

SUITABILITY OF THE UNDERLYING THEORIES OF ZEALOUS ADVOCACY IN ENSURING JUSTICE: LAYING THE GROUND TO LOOK BEYOND THE ZEALOUS ADVOCACY

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ABSTRACT

Despite the dissatisfaction, distrust, and to some extent, abhorrence of a considerable number of people, the zealous advocacy, without leaving any space to any alternative model, has been playing the dominant role in the adversary jurisdictions and “thoroughly dominates our thinking about legal problem solving.” Surprisingly, however, the overwhelming trust on, and bias towards, ZA are not based on any concrete justification. Rather, the system is, to a certain extent, based on some unexamined theories. The purpose of this Article is to examine the strength, correctness, or the suitability of these theories with the concept of justice. This examination will confirm whether there is any justification of the exclusive application of the ZA model, irrespective of the nature of legal problems, in all cases, even in the cases where the model completely fails and leads to tragedy.

This Article examines four broader theories: (1) Lawyers play an avoidable role in the process of decision making by the courts and the judicial system, which takes the decision; (2) A lawyer’s duty to the client is equal or superior to his or her duty to the court; (3) Oppositional presentation mechanism is the best way to reveal the truth; and (4) OPM is the best model to protect democratic values and to ensure accurate remedies. Detailed discussion of these theories reveals the incorrectness and inappropriateness of these theories to the purpose of justice. In consequence, the attempts to modify or to replace the zealous advocacy are justified, and it creates an opportunity to look into the alternative models which are likely to be more effective.

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I. INTRODUCTION

In Anglo-American jurisdictions, lawyers employ all of their skills and knowledge to serve the interests of their respective clients at any cost. This attitude of the lawyers is popularly known as zealous advocacy (“ZA”). However, there is an everlasting dispute as to the acceptability of ZA; the positive and negative aspects of ZA have been on the discussion table for more than a century. In an attempt to contribute to the dispute and understanding of the effect of the application of ZA, this Article begins with the depiction of two scenarios.

A. ZEALOUS ADVOCACY SCENARIO NUMBER ONE

Twenty-year-old Natasha is a very well-behaved, calm, and rational young woman who comes from a financially backward family. Twenty-five-year-old Jhony is, on the contrary, a rude, cruel, and aggressive young man from a rich and influential family. Every day, Jhony stalks and teases Natasha on her way to class. On several occasions, Natasha and her family have brought the issue to the attention of the local authorities and have

requested measures for her safety. However, nothing can stop the notorious Jhony, as his father, an influential person, saves him every time. One day, Jhony, along with his four friends, kidnap Natasha. They take turns continuously raping her for two days, following which they brutally assault her and then throw her on the highway. Later, she is rescued and charges of kidnapping, rape, and attempted murder are brought against the suspects.

Jhony retains Mr. Jadal as his defense attorney. As far as the “concept of zealous advocacy”¹ is concerned, the lawyer and the accused must be in a trusting relationship and have the understanding that the lawyer does not need to know anyone but his client, whom he should represent zealously.² According to this concept, Mr. Jadal holds the duty to save his client at any cost, and, in doing so, he is permitted to use any means the client can afford.³ The dominant view dictates that in order to prove the innocence, justness, and inculpability of his client, Mr. Jadal can humiliate and stigmatize the victim and her witnesses. In the process of stigmatizing the victim, he can use every offensive, scandalous, and nasty weapon

1. The “concept of zealous advocacy” or “zealous advocacy” or “zealous advocacy model” are hereinafter referred to as “ZA.”

2. Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 235 (2009); Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1322 (2006) (quoting Lord Brougham who in *Queen Caroline’s Case* [1820] stated: “[a]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”).

3. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. L. ETHICS & PUB. POL’Y 209, 271 (2006) (“The duty of zealous representation calls for the attorney to use all legal means to obtain a favorable outcome for the client, which can include using tactics that lead a jury to conclude mistakenly that the person is not guilty of the offense, because the government has not met its burden of proof beyond a reasonable doubt. . . . ‘Indeed, the prevailing view is that the lawyer is ethically required to do so.’”) (quoting MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 226 (3d ed. 2004)); Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 315, 315 (1991) (“Acting as an advisor, the lawyer certainly may, and arguably must, provide her clients with complete and accurate advice, even when she reasonably believes that doing so will cause them to withhold or suppress evidence. In litigation, the lawyer’s obligations of zeal and confidentiality require or permit her to engage in a host of dubious activities: withholding evidence, even when the resulting record is radically incomplete; presenting documents or testimony that she believes, based on information unavailable to the tribunal, to be false; discrediting through cross-examination witnesses she knows to be truthful; and arguing for inferences from the evidence that she knows are unwarranted.”); *United States v. Wade* 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) (positing that a lawyers in his normal course of action “can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive.” Justice White further states that defense counsel will cross examine and impeach a prosecution witness, even if he or she knows that the witness is telling the truth); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1317 (1975); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951) (stating that a lawyer should lie for the interest of his or her client).

imaginable so that the victim loses her moral strength and fails to effectively present her case.⁴ Consequently, the government (indirectly, the victim) loses the case and is prevented from receiving the assurance of justice, which is the sole purpose of law.⁵

B. ZEALOUS ADVOCACY SCENARIO NUMBER TWO

Harry, a young, energetic man and a devotee of democracy, organizes a peaceful and non-violent demonstration with the support of a mass of people to get rid of a dictatorial and tyrannical regime led by Douglas. The movement, aimed at establishing democracy, is intensifying day by day. To suppress the movement, the dictator, Douglas, with the help of his own supporters, brings violence to an otherwise non-violent movement, which leads to the death of innocent people. Although neither Harry nor any supporter of that movement is involved in the deaths of those innocent people, he is arrested and charged with murder. Despite oppositional pressure from the government, lawyers driven by strong professionalism, adversarialism, and democratic value spontaneously come forward to defend Harry. Following the rules of ZA, the lawyers with the utmost dedication to justice are succeeding to rebut the fabricated statements of the government witnesses.

In order to take control of the case, Douglas threatens Harry, stating that if Harry does not confess, his wife and children will be killed.⁶ To save his beloved family, Harry falsely confesses in court. However, Harry's lawyer, honoring the principles of ZA, continues to defend him. Finally, Harry's lawyer who is inspired by Lord Brougham, fights against Douglas with the infinite power of ZA and succeeds in defending his client's case.

Both of the cases depict the immense strength and influence of ZA. While the first case shows the immediate danger of ZA's strength in obstructing the path of justice, the second case shows its role in making the path of justice smooth. To deal with the irregularities in the application of ZA, numerous legal researches have argued in favor and against the system. The opponents, predominantly media, popular culture, and scholarly accounts based on general ethics, as opposed to legal ethics, have been

4. Nancy E. Snow, *Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE*, 252 (Keith Burgess-Jackson ed., 1999).

5. Although there is a debate as to the theory that the purpose of law is to ensure justice, for the purpose of this Article the theory is considered as true.

6. Apart from facing a threat, innocent people may, mistakenly or for other reasons, confess that they are guilty. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 10 (1975).

making an extreme effort to depict the shortcomings and inherent dangers of ZA, whereas ZA advocates have been making efforts to defend it at any cost.⁷ Despite the strong arguments for either side, a lawyer's utmost zeal to protect the interest of his clients has been the fundamental principle of the adversary system,⁸ and the same has been considered as the "the dominant standard of lawyerly excellence."⁹ Despite the dissatisfaction, distrust, and to some extent, abhorrence of a considerable amount of people, ZA, without leaving any space to the alternative models, has been playing the dominant role in adversary jurisdictions and "thoroughly dominates our thinking about legal problem solving."¹⁰

Surprisingly, however, the overwhelming trust on, and bias towards, ZA are not based on any concrete justification. Rather, to a certain extent, the system is based on several unexamined theories. The purpose of this Article is to examine the strength, correctness, and suitability of these theories in terms of the concept of justice. This examination will confirm whether there is any justification for the exclusive application of the ZA model, irrespective of the nature of the legal problem, in all cases, including when the model fails completely and leads to tragedy, such as in the first case discussed previously.¹¹ To this end, the Article examines four broad theories that lay the foundation of ZA, and later reveals that the theories are not suitable for the purpose of justice. Consequently, attempts to modify or replace ZA are justified, and these attempts create opportunities to look into

7. Asimow & Weisberg, *supra* note 2, at 248-53 (depicting the negative perception of ZA in popular culture); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 954 (2000) (pointing to a popular belief that "[l]awyers are an avaricious lot who will bleed you dry"); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996) (stating that the adversary system is not only inadequate, but also dangerous); Samuel D. Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEG. PROF. 5, 7 (1980) (depicting the attitude of the common people as to the zealous rule stating that "[i]n explaining to a layman the professional responsibilities of a lawyer one encounters almost immediately the enigma of the adversary system, often referred to as the 'sporting' or 'contest' system. How can you defend a person you know is guilty? How can you justify one-sided presentation if truth is the goal? Is not the search for truth subordinated to winning the law suit? Is it not the duty of an attorney to do everything possible to further the client's cause? Is the lawyer merely a hired gun, a mouthpiece, a hired brain and voice? Is the system anything other than a modern reflection of man's inherent combative nature, a pageant necessitating professional apology?"). *But cf. id.* (On the other hand, supporters of ZA believe that the rule is "the best guaranty against the premature and biased decisions."); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1644 (2015) (stating that the supporters of ZA believe that it plays an important role in advancing "human dignity, autonomy, due process rights, and clients' trust and confidence in their lawyers").

8. Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2, at 1319.

9. *Id.*

10. Menkel-Meadow, *supra* note 7, at 25.

11. *See supra* Section I.A.

the alternative models that are likely to be more effective. To utilize that opportunity, this Article explores beyond the ZA model.

II. ZA THEORIES

Numerous theories are credited for the dominance and survival of ZA in Anglo-American jurisdictions. These unexamined theories justify the immense importance of ZA in ensuring justice and democratic values. Thus, it may be said that the validity of ZA is subject to the validity of these theories. Consequently, in order to determine the acceptability or necessity of ZA, these theories must first be examined. Therefore, this Article examines numerous interrelated theories.

A. THEORY NUMBER ONE: RESTRICTED INFLUENCE ON THE ACTIONS OF LAWYERS - THE "SYSTEM DOES IT ALL"

Consciously or unconsciously, the promoters of ZA assume that the consequences of lawyers' actions in ensuring justice are very limited. They point to the fact that the direct course of action of lawyers is filtered through the system and that, at the end, a neutral judge makes the decision. ZA proponents, therefore, assume that lawyers merely play a secondary or indirect role in the decision-making process within the justice system. According to this theory, the system plays the primary or direct role in upholding justice and should, therefore, be allowed to make all decisions.¹² Thus, despite being an integral part of the system, lawyers are separate from it, especially in terms of the purposes that lawyers and the system aim to serve.¹³ For example, one scholar is of the opinion that "[f]inding the truth is the object of the judicial system, but it is not the governing principle for the lawyer."¹⁴ Therefore, the voice of the system is different than the voice of the lawyers.

This theory is presumed to be incorrect, as it is unquestionably true that lawyers play the most important and influential role in the adversary system. This presumption can be confirmed if one understands the power a lawyer has over a case. While traditional accounts assume that the judicial system plays the main role in the decision-making process, the direct role of lawyers in the formulation of that decision has been overlooked. Unlike the

12. Wasserstrom, *supra* note 6, at 9 ("[M]y job as a lawyer is not to judge the rights and wrong of the client or the cause; it is to defend as best I can my client's interests. . . . [T]rial is the mechanism by which we determine in our society whether or not the person is in fact guilty.").

13. Duncan Webb, *Are Lawyers Regulatable?*, 45 ALTA. L. REV. 233, 244 (2008) ("Lawyers are not the arbiters of justice — that is the role of the courts. While lawyers undeniably play an important role in the judicial process, they are simply assistants to the court.").

14. Henning, *supra* note 3, at 214.

previously-described theory, the voices of the judicial system and of the judges are at times or “most of the time,”¹⁵ intermingled with, or influenced by, the voice of the lawyers. Lawyers can successfully mislead the court and can affect the probability of winning a case.¹⁶ Sometimes judges do not make their own decisions; instead, they make decisions based on what lawyers want them to decide and, thus, lawyers are able to manipulate judgments.¹⁷ In addition, it is important to not overlook the fact that there are incompetent, or less competent, judges who are unable to stand up against the fame of good lawyers, and, therefore, decide cases in favor of those lawyers to minimize the risk of appeal.¹⁸ The overwhelming importance of lawyers in the courts’ decision-making process is nicely reduced into writing as follows:

[L]awyers are often—maybe usually—more than just legal technicians. They shape deals and they make law. They invent new forms of social life, they fill gaps, resolve conflicts and ambiguities. They mold the law, through the process of legal argument, in court, in briefs, in negotiations.¹⁹

In brief, borrowing the words of William Rich, it can appropriately be said that “legal rules are designed to be administered by lawyers.”²⁰ Because lawyers play the most important and influential role in the functioning of the judicial system, it cannot be expected that the system

15. Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 136 (2001).

16. Elisabetta Iossa & Bruno Jullien, *The Market for Lawyers and Quality LawSyers in Legal Services*, 43 RAND J. ECON. 677, 680 (2012). Scholars Fuller and Randall rightly argue that a lawyer “plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win [to further his or her client’s interest] leads him to muddy the headwaters of decision.” See David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 677 (2012) (reviewing W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010)) (quoting LON L. FULLER & JOHN D. RANDALL, *PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE*, 44 A.B.A. J. 1159, 1160-62 (1958)).

17. Koniak & Cohen, *supra* note 15, at 136-37 (“Most of the time, most judges consider the competing legal meanings offered by the lawyers in a case and simply adopt one, albeit generally with some modification, as that court’s official interpretation of the law. . . . And even when a judge adopts her own interpretation, because lawyers frame the questions courts decide, the lawyers will still have significantly influenced the law-building process, a role that extends far beyond a particular client’s case.”); MICHAEL HEAD & SCOTT MANN, *LAW IN PERSPECTIVE: ETHICS, SOCIETY AND CRITICAL THINKING* 1, 8 (2d ed., 2008) (“Particular defenders and prosecutors have achieved great fame and fortune effectively manipulating judges and juries through clever use of fallacious arguments”).

18. Koniak & Cohen, *supra* note 15, at 136-37; HEAD & MANN, *supra* note 17, at 8.

19. Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TECH. L. REV. 1157, 1160 (1987).

20. William Rich, *The Role of Lawyers: Beyond Advocacy*, BYU L. REV. 767, 783 (1980).

would serve any purpose other than that of the lawyers; the voice of the justice system is liable to be undermined by the voice of the lawyers.

To defend the theory that the “system does it all,” advocates prescribe a second theory. The belief is that, at the end of the day, the voice of the system will prevail because the opposing lawyer will neutralize or negate the influence of his or her counterpart by using zeal.²¹ Accordingly, Freedman justifies Lord Brougham’s position of extreme zeal in Queen Caroline’s Case, by positing that zeal is not prejudicial to justice as “[t]here is also an advocate on the other side and an impartial judge and/or jury sitting over both.”²² The belief regarding the neutralization or negation of lawyers’ influence during trial is based on a third theory that lawyers in conflict are equally equipped and are of equal standard, ensuring balance during trial and convenience for the judicial system to make its own neutral decisions.²³

Generally, this theory is not correct because, in practice, lawyers have a varying capacity for reasoning, aptitude, and competence, which results in parties not being on equal footing during trial.²⁴ Factors such as legal education, training, money, political influence, “natural barriers,”²⁵ are responsible for the variance.²⁶ It is common for graduates from elite law schools to be elite lawyers, whereas the graduates of “lower tier” law schools are likely to be average, below average, or “storefront” lawyers.²⁷ Similarly, training from, or affiliation with, large and reputable law firms tends to produce highly competent and sophisticated lawyers.²⁸

In addition, as Hadfield convincingly proves, “natural barriers” are immensely responsible for the significant variance in levels of competence

21. Wasserstrom, *supra* note 6, at 10.

22. Monroe H. Freedman, *Are There Public Interest Limits on Lawyers’ Advocacy?*, 2 J. LEG. PROF. 47, 48 (1977); *see also id.* at 8-9 (assuming that opposing counsel has the ability to “highlight, explain and refute such fallacious argument”); HEAD & MANN, *supra* note 17, at 8-9 (assuming that opposing counsel has the ability to “highlight, explain and refute such fallacious argument”).

