked whether one should defend a bad cause, Samuel Johnson famously argued that "you do not know it to be bad or good until the judge determines it".¹²⁹ These arguments suggest that a defence lawyer should refrain from prejudging a cause or client and simply perform the task of defending.

However, it was also contended that detachment and partisanship could not be allowed to rule defence advocacy unchallenged by moral standards of righteousness, fairness, truth and justice. Sir Alexander Cockburn, the Lord Chief Justice in 1864, described the role of the advocate in a direct response to a speech by Brougham at a banquet for the English Bar:

"It is his duty . . . to seek to reconcile the interests he is bound to maintain . . . with the eternal and immutable interests of truth and justice."¹³⁰

Rogers himself also identified moral limitations on defence advocacy. He claimed that "[e]very advocate is bound by an unwritten but stringent bond of ethical obligation to

¹²⁵ Rogers S. (1899) *The Ethics of Advocacy* – 15 L.Q. Rev., 260.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, 263.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, 274.

take no undue advantage of his tribunal"¹³¹ and that "[c]ourts . . . are not to be misled nor inveigled into wrong judgments by the misplaced ingenuity of advocates in order to gain victories for their clients in particular cases."¹³² Rogers believed that were such advocacy to prevail, then "truth would be dishonoured and justice dethroned".¹³³ He urged defenders to remember that "the stream of his forensic eloquence should flow from him as through a purifying filter; and it behoves him to guard against opening the sluices of words regardless of evil consequences to others than his client".¹³⁴ However, Rogers also accepted that sometimes "the *suppressio veri* (concealment of the truth) may not only be well within the legal and moral rights of an advocate, it may even constitute his actual duty"¹³⁵ and that a defence lawyer "has no monopoly in truth-seeking and no certainty that he will arrive unaided at a just conclusion as to the law".¹³⁶ This sort of academic discourse suggests that theoretical conceptions of the criminal defence lawyer's role required a balance between the competing obligations to client, court and the public; this balance is an integral part of the 'zealous advocate' model.

By the beginning of the 20th Century, a variety of theoretical conceptions of the role had been debated and developed. As the different views expressed above show, there was a significant degree of dispute about the ideal, traditional role of the criminal defence lawyer. It was not until 1908 that a comprehensive and consolidated set of ideals was issued in the form of the 'American Bar Association (ABA) Canons of Professional Ethics'. The canons can be distinguished from modern professional regulations such as the Solicitors' Code of Conduct, which have formal enforcement mechanisms¹³⁷ and are regarded as definitive, explanatory descriptions of the role of lawyers. The canons were described as "a general guide",¹³⁸ "fraternal admonitions"¹³⁹ and "authoritative norms",¹⁴⁰ which explain "what lawyer conduct should be".¹⁴¹ They summarise the development of the defence role and are "a crucial component in the legal profession's self-conception around the turn of the twentieth century."¹⁴²

¹³¹ Ibid., 272.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid., 275.

¹³⁵ Ibid., 276.

¹³⁶ Ibid., 264.

¹³⁷ See Chapter 3.

¹³⁸ ABA Canons of Ethics (1908) *Part II, The Canons of Ethics* – American Bar Association.

¹³⁹ Hazard G. (1990-1991) *The Future of Legal Ethics* – 100 Yale L.J., 1249.

¹⁴⁰ Altman J. (2003) *Considering the ABA's 1908 Canons of Ethics* – 71 Fordham L.R., 235.

¹⁴¹ Ibid., FN4.

¹⁴² Ibid., 241.

Some canons lent support to Brougham's partisan philosophy; Canon 15 stated:

"The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."

Lawyers were encouraged to take up a client's cause, regardless of its merits:

"No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." - Canon 15

Canon 5 stated that "the lawyer is bound by all fair and honorable means to present every defense 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." However, the phrase 'all fair and honourable means' represented an important limitation on over-zealous partisanship, and continues to do so today. Canon 15 further undermined Brougham's philosophy, stating:

"Nothing operates more certainly to create or to foster popular prejudice against lawyers . . . than does the false claim . . . that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."

The canons placed considerable emphasis on theoretical duties to justice and morality. The final line of Canon 15 stated that a lawyer "must obey his own conscience and not that of his client", suggesting the role involves pursuing the most ethical course of action, even if it contradicts the client's instructions.

Canon 18 required fair and ethical conduct in cross-examining witnesses:

"A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities."

Canon 22 underlined the importance of an honest approach to dealings with the court and the opposition:

"It is not candid or fair for the lawyer knowingly to . . . mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely . . . These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice."

This implied that the traditional role of the lawyer required openness and cooperation in progressing justice; for the defence lawyer, putting client interests ahead of this would be 'unprofessional and unworthy'. Canon 32 urged lawyers to "impress upon the client . . . exact compliance with the strictest principles of moral law", suggesting that lawyers should persuade clients to uphold broadly ethical standards in fighting their cause. In summary, recurring themes can be identified throughout the historical development of the defence role and this has continued into modern academic discourse. The work of 20th and 21st century academics, influenced by these historic conceptions, can be integrated into a coherent framework of principles. Like the historic debate, the concept of 'neutral partisanship' is at the centre of the 'zealous advocate' model, but a comprehensive theoretical model comprises more than this 'standard conception'.

3. A Coherent Theoretical Conception: The ‘Zealous Advocate’ Model

The Duty to the Client

The Principle of Partisanship

The Principle of Detachment

The Principle of Confidentiality

The Duty to the Court

The Principle of Procedural Justice

The Principle of Truth-Seeking

The Duty to the Public

The Principle of Morality

The ‘zealous advocate’ model comprises three ‘umbrella’ duties: the duty to the client, the duty to the court and the duty to the public. The umbrella duties summarise the general orientation of the underlying principles, which specifically outline the theoretical obligations of the criminal defence lawyer. The derivations of these will be explored in full, alongside justifications for their existence. Rooted in the historical foundations outlined above, 20th and 21st Century academics, practitioners and commentators have focused and clarified the adversarial criminal defence lawyer’s role. Based on this extensive, normative discourse, this thesis proposes that a coherent, theoretical conception can be identified. It is important to note that the ‘zealous advocate’ model is my interpretation. It is based on over two centuries of theoretical development and debate in written discourse about both criminal defence lawyers and lawyers in general. Although the majority of literature and commentaries appear to identify with these core duties and principles, they are by no means universally agreed upon within the legal and academic community. As noted earlier,¹⁴³ the model is normative and serves as a crucial starting point for exploring the role of the criminal defence lawyer as conceived in theory, formal regulation and practice.

¹⁴³ See Chapter 2, Section 1.

3.1 The Duty to the Client

The criminal defence lawyer is primarily employed to aid a citizen faced with the most punitive branch of the law. The duty to his or her client is direct and the relationship unique. It is therefore important to define what obligations bind defence lawyers when acting for the accused. The duty to the client consists of three principles – partisanship, detachment and confidentiality. It should be reiterated that these principles are my interpretation.

3.1.1 The Principle of Partisanship

"We have one focus, one responsibility, and one loyalty: it is to our client without regard to any other fallout from the result of our case or our actions."¹⁴⁴

The principle of partisanship is the cornerstone of adversarial justice, exemplifying the combative philosophy that underscores accusatorial systems. It is also at the heart of the 'zealous advocate' model. The terms zealous advocacy and partisanship are very closely related, and zealous advocacy has strong connotations of vigorous, partisan defence for a client. As such, one might describe partisanship as the primary obligation with this model. However, despite the fact that the 'zealous advocate' is led by the principle of partisanship, the model recognises that he or she has other duties too. The principle of partisanship asserts that the lawyer's "*raison d'être* is to serve client interests".¹⁴⁵ In the case of criminal defence lawyers, this is to act as a devoted partisan for the accused. A plethora of symbolic images have been used to illustrate the role of the defence advocate – "fearless knights in shining armour",¹⁴⁶ "the gladiator of the accused",¹⁴⁷ "champion in a hostile world",¹⁴⁸ "a tool",¹⁴⁹ "hired guns",¹⁵⁰ and so on. A common thread running through all of these metaphors is the obligation to be loyal to the defendant. At a basic level, this loyalty requires that the advocate present "as persuasively as he can, the facts and the law of the case as seen from the standpoint of

¹⁴⁴ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 7.

¹⁴⁵ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 123.

¹⁴⁶ *Ibid.*, 182.

¹⁴⁷ Du Cann R., (1964) *The Art of the Advocate* – London: Penguin Group, 46.

¹⁴⁸ Freedman M. (1977) *Are There Public Interest Limits on Lawyers' Advocacy?* - 2 J. Legal Prof., 48.

¹⁴⁹ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 42.

¹⁵⁰ Cain M., Harrington C. (1994) *Lawyers in a Post-Modern World* – Buckingham: Oxford University Press, 55.

his client's interest"¹⁵¹ and "say all that the client would say for himself (were he able to do so)."¹⁵² These obligations are founded on the legal principle, *qui facit per alium facit per se* – 'he who acts through another, acts for himself'. This summarises the nature of the 'advocate'; an agent who presents a defence for the client, where the client is unable to do so effectively. In this sense, the defence lawyer essentially becomes "an extension of the client's will".¹⁵³ However, the principle of partisanship suggests that fidelity goes beyond merely presenting favourable evidence and law. The duty to the client is a "singular devotion"¹⁵⁴ requiring "wholehearted and unending"¹⁵⁵ effort for the defendant. Such passionate faithfulness to the client's cause is "not the exception, but the rule",¹⁵⁶ and must be defined by the defence advocate's "surrender [of] his whole mental, intellectual, and physical power to his client's cause".¹⁵⁷

Partisanship is commonly associated with a fearless approach to the defence of the accused in hostile circumstances. Where police officers attempt to extract information from a suspect or a prosecutor grills a defendant in the hope of gaining an advantage, the defence lawyer is required to act as "both an advisor and an advocate with courage and devotion."¹⁵⁸ In addition to protecting the client from the aggression of the opposition, defence lawyers must also advance the defendant's case; this too requires fearlessness. For example, the duty to "defend [a] client vigorously, aggressively and completely"¹⁵⁹ may take time; it may be that "[t]he slow process of a rigorous defense may anger the judge by delaying the court's schedule".¹⁶⁰ A less courageous advocate might be deterred from partisan defence, lest his or her reputation with the court be damaged. Thus, the partisan defence advocate finds that "[t]here are many times, particularly during a trial, when [they] must be brave, strong and unflinchingly confrontational."¹⁶¹ Further, partisanship on behalf of the defendant may be regarded as distasteful or offensive to a complainant or complainant's relatives. However, this is not

¹⁵¹ O'Dair R., (2001) *Legal Ethics Text and Materials* – London: Butterworths, 152.

¹⁵² Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 92.

¹⁵³ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 42.

¹⁵⁴ Smith A. (2002-2003) *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart* – 44 S. Tex. L. Rev., 42.

¹⁵⁵ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 9.

¹⁵⁶ Dos Passos quoted in Freedman M. (2005-2006) *Henry Lord Brougham and Zeal* – 34 Hofstra L. Rev., 1323.

¹⁵⁷ *Ibid.*

¹⁵⁸ Lefcourt G. (1996-1997) *Responsibilities of a Criminal Defense Attorney* – 30 Loy L.A.L. Rev., 61.

¹⁵⁹ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 7.

¹⁶⁰ Mitchell J. (1980) *The Ethics of the Criminal Defense Attorney: New Answers to Old Questions* – 32 Stanford L.R. 2, 326.

¹⁶¹ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 11.

the defence lawyer's concern:

"The role we assign defense counsel is empathy with the client, not the victim, and experience has tested the wisdom of our choice."¹⁶²

Partisanship means that a lawyer "must be prepared to do whatever it takes to improve the client's position . . . [t]hat means they may have to offend . . . [t]hey have to do the uncomfortable thing."¹⁶³ A partisan defence lawyer "must say the best, and only the best, of his own case",¹⁶⁴ even if this omits salient details that might allow a jury to come to a more accurate or just verdict. Theoretical literature makes it clear that "[i]t is not the obligation of defense counsel to seek the truth".¹⁶⁵ The theoretical role of the defence lawyer requires that "[h]e fixes on the conclusion which will best serve his client's interests, and then he sets out to persuade others to agree."¹⁶⁶ Instead of working towards the truth, the partisan defender should work towards victory. The principle of partisanship is regularly described as the overriding duty owed by a defence lawyer. Loyalty to the defendant has been described as "the virtue that trumps all other values and virtues",¹⁶⁷ thus taking precedence over obligations to the court and the public. The primacy of the client over the court is confirmed by the words of Charles Curtis:

"Is not the lawyer an officer of the court? Why doesn't the court have first claim on his loyalty? No, in a paradoxical way. The lawyer's official duty, required of him indeed by the court, is to devote himself to the client. The court comes second by the court's, that is the law's, own command."¹⁶⁸

The primacy of the client over the public was hotly debated in the wake of the OJ Simpson trial.¹⁶⁹ Echoing the sentiments of Brougham,¹⁷⁰ Gerald Uelman concluded that "[t]he suggestion that lawyers owe a higher duty to their country than to their client

¹⁶² Rhode D. (1991) *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context* – 41 J. Legal Ed., 34.

¹⁶³ Lefcourt G. (1996-1997) *Responsibilities of a Criminal Defense Attorney* – 30 Loy L.A.L. Rev., 61.

¹⁶⁴ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 12.

¹⁶⁵ Hodes W. (1996) *Lord Brougham, the Dream Team and Jury Nullification of the Third Kind* - 67 U. Colo. L.R., 1083.

¹⁶⁶ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 12.

¹⁶⁷ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 522.

¹⁶⁸ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 3.

¹⁶⁹ *People v. Simpson* - No. BA097211 (Cal. Super. Ct., LA County 1995)

¹⁷⁰ But only to some extent. In the article referred to at FN111, Gerald Uelman discusses the validity of Brougham's philosophy in the context of the Simpson trial.

is inconsistent with our adversary system".¹⁷¹

Theoretical literature provides examples of tactical choices the defence lawyer could rightly make in order to aid their client:

"The defense lawyer who is guided by fidelity will do all sorts of things to protect the client from harm, including employing various strategies to produce delay, manipulating jury selection to obtain the most favourable jury, using evidentiary rules to prevent the admission at trial of information damaging to the client, rigorously cross-examining a truthful or sympathetic witness, and attempting throughout a trial to move the jury and stir its passions on the client's behalf."¹⁷²

Advocacy involving prosecution witnesses is a particularly controversial area. In cross-examination, the principle of partisanship requires that a defence advocate "impeaches witnesses she believes are truthful and secures an acquittal for a client she believes is guilty, and perhaps brutal and dangerous as well."¹⁷³ When faced with a choice between the client (whoever he or she may be) and a witness (however honest or vulnerable they may be) the defence lawyer's priorities are clear:

"Sometimes it is necessary to 'go after' the victim aggressively – to destroy the victim's credibility or even reputation – when the alternative is that the client will be hurt."¹⁷⁴

The defence partisan should also be unafraid to 'ambush' the prosecution. According to Greta Van Susteren, "[i]f there is a defect in the prosecution's presentation of evidence, you must jump on it and point it out to the jury . . . [t]o look the other way and not point it out to the jury is to violate your commitment as a lawyer".¹⁷⁵

¹⁷¹ Uelman G. (1996-1997) *Lord Brougham's Bromide: Good Lawyers As Bad Citizens* – 30 Loy. L.A.L. Rev., 122.

¹⁷² Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 523.

¹⁷³ Rhode D. (1991) *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context* – 41 J. Legal Ed., 31.

¹⁷⁴ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 529.

¹⁷⁵ Van Susteren G. (1996-1997) *Responsibility of a Criminal Defence Attorney* – 30 Loy. L.A.L. Rev., 128.

To correct an error that the prosecution has made is worse still:

"It is always the duty of the prosecution, who have undertaken the burden of proof, to make out their case; and to suggest that it is the duty of a defending counsel to help them to do so in the interests of abstract justice, is not only wholly to misconceive the function of an advocate, but to advance a theory that is not likely to find support outside the jurisdiction of the courts of Utopia."¹⁷⁶

All of these tactics may incur the wrath of the court, the prosecutor, the government and the public. Yet, this encapsulates the spirit of the partisan defender - there are "no sacrifices which he will not make, and no dangers that he will not incur, to advance the success of his employment."¹⁷⁷

There are some extreme interpretations of what partisanship means in theory, and debate about how far the criminal defence lawyer should go in fulfilling such obligations. For some, the function of the defence lawyer is no more than to "translate [clients'] interests into legal language that will make sense and hopefully establish legitimacy for their claims"¹⁷⁸ and to "shepherd the client through the courts."¹⁷⁹ This limited theoretical conception of the defender's duty of loyalty is perhaps a minority opinion; it appears to be a more widely held belief that more is required of the defence lawyer. Several theorists have argued that the advocate should do "anything arguably legal to advance the client's ends"¹⁸⁰ and that the client's goals should be pursued "no matter how immoral or unjust they or the means necessary to achievement may be."¹⁸¹ This requires the defence counsel to devote "time, passion and resources in ways that are not always maximally conducive to the greatest good of the greatest number"¹⁸² and to "acquiesce in mendacity."¹⁸³ Curtis even suggested that "one of the functions of a lawyer is to lie for his client . . . on rare occasions".¹⁸⁴ The latter statement might be

¹⁷⁶ Rogers S. (1899) *The Ethics of Advocacy* – 15 L.Q. Rev., 277.

¹⁷⁷ Dos Passos J. (1907) *The American Lawyer: As He Was, As He Is, As He Could Be* – New York: The Banks Law Publishing Co., 121.

¹⁷⁸ Cain M., Harrington C. (1994) *Lawyers in a Post-Modern World* – Buckingham: Open University Press, 55.

¹⁷⁹ Gillers S., (1985-1986) *Can a Good Lawyer Be a Bad Person?* – 84 Michigan Law Review, 1025.

¹⁸⁰ Simon W. (1992-1993) *The Ethics of Criminal Defense* – 91 Michigan Law Review, 1703.

¹⁸¹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 163.

¹⁸² Fried C. (1975-1976) *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* – 85 Yale Law Journal 1060, 1061.

¹⁸³ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 35.

¹⁸⁴ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 9.

regarded as a radical interpretation of the defence role, at the opposite end of the spectrum to 'translating' client interests. This excessive form of defence advocacy could be described as "hyper-zeal", a concept explored by Tim Dare in his 2009 work, 'The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role'.¹⁸⁵

Dare describes two "more or less moderate understandings"¹⁸⁶ of defence partisanship, called 'mere-zeal' and 'hyper-zeal'. The former describes a more compromising obligation, expecting a defender to only pursue a client's "legal interests".¹⁸⁷ This can be contrasted with the hyper-zealous advocate, who is "concerned not merely to secure their clients' legal rights, but instead to pursue any advantage obtainable for the clients through the law",¹⁸⁸ and strive to obtain for the client, "all that the law can be made to give them".¹⁸⁹ The latter interpretation might be regarded as excessive, in the same vein as Charles Curtis' 'lying' advocate mentioned above. Dare argues that "Brougham's classic characterisation of the advocate . . . surely takes us beyond mere-zeal and into the realm of hyper-zeal".¹⁹⁰ Dare argues that mere-zeal is a more appropriate and accurate summary of the lawyer's obligation of partisanship. He claims that partisan defenders are "under no obligation to pursue interests that go beyond the law",¹⁹¹ and explains the mere-zealous defence lawyer's role in the following terms:

"It is often in our interest to have more than we are entitled to under law, and no doubt we are often interested in having more than our bare legal entitlement. But this is of no moment to the merely-zealous lawyer. Their professional obligation is to pursue the client's legal rights zealously."¹⁹²

However, David Luban appears to disagree with this. His interpretation of partisanship "calls upon lawyers to secure the goals of mere-zeal, the defence of the client's rights, by adopting the tactics of hyper-zeal".¹⁹³

¹⁸⁵ Surrey: Ashgate

¹⁸⁶ Ibid., 76.

¹⁸⁷ Ibid., 7.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid., 78.

¹⁹¹ Ibid., 76.

¹⁹² Ibid.

¹⁹³ Ibid., 77.

This conclusion is based on the following statement by Luban:

"The no-holds-barred zealous advocate tries to get everything the law can give . . . and thereby does a better job of defending the client's legal rights than a less committed lawyer would do."¹⁹⁴

This is a compelling argument. It suggests that offence is the best form of defence, and truly demonstrates loyalty to the client. Further, Dare's argument suggests that the 'legal rights' of the client are known quantities - that they are pre-determined. This approach assumes that the court, the jury, the prosecutor and the defendant already *know* what the correct legal conclusion is. As a result, the criminal defence lawyer should work only to secure what he or she *knows* the defendant is entitled to. This pre-judges the outcome of a criminal process; if the legal rights of a defendant were so obvious, there would be little point in having a trial at all. Furthermore, the police and prosecution cannot necessarily be depended upon to only pursue people they *know* are legally guilty. As such, it is arguably even more essential that defence lawyers overreach in protecting a defendant's interests.

The theoretical obligation of partisanship can be justified in two ways. First, it is considered crucial to an effective adversarial system, which is designed to pit two competing versions of the facts, presented by two opposing parties, against each other. Each party is assigned "the responsibility to present their own cases and challenge their opponents";¹⁹⁵ this is done before a neutral tribunal of fact, with an impartial legal expert as arbiter. In terms of the defence lawyer, this means that "[z]ealous adversary advocacy is justified by the fact that the other side is also furnished with a zealous advocate",¹⁹⁶ and a balance is created. Where the state exerts effort in prosecuting, the lawyer must defend with equal force. This theoretical principle is therefore the linchpin of the adversarial system, necessary for it to effectively function. The adversary system has endured for centuries, and the legal determination of guilt and innocence by this method is regarded as ethical and fair in itself.

¹⁹⁴ Luban D. (1988) *Lawyers and Justice* – Princeton: Princeton University Press, 75.

¹⁹⁵ 'The Adversary System Excuse' by David Luban, in Abel R. (1997) *Lawyers: A Critical Reader* – New York: New Press, 4.

¹⁹⁶ *Ibid.*, 7.

Monroe Freedman justified partisanship on such grounds:

"[T]he adversary system is itself in the highest public interest, that it serves public policy in a unique and uniquely important way, and that it is, therefore, inconsistent with the public interest to direct lawyers to be less zealous in their roles as partisan advocates in an adversary system."¹⁹⁷

In a sense, one can summarise this justification as 'if the system is moral, the role is moral'. As William Hodes explained, "one may act immorally and antisocially, but still ethically, in carrying out one's assigned role, so long as that role itself makes some positive contribution to society."¹⁹⁸ For the criminal defence lawyer, part of that positive contribution is enabling the adversarial system to operate.

David Luban labelled the second justification the "criminal defense paradigm".¹⁹⁹ He described partisanship as a "prophylactic protection from the state",²⁰⁰ including the police, the prosecution and the government, whose overwhelming resources, and political and psychological advantages,²⁰¹ create the potential for abuse of the justice system. The 'criminal defense paradigm' has a direct and indirect benefit. The direct benefit is the protection provided by partisanship during the criminal justice process itself (for example, in the police station or at trial), which improves the chances of innocent defendants being acquitted. It could be argued that in the majority of cases, partisanship provides protection for those who are eventually convicted of an offence. However, a long-standing ethic of adversarial justice is that it is "[b]etter . . . that a hundred criminals go free than that one person be wrongly convicted."²⁰² In addition, it has been suggested that partisanship on behalf of the guilty is justifiable on the basis that "the criminal justice system is less a device for discovering the truth than it is a series of 'screens' designed to make it exceedingly difficult for the innocent to be convicted."²⁰³ The better the 'screen', the higher the chance of the innocent being acquitted. Further, since the principle imposes an obligation to present a strong,

¹⁹⁷ Freedman M. (1977) *Are There Public Interest Limits on Lawyers' Advocacy?* - 2 J. Legal Prof., 47.

¹⁹⁸ Hodes W. (1996) *Lord Brougham, the Dream Team and Jury Nullification of the Third Kind* - 67 U. Colo. L.R., 1107.

¹⁹⁹ Luban D. (1988) *Lawyers and Justice: An Ethical Study* - Princeton: Princeton University Press, 63.

²⁰⁰ Ibid.

²⁰¹ See Luban D. (1992-1993) *Are Criminal Defenders Different?* - 91 Michigan L.R., 1731.

²⁰² 'The Adversary System Excuse' by David Luban, in Abel R. (1997) *Lawyers: A Critical Reader* - New York: New Press, 5.

²⁰³ Hodes W. (1996) *Lord Brougham, the Dream Team and Jury Nullification of the Third Kind* - 67 U. Colo. L.R., 1086

partisan defence of the accused, this, in theory, "guarantees a thorough preparation of the case, not simply by the defence lawyers."²⁰⁴ A rigorous defence should make convictions more difficult to obtain and therefore should "force the state to investigate cases more thoroughly with a consequent uncovering of more exculpatory evidence and ambiguities in superficially strong cases."²⁰⁵ In short, the whole process is made more expansive and effective. This not only protects the innocent, but means that convictions are based on legitimate, well-prepared and comprehensively tested evidence.

Indirectly, partisanship acts as a form of deterrent. Without the efforts of partisan defence lawyers in criminal cases, the agencies of the state have "far fewer incentives to investigate the facts thoroughly, to corroborate a victim's story, to ensure, in short, that they are not trying the wrong person",²⁰⁶ and would simply be "another thug interfering with a citizen's freedom."²⁰⁷ Dedicated and vigorous defenders for the accused "ensure that the state will be loath to indict those whom it knows to be innocent."²⁰⁸ This rationale lies at the centre of the criminal justice system. The fact that lawyers assert and protect the fundamental rights of clients, such as the right to a fair trial and the privilege against self-incrimination, represent "society's respect for individual dignity".²⁰⁹ The difficulty in justifying this is that the resultant protection of the innocent citizen is a benefit that is "largely invisible."²¹⁰ As Jethro Lieberman explained, "[w]e rarely see who is not indicted, we never see those whom a prosecutor, or even a governor or president might like to prosecute but cannot."²¹¹ This, of course, does not mean they do not exist, and so this justification should perhaps be underlined more than any other.

²⁰⁴ Cranston R. (1995) *Legal Ethics and Professional Responsibility* – Oxford: Oxford University Press, 22.

²⁰⁵ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 196.

²⁰⁶ Rhode D. (1991) *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context* – 41 J. Legal Ed., 32.

²⁰⁷ Lefcourt G. (1996-1997) *Responsibilities of a Criminal Defense Attorney* – 30 Loy L.A.L. Rev., 62.

²⁰⁸ Lieberman J. (1981) *A review of 'Partisan Justice' by Marvin Frankel* – 27 N.Y.L. Sch. L. Rev., 695.

²⁰⁹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 195.

²¹⁰ Lieberman J. (1981) *A review of 'Partisan Justice' by Marvin Frankel* – 27 N.Y.L. Sch. L. Rev., 695.

²¹¹ *Ibid.*

3.1.2 The Principle of Detachment

"The criminal defense attorney in the courtroom with a 'conscience' or the criminal defense attorney who worries about reputation is not an advocate."²¹²

Together, partisanship and detachment make up the 'standard conception' or "official view"²¹³ of the criminal defence lawyer's role. Also known as 'neutrality', the principle of detachment "requires a lawyer to practice without regard to her personal views concerning either a client's character or the moral status of his objectives."²¹⁴ Combined, the principles of detachment and partisanship "mean that on the job the lawyer's moral universe may be - indeed, must be - defined solely by the law and by client interests."²¹⁵ Doing so requires that the defence lawyer separate the professional and personal. As a human being, the lawyer may consider a cause or client objectionable, but as a professional, he or she must "momentarily 'suspend' . . . personal morality and make a firm commitment to the system of justice."²¹⁶ In short, the "the belief of the advocate is wholly irrelevant",²¹⁷ because he or she is just that – an advocate. Thus, defence lawyers cannot restrict themselves to the defence of 'good' people or 'worthy' causes based on their own moral compass or indeed that of the wider public. Equally, defending a client who might be considered dangerous or perverted does not mean that the lawyer identifies with that client's character or approves of his or her actions. In essence, the criminal defence lawyer is "ethically neutral."²¹⁸ Adopting a neutral attitude towards representing questionable people or causes recognises that "moral responsibility for the consequences rests elsewhere";²¹⁹ the primary duty of the defence lawyer is to serve the client, not to "guarantee that the guilty do not go free or that sufficient punishment is accorded the convicted."²²⁰ That is a concern for the court or, more broadly, the government. The principle of detachment therefore creates a moral non-accountability which "insulates lawyers from considerations of morality,

²¹² Van Susteren G. (1996-1997) *Responsibility of a Criminal Defence Attorney* – 30 Loy. L.A.L. Rev., 128.

²¹³ Schneyer T. (1984) *Moral Philosophy's Standard Misconception of Legal Ethics* – Wis. L. Rev., 1534.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Van Susteren G. (1996-1997) *Responsibility of a Criminal Defence Attorney* – 30 Loy. L.A.L. Rev., 128.

²¹⁷ Du Cann R. (1964) *The Art of the Advocate* – London: Penguin Group, 46.

²¹⁸ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 16.

²¹⁹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 177.

²²⁰ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defence Lawyer* – 14 Clev. Marshall L. Rev., 78.

justice or politics in relation to [client] ends or the best means to them."²²¹

The defence lawyer must 'detach' him or herself from any moral debate surrounding representation, and focus on providing an effective and fearless defence. In contrast, if the criminal defence lawyer allowed personal ethics to influence his or her approach to a case, "the zealotry of that representation [might] be tempered by the lawyer's moral judgments of the client or of the client's cause."²²² Of course, this would breach the duty of loyalty which a defence lawyer owes to the defendant. The point at which the defence lawyer's personal feelings intrude into the lawyer-client relationship is the point at which "[t]he advocate has ceased to advocate and has now become the moral as well as legal judge of his client."²²³ George Sharswood memorably said:

"The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."²²⁴

The principle of detachment ensures that a criminal defence lawyer remains an 'advocate' in the literal sense of the word, and enables him or her to remain loyal even to "over-privileged or positively distasteful clients."²²⁵

The principle of detachment affects two stages of the lawyer-client relationship - the acceptance stage and the defence stage. The acceptance stage is self-explanatory. The defence lawyer, in responding to requests for representation from those suspected or accused of crime, must remain detached from any personal feelings about the person or the charges levied against them. Acceptance of a request to represent a client should be based on issues such as availability, competence and conflicts of interest (for example, if the lawyer is representing a client with competing objectives).²²⁶ Detachment at the

²²¹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 163.

²²² Freedman quoted in Luban D. (1994) *The Ethics of Lawyers* – Aldershot: Dartmouth, 89.

²²³ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 72.

²²⁴ Sharswood G. (1860) – University of Michigan, 27.

²²⁵ Fried C. (1975-1976) *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* – 85 Yale Law Journal, 1060.

²²⁶ However, detachment at the acceptance stage is not interpreted and applied in the same way across the adversarial tradition. Academic commentary emanating from the USA regards detachment as flexible when it comes to accepting clients. For example, Monroe Freedman noted that "[l]awyers can and do decline clients for a variety of reasons" ((1977) *Are There Public Interest Limits on Lawyers' Advocacy?* - 2 J. Legal Prof., 50). Gerald Lefcourt stated that "[l]awyers are not busses, and they are not obligated to stop at every stop" ((1996-1997) *Responsibilities of a Criminal Defense Attorney* – 30 Loy L.A.L. Rev., 61). In contrast, in England and Wales, the 'cab-rank rule' is the "accepted symbol of . . . professional detachment" (Rostow E. (1962) *The Lawyer and His Client* – 48 ABA J., at p.29.) This will be discussed

defence stage refers to the active pursuit of an accepted client's interests, for example in the police station or at trial. This requires an ongoing commitment by the defence lawyer to dismiss misgivings about the credibility of a defendant's evidence, the righteousness of his or her objectives throughout the process and any potential harm that a vigorous defence might inflict upon others. A prime example of the latter is the treatment of prosecution witnesses. Defence of a client may be contingent upon an aggressive cross-examination of an innocent party. However, concerns about upsetting or distressing a witness should not become an obstacle to the defence lawyer performing his or her role. As Smith and Montross summarised:

"If personal feelings of sympathy for the victim influence the attorney's representation of the client, the attorney is not acting with fidelity."²²⁷

The same principle applies to external opinions. The defence lawyer may fear that he or she will be judged negatively by the court, colleagues or the public. However, Cristina Arguedas explained:

"[I]t is not our responsibility to concern ourselves with what society, our friends, or our neighbours think or do when we defend our clients."²²⁸

The reasoning behind such a well-established principle derives from the moral and practical imperative of effective resolution of legal issues. In any society, there will be people considered to be outcasts or undesirables, those who do not conform to the political, religious or moral expectations of their communities. However, in a pluralist society, deviation from the norm is tolerated. Where this deviation strays beyond reasonable boundaries, for example when a law is broken, it is regulated via the mechanism of the legal system. Adversarial culture recognises that "we do not order our communities by direct appeal to any particular view of the good".²²⁹ As a result, the determination of legal issues is based on "decision procedures structured to take all reasonable views seriously."²³⁰ The principle of detachment flows from this systematic requirement; all citizens, accused of any offence, should be able to defend themselves

more fully in Chapter 3.

²²⁷ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 530.

²²⁸ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 7.

²²⁹ Dare T. (2009) *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* - Surrey: Ashgate, 74.

²³⁰ Ibid.

before an independent and objective tribunal. Of course, anyone can do this in theory, but the practical complexity of the legal system means that the vast majority of people require the help of a skilled professional to do so; it is for this reason that the "right to be represented by counsel is as basic as any right".²³¹ Since criminal defence lawyers are effectively the 'key' to accessing legal rights, this grants them "tremendous power"²³² in deciding who to represent and how much effort to expend on their behalf. The fact is that the majority of suspects and defendants would probably be considered 'deviant', usually because of a past criminal record, poverty, social habits, ethnicity, and other factors. Equally, many offences, particularly the most serious like rape and murder, are considered heinous by most people. If a criminal defence lawyer was permitted to refuse to represent someone or provide a less vigorous service for a defendant on the basis of personal or social objections, then not only would many people be denied access to the law, but the designated system for determining criminal justice issues would be circumvented. Thus, the primary justifications for the principle of detachment are that, first, it ensures respect for the rights of individual citizens, and, second, ensures respect for the system of due process.

The principle of detachment is based on the premise that all individuals within society are equally entitled to access legal rights, regardless of the merits of the person or their objectives. Without it, the individual rights of those arbitrarily considered undeserving could be denied and this would "undercut the strategy by which we secure community between people profoundly divided by reasonable but incompatible views of the good."²³³ The criminal justice system is, in essence, designed to civilise and formalise the resolution of serious social conflicts without resorting to the anarchic alternatives of violence or irrational squabbling. In this context, criminal defence lawyers are by no means moral crusaders. They are better described as "amoral technicians",²³⁴ who "integrate conflicting elements of society and . . . oil the machinery of social intercourse."²³⁵ Thus, to facilitate access to the law and the execution of these rights for *all* citizens, personal or wider social ethics must be removed from the defence lawyer's professional life. In actually defending an accepted client, the principle of detachment

²³¹ Lawry R. (1990-1991) *The Central Moral Tradition of Lawyering* – 19 Hofstra L.R., 363.

²³² Dare T. (2009) *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* - Surrey: Ashgate, 74.

²³³ Ibid.

²³⁴ Pepper S. (1986) *The Lawyer's Amoral Role: A Defence, a Problem and Some Possibilities* – American Bar Foundation Research Journal, 626.

²³⁵ Cain M., Harrington C. (1994) *Lawyers in a Post-Modern World* – Buckingham: Oxford University Press, 53.

commands that a defence lawyer not hold back on the grounds that the client or cause is objectionable to them or the public. Less diligence or vigour is not acceptable on this basis because, again, the individual's rights would be curtailed.

As Charles Curtis summarised:

"[T]hey could not give their clients the full measure of their services if they did not keep themselves detached. Thereby they were able to offer their clients what they had come to get - advice and counsel from someone above the turmoil of their troubles or at least far enough away from them to look at them." ²³⁶

Detachment also facilitates the execution of an individual's rights because it shields defence counsel from criticism for their professional behaviour. Without its protection, defence lawyers might avoid representing any client or cause that society frowned upon for fear of personal association, thus frustrating the right to defence counsel. In short, a defence lawyer is not his or her client.

The principle of detachment ensures that actors in the legal system respect adversarial due process and recognise it as a better method for determining legal and moral issues than their own potentially subjective views. The defence lawyer is only a part of the criminal justice system, which, as outlined above, takes into account a broad range of views on any particular matter. A judge and jury, who have heard and soberly considered all the evidence put before them are best positioned to make legal, factual or moral judgments about a case. Due process therefore reasons that "[t]he client is entitled to have his or her case determined under the standards and processes duly established by law, rather than by the vagaries of the individual conscience of the particular lawyer who has taken the case."²³⁷ A tribunal of fact is designed to come to decisions about the merits of a case. Lawyers have no selected or elected position that obligates or entitles them to make judgments in this regard, and to do so goes beyond their remit. To appoint the defence lawyer as gatekeeper, who only grants access to the 'good' or 'right' would also render the system redundant; why have a tribunal to resolve a dispute when there is nothing to dispute? As Richard Wasserstrom summarised, to allow defence lawyers to decide what causes and clients are worthy of protection would

²³⁶ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 20.

²³⁷ Freedman M. (1977) *Are There Public Interest Limits on Lawyers' Advocacy?* - 2 J. Legal Prof., 50.

"constitute a surreptitious and dangerous shift from a democracy to an oligarchy of lawyers."²³⁸ Moreover, the "consequences of lawyer mistakes are too serious to allow them to supplant the courts' judgment."²³⁹ It should be noted that, in reality, the majority of criminal defendants are convicted of the offence they are charged with. However, they are still entitled to defence representation until conviction, thus "[l]awyers have to assert legal interests unsupported by moral rights all the time – asserting legal interests is what they do, and everyone can't be in the right on all issues."²⁴⁰ It is impossible to defend only the virtuous since this would reduce defence lawyers to a very small number of cases. To do so would also contradict the higher social morals of defence rights, such as the presumption of innocence and free and fair trial. These, one would think, are morals that most people would rather not sacrifice. In summary, although some commentators criticise the principle of detachment for removing morality from the defence lawyer's role, it is quite the opposite. It appears crucial to a higher commitment to free and equal access to justice and as a result is "an important and deeply moral obligation."²⁴¹

An issue that should be addressed before moving on is the choice of the term 'detachment'. The rationale behind this choice is the belief that detachment presents what I consider to be a clearer and more accurate description of the duty, both linguistically and in relation to the nature of the principle. Two potential alternatives are 'neutrality' and 'independence', which I did not use for the following reasons. Use of the word 'neutral' in describing the criminal defence lawyer is potentially confusing. In general life, 'neutral' infers that someone holds no preference for any particular opinion or result. For legal professionals, 'neutrality' is a different concept. When partnered with partisanship, neutrality describes the removal of personal feeling from the job of vigorously defending a criminal client. It does not mean the lawyer is indifferent to a client's success or failure. On the contrary, neutrality enables the defence lawyer to perform his or her role without the restraint of personal concerns. Similarly, 'detachment' has been chosen over 'independence' as an obligation incumbent upon defence lawyers. Like neutrality, independence presents semantic difficulties. Linguistically, independence is more closely related to the concept of freedom than anything else. It suggests that defence lawyers may exercise choice in their professional

²³⁸ Wasserstrom R. (1975) *Lawyers As Professionals: Some Moral Issues* – 5 Human Rights, 6.

²³⁹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 225.

²⁴⁰ Luban D. (1988) *Lawyers and Justice: An Ethical Study* – Princeton: Princeton University Press, 54.

²⁴¹ Dare T. (2009) *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* - Surrey: Ashgate, 75.

work, free from the dictates of higher masters (such as the client). On this interpretation, independence seems more akin to a *right* of the defence lawyer than an obligation.

However, under the model presented in this thesis, I believe that it would be more accurate to suggest that both independence and neutrality are elements of the duty of detachment. These are defining factors of the obligation to be 'detached' from any external influence, including governmental pressure, financial gain, moral censure and personal inclination. Nicolson and Webb considered that the duty of independence required lawyers to "avoid situations that might compromise zeal".²⁴² Avoiding conflicts of interest between clients and ensuring that issues with fees do not affect representation are primary examples. This independence thus requires the defence lawyer to free him or herself from external pressures or temptations, which might damage the client's cause. The defence lawyer must 'detach'. Similarly, the adoption of a studied neutrality towards the character of the client and the nature of the offence is an act of detachment, annexing the professional from the personal in the same way that independence does. The duty of detachment, and its corollary concepts of neutrality and independence, not only demands positive acts but instils an attitude or state of mind, designed to ensure not only that defendants receive the full measure of partisanship, but that all citizens have the opportunity to avail themselves of representation. Since both independence and neutrality require the defence lawyer to detach from influences that do not emanate from the client, this principle has been entitled 'detachment'.

3.1.3 The Principle of Confidentiality

"The basis of the attorney-client privilege is to allow freedom of communication between client and attorney."²⁴³

The principle of confidentiality is a "fundamental ethical duty"²⁴⁴ incumbent upon criminal defence lawyers and lawyers generally. The basic obligation is that the "lawyer must hold in strictest confidence the disclosures made by the client in the course of the

²⁴² Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 105.

²⁴³ Gold G. (1965) *Split Loyalty: An Ethical Problem For the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 69.

²⁴⁴ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 248.

professional relationship".²⁴⁵ This prohibits the revelation of communications between the defence counsel and the client, relating to their professional relationship. However, this does not limit the duty to the duration of the defender's employment by the client. The obligation of confidentiality "begins as soon as the attorney confers with the accused (even prior to being retained) and continues after the final disposition of the case."²⁴⁶ Since the defence lawyer is the client's mouthpiece during the criminal process, communication between them is perhaps the most important, and vulnerable, aspect of the relationship. Thus, confidentiality is designed to "provide a refuge for the client by steadfastly maintaining his or her confidences and secrets, regardless of the circumstances."²⁴⁷ Although the duty of confidentiality covers a wide range of material, it is not absolute and "may . . . be overridden by competing legal duties, duties to the court and professional rules of conduct."²⁴⁸ This limitation on the defence lawyer's freedom to shelter his or her client's secrets is therefore in balance with other theoretical duties owed to the court and to the public.²⁴⁹

A broad justification for the principle is that it respects liberal values of personal autonomy and privacy, an ethic which pervades most spheres of social life in democratic states. Specific to the defence context, the principle is justifiable based on the fact that the defence lawyer is supposed to be a loyal partisan who advances the defendant's case. Without the binding obligation of confidentiality, "this purpose might be defeated if a relevant secret were available to one side merely by calling the opposition counsel to testify",²⁵⁰ or even if the defence lawyer chose to betray the client. Therefore, the "duty of loyalty demand[s] confidentiality and the duty of confidentiality demand[s] loyalty."²⁵¹ The principle of confidentiality is also central to a criminal defence lawyer performing the basic function of legal advisor. In order to provide adequate representation, he or she requires as much pertinent information from the client as possible. An obligation to protect communications conveyed to the defence lawyer will, in theory, "encourage clients to give their lawyers information necessary for effective

²⁴⁵ Freedman M. (1975) *Lawyers' Ethics in an Adversary System* – Indianapolis: Bobbs-Merrill, 27.

²⁴⁶ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 66.

²⁴⁷ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 525.

²⁴⁸ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 252.

²⁴⁹ See Sections 3.2 and 3.3.

²⁵⁰ Noonan J. (1965-1966) *The Purposes of Advocacy and the Limits of Confidentiality* – 64 Michigan L.R., 1485.

²⁵¹ Patterson R. (1980) *Legal Ethics and the Lawyer's Duty of Loyalty* – 29 Emory Law Journal, 954.

advocacy"²⁵² due to the guarantee of secrecy. Without this duty, "a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case".²⁵³ Like other professional relationships such as doctor-patient, confidentiality is "regarded as essential to the very existence of the lawyer-client relationship rather than a mere optional extra."²⁵⁴

As with the principles of partisanship and detachment, confidentiality affects how willing a defendant is to place his case in the hands of a representative. The more they can trust the defence lawyer, the more likely they are to exercise their legal rights through the medium of a representative. As such, confidentiality "promote[s] the public interest in ensuring the efficient working of the adversary system"²⁵⁵ and has even been called "an ancient right, fundamental to liberty and liberal democratic society."²⁵⁶ In addition, the principle of confidentiality protects both the defendant and his or her lawyer from the inappropriate attentions of the court. The judge and prosecution may attempt, perhaps through the route of disclosure, to extract more information from a defender about a client than he or she would like to reveal. In addition, it is by no means an unheard of event for a defence lawyer to be asked about the veracity of his or her client's claims by a judge. Confidentiality grants relief to a pressured defence lawyer, allowing him or her to practice "[a]voidance of the enforced pragmatic candor of answering the court's improper questions and the forced volunteering of information detrimental to a client's cause",²⁵⁷ something that "is necessary to continue the adversary system in the administration of criminal justice."²⁵⁸ Finally, it could be argued that confidentiality symbolises traditional 'gentleman's values' of discretion and promise-keeping, although these are perhaps a little outdated and informal.

²⁵² 'The Adversary System Excuse' by David Luban, in Abel R. (1997) *Lawyers: A Critical Reader* – New York: New Press, 5.

²⁵³ *Greenough v. Gaskell* (1833) 39 E.R. 618, 621 *per* Lord Brougham.

²⁵⁴ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 249.

²⁵⁵ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 258.

²⁵⁶ Cranston R. (1995) *Legal Ethics and Professional Responsibility* – Oxford: Oxford University Press, 9.

²⁵⁷ Gold G. (1965) *Split Loyalty: An Ethical Problem For the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 77.

²⁵⁸ *Ibid.*

3.2 The Duty to the Court

The sustaining institution of the criminal defence lawyer is the court. This does not mean the physical 'court'; rather, the court represents the legal authorities who administer and operate the criminal justice process. The court, in this context, includes the police, prosecution, judges and jurors, and as such the various duties owed by defence lawyers to the court stretch beyond the door of the court room itself. They apply in any situation where he or she is engaged in the defence of a criminal client before 'court' officials. This therefore includes, among other situations, work in police stations, in prisons, in probation offices, in negotiations with other counsel and at trial. The duty to the court is thus a duty to justice and the law itself and, within the 'zealous advocate' model, comprises two obligations: the principles of procedural justice and truth-seeking.

3.2.1 The Principle of Procedural Justice

"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'."²⁵⁹

The principle of procedural justice encapsulates the nature of Lord Morris' *amicus curiae* – 'friend of the court'. The principle requires that every criminal defence lawyer facilitate the "administration of justice . . . [and] . . . represent clients by fair and proper means."²⁶⁰ The defence lawyer should respect the procedural requirements of the system, refraining from tactics that obfuscate or frustrate the pursuit of justice. At this stage, it is important to explain the distinction between 'justice' and 'truth', as used in the 'zealous advocate' model. Truth could be defined as the reality of a debated legal issue; if a defendant is charged with an offence, the 'truth' is best described as 'what really happened'. This definition accepts that the versions presented by both sides during the criminal process may not necessarily represent the truth. Most academics, lawyers and laymen would accept that one of the aims of the criminal justice system is to ascertain what the objective truth is. 'Justice' is perhaps a different concept. Many would probably equate truth with justice, but the latter is arguably concerned with the

²⁵⁹ *Rondel v. Worsley* [1969] 1 AC 191, 247 per Lord Morris.

²⁶⁰ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 164.

legitimacy and fairness of the system, rather than the result it achieves. This definition accepts that the truth can only be established through balanced, regulated and fair due process, if it can be established at all. Without a just process, the 'truth' may just be another subjective version of events. As Charles Curtis noted:

"Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned."²⁶¹

Arguably, justice can be achieved without the truth being unveiled, and vice versa. As such, this theoretical model treats the duties of procedural justice and truth-seeking as separate, although inter-related.

It can be argued that procedural justice is the paramount duty owed by the criminal defence lawyer. The duties owed to the client are "subordinate to the lawyer's primary obligation to the law"²⁶² and therefore the "highest loyalty is at the same time the most intangible . . . to procedures and institutions."²⁶³ Although this is true, it can be said that those intangible masters are manifested in the form of the officials mentioned above; as a result, the defence lawyer, paradoxically, owes a theoretically higher duty to judges, prosecutors, jurors and police officers, who are the administrators of justice in adversarial systems. Like them, the criminal defence lawyer is an "officer of the court",²⁶⁴ and as such has "professional obligations [which] qualify the lawyer's duties as an agent of the client."²⁶⁵ The principle of procedural justice instils in defence lawyers a fidelity to a fair and balanced criminal justice process. As well as abiding by the rules themselves, defence lawyers must endeavour to "keep clients law-compliant".²⁶⁶ Using "illegal or improper means"²⁶⁷ to aid a client "does not promote the attainment of justice"²⁶⁸ and "breaches the public trust reposed in him by virtue of his oath of office."²⁶⁹ Of course, this does not mean the defence lawyer is expected to fight his or her client's cause with less effort or determination, but "must do so within

²⁶¹ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 12.

²⁶² Lawry R. (1990-1991) *The Central Moral Tradition of Lawyering* – 19 Hofstra L.R., 317.

²⁶³ Fuller L., Randall J. (1958) *Professional Responsibility: Report of the Joint Conference* – 44 American Bar Association Journal, 1162.

²⁶⁴ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 34.

²⁶⁵ Ibid.

²⁶⁶ Lawry R. (1990-1991) *The Central Moral Tradition of Lawyering* – 19 Hofstra L.R., 353.

²⁶⁷ Bress D. (1965-1966) *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility* – 64 Mich. L.R., 1494.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

the framework of the prescribed rules",²⁷⁰ meaning that the lawyer cannot do *anything* to win. It is argued that because the defence lawyer "owe[s] fidelity to the court as well as to the client",²⁷¹ he or she "may not do everything legally permissible to promote the client's cause."²⁷² Some actions, even if they are legally permissible, may betray the defence counsel's loyalty to procedural justice. There are various examples of this sort of behaviour. The defence lawyer may seek to manufacture delay in the proceedings, perhaps to bulk out a weak case, to buy time for developing a defence, to bury unfavourable evidence in a mountain of paperwork or discourage frustrated or scared witnesses. Delays may be achieved by disclosing as little as possible to the prosecution, forcing them to 'work harder'; conversely, the defender might deliver "tons of miscellaneous documents . . . to conceal a needle in a haystack."²⁷³ The defence lawyer may also attempt to surprise the prosecution with an 'ambush' defence; that is, using an unexpected argument or hidden evidence, revealed at a late stage, with the purpose of catching the unprepared opposition off-guard.

However, delays and 'ambushes' are strongly discouraged by the principle of procedural justice. As an assistant to the court, it seems that the fact "lawyers have the power to delay cases for tactical reasons is not to say that they have the right".²⁷⁴ Equally, it has been claimed that "[t]he 'ambush' defence, perceived as a strategic advantage, denies fundamental principles of fairness."²⁷⁵ The principle of procedural justice is an attempt at balancing fairness in the criminal justice process with the rights of defendant. The role of lawyers, including those defending criminal clients, is "to assist individuals to avail themselves of the rights allocated to them by their communities".²⁷⁶ Delays and 'ambushes' essentially create barriers to that process. Such tactics do not actively defend a client - they simply distract from the issues that affect the rights of the client, victims, witnesses and the public. For this reason, the principle of procedural justice suggests that "to portray . . . lawyers as being allowed or obliged to use every lawful tactic to prevent the legal system addressing a case is simply mistaken."²⁷⁷ In balancing

²⁷⁰ Ibid., 1497.

²⁷¹ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 67.

²⁷² Ibid.

²⁷³ Luban D. (1988) *Lawyers and Justice* – Princeton: Princeton University Press, 51.

²⁷⁴ Alschuler A. (1997-1998) *How To Win the Trial of the Century: The Ethics of Lord Brougham and the OJ Simpson Defense Team* – 29 McGeorge L.R., 298.

²⁷⁵ Tomljanovic G. (2002-2003) *Defence Disclosure: Is the Right To 'Full Answer' the Right To Ambush?* - 40 Alta. L.R., 689.

²⁷⁶ Dare T. (2009) *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* - Surrey: Ashgate, 80.

²⁷⁷ Ibid.

the integrity of criminal procedure and the rights of a defendant, the defence advocate "must not be blinded by partisanship";²⁷⁸ as an officer of the court, "systemic imperatives are entitled to weight."²⁷⁹

The principle of procedural justice is justifiable on the grounds that, for the legal system to work effectively, the actors within the system must themselves keep within the law. It is in the public interest that the old maxim, 'no one is above the law' is upheld, obligating the criminal defence lawyer to assist the court in the administration of justice thus "guard[s] against abuse of the powers and privileges entrusted to him".²⁸⁰ The court, as the embodiment of the legal system, is the master of the defence lawyer. Without it, a defendant would have no arena in which to plead his or her case and the defence lawyer would have no role. The court represents the roots and trunk of the legal system, and the legal professionals who work within its parameters are, to extend the metaphor, the 'branches'. As such, despite the defence lawyer's duty to the client, the court must come first because the said duty "cannot rise higher than its source, which is the court."²⁸¹ In the same way that the principle of partisanship acts as a protection for defendants in the face of a vigorous prosecution, the principle of procedural justice acts as a counter-balancing check on over-zealous defence. Furthermore, the principle recognises that it is "axiomatic that justice must be achieved for society as well as for defendants, that a criminal trial is not a sporting contest, and that the fair determination of an individual's guilt and the protection of society are both important objectives of the criminal law."²⁸² The obligation thus reminds the defence lawyer that the core aim of the criminal justice system is to achieve a just and fair verdict – not victory at all costs for his or her client.

²⁷⁸ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 28.

²⁷⁹ *Ibid.*, 9.

²⁸⁰ Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 121.

²⁸¹ Curtis C. (1951-1952) *The Ethics of Advocacy* – 4 Stanford L.R., 7.

²⁸² Bress D. (1965-1966) *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility* – 64 Mich. L.R., 1498.

3.2.2 The Principle of Truth-Seeking

"[The] zeal of the advocate must not tempt him from the path of strict truthfulness"²⁸³

The rationale behind the adversarial criminal process is that the "truth is best discovered by powerful statements on both sides of the question".²⁸⁴ As an integral part of this mechanism, it is arguable that a defender has both direct and indirect duties to facilitate the search for the truth. The indirect duty is to "pursue the process from which the truth emerges";²⁸⁵ that is, to defend the client resolutely and present the best of his or her case. When viewed in this way, one could conclude that it is "not [his or her] job to pursue the truth",²⁸⁶ *per se*. However, it is arguable that the defence lawyer's duty to 'pursue the process' does not green-light dishonest, deceitful or misleading conduct as a means to achieving acquittal for a client. Actively avoiding such behaviour is the defence lawyer's direct duty of truth-seeking, applying to dealings with both the court and the client. In dealings with the court, the most established and concrete aspect of the principle of truth-seeking is that the defence lawyer "must never suppress or distort the truth".²⁸⁷ First and foremost, this prohibits lying for the client or knowingly allowing the client to lie to the court. In this respect, the defence advocate has "a primary duty to preserve the integrity of the adversary system by preventing the court or jury from being misled by the presentation of false or perjured testimony."²⁸⁸

Beyond this, truth-seeking both promotes and forbids (or at least discourages) certain conduct in dealing with the court. For example, the defence lawyer should assist the court by ensuring it is aware of *all* the evidence and law it needs. It is argued that "[c]ounsel should have the obligation of bringing to the attention of the court any authority about which he reasonably believes the court would like to know before deciding the matter before it."²⁸⁹ To allow the defence lawyer to "withhold precedent

²⁸³ Macmillan quoted in Du Cann R. (1964) *The Art of the Advocate* – London: Penguin Group, 51.

²⁸⁴ *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 *per* Lord Chancellor Eldon.

²⁸⁵ Haar quoted in Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R. 29, 61.

²⁸⁶ *Ibid.*

²⁸⁷ Savage C. (1958-1959) *The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial* – 1 Crim. L.Q., 167.

²⁸⁸ Erickson W. (1981-1982) *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to his Client* - 59 Denv. L.J., 91.

²⁸⁹ Pye K. (1978) *The Role of Counsel in the Suppression of Truth* – Duke L.J., 939.

from the court in the hope of a favorable judgment"²⁹⁰ would be to defeat the search for the truth. Additionally, to exploit errors made by the prosecution in presenting their case (for example, omitting important evidence or law) simply to advance the defendant's cause, is proscribed. As Kenneth Pye explained:

"The ineptitude or lack of diligence of opposing counsel or of the court is no justification for increasing the likelihood that a judge will incorrectly ascertain or apply the law. Neither is the understandable attitude of the client that his counsel should take no action that 'will help the other side.'²⁹¹

Refusing to correct an obvious or basic mistake purely because it has been made by the opposition frustrates truth-seeking; such behaviour could be considered devious and underhand.

Some theorists have suggested that truth-seeking would expect defence lawyers to refrain from destroying the credibility of an honest witness using aggression or chicanery:

"[T]he argument is advanced that a cross-examination may be proper when a lawyer believes the witness is untruthful, inaccurate in recollection or narration, or has told less than the whole story, but not when the lawyer believes (or knows) that the witness has honestly narrated an accurate version of the events he perceived."²⁹²

Dealings with the client should also be driven by the principle of truth-seeking. Arguably, defence lawyers should avoid 'selective' questioning of their clients about the facts of their case and the nature of their defence. Bearing in mind that confidentiality is designed to encourage the defendant to confide fully in his or her representative, some believe that "the lawyer must seek the truth from the client, not shun it."²⁹³ Therefore, a defence lawyer should grill the client as a court might, rather than skip over difficult or damaging issues. This expectation accords with the obligation not to lie to the court; a full and frank exchange with a client will mean the defence lawyer is better

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid., 945.

²⁹³ Freedman M. (1975) *Lawyers' Ethics in an Adversary System* – Indianapolis: Bobbs-Merrill, 30.

informed, and as a result can ensure that the court will not be misled. However, it is arguable that such an approach is paternal, elitist and arrogant; it automatically assumes that a criminal client will lie or attempt to mislead the court, and also suggests that it is the responsibility of the defence lawyer to do what is, effectively, the prosecution's job. Some commentators have therefore advanced the argument that the duty to seek the truth simply requires defence lawyers to "advise witnesses and clients to testify only to what they believe in their own minds to be the truth and warn them of the pains of perjury and of the danger of effective cross-examination of a witness who is not truthful."²⁹⁴

The main justification for the duty of truth-seeking is derived from the rationale behind the adversary system itself. It is widely accepted that the "ascertainment of truth remains an important fundamental value of our system of criminal justice".²⁹⁵ It is arguable that truth-seeking is the primary reason for its existence and that everything connected to criminal justice flows from this premise. Defence lawyers must protect the interests of a defendant in this system (including those guilty of offences), but it should be remembered that they are not assigned their role with the sole purpose of securing victory for the accused. Although adversarial culture works on the basis that opposing views of an issue lead to a more accurate result, it is often the case that "[t]he struggle to win, with its powerful pressures to subordinate the love of truth, is often only incidentally, or coincidentally, if at all, a service to the public interest."²⁹⁶ The defence lawyer is expected to be a partisan for the defendant, just as the prosecutor is expected to be a partisan for the state; however, this clash of opposing forces against each other should not perpetuate an "irrational battle",²⁹⁷ but work "as a means to accurate fact-finding."²⁹⁸ If one accepts the conception that "sees truth as the central goal of adversary advocacy" then defence lawyers "should forgo sorts of conduct incompatible with that goal".²⁹⁹ This would seemingly rule out the forms of behaviour discussed above. At the most extreme, for a defence lawyer to allow a client to lie to a court and excuse it as 'partisanship' would be plainly wrong; as John Noonan stated, "[t]o furnish [a court] with a lie is to mock impartiality, to mislead rather than to inform, and to

²⁹⁴ Pye K. (1978) *The Role of Counsel in the Suppression of Truth* – Duke L.J., 949.

²⁹⁵ *Ibid.*, 959.

²⁹⁶ Frankel M. (1975) *The Search for Truth: An Umpireal View* - 123 U. Pa. L. Rev., 1055.

²⁹⁷ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 35.

²⁹⁸ Simon W. (1998-1999) *'Thinking Like a Lawyer' About Ethical Questions* – 27 Hofstra L.R., 8.

²⁹⁹ *Ibid.*, 7.

stultify the decisional process rather than to make it an exploration leading to mature judgment."³⁰⁰

Such tactics might advance a client's cause, but when considered in the context of the adversarial truth-seeking process, it seems clear that to some extent "the lawyer's duty to advance his client's interests must be subordinated to the fundamental purpose of truth-seeking which brought the relationship into being."³⁰¹ The principle of truth-seeking recognises that the partisan defence advocate has a unique power to influence criminal proceedings, for better or worse. Because the defence lawyer primarily works with the defendant, who may well demand victory at all costs, "situations . . . where zealous representation is synonymous with obfuscating and distorting the truth . . . are common."³⁰² The principle of truth-seeking, like procedural justice, is a check on that power. They are reminders that the defence lawyer, alongside his or her duty to protect the client, is "an officer of the court, participating in a search for truth"³⁰³ and these two duties to the court exemplify the argument that the 'standard conception' is only part of the traditional, theoretical conception of the defence lawyer's role. In summary, the defence lawyer is not only employed by the client - he or she has "a prior and perpetual retainer on behalf of truth and justice" that is "primary and paramount".³⁰⁴

³⁰⁰ Noonan J. (1965-1966) *The Purposes of Advocacy and the Limits of Confidentiality* – 64 Mich. L.R., 1488.

³⁰¹ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 35.

³⁰² Hodes W. (1996) *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind* - 67 U. Colo. L. Rev., 1083.

³⁰³ Freedman M. (1965-1966) *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* – 64 Mich. L.R., 1470.

³⁰⁴ *R v. Connell* (1844) 7 I.L.R. 261, 312.

3.3 The Duty to the Public

The legal system, like most state institutions, owes an ultimate duty to serve the public. The criminal defence lawyer in particular cannot forget that he or she has a duty to promote the interests of the people whom the system is designed to protect. It is arguable that the criminal justice process affects and influences the life of a nation more than any other branch of the legal system, and is inevitably interwoven with public morality. The defence lawyer is therefore part of an integral and ancient mechanism charged with shaping and defending the moral stance of the criminal law, a subject which generates intense passion and controversy. Consequently, it is suggested by some that the criminal defence lawyer has an obligation to the public to uphold certain standards of humanity, dignity and respect. The duty to the public can thus be described as a duty of morality, and is aimed at protecting the interests of that elusive concept, the 'greater good'.

3.3.1 The Principle of Morality

"[T]he lawyer must act . . . with concern for his own standards as a human person, as well as with regard for the requirements of the society which the system serves."³⁰⁵

The principle of morality is a direct challenge to the more cruel and merciless aspects of criminal defence. The principle consists mainly of obligations which academics and commentators believe the defence lawyer *should* adhere to. This significantly distinguishes it from the more established and accepted principles, such as partisanship and confidentiality. It would be fair to say that the principle of morality is, even at a theoretical level, a less robust and defensible duty than the others set out in the 'zealous advocate' model. However, debate about the place of morality in the work of the defence lawyer is an ancient one, and deserves examination. The principle of morality is informed by the fact that the criminal defence lawyer is, as stated above, a servant of the public through the legal system and that one of the aims of that system is to protect the public and its values. The principle of morality is disputed by those who claim that morals do not have a place in partisanship; however, as was demonstrated by the

³⁰⁵ Noonan J. (1965-1966) *The Purposes of Advocacy and the Limits of Confidentiality* – 64 Mich. L.R., 1492.

historical debate, the principle of morality is not a new concept. Furthermore, it seems that "the dominant tone of current scholarship . . . [is] highly critical of lawyers' seeming ability to remove their 'professional' actions from the scrutiny of basic precepts of ordinary morality".³⁰⁶

The foundation of the principle is that "lawyers should try to act in all of their professional dealings as a good person should act."³⁰⁷ In representing a client, criminal defence lawyers must not "'degrade' themselves personally for the purpose of winning their client's case"³⁰⁸ and although they cannot articulate their personal thoughts to the judge or jury, "this does not require him to be morally neutral."³⁰⁹ In fact, in giving advice to his or her client, the criminal defence lawyer "can and should express his opinions fully and frankly about all aspects of the case, legal and ethical."³¹⁰ It has been argued that defence lawyers who evade this duty by turning a blind eye to the immorality of a client's behaviour, opinions or desires, can in fact "make these clients a bit worse"³¹¹ and "can foster a cynical view of human relations and can reinforce selfish and manipulative attitudes".³¹² Such behaviour on the part of the defence lawyer arguably results from "a fantastic and distorted idea of duty"³¹³ that loyalty to the client justifies ethically dubious behaviour. In contrast, it has been asserted that "[I]oyalty does not replace the lawyer's conscience with that of his client".³¹⁴ Thus, defence lawyers have "a professional obligation to advise a client whenever the lawyer believes that a proposed argument or policy is unjust"³¹⁵ and should be open and honest with their client and ultimately "advise the client to do what is morally right."³¹⁶

Even as a professional representative, a defence lawyer should remember that he or she "is the keeper of his own conscience and any practice of the profession that conflicts with his ideas of right and wrong, even though it be sanctioned by custom, should be

³⁰⁶ Woolley A. (1996) *Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer* – 9 Canadian Journal of Law and Jurisprudence, 61.

³⁰⁷ Lawry R. (1990-1991) *The Central Moral Tradition of Lawyering* – 19 Hofstra Law Review, 337.

³⁰⁸ *In re G. Mayor Cooke* (1889) 5 T.L.R. 407, 408 per Lord Esher MR.

³⁰⁹ Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 153.

³¹⁰ *Ibid.*, 92.

³¹¹ Alschuler A. (1997-1998) *How To Win the Trial of the Century: The Ethics of Lord Brougham and the OJ Simpson Defense Team* – 29 McGeorge L.R., 297.

³¹² *Ibid.*

³¹³ From 'Ethical Obligations of the Lawyer' by Gleason Archer, in Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 27.

³¹⁴ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 78.

³¹⁵ Freedman M. (1977) *Are There Public Interest Limits on Lawyers' Advocacy?* – 2 J. Legal Prof., 50.

³¹⁶ *Ibid.*, 51.

avoided."³¹⁷ The fact that the defence lawyer is an agent of the criminal client does not mean that he or she is "entirely free from all moral responsibility"³¹⁸ and that he or she can "submerge his humanity by playing a technician's role."³¹⁹ In short, the behaviour of a defence lawyer can and, most likely, will have significant and real consequences for other people and society in general. For defence lawyers to excuse the wrongs caused by them or their client by reference to loyalty and detachment is perhaps to deny the fact that a defence lawyer is still a human being with a degree of choice. As such, academics have argued that the defence lawyer should "bring his full moral sensibilities to play in his professional role."³²⁰ On this basis, the approach to dealing with other parties, for example witnesses, should be tempered by a degree of empathy and consideration for their interests. Although defence lawyers are not expected to undermine or damage their own client's case, they must, when advancing it, be aware of "the lines . . . that define appropriate behaviour and be willing to go right up to, but not over, these lines."³²¹ For example, unfairly or dishonourably destroying the credibility of a truthful or vulnerable witness purely to achieve victory would be considered immoral by many. Lord Cockburn suggested that "in carrying out the interests of his client, the fearless advocate should wield the 'arms of a warrior and not of the assassin'",³²² while Gleason Archer asserted that the defence lawyer "should exercise a conscientious regard for the rights of others, to the end that he may be an instrument of justice and not a worker of injustice."³²³ It has been argued that a zealous and aggressive examination of the prosecution case is the only way that the defence lawyer evens the stakes, since the defendant is one person pitted against the vast resources of the state. However, this suggestion does not always hold weight. Unlike a victim, the state does not have to sit in a court and endure embarrassing questions from the lawyer of a potential offender; as Ted Schneyer pointed out, "[t]he complaining witness humiliated during relentless cross-examination in a rape case is not exactly Leviathan. Her interests are distinct from those of the state and deserve to be recognized."³²⁴

³¹⁷ Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 27.

