Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality

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Synopsis

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Introduction

When representing an accused who may be mentally ill, the problems which tend to arise during the early stages of the proceedings do not only relate to matters of substance, procedure and tactics but often present a disquieting ethical dimension. In the ordinary case, a lawyer can usually act on instructions obtained from an informed, reasoning client so long as the accused is aware of the risks and the potential consequences. Once the element of mental illness is injected into the process, the ethical problem becomes a common feature, adding a new dynamic and new conflicts into the lawyer's decision-making role. The inconsonant nature of the situation has been described succinctly by Chernoff and Schaffer:

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> In a case where the accused is or may be suffering from mental illness, however, a new range of ethical dilemma arises — problems for which there may be no solutions, problems involving such unacceptable alternatives that it is inappropriate and unfair to force the defense attorney to choose among them. Defense counsel in such cases may find that, to represent his client effectively and achieve a result which is in his best interest, he has to conduct himself in a manner that is inconsistent with established notions of legal ethics and professional responsibility.[1]

Faced with the factor of mental illness, the lawyer-client relationship changes and continues to change as one's confidence in instructions diminishes. Suddenly, new issues must be addressed and decisions customarily made in a straight forward fashion become uncommonly complex. The usual process of weighing risks and comparing potential consequences becomes supplanted by a spectrum of nebulous issues requiring consideration of questions as to dangerousness, the likely effectiveness of treatment, the availability of treatment and the comparative detriment of imprisonment and psychiatric confinement. Throughout, there is the nagging fear that even well-meaning paternalism may be inappropriate — particularly when exercised by someone not especially experienced in, or trained for, dealing with mental illness.

This paper focuses on the ethical aspects presented by the issues of fitness to stand trial and insanity at the time of the offence, particularly in situations where the accused disavows mental illness or instructs counsel not to raise a mental state issue. These problems necessarily raise the question whether counsel acting for a mentally-ill accused is entitled to take control of the case by superseding instructions. The problem is further exacerbated when one considers that to raise a mental state issue over the objection of one's client likely involves breaching the client's privilege with respect to psychiatric material. Can a lawyer take these extraordinary steps and, if so, in what circumstances is the action justified? How a lawyer resolves the problem depends on how the lawyer perceives the nature of his or her role in an ethical context. The lawyer must develop a general ethical posture which comes to grips with the potential distinctions between personal ethics and the group code of ethics, which I shall call institutional ethics. At the very least, the lawyer must appreciate the gaps in the institutional code of ethics and struggle with the question of how, and to what extent, one's personal judgment can fill them. One must recognize that the exercise of personal judgment invokes the influence of moral, ideological and political views. Thus, while a particular problem may not be answerable simply by reference to the professional code, the response to the problem which flows from the exercise of personal judgment may conflict with other aspects of the code.

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[1] Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand (1972) 10 Am. Crim. L. Rev. 505, 505.*

In order to address responsibly an ethical problem, it is essential that one starts with a clear understanding of the substantive and procedural sides of the issue. The issues of insanity and fitness are conceptually distinct: fitness relates to the ability of an accused to participate in, and be subject to, the process of adjudicating criminal responsibility; insanity, on the other hand, goes to the question of criminal responsibility. From reported decisions,[2] one often senses confusion, among lawyers and psychiatrists alike, as to the meaning of fitness and the factors relevant to its assessment.

The statutory manifestation of fitness to stand trial is found in s. 543 of the *Criminal Code*.

> 543. (1) A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.[3]

Clearly, the uncertainty arises from the attempted integration of a vague and undefined concept of insanity with the issue of the accused's ability to conduct a defence. As one writer has said with respect to the use of insanity in s. 543:

> it has the obvious defect of either not meaning what it says or being a word so larded over with secondary meanings, conflicting legal and medical definitions and preconceptions, as to be of no value in the Criminal Code.[4]

While the present rule has been interpreted judicially to provide criteria for addressing unfitness arising from mental disability,[5] the rule fails to resolve the problem of communicative disability of a physical nature[6] — an unavoidable dilemma when one considers that the source of the contemporary expression of the fitness rule arises from two 19th century cases dealing with deaf mutes.[7] Sufficient attention has been paid by authors[8] to the substantive inadequacies of the fitness rule to prompt the

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[2] See, *e.g.*, *R.* v. *Morris* (1977) 35 C.C.C. (2d) 157, 159-60 (Alta. S.C., App. Div.) *per* Clement J.A. addressing the psychiatrist's opinion and the trial judge's ruling.

[3] Enacted in its present form by the *Criminal Code*, S.C. 1953-4, c. 51, s. 524.

[4] Ryan, *Insanity at the Time of Trial under the Criminal Code of Canada* (1967) 3 U.B.C. L. Rev. 36, 48.

[5] See *R.* v. *Roberts* (1975) 24 C.C.C. (2d) 539 (B.C.C.A.); *R.* v. *Waltucky* (1952) 103 C.C.C. 43 (Sask. C.A.); *R.* v. *Budic* (1977) 35 C.C.C. (2d) 272 (Alta S.C., App. Div.); *Reference Re R.* v. *Gorecki (No 1)* (1976) 32 C.C.C. (2d) 129 (Ont. C.A.).

[6] For an example of the dilemma, see *R.* v. *Hughes* (1978) 43 C.C.C. (2d) 97 (Alta S.C., T.D.).

[7] *R.* v. *Pritchard* (1836) 7 Car. & P. 304, 173 E.R. 135 (Assizes); *R.* v. *Dyson* (1831) 7 Car. & P. 304, 173 E.R. 135 (Assizes).

[8] See Ryan, *supra*, note 4; Del Buono, *Mental Disorder: A Crime* (1976) 18 Can. J. of Crim. and Corr. 302; Lindsay, *Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada* (1977) 19 Crim. L.Q. 303; Slovenko, *Competency to Stand Trial: The Reality Behind the Fiction* (1971) 8 Wake Forest L. Rev. 1; Note, *Incompetency to Stand Trial* (1967) 81 Harv. L. Rev. 454.

Law Reform Commission of Canada to say that "all legal commentators and committees agree that substantial change and revision is necessary".[9]

As well as causing substantive problems, misunderstanding as to the rationale and scope of the rule has given rise to unresolved disparities of view with respect to the nature of the burden of proof and upon whom it lies.[10] Although the confusion which apparently exists must add further strain to the decision-making processes of the lawyer, it is not the intention of this paper to address these doctrinal and procedural aspects of the concept of fitness.

There are a variety of premises upon which different jurisdictions base the applicability of insanity as a defence.[11] In Canada, its elements are codified in s. 16 of the *Criminal Code* and have been the subject of much discussion by the judiciary[12] and learned commentators.[13] Moreover, the question of reform and the general issue of the propriety of insanity as a defence have been the source of much consideration and controversy.[14] The scope of this paper does not require, or permit, a further substantive discussion of insanity. The treatment of the ethical problems related to the defence of insanity assumes that a person cannot be convicted of "an offence in respect of an act or omission... while he was insane" and that "insanity" is defined as set out in ss. 16(2) and (3) of the *Code*. Part VII is restricted to the ethical snares which often accompany decisions as to the availability and appropriateness of the defence of insanity.

Raising mental state issues for consideration by trial courts necessarily involves the use of psychiatric testimony. There are a number of evidentiary

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[9] Law Reform Commission of Canada, *The Criminal Process and Mental Disorder* (1975) [*Working Paper 14*], 32.

[10] See *R.* v. *Roberts*, *supra*, note 5; *R.* v. *Waltucky*, *supra*, note 5; *R.* v. *Budic*, *supra*, note 5. But *cf. R.* v. *Hughes*, *supra*, note 6 and *R.* v. *Podola* [1960] 1 Q.B. 325 (C.C.A.).

[11] The English and Canadian formulations of insanity flow from the rules formulated in *M'Naghten's Case* (1843) 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.). Some American jurisdictions have developed other tests following *United States* v. *Currens* 290 F. 2d 751 (3d Cir. 1961) or *Durham* v. *United States* 214 F. 2d 862 (D.C. Cir. 1954) and *U.S.* v. *Freeman* 357 F. 2d 606 (2d Cir. 1966). For a general discussion, see M. Schiffer, *Mental Disorder and the Criminal Trial Process* (1978), 144-52.

[12] See *Cooper* v. *The Queen* [1980] 1 S.C.R. 1149; *R.* v. *Barnier* [1980] 1 S.C.R. 1124; *Schwartz* v. *The Queen* [1977] 1 S.C.R. 673; *Rabey* v. *The Queen* [1980] 2 S.C.R. 513.

[13] See Martin, *Insanity as a Defence* (1966) 8 Crim. L.Q. 240; Mewett, *Section 16 and "Wrong"* (1976) 18 Crim. L.Q. 413; Verdun-Jones, *The Insanity Defence since Schwartz* v. *The Queen: First Steps Along the Road Towards Rationalization of Canadian Policy?* (1979) 6 C.R. (3d) 300, and *The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country?* (1979) 14 U.B.C. L. Rev. 1; Shiffer, *supra*, note 11, 121-44.

[14] See G. Morris, *The Insanity Defense: A Blueprint for Legislative Reform* (1975); A. Goldstein, *The Insanity Defense* (1967); R. Arens, *Insanity Defense* (1974); Goldstein & Katz, *Abolish the 'Insanity Defense'— Why Not?* (1963) 72 Yale L.J. 853.

issues which arise in this context[15] and present factors which affect lawyers' decisions. Given the ethical perspective discussed in this paper, it addresses in Part V only the issue which bears most centrally on ethical and tactical decisions: the confidentiality of communications and consultations with a psychiatrist retained by defence counsel to assist in preparing, and perhaps eventually establishing, the response to the charge.

By their nature, ethical problems do not always compel a single answer — let alone an easy one. Even an ethical issue which is specifically and clearly addressed by a rule in a professional code involves the personal decision as to whether conformity is appropriate in the circumstances. Of course, the pressure to conform in clear cases is substantial. That does not, however, negate the existence of personal discretion. The exercise of discretion, unless the lawyer has chosen conformity as an *a priori* precept, requires consideration of the stated norm in light of the lawyer's view of what ought to be. Parts I and II of this paper attempt to demonstrate that such clearly stated norms are rare and usually exist in respect of duties which relate to the regulatory aspect of professional conduct such that they are not likely to evoke moral responses. More significant are the ethical problems arising in circumstances not specifically addressed by the group code.

Absolute answers cannot be stipulated universally since individual cases represent not only different factual contexts but also a different set of participants bringing with them their various backgrounds, attitudes, goals and values. The subjective process of determining what ought to be constitutes the lawyer as a moral agent who unwillingly becomes a new element in the ethical matrix in that his personal values, including a personal conception of the lawyer's role, become relevant. The intention of this paper is to encourage discussion and provide a tentative framework for assessing and resolving the ethical aspects of issues which so often trouble counsel who act for a mentally ill accused. I have isolated the factors and variables which I consider to be fundamental and have exposed my own characterizations and value judgments[16] to scrutiny. In this way, I have attempted to develop a "common vocabulary" to facilitate conscientious decision-making.[17]

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[15] For examples of the evidentiary problems which commonly arise, see Manning & Mewett, *Psychiatric Evidence* (1976) 18 Crim. L.Q. 325; Ho, *The Psychiatrist and the Accused: Some Evidentiary Problems* (1980) 38 U.T. Fac. L. Rev. 197; Schiffer, *supra*, note 11, 189-224.

[16] I have used the compendious phrase "value judgment" as distinguished from "moral judgment" to ensure that the discussion is not viewed from a purely moral perspective. A value judgment merely declares what I recognize as valuable in that I desire it; a moral judgment would require analysis of my value judgment on the basis of moral considerations.

[17] The utility of publicly explaining one's personal decision-making process in respect of an ethical dilemma requiring personal judgment was suggested by Alderman, *Three Discussions of Legal Ethics* (1977) 126 U. Pa. L. Rev. 452.

Throughout this paper, the word "ethics" is used in juxtaposition with a number of modifying words: legal ethics, personal ethics, professional ethics and institutional ethics. While these concepts may be distinguishable, in whole or in part, they share a common element in that each one includes, even if only at the aspirational level, at least the possibility of a "systematic and disciplined critical analysis of moral arguments".[18]

I. Institutional Ethics: The Professional Component as a Source of Guidance

The phrase "institutional ethics" is used in contradistinction to personal ethics. In the legal context, it refers to the group code of conduct emanating from the institutions of the legal system. The primary source of institutional ethics is the relevant code of professional responsibility promulgated by the professional governing body. Traditionally, these codes were known as the canons of ethics, a name which misleadingly gave the impression of a set of principles established to resolve universal questions of ethical responsibility. Contemporary codes of professional responsibility are essentially the rules by which the legal profession defines the lawyer's relationships with the public, the legal system and the legal profession. Notwithstanding a definitional format, these rules or duties are inherently regulatory in the sense that they represent the governing body's concern to maintain the image and integrity of the profession as perceived by the dominant segment of the bar. The foreword to the *Professional Conduct Handbook* of the Law Society of Upper Canada states:

> Public confidence in the administration of justice and in the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. Accordingly, he should endeavour to conduct himself at all times so as to reflect credit on the legal profession, inspire the confidence, respect and trust of his clients and the community, and should strive to avoid even the appearance of impropriety.[19]

The preamble to the American Bar Association's *Code of Professional Responsibility* similarly reminds us that "it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct".[20] In formulating rules of professional conduct, the role of the controlling group within the profession extends to injecting its prevailing norms as minimum standards for the rest of the profession. That

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[18] I have adopted the definition of ethics used and expanded upon in Smurl, *In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility* (1978) 11 Indiana L. Rev. 797.

[19] Law Society of Upper Canada, *Professional Conduct Handbook* (1978) [hereinafter L.S.U.C. *Handbook*], i.

[20] American Bar Foundation, *Annotated Code of Professional Responsibility* (1979), 2. The *Code* was adopted by the American Bar Association on 12 August 1969 and was effective 1 January 1970 [hereinafter the A.B.A. revision].

the rules are intended to serve this function is clear from an examination of the prefatory remarks to the revised codes of both the Canadian Bar Association[21] and the American Bar Association.[22] The nature of the legal profession's codes of responsibility as they relate to the practices of different lawyers has provoked one author to comment:

> They mandate conformity, not goodness or right behaviour. They look like a moral code but are really the descriptive ethic of never-never land. They do not constitute a viable norm, but for most lawyers, are the standards of some other time and place.[23]

In other words, the norms are those of the dominant segment of the bar but they are imposed on all lawyers notwithstanding distinctions in the modes of practice, geographic locale, client characteristics and individual conceptions of the role of the lawyer. In addition to this normative aspect, a major thrust of any code will be regulatory, which is an inevitable requirement since the lawyer practises pursuant to some form of officially sanctioned licence.[24] To this extent, the rules represent a "subspecies of legislation, having the sanction of authority and the pragmatic value of protecting order and autonomy".[25]

Within the past dozen years, both the Canadian Bar Association[26] and the American Bar Association[27] have substantially revised their respective codes of professional responsibility. Generally, it is fair to suggest that the impetus for revision arose from a changing social context. In the United States, specific societal factors have been identified as precipitating change and one may reasonably ask whether the existence of the same factors in Canada, albeit to a lesser extent, provided similar motivation.

The major factor which we can isolate is the expression of the valid criticism that the bar, as a professional organization within the legal system, had not accepted responsibility for promoting the availability of legal services to groups which traditionally had been denied access. After conducting substantial empirical investigation in Chicago and New York City, Carlin and Howard concluded that "lawyers systematically exclude lower-class clients... on the following considerations: low expectation of financial gain, a desire to avoid a less prestigeful type of practice and clientele, and perhaps, also, conceptions of what merits consideration in the

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[21] Canadian Bar Association, *Code of Professional Conduct* (1974) [hereinafter the C.B.A. revision], vii-viii.

[22] *Supra*, note 20, 2, which describes the canons as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers".

[23] Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code* (1968) 37 George Wash. L. Rev. 244, 249.

[24] In Ontario, see *Law Society Act*, R.S.O. 1980, c. 233, ss. 50, 62-3.

[25] G. Hazard, *Ethics in the Practice of Law* (1978), 2.

[26] *Supra*, note 21.

[27] *Supra*, note 20.

legal arena".[28] Clearly, the pre-existing canons of ethics did not encourage increased accessibility. However, the American Bar Association canons went further in discouraging increased access by prohibiting a facilitating role by lay intermediaries.[29] Again, the introductions to the 1974 C.B.A. revision[30] and the 1970 A.B.A. revision[31] reflect a concern "to meet this need for legal services".