23. *United States v. Wade* 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part) (positing that a true adversary system deserves that both parties at trial are on an equal footing); Menkel-Meadow, *supra* note 7, at 22 (“In an ideal and abstracted form, the adversary system clearly contemplates adversaries of equal skill and economic support. . .”).

24. CLIFF ROBERSON & DILIP K. DAS, AN INTRODUCTION TO COMPARATIVE LEGAL MODELS OF CRIMINAL JUSTICE 34 (2008).

25. Hadfield, *supra* note 7, at 989 (A “natural barrier” means the barrier humans are born into that affects “the underlying capacity of a particular individual to absorb and engage in a given form of reasoning.”).

26. *See generally* Hadfield, *supra* note 7, at 972-94.

27. Hadfield, *supra* note 7, at 990.

28. *Id.*

among lawyers from similar tiers of law schools and law firms.²⁹ Consequently, a lawyer with fewer natural barriers than his or her counterpart has a higher possibility of winning a case irrespective of the fact that both have academic and training experience of similar standards. Other relevant theories which claim that there is no best solution to legal problems,³⁰ that law is extensively complex,³¹ or that lawyers should aim for winning at all costs,³² make the situation of unequal training and experience even more complicated. These theories authorize a competent lawyer to craft the web of arguments so wonderfully, and to such an extreme extent, that he or she can make a castle in the air, and thus, win a meritless case only by his or her personal competence.³³ As a result, the interest of the party having a more competent lawyer usually prevails over the interest of the party with a less competent lawyer, and in this process the judge would likely decide in favor of the party having the highly competent lawyer. Therefore, it is worthwhile to quote a recent observation:

[H]iring a certified lawyer generates a decision-bias effect: incompetent judges bias their decisions in favor of certified lawyers, due to their reputational concerns. . . . Incompetent judges then bias their decisions in favor of certified lawyers in order to minimize the risk of appeals from certified lawyers and thus the inference about their ability. . . . [H]igh-quality lawyers are able to ‘influence’ the trial outcome, by raising the chance of finding evidence favorable to their case.³⁴

In this reality, Rich cannot resist asking, “what happens to our concept of justice if results really do hinge on the competence of the advocate and not on the merits of the case?”³⁵ It is not difficult to answer this question. The cases’ outcomes, at least from a theoretical perspective, are in favor of the parties that can afford to hire high-quality lawyers.³⁶ Hiring a high-

29. *Id.* Menkel-Meadow’s observation in this regard is the same in that “even if we equalized economic resources, an inequality in raw, legal talent might still exist in many cases.” Menkel-Meadow, *supra* note 7, at 39.

30. Webb, *supra* note 13, at 239 (“Given the nature of legal problems and their practical context, it can be shown that it is impossible distinguish between best solutions – even assuming there is one.”).

31. Hadfield, *supra* note 7, at 995-96.

32. HEAD & MANN, *supra* note 17, at 8.

33. Rich, *supra* note 20, at 781 (emphasis added) (stating that “the lawyer’s competence and effectiveness *make a difference*”).

34. Iossa & Jullien, *supra* note 16, at 678-79.

35. Rich, *supra* note 20, at 781.

36. Hadfield, *supra* note 7, at 956 (indicating that parties having more resources overwhelmingly win cases); Menkel-Meadow, *supra* note 7, at 22 (“In litigation, the unequal resources of the parties will often determine the hierarchy of opposition.”).

quality lawyer involves elevated legal costs and, consequently, financially unprepared individuals fail to hire lawyers who can win most cases.³⁷ Thus, the legal system “chooses the management of the economy over the justice of social and political relationships as its central preoccupation.”³⁸ Therefore, it would be no exaggeration to say that in access to justice, the practice of law, extracted through liberal market economy, creates alarming discrimination between the rich and the poor. Observing this situation, Rich expresses his disappointment that “[f]or the wealthy [law] connotes justice; for the poor it creates apprehension.”³⁹

Therefore, in order to ensure justice to all, case decisions must not be dependent upon the resources, skills, or competence of the lawyers “but on the merits of the argument.”⁴⁰ And, in order to avoid lawyers’ dominance over the law and over the merit of cases, they must not be allowed to use their competence for any purpose other than the purpose of the system itself. Thus, the legal system’s key player, the lawyer, must speak in the same voice as that of the system; his or her purpose and the purpose of the system must be the same. Consequently, lawyers’ actions and the rationale of those actions cannot be in any circumstance prejudicial to the concept of justice; instead ensuring and promoting justice should be the sole justification of lawyers’ actions.⁴¹ Justice Bokhary nicely states that the purpose of law is justice, whereas the duty of lawyers is to serve this purpose: “The pursuit of justice is the vocation of all lawyers, and every worthwhile landmark of the law has been built upon this idea.”⁴² Thus, the present theory, i.e., the “system does it all,” appears to be incorrect. Consequently, lawyers’ actions are required to be in conformity with either

37. Iossa & Jullien, *supra* note 16, at 679; Rich, *supra* note 20, at 780 (stating that “[T]he high price of professional litigation has driven a large segment of the middle income population away from the courts.”).

38. Hadfield, *supra* note 7, at 1000.

39. Rich, *supra* note 20, at 780. In this point, Kennedy seems more disappointed. He observes:

At present, the distribution of legal services is a disgrace: rich people get vastly more than they need or deserve; middle income people can’t afford a lawyer in numerous situations in which they are ripped off for relatively small amounts of money, or discriminated against on sexual or racial grounds, or seriously injured. Poor people have virtually no access to legal services, given the abysmal underfunding of the Legal Services Corporation.

Kennedy, *supra* note 19, at 1162.

40. Menkel-Meadow, *supra* note 7, at 22-23.

41. J. D. Heydon, *Reciprocal Duties of Bench and Bar*, 81 AUST. LAW J. 23, 26 (2007) (citing *Beavis v. Dawson*, (1957) 1 QB 195, at 201 (Eng.) (Singleton LJ considers lawyer as the helper in the administration of justice)).

42. Bokhary P. J., *Justice and the Law: The Evolving Role of the Lawyer*, 34 H.K. L.J. 133, 133 (2004).

the system or the law. To end the discussion on this theory, it is worthwhile to quote Kennedy:

You [addressing the lawyers] bear responsibility when *your* unique way of molding the law, your work product, wins out to the detriment of the community, even if it was not you, but a judge or administrator who “pulled the trigger,” so to speak, by actually deciding the case, and even if someone else would have done it if you didn’t.⁴³

B. THEORY NUMBER TWO: A LAWYER’S DUTY TO THE CLIENT IS EQUAL OR SUPERIOR TO HIS OR HER DUTY TO THE COURT

Along with others, lawyers predominantly play two key roles: (1) lawyers serve or represent clients with zeal and (2) lawyers serve the law or act as an “officer of the court.”⁴⁴ Proponents of ZA assume that the law does not specifically prescribe which role will prevail when the two conflict; therefore, zealous representation is justified until such zeal is not prejudicial to the balancing of these two duties.⁴⁵ The following words exactly depicts the situation:

Existing theories of legal ethics contain an important and largely unexamined assumption—that lawyers are simultaneously capable of partisanship on behalf of clients while remaining sufficiently objective to ensure that their own conduct is ethical. This assumption, which is referred to here as the objective-partisan assumption, can be found in all of the leading theories of legal ethics.⁴⁶

43. Kennedy, *supra* note 19, at 1161.

44. Trevor C.W. Farrow, *Sustainable Professionalism*, 46 OSGOODE HALL L.J. 51, 69-70 (2008); David A. Demers, *The Continuum of Professionalism*, 28 STETSON L. REV. 319, 319 (1998) (As an “officer of the court,” a lawyer’s duty is highly uncertain. However, for the purpose of this Article, an officer of the court lawyer is to serve the purpose of law, i.e. “justice,” and hence to act in “public interest.”).

45. Demers, *The Continuum of Professionalism*, *supra* note 44, at 319; Robert Bell & Caroline Abela, *A Lawyer’s Duty to the Court*, *ADVOC. SOC’Y J.* 1, 4 (Jan. 2009), http://www.advocates.ca/assets/files/pdf/bibliography/Duty_to_Court.pdf (last visited Aug. 9, 2016) (citing Gavin MacKenzie, *The Ethics of Advocacy*, *ADVOC. SOC’Y J.* 26-27 (Sept. 2008) (stating that a lawyer’s duty to the court and to the client are equally important)). Bell and Abela similarly state that “[w]hile facing financial and competitive pressures, lawyers must fulfil and balance their duties to the client, opposing counsel, the administration of justice and society.” *Id.* at 1.