³¹⁸ Noonan J. (1965-1966) *The Purposes of Advocacy and the Limits of Confidentiality* – 64 Mich. L.R., 1492.

³¹⁹ Ibid.

³²⁰ Postema G. (1980) *Moral Responsibility In Professional Ethics* – 55 New York University L.R., 64.

³²¹ Arguedas C. (1996-1997) *Duties of a Criminal Defence Lawyer* – 30 Loy L.A.L. Rev., 8.

³²² Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 65.

³²³ 'Ethical Obligations of the Lawyer' by Gleason Archer, in Zacharias F., Green B. (2005) *Reconceptualizing Advocacy Ethics* – 74 Geo. Wash. L.R., 28.

³²⁴ Schneyer T. (1984) *Moral Philosophy's Standard Misconception of Legal Ethics* – Wis. L.R., 1540.

The principle of morality can be justified on the basis that taking the morally correct course of action is for the benefit of the greater good which, arguably, is a core purpose of the legal system. The goal of criminal justice is, in part, to prosecute and deter criminal, and thus immoral, behaviour. It could be said that morally dubious conduct on the part of legal professionals undermines this goal and reduces it to the status of a distant and unobtainable dream. To relieve defence lawyers of any duty to defend moral standards suggests that such values, including honesty, empathy and fairness, become irrelevant once the criminal justice process begins - all that matters is which side wins. The principle of morality can therefore be justified on the grounds that the legal system is not isolated within a bubble, separate and disconnected from broader moral expectations; the defence lawyer's role "does not justify his or her departure from ordinary social norms of civility and fair dealing."³²⁵ The integrity and legitimacy of the criminal justice process is dependent upon the standards of conduct of those working within it. Since the criminal defence lawyer is an integral and highly exposed actor in the system, to behave in a morally objectionable manner undermines the legal system and the legal profession as institutions of moral authority. In addition, for the criminal defence role to exist without some form of obligation to morality would be unthinkable. The consequence of accepting an unchecked and unchallenged partisan defence, free of moral restraint, was described by Albert Alschuler:

"Imagine a rule of professional responsibility that declared 'A zealous advocate must do everything the law allows to disconcert, distress, divert, disturb, deflect, deceive, disorder, delude, dupe and distract his or her opponent and to keep the opponent from presenting his or her case effectively.'³²⁶

Thus, the principle of morality exists not only to ensure that the legal system and its servants encourage and display fair, moral and civil conduct, but to act as a counter-balance to the worst excesses of the 'standard conception'.

4. Conclusion

The development of the criminal defence lawyer's role was, in historical terms, a late comer to the traditional adversarial legal system and has evolved very speedily. This

³²⁵ Alschuler A. (1997-1998) *How To Win the Trial of the Century: The Ethics of Lord Brougham and the OJ Simpson Defense Team* – 29 McGeorge L.R., 319.

³²⁶ *Ibid.*, 299.

chapter aimed to summarise and discuss the nature of that role in the form of a coherent theoretical conception: the 'zealous advocate' model. The duty to the client is grounded in three long-standing principles; 'partisanship', the obligation to be a vigorous advocate of the client's interests; 'detachment', the obligation to represent a client or case regardless of merit; and 'confidentiality', the obligation to keep secret all communications between the lawyer and client relating to the case. This duty represents the 'standard conception' of the defence role, but is counter-balanced by the duties to the court and to the public. The former consists of the principle of procedural justice, the obligation to aid the administration of justice and adhere to the judicial process, and the principle of truth-seeking, the obligation to help the court reach an accurate and fair verdict, reflecting the reality of what happened. The duty to the public subjects the defence counsel to only one obligation – to uphold common standards of morality in his or her professional conduct. The rest of this thesis aims to assess how relevant and useful the 'zealous advocate' model is, in the context of modern criminal defence practice. The next chapter will take the first step towards this by exploring formal conceptions of the role and examining whether the 'zealous advocate' model is reflected in modern regulation.

**CHAPTER 3 - 'Formal' Conceptions of the Role of the Criminal
Defence Lawyer**

1. Introduction

This chapter will explore formal conceptions of the role by comparing the obligations imposed by formal sources with the 'zealous advocate' model. By considering whether formal conceptions reflect the theoretical model, I hope to gain an insight into how relevant theory is to modern practice; are the principles discussed in Chapter 2 part of the modern practitioner's role, or is the 'zealous advocate' model detached from reality? The answer to this question may have significant implications not only for the future of theorising the role of the criminal defence lawyer, but also for the direction of regulation in England and Wales. The rules and regulations which embody formal conceptions of the role have been drawn from four separate categories: legislation and the common law, professional standards, training materials and other relevant standards. The formal obligations drawn from these four categories will be considered using the same structure as the 'zealous advocate' model. For example, obligations or duties drawn from the Bar Council Code of Conduct (categorised as 'professional standards') which reflect the principle of detachment will be described in that context. Following this method allows a simple and systematic comparison of formal and theoretical conceptions of the role.

Legislation and the common law comprise the bulk of law in England and Wales. They are legally binding, and a breach of such provisions by criminal defence lawyers can have serious outcomes. For example, a criminal sanction might be imposed by the state if a defence lawyer asserts the innocence of a client who claims to be guilty. Under s.4 of the *Criminal Law Act 1967*, the lawyer may be impeding the prosecution of an offender and therefore be criminally liable.³²⁷ A breach can also damage the client's defence; if pre-trial disclosure provisions are not complied with, then a jury may be told they can draw inferences adverse to the client's case.³²⁸ Professional standards are considered to be "the closest one comes to a collective statement about lawyers' values and ideals",³²⁹ although they "[do] not constitute the full range of norms that may affect the way in which lawyers behave"³³⁰ because they operate in conjunction with a variety of other sources (such as legislation). They are very influential in defining formal conceptions of the role of the defence lawyer and "largely set the tone and determine the

³²⁷ See Section 3.2.

³²⁸ Section 11(3)(b) - *Criminal Procedure and Investigations Act 1996*.

³²⁹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 85.

³³⁰ *Ibid.*, 84.

content of most other written discourses on professional legal ethics."³³¹ Their status as a touchstone for understanding the work of the defence lawyer is attributable to the self-regulatory nature of the professional standards; that is, they are defined and enforced by the legal profession itself, although this is no longer entirely accurate in England and Wales.

In the wake of recommendations in 'The Review of the Regulatory Framework for Legal Services in England and Wales',³³² both the Law Society and the Bar Council (the representative bodies of solicitors and barristers respectively) created separate, independent bodies to deal with the regulation of conduct. This satisfied the review's recommendation to divide representative and regulatory functions in order to enhance the transparency, credibility and neutrality of the regulation of lawyers. This policy was reaffirmed by the *Legal Services Act 2007*. This statute created the Legal Services Board which sets out requirements ensuring:

"[T]hat the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and . . . that decisions relating to the exercise of an approved regulator's regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions."³³³

These independent, approved regulators are the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB), who now issue, with the approval of the Master of the Rolls and Secretary of State for Constitutional Affairs, most professional standards for solicitors and barristers. In addition, both bodies make it very clear that they are separate from the bodies representing the legal profession and act "in the public interest".³³⁴ Professional standards are not enforced by the state, but by independent bodies and since the legal profession in England and Wales is divided, there are different mechanisms for solicitors and barristers.³³⁵

³³¹ *Ibid.*, 85.

³³² Clementi D.(December 2004) – London: Ministry of Justice

³³³ Section 30(1) - *Legal Services Act 2007*.

³³⁴ 'Regulating for the future: The SRA Strategic Plan 2010-13'- The Solicitors Regulation Authority Website, <http://www.sra.org.uk/strategy/>: **Last accessed 16/08/2010**; 'About Us' - The Bar Standards Board Website, <http://www.barstandardsboard.org.uk/about/>: **Last accessed 16/08/2010**.

³³⁵ Solicitors' conduct is investigated and enforced by the Solicitors Disciplinary Tribunal (SDT). Clients may complain about professional misconduct to the Legal Complaints Service (LCS) or directly to the SRA. Matters requiring investigation are then passed to the SDT. If it is found a breach of conduct rules

Training refers to the legally required qualifications a lawyer must obtain to practice and the ongoing Continuing Professional Development (CPD) training they must undertake during practice. These include compulsory requirements such as the Bar Vocational Course (BVC) and Legal Practice Course (LPC), and other training which can be undertaken. Training materials for these are issued by regulatory bodies such as the SRA and the BSB and teach trainee lawyers the standards and duties which, as professionals, they are expected to uphold. These materials therefore have a significant impact upon the role of English and Welsh criminal defence lawyers. They "inculcate a professional approach to work and . . . develop in students a respect for the principles of professional ethics",³³⁶ affecting how trainees will perform their role in the future. The duties and standards derived from training are not enforced – rather, it is assumed that through successfully qualifying, students will obtain a thorough understanding of the obligations owed by defence lawyers. The enforcement mechanism is therefore formal examination of students on training courses or schemes. Other relevant standards are a catch-all category for miscellaneous materials which do not easily fit into the other categories. Such standards include leading academic texts and guides,³³⁷ pre-legislative papers, journal articles and official reports. Many of these sources are regarded in England and Wales as important contributors to the regulation of legal practice, but are non-binding. They therefore have no enforcement mechanism other than potential moral censure by the legal community or to the extent that they may be used as guidance in the enforcement of professional standards or other forms of legal decision making (for example, if a defence lawyer were sued for negligence).

has occurred, then the SDT may discipline the solicitor by:

"[T]he striking off the roll of the name of the solicitor to whom the application or complaint relates . . . the suspension of that solicitor from practice indefinitely or for a specified period . . . [or] the payment by that solicitor or former solicitor of a penalty not exceeding £5,000, which shall be forfeit to Her Majesty" (Section 47(2) - *Solicitors Act 1974*)

Barristers' conduct is regulated by the BSB. The BSB recommends first raising a complaint with the chambers of the barrister in question. If this does not resolve the issue, the BSB will investigate misconduct issues relating to the professional standards, including "[m]isleading the court . . . [f]ailing to keep information confidential . . . [a]cting against your [client's] instructions or best interests . . . [or] [a]cting dishonestly or in a way that damages the profession's reputation." (Bar Standards Board Website – "Complaints and Discipline: Professional Misconduct"). An independent 'Complaints Commissioner' oversees the investigation and refers it to the 'Complaints Committee' if it is thought there is evidence of misconduct. If found guilty of misconduct, a Disciplinary Panel will decide the appropriate punishment; this can include a fine, suspension or disbarment.

³³⁶ Paragraph 3(d), page 5, The BVC 'Golden Book' – London: Bar Standards Board.

³³⁷ These could be confused with theory. However, some academic texts are considered so influential that they have been adopted by defence lawyers and the profession bodies as 'unofficial' guides for practice. For this reason, they are included here.

2. The Duty to the Client

2.1 The Principle of Partisanship

Legislation and the Common Law

The *Legal Services Act 2007* provides a modern example of partisanship as a legislative obligation upon the criminal defence lawyer. The statute created the Legal Services Board which oversees the regulation of lawyers in England and Wales; under s.1 of the Act, several 'regulatory objectives' are outlined, the first of which is "promoting and maintaining adherence to the professional principles."³³⁸ These professional principles, which are outlined in the statute, therefore inform the regulation and conduct of all lawyers, including defence lawyers. The third principle states that "[a]uthorised persons should act in the best interests of their clients",³³⁹ which is a basic manifestation of partisanship. How partisan one should be is unclear; theory suggests that criminal defence lawyers should be vigorous, fearless advocates for their client's interests and objectives. In comparison, this legislative provision is somewhat restrained. It is a moderate and vague statement, which hardly reflects the passionate language used to describe the traditional defence lawyer. Additionally, the fourth professional principle imposes a "duty to the court to act with independence in the interests of justice".³⁴⁰ This juxtaposition detracts from any inference that legislation encourages bold and uncompromising defence of the accused, as the 'zealous advocate' model suggests.

A direct reference to a criminal defence lawyer's role as a partisan for the client is contained in Practice Code C of the *Police and Criminal Evidence Act 1984* (PACE). The code itself is not legislative and should perhaps be classified under 'other relevant standards'. However, since it was issued under legislative authority, it has been included here. Under s.66 of the statute, the Secretary of State is empowered to issue codes of practice in connection with various areas covered by PACE and this power is "exercisable by statutory instrument."³⁴¹ Code of Practice C outlines the conduct requirements of police officers in the detention, treatment and questioning of suspects.

³³⁸ Section 1(1)(h) - *Legal Services Act 2007*.

³³⁹ Section 1(3)(c) - *Legal Services Act 2007*.

³⁴⁰ Section 1(3)(d) - *Legal Services Act 2007*.

³⁴¹ Section 67(6) - *Police and Criminal Evidence Act 1984*.

Importantly, it makes reference to the role of the criminal defence lawyer in the police station, arguably the most intimidating and critical stage of the criminal justice process. However, the reference is brief and contained only in the 'Notes for Guidance'³⁴² relating to section 6, which deals with rights to legal advice. It states that the defence lawyer's "only role in the police station is to protect and advance the legal rights of their client."³⁴³ This statement does not seem to reflect the theoretical portrayal of the partisan defender, who protects the client with vigour and aggression, and without regard for anyone other than his or her client.³⁴⁴ The use of the words 'only' and 'legal' are significant; one could say this provision limits the defence lawyer's role to protecting the client's procedural rights and nothing else, reminiscent of Dare's argument.³⁴⁵ Since 'legal' rights are determined by the authorities, severe limitations can be placed on what the defence lawyer can do for his or her client in the police station. For example, the lawyer might wish to advise the client to remain silent, in order to hinder the police case. This is arguably in the client's interest, but provisions set out by legislation³⁴⁶ now mean that to do so might risk negative inferences later being drawn against the client, which would almost certainly not be in his or her interests.

The Criminal Procedure Rules 2010 (CPR)³⁴⁷ have fundamentally altered the landscape of criminal justice, affecting the duties of parties to the process including the criminal defence lawyer. The rules are derived from a variety of sources which, historically, governed criminal justice procedure. However, under s.69 of the *Courts Act 2003*, it was required that these disparate threads of regulation be drawn together in the form of the CPR. The rules were decided upon by the Criminal Procedure Rules Committee and approved by the Lord Chancellor, and were brought into effect by statutory instrument.³⁴⁸ As a primary obligation of the traditional adversarial defence lawyer, one might reasonably assume that the principle of partisanship would be manifested in the rules. Yet, no reference of any kind is made, not even one as basic as that contained in Practice Code C. As a result, this crucial piece of delegated legislation is somewhat incongruous with the theoretical principle outlined in Chapter 2. In contrast to statutory law, jurisprudence has frequently referred to the principle of partisanship as a central

³⁴² These do not in fact form part of the code.

³⁴³ 'Notes for guidance' [6D], 23 - *Police and Criminal Evidence Act 1984*, Code of Practice C.

³⁴⁴ However, it might be argued that the 'Notes for guidance' are merely explanations for users of the code (i.e. the police) rather than a definitive articulation of the defence lawyer's role.

³⁴⁵ See Chapter 2, Section 3.1.1.

³⁴⁶ See s.34 - *Criminal Justice and Public Order Act 1994*.

³⁴⁷ 2010/60.

³⁴⁸ Section 72 - *Courts Act 2003*.

part of the defence lawyer's role. In *R v. McFadden*,³⁴⁹ a trial judge attempted to financially penalise the defence lawyers in the case for wasting the court's time. In an addendum to the case report, the Chairman of the Bar "restated the principles which govern the conduct of counsel when defending an accused",³⁵⁰ declaring:

"It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of that accused."³⁵¹

Nearly three decades later, this statement was echoed in modern case law. Although a case on civil procedure, *Medcalf v. Mardell*³⁵² provides a fine summary of the duty of partisanship a lawyer owes to his or her client and its importance in an adversarial system:

"The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed."³⁵³

Other cases relevant to partisanship have centred on the issue of whether the defence can acquire tactical advantage from errors by the court or prosecution. In relation to mistakes by the court, most notably the judge, it is arguable that the defence lawyer is entitled to promote his or her client's best interests through silence. In *R v. Cocks*,³⁵⁴ James LJ made the following *obiter* comment:

"[A] defending counsel owes a duty to his client and it is not his duty to correct the judge if a judge has gone wrong".³⁵⁵

This comment suggests that in a situation where correcting a mistake by the judge might disadvantage the defendant, the defence lawyer would be entitled to remain silent.

³⁴⁹ (1976) 62 Cr. App. R. 187.

³⁵⁰ *Ibid.*, 193

³⁵¹ *Ibid.*

³⁵² [2003] 1 AC 120 (HL).

³⁵³ *Ibid.*, 141 *per* Lord Hobhouse.

³⁵⁴ (1976) 63 Cr. App. R. 79.

³⁵⁵ *Ibid.*, 82.

Arguably, this situation remains unchanged; in *Popat v. Barnes*,³⁵⁶ Buckley J seemed to accept the conclusion that "the dictum in *Cocks* should be taken to represent the law until such time as it is expressly disapproved by the Court of Appeal."³⁵⁷ This has not yet occurred.

Actively exploiting errors by the prosecution is less clear-cut. In theory, several sources suggest that the partisan defender should exploit any opportunity that furthers the cause of the client. In *R v. Munnery*,³⁵⁸ after the close of the prosecution case, the defence raised an evidential issue which had not been covered by the prosecution and which the defence had not referred to previously. The prosecution returned with further evidence which was admitted and the defendant was convicted. He appealed on the grounds that "the decision of the trial judge to allow the prosecution to call fresh evidence during the course of a defence submission of no case to answer amounted to both a material irregularity and a wrong decision on a question of law."³⁵⁹ In essence, the defence had taken advantage of a prosecution error, but had been dispossessed of it by the later admission of the evidence. In considering the importance of such tactical advantages, Mustill LJ said:

"What matters is that the judge should have in the forefront of his mind the strictly adversarial nature of the English criminal process, whereby the cases for the prosecution and the defence are presented consecutively in their entirety . . . the defendant may be prejudiced if his advisers have identified a gap in the prosecution's evidence, and have drawn attention to it by a submission of no case only to find that the judge gives leave to put it right; whereas if they had kept silent until the time to address the jury the prosecution would have been too late."³⁶⁰

This appears to support the contention that a partisan defender can and should exploit prosecution mistakes in order to advance the interests of the client.

³⁵⁶ [2004] EWHC 741 (QB).

³⁵⁷ *Ibid.*, [24].

³⁵⁸ [1992] 94 Cr. App. R. 164.

³⁵⁹ *Ibid.*, 165.

³⁶⁰ *Ibid.*, 172.

However, the above assertion was tempered by a later statement:

"Tactics are a legitimate part of the adversarial process, but justice is what matters: justice to the public, represented by the prosecution, as well as to the defendant. Undeniably, if [the court] had declined to admit the evidence he could not have been criticised. The question is whether by letting it in he stepped outside the reasonable bounds of the discretion and thereby created a real risk of injustice."³⁶¹

This creates a different situation. Essentially, any evidential "lacuna in the prosecution case"³⁶² may be corrected at the judge's discretion, if it is in the interests of justice to do so and does not cause injustice to the defendant. The important question is whether such tactical manoeuvres represent such an integral part of the defendant's case, that an 'injustice' would be perpetrated were prosecution evidence admitted *ex post facto*. In *Khatibi v. DPP*,³⁶³ it was stated that "[a] [d]efendant may demand that the prosecution proves its case and keep silent at any prosecution shortcomings until the time when it can take advantage of them".³⁶⁴ Although this statement seems to reflect the theoretical conception of the partisan defence lawyer, it was counter-balanced with a reference to the *R v. Munnery* 'justice' test. In the case of *Leeson v. DPP*,³⁶⁵ Simon Brown LJ responded to the defence's tactical silence about "a purely technical"³⁶⁶ prosecution omission in the following way:

"[T]he defence stood by watching the point develop, carefully avoiding any hint of a defence, let alone any challenge, which might conceivably have alerted the prosecution to their failure to comply strictly with all the niceties of these prosecutions . . . I do not say that the defence are bound to remind the prosecution of all matters required to be proved, but I do say that they can hardly complain if, in the result, justices exercise their discretion so as to secure justice rather than allow a totally unmeritorious acquittal."³⁶⁷

This statement seems to seriously limit the scope of tactical silence and, as a result,

³⁶¹ *Ibid.*, 173.

³⁶² *R v. Leeson* [2000] R.T.R. 385.

³⁶³ [2004] EWHC 83 (Admin).

³⁶⁴ *Ibid.*, [17].

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*, 392.

³⁶⁷ *Ibid.*, 392.

undermines the assertion that a criminal defence lawyer is obliged to be a zealous and unflinching representative of their client's interests. In all three of the above cases, the prosecution was allowed to adduce further evidence and thus the defence tactics were neutralised. It seems that, in defending a client, a criminal defence lawyer can employ tactics that uphold a 'legitimate' adversarial process, yet should not attempt to secure an 'unmeritorious acquittal' for their client. The meaning of such terms is open to court interpretation, presumably intentionally. This case law appears to place significant limitations on the freedom of the defence lawyer to behave as a partisan defender and presents a picture at odds with the theoretical conception. In conclusion, legislation, statutory instruments and common law appear to significantly underplay the importance of the principle of partisanship.

Professional Standards

The principle of partisanship is a prominent feature of the professional standards issued by the legal profession's regulatory authorities in England and Wales. The BSB Code of Conduct (hereafter, the 'Bar Code') states that Barristers must "promote and protect fearlessly and by all lawful and proper means the lay client's best interests",³⁶⁸ exemplifying the duty to the client in balance with the duty to uphold and abide by the law. The code expands on this in significantly stronger language. It states that fearless protection of the client's interests should be done "without regard to [the barrister's] interests or to any consequences to himself or to any other person",³⁶⁹ a rule reminiscent of the famous words of Lord Brougham.³⁷⁰ The Law Society Code for Advocacy, last updated in 2003, is a similar set of rules applied to solicitor advocates and repeats the aforementioned provision virtually word for word at Paragraph 2.3 (a). Similarly, the Public Defender Service Code of Conduct, which governs the behaviour of publicly funded criminal defence lawyers employed by the Legal Services Commission, asserts that "the professional employee shall provide the client with fearless, vigorous and effective defence and may use all lawful and proper means to secure the best outcome for the client."³⁷¹

³⁶⁸ [303(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

³⁶⁹ Ibid.

³⁷⁰ See Chapter 2, Section 2.

³⁷¹ Rule 2.1, page 4, Public Defender Service Code of Conduct – London: The Stationery Office.

The duty to provide partisan advocacy is replicated in the Solicitors' Code of Conduct 2007 (hereafter, the 'Solicitors' Code'), although in a somewhat diluted and ambiguous form. The code expects solicitors to "act in the best interests of each client"³⁷² and to make "the client's business your first concern".³⁷³ These appear to be significantly less powerful statements of the defence lawyer's duty to the client when compared with the other professional standards and the 'zealous advocate' model. It is unclear whether the professional standards consider the duty of partisanship to be the defence lawyer's primary obligation. The Solicitors' Code describes the client's business as the 'first concern' of the defence lawyer, while the Bar Code asserts that "[t]he guiding principle must be the obligation of counsel to promote and protect his lay client's best interests so far as that is consistent with the law and with counsel's overriding duty to the court".³⁷⁴ Neither of these statements explicitly states that the duty to the client takes precedence, while the latter quote requires that the 'guiding principle' of partisanship be 'consistent' with the 'overriding' duty to the court. From this, one might conclude that the principle of partisanship is in fact limited by a higher duty to the court.

Training

The LPC is a pre-requisite to practice as a solicitor in England and Wales. The 'Written Standards' that determine the course structure are issued by the SRA, and are therefore an important, early source of training in conduct and ethics. The 'Written Standards' seem to reflect the duty of partisanship; solicitors are expected to adopt an active role in developing their client's case, requiring them to "investigate and identify the relevant facts",³⁷⁵ "gather and analyse evidence"³⁷⁶ and generally "plan the progress of a transaction to promote the client's interests".³⁷⁷ The BVC, the equivalent professional qualification for barristers, is governed by a document known as the 'Golden Book', issued by the BSB. The 'Golden Book' requires that students are instructed on professional conduct and ethics and should "appreciate the core principles" that underpin the Bar Code of Conduct. One of these core principles is described as "loyalty

³⁷² Rule 1.04, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

³⁷³ [1], 'Guidance to rule 1 – Core duties', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

³⁷⁴ [6.2.3], 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board,

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

³⁷⁵ [3.2], page 1, 'Litigation', LPC 'Written Standards' – London: Solicitors Regulation Authority.

³⁷⁶ *Ibid.*, [4], page 15, 'Criminal Procedure' - Element 1.

³⁷⁷ *Ibid.*, [3.7], page 12, 'Litigation'.

to the lay client",³⁷⁸ a fairly explicit reference to the principle of partisanship. Various training manuals are used in legal professional courses like the LPC and BVC, some of which also refer to partisanship. An example is 'Criminal Litigation in Practice',³⁷⁹ which states that "[y]ou are under no duty to enquire in every case whether your client is telling the truth".³⁸⁰ This reflects the spirit of partisan defence; the goal of the defence lawyer is to pursue the interests of the client, and the truth may be a casualty of this. The manual also outlines the approach that a defence lawyer should adopt in the event of a confession of guilt, stating "[y]ou must still explore the facts with your client . . . [y]our client may believe that he is guilty of, for example, an assault, but it may become clear that he has a defence of self-defence."³⁸¹ Again, this advice embodies the principle of partisanship. When presented with a confession of guilt, a less partisan defender might simply advise the client to plead. The principle of partisanship would urge the defence lawyer to make assumptions in the client's favour and explore the facts as thoroughly as possible. The same manual summarises the duty of the defence lawyer in the following way:

"Do your job: Say for your client what he would properly say for himself if he had your legal training and expertise."³⁸²

This statement captures both the nature of the lawyer-client relationship and of partisanship; the lawyer is the agent of the client and should do everything the client would do, were he or she able to defend themselves.

The Criminal Litigation Accreditation Scheme provides further definition of the role of publicly funded criminal defence solicitors, who make up a large proportion of the criminal defence lawyers in England and Wales. In order to practice as a duty solicitor, lawyers must undertake two training schemes – the Police Station Qualification and the Magistrates' Court Qualification. They are now a central part of training for solicitors and, importantly, refer to the principle of partisanship. In relation to the Police Station Qualification, solicitors are expected to understand their role and aims in "the probing

³⁷⁸ [32], page 9, 'Professional Conduct and Ethics', The BVC 'Golden Book' – London: Bar Standards Board.

³⁷⁹ Plowden P. (2006) – Newcastle: Northumbria Law Press.

³⁸⁰ Ibid., 37.

³⁸¹ Ibid.

³⁸² Ibid., 99.

of the prosecution case"³⁸³ and must know "how to identify inappropriate behaviour by the police and when and how to respond to it."³⁸⁴ Both of these suggest an active and steadfast defence of the client in the Police Station, where he or she may be most vulnerable. As regards the Magistrates' Court Qualification, it is stated that a solicitor must have an understanding of the "duty to his or her client",³⁸⁵ which is a more restrained reference to the principle of partisanship. This is, however, expanded upon in the 'Advocacy Skills' section, where it is stated that defence lawyers must be able to "present a coherent and persuasive case that is consistent with the client's instructions".³⁸⁶

Other Relevant Standards

In June 2007, the Ministry of Justice and the Legal Services Commission published a consultation paper entitled 'Creating a quality assurance scheme for publicly funded criminal defence advocates'. The paper proposed a scheme for assessing the competence of advocates engaged in criminal defence across England and Wales. This was described in a recent discussion paper as "absolutely necessary to ensure [that] advocates are suitably qualified, experienced and skilled to represent defendants properly at every level of seriousness at which charged" as well as to "prevent those who are not good enough to do it thereby jeopardising their client's interest, the public interest and the court process".³⁸⁷ The relevance of the proposed scheme to the role of the defence lawyer is twofold. First, both the "discussion paper and the development to date [have] revolved around criminal defence advocacy",³⁸⁸ and second, the proposals outline standards which indicate what is expected of a criminal defence lawyer. The initial consultation paper made a direct reference to the principle of partisanship in the proposed 'competency framework',³⁸⁹ a set of standards which would be used for

³⁸³ [1.1.4], page 3, 'Standards of competence for the accreditation of solicitors and representatives advising at the police station', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>: **Last accessed 16/08/2010.**

³⁸⁴ *Ibid.*, [1.1.7], page 3.

³⁸⁵ [1.1.1], page 3, 'Standards of competence for the accreditation of solicitors advising at the magistrates' court', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>: **Last accessed 16/08/2010.**

³⁸⁶ *Ibid.*, [2.3.3], page 7.

³⁸⁷ Legal Services Commission (2010) *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy* – London: Legal Services Commission, [1.9.4] in 'Introduction'.

³⁸⁸ *Ibid.*, [8] in the 'Executive Summary'.

³⁸⁹ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for*

assessing the quality of defence advocates. The original framework required that a lawyer:

"Develops and advances the lay client's case to secure the best outcome for the lay client by gaining a rapid, incisive overview of case material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately."³⁹⁰

The defence lawyer was also expected to "stand up to the judge"³⁹¹ and respond to "the needs and circumstances of the lay client (including the lay client's means and the importance of the case to the lay client)".³⁹² However, after a pilot scheme in early 2009 and a final evaluation of the results by Cardiff Law School in early 2010, the 'competency framework' had been drastically altered, omitting all of the above references.³⁹³ The only remaining reference to any obligation to the defendant was the expectation that the defence lawyer "[a]ssist . . . the court where consistent with [his or her] duty to the client".³⁹⁴ What this indicates is uncertain; it is possible that the above standards were simply too verbose or too difficult to measure. Alternatively, one could conclude that the principle of partisanship was not considered desirable by the designers of the scheme.

'Active Defence',³⁹⁵ regarded as a standard reference text for criminal defence practitioners, stresses the importance of being a partisan in the police station. Criminal defence lawyers should "exhaustively and systematically . . . investigate every aspect of the police case, the prosecution evidence and the police investigation".³⁹⁶ Without taking these steps, according to the authors, "the future defence of [the] client is placed in jeopardy."³⁹⁷ Similarly, 'Criminal Defence'³⁹⁸ is considered an important source of defence ethics for solicitors. It states that the job of a criminal defender is "to do what is

Publicly Funded Criminal Defence Advocates – London: Ministry of Justice/Legal Services Commission, Annex 1.

³⁹⁰ *Ibid.*, [B], page 26.

³⁹¹ *Ibid.*, [C(8)], page 27.

³⁹² *Ibid.*, [C(9)], page 27.

³⁹³ Legal Services Commission (2010) *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy* – London: Legal Services Commission, Annex E.

³⁹⁴ *Ibid.*, [B.1.3], page 1.

³⁹⁵ Ede R., Shepherd E. (2000) *Active Defence* – London: The Law Society.

³⁹⁶ *Ibid.*, 332.

³⁹⁷ *Ibid.*, 332.

³⁹⁸ Ede R., Edwards A., (2002) *Criminal Defence* – London: The Law Society.

best for [his or her] client, consistent with his instructions, rather than bend to pressure to oil the wheels of the criminal justice system."³⁹⁹ This undoubtedly places a duty upon the defence solicitor to be a partisan representative and, interestingly, appears to directly contradict the duty to uphold procedural justice. Advice is provided on how to act in the event of a confession of guilt by the client: "Even if your client admits guilt, you must enquire further and make sure that your client is actually guilty in law and that there is sufficient prosecution evidence to convict him."⁴⁰⁰ Therefore, the primary aim of the criminal defence lawyer is to steadfastly protect the client's interests despite an admission of 'guilt'. 'Defending Suspects at Police Stations',⁴⁰¹ another leading academic work used widely by the legal profession, outlines some compelling reasons for not necessarily taking a confession of guilt at face value:

"In some cases, a person knows that they are not guilty but wishes to confess, for example, in order to protect another person, to help deal with guilt about something else, or to secure their release from custody. In other cases, a person may actually believe that they are guilty even though this is not so. This might be because they have deluded themselves into believing in their own guilt, or accept that they are guilty because the police say they are, and is a particular risk if their memory is affected by mental vulnerability or misuse of alcohol or drugs. Alternatively it may result from a mistaken understanding of the law."⁴⁰²

The vast majority of criminal defenders are publicly funded. As such, the contracts between defence firms and the Legal Services Commission (LSC) have relevance to the role of the criminal defence lawyer. These contracts regulate the conduct and payment of solicitors' firms acting in legally aided criminal cases, setting out standard contract terms between the LSC and firms of solicitors. Thus, they have scope for defining the role of defence lawyers. The current contract is the *Standard Crime Contract 2010*. It makes reference to partisanship at Paragraph 7.2, stating that contracted lawyers "must act in the best interests of [their] Clients and be uninfluenced by any factor other than Clients' (and potential Clients') best interests." Equally significant are the payment arrangements for criminal defence lawyers. The *Unified Contract (Crime) 2008*, and its predecessor (the *General Criminal Contract 2008*), introduced sweeping changes to the

³⁹⁹ Ibid., 1.

⁴⁰⁰ Ibid.

⁴⁰¹ Cape E. (2006) *Defending Suspects at Police Stations* – London: Legal Action Group.

⁴⁰² Ibid., 166.

system of remuneration for criminal defence lawyers at police stations. Defence lawyers are now paid "on the basis of a fixed fee rather than on Hourly Rates",⁴⁰³ which is "payable for all Police Station Attendance and Police Station Telephone Advice undertaken on a matter where a solicitor or accredited representative attends a Client in the Police Station".⁴⁰⁴ Defence work of this kind includes "time spent advising the Client, travelling to and from the Police Station, waiting, letters and telephone calls for the initial and subsequent visits to the Police Station",⁴⁰⁵ all of which can take varying lengths of time dependant on the nature of the case, the client and other factors. Arguably, the alteration of payments may cause criminal defence lawyers to, inadvertently or deliberately, invest less time in providing vigorous and thorough defence. Where a client's case is complex and time-consuming, a defence lawyer will be paid a fixed rate rather than by the number of hours spent on the case. This is a disincentive for a defence lawyer to devote more time than is absolutely necessary to defending a client at the police station. Due to shrinking margins in the criminal defence market, defence lawyers may feel pressure from above to cut costs by actively restricting time spent defending. This will be discussed in more depth in Chapter 8.

2.2 The Principle of Detachment

Legislation and the Common Law

The principle of detachment is enshrined in legislation, providing the basis for all other forms of regulation. Section 17 of the *Courts and Legal Services Act 1990* sets out the objective of Part II of the legislation ('Legal Services') as being "the development of legal services . . . by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice."⁴⁰⁶ An important part of this 'development' is setting the standards required to obtain "a right of audience, or . . . a right to conduct litigation in relation to any court or proceedings".⁴⁰⁷ One of these standards is that the rules of conduct "of a body whose members are or will be providing advocacy

⁴⁰³ Page 12, 'Definitions', Unified Contract (Crime) July 2008.

⁴⁰⁴ [2.2(1)], page 210, 'Part E: Remuneration under the General Criminal Contract', General Criminal Contract Jan. 2008.

⁴⁰⁵ Ibid., [2.2(2)], page 210.

⁴⁰⁶ Section 17(1) - *Courts and Legal Services Act 1990*.

⁴⁰⁷ Section 17(3) - *Courts and Legal Services Act 1990*.

services"⁴⁰⁸ (e.g. criminal defence lawyers) make adequate provision to prevent members withholding services to clients "on the ground that the nature of the case is objectionable to him or to any section of the public . . . [or] on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to him or to any section of the public".⁴⁰⁹ Clearly, 'a body' includes all legal regulatory bodies, such as the SRA and BSB, whose rules of conduct criminal defence lawyers are subject to. The principle of detachment is also recognized by the common law.

In *R v. Ulcay*,⁴¹⁰ Sir Igor Judge commented:

"Counsel cannot choose his clients, or more accurately, cannot refuse to accept the instructions of a solicitor to act on behalf of an individual because of the nature of the charge he faces, or because of his character and reputation."⁴¹¹

Similarly, in the case of *Medcalf v. Mardell*,⁴¹² Lord Hobhouse stated that "[u]npopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or by anyone else."⁴¹³ Both of these observations encapsulate the theoretical principle perfectly; defence lawyers are expected to act for clients who might be regarded as undeserving of legal protection or who have an objectionable cause. In addition, they should not identify with, or be identified with, said client or cause.

Professional Standards

Like partisanship, the principle of detachment represents a core obligation binding criminal defence lawyers to their clients, and is manifested in all the main professional standards. The Bar Code outlines one of its key purposes as being the provision of rules that require barristers "to be completely independent in conduct and in professional standing as sole practitioners."⁴¹⁴ The professional standards require criminal defence

⁴⁰⁸ Section 17(3)(c) - *Courts and Legal Services Act 1990*.

⁴⁰⁹ Section 17(3)(c) - *Courts and Legal Services Act 1990*.

⁴¹⁰ [2008] 1 W.L.R. 1209.

⁴¹¹ *Ibid.*, [39].

⁴¹² [2003] 1 AC 141.

⁴¹³ *Ibid.*, 141.

⁴¹⁴ [104(a)(i)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

lawyers to be neutral and to refrain from moral judgment of the merits of a client's case or character. As such the Bar Code prohibits defence lawyers from expressing personal opinions when conducting themselves in court.⁴¹⁵ The Bar Code lays out the basic principle of detachment in the following statement:

"A barrister who supplies advocacy services must not withhold those services . . . on the ground that the nature of the case is objectionable to him or to any section of the public . . . [or] on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to him or to any section of the public."⁴¹⁶

The Solicitors' Code replicates this statement in identical terms,⁴¹⁷ as does the Law Society Code for Advocacy.⁴¹⁸ Similarly, the Public Defender's Code of Conduct states that a criminal defence lawyer "shall not refuse to advise, assist or represent a client because of the nature of the allegation or the client or because of the employee's personal views."⁴¹⁹

The Principle of Detachment is best exemplified by the so-called "Cab-Rank Rule"⁴²⁰ contained in the Bar Code. This states that a barrister must:

"[A]ccept any brief to appear before a Court in which he professes to practise . . . accept any instructions . . . act for any person on whose behalf he is instructed . . . and do so irrespective of . . . the party on whose behalf he is instructed . . . the nature of the case and . . . any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person."⁴²¹

⁴¹⁵ Ibid., [708(b)].

⁴¹⁶ Ibid., [601].

⁴¹⁷ Rule 11.04(1), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁴¹⁸ [2.4.2], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁴¹⁹ Rule 4.4, page 5, Public Defender Service Code of Conduct – London: The Stationery Office.

⁴²⁰ [602], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁴²¹ [602] 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

This rule is the cornerstone of the principle of detachment in relation to barristers. The rule does not apply to solicitors as they are "generally free to decide whether or not to take on a particular client."⁴²² In *Rondel v. Worsley*,⁴²³ a landmark case on a barrister's liability to his or her client for professional negligence, Lord Pearce stated the importance of the cab-rank rule in the context of detachment:

"It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter, and that would be the inevitable result of allowing barristers to pick and choose their clients."⁴²⁴

Returning to *R v. Ulcay*,⁴²⁵ a criminal case, Sir Igor Judge affirmed that "[t]he cab-rank rule is essential to the proper administration of justice."⁴²⁶ Drawing on influential civil cases concerning the rule, including *Rondel v. Worsley*, he continued:

"We simply emphasise that if the cab-rank rule creates obligations on counsel in civil proceedings, it does so with yet greater emphasis in criminal proceedings, not least because to a far greater extent than civil proceedings, criminal proceedings involve defendants charged with offences which attract strong public aversion, with the possibility of lengthy prison sentences, when more than ever, the administration of justice requires that the defendant should be properly represented . . ."⁴²⁷

It seems well established that compulsory acceptance of work, the ultimate expression of detachment, is of paramount importance in the criminal justice system. However, the cab-rank rule does contain a crucial caveat – the Bar Code states that a barrister "must not accept any instructions if to do so would cause him to be professionally

⁴²² Rule 2.01 (1), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁴²³ [1969] 1 AC 191.

⁴²⁴ *Ibid.*, 275.

⁴²⁵ [2008] 1 W.L.R. 1209

⁴²⁶ *Ibid.*, [40].

⁴²⁷ *Ibid.*

embarrassed".⁴²⁸ This is an umbrella exception which allows choice in the selection of clients in certain situations, for example:

"[I]f [the barrister] lacks sufficient experience or competence to handle the matter . . . if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do . . . if the instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings in Court or to require a barrister to act otherwise than in conformity with law or with the provisions of this Code . . ." ⁴²⁹

The exceptions to the cab-rank rule are open to interpretation and, as a result, criticism levelled at the rule is "largely directed at the possible evasion of the principle, rather than the principle itself."⁴³⁰ Such criticism has, over the years, created much debate about the value of the cab-rank rule and detachment in general.

In *Arthur J.S. Hall and Co. v. Simons*,⁴³¹ Lord Bingham seemed to view the cab-rank rule as relatively ineffective, stating:

"It is a valuable professional rule. But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept."⁴³²

⁴²⁸ [603], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁴²⁹ Ibid.

⁴³⁰ [2008] 1 W.L.R. 1209, [40].

⁴³¹ [2002] 1 A.C. 615.

⁴³² Ibid., 678.

The BSB itself has been critical of the cab-rank rule. In its consultation paper on the implications of the *Legal Services Act 2007* for the regulation of barristers, the BSB highlighted:

"Some argue that the 'cab-rank' rule is not required or justified by considerations of access to justice. The rule does not apply to solicitors; and there is no evidence that members of the public are unable to find solicitors to represent them because of the nature of their case."⁴³³

The paper added that, "the various exceptions to the 'cab-rank' rule enable barristers to avoid it for perfectly legitimate reasons, for example by deciding that they are too busy or by asking a high fee";⁴³⁴ this allows barristers to dodge undesirable clients by manipulative interpretation of the Bar Code. In the context of criminal defence, the BSB made an important reference to what it termed "advice deserts in areas of publicly funded work",⁴³⁵ mostly made up of criminal and family work. This is due to the fact that fees for criminal work are considered insufficient for the purpose of the cab-rank rule. In September 2005, the BSB issued guidance for criminal barristers on the refusal of work. It stated:

"Until 15 November 2003, legally aided criminal defence work was deemed by the Code to be at a proper fee. On 15 November 2003, the Bar Council decided that criminal defence GFS cases should be excluded from the provision deeming them to be proper fees."⁴³⁶

Since paragraph 604(b) of the Bar Code entitles barristers to refuse a case if the fee is not "proper", the above guidance suggests that defence barristers may, in fact, circumvent the cab-rank rule. As a result, it has been commented that the cab-rank rule has, in reality, "not existed in publicly-funded work for several years".⁴³⁷ Considering that most criminal defence work is publicly funded, this raises the question as to

⁴³³ Bar Standards Board (2008) *The Legal Services Act 2007: Implications for the regulation of the Bar in England and Wales (Consultation Paper)* – London: Bar Standards Board, [60], 15.

⁴³⁴ *Ibid.*, [61], 16.

⁴³⁵ *Ibid.*, [60], 15.

⁴³⁶ Bar Standards Board (2005) *Guidance to Members of the Criminal Bar in relation to Refusing Work* - Bar Standards Board.

⁴³⁷ The Western Circuit (2008) *Practice at the Bar of England in the 21st Century: The Response of the Western Circuit to the Bar Standards Board Consultation on the Legal Services Act 2007, Practice in Partnership and the Cab-Rank Rule* – Exeter: The Western Circuit, [41], 13.

whether formal regulation really obligates the defence lawyer to be detached.

Further doubts about the value of the cab-rank rule have been created by the *Legal Services Act 2007*. The statute will allow barristers to work in 'Alternative Business Structures' (ABS) and 'Legal Disciplinary Practices' (LDP) which "allow lawyers and non-lawyers to work together to deliver legal and other services."⁴³⁸ In these structures, the cab-rank rule could prove a serious hindrance. Where solicitors and barristers work together, problems of 'conflicting out' could arise. If a barrister is bound by the cab-rank rule to accept a brief, this could exclude the business from accepting other conflicting briefs. This would not only limit the effectiveness of ABS, but would also contradict the principle that solicitors are "generally free to decide whether or not to take on a particular client."⁴³⁹ The cab-rank rule, applied in this context, is therefore deeply disadvantageous. In the consultation paper referred to previously, the BSB recognised this problem, stating, "it will be difficult or impossible to impose a number of the rules governing self-employed barristers, notably the 'cab-rank' rule, on barristers working in ABS or LDP structures"⁴⁴⁰ because "[t]he acceptance or refusal of instructions will be a matter for the firm as a business entity, not for an individual taking part in it".⁴⁴¹ As a result, the BSB concluded that "such firms or partnerships would be placed under such a disadvantage by this rule that it would be a considerable disincentive to them to form those structures, contrary to the legislative purpose."⁴⁴² In the light of such a critical problem, the BSB suggested that "this may call into question whether those rules should continue apply to the self-employed bar".⁴⁴³ Such comments represent a real challenge to the validity and usefulness of the cab-rank rule and to the principle of detachment.

Training

There are few references to the principle of detachment in training materials. The BVC 'Golden Book' states that "the principle of professional independence"⁴⁴⁴ represents one of the core values underpinning the Bar Code. Although open to interpretation,

⁴³⁸ Explanatory Note 11 - *Legal Services Act 2007*.

⁴³⁹ Rule 2.01 (1), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

⁴⁴⁰ Bar Standards Board (2008) *The Legal Services Act 2007: Implications for the regulation of the Bar in England and Wales (Consultation Paper)* – London: Bar Standards Board, [52(b)], 13.

⁴⁴¹ *Ibid.*, [59], 15.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, [52(b)], 13.

⁴⁴⁴ [32], 9, 'Professional Conduct and Ethics', The BVC 'Golden Book' – London: Bar Standards Board.

‘professional independence’ could be said to embody the requirement that barristers disregard outside influences, such as the public, the media, friends and family, the court or even the client. To suggest it requires them to act as neutral and non-judgmental is perhaps stretching the interpretation too far. The only other meaningful reference is contained in ‘Criminal Litigation in Practice’,⁴⁴⁵ the training manual mentioned earlier. It suggested that the defence lawyer should remember the following:

"You are not doing this for yourself. You are doing it for your client. Ignore your own worries and concerns."⁴⁴⁶

This summarises the detached role of the defence lawyer succinctly; any moral qualms or personal doubts should be dismissed because professional defence lawyers are acting for defendants, not themselves.

Other Relevant Standards

The Ministry of Justice (MOJ) and Legal Services Commission (LSC) consultation paper on quality assurance for criminal defence advocates contained one proposed standard reflective of the principle of detachment. As a neutral advocate, the defence lawyer should advance the rights of a client regardless of his or her personal views, the opinion of the public or that of the court. In the consultation paper, the spirit of this duty was captured in the requirement that defence counsel be "prepared to advance an argument that might not be popular".⁴⁴⁷ The *Standard Crime Contract 2010* also has the potential to affect the detachment of publicly funded defence lawyers. A ‘contract’ between defence lawyers and the LSC could obligate the lawyer to behave like an ‘employee’ of the state; as such, the state could arguably influence the defence lawyer through the means of the contract. Considering the adversarial criminal justice process pits the defendant against the state, this has potentially perilous consequences for the credibility of a detached defence lawyer. However, the contract explicitly states that "[y]ou are, and acknowledge you are, an independent provider of legal services. You are not our employee, agent or partner (in law) and must neither act as such nor so as to

⁴⁴⁵ Plowden P. (2006) *Criminal Litigation in Practice* – Newcastle: Northumbria Law Press.

⁴⁴⁶ *Ibid.*, 99.

⁴⁴⁷ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates* – London: Ministry of Justice/Legal Services Commission, Annex 1, [C(7)].

give the impression that you are our employee, agent or partner (in law)."⁴⁴⁸ Formally, this is an unambiguous statement that criminal defence lawyers are expected to be independent and free of influence from the state as its 'contractor'. Whether this reflects detachment in the theoretical sense is unclear. In 'Criminal Defence',⁴⁴⁹ the authors address how a defence lawyer should approach a difficult, but important, situation: when the lawyer suspects his or her client is guilty of the offence with which he or she is charged. The advice is fairly unambiguous:

"If you remain doubtful [about the client's innocence], strive to avoid pre-judgment and to remain detached. If you think your client is guilty, that does not prevent you from fully defending him. Your opinion may be erroneous and, in any event, it is not your function to judge your client."⁴⁵⁰

This seems to reflect detachment as conceived in the 'zealous advocate' model; the defence lawyer is not charged with determining the client's guilt or innocence. He or she must provide detached, non-judgmental defence, regardless of personal beliefs.

2.3 The Principle of Confidentiality

Legislation and the Common Law

In terms of legislation and common law, the principle of confidentiality is primarily embodied in the principle of 'legal professional privilege'. However, it is important to note that this is just one facet of the general duty of confidentiality incumbent upon a criminal defence lawyer. For many years, legal privilege had been governed and developed by common law; with the advent of the PACE in 1984, this was given statutory definition under s.10, outlining "the scope of legal privilege in terms that would be instantly recognised by any lawyer as covering the position at common law".⁴⁵¹ The statute recognises two distinct categories of legal privilege. The first category provides that "communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal

⁴⁴⁸ [2.14], 16, 'Relationship and Communication', Standard Crime Contract 2010.

⁴⁴⁹ Ede R., Edwards A. (2002) *Criminal Defence* – London: The Law Society.

⁴⁵⁰ *Ibid.*, 116.

⁴⁵¹ *R v. Central Criminal Court, Ex Parte Francis & Francis* [1989] AC 346, 382 *per* Lord Griffiths.

advice to the client"⁴⁵² are subject to privilege. This category is commonly known as 'legal advice privilege' and "arises out of a relationship of confidence between lawyer and client."⁴⁵³ Not all communications relating to legal advice are protected – it seems that "[u]nless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising."⁴⁵⁴ The legal advice privilege is a primary example of the principle of confidentiality as an obligation upon the criminal defence lawyer, and has been approved in strong terms in case law.

In *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)*,⁴⁵⁵ Lord Scott of Foscote stated:

"[I]t is necessary in our society . . . that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others . . . this idea . . . justifies . . . the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."⁴⁵⁶

The second category of legal privilege outlined in PACE protects "communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings".⁴⁵⁷ Again, the common law has elaborated on this category, known as 'litigation privilege'. According to Lord Carswell in *Three Rivers*, litigation privilege only arises when three conditions are met: "litigation must be in progress or in contemplation . . . the communications must have been made for the sole or dominant purpose of conducting that litigation . . . [and] the litigation must be adversarial, not investigative or inquisitorial."⁴⁵⁸ The major difference between the two categories of

⁴⁵² Section 10(1)(a) - *Police and Criminal Evidence Act 1984*.

⁴⁵³ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, [24], 646 *per* Lord Scott of Foscote.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*, [34], 649.

⁴⁵⁷ Section 10(1)(b) - *Police and Criminal Evidence Act 1984*.

⁴⁵⁸ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)*

privilege are therefore the nature of a communication – whether it is legal advice or in relation to litigation, commenced or in contemplation.

They can also be distinguished because legal advice privilege is an ‘absolute’ right, whereas litigation privilege is not. In *R v. Derby Magistrates’ Court, ex parte B*,⁴⁵⁹ it was held that “no exception should be allowed to the absolute nature of legal professional privilege, once established.”⁴⁶⁰ The use of the umbrella term legal professional privilege suggested that both categories were ‘absolute’. However, Lord Nicholls of Birkenhead clarified this, stating, “communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.”⁴⁶¹ Additionally, the case of *Re L (A Minor)*⁴⁶² distinguished *Ex parte B* as only applying “in the context of the relationship between solicitor and client.”⁴⁶³ It was submitted by counsel that “the absolute nature of the privilege attaching to the solicitor-client relationship extended equally to all other forms of legal professional privilege.”⁴⁶⁴ The court rejected this, stating that “[t]here is . . . a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation.”⁴⁶⁵ Furthermore, this case concerned care proceedings under the *Children Act 1989*, and the court concluded that “the primary consideration was and is the welfare of the child”,⁴⁶⁶ clearly indicating that other factors can be taken into account in deciding whether to uphold privilege.

[2005] 1 AC 610, [102], 675 *per* Lord Carswell.

⁴⁵⁹ [1996] AC 487.

⁴⁶⁰ *Ibid.*, 507 *per* Lord Taylor.

⁴⁶¹ *Ibid.*, 510.

⁴⁶² [1997] AC 16.

⁴⁶³ *Ibid.*, 24 *per* Lord Jauncey of Tullichettle.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*, 26.

Thus, litigation privilege is not 'absolute' in the same way that legal advice privilege is. Lord Jauncey added:

"[C]are proceedings are essentially non-adversarial. Having reached that conclusion, and also that litigation privilege is essentially a creature of adversarial proceedings, it follows that the matter is at large for this House to determine what if any role it has to play in care proceedings."⁴⁶⁷

This reinforces the conclusion that litigation privilege may be applicable at the discretion of the Court, whilst legal advice privilege is always applicable unless waived by the client

Legal professional privilege of either category is "at the instance of the client",⁴⁶⁸ that is, the client may waive the right if he or she chooses. Thus, the criminal defence lawyer is bound by the will of the client. Waiver may take place expressly, for example "when [the client] elects to disclose communications which the privilege would entitle him not to disclose"⁴⁶⁹ or impliedly, for example by pursuing legal action against his or her lawyer.⁴⁷⁰ The point at which a reference to a privileged document constitutes implied waiver is the subject of some debate. In *Dunlop Slazenger International Limited v. Joe Bloggs Sports Limited*,⁴⁷¹ Waller LJ quoted Matthews and Malek in attempting to clarify the issue:

"The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect."⁴⁷²

Although the defence lawyer is, generally, bound by confidentiality until it is waived, there is an exception to this. Section 10(2) of PACE states that "[i]tems held with the intention of furthering a criminal purpose are not items subject to legal privilege"; this is

⁴⁶⁷ Ibid.

⁴⁶⁸ Murphy P. (2005) *Murphy on Evidence* – Oxford: Oxford University Press, 445.

⁴⁶⁹ *Paragon Finance v. Freshfields* [1999] 1 WLR 1183, 1188 per Lord Bingham.

⁴⁷⁰ Ibid.

⁴⁷¹ [2003] EWCA Civ. 901.

⁴⁷² Ibid., [11].

known as the "Iniquity Exception".⁴⁷³ The word 'held' potentially limits the exception; since solicitors would normally 'hold' privileged items, the provision, interpreted literally, could only apply when a solicitor had the purpose of perpetrating a crime. However, in *R v. Central Criminal Court, Ex Parte Francis & Francis*,⁴⁷⁴ a majority of the House of Lords found that the exception could apply "to all documents prepared with the intention of furthering a criminal purpose whether the purpose be that of the client, the solicitor or any other person."⁴⁷⁵ This exception was justified in the case of *In re McE*,⁴⁷⁶ when Lord Hope stated:

"The common law does not shut its eyes to the possibility that the communications between the detainee and the solicitor may be fraudulent or criminal. Solicitors are of course expected to, and with rare exceptions do, act with complete propriety. But it would be an abuse of the common law privilege for them to act as instruments or accomplices in the furtherance of the detainee's criminal activity . . ."⁴⁷⁷

If confidentiality were allowed to shield the unlawful conduct of the defendant and other participants in the criminal justice process, then the process would no longer be legitimate.

Professional Standards

Within the 'zealous advocate' model, confidentiality represents a key supporting principle to the 'standard conception'. It protects a client's communications with his or her lawyer and manifests the undivided loyalty that defence lawyers owe to their clients, allowing, in theory, a frank and honest exchange between them. This in turn should enable the criminal defence lawyer to advance the strongest possible case for the client. Although confidentiality is expressed in the form of legal professional privilege, all the professional standards outline a more broad duty of confidentiality.

⁴⁷³ *In re McE* [2009] UKHL 15, [11] *per* Lord Phillips.

⁴⁷⁴ [1989] AC 346.

⁴⁷⁵ *Ibid.*, 385 *per* Lord Griffiths.

⁴⁷⁶ [2009] UKHL 15.

⁴⁷⁷ *Ibid.*, [59].

The Bar Code states:

"Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person . . . information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another client's advantage."⁴⁷⁸

The Public Defender Service Code and the Law Society Code for Advocacy both have similar provisions.⁴⁷⁹ The Solicitors' Code includes a shortened version of the obligation above,⁴⁸⁰ but does make an important point in the Guidance section. It draws a contrast between legal professional privilege and the duty imposed in the code, stating:

"It is important to bear in mind the distinction between this duty and the concept of law known as legal professional privilege. The duty of confidentiality extends to all confidential information about a client's affairs, irrespective of the source of the information . . . Legal professional privilege protects certain communications between you and your client from being disclosed, even in court."⁴⁸¹

Thus, it would seem that the principle of confidentiality as embodied in the codes extends beyond the borders outlined by legal professional privilege, encompassing 'all confidential information' and not just that which meets the criteria set by legislation and the common law. However, it is important to bear in mind that legal professional privilege legally binds a criminal defence lawyer, whereas the codes professionally bind and will therefore have different consequences. As the Solicitors' Code says, "not all

⁴⁷⁸ [702] 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁴⁷⁹ Rule 5.1, page 5, Public Defender Service Code of Conduct – London: The Stationery Office; Rule 6.2, page 8, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁴⁸⁰ Rule 4.01, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁴⁸¹ *Ibid.*, [3], 'Guidance to Rule 4 – Confidentiality and Disclosure'.

communications are protected from disclosure and you should, if necessary, refer to an appropriate authority on the law of evidence."⁴⁸² The Solicitors' Code also imposes a duty not to act for a client when doing so might compromise the confidentiality of a current or former client; this situation arises where "[confidential] information might reasonably be expected to be material; and . . . that client has an interest adverse to the first-mentioned client or former client."⁴⁸³

Training

Training materials add little to formal conceptions of the principle of confidentiality. The LPC Written Guidelines merely require, under the 'Pervasive Areas' section, that professional conduct rules relating to confidentiality are something students must be "familiar with",⁴⁸⁴ a somewhat underwhelming statement. Similarly, the 'standards of competence' for the Police Station Qualification simply state that "instructions are taken from the client and any information obtained is kept confidential."⁴⁸⁵

Other Relevant Standards

Other relevant standards mention confidentiality, but only repeat references that have already been covered.

⁴⁸² Ibid.

⁴⁸³ Rule 4.03, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁴⁸⁴ [1.2.1], page 16, 'Pervasive Areas', LPC 'Written Standards' – London: Solicitors Regulation Authority.

⁴⁸⁵ [3.8.2], page 9, 'Standards of competence for the accreditation of solicitors and representatives advising at the police station', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>: **Last accessed 16/08/2010.**

3. The Duty to the Court

3.1 The Principle of Procedural Justice

Legislation and the Common Law

The 'zealous advocate' model specified three umbrella duties incumbent upon criminal defence lawyers. Of these, the duty to the court is best exemplified by the principle of procedural justice; that is, to aid the court in the fair and balanced administration of justice. In terms of formal regulation, the primary representations of this are contained in statute. The *Courts and Legal Services Act 1990* states that "[e]very person who exercises before any court a right of audience granted by an authorised body has . . . a duty to the court to act with independence in the interests of justice".⁴⁸⁶ This statement infers that the defence lawyer has a duty to promote the interests of justice and must consider the needs of justice independently, free of the influence of the client's interests. To some extent, this summarises the role of *amicus curiae* and reflects the theoretical role of 'officer of the court'. Similarly, the case of *Medcalf v. Mardell*⁴⁸⁷ states quite simply that lawyers, including defence lawyers, "must respect and uphold the authority of the court".⁴⁸⁸ Other expressions of procedural justice do not explicitly refer to a duty to pursue 'justice', but do obligate the defence lawyer to aid the court and in some ways that work against defendant interests. A prime example is the duty of disclosure incumbent upon the defence. The *Criminal Procedure and Investigations Act 1996* states that "the accused must give a defence statement to the court and the prosecutor";⁴⁸⁹ in addition, the CPR strongly suggest that this duty extends to the defence lawyer personally.⁴⁹⁰

The defence statement imposes significant duties of disclosure upon the accused and his or her lawyer; the statement must set out "in general terms the nature of the accused's defence . . . indicating the matters on which he takes issue with the prosecution, and . . . setting out, in the case of each such matter, the reason why he takes issue with the prosecution."⁴⁹¹ The *Criminal Justice Act 2003* inserted an additional section into the

⁴⁸⁶ Section 27(2A) - *Courts and Legal Services Act 1990*.

⁴⁸⁷ [2003] 1 AC 120 (HL).

⁴⁸⁸ *Ibid.*, [54].

⁴⁸⁹ Section 5(5) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁰ Rules 3.2 and 3.3 - *Criminal Procedure Rules 2010*, 2010/60.

⁴⁹¹ Section 5(6) - *Criminal Procedure and Investigations Act 1996*.

aforementioned statute, expanding the scope of defence statement. The new section states that it must specify "the nature of the accused's defence, including any particular defences on which he intends to rely",⁴⁹² suggesting a more detailed description is required. It should also contain "any point of law . . . which he wishes to take, and any authority on which he intends to rely for that purpose",⁴⁹³ as well as "a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial"⁴⁹⁴ including their "name, address and date of birth".⁴⁹⁵ In addition, the *Criminal Justice and Immigration Act 2008* added a further requirement that the defence statement must set out "particulars of the matters of fact on which [the accused] intends to rely for the purposes of his defence".⁴⁹⁶ If these rules are not adhered to then "the court or any other party may make such comment as appears appropriate"⁴⁹⁷ and "the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned."⁴⁹⁸

The defence statement is a prime example of the criminal defence lawyer's duty to facilitate the administration of justice. The *Criminal Procedure and Investigations Act 1996* emerged in the wake of the 'Royal Commission on Criminal Justice',⁴⁹⁹ which criticised the fact that the defence could "require the police and prosecution to comb through large masses of material in the hope either of causing delay or chancing upon something that would induce the prosecution to drop the case rather than to have to disclose the material concerned".⁵⁰⁰ The defence statement was designed to alter this situation, ensuring that the defendant, and as such the defence lawyer, cooperated with the court and the trial process. In addition, it has been stated that "the defence statement is intended to eliminate the 'ambush' defence",⁵⁰¹ requiring that all defence evidence and argument is presented in a timely and fair fashion. It is important to note that the requirement to serve a defence statement only applies where a person is charged with an indictable offence.⁵⁰² The provision of a defence statement is voluntary in the case of a summary trial, although the impact of the CPR on this will be discussed further in

⁴⁹² Section 6A(1)(a) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹³ Section 6A(1)(c) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁴ Section 6C(1) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁵ Section 6C(1)(a) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁶ Section 6A(1)(c)(a) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁷ Section 11(3)(a) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁸ Section 11(3)(b) - *Criminal Procedure and Investigations Act 1996*.

⁴⁹⁹ Home Office (1993) – London: The Stationary Office, Cm 2263.

⁵⁰⁰ *Ibid.*, [42], Chapter 6.

⁵⁰¹ [17.10.2], 'Chapter 17: Criminal Procedure and Investigations Act', Enforcement Instructions and Guidance Manual 2009 - UK Border Agency.

⁵⁰² Section 1(2) - *Criminal Procedure and Investigations Act 1996*.

Chapter 4. These obligations are clearly designed to facilitate a speedy, open, effective, and procedure-driven process, free from delays and ambushes.

Leading case law appears to support this conclusion. In both *DPP v. Hughes*⁵⁰³ and *R v. Gleeson*,⁵⁰⁴ defence counsel attempted to enter ‘surprise’ defences at a late stage in the proceedings. In the former case, the defence submitted there was no case to answer, exploiting a hole in the prosecution’s evidence. The court rejected this, saying:

"Ambushes of the kind attempted in this case are to be discouraged and discountenanced. Criminal proceedings are not a game: their object is to achieve a fair determination of the innocence or guilt of the defendant."⁵⁰⁵

In *R v. Gleeson*, the defence submitted no case to answer having not disclosed, in advance, a flaw in the prosecution case which related to the charge. The prosecution application to have the indictment amended was accepted and the defence application to have a fresh trial rejected. On appeal, the defence argued that by disclosing its argument, tactical advantage would have been lost. Auld LJ dismissed this, stating:

"[F]or defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is . . . no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years."⁵⁰⁶

In *DPP v. Chorley Justices*⁵⁰⁷ the defendant had been charged with drink-driving, but submitted a plea of no case to answer on the basis that documents had not been served on him. Again, the defence was raised at a late stage and had not been mentioned at all earlier in proceedings.

⁵⁰³ [2003] EWHC 2470 (Admin.).

⁵⁰⁴ [2004] 1 Cr. App. R. 29.

⁵⁰⁵ *DPP v. Hughes* [2003] EWHC 2470 (Admin.), [16].

⁵⁰⁶ *R v. Gleeson* [2004] 1 Cr. App. R. 29, [34].

⁵⁰⁷ (2006) EWHC 1795 (Admin.).

In response, Thomas LJ said:

"The pertinent point relevant to what happened in this case is the early identification of the real issues . . . If a defendant refuses to identify what the issues are, one thing is clear: he can derive no advantage from that or seek, as appears to have happened in this case, to attempt an ambush at trial. The days of ambushing and taking last minute technical points are gone."⁵⁰⁸

Similarly, in *Writtle v. DPP*⁵⁰⁹ the defence attempted to introduce expert evidence, and consequently a host of new issues, at a very late stage. Simon J criticised this, saying, "[t]he days when the defence can assume that they will be able successfully to ambush the prosecution are over."⁵¹⁰

The CPR also reflect the importance of the principle of procedural justice. The "participants in a criminal case",⁵¹¹ which includes criminal defence lawyers, must "prepare and conduct the case in accordance with the overriding objective".⁵¹² The 'overriding objective' outlines a number of targets to be met by the court and 'participants', including "dealing with the case efficiently and expeditiously".⁵¹³ The Rules expand on this. Under Rule 3.2, the court's duties include "the early identification of the real issues", "ensuring that evidence . . . is presented in the shortest and clearest way", "discouraging delay, dealing with as many aspects of the case as possible on the same occasion" and "encouraging the participants to co-operate in the progression of the case".⁵¹⁴ According to Rule 3.3, "each party . . . must actively assist the court in fulfilling its duty under Rule 3.2",⁵¹⁵ which insinuates a shared burden of responsibility between the court, the prosecution and the defence in achieving the requirements outlined above. Rule 3.10 further outlines that the court may require a party, including the defendant and his or her lawyer, to identify "which witnesses he intends to give oral evidence", "what written evidence he intends to introduce" and "whether he intends to raise any point of law that could affect the conduct of the trial or appeal".⁵¹⁶ In

⁵⁰⁸ *Ibid.*, [26].

⁵⁰⁹ (2009) EWHC 236 (Admin.).

⁵¹⁰ *Ibid.*, [15].

⁵¹¹ Rule 1.2 - *Criminal Procedure Rules 2010*, 2010/60.

⁵¹² *Ibid.*, Rule 1.2(1)(a).

⁵¹³ *Ibid.*, Rule 1.1(2)(e).

⁵¹⁴ *Ibid.*, Rule 3.2.

⁵¹⁵ *Ibid.*, Rule 3.3(a).