While the problem of access to justice presented a significant incentive for change in institutional ethics, it also produced corollary concerns for the organized bar in the United States. Lawyers who found themselves excluded from the prestigious large law firms and the successful medium-sized firms by reason of racial, ethnic, religious, social and educational background[32] were drawn as sole practitioners to poor and low income communities.[33] The movement to practices within low income communities involved more than just a matter of geography. Large firms controlled the corporate, commercial and institutional areas of legal practice through their specialization, resources and existing client base. Thus, the sole practitioner was compelled to work in areas usually characterized by the infrequent occurrence of single problems such as family law, criminal law, real estate transactions and some aspects of civil litigation. Because the sole practitioner could not expect the security of ongoing lawyer-client relationships to maintain a practice, more aggressive methods of attracting clients were employed than those used and accepted by the large firms.[34] Aggressive client solicitation, including the use of advertising and intermediaries, represented a double-edged threat to the organized bar. It tended to derogate from the autonomous, aloof image of the lawyer as a professional which the traditional bar had fostered and enjoyed while also posing a potential threat to the financial advantage held by the established law firms. It is not suprising that prior to the 1970 A.B.A. revision this group of lawyers was the subject of substantial criticism for "unethical" conduct.[35] Although one might argue that the sole practitioners were an illusory foe in the sense that their strength was insufficient to depose the dominant segment of the bar, the atavistic influence of self-preservation on the 1970 A.B.A.

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[28] Carlin & Howard, *Legal Representation and Class Justice* (1965) 12 U.C.L.A. L. Rev. 381, 428. See also J. Carlin, *Lawyers on Their Own; A Study of Individual Practitioners in Chicago* (1962), and *Lawyers Ethics; A Study of the New York City Bar* (1966).

[29] See Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar* (1965) 12 U.C.L.A. L. Rev. 438, 449-50.

[30] *Supra*, note 21, vii.

[31] *Supra*, note 20, 1.

[32] See Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practise and the Law* (1963) 16 J. Legal Ed. 127; J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern Amercia* (1976).

[33] See Carlin & Howard, *supra*, note 28.

[34] See Ladinsky, *supra*, note 32, 140-1.

[35] See Note, *Legal Ethics and Professionalism* (1970) 79 Yale L.J. 1179, 1180-3.

revision has been noted by a number of critics[36] who have suggested that the new *Code* subordinates the interests of the client and the public generally to the individual and collective self-interest of the legal profession.[37] From the more pointed perspective of the self-interest of the dominant segment of the bar, it has been said that:

> [those] in control of the legal profession at any point in time will be sorely tempted to use the code of ethics as a weapon to perpetuate their position of control, or to prevent even small shifts in the balance of power within the profession.[38]

The actual degree of influence is inconsequential. It is significant, however, that to some extent the code of ethics represents a tool of control, the exercise of which is not always guided by concerns for the public interest. While speaking the expansive language of increasing access to justice, the 1970 A.B.A revision clutched at the *status quo* by offering impediments to group legal services and by refusing to liberalize its advertising edicts.[39]

Another factor relevant to the changing social context was the development of new modes of delivering legal services[40] arising not only from concerns over access to justice but also from evolving conceptions of the role of the lawyer directly attributable to the heightened social conscience of the 1960s. The growth of public interest law represented, within a segment of the community of lawyers, a marriage between social concern and the attraction of social activism. Changing conceptions of the role of the lawyer were functional responses to the "newly emergent and valid understanding of the need to protect all members of society in their relatively passive capacity as citizens who consume not only material goods and services but also governmental policies and programs".[41] If the traditional bar with its meritocracy and hierarchy fit Charles Reich's[42] description of CONSCIOUSNESS II, then the new public-interest lawyer of the 1960s represented a movement within the legal profession to CONSCIOUSNESS III where the lawyer perceived a society

> that is unjust to its poor and its minorities, is run for the benefit of a privileged few, is lacking in its proclaimed liberty, is ugly and artificial, that destroys environment and self..., that is deeply untruthful and hypocritical.[43]

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[36] See Auerbach, *supra*, note 32; Note, *supra*, note 35; Morgan, *The Evolving Concept of Professional Responsibility* (1977) 90 Harv. L. Rev. 702; Flynn, *Professional Ethics and the Lawyer's Duty to Self* [1976] Wash. U.L.Q. 429.

[37] See Morgan, *ibid.*, 704-6; Schuchman, *supra*, note 23.

[38] Note, *supra*, note 35, 1187.

[39] See Auerbach, *supra*, note 32, 286-8; Note, *supra*, note 35, 1184-6.

[40] See generally Cahn & Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law* (1970) 79 Yale L.J. 1005, 1016-37; Note, *The New Public Interest Lawyers* (1970) 79 Yale L.J. 1069; Ontario: Ministry of the Attorney-General, *Report of the Task Force on Legal Aid* (1974) [hereinafter the *Osler Report*], 51-65.

[41] Cahn & Cahn, *ibid.*, 1006.

[42] C. Reich, *The Greening of America* (1970).

[43] *Ibid.*, 246.

If the sole practitioner was viewed as a threat to the prevailing order, one can imagine the reactions of the organized bar to lawyers who determined their loyalties to clients not on the basis of financial relationships but solely on whether the client or his problem came within the lawyer's ardently described area of interest. The area may have been defined geographically in the sense of the set of legal and social problems experienced by a particular community. Alternatively, the area may have been defined conceptually as with environmental law, welfare law, consumer-protection law, prison law, workers' compensation, and occupational health and safety law. The areas of interest shared common features in that they had been virtually ignored by the traditional bar and their respective plaintiffs were characterized by both material and political impotence. The affinity between lawyers and clients around a common cause engendered intimate relationships which were clearly distinguishable from the traditional lawyer-client relationship. To develop mutual support, new organized groupings of lawyers emerged around specific areas or communities of interest and older organizations with activist histories such as the National Lawyers Guild were rejuvenated.[44] These factors combined in the ferment of social and political activism to encourage zealous advocacy leading naturally to a politicized role for some lawyers. Within the ethos of the decade, the political nature of various conspiracy prosecutions[45] and the political character of the accused compelled a politicized approach by which the lawyer subordinated his views entirely to the instructions of the accused on all tactical matters.[46] As a result, contempt citations and disciplinary proceedings were common.[47] Strident cries for stricter regulation of advocates by professional governing bodies came from sources as highly placed as Chief Justice Burger.[48] Even

[44] See M. James, *The People's Lawyers* (1973), xvi-xix.

[45] By 1968 the political use of conspiracy indictments in response to the anti-war movement resulted in the prosecution of Dr Benjamin Spock, William Sloane Coffin, Marcus Raskin, Michael Ferber and Mitchell Goodman in New York, and the Catonsville Nine (including Ted and Daniel Berrigan, the activist Roman Catholic priests) in Maryland. See N. Cantor, *The Age of Dissent* (1969), 283-8.

However, it was the trial of the Chicago Eight in 1969 which most dramatically illustrated the political decision to utilize the courts to repress dissent. See James, *supra*, note 44, 101-5, in which Morton Stavis is quoted as saying that "one of the chief signals that the Nixon administration intended to change the role of the courts was the Chicago Indictments, issued but two months after Attorney General John Mitchell took office, the object being to rewrite the history contained in the Walker Report". To appreciate the historical significance of the trial of the Chicago Eight, see J. Epstein, *The Great Conspiracy Trial: An Essay on Law, Liberty and the Constitution* (1970); A. Kinoy *et al.*, *Conspiracy on Appeal: Appellate Brief on Behalf of the Chicago Eight Center for Constitutional Rights* (1971).

[46] See William Kunstler's comments on the conduct of the Chicago Eight trial in an interview in (1970) 17 (No. 10) Playboy 71, 76.

[47] See Auerbach, *supra*, note 32, 288-92; Beil, *Controlling Lawyers by Bar Associations and Courts* (1970) 5 Harv. C.R.-C.L. L. Rev. 301.

[48] See M. Freedman, *Lawyers' Ethics in an Adversary System* (1975), 14-5; Auerbach, *supra*, note 32, 289.

the legal-services programme of the Office of Economic Opportunity, an agency committed to improving accessibility to justice and already endangered by attacks from the Nixon administration, was further disabled by the American Bar Association's insistence that its lawyers conform with traditional modes of advocacy.[49] Again, one can only speculate about the actual degree of influence exerted by the bar's preoccupation with courtroom decorum, new styles of advocacy and radical lawyers. Whatever the extent of its influence, the existence and activity of a repressive element within the organized bar of the United States prompted Auerbach to conclude that "[by] 1970 it was once again professionally and legally dangerous to be a lawyer representing the poor, minorities and the politically unpopular".[50]

The 1974 C.B.A. revision has not been subjected to the same assiduous scrutiny and blunt criticism as its American counterpart. The Canadian Bar Association is a professional association not a governing body. Accordingly, its *Code* has no officially binding status but its tenets have been adopted in Ontario and incorporated into the Law Society of Upper Canada's *Professional Conduct Handbook*.[51] If collective preservation and maintenance of the lawyer's traditional image as the objective, discreet counsellor were influential factors in the United States, similar conclusions about the motives underlying the 1974 C.B.A. revision would be relevant in assessing its scope as a source of guidance in addressing the ethical problems posed in this paper.

Looking back to the years immediately preceding the C.B.A. revision, we find a similar recognition of the need to increase the availability of legal services.[52] By the early 1970s, a number of community legal clinics had been established.[53] Some encountered opposition from local county law associations which perceived the new vehicles as a threat to the material interest of the local bar.[54] These fears made little sense to the lawyers, law

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[49] See Auerbach, *supra*, note 32, 297-9; Scheindlin, *Legal Services — Past and Present* (1974) 59 Cornell L. Rev. 960, 965-7.

[50] Auerbach, *supra*, note 32, 289.

[51] See (1975) 9 L.S.U.C. *Gazette* 256.

[52] Taman, *The Legal Services Controversy: An Examination of the Evidence* [,] *A Study Prepared for the Office of the National Council of Welfare* (1971).

[53] See Zemans, *Legal Aid and Legal Advice in Canada: An Overview of the Last Decade in Quebec, Saskatchewan and Ontario* (1978) 16 Osgoode Hall L.J. 663; Brooke, *Legal Services in Canada* (1977) 40 M.L.R. 533, 536-43.

[54] See Parkdale Community Legal Services, *Submission to the Commission on Clinical Funding* (1978), 10-2 and appendices; Clinical Law Committee of the University of Windsor Faculty of Law, *Submission to the Clinic Funding Committee on the Reference Regarding University-Based Clinics* (1980), 2. These comments conform with the author's observations during the incipient stages of the development of a neighbourhood clinic by the Faculty of Law, University of Western Ontario in 1970.

students and supporters of community clinics who realized that their attention was directed to needs previously ignored by the traditional bar in areas of law which were essentially non-remunerative. One cannot assume that these unfounded local concerns[55] had much impact particularly when one considers that the projects went ahead with the approval of the governing bodies. In Ontario, for example, where the governing body has statutory control over legal aid[56], the Ontario Legal Aid Plan became the financial benefactor and the engine for development of community legal clinics.[57] However, while the new *Code* includes a statement of the bar's responsibility for access to legal services, it is accompanied by the conservative qualification that the methods employed be "compatible with the integrity, independence and effectiveness of the profession."[58] Interestingly, the C.B.A. commentary to this rule is restricted to matters of advertising, self-promotion and referrals developed in greater detail in the *Professional Conduct Handbook* of the Law Society of Upper Canada.[59] In a subsequent rule dealing with the lawyer's obligation to participate in the profession's activities, the accompanying C.B.A. commentary explains that this includes such activities as law reform, continuing legal education, legal-aid programs and community legal service.[60] When this rule was adopted into Ontario's *Professional Conduct Handbook*, the explanatory reference which specifically related professional responsibility to issues of delivering legal services was conspicuously not included.

From the perspective of concerns about new conceptions of the role of the lawyer, particularly a politicized role, there appears to be no evidence of a process of criticism, discipline and sanction analogous to what occurred in the United States. One need not necessarily conclude that the Canadian bar adhered to a different ideology than its American colleagues. The more accurate conclusion likely flows from the substantial differences in the degree and intensity of participation in social and political activism generally throughout Canada. Left-wing lawyers were insulated from dramatic confrontations due to the absence of politically motivated "show" trials.[61] If the bar was looking for a relationship between social unrest and changing

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[55] S. Grange, *Report of the Commission on Clinical Funding* (1978), 8-10. This conclusion is also implicit in the findings and recommendations of the *Osler Report*, *supra*, note 40.

[56] *Legal Aid Act*, R.S.O. 1980, c. 234.

[57] R.R.O. 1980, Reg. 575, ss. 148-59, originally enacted as O. Reg. 160/76 which was substantially revised by O. Reg. 391/79 as a result of the recommendations of Mr Justice Grange, *supra*, note 55.

[58] C.B.A. revision, *supra*, note 21, 51.

[59] *Ibid.*, 51-5; L.S.U.C. *Handbook*, *supra*, note 19, 38, Rule 13 and commentary.

[60] C.B.A. *Code*, 56-7.

[61] The emphasis here is on the phrase "show" trial. Clearly, the *War Measures Act*, R.S.C. 1952, c. 288, am. S.C. 1960, c. 44, s. 6, effected as of 15 October 1970 by proclamation under the authority of the Governor in Council that "apprehended insurrection exists and has

conceptions of the lawyer's role, it is significant that an alternative association for left-wing lawyers was not established until 1974 when the passions of social activism had already waned.[62] It is clear, however, that the drafters of the new *Code* appreciated that the members of the profession would no longer consist solely of conventional lawyers but would include "a new breed of young lawyers, some of whom were determined to use law to change society".[63]

In response to whether the new *Code* was intended to inhibit or encourage reformist activity on the part of lawyers, Professor Arthurs noted the "contrapuntal, sometimes contradictory" manner in which the ideas of reform and respect are addressed.[64] He commented:

> There is in all of this an implicit assumption, occasionally made explicit, that the lawyer is both more and less than any other citizen. He is more in that he has affirmative obligations to seek reforms; he is less in that he is inhibited in the means he can use in aid of the causes he supports.[65]

Thus, while it would be inappropriate to impute the same consciously repressive motives to the C.B.A. revision, one can conclude that it is tainted with a conservative view of the lawyer's role and a concern to maintain a public image which reflects that role.

Notwithstanding concerns about some of the factors which may have influenced the 1974 C.B.A. revision, its content is significant particularly when viewed from an evolutionary perspective starting with its predecessor,

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existed" S.O.R./70-443, and its corollary, the *Public Order (Temporary Measures) Act, 1970*, S.C. 1970-71-72, c. 2, resulted in a number of prosecutions in Québec which were blatantly political in nature. However, as an interested observer, the author has concluded that the ostensibly legalistic tenor of the ensuing trials precludes the label of "show" trials. It should be noted that a number of contempt citations did result. See Marx, *The "Apprehended Insurrection" of October 1970 and the Judicial Function* (1972) 7 U.B.C. L. Rev. 55; *R.* v. *Vallières (No. 2) and Gagnon* (1973) 17 C.C.C. (2d) 361 (Qué. C.A.); *R.* v. *Larue-Langlois* (1970) 14 C.R.N.S. 68 (Qué. Sess.). For further discussion of the October 1970 crisis, see McNaught, "Political Trials and the Canadian Political Tradition" in M. Friedland, *Courts & Trials: A Multidisciplinary Approach* (1975) 137, 155-7; T. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (1981), 190-218.

As an example of a political trial in Canada which the author would characterize as a "show trial", see the trial of Tim Buck and seven other members of the Communist Party pursuant to s. 98 of the *Criminal Code* ("unlawful association") enacted by S.C. 1919, c. 46, s. 1. While the report of the appeal, *R.* v. *Buck* (1932) 57 C.C.C. 290 (Ont. C.A.), reflects the nature and conduct of the prosecution, a more dramatic description can be found in T. Buck, *Yours in the Struggle: Reminiscences of Tim Buck* (1977), 162-94.

[62] The Law Union of Ontario had its founding meeting at Hart House, University of Toronto in May 1974.

[63] Arthurs, *Barristers and Barricades: Prospects for the Lawyer as a Reformer* (1976) 15 U.W.O. L. Rev. 59, 64. Prof. Arthurs was a member of the C.B.A.'s Special Committee of Legal Ethics, which was responsible for the 1974 revision of the C.B.A. *Code*.

[64] *Ibid.*

[65] *Ibid.*, 65.

the 1920 *Code of Legal Ethics*. The 1920 document has been described as "the essence of innocuity", cast in language which was "platitudinous, archaic, and sometimes contradictory".[66] The revised *Code* represents an attempt to describe the lawyer's role and relationships in a contemporary context, albeit vaguely defined. More helpful, however, than the re-designed rules are the commentary and notes which accompany them. The notes include cross-references to other codes of conduct but also refer to judicial authorities which bear on various issues of propriety. In this way the 1974 C.B.A. revision and the 1978 L.S.U.C. *Professional Conduct Handbook*, which has further developed the commentary and notes, recognize the judicial component of institutional ethics. Many situations which have escaped the scrutiny of governing bodies either accidentally or intentionally have arisen within the course of litigation and have attracted either criticism or approval from the judiciary. Given the obvious relationship between the professional governing bodies and the process of justice and in light of the judiciary's role within that process, one can argue that conduct which receives positive judicial approval must necessarily be acceptable to the bar. Hence, this suggests that the judicial component is the paramount aspect of institutional ethics. This is surely the case in Ontario where disciplinary proceedings against members of the bar based on allegations of "professional misconduct or of conduct unbecoming a barrister"[67] give rise ultimately to a right of appeal on the merits to the Divisional Court.[68]

From the foregoing brief discussion, we can posit a number of conclusions about the nature of professional codes of conduct which will assist in appreciating their limitations in respect of the ethical problems raised in this paper. First, because a code attempts to articulate group norms, the expression of particular rules or the description of particular relationships will be cast in vague and safe language. Secondly, a code will represent the norms of the dominant segment of the bar which may not have direct applicability to the various modes and contexts in which lawyers practise. Thirdly, a code will be an essentially conservative document written with the goal of maintaining the authority and status of the dominant

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[66] *Ibid.*, 63.