46. Perlman, *supra* note 7, at 1643.

In addition, strong proponents of ZA assume that a lawyer's duty to the client should not be subject to his or her duty to the court.⁴⁷ For example, McGillivray states that "[t]his is the essence of neutral [zealous] lawyering – to have no interest other than those of the client and to prefer those interests above all others."⁴⁸ Therefore, it appears there is no legal limit placed on lawyers representing a client with zeal. In fact, this notion is more popular and common than the previous notion.⁴⁹ Patterson posits that "[t]he prevailing notion among lawyers seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer."⁵⁰ Glendon expresses a similar theory that "[l]awyers to the interest of the client not to the law" and "[t]he only duty of the lawyers to be loyal to the client."⁵¹

Given the nature of the legal profession, attempting to balancing these two duties may make the situation more complicated. The "objective-partisan assumption" may be, at best, presumably based on a second theory that to balance these two duties, lawyers can identify a line, if there is one, or in the absence of such a line, draw one between the interest of the client and the interest of justice.⁵² Perlman explains that the balancing theory creates "difficulty identifying the line between permissible and impermissible advocacy and that compliance with the dominant view will result in misconduct more often than dominant-view proponents acknowledge."⁵³

It seems that those assuming such are not aware of the catalysts that control the lawyers' behavior, and this unawareness leads to a groundless theory. Perlman's research convincingly depicts the immense influence of

47. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) ("When acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.").

48. Anne McGillivray, *'He Would Have Made a Wonderful Solicitor': Law, Modernity and Professionalism in Bram Stoker's Dracula*, in *LAWYERS AND VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS* 225, 247 (W. Wesley Pue & David Sugarman eds., 2003).

49. Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40 (1989).

50. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 918 (1980).

51. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 60 (1996); *see also* McGillivray, *supra* note 48, at 247 (stating the essence of the zealous layering is that "to have no interest other than those of the client and to prefer those interests above all others").

52. Perlman, *supra* note 7, at 1646 (referring to WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* (1998) in stating that "[t]he problem is that Simon assumes that lawyers are capable of making objective assessments about whether their conduct is consistent with the legal culture's understanding of justice").

53. *Id.* at 1641.

partisanship, the prime derivative of ZA, on lawyers' capabilities to make justifiable decisions.⁵⁴ He shows that partisanship, or the lawyer's zeal to his or her client, affects the lawyer's perception.⁵⁵ It can be argued that a lawyer, irrespective of the demands of justice, perceives only those points favorable to his or her client.⁵⁶ On the other hand, lawyers are likely to disregard valid claims of the opposing party because of their partisanship.⁵⁷ Perlman asserts that the explanation behind such distortion of perception is that:

[P]artisanship itself is a situational force capable of distorting a professional's perceptions, including judgments relating to legal compliance. . . . So when we are placed in partisan roles, we tend to filter information in ways that support that conclusion (i.e., the conclusion favoring our clients). This effect complicates our ability to make objective decisions, such as determining whether our clients are complying with existing legal requirements. . . . This effect is even stronger when people's sense of identity and self-worth is tied to their partisan stances.⁵⁸

Thus, the argument is that a partisan lawyer is completely unable to identify, or draw a line between his or her two key roles. This inability places a lawyer "at a heightened risk of engaging in impermissible behavior"⁵⁹ and in a position prone to "make mistakes when determining what is lawful, thus increasing the risk of crossing the line between permissible and impermissible behavior."⁶⁰

Apart from this, there are other catalysts that prevent lawyers from taking balanced steps to serve the interests of the client and of the law at the same time. As previously discussed in the rebuttal to the first theory, economic factors influence the market for legal practice because "the practice of law is not apart from the economy."⁶¹ Economic pressure,

54. See generally *id.* at 1651-57.

55. *Id.*

56. Perlman, *supra* note 7, at 1654, 1657 (stating that lawyers' self-esteem and identity are so intertwined with client-favorable outcomes that these lawyers may find it more difficult to assess information that tends to undermine their clients' positions); John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 57 (2013) ("[T]he very nature of lawyering encourages lawyers to interpret ethical rules to their benefit.").

57. Menkel-Meadow, *supra* note 7, at 21-22. This phenomenon is known as "reactive devaluation," the effect of which is that "[w]e do not hear the validity of a claim or argument or offer made by 'the other side' simply because it comes from the other side." *Id.* at 22 n.78.

58. Perlman, *supra* note 7, at 1655-56.

59. *Id.* at 1644.

60. *Id.* at 1661.

61. Hadfield, *supra* note 7, at 956.

especially in liberal and self-regulating markets, contaminates a lawyer's decision-making ability and judgment which leads to his or her boundless commitment to the client.⁶² Thus, at any cost, the lawyer attempts to win the case for his or her client which may involve sacrificing his or her commitment to justice or to the law.⁶³ "[W]inning at all costs" is a concomitant of ZA which deludes a lawyer into believing that he or she is under a duty to further the unjustifiable interest of his or her client.⁶⁴ In addition, the intrinsic desire of human beings to succeed also drives a lawyer to only further his or her client's cause because, in the market of the legal practice, the success of a lawyer is not measured in the balance of justice, but by "money, prestige, and status."⁶⁵

However, the author believes that there is no practical necessity to balance these two key roles as it is going to be seen that a lawyer's duty to the law is unquestionably superior to the duty to the client. Possibly, the client supremacy or the ambiguity regarding the supremacy of roles is fabricated and intentional. Promoters of this theory, especially lawyers, intentionally nourish the dispute making it convenient to be more client centered, while being less accountable to the system.⁶⁶ There are instances in which lawyers use the ZA model as a shield to defend violations of the professional code of conduct.⁶⁷ In addition, public misconception and exaggerated depictions of extreme zeal in the media and literature have made the lawyer's role more complicated.⁶⁸ Yet, it has been established that serving the law to uphold justice is the lawyers' prime duty, whereas the duty to the client is second.⁶⁹ Supremacy of law has been best explained as follows:

62. *Id.*; Perlman, *supra* note 7, at 1661.

63. Hadfield, *supra* note 7, at 1000.

64. HEAD & MANN, *supra* note 17, at 8 ("If a lawyer sees their role as that of 'winning at all costs' [in fact, ZA shows the same] and they have little in the way of valid or strong logical argument with which to do so, or believe that bad argument will be more effective than good in convincing judge or jury, then they could come to believe that they have a responsibility to utilize such bad reasoning. Such logically bad reasoning could be instrumentally or functionally good reasoning from their perspective, or that of their clients.>").

65. Susan Swaim Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 567 (1998).

66. Gaetke, *supra* note 49, at 40 ("Indeed, the image of the lawyer as loyal advocate for the beleaguered client is perpetuated by the bar itself. . . .").

67. See generally Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757, 767, 769, 775-78 (2000).

68. Gaetke, *supra* note 49, at 40 ("More familiar to the public, and more comfortable to lawyers, is the model of the lawyer as a 'zealous advocate,' the devoted champion of the client's cause . . . and reinforced by the media, in literature, and in common lore.>").

69. HEAD & MANN, *supra* note 17, at 8; Dzienkowski, *supra* note 56, at 75 ("[T]he duty of zeal should not be allowed to be a justification for lawyer behavior that imposes significant costs

[The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. . . . He must disregard the most specific instructions of his client if they conflict with his duty to the court.⁷⁰

Similarly, the Supreme Court of Nebraska stated:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.⁷¹

Even Freedman, one of the strongest advocates of ZA,⁷² never denies the supremacy of lawyers' duty to justice; instead, he believes that there is a lawful limit to ZA.⁷³ While providing that a lawyer should take whatever measures are required to "vindicate a client's cause," the ABA rules also provide that the measures must be "lawful and ethical."⁷⁴

Moreover, some research that considers lawyers to be agents of either the court or the client, also confirms the supremacy of law. For example, Gaetke believes that a lawyer, as an officer of the court, is in fact an agent of the court, or more broadly of the judicial system.⁷⁵ On the other hand, Daniel states that "[t]he lawyer-client relationship is one species of the

on the legal system and society in general."); Bell & Abela, *supra* note 45, at 3 ("[A] lawyer may not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk."); G.T. Pagone, *The Advocate's Duty to the Court in Adversarial Proceedings* (July 23, 2008), <http://www.austlii.edu.au/au/journals/VicJSchol/2008/10.pdf> (citing *Giannarelli v. Wraith*, 165 CLR 543, 556-57 (1988) (confirming that barristers do have a duty to the administration of law that goes beyond the duty to the client); Luban, *supra* note 18, at 677 (depicting Wendel's belief that lawyers' "accountability runs to the law, not to individuals").