⁵¹⁶ *Ibid.*, Rule 3.10.

summary, the rules eliminate almost any opportunity for the criminal defence lawyer to 'surprise' the court. Any tactical advantage that might be gained by the defence lawyer keeping "his case close to his chest"⁵¹⁷ is, as far as the formal rules are concerned, no longer an option.

The importance of the CPR was reinforced in December 2009. Lord Justice Leveson, the senior presiding judge for England and Wales, issued a document entitled 'Essential Case Management: Applying the Criminal Procedure Rules'.⁵¹⁸ Its general theme was to firmly remind parties involved in criminal procedure of their obligations; this included highlighting the following:

"The Rules are not mere guidance. Compliance is compulsory. The word 'must' in the Rules means must."

Of most relevance to the defence lawyer was the assertion that:

"The key to effective case management is the early identification by the court of the relevant disputed issues . . . From the start, the parties must identify those issues and tell the court what they are . . . If the parties do not tell the court, the court must require them to do so."

This 'reminder' makes it plain that case management is a very prominent and central part of the defence lawyer's role as an actor in criminal proceedings. These legislative, managerial objectives do reflect the principle of procedural justice, where the "highest loyalty is . . . to procedures and institutions".⁵¹⁹ Arguably, these provisions take the principle much further than the obligations embodied in the 'zealous advocate' model.

Professional Standards

All of the professional standards governing the work of criminal defence lawyers feature obligations that reflect the principle of procedural justice, if only at a fairly vague and superficial level. The Bar Code states that "[a] barrister has an overriding

⁵¹⁷ Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 Ethics 1, 69.

⁵¹⁸ Lord Justice Leveson (2009) – London: Office of the Senior Presiding Judge For England and Wales.

⁵¹⁹ Fuller L., Randall J. (1958) *Professional Responsibility: Report of the Joint Conference* – 44 American Bar Association Journal, 1162.

duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice".⁵²⁰ This includes taking "all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time".⁵²¹ The Solicitors' Code is equally unequivocal – the opening rule of the code states: "[y]ou must uphold the rule of law and the proper administration of justice."⁵²² The Public Defender Service Code requires that defence lawyers "discharge their duties in a way which is consistent with the proper and efficient administration of justice",⁵²³ while the Law Society Code for Advocacy asserts the primacy of the duty to the court stating that "advocates have an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved".⁵²⁴

Training

The BVC 'Golden Book' places the principle of procedural justice firmly among the central duties of a lawyer. Under the guidelines on 'Professional Ethics and Conduct', it is stated that commitment "to maintaining . . . the proper and efficient administration of justice and to the Rule of Law"⁵²⁵ is a core principle underpinning the Bar Code of Conduct, and thus the role of the criminal defence lawyer. As regards Accreditation training, the 'standards of competence' for the Magistrates' Court Qualification merely state a solicitor must have an understanding of his or her "duty to the court",⁵²⁶ a brief and unhelpful statement of the defence lawyer's requirement to aid in the administration of justice.

⁵²⁰ [302], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵²¹ [701(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵²² Rule 1.01, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁵²³ [6.2], page 6, Public Defender Service Code of Conduct – London: The Stationery Office.

⁵²⁴ [2.2], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁵²⁵ [32], page 9, 'Professional Conduct and Ethics', The BVC 'Golden Book' – London: Bar Standards Board.

⁵²⁶ [1.1.2], page 3, 'Standards of competence for the accreditation of solicitors and representatives advising at the magistrates' court', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>: **Last accessed 16/08/2010.**

Other Relevant Standards

It is arguable that the principle of procedural justice has become a more and more prominent feature of modern regulation of the criminal defence lawyer's role. An indicative source is the 'Review of the Criminal Courts of England and Wales'⁵²⁷ conducted by Auld LJ, in which he referred scathingly to "the uncooperative or feckless defendant and/or his defence advocate who considers that the burden of proof and his client's right to silence justifies frustration of the orderly preparation of both sides' case for trial".⁵²⁸ He continued:

"[T]o delay telling the court and the prosecution what [the defendant] challenges as a matter of tactics, has nothing to do with the burden and standard of proof or his right of silence. Those fundamental principles are there to protect the innocent defendant from wrongful conviction, not to enable the guilty defendant to engage in tactical manoeuvres designed to frustrate a fair hearing and just outcome on the issues he intends to take."⁵²⁹

In addition, he stated:

"Equally untenable is the suggestion that defence by ambush is a permissible protection against the possibility of dishonesty of police and/or prosecutors in the conduct of the prosecution."⁵³⁰

In summary, Auld LJ asserted that "the sooner [a defendant] tells the court and the prosecutor the better, so that both sides knows the battleground and its extent"⁵³¹ and that defence lawyers should no longer be able to "make it as procedurally difficult as possible for the prosecution to prove their guilt regardless of cost and disruption to others involved."⁵³²

Another source reflecting this sea-change was the government white paper, 'Justice for All', published in 2002. The paper laid out future, wide-ranging reforms of the criminal

⁵²⁷ Lord Justice Auld (October 2001) – London: The Stationary Office.

⁵²⁸ Ibid., [8], 'Chapter 10: Preparing for Trial'.

⁵²⁹ Ibid., [5], 'Chapter 10: Preparing for Trial'.

⁵³⁰ Ibid., [154], 'Chapter 10: Preparing for Trial'.

⁵³¹ Ibid., [153], 'Chapter 10: Preparing for Trial'.

⁵³² Ibid., [183], 'Chapter 10: Preparing for Trial'.

justice system. In the section, 'The Need for Reform', the desire to stamp out what were perceived to be disruptive defence methods was obvious in the assertion that:

"While the fundamental principle remains that the prosecution must prove its case, this does not mean that the system should enable a defendant to obstruct justice by inaction or by abuse of the process. Defence lawyers have a duty to test the prosecution case, but also have obligations to the court as well as to their clients."⁵³³

Reforms would work towards ensuring that the defence could no longer use "delay and obstruction . . . as a tactic to avoid a rightful conviction."⁵³⁴ The most unambiguous signal of intent was represented by the statement below:

"We believe these changes will substantially improve prosecution disclosure and reduce the scope for tactical manoeuvring by the defence. They will reinforce the professional obligation on defence lawyers to assist decision-making by the courts by defining and clarifying the issues in the case."⁵³⁵

These statements summarise the gradual evolution of the defence lawyer's duty to procedural justice. Examples such as the expansion of the defence statement in the *Criminal Justice Act 2003* and the introduction of the CPR in 2005 represent the shifting attitude of the courts regarding frustrating defence tactics. The launch of "Criminal Justice: Simple, Speedy, Summary" (CJSSS), a policy drive rolled out in 2006, further strengthened the 'need for speed' in defence work. The official aim of CJSSS was, and is, "improving the speed and effectiveness of Magistrates' and Youth Courts",⁵³⁶ primarily by "reduc[ing] the number of hearings . . . [and] the average time taken from charge to disposal".⁵³⁷ CJSSS is applicable to all parties in the criminal justice system, including "magistrates, district judges, defence, prosecutors, the police, probation and the courts",⁵³⁸ with the aim of "tackling delay and improving efficiency . . . improv[ing]

⁵³³ Home Office (2002) *Justice For All: The Need For Reform* - London: The Stationary Office, Cm 5563, [1.8], 28.

⁵³⁴ *Ibid.*, [0.10], 16, 'Delivering justice: Fairer, more effective trials'.

⁵³⁵ *Ibid.*, [3.55], 64, 'Pre-trial Openness and Transparency'.

⁵³⁶ 'Welcome' - CJSSS website:

<http://cjsss.cjsonline.gov.uk/>: **Last accessed 17/08/2010.**

⁵³⁷ *Ibid.*

⁵³⁸ Office for Criminal Justice Reform (2007) *Working Together to Cut Crime and Deliver Justice: A Strategic Plan for 2008-2011* - London: The Stationary Office, Cm7247, [5.2.2], 43.

the speed and effectiveness with which cases proceed and improv[ing] the way cases are managed."⁵³⁹ The scheme has permeated every aspect of summary criminal justice and fundamentally altered the approach of all actors, particularly the criminal defence lawyer, to the justice process. The requirement that the defence lawyer engage with CJSSS is a concrete example of the principle of procedural justice.

The proposed Quality Assurance Scheme discussed earlier also reflects a shift in the defender's role, containing some interesting provisions that echo the principle of procedural justice. The revised competency framework, issued in 2010, appears to place great emphasis on the defence lawyer's role as a facilitator of the justice process. It suggests that the defence lawyer should [a]ssist . . . the court with the proper administration of justice"⁵⁴⁰ and "[o]bserve . . . [the] duty to the court and duty to act with independence".⁵⁴¹ In addition, it must be demonstrated that the lawyer "[c]omplies with appropriate Procedural Rules and judicial directions",⁵⁴² "[p]rovides appropriate disclosure of evidence"⁵⁴³ and "[m]akes only relevant submissions".⁵⁴⁴ All of these standards seem to emphasise the centrality of the principle of procedural justice in the role of the criminal defence lawyer. Finally, the 'Standard Crime Contract 2010' exemplifies the drive for efficiency and economy in the criminal justice system. The contract outlines that the LSC are bound by legislation "to aim to obtain the best possible value for money"⁵⁴⁵ in providing criminal defence services. This is followed by the requirement that that the criminal defence lawyer and the LSC "agree to work together in mutual trust and co-operation to achieve this aim."⁵⁴⁶ The increased emphasis on efficiency and expediency characterised by formal conceptions of procedural justice has arguably been driven this desire to achieve 'value for money', something which will be discussed in Chapter 8.

⁵³⁹ Ibid.

⁵⁴⁰ Legal Services Commission (2010) *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy* – London: Legal Services Commission, Annex E, [D.3.3], page 2.

⁵⁴¹ Ibid., [D.3.1], page 2.

⁵⁴² Ibid., [B.2.1], page 1.

⁵⁴³ Ibid., [B.2.2], page 1.

⁵⁴⁴ Ibid., [A.1.3], page 1.

⁵⁴⁵ [2.2], 'Relationship and Communication', Standard Crime Contract 2010.

⁵⁴⁶ Ibid.

3.2 The Principle of Truth-Seeking

Legislation and the Common Law

The primary legislative manifestation of truth-seeking is contained in the *Criminal Law Act 1967*. Under s. 4(1), it is stated that:

"Where a person has committed a relevant offence, any other person who, knowing or believing him to be guilty of the offence or of some other relevant offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence."

This obligation makes it reasonably clear that the defence lawyer cannot lie about the innocence of the client. If a client admits to his or her defence lawyer that they have committed the offence but want the lawyer to assert a false defence, the lawyer would likely be committing a criminal offence if he or she obliged. What one can conclude is that the criminal defence lawyer's obligations to tell the truth and avoid deception take primacy over obedience to the client. The CPR seem to support this. The 'overriding objective' involves "[d]ealing with a criminal case justly", including "acquitting the innocent and convicting the guilty".⁵⁴⁷ This goal is the central rationale behind truth-seeking, and since all participants in the process must help fulfil the 'overriding objective', helping to convict the guilty and acquit the innocent is therefore part of the defence lawyer's role. The rules also contain other obligations which seem to promote the pursuit of honesty, openness and truth. For example, "the early identification of the real issues",⁵⁴⁸ the revelation of "witnesses [the defence] intends to give oral evidence", disclosure of "what written evidence [the defence] intends to introduce" and notice of "whether [the defence] intends to raise any point of law that could affect the conduct of the trial or appeal".⁵⁴⁹ In 2008, the *Criminal Justice and Immigration Act* added a notable requirement to the list of contents for the defence statement; it should contain "any point of law (including any point as to the admissibility of evidence or an abuse of process) which [the defendant] wishes to take, and any authority on which he intends to rely for that purpose."⁵⁵⁰ The requirement to indicate any issues relating to 'abuse of

⁵⁴⁷ Rule 1.1(2) - *Criminal Procedure Rules 2010*, 2010/60.

⁵⁴⁸ *Ibid.*, Rule 3.2.

⁵⁴⁹ *Ibid.*, Rule 3.10.

⁵⁵⁰ Section 6A(1)(d) - *Criminal Justice and Immigration Act 2008*.

process' potentially imposes an active duty on the defence lawyer to correct any errors made by police or prosecution, which the defence might otherwise exploit. Arguably, this means the truth must come before tactics.

Common law appears to support the contention that the defence lawyer must seek the truth. In *Arthur J.S. Hall and Co. v. Simons*,⁵⁵¹ Lord Hope outlined the extent of this duty:

"The advocate's duty to the court is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him."⁵⁵²

Even if legal authority undermines the client's case and damages his or her chance of success, the defence lawyer is obliged to disclose *all* authorities. Again, the truth comes first. *R v. Gleeson*,⁵⁵³ referred to earlier, outlines the most explicit statement of the criminal defence lawyer's obligation to seek the truth. Reading the court's judgment, Auld LJ opted "to repeat and adopt the extra-judicial sentiments . . . in the 'Report of the Criminal Courts Review'",⁵⁵⁴ which stated:

"A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent."⁵⁵⁵

This statement appears to suggest that the defence lawyer must actively contribute to the search for the truth, regardless of the conflicting interests of a defendant.

⁵⁵¹ [2002] 1 AC 615.

⁵⁵² *Ibid.*, 715.

⁵⁵³ [2004] 1 Cr. App. R. 29.

⁵⁵⁴ *Ibid.*, [36], 416.

⁵⁵⁵ *Ibid.*

In terms of the defence lawyer's duty to correct flaws in the case, Auld LJ asserted:

"For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is, in our view, no longer acceptable . . . and not in the legitimate interests of the defendant."

Such an explicit statement is interesting, not only because of its unambiguous endorsement of the defence lawyer's obligation to aid truth-seeking, but because of the phrase 'the legitimate interests of the defendant'. The word 'legitimate' suggests that only interests that are rightful or deserved may be pursued; for example, a defendant attempting to escape conviction on the basis of a prosecution error alone would not be pursuing his or her 'legitimate' interests. The inference is that if the defendant only has a 'technical' defence, rather than a substantial or meritorious defence, then he or she has no 'legitimate' interest in acquittal. Such a statement has significant potential to limit the defence lawyer's role as a partisan advocate and expand the role as a truth-seeker, as well as presenting a considerable challenge to the presumption of innocence.

Professional Standards

The professional standards explicitly reflect the principle of truth-seeking. The Bar Code states:

"A barrister . . . must not deceive or knowingly or recklessly mislead the Court."⁵⁵⁶

⁵⁵⁶ [302], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

It later expands on this, reinforcing the importance of adhering to the truth in presenting a client's case:

"A barrister must not devise facts which will assist in advancing the lay client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing . . . any statement of fact or contention which is not supported by the lay client or by his instructions . . . any contention which he does not consider to be properly arguable . . ." ⁵⁵⁷

This principle is not limited to the defence barrister's dealings with his or her client. He or she "must not . . . encourage a witness to give evidence which is untruthful or which is not the whole truth". ⁵⁵⁸ Like legislation and common law, the Bar Code stresses the importance of sharing *all* legal authorities with the court and correcting any flaws in the process. Rule 708 (c) states that a barrister "must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware, whether the effect is favourable or unfavourable towards the contention for which he argues", and that he or she "must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal". ⁵⁵⁹ Although the phrase 'during the hearing' arguably leaves some leeway for ambushing, the general intention of the provision appears to reflect the principle that the defence should highlight an error rather than exploit it, as expressed in *R v. Gleeson*.

The Solicitor's Code is unequivocal about the obligation to seek the truth, stating "[y]ou must never deceive or knowingly or recklessly mislead the court." ⁵⁶⁰ As with the Bar Code, it also asserts that solicitors must "draw to the court's attention . . . relevant cases and statutory provisions . . . the contents of any document that has been filed in the proceedings where failure to draw it to the court's attention might result in the court

⁵⁵⁷ [704], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵⁵⁸ [705(b)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵⁵⁹ [708(d)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵⁶⁰ Rule 11.01(1), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

being misled and . . . any procedural irregularity."⁵⁶¹ Similarly, the Public Defender Service Code expects an employee to "act with honesty and integrity in carrying out his or her duties on behalf of the salaried service",⁵⁶² while the Law Society Code for Advocacy states that advocates must not engage in behaviour that is "dishonest or otherwise discreditable".⁵⁶³ In the case of a confession of guilt, the criminal defence lawyer cannot lie or assert the defendant's innocence. As is reflected elsewhere, "[s]uch a confession . . . imposes very strict limitations on the conduct of the defence";⁵⁶⁴ in particular, the defence barrister "must not assert as true that which he knows to be false . . . [and] must not connive at, much less attempt to substantiate, a fraud."⁵⁶⁵ This also seems to align with s.4 of the *Criminal Law Act 1967*, mentioned earlier.

Training

No training materials make explicit or implicit reference to the principle of truth-seeking.

Other Relevant Standards

The proposed Quality Assurance Scheme for defence lawyers contributes to formal conceptions of the principle of truth-seeking. The original competency framework contained several examples; in the section entitled 'Integrity', under Paragraph E of Annex 1, it was stated that defence advocates should "[be] honest and straightforward in professional dealings, including with the court and all parties",⁵⁶⁶ "not mislead, conceal or create a false impression"⁵⁶⁷ and "[w]here appropriate refer . . . to authorities adverse to the lay client's case."⁵⁶⁸

⁵⁶¹ Rule 11.02(2), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁵⁶² [3.1], page 4, Public Defender Service Code of Conduct – London: The Stationery Office.

⁵⁶³ [2.1(a)(i)], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁵⁶⁴ [12.3], 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates* – London: Ministry of Justice/Legal Services Commission, Annex 1, [E].

⁵⁶⁷ *Ibid.*, [E(1)].

⁵⁶⁸ *Ibid.*, [E(4)].

However, by 2010, the competency framework had been reduced to only one reference:

"Advises the court of adverse authorities and, where they arise, procedural irregularities."⁵⁶⁹

These are, of course, prime examples of the duty to seek the truth. The removal of the obligations 'not to mislead' and 'be honest' is perhaps not as significant as one might initially assume though. These are fairly uncontentious duties and are unlikely to have been removed because they do not apply to criminal defence lawyers. Rather, it seems likely they were removed for practical reasons. Those consulted about the competency framework raised concerns about some of the proposed standards. The analysis of these concerns concluded that "the level of detail was too elaborate, complex, disproportionate and should be simplified: some of the behaviours were considered to be subjective and difficult to measure",⁵⁷⁰ and it may well be for the above reasons that such standards were removed.

Like other sources, the 'Review of the Criminal Courts of England and Wales'⁵⁷¹ also stressed the importance of correcting procedural errors rather than taking advantage of them. In it, Auld LJ explained that:

"A defendant's right to a fair trial . . . do[es] not entitle him to ignore the error hoping for a better chance of acquittal or in the hope, if there is a conviction, of getting it quashed in the Court of Appeal."⁵⁷²

The words of the Bar Code at rule 708(d) mirror this statement, presumably because the Code was changed in the light of the review's conclusions. This analysis is lent credence by the fact that, in the paragraph preceding the above quote, Auld LJ asserted that where regulation allowed a defence lawyer to leave an error uncorrected, "both the law and the codes should be changed to require it".⁵⁷³ The wording of rule 708(d)

⁵⁶⁹ Legal Services Commission (2010) *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy* – London: Legal Services Commission, Annex E, [D.3.2], page 2.

⁵⁷⁰ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates: Analysis of Consultation Responses* – London: Ministry of Justice/Legal Services Commission, 16.

⁵⁷¹ Lord Justice Auld (October 2001) – London: The Stationary Office.

⁵⁷² *Ibid.*, [39], 'Chapter 11: The Trial - Procedures and Evidence'.

⁵⁷³ *Ibid.*

suggests that this is exactly what happened.

4. The Duty to the Public

4.1 The Principle of Morality

Legislation and the Common Law

Although the principle of morality is manifested in various other sources, legislation makes few references of any relevance. The ‘overriding objective’ of the CPR provides a clue as to the sort of behaviour expected, stating that "criminal cases must be dealt with justly",⁵⁷⁴ a provision that must be complied with by all ‘participants’ in a case. This includes "respecting the interests of witnesses, victims and jurors",⁵⁷⁵ an obligation which suggests something outside of the twin duties of loyalty to the client and the court. The requirement to ‘respect’ witnesses and victims reflects the spirit of ‘doing the right thing’ embodied in the theoretical conception of morality. Additionally, as mentioned previously, the ‘overriding objective’ also includes "acquitting the innocent and convicting the guilty",⁵⁷⁶ which is arguably an inherently moral pursuit.

Professional Standards

The principle of morality rests on the idea that a criminal defence lawyer is a public servant whose master, ultimately, is the public. Therefore, a defence lawyer, in the course of his or her work, should consider the ethical implications of representing a client in the context of the interests of the greater good. This ideal is not explicit in the professional standards, but is implied by several provisions. For example, the Bar Code states that barristers "must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person".⁵⁷⁷ This establishes a standard of expected ethical behaviour which may actually limit, from a partisan perspective, the ability of a criminal defence lawyer to do all he or she can for the client. Additionally, the broad requirement that a barrister

⁵⁷⁴ Rule 1.1(1) - *Criminal Procedure Rules 2010*, 2010/60.

⁵⁷⁵ *Ibid.*, Rule 1.1(2)(d).

⁵⁷⁶ *Ibid.*, Rule 1.1(2).

⁵⁷⁷ [708 (g)] ‘Section 1: The Code of Conduct’, Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

must not "compromise his professional standards in order to please his client"⁵⁷⁸ reflects the theoretical principle. Rule 708(j) of the Code arguably supplies an example of the above; it states that a defence barrister "must not . . . make any defamatory aspersion on the conduct of any other person", inferring that the defender should not stoop to petty insults simply to undermine or provoke opposing witnesses. Such behaviour would arguably 'compromise his professional standards'.

Similarly to the Bar Code, the Solicitors' Code states that a solicitor "must not say anything which is merely scandalous or intended only to insult a witness or any other person",⁵⁷⁹ again suggesting that using immoral tactics, such as subtle slander or character-bashing, to advance the client's cause are not acceptable. As was mentioned earlier, the Solicitors' Code asserts that solicitors are "generally free to decide whether or not to take on a particular client".⁵⁸⁰ The implication is that a defence solicitor could refuse to represent a morally objectionable client or cause. Once a client has been taken on, a solicitor "must act with integrity",⁵⁸¹ a wide provision which appears to be directed at encouraging some form of ethical behaviour. However, it is unclear whether this includes upholding moral values and acting in an 'ethical' manner. The Guidance Notes of the code elaborate, stating "[p]ersonal integrity is central to your role as the client's trusted adviser and must characterise all your professional dealings – with clients, the court, other lawyers and the public."⁵⁸² If the defence lawyer believes the behaviour required of him might compromise his integrity, he or she can cease to act for their client. However, the Code states that "[y]ou may only end the relationship with the client if there is a good reason" examples including "where there is a breakdown in confidence between you and the client, and where you are unable to obtain proper instructions."⁵⁸³ The phrase 'breakdown in confidence' is open to interpretation. The defence lawyer may not trust his or her client or feel able to act for someone without damaging his or her integrity. These are merely suggestions. In general, these provisions seem only to hint at some kind of obligation of moral behaviour and are unlikely to prove useful in a practical situation of moral conflict. The only other expression of the principle of morality is a provision in the Public Defender Service

⁵⁷⁸ Ibid., [307 (c)].

⁵⁷⁹ Rule 11.05(a), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁵⁸⁰ Ibid., Rule 2.01(1).

⁵⁸¹ Ibid., Rule 1.02.

⁵⁸² Ibid., [6], 'Guidance to rule 1 – Core duties'.

⁵⁸³ Ibid., [8], 'Guidance to rule 2 – Client relations'.

Code which requires defence counsel to display "courteousness, mutual respect and professionalism."⁵⁸⁴

Training

The BVC 'Golden Book' outlines a variety of aims central to the course. The principle of morality appears to be reflected in the statement, "the course will . . . inculcate a professional and ethical approach to practice as a barrister".⁵⁸⁵ In addition, the 'Professional Ethics and Conduct' section states that students must have an understanding of the "principle of integrity".⁵⁸⁶ Again, the meaning of 'integrity' is undefined and open to interpretation. One would assume it is designed to ensure trainee barristers behave as responsible and honest professionals, throughout their studies and practice.

Other relevant standards

The proposed Quality Assurance Scheme provides an interesting insight into formal conceptions of morality from the viewpoint of the government. In the 'Working With Others' section of the original standards, there were proposed requirements for criminal defence lawyers to be "candid with the lay client"⁵⁸⁷ and "advance . . . arguments in a way that reflect . . . appropriate consideration of the perspective of everyone involved in the case."⁵⁸⁸ These standards imply that advice to the client should not be driven purely by the client's wishes and the pursuit of victory. The defence lawyer should be frank, honest and ethical in advising a client, and in dealings with witnesses and victims should exercise a degree of empathy. Additionally, the more general provision that defence lawyers should act "in professional life in such a way as to maintain the high reputation of advocates"⁵⁸⁹ appears to be an effort to encourage avoidance of less palatable methods of defence, which might otherwise compromise the profession's reputation for fair and ethical behaviour. However, as with other principles, these

⁵⁸⁴ [9.2], page 7, Public Defender Service Code of Conduct – London: The Stationery Office.

⁵⁸⁵ [2(b)], page 5, 'Aims, Ethos and Principles of the BVC', The BVC 'Golden Book' – London: Bar Standards Board.

⁵⁸⁶ *Ibid.*, [32], page 9.

⁵⁸⁷ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates* – London: Ministry of Justice/Legal Services Commission, Annex 1, [C(4)].

⁵⁸⁸ *Ibid.*, [C(3)].

⁵⁸⁹ *Ibid.*, [E(6)].

references to the principle of morality have now been removed. That being said, the competency framework proposed in February 2010 does contain one important standard requiring defence lawyers to "deal . . . appropriately with vulnerable witnesses."⁵⁹⁰ Although brief, this duty seemingly expects a defence lawyer to treat vulnerable witnesses, most likely a complainant, with care and restraint. Subjecting a vulnerable witness to humiliation and embarrassment in order to score points for the defendant would arguably be considered an immoral practice. Presumably, 'dealing appropriately' with the vulnerable is aimed at discouraging this sort of behaviour.

5. Conclusion

The 'zealous advocate' model does find expression in formal conceptions of the criminal defence lawyer's role, as manifested in the regulation covered in this chapter. All of the principles (perhaps with the exclusion of morality) are, to some extent, described in a substantial form by legislation, common law, professional standards, training materials and other relevant standards. However, it is arguable that formal regulation outlines significantly different versions of the obligations embodied in the principles of the 'zealous advocate' model. Whereas the theoretical model placed more emphasis on the 'standard conception', representing the core of the theoretical defence role, formal conceptions extend the obligations to the court beyond the traditional boundaries. Formal conceptions of partisanship are more restrained and often counter-balanced with language encouraging cooperative, court-orientated conduct. Formal conceptions of the principles of procedural justice and truth-seeking appear to have more emphasis than under the 'zealous advocate' model and often seem to be the defender's primary duty. This perhaps suggests a shift away from the traditional values underpinning criminal defence work, although it should be recognised that partisanship remains an important formal obligation and that detachment and confidentiality appear to be substantially the same in formal and theoretical conceptions of the role. This 'shift' illustrates the ongoing competition between different aspects of the defence lawyer's role. Both Chapters 1 and 2 underline the potential incompatibility of the duties to the client, the court and the public. The battle for primacy between the principles, both in theoretical and formal conceptions, creates difficulty for theorists seeking to define the role of the defence lawyer, draftsmen attempting to describe the role and, ultimately, the

⁵⁹⁰ Legal Services Commission (2010) *Quality Assurance for Advocates: Working with the professions to deliver a framework for better advocacy* – London: Legal Services Commission, Annex E, [C.3.2].

practitioner trying to perform the role. These 'conflict points' will be explored in Chapter 4, providing insight into incompatibilities and assessing their affect on conceptions of the role.

**CHAPTER 4 – Conflicts in the Theoretical and
Formal Conceptions of the Role**

1. Introduction

The ‘zealous advocate’ model is not without inconsistencies and clashes. This chapter will consider conflicts between the duties and obligations embodied in both the theoretical model and formal regulation. These conflict points represent a crucial aspect of theoretical and formal conceptions of the criminal defence lawyer's role; to assess the relevance and usefulness of these conceptions, one must question whether such conflicts can be resolved and, if so, how. Where two or more duties are in conflict and the resolution is unclear, the task of describing the defence lawyer's role becomes complex and debatable. For example, if the principles of confidentiality and truth-seeking come into conflict, one cannot decisively describe what the defence lawyer's role would be in a given situation. In effect, we need to know which principle ‘wins out’ in order to accurately outline theoretical and formal conceptions of the role. In terms of the ‘zealous advocate’ model, this lack of clarity causes a headache for those searching for coherent and definitive conceptions of the role, generating uncertainty. However, in relation to formal and practical conceptions, unresolved ethical conflict can prevent defence lawyers performing their work, at least in a consistent way. Thus, the conflict points are the key signifiers of what the criminal defence lawyer's role really is. Identification of unresolved ethical conflicts should undoubtedly inform future changes in legislation, professional codes, training materials and other standards which define the role of the criminal defence lawyer in England and Wales. After all, formal guidance should make a defence lawyer's role clear and their work easier to perform; vague and contradictory obligations do not achieve this. Some of the conflict points explored also represent what appears to be a changing attitude toward the core principles of the adversarial system, as referred to at the end of Chapter 3. This chapter will engage in debate about the effect on principles such as the presumption of innocence, the prosecution burden of proof and right against self-incrimination, which traditionally provide protection for defendants.

This chapter will focus on describing incompatibilities in both the theoretical model and formal conceptions of the role in the context of the four identifiable conflict points:

Confidentiality v. Procedural Justice and Truth-Seeking

Partisanship v. Morality

Detachment v. Morality

Partisanship v. Procedural Justice and Truth-Seeking

These appear to me to be the key areas of conflict within the conceptions of the defence lawyer's role. I initially settled on these conflicts during the extensive exploration of academic literature, undertaken for Chapter 2. I felt that the six principles of the 'zealous advocate' model displayed obvious incompatibilities. For example, whereas confidentiality requires secrecy, truth-seeking and procedural justice require openness, and while detachment demands an emotionless approach to defence, morality encourages the opposite. As I continued the research for this thesis, it became clear that these conflicts manifested themselves in both theoretical conceptions and formal regulation of the role. Not only could specific instances of conflict be identified, but the literature openly discussed these particular conflicts, as will be discussed below. As such, I concluded that it was vital to place my exploration of these paired conflicts at the centre of my thesis.

It should be noted that procedural justice and truth-seeking have been classified as one side of the conflicts with partisanship and confidentiality. Together they constitute the duty to the court and will be explored in the same section primarily because they are closely linked and several elements of both overlap. For example, for the purposes of this thesis, the defence lawyer's obligation to avoid 'ambushing' the prosecution represents part of the principle of procedural justice; the duty to correct procedural errors (an inter-linked duty) is considered an element of truth-seeking. Both principles raise thematically similar issues and often arise from similar circumstances, primarily where the client's interests clash with the court's pursuit of a "full and fair hearing".⁵⁹¹ I

⁵⁹¹ Lord Justice Auld (2001) *Review of the Criminal Courts of England and Wales* – London: The Stationary Office, [154], 'Chapter 10: Preparing for Trial'.

consider the separate classification of procedural justice and truth-seeking throughout this thesis necessary for a logical and organised analysis. However, in recognition that these classifications are fluid, conflicts involving procedural justice and truth-seeking will be examined in the same section. I will explore the presence of these conflicts in the 'zealous advocate' model, before examining whether formal conceptions suffer from similar ethical tensions. Again, it should be underlined that although I have chosen to use this structure in order to aid clarity of analysis, some issues and conflicts do overlap. It is acknowledged that the categories above make artificial distinctions.

2. Conflict Points in the 'Zealous Advocate' Model

"Nowhere in law do ethical considerations play a greater part or come into greater conflict than in the defense of those accused of crime."⁵⁹²

The 'zealous advocate' model is intended to reflect a consensus view of the role and function of criminal defence lawyer, developed over the last century. However, it is conceded that this consensus is a loose one and is constantly debated and questioned. This is partially due to the essential incompatibility of some of the principles. The difficulty stems from the fact that the criminal defence lawyer owes "a duty to his client, a duty to his opponent, a duty to the court, a duty to the state and a duty to himself".⁵⁹³ These inter-weaving loyalties can lead to friction because the interests of each party vary, and "when the various loyalties conflict, fair, safe, and moral resolutions are most difficult."⁵⁹⁴ One can identify a series of conflict points, where the principles clash with each other; this leads to uncertainty, at a theoretical level, as to which duties take precedence and which are subordinated. These conflict points have inspired and perpetuated much of the discourse on the role and ethics of lawyers over the years. This is particularly true of criminal defence lawyers, in part because of the unique and sensitive nature of their work but also because criminal defence work generates particularly acute conflicts.

⁵⁹² Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 65.

⁵⁹³ 'The Ethics of Advocacy', in MacMillan H. (1937) *Law and Other Things* – Cambridge: Cambridge University Press, 17.

⁵⁹⁴ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 65.

2.1 Confidentiality v. Procedural Justice and Truth-Seeking

The principle of confidentiality is a crucial element of the defence lawyer's role, but many have questioned its validity on the basis that it frustrates fair and efficient procedure and hinders the truth-seeking function of criminal justice. Although it is not absolute, confidentiality obligates defence lawyers to keep information private which might otherwise help the court reach an accurate verdict. This duty of privacy is designed to protect the client and encourage him or her to open up to their lawyer. Despite the likelihood that "it leads to some increased disclosure to lawyers",⁵⁹⁵ it has been argued that "intuition . . . tells us that there are bad effects" and that "we can be equally sure it leads to some reduced disclosure by lawyers."⁵⁹⁶ It is arguably "a significant barrier to the search for truth and the attainment of justice",⁵⁹⁷ denying the court the opportunity to review vital information and constructing metaphorical 'brick walls' for prosecutors. As a result, the process could be reduced to little more than a slow and painful sham and "the image of a trial as a search for the truth could be made to appear a mockery".⁵⁹⁸ The principle of confidentiality, by its nature, requires the suppression of information. Imposing this duty on the defence lawyer concedes that the defendant and his or her representative are entitled to be economical with the truth, and in accepting this it is arguable that the principle "unjustifiably undervalues the administration of justice, the interests of legal opponents, other affected third parties [and] the general public interest".⁵⁹⁹ Confidentiality is potentially a "device for cover-ups",⁶⁰⁰ allowing the defendant to instruct the criminal defence lawyer to engage in "highly immoral acts of dubious legality"⁶⁰¹ on his or her behalf. Some argue that confidentiality is unnecessary. The innocent, with nothing to hide, would in fact welcome a speedy and fair process and would be vindicated by the truth, whilst the guilty are loaned a cloak to veil their misdeeds.

Of course, the above argument oversimplifies the debate. Innocence, guilt and truth are not necessarily straightforward or discrete concepts; for example, a defendant may be

⁵⁹⁵ Simon W. (1998-1999) *Thinking Like a Lawyer' About Ethical Questions* – 27 Hofstra L.R., 10.

⁵⁹⁶ Ibid.

⁵⁹⁷ Noonan J. (1965-1966) *The Purposes of Advocacy and the Limits of Confidentiality* – 64 Michigan L.R., 1485.

⁵⁹⁸ Denecke A. (1979) *The Dilemma of the Virtuous Lawyer or When Do You Have to Blow the Whistle On Your Client?* – Ariz. St. L.J., 247.

⁵⁹⁹ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 254.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid., 255.

factually or legally innocent, yet may be convinced of their guilt. Without the principle of confidentiality, defendants might unintentionally incriminate themselves or, fearful that honesty may lead to conviction, withhold vital information from their lawyer. The result may be an inadequate defence and a disastrous miscarriage of justice. Equally, an innocent defendant may be ashamed or embarrassed by certain facts relating to the case; without the protection of confidentiality the client may be reluctant to open up fully to a defence lawyer, who they may have been assigned without any choice. The theoretical conception of the role of the adversarial defence lawyer therefore depends on commitment to both the principle of confidentiality and the principle of truth-seeking, but the conflicts between them are difficult to resolve. This conflict point also has particularly significant implications for the presumption of innocence and the prosecution burden of proof, which will be discussed below.

2.2 Partisanship v. Morality

The zealous pursuit of client goals may impinge upon common morality.⁶⁰² Some defence tactics may be legitimate and legal but may still be regarded as morally wrong; for example, the questioning of a rape victim about their sexual history. Under the theoretical duty of partisanship, a defence lawyer might cross-examine a rape complainant by portraying him or her as promiscuous, so as to insinuate that they were at least partially liable for their own suffering. Unfortunately, "client goals may be best achieved through immoral, unjust or unfair means"⁶⁰³ and although this behaviour may be expected of a partisan defence lawyer, for many it is distasteful, brutal, uncaring and unfair.⁶⁰⁴ The question of which principle prevails in the event of a conflict is complex. Often, the defence lawyer will be faced with 'Hobson's Choice':

"She must follow Lord Brougham's famous 'declaration' that '[a]n advocate knows but one person in all the world, and that is his client', while attempting to satisfy the vague but dangerous suggestion that she function as a 'good person.'⁶⁰⁵

⁶⁰² See Section 2.3 for further discussion of 'common morality'.

⁶⁰³ Nicolson D., Webb J. (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 160.

⁶⁰⁴ Jennifer Temkin questioned the validity of defence cross-examination of rape complainants, stating, "[t]he specific moral rights of witnesses must count against abusive or misleading cross-examinations and the duties dictated by the adversary system" (Temkin J. (2000) *Prosecuting and Defending Rape: Perspectives from the Bar* – 2 *Journal of Law and Society* 27, 245). See this article for more discussion of the conflict between defence duties and the rights of witnesses.

⁶⁰⁵ Brown R. (1999) *The 'Good Person' Question: Valid Query or Hobson's Choice?* – 2 *J. Inst. Study of*

Some theorists argue that in an adversarial system "the lawyer-client relationship has moral value as a relationship",⁶⁰⁶ and so partisanship on behalf of the client, as a crucial part of that bond, is intrinsically good. If the importance of a vigorous defence for the accused is accepted by those outside of the relationship, it is suggested that they should also "accept the risk that some actions taken in the name of the relationship will conflict with the moral principles [the lawyer] would apply if acting independently".⁶⁰⁷ The defender's role, as a morally commendable one, thus justifies actions which might normally be criticised. As William Hodes noted, "one may act immorally and antisocially, but still ethically, in carrying out one's assigned role, so long as that role itself makes some positive contribution to society."⁶⁰⁸

Yet, this logic is simple and convenient. It lends credence to the contention that "questions about the moral conduct of lawyers and broader issues affecting the entire justice system are frequently evaded".⁶⁰⁹ It suggests that actions taken by defence lawyers do not require further moral examination because the role itself is accepted. The above arguments are of little consolation to the humiliated rape victim in a court room or to grieving families, and so the debate continues as to what is more valuable to society – moral fibre or an effective system. This is essentially a conflict between 'macro' and 'micro' morality, the former being ethics that represent the needs and values of society as a whole, and the latter being ethics at an individualistic level.⁶¹⁰ The difference between the two is important. The principle of morality, as articulated by academics and commentators, does not disapprove of partisan defence of the accused *per se*. The role's existence and necessity is not questioned; this principle does not relate to 'macro' morality. The principle of morality is more concerned with the effects of partisanship at a 'micro' level, and whether some aspects of it need to be curbed. The principle of morality focuses more on countering the excesses of the over-eager defender, rather than creating a legion of righteous lawyers. What is clear is that partisanship and morality are not comfortable bed-fellows, and that conflict between the two continues to preoccupy theorists and social commentators.

Legal Ethics, 160.

⁶⁰⁶ Schneyer T. (1984) *Moral Philosophy's Standard Misconception of Legal Ethics* – Wis. L.R., 1564.

⁶⁰⁷ Ibid.

⁶⁰⁸ Hodes W. (1996) *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind* - 67 U. Colo. L. Rev. 1108.

⁶⁰⁹ Brown R. (1999) *The 'Good Person' Question: Valid Query or Hobson's Choice?* – 2 J. Inst. Study of Legal Ethics, 156.

⁶¹⁰ See Rest J., et al. (1999) *Post-Conventional Moral Thinking: A Neo-Kohlbergian Approach* – Mahwah: Lawrence Erlbaum Associates.

2.3 Detachment v. Morality

The former principle requires a criminal defence lawyer to act as a neutral advocate, who will defend a client regardless of the nature of their case or their character. The obligation of morality encourages the defence lawyer to behave in a way that upholds common moral standards of right and wrong. Common morality is a nebulous concept, in that the parameters of what is or is not morally correct are subjective. However, terms such as 'the public interest' and 'the will of the people' could be similarly criticised, and they are well-used and accepted phrases. The amorphous collection of ethics one might term 'common morality' has been described as "the set of norms shared by all persons committed to the objectives of morality".⁶¹¹ These norms are directed at "promoting human flourishing by counteracting conditions that cause the quality of people's lives to worsen"⁶¹² and are "applicable to all persons in all places, and all human conduct is rightly judged by [their] standards."⁶¹³ Such norms arguably include "nonmalevolence, honesty, integrity, conscientiousness, trustworthiness, fidelity, gratitude, truthfulness, lovingness, kindness",⁶¹⁴ and arguably empathy, civility and respect. Often, the definition of these norms and the actions that reflect them are dictated by media agendas or unconvincing democratic mandates. Despite this, it is broadly true to say that such norms are valued and defended by many people in many societies, and so reflect a common moral consensus. The principle of detachment would expect a defence lawyer to abandon these standards if the client's case required it, and so a direct conflict is created.

A client may be guilty of the offence with which they are charged and if acquitted with the help of a morally neutral representative, the defence lawyer "who has contributed to that end is considered to be earning his fee from morally dubious practices."⁶¹⁵ Furthermore, whether a client is guilty or innocent, he or she may still be regarded as morally reprehensible, perhaps due to a history of criminal convictions, because of his or her sexual practices, extreme political views or controversial employment. Whereas detachment demands that the defence lawyer ignore these factors, the principle of morality would urge him or her to 'do the right thing' and refuse to represent the client

⁶¹¹ Beauchamp T. (2003) *A Defense of Common Morality* – 13 Kennedy Inst. of Ethics J., 260.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 165.

or at the least provide only basic, technical assistance. Another potential conflict arises when the nature of the charge offends common values, usually where the subject matter is morally controversial. Examples include high-profile or multiple murders, rape, animal testing, child abuse and, in recent times, terrorism. Generally, most commentators appear to agree that, in theory, the principle of detachment should prevail, at least on the basis of the presumption of innocence. Additionally, it could be said that the criminal justice process morally justifies the defence lawyer's role and that 'doing the right thing' is the concern of the court. However, criticism by some academics⁶¹⁶ underlines that, in reality, criminal justice is not an idyllic system that always works. Sometimes, bad people escape punishment for criminal acts, whilst some legal acts may be morally objectionable. It is perhaps arguable then that to rely on theory is to deny reality and to shirk responsibility.

2.4 Partisanship v. Procedural Justice and Truth-Seeking

The principle of partisanship and the principles of procedural justice and truth-seeking clash because they are duties owed to different masters with different interests. On the one hand, the defence lawyer is engaged by a client to act as a vigorous partisan, protecting his or her rights and ensuring every favourable argument or approach is employed. This may necessitate tactics which frustrate the administration of justice or compromise the truth. Where evidence overwhelmingly suggests that the client is guilty, and the defence lawyer does his or her utmost to disparage witnesses, suppress evidence, slow down the process or surprise the prosecution, it would seem that neither justice nor truth are obtained. The major criticism levelled at partisanship is that it is characterised by "[a] lack of civility between lawyers, the win-at-all-costs mentality, the running roughshod over witnesses, and with court procedures, rules, and the truth."⁶¹⁷ In contrast, as an officer of the court, the defence lawyer is expected to facilitate a fair and proper justice process and engage in helping the court uncover the truth. In short, "[t]he lawyer seeking to be both an advocate for his client and at the same time, fair and candid with the court, faces a true dilemma",⁶¹⁸ and the potential for conflict between the principles is considerable.

⁶¹⁶ For example, Alice Woolley and John Noonan.

⁶¹⁷ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 523.

⁶¹⁸ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 77.

Friction between partisanship and truth-seeking is problematic. For example, the lawyer might choose to omit law or information that is unfavourable to the defendant's cause but is relevant to the case, or might seek to paint an honest witness in a bad light. As was mentioned in Chapter 2, partisanship may lead "the lawyer . . . [to] lie in defense of his client's interests".⁶¹⁹ Perjury is difficult to justify and rarely approved of in theory, but it is arguable that passively allowing the court to be misled (perhaps through silence) is a form of dishonesty embraced by partisanship yet discouraged by truth-seeking. As such, the crux of the conflict rests on the fact that "[l]awyers often do know the truth . . . and partisanship often requires lawyers to work against the truth".⁶²⁰ Which principle takes primacy is debatable. It has been suggested that "[i]t is more important – and more virtuous – to serve one's client with devotion, faithfulness, and fidelity than to serve the truth".⁶²¹ Yet, others have been critical of such logic. In *R. v. O'Connell*,⁶²² Crampton J seemed to suggest truth-seeking takes precedence, stating that "we are all – judges, jurors, advocates and attorneys together concerned in this search for truth"⁶²³ and that lawyers have "a prior and perpetual retainer on behalf of truth and justice"⁶²⁴ that was "primary and paramount".⁶²⁵

Partisanship also regularly contradicts the principle of procedural justice. A defence lawyer might 'ambush' the prosecution with a late defence or generate delay in proceedings with adjournments or the submission of extra evidence. These are tactics which do not promote a fair and balanced process. The conflict between partisanship and procedural justice is the quintessential example of 'Client v. the Court'. The defence lawyer is, as stated, an officer of the court and has a duty to aid the administration of justice; however, he or she is also a partisan for the client, charged with using all means possible to defend them. These duties weigh heavily upon the defence lawyer, leading to "divided loyalties with the potential for conflict being very considerable."⁶²⁶

⁶¹⁹ Fried C. (1975-1976) *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* – 85 Yale L.J. 1060, 1064.

⁶²⁰ Simon W. (1998-1999) 'Thinking Like a Lawyer' About Ethical Questions – 27 Hofstra L.R., 2.

⁶²¹ Smith A., Montross W. (1998-1999) *The Calling of Criminal Defense* – 50 Mercer L.R., 526.
⁶²² (1844) 7 I.L.R. 261.

⁶²³ *Ibid.*, 312.

⁶²⁴ *Ibid.*

⁶²⁵ *Ibid.*

⁶²⁶ Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 121.

Resolution of this theoretical conflict is difficult and has fuelled debate for decades:

"Legal authors have long wrestled with the question of how to balance the roles of zealous advocate and officer of the court charged with the pursuit of justice."⁶²⁷

Strong arguments support either principle taking precedence over the other. Some see the partisan advocate as a "mere instrument of the client's interests",⁶²⁸ and that "instrumental behaviour of the sort prescribed by the principle of partisanship exhibits disrespect for the law."⁶²⁹ Partisanship serves only to frustrate the system and results in a case of "the lawyer against the law."⁶³⁰ In contrast, others contend that if a defence lawyer "see[s] . . . her role as aiding the court in accurate fact-finding and legal judgment,"⁶³¹ then it is arguable that "the defender's basic role in representing *guilty* clients consists in facilitating their conviction and punishment".⁶³² In effect, actively helping the court requires betrayal of the client. In this context, one could describe the defence lawyer who facilitates justice as a sort of 'mole' for the court.

3. Conflict points in Formal Conceptions of the Role

3.1 Confidentiality v. Procedural Justice and Truth-Seeking

The principle of confidentiality conflicts with both of the major duties owed to the court. An important point of friction between confidentiality and procedural justice arises when the defence lawyer attempts to balance the duty to protect confidential information with duties of pre-trial disclosure. Confidentiality is a prominent feature in formal conceptions of the role. It is extensive, covering "all confidential information about a client's affairs, irrespective of the source of the information."⁶³³ This includes information provided by a client, any tactics and arguments for trial, any advice in contemplation of litigation and various other types of material. The duty to 'hide'

⁶²⁷ Goel R. (2004-2005) *Can I Call Kimura Crazy? Ethical Tensions In the Cultural Defense* – 3 Seattle J. Soc. Just., 450.

⁶²⁸ Luban D. (1988) *Lawyers and Justice: An Ethical Study* – Princeton: Princeton University Press, 13.

⁶²⁹ *Ibid.*, 18.

⁶³⁰ *Ibid.*, 12.

⁶³¹ Simon quoted in Luban D. (1992-1993) *Are Criminal Defenders Different?* – 91 Mich. L.R., 1758.

⁶³² *Ibid.*

⁶³³ [3], 'Guidance to rule 4 – Confidentiality and Disclosure', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

information inevitably frustrates the duty to facilitate the justice process and some formal expressions of confidentiality appear to accept this conflict:

"[I]t is necessary in our society . . . that communications between clients and lawyers . . . should be secure against the possibility of any scrutiny from others . . . notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."⁶³⁴

It should be reiterated that confidentiality is "at the instance of the client",⁶³⁵ and that the defence lawyer cannot independently choose to waive any rights of confidentiality. However, obligations to disclose information at the pre-trial stage are also not a matter of choice.

The formal process of pre-trial disclosure is outlined in the *Criminal Procedure and Investigations Act 1996*, and is expanded on by the CPR. Initial disclosure must be made by the prosecution, who must release any material which has not already been disclosed and "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".⁶³⁶ Once this has occurred, the defence must provide a defence statement which, as described in Chapter 3, must outline information including "the nature of the accused's defence", "the matters of fact on which [the defence] takes issue with the prosecution", "any point of law" the defence will raise and relevant authority.⁶³⁷ This is compulsory for indictable offences⁶³⁸ and voluntary for summary offences.⁶³⁹ The defence must comply with these requirements within 14 days of initial disclosure by the prosecution;⁶⁴⁰ this can be extended at the discretion of the court if the defence reasonably believes it cannot comply and can specify how long an extension will be necessary.⁶⁴¹ The prosecution then has a continuing duty to disclose material to the defence that may be "relevant".⁶⁴² The defence statement is comprehensive; it limits

⁶³⁴ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, [24], 649 per Lord Scott of Foscote.

⁶³⁵ Murphy P. (2005) *Murphy on Evidence* – Oxford: Oxford University Press, 445.

⁶³⁶ Section 3(1)(a) - *Criminal Procedure and Investigations Act 1996*.

⁶³⁷ Section 6A - *Criminal Procedure and Investigations Act 1996*.

⁶³⁸ Section 5 - *Criminal Procedure and Investigations Act 1996*.

⁶³⁹ Section 6 - *Criminal Procedure and Investigations Act 1996*.

⁶⁴⁰ Regulation 2 - *Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997*, SI 684

⁶⁴¹ *Ibid.*, Regulation 3.

⁶⁴² Section 7A - *Criminal Procedure and Investigations Act 1996*.

what can be kept private until the trial and so the potential for conflict with the principle of confidentiality is substantial. Failure to disclose correctly may have serious consequences for the defence case. The defence lawyer will be at fault if he or she "puts forward a defence which was not mentioned in [the] defence statement or is different from any defence set out in that statement" or "relies on a matter which . . . was not mentioned in his defence statement."⁶⁴³ Withholding required information will entitle "the court or any other party . . . [to] make such comment as appears appropriate" and may result in "the court or jury . . . [drawing] such inferences as appear proper in deciding whether the accused is guilty of the offence concerned."⁶⁴⁴ This therefore makes balancing confidentiality and procedural justice, as exemplified by the defence statement, a tricky task.

The statutory defence statement is by no means the only source of conflict. The CPR have arguably extended the duties of disclosure that apply to the defence lawyer and, as a result, the duty to facilitate procedural justice. The court has a duty to "actively manage"⁶⁴⁵ criminal proceedings; a primary part of this is "the early identification of the real issues"⁶⁴⁶ and "each party must . . . actively assist the court"⁶⁴⁷ with this. As suggested in Chapter 3, this includes the defence lawyer, as well as the defendant and as such it is arguable that the court could compel the defence lawyer to disclose materials, issues, tactics or problems that might fall within the category of 'real issues'. This vague concept is very powerful; the phrase 'real issues' remains undefined and open to interpretation. In *Malcolm v. DPP*,⁶⁴⁸ Stanley Burnton J stated that "[i]t is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage."⁶⁴⁹ Equally, in *Chorley Justices*,⁶⁵⁰ Thomas LJ stated that "after the entry of the plea of not guilty, the defendant should have been asked first what was in issue".⁶⁵¹ These readings of the procedure rules presumably cover the contents of the defence statement at least. The definition is arguably flexible through design, potentially enabling the court to eliminate as many disclosure 'loopholes' as possible.

⁶⁴³ Section 11(2)(f) - *Criminal Procedure and Investigations Act 1996*.

⁶⁴⁴ Section 11(5) - *Criminal Procedure and Investigations Act 1996*.

⁶⁴⁵ Rule 3.2(3) - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁴⁶ Rule 3.2(a) - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁴⁷ Rule 3.3 - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁴⁸ [2007] EWHC 363.

⁶⁴⁹ *Ibid.*, [31].

⁶⁵⁰ *R (on the application of the DPP) v. Chorley Justices & Anor* [2006] EWHC 1795.

⁶⁵¹ *Ibid.*, [26].

Rule 3.10 of the CPR appears to expand defence disclosure duties significantly. It requires information about "which witnesses [the defence] intends to give oral evidence", "what written evidence [the defence] intends to introduce", "what other material, if any, [the defence] intends to make available to the court in the presentation of the case" and "whether [the defence] intends to raise any point of law that could affect the conduct of the trial or appeal".⁶⁵² These provisions apply to the prosecution as well. Since they have pre-existing legislative disclosure commitments and are backed with the support and resources of the state, it is reasonable to expect their compliance with such provisions. In contrast, a defendant and his or her lawyer have severely limited funding and time available for preparation.⁶⁵³ Confidentiality is arguably the core expression of the adversarial philosophy that defendants cannot be compelled to incriminate themselves, a principle which levels the playing field. Thus, provisions like those above, which eat into the protection of confidentiality, have a substantially bigger impact on the defence than on the prosecution. It is important to highlight that the case management provisions apply to both the Magistrates' Courts and the Crown Court.⁶⁵⁴ However, this does not extend the scope of the more formal and well-defined defence statement. Under Rule 22.4 (which concerns defence disclosure), a note states that "[t]he defendant is not obliged to give a defence statement in a Magistrates' Court case."⁶⁵⁵ This relief from the arguably onerous disclosure framework is significant, as summary hearings make up the vast majority of criminal proceedings in England and Wales.⁶⁵⁶

Formal regulation does address the clash between disclosure and confidentiality. The Bar Code states that "[a] barrister must cease to act, and if he is a self-employed barrister must return any instructions . . . if the client refuses to authorise him to make some disclosure to the Court which his duty to the Court requires him to make".⁶⁵⁷ This suggests that procedural justice overrides confidentiality. Similar advice is provided relating to voluntary disclosure. The Solicitors' Code suggests that where a defence

⁶⁵² Rule 3.10 - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁵³ It should, however, be noted that the Crown Prosecution Service are also subject to time pressures.

⁶⁵⁴ Rule 3.1 - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁵⁵ This caveat was not included in the original version (2005) of the CPR. Whether this represents a government 'u-turn' or is simply a correction is unclear.

⁶⁵⁶ "Virtually all criminal court cases start in a magistrates' court. The less serious offences are handled entirely in magistrates' courts, with over 90 per cent of all cases being dealt with in this way." – Ministry of Justice (2009) *Judicial and Court Statistics 2008* – London: The Stationary Office, Cm 7697, 136, 'Chapter 7: Magistrates' Courts'.

⁶⁵⁷ [608(d)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

lawyer has "certain knowledge which [he or she] realise[s] is adverse to the client's case, [he or she] may be extremely limited in what [they] can state in the client's favour."⁶⁵⁸ First, the defence lawyer should attempt to resolve this problem by "seek[ing] the client's agreement for full voluntary disclosure".⁶⁵⁹ Keeping such information hidden, as the principle of confidentiality would suggest, could result in the defence lawyer being "severely criticised by the court".⁶⁶⁰ If the client refuses to consent, then the defence lawyer is "entitled to refuse to continue to act for the client if to do so will place [him or her] in breach of [their] obligations to the court",⁶⁶¹ namely the disclosure of information that will facilitate the process. Thus, if a defence lawyer finds his or her disclosure obligations conflict with the duty to keep client matters confidential, withdrawal from the case appears to be the formal resolution. It is interesting, and perhaps disappointing, to note that in this situation of conflict, defence lawyers are not obligated to reconcile their duties, one way or another: they can simply abandon them. The fact that the professional codes of conduct recommend resignation in the case of a conflict between confidentiality and procedural justice, suggests that such a conflict is irresolvable.

However, the CPR may have altered this. Previously, where a defence lawyer was forbidden by his or her client to disclose information, then there was a problem since disclosure was required of the defendant rather than the lawyer. However, the CPR has made it clear that the obligations it imposes apply to the 'parties', not just the defendant; arguably, this "implies that disclosure obligations extend to the defence lawyer."⁶⁶² Where a client 'refuses to authorise' disclosure, the defence lawyer may now be able to go ahead and do it anyway because he or she is considered a separate party to the client with, potentially, separate duties. This would have significant implications for confidentiality, although it is by no means clear that this is the case. In 2007, the Law Society released a practice note (which was updated in 2009) entitled, 'Criminal Procedure Rules: impact on solicitors' duties to the client', which addressed some of the issues raised by the conflict between confidentiality and procedural justice. It describes the defence lawyer's role as "a complex one"⁶⁶³ due to the fact that "as a lawyer the

⁶⁵⁸ Rule 15, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁶⁵⁹ *Ibid.*, [14], 'Guidance to rule 4 – Confidentiality and Disclosure'.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 Legal Ethics 1, 64.

⁶⁶³ Legal Policy Directorate (2009) *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client* –

solicitor owes professional duties to his or her client, as well as - as one of its officers - to the court."⁶⁶⁴ The practice note states that "[o]n occasions these various duties may conflict with each other",⁶⁶⁵ and as such the note is designed to "define the extent of these duties and burdens, and to identify and address the ethical problems that are likely to arise from their imposition."⁶⁶⁶ However, practice notes only "represent the view of the [Law] Society on what a standard of good practice in a particular area is"⁶⁶⁷ and "[s]olicitors are not required to follow them."⁶⁶⁸ Therefore, it could be considered as loose guidance rather than as binding dictum.

The practice note provides example scenarios involving potential conflicts between confidentiality and procedural justice:

"A solicitor may hold factual information . . . which is of crucial importance to a party to the proceedings. When requested, or served with a witness summons, to produce this information the solicitor declines to do so."⁶⁶⁹

"There is a defence available to the defendant, but he refuses to permit the solicitor to pass the information to the court."⁶⁷⁰

The practice note appears to come to some muddled conclusions. In relation to the first scenario, it states:

"Whilst, understandably, the court . . . may consider itself entitled to an explanation, and [be] frustrated by its absence . . . the court should understand that the solicitor's duty of confidentiality to his or her client absolutely forbids the provision of reasons, because the information sought by the court will be privileged."⁶⁷¹

In response to the second scenario, the practice note again suggests that client

London: The Law Society, 4.

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid., 2.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid., 6.

⁶⁷⁰ Ibid., 11.

⁶⁷¹ Ibid., 7.

confidentiality takes precedence:

"Whilst a positive duty is imposed by the CPR on the solicitor to pass on the information to the court, the solicitor should inform the court that the defendant refuses to permit the solicitor to disclose the defence."⁶⁷²

However, despite these comments, the practice note makes several other remarks which seem to contradict the above. Whilst noting that confidentiality "means that a court cannot ask a solicitor to reveal what a defendant has told him or her if it is privileged",⁶⁷³ the practice note warns:

"[S]olicitors can clearly be required by the CPR, or by a direction of the court made under its case management duties arising from the CPR, to provide information that will enable the court process to proceed efficiently and expeditiously, but only if in so doing none of the defendant's rights listed above, is encroached upon."⁶⁷⁴

Coupled with the statement that "solicitors are under a duty to provide information to the court which is not privileged and which enables the court to further the overriding objective by actively managing the case",⁶⁷⁵ the practice note implies that any information falling outside of the definition of legal professional privilege can, and should, be disclosed. This creates significant potential for conflict since "[n]ot everything that lawyers have a duty to keep confidential is privileged."⁶⁷⁶ This seems to be an inadequate resolution to the conflict between confidentiality and procedural justice.

Confidentiality also conflicts with truth-seeking, primarily because the former obligation requires the defence lawyer to hide information from the court. The extent to which the truth can be compromised for the sake of client privacy has one clear limitation: where a client attempts to use the cloak of confidentiality to disguise criminal intent.⁶⁷⁷ However, outside of the context of this provision, the boundary

⁶⁷² Ibid., 11.

⁶⁷³ Ibid., 9.

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid., 10

⁶⁷⁶ Ibid., 5.

⁶⁷⁷ As was outlined in Chapter 2, s.10(2) of PACE states that "[i]tems held with the intention of furthering

between confidentiality and truth-seeking is changeable. Two situations that pose difficulty are confessions of guilt by a client and the failure of a client to attend a court hearing. If a client confesses guilt to the defence lawyer, then that information is confidential and the lawyer has a duty to protect it. However, formal conceptions of truth-seeking "impose . . . very strict limitations on the conduct of the defence"⁶⁷⁸ in these circumstances. The defence lawyer "must not assert as true that which he knows to be false" and "must not connive at, much less attempt to substantiate, a fraud."⁶⁷⁹ The real issue arises if the client asks the defence lawyer to lie to the court, which the principle of truth-seeking clearly forbids. The Solicitors' Code states that a defence lawyer must "never deceive or knowingly or recklessly mislead the court"⁶⁸⁰ and "must refuse to act or cease acting for a client . . . when to act would involve . . . a breach of the law or a breach of the rules of professional conduct".⁶⁸¹

Similarly, the Bar Code says that a client cannot "require a barrister to act otherwise than in conformity with law or with the provisions of this Code".⁶⁸² The instructions are clear – the defence lawyer cannot assert the client's innocence when the client has confessed guilt and so must withdraw.⁶⁸³ However, the lawyer who ceases to act has an ongoing duty of confidentiality. He or she "must inform the court of the reasons for . . . withdrawal, by providing enough explanation to enable the judge to decide how to proceed"; however, "in doing so [he or she] must not breach legal professional privilege."⁶⁸⁴ Thus, a strange situation is created where the defence lawyer is forced to withdraw but cannot say why. This resolution is designed to protect client confidentiality and promote truth-seeking, but essentially achieves neither. Although the defence lawyer cannot explain their withdrawal, the act in itself indicates a serious ethical conflict between representative and client. Equally, withdrawal does not, in reality, promote truth-seeking because the client's intended deception and guilt remain

a criminal purpose are not items subject to legal privilege".

⁶⁷⁸[12.3] 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board,

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 17/08/2010.**

⁶⁷⁹ Ibid.

⁶⁸⁰ Rule 11.01(1), Solicitors' Code of Conduct – Solicitor's Regulation Authority,

<http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁶⁸¹ Ibid., Rule 2.01(1).

⁶⁸² [603(c)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁶⁸³ See also, s.4 of the *Criminal Law Act 1967* which states that "any other person who, knowing or believing [the defendant] to be guilty of the offence . . . act[s] with intent to impede [his or her] apprehension or prosecution shall be guilty of an offence."

⁶⁸⁴ The Law Society (2008) *Withdrawing from a Criminal Case* – London: The Law Society, [4].

hidden. It is, at best, avoiding lying. A similar conflict arises in the context of a client's non-attendance at trial:

"If a client tells the solicitor that he or she is not going to attend the trial, the solicitor is placed in an invidious position as far as the solicitor's duty to the court is concerned, for such information, in all likelihood, will be privileged; in which event the solicitor cannot waive the client's privilege, and nor can the court order him or her to do so."⁶⁸⁵

The defence lawyer cannot reveal what the client has said, yet has a duty to aid the court in the search for the truth. In such a situation, formal regulation suggests that "[i]f the client does fail to attend . . . in relation to your duty of confidentiality you may properly state that you are without instructions, but may not disclose information about the client's whereabouts" and "you may consider it appropriate to withdraw from the hearing where, having regard to the client's best interests, you believe you cannot properly represent the client."⁶⁸⁶ Once again, the defence lawyer must take the fall; he or she cannot lie about the client's absence, but cannot tell the truth. It is therefore questionable how adequate these formal resolutions are.

The conflict between the principle of confidentiality and the principles of procedural justice and truth-seeking raise questions about the very foundations of the adversarial process and the status of the defendant and his or her lawyer. To suggest that the provisions outlined above are simply designed to improve the efficiency of the criminal process is misleading. Rhetoric from the courts indicates that a significant part of their purpose is to 'flush' out the truth by removing any hiding places for the defence. For example, defence tactics should not prevent "a full and fair hearing",⁶⁸⁷ the criminal trial is a "search for the truth"⁶⁸⁸ and in the adversarial process, "justice is what matters".⁶⁸⁹ The defence is expected to cooperate in this exercise, which protects the "legitimate interests of the defendant".⁶⁹⁰ But what are his or her 'legitimate interests'? Article 6(2) of the European Convention on Human Rights and its associated case law,

⁶⁸⁵ Legal Policy Directorate (2009) *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client* – London: The Law Society, 17.

⁶⁸⁶ [5], 'Guidance to Rule 11 – Litigation and Advocacy', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁶⁸⁷ *R v. Gleeson* [2004] 1 Cr. App. R. 29, 416.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *R v. Munnery* [1992] 94 Cr. App. R. 164, 173.

⁶⁹⁰ *R v. Gleeson* [2004] 1 Cr. App. R. 29, 415.

applicable to England and Wales, establishes the right of a defendant to "be presumed innocent until proved guilty according to law". This inherently implies that the burden of proof lies with the prosecution and "[a]lthough not specifically mentioned in Article 6 of the Convention, there can be no doubt that . . . the privilege against self-incrimination [is a] generally recognised international standard".⁶⁹¹ This privilege protects defendants from being compelled to "co-operate in the building up of the case against them".⁶⁹² Confidentiality represents an arm of this privilege. However, obligations to promote procedural justice and truth-seeking potentially offend this 'legitimate interest'.

The European case of *Funke v. France*⁶⁹³ provides a good example of this:

"The Court notes that the customs secured Mr. Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence,' within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating itself."

Even the CPR state that the criminal process should recognise "the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights".⁶⁹⁴ However, the basic 'legitimate interests' of presumption of innocence, privilege against self-incrimination and the prosecution burden of proof appear to have been sidelined to some extent. The degree to which the defence lawyer and the defendant are expected to aid in criminal proceedings signifies an unprecedented erosion of the 'legitimate interests' of the defendant. The dictum of Auld LJ in *R v. Gleeson* strongly suggests that the primary 'legitimate interests' of the defendant are to cooperate in "acquitting the innocent and convicting the guilty"⁶⁹⁵ and help in "dealing with the prosecution and the defence fairly",⁶⁹⁶ involving some degree of self-incrimination and relieving some of

⁶⁹¹ *Murray v. UK* (1996) 22 EHRR 29, [45].

⁶⁹² 'The Structure and Organization of Criminal Justice in England and Wales' by Robin White, in McConville M., Wilson G. (2002) *The Handbook of The Criminal Justice Process* – Oxford: Oxford University Press, 5.

⁶⁹³ (1993) 16 EHRR 297

⁶⁹⁴ Rule 1.1(c) - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁹⁵ Rule 1.1(2)(a) - *Criminal Procedure Rules 2010*, 2010/60.