[67] *Law Society Act*, R.S.O. 1980, c. 233, s. 34, discussed in *Re Cwinn and Law Society of Upper Canada* (1980) 28 O.R. (2d) 61, 63-7 (Div. Ct) *per* Craig J. and in Arthurs, *Authority, Accountability and Democracy in the Government of the Ontario Legal Profession* (1971) 49 Can. Bar Rev. 1, 4-6.

[68] *Law Society Act*, R.S.O. 1980, c. 233, s. 44, the scope of which is discussed in *Re Stoangi and Law Society of Upper Canada (No. 2)* (1979) 25 O.R. (2d) 257, 267 (Div. Ct) *per* Griffiths J. Of course, this appellate jurisdiction co-exists with the general supervisory jurisdiction of judicial review in respect of decisions of inferior tribunals on jurisdictional or procedural grounds. However, it should be noted that relief in the nature of *certiorari* is a discretionary remedy the consideration of which will include the question of alternative remedies.

segment of the profession and will include a number of internal regulatory rules intended to promote that goal. Fourthly, a code will reflect concern to preserve the traditional public image of the lawyer as the trusted, aloof, discreet counsellor and vigorously partisan advocate. Lastly, while a code will describe a range of duties, it will not provide any indication of paramountcy or a scheme of priorities.

II. The Lawyer's Duties and the Ideology of Advocacy

The two predominant duties articulated in the 1974 C.B.A. revision as adopted in Ontario are the duty to one's client and the duty to the court. With respect to clients, the lawyer is required to pursue their best interests vigourously, to advance "fearlessly" all defences available at law and to ask every pertinent question.[69] A lawyer cannot abandon or waive a client's rights, for example an available defence, without the client's informed approval.[70] Of course, one is subject to certain restraints in that the obligation does not extend to involvement in criminal or unethical conduct.[71] Furthermore, if the instructions appear to be unreasonable, the lawyer is entitled, and perhaps in some circumstances even required, to withdraw from the case.[72] Throughout, the lawyer is bound to keep confidential all information and documents obtained within the context of a solicitor-client relationship unless instructed by the client to communicate or disclose the privileged material.[73]

The lawyer's duty to the court is essentially an obligation of respect and candour. The advocate is expected to comply with the rules of court and the contemporary standard of decorum. This duty has been described by Lord Diplock:

> To say of a barrister that he owes a duty to the court, or to justice as an abstraction, to act in a particular way in particular circumstances may seem to be no more than a pretentious way of saying that when a barrister is taking part in litigation he must observe the rules... . A barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason of its failure to ascertain facts that are within the barrister's knowledge.[74]

Recognizing that conflicts may arise between instructions from a client and the lawyer's duty to the court, there is significant authority, at least in the

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[69] L.S.U.C. *Handbook*, *supra*, note 19, 20, Rule 8 and commentary.
[70] *Ibid.*, 22.
[71] *Ibid.*, 20-1.
[72] *Ibid.*, 31-5, Rule 11 and commentary.
[73] *Ibid.*, 7-8, Rule 4 and commentary.
[74] *Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198, 219-20 (H.L.).

English context, to suggest that the paramount duty is that owed to the court.[75] In the words of Lord Reid in *Rondel* v. *Worsley*:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.[76]

However, there are clear distinctions between the barrister's status in England, where the legal profession is split, and in Canada where the unified professional structure blends the roles of barrister and solicitor.[77] In England, the barrister is retained by a solicitor and not directly by the client. With the exception of "dock brief" situations, as in *Rondel* v. *Worsley*, the barrister does not enter into a contractual relationship with the client.[78] This fundamental difference may cast doubt on the applicability in Canada of Lord Reid's clear statement of paramountcy.

Regardless of the question of paramountcy, the scopes of these duties are determined by sources external to the lawyer if we view them as discrete obligations without reference to any other applicable obligations. The responsibility to a client is defined by the scope of instructions and the extent of the retainer; the responsibility to the court is determined by the court through its rule-making function and its power to control its process. There are other operative duties, however, which can be defined only by the individual lawyer as an autonomous agent who makes choices and judgments. I am referring to duties owed to justice and to the community. If one assumes that all citizens have, or should have, these responsibilities, surely the lawyer cannot be exempted. It is even more appropriate to expect a greater sensitivity to these obligations from one who has chosen to participate professionally in the community's justice system by making

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[75] *Rondel* v. *Worsley* [1969] 1 A.C. 191, 227 (H.L.) *per* Lord Reid, 251 *per* Lord Morris of Borth-y-Gest, 271 *per* Lord Pearce, 283 *per* Lord Upjohn, *aff'g* [1967] 1 Q.B. 443, 493-506 (C.A.) *per* Lord Denning M.R.; *Saif Ali* v. *Mitchell, ibid.*, 219 *per* Lord Diplock.

[76] *Ibid.*, 227.

[77] For a critical discussion of the "divided profession" in England, see M. Zander, *Lawyers and the Public Interest: A study in restrictive practices* (1968), 270-332.

[78] See *Demarco* v. *Ungaro* (1979) 21 O.R. (2d) 673, 676-7 (H.C.) *per* Krever J. This case raised the issue of a barrister's alleged immunity from negligence actions in Ontario. Mr Justice Krever pointed out a further and somewhat surprising distinction in the same passage, that "in England a barrister is not thought to be strictly an officer of the Court although a solicitor is". This case provided an opportunity for Krever J. to question the English view of relative priority given to the duty owed to the Court but he refrained from doing so; rather, he addressed the issue of whether the same public interest implications which were persuasive in *Rondel* v. *Worsley*, *supra*, note 75, prevailed in Ontario. He concluded that they were not and that barristers enjoyed no immunity in respect of their conduct within the litigious process.

available his access to that system for a fee or salary. In any event, the applicability of these duties cannot reasonably be disputed by anyone who accepts that promoting justice and furthering the shared interests of a community are important features of a society. However, recognition of the duties to justice and the community necessarily brings into play individual definitions, perceptions and conceptions which may not conform with the commonly held or traditionally held views.

From the perspective of institutional ethics, a duty to justice appears to have been subsumed under the duty to the court by equating justice with the administration of justice.[79] By administration of justice, I mean the institutional machinery or system established to administer laws and resolve legal disputes within a society in order to achieve justice. The concept of justice can be explained within a social context as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation".[80] To equate justice with the administration of justice is to ignore the distinction between means and ends. The result is not only formalistic but discourages serious consideration of justice and thereby reduces the likelihood of achieving justice other than in a procedural sense.

The equation of justice with the administration of justice is analogous to the way in which the duty to the community was characterized in the 1920

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[79] See L.S.U.C. *Handbook*, *supra*, note 19, 36-7, Rule 12 and commentary. The equation of justice with the administration of justice for the purpose of determining the scope and nature of the lawyer's obligations can be discerned from a number of judgments in which professional conduct was in issue. See, *e.g.*, Lord Diplock's comments in *Saif Ali*, *supra*, note 74. *Myers* v. *Elman* [1940] A.C. 282 (H.L.) asserts the propriety of ordering costs against a solicitor personally in respect of a deliberately incomplete affidavit on production. The solicitor's breach of duty was described as "conduct which involves a failure on the part of a solicitor to fulfill his duty to *aid in promoting in his own sphere the cause of justice*," 319 *per* Lord Wright [emphasis added]. Notwithstanding the inclusion of an ostensible duty to promote justice, the application of this duty in subsequent cases has been restricted conspicuously to matters relating to the lawyer's duty to the court and the administration of justice. See *Edwards* v. *Edwards* [1958] 2 All E.R. 179 (Div. Ct); *Currie* v. *The Law Society* [1977] Q.B. 990; *Sonntag* v. *Sonntag* (1979) 24 O.R. (2d) 473 (S.C.); *Fraser River Contracting Ltd* v. *F.W.P. Contracting Ltd* [1978] 2 W.W.R. 355 (B.C.S.C.); *R.* v. *Clarke* (1981) 62 C.C.C. (2d) 442 (Alta C.A.). See also Miller, *The Advocate's Duty to Justice: Where Does it Belong?* (1981) 97 L.Q.R. 127, implicit in which is the equation of the barrister's duty to justice with a duty to the administration of justice resulting in Miller's submission that the duty to justice be elevated to the "sphere of adjectival law" by transforming it into rules of civil and criminal procedure.

[80] J. Rawls, *A Theory of Justice* (1971), 7. I have not chosen this definition to suggest it is necessarily authoritative but because it succinctly expresses the link between the distributive aspect of justice and social institutions. For a discussion of Rawls, see R. Dworkin, *Taking Rights Seriously* (1977), 150-83.

Code as a duty to the State.[81] Perhaps the deletion of a reference to the State in the 1974 revision reflects the recognition that the State and the community are not congruent concepts and that the State does not always act in the best interests of the community. Regrettably, the C.B.A. revision has not gone the further step of attempting to encourage an obligation to the community. A concept of community must reflect the values and social institutions considered to be central to the evolution of the community's best interests. Accepting that justice entails a distribution of rights across the range of social institutions, the end product of that distribution will vary depending on the prevailing view of the ideal form of social and economic order which determines the structuring of social institutions. One can only be comfortable with the products that flow from a system of justice if one agrees with the ordering of values upon which the system is premised.

But why should a body representing the legal profession, while purporting to espouse rules to promote responsible conduct by lawyers, shy away from discussing a duty to justice and a duty to the community as discrete duties? The answer must lie in a reluctance to encourage the development of responses based on personal values and norms the manifestations of which may be antithetical to the interests of the dominant segment of the bar — which likely also constitutes an aspect of the dominant segment of the community at large. If it is accurate to conclude that a function of professional codes of conduct is to discourage the exercise of personal ethical judgments, this conclusion is consistent with Simon's analysis in his impressive article *The Ideology of Advocacy: Procedural Justice and Professional Ethics*.[82]

Simon characterizes professional codes of conduct as a formal expression of the prevailing "ideology of advocacy" — the framework within which lawyers define their roles as participants in the legal process. He explains that the existing "ideology of advocacy" is premised on the basic principles of procedural justice and professionalism[83] from which two guiding principles of conduct and attitude evolve: neutrality and partisanship. Neutrality demands that the lawyer "remain detached from his client's ends"[84] while partisanship requires concurrently "that the lawyer work aggressively to advance his client's ends".[85] Although this marriage of separation and loyalty may appear to cast the lawyer in an almost schizophrenic role, it may be that this expectation of role-differentiated

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[81] Canadian Bar Association, *Canons of Legal Ethics* (1920), Canon 1, in which it is stated that the lawyer "owes a duty to the State, to maintain its integrity and its law and not to aid, counsel or assist any man to act in any way contrary to those laws".

[82] [1978] Wisc. L. Rev. 30.

[83] *Ibid.*, 36-9.

[84] *Ibid.*, 36.

[85] *Ibid.*

behaviour is endemic to any professional relationship in which the client or patient seeks objectively exercised skills in a sphere that is foreign to him.[86] If separation (neutrality) and loyalty (partisanship) are discontinuous, Simon argues that the discontinuity affects the client and not the lawyer. The lawyer has chosen to divorce his role from his own ends and disclaims responsibility for the consequences of actions approved by the client. The client, however, enters the process with desired ends but, while still required to accept consequences, loses sight of his ends due to the deference paid to the views of the lawyer. If the lawyer acted as an individual, the client could respond to the lawyer's opinions on that level and both participants would be required to develop a common view of objectives since both would accept the consequences. As a professional, the lawyer's functional role within a specialized procedural system which is foreign to the client's social context ensures deference to the lawyer's views not because they are inherently preferable but because they represent "the embodiment of a neutral specialized discipline".[87] To Simon, the purpose of the "ideology of advocacy" is "to rationalize the most salient aspect of the lawyer's peculiar ethical orientation: his explicit refusal to be bound by personal and social norms which he considers binding on others".[88]

Simon subjects the "ideology of advocacy" to criticism from the alternative perspectives of positivism, purposivism and ritualism as potential *rationalia* for the role of the lawyer. He finds them unsatisfactory in that each necessarily frustrates one of the ostensible norms of the "ideology of advocacy" — autonomy, responsibility and dignity:

> Positivism promises to safeguard the autonomy of the individual. Yet, when the individual's autonomy is threatened, it thrusts him into a situation where he cannot make rational choices and must submit to the will of his lawyer. Purposivism promises to enhance social welfare by encouraging individual responsibility. Yet, at points of stress, Purposivism exacerbates centrifugal tendencies by encouraging individuals to regard values in a manner which strips them of their meaning and force. Finally, Ritualism makes only the modest claim to ceremonially affirm individual dignity. Yet, the ceremonies it prescribes turn out to be a mockery of individual dignity.[89]

Ultimately, he concludes that "the Ideology of Advocacy is incoherent in theory and destructive in practice".[90] In its place, he offers the "non-professional advocate" who offers his or her skills to clients on the understanding that personal commitments to moral and ideological percepts will determine the lawyer's response to any ethical problems which might arise. Accordingly, the advocate is freed both from the restraint of the

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[86] See Wasserstrom, *Lawyers as Professionals: Some Moral Issues* (1975) 5 Human Rts 1.
[87] Simon, *supra*, note 82, 116-7.
[88] *Ibid.*, 30.
[89] *Ibid.*, 114.
[90] *Ibid.*, 130.

client's moral outlook and from the articulated group code of the profession. In Simon's words:

> The foundation principle of non-professional advocacy is that the problems of advocacy be treated as a matter of *personal* ethics... . [T]hey require that every moral decision be made by the individual himself; no institution can define his obligations in advance. [P]ersonal ethics require that individuals take responsibility for the consequences of their decisions. They cannot defer to institutions with autonomous ethical momentum.[91]

While this proposal may seem heretical to many, it should be noted that Simon is not alone in his discounting of the value of professionalism[92] and his desire that lawyers rely upon personal ethics.[93]

If we return to ethical problems associated with mentally-ill clients and examine our own code for assistance, we note that it makes no specific reference to the mentally-ill.[93a] The only expressly articulated rule which applies directly to the ethical problems under consideration is the aspect of the duty to one's client which requires the lawyer to keep confidential all communications and material which arise within the lawyer-client relationship. To suggest that this rule must be the cornerstone for the resolution of all ethical problems is to ignore the other duties owed by a lawyer. For example, if maintaining the integrity of the substantive law is an

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[91] *Ibid.*, 131.

[92] See Wasserstrom, *supra*, note 86; Fried, *The Lawyer as Friend: The Moral Foundations or the Lawyer-Client Relation* (1976) 85 Yale L.J. 1060.

[93] See Alderman, *supra*, note 17; Flynn, *Professional Ethics and the Lawyer's Duty to Self* [1976] Wash. U.L.Q. 429.

[93a] The C.B.A. revision and the L.S.U.C. *Handbook* do not address the issue of a client's mental disability but the A.B.A. revision does deal generally with the problem in Rule EC7-12 which states: "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent." While the law requires the client to plead, insanity is not a special plea but a defence and the issue of fitness arises before pleadings are presented. Hence, the lawyer faced with instructions and a client who disavows mental illness must make a personal assessment of the client's capacity in order to understand and respond in the light of "all circumstances". This rule provides no answer but at least encourages the kind of analysis of alternatives, consequences and circumstances suggested in this paper.

aspect of the undefined duties owed to the court or the administration of justice, how should one react to the prospect of the conviction of a client whom the lawyer believes to have been insane at the time of the offence? A duty owed to a conception of justice may evoke serious concern about long-term imprisonment in respect of an arguably insane client, or indefinite psychiatric confinement due to a finding of unfitness in respect of a client whom the lawyer believes to be innocent. The duty owed to the community necessarily brings into play questions of potential dangerousness and future consequences. While the obligation of confidentiality is a serious consideration in any situation, the failure of the code to define other duties in a way which would make them useful and the absence of any scheme of priorities between duties renders it ineffectual as a source of guidance to a lawyer faced with these hard questions. This view is consistent with the inherent structural limitations of a code of professional conduct suggested by the conclusions offered in the previous section of this paper regarding the nature and institutional function of professional codes. Moreover, if we can characterize codes of conduct as expressions of the "ideology of advocacy" as defined by Simon,[94] their failure to provide assistance with hard questions is reflective of the inadequacy of the "ideology of advocacy".