70. HEAD & MANN, *supra* note 17, at 8 (citing *Rondel v. Worsley* (1967) 1 QB 443, 502).

71. JAMIE S. GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, *DESTRUCTION OF EVIDENCE* 254 (1995) (citing *In re Integration of Neb. State Bar Ass'n*, 275 NW 265, 268 (Neb. 1937)).

72. Freedman's overwhelming support for ZA is best depicted by his statement saying, "[l]et justice be done—that is, for my client let justice be done—though the heavens fall." MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975).

73. Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2, at 1320.

74. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt.1 (AM. BAR ASS'N 1983).

75. Gaetke, *supra* note 49, at 43.

broad agent-principal relationship.”⁷⁶ At the outset, it may seem that, in terms of supremacy, Daniel and Gaetke have opposite positions. Indeed, their positions differ as to whether the lawyer is the agent of the client or the system, but this does not necessarily mean that there is confusion as to which duty a lawyer shall perform. Either way, a lawyer must follow agency law, and even if acting as the client’s agent, the lawyer’s actions are subject to legal standards.⁷⁷

Similarly, historical accounts of this issue support the presumption that a lawyer’s duty to either the court or the system is never subordinate to his or her duty to the client. For example, Gaetke shows that historically lawyers have been servants of the law.⁷⁸ In fact, the client supremacy theory is historically boosted by a famous statement in the 1820s Queen Caroline’s Case,⁷⁹ claiming that in order to save the client, a lawyer can do whatever he or she wants.⁸⁰ However, another scholar, Wendel, believes that this statement has no general applicability because it was a mere political threat and “was never intended as maxim of legal ethics.”⁸¹ Further, two additional scholars, Zacharias and Green, claim that Brougham, the author of Queen Caroline’s Case, repudiated the statement on the ground that it was not deliberate.⁸² “In 1859, Brougham described his famous speech as ‘anything rather than a deliberate and well-considered opinion.’”⁸³ Even Freedman, who considers Zacharias, Green, and Smith’s claims of Brougham’s repudiation to be false, admits that Brougham never intended to mean that lawyers who exercise zeal can cross the limit of the law.⁸⁴ Freedman further acknowledges that “neither Brougham nor anyone

76. Josiah M. Daniel, *A Proposed Definition of the Term “Lawyering”*, 101 LAW LIBR. J. 207, 213 (2009); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1128 (2013) (finding the same relationship).

77. Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 83 (2007) (“[L]awyers arguably are just clients’ agents, in a strictly legal sense, and should act in accordance with common law agency principles.”).

78. Gaetke, *supra* note 49, at 42 n.12 (citing G. WARVELLE, *ESSAYS IN LEGAL ETHICS* 28-29 (2d ed. 1920) (stating that lawyers seem to be “[s]ervants at law of our Lord the King”)).

79. See Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2.

80. Monroe H. Freedman, *Henry Lord Brougham-Advocating at the Edge for Human Rights*, 36 HOFSTRA L. REV. 311, 311-12 (2007).

81. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 60 n.205 (1999).

82. See Fred C. Zacharias & Bruce A. Green, *Anything Rather Than a Deliberate and Well-Considered Opinion*—*Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221 (2006).

83. Tom Smith, *Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defense Lawyer*, LAW, CRIME AND HISTORY 1, 10 (2012), http://eprints.uwe.ac.uk/29074/1/Zealous_Advocates_The_Historical_Foundat.pdf.

84. Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2.

else has ever suggested that there are no lawful limits on zealous advocacy.”⁸⁵

C. THEORY NUMBER THREE: THE OPPOSITIONAL PRESENTATION
MECHANISM IS THE BEST WAY TO REVEAL THE TRUTH

In order to ensure justice, the fundamental and comprehensive requirement is that the judgment must be founded on complete and definite presentation of fact so that the truth is discovered.⁸⁶ Defenders of ZA assume that when two opposing parties speak, truth is revealed.⁸⁷ They claim that the Oppositional Presentation Mechanism (“OPM”) enables a lawyer to employ, with extreme zeal, his or her skills, knowledge, and tricks to destroy the credibility of the information and evidence produced by opposing counsel.⁸⁸ As a result, only true information and evidence prevails, leading to an accurate decision.⁸⁹ Some scholars believe that the OPM decision is accurate because it enables the tribunal to receive a complete account of the dispute, which “leads to a better evidentiary record.”⁹⁰ Further, these scholars believe that the competition generated by the OPM “improve[s] the quality of information presented” by vigorously attacking the unreliable information.⁹¹ Moreover, the OPM has been considered a modern “bloodless” battle and has been said to replace traditional bloody combat.⁹² This theory is explained as follows:

The adversary system proceeds from the assumption that the most effective way to determine truth and to do justice is to pit against each other two advocates, two adversaries, each with the responsibility to marshal all of the relevant facts, authorities, and policy considerations on each side of the case, and to present those conflicting views in a clash before an impartial arbiter. In the performance of that adversarial role, zealous advocacy is, of

85. *Id.*

86. Bundy & Elhauge, *supra* note 3, at 316-17 (stating that “receiving a complete account of dispute” or enabling the court to get the truth behind the dispute leads to accurate adjudication). For the purpose of this Article, it is supposed that the identification of the truth is the prerequisite for ensuring justice.

87. Thurman, *supra* note 7, at 8.

88. Bundy & Elhauge, *supra* note 3, at 317-18.

89. *Id.* (stating that “[t]he lawyer’s zeal ensures that motivation is high, and competition from the opposing counsel checks potential excesses and ensures that each party’s increased effort enhances rather than impairs the accuracy of adjudication”).

90. *Id.* at 316.

91. *Id.* at 316-17.

92. Menkel-Meadow, *supra* note 7, at 21.

course, an essential element in producing an effective clash of opposite views.⁹³

Like the two previous theories, it can be argued that this theory is also incorrect because the product of the OPM, belligerent lawyers, negatively affects the whole system. The combative and aggressive nature of the OPM is said to be responsible for the deterioration of the legal profession.⁹⁴ This is explained as the “unrestrained competitiveness driven by an obsessive desire to win and a compulsive fear of losing.”⁹⁵ The weakest point of this theory is that it is designed to work in a binary oppositional world; however, the binary oppositional model cannot correctly explain the world.⁹⁶ This theory can be explained as follows:

Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out -important information, simplifies complexity, and obfuscates rather than clarifies. More significantly, some matters—mostly civil, but occasionally even criminal, cases—are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution.⁹⁷

Menkel-Meadow specifically and persuasively demonstrates that the OPM distorts truth.⁹⁸ Many others similarly observe that the OPM “increase[s] confusion,”⁹⁹ “retards discovery of truths,”¹⁰⁰ and encourages

93. Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, *supra* note 22.

94. Steve C Briggs, *The Myth and the Mischief of Zealous Advocacy*, 34 THE COLORADO LAWYER 33, 34 (2005), <http://coloradomentoring.org/wp-content/uploads/2013/10/Briggs-S-The-Myth-and-Mischief-of-Zealous-Advocacy-34-The-Colorado-Lawyer-33-2005.pdf>.

95. Briggs, *supra* note 94, at 33 (citing Michael Josephson, *Ethics Beyond the Code*, Speech at the Colorado Bar Association Annual Meeting (Sept. 1994)).

96. Menkel-Meadow, *supra* note 7, at 6.

97. *Id.* Similarly, Thurman states that the model disassembles, distorts, and subordinates truth to winning. Thurman, *supra* note 7, at 19.

98. Menkel-Meadow, *supra* note 7, at 21–22 (observing that the OPM distorts the truth “by making extreme claims, by avoiding any potentially ‘harmful’ facts, by refusing to acknowledge any truth in the opposition,” by limiting storytelling to two, rather than allowing for a multiplicity of stories, by refusing to share information, or, conversely, by strategically giving or demanding too *much* information, “by manipulating information (as in the ‘battle of experts’), by making the true look false (cross-examining a truthful witness) or the false look true (by offering false or misleading evidence or by actively ‘coaching’ witnesses.)”); Asimow & Weisberg, *supra* note 2, at 243 (“The present system, of course, strongly motivates lawyers to avoid finding out the truth and encourages smart clients to lie to their lawyers.”).