⁶⁹⁶ Rule 1.1(2)(b) - *Criminal Procedure Rules 2010*, 2010/60.

the prosecution's burden. It could be argued that these developments are at best significant and at worst "a fundamental attack on the foundational principles of the criminal process in England and Wales".⁶⁹⁷ In summary, this conflict point appears to be unresolved, leaving troubling questions about where the defence lawyer's loyalties should lie.

3.2 Partisanship v. Morality

Advancing the interests of a defendant will not always require unethical behaviour; as was argued earlier in the thesis, partisanship may be regarded as moral in itself. However, public morality and partisan defence often stand opposed. For example, a defence lawyer should "do what is best for [his or her] client, consistent with his instructions, rather than bend to pressure to oil the wheels of the criminal justice system."⁶⁹⁸ The phrase 'oil the wheels' is significant in that it suggests that a defence lawyer should make it difficult for the prosecution or court to process the client through the system. It is therefore arguable that a part of the defence lawyer's job is to be a nuisance. Providing solid opposition in turn validates the legitimacy of any prosecution; it will be hard-fought, fully held to account and thoroughly scrutinised. 'Pressure to oil the wheels' may emanate from public opinion about a case or client. Strong public feeling is often aroused by criminal cases, for example, high-profile murderers,⁶⁹⁹ accused child abusers⁷⁰⁰ or immigrant rapists.⁷⁰¹ In the case of wide media coverage, pressure on the defence lawyer to cooperate in the client's conviction may be tangible. Formal regulation suggest that this should be dismissed and the defence lawyer should do all that is possible to defend the client. However, the defence lawyer is also expected to maintain certain standards of integrity. He or she must not "compromise his professional standards in order to please his client".⁷⁰² Although vague, this arguably implies that the lawyer should be honest, respectful,

⁶⁹⁷ Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 Legal Ethics 1, 71.

⁶⁹⁸ Ede R., Edwards A. (2002) *Criminal Defence* – London: The Law Society, 1.

⁶⁹⁹ Blacker T. (2010) *Jon Venables and a Case of Mob Mentality* – The Independent, <http://www.independent.co.uk/opinion/commentators/terence-blacker/terence-blacker-jon-venables-and-a-case-of-mob-morality-1918872.html>: **Last accessed 17/08/2010.**

⁷⁰⁰ Herbert I. (2000) *Man accused of paedophile offences kills himself after vigilante attack* - The Independent, <http://www.independent.co.uk/news/uk/this-britain/man-accused-of-paedophile-offences-kills-himself-after-vigilante-attack-710832.html>: **Last accessed 17/08/2010.**

⁷⁰¹ Coles J. (2006) *Outrage as 'rapist' vanishes* - The Sun, <http://www.thesun.co.uk/sol/homepage/news/article68323.ece>: **Last accessed 17/08/2010.**

⁷⁰² [307(c)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

straightforward and "maintain the high reputation of advocates".⁷⁰³ In cases like those above, one must wonder whether upholding the ethical and honest 'high reputation' of defence lawyers is a duty that is compatible with the ruthless questioning and obstructive delay that is often necessary in partisan defence.

The treatment of complainants in court is an area of particular conflict. A defence lawyer is expected to act "without regard to his interests or to any consequences to himself or to any other person".⁷⁰⁴ Yet, he or she should also use "proper and lawful means".⁷⁰⁵ There is, of course, nothing unlawful about being insensitive toward a complainant when defending a client in court; whether it is proper is another question. The phrase 'lawful and proper' occurs frequently in formal regulation and may represent an attempt to balance partisanship and ethical behaviour, although this is purely speculative. 'Cordery on Solicitors'⁷⁰⁶ suggests that "[t]he duty of a solicitor to place his client's interests first is subject to his other professional obligations, and in particular duties of a public nature".⁷⁰⁷ The principle of morality is, essentially, a reflection of public values and the greater good; this advice implies that some higher duty to public service must have weight in defence lawyer's decisions. Yet, this is not explicit and as was argued earlier in this thesis, defending criminal clients can be considered a moral pursuit because "it is also in the public interest that the duty should be performed."⁷⁰⁸ Whether treating complainants with dignity and respect is a duty 'of a public nature' is uncertain. Elsewhere, it is stated that lawyers "must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person".⁷⁰⁹ A realistic example of this conflict is a rape trial. Rape is generally regarded as a heinous offence; due to the very intrusive, traumatic and personal nature of the crime, proceedings surrounding it are deeply emotive and sensitive. As a trial advocate, the defence lawyer must make

⁷⁰³ Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates* – London: Ministry of Justice/Legal Services Commission, Annex 1, [E(6)].

⁷⁰⁴ [303(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁷⁰⁵ *Ibid.*; *Medcalf v. Mardell* [2003] 1 AC 120 (HL), [51].

⁷⁰⁶ Holland A., et al. (2008) *Cordery on Solicitors (9th Ed.)* – London: LexisNexis Butterworths.

⁷⁰⁷ *Ibid.*, J-2, 'Section 1: Solicitors' Code of Conduct 2007', 'J – Requirements of Practice and Relations with Clients', Vol. 1.

⁷⁰⁸ *Medcalf v. Mardell* [2003] 1 AC 120 (HL), [51] *per* Lord Hobhouse.

⁷⁰⁹ [708 (g)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; Rule 11.01(2)(a), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

submissions and arguments which test the prosecution and support the accused. Cross-examination can take the form of a very personal yet very public grilling of a rape complainant, undermining his or her honesty, accuracy or self-control. Formal conceptions of partisanship suggest that the consequences of questioning a distressed person in this way should be ignored; the primary function of the defence lawyer is to pursue the client's best interests. Dependent on the approach however, this sort of cross-examination treads the border between acceptable and unacceptable conduct, and may contradict the moral obligation "not to vilify, insult or annoy" a complainant. Moreover, it might be argued that to harass a potential victim of crime in this way defeats the object of the criminal justice system.⁷¹⁰

The above example of conflict between partisanship and morality has had a significant impact on the defence lawyer's role in recent years. The *Youth Justice and Criminal Evidence Act 1999* attempted to "resolve the natural tension between protecting the complainant's privacy and dignity and the accused's right to a fair trial in a proportionate manner."⁷¹¹ Under s.41(1), it was stated that "no evidence may be adduced, and . . . no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant". This provision, often referred to as the "rape shield",⁷¹² was designed to "protect complainants from unnecessary humiliation and distress when giving evidence"⁷¹³ and prevent rape trials from being "distorted"⁷¹⁴ by the "twin myths . . . 'that unchaste women were more likely to consent to intercourse and . . . were less worthy of belief.'"⁷¹⁵ At the time of its introduction, the defence could apply to the court to bypass this provision but only in three very limited circumstances. First, where the "issue is not an issue of consent";⁷¹⁶ second, where "it is an issue of consent" and the sexual behaviour in question "is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused;"⁷¹⁷ and third, where "it is an issue of consent" and the sexual behaviour raised is "so similar" to the alleged offence or sexual

⁷¹⁰ For more on the role of the 'victim' in the criminal justice process, see Chapter 8.

⁷¹¹ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History* – The Barrister Magazine Website, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010.**

⁷¹² *R v. A (No. 2)* [2001] UKHL 25, [33].

⁷¹³ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History* – The Barrister Magazine Website, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010.**

⁷¹⁴ *Ibid.*

⁷¹⁵ *R v. A (No. 2)* [2001] UKHL 25, [27].

⁷¹⁶ Section 41(3)(a) - *Youth Justice and Criminal Evidence Act 1999.*

⁷¹⁷ Section 41(3)(b) - *Youth Justice and Criminal Evidence Act 1999.*

behaviour of the complainant at or about the same time of the alleged offence, that “the similarity cannot reasonably be explained as a coincidence.”⁷¹⁸ The statute added that no evidence would be allowed if “if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.”⁷¹⁹ The provision seemingly eliminated all opportunity for the defence to raise evidence of past sexual behaviour, placing the well-being of the complainant above all else and significantly limiting the ability of the defence lawyer to be a partisan.

However, this “virtual blanket exclusion of previous sexual history evidence”⁷²⁰ was challenged in the case of *R v. A (No. 2)*.⁷²¹ The case sought to address the conflict outlined above:

“The question is whether one of these interests should prevail or whether there must be a balance so that fairness to each must be accommodated and if so whether it has been achieved in current legislation.”⁷²²

Lord Slynn of Hadley reaffirmed that “women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences”⁷²³ while Lord Steyn highlighted that “the statute pursued desirable goals”.⁷²⁴ However, he went on to describe the provisions contained as “legislative overkill”.⁷²⁵ He described how the admission of potentially relevant evidence of past sexual behaviour was limited by “extraordinarily narrow temporal restriction”⁷²⁶ in the statute. He provided the example of a defendant and a complainant who may have had sexual relations over a period of weeks prior to an allegation. He stated that “[w]hile common sense may rebel against the idea that such evidence is never relevant to the issue of consent, that is the effect of the statute.”⁷²⁷

⁷¹⁸ Section 41(3)(c) - *Youth Justice and Criminal Evidence Act 1999*.

⁷¹⁹ Section 41(4) - *Youth Justice and Criminal Evidence Act 1999*.

⁷²⁰ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History* – The Barrister Magazine Website, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010**.

⁷²¹ [2001] UKHL 25.

⁷²² *Ibid.*, [5] *per* Lord Slynn of Hadley.

⁷²³ *Ibid.*, [1].

⁷²⁴ *Ibid.*, [43] *per* Lord Steyn.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*, [40].

⁷²⁷ *Ibid.*, [43].

Lord Steyn concluded that:

“[T]he test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention.”⁷²⁸

This case in effect relaxed the restriction on questioning and “unshackled judges from a legislative straitjacket that might otherwise have led them to exclude truly relevant evidence on an arbitrary basis”.⁷²⁹

However, the restoration of judicial discretion has not entirely resolved the conflict between partisanship and morality. In *R v. Beedall*,⁷³⁰ a defendant was charged with the homosexual rape of a youth who claimed not to be homosexual. The defendant claimed that anal intercourse between the two had been consensual; in attempting to prove this, the defence lawyer wished to cross-examine the complainant about past sexual behaviour. Specifically, the lawyer wished to ask the complainant whether he was or had been a practising homosexual. If he denied this, the lawyer intended to raise medical evidence stating that no injuries resulted from the intercourse due “the lax and capacious nature of the complainant's anus”,⁷³¹ suggesting that he was a practising homosexual and may therefore have consented. The defence attempted to raise this evidence under s.41(3)(c), the exception relating to ‘similar’ behaviour; however, the trial court rejected this. The defence appealed on the basis that the court had not interpreted s.41(3)(c) in a manner that was compatible with European Convention fair trial rights, as required under s.3 *Human Rights Act 1998* and in light of the decision in *R v. A (No. 2)*. The Court of Appeal dismissed this, stating that “[i]t is by statute not permissible to cross-examine a complainant upon the basis that he or she has consented to similar acts in the past and therefore is likely to have consented on this occasion”⁷³² and that “[i]t is plain to us that the statute may well exclude things which are capable of having some relevance.”⁷³³ *R v. Beedall* therefore exemplifies the ongoing conflict between partisanship and morality. Such provisions place the defence lawyer in an

⁷²⁸ *Ibid.*, [46].

⁷²⁹ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History* – The Barrister Magazine Website, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010.**

⁷³⁰ [2007] EWCA Crim. 23.

⁷³¹ *Ibid.*, [24].

⁷³² *Ibid.*, [20].

⁷³³ *Ibid.*

interesting position, severely limiting what they can do for a client in the case of a rape charge.⁷³⁴

3.3 Detachment v. Morality

The principles of detachment and morality are, by their nature, contrary. The former requires the adoption of studied neutrality, free of prejudice in relation to clients and cases. The latter is an obligation to be an ethical professional, to uphold standards that advance the 'greater good' and influence the client to do so as well. Formal manifestations of these principles seem to leave the conflict unresolved, presenting defence lawyers with practical problems. Formal regulation provides little guidance as to how the defence lawyer should interview a client in readiness for a trial. For example, one might question whether the lawyer should prepare by requesting a full account from the client or by questioning selectively in order to obtain only advantageous information. The former approach would be more ethical; possession of all the facts would allow the defence lawyer to advise the client on what the *right* course of action is. The latter approach would require the defence lawyer to remain detached from any concerns that he or she may not be hearing the whole truth, potentially increasing the likelihood of an unjust victory for the client. Formal conceptions of the defence role make no reference to the correct course of action at this stage, rendering the above options speculative.

Where formal regulation does refer to detachment and morality, the advice is contradictory. Defence lawyers are prohibited from expressing an opinion about the merits or morality of a case or client. For example, barristers "must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law."⁷³⁵ This sort of provision suggests that the defence lawyer, as a detached representative, is not required to assess moral virtues in his or her work. Yet, this is confused by other formal regulation which implies a duty to pursue moral goals. The 'overriding objective' of the CPR, which defence lawyers

⁷³⁴ For more on this debate, see Kibble N. (2004) *Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999* – London: Criminal Bar Association, and Temkin J. (2003) *Sexual History Evidence – Beware the Backlash* – Crim LR 217.

⁷³⁵ [708(b)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

must help achieve, includes "respecting the interests of witnesses, victims and jurors".⁷³⁶ One must wonder to what extent 'respect' obligates a defence lawyer to consider the above parties. Equally, it is questionable whether the role of detached defender, which essentially requires the lawyer not to care about other parties, is compatible with this requirement. For example, if a defendant is charged with the murder of a child, one would assume that secondary victims such as the deceased's family would have interests that should be 'respected'. Should the defence lawyer shape his or her case to protect the feelings and emotions of these parties? Should he or she avoid submissions that might offend, even if they are potentially significant? Alternatively, is the defence lawyer obliged by the principle of detachment to disregard all of this and simply 'do his job'? This is a difficult conflict with no clear resolution.

Defence lawyers "must act with integrity"⁷³⁷ and should not "compromise [their] professional standards in order to please [their] client".⁷³⁸ The non-specific construction of such statements renders them unhelpful. However, vague as they are, they open the door for restriction of the defence lawyer's client-orientated role. They suggest that defence lawyers should demonstrate some degree of honour and honesty in conducting their work, but when, where and in what form this is required is unclear. Formal regulation dealing with the acceptance of clients also provides conflicting advice. The cab-rank rule for barristers seems to be clear enough on this, although as was discussed in Chapter 3 the link between low-paid legal aid work and unpalatable clients may provide a convenient loop-hole for defence barristers to avoid undesirable work. The Solicitor's Code of Conduct states that a solicitor:

"[M]ust not refuse to act as an advocate for any person . . . [because] the nature of the case is objectionable to [the solicitor] or to any section of the public . . . [or because] the conduct, opinions or beliefs of the prospective client are unacceptable to [the solicitor] or to any section of the public . . ."⁷³⁹

Yet, the code also says that solicitors are "generally free to decide whether or not to take

⁷³⁶ Rule 1.1(2)(d) – *Criminal Procedure Rules 2010*, 2010/60.

⁷³⁷ Rule 1.02, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁷³⁸ [307(c)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁷³⁹ Rule 11.04(1), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

on a particular client".⁷⁴⁰ This perhaps grants a licence to defence solicitors to reject cases on the basis of personal or public moral opinions. For example, where a serial sex offender is on trial for indecent assault, a defence solicitor might be able to refuse to act for someone who might be widely regarded as unpleasant and undeserving. The above provision is followed by a list of possible reasons for refusing to act or ceasing to act; none of them appear to rule out moral objections as a reason. However, like all of the conflicts within formal regulation, there is much ambiguity. As discussed in Chapter 3, the Solicitors' Code does suggest that a solicitor "may only end the relationship with the client if there is a good reason", for example where there is "a breakdown in confidence between you and the client".⁷⁴¹ Like many provisions, 'breakdown in confidence' is a phrase open to generous interpretation, and does not provide sufficient clarity in resolving such conflicts. Other aspects of formal regulation do make broad attempts at resolving some of ethical conflict between detachment and morality. Unlike most of the professional standards, the Solicitors' Code directly addresses the issue of conflict generally, stating:

"Where two or more duties come into conflict, the factor determining precedence must be the public interest, and especially the public interest in the administration of justice."⁷⁴²

The inclusion of the phrase 'public interest' is again open to interpretation. It could be argued that the 'public interest' means the 'greater good', and as such, conflicts should be resolved in favour of the people and public morality. Alternatively, the 'public interest' might mean the fair and balanced pursuit of justice, which requires a full and thorough defence of the accused. Whatever this provision means, it provides little specific or useful guidance for a defence lawyer faced with a conflict between detachment and morality.

⁷⁴⁰ Ibid., Rule 2.01(1).

⁷⁴¹ Ibid., [8], 'Guidance to rule 2 – Client relations'.

⁷⁴² Ibid., [3], 'Guidance to rule 1 – Core duties'.

3.4 Partisanship v. Procedural Justice and Truth-Seeking

These principles represent the two main masters of the criminal defence lawyer – the client and the court. Partisanship requires that the defence lawyer make "the client's business [his or her] first concern".⁷⁴³ However, the duties of procedural justice and truth-seeking naturally contradict this:

"Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by every means. They also owe a duty to the court and the administration of justice . . . Sometimes the performance of these duties to the court may annoy the client."⁷⁴⁴

These split loyalties create a difficult conflict point, apparent in formal conceptions of the role. The principles of partisanship and procedural justice, in particular, are a continual source of tension for the defence lawyer. The partisan defender is expected "to do what is best for [his or her] client, consistent with his instructions, rather than bend to pressure to oil the wheels of the criminal justice system."⁷⁴⁵ However, the CPR appear to describe a substantial defence duty to facilitate procedural justice, involving "the early identification of the real issues", "discouraging delay" and "encouraging the participants to co-operate in the progression of the case".⁷⁴⁶ This indicates an increasing emphasis on the defence lawyer's role as an officer of the court, arguably at the expense of partisanship. Such changes have slowly transformed formal conceptions of the role into a tangle of contradictory obligations and inconclusive guidance.

For example, the defence lawyer should "present a coherent and persuasive case that is consistent with the client's instructions",⁷⁴⁷ a clear reflection of the duty of partisanship. Yet, other formal regulation says that he or she "must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him",⁷⁴⁸ words which appear contradictory. The partisan lawyers'

⁷⁴³ *Ibid.*, [1].

⁷⁴⁴ *Arthur J.S. Hall and Co. v. Simons* [2002] 1 AC 615, 686 *per* Lord Hoffman.

⁷⁴⁵ Ede R., Edwards A. (2002) *Criminal Defence* – London: The Law Society.

⁷⁴⁶ Rule 3.2 – *Criminal Procedure Rules 2010*, 2010/60.

⁷⁴⁷ [2.3.3], page 7, 'Standards of competence for the accreditation of solicitors and representatives advising at the magistrates' court', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>:

Last accessed 16/08/2010.

⁷⁴⁸ *Arthur J.S. Hall and Co. v. Simons* [2002] 1 AC 615, 715.

ability to present a comprehensive and favourable case for his or her client may be impeded by such provisions. Other obligations to procedural justice indicate this. The defence lawyer must take "all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time",⁷⁴⁹ and bring "any procedural irregularity to the attention of the Court during the hearing".⁷⁵⁰ Arguably, the latter provision may compromise the right against self-incrimination and the former provision may threaten the right to a full and fair public hearing. However, the courts seem to disagree. In *R v. Jisl*,⁷⁵¹ Judge LJ said that "[i]t is not . . . a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate."⁷⁵² Indeed, he stated that "[t]he objective is not haste and rush, but greater efficiency and better use of limited resources by closer identification of and focus on critical rather than peripheral issues." Equally, in the case of *R v. Chaaban*⁷⁵³ the same judge again addressed the issue of efficiency and fair trial rights, stating:

"Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time."⁷⁵⁴

Presumably, the above statements also reflect the rationale behind the CJSSS policy, applied to Magistrates' proceedings.

Disclosure is a significant source of conflict for defence lawyers, who must juggle their duty as a partisan and their duty to promote procedural justice. The Attorney General's 'Guidelines on Disclosure', issued in 2005, state that "[a] fair trial should not require consideration of irrelevant material and should not involve spurious applications or arguments which serve to divert the trial process from examining the real issues before

⁷⁴⁹ [701(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁷⁵⁰ [708(d)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁷⁵¹ [2004] EWCA Crim. 696.

⁷⁵² *Ibid.*, [114].

⁷⁵³ [2003] EWCA Crim. 1012.

⁷⁵⁴ *Ibid.*, [37].

the court."⁷⁵⁵ Of course, what is classified as 'spurious' or 'irrelevant' is not necessarily clear-cut. As discussed earlier, the partisan defence lawyer would seek to keep the case of his or her client hidden from the opposition until its presentation in court. However, as outlined earlier, formal regulation also imposes conflicting duties to uphold the administration of justice; concealing the defendant's case until it is presented is now highly contentious. The defence statement plays a major role in this conflict, requiring disclosure of, among other things, "the nature of the accused's defence, including any particular defences on which he intends to rely" and "any authority on which he intends to rely for that purpose".⁷⁵⁶ This is optional in summary hearings, which make up the majority of criminal proceedings. However, other formal regulation seems to fill this gap. The various requirements of the CPR arguably replicate the demands of the defence statement. Recent case law provides that "[a]mbushes . . . are to be discouraged and discountenanced . . . criminal proceedings are not a game: their object is to achieve a fair determination of the innocence or guilt of the defendant."⁷⁵⁷ Manipulating prosecution omissions or slip-ups is equally controversial; it now seems that "for defence advocates to seek to take advantage of such errors . . . is . . . no longer acceptable".⁷⁵⁸ All of these provisions, and others, thus amount to considerable levels of disclosure.

Formal conceptions of the role attempt to address the conflicts between partisanship and the duties to the court, but struggle to resolve them. In *Medcalf v. Mardell*,⁷⁵⁹ Lord Hobhouse said:

"At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party."⁷⁶⁰

⁷⁵⁵ Attorney General's Office (2005) *Attorney General's Guidelines on Disclosure* – London: The Stationary Office, [2].

⁷⁵⁶ Section 6A - *Criminal Procedure and Investigations Act 1996*.

⁷⁵⁷ *DPP v. Hughes* [2003] EWHC 2470 (Admin.), [16].

⁷⁵⁸ *R v. Gleeson* [2004] 1 Cr. App. R. 29, [34].

⁷⁵⁹ [2003] 1 AC 120.

⁷⁶⁰ *Medcalf v. Mardell* [2003] 1 AC 120 (HL), 142 *per* Lord Hobhouse.

This statement is an interesting but unhelpful attempt to resolve the conflict point. It suggests that the client's best interests should be protected and promoted first, and compliance and cooperation with the court and prosecution should come second. However, it is broad and non-committal and one must doubt how much weight it holds when juxtaposed with the CPR and more recent decisions, such as *R v. Gleeson*.⁷⁶¹ According to the Law Society practice note discussed earlier, "[t]he concept of the solicitor apparently putting the court's interests above those of the client has caused many solicitors to question where their duty lies."⁷⁶² Of specific interest is the practice note's exploration of the conflict that arises when the defendant exercises his or her right to 'put the prosecution to proof':

"The CPR stipulates that solicitors must assist the court in the management of the case. This can come into conflict with their duty to act in the best interests of their client where the client wishes to exercise their right to put the prosecution to proof and offer little by way of assistance to the court."⁷⁶³

Where the defence lawyer adopts an uncooperative approach, management of the case is inevitably frustrated and the duty to assist the court goes unfulfilled. The most controversial example of this might involve withholding information for the purposes of ambushing the prosecution with "an issue, or deficiency in [their] case, on which the defendant wishes to rely . . . [which] he or she does not wish to give the court advance notice of".⁷⁶⁴ The practice note suggests that "the CPR require the defence to identify the issue, even if the technical defence is lost, or the deficiency is rectified because the prosecution is put on notice."⁷⁶⁵ This seems to resolve the conflict in favour of procedural justice. Yet, it should be remembered that the practice note is not binding or necessarily authoritative and case law seems to contradict the above, suggesting defendants can demand that "the prosecution proves its case" and "keep silent at any prosecution shortcomings until the time when it can take advantage of them".⁷⁶⁶ Thus, the defence lawyer's role remains confused in this context, divided between aiding the client and the court.

⁷⁶¹ [2004] 1 Cr. App. R. 29.

⁷⁶² Legal Policy Directorate (2009) *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client* – London: The Law Society, 9.

⁷⁶³ *Ibid.*, 11.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Khatibi v. DPP* [2004] EWHC 83 (Admin), [17].

There are two primary sources of conflict between partisanship and truth-seeking. The first is the age-old quandary of defending a client who has confessed guilt; the second is the incoherent approach of formal regulation to the issue of tactical silence. Given the opportunity, the first question many laymen would probably ask a criminal defence lawyer is ‘how can you defend someone who you know is guilty?’ Of course, one could answer the above question theoretically; one can never ‘know’ a defendant is guilty until the court has weighed up the evidence and passed its judgment. However, this answer is undermined by the concept of the guilty plea, a confession in all but name, which the court unreservedly accepts to be the truth.⁷⁶⁷ No evidence is considered, no testimony presented and no investigation into the truth of the matter undertaken. Considered in this light, a defence lawyer certainly can ‘know’ when his or her client is guilty, just as a court does when accepting a guilty plea. One could argue that it is not for the defence lawyer to consider a client’s guilt or innocence. However, the reality is that defence lawyers are human and may have an overwhelming suspicion that their client is guilty of the offence with which they are charged. Considering that the defence lawyer is obliged to aid in “acquitting the innocent and convicting the guilty”⁷⁶⁸ under the ‘overriding objective’ of the CPR, this fact is troubling.

A review of Chapter 3 suggests that formal regulation inadequately deals with conflicts between partisanship and truth-seeking. The Bar Code’s ‘Written Standards for the Conduct of Professional Work’ state that a confession of guilt is “no bar to [a] barrister appearing or continuing to appear in [a client’s] defence, nor indeed does such a confession release the barrister from his imperative duty to do all that he honourably can for his client.”⁷⁶⁹ Similarly, practice guidance asserts that “[e]ven if your client admits guilt, you must enquire further and make sure that your client is actually guilty in law and that there is sufficient prosecution evidence to convict him.”⁷⁷⁰ However, other sources contain contradictory statements, placing emphasis on honesty and the pursuit of truth. Most notably, defence lawyers “must never deceive or knowingly or recklessly mislead the court”⁷⁷¹ or behave in a manner that is “dishonest or otherwise

⁷⁶⁷ A possible exception to this is a Newton Hearing, where the plea is accepted but the facts are disputed. However, the essential element of ‘guilt’ is still recognised by the court.

⁷⁶⁸ Rule 1.1(2)(a) – *Criminal Procedure Rules 2010*, 2010/60.

⁷⁶⁹ [12.2], ‘Section 3: Written Standards for the Conduct of Professional Work’, Bar Standards Board Code of Conduct – Bar Standards Board,

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 17/08/2010.**

⁷⁷⁰ Ede R., Edwards A. (2002) *Criminal Defence* – London: The Law Society, 1.

⁷⁷¹ Rule 11.01(1), Solicitors’ Code of Conduct – Solicitor’s Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

discreditable".⁷⁷² One must question whether representing a client who has confessed guilt is compatible with this requirement. The difference between protecting a client who admits guilt and misleading the court is perhaps only a matter of semantics. The defence lawyer may be treading a very thin line between legitimately representing their client and deliberately allowing the truth to be obscured, begging the question – where is the boundary to be drawn between defence and deception? Positive acts of deceit are forbidden, what might be termed ‘actively’ misleading the court. This would include "set[ting] up an affirmative case inconsistent with the confession [of guilt] made to [the defence lawyer]",⁷⁷³ "submitting inaccurate information or allowing another person to do so",⁷⁷⁴ or "calling a witness whose evidence you know is untrue".⁷⁷⁵ In contrast, ‘passively’ misleading the court does not involve proactive dishonesty, but does allow the court to make false assumptions. For example, the defence lawyer has no duty to disclose previous convictions of his or her client, which may be evidence of the bad character. If the prosecution fail to identify such evidence and the court makes positive assumptions about a defendant’s character, the defence lawyer has no duty to disclose those convictions unless the defendant "is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant",⁷⁷⁶ either through evidence or conduct. Theoretically, if the defence remained passive, there would be no duty to correct a false impression.

However, this is a major source of contention, as it no longer appears to be clear what forms of ‘passive’ deception are acceptable and which are not. Formal conceptions of the role provide insufficient and conflicting assistance for defence lawyers dealing with such issues. Since giving a false impression about character can even include the defendant’s "appearance or dress",⁷⁷⁷ it is hard to know what kind of ‘passive’ behaviour does not mislead the court. Advising a lawyer to "ignore your own worries and concerns"⁷⁷⁸ may be easier said than done, especially in a minefield of professional regulation which forbids ‘dishonest or otherwise discreditable’ behaviour. If formal

⁷⁷² [2.1(a)(i)], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁷⁷³ [12.4], ‘Section 3: Written Standards for the Conduct of Professional Work’, Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁷⁷⁴ [12(a)], ‘Guidance to rule 11 – Litigation and Advocacy’, Solicitors’ Code of Conduct – Solicitor’s Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁷⁷⁵ *Ibid.*, [12(c)].

⁷⁷⁶ Section 105(1)(a) - *Criminal Justice Act 2003*.

⁷⁷⁷ Section 105(5) - *Criminal Justice Act 2003*.

⁷⁷⁸ Plowden P. (2006) *Criminal Litigation in Practice* – Newcastle: Northumbria Law Press, 99.

regulation was unambiguous in its encouragement of zealous defence and the courts supportive of such principles, perhaps the defence lawyer could dismiss any doubts as to his or her professional integrity. Equally, if formal regulation consistently outlined that defence lawyers cannot deceive the court with silence, the position would be plain. This does not seem to be the case. Guidance appears to create irresolvable conflicts, leaving defence lawyers to perform a dangerous balancing act between fallacious conduct and inadequate protection for a defendant.

Tactical silence is another example of the treacherous waters defence lawyers must navigate between actively and passively misleading the court. Some case law appears to endorse the use of tactical silence, stating "[a] defendant may demand that the prosecution proves its case and [may] keep . . . silent at any prosecution shortcomings until the time when it can take advantage of them".⁷⁷⁹ This encourages the partisan exploitation of any opportunities to further the client's cause. Academic commentary seems to support this, asserting that a defence lawyer is "under no duty to enquire in every case whether your client is telling the truth".⁷⁸⁰ Most explicit of all are the professional standards. The Solicitors' Code states that "[i]f you are acting for a defendant, you need not correct information given to the court by the prosecution or any other party which you know may allow the court to make incorrect assumptions about the client or the case, provided you do not indicate agreement with that information."⁷⁸¹ This perfectly encapsulates the concept of 'passively' misleading the court. However, other regulation contradicts this. Disclosure obligations such as the defence statement and those specified by the CPR require the defence to divulge material which might otherwise be useful to the defendant.

⁷⁷⁹ *Khatibi v. DPP* [2004] EWHC 83 (Admin), [17].

⁷⁸⁰ Plowden P. (2006) *Criminal Litigation in Practice* – Newcastle: Northumbria Law Press, 37.

⁷⁸¹ [14], 'Guidance to Rule 11 – Litigation and Advocacy', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

In the *Chorley Justices*⁷⁸² case, Thomas LJ stated:

"The duty of the court is to see that justice is done. That does not involve allowing people to escape on technical points or by attempting, as happened here, an ambush. It involves the courts in looking at the real justice of the case and seeing whether the rules have been complied with by 'cards being put on the table' at the outset and the issues being clearly identified."⁷⁸³

This seriously limits the ability of the defence lawyer to maintain any tactical silence where it might benefit his or her client to do so. It could be argued that this is reasonable since the duties of disclosure apply to both the defence and prosecution in a criminal trial, as was discussed earlier. Yet, the prosecution has considerable resources at its disposal for constructing a case against an accused, primarily people and money; as such, prosecution disclosure is regarded as crucial to a fair and effective criminal justice process. The Attorney General's Guidelines on Disclosure state that "[t]he 'golden rule' is that fairness requires [that] full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence"⁷⁸⁴ and that "[f]air disclosure to an accused is an inseparable part of a fair trial."⁷⁸⁵ Additionally, the burden of proof lies with the prosecution. Such principles recognise that criminal proceedings are not a level playing field. Despite these long-standing principles, prevailing attitudes appear to dismiss the inherent inequality of the adversaries in English and Welsh criminal proceedings, claiming that "[a] criminal trial is not a game under which a guilty defendant should be provided with a sporting chance."⁷⁸⁶ Formal regulation implies that defence lawyers have duties to aid the search for truth; defence partisanship is "not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial".⁷⁸⁷ The modern approach to tactical silence and defence disclosure therefore appears to undermine 'the golden rule' by compelling the defence to help the prosecution build a case against the defendant. This surely conflicts with the defence lawyer's duty to "promote and protect fearlessly and by all proper and lawful means his lay client's best interests".⁷⁸⁸ The rationale behind the

⁷⁸² *R (on the application of the DPP) v. Chorley Justices & Anor* [2006] EWHC 1795.

⁷⁸³ *Ibid.*, [27].

⁷⁸⁴ Attorney General's Office (2005) *Attorney General's Guidelines on Disclosure* – London: The Stationary Office, 'Foreword'.

⁷⁸⁵ *Ibid.*, [1].

⁷⁸⁶ *R v. Gleeson* [2004] 1 Cr. App. R. 29, [36].

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Medcalf v. Mardell* [2003] 1 AC 120 (HL), 141 *per* Lord Hobhouse.

increasingly 'zero-tolerance' approach to tactical silence is debatable. It is arguably to improve the effectiveness, efficiency and speed of the criminal justice system, eliminating deliberate prevarication and obstruction by the defence. Alternatively, these provisions may be designed to reduce the influence of the defence lawyer as much as is possible within legal boundaries, demonstrating "a growing antipathy towards adversarial principles and the adversarial role of defence lawyers."⁷⁸⁹

Attempts to resolve the conflict between partisanship and truth-seeking have been one-sided and vague. *Leeson v. DPP*,⁷⁹⁰ cited in Chapter 3, provides a good example:

"I do not say that the defence are bound to remind the prosecution of all matters required to be proved, but I do say that they can hardly complain if, in the result, justices exercise their discretion so as to secure justice rather than allow a totally unmeritorious acquittal."⁷⁹¹

This statement seems to permit the use of tactical silence to some unidentified degree. However, it counteracts this by approving the exercise of a somewhat unpredictable discretion to ensure 'justice' is done. Adversarial principles suggest that if the prosecution fails to cover a point of fact or law (as in *R v. Gleeson*), then the prosecution has failed to discharge their burden and the defence is entitled to remain silent about it. The defendant's guilt will not have been proven sufficiently and an acquittal is entirely 'meritorious'. *Leeson v. DPP* suggests that the courts will take matters into their own hands and decide, regardless of prosecution incompetence, whether the defendant is guilty. Other common law seems to confirm that technicalities will not prevent what Thomas LJ called 'real justice' being done, whatever that may be. Therefore, one must question whether this approach alters the burden of proof in a criminal trial; it appears that the defence lawyer must now help the prosecution and court 'secure justice' despite their failings. This implies that the burden of proof is, in part, a shared responsibility. It is arguable that the truth-seeking obligations outlined above effectively force defendants to incriminate themselves through their lawyers, something that surely stands in contrast to formal conceptions of partisanship. Formal conceptions of the role do not seem to answer these questions adequately, leaving substantial conflicts unresolved.

⁷⁸⁹ Cape E. (2004) *The Rise (And Fall?) of a Criminal Defence Profession* – Crim. L.R., 415.

⁷⁹⁰ [2000] R.T.R. 385.

⁷⁹¹ *Ibid.*, 392.

4. Conclusion

This chapter has explored a crucial aspect of the criminal defence lawyer's role: ethical conflict. The principles of the 'zealous advocate' model and the didactic rules of formal regulation may outline particular conceptions of the role, but neither is without conflict. The four conflict points identified in this chapter demonstrate that the central functions of the criminal defence lawyer often contradict each other. However, a lack of clarity and certainty characterises the resolution of such clashes. This makes describing and analysing the role of the defence lawyer, in theoretical and formal conceptions, much more difficult. Furthermore, the conflict points have implications for criminal defence practice; without resolution, the 'real-life' work of the defence lawyer is surely hampered. As such, examining the conflict points in greater depth is essential to a thorough and valid assessment of the usefulness of the 'zealous advocate' model in the 21st Century. The next three chapters will outline the methodology and findings of an empirical study, focusing on how defence lawyers conceive of their role in practice and how, if at all, they resolve ethical conflicts in their day-to-day working life. This will hopefully expand and enrich my exploration of role definition and ethical conflict in criminal defence work, and significantly contribute to answering the second research question: does the 'zealous advocate' model constitute a useful and relevant reflection of the role of the modern practitioner?

**CHAPTER 5 – Exploring ‘Practical’ Conceptions of the Role of the
Criminal Defence Lawyer: A Methodological Approach**

1. Introduction

Do lawyers do what they are supposed to?

As was outlined in Chapter 1, the exploration of the role of the criminal defence lawyer can be broadly divided into three layers; theoretical conceptions, formal conceptions and practical conceptions. Chapters 5, 6 and 7 will focus on the third layer, describing the process and results of an empirical study of practical conceptions of the role in the modern English and Welsh criminal justice system. Chapter 5 is a critical account of the methodology employed for conducting the empirical study, primarily detailing and justifying the use of the 'vignette' technique. Chapters 6 and 7 are an analysis of the interviews undertaken with criminal defence lawyers. From the outset, I would like to stress that this empirical study is designed to provide an *insight* into the 'real-life' role of the defence lawyer, rather than act as a comprehensive and statistically valid piece of fieldwork. However, the importance of any such study should not be underestimated. Without empirical evidence about practical conceptions of the role, the 'zealous advocate' model and formal conceptions represent abstract aspirations and unconfirmed assumptions about how practitioners work. Therefore, the rationale behind this empirical study is legitimacy.

The central aim of this thesis is to explore and test the theoretical roots that underpin the role of the 21st century criminal defence lawyer. This empirical study was designed to help answer the second research question identified in Chapter 1 – does the 'zealous advocate' model constitute a useful and relevant reflection of the role of the modern practitioner? In addition to exploring formal regulation, questioning practitioners about how they conceive of their role facilitates this goal. The fieldwork was guided by two key sub-questions: what is the 'practical conception' of the role of the criminal defence lawyer in England and Wales and how, if at all, do practitioners resolve any 'conflict points' in their everyday role. Empirical research ensures that analysis does not exist in a vacuum; the true test of theoretical conceptions of the role is whether modern practitioners understand the principles they embody and employ those principles in their working life. This empirical study therefore gives genuine credibility to any conclusions drawn about the usefulness and relevance of the 'zealous advocate' model to modern criminal defence. Of course, for the study to lend legitimacy to the thesis as a whole, it is important to both examine and justify the empirical process itself; thus, as

stated above, this chapter serves as a thorough critique of the research methodology used in this study. Without a legitimate process, you do not have legitimate results.

2. Empirical Methodology

2.1 Overview

This empirical study adopted a qualitative approach, in that it was focused on uncovering "the underlying motivations that people have for doing what they do"⁷⁹² and exploring their "ideas, attitudes, motives and intentions".⁷⁹³ To achieve this, I undertook a series of in-depth interviews with criminal defence practitioners; that is, qualified professionals engaged in their work to advise or represent clients suspected of or charged with criminal offences.⁷⁹⁴ Qualitative interviews were chosen simply because they would provide the freedom to explore the key obligations which might define the role of the criminal defence lawyer. The open-ended nature of the interviews allowed respondents to independently express their views on their role without being led to conclusions, but at the same time ensured that I could restrict the dialogue to relevant issues. Each interview was conducted using a standard *pro forma*⁷⁹⁵ specifically designed for the purpose and which was divided into three sections.

The first section posed a series of set questions with the aim of extracting 'base-line' information from respondents. These were basic facts about their firm or chambers, their experience and the type of defence work (for example, bail applications) they usually undertook.⁷⁹⁶ This was necessary not only to establish reference points for the analysis of data, but also to demonstrate that a variety of lawyers, with a variety of experience, from a variety of organisations were interviewed. This diversity provides a more accurate picture of how defence lawyers view their role; interviewing several solicitors from the same firm would provide less useful data than interviewing a mix of solicitors and barristers from a selection of firms and chambers. In essence, a wider sample of subjects would hopefully yield more valid results. The section also directly asked respondents to describe, in their own words, their obligations to different parties,

⁷⁹² Henn M., Weinstein M., Foard N. (2006) *A Short Introduction to Social Research* – London: SAGE, 149.

⁷⁹³ *Ibid.*, 150.

⁷⁹⁴ This was previously defined in Chapter 2, section 1.

⁷⁹⁵ See Appendix 4 and section 2.5 of this chapter.

⁷⁹⁶ See Appendix 1.

including the client, the court and the prosecution. This kind of direct questioning ensured that, should the rest of the interview fail to elicit any clear opinions on their role, some basic impressions about their views could be gleaned. More importantly, directly asking respondents about their obligations presented an opportunity to explore, without any context or facts, what they broadly believed their obligations to be; this provided an insight into how they consciously constructed their role when detached from the reality of their work. This type of enquiry, as will be discussed later, does not necessarily reveal how respondents' would behave in practice. However, in this thesis, it did enable "a comparison between an interviewee's views and beliefs as expressed in general terms and their application to more or less detailed scenarios",⁷⁹⁷ and therefore revealed potential inconsistencies between what respondents preached and what they 'practiced'. What they practiced was explored in the second section of the *pro forma*. This section used a set of hypothetical 'Professional Conduct Scenarios' to ascertain how respondents' obligations operated in practice and whether these obligations were commensurate with the 'zealous advocate' model outlined in Chapter 2. These scenarios will be discussed in more depth shortly.

The third section also posed set questions, focusing on the sources of guidance defence lawyers referred to when resolving ethical conflicts, their opinions on the CPR, how respondents characterised the role of the defence lawyer and how that role had changed in recent years. Covering these subjects was important. Exploring their attitude toward sources of guidance gave an impression of how useful respondents found modern regulation defining their role and would perhaps indicate a need for revision. The CPR have introduced significant changes in criminal case management and, as a result, the role of the criminal defence lawyer. It was therefore appropriate to dedicate a few questions solely to the exploration of their impact. Finally, asking respondents about how they would describe the role of the criminal defence lawyer in broad terms would, hopefully, encourage them to focus on the most crucial aspects of their work and their most prominent obligations. The question was asked without prior warning in order to encourage an instinctive, on-the-spot response. I now return to the second section, and the major focus of the interviews: the four 'Professional Conduct Scenarios', which employed a methodology commonly known as the 'vignette' technique.

⁷⁹⁷ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 180.

2.2 The 'Professional Conduct Scenarios'

2.2.1 Researching Lawyers: Methodological Challenges

As a subject of research, lawyers present several problematic traits which can hinder effective enquiry. The choice of the vignette technique for this empirical study was driven by my desire to overcome such obstacles and probe deeper into the day-to-day role of the criminal defence lawyer. It therefore seems appropriate to discuss some of the potential methodological issues in lawyer-based research. To begin with, selecting tried and tested methods for empirical work with legal practitioners was difficult because of a lack of established methodology in the area. Reading the relevant literature, it became apparent that "[t]he history of research into the English Criminal Justice System is very short. Only in the last twenty years have social scientists singled out the activities of Police Officers, Judges, Lawyers and other court personnel as subjects worthy of attention";⁷⁹⁸ in other words, the area is, or was, underdeveloped. That statement was from 1981, and much research has been done since, but over a decade later, the same author claimed that "there has been no systematic attempt to describe and explain what lawyers actually do",⁷⁹⁹ particularly the "working practices and philosophies of duty solicitors [and] defending solicitors . . . engaged in criminal work."⁸⁰⁰ Studies of the law and legal practices "did not make lawyers the focus of their interest and were very much 'end-process' oriented in their concern with court-based activity."⁸⁰¹ This lack of focus on solicitors, barristers and other qualified legal professionals created a significant "lacuna"⁸⁰² in both the collective knowledge about their work and the methodological rigour of such research. In the last 15 years, empirical research into the activities of lawyers, from both a legal perspective⁸⁰³ and wider sociological perspective,⁸⁰⁴ has attempted to fill this gap. However, using what one can broadly term quantitative and qualitative interviews and general observation are as far as proven fieldwork methods go, with expansion of those concepts open to the

⁷⁹⁸ Baldwin J., McConville M. (1981) *Courts, Prosecution and Conviction* – Oxford: Clarendon Press, 19.

⁷⁹⁹ McConville M., Hodgson J., Bridges L., Pavlovic A. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* – Oxford: Clarendon Press, 1.

⁸⁰⁰ *Ibid.*, 9.

⁸⁰¹ *Ibid.*

⁸⁰² Tague P. (2007) *Barristers' selfish incentives in counselling defendants over the choice of plea* – *Crim. L.R.*, 4.

⁸⁰³ *Ibid.*

⁸⁰⁴ Harris L. (2002) *The Emotional Labour of Barristers: An exploration of emotional labour by status professionals* – 39 *Journal of Management Studies* 4, 553-584.

individual researcher. It therefore seems that the development of effective methodology for researching lawyers, and most particularly defence lawyers, is still dogged by a lack of academic interest.

A second potential limitation on effective empirical research with lawyers is distrust of outside research, an attitude that inevitably inhibits a researcher's ability to access the world of the research subject. At an early stage of research with lawyers, academics concluded that "[t]he legal profession has never shown much enthusiasm for research"⁸⁰⁵ and that researchers were generally regarded "with suspicion and on occasions with fear."⁸⁰⁶ This is not isolated to lawyers, but, as an ancient, unique and elite profession, it has been observed many times that legal practitioners demonstrate the "understandable reluctance of any professional group to allow its activities to be scrutinised with no obvious benefits for its members".⁸⁰⁷ This "natural conservatism shown by any profession towards having its business examined by outsiders"⁸⁰⁸ was illustrated *in extremis* in the historical, but educational, example of the furore surrounding the publication of 'Negotiated Justice'.⁸⁰⁹ This study implicated legal practitioners, particularly barristers, in 'plea bargaining' – the informal agreement between prosecution and defence that the defendant will plead guilty to lesser charges. This highlighted the possibility that counsel had exerted inappropriate pressure on defendants to plead guilty to offences when they did not want to. The research had been conducted with defendants only, as the Senate of the Bar, the representative body of barristers, had "withheld co-operation".⁸¹⁰ There were "continued efforts to thwart the conduct of the research"⁸¹¹ and a "concerted attempt . . . to prevent publication";⁸¹² the findings resulted in "open hostility"⁸¹³ toward the authors with leaders of the legal profession "resort[ing] to slur and innuendo when pressed".⁸¹⁴ The authors drew the

⁸⁰⁵ Baldwin J., McConville M. (1978) *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* – 5 British Journal of Law and Society 2, 228.

⁸⁰⁶ Baldwin J., McConville M. (1981) *Courts, Prosecution and Conviction* – Oxford: Clarendon Press, 1.

⁸⁰⁷ McConville M., Hodgson J., Bridges L., Pavlovic A. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* – Oxford: Clarendon Press, 13.

⁸⁰⁸ Baldwin J., McConville M. (1978) *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* – 5 British Journal of Law and Society 2, 228.

⁸⁰⁹ Baldwin J., McConville M. (1977) – London: Martin Robertson.

⁸¹⁰ McConville M., Wing Hong Chui (2007) *Research Methods for Law* – Edinburgh: Edinburgh University Press, 209.

⁸¹¹ Baldwin J., McConville M. (1978) *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* – 5 British Journal of Law and Society 2, 235.

⁸¹² McConville M., Wing Hong Chui (2007) *Research Methods for Law* – Edinburgh: Edinburgh University Press, 211.

⁸¹³ *Ibid.*

⁸¹⁴ Baldwin J., McConville M. (1978) *Plea Bargaining: Legal Carve-Up and Legal Cover-Up* – 5 British Journal of Law and Society 2, 235.

conclusion that, "[l]awyers characteristically demonstrate an extraordinary high level of satisfaction with current procedures and attempts to change these, from outside or from within, are likely to encounter the most stubborn resistance. No researcher, then, who trespasses on this difficult terrain, can expect an easy passage."⁸¹⁵ In the light of this warning, the implications for empirical research methodology were clear. Any approach would need to penetrate a potential layer of distrust and allow the respondents to interpret questions in their own way. It should be made clear at this point that, in undertaking my empirical study, I encountered virtually no resistance or evasion; all of my subjects were very open, friendly and willing to participate. I would hope that this was, in part, a result of the methodology I adopted.

Another potential issue is the attachment of lawyers to the standard values of their profession and their adherence to the 'official line'. The 'official line' is the *right* one, the 'correct answer' to a question and one which may not reflect the truth. However, providing acceptable answers to a researcher is not necessarily a deliberate or conscious deception on the part of lawyers; it is a result of training and a natural, internal perspective. The education and regulation of legal practitioners aims to breed proud and conservative professionals with an in-built loyalty to and respect for the standards that govern them. For example, Rule 301 of the Bar Code of Conduct states that a barrister "must not . . . engage in conduct . . . which is . . . likely to diminish public confidence in the legal profession" and "must not . . . engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar." It has also been observed in the past that the "the [legal] profession itself tends to promote an altruistic model under which solicitors use their skills in the interests of their clients and of the public."⁸¹⁶ The importance of maintaining this reputation is indoctrinated through the lengthy and intensive training process described earlier in this thesis. It "provides the initiate with a knowledge (tacit or explicit) of the norms and values of the occupational community",⁸¹⁷ resulting in a "high degree of social and cultural homogeneity at the point of entry".⁸¹⁸ Beyond their education, lawyers practice in fairly closed circles, interacting largely with each other, meaning that "the initiate's subsequent path through the legal profession becomes a highly structured 'rite de

⁸¹⁵ Ibid., 228.

⁸¹⁶ McConville M., Hodgson J., Bridges L., Pavlovic A. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* – Oxford: Clarendon Press, 11.

⁸¹⁷ Ibid., 12.

⁸¹⁸ Ibid.

passage".⁸¹⁹ Therefore, a lawyer asked about their role may give the 'official' answer.

This could be in the form of "'presentational information' being offered by respondents";⁸²⁰ that is, an answer that presents an acceptable image and upholds the integrity of the profession. Alternatively, the 'official line' may be a result of "respondents' imperfect knowledge of their own world";⁸²¹ in essence, a lack of awareness that the 'official' answer and the reality may be different. I experienced this first-hand, prior to commencing my fieldwork. Whilst undertaking a day of observation in the Crown Court of a large, urban legal circuit,⁸²² I discussed the role of the criminal defence lawyer with a barrister. When asked if he was a 'zealous advocate', he responded that he believed he was, and talked about defending the best interests of the client (reminiscent of the principle of partisanship). I later observed him spend time convincing a client, who claimed to be innocent of any offence, that she should plead guilty. After arranging a plea bargain with a very forceful and impatient prosecuting barrister, the client agreed and the case 'cracked'.⁸²³ I felt compelled to question whether the 'official line' and the reality matched up here; arguably, the client and lawyer had divergent views as to what the client's best interests were. In this case, does a lawyer serve the best interests of the client by doing his or her best to execute the client's wishes, or by effectively 'overruling' the client and imposing their own paternal view? Again, the implications for methodology are significant. My approach would need to encourage answers grounded in actual practice and eliminate room for potential 'standard' answers.

Two other issues had the potential to restrict effective empirical research with lawyers. Lawyers, and particularly criminal defence lawyers, act as a confidante and "legal friend . . . which exemplifies . . . the ideal of personal relations of trust".⁸²⁴ Without that reputation of discretion and trustworthiness, the lawyer cannot perform his or her work. Empirical research is by its nature intrusive; to effectively explore the role and work of a lawyer, a researcher will seek to at least glimpse the private domain of the practitioner

⁸¹⁹ Ibid.

⁸²⁰ Ibid., 13.

⁸²¹ Ibid.

⁸²² This was a different legal circuit to the one used for my empirical study.

⁸²³ A 'cracked' case is any case where, on the day of a listed trial, the defendant changes his plea to guilty, pleads to a lesser charge or the prosecution decides not to proceed. See s.1(1), Schedule 1 of the *Criminal Defence Service (Funding) Order 2007 No. 1174*.

⁸²⁴ Fried C. (1975-1976) *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* – Yale Law Journal 85, 1075.

and his or her clients. As a result, lawyers may be unwilling to engage in fieldwork of this nature for fear of undermining their standing as a figure of trust, and also to protect client confidentiality, an obligation which "predisposes lawyers to be extremely reluctant to allow a research function to intervene at all."⁸²⁵ The methodology would therefore need to make appropriate provision for anonymity guarantees, to reassure respondents that their reputation would not be jeopardised. The second problem applied specifically to criminal defence lawyers – that of public image, a subject briefly discussed in Chapter 1. Lawyers generally are the subject of a "widespread and ancient perception that [they] are grasping, callous, self-serving, devious and indifferent to justice, truth and the public good."⁸²⁶ As a result of this, criminal defence lawyers, as one of the most visible and well-known types of lawyer, have a particularly poor public image.⁸²⁷ They are often regarded as defenders of the wicked and persecutors of the victimized. Furthermore, because "[t]here is a tendency to associate lawyers with their clients . . . for criminal lawyers the association with poverty and crime gives them low status within the professional hierarchy."⁸²⁸ I therefore expected to encounter a profession suffering from low morale, unwilling to be exposed to further analysis, criticism and potential denigration from an outsider. My approach would therefore need to grant respondents the opportunity to explain their role in their terms and avoid any loaded concepts or implied criticism. I felt that the vignette technique could effectively counter all of the above issues.⁸²⁹

2.2.2 What are ‘Vignettes’?

It is necessary to clarify that a ‘Professional Conduct Scenario’ is a vignette. This alternative label was chosen to more appropriately reflect the focus of the vignettes and

⁸²⁵ Danet B., Hoffman K., Kermish N. (1979-1980) *Obstacles to the study of Lawyer-Client interaction: The biography of a failure* – 14 *Law & Society Review* 4, 910.

⁸²⁶ Dare T. (2009) *The Counsel of Rogues? A defence of the standard conception of the lawyer's role* – Farnham: Ashgate, 1.

⁸²⁷ This reputation goes beyond the public at large. In the case of *R v. (on the application of Faisaltex Ltd) Preston Crown Court* [2008] EWHC 2832, police searched the offices of a firm of criminal defence solicitors for files relating to the potential criminal activities of their clients. The solicitors were not given an opportunity to ‘produce’ the files because the police and lower Court concluded that they might allow their clients to remove and destroy them before a search could be carried out. Lord Justice Keene was forced to state that, “A solicitor is not to be regarded as somehow tainted and unreliable because, for example, he acts for someone charged with or convicted of a criminal offence” ([47]), an assumption the police and Courts appeared to have made.

⁸²⁸ McConville M., Hodgson J., Bridges L., Pavlovic A. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* – Oxford: Clarendon Press, 24.

⁸²⁹ For more on the issues encountered by researchers working with lawyers and the use of vignettes with lawyers, see Jack R., Jack D. (1989) *Moral vision and professional decisions: the changing values of women and men lawyers* – Cambridge: Cambridge University Press.

also to avoid using a term that, whilst having a specific meaning to empirical researchers, might have confused respondents as to the nature and purpose of the scenarios. The vignette technique uses "short stories about hypothetical characters in specified circumstances, to whose situation the interviewee is invited to respond."⁸³⁰ Respondents are "typically asked to respond to these stories with what they would do in a particular situation or how they think a third person would respond."⁸³¹ The purpose of this was to obtain an impression of how a respondent behaves in a realistic context and why. The "scenarios depicted in the stories can take the form of 'moral dilemmas'",⁸³² and by asking the respondent to make choices about what action they would take in the situation presented, one can hopefully derive what values, principles or beliefs drive that behaviour. In this thesis, the application of the vignette technique was therefore designed to present ethical dilemmas to criminal defence lawyers (based on the conflict points),⁸³³ to which they would respond, outlining what course of action they would take in such circumstances. These decisions should reflect what criminal defence lawyers regard as their guiding values and obligations as professionals. This choice of method was based on extensive research into past use and academic commentary on the advantages and disadvantages of vignettes.

2.2.3 Advantages and Disadvantages of the Vignette Technique

One of the key advantages of the vignette technique is its focus on specific, hypothetical situations. A fundamental criticism of interview or survey-based research is "the ambiguity that often arises when survey respondents are asked to make decisions and judgments from rather abstract and limited information."⁸³⁴ This is a problem for two reasons. First, it can result in responses which are "simply bland generalisations and impossible to interpret".⁸³⁵ Presenting a respondent with vague, abstract questions is likely to encourage answers that are detached from their day-to-day experience. Second, a respondent may not be "particularly insightful about the factors that enter their own judgment-making process"⁸³⁶ and forcing them to engage in isolated

⁸³⁰ Finch J. (1987) *The Vignette Technique in Survey Research* – 21 *Sociology* 1, 105.

⁸³¹ Hughes R., (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 381.

⁸³² Ibid.

⁸³³ See Chapter 4, section 1, and Section 2.2.4 of this chapter.

⁸³⁴ Alexander C., Becker H. (1978) *The Use of Vignettes in Survey Research* – 42 *The Public Opinion Quarterly* 1, 103.

⁸³⁵ Finch J. (1987) *The Vignette Technique in Survey Research* – 21 *Sociology* 1, 110.

⁸³⁶ Alexander C., Becker H. (1978) *The Use of Vignettes in Survey Research* – 42 *The Public Opinion*

speculation about such factors may lead to confusion and inaccuracy. As Hughes highlights, "[i]ndividuals have a limited capacity to maintain a discursive awareness of every aspect of day-to-day life".⁸³⁷ Thus, asking direct questions about abstract concepts that seemingly bear no relation to the 'real-life' experience of a respondent may prove difficult for him or her to answer. For example, for the purposes of this thesis, the principle of partisanship is a defined concept which generally describes the obligation a defence lawyer owes to a client to defend them to best of their ability. I am attempting to discover whether this concept accurately reflects the role of criminal defence lawyers in practice. However, a respondent may not understand such a detached concept and will be unlikely to have the self-awareness to recognise its influence. The way he or she defines and performs their role may correlate with this concept, but the respondent may or may not be conscious of this; they may just do their job in a particular way without any over-arching view of their role. Therefore, asking about it directly is unlikely to be helpful.

In contrast, the vignette technique avoids asking a respondent directly about factors that they may not comprehend in the same way as the interviewer. Instead, they enable an interviewer to place a respondent in a position where he or she can make instinctive decisions about specific factors which are indicative of the underlying principles that shape their role. By asking a respondent to focus on a specific set of facts, they "move further away . . . from a direct and abstracted approach, and allow for features of the context to be specified, so that the respondent is being invited to make normative statements about a set of social circumstances, rather than to express his or her 'beliefs' or 'values' in a vacuum."⁸³⁸ The use of vignettes recognises that a respondent has to make decisions about his or her behaviour in a variety of circumstances and "acknowledges that meanings are social and that morality may well be situationally specifically."⁸³⁹ Therefore, asking a respondent to react to a set of facts rather than a direct, abstract question "more closely approximate[s] a real-life decision-making or judgment-making situation."⁸⁴⁰ The more realistic and specific the situation in which a respondent is placed, the more likely one is to receive a realistic and specific response.

Quarterly 1, 95.

⁸³⁷ Hughes R., (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 383.

⁸³⁸ Finch J. (1987) *The Vignette Technique in Survey Research* – 21 *Sociology* 1, 106.

⁸³⁹ *Ibid.*

⁸⁴⁰ Alexander C., Becker H. (1978) *The Use of Vignettes in Survey Research* – 42 *The Public Opinion Quarterly* 1, 93.

Responses to vignettes should therefore be more reflective of a respondent's "experience of practice, facilitating the identification of individuals' situated understanding and practical theory."⁸⁴¹ By presenting conflicts as fact-based vignettes rather than abstract concepts, the responses given should more accurately indicate how defence lawyers resolve conflicts in 'real life'.

Vignettes should also result in more honest and natural answers. Vignettes disguise the intentions of the interviewer, making it less likely that a respondent will be influenced by leading questions or directed reasoning. As stated earlier, vignettes generally contain an ethical dilemma which a respondent is asked to resolve. This resolution indicates what principles guide their behaviour. In the context of this thesis, the ethical dilemmas presented in the vignettes were based on the conflict points. Directly presenting conflict points to a respondent has little empirical value because it effectively guides the respondent to the answer. For example, consider the following question:

'When faced with a conflict between the two obligations, would you say that your duty to assist the court takes precedence over your duty to fearlessly defend your client?'

The answer to this may have limited usefulness. The question may influence the respondent in three ways. First, the use of language such as 'fearlessly defend' and 'assist the court' presumes that these are, by default, a defence lawyer's practical obligations. Second, presenting them in this way presumes that the respondent subscribes to this view, without providing any opportunity for him or her to identify them without being prompted. Third, presenting a conflict directly and asking about how it might be resolved inherently hints that the interviewer is looking for a particular answer.

When faced with this type of loaded question, the likelihood is that a respondent will provide the answer they think the questioner wants to hear, what is known in psychology as the observer-expectancy effect. This is likely to be the 'official' answer. Formal regulation provides 'official' answers to questions such as these; the Bar Code of Conduct deals with this conflict quite explicitly, stating that the duty to the court is

⁸⁴¹ Phillips T., Schostak J., & Tyler J. (2000) *Practice and assessment in nursing and midwifery: Doing it for real* – 16 Research Reports Series, 130.

"overriding".⁸⁴² This, of course, may not necessarily reflect the reality of conflict resolution. In addition, no detail about the 'conflict' is given; to quote or paraphrase the formal guidance is much easier than considering the potential permutations of a real life client-court conflict. These kinds of answers defeat the point of the fieldwork. Its purpose is to investigate whether day-to-day criminal defence work reflects formal and theoretical conceptions of the role. If posing questions like the one above only results in broad, formal answers, then they have no place in a probing and effective empirical study. Vignettes allow the interviewer to avoid explicitly leading respondents to either recognise or resolve the conflict points; they are masked by the scenarios, allowing respondents to identify and consider the issues independently. By removing any suggestive context that direct questions might add, the respondents will hopefully give more honest answers.

Vignettes also provide a form of 'comfort zone' for respondents. Asking them to comment on a set of facts rather than directly questioning them about their ethical framework "provides respondents with an opportunity to discuss issues arising from the story from a non-personal and therefore less-threatening perspective."⁸⁴³ This reduces the potential effect of "social desirability factors";⁸⁴⁴ that is, the urge to provide a response which will cast the respondent in the best light in the context of their work. When asked about a subject directly and in broad terms, a respondent may be tempted to give the socially acceptable or 'correct' answer, which may not be the honest answer. For example, a lawyer who is asked whether they 'fearlessly defend a client' may answer that they do, because that reflects well on them as a professional. Vignettes go deeper. If the lawyer is presented with a specific scenario rather than a loaded question, he or she will be less likely to present a sanitised version of what they *would* do or describe what they *should* do; they are more likely to describe what they *actually* do. Thus, when presented with a vignette, a "respondent is not as likely to consciously bias his report in the direction of impression management (social approval of the interviewer) as he is when being asked directly".⁸⁴⁵ In essence, vignettes are a form of research

⁸⁴² [302], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁸⁴³ Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 383.

⁸⁴⁴ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 *Qualitative Social Work* 1, 82.

⁸⁴⁵ Alexander C., Becker H. (1978) *The Use of Vignettes in Survey Research* – 42 *The Public Opinion Quarterly* 1, 95.

subterfuge, disguising the interviewer's interest in the underlying opinions and attitudes of respondents. Humans are likely to behave more naturally when they do not know they are being observed and vignettes help reduce the awareness the respondent has of the interests of the interviewer.

Finally, a danger in qualitative research is the difficulty in analysing and comparing the data collected from respondents. If the questions are broad and non-specific, then "each respondent will answer in terms of his own mental picture of the task before him."⁸⁴⁶ If questions do not reflect any realistic situation that the respondent can relate to, each answer will reflect a respondent's personal interpretation of a very abstract question. For example, if each respondent is asked 'Do you have a duty of truth-seeking?', the answers given will reflect the meaning each respondent attributes to 'truth-seeking'; it is not a discrete concept. When it comes to analysing whether defence lawyers recognise such a duty, one cannot credibly say that all the respondents understood the concept of 'truth-seeking' in the same way. Therefore, how can one compare their answers? Vignettes go some way to overcoming this troublesome but inevitable complication. By presenting the same, concrete situation to each respondent, "the survey researcher gains a degree of uniformity and control over the stimulus situation",⁸⁴⁷ limiting the potential for more personalised and incomparable responses. They remove abstraction, forcing respondents to consider limited, definite factors; this should lead to more consistency across an empirical study. By setting the boundaries within which a response can be formulated, each respondent is more likely to give an answer to the same question or 'stimulus' rather than their personal reading of the question. Of course, one can never eliminate subjective interpretation, nor would one want to; if the parameters of the question were narrowed too much, then the interviewer would receive the same, mechanical answer over and over again from each respondent. Vignettes provide enough concrete information to enable the comparison of answers, without limiting a respondent's freedom of interpretation too much.

Although vignettes appear to be effective at eliciting realistic responses to a situation, it is important to remember that they are merely a simulation of life. As Wilks states, "[t]here is no guarantee that the responses to a given vignette will in some way mirror

⁸⁴⁶ Ibid., 93.

⁸⁴⁷ Ibid.

actual behaviour of the respondent in their professional practice."⁸⁴⁸ Three key criticisms support this caution. First, vignettes are fixed scenarios, with no human participant other than the respondent.⁸⁴⁹ This problem is well summarized by Hughes:

"Individuals are constantly responding to the people and the environment around them and one of the main criticisms levelled at the vignette technique is that it neglects the interaction and feedback that is a necessary part of social life."⁸⁵⁰

This not only adds to the 'unreality' of the vignette, but fails to take account of the potential reactions that others may have to the respondent's analysis of the situation. For example, in the context of this thesis, a vignette cannot take account of the reaction that a defendant, a judge, a prosecutor, a complainant or a police officer may have to the respondent's answers. This may affect how a respondent proceeds. Unfortunately, the vignette technique cannot capture this organic development entirely. Second, vignettes cannot recreate the effect of a pressurised environment, such as a court room or police station, which might influence the respondent's answers. A respondent is "right 'in the thick of things' in real life, whereas they are always detached or detachable from stories they read".⁸⁵¹ However specific the facts of a vignette may be, an interview situation still gives a respondent time and space to think, with no vested interest in the outcome. Third, the problem of "social desirability bias" cannot be totally eliminated by the use of vignettes. There may be differences between "what people think should happen and what actually does happen";⁸⁵² indeed, in a study using vignettes, Field suggested that respondents may have still been "defensively constructing an account for the interviewer built in terms of what they were supposed to be doing rather than what they actually did."⁸⁵³ Cornwell defined this contrast between the response and the reality as public and private accounts.⁸⁵⁴ The former "reflect what people feel is acceptable to tell

⁸⁴⁸ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 Qualitative Social Work 1, 82.

⁸⁴⁹ The interviewer is a human participant in the interview, but not 'within' the scenario. The interviewer is, essentially, an objective observer who is not involved in the scenario in the way a client, a prosecutor or a judge might be. Therefore, the respondent is the only human 'involved' in the vignette.

⁸⁵⁰ Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 Sociology of Health & Illness 3, 383.

⁸⁵¹ Parkinson B., Manstead A. (1993) *Making sense of emotion in stories and social life* – Cognition & Emotion 7, 310.

⁸⁵² Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 Sociology of Health & Illness 3, 383.

⁸⁵³ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 182.