III. Ethical Problems and the Mentally-Ill Accused

I now turn to the consideration of the kinds of ethical problems which can occur when acting for a mentally-ill accused and the factors which give rise to them. The real source of the ethical problem is the difficulty presented by the question of what is truly in a client's best interests. Flowing from this issue is the fundamental and often introspective question whether a lawyer is capable of making an assessment of "best interests" in this context. Of course, this determination must extend beyond personal observations and consultation with one's client. It would not be uncommon to make enquiries of the accused's family, friends or co-workers so long as they are conducted discreetly and without breaching solicitor-client privilege. Moreover, it is essential that the lawyer carefully consider psychiatric assessments and recommendations which might involve the weighing of conflicting opinions. When the observations, data and recommendations, including those emanating from the accused, are consistent, the lawyer's choices are easy. A discordant view from the accused's family may confuse the decision-making process but the lawyer's duty is owed to the accused and ultimate choices must reflect that duty. The classic dilemma, however, arises when the voice of dissent comes from the accused.

Most criminal lawyers have had the experience of being asked how they can act for someone whom they know is guilty. The common response

[94] Simon, *supra*, note 82, 31.

usually combines the rhetorical question of whether one ever "really knows" with an explanation of the Crown's obligation to prove beyond a reasonable doubt and the role of the trier of fact in determining ultimate issues. In other words, the accused is entitled to make full answer and defence and the lawyer, within ethical limits, takes instructions and assists with that defence without prejudging guilt. The classic statement of this approach to lawyering can be found in a conversation between Boswell and Johnson:

> Boswell: "But what do you think of supporting a cause which you know to be bad"?
> Johnson: "Sir, you do not know it to be good or bad till the judge determines it".[95]

The idea of acting on instructions is essential to the traditional view of a lawyer's role. However, it is a fiction, albeit a useful one, to conclude that lawyers never prejudge. This fiction may enable some to cross-examine vigourously and to address juries with passion. Thinking individuals, however, cannot help but make observations, draw inferences and reach conclusions. For the criminal lawyer, the distinction lies in the simple, traditional *caveat* that one does not act on personal conclusions but, rather, one acts on instructions. This is merely a simplified reassertion of the duty that one owes to one's client flowing from the principles of neutrality and partisanship.

The integrity of instructions and the operative fiction involved in leaving all conclusions to the trier of fact cease to provide easy answers when acting for the mentally-ill accused. At some stage, a suspicion about mental disability may cause the lawyer to question, or even disregard, instructions from the accused. The conflict between the lawyer's personal conclusions and the accused's instructions represents the classic conflict between duties which allows for no simple answer. Even armed with a psychiatric opinion, the lawyer must recognize that, while reassuring, it is merely an opinion. On the other hand, the perceived quality of the instructions are tainted somewhat by the lawyer's own views of the client's mental disability. The significance of resolving the conflict is obvious when one considers that the choice of issues which will be put forward will likely affect the eventual disposition of the case. Can the lawyer supercede the instructions of the accused? If so, how much support must exist in order to justify acting in the face of instructions? Alternatively, is withdrawal from the case required when the accused's perception of "best interests" differs from the lawyer's? These are the perplexing ethical questions.

It would be useful at this point to distinguish between tactical decisions and ethical ones. Hard choices are not uncommon; many tactical problems produce substantial anxiety. However, the tactical/ethical distinction lies

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[95] *Boswell's Life of Samuel Johnson* (1887), 47, quoted in Freedman, *supra*, note 48, 51 in the chapter entitled "What Does a Lawyer Really 'Know': The Epistemology of Legal Ethics" which discusses "knowing" within the context of the A.B.A. revision, *supra*, note 20.

not in the degree of anguish but rather in the nature of the two problems. Tactical decisions require the weighing of consequences and the balancing of risks in order to predict the outcome of a course of action. Ethical decisions involve evaluating a course of action according to some set of norms or precepts. They usually arise interstitially between conflicting duties which attach to the lawyer's role or from questions relating to the nature of the lawyer's role. When speaking of mental state issues, automatism and mental disorder short of insanity provide helpful examples of difficult tactical problems which may not include ethical components. As a result of *Rabey* v. *The Queen*[96] and particularly the subtle external/internal cause dichotomy,[97] a defence based on non-insane automatism runs the risk that the trier of fact may conclude that the causal factor is of internal origin so as to constitute a disease of the mind resulting in a verdict of not guilty by reason of insanity.[98] Assuming that it is appropriate to adduce evidence of mental disorder short of insanity to negative the requisite *mens rea*, and a number of appellate courts have agreed with this proposition,[99] the accused runs a similar risk. The expert psychiatric testimony called by the accused may, particularly after cross-examination, provide a basis for leaving insanity with the trier of fact. In light of the consequences of a verdict of not guilty by reason of insanity, defence counsel and the accused are faced with a difficult and risky choice which may lead to an unattractive, and perhaps inordinate, result. Although it is impossible to accurately quantify risks, and even recognizing that clients often look to their lawyers to make hard choices, counsel can rely on the instructions of an informed, rational client. It is the client who runs the risk and, therefore, is entitled to determine the course to be taken. This is not to say that the process of advising one's client is easy but it represents a tactical dilemma, not an ethical one. The problem may, however, take on an ethical dimension if the lawyer doubts the accused's ability to appreciate and assess the risks or if the client's choice appears to be so imprudent that to pursue it would conflict with the lawyer's perception of his or her duty to the accused. Absent a conflict between duties or doubt as to the validity of the basis upon which instructions are given, the problem remains a tactical one, regardless of the degree of anguish it generates.

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[96] *Supra*, note 12.

[97] *Ibid.*, 533-4 adopting this aspect of Martin J.A.'s judgment in *R.* v. *Rabey* (1977) 37 C.C.C. (2d) 461, 477-83 (Ont. C.A.).

[98] For an example of these subtle distinctions and their inherent risks, see *R.* v. *Revelle* (1979) 48 C.C.C. (2d) 267 (Ont. C.A.).

[99] See *R.* v. *Wright* (1979) 48 C.C.C. (2d) 334 (Alta S.C., App. Div.); *R.* v. *Meloche* (1975) 34 C.C.C. (2d) 184 (Qué. C.A.); *Lechasseur* v. *The Queen* (1978) 1 C.R. (3d) 190 (Qué. C.A.); *R.* v. *Browning* (1976) 34 C.C.C. (2d) 200 (Ont. C.A.); *R.* v. *Milton* (1977) 34 C.C.C. (2d) 206 (Ont. C.A.).

In this discussion, we are considering the conflicts between the lawyer's personal views and the accused's instructions as they relate to the issues of fitness to stand trial and insanity as provided by s. 16 of the *Criminal Code*. Both issues, if raised, may result in indefinite commitment pursuant to a Warrant of the Lieutenant-Governor. Hence, the lawyer's personal decision-making process must extend beyond a consideration of the weight of the available evidence pointing to unfitness or insanity to include regard for the impact of the consequences. Also, when assessing the quality of the accused's instructions, the lawyer must not only consider the accused's insight into the offence and his or her mental state but also the accused's ability to appreciate the nature of confinement pursuant to a Lieutenant-Governor's Warrant.[100]

To formulate an analysis in the general context, it is necessary to define the potential conflicts. First, we must consider the situation in which the lawyer doubts the fitness of the accused to stand trial but the accused disavows any mental disability. The second category relates to situations in which the lawyer thinks that there is evidence suggesting insanity at the time of the offence but the accused instructs the lawyer not to raise insanity. The nature of the ethical issue in respect of the second category depends on the accused's mental state at the time of trial and the lawyer's impressions in this regard. Here, of course, we are considering an accused who has not been found unfit to stand trial and one must note that a finding of fitness does not rule out diseases of the mind[101] including psychoses and psychopathy, even accompanied by delusional behaviour.[102] Hence, an accused who is fit to stand trial may still be characterized, both by legal and psychiatric criteria, as insane and perhaps even potentially dangerous. At the same time, an accused who may have been insane according to legal criteria at the time of the offence may, by the time of trial, present defence counsel with a sane,

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[100] While the lawyer's dilemma usually arises from a disavowal of mental disability on the part of the accused, it is conceivable that the conflict may arise in the opposite sense if the accused views a Lieutenant-Governor's Warrant as preferable to a conviction. In a number of jurisdictions in the United States, state legislatures have placed limits on the length of permissible incarceration after a finding of unfitness. This development, following *Jackson* v. *Indiana* 406 U.S. 715 (1971), has given rise to some concern over feigning incompetence in order to avoid criminal sanctions. For a discussion of this issue, see, *e.g.*, Wulach, *The Incompetence Plea: Abuses and Reforms* (1980) J. of Psych. and Law 317, and the references cited therein.

[101] With respect to what may constitue a "disease of the mind" within the meaning of s. 16 of the *Criminal Code*, see *Cooper* v. *The Queen*, *supra*, note 12, 1156-60 *per* Dickson J.; *R.* v. *Rabey*, *supra*, note 97, 472-83 *per* Martin J.A., *aff'd Rabey* v. *The Queen*, *supra*, note 12. But with respect to elements of "disease of the mind", see the dissenting judgment of Dickson J. at *supra*, note 12, 522-53 as it relates to whether "the likelihood of recurrence" is a factor; *R.* v. *Simpson* (1977) 35 C.C.C. (2d) 337, 347-56 (Ont. C.A.) *per* Martin J.A.

[102] For examples of fit but delusional accuseds, see *R.* v. *Trecroce*, *infra*, note 182, and *R.* v. *Budic*, *supra*, note 5.

lucid and reasonable client who clearly appreciates the effect of a Lieutenant-Governor's Warrant and reasonably decides to risk conviction rather than indefinite commitment. Clearly, the lawyer's decision must be determined with a view to the client's mental state, or perceived mental state, at the time instructions are given.

It should be apparent that the kinds of conflict set out above should only arise after comprehensive psychiatric material has been obtained. Furthermore, the decision whether to put forward an issue on behalf of a client can only be a potential source of conflict when the psychiatric material is solely in the possession and control of defence counsel. Although such decisions may represent the more dramatic conflicts, a similar ethical problem can arise even when the Crown pre-empts the programme by raising the issues of fitness or insanity on its own initiative. Then, defence counsel may have to decide whether he or she considers it appropriate to follow instructions to contest the issue. Whether the Crown puts the accused's mental state into issue may depend on whether the Crown has access to available psychiatric material. Thus, the control and confidentiality of psychiatric material becomes a further consideration in the ethical decision-making process which accompanies the obligation, in proper circumstances, to investigate the accused's mental state. The ability of defence counsel to control the use of psychiatric material depends on the manner in which the psychiatric material has been obtained.

IV. The Lawyer's Duty to Inquire: Obtaining Psychiatric Material

As a result of interviews, personal observation and available information about the offence itself, a suspicion about mental disability may arise in counsel's mind. Particularly when these doubts might potentially relate to the issues of fitness to stand trial or insanity at the time of the offence, the lawyer is obliged to seek the assistance of psychiatric opinions in order to advise the accused and properly make the necessary tactical decisions. This initial obligation to enquire likely exists regardless of the degree of seriousness of the offence so long as mental state represents an issue potentially relevant to some aspect of the case.[103]

The extent to which one must pursue the enquiry and the use to which the psychiatric material will be put depends on the nature of the offence. However, the initial determination of how to obtain psychiatric material depends on the particular sources which may be available. The accused may have been treated previously in a psychiatric institution. In Ontario,

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[103] Without reference to the specific problem of the mentally ill client, it has nonetheless been said that there is always a general duty to ascertain all relevant facts. See M. Orkin, *Legal Ethics: A Study of Professional Conduct* (1957), 80-1.

pursuant to s. 29 of the *Mental Health Act*,[104] some clinical reports can be obtained directly from the institution upon forwarding an executed authorization in the prescribed form. Alternatively, the accused may be, or may have been, the patient of a private psychiatrist. If so, à report can be obtained by forwarding an authorization accompanied by an undertaking to pay the psychiatrist's account for preparing the report. The value of material obtained from an institution or from a psychiatrist who has treated the accused will depend on the length of time which has transpired since the last contact with the accused and the nature of the confinement or treatment particularly as it may be distinguished from the cognitive issues relevant to fitness and insanity in the legal sense. One should be careful to recognize that many psychiatrists do not have forensic experience. Hence, it is useful when requesting a report from a psychiatrist who has treated the accused to outline not only the circumstances which give rise to your request but also to provide a brief discussion of the issues in which you are interested so that the psychiatrist can relate his or her opinions to the relevant legal criteria.[105]

In most cases, psychiatric institutions or practising psychiatrists who have treated the accused will not provide adequate sources of material. Particularly with respect to serious criminal offences, the material obtained from these two sources may not be sufficient to assist counsel. Alternatively, it may be that the accused has no treatment history. Accordingly, it becomes necessary to consider obtaining psychiatric assessments from a psychiatrist with forensic experience. The decision to obtain a fresh assessment should be discussed with the accused not only to prepare the accused for the assessment but also because the accused's initial reaction to the suggestion may foreshadow future conflict and provide a further relevant factor to be considered when making future choices.

Essentially, there are two avenues by which psychiatric assessments can be obtained. Counsel can retain a psychiatrist privately, assuming that funds are available, which allows for control of selection and an opportunity to acquaint and instruct the psychiatrist prior to the assessment. The alternative is to apply for an order for a remand for a mental examination. This represents no cost to the accused, at least in financial terms, but the resulting material is directed to the Court and is available to the Crown. At the pre-trial stage, the authority for ordering a remand for a mental examination is found in ss. 465(1) (c) and 465(2) of the *Criminal Code*. While

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[104] R.S.O. 1980, c. 262; originally enacted by S.O. 1978, c. 50, s. 10 and designated as s. 26a of the *Mental Health Act*.

[105] Even forensic psychiatrists can display inadequate understanding and erroneous views of the legal tests for fitness. See, *e.g.*, *R.* v. *Morris*, *supra*, note 2, 159 and the discussions in Vann & Morganroth, *Psychiatrists and the Competence to Stand Trial* (1964) 42 U. Det. L.J. 75 and McGarry, *Competency for Trial and Due Process via the State Hospital* (1965) 122 Am. J. Psych. 623.

the statutory test asks whether "there is reason to believe that the accused may be mentally ill",[106] the object of the remand is to generate opinions with respect to the issue of fitness to stand trial.[107] Nevertheless, orders are often made for other reasons and examining psychiatrists are not given clear directions as to the purpose intended, whether justifiable under the existing statutory provision or not.[108] Hence, the psychiatric interviews and the resulting reports commonly extend beyond matters relevant to the fitness issue to touch on other mental state issues even including factual admissions which may relate to whether the accused committed the act.

V. Confidentiality of Psychiatric Material

In Canada, there is no privilege to protect communications between psychiatrist and patient.[109] While there may exist rare examples of a trial judge refusing to compel testimony from a psychiatrist in order to maintain the integrity of the treatment relationship, as in *Dembie* v. *Dembie*,[110] such cases are anomalous and cannot serve as the basis for reliance. Thus, a psychiatrist who has treated the accused prior to the offence is a compellable witness for the Crown. Even if defence counsel asks a psychiatrist to prepare an opinion as to mental state based on a pre-existing treatment relationship, the psychiatrist's opinions are available to both sides. While it is argued in this paper that an expert retained by defence counsel to assist in preparing and presenting the case is protected under the umbrella of solicitor-client privilege, this protection cannot be extended retrospectively to a previous treatment relationship merely by paying a fee for a report. It may be, however, that the nature of the psychiatrist's role changes, notwithstanding a pre-existing relationship, if he or she is retained after a criminal charge specifically to interview and assess the accused in order to assist counsel.

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[106] *Criminal Code*, R.S.C. 1970, c. C-34, s. 465(1)(c). For an explanation of the manner in which the statutory test should be applied, see *R.* v. *Sweeney* (1976) 28 C.C.C. (2d) 70 (Ont. Prov. Ct, Crim. Div.).

[107] See *R.* v. *Sweeney (No. 2)* (1977) 28 C.C.C. (2d) 245 (Ont. C.A.).

[108] See Lindsay, *supra*, note 8, 330-2; *Working Paper 14*, *supra*, note 9, 53-8.

[109] See Schiffer, *supra*, note 11, 32-5; Manning & Mewett, *supra*, note 15, 350-1; Tacon, *A Question of Privilege: Valid Protection or Obstruction of Justice?* (1979) 17 Osgoode Hall L.J. 332, 333-7; Dickens, *Legal Protection of Psychiatric Confidentiality* (1978) 1 Int. J. of Law and Psych. 255, 257-60.

For general discussions as to the absence of physician-patient privilege at common law, see J. Wigmore, *Evidence*, 3d ed. (1961) vol. 8, §§ 2380-91; C. McCormick, *Handbook of the Law of Evidence*, 2d ed. (1972), 212-3; R. Cross, *Evidence*, 5th ed. (1979), 296-7. There was a statutory privilege with respect to physicians in Québec by virtue of S.Q. 1965, c. 80, s. 308; but s. 308 in the *Code of Civil Procedure*, L.R.Q. 1979, c. C-25, is now limited to government officials and no longer includes physicians or priests, advocates, notaries and dentists.