99. Bundy & Elhauge, *supra* note 3, at 317.

100. *Id.* (citing JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1947)); Briggs, *supra* note 94, at 34; A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L. J. 921–59 (1978) (discussing how defense counsel in criminal cases may suppress the truth).

many lawyers “to subvert our adversary system into a mechanism for . . . subverting justice, and treating others with incivility.”¹⁰¹

Most of the OPM loopholes become visible when one side of the conflict has superior access to advice. Even the strong supporters of the OPM acknowledge that when one party has superior access to legal advice “competitive presentation does not invariably prevent or correct inaccuracy.”¹⁰² They believe that “imbalances may have harmful or doubtful effects, particularly because they increase the ability of the more knowledgeable party to present false or prejudicial information and to impose costs on her opponent.”¹⁰³ Despite their unadorned response, supporters do not accept the shortcomings of OPM; instead, they believe that the accounts against OPM are “partial and simplistic.”¹⁰⁴ This position is reconfirmed in demanding that:

[W]hile advice has many disturbing or ambiguous informational effects, on balance providing litigation advice to one or both parties will generally increase the information reaching tribunals and improve the capacity of tribunals to determine who deserves to be sanctioned and who does not.¹⁰⁵

The supporters of the OPM believe that the accounts criticizing it unjustifiably evaluate the importance of the OPM by placing excessive emphasis on the cases with one party having superior access to advice or information; the accounts, as they believe, consider only those cases in which parties have unequal access to advice.¹⁰⁶ Generally, parties have equal access to advice; the incidents of unequal access are exceptions.¹⁰⁷ While people tend to present favorable information and suppress unfavorable information, lawyers are generally competent enough to “detect and sanction opponent suppression.”¹⁰⁸

However, this theory appears to be incorrect because in the discussion of the first theory, it was depicted that parties are generally not on equal footing because of parties’ inability to hire lawyers of equal competence. In reality, parties will never be on equal footing. Aside from a lawyer’s competence in presenting and suppressing information, the ability of a client or witness to present or suppress information and their ability to

101. Briggs, *supra* note 94, at 34.

102. Bundy & Elhauge, *supra* note 3, at 318.

103. *Id.* at 319.

104. *Id.* at 318.

105. *Id.* at 319.

106. *Id.* at 318.

107. *Id.*

108. Bundy & Elhauge, *supra* note 3, at 415.

successfully defend cross-examination also makes a significant difference. For example, suppose that the victim in case number one can afford to be represented by the highest quality lawyer, whereas the accused is only represented by an average lawyer. Here, the accused will present less favorable information than the victim.

Finally, it is worth noting that “[p]erhaps the distortions of modern verbal combat have outlived their usefulness and we can evolve to the next level—a combat-less legal system.”¹⁰⁹

D. THEORY NUMBER FOUR: THERE IS NO ALTERNATIVE TO ZEALOUS ADVOCACY

ZA is considered fundamental or cornerstone to the adversary system.¹¹⁰ The survival of the adversary system is predominantly dependent on the theory that to ensure justice, the adversary model coupled with ZA is best suited to the purpose and there is no alternative to the unique companion that can replace either of these two. Even Menkel-Meadow, who is completely aware of the serious drawbacks of ZA, is afraid of the probable risks involved in the alternative models.¹¹¹ The theory is justified on the grounds that the unique companion is best suited to the survival and prosperity of democracy and to the question of ensuring the most appropriate and effective remedy.¹¹²

Those who believe this theory also believe that lawyers are the most important democratic role players or political agents; the guardians of democracy.¹¹³ Lawyers can best play this political role when ZA is in place. In fact, zealotry is considered as “the foundation of some of the most important values in our system of government.”¹¹⁴ Zealous advocates play this important role in two ways. First, advocates provide legal services to everyone irrespective of whether the client is guilty or innocent.¹¹⁵

109. Menkel-Meadow, *supra* note 7, at 21.

110. LAWRENCE J. FOX, SUSAN R. MARTYN & ANDREW S. POLLIS, *A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS* 80 (2009).

111. Menkel-Meadow, *supra* note 7, at 41 (stating that “we know that any system that we might substitute for it would have other, perhaps worse, flaws for those who fear the power of state investigators, or the absence of clear standards or governing rules in private dispute”).

112. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 *CHAP. L. REV.* 57, 63 (1998); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *DUKE L. J.* 1, 3-4 (2011); Michael Asimow, *Popular Culture and the Adversarial System*, 40 *LOY. L. A. L. REV.* 653 (2007).

113. Luban, *supra* note 16, at 676 (stating that “a legal system is a political institution that serves indispensable political ends. . . . The lawyer’s obligations are political obligations.”).

114. Freedman, *Are There Public Interest Limits on Lawyers’ Advocacy?*, *supra* note 22, at 48.

115. Rich, *supra* note 20, at 781.

Second, advocates prevent the government from exercising coercive practices or, at least, by making the government responsible for its actions in court.¹¹⁶

“Lawyers represent both sides in a controversy regardless of whether one side is ‘good’ or the other ‘bad.’”¹¹⁷ Referring to the democratic role of the lawyers, one scholar posits that it is the constitutional duty of the lawyer to represent the accused.¹¹⁸ The whole concept is that everyone has a constitutional right to be represented to ensure justice for all.¹¹⁹ Lawyers are responsible for ensuring “true equality before the law” and “for the state to be subject to the ordinary law of land.”¹²⁰ Similarly, the system empowers “one or more citizens to call the government itself before the bar of justice.”¹²¹ A threat to ZA would be against both civil liberties and the public interest.¹²²

The basis of the theory that lawyers are democratic role players lies in the political and judicial conditions of the period when ZA was in the introduction and development process. “Dangerous social and political unrest”¹²³ and excessive government interference in the administration of justice contributed to the creation of ZA.¹²⁴ ZA is justified because it originated during a time when various troubling elements in the administration of justice were underplayed. In particular, the government “would often target the vulnerable, fabricate offences, bring a prosecution and reap the rewards of a wrongful conviction.”¹²⁵ This is nicely depicted as follows:

[T]he importance of the ‘full defence’ principle clearly emerged in reaction to the substantial flaws evident in the criminal justice system: the systematic abuse and repression of the rights of prisoners, the one-sided nature of criminal trials in the seventeenth and eighteenth centuries; the exploitation of prosecution for profit

116. Webb, *supra* note 13, at 243.

117. Rich, *supra* note 20, at 781.

118. Thurman, *supra* note 7, at 15.

119. Freedman, *Are There Public Interest Limits on Lawyers’ Advocacy?*, *supra* note 22, at 48 (Freedman is of the opinion that ZA protects the dignity of the individual, “even when the [individual] is known by the state to have committed a heinous offence.”).

120. Webb, *supra* note 13, at 243.

121. Freedman, *Are There Public Interest Limits on Lawyers’ Advocacy?*, *supra* note 22, at 49.

122. *Id.*

123. Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2, at 1320.

124. McGillivray, *supra* note 48, at 247 (stating that lawyers’ “concrete response to the exercise of state power” gave rise to the emergence of the ZA).

125. Smith, *supra* note 83, at 7.

by thief-takers and solicitors . . . it appeared that a ‘full defense’ was required to remedy these issues.¹²⁶

Based on this assertion, “graymail” is justified,¹²⁷ though, it is likely most important when there is a repressive government.¹²⁸ When the circumstances are stable and peaceful, graymail may have little importance; instead, in sensitive cases, it may be harmful.¹²⁹ In fact, where judicial independence is guaranteed, there is only a slight possibility that the government may interfere with the administration of justice.¹³⁰ Furthermore, the author observes that in most cases, politics has no direct connection to the subject matter of the case and the number of cases in which the accused is charged based on a political motive is limited. Therefore, in scenario number one, exercising zeal against the victim will likely prevent justice rather than promote it.

