

The Adversary System

Position One: Keep His Confidence

You are a lawyer in Houston, Texas, who specializes in criminal defense. Jim has asked you to represent him. He says that the police have searched his home and found evidence making him a suspect in a rape case. He admits to you that he committed the rape. However, he wants to plead not guilty.

In investigating the circumstances, you discover that the police obtained the evidence illegally. On Friday evening they could not find a judge to give them a search warrant. Afraid that Jim would destroy the evidence, they decided to search his home without a warrant and found some clothing that was worn during the rape.

You are successful in getting the evidence excluded from the trial because of the illegal search, and get a not guilty verdict from the jury, even though you know Jim is really guilty of several rapes.

The *Model Code of Professional Responsibility* says:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer. . . .

According to the *Model Code of Professional Responsibility*, did you do the right thing?

Yes, we did the right thing. The code clearly instructs us to protect the best interests of our client. While it is unfortunate that a guilty man was acquitted, it is more unfortunate that the police didn't do their job correctly. If we allowed Jim to be convicted on the basis of illegal evidence, it would give the government the freedom to gather illegal evidence anytime, even against innocent people.

It is not our job within the adversarial legal system to be the judge. The lawyer who refuses to render professional services because, in his or her judgment, the case is unjust and indefensible usurps the functions of both the judge and jury.¹ By defending Jim we were doing our job. It is the legal system's responsibility to deliver justice. It is the lawyer's responsibility to serve the client.

Murray Schwartz says that there are two principles for lawyers in an adversary system:

- **Principle of Nonaccountability**

When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.

- **Principle of Professionalism**

When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail.²

According to these principles and the model code we took the correct action.

The adversary system is the best way to find out the truth, if everyone follows the rules. Freedman said,

. . . the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshaling and presenting the evidence in as thorough and persuasive a way as possible. . . . Thus, the judge or jury is given the strongest possible view of each side, and is put in the best possible position to make an accurate and fair judgment.³

¹ George Sharswood, cited in Luban, D. (1984). The Adversary System Excuse. In Luban, D. (ed.), *The Good Lawyer*, (83-122). Totowa, New Jersey: Roman & Allenheld, p. 84.

² *Ibid*, p. 84.

³ Freedman, M. (1989). Where the Bodies are Buried. In Katsh, M. & Ethan. (eds.), *Taking Sides: Clashing Views on Controversial Legal Issues*, (12-18). Guilford, Connecticut: Dushkin Publishing, p. 15.

Position Two: Protect Society

You are a lawyer in Houston, Texas, who specializes in criminal defense. Jim has asked you to represent him. He says that the police have searched his home and found evidence making him a suspect in a rape case. He admits to you that he committed the rape. However, he wants to plead not guilty.

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According to the *Model Code of Professional Responsibility*, did you do the right thing?

The lawyer's responsibility is to seek justice. In this case justice was not well served, since an obviously guilty man was released. Knowing that this man was guilty of this rape obligates us to protect society, either by allowing the illegal evidence or by convincing our client to plead guilty, even if on a lesser charge. Samuel Taylor Coleridge said in 1831:

There is undoubtedly a limit to the exertions of an advocate [lawyer] for his client. The advocate has no right, nor is it his duty, to do that for his client which his client . . . has no right to do for himself.

Something is wrong with the adversarial legal system if lawyers are obligated to obstruct justice. Too often lawyers are encouraged to do things for their clients that are clearly undesirable, like hiding the truth. "Lawyers themselves do not see the point of what they do as defending their clients' legal rights, but as using the law to get their clients what they want."⁴

A lawyer ". . . will waste a lot of time if he goes with an open mind. . . . He fixes on the conclusion which will best serve his client's interests, and then he sets out to persuade others to agree."⁵

The two adversary attorneys, moreover, are each under an obligation to present the facts in the manner most consistent with their clients' positions—to prevent the introduction of unfavorable evidence, to undermine the credibility of opposing witnesses. . . . The assumption is that the two such accounts will cancel out, leaving the truth. . . . But there is no earthly reason to think this is so; they may simply pile up the confusion.⁶

The likelihood of winning a case often depends more on the skills of the lawyer than on the facts of the case. Much of a lawyer's training is not how to best find the truth, but how to win a case, for example, by using techniques that undermine witnesses' credibility.

No matter how clear, how logical, how concise, or how honest a witness may be or make his testimony appear, there is always some way, if you are ingenious enough, to cast suspicion on it; to weaken its effect.⁷

⁴ Luban, D. (1984). The Adversary System Excuse. In Luban, D. (ed.), *The Good Lawyer*, (83-122). Totowa, New Jersey: Roman & Allenheld, p. 99.

⁵ Charles Curtis, cited in Strick, Ann. (1989). Requiem for the Adversary System. In Katsh, M. Ethan, (eds.), *Taking Sides: Clashing Views on Controversial Legal Issues*. (4-11). Guilford, Connecticut: Dushkin Publishing, p. 7.

⁶ Luban, D. (1984). The Adversary System Excuse. In Luban, David, (ed.), *The Good Lawyer*, (83-122). Totowa, New Jersey: Rowman and Allenheld, p. 94.

⁷ Lewis Lake, cited in Strick, Ann. (1989). Requiem for the Adversary System. In Katsh, M. Ethan, (eds.), *Taking Sides: Clashing Views on Controversial Legal Issues*. (4-11). Guilford, Connecticut: Dushkin Publishing, p. 7.