[110] (1963) 21 R.F.L. 46 (Ont. H.C.), discussed in Kirkpatrick, *Privileged Communications in Correction Services* (1964) 7 Crim. L.Q. 305, 316-8.

In the United States, most jurisdictions have followed the lead of New York which in 1828 enacted a statutory privilege to insulate the physician-patient relationship.[111] Perhaps surprisingly, the extension of privilege to the medical relationship has been criticized by commentators who argue that the alleged benefit is questionable and speculative while the impairment of the court's fact-finding function is apparent.[112] While some state courts have attempted to diminish the extent of the privilege, so that in some jurisdictions it has been characterized as "substantially impotent",[113] a warmer reception has been afforded recently to psychiatrist-patient privilege, based on a "zones of privacy" rationale.[114] A United States District Court Judge stated:

> Whatever merit these privacy arguments have in favour of a general patient-physician privilege their persuasiveness is increased where the medical relationship implicated is that between psychotherapist and patient. First, the pragmatic, empirical objections to the rationale of the general physician-patient privilege are not applicable to this specialized relationship. The practical need for and efficacy of a privilege covering this unique relationship is clear... . Second, and perhaps more significant for the purpose of determining the validity of a constitutional claim grounded in a right to privacy, is the depth and extraordinary intimate nature of the patient's revelations.[115]

However, by premising the argument for psychiatrist-patient privilege on a right to privacy, its applicability is denied when the purpose of the relationship is not diagnostic or therapeutic but rather to assist with litigation.[116] This may be a significant distinction since the recommendation of a general professional privilege[117] by the Law Reform Commission of Canada is restricted to consultations "for the purpose of obtaining professional services" and subject to the qualification that the public interest in maintaining the privacy of the relationship outweighs the public interest in the administration of justice". The public interest qualification creates an onus of establishing confidentiality as compared to an onus of justifying

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[111] See McCormick, *supra*, note 109, 212, fn. 3.

[112] See Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence* (1943) 10 U. Chi. L. Rev. 285, 290-2; Chaffee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* (1943) 52 Yale L.J. 607, 609-10.

[113] Comment, *Federal Rules of Evidence and The Law of Privilege* (1969) 15 Wayne L. Rev. 1286, 1324.

[114] See *United States ex. rel. Edney* v. *Smith* 425 F. Supp. 1038 (E.D.N.Y. 1976) *per* Weinstein J. applying *Roe* v. *Wade* 410 U.S. 133, 152 (1973) *per* Blackmun J. and *Doe* v. *Bolton* 410 U.S. 179, 197-8 (1973) *per* Blackmun J.

[115] *Ibid.*, 1043.

[116] *Ibid.*, 1044; *State* v. *Hilliker* 185 N.W. 2d 831 (C.A. Mich. 1957); *People* v. *Lines* 531 P. 2d 793 (Cal. 1975) (*in banco*); *State* v. *Kociolek* 129 A. 2d 417 (N.J. 1957).

[117] Law Reform Commission of Canada, *Report on Evidence*[;] *Proposed Evidence Code* (1975), s. 41.

disclosure—a reversal of the position proposed for marital or family privilege[118] and Crown privilege.[119]

With respect to opinions arising from a compulsory examination pursuant to s. 465(1) (c), the practice has developed that both sides receive copies of the examining psychiatrist's report. If mental state is in issue at trial, the expert can be called to give opinion evidence on behalf of the Crown or the defence even though, strictly speaking, the object of the remand was to consider only the issue of fitness to stand trial. The relevance of mental state goes beyond questions of fitness and insanity and has been held to include the defence of non-insane automatism[120] and a defence based on the accused's "normal mental make-up" in the context of an offence "of a kind that is committed only by members of an abnormal group".[121] The admissibility of opinion evidence permits testimony about the basis for the opinion, including reference to incriminating admissions. Although such admissions must be subjected to a limiting instruction which cautions the jury as to their restricted purpose distinct from evidence going to the truthfulness of an admission,[122] the prejudice which arises merely from allowing the jury to hear the admission cannot be eradicated.[123]

The more intriguing question is whether the psychiatrist who conducts the fitness assessment at the request of the court can be compelled to disclose factual admissions made by an accused during the assessment in cases where mental state is not in issue and the sole purpose of the testimony is to fill a factual gap in the Crown's case. This issue was addressed recently by the Alberta Court of Appeal in *Regina* v. *Stewart*.[124] The setting was a re-trial of a first-degree murder charge before a judge sitting without a jury, in which the statement to the psychiatrist was characterized as "the one piece of direct evidence putting the Appellant at the scene of the crime on the evening in question."[125] The psychiatrist confirmed that he had advised the accused at the outset of their interview that its purpose was directed solely to the issue of fitness and that anything said was confidential and could not be disclosed. The Court applied a subjective test to determine whether the psychiatrist was a person in authority and held that the circumstances were sufficient to

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[118] *Ibid.*, s. 40.

[119] *Ibid.*, s. 43.

[120] See *R.* v. *Smith (Stanley)* [1974] 1 W.L.R. 1445, 1452 (C.A.) *per* Geoffrey Lane L.J.

[121] See *R.* v. *McMillan* (1975) 23 C.C.C. (2d) 160, 177-8 (Ont. C.A.) *per* Martin J.A., *aff'd McMillan* v. *The Queen* [1977] 2 S.C.R. 824.

[122] See *Wilband* v. *The Queen* [1967] S.C.R. 14, 21 *per* Fauteux, J.

[123] See *Perras* v. *The Queen* [1974] S.C.R. 659, 673-4 *per* Spence J., dissenting; *Krulewich* v. *United States* 336 U.S. 440, 453 (1949) *per* Jackson J.; *Delli Paoli* v. *United States* 352 U.S. 232, 247 (1957) *per* Frankfurter J.; *Jackson* v. *Denno, Warden* 378 U.S. 368, 388-9 (1964) *per* White J. See also Tacon, *supra*, note 109, 347.

[124] (1980) 54 C.C.C. (2d) 93 (Alta C.A.).

[125] *Ibid.*, 98.

designate him as such so that the admission could only be accepted into evidence if "voluntariness" was established. By adopting a narrow view of "voluntariness" restricted to a test of reliability,[126] the Court rejected the argument that the assurance of confidentiality was an inducement which rendered the admission involuntary. It stated that "the inducement would not give the appellant any hope of advantage which, in turn, might constitute a motive for a false statement".[127] It is regrettable that the argument and decision proceeded from the narrow perspective of voluntariness as it relates to the admissibility of an incriminating statement. A broader approach would have compelled a closer examination of the nature of the relationship between a psychiatric examiner and an accused in a situation where the examiner acts under the auspices of the court and the accused is confined in custody shortly after arrest on a serious criminal charge. A more comprehensive analysis, including consideration of psychiatric diagnostic techniques, may have persuaded the court that it is naive to assume that an assurance of confidentially could only produce truthful results in the circumstances. Moreover, the need for candour and co-operation to enhance the validity of the assessment may, in the context of an assessment requested by the court to assist in determining whether the accused is fit to stand trial, have persuaded the court to distinguish the statement made to the psychiatrist from other out-of-court statements. In this way, it could have been argued that the public interest in promoting the integrity of the administration of justice required the exclusion of the statement. Assuming that the confession rule is sufficiently broad to accommodate an exclusionary discretion based on ensuring that the manner in which evidence is obtained and used does not produce a perception of unfairness or bring the administration of justice into disrepute,[128] the betrayal of the psychiatrist's assurance of confidentiality should be a significant factor. Alternatively, because of the functional role which the compulsory examination plays within the criminal process, the accused's participation in the assessment process might be characterized as both "*qua* accused" and "*qua* witness"

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[126] *Ibid.*, 106-7. The Court applied the apparent acceptance in *R.* v. *Alward and Mooney* [1978] 1 S.C.R. 559, 562 *per* Spence J. of the test put by Limerick J.A. in the following terms: "The true test, therefore, is did the evidence adduced by the Crown establish that nothing, said or done by any person in authority, could have induced the accused to make a statement which was or might be untrue because thereof."

However, the Supreme Court recently confirmed in *Rothman* v. *The Queen* (1981) 20 C.R. (3d) 97, 116 *per* Martland J., that Spence J.'s "casual" acceptance is not to be construed as formulating a new test and rejected reliability as the rationale for the admissibility of confessing in favour of a vaguely defined concept of voluntariness.

[127] *Ibid.*, 108.

[128] See *R.* v. *Sang* [1980] A.C. 402, 436-7 (H.L.) *per* Lord Diplock, 449-50 *per* Lord Fraser of Tullybelton, 455-7 *per* Lord Scarman. See also *Rothman*, *supra*, note 126, 125-34 *per* Estey J., dissenting, 146-54 *per* Lamer J., concurring with the majority in the result, and 97-119 *per* Martland J., speaking for the majority.

such that subsequent disclosure could be prevented by relying on the testimonial nature of the so-called right against self-incrimination.[129]

Thus, it appears that there can be no expectation of control in respect of psychiatric opinions obtained either as a result of a previous treatment relationship or a court ordered remand for "observation". Furthermore, so long as the authority of *Regina* v. *Stewart*[130] remains unchallenged, psychiatric assessments pursuant to court orders may produce an unexpected — even unsuspecting — Crown witness as to factual issues. A more unsettling example arose recently in Newfoundland when an accused attempted to challenge the validity of a search warrant issued to obtain the hospital file arising from the psychiatric remand.[131] The warrant had been issued on the information that an anonymous doctor had advised the informant that the accused (who stood charged with first-degree murder) had made relevant admissions, a record of which was included in the file. Noël J. denied the application without analyzing the relationship between the psychiatrist and the remanded prisoner as a component of the criminal process by concluding that it "is difficult to believe that public policy requires that evidence which might tend to prove truth in a trial of a person charged with a criminal offence should be suppressed".[132]

It remains to consider whether any degree of control and protection from disclosure exists with respect to a psychiatrist retained by defence counsel to assess the accused. The question of controlling psychiatric material from an expert retained by defence counsel becomes a relevant consideration in making ethical and tactical judgments, particularly in respect of the lawyer's duty to inquire and consult. Can the Crown raise a mental state issue through the opinion evidence of a psychiatrist initially retained to assess the accused and consult with defence counsel? Can the Crown call a defence psychiatrist to give opinion evidence which tends to rebut a mental state issue raised by the defence? If these questions compel an affirmative answer, the necessary consequence must be a reluctance to consult extensively with experts for fear that unfavourable opinions, or opinions inconsistent with the ultimate defence posture, will come back to haunt the accused. Perhaps more disturbing is the question of control and confidentiality as it relates to factual admissions made by the accused during the assessment process — an assessment arranged by defence counsel ostensibly to benefit the accused — in cases where mental state is not in issue. Assuming that the prosecution is aware that a psychiatric assessment of the

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[129] See *Marcoux and Soloman* v. *The Queen* [1976] 1 S.C.R. 763.

[130] Motion for leave to appeal to the Supreme Court of Canada refused, 20 May 1980 *per* Martland, Ritchie and Dickson JJ.

[131] *Waterford Hospital* v. *The Queen* (1981) 23 C.R. (3d) 48 (Nfld S.C.).

[132] *Ibid.*, 51. Interestingly, no authority was cited for this far-reaching conclusion other than a reference to the *Criminal Code*, R.S.C. 1970, c. C-34, s. 443.

accused has been completed, it is not unreasonable for the Crown to conclude that the examination included a interview which touched on the events giving rise to the charge. It is common for a responsible psychiatrist to obtain not only the accused's personal history but also a factual account of the events from the accused's perspective.[133] A zealous Crown Attorney faced with factual gaps in the Crown's case might consider whether these gaps could be filled through admissions made by the accused to the psychiatrists retained by the accused's counsel. Thus, one must ask the general question whether the defence psychiatrist is a compellable witness on behalf of the Crown.

At first, the question appears to compel a simple answer — a psychiatrist retained by defence counsel is protected under the umbrella of solicitor-client privilege. However, further consideration tends to complicate the issue when one appreciates that the question does not relate to communications between the client and the solicitor or even between the psychiatric expert and the solicitor, for example a written report provided to the solicitor, but rather relates to communications between the accused and the psychiatrist. Ordinarily, admissions against interest are admissible subject to the test of voluntariness in respect of admissions to persons in authority. However, the characterization of the issue as an "admissions" problem is in my view erroneous and tends to cloud the issue. A proper analysis requires resort to the underlying rationale of solicitor-client privilege. It is commonly accepted that the basis for this privilege relates to the adversarial nature of the judicial process rather than some special quality inherent in lawyers as a group which distinguishes them from physicians and the clergy. Recently, the Supreme Court of Canada cited with approval the following classic explanation of the rationale offered by Jessel M.R. in *Anderson* v. *Bank of British Columbia*:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only properly be conducted by professional men [sic], it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and... that he should be able to make a clean breast of it to the gentleman whom he consults...; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.[134]

Simply and briefly put, communications between a solicitor and client are privileged in order that frank and truthful discussions can be conducted

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[133] See Meister, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Rights to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants* (1974) 11 Colum. J. of Law and Soc. Prob. 403, 417.

[134] [1876] 2 Ch. 644, 649 cited with approval in *Solosky* v. *The Queen* [1980] 1 S.C.R. 821, 835 *per* Dickson J.

to allow the solicitor to advise a client of his or her legal position so that the client can make full answer and defence without fear of any prejudice arising from the discussion. In other words, the privilege exists to protect the client and not the solicitor. As has already been stated, in many situations it is not only prudent but is also the lawyer's duty to obtain psychiatric assessments in order to properly advise an accused. Assuming that such an assessment involves frank discussions between the accused and the psychiatrist, it is entirely consistent with the policy behind solicitor-client privilege to include these discussions under its protective umbrella.

To conclude otherwise would leave either the solicitor or the psychiatrist in an untenable position. In a case where the proof of factual guilt is contentious, defence counsel would likely be reluctant to obtain a psychiatric assessment, notwithstanding the existence of deep suspicions as to the accused's mental state, in order to ensure that factual admissions made during the course of the assessment could not serve to fill in gaps in the Crown's case. In respect of clients who are in custody pending trial, there would be little difficulty in finding out the names of any psychiatrists who visited the jail to interview them. Alternatively, the psychiatrist might, in order to avoid becoming a Crown witness as to factual admissions, choose not to obtain a factual account from the accused during the assessment process. Thus, we are left with an emasculated assessment and a less than satisfactory opinion. Accordingly, it is submitted that in order to protect the accused's right to make full answer and defence and to ensure that the accused has the best opportunity of obtaining legal advice and assistance, it is necessary that the lawyer be free to consult with psychiatric experts. Discussions between the expert and the accused, carried out for the purpose of developing an opinion for the use of the solicitor, must be protected by privilege.

It would be useful to consider the role of the legal secretary, articling student, clerk or investigator employed by a solicitor. Can there be any doubt that these individuals are protected by solicitor-client privilege in respect of any communications made to them by their employer's client with respect to pending litigation? They act as agents for the solicitor and, again, if the accused is to obtain proper advice based on frank discussions, the solicitor's agents must also be protected.[135]

In the United States, a number of cases have insulated psychiatrists retained by defence counsel by way of analogy to the agency relationship. Hence, psychiatrists have been characterized as "transmission agents" or

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[135] See Wigmore, *supra*, note 109, § 2301; Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery* (1964) 42 U. Det. L.J. 105, 121-5; McLachlin, *Confidential Communications and the Law of Privilege* (1977) 11 U.B.C. L. Rev. 266, 275.

"intermediate agents".[136] Essentially, these cases concluded that adequate legal representation when mental state was in issue required the assistance of a psychiatric expert to obtain and interpret data for use by defence counsel such that communications between the accused and the "transmission agent" warranted the protection of lawyer-client privilege.[137] The question of lawyer-client privilege was discussed extensively in the more recent decision from the Third Circuit in *United States* v. *Alvarez*[138] in which the prosecution subpoenaed a psychiatrist retained by the defence and elicited opinion evidence as to the accused's sanity to rebut the defence of insanity as well as incriminating factual admissions made to the psychiatrist. In a well-reasoned judgment which considered a variety of potential sources for protection of the psychiatrist, the Court concluded that the accused was protected from the disclosure of any admissions by the psychiatrist by reason of the attorney-client privilege and the sixth amendment guarantee of effective assistance of counsel.[139] Recognizing the lawyer's obligation to consult with psychiatric experts, the Court stated:

> A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosure made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informal judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.[140]

Moreover, the Court rejected the prosecution's argument that by raising the defence of insanity the accused had waived any privilege or confidentiality with respect to the psychiatrist.[141] By rejecting any form of implied waiver, the decision gave the defence complete control over its own psychiatrists and ensured that the fear of generating an unfavourable opinion or incriminating admissions would not inhibit defence counsel from consulting one or more experts.