In addition, the claim that no other system is as effective as ZA’s embedded adversary system in “protecting individual dignity and autonomy,”¹³¹ is incorrect as it is established that the proper application of alternative models, like the investigatory model, ensures more protection.¹³² There are other systems like “[t]he inquisitorial system of civil law countries, the mediation of Asian countries, the dispute resolution processes of Native Americans, and the ‘moots’ of some African cultures” and these systems each have “something to teach us.”¹³³

On the other hand, the theory that zeal ensures the best remedy is the by-product of the OPM. It has already been observed that the OPM, as theorists claim, enable the tribunal to receive a complete account of the dispute and “enhances rather than impairs the accuracy of adjudication.”¹³⁴ Eventually, theorists claim an accurate adjudication leads to an accurate remedy. However, from the beginning, the theory proves to be wrong

126. Smith, *supra* note 83, at 16–17.

127. The term graymail “refers to a threat by a criminal defendant to reveal, in the course of the defense, information that is harmful or embarrassing to the government, in order to induce the government to drop the charges.” Freedman, *Henry Lord Brougham and Zeal*, *supra* note 2, at 1320.

128. *Id.*

129. Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L. J. 427, 429 (1988).

130. Thomas E. Plank, *Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL OF RTS. J. 1, 6 (1996). In addition, without reliable data to this regard, taking the instances of the inquisitorial jurisdiction may support this point.

131. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301, 302 (1988).

132. Friendly, *supra* note 3, at 1290 (stating that the investigatory model also ensures the protection of individual and the proper application of it ensure more protection).

133. Menkel-Meadow, *supra* note 7, at 28 (footnote omitted).

134. Bundy & Elhauge, *supra* note 3, at 317–18.

because it has already been revealed in the discussion of the third theory that the OPM does not necessarily enhance the accuracy of adjudication.

Furthermore, since ZA tends to be based on negative qualities such as distrust,¹³⁵ hostility,¹³⁶ and combativeness, it may, at best, give a conflict time remedy. This kind of remedy is exclusionary,¹³⁷ reactive,¹³⁸ and unaccommodating. These shortcomings are equally observable in practice. In cases involving issues such as divorce, guardianship, and estates the exclusionary model destroys the likelihood of reaching to an accommodating solution.¹³⁹ The devastating effect of the exclusionary model can be explained as follows:

[T]he adversary process infuses the parties with the same spirit of adverseness and depersonalization . . . it can also serve to deteriorate the parties' underlying relationship. A graphic example regularly occurs in divorce law. Many a couple reconciled to separation has been driven to hostility by the maximum demands asserted by their spouse's lawyer. The typical response is: "If (s)he's going to try to wipe me out, then I'm going to fight over the kids."¹⁴⁰

Thus, the negative characteristics of ZA close the doors to mutual understanding, cooperation, and compromise, which are prerequisites for an equally beneficial solution to each party.¹⁴¹ However, "[l]itigation is often unnecessary and potentially destructive."¹⁴² Unfortunately, ZA does not leave any space for this realization because a remedy is only accurate when filtered through combat involving lawyers. As a result, ZA destroys the option of settling a legal dispute more effectively without involving costly, time consuming, and stressful litigation. This is why ZA might "cultivate evil."¹⁴³

It has become clear that none of the theories are correct on which the grand theory depends (i.e., that ZA is the best model). Therefore, it appears

135. See generally Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313 (1993).

136. Rich, *supra* note 20, at 782.

137. See generally Menkel-Meadow, *supra* note 7. ZA-based remedies are exclusionary in the sense that they exclude the losing party, exclude a third party who is directly affected, exclude open thinking, exclude relationships, and exclude other positive values. *Id.*

138. See Rich, *supra* note 20, at 768.

139. *Id.* at 782.

140. *Id.*

141. See generally Menkel-Meadow, *supra* note 7, at 6-10.

142. Rich, *supra* note 20, at 767.

143. McGillivray, *supra* note 48, at 247.

that the theory claiming the immense importance of lawyers in protecting democratic values in every case is an exaggeration, and the theory predicting the best remedy is not well-grounded. In addition, even from the stakeholder's perspective, i.e., lawyers, clients, and society, the ZA model has substantial drawbacks. For example, in 1993, a Legal System Dynamics Subcommittee of the Professionalism Committee, reported that zealotry is responsible for the increased lack of professionalism among lawyers.¹⁴⁴ The reality is that ZA is being used as a shield to justify negative characteristics of the legal practice, such as paranoia, deceitfulness, insensitivity, and the utmost desire to promote the client's interest regardless of whether it is justified.¹⁴⁵ Therefore, should ZA be continued in its current form, "lawyer[s] will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled."¹⁴⁶

III. LOOKING FOR REFORM IN THE ZA MODEL AND BEYOND

"Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it."¹⁴⁷ It is apparent, however, that the ocean of theories in which the "great whale" lives has been dried out. For example, scholars have already begun to realize the necessity of alternative models.¹⁴⁸ Realizing the necessity of modification, the adversary system "must constantly be reexamined and defined in the light of today's world."¹⁴⁹ Reform in the traditional ZA model is inevitable because it has become outdated compared to the "many functions of a modern lawyer."¹⁵⁰ Even strong supporters of ZA acknowledge the importance of its reformation:

We do need reform. We need reform to make the adversary system function better, to inform people about their rights and about how to vindicate them, to ensure effective representation on

144. Briggs, *supra* note 94, at 38.

145. Daicoff, *supra* note 65, at 560.

146. Wasserstrom, *supra* note 6, at 13.

147. Menkel-Meadow, *supra* note 7, at 40.

148. *Id.* at 43 ("I firmly believe that the only way to reform the adversary model is to successfully 'oppose' it with other modes and processes and see if we can create a more varied legal system, one that is more sensitive to the particular postmodern needs of parties and the particularities of cases"); Perlman, *supra* note 7, at 1663.

149. Thurman, *supra* note 7, at 7.

150. Dzienkowski, *supra* note 56, at 57.

both sides of every case, and to provide competent judges in all cases.¹⁵¹

Thus, it is well-grounded and timely to demand the reevaluation of ZA in the guarantee of justice. In fact, scholars, ranging from strong critiques to strong supporters of ZA, have already started to prescribe measures required to deal with the shortcomings of ZA. Strong critiques of ZA suggest that lawyers should essentially look at the interest of law, and, to this end, ZA needs to be replaced by other appropriate models.¹⁵² One such critique prescribes that lawyers should not even take on a case when denying the case is better for the society or when it is apparent that the client may use the lawyer's skill to do harm.¹⁵³ Similarly, Professor Wendel opines that lawyers should not represent all causes of a client, even if permitted to do so by law.¹⁵⁴ Instead, lawyers should only pursue client's substantiated "legal entitlements."¹⁵⁵

Conversely, supporters of weak adversarialism believe that ZA should remain in action to the extent that it serves justice. One scholar, William Simon, suggests a discretionary model where the issue of advancing a client's unjustified claim is left to the discretion of the lawyer,¹⁵⁶ expecting the lawyer to exercise discretion to promote justice.¹⁵⁷ In contrast, however, other scholars, Asimow and Weisberg, take slightly different positions, desiring a compromise between strong and weak adversarialism.¹⁵⁸ According to their prescribed model, a defense attorney must not perform at his or her best unless the defendant is subject to "wildly excessive punishment," and then a "full-throttle" defense is permitted.¹⁵⁹

However, when considering different facts in different cases, there is no justification for viewing all cases from the same point of view, because legal problems and remedies in two cases are never the same. The same rationale applies in that the amount of zeal required in a criminal case is not

151. Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, *supra* note 22, at 54.

152. Andrew Boon, *Re-Conceiving the Lawyer's Role and the Foundations of Legal Professional Ethics*, JOTWELL (2013), <http://legalpro.jotwell.com/re-conceiving-the-lawyers-role-and-the-foundations-of-legal-professional-ethics/?pfstyle=wp>.

153. Kennedy, *supra* note 19, at 1160 (explaining that lawyers "should avoid doing harm with [their] lawyer skills even if there is someone else waiting to take [their] place").

154. Perlman, *supra* note 7, at 1645.

155. *Id.*

156. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1145 (1988).