⁸⁵⁴ Cornwell J. (1984) *Hard-earned lives: Accounts of health and illness from East London* – London: Tavistock.

strangers",⁸⁵⁵ whilst the latter are "richer and more detailed descriptions of people's lives."⁸⁵⁶ Therefore, when using vignettes, one should be aware that "we can never be sure that the way in which respondents say that they would behave and why reflects accurately their likely actions and motives in the 'real world'.⁸⁵⁷ Literature on the use of the vignette technique also highlights that "[n]o research tool can truly reflect people's real life experiences"⁸⁵⁸ and will only be indicative. Notwithstanding this assertion, when used as a tool for gaining an interpretation of and insight into the real life experiences of respondents, vignettes can "complement other forms of data collection to provide a more balanced picture of the social world which researchers seek to understand" and "help unpackage individuals' perceptions, beliefs, and attitudes to a wide range of social issues."⁸⁵⁹

2.2.4 Construction

The construction of the 'Professional Conduct Scenarios' was an extended and challenging process. Discourse on the vignette technique referred to using scenarios that "seem real and relevant",⁸⁶⁰ and that "reflect mundane, rather than exceptional, occurrences".⁸⁶¹ In constructing vignettes, academics recommended resisting the temptation to describe "a group of eccentric characters . . . subject to a chain of disastrous events".⁸⁶² Capturing the imagination of the respondent should be subordinate to the aim of presenting a realistic situation which reflects his or her real-life experience. Literature suggested that if one aims for the plausible and average, then there is more likely to be a "close relationship between people's real life and vignette responses"⁸⁶³ and avoiding the fantastical should minimise "an atmosphere of 'make believe'".⁸⁶⁴ One of the research studies reviewed described the use of vignettes that

⁸⁵⁵ Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 384.

⁸⁵⁶ Ibid.

⁸⁵⁷ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – *Crim. L.R.*, 180.

⁸⁵⁸ Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 383.

⁸⁵⁹ Ibid., 384.

⁸⁶⁰ Ibid., 385.

⁸⁶¹ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – *Crim. L.R.*, 180.

⁸⁶² Finch J. (1987) *The Vignette Technique in Survey Research* – 21 *Sociology* 1, 111.

⁸⁶³ Hughes R., (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 385.

⁸⁶⁴ Ibid.

were "adapted from real cases";⁸⁶⁵ I adopted a similar method for this thesis. With the objective of creating believable and realistic scenarios in mind, I undertook several brief periods of shadowing and observation with solicitors, barristers and accredited representatives. On four occasions (April 2008, November 2008, December 2008 and January 2009), I shadowed criminal defence practitioners as they performed work in court, in the cells, in the police station and in client conferences. Tasks observed included advocacy in summary and indictable/either way trials, bail applications, plea and case management hearings and sentencing; providing clients with advice prior to hearings, in the cells and during police interviews; preparing case files; drafting advice in Chambers or at Firm offices. Notes based on these experiences were used to draft vignettes for the fieldwork.

The purpose of the empirical study, and thus the vignettes, was to gain an insight into the relationship between defence lawyers' practical conceptions of their role, the theoretical 'zealous advocate' model, and formal conceptions of the role. The study also aimed to explore how defence practitioners resolve the key conflicts that arise in the course of their working life. Therefore, each vignette was constructed around what the literature termed a 'dilemma' and what this thesis has referred to as conflict points. The benefit of basing the vignettes around the conflict points was twofold; it not only placed a respondent in a central problem-solving position, but, due to the free-form nature of the discussion surrounding the vignettes, allowed the respondent to elaborate on the principles in conflict and what they meant to them. For example, discussion of a vignette based around the conflict between the principle of partisanship and the principles of procedural justice and truth-seeking (Scenario D – see below) would allow a respondent to demonstrate how they might approach resolution and also outline their conceptions of partisanship, procedural justice and truth-seeking. Although manifested in formal regulation, these conflict points are essentially abstract, theoretical concepts; adapting them for presentation to each respondent required realistic, fact-based conflicts. This process of converting theoretical dilemmas into believable, recognisable conflicts exploited my extensive observation notes. None of the final vignettes were direct reproductions of actual ethical conflict situations that I observed. However, all incorporated elements of observed events and everyday, real-life clashes witnessed by the author. Therefore, one might regard the vignettes as a collage of fact-based

⁸⁶⁵ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 180.

dilemmas, arranged to represent the conflict points being examined in this thesis.

The arrangement of these observed ideas and concepts into vignette form took account of advice of the literature already discussed. I constructed a series of brief 'narratives'; this appeared to be the most compact and accessible method, and constituted "one of the more common applications of the vignette technique",⁸⁶⁶ indicating reliability and effectiveness. The scenarios had to "contain sufficient context for respondents to have an understanding about the situation being depicted, but be vague enough to 'force' participants to provide additional factors which influence their decisions."⁸⁶⁷ Striking this balance was difficult. Too vague a vignette would lead to the issues discussed earlier in this chapter, while too much detail could constrict the necessary flexibility for a respondent to interpret facts and obligations in their own way. Despite this, a core benefit of the vignette technique is that detailed, fact-based situations can enhance a "[p]articipant's ability to engage with the story".⁸⁶⁸ This is especially true if a respondent has "personal experience of the situation described",⁸⁶⁹ which is why the vignettes were adapted from observed situations involving the types of respondent targeted in this empirical study. However, all of the literature appeared to place considerable emphasis on the philosophy that "fuzziness is strength".⁸⁷⁰ In using vignettes for qualitative, empirical research, academic commentary concurs that "ambiguity is a positive virtue, since it leaves space for respondents to define the situation in their own terms".⁸⁷¹ This taps into the personal view of the respondent about his or her role, rather than one pre-defined by extensive detail. In essence, too much detail results in too much certainty, which in turn eliminates room for conflict. This would defeat the object of the vignettes.

In drafting the vignettes, I outlined basic facts about the subjects of the scenario, the events that had occurred and only *inferred* conflict issues. I considered it important that the potential conflicts of principle be identified by each respondent if possible. Unnecessary or irrelevant details, such as elements of procedure or unanswerable legal questions, were omitted from the vignettes. This is not to say that such detail was not

⁸⁶⁶ Hughes R. (1998) *Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour* – 20 *Sociology of Health & Illness* 3, 382.

⁸⁶⁷ Barter C., Renold E. (1999) *The Use of Vignettes in Qualitative Research* – 25 *Social Research Update*, 4.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ *Ibid.*

⁸⁷⁰ Finch J. (1987) *The Vignette Technique in Survey Research* – 21 *Sociology* 1, 112.

⁸⁷¹ *Ibid.*

discussed when deemed material to the conflict or the surrounding principles. In terms of practicality, the literature also highlighted that vignettes should be "readily understood, [be] internally consistent and not too complex" and "that more than three changes to a story line was often too confusing for participants to remember."⁸⁷² Each vignette was approximately a paragraph in length (100-250 words), with one basic storyline made up of four or five events. Where the direction of the story changed, the vignette was divided into two separate parts; 'Part A' would be presented and discussed, followed by 'Part B'. The vignettes were also drafted to reflect, as was highlighted earlier, "mundane, rather than exceptional, occurrences".⁸⁷³ The events described involved an alleged offence followed by interaction with the client, court, police and others. These offences and interactions were influenced by observed events and were designed to be commonplace.

2.2.5 Pilot

Once I had drafted vignettes that appeared to fulfil all the aforementioned criteria, I felt it was important to validate how realistic and effective they would be when presented to criminal defence practitioners. Again, literature on the use of vignettes proved useful; it highlighted that "[m]ost commonly experts or professionals not involved in the study are used to pre-test the 'realness' of the hypothetical account presented in the vignette."⁸⁷⁴ I chose to follow this advice and 'pilot' the vignettes with appropriate test respondents who would not be included in the fieldwork. One practitioner and two academics were targeted. The practitioner, a criminal defence solicitor, was based in a different geographical location to that of the empirical study, to ensure there were no potential links between the pilot respondent and any research respondents. The academics, both university lecturers with expertise in criminal law, were based in the location of the study, but it was felt that they would be less likely to have personal connections with potential research respondents as they were not in the same profession. I felt that, for a small study like this, only a few pilot respondents were needed. Unfortunately, only one of the three individuals targeted (one of the academics) responded with feedback. However, the pilot respondent was also a qualified criminal

⁸⁷² Barter C., Renold E. (1999) *The Use of Vignettes in Qualitative Research* – 25 Social Research Update, 4.

⁸⁷³ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 180.

⁸⁷⁴ Wilks T. (2004) *The Use of Vignettes in Qualitative Research into Social Work Values* – 3 Qualitative Social Work 1, 82.

defence practitioner with recent experience in the field, despite his employment as an academic. He was sent a feedback document, explaining what my thesis was and that the fieldwork was 'specifically interested in the ethical conflicts that defence lawyers encounter in their day-to-day work'. He was provided with a copy of the draft vignettes, accompanied by a 'title', indicating the conflict point each vignette represented. It was also explained that, in employing vignettes, it was hoped that responses to them would 'indicate how [respondents] would react to the ethical dilemma presented . . . [and] indicate how they view their role as a criminal defence lawyer and where their duties lie.' It was requested that feedback on the vignettes comment on the following:

1. The 'realism' of the scenarios – do they make sense in a legal context?
Could these scenarios potentially occur in day-to-day work?
2. Are the scenarios understandable? Are they confusing, rambling, too simple?
3. Do they raise real ethical conflicts? – The scenarios are intended to create conflicts that reflect the heading they are under.

The feedback was very helpful. The pilot respondent highlighted where information was too vague; proposed alterations where no realistic conflict existed (such as using a different offence or clarifying procedural defects); suggested that questions about financial considerations be included; edited the narrative to ensure the language used was realistic (e.g. "special measures" in place of "special arrangements"); provided advice on likely answers, allowing the author to judge where more ambiguity could be introduced. The implications of such a limited pilot must be conceded; feedback was received from only one respondent, although he was both an academic and a practitioner. Different perspectives, particularly from a current practitioner, may have provided valuable information for improving the scenarios. However, feedback from other sources may have reflected what the author did receive, and so may have added nothing substantial to the drafting process. It is likely that the wider the range of feedback, the more accurate and effective the vignettes may have been and thus may have led to more statistically valid data. Thus, one must bear in mind the limitations of the process when weighing the value of the results of this study.

2.2.6 The Final 'Professional Conduct Scenarios'

The four final scenarios were presented (minus the 'titles') to the respondents:

Scenario A (Confidentiality v. Procedural Justice and Truth-Seeking)

'Your client, Z, has been charged with possession of heroin with intent to supply. He was arrested on North Road, which is a well-known haunt for drug users. Z claims that the heroin found on him was for personal use and that he does not deal. He pleads not guilty and his trial date is set; however, in your last meeting with Z before the trial, he says that he won't be able to attend the first day of the trial as he 'needs to score on North Road after the weekend.' You warn him he must attend the trial; he responds by asking you to explain his absence to the court. You outline the potential consequences of failing to attend, but he insists on his instructions. On the morning of the trial, Z does not appear as expected; you attempt to phone him but receive no answer. You must explain Z's absence to the court. '

In this vignette, the respondent is provided with information by the client; this information could potentially aid the court in locating the defendant and thereby facilitate the proceedings and progress the truth-seeking process. Equally, the information could be disadvantageous to the client. It not only casts him in a bad light but could help the court find and convict him. The respondent therefore needs to reconcile competing duties - to keep communications with the client confidential and to assist the court in the administration of justice and pursuit of the truth.⁸⁷⁵

⁸⁷⁵ For more on this conflict point, see Chapter 4, section 2.1.

Scenario B (Partisanship v. Morality)

'Your client, A, has been charged with raping B. A met B in 'The Dock', a local nightclub, and after having drunk a lot, went back to B's house. B claimed that A then raped her when she refused to have sex with him. A denies the allegation, claiming that B consented at the time and had made it clear she wanted to have sex throughout the night. There were no witnesses to the alleged rape itself. A claims to have seen B in 'The Dock' several times before, behaving flirtatiously and always leaving with different men. He claims others would agree with him that B has a reputation for picking up men in 'The Dock' and taking them home to have sex. She has alleged rape against a man in the past, a charge which was dropped due to lack of evidence. A has an historic conviction for sexual assault and witnesses attest to his history of sexual promiscuity. A instructs you to argue that B is lying and that her sexual history backs up this claim. '

In this scenario, the respondent is presented with a conflict between the duty to advance the best interests of the client and the duty to act in an ethical manner. On the one hand, exploring the sexual history of the complainant may demonstrate a propensity to make false claims and may suggest to a jury that she is someone who consents to random sexual encounters regularly. This may further the client's case that she is lying about the alleged rape. However, pursuing this line of questioning may be a cheap and immoral tool for humiliating someone who may be a vulnerable victim of a serious sexual attack, to the advantage of a man with a record of sexual offences.⁸⁷⁶

⁸⁷⁶ For more on this conflict point, see Chapter 4, section 2.2, and also see Temkin J. (2000) *Prosecuting and Defending Rape: Perspectives from the Bar* – 2 *Journal of Law and Society* 27 for a discussion of this conflict and for an example of interviews with defence lawyers about defence strategy with rape complainants.

Scenario C (Detachment v. Morality)

PART A: 'W, a 40 year old male, has been charged with sexually assaulting his 13 year old daughter, X, whilst visiting her at her mother's home. Her mother, Y, had left the house briefly to go to the shop. W has a string of past convictions for domestic violence directed at Y, for which he has spent time in custody and which led to their separation. 'W' also had a charge of indecent exposure to a minor dropped due to a lack of evidence. He protests his innocence, claiming his daughter is lying and made the accusations after he refused to give her money. W requests your representation in what will clearly be a large-scale and potentially lucrative Crown Court trial. '

PART B: 'W pleads not guilty, on your advice. In preparing for trial, you discover that X has raised allegations of violence against both of her parents in the past, none of them pursued by the Police. The trial begins and the prosecution call X, who has been given special measures to protect her in court. She claims that W asked her to perform a sexual act on him and attacked her when she refused. She also claims that he has sexually abused her several times in the past, but she was too scared to tell anyone. You begin cross-examination of X.'

The conflict in this scenario pitches detachment against morality. Defending a man with a history of domestic violence and sexual deviance with minors could be considered abhorrent and not a task that a figure with a duty of morality should undertake. In addition, attacking a child for the purpose of advancing his case could also be considered unethical. However, if the respondent also has a duty to remain detached and not pre-judge a client based on their character or the nature of the case, then a conflict exists.⁸⁷⁷

⁸⁷⁷ For more on this conflict point, see Chapter 4, section 2.3.

Scenario D (Partisanship v. Procedural Justice and Truth-Seeking)

PART A: 'Your client, F, has been charged with driving whilst under the influence of alcohol. She was pulled over by a Police Officer who breathalysed and arrested her. She provided a breath sample using an Intoximeter at the Police Station, which gave a reading of 50 microgrammes – 15 microgrammes over the limit. This entitled her to choose to replace her breath sample with a blood or urine sample. However, contrary to procedure, an officer said that she must give a blood or urine sample, and she complied. Her samples confirmed she was over the limit and she was charged. She tells you she 'was at the pub but didn't drink anything' and on her instructions, you enter a plea of not guilty. '

PART B: 'The trial begins. The arresting officer gives evidence that on arrest F claimed she'd 'only had one drink'. In a brief break, F admits to you that she may have drunk alcohol at the pub but had just forgotten. In addition to this, the officer who operated the Intoximeter fails to confirm that it was working reliably, as is required. The prosecution case is drawing to a close. '

This scenario presents respondents with a difficult clash of principles. The client appears to have committed the offence but wishes to plead not guilty on a technicality. The respondent must therefore resolve the conflict between the duty to be a partisan for the client, and the duties to seek the truth and aid the administration of justice. The latter obligations require the lawyer to aid the conviction of the guilty and share information with the court, including being open about tactics and mistakes by the police and prosecution. The vignette therefore requires difficult decisions about what duties will take precedence.⁸⁷⁸ It is important to point out that none of the vignettes contain a direct reference to the theoretical principles identified in this thesis, nor explicitly outline a conflict. They set up a series of facts and are left open to the interpretation of the respondent. This, as has previously been stated, is to ensure that a respondent identifies any duties or conflicts without guidance.

⁸⁷⁸ For more on this conflict point, see Chapter 4, section 2.4.

2.3 Target Organisations

Lawyers working in the context of two types of 'organisation' were targeted in this empirical study; Firms, employing both solicitors and accredited representatives, and Chambers, at which barristers were tenured residents. The respondents were drawn from six Firms and two Chambers. Each Firm specialised in legally aided criminal defence, whilst each set of Chambers had a large number of barristers undertaking defence work. It was recognised that the type and size of the respondent's organisation might have an effect on their responses; there is clear potential for trends to emerge in the data collected when several respondents are drawn from the same organisation. This could be related to factors such as an internal culture of practice or specific organisational policies from partners/seniors, factors which could perpetuate an organisation-specific approach. Although this potential 'osmosis' within Firms and Chambers could influence the data, it was decided that the data collected would not be categorised based on which organisation the respondent belonged to (for example, Respondent 1 from Firm A). First, it was felt that the sample in this study was too small to demonstrate any meaningful trends; the highest number of respondents from the same organisation was four. Second, this empirical study and thesis are interested in the views of individual criminal defence lawyers about their role and how that compares with theory, not the impact of organisational structures on an employee's thinking. The scope of the research had to remain focused; it was for this reason that other variables which might affect the responses of the respondents, such as gender or age, were not included.⁸⁷⁹

2.4 Target Respondents

The only variable that the empirical study took account of was the *type* of criminal defence lawyer. 'Criminal defence lawyer'⁸⁸⁰ is an umbrella term and in the course of the fieldwork, three types of criminal defence lawyer were interviewed - Solicitors, Barristers and Accredited Police Station Representatives. At the early stages of the fieldwork, my intention was to interview approximately twenty criminal defence lawyers from at least four firms of solicitors and one set of chambers, and I considered fifteen respondents to be the minimum number for a substantial sample. The process of

⁸⁷⁹ See Appendix 1 for more information on the target organisations.

⁸⁸⁰ As defined in Chapter 2, section 1.

securing interviews with the respondents was extended and problematic. As stated earlier, I undertook several periods of observation with firms and chambers in the year leading up to the fieldwork; these were used to establish key contacts within the organisations, disseminate information about my study amongst practitioners and to develop relationships with individual practitioners who seemed open to the idea of participation. I organised the interviews through two channels. The first, and primary method, was to directly contact individual respondents who I considered willing to be involved, either by telephone, by email or in person (either at court or at their organisation). The second method was to arrange interviews by proxy, either through a respondent I had already interviewed who recommended me to another practitioner, or through staff at the organisations targeted (such as clerks at barristers' chambers), who would arrange an interview on my behalf.

The period of fieldwork began in March 2009. Initially, my primary method of securing interviews through personal contact resulted in only five interviews by the end of April 2009 (four solicitors and one accredited representative, at only three firms). This lack of success led to the second method, what one might call 'exploiting' contacts. This was, frankly, a result of luck rather than planning, as two respondents offered to contact others for me. This saw a greater success rate by the beginning of June 2009 - ten interviews with seven solicitors, one barrister and two accredited representatives, at four firms and one chambers. However, the period of fieldwork had now extended beyond my original schedule of two months; I therefore adopted a more persistent approach, communicating with potential respondents nearly every day and informing them that I needed to complete all interviews by the end of June 2009. This injection of urgency resulted in six more interviews. In total, I managed to interview sixteen respondents from all three of the 'categories' of defence lawyer identified above – nine solicitors, four barristers and three accredited representatives. These were drawn from six firms and two sets of chambers.

The key problems I encountered were making initial contact with respondents and convincing them to commit to an interview. I approached at least twenty-five criminal defence lawyers for interviews, either through speculative messages or direct conversation. However, several either promised to commit and never did, or did not

respond at all.⁸⁸¹ Unsurprisingly, I was most successful when I either established a relationship with a respondent before approaching them for interview or convinced an established contact to arrange an interview on my behalf. It should also be noted that only four of the respondents were what one might term 'leaders' at their organisations; that is, those involved in management, such as partners at firms. This is not to say that other respondents were not experienced or senior.⁸⁸² However, it would have been desirable to interview more organisation leaders, not only due to the considerable experience they would inevitably have, but because of the potentially high-end work they do. The reasons for the absence of more leaders and the general limited numbers of willing respondents are difficult to identify; without doubt, the time demands on criminal defence lawyers contributed. Some of the obstacles discussed earlier, such as distrust of independent researchers, may have played a part, but one can only speculate.

At an early stage of analysis, there appeared to be certain trends in the responses of each type of criminal defence lawyer and considering these differences presented an interesting opportunity.⁸⁸³ Despite this, these trends served only as a background consideration in the analysis; the focus remained on exploring whether the views of each individual respondent reflected the theoretical and formal conceptions identified earlier in this thesis. Therefore, the type of lawyer served primarily as a simple method of categorising the respondents. Specifically, they were classed as a Solicitor ('S'), Barrister ('B') or Accredited Representative ('A'), combined with a number derived from the order in which they were interviewed. So, the first Solicitor interviewed was categorised as 'S1', whilst the fourth Barrister interviewed was categorised as 'B4', and so on. The empirical study was based exclusively in a single, major legal circuit in England and Wales and the respondents were drawn from organisations practicing primarily on that circuit. There are, of course, limitations to conducting research in a single location with a low number of subjects, namely the potential for localised cultures and the lack of breadth across the profession as a whole. However, as has been explained, this study represents an insight rather than a statistically valid assessment. A

⁸⁸¹ Clearly, some things never change. The article 'Obstacles to the study of lawyer-client interaction: The biography of a failure', details an aborted study into lawyer-client relations in the United States due to a lack of respondents. At one point, the authors describe that they secured the "commitment in writing of two attorneys to participate in the study. Only later did we come to understand how little such written commitment meant, when it came to the test." (Danet B., et al. (1979-1980) - 14 Law & Society Review, 908.)

⁸⁸² A full breakdown of the respondents is available in Appendix 1.

⁸⁸³ Training and education may influence this – see the sections on 'training materials' in Chapter 3 for more on this.

single-area study can provide valuable indicative data if, for example, it "reflect(s) geographical spread within a single police force area"⁸⁸⁴ and targets respondents with "a range of experience".⁸⁸⁵ This piece of fieldwork attempted to capture this.⁸⁸⁶

2.5 Data Collection

As stated above, the fieldwork took place between March and June 2009. Each interview was conducted in the same way. Prior to the date of interview, each respondent was sent a set of advance materials, consisting of the 'Professional Conduct Scenarios', an Ethical Consent Contract⁸⁸⁷ and an Anonymity Guarantee⁸⁸⁸ (the latter two will be discussed in the 'Ethics' section below). I would attend the Firm or Chambers of the respondent and the interview would be conducted in private, usually in a conference room or office. Each interview was recorded in full using a microphone and laptop computer, whilst I took notes. As stated previously, the first and third sections of the interview posed pre-set questions to all of the respondents, followed by some open-ended discussion. In the second section, I would read out each 'Professional Conduct Scenario' followed by a series of 'starter' questions, designed to engage the respondents in a free-form discussion. Obviously, open-ended dialogue would vary with each respondent and, in several interviews, some pre-set questions were omitted if they had already been answered or if time became a factor. Additionally, a number of *ad hoc* questions were asked and a variety of spontaneous topics explored. The addition of appropriate questions during the interview ensured that the points of relevance were explored in depth and that the discussion remained within the scope of the research – the views of criminal defence lawyers about their role and obligations. However, in general, respondents were asked the same questions in the same order. The importance of this is that consistency in the conduct of the interview validates comparison and analysis of responses as they are the result of the same or similar stimuli. It should also be made clear that the 'starter' questions mentioned above did not attempt to steer the discussion toward specific issues; as I highlighted earlier, the vignettes are designed to avoid leading or influencing the respondent. However, 'starter' questions were necessary for several reasons. Sometimes respondents would become bogged down in

⁸⁸⁴ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 180.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ See Appendix 1 for descriptions of the respondents.

⁸⁸⁷ See Appendix 3.

⁸⁸⁸ See Appendix 3.

detailing court procedures, discuss topics outside of the scope of the fieldwork or merely be unclear as to what was required of them. In these situations, questions used to bring the discussion back to the scenarios were designed to be as broad as possible and omitted, wherever possible, any terms used in this thesis, such 'partisanship' or 'detachment'.

I conducted each interview using the *pro forma*,⁸⁸⁹ which was not seen by the respondents. This consisted of an opening narrative explaining the purpose of the interview and its structure, followed by the three distinct sections described earlier in this chapter. The vignettes section ('Part 2') included the 'titles',⁸⁹⁰ indicating each ethical conflict, as well as the 'starter' questions mentioned previously. In addition, 'Part 2' included brief summaries of relevant legislation, case law and regulation under each vignette, in case I required direct reference to aid the respondents in answering a question. The drafting of the *pro forma* used in this study was influenced in terms of layout by a questionnaire used for telephone-based interviews in the research project, *Evaluation of the Public Defender Service in England and Wales*.⁸⁹¹ The interviews were intended to last approximately an hour, although if the respondent was willing to continue beyond this then that was acceptable. In fact, the interviews lasted between approximately 45 minutes and 1 hour and 40 minutes, the average being approximately an hour.

2.6 Ethics

In undertaking an empirical study, I needed to consider several ethical issues, by which I mean "those issues that concern the behaviour of social researchers and the consequences that their research brings to the people they study."⁸⁹² This piece of fieldwork is an example of 'applied' social research; that is, it is grounded in exploring real-life issues rather than detached theory. In social science disciplines, such as psychology, sociology and law, applied research inevitably involves human beings. This leads to a variety of ethical considerations for researchers, generally directed at ensuring that "studies are directed toward worthwhile goals and that the welfare of . . .

⁸⁸⁹ See Appendix 4 and section 2.1 of this chapter.

⁸⁹⁰ These were for my reference and not seen by the respondents.

⁸⁹¹ Bridges L., Cape E., Fenn P., Mitchell A., Moorhead R., Sherr A. (2007) – London: Legal Services Commission.

⁸⁹² Henn M., Weinstein M., Foard N. (2006) *A Short Introduction to Social Research* – London: SAGE, 68.

subjects and . . . research colleagues is protected."⁸⁹³ This welfare may relate to issues such as:

1. Protecting the identity of subjects
2. Protecting the legal rights of subjects
3. Providing subjects with the opportunity to consent to participation
4. Ensuring subjects are properly informed about their obligations
5. Protecting vulnerable subjects, such as children or medical patients
6. The source of funding for the research and any potential bias as a result
7. Providing the opportunity for subjects to withdraw
8. Whether there will be remuneration for subjects
9. Ensuring the security of data collected

Ensuring that such standards are considered and adequately met requires the researcher to strike a balance between ethical behaviour and safe-guarding the integrity and probity of the research. For example, providing too much information to subjects may influence the way they behave or respond to research questions. This, of course, would undermine a project designed to capture a natural and realistic snapshot of the behaviour or views of subjects. To help achieve this balance, researchers generally have regard to ethical guidelines; in the context of this empirical study two strands of ethical standard were consulted. The first of these was an informal and general ethical standard, a non-specific and undefined body of broadly accepted values, such as anonymity of subjects and informed consent. These were drawn from literature on social research and ethics. I regarded satisfying widely accepted ethical standards as essential. If these standards are ignored, research is unlikely to be considered valuable or valid in academic circles. That is not to say such research would be without merit, more that research is only likely to be effective when it is regarded as ethically robust. This indistinct set of principles in turn informs the second strand; the internal ethical standards imposed by my institution. This process required that I submit an Ethical Consent Proposal to my university faculty Ethics Committee.

In satisfying both of these strands, I adopted some methods for conducting my interviews designed to reinforce the ethical integrity of my research. Each respondent

⁸⁹³ Kimmel A. (1988) *Ethics and Values In Applied Social Research* – 12 Applied Social Research Methods Series, 9.

was approached directly by me and given a full explanation of the nature and aims of the fieldwork before they consented to involvement. Prior to each interview, the respondent would be sent a copy of the scenarios, as well as an Ethical Consent Contract⁸⁹⁴ and Anonymity Guarantee.⁸⁹⁵ The Contract created an agreement between me and the respondent to abide by and uphold the obligations contained, including my right to publish data and record the interview, and the respondent's right to confidentiality and right of withdrawal. The Guarantee specifically outlined what information would be kept confidential, for example a respondent's name, age, gender and employer, and what would not. In drafting these, I wanted to reflect widely accepted ethical principles. As a result, the Consent Contract and the Anonymity Guarantee were designed using the guidance of the *Statement of Principles of Ethical Research Practice*⁸⁹⁶ issued by the Socio-Legal Studies Association (SLSA), and the *Statement of Ethical Practice*⁸⁹⁷ issued by the British Sociological Society (BSA).

3. The Process of Analysis

3.1 Qualitative Data Analysis

Much has been written about qualitative methodology, yet when it comes to analysing the data it yields, little is certain. Many academics from many disciplines have devoted time and energy to exploring and explaining strategies for analysing such data, but there does not appear to be any consensus about what methods should be used. Producing a definitive account of a 'correct' approach continues to elude academics, and as a result "much mystery surrounds the way in which researchers engage in [qualitative] data analysis."⁸⁹⁸ There are a few reasons for this. First, the qualitative data produced by an empirical study tends to vary enormously in its form, content, size and significance. In this respect, qualitative data is a very different creature to its more traditional and scientific counterpart, quantitative data. Qualitative data is both nuanced and voluminous; therefore, a major obstacle to any analysis and its presentation is the "sheer volume of data customarily available and the relatively greater difficulty faced by the

⁸⁹⁴ See Appendix 3.

⁸⁹⁵ See Appendix 3.

⁸⁹⁶ Socio-Legal Studies Association (2009) - Socio-Legal Studies Association website, <http://www.kent.ac.uk/nlsa/content/view/247/270/>: **Last Accessed 02/09/09**

⁸⁹⁷ British Sociological Society (2002) - British Sociological Society website,

<http://www.britisoc.co.uk/equality/Statement+Ethical+Practice.htm>: **Last Accessed 02/09/09**

⁸⁹⁸ Burgess R., Bryman A. (1994) *Analyzing Qualitative Data* – London: Routledge, xiii.

researcher in summarising qualitative data."⁸⁹⁹ Another contributor to the 'mystery' of qualitative data analysis is the lack of focus on the analytical process itself in research studies and advisory literature. Academics complain that "many qualitative researchers have neglected to give adequate descriptions in their research reports of their assumptions and methods, particularly with regard to data analysis."⁹⁰⁰ It also seems that while "[t]here are numerous texts and sets of readings attempting to give guidance to researchers about the styles and strategies that can be used in qualitative research . . . the books are often silent about the processes and procedures associated with data analysis."⁹⁰¹ Therefore, the analysis of qualitative data is "often characterised by its lack of distinct rules".⁹⁰² One might consider this is a disadvantage, but arguably it "can be liberating, since it can be considered that there are no right or wrong approaches".⁹⁰³

In relation to vignettes, there was little description of or guidance on qualitative analysis in any of the research studies I encountered. In Stewart Field's study of police decision-making,⁹⁰⁴ the focus was on the use of the vignette technique and content of the interviews themselves. The only reference to analysis was the statement that "[a]ll interviews were taped and then coded and analysed using Atlas data indexing and sorting software."⁹⁰⁵ This tells us little about the process of analysis; however, the subject of 'Atlas' is worth briefly expanding upon. Atlas is a computer program designed to aid researchers in organising and analysing qualitative data. The use of computer programs has become increasingly popular amongst researchers handling large amounts of qualitative information. This was a tool I could have employed in my analysis, however, due to the size of the sample, it seemed unnecessary. The only other vignette-related reference described a quantitative analytical method, ("fractional replication factorial design") in a study by Alexander and Becker.⁹⁰⁶

⁸⁹⁹ Mays N., Pope C. (1995) *Qualitative Research: Rigour and qualitative research* – 311 British Medical Journal, 109-112, <http://www.bmj.com/cgi/content/full/311/6997/109>: **Last accessed 30/09/09**.

⁹⁰⁰ Ibid.

⁹⁰¹ Burgess R., Bryman A. (1994) *Analyzing Qualitative Data* – London: Routledge, xiii.

⁹⁰² Henn M., Weinstein M., Foard N. (2006) *A Short Introduction to Social Research* – London: SAGE, 197.

⁹⁰³ Ibid.

⁹⁰⁴ In the context of this thesis, this was a significant and informative study due to its use of the vignette technique in a criminal justice context – a rare occurrence to date.

⁹⁰⁵ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-making* – Crim. L.R., 181.

⁹⁰⁶ Alexander C., Becker H. (1978) *The Use of Vignettes in Survey Research* – 42 The Public Opinion Quarterly 1, 96.

3.2 Application in this Thesis

Due to the flexible and indistinct nature of qualitative data analysis, the analytical process in this thesis did not reflect any pre-defined method; one might therefore refer to this approach as 'informal narrative analysis'. This process wove together disparate methods outlined by literature on qualitative data analysis, drawn from a variety of disciplines.⁹⁰⁷ The interviews produced three types of data for analysis – the 'base-line' data from the first section, the vignette data from the second section and additional data from both the first and third sections. The 'base-line' data, as mentioned earlier in the chapter, was basic, quantitative information about the respondents and therefore required no analysis for any deeper meanings. The vignette and additional data were qualitative and thus indicative of the views and opinions of the respondents about the practical role of the criminal defence lawyer. They consisted of extensive dialogue between myself and each respondent. The vignette data resulted from the presentation of the 'Professional Conduct Scenarios' and subsequent questioning, whilst the additional data resulted from direct questioning about a variety of other topics, discussed earlier in the chapter. The vignette and additional data were analysed together as they were both qualitative in nature and related to closely linked issues. However, distinctions will be made in the next chapter between information obtained as a result of the 'Professional Conduct Scenarios' and as a result of direct questioning. Once this data had been collected, the next step was to analyse the information in the hope that I might answer the second research question – does the 'zealous advocate' model have any relevance or validity in modern practice?

The first step was to transcribe the data that I had collected. One would normally consider transcription a straightforward, dull and repetitive process, where one simply copies what has been said by another. This is a myth. Transcription is "neither neutral nor value-free . . . [w]hat passes from tape to paper is the result of the decisions about what ought to go on to paper . . . [t]ranscriptions are, quite unequivocally, interpretations."⁹⁰⁸ It is one of the most important stages of analysis because transcription is a form of subtle, eliminative analysis in itself. Despite a researcher's best efforts, what he or she transcribes "will never fully encompass all that takes place

⁹⁰⁷ These were mostly social sciences. In the context of this thesis, a discipline that was notably absent from the body of literature was legal research. As far as I could tell, nothing has been written about qualitative data analysis in legal research studies.

⁹⁰⁸ Arksey H., Knight P. (1999) *Interviewing for Social Scientists* – London: SAGE, 141.

during an interview".⁹⁰⁹ Therefore, transcription is a process of "data reduction", that is "selecting, focusing, simplifying, abstracting and transforming the 'raw' data that appear[s] in written-up field notes."⁹¹⁰ One might assume that this is merely an organisational exercise, a formality; data reduction is in fact "*part of analysis . . . [t]he researcher's choices of which data chunks to code, which to pull out, which patterns summarise a number of chunks, what the evolving story is, are all analytic choices.*"⁹¹¹

Decisions as to what to transcribe will shape the final, indisputable record of what each respondent had said in their interview and since all references in an analysis will flow from this document, it is clear that "what is transcribed, what is not transcribed, and how the transcript is structured very much influences the analysis process."⁹¹² Deciding how much of the interviews would be transcribed was reasonably straightforward. The following advice accurately summarises the approach I took:

"For some analyses, it may not be necessary to transcribe an entire interview. Selected sentences, passages, paragraphs, or stories relevant to the research question or theory may be all that are needed . . . The level of transcription should complement the level of the analysis . . . If researchers do not need such a detailed analysis, the exploration of general themes and patterns can be undertaken with less text."⁹¹³

I came to the conclusion that I would not need to transcribe the interviews in full. This empirical study, as has been mentioned, represents an insight into the practical role of the criminal defence lawyer. On this basis, I only transcribed what I felt related to the scope of the research; that is, the obligations of the criminal defence lawyer and the resolution of ethical conflicts. Once I had settled on a partial-transcription approach, the next stage was to decide exactly *what* data I would include. I did this using two key methods – coding and data display. Coding involves "categorizing data extracts according to how they relate to emerging or existing analytic themes".⁹¹⁴ Extracts are

⁹⁰⁹ McLellan E., MacQueen K., Neidig J. (2003) *Beyond the Qualitative Interview: Data Preparation and Transcription* – 15 Field Methods 1, 65.

⁹¹⁰ M. Miles., M. Huberman. (1994) *Qualitative Data Analysis: An Expanded Sourcebook (2nd Ed.)* – London: SAGE, 21.

⁹¹¹ Ibid.

⁹¹² McLellan E., MacQueen K., Neidig J. (2003) *Beyond the Qualitative Interview: Data Preparation and Transcription* – 15 Field Methods 1, 74.

⁹¹³ Ibid., 66.

⁹¹⁴ Li S., Seale C. (2007) *Learning to do Qualitative Data Analysis: An Observational Study of Doctoral*

categorised using a 'code', which is "an abbreviation or symbol applied to a segment of words – most often a sentence or paragraph of transcribed field notes – in order to classify the words."⁹¹⁵ Put simply, codes are "data-labelling and data-retrieval devices"⁹¹⁶ allowing a researcher to refer back to key sections of a transcript when analysing data. Furthermore, coding is a process of filtering out irrelevancy and including data which may answer the questions a study asks; in short, coding is a crucial form of analysis.

According to literature on the subject, codes "usually derive from research questions, hypotheses, key concepts, or important themes".⁹¹⁷ As mentioned at the beginning of this chapter, two sub-questions have driven this empirical study: what practical conceptions of the role do defence lawyers have and are ethical conflicts resolved in practice? I therefore followed the advice of the literature and based my codes (in the form of a 'coding framework') on the 'zealous advocate' model (e.g. principle of partisanship, etc.). I engaged in a process of "familiarisation"⁹¹⁸ with the interviews; that is "immersion in the raw data . . . by listening to tapes, reading transcripts, studying notes and so on, in order to list key ideas and recurrent themes."⁹¹⁹ I listened to each interview in full and, with reference to my notes, transcribed quotations related to these principles or the resolution of conflicts between them, matching them to the relevant code. Thus, any quotation relating to the principle of morality was coded under the 'principle of morality'. This enabled a direct comparison between the practical expression of principles, the theoretical model and formal conceptions; this aided analysis of similarities or differences between them and by extension, illustrated how relevant and useful the 'zealous advocate' model was to modern practice. References to conflict points were coded according to which principle took 'precedence'. Thus, if a respondent suggested that a conflict between detachment and morality was resolved in favour of detachment, it would be transcribed under the 'detachment' code. Again, this method provided a picture of how respondents chose to resolve ethical conflicts, indicating the true nature of the modern role of the criminal defence lawyer. This coding approach represents deductive qualitative analysis, in that "it starts . . . from pre-

Work – 17 *Qualitative Health Research* 10, 1445.

⁹¹⁵ M. Miles., M. Huberman. (1994) *Qualitative Data Analysis: An Expanded Sourcebook (2nd Ed.)* – London: SAGE, 56.

⁹¹⁶ *Ibid.*, 64.

⁹¹⁷ *Ibid.*, 56.

⁹¹⁸ Pope C., Ziebland S., Mays N. (2000) *Analysing Qualitative Data* – 320 *British Medical Journal*, 114-116.

⁹¹⁹ *Ibid.*

set aims and objectives"⁹²⁰ and is "strongly informed by *a priori* reasoning".⁹²¹ The rationale for a deductive approach is based on the fact that the empirical study grew out of the exploration of theory rather than the other way around; the objective of this thesis is to evaluate the validity of existing principles, rather than generate new ones. Therefore, in testing theoretical principles, I wanted them to be at the foundation of my analysis.

In order to code the data effectively, I needed to settle on a method of display. Data display is another stage of analysis that is overlooked, yet important. Efficient coding and analysis is facilitated by "an organised assembly of information that permits conclusion drawing and action taking."⁹²² Transcribing data is an intensive process, and it is "important to establish a format template so that each transcript has an identical structure and appearance."⁹²³ Without a display, the process of transcription will be slow and inconsistent, codes may be arbitrary and confusing, and data may be lost. In addition, a display acts as a mental 'map' for the researcher when transcribing, aiding them in their search for relevant and important data. The coding framework with which I transcribed the interviews can be found under Appendix 2. It is a very simple display with no text to explain what the codes mean; as a qualitative study, the categories the codes represent were meant to be open to interpretation and did not have detailed criteria (as one might find in a quantitative study) that could limit the transcription. So, for example, a quotation did not have to contain the word 'partisan' in order to be placed under the 'partisanship' code. The basic criterion for each category was that a quotation related to either the principle or a conflict point involving that principle.⁹²⁴

The coding framework was for my reference only and thus a tool to aid selective transcription. This selectivity leads to the potential issue of researcher bias in choosing what quotations fulfil the broad criteria outlined above. A researcher may have a personal agenda or goal, pressure from those funding the research or may make subconscious assumptions about the data, factors which can undermine the validity of the analysis. It is therefore important that the researcher have an objective, rigorous and

⁹²⁰ Ibid.

⁹²¹ Ibid.

⁹²² M. Miles., M. Huberman. (1994) *Qualitative Data Analysis: An Expanded Sourcebook (2nd Ed.)* – London: SAGE, 21.

⁹²³ McLellan E., MacQueen K., Neidig J. (2003) *Beyond the Qualitative Interview: Data Preparation and Transcription* – 15 Field Methods 1, 69.

⁹²⁴ The definitions of the principles and conflict points are discussed fully in Chapters 2, 3 and 4.

reasoned method of selection, particularly in qualitative research. As the name indicates, qualitative data analysis involves assessing the *quality* of what is said rather than the *quantity* (as in quantitative data analysis). One must therefore look for the meaning conveyed by what a respondent says, rather than the number of times a particular phrase or utterance is used. The difficulty, of course, is that the *quality* of a phrase is open to interpretation. In the case of this thesis, as the researcher, I interpreted what a respondent meant and transcribed it using the coding framework above. The unique problem of qualitative research is that it is challenging to explain and justify the selections a researcher makes; so, how can a researcher combat potential bias in his or her analysis?

Miles and Huberman suggest that during interviews or observations, a researcher should "[a]void cooptation or going native by spending time away from the site; spread out visits."⁹²⁵ This should reduce the danger of interpreting data in a manner that suits the needs or aims of the respondents or their colleagues. They also advise that transcriptions include "dissidents, cranks or isolates – people with different points of view from the mainstream, people less committed to tranquillity and equilibrium in the setting."⁹²⁶ This gives a more balanced reflection of the views and opinions of all the respondents. Finally, they stress that throughout the process of analysis one should "[k]eep [his or her] research questions firmly in mind; don't wander too far from them to follow alluring leads, or drop them in the face of a more dramatic or momentous event."⁹²⁷ The selections I made for transcription were continuously related back to the 'zealous advocate' model and the conflict points, as will be demonstrated in Chapter 6. At the same time, I approached selection with an open mind, transcribing as much as I thought was relevant, a point reinforced by the significant amount of unused transcription material. More broadly, since it is virtually impossible to describe the internal mental processes of the researcher during selection, I hope that the open and detailed scrutiny of the process of analysis which I have engaged in signals a desire to hide nothing.

⁹²⁵ M. Miles., M. Huberman. (1994) *Qualitative Data Analysis: An Expanded Sourcebook (2nd Ed.)* – London: SAGE, 234.

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*

4. Conclusion

The design of the methodology for this empirical study was driven by a genuine desire to connect with the everyday life of the practicing criminal defence lawyer. At every stage of the process, I consciously questioned whether the approach adopted would lead to a more open, more honest and more natural exchange between me and the respondents. From the beginning, I was aware of the undoubted possibility that the criminal defence lawyers I wanted to interview might be either unresponsive or try to satisfy my curiosity with easy answers; this would, of course, add nothing to this thesis. I was pleased to find, as I will outline in the next chapter, that every person I interviewed expressed many interesting and insightful ideas, which I believe have truly furthered the overarching aim of this thesis – to accurately conceptualise the role of the modern criminal defence lawyer in England and Wales. Finally, I felt that ensuring that the methodology was rigorous and robust had two key benefits. The first, and most obvious, was referred to at the beginning of this chapter: to give the study credibility. A well-designed methodology leads, in theory, to more valid results. The second benefit was personal; if one sees the researcher as an explorer, then he or she must be well equipped. With a strong and thoroughly researched framework for my study, I was instilled with the confidence and freedom to effectively interview the respondents. At no point did I feel under-prepared or out of my depth, and believe that a large part of this is down to the methodology used. My findings are set out in Chapters 6 and 7.

**CHAPTER 6 – Criminal Defence Lawyers’ Conceptions of their Role:
An Empirical Comparison**

1. Introduction

This, and the next, chapter will detail a critical analysis of the data obtained in the empirical study. The analysis is divided into two parts, based on the two research sub-questions identified at the beginning of Chapter 5:

What is the 'practical conception' of the role of the criminal defence lawyer in England and Wales?

How, if at all, are conflicts between principles resolved in practice?

The first part, covered in this chapter, considers each of the principles in the 'zealous advocate' model and explores whether the responses of the practitioners reflect those principles in both their traditional and formal manifestations. Structurally, the examination of these responses is further divided, distinguishing between responses that resulted from direct questioning and from the vignette technique. I felt that, in presenting my findings, it was important to distinguish between the two interview methods. As was discussed in Chapter 5, there are potential dangers with direct questioning which may undermine the validity of data; it is arguable that responses to vignettes are more honest and accurate reflections of the practice of criminal defence lawyers than responses to direct questions. Despite this, responses to direct questions are still valuable. They give an impression of how defence lawyers consciously construct their role and how that compares to theoretical and formal conceptions of the role. They also enable a comparison between what defence lawyers say they do and what they *actually* do, as indicated by their responses to the vignettes. Furthermore, direct questioning, if used in a careful and subtle manner, encourages respondents to engage in active reflection on their role. Using only vignettes might leave such engagement to chance since respondents may become 'lost' in the scenario, focusing on irrelevancies such as hypothetical variations of the facts or legal minutiae. Utilising both direct questioning and the vignette technique therefore facilitates the extraction of relevant information from respondents and, in turn, aids analysis of what the 'real-life' role is. However, I still considered it important to demarcate the two types of data, so that their value can be weighed in the context of the methods used to obtain them. The second part, covered in Chapter 7, focuses on practical resolution of the conflict points. Each 'Professional Conduct Scenario' was based on the conflict points set out in Chapter

4. In this part, I will explore whether respondents recognised any conflicts in each scenario; if they did, I will consider whether their responses sought to resolve these conflicts. This in turn may indicate which principles take primacy in a 'real-life' conflict situation. In analysing this process of conflict resolution, I will compare the responses provided by the respondents with some of the theoretical and formal 'solutions', which were discussed in Chapter 4. Again, the second part considered each 'Professional Conduct Scenario' and its relevant conflict point in turn. In contrast to the first part, all of the data obtained pertaining to conflict points and their resolution was derived from responses to vignettes, thus there is no need to distinguish between responses to direct questioning and responses to vignettes.

2. Do Lawyers' Conceptions Reflect the 'Zealous Advocate' Model?

In assessing the respondents' conception of their role, my primary approach was to question them about their role in the context of each of the principles within the theoretical 'zealous advocate' model, but without any explicit reference to the principles. However, I also wanted to explore their interpretation of the general concept of the 'zealous advocate', whether this reflected the 'zealous advocate' model and if so, what aspects of the model the respondents emphasised. During the latter stages of each interview, I asked the respondents the following direct questions:

'Are you familiar with the term 'zealous advocate'? What does it mean to you? '

Interestingly, 10 out of the 16 respondents were not familiar with the term 'zealous advocate'. One had "no idea" what the term meant (Respondent B3), while another was "not entirely sure" (Respondent A1). Most of the respondents who were unfamiliar with the term did attempt to define what they thought it meant. A slim majority seemed to regard the term 'zealous advocate' as having a "negative connotation" (Respondent B3). One respondent stated, "I don't know whether it's meant to be a criticism or not" (Respondent S4), while another regarded the term as more akin to "TV law" where the lawyers were "slightly over-the-top" (Respondent S7). Another respondent seemed to concur, thinking a 'zealous advocate' might be someone who was "a bit dramatic, too theatrical and perhaps too involved" (Respondent S6), while another equated the term with "speaking aggressively" (Respondent A2). However, some of the respondents who did not recognise the term considered it to be a form of compliment. One respondent

thought it meant "being extremely positive and speaking really well on your client's behalf" (Respondent A3), while another went further, suggesting a 'zealous advocate' "speaks on behalf of the client . . . without fear of . . . facing up to people who don't necessarily agree" (Respondent S2). Others thought it described a lawyer who was "thorough and professional" (Respondent S3), and "thorough and committed" (Respondent S4).

Five of the respondents were familiar with the term, and expressed mixed views about its merit as a description of the defence lawyer's role. One respondent (Respondent S5) thought a 'zealous advocate' would be "fairly fearless" in representing the client, while another described it as "the advocate who takes every point" (Respondent B2). Others felt that a 'zealous advocate' would be "proactive" and would work "carefully [and] conscientiously" (Respondent S9), and would protect the client "at most costs", even if it "upset magistrates or judges in [the] advancement of [a] client's case" (Respondent S8). However, some of the respondents who were familiar with the term appeared to be critical of it. One respondent stated that a 'zealous advocate' was "somebody who is rather [more] emotive than necessary", and tended to use "using very florid and emotive language" in order to "give the impression of a passion which may not necessarily be there" (Respondent B4). One respondent suggested that a 'zealous advocate' might in fact be "over-zealous", for example where the lawyer "starts taking it personally" (Respondent S9). One respondent was not asked this direct question due to time constraints. In general, most of the respondents seemed unfamiliar with the term 'zealous advocate'. Generally, they seemed to equate it with a more negative image of the defence lawyer, one disconnected from the reality of their work where theatrics and aggression were the main tools for advancing a client's case. However, others did view the 'zealous advocate' as a positive label, denoting fearlessness in the face of hostility, and a thorough approach.

2.1 The Principle of Partisanship⁹²⁸

2.1.1 Responses to Direct Questioning

When responding to direct questioning about their obligations to the client, the respondents' answers fell into two broad categories; those reflecting the theoretical duty of partisanship, and those reflecting formal conceptions of the principle. Answers falling under the former category exhibited a more traditional view of the principle. One respondent stated that, "[t]he obligation to the client is uppermost and foremost" (Respondent B2) and that a defence lawyer should "represent his interests fearlessly . . . [putting] instructions in an appropriate way in order to best advance his defence" (Respondent B1). Some seemed to hold the opinion that the defence of the client should be pursued as far as possible, especially in the face of prosecutors that regard court work as "a gladiatorial contest" (Respondent S8). In attempting to convict the respondent's clients, prosecutors were "not above bending the rules and the like, and therefore the only way you can deal with them is to deal with them on exactly the same basis" (Respondent S8). This appears to mirror the theoretical conception of partisan dedication to the cause of the client, even at the cost of absolute procedural integrity. Some respondents felt that the interests of the client should be defended in the face of overwhelming evidence of guilt. Even when the client provides instructions which essentially admit guilt, the defence lawyer is "still entitled to test the prosecution case" (Respondent A1). Another respondent stated that, "[t]he fact that I think my client's guilty, even in some circumstances that I may know that my client is guilty, is not the point. If the prosecution can't prove their case, then the defendant still succeeds" (Respondent S3). These opinions appear to reflect the 'zealous advocate' model, which suggests that the criminal defence lawyer is "the gladiator of the accused"⁹²⁹ who will do "anything arguably legal to advance the client's ends."⁹³⁰

However, the majority of respondents subscribed to a form of partisanship more reflective of formal regulation. Half of the respondents characterised the duty to the client as requiring the defence lawyer to represent their "best interests" (Respondents S5, S6, A1 and A3) or secure the "best outcome" (Respondent S2) or "best possible

⁹²⁸ See Chapter 2, section 3.1.1 and Chapter 3, section 2.1 for definitions and discussion of the principle of partisanship.

⁹²⁹ Du Cann R. (1964) *The Art of the Advocate* – London: Penguin Group, 46.

⁹³⁰ Simon W. (1992-1993) *The Ethics of Criminal Defense* – 91 Mich. L.R., 1703.

result" (Respondent B3). Alongside these fairly restrained statements, several respondents made it clear that anything they did for a client had to be "within the parameters of professional conduct", (Respondent S3), "within the rules" (Respondent B3) and "within the law" (Respondent S2). One respondent made it clear that modern partisan defenders are not "obliged simply to say or do anything that the client tells us to do" (Respondent S3) and another stated:

"[T]he client has to understand that there are limitations on what I can do . . . I have professional duties which mean . . . that I can't lie for the client and I wouldn't do that." - (Respondent S4)

Such statements seemed designed to reinforce the idea that the modern defence lawyer is not "a tool"⁹³¹ of the client, who will "acquiesce in mendacity"⁹³² and try to extract "everything the law can give."⁹³³

One respondent described the role of the defence lawyer at the police station as being to "protect [the client's] position legally" (Respondent A3), whilst another described the role as being to "protect and advance my client's legal rights" (Respondent S9). These statements are similar to the dictates of PACE Code C and also seem to reflect the concept of 'mere-zeal' described by Tim Dare,⁹³⁴ where a defence lawyer is "concerned solely with their clients' legal rights"⁹³⁵ and will not slavishly pursue "anything which happens to be in the client's interests, let alone anything in which the client happens to be interested."⁹³⁶ The view above also appears to reflect Maureen Cain's theoretical conception of partisanship, discussed in Chapter 2, as the obligation to "translate [client] interests into legal language that will make sense and hopefully establish legitimacy for their claims."⁹³⁷ Overall, when directly questioned, the majority of respondents seemed more inclined towards a less traditional form of criminal defence, reflecting formal conceptions of the role. The emphasis appears to be on doing the best one can for the client within the rules rather than displaying the unyielding partisanship described by

⁹³¹ Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R., 42.

⁹³² *Ibid.*, 35.

⁹³³ Luban D. (1988) *Lawyers and Justice* – Princeton: Princeton University Press, 75.

⁹³⁴ (2009) *The Counsel of Rogues? A defence of the standard conception of the lawyer's role* – Farnham: Ashgate, 7. See Chapter 2, section 3.1.1 for an extensive discussion.

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*, 76.

⁹³⁷ Cain M., Harrington C. (1994) *Lawyers in a Post-Modern World* – Buckingham: Open University Press, 55.

Lord Brougham,⁹³⁸ who exploits any opportunity to secure victory for the client at all costs.

2.1.2 Responses to Vignettes

One respondent highlighted a potential difference in the degree of partisanship required by different types of defence lawyer, stating that their duty "is to defend [the] client, if you're a barrister fearlessly, if you're a solicitor, to the best of your abilities" (Respondent S6). This appears to reflect the formal regulation of criminal defence lawyers, which appears to distinguish between what might be termed 'barrister partisanship' and 'solicitor partisanship'. The primary examples of this contrast are contained in the Bar Code and the Solicitors' Code, the former requiring barristers to act "fearlessly",⁹³⁹ the latter obligating solicitors to "do your best for each of your clients."⁹⁴⁰ Whether this division sets different standards is debatable. 'Fearless' seems to have connotations of unswerving devotion to the client's cause, whereas 'do your best' couches the duty in terms of the lawyer's skills rather than the client's needs. In short, the language used suggests that barristers owe a more powerful and far-reaching duty of partisanship than solicitors. This formal adoption of explicitly divergent language stands in contrast to the theoretical conception of the principle of partisanship, which makes no such distinction.

It is important to note that adversarial theory is cross-jurisdictional (with much derived from American literature), applying to legal systems without any professional division. England and Wales is one of the few adversarial systems⁹⁴¹ with multiple 'types' of lawyer and thus it was perhaps justifiable, at one time, for those drafting formal regulations to assign different standards of partisanship to barristers and solicitors. However, the modern roles of barristers and solicitors appear to be slowly converging; many solicitors now practice as advocates in court, a role traditionally reserved for barristers. Historically, it was perhaps important for barristers to be 'fearless' in the face of a hostile court, prosecution, jury and public gallery. In modern practice, that

⁹³⁸ See Chapter 2, section 2.

⁹³⁹ [303(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁹⁴⁰ [8], 'Guidance to Rule 1 – Core duties', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁹⁴¹ Including Scotland and Northern Ireland.

fearlessness is no longer reserved for members of the Bar, exemplified by the use of the word 'fearless' in the description of the roles of Solicitor Advocates⁹⁴² and employees of the Public Defender Service, which includes solicitors.⁹⁴³ In this context, the divergent language used by the primary codes of conduct may represent nothing more than archaic syntax. Therefore, one might suggest that the aforementioned respondent's definition of her role is mere repetition of the outdated language contained in the most prominent codes of conduct, rather than a reflection of the role in practice.

Other respondents seemed to describe a role more reflective of the theoretical principle of partisanship. These views were expressed by respondents of all types and in reference to all stages of the criminal process. One respondent asserted that the "primary obligation is to ensure [the client's] acquittal" (Respondent B1) and another that, in defending a client, one had to "wear a suit of armour as far as the court's concerned" (Respondent S6). Others ventured opinions on a variety of aspects of the criminal defender's work. Respondents agreed that a degree of bravery was required in taking advantage of defences that might not be approved of by the court, police or public. For example, referring to technical points,⁹⁴⁴ one respondent said, "I think it's your obligation to fearlessly defend your client and if there is a point there to be taken, you might take it" (Respondent S6).⁹⁴⁵

⁹⁴² [2.3(a)], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010.**

⁹⁴³ Rule 2.1, page 4, Public Defender Service Code of Conduct – London: The Stationery Office.

⁹⁴⁴ A technical point could also be described as a 'procedural' point. Rather than relating directly to the guilt or innocence of a defendant, the point relates to the technicalities of the process. A flaw or 'loophole' might therefore allow a defendant to escape conviction, even when the substantive evidence points to guilt.

⁹⁴⁵ Interestingly, this was the same respondent who described different degrees of partisanship for barristers ("fearlessly") and solicitors ("best of your abilities"), yet used the word "fearlessly" to describe her role as a solicitor. Her initial description, as suggested earlier, may have subconsciously reflected the codes of conduct; the latter quote may, as a result of immersion in the vignettes, symbolise a more honest representation of the reality of practice. One must again question, how useful the distinction between 'barrister partisanship' and 'solicitor partisanship' is in reality.

The same respondent indicated that all available defences and information should be presented to the client, regardless of the opinions of others:

"I've been threatened with [being] thrown out of police stations because I wouldn't kowtow to police officers when they didn't want me to provide clients [with] information. They simply don't understand my obligation is to my client, not them." - Respondent S6

Another respondent gave an example of, perhaps, the most personal form of sacrifice a criminal defence lawyer should make for a client. Discussing the use of tactics that displeased court, the respondent said that "often judges use the threat of costs to make you back down . . . so [in] my view, fearless representation includes fearlessness in relation to your own wallet" (Respondent B1). Some respondents also seemed to support a robust and vigorous approach to questioning witnesses. One described the goal of the defence lawyer as being to "try and make [a witness] look like [they] couldn't be believed" and even if it is only "one or two bits of . . . evidence . . . if you can make them big enough, they can throw doubt on the rest of it." (Respondent B3). This seems to reflect the dogged and thorough approach embodied in theory, where a defence lawyer takes advantage of every point that might benefit the client. In some situations, a vulnerable witness may face intrusive or embarrassing examination by the defence lawyer and this may be frowned upon by the court or the wider public. One respondent argued that:

"Judges may plenty of times not wish me to pursue matters in the way that [the] client requires [me] to . . . judges may find it deeply unpalatable to watch a witness have to answer those questions, but . . . you've still got to challenge it." - Respondent B2

Another respondent seemed to concur, bluntly stating that, when questioning a witness, "[i]f you've got no baggage yourself then you can be as rude as you want in a way, subject to being told off by the court" (Respondent S7). These statements seem to be consummate examples of theoretical partisanship - defending the client's interests without regard for the opinions of or consequences to other parties.

However, others seemed to describe a role where one-sided and vigorous define of the

client was either not possible or not desirable. These responses seemed to reflect formal conceptions of the role, rather than the 'zealous advocate' model. Whilst discussing whether a defence lawyer should reveal tactics or favourable information to the court, some respondents felt that they should keep their cards close to their chest, but were required to strike a balance in doing so. One stated, "[m]y own tactical preference is to withhold as much as I can" but in a manner that was "commensurate with my duties of frankness and candour" (Respondent B4). This suggests significant limitations on what a defence lawyer can hide for the benefit of a client, illustrating a role where partisanship is tempered by other obligations. In a similar vein, another respondent declared, "[w]e're not allowed to lie or mislead the court, but we don't have to be totally upfront and frank with them" (Respondent A2), while another felt that "sometimes it seems . . . very appropriate to be very upfront about a defence", although "there are occasions where you want to be as vague as possible" (Respondent S3). The respondents' answers suggest that the role of the modern partisan defence advocate lies somewhere between theoretical and formal conceptions of the principle. The responses indicate that the theoretical conception of uncooperative and ruthless advocacy in pursuit of victory has been altered by modern regulation. However, the responses do suggest that core elements of theory remain - fearlessness in the face of a hostile court, vigorous questioning of witnesses, exploitation of loopholes and, to a degree, hiding information from the court. However, these aspects must be balanced with honesty, openness and cooperation.

2.2 The Principle of Detachment⁹⁴⁶

2.2.1 Responses to Direct Questioning

In responding to direct questions about their role, only two respondents made any reference to the principle of detachment. One respondent stated that "[y]ou're there as your client's mouthpiece" (Respondent B2). This is a common theoretical characterisation of the criminal defence lawyer. A 'mouthpiece' implies that the lawyer acts as a spokesperson for the defendant, rather than funnelling their desires and interests through a personal filter. Another respondent seemed to reject what he saw as the 'pre-judging' of defendants in criminal proceedings:

⁹⁴⁶ See Chapter 2, 3.1.2 and Chapter 3, section 2.2 for definitions and discussion of the principle of detachment.

“‘Victim’ is something the police and CPS have brought into our legal system, ‘cos it’s so emotive. It’s a ‘victim’ – in other words, you’ve already decided that there’s somebody who has suffered at the hands of your client . . . so I prefer to call them complainants.” - Respondent S8

This seems to adhere to the principle that the lawyer should remain detached and not judge their client’s guilt or innocence in advance of a trial, regardless of the accusations they face. Additionally, the respondent suggests that the involvement of emotions in the criminal justice process is undesirable, by referring to the use of the word victim as ‘emotive’.

In questioning the respondents directly, I refrained from using phrases such as ‘neutrality’ or ‘detachment’ unless they were prompted or clearly pertinent to what a respondent was saying; this was to avoid leading respondents to answers. Although respondents made little mention of the principle of detachment in response to direct questioning, it is not necessarily because it is not part of their role. The obligation to remain detached is perhaps a less obvious duty when exploring the role a defence lawyer plays. Most answers to direct questions made reference to the principles of partisanship and procedural justice – the primary examples of the duties to the client and the court respectively. Without leading them to it directly, it might be argued that respondents were likely to describe more obvious and exciting aspects of their role than the principle of detachment. Alternatively, it may be that the principle of detachment is such a basic element of criminal defence, that respondents simply took it as read.

2.2.2 Responses to Vignettes

Detachment is arguably the most controversial of the theoretical obligations incumbent on defence lawyers as it effectively requires them to turn a blind eye. The duty to remain neutral and professional when defending those who might be considered morally reprehensible by the wider public is a major source of criticism from many outside of the legal world.

One respondent perfectly encapsulated this:

"You get asked this a lot as a criminal defence solicitor, 'How can you represent somebody who's done all these heinous crimes?' and the other one is 'How can you represent somebody who you know is guilty?'" - Respondent S6

The responses of those interviewed seemed to reflect both the theoretical and formal conceptions of the principle, suggesting a unity between theory, regulation and practice. One respondent said, "[w]e do not refuse, on moral grounds or on judgmental grounds, to represent anybody" (Respondent S4), whilst another asserted, "you never know that [a client] is guilty . . . unless they tell you, in which case you know your options become more limited" (Respondent S6). These answers suggest that morality or pre-judgment of 'guilt' do not enter into decisions about accepting clients. If a client does confess guilt, the defence lawyer should continue to defend him or her within the 'limitations' alluded to above.⁹⁴⁷ One respondent felt that when defendants are accused of offences which are "unpleasant, unsavoury and . . . unpopular with the general public . . . it's more important for [them] to be represented, to show that the process is working properly" (Respondent S2). Another joked, "we've got all sorts of cases and all sorts of clients that if we could give back we would (laughs)" (Respondent B3), perhaps indicating the strength of the obligation - it overrides personal preference.

For barristers, choosing clients appears straightforward. One respondent explained, "the cab-rank principle applies. If you hold yourself out as being a criminal practitioner, then you are available . . . to defend those who need defending" (Respondent B4). Another respondent stated that the cab-rank rule meant that "the only realistic things that I should be taking into consideration are . . . basically, my diary availability . . . [and] whether my professional capabilities are sufficient" (Respondent B1). Another respondent simply said, "I'm briefed to represent [a client]. End of" (Respondent B2). Formal regulation states that solicitors are "generally free"⁹⁴⁸ to choose their clients, unlike barristers. As discussed above, theory does not seem to make this distinction and neither did the respondents in this sample. One said, "[n]o solicitor is bound to act for anybody but most solicitors do act for anybody in the sense that it's not a matter for us

⁹⁴⁷ That is, the criminal defence lawyer cannot falsely assert the innocence of the client, for this would be 'actively' misleading the court. See Rule 11, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁹⁴⁸ *Ibid.*, Rule 2.01(1).

to start picking and choosing" (Respondent S4). Similarly, another stated, "[w]e can't pick and choose the offences and the clients that we represent. I would say we have a duty to . . . represent anybody who asks for representation" (Respondent S3). Another respondent, a solicitor, appeared to dismiss any distinction in practice between solicitors and barristers at all:

"Most barristers work on what they call the . . . taxi-rank rule, which is that if I'm next in line then I take the case whether I like the client or not . . . and I think we have to work on very much the same sort of principle." - Respondent S8

These responses indicate that, in practice, the principle of detachment operates in a similar way for both barristers and solicitors.

One element of the principle of detachment that was mentioned several times was the requirement to remove all personal feeling and emotion from representation. One respondent said, "my role . . . in an adversarial system is to put my client's defence to the complainant and I have to be objective about it; I can't become passionate or emotional" (Respondent S6). It would seem that the lawyer cannot become attached or personally invested in a case, regardless of the vulnerability of a complainant or the ignobility of a defendant. The same respondent explained that "you get on with it as a professional and you represent them." (Respondent S6). Another respondent made it plain that his personal opinions and thoughts were irrelevant, stating, "I never say 'I think'" (Respondent B1). One respondent seemed to place emotional detachment and personal neutrality at the centre of his role as a defence lawyer:

"They say that the best lawyer is the one who has no emotion at all. That's . . . one of the duties of a lawyer to his client, to . . . take all emotion out of it, because emotional people can make some very silly decisions and if you . . . don't have the emotion there . . . then [you] can make a decision that is totally emotionless and therefore based on the facts." - Respondent S8

Another respondent underlined how crucial personal detachment is to effective criminal defence work:

"Say, for example, the barrister who [a brief] was sent to was somebody who had personal experience of quite hideous domestic violence . . . if they know that they're not going to be able to deal objectively [with] the client's best interest . . . it would really be a question of . . . being honest with yourself, are you able to, you know, fearlessly represent this client and give them the best service and if you can't then you shouldn't take the brief." - Respondent B3

Although this seems to contradict the principle that a defence lawyer should accept any client, it in fact represents the consummate example of practical, professional detachment. If the defence lawyer does not *realistically* believe they can overcome deep-seated personal feelings and provide a neutral, zealous defence of their client, they should sacrifice their opportunity to be paid. In other words, the duty to the client comes first.