The two grounds posited in *Alvarez* for protecting the accused from the compellability of the defence psychiatrist were not viewed cumulatively but as alternative bases for the Court's decision. While there is no constitutional

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[136] See *San Francisco* v. *Superior Court* 231 P. 2d 26 (Cal. 1951); *State* v. *Kociolek*, *supra*, note 116; *People* v. *Hilliker*, *supra*, note 116; *Ex parte Ochse* 238 P. 2d 561 (Cal. 1951).

[137] See *San Francisco* v. *Superior Court*, *supra*, note 136, 29-31; Note, *Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards* (1976) 51 N.Y.U. L. Rev. 409, 438-9. But, *cf.* Schiffer, *supra*, note 11; Gardner, *Agency Problems in the Law of Attorney-Client Privilege: The Expert Witness* (1965) 42 U. Det. L.J. 473, 478-9.

[138] 519 F. 2d 1036 (3d Cir. 1975), applied and explained in *United States ex. rel. Edney*, *supra*, note 114; *United States* v. *White* 617 F. 2d 1131, 1135 (5th Cir. 1980) *per* Roney J.; *Federal Trade Commission* v. *T.R.W., Inc.*, 628 F. 2d 207, 212 (D.C. Cir. 1980) *per* McGowan J.

[139] *Ibid.*, 1045-6.

[140] *Ibid.*, 1046-7.

[141] *Ibid.*

analogy in Canada to the effective assistance of counsel issue, it is submitted that a similar argument could be based on the right to make full answer and defence. A failure to afford protection similar to that in *Alvarez* places ethical and tactical hurdles in counsel's path by discouraging frank consultation with experts. Hence, it can be argued that the public interest is better served by enabling defence counsel to investigate comprehensively and put forward all available defences rather than by inhibiting effective representation merely to assist the Crown in a few cases with evidence of a dubious nature. To permit the Crown to compel testimony from defence psychiatrists must intuitively leave a bad taste in the mouth of anyone who would suggest that the burden of proof rests on the Crown.

Further support for the use of privilege to protect a defence psychiatrist from compellability can be found in the acceptance by the Supreme Court of Canada in *Slavutych* v. *Baker*[142] of Wigmore's four fundamental tests "necessary to the establishment of a privilege against the disclosure of communications":

> 1. The communications must originate in a confidence that they will not be disclosed.
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> 3. The relation must be one which in the opinion of the community ought to be seduously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[143]

With respect to psychiatric testimony, affirmative arguments in support of conditions one to three are easily developed.[144] While the phrase "correct disposal of litigation" in condition four may raise questions, it is submitted that a narrow construction with reference solely to promoting the community's interest in criminal convictions is entirely unwarranted and that the proper construction compels consideration of the apparent fairness of the administration of justice, the presumption of innocence and the accused's right to make full answer and defence. Commentators have suggested that the application of Wigmore's four pre-conditions to privilege will extend the existing categories of matters protected by solicitor-client privilege[145] and that it might even provide a general protection against

[142] [1976] 1 S.C.R. 254. Laskin C.J.C. points out in his dissenting judgment in *Solicitor General of Canada and the R.C.M.P.* v. *The Royal Commission of Inquiry Into the Confidentiality of Health Records* (1980) 38 N.R. 588, 619 (S.C.C.) that "*Slavutych* established that the categories of privilege are not closed." For other examples of a public interest test to the question of disclosure of information obtained through assurances of confidence, see *Rogers* v. *Home Secretary* [1973] A.C. 388 (H.L.); *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 (H.L.); *Science Research Council* v. *Nassé* [1980] A.C. 1028 (H.L.).

[143] *Ibid.*, 260 *per* Spence J. quoting from Wigmore, *supra*, note 109, § 2285.

[144] See Ho, *supra*, note 15, 203-9.

[145] McLachlin, *supra*, note 135, 275-9.

disclosure by psychiatrists in the absence of a waiver by the patient.[146] More significantly, the Appellate Division of the Alberta Supreme Court in *Re Medicine Hat Greenhouses Ltd and German and The Queen (No. 3)*[147] recently upheld a decision which applied Wigmore's four-fold test to render inadmissible a report from investigators to counsel for the Department of Justice on the basis of solicitor-client privilege. During the course of arguing a prohibition application raising, among other grounds, an abuse of process argument with respect to delay in prosecution, the applicant sought production of the investigator's report which recommended prosecution. The Appellate Division agreed with the ruling and reasons of the Chambers Judge who stated:

> There is, however, a very considerable distinction between the facts and particulars on the one hand, and placing an accused in a direct line of communications between Crown counsel and the investigators who assist him on the other hand.[148]

In other words, the document was privileged because it represented a confidential communication which conveyed facts and opinions between counsel and those employed for the purpose of assisting with litigation. Thus, one can infer that in the context of a tax prosecution the "correct disposal of litigation" should be interpreted to include a reference to the adversarial nature of the trial process and the inherent need to promote frank discussions with counsel. If solicitor-client privilege extends to protect the report of a tax investigator to Crown counsel, surely it must extend to protect a defence psychiatrist from compellability.

Although it may be suggested that, in respect of a psychiatrist or any other expert, there is no property right, this suggestion ignores the nature of the evidence in question. We are not discussing evidence which exists at large and is available to anyone who finds it; we are discussing statements made directly by an accused to an expert retained by his or her own counsel. Frankness is encouraged because the accused's advocate has sanctioned the interaction and placed trust in the psychiatrist. Recognizing that he cannot be compelled to volunteer admissions to the police or to give testimony at trial, the accused voluntarily co-operates with the expert retained by his counsel solely for the purposes of assisting counsel in promoting the accused's best interests and ensuring the accused's right to make full answer and defence in order that the trial process can reach a fair adjudication and appropriate disposition. The relationship between accused, counsel and psychiatrist is not tripartite in nature but has a unitary object—the protection and promotion of the accused's best interests within the structure of the criminal process. One could not find a more patent case for the protective cloak of solicitor-client privilege.

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[146] See Ho, *supra*, note 15; Dickens, *supra*, note 109.

[147] (1978) 45 C.C.C. (2d) 27, 43-5 (Alta S.C., App. Div) *per* Leiberman J.A.

[148] *Ibid.*, 45.

VI. Ethical Aspects of the Issue of Fituess

To return to the ethical dilemma posed earlier: is there an obligation on defence counsel to raise the issue of fitness when in possession of confidential psychiatric material which causes one to doubt whether the accused is fit to stand trial even in the face of a disavowal of mental disability by the accused and instructions not to raise the issue of fitness? Given the nature of the fitness inquiry, the mere existence of instructions is not particularly helpful. One must recognize that the available psychiatric opinion may be vague or qualified either in respect of whether a mental disability exists or in respect of the corollary issue whether, according to the accepted criteria, it might render the accused unfit to stand trial. Of course, a vague or qualified opinion might create an obligation to obtain a further opinion. Ultimately, it may still arise that the ambit of available psychiatric opinions do not clarify the situation. Hence, I would suggest that defence counsel must balance the psychiatric opinion with his own perception of the client's capacity to understand the nature of the allegations and the criminal process, to appreciate the potential consequences, to communicate with counsel and to assist generally in the conduct of the defence. If after these considerations have been made there exists serious doubt about fitness to stand trial, I would submit that counsel must raise the issue, subject only to the qualifications discussed below dealing with the nature of the offence, probable sanctions and the availability of diversion from the criminal process.

Fitness hearings are often characterized as "non-adversarial"[149] in nature and therefore discussions by the judiciary of counsel's role are uncommon in cases where fitness is put in issue. However, the duty upon defence counsel was discussed in *Rex* v. *Gibbons*[150] in which the issue of fitness to stand trial was not raised formally by the defence or by the Crown but arose obliquely from questions asked by defence counsel of a psychiatrist who was called to give evidence in support of a defence of insanity. Assuming that defence counsel had made the tactical decision not to raise fitness, Robertson C.J.O. made the following comment:

> In my opinion it is open to grave question whether counsel, having the opinion of a psychiatrist, whom he proposes to call as a witness for the defence, that the accused is suffering from mental illness or insanity, which he proposes to establish as a defence to

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[149] See *R.* v. *Roberts, supra*, note 5, 546; *R.* v. *Budic supra*, note 5, 278. However, this characterization may be overly simplistic in that it does not take into account the manifold circumstances in which an accused may vigorously and justifiably contest the Crown's assertion, whether it be fitness or unfitness, keeping in mind that it is the Crown which has chosen to invoke the criminal process. As a result of this "non-adversarial" characterization, the issues relating to the standard of proof and upon whom it lies have been distorted. See *R.* v. *Waltucky, supra*, note 5, 46; *cf. R.* v. *Hughes, supra*, note 6, 104.

[150] (1946) 86 C.C.C. 20 (Ont. C.A.).

> the charge, is entitled to take it upon himself to enter upon the trial without directing the attention of the trial Judge to the situation, so that, in his discretion, the trial may not be entered upon until it has been determined that the accused is mentally fit to be tried.... I find it difficult to conceive how counsel for the accused could properly receive instructions from the accused as to a defence of insanity, if that insanity still persisted at the time of the trial.[151]

While His Lordship's views may be appropriate in a situation where the available psychiatric opinion does cause, or should cause doubt on the part of defence counsel as to the accused's fitness to stand trial, it should be noted that the psychiatric testimony in *Gibbons* indicated that the accused understood the proceeding and the nature of the allegation against him and that he could instruct counsel "merely as to the events that occurred, but not as to the reasons beyond them" due to the delusions under which he laboured.[152] In light of the distinctions between the issue of fitness and insanity as a defence, the harsh criticism of defence counsel in *Gibbons* appears to have been unwarranted. The persistence of delusions which relate to the event in question must necessarily cloud any attempt to discuss the event but need not affect an accused's fitness to stand trial. There are more recent examples of judicial reaction to a fit but delusional accused which reflect a more sophisticated appreciation of psychiatric testimony and the distinctions between fitness and insanity as a defence.[153] Furthermore, the reaction in *Gibbons* tends to ignore the role of defence counsel's own observations as to the extent of the client's communicative and cognitive abilities. Particularly if one subscribes to the view that a fitness inquiry is "non-adversarial" in nature, I would suggest that any serious residual doubt on the part of defence counsel should be resolved in favour of raising the issue, keeping in mind that the observations of defence counsel as to the relevant criteria put in question during a fitness inquiry should be brought to the Court's attention.

Of course, the obligation to raise the issue of fitness must be qualified by a pragmatic assessment of the potential consequences of a finding of unfitness compared to the criminal sanctions which might be available upon conviction. When dealing with less serious offences, the obligation to raise the issue of fitness cannot be viewed in absolute terms. Even short terms of imprisonment are likely to appear more attractive than the spectre of indefinite confinement pursuant to a Lieutenant-Governor's warrant.[154]

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[151] *Ibid.*, 21-2 *per* Robertson C.J.D.

[152] *Ibid.*, 25-6 *per* Laidlaw J.A.

[153] See *R.* v. *Trecroce*, *infra*, note 182; *R.* v. *Budic*, *supra*, note 5; *R.* v. *Morris*, *supra*, note 2.

[154] For a dramatic example of the dangers of confinement pursuant to a Lieutenant-Governor's Warrant, see the discussion of the Emerson Bonnar case in Savage, *The Relevance of the Fitness to Stand Trial Provisions to Persons with Mental Handicaps* (1981) 59 Can. Bar Rev. 319.

However, in the context of charges which are lower down in the hierarchy of criminal offences, other alternatives are available. These situations present an opportunity for a conciliatory attempt at diversion which might be arranged through negotiations with the police and the Crown. Keeping in line with the idea of employing the "least intrusive" form of disposition,[155] counsel must be prepared to address the questions of available treatment facilities in the community and the accused's amenability to treatment in order to provide a realistic basis for a discussion of diversion. If the accused appears to be both unfit and certifiable pursuant to provincial legislation which involves an assessment of whether the accused is dangerous to himself or others, it may be prudent to consider resort to the mechanisms of the mental health legislation rather than the criminal process. Substantial distinctions exist between the two vehicles in respect of the duration of confinement and the frequency of reviews in order to justify continued confinement.[156] If an accused appears to be unfit to stand trial in a situation where there is no concern about dangerousness such that certification pursuant to provincial legislation is not available, other options may be available in the community and should be discussed with the various participants in the criminal process. It may be clear that to merely terminate the criminal process and risk the repetition of further petty offences represents less of a cost both in human and financial terms than to subject the accused to confinement pursuant to a Lieutenant-Governor's Warrant.

VII. Insanity: The Ethical Dilemma

The ethical dilemma with respect to insanity which perplexes counsel defending a serious criminal charge arises when the available psychiatric opinions reflect a potential s. 16 insanity defence but the accused specifically instructs counsel not to raise it. Keeping in mind that the criteria relevant to the issue of fitness are different from the factors which relate to insanity pursuant to s. 16 of the *Criminal Code*, this category of dilemma divides into two sub-categories depending on whether the alleged "disease of the mind" which existed at the time of the offence still exists at trial or not. Pragmatic consideration must be given to the seriousness of the charge and the potential consequences which could flow from conviction. One would hope that the issue would only be characterized as a dilemma for counsel in situations where the prosecution may result in lengthy terms of imprisonment. For the purpose of discussion, we are assuming that the trial has commenced and that the accused has not been found unfit. Hence, it is presumed that the

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[155] The idea of the "least intrusive" form of intervention arises from the recommendations of the Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (1976), [hereinafter *Mental Disorder in the Criminal Process*] 36-7, discussed comprehensively in Lindsay, *supra*, note 8.

[156] *Mental Health Act*, R.S.O. 1980, c. 262, ss. 14, 31 and 32.

accused is capable of instructing counsel. To supercede instructions, defence counsel must necessarily be prepared either to subordinate the duty to the accused in favour of perceived duties owed to the community or to some concept of justice, or alternatively, to prefer his or her own view of the accused's "best interests" to that of the accused. The dynamics of this analysis will likely vary depending on the individual lawyer's self-perception and characterization of the role of the lawyer. Admittedly, this analysis may appear facile and simplistic in that it does not adequately reflect the intense anxiety which usually befalls a lawyer ensnared in this ethical dilemma. To the extent that the scope of this analysis is acceptable, however, it directs our attention to two subsidiary questions:

1. Can it be said that the accused has misperceived his or her "best interests" by reason of the accused's lack of insight into mental problems or an inability to appreciate reasonably the respective consequences of a conviction and a verdict of not guilty by reason of insanity?
2. Does the accused by reason of mental illness represent a danger?

It may be suggested that a further question arises as to whether the lawyer subscribes to a view of the criminal justice system which, in orthodox terms, should not permit the conviction of an accused who is not criminally responsible. Assuming that no conscientious member of the defence bar would carry this proposition to absurdity by raising a s. 16 defence in response to a prosecution over a matter like shoplifting, it cannot be given a decisive role and must be subsumed by the pragmatic considerations involved in assessing the accused's appreciation of potential consequences.

First, we can deal with the situation of the accused who is not mentally-ill at trial. My comments are restricted to the situation of an accused in respect of whom psychiatric evidence, if adduced, will indicate that he or she at the time of the offence was subject to a "disease of the mind" which would have rendered the accused insane within the meaning of s. 16 but which condition is no longer operative by reason of either successful treatment or the passage of time. Hence, we are dealing with an accused who is capable of providing clear and reasonable instructions and who does not, by reason of mental illness, present concerns as to dangerousness. Ordinarily, we would conclude that counsel must follow instructions. If the accused instructs counsel not to raise a defence of insanity, however, the situation may still be one in which the accused and counsel differ as to what is in the accused's "best interests". Of course, it is the accused who is on trial and thus entitled to be the risk-taker. It is not uncommon for an accused to choose not to follow counsel's advice and to embark on a course which counsel considers imprudent. I would suggest that the appropriate test is not based on the prudence of the choice but rather on the reasonableness of the consideration. Counsel must assess the accused's understanding of the likelihood of conviction or acquittal in the absence of a defence based on mental state and

determine whether the accused appreciates the distinctions between the likely range of sentence which will flow from a conviction and the likelihood of discharge from the Lieutenant-Governor's Warrant which will issue as a result of a verdict of not guilty by reason of insanity. The weighing of consequences is more pointed in the context of a murder prosecution with the potential consequence of a mandatory term of life imprisonment and a lengthy parole eligibility period. The strength of the Crown's case must be carefully considered in order to assess whether the accused's instructions represent an unreasonable risk-taking. Unless the process of consideration is inadequate such that the instructions can be characterized as unreasonable, it is submitted that defence counsel should follow instructions. It is trite to add that these instructions should be obtained in writing complete with comprehensive acknowledgements of the advice given by counsel in respect of the options available to the accused. If counsel considers that the instructions are unreasonable, I would suggest that the appropriate response is to withdraw from the case in accordance with the appropriate mechanisms for withdrawal in criminal cases as may apply in the jurisdiction.[157] I reach this conclusion not out of any interest in providing counsel with a method by which to abdicate responsibility but rather to reflect the significance of the accused's sense of responsibility. It is, of course, the accused who pays the consequences and who should be responsible for the consequences. While paternalistic responses may be endemic to the role of the lawyer who so often encounters dependant clients seeking to transfer their own anxieties and responsibilities, it is submitted that, in the context of a rational client, paternalism must be treated with suspicion.[158] If the alternative to withdrawing is continued participation, but with reservation or without vigor, this is obviously undesirable. On the other hand, the act of withdrawing might produce a salutary effect on the accused's perception of his or her "best interests" particularly if subsequent counsel also reacts adversely to the accused's instructions.