157. Perlman, *supra* note 7, at 1646.

158. Asimow & Weisberg, *supra* note 2, at 54.

159. *Id.*

the same amount required in a civil case.¹⁶⁰ It is also important to note that ZA may have importance in some cases, yet obstruct the path of justice in other cases.¹⁶¹ Therefore, it would be a mistake to believe that a single model, such as extreme ZA, weak adversarialism, or balanced ZA, alone, would effectively solve all problems.¹⁶² There is no reason to prescribe the same antibiotic for all kinds of bacteria; rather, different antibiotics, in different dosages are to be administered to deal with different types of bacteria. In order to ensure justice and effectively and appropriately deal with legal problems, all models should be taken into account and then the best suited model should be applied.¹⁶³ For example, the multi-story-telling model should be applied when appropriate, “permit[ing] more voices, more stories, more complex versions of reality to inform us and to allow all people to express views that are not determined entirely by their ‘given’ cultural identities.”¹⁶⁴ This model may provide the best solution in cases relating to comparative negligence or business necessity defenses.¹⁶⁵

The author believes that in its extreme form, traditional ZA may be used in cases with powerful parties, like multinational corporations, states, political parties, or other entities that can influence the outcome of trial on the prosecution side, and thus, may pose a threat to democratic and political values. In such cases, there may be political lawyers who deal with cases involving states or other politically influential parties. This kind of lawyer will likely have the privilege of doing whatever he or she wants to serve the client’s interests, and will be the only lawyer allowed to resort to extreme zeal.

In other cases, however, ZA may be applied if modified. For example, in the “Damini Rape Case,”¹⁶⁶ a main point was that one of the five

160. Dzienkowski, *supra* note 56, at 75 (stating that in criminal cases the role of zeal is especially important).

161. *See generally* Menkel-Meadow, *supra* note 7, at 24-27 (stating that “binary solution” or the competitive representational model is not necessary in every case).

162. Perlman, *supra* note 7, at 1663 (stating that “rather than prescribing the same conduct in every situation (e.g., pursuing the client’s interests to the full extent the law allows), theorists should acknowledge that lawyers need to adopt a different mindset”).

163. Menkel-Meadow, *supra* note 7, at 11 (“[W]hat I would substitute for [the dominant ZA system] I have no one panacea, solution, or process to offer-instead, I think we should contemplate a variety of different ways to structure process in our legal system”).

164. *Id.* at 31.

165. *Id.* at 17.

166. *Profiles: Delhi gang rapists*, BBC NEWS (Dec. 20, 2015), <http://www.bbc.com/news/world-asia-india-23434888>; *see also* Niharika Mandhana & Anjani Trivedi, *Indians Outraged Over Rape on Moving Bus in New Delhi*, INDIA INK (Dec. 18, 2012, 7:01 AM), http://india.blogs.nytimes.com/2012/12/18/outrage-in-delhi-after-latest-gang-rape-case/?_r=0; *see also* *India gang rape bus driver arrested in Delhi*, TELEGRAPH (Dec. 18, 2012, 10:45 AM),

defendants was a minor who required special protection under juvenile law.¹⁶⁷ In a case in which the accused and the victim are vulnerable, modified or weak ZA may be used. The accused gets the benefit of ZA in the sense that the defense attorneys exercise zeal in the client's interest but will not "*actively* mislead the court"¹⁶⁸ or attack on the victim. Instead of exposing victims to the harsh behavior of defense attorneys, he or she may be separately cross-examined to ensure comfortability and privacy. Alternatively, to avoid gender-based discomfort, this type of case may be tried jointly by a team of male and female judges.¹⁶⁹ In addition, the impact of cross-examining a female victim by a female lawyer in front of a female judge may be considered.

In cases with a number of aggrieved parties, an inquisitorial system is more and appropriate than an adversarial system. Therefore, cases involving issues of mass justice, such as environmental and consumer litigation, or personal injury claims arising from industrial disease, may be solved under the inquisitorial system. One model, largely influenced by the inquisitorial system, suggests:

Under such a model the "judge" would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence.¹⁷⁰

Farrow proposes another model which, at the outset, seems absurd and whimsical, but it may work well if applied to cases related to the dissolution of marriage, settling a guardianship issue, divorce, or partition. Under this proposal, the lawyer takes on all clients, and instead of pursuing their unjustified causes, he or she will later try to convince the client to pursue the justified cause.¹⁷¹

To find an effective remedy to mitigate the impact of the differences opposing lawyers face in skill or capacity, one scholar wittily asks, "Should we assign lawyers to cases on a random or lottery basis?"¹⁷² Inspired by this question, the author would like to imagine a model that may be applied

<http://www.telegraph.co.uk/news/worldnews/asia/india/9752301/India-gang-rape-bus-driver-arrested-in-Delhi.html>.

167. *Id.*

168. Bell & Abela, *supra* note 45.

169. Menkel-Meadow, *supra* note 7.

170. Friendly, *supra* note 3, at 1289.

171. Farrow, *supra* note 44, at 100 (explaining that "the lawyer may choose to take on the client but then try hard to persuade the client to pursue a different course of action").

172. Menkel-Meadow, *supra* note 7, at 39.

when there is a lesser possibility of abuse by the lawyers. Accordingly, lawyers would not choose the client, instead a lawyer or government association would distribute the cases blindly to lawyers who would be required to defend their client to the greatest extent permitted by law. Then, a ranking would be made based on the success rate of each lawyer. A lawyer would then have the option to reject a case if it was found to be meritless; thus, contributing to the success rate. Upon rejection, other lawyers, at their discretion, would be permitted to take the case at their own risk of reducing the success rate. If the new lawyer succeeds, the lawyer who rejected the case would be discredited. In response, however, the question must be raised as to the clients' freedom to choose desired counsel, because a client may not be comfortable with sharing his or her case with all lawyers. In that situation, a client may be asked to provide a list of acceptable lawyers, and then, one lawyer from the list may be assigned.

In addition to classifying cases and selecting different models, the author is of the opinion that some ground rules should be set and followed, with violations leading to punishment including disbaring the violating lawyer. For example, in all cases, no lawyer should be allowed to willfully deny the points of law brought forth by opposing counsel, because the denial is disgraceful to the spirit of law.¹⁷³ The following suggestion may be taken as an important ground rule. "Instead of attempting to destroy the testimony it would be better to refrain from impeaching the truthful witness and to trust the trier of fact to draw the right conclusions."¹⁷⁴ An additional ground rule may be that "[a] lawyer should not unreasonably raise or defend an action for which there is no legal justification."¹⁷⁵ Also, there is a necessity to set ground rules to prohibit lawyers' rude, harsh, and aggressive behavior in the courtroom.¹⁷⁶ Lawyers may be required to receive more training, counseling, and to pass advanced eligibility exams so that it is ensured that they can technically, rationally, and gently without stigmatizing the victim, bring out the truth.

IV. CONCLUSION

Rabbi Harold L. Kudan states: "[t]hat which dominates our imagination and our daily thoughts will determine our life and character. Therefore, it

173. See generally Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247 (2005).

174. John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. LAW REV. 1485, 1487 (1966).

175. Bell & Abela, *supra* note 45.

176. Norman L. Greene, *Perspective on Temper In the Court: A Forum on Judicial Civility*, 23 FORDHAM URB. L. J. 709 (1995).

behooves us to be careful what we are worshipping, for what we are worshipping we are becoming.”¹⁷⁷ Understandably, in the ZA context, Kudan’s statement is correct. Despite having no conclusive justification, ZA dictates our consciousness, our minds, and our actions because we worship it. We worship ZA because we assume that the exclusionary model is best to deal with all types of legal problems. Until a system is proven groundless, meritless, ineffective, less effective, or prejudicial, there is nothing wrong with worshipping or having faith in any system; it is instead required for the functioning of that system. However, as argued in this Article, the underlying theories of ZA are groundless and sometimes the system gives rise to prejudicial decisions in pursuit of justice; therefore, there is no reason to worship or stick to ZA as a solution to all legal problems. Instead, it is more appropriate to believe that, in addition to ZA, there are other options. Bearing in mind there are variations in the nature, context, subject-matter, and remedy sought in legal problems, all options should be examined so that the best suited models for a particular type of legal problem can be identified.

To this end, extensive engineering is required to deal with legal problems of a different nature; a series of analytical works from the micro level, instead of macro level, are urgently required. As explained in previous sections of this Article, different models, questions, hypotheses, and possibilities may be explored. It is then necessary to conduct an extensive study on each of these models in relation to the different types of cases. All of the alternative systems must be put on trial to determine which mechanism produces the most appropriate remedy for a particular kind of case by introducing a scientific trial and error mechanism. Like the periodical table of elements used by a chemist, a lawyer may need to maintain a detailed chart or database enlisting the wide variety of circumstances and factors related to legal problems. Like a microbiologist who conducts his or her research deep into the microscopic details of a cell, a legal scholar must enter into the hair-splitting details of the human mind to ascertain responses in different circumstances and to identify the elements that affect those responses.

177. Briggs, *supra* note 94, at 34.