2.3 The Principle of Confidentiality⁹⁴⁹

2.3.1 Responses to Direct Questioning

Similarly to the principle of detachment, only a few respondents made explicit mention of the duty of confidentiality when questioned directly about their role. In response to being asked what obligations they owed to their clients, three respondents said the following:

"Act with confidentiality." - Respondent S7

"I've got an obligation of confidentiality to clients, which exists even after I've finished dealing with them." - Respondent S9

"You have an obligation to . . . keep what [the client] tells you private in most circumstances." - Respondent S8

All of these statements are fairly simple and self-explanatory, reflecting both theoretical and formal conceptions of the principle. The second quotation highlights that the duty of confidentiality does not cease once the lawyer-client relationship is terminated. The theoretical obligation is designed to "encourage clients to give their lawyers information";⁹⁵⁰ if the client knew that their lawyer could simply reveal secrets once the formal criminal process ended, then he or she would most likely say nothing in the first place and as such the duty "continues after the final disposition of the case."⁹⁵¹ Formal regulation also recognises that the obligation extends beyond the immediate lawyer-client relationship, thus aligning with the respondent's statement above. The Bar Code says, "[w]hether or not the relation of counsel and client continues, a barrister must preserve . . . confidentiality",⁹⁵² while the Solicitors' Code states that the duty applies to

⁹⁴⁹ See Chapter 2, section 3.1.3 and Chapter 3, 2.3 for definitions and discussion of the principle of confidentiality.

⁹⁵⁰ 'The Adversary System Excuse' by David Luban, in Abel R. (1997) *Lawyers: A Critical Reader* – New York: New Press, 5.

⁹⁵¹ Gold G. (1965) *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer* – 14 Clev. Marshall L. Rev., 66.

⁹⁵² [702], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

"clients and former clients".⁹⁵³ The Public Defender Service Code of Conduct is clearest, asserting that the duty of confidentiality is "an ongoing duty that does not cease once employment has terminated".⁹⁵⁴ The answer of the third respondent above also accurately reflects theoretical and formal conceptions of confidentiality, inferring that the principle is not absolute. The low number of references to the duty of confidentiality does not necessarily indicate that respondents did not consider it part of their practical role. Again, this may be attributable to it being so basic an element of the role; respondents may have chosen to focus on more prominent features of their job. If we return to the idea of providing 'public accounts' (explored in Chapter 5), it is possible that respondents identified more exciting and controversial aspects of their role as defining it. The respondents may also have assumed knowledge on my part. Alternatively, the breadth of the direct questions posed or the size of the small sample may have contributed to the limited references to the duty.

2.3.2 Responses to Vignettes

Most responses that made reference to the principle of confidentiality were unambiguous, reflecting the basic theoretical obligation that defence lawyers must guard private communications with a client. One respondent said that defence lawyers "cannot be used, if you like, by the courts to make [a] client's situation worse and anything he does tell me is privileged" (Respondent S6), while another explained that "[a]lthough we have professional obligations to the court . . . that doesn't require us to spill the beans . . . as to everything we know about everything" (Respondent A2). Similarly, another respondent said, "I don't think you have a duty to . . . show your hand to either the court or the CPS" (Respondent S8). All of these respondents emphasised the primacy of secrecy in their professional relationship with the client. However, another respondent described the duty of confidentiality in a different way:

"Your job is to pass on relevant information in a way that assists the client and does not mislead the court." - Respondent S7

This response seems to couch the duty in terms of what you *must* divulge, rather than what you *must not*. This response suggests that any information that is revealed has to

⁹⁵³ Rule 4.01, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.**

⁹⁵⁴ Rule 5.1, page 5, Public Defender Service Code of Conduct – London: The Stationery Office.

aid the defendant, but without deceiving the court. This appears to be a more negative interpretation of the duty, implicitly accepting that revelation of information will be required to some degree. The other respondents seemed to provide more positive interpretations, starting with the assumption that the defence lawyer is obliged to protect client secrets and withhold information.

2.4 The Principle of Procedural Justice⁹⁵⁵

2.4.1 Responses to Direct Questioning

The respondents referred several times to this principle when questioned about their obligations to the court and the prosecution. Respondents said they had to "[e]nsure the swift progress of justice" (Respondent S8) and "facilitate the administration of justice" (Respondent S2), words that seem to reflect both theoretical and formal conceptions. Another respondent said that the duty to the court represented the "primary obligation, and one that, when in conflict with any duty to the lay client, takes precedence" (Respondent B1). Respondents expressed divergent opinions about their position as an 'officer of the court'. An accredited representative claimed to be a "quasi court officer" meaning that the "court takes precedence over everything else" (Respondent A2), while a solicitor simply stated, "I'm an officer of the court, so I have a duty to the court" (Respondent S6). In contrast, a barrister said:

"I'm not, as I understand it, necessarily an officer of the court; I merely have a right of audience, whereas solicitors, I think, are officers of the court." - Respondent B1

The significance of this distinction is debatable. Whether it means barristers are less obliged to help administer justice than solicitors is questionable, particularly since neither formal nor theoretical conceptions seem to explicitly describe different standards of 'commitment' for the two types of lawyer. As discussed earlier, solicitors can now acquire higher rights of audience and defend clients in the Crown Court in the same way as barristers, suggesting that there is little practical difference between the two in terms of their duty to the court. Accredited representatives do not have such rights of

⁹⁵⁵ See Chapter 2, section 3.2.1 and Chapter 3, section 3.1 for definitions and discussion of the principle of procedural justice.

audience although they can perform the functions of a solicitor in the Magistrates' Court. The description of a 'quasi' officer role is thus confusing as it insinuates a lesser duty than solicitors, even though large parts of their jobs overlap. Although accepting some form of obligation to procedural justice, some respondents expressed mixed views about the extent of their duty as an *amicus curiae*. One respondent unenthusiastically said, "[m]y duty, I suppose . . . to the court [is] to be . . . actively involved in case management" (Respondent S6).

Another respondent seemed to present a contrasting view, stating:

"My obligation to the court . . . is to properly represent my client within the rules." - Respondent B3

This represents an interesting approach. It recognises, primarily, that the best way to serve the court is to defend the client. In a sense, this exhibits a true commitment to procedural justice; it endorses the validity of adversarialism, which pits defence against prosecution in order to produce a fair and balanced verdict. In this context, too active a role in case management would conflict with the essential tenets of adversarial procedure. As commented earlier, formal regulation seems to describe a more active version of the principle of procedural justice than the theoretical model. The above response therefore seems more akin to the 'zealous advocate' model of criminal defence, where counsel help to progress justice but whose primary method of participation is still the defence of their clients' interests. One respondent seemed to view active engagement, rather than deliberate truculence, as beneficial to the client:

"My obligation is to the client, but the client's best interests, in my opinion, [are] usually served by cooperating with the prosecution and the police rather than being confrontational with them, unless necessary." - Respondent A2

Another respondent took a slightly different view, claiming that "[y]ou are obliged to be as cooperative as you can be, within your client's instructions" (Respondent S3). This statement seems to present a somewhat cautious attitude toward active engagement, attaching the important caveat, 'within your client's instructions'. Others seemed to outwardly reject any duty to cooperate, particularly in relation to the prosecution. One respondent described the obligations to them as being "very limited", and added, "I will

always be very cautious whatever I say to the prosecution" (Respondent B2). Three others stated that they did not have any obligations to the prosecution (Respondents A3, S9 and A1), particularly since they were "the other party" (Respondent A1). Respondents also expressed different views about the duty of the defence to disclose information to the prosecution and help narrow the issues in the case. One respondent accepted there had been a shift towards this, saying, "[t]here are a lot of changes at the moment with the case management requirements which means we have to disclose more of our defence than we would normally have done . . . before that came in" (Respondent S5). In contrast, another respondent said that, "[y]ou are obliged to be as candid as you need to be . . . to ensure that disclosure is properly considered" (Respondent B4). The former statement seems to represent a philosophical acceptance that the defence is now expected to openly share information with the prosecution and the court. The latter statement represents a more limited interpretation, where any information that can be reasonably withheld will be.

As mentioned earlier, formal regulation reflecting the principle of procedural justice seems broader and more extensive than the theoretical conception of the duty. An example of this is CJSSS. Respondents seemed to recognise the significance of the policy in their practical role; one said, "[t]here's a greater emphasis on making progress on cases basically . . . rather than unnecessary delay" (Respondent S3), while another felt that CJSSS was "designed to rush certain cases through the courts" (Respondent S9). The responses gave the impression that the undoubted presence of procedural justice, primarily in the form of CJSSS, was not entirely welcome. One respondent bluntly stated that he was "not a big fan of CJSSS" and that he was "not sure it's designed . . . to shall we say acquit the innocent as much as it is to convict the . . . apparently guilty, but that's a personal view" (Respondent S9). He added that there were "occasions where . . . defendants are put at a disadvantage as a result of [CJSSS] . . . because . . . issues perhaps are not explored as . . . fully as they could have been had more time been given to investigate it" (Respondent S9). The pressure to implement fast and efficient justice therefore has implications for the defence lawyer's other obligations, something which will be explored further in the next chapter. The respondents appeared to acknowledge a core duty to cooperate with the court and progress cases. They also seemed to concede that the obligation to procedural justice is more far-reaching in the light of modern legislation and regulation, although with a degree of cynicism and resistance from some. One respondent neatly summarised the

prevailing attitude of the sample:

"The obligation to the court may have to override the obligations to the client, but the approach to the case, the approach to advice and the tactical approach to the case will always be . . . taken with the client's interests primarily at stake." - Respondent B2

2.4.2 Responses to vignettes

In reaction to the vignettes, respondents seemed to recognise that their practical role involved a significant duty to aid in the administration of justice. One said, "[t]here is an obligation under the Criminal Procedure Rules to ensure the smooth running of the court . . . and I think you're obliged to assist the court with telling them what the issues in the case are" (Respondent S2), while another felt that it was the criminal defence lawyer's duty to ensure that "justice does move . . . swiftly on and the trial process is preserved" (Respondent B4). Some appeared to identify an institutional change in attitude towards the defence and its role in promoting procedural justice. One respondent said that "[b]y and large, the court won't let the defence profit from simply playing games with the system"(Respondent S4). Another stated:

"The procedure rules now make it clear that [the criminal process is] not supposed to be a game and that the purpose of criminal proceedings is to convict the guilty and acquit the innocent, not to allow . . . tactical considerations to outweigh those interests." - Respondent B2

The opinions above suggest that the promotion of an efficient and effective process is a prominent part of the defence lawyer's day-to-day role. The elimination of 'game-playing' has significant implications for the defendant and the lawyer, specifically in relation to disclosure and ambush defences. One respondent felt that defence disclosure allowed the trial to be "reduced to its narrowest point of focus" (Respondent S2). Views on how positive this is were mixed. One respondent was "all for" (Respondent S6) narrowing the issues in a trial, while another said "[the] earlier the issues are put out there, the better prepared all parties can be . . . [and] that's actually in favour of the defendant" (Respondent A1). However, another believed that the modern duty of defence disclosure had caused "all sorts of inroads" (Respondent B3) into the traditional

burden of proof – that is, that the prosecution have to prove their case against the defendant, who is free from self-incrimination. The same respondent thought the defence statement had been "extended well beyond what was originally envisaged" (Respondent B3), while another believed that the defence lawyer now had an obligation to reveal information to avoid "wasting people's time . . . that's the great sin these days" (Respondent A2).

When discussing ambush defences, the respondents were consistent in their answers - in modern practice, they no longer have a place. As one respondent put it: "[t]he game's changed" (Respondent S1). It would seem that defence lawyers can no longer "exploit a loophole or jump up and say 'you've forgotten to say this therefore we win and you lose'" (Respondent S4). Several respondents identified the CPR as playing a key role in shaping this aspect of modern criminal defence work. One stated that as a result of the rules, "the ambush defence stuff is theoretically undermined fatally" (Respondent B1), while another said, "[t]hat aspect of defence tactics has . . . since the procedure rules been taken out of the defence box of tools" (Respondent B2). Other respondents referred to the burgeoning body of case law on the subject of ambush defences, one stating, "there are any number of authorities now which frown upon that" (Respondent B4). Another elaborated:

"[A] number of cases that have come out of the Court of Appeal say that defendants and solicitors will not be rewarded for making ambush points or keeping the powder dry . . ." - Respondent S4

As a result, the day-to-day attitude of the courts seems to have hammered a final nail into the coffin of the ambush defence. One respondent stated that:

"[T]here are District Judges who tend to be quite aggressive . . . in enforcing the way they think things should be done. A lot of them don't take very kindly to ambush defences. The consequence of that could potentially be a costs order against me as an individual . . ." - Respondent B1

Another confirmed this, saying that there were now "penalties and costs for ambushing the Crown on the day of trial . . . which, of course, in the old days used to be part of the fun!" (Respondent S9). Joking aside, the use of the phrase 'the old days' implies a

distinct expansion in the scope of procedural justice in recent years. The fact the CPR and key cases are also recent is no coincidence, and supports suggestions by the respondents that they have been integral in the decline of ambush defences. More broadly, this indicates that the modern role of the defence lawyer is different to that of the past.

A few respondents seemed supportive of the duties of case management, defence cooperation and aiding procedural fairness. Discussing the use of ambushes, one respondent said that they made defence lawyers "look like [they're] being difficult for difficult's sake . . . it just makes you look like you haven't got a defence, [that] you're just trying to be devious" (Respondent S7). Another seemed to think that ambushes were justifiable in the case of "fundamental defects in the Crown's case", but that "there is a difference between [fundamental defects and] simple, procedural defects which are essentially remediable" (Respondent B4). However, some respondents, whilst accepting the role and extent of the principle of procedural justice, questioned its necessity and fairness. One respondent said, "[i]n terms of case management, we are very often being utilised as a club with which to batter our clients" (Respondent S6). Another respondent felt that the obligation was applied unequally, stating that "the prosecution routinely take points late, serve notices of additional evidence during a trial . . . adapt their case constantly . . . [and] there's never any suggestion that those prosecuting counsel are in the wrong" (Respondent B1). Both statements insinuate that the principle of procedural justice is not so much a tool for improving the fairness and efficiency of proceedings, but a weapon for suppressing the defence. One of the aforementioned respondents continued:

"[T]here is a conflict there, and the Law Society hasn't really . . . provided us with up to date guidance [as] to how we actually deal with that." - Respondent S6

This seems to confirm the conclusions of Chapter 4, which suggested that formal regulation does not adequately resolve the conflicts between the different duties owed by defence lawyers.

2.5 The Principle of Truth-Seeking⁹⁵⁶

2.5.1 Responses to Direct Questioning

At the core of the principle of truth-seeking is the idea that the criminal justice process is designed to acquit the innocent and convict the guilty, a duty which the 'zealous advocate' model and formal regulation (notably the CPR) extend to the defence lawyer. When responding to direct questioning, respondents seemed to doubt the desirability and logic of such an obligation. This was summarised in no uncertain terms by one respondent:

"The overriding objective of the Criminal Procedure Rules . . . is to convict the guilty and acquit the innocent, and all parties are under an obligation to cooperate with that. So in those circumstances, theoretically, as a defence advocate, if the defendant is guilty, I should work under the overriding objective to assist the court to convict the client. Which is a bit fucked up really isn't it?" - Respondent B1

The key word above is 'theoretically', which insinuates a potential gap between what defence lawyers are supposed to do and what happens in practice. Where a lawyer protects and defends a defendant he knows to be 'guilty', the principle of truth-seeking supposedly requires him or her to help the court in the pursuit of a conviction. However, arguably the defence lawyer can only know a defendant is guilty in the event of a confession. Outside of this, does the duty extend, in practice, to strong or even moderate suspicion of guilt? If the defence lawyer genuinely believes in the client's innocence, is it then, and only then, the defence lawyer's job to argue for an acquittal?

⁹⁵⁶ See Chapter 2, section 3.2.2 and Chapter 3, section 3.2 for definitions and discussion of the principle of truth-seeking.

One respondent did not think so, believing that defending the guilty helped achieve the ultimate objective:

"If anything, your obligation is to argue . . . your defence case even more vociferously and that really does demonstrate the objective fulfilled, because the prosecution have managed to persuade a jury of the guilt of somebody in the face of a very well fought and hard pressed defence." - Respondent B4

In essence, this respondent is saying that by defending the guilty, one ensures that any resultant conviction is legitimised. As has been discussed in previous chapters, the 'acquit the innocent, convict the guilty' element of truth-seeking creates ethical conflicts. One respondent, however, seemed to imply that the obligation is hollow and merely designed to make defence work harder:

"I don't think there's very much emphasis on acquitting the innocent, and I think that has an effect on defence lawyers because we obviously occasionally do believe our clients to be innocent . . . [I]t becomes frustrating and difficult to continue doing the job when you feel barriers are being put up to a fair trial." - Respondent S2

Other aspects of the principle of truth-seeking hold a more certain place in practical conceptions of the role. Six respondents said they were "not to mislead the court" (Respondents A1, B4, B3, S2, S9 and S7), a core feature of their duty to seek the truth and one they are "taught from a very early stage" (Respondent B4). Others used more explicit language to describe the obligation, stating that they had "an obligation to . . . tell the truth at all times" (Respondent S9), a duty "always to be truthful" (Respondent S2) and "to be completely honest and frank with the court" (Respondent B4). One respondent subtly elaborated on the duty "not to mislead", saying, "I've got a duty not to actively mislead the court . . . [and] I certainly wouldn't lie to the court" (Respondent S5). This openly recognises the difference between 'passively' and 'actively' misleading the court, as discussed earlier. All of the statements above reflect the primary characteristic of truth-seeking, which is not to actively mislead or lie to the court – but what about passively misleading the court? Little mention was made of this in response to direct questioning. However, two respondents seemed to believe that passively misleading the court was acceptable in practice.

One respondent made the distinction clear:

"I mustn't actively seek to mislead [the court] nor put forward information I know to be false . . . but I am entitled to advance my client's instructions on occasion . . . without saying something to the court and it being a matter for them whether they ask me or not." - Respondent S4

The same respondent continued, "[i]t's no part of my role, with or without the Criminal Procedure Rules, to tell the court things that I may know" (Respondent S4). These responses indicate limitations to the obligation to seek the truth, but it should be remembered that direct questioning is without context or conflict. General responses to the vignettes and, more crucially, the conflict points more thoroughly test the validity of tactical silence in a practical context, aiding the exploration of practical conceptions of the principle.

2.5.2 Responses to Vignettes

During the vignette section of the interviews, the respondents discussed the principle of truth-seeking extensively. Some respondents were divided on whether acquitting the innocent and convicting the guilty formed a part of their role. One recognised the rationale and utility of such an obligation, citing a practical example to justify it – the use of 'loopholes' to secure acquittals:

"The public would say that that is an obviously guilty person who's got away because of an issue, a loophole, that has no relevance to the question of guilt but is simply a procedural mishap." - Respondent B2

This implies that using a loophole evades the truth and that those the system is designed to serve – the public – reject it.

The same respondent also reinforced the idea that the defence lawyer's role should focus on searching for the truth, rather than pursuing irrelevant issues, giving the example of defendants harbouring ulterior motives for pleading their case:

"Take the conduct in a case where the client has admitted his guilt of the offence, but wants to conduct the defence in order to advertise a political cause. That's not appropriate to my role." - Respondent B2

This indicates that the defence lawyer's practical role is not to slavishly serve the whims of a client, but to pursue the truth by dealing with facts. One would assume the same principle would apply if a defendant sought a defence in order to humiliate a witness or promote a religious faith. However, others did not believe it was their role to judge the 'truth'. One respondent stated, "[i]f my client says they are not guilty, then they're entitled to have their day in court as far as I'm concerned . . . I don't think it's for me as a lawyer to . . . try to in any way . . . influence their thinking" (Respondent S9). Another respondent echoed this, asserting, "I don't think as the defence you are searching for the truth; burden of proof's on the prosecution . . . [the] defendant doesn't have to prove anything" (Respondent B3). This represents a rather blunt assessment of the place of truth-seeking in the practical role of the adversarial defence lawyer; the burden of proof is not a shared responsibility.

Responses alluding to another element of truth-seeking – the duty not to mislead the court – seemed to reflect both theoretical and formal conceptions. One respondent considered it a core duty, saying "[t]he duty to the court . . . is summed up very succinctly – it's that you can't go into court and lie on behalf of the client" (Respondent S8). He also considered the obligation to engage in "facilitation of the criminal process" (in other words, procedural justice) to be "a fairly modern thing", while being "honest before the face of the court" was "far more ancient" (Respondent S8). The difference between actively and passively misleading the court was highlighted by one respondent, who explained, "I'm entitled to allow the court to labour under a misapprehension" (Respondent B1). Several respondents reported that some clients misunderstood the truth-seeking aspect of their role, and did not understand the difference between actively and passively misleading the court. One respondent outlined that she would tell a client, "I can't lie on your behalf, it's not my job" (Respondent B3). She elaborated, saying that "most clients understand that . . . [but]

you get the occasional one who thinks you'll say anything in order to get them off . . . you have to explain quite clearly what your role is" (Respondent B3). She later gave a telling example:

"I had one client . . . sort of sat there and I went through it and he admitted it all to me, and then he said 'Yeah, but that's not what we're saying in court' and I just said, 'Hmm, I'm not sure you understand what we're doing here' and he . . . turned around to his solicitor and said 'Get me a fucking proper barrister'." - Respondent B3

This aspect of truth-seeking therefore appears to be well-defined in theoretical, formal and practical conceptions of the role. Deliberately misleading or lying to the court has no place in the defence lawyer's role.

Another dimension of the principle of truth-seeking, developed significantly in formal regulation, is the duty to correct errors in the prosecution case.⁹⁵⁷ One might consider this and prohibition of ambush defences as two sides of the same coin. Respondents gave mixed reactions; some seemed to categorically reject the concept. One said, "I don't think you have an obligation to the court or the prosecution to make sure that their case is right" (Respondent A3), while another dismissed any duty to "prove their case for them or highlight any . . . errors in their case" (Respondent S9). The same respondent did not accept that the changes ushered in by modern regulation meant that the defence role had changed in this respect, saying "even with the Criminal Procedure Rules . . . if they make a mistake, that is unfortunately an issue for them" (Respondent S9). In contrast, others did seem to recognise the duty as part of the role, but were critical of the practical difficulties it created for defence lawyers. One respondent commented that defence lawyers "now appear to have been given a duty to assist the prosecution in prosecuting our clients . . . and it's quite bizarre but it's there" (Respondent S2). Another made a near-identical observation, stating that, "[t]he rules have changed slightly in that the Government tell us that if we see a glaring hole in the prosecution case, we should in all reality tell the prosecution about it so they can fill it, which doesn't seem to me to be quite fair in an adversarial judicial system" (Respondent S8). One respondent felt it restricted the ability of defence lawyers to do their job by "putting [them] in a procedural strait-jacket" (Respondent S5), while another felt it

⁹⁵⁷ See *R v. Gleeson* [2004] 1 Cr. App. R. 29.

unburdened the prosecution of their responsibilities:

"You should be able to not point out glaring errors, bearing in mind there are lawyers on the other side who should be spotting those errors. I think it's their duty to do that and our duty to do our side of it, and if they get it wrong then that's their responsibility. But that's definitely changed quite substantially in the last few years." - Respondent S7

One respondent found it disconcerting that the court, as exemplified in *R v. Gleeson*, could weigh in to censure the defence for not fulfilling this duty:

"The prosecution are presenting the case, they've got trained lawyers, they should be spotting those things. Is it a matter for the court to enter into it, effectively on the side of the prosecution? I'm really not sure about that one at all." - Respondent S5

Only one respondent seemed to openly accept and approve of this aspect of the principle of truth-seeking. When asked whether the judicial system was a level playing field, he said:

"You can have people who are seriously outgunned on either side . . . I'm very concerned that I can take a tactical advantage that is not fair to the prosecution witnesses . . . simply by virtue of the ineptitude of my opponent. That should be evened out by the judicial process to a great extent." - Respondent B1

Respondents were also sceptical about the obligation to share disadvantageous authorities and evidence with the prosecution and court, as part of their duty to seek the truth. One respondent said, "I don't think we've reached the stage in this country, and it may well come . . . where we are duty-bound to put everything in front of the court whether it be advantageous to our client or not" (Respondent S8). The same respondent summarised the essential problem with such an obligation, saying it would create a "strange clash of interests between your duty to your client and your duty to the court" (Respondent S8). Evidence of this kind might include previous convictions. One respondent said, "I dare say you would want to keep that away from the jury . . . whether to let a client's form go in is always a tricky one" (Respondent A2).

2.6 The Principle of Morality⁹⁵⁸

2.6.1 Responses to Direct Questioning

Few references were made to any obligation of morality in response to direct questioning, but respondents did discuss duties they owed to victims, or complainants. When asked directly, most respondents did not think the defence lawyer owed any "direct obligation" (Respondent B3) to complainants or prosecution witnesses. However, one respondent believed that a defence lawyer should not go to any length, however unethical, to secure an advantage for the client at a complainant's expense:

"If a client instructed me to cross-examine a victim by saying that she was 'an effing bitch and everyone knew she'd slept with half the people in the road', I would . . . probably refuse to do it on the basis that it would be completely wrong or disconnected from the reality of the case. So, on some levels it may be a professional decision that I'm simply not prepared to run a case like that . . . it would be positively conspiring to do something . . . more broadly wrong and illegal anyway." - Respondent S4

Other respondents described more restrained versions of this obligation, saying that defence lawyers should "treat [complainants] with courtesy and dignity" (Respondent S2), defend as "civilly . . . and politely as circumstances allow" (Respondent B4) and display "common decency" (Respondent S4). Some respondents felt that defending their client within the parameters of the criminal justice framework fulfilled any ethical duties. One said the only duty to the complainant was in the "wider picture of the criminal justice system" (Respondent A1), while another described a "moral obligation" to "abide by the rules" (Respondent B3). However, as regards complainants and prosecution witnesses, most respondents described their role as having "[n]o duty whatsoever . . . save the procedural aspects" (Respondent B1), and that to impose any would be "widening the role too far" (Respondent A1).

None of this necessarily indicates that the respondents, or criminal defence lawyers

⁹⁵⁸ See Chapter 2, section 3.3.1 and Chapter 3, section 4.1 for definitions and discussion of the principle of morality.

generally, approve of treating complainants or witnesses poorly. Rather, one respondent described *choosing* to behave ethically towards victims and witnesses of crime because, ultimately, it advances the client's cause, or at least does not damage it:

"[The] jury will . . . unless justified, react I think generally against any of the old fashioned bullying that used to be commonplace at the Bar." - Respondent B2

The same respondent continued, "[j]uries are less willing to accept and tolerate you being pompous or patronising or shouting down witnesses and the Judges reflect the change in public opinion . . . requiring actually a different standard of behaviour in court" (Respondent B2). It would seem that behaving in an ethical and respectful manner was "not an obligation, but failing to do that doesn't assist the client" (Respondent A2).

2.6.2 Responses to Vignettes

The responses to the vignettes produced only a few statements reflecting duties of morality in relation to both third parties and defendants. One respondent said, "[t]he obligation I have to the complainant is to ask fair questions in an appropriate way" (Respondent B4), implying that the defence lawyer should avoid irrelevant and unnecessarily distressing questions, even if they might lead to some advantage for their client. Another respondent, using a rape case as an example, demonstrated a similar approach to a potentially sensitive and difficult cross-examination:

"In terms of representing a case . . . like that, I will do it on a professional basis. It doesn't necessarily mean that I will allow the client to effectively trample through the evidence . . . part of my job is persuading the client . . . that if the evidence is there, that it is appropriate not to go through the trial process . . . [and] spare the person cross-examination . . . I think you've got to have a responsible approach" - Respondent S5

This statement lends some support to the notion that, in practice, criminal defence lawyers have a duty to consider the complainant when presenting their client's case. In this instance, it is to be 'responsible' in handling the evidence and honestly assess the necessity of cross-examination. Some respondents recognised some degree of moral

obligation in performing their role, but usually counter-balanced this with a more client-oriented statement. One respondent said, "[y]ou're not there just to haul [complainants] over the coals for no reason", but conceded that "if [the] client insists on . . . a slightly more aggressive strategy then of course that might happen" (Respondent S9). Similarly, another respondent stated, "[t]he client can't make me do what I consider unethical", but also said, "I can't allow my own sensitivity to outweigh my duty to the client" (Respondent B2).

One respondent believed that sometimes she could be frank with a client about his or her behaviour:

"There are clients that we get to know extremely well . . . if you know them, you might say 'I can't believe you've done that again' or . . . 'you keep getting yourself into this mess, what are you doing?' In that way, there are occasions in which . . . you would pass an opinion on somebody, that you have known for a while." – Respondent S7

Such conduct does reflect elements of the principle of morality. It suggests that defence lawyers can advise criminal clients about their personal conduct in almost a parental fashion. However, it is doubtful that this represents a concrete obligation. First, it is virtually impossible to regulate how defence lawyers conduct their private meetings with clients, in or out of court. Second, defence lawyers would most likely resent such intrusive regulation of their work. Third, it is unlikely that a large number of criminal clients would appreciate being scolded by a figure who is employed, primarily, to protect them.⁹⁵⁹ Other respondents outlined what might be termed a 'watered down' obligation of morality. This was, in essence, an obligation to exhibit basic levels of respect for complainants and prosecution witnesses. One respondent stated that defence lawyers "don't have a duty to the witness other than in terms of common decency and not being deliberately unreasonable" (Respondent S4), while another felt that, "[y]ou must not badger or harass a witness" and that defence lawyers should "treat everybody with civility and respect" (Respondent S6).

⁹⁵⁹ The principle of morality obviously creates conflicts with the principle of partisanship. This will be discussed in Chapter 7.

One respondent made it clear that any duty to behave ethically had boundaries:

"[The] only . . . obligation [is] to treat her as courteously as possible. That's the only obligation I think you have to the complainant, because . . . if you were to go further than that and start bending over backwards to be good to the complainant . . . you must be disadvantaging your own client and you shouldn't be doing that." – Respondent S8

Indeed, another respondent echoed this. Whilst accepting that the defence lawyer has an obligation "to treat [complainants] properly", he said, "[i]t doesn't mean not tackling awkward, difficult, embarrassing situations" (Respondent S2). Other respondents felt that any duty they owed to treat complainants with civility and respect also benefited their client's cause. One respondent said, "I personally feel an obligation to treat everybody with a degree of respect . . . I'm not sure it ever helps your client to move away from that" (Respondent B3). This suggests that treating a complainant with respect is a *personal* obligation, rather than a professional one; it just happens to benefit the client to behave in this way. Similarly, another respondent said that a defence lawyer "should take sufficient account of any obligations . . . to put questions in a palatable way", so as not to "disadvantage [the] client or . . . be perceived by the jury as taking any kind of . . . pleasure or . . . gratification in watching [a complainant] apparently humiliated" (Respondent B2). Another respondent believed that taking a "softly, softly approach" in cross-examination was "not really . . . an obligation to the witness but . . . [due to] how it comes across to the jury. I don't think you want to be seen as aggressive" (Respondent A3). Most respondents did not recognise any moral obligation giving them responsibility for the complainant's wellbeing. One said, "[t]he court will protect the complainant" (Respondent S2), while another said "[t]he court . . . [are] there to rein me in if I go too far" (Respondent S9). One respondent did not believe the role encompassed a duty to "place any moral restrictions upon how we approach the evidence of complainants" (Respondent S1). Another made it clear that such a limitation could not apply in practice:

"You can't not ask questions just because it might upset them – you have to put your case." – Respondent S7

Some respondents simply believed that the principle of morality was not compatible

with their primary function of protecting and advancing the client's case:

"I've had cases where the client has absolutely insisted on doing the most unattractive, the most unpalatable and he was right to do so." – Respondent B2

Another felt that delicacy and sensitivity in cross-examination were not obligations, saying, "[i]f my instructions are to go in with a sledgehammer rather than a scalpel, then unfortunately that's probably what I would do" (Respondent S9). All of these responses suggest that modern practice does not obligate defence lawyers to act as moral agents. As one respondent neatly summarized that, for complainants, "any chance of dignity is virtually non-existent in practical terms" (Respondent A2). Some respondents seemed to dismiss any duty to reprimand clients for poor behaviour, claiming that it "would be pre-judging" (Respondent B4), while another stated, "I wouldn't ever moralise to anybody" (Respondent S3). Another concluded that, as a defence lawyer, "[o]ne has to, to a degree, not address moral issues" (Respondent S2).

3. Conclusion

All of the respondents interviewed were keen to engage in debate about the role of the defence lawyer, and various aspects of the 'zealous advocate' model appeared to be reflected in the respondents' conceptions of their roles. Opinions about the importance or prominence of different obligations and duties varied to an extent, but clear trends can be identified. The respondents' practical conceptions seemed to place different emphasis on different aspects of their role. The duties to the court, particularly procedural justice, appear to have more significance to the role than under the 'zealous advocate' model, reflecting the more court-oriented tone of formal regulation. Duties owed to the client, specifically the principle of partisanship, appear to be restrained. Few respondents seemed to recognise any substantial obligation of morality, suggesting it is very much an ideal. These conclusions will be discussed in more detail in Chapter 8. The responses in Chapter 6 only tell half of the story though. As was discussed in Chapter 4, conflict between the various principles fundamentally affects the nature of the role and any exploration of practical conceptions should be coupled with an exploration of practical conflict resolution. Using the vignette technique discussed in Chapter 5, I questioned the respondents about how they would react in the event of ethical conflicts. Chapter 7 outlines my findings.

CHAPTER 7 – Resolving Conflicts in Practice

1. Introduction

This chapter will examine the respondents' reactions to the 'Professional Conduct Scenarios' presented to them during the interviews. Specifically, it will explore what conflicts of principle, if any, the respondents identified in the scenarios and how they chose to resolve those conflicts, if they felt they could be resolved. The purpose of this is twofold; first, it will gauge whether the respondents recognise the conflict points around which the scenarios were designed. This will go some way to indicating whether the conflict points discussed in Chapter 4 are recognised by defence practitioners and whether they pose difficulties for defence lawyers in practice. Second, by examining the attempts of the respondents' to resolve such conflicts, we will gain an impression of what obligations are overriding in a conflict situation and whether any of the conflict points are irresolvable. The importance of analysing the conflict points cannot be underestimated. Although some elements of the theoretical and formal conceptions of the role are consistent and compatible, there are inevitable conflicts of obligation which have not been adequately resolved by theoretical discourse or formal regulation, leaving an uncertainty about what the role of the defence lawyer is. By ascertaining how, if at all, defence lawyers resolve conflicts in 'real-life' scenarios, one can gain a fuller picture of the role. For example, with empirical evidence it can be said with more conviction that partisanship overrides procedural justice or vice versa. Empirical investigation into defence obligations, both in isolation and in conflict with each other, allow a more accurate and valid examination of the defence lawyer and indicate whether practical conceptions of the role reflect the theoretical and formal conceptions. Structurally, this chapter is divided into four sections (excluding this introduction), each one dealing with a conflict point. Within each section, the 'Professional Conduct Scenario' representing its respective conflict point will be explained; this explanation will make explicit the conflict point that the scenario is designed to represent. It should be noted that this explanation of the scenario and the conflicts at play is the author's and not necessarily the respondents'. Once the scenario has been outlined, I will undertake a thorough analysis of the responses to each conflict point, examining whether or not they resolve the issues presented and what this indicates about practical conceptions of the role.

2. Confidentiality v. Procedural Justice and Truth-Seeking

Scenario A:

'Your client, Z, has been charged with possession of heroin with intent to supply. He was arrested on North Road, which is a well-known haunt for drug users. Z claims that the heroin found on him was for personal use and that he does not deal. He pleads not guilty and his trial date is set; however, in your last meeting with Z before the trial, he says that he won't be able to attend the first day of the trial as he "needs to score on North Road after the weekend." You warn him he must attend the trial; he responds by asking you to explain his absence to the court. You outline the potential consequences of failing to attend, but he insists on his instructions. On the morning of the trial, Z does not appear as expected; you attempt to phone him but receive no answer. You must explain Z's absence to the court. '

Scenario A was designed to create tensions between the principle of confidentiality and the two opposing duties to the court - the principles of truth-seeking and procedural justice. The client divulged information to his defence lawyer, namely that he wouldn't be able to attend the first day of his trial as he was intending to buy drugs. Arguably, this information is not only protected by legal professional privilege, as outlined by s.10 of the *Police and Criminal Evidence Act 1984* and common law,⁹⁶⁰ but also wider professional obligations of confidentiality, including paragraph 702 of the Bar Code and rule 4.01 of the Solicitors' Code. These would require the defence lawyer to keep the client's communication private, in line with the theoretical principle of confidentiality. Such information might be regarded as having the potential to damage the client's reputation and credibility in the eyes of a judge and jury and keeping such information away from the court may be more favourable to the client than revealing it. However, this creates two potential conflicts of obligation for the defence lawyer. First, it could be argued that the lawyer's duty of truth-seeking obligates him or her to reveal this information. Revelation would prevent the court from being misled in any way, as paragraph 302 of the Bar Code and rule 11.01(1) of the Solicitors' Code specify, and would ensure that all relevant evidence, advantageous to the client or not, was available

⁹⁶⁰ Primarily, *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 and *R v. Derby Magistrates' Court, ex parte B* [1996] AC 487.

for assessment by the court.⁹⁶¹ This, of course, stands in contrast to any obligation to suppress such information, as the principle of confidentiality might require. Second, the principle of procedural justice imposes obligations of disclosure on the defence lawyer,⁹⁶² as well as a duty to facilitate the administration of justice.⁹⁶³ Shielding the information about 'Z's non-attendance, as the principle of confidentiality would require,⁹⁶⁴ could contravene this principle. Remaining silent about the client's whereabouts, information which might help the trial proceed, could significantly contribute to a delay contrary to this principle.⁹⁶⁵

In reaction to this, respondents provided an array of responses which can be broadly grouped into five categories. The first category of responses favoured upholding the principle of confidentiality in the event of a conflict and respondents explained their reasoning in a variety of ways. Several doubted that their duties to be honest or open with the court or speed up the trial process required them to compromise any duties of confidentiality owed to the client. One respondent explained, "[y]ou do have a duty to assist the court but not to that extent, and certainly not to breach confidentiality in relation to offences being committed" (Respondent S3). Another respondent bluntly stated, "I am under no obligation to tell the police or the court where my client is" (Respondent S4), while another said, "I don't think this falls into the category where you have to start informing on your client" (Respondent A1). When asked whether withholding information from the court would create procedural delay, the above respondent said, "I don't think it would necessarily slow things down" (Respondent A1), while another did not think upholding confidentiality in this scenario would hold up the process because "the trial's going to go ahead" (Respondent S7). One respondent said, "[I] would be concerned about . . . putting myself in the position where you're volunteering information about [the client]" (Respondent S7). The key word here is 'volunteering'. It insinuates that a defence lawyer in this scenario would not be *obliged*

⁹⁶¹ This aspect of truth-seeking was outlined in *Arthur J.S. Hall and Co. v. Simons*[2002] 1 AC 615, and included in [708], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; and in [17], 'Guidance to rule 11 – Litigation and Advocacy', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

⁹⁶² Section 5(5) - *Criminal Procedures and Investigations Act 1996*.

⁹⁶³ Included several leading cases; in [302], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; Rule 1.01 Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

⁹⁶⁴ [5], 'Guidance to rule 11 – Litigation and Advocacy', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

⁹⁶⁵ Rule 3.9(d) - *Criminal Procedure Rules 2010*, 2010/60.

to reveal information and that freely choosing to do so in order to aid the court and prosecution made this respondent uncomfortable.

Respondents also seemed to think that the duty to the client, in the form of confidentiality, overrides the duty to the court. One respondent conceded that Scenario A presented the defence lawyer with a conflict of interests, but that the client should come first:

"[C]ertainly we are under a duty not to inadvertently delay the court proceedings . . . but . . . my understanding is my obligations to the client will supersede that . . ." - Respondent S9

Similarly, others seemed to justify their decisions on the basis that the client's cause was paramount. One respondent said, "it wouldn't be appropriate in the interests of your client . . . to . . . explain his absence" (Respondent A1), while another stated, "[i]t's not your obligation to assist the court in going to affect an arrest of your client", despite the possibility that "[t]he judge may not like that" (Respondent B2). Some respondents simply did not believe that 'Z' had waived his right to confidentiality, thus they had no obligation to reveal information to the court:

"If my client or clients generally . . . had provided me with information that they hadn't confirmed that I could pass on, then I don't think it would be appropriate for me to . . . waive confidentiality potentially to avoid any delay." - Respondent S9

Another respondent agreed that waiver was a matter for the client and that, in this instance, 'Z' had not freed the defence lawyer from his responsibility to protect confidential material:

"I think that the information he's given is effectively confidential information; once I start to explain what he's told me, I am waiving privilege I think and I'm not going to do that." - Respondent B2

The second category of responses seemed to resolve the conflict point by revealing the information about 'Z'. However, the respondents justified this decision on the basis that

they were following their client's instructions, not because their duties to the court were overriding. The client had, in their view, waived the protection of confidentiality, allowing them to share the information with the court and prosecution. One respondent simply followed orders, stating, "[i]f he wants me to, I must do it" (Respondent A2).

Some respondents seemed unwilling to reveal such information since it might damage the client's cause, but conceded that they would pass on the information to the court despite their misgivings:

"[I]f the client's giving me instructions to pass that on and I've got signed instructions from him that says that he is content with me to pass on those instructions to the court, then I see no difficulty with that . . . I wouldn't feel comfortable with it, but I would do it." - Respondent S9

Another respondent provided a similar response, saying, "I don't think there [are] any confidentiality issues; he has told me to tell the court that he's gone to score drugs and as undesirable as that is to tell a court . . . that is what it is" (Respondent A3). Other respondents held a contrasting opinion, believing that following the client's instructions would in fact further his cause. One respondent stated that facilitating the client's attendance at court would be beneficial because "it is in the defendant's interests to have . . . his evidence before the jury, to set forward to them 'I'm not a drug dealer, I'm a drug user'" (Respondent B1). He continued:

"[B]ased on his instructions, I'd say to the judge, you will be able, in all likelihood, to get him here for a trial if you send your officers to North Road . . . to nick him . . . He's instructed me to say that on his behalf . . ." - Respondent B1

The same respondent later concluded that "the reason that I do it is because, yes, it is to his tactical benefit and it is based on his instructions" (Respondent B1). Another respondent agreed, saying, "If you withhold the information, you're not doing your client a service in any event" (Respondent B4). Some of the above decisions do leave the defence lawyer in a strange situation. In a sense, one could conclude that the respondents are defending 'Z's interests, because they are following his instructions and therefore fulfilling his wishes. Equally, by providing the court with the information, the respondents are fulfilling their duties to facilitate the justice process and aid the search

for the truth. Yet, simultaneously, neither the duty to the client nor the duty to the court are truly being served. One could argue that revealing this confidential information could damage 'Z's cause and therefore is not in his best interests. It should be remembered that confidentiality is not secrecy for the sake of it; it is secrecy with the purpose of protecting the client. Thus, even if it is the client's wish that detrimental information be revealed, to do so could be considered a failure on the part of the defence lawyer to fulfil his or her true duty to the client, which is to protect and advance his or her best interests. Criminal clients do not necessarily know the ideal course of action to take in order to promote their cause. They are not lawyers (usually) and consequently are entitled to representation by a qualified professional. Arguably, the defence lawyer should recognise that confidentiality is designed to prevent private information from hurting the defence case and adopt a paternal approach with the client, taking the decision for him or her. In this context, the merit of simply following 'Z's instructions is questionable. At the same time, the evident reluctance and discomfort at revealing the information hardly reflects willing commitment to the principles of procedural justice or truth-seeking. These principles expect an officer of the court to provide as much information to the court as possible and help oil the cogs of the justice machine. However, from the responses above, it would appear that had they had the choice, many respondents would opt to maintain confidentiality, regardless of 'Z's misguided commands or the court's desire to be in the loop. The respondents do not appear to be *choosing* disclosure – it is an overriding expectation because of the client's instructions. This seems to leave the defence lawyer in a position where he or she is slavishly following orders, but doing a disservice to both the client and the court.

The third category of responses saw respondents resolve the conflicts by revealing the information provided by 'Z', primarily because they owed overriding duties to the court. One respondent said, "[i]f I'm directly asked by the court . . . I couldn't mislead them . . . that is my obligation to the court . . . to keep them fully informed I think" (Respondent A3), while another said, "[i]f the court asks you the direct question 'why isn't your client here?', you're going to have to tell them" (Respondent S8). These responses again demonstrate the subtle difference between actively and passively misleading the court; both responses imply that if the court did not directly ask about the whereabouts of 'Z', then the defence lawyer may choose to keep the information secret. In contrast, to withhold the information when directly asked would be actively misleading the court, and thus unacceptable. However, one respondent suggested that

this division between passively and actively misleading the court is perhaps a false one:

"He's told you, as an officer of the court, that he won't be attending. In your duty not to mislead the court, you have two choices: You can remain silent, which would be singularly unhelpful to your client in any event and the inferences drawn against you could only be adverse, or you can tell the court the reasons that he has told you why he's not going to be there. I wouldn't consider there was any other duty to the defendant which would preclude me from giving that account." - Respondent B4

It would therefore seem that regardless of being asked directly or not, a defence lawyer, in this scenario, would best serve both court and client by revealing the information. This respondent therefore seemed to believe that, in this scenario, there was no real *choice*. Other responses seem to reaffirm this sense of 'obligation' to reveal the information. One respondent admitted:

"I think I'd be pretty truthful with the court actually . . . I wouldn't say what conversations we'd had, but I would say that Z is a heroin addict . . . he may well be taking his drugs for the day or whatever . . . the court actually . . . can be quite sympathetic." - Respondent B3

Another respondent was of a similar opinion:

"I would urge . . . for the trial to go ahead to the court . . . and to be honest I would explain that he's indicated he's not available for the first day . . . if pushed, I probably would tell the court that he has told me that he will be using drugs and needed to obtain some drugs . . . I would be reluctant to mislead the court or lie." - Respondent A3

The fourth category of response to Scenario A could be described as 'in between' or 'mixed'.

Rather than resolve the conflict point in favour of the principle of confidentiality or the principles of procedural justice or truth-seeking, one respondent settled for a form of compromise between the conflicted obligations:

"I think my first duty's to my client . . . and I would be able to find a form of words . . . which . . . tried to get my client into the least amount of trouble, without breaching confidentiality but also enabled the court to make decisions as to whether they adjourn and wait or whether they carry on." - Respondent B3

She later added, "[y]ou've got to try and give [the court] the information, but in the way that puts your client in the best light" (Respondent B3). Finally, when asked whether the obligations to confidentiality and procedural justice were reconcilable, the respondent said, "I'm sure they're not always, but I think most of the time you can find a middle ground" (Respondent B3).

In the fifth and final category of responses, the respondents did not seem to recognise any particular conflict requiring resolution, describing their actions simply and unequivocally. When asked how she would approach Scenario A, one said, "I simply wouldn't explain his absence to the court" (Respondent S3). Another, contemplating potential interactions with the court, said, "I think . . . I would be asked by the court if I have any information and I think the answer that I would have to give would be I have no information to give to the court" (Respondent S2). One respondent was of the opinion that the information provided by 'Z' was not afforded any protection by the defence lawyer's obligations of confidentiality:

"You have to consider the question of whether that piece of information he gives you is privileged, and the answer is it's probably not and so you could divulge that to a third party." - Respondent S8

He continued, "I don't think that him telling you he's going to score on North Road is privileged information – it's nothing to do . . . directly with his case" (Respondent S8). These statements seem to dismiss any notion of conflict; if the information is not privileged, then it would seem there is no clash between the confidentiality and the principles of procedural justice and truth-seeking. Accordingly, respondents in this category seemed to answer without difficulty.

3. Partisanship v. Morality

Scenario B:

'Your client, A, has been charged with raping B. A met B in 'The Dock', a local nightclub, and after having drunk a lot, went back to B's house. B claimed that A then raped her when she refused to have sex with him. A denies the allegation, claiming that B consented at the time and had made it clear she wanted to have sex throughout the night. There were no witnesses to the alleged rape itself. A claims to have seen B in 'The Dock' several times before, behaving flirtatiously and always leaving with different men. He claims others would agree with him that B has a reputation for picking up men in 'The Dock' and taking them home to have sex. She has alleged rape against a man in the past, a charge which was dropped due to lack of evidence. A has an historic conviction for sexual assault and witnesses attest to his history of sexual promiscuity. A instructs you to argue that B is lying and that her sexual history backs up this claim. '

Scenario B was constructed in order to create a clash between the duty of partisanship owed to the defendant, 'A', and any duties of morality owed to the complainant, 'B'. The conflict centres on the proposed tactics for defending 'A'. As a partisan advocate, it could be argued that the defence lawyer should fearlessly make use of any avenues of cross-examination that might discredit the complainant and promote the best interests of the client, as long as they are lawful and proper.⁹⁶⁶ For example, her promiscuous sexual history and her past allegation of rape may show a propensity to consent. Coupled with her behaviour throughout that night, it could be suggested that she is lying about her intentions and what occurred at her house.⁹⁶⁷ Questioning 'B' about these issues could demonstrate her unreliability to the jury and undermine the prosecution against 'A'. However, the obligation to morality causes difficulties. Conducting a cross-examination of a vulnerable witness, who is potentially the victim of a rape, is naturally strewn with pitfalls. It is suggested that defence lawyers, "when the witness is nervous,

⁹⁶⁶ [303], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; Rule 2.1, page 4, Public Defender Service Code of Conduct – London: The Stationery Office; *R v. McFadden* (1976) 62 Cr. App. R. 187; *Medcalf v. Mardell* [2003] 1 AC 120 (HL).

⁹⁶⁷ Similar issues were considered in *R v. Beedall* [2007] EWCA Crim. 23.

vulnerable or apparently the victim of criminal or similar conduct", have an obligation to ensure that they "are put as much at ease as possible".⁹⁶⁸ In contrast, to publicly suggest that a rape victim is a liar and a drunk by tarnishing her character is a tactic that is arguably deeply unethical, unfair and unacceptable.⁹⁶⁹ Equally, suggesting that she must have consented to sex on this occasion on the basis that she regularly consents to sex is an example of the 'twin myth' logic discussed in Chapter 4. So, if the principle of morality requires a defence lawyer to respect victims of crime⁹⁷⁰ and the principle of partisanship expects the lawyer to utilise all his or her legal clout to secure victory for the defendant, regardless of the feelings of a complainant,⁹⁷¹ then Scenario B presents an interesting dilemma.

It should be noted, before proceeding to the analysis of the responses, that several (if not the majority) of the respondents questioned whether they would be legally allowed to cross-examine 'B' about her previous sexual conduct. As was discussed earlier,⁹⁷² the *Youth Justice and Criminal Evidence Act 1999* places significant limitations on this area of advocacy, so far as to start with the assumption that any such questioning would not be permissible,⁹⁷³ although some exceptions could be allowed.⁹⁷⁴ Of course, whether the court would permit such cross-examination is a potentially complex legalistic debate. In the course of the interviews, I did not want discussions to be side-tracked by consideration of the possible interpretations of the statute and the facts, particularly since the scenarios were designed to be relatively vague. As a result, when respondents raised the question as to whether they would be granted permission to pursue this course of action, they were told to assume that they had been and to consider what they would do in light of that assumption. This was done in order to focus on the true purpose of the 'Professional Conduct Scenarios' - namely the exploration of the respondents' approaches to conflicts of obligation, rather than on the potentially unpredictable decision the court might make about the validity of such questioning. It should be

⁹⁶⁸ [6.1.4], 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board,

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

⁹⁶⁹ [708(g)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; Rule 11.05(a), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010.** Sub-sections (c) and (d) of the latter rule also seem to prohibit using cross-examination merely to 'sling mud' at witnesses.

⁹⁷⁰ See Rule 1.1(d) - *Criminal Procedure Rules 2010*, 2010/60.

⁹⁷¹ As outlined in paragraph 303(a) of the Bar Code

⁹⁷² See Chapter 4, section 3.2.

⁹⁷³ Section 41 – *Youth Justice and Criminal Evidence Act 1999.*

⁹⁷⁴ See FN 974.

stressed that this was done for practical reasons of time and relevance.

Several respondents seemed to believe that they did have an obligation, as a partisan defender, to discredit the complainant by questioning her about her sexual history and reliability as a witness. One respondent suggested that, regardless of his or her personal views on the ethics of such behaviour, it was not a matter of choice:

"It's for [the client] to tell me what my instructions are and I don't regard myself as . . . having the right to choose the tactical course without having consulted with him in advance . . . If that's how he wants it done, that's how it'll be done." - Respondent B2

Similarly, one respondent said, "[i]f the court would let me do it, if the client instructs me to do it, then I would ask those questions" (Respondent S9), while another stated, "[i]f it is relevant and it is something that you are permitted . . . to use, then you use it" (Respondent S6). One respondent justified this approach by reference to his duties to the client:

"If you adopt a process where you are gonna go easy on her essentially because she's telling the truth, then you're not doing your job and you're failing in your obligations to your client." - Respondent B4

This statement suggests that questioning the complainant robustly on such matters is a core element of defence practice, and to do otherwise, however morally commendable, would be contrary to the essential principles of the role. One respondent seemed to concur, conceding that this type of cross-examination was "what jurors need to see" despite being "quite unattractive" (Respondent A3). Another respondent simply felt that the reality of criminal defence in a situation like Scenario B did not leave room for 'ethical' behaviour:

"In this particular circumstance, could it be immoral to . . . cross-examine very robustly a vulnerable woman about her alleged past sexual promiscuity? Well, of course, it might be, but I think morality . . . isn't really a consideration on a day-to-day basis." - Respondent A1

In contrast, very few respondents felt that they would have an overriding obligation to uphold any broad notions of morality; those that did merely insinuated as such. One respondent explained:

"The court would not allow you to put in or ask questions about sexual history which are merely to show that she had sex a lot; who cares, so what? She's perfectly entitled to have sex ten times a day." - Respondent S4

This statement implies a certain disdain for such tactics, but does not necessarily indicate any duty to uphold morality and protect the complainant's dignity. However, other respondents did seem to allude to some level of obligation to morality. One said, "[y]ou can't go off on a fishing expedition just because 'A' says, you know, she's a slapper and that's what he wants the jury to know" (Respondent S6). The same respondent seemed to identify both morality and legal regulation as restraints on over-zealous behaviour:

"You can't gratuitously just . . . detract from her character on your client's instructions; what you have to do, as I said, is work within the framework that the law and the procedure provides you with but fearlessly defend your client and present his case." - Respondent S6

Only one respondent openly suggested that she felt obliged to uphold a moral standard, saying that she would not employ tough tactics in Scenario B because it was an unethical thing to do:

"I wouldn't be awful to her in cross-examination because at the end of the day, it is a really nasty offence if it has been committed . . . No doubt she's terrified to give evidence and, to be honest, I wouldn't want the jury to think that we were bullying a witness or being overly harsh 'cos it just doesn't call to be like that I don't think . . . To be sensitive is an obligation I would try to have." - Respondent A3

However, the vast majority of respondents subscribed to neither of these approaches. Although most felt that their obligation would be to avoid a rough cross-examination of the complainant's sexual habits and personal behaviour, this was not because of a duty

to uphold moral standards. Rather, it was because of an obligation to protect and advance the client's best interests in the circumstances. In effect, the respondents chose not to probe delicate issues with a vulnerable witness out of a duty of *partisanship*; securing the best tactical advantage for the client seemed to be the driving factor, rather than the complainant's well-being. When asked whether she would hold back to protect the complainant, one respondent said:

"I wouldn't do it on the basis that I was considering necessarily the witness' point of view; I would do it because it is common courtesy . . . and also because in my opinion, it is detrimental to your client's defence to be seen to be aggressive or . . . derogatory of witnesses who are there just to give evidence." - Respondent S6⁹⁷⁵

Another respondent expressed a similar view:

"If you really go to town on . . . an alleged victim, then . . . every question you ask is bumping up the sentence should it go wrong. But no, I don't think I have any obligation to protect her or to treat her well because the reality is that [the client] expects me to fearlessly represent him." – Respondent B1

Several respondents explained the potential consequences of employing aggressive tactics with a rape complainant, believing that they would ultimately do damage to their client's cause. One respondent said, "you'd be very, very foolish to go slagging her off left, right and centre, unless you had a particularly cogent piece of evidence which could demonstrate that she was lying" (Respondent B4), while another believed that "chucking around seriously nasty allegations that aren't directly involved with what happened on that particular night . . . can do more harm to a defendant's case than . . . good" (Respondent B1). Respondent B1, although sharing the broadly negative view of such tactics, did not rule out a more ruthless approach to cross-examination in the right situation.

⁹⁷⁵ It should be noted that Respondent S6 provided answers reflecting some potentially conflicting views on the criminal defence lawyer's obligations in Scenario B. This should be borne in mind when assessing the value of the opinions expressed.

When asked if he had an *obligation* to question 'B' about her sexual history, he said:

"No, because . . . it may not be in the defendant's best interest to do that. It's certainly my duty to seek disclosure of that material . . . I'd ask the solicitors instructing me to explore, you know, if she is the village bike . . . to see what cards are in my hand." - Respondent B1

Similarly, Respondent A1 said:

"Generally speaking, I don't think it's gonna be tactically a very good move to start rubbishing the complainant and saying that she's very promiscuous, but again it depends on the circumstances." - Respondent A1

These statements probably reflect the overall consensus. Adopting such tactics are, essentially, a choice rather than an obligation. The obligation is to defend the best interests of the client; this may require thorough and unflinching cross-examination sometimes and other times it may not. This flexibility perhaps has more utility in practice than a slavish devotion to the idea of 'partisanship'.

4. Detachment v. Morality

Scenario C:

PART A: 'W, a 40 year old male, has been charged with sexually assaulting his 13 year old daughter, X, whilst visiting her at her mother's home. Her mother, Y, had left the house briefly to go to the shop. W has a string of past convictions for domestic violence directed at Y, for which he has spent time in custody and which led to their separation. 'W' also had a charge of indecent exposure to a minor dropped due to a lack of evidence. He protests his innocence, claiming his daughter is lying and made the accusations after he refused to give her money. W requests your representation in what will clearly be a large-scale and potentially lucrative Crown Court trial. '

PART B: 'W pleads not guilty, on your advice. In preparing for trial, you discover that X has raised allegations of violence against both of her parents in the past, none of them pursued by the Police. The trial begins and the prosecution call X, who has been given special measures to protect her in court. She claims that W asked her to perform a sexual act on him and attacked her when she refused. She also claims that he has sexually abused her several times in the past, but she was too scared to tell anyone. You begin cross-examination of X.'

Scenario C again raises issues relating to the principle of morality, but this time in conflict with the principle of detachment. Part A deals with what might be called the 'acceptance' stage of the client-lawyer relationship. In upholding the duty to remain detached and neutral in accepting clients, the defence lawyer would be expected to take up 'W's case without regard for the accusation against him, his previous conduct, beliefs about his guilt or the fee involved.⁹⁷⁶ However, the principle of morality might require a defence lawyer to take a more responsible approach and refuse to represent someone like 'W'.⁹⁷⁷ He might be considered a morally reprehensible person because of his

⁹⁷⁶ This principle is enshrined in legislation, under s.17(3)(c) of the *Courts and Legal Services Act 1990*, as well as professional standards, including the Bar Code 'cab-rank' rule ([602]) and the Solicitors' Code (Rule 11.04)

⁹⁷⁷ Solicitors are "generally free to decide" which clients to accept - Rule 2.0, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**. Barristers, however, do not appear to be compelled in any way to exercise moral judgment in accepting clients.

numerous convictions for domestic violence and the historic allegation of sexual activity involving a child. Some might conclude that a man of 'W's character is not deserving of a defence. At the very least, the principle of morality would urge the defence lawyer, as a guardian of public values, to highlight to 'W' the unacceptable nature of his behaviour.⁹⁷⁸ Part B operates on the basis that the respondent has accepted 'W' as a client, and explores the potential for conflict between the two principles at the trial stage, particularly in the cross-examination of 'X'. The principle of detachment would expect the defence lawyer to dismiss any moral qualms about questioning 'X' and would require an unflinching and unsympathetic exploration of her allegations regardless of their veracity or her potential vulnerability.⁹⁷⁹ Furthermore, the defence lawyer should arguably attempt to undermine 'X's credibility by questioning her habit of making unproven complaints against her parents and 'conveniently' recalling past sexual abuse. This should be done regardless of any doubts the defence lawyer has. In contrast, the principle of morality would expect the defence lawyer to behave as a right-thinking member of society would and show restraint with an emotionally exposed and potentially terrified child.⁹⁸⁰ The defence lawyer, having a duty to protect and respect victims of crime,⁹⁸¹ would arguably be required to cross-examine 'X' very gently and empathetically and refrain from trying to paint her as a liar or a blackmailer.⁹⁸²

As regards Part A, all of the respondents recognised a clear and overriding duty to remain detached when deciding whether to accept 'W' as a client. Two respondents neatly summarised the general consensus about the role of the defence lawyer in Scenario C, describing themselves as "the educated mouthpiece for the client" (Respondent S5) who were "here to represent people . . . not here to judge them"

⁹⁷⁸ The defence lawyer should be "candid with the lay client" (Ministry of Justice/Legal Services Commission (2007) *Creating a Quality Assurance Scheme for Publicly Funded Criminal Defence Advocates* – London: Ministry of Justice/Legal Services Commission, Annex 1, [C(4)]. This appears to have been excised from the 2010 'competency framework.

⁹⁷⁹ [303(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**;

[2.3(a)], page 3, The Law Society Code for Advocacy – The Law Society, http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf: **Last accessed 16/08/2010**.

⁹⁸⁰ Inferred in [307(c)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**.

⁹⁸¹ See Rule 1.1(2)(d) - *Criminal Procedure Rules 2010*, 2010/60.

⁹⁸² See [708(g)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**;

and Rules 11.05 (a) and (c), Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

(Respondent A3). Respondents identified several reasons for this. When confronted with the potential conflict between morality and detachment, one respondent suggested that it was the job of the court to pass moral judgments, and not that of the defence lawyer:

"Any moral qualms you might have about representing 'W' . . . you should put to one side because of course it's right, morally, that the guilty should be convicted . . . and the only people who are sure to be guilty are convicted. So, if you trust in the system, the system is fair and moral . . . there shouldn't be any moral concerns about representing him." - Respondent B1

Another respondent agreed with this conclusion, expanding on the concept of 'systemic morality':

"It's an unsavoury allegation but . . . to have a moral problem with this is to . . . almost reverse the burden of proof . . . and it's not my duty to make any judgment of him at all . . . if I have private opinions, I feel they really ought to remain private." - Respondent S2

Another respondent believed that passing judgement on 'W' would be "essentially bypassing the trial system . . . which is of course something which defence lawyers need not concern themselves with" (Respondent A1). Another respondent highlighted that "at that stage, it is simply an allegation, no more than that" (Respondent S9).

Respondents also cited 'W's "right to representation" (Respondent S3) as a compelling reason for accepting him as a client, and that this should be done "regardless of any personal feelings you might have" (Respondent S3). It was pointed out that to do otherwise would lead defence lawyers down a treacherous road:

"If you say 'no, I'm not dealing with this because it's unpleasant', you're starting to make moral judgments and where would you be drawing the line if you do that?" - Respondent S2

All of this implies that to apply any sort of ethical litmus test when deciding on which clients to accept would be a dangerous move. To do so could seriously undermine the

legitimacy of the criminal justice process. Furthermore, individual defence lawyers cannot necessarily be relied upon to represent broad moral standards, since each one will likely possess different opinions on the merits of a client or a cause. The respondents seemed to agree that defence lawyers should not involve personal feelings in the process of accepting clients. One said, "I can't take into consideration . . . whether or not I feel sick about the alleged allegations or anything like that" (Respondent B1). The implication is that, as a person, the respondent may have felt that way about 'W', but that this should not influence any decision to accept him as a client. One respondent recognised the important difference between 'the person' and 'the defence lawyer', as well as 'the person' and 'the client':

"I don't think I would like 'W' . . . for a kick off, but I don't think that's something I can take into account when I decide to represent him or not . . . There are a number of clients I don't particularly like as people, but . . . as long as I'm satisfied I can do my best for them and that . . . I will not involve any emotion in their defence then . . . I can quite reasonably represent them." - Respondent S8

In essence, the approach of all the respondents to Part A of Scenario C was to "get on with it as a professional and . . . represent them" (Respondent S6). Equally, none of the respondents felt that they would be obliged to moralise to 'W' about his past conduct or current predicament; several considered it positively inappropriate for a defence lawyer to do so. One respondent said, "[w]hat I certainly wouldn't do is say 'essentially, you're a wife beater and a pervert, I'm not representing you'" (Respondent B4). Others seemed to believe that expressing personal opinions would be stepping beyond the boundaries of their role:

"It is not for me to start letting [the client] know I find him personally offensive . . . I will not, in my professional capacity, when I'm actually dealing with him, say . . . that I think he is such and such, a bad man or a pervert or whatever it might be." - Respondent S4

"I'm not there as a friend . . . I'm there to professionally advise them and if you start expressing personal opinions, you're not being professional in my view." - Respondent S9

In summary, the responses to Part A suggest that the backbone of the criminal defence lawyer's role, when deciding on whether to accept clients and when dealing with them generally, is to act as a detached professional.

Part B produced a wider range of responses than Part A. Part B focused on the trial stage of 'W's case, specifically the cross-examination of the complainant, 'Y'. After contemplating the potential for conflict when questioning a 13 year old girl, a few respondents seemed reasonably certain that their obligation to remain detached would outweigh any duty to protect the complainant. When asked whether he might refrain from pursuing delicate or sensitive issues with 'Y', one respondent said, "[w]ell, she might not want you to put those questions to her, but so what?" (Respondent B2). Another respondent (Respondent B3) said she "wouldn't be concerned about ['Y']" in such a situation. Some respondents recognised the potential drawbacks of an aggressive approach, but ultimately conceded that one had to detach from this. One respondent said, "I think it's undesirable to use those tactics . . . but sometimes it is necessary" (Respondent A3), while another stated, "[h]owever apparently unpalatable, sometimes it has to be done" (Respondent B2). One respondent did not believe that a tough cross-examination "necessarily amounts to a lack of respect for the witness" and summarised the approach a defence lawyer adopts as "nasty things put nicely" (Respondent A2).