A far more complex problem arises in the context of an accused who, although fit to stand trial, is still apparently subject to the "disease of the mind" which was operative at the time of the offence. In light of the complex nature of this problem, it would be presumptuous to offer a solution or even to propose a vague mode of analysis which would be universally applicable. One can, however, raise the various considerations which are relevant and

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[157] See L.S.U.C. *Handbook*, *supra*, note 19, 31-5, Rule 11 and commentary.

[158] This is particularly significant with respect to the lawyer's role within the contemporary "ideology of advocacy" described by Simon, *supra*, in which the lawyer's functional role as professional engenders deference to his opinions thereby distorting the client's ability to assess and choose. If both client and lawyer approach problems as autonomous individuals who accept responsibility for their choices, conflict may be inevitable so that continued representation by the lawyer is impossible.

examine cases which appear to reflect this kind of ethical dilemma in order to provide examples of different reactions to the situation.

With respect to the relevant considerations, one obviously starts with a careful examination of the available psychiatric opinions in order to assess the extent to which the alleged mental illness might affect the instructions given by the accused. Particular attention should be paid to the existence of delusions and the extent of the accused's insight into his or her mental problems. A disavowal of any mental illness by the accused in the face of strong psychiatric opinions to the contrary is particularly relevant in the context of what a non-medical person would characterize as bizarre or aberrant behaviour. Attention must be paid to the issue of dangerousness as well as the question of treatability. Treatment gives rise to its own range of sub-issues keeping in mind that the indefinite confinement which arises from a Lieutenant-Governor's Warrant provides for safe custody but does not necessarily require the provision of treatment.[159] While s. 19 of the *Penitentiary Act*[160] provides a mechanism for the transfer of prisoners to a mental health facility, it must be noted that the use of this mechanism is subject to agreement by both the penitentiary and the receiving institution as to the appropriateness of the transfer and the suitability of the prisoner to the regime of the psychiatric facility. Within the penitentiary system itself, psychiatric resources are not extensive and most programmes are of a pre-release nature.[161] In the result, a convicted accused whose mental illness manifests a serious danger to others but which is amenable to intensive treatment may find, tragically, that such treatment is not available.[162]

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[159] See *Mental Disorder in the Criminal Process, supra*, note 155, 36-7; *Ex Parte Kleinys* [1965] 3 C.C.C. 102 (B.C.S.C.); *Re Brooks* (1961) 37 C.R. 348 (Alta S.C.).

[160] R.S.C. 1970, c. P-6, s. 19 discussed in *R.* v. *Deans* (1977) 37 C.C.C. (2d) 221, 226 (Ont. C.A.) *per* Martin J.A.

[161] See Canada: Department of the Solicitor General, *The General Program for the Development of Psychiatric Services in Federal Correctional Services in Canada* (1973), [referred to as the *Chalke Report*].

[162] *R.* v. *Poore*, an unreported decision of the Ontario Court of Appeal released on 1 June 1978, arose from an appeal against a life sentence following a manslaughter conviction in respect of an aceused who exhibited an unusual but dangerous sexual aberration. Psychiatric evidence indieated that the accused might respond to an intensive therapeutic program lasting five to ten years. Subsequent to conviction and in the face of strong recommendations by the sentencing judge, the authorities at the Mental Health Centre in Penetanguishene re-assessed the accused as unsuitable for that facility and he was transferred to penitentiary custody at the Regional Psychiatric Centre in Kingston. In light of the life sentence and the short pre-release nature of its programmes, the penitentiary system would not provide treatment until the accused approached his parole eligibility date. After considering the changed circumstances, and recognizing that it was a "tragic case", the Court dismissed the appeal on the basis that the issue raised related to the *administration* of the sentence, not its fitness. See also the commentary on this case from the psychiatrist's perspective in Smith & Braun, *Necrophilia and Lust Murder: Report of a Rare Occurrence* (1978) 6 Bull. of the Am. Academy of Psych. and Law 259.

Whether based on a perception of the accused's best interests or because of a sense of duty to the community or a concept of justice, defence counsel might responsibly conclude that the defence of insanity must be raised.[163] The more difficult problem, however, is choosing the vehicle for putting the issue forward. If one subscribes to the view that defence counsel has conduct of the case, an attempt might be made to raise the defence on behalf of the accused. As soon as this plan of action came to the attention of the accused, the likely result would be the discharge of counsel. If this happened before trial, the same ethical problem would merely be placed in the hands of another lawyer without any progress towards a resolution. The Ontario Court of Appeal addressed the question of an accused's right to discharge counsel after the commencement of a trial in *Regina* v. *Spataro*.[164] While the appeal against conviction was dismissed, at least two of the judges confirmed that a trial judge would commit a serious error by directing counsel to continue in the face of an unequivocal discharge.[165] In dissent, Brooke J.A. challenged the view that defence counsel had conduct of the case by supporting his conclusion as to the accused's right to discharge counsel not only by reference to the right to make full answer and defence but more significantly because of "the accused man's fundamental right to the conduct of his own trial."[166] Accordingly, depending on the manner in which the discharge of counsel is effected, the trial judge would be compelled either to allow self-representation or declare a mistrial. In either event, nothing would have been achieved beyond extricating the particular lawyer from the situation. When this question was raised in a 1969 panel discussion conducted by the Law Society of Upper Canada on the topic of ethics and

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[163] Even Munroe Freedman does not exclude this response. Ordinarily his iconoclastic reactions to ethical problems in the criminal process maintain the inviolability of lawyer-client confidentiality as the bulwark of an adversarial process premised on disproportionate resources between the accused and prosecutor. See generally Freedman, *supra*, note 48; Freedman, *Where the Bodies are Buried: The Adversary System and the Obligation of Confidentiality* (1974) 10 Crim. L. Bull. 979. Freedman argues that the efficacy of the adjudicative process permits counsel to discredit a witness he believes to be telling the truth, to call a witness he believes will commit perjury and to advise a client in a manner which might tempt him to perjury. See Freedman, *Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions* (1966) 64 Mich. L. Rev. 1469; Noonan, *The Purposes of Advocacy and Limits of Confidentiality* (1966) 64 Mich. L. Rev. 1485. However, when faced with a mentally disturbed client, Freedman has expressed his uncertainty as to the lawyer's obligations and conceded that "the lawyer might come to the conclusion that the client does not indeed know what is in his or her best interests". See the discussion in N. Galston, *Professional Responsibility of the Lawyer: The Murky Divide Between Right & Wrong* (1977), 72.

[164] (1971) 4 C.C.C. (2d) 215 (Ont. C.A.).

[165] See *ibid.*, 216 *per* Jessup J.A., 218 *per* Brooke J.A., dissenting, 216 *per* Kelly J.A.; the latter's judgment is ambiguous on this point since he concluded that "there was never an unequivocal discharge of counsel by the accused."

[166] *Ibid.*, 220.

advocacy,[167] Mr Justice Hartt offered a lengthy response including the following comment:

> [I]f indeed the offence is capital murder as premised in this question then, I think that counsel has a responsibility to raise that defence. It should be raised and if he is controlling the conduct of the defence then the insanity defence will, in fact, be raised. If the accused refuses to allow him to do so, this certainly in my opinion would be very valid grounds for the counsel to leave the case.[168]

While this statement may reflect a controversy within judicial ranks as to which party, counsel or the accused, has conduct over the defence, it is submitted that the option of withdrawal is only appropriate in the context discussed above — an accused who no longer suffers from the disease of the mind which allegedly affected his reasoning at the time of the offence. If the accused is still subject at the time of trial to the same defective reasoning, withdrawing from the case achieves no more than the smooth extrication of one lawyer and the thorny entrapment of another.

There may be some cases in which the Crown is in possession of psychiatric material which would support a defence of insanity. This material may have been obtained by way of a court-ordered remand for mental examination or, during the pre-trial stage, arrangements may have been made with defence counsel and the accused for an assessment by a psychiatrist retained by the Crown. In this situation, defence counsel could consider an attempt to persuade the Crown to raise the issue of insanity. If the Crown agreed, the lawyer's problem would not be resolved but only diminished since it would still be necessary to consider how on behalf of the accused the Crown's psychiatric evidence would be addressed in cross-examination. There is also the question of whether defence counsel could make available to the Crown other existing psychiatric opinions obtained in the course of preparing for trial or, at least, provide the prosecution with the names of psychiatrists who may have assessed the accused. It is submitted that either step would be improper and inconsistent with the protective umbrella of solicitor-client privilege which should operate not only to preclude the prosecution from compelling testimony from a defence psychiatrist but also to prevent defence counsel from communicating the substance of such opinions. Quite clearly, the privilege belongs to the client and, when faced with specific instructions not to raise insanity, it could hardly be argued that the client has waived the privilege which should apply to insulate such psychiatric material. Perhaps what is more critical in assessing this avenue is the gnawing sense of impropriety that surrounds such indirect methods. While it may be too strong to suggest a tainted resemblance to backroom

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[167] See the comments of Martin, "Problems in Ethics and Advocacy" in *Defending the Criminal Case* [1969] L.S.U.C. Special Lectures 279, 282-4. See also Martin, *The Role and Responsibility of the Defence Advocate* (1970) 12 Crim. L.Q. 376.

[168] *Ibid.*, 315.

manipulations, the aphorism that something which cannot be done openly should not be done at all certainly comes to mind.

A responsible approach was endorsed by Mr Justice Hartt when, faced with this issue, he said:

> I suggest that... a somewhat modified position of the traditional approach will be adopted, namely, that insanity being a defence should be raised only by the accused or upon his behalf, subject to a right in the trial judge to raise the issue where the interests of justice demand that that be done. In my opinion, the modern view of the purpose and function of the criminal law demands this modification to the strict adversary process.[169]

In other words, the suggestions appears to be that the trial judge would be invited to raise the issue of insanity. While the adversary process would be maintained to the extent that defence counsel could challenge the psychiatric evidence adduced in support of the defence either through cross-examination or by calling opinion evidence to the contrary, the procedure would have to be viewed as exceptional at least to the extent of permitting or justifying the release by defence counsel of the names of psychiatric witnesses who would support the issue. In practical terms, this may not present a real problem at least with respect to an accused who is in custody since it would not be particularly difficult for the Crown to find out which psychiatrists may have visited the jail. However, to be frank about the procedure, its exceptional nature must be recognized in order to answer the argument of privilege, which I have submitted should apply to psychiatric evidence obtained by defence counsel in preparation for trial.

A number of recently reported cases which, by their circumstances, appear to have involved counsel in this ethical issue are useful in illustrating the choices made by counsel and how the judiciary reacted to them. In the case of *Regina* v. *Gorecki (No. 1)* and *(No. 2)*, the appellant had been convicted of non-capital murder in respect of the death of his wife.[170] At trial, the theory of the defence was based on accident. Subsequently, pursuant to an application to the Minister of Justice in accordance with s. 617(b) of the *Criminal Code*, the issue of the accused's fitness to stand trial was referred to

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[169] *Ibid.*, 314-5. This view receives support from the careful analysis of Chernoff & Schaffer, *supra*, note 1, 523-7. See also the *Report of the Royal Commission on Capital Punishment* (1949-53), Cmnd 8932, 155-6, para. 454, which found it undesirable that the prosecution should have the power to raise the defence of insanity but nonetheless recommended that the trial judge should have the authority "to raise the issue of insanity, to call relevant evidence and to put the issue to the jury" subject to the qualification that the power not be exercised unless the judge "was satisfied that this course was in the interests of justice and that no reasonable or legitimate interest of the defence would thereby be prejudiced".

[170] *Reference Re Regina* v. *Gorecki (No. 1)* (1976) 32 C.C.C. (2d) 129 (Ont. C.A.); *Reference Re Regina* v. *Gorecki (No. 2)* (1976) 32 C.C.C. (2d) 135 (Ont. C.A.). The original appeal to the Ontario Court of Appeal is reported as *R.* v. *Gorecki* (1973) 14 C.C.C. (2d) 378.

the Ontario Court of Appeal. After it became apparent that the psychiatric evidence to be heard would extend to the question of insanity at the time of the offence, a second expeditious application to the Minister of Justice was made in order to expand the terms of the reference. It is from this reference that the history of the case, including instructions to trial counsel, became known. Prior to trial in 1973, defence counsel became concerned about the accused's emotional state and discussed this problem "as a matter of precaution" with a senior member of the criminal bar and subsequently arranged for a psychiatric examination including the use of sodium amytal. The psychiatric report indicated that the accused was fit to instruct counsel but that "insanity might constitute a valid defence to the charge of murder."[171] The psychiatrist orally advised counsel that the accused suffered from a "reactive depression... of psychotic proportions".[172] The accused, however, who was a physician himself, would not accept the suggestion that insanity be put forward and instructed that the trial proceed on the basis of accident.[173]

While some of the psychiatrists who testified on the reference thought that the accused was unfit to stand trial, the Court concluded that an "inability to accept the possibility that he could have been wrong or insane at the time of the shooting" did not render the accused unfit particularly in light of his ability to understand the trial process, communicate rationally with counsel and give a detailed account of the events.[174] On the issue of insanity, the Court concluded that there was substantial evidence that Dr Gorecki suffered "from a severe mental disorder both at the time of the incident giving rise to the charge and at the time of the trail; he did not then have (and has not now) any real insight into his condition, and did not consider that he was insane".[175] Upon concluding that the fresh psychiatric evidence was such that a jury might reasonably be persuaded on a preponderance of probability that the accused was insane within the meaning of s. 16, the Court allowed the appeal and ordered a new trial limited to the defence of insanity. One must note the lengthy and circuitious path taken in this case in order that counsel could bring the issue of insanity to court on behalf of an accused who disavowed mental illness. In retrospect, one might infer that the accused's background may have influenced trial counsel's disposition to follow instructions. However, it must also be remembered that a defence based on the accidental discharge of the rifle, although rejected, was not an unreasonable one to be pursued by defence counsel. A further noteworthy aspect was the Court's reaction to the psychiatric evidence as new and fresh evidence. The usual limitations on the admissibility of new and fresh

[171] *Gorecki (No. 2)*, *ibid.*, 141-2.
[172] *Ibid.*, 142.
[173] *Gorecki (No. 1)*, *ibid.*, 132.
[174] *Ibid.*, 134-5.
[175] *Gorecki (No. 2)*, *ibid.*, 146.

evidence[176] are often applied to ensure that an accused who consciously chose to try one route at the original trial cannot go back for a second attempt via a different path. In *Gorecki (No. 2)* the Court reacted with flexibility to this aspect and to the "due diligence of counsel" test when faced with an appellant who, though fit to stand trial, appeared to have been mentally-ill at the time of the offence and throughout the trial.

The case of *Regina* v. *Irwin*[177] reflects the use of the powers of an appellate court, both procedural and dispositional, to bring forward the issue of insanity. The appellant had been convicted of the murder of her infant son. At trial, the theory of the defence was essentially "that the child had been killed by the stranger who had asked to use the telephone and not by the appellant."[178] The defence did not raise an issue arising from mental state and, in the Ontario Court of Appeal, twelve of the thirteen grounds of appeal raised related to the "mysterious stranger" defence, the remaining ground dealing with an alleged failure to properly explain infanticide. Without stating what actually took place during the course of argument, the reported judgment indicates that although counsel for the appellant "advised the court that he was not putting forward any ground of appeal based on insanity, we were concerned about the mental condition of the appellant."[179] With the consent of counsel, the argument of the appeal was adjourned and the Court employed the power contained in s. 608.2 of the *Criminal Code* to remand the appellant to a mental facility for observation. Upon receiving the report of the forensic psychiatrist, the Court of Appeal requested that the opinions of the psychiatrist be given orally to the Court, recognizing that this procedure was an unusual one but that "justice required that it be done."[180] The opinion provided by the psychiatrist who was, at the time, the Co-ordinator of Forensic Services at the Queens Street Mental Health Centre in Toronto, was essentially that the combination of a character disorder, the ingestion of alcohol and drugs and *post-partum* depression rendered the appellant unable to appreciate the nature and quality of her act when she killed her child. Because the Court was satisfied that the appellant had committed the act, notwithstanding the "mysterious stranger" defence, and was satisfied that the appellant was insane at the time of the offence within the meaning of s. 16, it invoked the dispositional power contained in s. 613(1)(d) to allow the appeal and enter a verdict of not guilty by reason of insanity. Again, perhaps out of sympathy for counsel's dilemma, the judgment

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[176] See *McMartin* v. *The Queen* [1964] S.C.R. 484; *R.* v. *Parks* (1962) 46 Cr. App. R. 29, 32 *per* Parker L.C.J.; *R.* v. *Demeter* (1975) 25 C.C.C. (2d) 417, 454 (Ont. C.A.); *R.* v. *McDonald* [1970] 3 C.C.C. 426 (Ont. C.A.).