Other respondents were more cautious in their approach to Part B, although few seemed to overtly express any overriding obligation to morality. One respondent said:

"[T]he first [thing] you have to take into account is the fact this is a 13 year old girl . . . and therefore you have to treat her very carefully; not only morally should you treat a 13 year old very carefully but legally you have to." - Respondent S8

This statement implies that a more restrained and delicate approach than described above is required. Further, this response suggests that to do so is a moral obligation. However, the same respondent added that, whilst taking a careful approach, "you have to put, as robustly as you can, your client's version of events to her" (Respondent S8). This response summarises the general consensus. Most respondents seemed to recognise a degree of moral obligation, but that the situation was "a balancing exercise"

(Respondent S1) between a detached and thorough cross-examination and exhibiting "care and consideration of the fact that ['Y'] is a child" (Respondent S6). Some took a similar approach, but for different reasons – namely, that respectful treatment of 'Y' could be more advantageous to the client than undertaking a ruthless grilling in front of a jury:

"You'll be weighing up the . . . damage it may do to ['W's] cause for you to attack a witness who's 13 years old, who's got the protection of the court and the sympathy of the jury [by] accusing her of lying; but . . . that may be a justifiable risk to take." - Respondent B2

This response makes the point that 'Y' has the protection of the court, perhaps suggesting that this is not part of the defence lawyer's role. However, exercising care and restraint with the complainant may be a more tactically sensible approach. Rather than representing fulfilment of any moral duties, "it just happens to be convenient . . . to treat her in that way and it happens to be kinder as well" (Respondent S3). In a sense, Respondent B2's statement above is the consummate example of detachment. It recognises the vulnerabilities of 'Y' and the risks attached to any attack on her character. However, the overriding drive behind the respondent's approach is the benefit to the client. The defence lawyer remains detached from the moral whys and wherefores, and makes a decision based on the requirements of his or her client.

5. Partisanship v. Procedural Justice and Truth-Seeking

Scenario D:

PART A: 'Your client, F, has been charged with driving whilst under the influence of alcohol. She was pulled over by a Police Officer who breathalysed and arrested her. She provided a breath sample using an Intoximeter at the Police Station, which gave a reading of 50 microgrammes – 15 microgrammes over the limit. This entitled her to choose to replace her breath sample with a blood or urine sample. However, contrary to procedure, an officer said that she must give a blood or urine sample, and she complied. Her samples confirmed she was over the limit and she was charged. She tells you she "was at the pub but didn't drink anything" and on her instructions, you enter a plea of not guilty. '

PART B: 'The trial begins; the arresting officer gives evidence that on arrest F claimed she'd "only had one drink". In a brief break, F admits to you that she may have drunk alcohol at the pub but had just forgotten. In addition to this, the officer who operated the Intoximeter fails to confirm that it was working reliably, as is required. The prosecution case is drawing to a close. '

The final scenario attempted to draw out tensions between the principle of partisanship and the principles of procedural justice and truth-seeking – the major conflict point between the defence lawyer's concurrent duties to serve the client and the court. Again, the scenario was split into two parts to deal with different aspects of the conflict. Part A deals with pre-trial issues of disclosure and tactics. The information that the police have made a procedural error could be advantageous to the client's cause. If the prosecution and police discovered this mistake, there is the possibility that they could remedy it or otherwise alter their strategy (or even the charge) to counter any 'technical defence' offered by the client. A partisan defence lawyer might feel obliged to keep silent about such information in order to make the most of the error. In contrast, the principle of procedural justice expects the defence lawyer to facilitate speedy and efficient justice.⁹⁸³ Withholding potentially useful information and employing secretive tactics could

⁹⁸³ All parties, including the defence, are expected to aid in "dealing with the case efficiently and expeditiously" (Rule 1.1(2)(e) - *Criminal Procedure Rules 2010*, 2010/60).

arguably contravene this obligation.⁹⁸⁴ The principle of truth-seeking also expects the defence lawyer to help convict the guilty⁹⁸⁵ and to highlight errors the prosecution may have made.⁹⁸⁶ Keeping quiet about this flaw in the prosecution case as well as making use of this technicality to help 'F', who was clearly very drunk at the time of arrest, might be viewed as contrary to these duties. Part B presents similar issues during the trial. The change in 'F's story might be considered very relevant to the court in determining a verdict. The principle of partisanship would probably compel the defence lawyer to remain silent about the admission,⁹⁸⁷ and continue to plead not guilty but on more limited grounds.⁹⁸⁸ It could be argued again that the principle of truth-seeking would expect the defence lawyer to help convict the guilty, by either revealing this evidence or by withdrawing. The omission by the police officer regarding the functionality of the intoximeter is another technical flaw. Therefore, a potential conflict again arises between the principle of partisanship, which might encourage a tactical 'ambush' of the prosecution,⁹⁸⁹ and the principle of procedural justice, which prohibits this.⁹⁹⁰

⁹⁸⁴ This is implied by the court in *Arthur J.S. Hall and Co. v. Simons* [2002] 1 AC 615.

⁹⁸⁵ See Rule 1.1(2)(e) - *Criminal Procedure Rules 2010*, 2010/60.

⁹⁸⁶ All parties have a duty to "at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules . . . A failure is significant if it might hinder the court in furthering the overriding objective" (Rule 1.2(1)(c) - *Criminal Procedure Rules 2010*, 2010/60).

⁹⁸⁷ See [14], 'Guidance to Rule 11 – Litigation and Advocacy', Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

⁹⁸⁸ A confession (and arguably a major change in the client's story), "imposes very strict limitations on the conduct of the defence. A barrister must not assert as true that which he knows to be false. He must not connive at, much less attempt to substantiate, a fraud." However, it would seem that counsel are "entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount to proof that the defendant is guilty of the offence charged." See [12.3] and [12.5], 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board,

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**.

⁹⁸⁹ In *Khatibi v. DPP* [2004] EWHC 83, the court felt that "A Defendant may demand that the prosecution proves its case and [may] keep . . . silent at any prosecution shortcomings until the time when it can take advantage of them".

⁹⁹⁰ In *DPP v. Hughes* [2003] EWHC 2470, the court stated that "ambushes . . . are to be discouraged and discountenanced."

Part A provoked a variety of responses. One respondent seemed to consider 'F's case unwinnable, and suggested that pursuing it would create unnecessary work for the court and undermine the search for the truth:

"This sounds like a 'take the money and run' kind of case . . . I suppose your obligations would be to tell the client that she doesn't have a hope in hell of winning her case, she will be convicted and if she wants to pay you to . . . put forward some kind of not guilty case, then firstly she's . . . wasting her money and secondly . . . you don't really wanna do it because . . . you [have] some kind of reputation with the court for not taking the piss." - Respondent A2

However, other respondents took a different view. One respondent was of the opinion that if 'F' wanted a not guilty case run, that was her choice:

"I make sure that at no stage are [clients] pressured to plead guilty on anything. It is always their decision . . . it's not for us to pressure, it's not for us to persuade . . . I think professionally it is dangerous." - Respondent S9

Another respondent did not believe he could deny 'F' her day in court if that was her desire, saying, "I have an obligation to tell ['F'] that in fact she may have a technical defence, even if she doesn't have a defence of any particular merit in terms of . . . the reality of what happened that night" (Respondent S4). He later recalled a similar, real-life experience to support his conclusion, stating, "It was obvious that [the client] was completely drunk, but you can't not tell him that he has a defence. So, in this scenario, I can't not tell her . . . whether or not she has a defence" (Respondent S4). Similarly, other respondents were not deterred from pursuing a not guilty case using a technical defence as opposed to a 'substantive' defence. One respondent, when asked if he would employ such a tactic to secure an acquittal said, "[e]very single time, yes. I think that's part of our job; I mean that's what the client, or the state, pays us for . . . it's what lawyers have done for hundreds of years" (Respondent S8). Another respondent added:

"From the client's perspective and from my perspective, if there is a loophole to which we're entitled, then we're entitled to seek to avoid a conviction by means of that loophole." - Respondent B2

Where the duty to truth-seek would expect a defence to be based on issues of 'particular merit' (primarily, whether 'F' was drunk when driving), this client-oriented approach focuses on using any advantage to further 'F's defence, even if it does 'take the piss'.

Part A also produced an array of responses to the potential conflict between partisanship and procedural justice, in the context of disclosure of defences and tactics. If the defence lawyer were obliged to reveal the procedural flaw and the resultant defence, then the prosecution and police might act to nullify any advantage the defence could receive. A few respondents did not think they would necessarily be obliged to disclose such information. One said, "[y]ou're not under an obligation to . . . put all of 'F's instructions to the court if you don't think it assists her case" (Respondent A2), while another stated, "[i]t's not for the defence to assist the prosecution in completing their case anymore than it would be the prosecution's job to suggest what defences the defence might run" (Respondent A1). However, other respondents suggested that this was no longer the case:

"It used to be that you could turn up on the day of trial and go 'Aha! You haven't noticed this, this and this!', but these days you would have to say . . . it's a procedural defence based on the police's incorrect completion of the relevant forms." - Respondent S7

Some conceded that whilst they would prefer to play their cards close to their chests, maintaining secrecy in this scenario would probably be difficult:

"I would be desperately checking the Criminal Procedure Rules to see what my obligation is. My inclination is to remain silent, but I am not sure that that's the right thing to do under the new regimes . . ." - Respondent S2

He continued:

"It creates a feeling for me of real discomfort having to reveal what the issues are and a lack of knowledge by other professional parties causes problems. I have a court clerk . . . who will repeatedly tell me that clients are no longer allowed to put the prosecution to proof, which is simply not correct."⁹⁹¹ - Respondent S2

Another respondent also described this almost embattled state of existence for criminal defence lawyers:

"I think you're being made, when you're defending, to give the prosecution far more information about your case and I think that in some ways waters down the basic rule that the prosecution must prove it. I think you're being made to help them or at least flag up the problems in their case, which I don't think . . . should be the role of the defence." - Respondent B3

It would thus seem that some respondents considered the principle of procedural justice, with its obligations of disclosure and cooperation in facilitating justice, to be a negative but undoubted influence on the role of the defence lawyer. However, whilst agreeing that they would probably be obliged to share information with the prosecution and court, several other respondents viewed revelation as a positive step which would benefit (or at least not disadvantage) the client. One respondent said:

"[If] you've got a winning legal point, then you'd raise that at the start . . . I would say that you've got an obligation to your client in any event . . . if you can kick it out before it starts, to do so." - Respondent B3⁹⁹²

Other respondents concurred that dealing promptly and openly with the issue of a procedural flaw would be ideal. One respondent said, "I certainly wouldn't sit on it if it was something that I could do before the trial, instead of going 'Ta-da! Here's out surprise" (Respondent A3), while another explained, "I don't think in this country we

⁹⁹¹ The dispute about the validity of "putting the prosecution to proof" is also relevant to Part B; it should be considered as a response to that aspect of this scenario also.

⁹⁹² It should be noted that Respondent B3 appears to have made contradictory statements. However, one might consider the first quotation above to be more of a general comment on the role of the defence lawyer, while the latter quotation deals directly with the conflict in Scenario D.

really believe in producing rabbits from hats . . . you would be telling the prosecution that you have that rabbit" (Respondent A2).

Interestingly, one respondent characterised sharing such information with the court as fulfilling both the principle of partisanship and the principle of procedural justice. Considering the procedural error in Part A, she stated:

"They can't rectify that after the event, can they? It's not like they can go and take another statement from somebody or change the charge or anything like that . . . it would be in your client's interests to raise it at an early stage if it's a real technical knockout point." - Respondent B3⁹⁹³

Furthermore, she also suggested that to do so discharged the obligations owed to the court, and in fact circumvented any conflict between partisanship and procedural justice:

"I think if you've got . . . proper legal argument which effects for example the fact of the case carrying on at all or legal argument to admissibility of evidence . . . then I think, yeah, you probably do have an obligation to the court which isn't necessarily contrary to your obligation to the client." - Respondent B3

Part B raised similar issues. One potential point of contention was 'F's admission that she had drunk alcohol on the night she was arrested and although this was not a confession of guilt, it clearly represented a drastic change in the substance of her testimony. The key question was whether defence lawyers felt compelled to reveal this important but disadvantageous evidence, as the principle of truth-seeking might expect, or whether to ignore it and continue to put the prosecution to proof, as the principle of partisanship might require. The respondents were clear about what they *could not* do for 'F'. One said, "I can't make things up for her" (Respondent S2) and another stated, "[w]e can't be party to the putting forward of any information which we have been told by [the client] is not the truth" (Respondent S3). Clearly, continuing to claim that 'F' had not consumed alcohol was thus out of the question; but would a defence lawyer

⁹⁹³ Contrary to Respondent B3's answer, the prosecution could arguably change the charge. In *R v Gleeson* [2004] 1 Cr. App. R. 29, the defence remained silent about a flaw in the prosecution's case on a charge of common law conspiracy. The court allowed the prosecution to add a charge of statutory conspiracy instead.

have to reveal such information to the court?

One respondent did not seem to believe there was an obligation to share the admission with the court:

"I don't think you would have any difficulty proceeding as before . . . [F] does have the right not to give live evidence and they could draw any inferences they wanted from that . . . you're putting the prosecution to proof. There's no obligation that she's got to give evidence or to put over that information to them." - Respondent S3

Similarly, another respondent said, "you can't mislead the court but I don't think you have a duty to reveal your instructions . . . even if she has made a full admission . . . as long as you're not putting the case that she hasn't had a drink at all, then you can still test the prosecution case" (Respondent A1). One respondent suggested that it would only become necessary to reveal the admission by 'F' if she were asked directly, saying, "I don't need to tell anybody; *she* needs to tell somebody if she gives evidence and that's it really" (Respondent S6).

However, one respondent did not seem to think the client's admission could simply be swept under the carpet, believing he had a responsibility to correct any misapprehension the court may have about 'F's sobriety:

"I would be placed in a position where I had misled the court by putting a case that wasn't actually accurate and unless I put that right, the court would be misled throughout the proceedings, whatever I did. So, I would want to put that right." - Respondent B4

The other issue in Part B concerned the police officer's evidential omission. This raised the question of whether a defence lawyer should remain silent about it and ambush the prosecution at an advantageous juncture, or whether to highlight the mistake and help them present a fuller case. Several respondents seemed adamant that they would not be obliged to correct prosecution errors.

One respondent stated:

"I don't see it as a criminal defence solicitor's obligation to make sure that the prosecution complete their case, particularly if that's acting against the interests of your client." - Respondent S3

Others held similar convictions. One said, "you've got no obligation to draw it out yourself, you're not prosecuting it . . . it is after all an adversarial process" (Respondent B3), while another did not believe that a defence lawyer would be "under any duty at that stage to go to the prosecution and say 'oh, by the way, you've got a hole in your case possibly'" (Respondent S8). Even though several respondents favoured remaining silent about the police officer's mistake, virtually none suggested that they would use the error to ambush the prosecution at a later stage. One respondent insinuated that he might do, saying, "I think that is something that if we can exploit it, we should" (Respondent S8). However, the majority of responses characterised an ambush as pointless, self-defeating or undesirable. One respondent summarised, in sceptical terms, the likelihood such a tactic would succeed:

"It's playing games and a game that you can't actually win because somebody at some point is gonna pick up on it . . . It helps much more if you are perceived to be somebody who is straightforward and honest, and not have a reputation for pulling a fast one because it won't help in the long run. Now obviously, that isn't something that should override your helping the client in this particular situation, but I can't see how, even if you keep your mouth shut, that's gonna result in you winning that case." - Respondent S7

Other respondents agreed, concluding that attempting an ambush would probably damage F's case, rather than advance it:

"I could understand why the court would be critical if you left it to the last minute to do it . . . I think it would benefit everyone to sort it out earlier rather than later." - Respondent B3

Another respondent suggested that the court would consider an ambush a defence diversion, designed to help the client escape justice:

"It may be that by keeping your powder dry, it looks to the court as if your client's amending her case to try . . . to introduce new issues." - Respondent B2

Two other respondents simply said that they would, effectively, ignore the omission and that they were not compelled to reveal or exploit the point. One respondent claimed, "[i]f you're not taking advantage of it, you don't need to correct it, do you? It goes unsaid" (Respondent S6), while another explained:

"[I]t doesn't necessarily look good in court to positively jump up and say 'the prosecution have forgotten to do this, let me help you cure the prosecution case'; but equally you can know that there's no point in raising it because even if you did raise it they would just be allowed to cure the problem - so it is neither here nor there really." - Respondent S4

6. Conclusion

The respondents' approached resolution of the conflict points in a variety of ways. Some seemed to staunchly place the interests of the client before all other obligations, while many recognised that they needed to work within a strict and extensive framework of duties owed to the court. The most certain conclusion one can initially draw is that the respondents did not provide a set of identical, uniform answers. This could suggest that uncertainty exists about how to deal with conflicts of duty in practice, insinuating that what formal regulation says and what happens may be different concepts. However, these are initial observations about the diverse range of opinions offered and it should be remembered that this study comprised only a small sample of the criminal defence profession. It should also be remembered that, despite the benefits of the vignette technique discussed in Chapter 5, the respondents were invited to engage with a simulation of conflict. Their interpretation of the information provided could have varied, producing a wide range of conclusions. These caveats, and the other issues discussed in Chapter 5, should be borne in mind when assessing the value of these findings. Chapter 8 will now return to the research questions identified in Chapter 1, drawing more specific and detailed conclusions about the overall findings of this thesis.

Finally, I will discuss the implications of my conclusions for both adversarial culture in general and the future of theorising the criminal defence lawyer's role.

CHAPTER 8 – The ‘Zealous Advocate’: A 21st Century Conception?

1. Introduction

This chapter aims to draw together the findings of every part of this thesis and adequately answer the research questions identified in Chapter 1. The research questions read as follows:

The overarching question:

What is the role of the criminal defence lawyer in the modern era?

The three guiding research questions and their sub-questions:

1. Is there a coherent 'theoretical' conception of the role of the adversarial criminal defence lawyer?
 - In relation to this question, I intend to explore three issues: why one should look at 'theoretical' conceptions of the adversarial of the role; where one looks for 'theoretical' conceptions of the role; and what principles define any coherent 'theoretical' conception of the role.
2. Does any coherent 'theoretical' conception constitute a useful and relevant reflection of the role of the modern practitioner?
 - In relation to this question, I intend to explore six issues: what 'formal' conceptions of the role exist in England and Wales; how do 'formal' conceptions compare with any 'theoretical' conception of the role; do 'conflict points' exist within 'theoretical' and 'formal' conceptions of the role; are any 'conflict points' resolved by regulation in England and Wales; what 'practical' conceptions of the role exist in England and Wales; and how, if at all, do practitioners resolve any 'conflict points' in their everyday role.
3. What implications do my findings have for any 'theoretical' conception of the role?
 - In relation to this question, I will consider what the future of theorizing the

criminal defence lawyer's role and explore what implications my findings have for the wider adversarial tradition in England and Wales.

Each research question, and its relevant sub-questions, will be addressed in turn. First, I would like to draw some conclusions about the empirical methodology used in this thesis.

2. Lawyers and the Vignette Method

The use of the 'vignette technique' coupled with traditional, open-ended qualitative questioning was novel. Vignettes have been used many times in various social science disciplines, but have had limited application in legal research.⁹⁹⁴ Vignettes have, as far as I am aware, never been used in qualitative research with lawyers generally or defence lawyers specifically. Thus, adopting this method for my empirical study was, to some extent, a leap into the unknown. However, I found that the vignettes produced an abundance of rich, varied and relevant material. Respondents happily engaged with the scenarios presented to them. Virtually none asked for more information about the situations presented, suggesting that the scenarios were not too vague. Equally, the respondents discussed several possible courses of action or outcomes within each scenario, suggesting that none were too restrictive. All the respondents tended to answer in terms both specific to the scenario (for example, referring to characters) and in the abstract (for example, discussing their duties generally). Although several respondents paraphrased formal regulation, nearly all questioned and discussed the practical application of their formal duties. Part of the rationale for using the vignettes was to produce honest answers reflecting real-life practice and the responses received indicate that the vignette technique, to some extent, achieved this. Most of the respondents recognised the conflicts presented in the vignettes without being directed or prompted, and regularly referred to elements of the six principles which I have argued constitutes the role.

As with any empirical study, there is also scope for criticism of the approach adopted.

⁹⁹⁴ Field S. (2008) *Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making* – Crim. L.R., 180. In addition, for an example of the use of vignettes in interviews with lawyers, see Jack R., Jack D. (1989) *Moral vision and professional decisions: the changing values of women and men lawyers* – Cambridge: Cambridge University Press.

Some of the respondents interviewed either had limited or no experience of the situations presented. For example, the accredited representatives interviewed had little advocacy experience compared to barristers. However, it should be highlighted that the specific situation presented was not crucial; what I wanted respondents to identify and engage with were the core duties owed by defence lawyers and the resolution of conflicts between them. None suggested that they had not encountered ethical conflicts, and none believed that they were not in a position to address the issues raised. An inevitable criticism of this empirical study is its size. Obviously, the limited sample and imbalance in the types of lawyer interviewed must be borne in mind in assessing the validity of the findings. However, as I have stated previously, this study was intended to provide an insight into the working role of defence lawyers. The wealth of material gathered suggests that this study is a good example of quality over quantity. Overall, I felt that the vignette technique, integrated with wider, open-ended questioning, was a very worthwhile, effective and simple method to adopt. I genuinely believe it brought realism to the interviews. Placing the respondents in a hypothetical scenario helped them engage in a practical way with the issues raised and allowed them to express their thoughts quite freely. On a pragmatic level, it was a useful method for maintaining the interest and engagement of the respondents, who might otherwise have become bored with repeated questioning.

3. Is There a Coherent 'Theoretical' Conception of the Role of the Criminal Defence Lawyer?

The first and second sub-questions, outlined above, were dealt with in detail in Chapter 1, and therefore here I consider the third sub-question - *What principles define any 'theoretical' conception of the role?*

The answer to this question has arguably been the spine of this thesis. I have argued that the 'zealous advocate' model constructed in Chapter 2 represents a coherent, justifiable and accurate description of the traditional, ideal conception of the role of the criminal defence lawyer acting in an adversarial context. The umbrella duties to the client, the court and the public have characterised the role for nearly three centuries. From the very beginning, the first of these duties has remained a constant element of the role. Brougham's statement that the defence lawyer should work to "save [the] client by

all means and expedients, and at all hazards and costs to other persons"⁹⁹⁵ is echoed today in the comments of former Law Lord, Tom Bingham:

"Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be."⁹⁹⁶

Despite this, the defence lawyer has always been part of a system of justice designed to fairly and consistently seek the correct determination of criminal accusations for the good of the public. In owing "all due fidelity to the court as well as the client",⁹⁹⁷ the defence lawyer has always had procedural duties and moral obligations. Theoretical literature describes the defence lawyer as "an officer of the law . . . with the duty of aiding in the administration of justice"⁹⁹⁸ and who "has important responsibilities to the court",⁹⁹⁹ and it discusses the important duty to "reconcile the interests he is bound to maintain . . . with the eternal and immutable interests of truth and justice."¹⁰⁰⁰

The 'zealous advocate' model, based on a wide range of diverse academic discourse, attempted to bring together the three umbrella duties and express them as part of a single, coherent and comprehensive conceptual model. I have argued that this model consists of six principles, which describe the professional obligations of defence lawyers under the three umbrella duties. The duty to the client is characterised by the principles of partisanship, detachment and confidentiality; the duty to the court is characterised by the principles of procedural justice and truth-seeking; and the duty to the public is characterised by the principle of morality. These theoretical principles, and their academic grounding, were discussed at length in Chapter 2 and as such, it is unnecessary to repeat the definitions and sources here. However, in reaching a conclusive answer to the third sub-question, and consequently the first research question, it would be informative to critique the theoretical model as a whole and comment on the relative robustness of its principles. All of the above principles were constructed after an extensive, ongoing review of the academic literature relating to the role of criminal defence lawyers and lawyers generally. The latter point is important.

⁹⁹⁵ Henry Lord Brougham, 2 *The Trial of Queen Caroline* 3 (1821). See Chapter 2, section 2.

⁹⁹⁶ Bingham T. (2010) *The Rule of Law* – London: Allen Lane, 92.

⁹⁹⁷ *Rush v. Cavanaugh* (1845) 2 Pa. 187, 189.

⁹⁹⁸ Canons 22, ABA Canons of Ethics (1908) *Part II, The Canons of Ethics* – American Bar Association.

⁹⁹⁹ Pannick D. (1992) *Advocates* – Oxford: Oxford University Press, 105.

¹⁰⁰⁰ Rogers S. (1899) *The Ethics of Advocacy* – 15 L.Q. Rev., 274.

Several of these principles, to an extent, apply to lawyers engaged in other legal disciplines; thus, some of the literature simply implies that these are obligations owed by criminal defence lawyers. However, this does not, materially, affect the validity of the ‘zealous advocate’ model – after all, criminal defence lawyers are included in these more general discussions and when such principles are considered in the context of criminal defence, their applicability is obvious. Furthermore, the majority of literature considered whilst constructing the model focused on criminal defence, and in reading such articles the importance of these particular principles was apparent.

Some of the principles could be described as being more robust than others. A robust principle could be broadly classified as one which has a consistent presence in academic literature, is described as a positive theoretical obligation and features in discourse across a significant chronological period. All of the principles described in Chapter 2 exhibited the above characteristics to some extent. However, the ‘zealous advocate’ model attempts to describe as wide a range of potential obligations as possible, some with more robust academic roots than others. The principles of partisanship, detachment and confidentiality have, since the early days of criminal defence, been consistently raised in academic discussion, and are regularly asserted as core duties owed by the defence lawyer. Similarly, elements of the principle of truth-seeking, most notably the prohibition of lying to the court, have long represented unquestionable obligations. The principle of procedural justice has featured in descriptions of the role since the 19th Century, but some aspects of the principle, like disclosure and procedural integrity, have taken on increasing theoretical importance in the last three decades. Thus, the principle has, in an academic sense, developed considerably in recent times. As such, the principle of procedural justice is perhaps less theoretically robust than others. Similarly, the principle of morality, whilst undoubtedly present in theoretical discourse, was arguably a stronger element of the role in the 19th and early 20th Centuries. Modern descriptions of the role involving moral obligations are arguably less common than, for example, those discussing partisanship or confidentiality. However, it is certain that all of the principles describe, to some extent, the ‘zealous advocate’ conception of the role in a clear, thorough and comprehensive way. Therefore, bearing in mind the caveat detailed in this paragraph, I would argue that the ‘zealous advocate’ model sufficiently answers the first research question – it is possible to identify a coherent ‘theoretical’ conception of the role of the adversarial criminal defence lawyer.

4. Is the ‘Zealous Advocate’ Model Useful and Relevant to Modern Practice?

Answering the above required me to address two questions: what is the role of the modern criminal defence practitioner and to what extent, if at all, does the ‘zealous advocate’ model reflect this? As stated in Chapter 1, and reiterated above, I pursued six main issues in order to answer these questions:

What ‘formal’ conceptions of the role exist in England and Wales; how do ‘formal’ conceptions compare with any ‘theoretical’ conception of the role; do ‘conflict points’ exist within ‘theoretical’ and ‘formal’ conceptions of the role; are any ‘conflict points’ resolved by regulation in England and Wales; what ‘practical’ conceptions of the role exist in England and Wales; and how, if at all, do practitioners resolve any ‘conflict points’ in their everyday role.

4.1 Do Formal Conceptions Reflect the ‘Zealous Advocate’ Model?

Chapter 3 outlined formal conceptions of the defence lawyer’s role, using the ‘zealous advocate’ model as a guiding structure. I examined how formal regulation defined the role and assessed how closely such definition reflected the theoretical model discussed in Chapter 2. The theoretical principle of partisanship requires defence lawyers to fearlessly and vigorously protect and advance the client’s cause, at any cost to other parties. Although formal conceptions of the principle share this client-orientated approach, the language used to describe the obligation is much more restrained. Formal regulation seems to require, primarily, that defence lawyers act in the legitimate best interests of their client, by advancing their legal rights. Any actions must be proper, lawful and, in terms of exploiting prosecution errors, ‘just’. The most robust references to the principle of partisanship are contained in some codes of conduct, older case law and authoritative guidance manuals. In general, reference to the principle is characterised by vague and conservative language. Whilst ‘fearless’ summarises the nature of the theoretical obligation, ‘best interests’ is perhaps a better summary of formal conceptions of the principle. The CPR, which have had a crucial impact on criminal defence, make absolutely no reference to the principle of partisanship. Formal conceptions of partisanship appear to be more highly regulated than the theoretical conception.

Legislation, case law and conduct rules have curtailed several traditional elements of criminal defence work. The use of ambushes or delaying tactics, the exploitation of errors and loopholes, and aggressive cross-examination of witnesses have either been eliminated or restricted to very specific circumstances. The somewhat ambiguous and often arbitrary concepts of ‘proper conduct’ and ‘justice’ have also emerged as powerful influences on how far a defence lawyer can go in fulfilling the obligation to be a partisan defender. Furthermore, defence lawyers are sent mixed messages about the principle of partisanship. In police stations, a solicitor’s “only role is to advance their clients legal rights”.¹⁰⁰¹ In court, they are expected to be ‘fearless’ according to some standards, yet ‘act in the best interests’ of a defendant according to others. This is not simply semantic nit-picking; the importance, and difference between, the meaning of these obligations should not be underestimated. In the light of Lord Auld’s reference to “legitimate best interests” in *R v. Gleeson*, one has to wonder whether promoting the ‘legitimate best interests’ of a client and protecting them ‘fearlessly’ are the same thing.

It could be concluded that formal conceptions reflect the concept of ‘mere-zeal’ proposed by Tim Dare.¹⁰⁰² The “merely-zealous lawyer”¹⁰⁰³ seeks to secure the client’s legal rights and nothing beyond that. Considering the emphasis formal conceptions of the principle of partisanship place on promoting the ‘legitimate best interests’ and *legal* rights of the defendant, one could conclude that the formal framework regulating the defence lawyer’s modern role has more in common with ‘mere-zeal’ than theoretical notions of partisanship. In summary, formal conceptions of the principle of partisanship seem to be typified by more moderate and cooperative obligations. Under the ‘zealous advocate’ model, partisanship is undoubtedly the foremost aspect of the defence lawyer’s role, taking primacy over most other obligations. In contrast, the principle is less prominent in formal regulation. It remains an essential and central part of modern criminal defence, but is now symbolised by deference to the court and to justice, a less combative approach to opponents, and arguably a more paternal relationship with clients, where a defendant’s blind desire to escape conviction at all costs may not necessarily guide the defence lawyer’s work.

¹⁰⁰¹ ‘Notes for guidance’ [6D], 23 - *Police and Criminal Evidence Act 1984*, Code of Practice C.

¹⁰⁰² See Chapter 2, Section 3.1.1.

¹⁰⁰³ Dare T. (2009) *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* - Surrey: Ashgate, 76.

The principle of detachment is arguably as robust in formal conceptions of the role as it is under the 'zealous advocate' framework. Legislation appears to prohibit defence lawyers from rejecting clients because the nature of an allegation or the character of a client is personally objectionable to him or her.¹⁰⁰⁴ Other regulation, particularly case law and codes of conduct, make it clear that defence lawyers cannot pick and choose their clients, and must accept unpopular or unmeritorious causes. Further, the personal views of the defence lawyer have no place in the decision-making process or advisory function of defence lawyers. It is, however, worth noting that criminal defence solicitors are 'generally free' to choose clients, while the 'cab-rank' rule binding barristers contains exceptions, most notably related to fees. Both of these issues can be attributed to the idiosyncrasy of the English and Welsh legal system and its divided legal profession. However, as has been highlighted, the overriding principle applying to both types of lawyer, and accredited representatives, is that members of the public should not be denied representation on the basis that the case or the client are disliked by the lawyer or wider society. The rather non-committal suggestion that solicitors are 'generally free' to choose clients is not fatal to the applicability of the principle of detachment, and the cab-rank rule is, in formal regulation, a leading example of detachment and neutrality, despite the practical flaws it might have. I would therefore conclude that formal conceptions of detachment, when regarded as a whole, very closely reflect the principle as conceived in the theoretical 'zealous advocate' model.

Like the principle of detachment, confidentiality appears to remain a fundamental, and mostly unchallenged, aspect of formal conceptions of the role. Legal Professional Privilege is the primary manifestation of the duty, and represents a highly respected and overriding client-orientated obligation. Defence lawyers remain bound by until it is waived by the defendant, and courts cannot compel defence lawyers to breach it, even if it means "cases may sometimes have to be decided in ignorance of relevant probative material."¹⁰⁰⁵ Like the theoretical conception, the principle is not absolute, with exceptions primarily in cases of iniquity. Alongside legal professional privilege, defence lawyers are bound by general confidentiality rules contained in codes of conduct. These cover a wider range of material than privilege, but have arguably been eroded by increasingly burdensome disclosure obligations in legislation such as the *Criminal Procedure and Investigations Act 1996* and the CPR. As such, one could

¹⁰⁰⁴ Section 17(3)(c) - *Courts and Legal Services Act 1990*.

¹⁰⁰⁵ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, [24], 649 *per* Lord Scott of Foscote.

conclude that although the core principle of confidentiality remains intact in formal conceptions of the role, the extent to which it can apply has been limited by encroaching duties to reveal information to the prosecution and court.

Formal conceptions of the principle of procedural justice are arguably much more extensive than under the 'zealous advocate' model. Like the theoretical conception, formal regulation expects defence lawyers, as 'officers of the court', to uphold the interests and administration of justice. The theoretical principle of procedural justice requires defence lawyers to "keep clients law-compliant"¹⁰⁰⁶ and work within "the framework of the prescribed rules".¹⁰⁰⁷ In addition, theoretical discourse suggests that as an officer of the court the defence lawyer should reduce delay and refrain from using tactics that "den[y] fundamental principles of fairness",¹⁰⁰⁸ such as ambushes. Formal conceptions of the principle of procedural justice arguably go much further. To begin with, defence disclosure requirements are now more far-reaching than ever before. The expectation that defence lawyers will reveal information about their case in order to facilitate the justice process is a strong one. This is embodied in the defence statement, provided for in the *Criminal Procedure and Investigations Act 1996*, and evident in the requirements the CPR. Formal regulation now demands that defence lawyers share the nature of their client's defence, any authorities they wish to rely on, and any witnesses they wish to call.¹⁰⁰⁹ Furthermore, failure to reveal required information (for example, by omission from the defence statement or by maintaining silence at the police station) can lead to negative inferences being drawn against the defendant.

The CPR and policies such as CJSSS arguably extend the defence lawyer's case management duties beyond the general theoretical obligation to facilitate the administration of justice. The obligations owed by the defence lawyer are now much more specific, highly regulated and compulsory. Defence lawyers must help identify the "real issues", must participate in "discouraging delay" and "co-operate in the progression of the case".¹⁰¹⁰ Although criticised by some academics, the theoretical

¹⁰⁰⁶ Lawry R. (1990-1991) *The Central Moral Tradition of Lawyering* – 19 Hofstra L.R., 353.

¹⁰⁰⁷ Bress D. (1965-1966) *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility* – 64 Mich. L.R., 1497.

¹⁰⁰⁸ Tomljanovic G. (2002-2003) *Defence Disclosure: Is the Right To 'Full Answer' the Right To Ambush?* – 40 Alta. L.R., 689.

¹⁰⁰⁹ As mentioned earlier, the disclosure aspect of the formal principle of procedural justice has been curtailed by a note contained in the *Criminal Procedure Rules 2010*, stating that the defence statement does not apply to Magistrates' Court proceedings.

¹⁰¹⁰ Rule 3.2 – *Criminal Procedure Rules 2010*, 2010/60.

principle of procedural justice did not explicitly prohibit ambush defences. Again, formal conceptions of the role contrast. The case of *R v. Gleeson*,¹⁰¹¹ amongst several others, makes it clear that utilising prosecution or court errors for tactical advantage is no longer acceptable; thus, the principle of procedural justice requires that defence lawyers refrain from exploiting such loopholes. Coupled with formal conceptions of the principle of truth-seeking (which arguably requires defence lawyers to ‘cure’ mistakes in their opponents case), it is clear that the defence lawyer has a much more court-orientated role than the ‘zealous advocate’ model depicts. However, both the theoretical and formal conceptions of procedural justice have, at their heart, the principle that the defence lawyer should promote a fair procedure and play by the rules. The robustness of procedural justice in formal regulation can be attributed to the increased body of rules governing criminal procedure. Extensive and detailed legislative and jurisprudential obligations have replaced broad and vague professional regulation as the primary source of guidance for defence lawyers’ duties to the court. I would therefore argue that formal conceptions of the principle of procedural justice make it a much more prominent element of the defence role, and only partially reflects the theoretical conception.

Some aspects of formal regulation are consistent with the theoretical conception of truth-seeking. For example, lying for a client is prohibited, a rule that is evident in all formal regulation. Both formal and theoretical conceptions require defence lawyers to participate in the process of acquitting the innocent and convicting the guilty. This has somewhat vague implications for the role; however, where theory leaves such uncertainty unresolved, formal conceptions of truth-seeking are more clear and expansive. The disclosure obligations discussed above not only fulfil the principle of procedural justice, but promote the principle of truth-seeking. Defence disclosure is a quintessential example of truth-seeking, in that it reveals *all* relevant information for the court to assess, whether it damages or aids the defendant. Formal regulation also requires the defence lawyer to draw the court’s attention to adverse legal authorities. Although this is identified by a minority of theorists as constituting a defence duty, it does not seem to represent prevailing theoretical opinion. At best, sharing disadvantageous authorities with the court and prosecution symbolises an extreme of end of truth-seeking within the ‘zealous advocate’ model. In contrast, formal conceptions of truth-seeking treat it as a basic duty of any defence lawyer.

¹⁰¹¹ [2004] 1 Cr. App. R. 29, [34].

Formal conceptions of the principle also expect defence lawyers to highlight any abuse of process, technical error or procedural flaw that may have been perpetrated by the prosecution, the court or indeed the defence. The theoretical principle makes no reference to such a duty. In fact, the theoretical principle of partisanship urges defence lawyers to take advantage of such opportunities. Once again, formal regulation goes further than the ‘zealous advocate’ model. In summary, it would be fair to say that to some extent formal conceptions of truth-seeking reflect the ‘zealous advocate’ model. However, in many ways formal regulation of the role goes beyond the basic idea that the defence lawyer should "pursue the process from which the truth emerges".¹⁰¹² It specifies concrete, active obligations which the defence lawyer must discharge. Formal regulation surrounding the modern criminal defence lawyer sends a fairly clear message – the principle of truth-seeking is a significant and central obligation which defence lawyers must comply with. It also places greater emphasis on the court-orientated duties owed by the defence lawyer. Thus, it can be said that formal conceptions of the principle of truth-seeking do reflect the theoretical principle in a sense, but certainly seem to extend the duties of the defender beyond the boundaries of the ‘zealous advocate’ model.

Formal conceptions of the principle of morality are, at best, limited in scope. Regulation in the form of legislation, case law and codes of conduct require defence lawyers to respect witnesses, and avoid "defamatory aspersion[s]".¹⁰¹³ In essence, the defence lawyer cannot say *anything* to support a client’s cause. The provisions of the *Youth Justice and Criminal Evidence Act 1999* severely restrict the cross-examination of complainants about their sexual history, to ensure that vulnerable complainants are "treated with dignity in court and . . . given protection against cross-examination and evidence which invades . . . privacy unnecessarily and which subjects [a witness] to humiliating questioning and accusations which are irrelevant to the charge against the defendant."¹⁰¹⁴ This is a clear and robust obligation, requiring that defence lawyers avoid employing cynical, unethical and offensive tactical options. Beyond this, the principle of morality has little presence in formal conceptions of the role. Like much of the academic discourse on this area, some of the sources that shape formal conceptions

¹⁰¹² Haar quoted in Simon W. (1978) *The Ideology of Advocacy: Procedural Justice and Professional Ethics* – Wis. L.R. 29, 61.

¹⁰¹³ [708(j)], ‘Section 1: The Code of Conduct’, Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010.**

¹⁰¹⁴ *R v. A (No. 2)* [2001] UKHL 25, [142] *per* Lord Hutton.

have a normative tone, urging change rather than imposing standards. Mostly, formal regulation in this area relates to matters of civility and respect, rather than proactive moralising. Of the few regulatory materials that infer a formal obligation of morality, none require defence lawyers to exercise a conscience in choosing, advising or defending their clients. It could therefore be concluded that formal conceptions of the principle only vaguely reflect the ‘zealous advocate’ conception, and that the principle of morality should be considered an ideal rather than a formally regulated duty.

4.2 Conflicts and Formal Conceptions

The introductory section of Chapter 4 comprehensively identified and explored conflict points in the ‘zealous advocate’ model. The remainder of that chapter reviewed the existence of such conflicts in formal conceptions of the defence lawyer’s role, and pointed to a number of conflict points that seem to be unresolved by formal regulation. The conflict between the principle of confidentiality and the principles of procedural justice and truth-seeking is significant. In terms of confidentiality and procedural justice, the major point of friction is defence disclosure. The requirements of the defence statement and the CPR are extensive, and the boundary between confidential information and what information should be disclosed is unclear. As was highlighted earlier, the ‘identification of the real issues’ is a primary obligation and the meaning of ‘the real issues’ is not yet formally defined. Regulation provides mixed and confusing guidance on such matters, in some instances insisting that defence lawyers cannot reveal information the court may require, yet stating elsewhere that case management provisions must be adhered to. If the defence lawyer is unable to balance the duty to maintain confidentiality with the duties of disclosure, then he or she may be forced to withdraw. This is hardly an adequate solution, helping neither the client nor the court.

In terms of the clash between confidentiality and truth-seeking, there are some clear-cut resolutions. For example, confidentiality cannot be used to suppress material that might facilitate criminal activity. However, the balance is more difficult elsewhere, a particular example being a confession of guilt by the defendant. Although the defence lawyer is forbidden from asserting a positive defence in such a situation, he or she is obliged by the principle of confidentiality to hide said confession. If a defendant, after having made such a confession, insists on a positive defence, then again the defence lawyer must withdraw. However, in doing so, the defence lawyer cannot reveal why he

or she is withdrawing. This results in a very questionable situation; the defendant is left without representation, the court is left without any information, yet the actions of the lawyers clearly imply that the defendant has attempted to perpetrate some form of deception. This does not seem to promote either confidentiality or truth-seeking, or equate with the stated purpose of achieving a "full and fair hearing".¹⁰¹⁵ Similar problems arise with the defendant's non-attendance, or a fundamental change in instructions that fall short of a request to lie. Therefore, various conflicts between confidentiality and the umbrella duty to the court remain unresolved and are, in some ways, farcical.

The principles of partisanship and morality also appear to be blighted by unresolved friction, but perhaps less acute than some other conflict points. The principle of morality, as was discussed above, has a very faint presence in formal conceptions of the defence lawyer's role. However, where it does place obligations upon the defence lawyer, it generates difficulties. For example, the provisions of s.41 of the *Youth Justice and Criminal Evidence Act 1999* created very strict 'gateways'¹⁰¹⁶ which defence evidence must pass through in order to question witnesses about their sexual history. So, in a rape case or sexual assault case, a vulnerable victim may be shielded from humiliating or upsetting cross-examination about their past sexual activity. This undoubtedly fits within the scope of the principle of morality, as an obligation (or more accurately, a bar) which compels defence lawyers to respect the interests of a prosecution witnesses. In *R v. A*,¹⁰¹⁷ Lord Slynn highlighted that, "the accused is entitled to a fair trial and there is an obvious conflict between the interests of protecting the woman and of ensuring such fair trial."¹⁰¹⁸ As such, Lord Steyn concluded that the above provisions constituted "legislative overkill."¹⁰¹⁹

¹⁰¹⁵ *R v. Gleeson* [2004] 1 Cr. App. R. 29, 416.

¹⁰¹⁶ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History – The Barrister Magazine Website*, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010.**

¹⁰¹⁷ *R v. A (No. 2)* [2001] UKHL 25.

¹⁰¹⁸ *Ibid.*, [5].

¹⁰¹⁹ *Ibid.*, [43].

Yet, even in the light of a more balanced application of the provisions, it seems that:

"The strict requirements imposed by the legislation remain active, are consistently and rigorously applied by trial judges, and there has been no softening of the very tight regime regulating previous sexual history with people other than the defendant himself."¹⁰²⁰

Cases like *R v. Beedall*¹⁰²¹ add to the evidence that the balance between the defence lawyer's obligation to thoroughly cross-examine a witness and the ethical requirements of the statute is a difficult one to strike. Other than this particular issue, the obligations incumbent upon defence lawyers to respect victims and avoid scandalous or defamatory assertions do not necessarily conflict with the duty to be a partisan advocate. However, to some extent, this conflict remains unresolved.

The principle of detachment is, at a basic level, incompatible with any comprehensive set of duties to uphold moral standards. However, as has been illustrated, formal conceptions of morality are limited and represent a fringe obligation. The conflicts that do remain in formal regulation do raise questions. For example, the duty of solicitors not to reject clients based on their cause or character clashes with the assertion that they are 'generally free' to choose who to represent. This is a freedom which presumably allows solicitors to turn away persons accused of offences of an opprobrious nature or who possess dubious intentions. These obligations are not only contradictory; they lack detailed advice as to when they may or may not be applicable. For example, it might be questioned whether the seriousness of a case or the fee involved would be reasonable issues to take into account. This conflict point is also affected by the provisions of s.41 of the *Youth Justice and Criminal Evidence Act*. Arguably, detachment is a necessary corollary of the zealous cross-examination of witness. The inference of s.41 is that defence lawyers should not pursue issues that may be difficult for a vulnerable witness to cope with unless they are absolutely necessary. In contrast, the principle of detachment would expect defence lawyers to ask difficult questions regardless of the consequences to others. The latter requirement seemingly contradicts the obligation to 'respect' witnesses. As such, some elements of conflict exist in formal conceptions of

¹⁰²⁰ Rook P. (2004) *Restrictions on Evidence or Questions About the Complainant's Sexual History* – The Barrister Magazine Website, <http://www.barristermagazine.com/articles/issue22/rook.htm>: **Last accessed 27/07/2010.**

¹⁰²¹ *R v. Beedall* [2007] EWCA Crim. 23.

detachment and morality, particularly in relation to the boundary between neutral advocacy and respectful questioning.

The final conflict point, between the principle of partisanship and the principles of procedural justice and truth-seeking, presents significant, ongoing difficulties. Defence lawyers are, on the one hand, expected to follow their client's instructions, to act in their client's "best interests",¹⁰²² present to the court "a coherent and persuasive case"¹⁰²³ and, when necessary, put the prosecution to proof. On the other hand, they are expected to comply with rigorous disclosure obligations, help facilitate a fair, efficient and speedy process and be honest at all times. These can create serious clashes. For example, the former set of requirements might obligate the lawyer to secure the services of expert witnesses to test the prosecution case, or require a thorough examination of evidence, such as witness statements or CCTV footage. These endeavours may take time. Yet the defence lawyer is also expected to conduct such work in a way which is "consistent with the law and with counsel's overriding duty to the court",¹⁰²⁴ which includes avoiding "unnecessary expense or waste of the court's time" (and what unnecessary means is open to interpretation). The CPR clearly expect defence lawyers to minimise delays by "identification of the real issues" and "discouraging delay"¹⁰²⁵ from the outset. It must be questioned whether these obligations are compatible or realistic. After all, some crucial issues that the defence might wish to pursue may arise after the start of a case, making 'efficiency' obligations seem heavy-handed. Alternatively, a defence lawyer may simply be trying to waste time and money to deter the prosecution or bore a jury. Formal requirements are therefore in a continual state of conflict.

Ambush defences (and the closely related issue of 'curing' prosecution errors) also present problems. The defence statement requires defence lawyers, as a party to the

¹⁰²² Section 1(3)(c) - *Legal Services Act 2007*; *Medcalf v. Mardell* [2003] 1 AC 120 (HL), 141 *per* Lord Hobhouse; [303(a)], 'Section 1: The Code of Conduct', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**; Rule 1.04, Solicitors' Code of Conduct – Solicitor's Regulation Authority, <http://www.sra.org.uk/rules/>: **Last accessed 16/08/2010**.

¹⁰²³ [2.3.3], page 7, 'Standards of competence for the accreditation of solicitors advising at the magistrates' court', Criminal Litigation Accreditation Scheme – The Law Society, <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>: **Last accessed 16/08/2010**.

¹⁰²⁴ [6.2.3], 'Section 3: Written Standards for the Conduct of Professional Work', Bar Standards Board Code of Conduct – Bar Standards Board, <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/>: **Last accessed 16/08/2010**.

¹⁰²⁵ Rule 3.2 – *Criminal Procedure Rules 2010*, 2010/60.

proceedings, to correct any "abuse of process",¹⁰²⁶ which one would assume includes fundamental flaws in the prosecution case. Law Society advice seems to support this, suggesting that defence lawyers sacrifice a helpful "deficiency"¹⁰²⁷ in order to help the court. However, case law sends mixed messages about the issue. *R v. Cocks*,¹⁰²⁸ *R v. Khatibi*,¹⁰²⁹ *R v. Munnery*¹⁰³⁰ and *R v. Gleeson*¹⁰³¹ all address the problem of ambushes and provide some contradictory conclusions. The opinions expressed in *R v. Gleeson* appear to represent the prevailing attitude in much case law. However, difficulties remain, particularly in the context of the privilege against self-incrimination and the right to put the prosecution to proof.

A defendant's right to be presumed innocent until proven guilty, under Article 6(2) of the European Convention on Human Rights and Article 48 of the European Union Charter of Fundamental Rights, was interpreted by the European Court of Human Rights in the following manner:

"The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."¹⁰³²

Related is the ancient principle, famously articulated in *Woolmington v. DPP*,¹⁰³³ that the prosecution must discharge the burden of proof in a criminal case. It is therefore questionable whether compelling the defendant's lawyer to correct prosecution mistakes, and as a result help the prosecution 'build' a case against the defendant, would be compatible with the right against self-incrimination. Equally, the prohibition of the ambush defence (which arguably forgives and encourages incomplete and deficient prosecutions) seems incompatible with the obligation to provide "fearless, vigorous and effective defence"¹⁰³⁴ where the defendant's interests are the defence lawyer's "first concern".¹⁰³⁵ Therefore, I would suggest that serious conflicts of duty remain a problem

¹⁰²⁶ Added by s.6A(1)(d) - *Criminal Justice and Immigration Act 2008*.

¹⁰²⁷ Legal Policy Directorate (2009) *Criminal Procedure Rules: Impact on Solicitor's Duties to the Client* – London: The Law Society, 11.

¹⁰²⁸ (1976) 63 Cr. App. R. 79.

¹⁰²⁹ [2004] EWHC 83 (Admin).

¹⁰³⁰ [1992] 94 Cr. App. R. 164.

¹⁰³¹ [2004] 1 Cr. App. R. 29, 416.

¹⁰³² *Murray v. UK* (1996) 22 EHRR 29, [45].

¹⁰³³ [1935] AC 462.

¹⁰³⁴ Rule 2.1, page 4, Public Defender Service Code of Conduct – London: The Stationery Office.

¹⁰³⁵ [1], 'Guidance to rule 1 – Core duties', Solicitors' Code of Conduct – Solicitor's Regulation

in the context of the principle of partisanship and the principles of procedural justice and truth-seeking.

4.3 Do Practical Conceptions Reflect the ‘Zealous Advocate’ Model?

Practical conceptions of the criminal defence lawyer’s role were derived from the empirical study. As has been discussed, the empirical study had two main aims: to assess how criminal defence practitioners conceive of their role and to examine whether defence practitioners recognise the conflict points discussed in this thesis, and how, if at all, they resolve them in practice. In assessing how the respondents conceived of their role in practice, I utilised a mixture of direct questioning and vignette-based methodology. With these techniques, I intended to explore how the respondents defined their practical role and whether it reflected the ‘zealous advocate’ model and formal conceptions of the role, outlined in Chapters 2 and 3. Like much of this thesis, this approach was structured around the theoretical framework of principles described in Chapter 2, and my conclusions will use the same structure.

The respondents provided a large body of opinion relating to the principle of partisanship. It was one of the most pervasive topics discussed in the interviews. Several respondents expressed views that were akin to a more traditional, ideal model of the vigorous, combative and gladiatorial defence lawyering, characterised by a defiant, invariable pursuit of client interests, even if it meant ‘bending the rules’. Yet, several expressed more moderate and balanced views, carefully explaining the need to work within the rules and the law, closely reflecting formal conceptions of the role. Most respondents stated they would pursue the ‘best interests’ of the client which, as discussed, is a term open to interpretation. For example, ‘best interests’ could mean victory for the client at all costs; it could mean an early guilty plea to get a sentence reduction; or it could mean getting an early guilty plea because the client *should* be convicted in the light of the evidence against him or her. ‘Best interests’ is therefore a difficult term, which may have had different meanings to different respondents. In pursuing the ‘best interests’ of the client, only one respondent overtly stated that his duty, regardless of innocence or guilt, was to “ensure [an] acquittal” for their client. This suggests that, for most respondents, to ‘win’ is not necessarily the same as pursuing the ‘best interests’ of the client. This is perhaps a little closer to formal conceptions than

Authority, <http://www.sra.org.uk/rules/>: Last accessed 16/08/2010.

the theoretical model.

However, this is not to suggest that the respondents seemed inclined to surrender clients of questionable credibility to the mercy of judges and magistrates without a fight. For example, several made it clear that confessions of guilt were not, within reason, a barrier to representation, reflective of both the 'zealous advocate' model and formal conceptions of the role. Several respondents suggested that they would take points, pursue leads or ask questions that were not necessarily popular with the court, the prosecution or complainants. However, in general, duties of partisanship were described in restrained and complaisant terms. Promoting the 'best interests' of a client seemed to focus specifically on their legal rights, again reflecting the concept of 'mere-zeal' that characterises formal conceptions of the principle. None suggested that they would indulge defendants' whims by making inflammatory statements, false claims or telling lies. At no point did the respondents convey the traditional image of the defence lawyer as a 'tool' of the client. Yet, the respondents' practical conceptions of the principle of partisanship still seemed to lie somewhere in between the theoretical 'zealous advocate' model (more akin to the 'hyper-zealous' lawyer) and formal regulation. Responses displayed aspects of both the theoretical spirit of uncooperative and ruthless advocacy, alongside the more conciliatory nature of formal conceptions. Thus, one could conclude that practical conceptions do not fit comfortably within the categories of mere or hyper zealous partisan. The responses do indicate that core elements of theory remain; fearlessness in the face of hostility, vigorous questioning of witnesses and *some* exploitation of loopholes. However, these aspects must be balanced with honesty, openness, cooperation and the acceptance that the court and the rule of law come first.

Responses relating to the principle of detachment were consistent, reflecting the 'zealous advocate' model and formal regulation. Respondents made it clear that, in accepting clients, they would not pass any sort of moral judgment and would always put personal opinions aside. Barristers referred to the 'cab-rank principle' as obliging them to represent any client, regardless of their alleged offences or their motives. Interestingly, as was highlighted in the analysis, solicitors also believed that were obliged to accept any client, feeling they could not "pick and choose" (Respondent S3). The conclusion one can draw is that, in practice, barristers and solicitors *both* operate a 'cab-rank principle', which closely reflects the theoretical conception of the role. In

general, the respondents seemed to characterise the role of the defence lawyer as being emotionless, where feelings of empathy, passion or anger have no place. This, of course, is the very definition of detachment; the exercise of complete neutrality toward the right or wrong of the proceedings enables the defence lawyer to act as a thorough and determined professional. Several respondents made this explicit. In summary, practical conceptions of the principle of detachment closely mirror both the 'zealous advocate' model and formal regulation, suggesting a unity between all three conceptions of the role. It should be noted that since legal aid is no longer classified as sufficient pay under the 'cab-rank rule', both barristers and solicitors may, in practice, opt out of representing clients if the fee is too low to justify acceptance. However, one respondent addressed this issue directly, stating:

"I don't think legal aid is deemed to be sufficient remuneration anymore . . . so I could turn it down saying 'you aren't offering me enough money' . . . I wouldn't do that cos I do actually take on legal aid cases routinely." – Respondent B1

This seems to undermine the suggestion that money affects detachment.

Most respondents seemed to regard the principle of confidentiality as a primary obligation in their practical role. They described the necessity of protecting information passed on by the client or material relating to the case. However, they also accepted that the principle was not absolute. Most of the respondents that referred to their duty of confidentiality seemed to imply that it had to be balanced with professional obligations to the court. However, none seemed to think that this meant they had to betray their clients by 'spilling the beans'. The practical principle of confidentiality therefore appears to be a question of judgment. The respondents suggested that they would maintain confidentiality as far as possible, but that there were limits. None were clear about where these boundaries lie, but one suspects that, in practice, the respondents dealt with such issues on an *ad hoc* basis, depending on the type of information held, the attitude of the client, the demands of the court and the obligations outlined by regulation such as the CPR. This is of course speculation. Overall, the responses received suggest that practical conceptions of the principle of confidentiality are robust but limited by competing obligations, much like the theoretical and formal conceptions. The theoretical conception of uncooperative, secretive and evasive defence is less tenable in modern practice, and as such the practical conception is

seemingly more akin to formal conceptions than to the theoretical model.

The respondents' opinions strongly suggest that the principle of procedural justice has an unwelcome but undoubted place in practical conceptions of the role, extending beyond the limited parameters of the theoretical principle. Furthermore, practical conceptions appear to reflect formal conceptions of procedural justice; for example, the CPR were referenced by the respondents frequently, as they described obligations to avoid delays, time-wasting and game-playing. They described definite duties to disclose extensively at an early stage, via the defence statement or as a result of procedural requirements, and they categorically dismissed the use of ambushes on the court or prosecution. Overall, most respondents described a role in which they actively helped the court 'manage' a case, avoided unnecessary confrontation and allowed justice to move "swiftly on" (Respondent B4). However, this is not to say that *all* the respondents considered this situation to be positive. Some seemed to think the disclosure and efficiency requirements had gone too far, and had made "inroads" (Respondent B3) into traditional, adversarial defence territory. In contrast, others felt that the obligations were fair and often beneficial to the client. It is therefore difficult to draw definite conclusions about how happy respondents were with their practical obligations to promote procedural justice. However, what is clear is that the respondents recognised an extensive, court-orientated principle, which has much in common with formal conceptions of the role, and leaves the theoretical principle of procedural justice looking both limited and vague.

Both the theoretical and formal conceptions of the principle of truth-seeking were, in some ways, reflected in the comments of the respondents. It is clear that the duty not to actively mislead the court by lying for the defendant is a universally recognised obligation of defence lawyers in theory, formal regulation and practice. Several respondents also suggested that passively misleading the court, by allowing it to "labour under a misapprehension" (Respondent B1) for example, was also acceptable. The 'zealous advocate' model reflects this. However, the 'no ambushes' doctrine and the suggestion that defence lawyers should 'cure' prosecution mistakes, outlined in formal sources such as *R v. Gleeson*,¹⁰³⁶ cast doubt on the viability of passively misleading the court. Again, the respondents expressed contrasting views about the practical reality of these truth-seeking obligations, some confidently dismissing any practical duty to

¹⁰³⁶ [2004] 1 Cr. App. R. 29, 416.

correct errors, others stating with some certainty that they were obliged to do so. Several respondents rejected the notion that they had a direct responsibility to help acquit the innocent and convict the guilty, regarding it as an almost perverse idea. Therefore, much of the discussion relating to the principle of truth-seeking suggests that its practical conception is uncertain and debatable. Outside of the obligation not to lie to the court, it is difficult to conclude with any clarity whether practical conceptions of the principle reflect the theoretical model or formal regulation. However, the uncertainty about whether the more controversial duties apply and the obvious resistance of several practitioners to them, implies that in practice the principle of truth-seeking is more akin to the theoretical principle, which primarily prohibits lying. Modern, formal conceptions of the principle, which encourage active pursuit of the truth by aiding the opposition and sharing information, may not yet have filtered into practice but may have in the near future.

The principle of morality primarily focuses on the defence lawyer's treatment of other parties to the criminal justice process, namely complainants and witnesses. Most respondents described a duty to be polite, civil and respectful, reflecting basic elements of both formal and theoretical conceptions of the principle. The 'zealous advocate' model describes a set of active moral duties that go beyond basic courtesy, however, few respondents felt they were obliged to do any more than this. None of the respondents recognised any direct duty to do the 'right thing' by complainants and witnesses. Moreover, respectful behaviour was not driven by any obligation to protect the dignity of the complainants or witnesses, but by the needs of the defendant. Several stated that bullying or aggression was likely to damage a client's case and so was of little utility. Most respondents suggested that they would prefer not be rough or unsympathetic with prosecution witnesses, but explained that their job was to serve the client, which would come first. Additionally, most respondents dismissed any obligation to moralise to their clients about their past convictions or their ongoing behaviour; however, some suggested they would attempt to steer a defendant towards a more ethical course of action in the right circumstances. In conclusion, any meaningful principle of morality therefore seems to have little application in practice, although this is not because defence lawyers have an active duty to be immoral, rather, they have no duty to avoid or prevent unfair or immoral behaviour. Practical conceptions of the principle, much like formal regulation, are very limited. Any practical principle of morality is more closely related to common decency than a robust framework of moral

obligations. Thus, there is little reflection of the theoretical conception in modern practice.

4.4 Resolving Conflicts in Practice

Confidentiality v. Procedural Justice and Truth Seeking

The majority of respondents recognised a conflict point in Scenario A, primarily between their duty to protect privileged information and their duties not to mislead the court or generate procedural delay. All of the respondents attempted to overcome the conflict points presented, with most resolving it in favour of the client. Few seemed to believe that any delays would be caused by upholding confidentiality and expected the trial to proceed. Where respondents felt delay might be caused by secrecy, they still believed that confidentiality superseded other obligations. Several respondents stated that they would not reveal the information passed on by 'Z' and would thus uphold the principle of confidentiality, whilst others stated that they would divulge the information only if the client desired this and had clearly waived privilege. Some felt that sufficient waiver had been granted, but most did not. Other respondents felt that they had an overriding duty not to mislead or lie to the court, but would only reveal 'Z's whereabouts if they were asked directly. This suggests that, if possible, the respondents would avoid revealing the information. Some respondents did resolve the conflict in favour of their court-orientated duties by sharing the information with the court; however, they characterised such behaviour as client-serving, believing that honesty and openness would benefit the defendant's cause. In summary, most recognised and resolved the conflict point without much difficulty, with the majority opinion favouring secrecy over revelation. This seems to be contrary to some examples of formal conflict resolution. Cases like *R v. Gleeson* and regulation such as the CPR suggest that the principles of procedural justice and truth-seeking are overriding. However, the respondents' answers imply that, in practice, confidentiality may outweigh the principles of procedural justice and truth-seeking.

Partisanship v. Morality

The respondents seemed to find the resolution of this conflict point relatively straightforward. The vast majority of the respondents believed they had a duty to

discredit a complainant by reference to her sexual history, if the court allowed it and the client requested it. The group consensus was that defence lawyers have no direct obligation to actively protect a vulnerable complainant, for example, by rejecting any unfair, cruel or morally questionable tactics. Aside from the limitations placed on the lawyer by a court, most notably the provisions of the *Youth Justice and Criminal Evidence Act 1999*, the respondents seemed to agree that they would adopt unattractive but necessary tactics in the right circumstances. However, the respondents also seemed to suggest that they would not indulge clients by asking irrelevant or intrusive questions, or by making derogatory claims about complainants. They would most likely adopt a sensitive approach to dealing with vulnerable witnesses, although not because of any duty of morality. As above, the respondents suggested that to do otherwise would usually damage client interests and as such, nearly all the respondents felt that they had a *choice* rather than a duty to behave in a careful and delicate manner. However, it was clear that if a more robust and tough approach seemed necessary and was expected by the client, then that would happen. In conclusion, the overwhelming majority of respondents resolved this conflict point in favour of the principle of partisanship, suggesting not only that it is overriding in such situations but that any principle of morality is not a significant aspect of the defence lawyer's role on a day-to-day basis.

Detachment v. Morality

Part A of this conflict point dealt with acceptance of clients. The respondents were unanimous in concluding that they would always remain detached when accepting clients and refrain from passing judgment. All of the respondents believed that the allegations levelled at a client, his or her character or any past convictions were immaterial to acceptance of their case. They suggested that their job required them to regularly dismiss moral qualms about potential clients. They also suggested that they could trust in the criminal justice system to reach a fair and accurate verdict and that introducing moral judgments into the acceptance process would undermine the system. They seemed to regard such behaviour as unprofessional, too personal and outside of the remit of their role. Part B examined potential conflict when conducting the defence of a client. Again, most respondents concurred that questions of morality were irrelevant to their decisions about the conduct of a case. All the respondents accepted that cross-examination of a potentially vulnerable child witness did raise delicate issues. The majority suggested that they would adopt a careful and cautious approach but that,

ultimately, they would ask difficult or intrusive questions and would not shy away from tough or aggressive tactics if necessary. This would only be limited by the potential damage such an approach might do to a defendant's case and none recognised morality as an obstacle to a detached and thorough defence. In conclusion, the majority of respondents seemed to suggest that, in potential clashes between detachment and broader moral standards, the former, client-orientated obligation would prevail.

Partisanship v. Procedural Justice and Truth-Seeking

Part A examined the respondents' decisions about disclosure and the exploitation of 'loopholes' for the client's advantage. One respondent believed that presenting a technical defence in the face of significant evidence was "taking the piss" (Respondent A3), but the vast majority disagreed. Most felt that a client deserved his or her day in court, regardless of whether the defence was meritorious or the evidence compelling. Most simply believed that their job was to help the client before helping the court. In terms of disclosing the defence, a minority suggested that they would keep the information secret, believing they were not obliged to reveal anything to the court. However, the majority accepted, rather reluctantly, that they had an overriding duty to share their defence with the court and prosecution at an early stage. A small number of respondents considered such disclosure requirements to be positive; however, most felt aggrieved by this state of affairs, claiming that they were being forced to help prove the case against their client.

Part B also explored disclosure issues, namely whether a substantial change in the client's instructions had to be shared with the court. The vast majority provided the same response - they would not lie for the client by asserting her innocence, but they would not say anything to the court about her admissions as they could put the prosecution to proof. Most respondents therefore suggested that they would passively mislead the court which, in a sense, reconciles the principles of partisanship and truth-seeking. The second issue dealt with in Part B focused on ambush defences, examining whether the respondents would exploit a prosecution error and surprise the prosecution with a late defence. All the respondents concurred that they would not ambush the prosecution; most recognised that to do so would be pointless and counter-productive. However, the majority suggested that they would remain silent about any prosecution errors, although a few stated that they were obliged to 'cure' the flaws in the prosecution

case. Overall, the conflict point presented difficult and controversial issues for the respondents to tackle. Where they could, the respondents favoured the client-orientated principle of partisanship (for example, in relation to loopholes and putting the prosecution to proof). However, the respondents recognised that most of the time, they had an overriding duty to uphold the administration of justice and the search for the truth. They felt obliged to disclose information at an early stage, avoid ambushes and generally adhere to the truth. One gained the impression that, were the court more direct and probing, then the respondents would be forced to reveal more about their case than they would want to. As such, one can summarise that this conflict is, more often than not, resolved in favour of the court-orientated principles.

5. The Research Questions: Conclusions

Does any coherent 'theoretical' conception constitute a useful and relevant reflection of the role of the modern practitioner?

If the 'zealous advocate' model adequately describes the modern role, then one could conclude that it is both relevant and useful. It would suggest that academic discourse explains and influences the role of the criminal defence lawyer, and continues to resonate with 21st century practitioners. If the theoretical conception only loosely reflects modern practice or has no similarity at all, then one could draw different conclusions. At an extreme, one might suggest that theory is both irrelevant and useless, representing the disengaged commentary and ancient rhetoric of isolated academics. Alternatively, it could be argued that past and current theorising about the role of the criminal defence lawyer *lacks* relevance, in that it is out of touch with the modern duties and obligations of practitioners, but still serves a valuable normative purpose. This conclusion therefore implies that the 'zealous advocate' model is useful as a set of ideals that modern practitioners should aspire to. In the same way that pressure groups attempt to steer government toward less conventional, more idealistic policies, the theoretical conception could be regarded as an influential, external force for change in the criminal legal profession. I am inclined to draw the latter conclusion. There is a significant 'gap' between the 'zealous advocate' model and the modern role, as manifested by formal and practical conceptions. Some aspects of the traditional model remain valid and are reflected in both formal rules and modern defence practice; for example, the modern principle of detachment generally mirrors the historic,

traditional and ideal conception of the role. Nevertheless, much of the doctrine outlined in the theoretical conception appears to be at odds with the tone of the modern role.