[177] (1977) 36 C.C.C. (2d) 1 (Ont. C.A.).

[178] *Ibid.*, 2.

[179] *Ibid.*, 3.

[180] *Ibid.*

expressly indicates that the appellant's counsel "would not agree to the Court making an order under that section."[181]

The more recent case of *Regina* v. *Trecroce*[182] dramatizes the naivety of the conclusion that the lawyer's dilemma at the appellate stage can be resolved easily and simply through the use of the appellate court's power to remand an appellant for a mental examination. The appellant had been convicted of murdering his wife. The trial judge left the defences of self-defence, drunkenness, provocation and accident with the jury. In accordance with instructions and a firm disavowal of mental illness, a defence based on mental state was not raised notwithstanding the existence of a psychiatric opinion obtained through a court ordered remand that, while the appellant was fit to stand trial, "there was significant evidence that the appellant as a result of serious mental disorder may have been insane within s. 16 of the *Code* at the time of the killing."[183] While this material would have been in the possession of the Crown, apparently the issue of insanity was not raised by the Crown at trial.

In the Court of Appeal, an application was made by counsel for the appellant, with the support of the pre-existing psychiatric opinion, for an order pursuant to s. 608.2(1) (b) of the *Code*. The order was made and a further psychiatric assessment obtained. Perhaps again out of sympathy for counsel's dilemma, the judgment expressly states the following:

> Mr. Ruby while making it clear that he was not advancing the defence of insanity on behalf of the appellant, agreed that it was entirely appropriate for the Court to consider the psychiatric reports previously mentioned.[184]

After considering the reports, the Court was of the view that the psychiatric opinion evidence should be adduced *viva voce* and the matter was adjourned again. Up to this stage, the development of the case parallels that of *Irwin*. Upon reconvening, however, the Court was advised that the appellant had discharged his counsel since he "did not want to be seen as mentally ill, and was opposed to the issue of insanity being considered by the Court."[185] Counsel indicated that he was prepared to continue his participation in order to assist the Court. The Court expressed concern about the appellant's competence to discharge counsel and requested further psychiatric assessments in this regard. Two psychiatrists testified that the appellant, while suffering from a mental disorder and perhaps subject to the exercise of bad judgment, was capable of understanding the proceedings, the functions of the participants, the evidence, the scope of the issues and the possible

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[181] *Ibid.*, 4.
[182] (1980) 55 C.C.C. (2d) 202 (Ont. C.A.).
[183] *Ibid.*, 215.
[184] *Ibid.*, 216.
[185] *Ibid.*

outcome. By applying the fitness criteria employed in *Gorecki (No. 1)*, the Court concluded that the appellant was competent to discharge counsel and that it would be unfair to ask counsel to continue in any capacity. The Court took pains to point out that, in their view, counsel had "discharged his duty to the appellant and to the Court ably and with entire propriety".[186] After an adjournment, another counsel was retained who was prepared to follow the appellant's instructions that the insanity issued be challenged. Subsequently, a different conflict arose between counsel and the appellant and this counsel was also discharged. After a number of adjournments, the appellant eventually proceeded without counsel.

In light of the protracted course taken in this case to raise the issue of insanity at the appellate stage, it is perhaps surprising that the Court eventually rejected the issue on the basis that the psychiatric evidence was not of sufficient strength or cogency to justify either substituting a verdict of not guilty by reason of insanity as in *Irwin*, or even to order a new trial. With respect to a new trial, it must be noted that the issue of insanity was disavowed by the appellant and was essentially raised by the Crown respondent. Accordingly, in light of the appellant's tenacious insistance that he was not mentally-ill, the Court considered the issue of a new trial in the context of whether insanity could be raised by the Crown. It relied on *Regina* v. *Simpson*[187] in rejecting this form of disposition. It is interesting to note that on appeal the psychiatric evidence indicated that the appellant's mental state had deteriorated substantially so that the delusions to which he was subject had become more fixed. Since there was some indication of treatability, notwithstanding a guarded prognosis, the Court directed that all psychiatric reports and a transcript of the psychiatric evidence be transmitted to the penitentiary authorities and pointed out the availability of s. 19 of the *Penitentiary Act* to transfer a prisoner to a mental health facility. The Court referred to *Regina* v. *Deans*,[188] in which this transfer mechanism was discussed as a response to judicial recommendations for psychiatric treatment. The "normal procedure" set out in *Deans* tends to give the impression that in Ontario the only obstacle to a transfer to the Mental Health Centre at Penetanguishene is whether the receiving institution is "able and willing to accept the prisoner for treatment."[189] In *Trecroce*, the Court recognizes the discretion which rests with the penitentiary authorities before invoking s. 19 of the *Penitentiary Act* by predicating the reference to a transfer on whether "the penitentiary authorities consider that it is desirable and appropriate."[190]

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[186] *Ibid.*, 217.

[187] (1977) 35 C.C.C. (2d) 337 (Ont. C.A.), discussed *infra*, note 196 and accompanying text.

[188] *Supra*, note 160, 226-7.

[189] *Ibid.*, 227.

[190] *R.* v. *Trecroce*, *supra*, note 182, 218.

The last example is *Regina* v. *Talbot (No. 2)*,[191] which highlights the extraordinary role a trial judge may be asked to play in situations where an accused specifically instructs defence counsel not to raise insanity but psychiatric material exists which would support this issue. In *Talbot*, psychiatric opinion evidence was adduced by the Crown as part of its case which tended to show that at the time of the shooting the accused's mental state fell within the operative scope of s. 16 of the *Criminal Code*. The accused specifically instructed his counsel not to raise the issue of insanity nor to call any evidence in support of it. The trial judge indicated that, in his view, the accused's decision was a "reasonable and rational one".[192] Apparently, remarks were made by counsel to indicate that testimony was available from two psychiatrists and a psychologist which would bear on the issue of insanity and, furthermore, would likely support the psychiatric evidence already offered by the Crown. From the report of the ruling, it appears that defence counsel openly disclosed the names of the available witnesses. In light of the accused's instructions and defence counsel's decision to abide by them, the issue for the trial judge was whether to compel the Crown to call the available expert witnesses when, at least as it appears from the report, the Crown did not choose to do so. Galligan J., while recognizing the existence of a residual power in unusual circumstances to direct that Crown counsel call specific witnesses, concluded that it would not be appropriate to do so.[193] This left the judge to decide whether steps should be taken on his own initiative to ensure that "any evidence that may prevent an improper conviction from being registered, should be placed before the jury."[194] Premising his conclusion on a consideration of what the interests of justice required, Galligan J. decided to call the expert witnesses. Furthermore, to ensure fairness to the accused, and the Crown having closed its case, he proposed to call the evidence prior to putting the accused to his election as to whether defence evidence would be called. He also indicated that he would

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[191] (1977) 38 C.C.C. (2d) 560 (Ont. H.C.).

[192] *Ibid.*, 560.

[193] *Ibid.*, 561. Although Galligan J. offered no references, it would appear that his views are consistent with precedent. Simplistically stated, one might say that the authority of a trial judge to interfere in the trial process by directing the prosecution to call specific evidence is limited to situations in which the judge is of the view that the prosecution has improperly exercised its discretion as to the evidence it has chosen to call (see *R.* v. *Oliva* (1965) 49 Cr. App. R. 298) or, in other words, that the exercise of this discretion was "influenced by some oblique motive" (see *Lemay* v. *The King* [1952] 1 S.C.R. 232). See also Silverman, *The Trial Judge: Pilot, Participant or Umpire?* (1973) 11 Alta L. Rev. 40. For a general discussion of the scope of a judge's role in the conduct of a trial, see S. Cohen, *Due Process of Law* (1977) 281, 342.

[194] *Ibid.*, 561. For a general discussion of the trial judge's power to call witnesses, see Newark & Samuels, *Let the Judge Call the Witness* [1969] Crim. L.R. 399; Stenning, *One Blind Man to See Fair Play: The Judge's Right to Call Witnesses* (1973) 24 C.R.N.S. 49, an annotation following and with respect to *R.* v. *Bouchard* (N.S. Cty Ct).

initially examine each witness and thereafter an opportunity would be afforded both to Crown counsel and defence counsel to cross-examine. Although the issue of insanity appears to have been raised by the Crown in *Talbot*, the active role played by the trial judge in the face of instructions to counsel by the accused not to call psychiatric evidence in support of insanity, comes extremely close to the non-adversial role suggested by Mr Justice Hartt. The case reflects another exception to the traditional adversary approach to the criminal process in that no disapproval was attributed to defence counsel's open disclosure of the names of available psychiatric witnesses. If the conduct of defence counsel was unobjectionable, and I would suggest that it was, what might arguably have been a breach of solicitor-client privilege as it relates to experts retained by the defence must be justified by reference to the exceptional and peculiar nature of the case. While there are inherent distinctions between the issues of fitness and insanity at the time of the offence, the circumstances of an individual case might allow for some analogy at least to the extent that counsel could properly raise the issue with the court, leaving its introduction as an issue in the particular trial to the court's discretion. Thus, counsel would be able to cross-examine psychiatric witnesses whose opinions supported the defence of insanity and would also be able to call psychiatric evidence in rebuttal, assuming that it was available. Particularly with respect to accused persons like Gorecki or Trecroce who exhibited no insight into their own mental state, this approach would avoid the protracted proceedings which occurred in those cases by ensuring that mental state was placed before the trier of fact. More importantly, this approach would enable an accused through counsel to challenge vigorously the issue of insanity and the existence of the alleged disease of the mind upon which it would be premised.

It must be kept in mind that any steps towards raising insanity when disavowed by the accused must be subject to a serious consideration of the strength of the Crown's case particularly as it relates to whether the accused committed the act. Of course, this consideration will include reference to a denial of the act by the accused, as in *Irwin*, for example. A denial of the act accompanied by a disavowal of mental disability casts the problem in a different light and invokes different considerations due to the inherent prejudice which might flow from allowing evidence of mental illness to go to the jury. This situation was put to Mr Justice Hartt in the hypothetical context of a case in which alibi evidence was available, as well as psychiatric material pointing to insanity, although the accused disavowed mental illness.[195] He responded that if the alibi was not preposterous it should be pursued and the matter of insanity not raised because to do so would place inconsistent positions before the jury. He went on to say that if the alibi was

[195] *Supra*, note 170.

not believable, then the appropriate decision would be to raise insanity. While this test appears attractive, the subjective consideration as to what is preposterous or what is believable brings us back full circle to the earlier discussions of the role of counsel as it relates to prejudging facts. While the test can be stated easily, it would be wrong to assume that it can be applied easily or that its application precludes an ethical dilemma. However, this response is consistent with the rationale in *Regina* v. *Simpson*[196] which, although it relates to the ability of the Crown to raise insanity, addresses the same dangers but from a different perspective. Martin J.A. concluded that, in a situation where an accused denies committing the act and identity is in issue, it would be prejudicial to allow the Crown to raise insanity on the basis of psychiatric material which might suggest that the accused is the kind of person who might be expected to commit the sort of acts alleged. The Ontario Court of Appeal has recently in its judgment in *Regina* v. *Saxell*[197] clarified Martin J.A.'s comments in this regard by providing an indication of the factors which a trial judge must consider when determining whether leave should be granted to the Crown to raise insanity when the accused has not chosen to do so. The judge must ask whether there is persuasive evidence of guilt and substantial evidence of the accused's insanity, and must show regard for the seriousness of the charge and the dangerousness of the accused.[198]

Conclusion

Findings of unfitness to stand trial or insanity at the time of the offence, while conceptually distinct, give rise to the same consequences: indefinite commitment pursuant to a Lieutenant-Governor's Warrant. The circumstances which may give rise to either finding can span a variety of disorders accompanied by a spectrum of potential treatment responses.[199] While some disorders may include *indicia* of dangerousness, this vague notion is not an essential element in either adjudicative inquiry. Moreover, a growing body of literature exists which supports the conclusion that the prediction of dangerousness is beyond the expertise of psychiatrists.[200] Notwithstanding the variety of circumstances which may give rise to findings of unfitness or insanity, and the array of real distinctions between individuals so found, the

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[196] *Supra*, note 187.

[197] (1980) 59 C.C.C. (2d) 176 (Ont. C.A.).

[198] *Ibid.*, 188-9 *per* Weatherston J.A.

[199] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3d ed. (1980) [commonly referred to as DSM-111].

[200] See Morris, *Psychiatry and the Dangerous Criminal* (1968) 41 S. Cal. L. Rev. 514; Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence* (1976) 29 Rutgers L. Rev. 1084; Dix, *Determining the Continued Dangerousness of Sex Offenders* (1975) 3 J. of Psych. and Law 327.

Criminal Code continues to offer a single response. If a person is found to be unfit, even though the issue of fitness can be postponed until after the close of the Crown's case,[201] the accused will in most situations be denied a full adjudication as to guilt. Accordingly, the ensuing indefinite incarceration can only be characterized as the punitive aspect of what is essentially a status crime — unfitness due to mental illness. Furthermore, it appears that the Lieutenant-Governor's responsibility after a warrant has been issued does not extend beyond providing safe custody to ensure the protection of the community.[202] So long as Parliament continues to refuse to recognize disparities between accused persons who may be mentally-ill and continues to subject all such individuals to the potential consequences of indefinite commitment, defence counsel will continue to be thrust into the "ethical quicksand".[203] Only a variety of dispositional alternatives structured to accommodate the scope of treatment needs will free the criminal process from the fear of excessive consequences which distorts factual inquiry, prevents humane responses to the mentally-ill accused and subjects lawyers to distressing ethical dilemmas.

In this paper, I have suggested that the hard questions posed by mental illness within the criminal process must be resolved by an ethical decision-making process personal to the lawyer. While the professional component of institutional ethics offers no assistance, at the same time its inability to address these questions does not preclude the exercise of individual judgment even if it leads to the conclusion that, in particular circumstances, a client's instructions can be superseded. In this regard, comments found in *Irwin*, *Trecroce* and *Talbot* reflect judicial approval of the individual decisions by counsel who reached that conclusion. One aspect of professional codes of conduct which might provide some assistance in difficult situations, and which is particularly relevant in light of the issue of confidentiality discussed earlier is the lawyer's obligation to consult with experienced members of the bar in order to ensure a standard of competent and conscientious service.[204] Such consultations are clearly protected by solicitor-client privilege.[205] The commentary to the same rule which encourages consultation with more experienced lawyers also recognizes that lawyers may need to "seek advice from, or collaborate with experts in scientific, accounting or

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[201] *Criminal Code*, R.S.C. 1970, c. C-34, s. 543(4). The Law Reform Commission of Canada has recommended that the discretion to postpone be extended beyond the close of the Crown's case to permit a "full adjudication of the merits". See *Mental Disorder in the Criminal Process*, *supra*, note 155, 44, Recommendation 18.

[202] See *supra*, note 159, *passim*.

[203] Regrettably, this phrase is not original but must be credited to Chernoff & Schaffer, *supra*, note 1.

[204] L.S.U.C. *Handbook*, *supra*, note 19, 2-3, Rule 2 and accompanying commentary.

[205] See Cross, *supra*, note 109, 249; Gardner, *supra*, note 135, 121-2.

other non-legal fields".[206] While consultation with a psychiatrist may be different from consultation with other experts, since it will likely require interaction between the client and the psychiatrist, the intended purpose of assisting counsel in responsibly and properly presenting a defence is equally applicable whether the person consulted is an accountant, pharmacologist, neurosurgeon, psychiatrist or another lawyer. Thus, what was a matter of good practice appears to have been transformed into a professional duty thereby lending further support to the conclusion that the lawyer-client-psychiatrist relationship nestles confidentially within the shelter of solicitor-client privilege.

Consultation with other lawyers may assist in formulating one's response to an ethical problem and should be encouraged. In some jurisdictions, such as Ontario, the professional governing body is structured to permit the seeking of an advisory opinion before a lawyer acts. By their official nature, such consultations are different from asking another lawyer for a personal ethical response to a situation. Because one is dealing with a committee of the governing body, the opinions generated necessarily reflect an attempt to produce a response which is consistent with the group norm. Strictly speaking, the lawyer is not bound to act in accordance with the advisory opinion. Should the matter become controversial, however, the lawyer sits in the position of someone who knew the views of the governing body but chose not to follow them. Thus, unless one is entirely satisfied in advance that conformity with the advisory opinion is appropriate, regardless of its substance, a serious process of consultation with experienced and senior members of the bar on an individual basis will be more useful to the lawyer who wishes to formulate a personal ethical response.[207]

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[206] *Supra*, note 204.

[207] This should not be taken to mean that conformity with the group norm is inherently wrong. In my view, however, blind unthinking conformity is wrong in that, by precluding individual judgments, it negates the autonomy and responsibility of the lawyer and, more significantly, entrenches "what is" without regard to "what ought to be".