Having examined formal and practical conceptions of the role, the theoretical principle of morality seems utopian. Despite this, the defence lawyer's role appears to have at least shifted towards a more complainant-friendly model. However, the most notable and important conclusion that one can draw from this thesis is that, in modern criminal defence, there is an increased emphasis on the duty to the court. The theoretical principles of procedural justice and truth-seeking seem limited in comparison to the recent and extensive formal provisions relating to case management, the search for the truth, efficient procedure and cooperative conduct. Furthermore, this new culture of prominent court-orientated obligations has undoubtedly filtered into modern practice. As a consequence, one can also conclude that there are now more barriers and disincentives attached to client-orientated defence. For example, far-reaching disclosure obligations, the prohibition of ambushes, more focus on respect for and fairness to prosecution witnesses, the reduction of delays and the correction of disadvantageous errors. In addition, the responses of the practitioners in the empirical study suggest that more pragmatic issues have also contributed, such as controversial pay structures and rates for legal aid work, the threat of costs orders, increased administration and paperwork, and the focus on speed and simplicity.¹⁰³⁷ The result is arguably a less zealous, combative, secretive and one-sided defence role than theory portrays; some aspects of the theoretical principles of partisanship and confidentiality seem almost excessive and extreme. As such, I would conclude that the 'zealous advocate' model has less relevance and utility in the context of modern practice, appearing outdated, somewhat detached from reality and anchored in the abstract. Early in this thesis, I highlighted a comment by Nicholson and Webb. This now represents an appropriate summary, since the findings of this thesis suggest that much of the underlying theory relating to legal defence ethics may simply be "pure aspiration".¹⁰³⁸

6. The Implications for the 'Zealous Advocate' Model

The conclusion that there is a 'gap' between the 'zealous advocate' model and the modern role of the criminal defence lawyer implies that it has decreasing relevance and

¹⁰³⁷ This will be covered more thoroughly in section 5.

¹⁰³⁸ Nicolson D., Webb J., (1999) *Professional Legal Ethics* – Oxford: Oxford University Press, 281.

utility as a commentary of and influence upon the development of criminal defence ethics in the 21st Century. Before addressing the implications that these findings have for future theorising of the role of the criminal defence lawyer, it would be valuable to further explore the meaning of the 'gap', its significance in recent criminal justice policy and the impact it may have on the English and Welsh adversarial system.

6.1 'Mind the (Theoretical) Gap'

One of the potential causes of the discrepancy between the 'zealous advocate' model and the modern role is what might be termed 'ideological drift'. This is the notion that the role of the criminal defence lawyer and the criminal justice process in general are gradually shifting toward a 'hybrid' construction, incorporating elements of both adversarial and inquisitorial legal traditions. England and Wales has operated a traditional adversarial system for centuries, thus one could argue that the English and Welsh defence lawyer and the criminal justice system are drifting away from their accusatorial roots and towards more inquisitorial ideology. The evidence for this claim is substantial. In terms of the defence lawyer, modern obligations and duties (as compared to the theoretical and traditional ones) seem to have both diluted adversarial principles and embraced investigative ones. The abundant references to cooperation and openness contained in the CPR stand in contrast to the adversarial contest between opposing parties; instead, it envisages a system in which the defence lawyer works closely with the court and prosecutor, and all information is shared. Cases like *R v. Gleeson* and *Chorley Justices* appear to obligate defence lawyers to aid the prosecution in presenting a factually and procedurally correct case, and the disclosure requirements of both statute and the procedure rules demand that defence lawyers provide plenty of advance information to the court about their case. The inquisitorial tradition places great emphasis on the court leading the investigation, handling the construction of the case and gathering as much information as possible. The principles above seem to fit within this model more comfortably than they do within the traditional, adversarial process which allows defence secrecy and exploitation of prosecution mistakes. Most notably, the CPR expect defence lawyers, as participants in criminal proceedings, to help 'acquit the innocent and convict the guilty', whilst Auld LJ made it plain that the criminal process is a 'search for the truth' which defence lawyers are obliged to help with. These sentiments seem closer to the inquisitorial tradition than to the adversarial.

English and Welsh criminal justice procedure generally appears to have undergone similar cultural change, indicating an ideological drift toward a multi-traditional approach. Several aspects of modern criminal procedure suggest that this is true. The significant case management powers granted to judges; the 'dilution' of the defendant's right to silence; the increased disclosure obligations incumbent on both defence and prosecution; the restriction of jury trials; the treatment of the criminal investigation and trial as a linked, "continuous process";¹⁰³⁹ the emphasis on early pleading rather than lengthy, costly court battles; the use of secretive control orders and the detention without charge of suspected terrorists. As such, it is arguable that "[l]egislative reform over the last twenty years appears to have ignored the theoretical framework of the criminal justice system in England and Wales."¹⁰⁴⁰ There are a variety of potential explanations for the shift toward a hybrid model. It has been suggested that, in the wake of high profile miscarriages of justice in the early 1990s, criminal justice policy was directed away from adversarialism in order to avoid the "police tunnel vision"¹⁰⁴¹ that significantly contributed to the conviction of innocent people. It is also argued that a more cooperative, judicially-managed system has evolved out of necessity. The last government's "strong and populist law and order agenda"¹⁰⁴² was very much characterised by "constant and unprecedented change in the substantive law",¹⁰⁴³ and resulted in "a huge growth in criminalization over this period".¹⁰⁴⁴ As such, with larger streams of offenders moving through the criminal justice system, there has been a drive to cut costs, increase efficiency and reduce the time from arrest to conviction or acquittal. As Hodgson suggests, the "weight of case disposition is shifting ever more away from trial"¹⁰⁴⁵ with the introduction of "more diversion away from prosecution, more summary justice dispensed by prosecutors, police and quasi-police, and more system penalties for non-co-operation."¹⁰⁴⁶

Coupled with the necessity of processing more cases through the system is the culture of managerialism that has generally pervaded government policy for some years.

¹⁰³⁹ *R v. Howell* [2003] EWCA Crim 1, [23].

¹⁰⁴⁰ Hodgson J. (2010) *The Future of Adversarial Criminal Justice in 21st Century Britain* – 35 N.C.J. Int. L. & Com. Reg., 331.

¹⁰⁴¹ *Ibid.*, 340.

¹⁰⁴² Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 Int. J. of Evidence & Proof, 107.

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ Hodgson J. (2010) *The Future of Adversarial Criminal Justice in 21st Century Britain* – 35 N.C.J. Int. L. & Com. Reg., 331.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ *Ibid.*

Managerialism emphasises "productivity, cost-efficiency and consumerism"¹⁰⁴⁷ in organisational structures. In terms of the criminal justice system, this has led to the development of policies designed to promote "value-for-money"¹⁰⁴⁸ and "triple 'E' initiatives" of "economy, efficiency, and effectiveness".¹⁰⁴⁹ It has been argued by some that managerial imperatives have "gained ascendancy over grand 'metanarrative' schemata like liberal progressiveness and humanitarianism"¹⁰⁵⁰ and as such, cost-efficiency and speed have facilitated a shift away from "more traditional, themes of criminal justice, such as 'protection of human rights' . . . and 'promotion of due process'".¹⁰⁵¹ Managerialism has great significance in the context of criminal defence work. As Cheliotis highlights:

"[T]he natural complexity and capriciousness of the variable human is largely regarded as an impediment to the delivery of pragmatic penal policy agendas."¹⁰⁵²

Of all people, criminal defendants tend to exhibit such complexity and the robust and uncompromising defence of such characters (in the context of an increasingly managerial system) is problematic. To fulfil managerial aims, it has been suggested that "criminal justice organizations . . . look for . . . an army of impotent, homogenous executive automata that will humbly sustain faceless systems and mundane routines".¹⁰⁵³ Although this is perhaps an exaggerated image, the defence lawyer, as evidenced by much of the regulation identified in this thesis, is expected to comply with and sustain managerial imperatives within the criminal justice system. This altered focus, which has dominated criminal justice policy over the last two decades, can therefore partially explain the 'drift' away from the traditional, adversarial model of criminal defence.

The CPR represent a primary example of the managerial culture in English and Welsh

¹⁰⁴⁷ Raine J., Willson M. (1996) *Managerialism and beyond: The case of criminal justice* – 9 Int. J. of Public Sector Management 4, 21.

¹⁰⁴⁸ Loader and Sparks quoted in Cheliotis L. (2006) *Penal Managerialism from within: Implications for theory and research* – 29 Int. J. of Law and Psychiatry, 397.

¹⁰⁴⁹ *Ibid.*, 399.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ Raine J., Willson M. (1996) *Managerialism and beyond: The case of criminal justice* – 9 Int. J. of Public Sector Management 4, 21.

¹⁰⁵² Cheliotis L. (2006) *Penal Managerialism from within: Implications for theory and research* – 29 Int. J. of Law and Psychiatry, 399.

¹⁰⁵³ *Ibid.*

criminal justice and although the nature of the impact they have had is debatable, it is undoubtedly significant. During my empirical study, respondents were directly asked what effect, if any, the CPR had had on their role. The majority of respondents did believe that the rules had had "a significant impact" (Respondent S1) on their working lives. One respondent claimed they had "changed the culture" of criminal defence and likened them to a "revolution" (Respondent S4). However, one respondent suggested they had "less impact than the government would want them to have" (Respondent S8). Surprisingly, another respondent claimed that he "didn't know there were any" (Respondent A2), which initially suggests one of three conclusions: either the rules are very insignificant; they are now so ingrained in defence culture that they are not distinguished from the normal requirements of criminal defence work; or this particular respondent had not consciously encountered a situation where they were relevant. Judging by the thoughts of other respondents, the first conclusion is almost certainly wrong, whilst the third conclusion, due to the pervasive nature of the rules, is also improbable.¹⁰⁵⁴ It is therefore likely that the second conclusion is correct. Further evidence for this was the same respondent's claim that the rules were "probably all common sense anyway" (Respondent A2).

The respondents were divided as to whether the CPR had had a positive or negative impact on the criminal defence role. A significant proportion of the respondents expressed favourable opinions about the rules, identifying the benefits they had brought to the criminal justice process and their role. One stated, "I think there are aspects of [the rules] that will probably make it more likely that justice is done" (Respondent B3), while another described them as "useful assistance as to how you conduct things on a day-to-day basis" (Respondent A1). One respondent suggested that the rules had helped eliminate the more excessive aspects of adversarial culture, stating that "they've probably put a brake on game playing" (Respondent B2) and that it was "certainly the public wish and . . . I think it's probably a justifiable wish" (Respondent B2). Others concurred. One respondent felt that "the 'no delay' objective" was "mostly . . . a good thing" (Respondent S3), and added that what she called the "adjournment culture" was "largely gone [which] you don't think [is] a bad thing" (Respondent S3). Others concluded that the reduction in delays and 'game playing' had helped to "focus minds as to timescales and obligations" which had had "a positive effect" (Respondent B4), and that "ultimately you probably represent your client better" (Respondent B3).

¹⁰⁵⁴ This was an accredited representative, who in practice would be less likely to encounter the CPR.

However, a majority of respondents were critical of the CPR. One respondent stated, "I think they've made our lives harder" (Respondent S2), while another felt that "they do put us into conflict with our client" (Respondent S6). Their obstructive nature thus leads to a situation where defence lawyers "try to avoid them as much as possible" (Respondent B3). One respondent felt certain that the rules "create more of an obligation to the court" (Respondent B1), while another believed that there was "too much emphasis on speed" which was "to the detriment of cases being decided properly" (Respondent S2). Another respondent made a similar point, claiming that "courts are now very much fixed with the culture of getting things on, getting things done" (Respondent S4). This approach, dominated by the CPR, has, according to the respondents, created an almost mechanical criminal justice process. One respondent stated that cases had become "a purely administrative exercise without any recognition that it involves people" (Respondent B3), while another described the system being like "a sausage machine" where "people who have been charged go in one end and eventually come out the other" (Respondent S8). However, respondents were most dismayed by what they regarded as the unfair nature and application of the rules. Several respondents described how "they're used to beat the defence" (Respondent S9), and that "if the defence don't do what they're supposed to do the sanction is always there", whereas "if the prosecution don't do what they're supposed to do, there is no sanction" (Respondent S6). One respondent described the rules as "absurd" (Respondent B1) and was vitriolic about their inequitable application, claiming that "judges cite them routinely when you're being awkward" (Respondent B1). He suggested that they "completely undermine the point of an adversarial legal system" (Respondent B1), and added:

"They're not a trump card, they're just procedural rules, they don't create new law, they don't fundamentally change what you're supposed to be doing." – Respondent B1

He concluded that the rules were not designed "to make the system fairer". Rather they represented "populist policy" which simply serves to "make things cheaper and easier for the government to convict people" (Respondent B1).

As Respondent B1 suggests, an overarching driver behind managerial culture and the

necessity of better 'through-put' in the criminal justice system is, put simply, money. The sweeping financial reforms affecting the criminal defence system were primarily kick-started by Lord Carter's review of legal aid procurement, 'Legal Aid: A market-based approach to reform'.¹⁰⁵⁵ Charged with auditing the public funding of legal aid services, Lord Carter recommended a "market economy"¹⁰⁵⁶ system stating:

"A healthy legal services market should be driven by best value competition based on quality, capacity and price"¹⁰⁵⁷

Much of Lord Carter's report reflected more managerialist, cost-efficient ways of working. He underlined that the reforms were designed to ensure that "the taxpayer and government receive value for money",¹⁰⁵⁸ that "the justice system is more efficient, effective and simple"¹⁰⁵⁹ and would "reward more efficient practices and provide appropriate incentives for early preparation and resolution".¹⁰⁶⁰ Such intentions arguably contradict the adversarial tradition in England and Wales and perhaps indicate the intention to move away from such practice. Indeed, the report made clear that "the adversarial nature of the justice system in England and Wales appears to be a key contributory factor to the higher cost of justice here."¹⁰⁶¹ Lord Carter expressed surprise at what he termed an "adversarial and sometimes hostile"¹⁰⁶² relationship between the publicly funded bodies involved in legal aid work (which could potentially mean defence lawyers and prosecutors) and instead praised what he called "a growing recognition that a new co-coordinated and collaborative approach is required".¹⁰⁶³ Again, these words seem to reflect a shift away from adversarial culture towards a more cooperative, integrated and streamlined system of criminal justice.

In terms of criminal defence work, Lord Carter specifically recommended the introduction of fixed fees for police station and magistrates' court work and graduated fees for Crown Court work, which were duly implemented. He also recommended a system of best-value tendering (BVT), where firms would bid against each other to

¹⁰⁵⁵ (2006) – London: The Stationary Office.

¹⁰⁵⁶ Ibid., [17], 53, 'The Procurement Strategy to 2010'.

¹⁰⁵⁷ Ibid., [9], 3, 'Executive Summary'.

¹⁰⁵⁸ Ibid., [3], 3, 'Executive Summary'.

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ Ibid., [17], 4, 'Executive Summary'.

¹⁰⁶¹ Ibid., [14], 18, 'Purpose of the Review'.

¹⁰⁶² Ibid., iii, 'Final Report on Legal Aid Procurement'.

¹⁰⁶³ Ibid.

secure legal aid work in certain geographical areas, for example at certain police stations. This was to be piloted in January 2010, but was abandoned a month before, in part due to serious resistance from legal aid firms.¹⁰⁶⁴ Since Lord Carter's review in 2006, commentators have criticised the reforms on the basis that they have made it significantly more difficult for defence firms to survive financially. This has arguably forced defence firms to either fold, cut corners in their work or merge, reducing the overall number of legal aid practices available to those who need it. From the beginning, it seemed that Lord Carter's reforms would inevitably be achieved through the ultimate efficiency – a "shift to a smaller number of suppliers",¹⁰⁶⁵ or as the Law Society Gazette termed it, "driv[ing] small practices out of business".¹⁰⁶⁶ Despite Lord Carter's claim that "the restructuring of firms, whether through consolidation or other means of growing, is about developing efficient practices and not reducing the total number of solicitors in the overall legal aid market",¹⁰⁶⁷ many disagree. In 2006, the Law Society Gazette suggested that "[f]irms will be encouraged to consolidate so that they can take on large volumes of work".¹⁰⁶⁸ Four years later, the Legal Action Group highlighted that the proposed savings of BVT would be achieved through "cuts in administration costs, mainly made through reducing the number of providers"¹⁰⁶⁹ and noted how, over the last decade, there had been a marked "decline in legal aid practices".¹⁰⁷⁰

In March 2010, the government published a new paper on legal aid reform, entitled 'Restructuring the delivery of criminal defence services'.¹⁰⁷¹ Intended as a follow-up to Lord Carter's review, it admitted that the original report "[u]ltimately . . . envisaged a

¹⁰⁶⁴ The Law Society (2009) *Ministry of Justice drops BVT plans following meetings with Law Society* – The Law Society Media Centre Website, http://www.lawsocietymedia.org.uk/site.php?s=1&content=55&highlight_id=21: **Last accessed 23/08/2010.**

¹⁰⁶⁵ Lord Carter of Coles (2006) *Legal Aid: A market-based approach to reform* – London: The Stationary Office, [43], 7, 'Executive Summary'.

¹⁰⁶⁶ The Law Society Gazette (2006) *Carter sets terms for Legal Aid revolution* – The Law Society Gazette Website, <http://www.lawgazette.co.uk/news/carter-sets-terms-legal-aid-revolution>: **Last accessed 23/08/2010.**

¹⁰⁶⁷ Lord Carter of Coles (2006) *Legal Aid: A market-based approach to reform* – London: The Stationary Office, [42], 99, 'Assessing the impacts and managing the transition'.

¹⁰⁶⁸ The Law Society Gazette (2006) *Carter sets terms for Legal Aid revolution* – The Law Society Gazette Website, <http://www.lawgazette.co.uk/news/carter-sets-terms-legal-aid-revolution>: **Last accessed 23/08/2010.** Interestingly, since the empirical study was conducted, two of the firms involved have in fact merged, indicating such predictions were accurate.

¹⁰⁶⁹ Legal Action Group (2010) *Carter reforms: What now?* – Legal Action Group Website, <http://www.lag.org.uk/Templates/Internal.asp?NodeID=93267>: **Last accessed 23/08/2010.**

¹⁰⁷⁰ *Ibid.*

¹⁰⁷¹ Ministry of Justice (2010) – London: The Stationary Office.

much smaller number of suppliers winning contracts".¹⁰⁷²

More worryingly, the paper also acknowledged:

"A number of providers have told us forcefully that we have already reached the point at which criminal legal aid work has become unprofitable for them, and it is no longer viable for them to continue to undertake it. At some point in the future we might therefore expect that suppliers would start to leave the market in significant numbers. We cannot predict how quickly this might happen, or the impact on the provision of services."¹⁰⁷³

The paper, in effect, re-launched the abandoned BVT scheme, proposing a "future tendering process [that] would ensure a more consolidated market, with a smaller number of more efficient suppliers, required to undertake the full range of the services we need."¹⁰⁷⁴ The reaction of commentators was critical. The suggestion by former legal aid minister Lord Bach that "only efficient firms will thrive"¹⁰⁷⁵ has been interpreted by some as meaning 'only big firms will survive'. The Solicitors' Journal commented that "[a] large number of small and medium-sized criminal legal aid firms would lose their contracts under the government's latest and most drastic cost-cutting plans",¹⁰⁷⁶ whilst the Legal Action Group claimed that "up to 1,500 firms could close down or be forced to merge", representing a "draconian culling".¹⁰⁷⁷ In terms of ideological drift, it is arguable that the reforms and the resultant re-shaping of the legal aid market have had, and will continue to have, a significant trickle-down effect on adversarial criminal defence work, forcing defence lawyers towards a more cooperative, managerial culture. With fewer firms doing much more work for less money in less time, it is conceivable that a less adversarial service will result because a centrally managed, speedy and cooperative approach is simply more cost-effective. For example, fixed fees in the police station and magistrates' court will be maximised if defence

¹⁰⁷² Ibid., [3], 3, 'Introduction'.

¹⁰⁷³ Ibid., [6], 4, 'The case for restructuring the delivery model'.

¹⁰⁷⁴ Ibid., [8], 5, 'Future structure of the market for criminal defence services'.

¹⁰⁷⁵ Legal Action Group (2010) *Carter reforms: What now?* – Legal Action Group Website, <http://www.lag.org.uk/Templates/Internal.asp?NodeID=93267>: **Last accessed 23/08/2010.**

¹⁰⁷⁶ The Solicitors Journal (2010) *Small criminal legal aid firms to lose contracts* – The Solicitors Journal Website, http://www.solicitorsjournal.com/story.asp?storycode=15913&eclipse_action=getsession: **Last accessed 23/08/2010.**

¹⁰⁷⁷ Legal Action Group (2010) *Carter reforms: What now?* – Legal Action Group Website, <http://www.lag.org.uk/Templates/Internal.asp?NodeID=93267>: **Last accessed 23/08/2010.**

lawyers cooperate and avoid disputing 'minor' issues on the defendant's behalf. Firms might also endeavour to avoid punitive 'wasted costs orders' by complying more willingly with the court. In short, the reality of 'less for more' may simply be just 'less'.

The respondents interviewed in my empirical study appeared to reflect these conclusions about the effect of funding on their role. Broadly, they seemed to think that changes to legal aid and the funding of criminal defence "encourage you to do less work" (Respondent A3) because "it is more financially efficient to do less work" (Respondent S8). This was described as "galling" (Respondent S8). Others described the financial state of criminal defence as representing "the quick and cheap justice route" (Respondent B1), where defence lawyers have had "to cope with a number of restrictions in the way legal aid funding takes place . . . [and] do what we used to do with fewer staff" (Respondent S4). Some felt that pay structures and rates had created a situation where "the gap between criminal defence lawyers and other areas of law . . . has got even wider" (Respondent S3), leaving defence lawyers feeling "a bit devalued to be honest, like . . . it's not a very good profession" (Respondent A3). The above respondent continued:

"It's like they can just . . . pay you whatever they want and actually it's a really . . . invaluable service you're offering to people. The people who make these rules . . . probably don't find themselves in the police station" – Respondent A3

Another respondent seemed to reflect this deep dissatisfaction with what he regarded as the under-funding of criminal defence services and the apparent ignorance of authorities about the problem, stating, "sod what the Bar Council says about quality being what the government's interested in – they're not [t]hey're interested in volume and price" (Respondent B1).

Several respondents seemed to believe that funding had compromised their ability to do their job properly. One respondent claimed:

"In a very complicated case, you're left with the . . . invidious choice of either . . . not doing the work you feel that you should be doing . . . because you're not going to get paid for it, or else doing a certain amount of work pro bono for the government." – Respondent S8

He asserted that such a situation left defenders with "a decision as to whether to do work for free or not to do the work at all and thereby prejudice [a] client", which he described as a decision a defence lawyer "shouldn't have to make as a professional" (Respondent S8). Another respondent concurred with this claim, stating that "fixed fees . . . act . . . as a deterrent for exploring some avenues that would previously have been explored" (Respondent S3). One respondent neatly summarised the overall attitude of the sample toward the effect of money on the defence work, saying, "it may well have an effect, although it really pains me to say that; I don't think it should, but I think it might do" (Respondent S2).

A more broad and indirect influence on ideological drift may have been the increased European Union involvement in general criminal justice policy and its goal of "progressing toward a single area of justice."¹⁰⁷⁸ Since the Treaty of Amsterdam, the EU's direction of travel in criminal justice has been characterised by harmonisation and ensuring that:

"Cross-border crimes are dealt with more efficiently and that individuals have their rights guaranteed equally, no matter under which Member State's jurisdiction their case is being heard in, whether they are suspects, accused or victims."¹⁰⁷⁹

The European Council meeting at Tampere accelerated this process, prioritising the "approximation of legislation"¹⁰⁸⁰ on criminal justice across the EU and emphasising the "cornerstone"¹⁰⁸¹ of cooperation: the principle of mutual recognition. The principle asserts that a member state must recognise the validity of judicial decisions in another, as if it were its own.

¹⁰⁷⁸ 'Prosecuting criminals and guaranteeing individuals' rights more effectively in free movement Europe - Introduction', Criminal Justice, European Commission Policies - EUROPA website, http://ec.europa.eu/justice/policies/criminal/policies_criminal_intro_en.htm: **Last accessed 23/08/2010.**

¹⁰⁷⁹ Ibid., 'Part II - General Context'.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid.

An operating manifestation of this principle is the European Arrest Warrant, which is:

"[A] judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."¹⁰⁸²

This of course requires close cooperation between member states, and thus promotes a European criminal justice culture, as opposed to the separate cultures of individual states. That being said, the rights of the 'requested person' under a warrant are governed by the "national law"¹⁰⁸³ of whichever state he or she happens to be in. Thus, the European Arrest Warrant is not a fully 'continental' criminal justice policy. However, the move toward a more collective concept of criminal justice is undoubted. The existence of bodies such as the European Court of Justice, Europol and Eurojust provide concrete evidence of this.

The pursuit of 'single area' criminal justice clearly requires harmonisation of policy across the EU. It is therefore important to note that most member states have inquisitorial-style systems, whereas England and Wales (among others) have an adversarial tradition. One therefore has to question how this will be achieved. It is arguable that while England and Wales moves away from adversarialism towards a hybrid incorporating elements of inquisitorialism, other member states are being compelled to do the opposite, creating a more uniform hybrid tradition. An example of this is the recently resurrected policy designed to create Europe-wide minimum rights for criminal suspects and defendants. This was re-launched in late 2009 as part of the 'Stockholm Programme: An open and secure Europe serving and protecting the citizen',¹⁰⁸⁴ which endorsed the European Council's "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".¹⁰⁸⁵ Originally proposed in 2004, the revived 'roadmap' sought to "strengthen the rights of suspected or accused persons in criminal proceedings",¹⁰⁸⁶ applying to both "pre-trial

¹⁰⁸² Council Framework Decision (EC) 2002/584/JHA, *The European Arrest Warrant and the surrender procedures between Member States* – [2002] OJ L 190/1, [1], Art. 1, Chap. 1, 'Definition of the arrest warrant and obligation to execute it'.

¹⁰⁸³ *Ibid.*, [1], Art. 11, Chapter 2, 'Surrender Procedure'.

¹⁰⁸⁴ Presidency (EC) 'Stockholm Programme: An open and secure Europe serving and protecting the citizen' (Draft Programme) 17024/09, 2009.

¹⁰⁸⁵ Council Resolution (EC) 2009/C295/01 – [2009] OJ C 295/1.

¹⁰⁸⁶ *Ibid.*, [1], 2.

and trial stages".¹⁰⁸⁷ Significantly, the 'roadmap' also recognised that the development of minimum procedural standards had to give "due respect for [member states'] legal traditions."¹⁰⁸⁸ This implies that the different legal traditions will be considered in the development process but will not in themselves be barriers to the establishment of harmonised standards, lending credence to the hybridisation theory espoused above.

The proposed rights, outlined in the annex to the 'roadmap', are fairly limited, the most significant and interesting being Measures B and C. Measure B states that "[a] person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing"¹⁰⁸⁹ and "also receive information promptly about the nature and cause of the accusation against him or her."¹⁰⁹⁰ These rights have more in common with the adversarial tradition than the inquisitorial, where the suspect is usually entitled to little information in the pre-trial stage. Measure B also suggests that "[a] person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence",¹⁰⁹¹ although "this should not prejudice the due course of the criminal proceedings."¹⁰⁹² This seems to reflect a balance between both traditions, allowing the defendant to build a defence case yet stressing the importance of maintaining the integrity of the justice process. Measure C proposes a guarantee of "[t]he right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage", calling it "fundamental".¹⁰⁹³ Again, this introduces rights for suspects and defendants that are traditionally alien to inquisitorial systems. For example, extensive access to a lawyer at an early stage appears incompatible with the current "diminished role of the defense lawyer"¹⁰⁹⁴ in French criminal process. In general, some of these proposals, which are at an embryonic stage, would constitute a traditional shift for inquisitorial member states towards a more adversarial model, although a wider assessment of the reality of criminal defence across the EU would be needed to back up this claim.¹⁰⁹⁵ However, what is clear is that the European Union continues to strive for a more

¹⁰⁸⁷ Ibid., Note (1), 1.

¹⁰⁸⁸ Ibid., Note (7), 1.

¹⁰⁸⁹ Ibid., Measure B, 3.

¹⁰⁹⁰ Ibid.

¹⁰⁹¹ Ibid.

¹⁰⁹² Ibid.

¹⁰⁹³ Ibid., Measure C, 3.

¹⁰⁹⁴ Hodgson J. (2010) *The Future of Adversarial Criminal Justice in 21st Century Britain* – 35 N.C.J. Int. L. & Com. Reg., 340.

¹⁰⁹⁵ See Cape E., Namoradze Z., Smith R., Spronken T. (2010) *Effective Criminal Defence in Europe* – Antwerp-Oxford: Intersentia.

unified, harmonised and common model of criminal justice, which may well have contributed to the ideological drift in England and Wales over the last decade.

Alongside the influence of a 'new European' tradition in criminal justice is the development of legal competence at international level. In a similar vein to the ideological drift in both England and Wales and across the EU, international criminal justice has arguably shifted from a distinct legal tradition to a hybrid form in recent years. In 1990, the United Nations 'Congress on the Prevention of Crime and the Treatment of Offenders' issued a document entitled the 'Basic principles on the role of lawyers'.¹⁰⁹⁶ Known as the 'Havana Declaration', the document stated that the principles set out:

"[S]hould be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general."¹⁰⁹⁷

The principles set out had a distinctly adversarial character. For example, defendants had to have lawyers available to "defend them in all stages of criminal proceedings,"¹⁰⁹⁸ perhaps contrary to traditional inquisitorial procedure where defence lawyers are mostly excluded from the pre-trial phase. The declaration also required lawyers to "always loyally respect the interests of their clients",¹⁰⁹⁹ and outlined that "all communications and consultations between lawyers and their clients within their professional relationship are confidential."¹¹⁰⁰ The more recent and significant examples of international criminal justice are the International Criminal Tribunal for the former Yugoslavia (ICTY) and later the International Criminal Court (ICC), established by the Statute of Rome in 2002. These two institutions have exhibited the aforementioned ideological drift from the primarily adversarial tradition, in the mould of the Havana Declaration, to a compromise between common and civil law systems.

Academics describe early adversarial trends in international criminal justice. Ambos

¹⁰⁹⁶ Office of the High Commissioner for Human Rights (1990) – Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba.

¹⁰⁹⁷ Ibid., 'Introduction'.

¹⁰⁹⁸ Ibid., [1], 'Access to lawyers and legal services'.

¹⁰⁹⁹ Ibid., [15], 'Duties and Responsibilities'.

¹¹⁰⁰ Ibid., [22], 'Guarantees for the functioning of lawyers'.

explained how the original draft statute for establishing the ICC in 1994 "provided for an adversarial procedure",¹¹⁰¹ while Langer noted the "dominance of the adversarial system"¹¹⁰² in the "early years"¹¹⁰³ of the ICTY. However, over the last decade and a half, this situation appears to have changed. Ambos argued that "it is only recent developments which have strengthened the civil law elements in international criminal procedure",¹¹⁰⁴ with both the ICTY and the ICC incorporating a more inquisitorial approach, which he described as more "judge-led".¹¹⁰⁵ He claimed that there is "general agreement that the procedure before the ICTY and ICC is a mixed one",¹¹⁰⁶ which "contains structural elements or building blocks of both the 'adversarial' and 'inquisitorial' system."¹¹⁰⁷ He concluded:

"At the level of international criminal procedure, the traditional common-civil law divide has been overcome. Although most rules can be traced back to a common or civil law origin, they are rendered *sui generis* and unique in their application before International Criminal Tribunals."¹¹⁰⁸

Langer appeared to draw similar conclusions, describing the adversarial and inquisitorial systems as playing a "central role"¹¹⁰⁹ in the development of international criminal justice and arguing that it was "a competition between these two systems".¹¹¹⁰ He described the modern international criminal justice procedure as "managerial",¹¹¹¹ which "conceives the parties not only as zealous advocates of their positions, but also as the court's assistants in the goal of expediting process."¹¹¹²

¹¹⁰¹ Ambos K. (2003) *International criminal procedure: 'Adversarial', 'Inquisitorial' or mixed?* – 3 Int. Crim. L.R., 5.

¹¹⁰² Langer M. (2005) *The Rise of Managerial Judging in International Criminal Law* – 53 Am. J. Comp. L., 858.

¹¹⁰³ Ibid.

¹¹⁰⁴ Ambos K. (2003) *International criminal procedure: 'Adversarial', 'Inquisitorial' or mixed?* – 3 Int. Crim. L.R., 5.

¹¹⁰⁵ Ibid., 1.

¹¹⁰⁶ Ambos K. (2003) *International criminal procedure: 'Adversarial', 'Inquisitorial' or mixed?* – 3 Int. Crim. L.R., 5.

¹¹⁰⁷ Ibid.

¹¹⁰⁸ Ibid., 35.

¹¹⁰⁹ Langer M. (2005) *The Rise of Managerial Judging in International Criminal Law* – 53 Am. J. Comp. L., 847.

¹¹¹⁰ Ibid., 848.

¹¹¹¹ Ibid., 836.

¹¹¹² Ibid., 877.

He also stated that:

"The parties can be zealous advocates of their positions as long as this zeal does not delay the proceedings, but they also have an active duty to collaborate with the court and to coordinate with each other to expedite the case."¹¹¹³

Much of the above is reminiscent of modern criminal justice procedure in England and Wales. It is perhaps more than a coincidence that the merging of the different legal traditions has occurred over a similar timeframe.

Indicative of an ideological shift away from adversarialism in England and Wales is the increase in victim-oriented criminal justice policy. The traditional adversarial criminal justice system operates on the premise that some offences are of such magnitude that they merit state attention. As such, the offender or offenders are prosecuted by the state. The victim, if one exists, does not commence proceedings or even have to consent to them. As such, "[v]ictims are not parties to a criminal trial, and the existence of a victim is neither necessary nor sufficient for proceedings to be brought."¹¹¹⁴ The only parties in a traditional, adversarial system are the defendant and the state's prosecution. The victim is a third party and since a "formal adversarial framework is said not to take into account the interests of other persons"¹¹¹⁵ the result is that, despite any direct connection with the offence, "conceptually . . . victims have no role to play in the modern criminal justice system".¹¹¹⁶ In this sense, the state is a sort of "surrogate victim of crime".¹¹¹⁷ In contrast, the traditional inquisitorial system "appears to take a more inclusive approach"¹¹¹⁸ to victims who generally play "a more active role in the investigatory stage as well as in court."¹¹¹⁹ They are considered "a party to the proceedings"¹¹²⁰ and as such are given "voice, validation and respect in more, and

¹¹¹³ Ibid.

¹¹¹⁴ Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 Int. J. of Evidence & Proof, 110.

¹¹¹⁵ Freiberg A. (2010) *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms* – Faculty of Law, Monash University, Research Paper No. 2010/1, 3.

¹¹¹⁶ Doak J. (2005) *Victims' Rights in Criminal Trials: Prospects for Participation* – 32 Journal of Law and Society 2, 299.

¹¹¹⁷ Freiberg A. (2010) *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms* – Faculty of Law, Monash University, Research Paper No. 2010/1, 14.

¹¹¹⁸ Ibid., 13.

¹¹¹⁹ Ibid.

¹¹²⁰ Hodgson J. (2002) *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform* – 51 Int. and Comp. L.Q., 792.

better, ways than they are in the adversarial system."¹¹²¹ This is demonstrated by the French criminal justice system, arguably the archetypal inquisitorial system, where the victim "enjoys the same rights of participation as the suspect"¹¹²² in the pre-trial phase and thus "has a greater role to play . . . than is the case in England and Wales".¹¹²³ In summary, the traditional inquisitorial system has a "unitary process"¹¹²⁴ which "uphold[s] the rights and interests of the state, the victim and the accused."¹¹²⁵

However, in England and Wales this situation has arguably changed. Over the last decade and a half, "a strong policy emphasis on victims and witnesses has existed"¹¹²⁶ which has been justified on the basis that "[j]ustice [is] weighted towards the criminal"¹¹²⁷ and that reform aimed at "re-balancing in favour of victims"¹¹²⁸ was necessary. Such New Labour "mantra"¹¹²⁹ not only characterised defendants as 'criminals' rather than suspects, but seemed to introduce a fundamentally new concept into English and Welsh criminal justice – the victim as a 'stakeholder' in criminal proceedings. This arguably represents a "subtle shift in mindset from the adversarial to the inquisitorial"¹¹³⁰ and has raised questions about "how far the interests of a third party ought to be accommodated within the traditionally dichotomous nature of the criminal trial between the state and the accused."¹¹³¹ The changes introduced have been significant. For example, in 2001, a national Victim Personal Statement scheme was launched, allowing victims of crime to elaborate on the impact of an alleged incident, how they feel and even "anything . . . helpful or relevant".¹¹³² In 2006, the government launched a Code of Practice for Victims of Crime, aimed at putting victims "at the heart

¹¹²¹ Freiberg A. (2010) *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms* – Faculty of Law, Monash University, Research Paper No. 2010/1, 13.

¹¹²² Hodgson J. (2002) *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform* – 51 *Int. and Comp. L.Q.*, 792.

¹¹²³ *Ibid.*

¹¹²⁴ Doak J. (2005) *Victims' Rights in Criminal Trials: Prospects for Participation* – 32 *Journal of Law and Society* 2, 308.

¹¹²⁵ *Ibid.*

¹¹²⁶ Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 *Int. J. of Evidence & Proof*, 110.

¹¹²⁷ Quoting Prime Minister Tony Blair, in Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 *Legal Ethics* 1, 59.

¹¹²⁸ Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 *Int. J. of Evidence & Proof*, 108.

¹¹²⁹ Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 *Legal Ethics* 1, 58.

¹¹³⁰ Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 *Int. J. of Evidence & Proof*, 108.

¹¹³¹ Doak J. (2005) *Victims' Rights in Criminal Trials: Prospects for Participation* – 32 *Journal of Law and Society* 2, 295.

¹¹³² 'Victim's Personal Statement', Victims and Witnesses – Crown Prosecution Service Website, http://www.cps.gov.uk/victims_witnesses/reporting_a_crime/victims_personal_statement.html: Last accessed 23/08/2010.

of our criminal justice system."¹¹³³ Among other things, it gives victims a right to early notification of a charge being brought or being dropped, explanations for delays in proceedings and a right to appeal against unsatisfactory service from the relevant organisations, such as the CPS and police. Victim protection and anonymity have also arguably been strengthened. The *Youth Justice and Criminal Evidence Act 1999* set out a number of situations meriting special measures for witness protection and limitations on certain strands of defence questioning (for example, sexual history). Equally, the *Criminal Evidence (Witness Anonymity) Act 2008* made sweeping changes to victim anonymity. In *R v. Davis*,¹¹³⁴ Lord Bingham criticised anonymity as leaving defendants to take "blind shots at a hidden target"¹¹³⁵ and the court held that the common law arrangements for anonymous evidence contravened the defendant's right to a fair trial. In knee-jerk reaction, the above legislation abolished all common law provisions, including the restrictive precedent in *R v. Davis*, and re-established an extensive system of victim and witness anonymity. Such provisions clearly bolster the position of the victim, potentially at the expense of the defendant.

The rise in the use of restorative justice in England and Wales is one of the best examples of the ideological shift. Restorative justice focuses on victim impact, recognising that "the harm done by crime an offence as against a person or organisation"¹¹³⁶ rather than just the state. Under this model, offenders and victims interact in a mediation setting; this gives the victim the opportunity to explain the impact of the offence, ask questions of the offender and possibly receive recompense, reparation or an apology. Equally, the offender is given the chance to explain their actions and make amends for them. Restorative justice gives the victim more control and involvement in the criminal justice process and as such represents an area where "there has been the most convergence between adversarial and inquisitorial systems".¹¹³⁷ Highlighting all of these trends is not necessarily a criticism, but there are undoubtedly dangers in over-emphasising the role of the 'victim' in criminal justice.¹¹³⁸

¹¹³³ 'Introduction', The Code of Practice for Victims of Crime: Crown Prosecution Service Operational Guidance – Crown Prosecution Service Website, http://www.cps.gov.uk/legal/v_to_z/victims_code_operational_guidance/: **Last accessed 23/08/2010.**

¹¹³⁴ [2008] UKHL 36.

¹¹³⁵ *Ibid.*, [32] *per* Lord Bingham.

¹¹³⁶ 'Restorative Justice & the Criminal Justice System', Restorative Justice Consortium Website, http://www.restorativejustice.org.uk/?Restorative_Justice:RJ_%26amp%3B_the_CJS: **Last accessed 23/08/2010.**

¹¹³⁷ Freiberg A. (2010) *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms* – Faculty of Law, Monash University, Research Paper No. 2010/1, 13.

¹¹³⁸ The case of Warren Blackwell exemplifies the dangers of assuming a complainant is a 'victim' at all -

These observations do underline what seems to represent a distinct move away from a strictly bipartisan, open, oral and unrestrictive criminal justice process. The 'rebalancing' process has been questioned by academics and practitioners. It has been argued that the increase in victim involvement in the process creates "a risk that policy-makers and commentators alike perceive the appropriate balance to be achieved as between the interested parties in the case (victims, witnesses and an accused) rather than the state as prosecutor and the individual defendant."¹¹³⁹ It has been pointed out that most approaches to achieving this kind of balance between victims and defendants have been guided by the logic that "the rights of the former could only be enhanced at the expense of the latter",¹¹⁴⁰ which may "breach the principle of equality of arms".¹¹⁴¹ In summary, some academics believe that the extension of victim rights in the English and Welsh criminal justice process could "cause immense structural and normative problems within any adversarial system"¹¹⁴² and, along with the others issues raised here, symbolise a continuing "drift into uncharted inquisitorial waters".¹¹⁴³

6.2 The Future of Theorising the Role of the Criminal Defence Lawyer

The conclusion that there is a 'gap' between traditional conceptions of the criminal defence lawyer's role and its modern form may suggest that change is required. If one concludes that traditional conceptions have been sidelined in modern practice, then this can be viewed as either a good thing or a bad thing and one could argue for one of two courses of action. If the decline of theory as an influence on modern practice is considered positive, then theorists should instigate a shift towards descriptions of the role that are more reflective of modern formal and practical conceptions. The adjustment of theoretical conceptions to more closely reflect modern practice might be justified on the basis that it is now detached from reality and simply represents wishful thinking on the part of academics. Since theory exists in academic works, enacting such a shift would require modern theorists to generate a new body of literature re-evaluating the extent of and importance afforded to the various duties and obligations owed by

<http://www.bbc.co.uk/news/10343403>: Last accessed 09/08/2010.

¹¹³⁹ Hall A. (2010) *Where do advocates stand when the goal posts are moved?* – 14 Int. J. of Evidence & Proof, 110.

¹¹⁴⁰ Cape E. (2006) *Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers* – 9 Legal Ethics 1, 59.

¹¹⁴¹ Doak J. (2005) *Victims' Rights in Criminal Trials: Prospects for Participation* – 32 Journal of Law and Society 2, 298.

¹¹⁴² *Ibid.*, 297.

¹¹⁴³ *Ibid.*, 312.

defence lawyers to their clients, the courts and the public. In this spirit, the 'zealous advocate' model proposed in Chapter 2 would require significant revision. Below are some suggested changes:

The Principle of Protection

Replacing the principle of partisanship, this obligation places more emphasis on the defence lawyer's obligation to protect and advance the legitimate, legal rights and best interests of a client in a proper and lawful way. This would exclude doing or saying *anything* for a client, including manipulation of process and exploitation of errors.

Principle of Detachment

This principle would be retained in essentially its current form, requiring that defence lawyers accept and represent clients in a non-judgmental and neutral way, regardless of their character or the charges levied against them.

Principle of Confidentiality

Again, the principle of confidentiality would remain mostly unchanged, with defence lawyers bound to uphold privilege and protect any other confidential information provided by the client. However, this would be limited by disclosure obligations and iniquity.

Principle of Assistance

Combining elements of the principles of procedural justice and truth-seeking, this obligation would emphasise the *amicus curiae* aspect of modern practice, informed by cooperation and openness. It would require defence lawyers to actively aid the court in case management, comply with extensive disclosure obligations, reduce unnecessary delay, refrain from 'ambushes' and avoid misleading the court.

Principle of Professionalism

This principle would combine elements of the principles of morality and truth-seeking,

requiring defence lawyers to exercise respect and courtesy towards witnesses in court, and conduct the client's case in a fair and honest manner by raising relevant issues, identifying *all* authorities and correcting defence, prosecution or court errors.

Alternatively, if the discrepancy between theoretical conceptions and modern practice is viewed as negative, then arguably legislators, regulators and practitioners should incorporate more traditional elements of criminal defence practice into their conceptions in order to re-establish its relevance. In essence, theoretical conceptions do not need to change - the modern practitioner does. This could be justified on the basis that abandoning traditional theoretical conceptions would represent a defeat for core adversarial principles in England and Wales. As has been highlighted throughout this thesis, many academics and practitioners argue that modern formal and practical obligations have made inroads into traditional conceptions of the role. A shift towards greater unity of the theoretical, formal and practical conceptions would most obviously be facilitated by changes to legislation and professional codes of conduct. Currently, no code of conduct or statute is specifically dedicated to outlining the role of the criminal defence lawyer in England and Wales. A possible remedy might be a 'Criminal Defenders Code of Conduct', detailing a clear and accessible set of standards for criminal defence work. This could also be used to directly and comprehensively address unresolved ethical conflicts identified in this thesis, and suggest sources of guidance and authority in the event of such conflicts.

During the empirical study, the respondents were asked directly about their use of formal guidance, in general and when faced with conflicts. The majority of respondents' primary source of guidance seemed to be their professional colleagues. When asked if they consulted their peers, answers included "all the time", "constantly", "loads of times", "I'd just ask my boss" and "[I'd] let a senior decide". They described firms and the Bar as being "positive" and "useful" for such issues because they grant access to a wide range of experience and disciplines, although one respondent admitted this could "perpetuate an internal culture". The danger of an 'internal culture' is a potential lack of independent scrutiny of defence lawyers, inconsistent application of professional standards and a lack of clarity about what defence lawyers should be doing. In essence, referring to colleagues suggests that formal guidance is not sufficiently helpful, perhaps requiring revision. However, several respondents indicated that they had referred to formal sources of guidance in the event of an ethical conflict, including

the Law Society Ethics and Bar Council phone lines, the Solicitors' Code and the Bar Code. These answers therefore suggest that the respondents took a more practical approach to conflict resolution, consulting fellow defence lawyers and legal ethics officials ahead of formal standards of guidance. Furthermore, the respondents frequently mentioned formal guidance (such as the CPR) during the interviews. This suggests that formal regulation, as well as the attitude of the judiciary and the opinions of colleagues, were important factors in practitioners' conceptions of their role. As such, one would conclude that a broad sea-change in formal conceptions would filter down into practice.

However, it is arguable that to deliberately shift either theoretical or formal conceptions to match the other is both unrealistic and undesirable. Theorists and academics are unlikely to totally abandon ancient, entrenched adversarial ideology, whilst the government and regulatory authorities will almost certainly press on with the current pattern of reform (although the approach of the new coalition government remains to be seen). Moreover, the conclusion that the ideological 'gap' requires correction assumes that the core purpose of theorising is purely prescriptive. This perhaps misses the point of academia and theoretical discourse. Whilst formal regulation, such as codes of conduct and legislation, aim to create realistic, concrete standards of conduct, theoretical discussion has a normative function. It seeks to describe ideal models, questioning not only the internal logic of academia but the status quo of modern practice. Theorising primarily seeks to shape the future by challenging formal and practical conceptions, as well as describing and explaining reality. Theory works outside of the narrow confines of official regulation and accepted practice by presenting alternative interpretations of the role of the criminal defence lawyer. Theorising is thus a form of check, anchoring formal and practical conceptions in the adversarial tradition. To abandon theoretical conceptions of the role and simply describe reality not only appears pointless but might hasten the end of the adversarial criminal justice system as we know it. Whilst remembering that theoretical discourse must have usefulness and relevance to justify its existence, it is arguable that academics discussing the role of the criminal defence lawyer should embrace the ideological 'gap' between their conceptions and the reality of criminal defence. They should discuss, debate, question and lobby to effect the change they believe is required through a natural evolutionary process. Perhaps then, a framework like the 'zealous advocate' model will move beyond the theoretical and the aspirational, and will come to accurately reflect the role the 21st

century criminal defence lawyer.

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APPENDIX 1 – Breakdown of Target Organisations and Respondents

1. Target Organisations

1.1 Organisation 1

A large firm of solicitors, specialising exclusively in criminal defence work. Approximately 25 fee earners.

1.2 Organisation 2

A medium-sized firm of solicitors, specialising exclusively in criminal defence work. Approximately 14 fee earners.

1.3 Organisation 3

A medium-sized firm of solicitors, specialising in criminal defence work and some mental health work. Approximately 11 fee earners.

1.4 Organisation 4

A small firm of solicitors, specialising exclusively in criminal defence work. Approximately 8 fee earners.

1.5 Organisation 5

A large set of chambers, undertaking some criminal defence work. Approximately 40 fee earners.

1.6 Organisation 6

A medium-sized firm of solicitors, specialising exclusively in criminal defence work. Approximately 15 fee earners.

1.7 Organisation 7

A large firm of solicitors, specialising in criminal defence work. Approximately 40 fee earners.

1.8 Organisation 8

A large set of chambers, undertaking some criminal defence work. Approximately 50 fee earners.

2. Respondents

2.1 Accredited Representatives

2.1.1 Respondent A1

Respondent A1 was an accredited representative employed at Organisation 2, with 6 years of legal experience and 6 years of criminal defence experience. The respondent possessed the Police Station Qualification and was a duty representative at the police station. Respondent A1 had experience of representing suspects at the police station, preparing instructions and advice for Crown Court hearings, and instructing counsel.

2.1.2 Respondent A2

Respondent A2 was an accredited representative employed at Organisation 4, with 18 years of legal experience and 18 years of criminal defence experience. The respondent possessed the Police Station Qualification and was a duty representative at the police station. Respondent A2 had experience of representing various offences, providing police station advice, and managing cases at the Crown Court, including instructing counsel and liaising with other parties.

2.1.3 Respondent A3

Respondent A3 was an accredited representative employed at Organisation 4, with 4

years of legal experience and 4 years of criminal defence experience. The respondent possessed the Police Station Qualification and was a duty representative at the police station. Respondent A3 had experience of police station advice and attendance, preparing briefs for Crown Court hearings and relaying client instructions.

2.2 Barristers

2.2.1 Respondent B1

Respondent B1 was a barrister resident at Organisation 5, with 5 years of legal experience and 5 years of criminal defence experience. Respondent B1 had experience of representing clients in Crown Court trials, pre-trial hearings, bail and Court of Appeal hearings.

2.2.2 Respondent B2

Respondent B2 was a barrister (Queen's Counsel) resident at Organisation 8, with 28 years of legal experience (10 as a solicitor) and 26 years of criminal defence experience. Respondent B2 had experience of high profile Crown Court trials, conferences in prison and chambers, pre-trial hearings, sentencing and Court of Appeal hearings.

2.2.3 Respondent B3

Respondent B3 was a barrister resident at Organisation 8, with 19 years of legal experience and 19 years of criminal defence experience. Respondent B3 had experience of Crown Court trials, sentencing, Court of Appeal hearings, conferences with clients and visits to crime sites.

2.2.4 Respondent B4

Respondent B4 was a barrister resident at Organisation 8, with 22 years of legal experience and 22 years of criminal defence experience. Respondent B4 had experience of representing clients in Crown Court trials, client conferences, and appeals against sentencing and conviction.

2.3 Solicitors

2.3.1 Respondent S1

Respondent S1 was a solicitor employed at Organisation 1, with 13 years of legal experience and 13 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S1 had experience of providing telephone advice to suspects, attending police interviews, advising before and during court appearances, and representing at all courts including, the Magistrates', Crown and Youth Courts, with occasional High Court work.

2.3.2 Respondent S2

Respondent S2 was a solicitor employed at Organisation 2, with 14 years of legal experience and 14 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S2 had experience of providing police station advice, representing at preliminary hearings, and defending in the Magistrates', Crown and Youth Courts.

2.3.3 Respondent S3

Respondent S3 was a solicitor employed at Organisation 2, with 8 years of legal experience and 4 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S3 had experience of representing clients at the Magistrates' Court and police station, advising clients at firm offices, and a little Crown Court work.

2.3.4 Respondent S4

Respondent S4 was a solicitor employed at Organisation 3, with 29 of legal experience and 25 years of criminal defence experience. The respondent possessed the Police Station Qualification and had higher rights of audience, and was a duty solicitor at both

the police station and the Magistrates' Court. Respondent S4 had experience of minor Magistrates' Court matters, summary trials, and trials and sentencing in the Crown Court.

2.3.5 Respondent S5

Respondent S5 was a solicitor employed at Organisation 3, with 24 years of legal experience and 24 years of criminal defence experience. The respondent possessed the Police Station Qualification and higher rights of audience, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S5 had experience of a few summary trials, preparation and representation for large Crown Court trials, advice in firm offices and police station advice.

2.3.6 Respondent S6

Respondent S6 was a solicitor employed at Organisation 3, with 22 years of legal experience (3 as a barrister) and 19 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S6 had experience of police station advice, representation in the Magistrates' Court, trials and sentencing in the Crown Court, parole hearings and confiscation hearings.

2.3.7 Respondent S7

Respondent S7 was a solicitor employed at Organisation 3, with 12 years of legal experience and 12 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S7 had experience of trials in all courts, advice and sentencing.

2.3.8 Respondent S8

Respondent S8 was a solicitor employed at Organisation 6, with 34 years of legal experience and 34 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the

Magistrates' Court. Respondent S8 had experience of trials, sentencing, and pleas in the Magistrates' Court and preparation of Crown Court trials.

2.3.9 Respondent S9

Respondent S9 was a solicitor employed at Organisation 7, with 6 years of legal experience and 6 years of criminal defence experience. The respondent possessed the Police Station Qualification, and was a duty solicitor at both the police station and the Magistrates' Court. Respondent S9 had experience of Magistrates' Court and Crown Court trials.

APPENDIX 2 - Coding Framework

Principles and Conflict Points

Zealous Advocacy	
Detachment	
Confidentiality	
Procedural Justice	
Truth-Seeking	
Equality	
Morality	

Other Notes

Role?	
“Zealous Advocate”?	

APPENDIX 3 – Ethics Materials

ETHICAL CONSENT CONTRACT: INTERVIEWS AND PUBLICATION

This contract governs fieldwork being undertaken on by Mr Thomas Smith (who henceforth shall be referred to as the ‘Researcher’) for the purposes of his PhD thesis at the University of the West of England, Bristol.

This contract is applicable to the following people:-

- The Researcher
- (who henceforth shall be referred to as the ‘Respondent’) who is employed by (which henceforth shall be referred to as ‘the Firm’)

Obligations & Rights Applicable to the Researcher

The fieldwork:-

- Will be in the form of a single, semi-structured, one-on-one interview, an hour in length. It will be conducted with the Respondent, by the Researcher.
- Will be recorded by the Researcher and contemporaneous notes taken by the Researcher.

Data obtained from the fieldwork:-

- Will be published in the Researcher’s thesis, but not in its entirety.
- 4. All data obtained from the interview will be “fed back” to the Respondent for further comment, if they wish to do so.
- 5. The Researcher will then select data that appears relevant to the thesis for analysis and eventual publication.
- 6. All data published will be cited appropriately.
- Will be subject to anonymity. There will be no publication of the name of the Respondent, the name of the Firm, any firm clients or geographical locations. However, broad descriptions may be used for contextual purposes.

The Researcher:-

- Will send advanced materials to the Respondent to ensure they have adequate information prior to the scheduled interviews.
- Will attach a separate ‘Anonymity Guarantee’ to this contract.

Obligations & Rights Applicable to the Respondent

The Respondent:-

- Agrees to engage in a single, hour-long, semi-structured interview with the Researcher.
- Accepts that the data obtained will be recorded and noted, and some of the data will later be published in the Researcher’s thesis.
- Will be entitled to “feedback” on all data obtained from the interview before it is used for the Researcher’s thesis, and may read the analysed data before publication.
- Is satisfied with the guarantees of anonymity made by the Researcher.
- Is encouraged to discuss any concerns about the fieldwork with the Researcher but if he/she does not wish to continue participating, they may withdraw.

I, the undersigned, understand and accept all of the terms outlined in this contract.

Signed: (The Respondent)

Print Name:

Signed: (The Researcher)

Print Name:

ANONYMITY GUARANTEE

- The anonymity and privacy of the Respondent will be respected; personal information concerning the Respondent, including name, age and gender, will be kept confidential. The job title of the Respondent (e.g. Solicitor, Barrister) will be published.
- The identity of the Respondent's Firm and the geographical location of the Respondent's Firm will be kept confidential, but may be described in broad terms.
- Appropriate and practicable methods for preserving the anonymity of data will be used, including the removal of identifiers and the use of pseudonyms.
- Statements attributable to the Respondent may be published in the Researcher's thesis, but will only be attributed to pseudonyms.
- Data provided by the Respondent to the Researcher does not enjoy legal privilege, that is it may be liable to subpoena by a court.
- This Anonymity Guarantee is based on standards and principles outlined by the Socio-Legal Studies Association (SLSA) in their "Statement of Principles of Ethical Research Practice (January 2009)" and the British Sociological Association (BSA) in their "Statement of Ethical Practice (March 2002)".

INTERVIEW PRO-FORMA

Interview Date:

Interview Location:

Name of Interviewer:

Name of Interviewee:

This interview is being conducted with criminal defence lawyers to explore how they view their role in the modern criminal justice system of England & Wales. The interview should last approximately an hour and will be split into three parts.

In the first, I will record some basic information about you and your firm. I will then put some general, open-ended questions to you. In the second part, I will be presenting you with ‘Professional Conduct Scenarios’; a series of hypothetical situations which I would like you to respond to. In the third part, I will be asking some further open-ended questions.

I will not be asking for you to comment on any individuals or organisations. Parts of the interview may be published as part of my doctoral thesis, which will be on display in the UWE library as a public document. However, no data will be published in a way which would allow you, your firm or the location of your firm to be identified. You also be able to feedback on data used before it is published.

Part 1 – General Questions

1. What is your professional status? e.g. Barrister, Solicitor, Accredited Rep.

2. How long have you been:

a) a legal practitioner?

b) a criminal defence lawyer?

3. What proportion of your work is criminal defence work?

4. How many fee earners are employed/resident at your firm/chambers?

5. How many of them solely or mostly focus on criminal defence work?

6. Do you have the Police Station Qualification?

7. Are you a duty solicitor at the Police Station/Magistrates' Court?

8. What kind of criminal defence work do you regularly do? e.g. bail applications,
etc.

9. How would you describe your obligations to the following:

a) a client?

b) the courts?

c) the prosecution?

d) the Police?

e) the victim(s)?

f) Prosecution witnesses?

Part 2 – Professional Conduct Scenarios

Confidentiality v. Truth-Seeking and Procedural Justice

“Your client, Z, has been charged with possession of heroin with intent to supply. He was arrested on North Road, which is a well-known haunt for drug users. Z claims that the heroin found on him was for personal use and that he does not deal. He pleads not guilty and his trial date is set; however, in your last meeting with Z before the trial, he says that he won't be able to attend the first day of the trial as he “needs to score on North Road after the weekend.” You warn him he must attend the trial; he responds by asking you to explain his absence to the court. You outline the potential consequences of failing to attend, but he insists on his instructions. On the morning of the trial, Z does not appear as expected; you attempt to phone him but receive no answer. You must explain Z's absence to the court.”

- How would you deal with this situation?
- Would you withhold the information regarding Z's whereabouts?
- Do you have an obligation to reveal what you know about Z's whereabouts?
- Would you disregard his instructions?
- Is it your duty to facilitate the process by stating where he is?
- By refusing to reveal his whereabouts, are you contributing to delay contrary to your duties or misleading the court?
- Do you have duty to disclose that he is buying drugs?

RELEVANT RULES:

- Rule 1.1(2)(e) (CPR 2005) “efficient and expeditious”
- S.10(1) and (2) PACE 1984 “Advice and Litigation Privilege”, “furthering a criminal purpose”
- Bar Code Para. 702 “confidentiality”
- SCC, Rule 4.01 “confidentiality”
- Bar Code, 701(a) “avoid unnecessary expense or waste”
- Rule 3.2(2)(f)(CPR 2005) “discourage delay”

- Rule 3.2(2)(a) “identification of real issues”
- SCC, Rule 11.01(2)(c) “draw court attention to procedural irregularities”

Zealous Advocacy v. Morality

“Your client, A, has been charged with raping B. A met B in The Dock, a local nightclub, and after having drunk a lot, went back to B’s house. B claimed that A then raped her when she refused to have sex with him. A denies the allegation, claiming that B consented at the time and had made it clear she wanted to have sex throughout the night. There were no witnesses to the alleged rape itself. A claims to have seen B in The Dock several times before, behaving flirtatiously and always leaving with different men. He claims others would agree with him that B has a reputation for picking up men in The Dock and taking them home to have sex. She has alleged rape against a man in the past, a charge which was dropped due to lack of evidence. A has an historic conviction for sexual assault and witnesses attest to his history of sexual promiscuity. A instructs you to argue that B is lying and that her sexual history backs up this claim.”

- How would you approach the issue of B's previous sexual history?
- Do you have a duty to question B about her sexual history and behaviour?
- What issues would you consider when considering whether to question B about sexual behaviour?
- Do you have any obligations to the complainant?

RELEVANT RULES:

- Bar Code, Para. 303 “promote and protect fearlessly”
- s.41 *Youth Justice and Criminal Evidence Act 1999* “no questioning on behalf of accused about sexual behaviour”
- SCC, Rule 1.04 “act in best interests”
- Rule 1.1(2)(d) CPR 2005 “interests of witnesses, victims and jurors”
- Bar Code, Para. 708(g) “vilify or annoy witness”

Detachment v. Morality

“W, a 40 year old male, has been charged with sexually assaulting his 13 year old daughter, X, whilst visiting her at her mother's home. Her mother, Y, had left the house

briefly to go to the shop. W has a string of past convictions for domestic violence directed at Y, for which he has spent time in custody and which led to their separation. 'W' also had a charge of indecent exposure to a minor dropped due to a lack of evidence. He protests his innocence, claiming his daughter is lying and made the accusations after he refused to give her money. W requests your representation in what will clearly be a large-scale and potentially lucrative Crown Court trial."

- What factors would you take into account in deciding whether to represent W?
- Are there any moral problems in accepting 'W' as a client?
- Would you refuse to act for W based on moral considerations?
- Would you express personal opinions about W's previous conduct?

"W' pleads not guilty, on your advice. In preparing for trial, you discover that X has raised allegations of violence against both of her parents in the past, none of them pursued by the Police. The trial begins and the prosecution call X, who has been given special measures to protect her in court. She claims that W asked her to perform a sexual act on him and attacked her when she refused. She also claims that he has sexually abused her several times in the past, but she was too scared to tell anyone. You begin cross-examination of X."

- What factors would you take into account in deciding on your cross-examination strategy?
- Would you undermine X's credibility by suggesting she has made false claims of violence in the past? Or that she is just blackmailing her father? Or that she is a compulsive liar?
- What would you consider in deciding on such a strategy?
- Do you have a duty to respect the witness and refrain from using such tactics?
- Would you pursue the argument that there is purely a lack of evidence?

RELEVANT RULES:

- Bar Code, Para. 602 "cab rank rule"
- SCC, Rule 2.01 "generally free to accept clients"
- SCC, Rule 11.04 "must not withhold services on grounds case or client is objectionable"
- Ede and Edwards, Criminal Defence "avoid pre-judgment and remain

detached”

- Plowden - “Ignore your worries”
- Brougham - “Regardless of consequences”

Zealous Advocacy v. Truth-Seeking

“Your client, F, has been charged with driving whilst under the influence of alcohol. She was pulled over by a Police Officer who breathalysed and arrested her. She provided a breath sample using an Intoximeter at the Police Station, which gave a reading of 50 microgrammes – 15 microgrammes over the limit. This entitled her to choose to replace her breath sample with a blood or urine sample. However, contrary to procedure, an officer said that she must give a blood or urine sample, and she complied. Her samples confirmed she was over the limit and she was charged. She tells you she “was at the pub but didn't drink anything” and on her instructions, you enter a plea of not guilty.”

- What are your obligations at this point?
- Would you keep silent about any favourable information?
- Would you bring the above facts to the attention of the court immediately?
- Do you have an obligation to disclose all tactical information to the court?
- Would you take advantage of technical points to aid the client?

“The trial begins; the arresting officer gives evidence that on arrest F claimed she'd “only had one drink”. In a brief break, F admits to you that she may have drunk alcohol at the pub but had just forgotten. In addition to this, the officer who operated the Intoximeter fails to confirm that it was working reliably, as is required. The prosecution case is drawing to a close.”

7. How would you deal with this situation?
8. Would you remain silent about the prosecution error until a tactically

advantageous juncture?

9. Do you have a duty to the court to correct this omission and ensure all the relevant facts are heard?
10. Do you have a duty to reveal the client's admission?

RELEVANT RULES:

DPP v. Hughes, R v. Gleeson “no ambushes”

Rule 3.2(2)(a) “real issues”, Rule 3.10(f) “written evidence to be introduced”

Khatibi “keep silent about prosecution shortcomings”

Leeson v. DPP “defence not bound to remind but justice may be done”

Wakeley v. Hyams [1987] “misinformed of right to replace breath specimens”

Road Traffic Act 1988 s.8(2) “choice of specimen”

Part 3 – Concluding Questions

1. When presented with an issue of professional conduct, have you ever referred to any professional rules of conduct, legislation or case law? *For example, where it is unclear whether you are required to disclose tactically useful information.*

2. When presented with an issue of professional conduct, have you ever asked a colleague for advice? If so, do you have any examples?

3. Are you familiar with the Criminal Procedure Rules (2005)? Do you think that these have had any impact on the role of the criminal defence lawyer?

4. What effect do you think the following Criminal Procedure Rules have had on the role of the criminal defence lawyer:

a) Pursuing the “Overriding Objective” of the rules by “acquitting the innocent and convicting the guilty” (Rule 1.1(2)(a))?

b) Pursuing the “Overriding Objective” of the rules by “respecting the interests of witnesses, victims and jurors” (Rule 1.1(2)(d))?

5. Pursuing the “Overriding Objective” of the rules by “dealing with the case efficiently and expeditiously” (Rule 1.1(2)(e))?

6. Since “each party must . . . actively assist the court” (Rule 3.3(a)) in “actively managing” (Rule 3.2(1)) a criminal case, have the following elements of case management affected the role of the criminal defence lawyer:

a) “the early identification of the real issues” (Rule 3.2(2)(a))?

b) “ensuring that evidence . . . is presented in the shortest and clearest way” (Rule 3.2(2)(e))?

c) “encouraging the participants to co-operate in the progression of the case” (Rule 3.2(2) (g))?

7. How would you describe the role of a criminal defence lawyer?

- Follow up: Are you familiar with the terms “zealous advocate” and “administration of justice”?

8. In your opinion, how, if at all, has the role of the criminal defence lawyer changed in recent years?

Thank you for your time!!