PHOENIX
LAW REVIEW

VOLUME 6 SPRING 2013 NUMBER 4

PHOENIX
SCHOOL OF LAW

Published by
Phoenix School of Law
Phoenix, Arizona 85004

Published by *Phoenix Law Review*, Phoenix School of Law, One North Central Avenue,14th Floor, Phoenix, Arizona 85004.

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Cite as:
6 PHOENIX L. REV. __ (2013).

Understanding the Legal Client's Best Interests: Lessons from Therapeutic Jurisprudence and Comprehensive Justice

Dale Dewhurst*

I. Introduction: The Ethical Problem

The Canadian Bar Association's *Code of Professional Conduct* ("*Canadian Code*") for lawyers[1] provides frequent direction to promote the client's "best interests."[2] Alternatively, other terminology is used such as: "interests of the

* Professor of Legal Studies and Legislative Drafting, Athabasca University; Co-Director, Athabasca University Post Baccalaureate Diploma in Legislative Drafting.

[1] Can. Code of Prof'l Conduct (Can. Bar Ass'n 2009).

[2] "A lawyer must exercise independent judgment and at all times act in the *best interests* of the client." *Id.* ch. XXII, cmt. 1 (emphasis added). "[T]he lawyer must first be satisfied that any communication is in the *best interests* of the client and within the scope of the retainer." *Id.* ch. XVIII, cmt. 2 (emphasis added).

client";[3] "client's interests";[4] and "client's legitimate interests."[5] However, the *Canadian Code* does not define "best interests," set out a process to determine "best interests," or clarify distinctive meanings for the alternate terminology.

Similar provisions can be seen in the American Bar Association's *Model Rules of Professional Conduct* ("*U.S. Code*").[6] With regard to the *U.S. Code*, a detailed subject-matter index is included; however, topics such as client's "best interests," "client's interests," or "legitimate interests" do not find their way into the index. Instead, the index includes references to the public interest, law reform activities that affect client's interests, business interests of the lawyer and conflict of interest, and prohibitions to the lawyer's obtaining proprietary interests in a client's cause of action.[7] Not all discussions of the client's best interests are ignored in the *U.S. Code*; however, they are certainly not given priority in the *U.S. Code*.

In the text of the *U.S. Code* itself (i.e., not including the commentaries) there is reference to a "client's legitimate interests,"[8] client "interests,"[9] "interests of the client,"[10] and the "best interest of the organization" (when representing an organization as a client).[11] Other than the reference to the best interest of the organizational client, reference to the client's "best interests" does not appear, except infrequently in the commentaries.[12]

Surprisingly little has been written in an attempt to gain a more complete understanding of the client's "best interests." To some extent, the meaning of

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[3] "Competence . . . goes beyond formal qualification to practise law . . . . It includes knowledge, skill, and the ability to use them effectively in the *interests of the client*." *Id.* ch. II, cmt. 1 (emphasis added).

[4] "[T]he onus being on the lawyer to prove that the *client's interests* were protected by such independent advice." *Id.* ch. VI, R. 2(b) (emphasis added). "[T]he client expects or might reasonably be assumed to expect that the lawyer is protecting the *client's interests*." *Id.* ch. VI, R. 3(a) (emphasis added). "The public interest and the *client's interests* must not, however, be compromised by agreeing to a guilty plea." *Id.* ch. IX, cmt. 13 (emphasis added). "[Counsel] should never expose himself to the reproach that he has sacrificed his *client's interests* on the altar of expediency." *Id.* ch. IX, n.1 (emphasis added) (quoting J. A. Schroeder, *Some Ethical Problems in Criminal Law*, *in* LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 1963, at 87, 102 (1963)). "[T]he lawyer should protect the *client's interests* so far as possible and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril." *Id.* ch. XII, cmt. 7 (emphasis added).

[5] *Id.* app., pt.1, at para. 13. "Counsel should agree to reasonable requests for scheduling changes, such as extensions of time, provided the *client's legitimate interests* will not be materially and adversely affected. *Id.* (emphasis added).

[6] MODEL RULES OF PROF'L CONDUCT (2010).

[7] *Id.*

[8] *E.g.*, *id.* pmbl. § 9.

[9] *E.g.*, *id.* R. 1.11(c), 1.14(b), (c), 1.16(b)(1), (d), 2.3(b), and 6.4.

[10] *E.g.*, *id.* R. 3.2 and 4.3.

[11] *E.g.*, *id.* R. 1.13(b).

[12] *E.g.*, *id.* R. 1.4 cmt. 5, 1.14 cmt. 5, and 8.5 cmt. 3.

these terms can be imputed from the surrounding text; however, this understanding is far from complete. Also, what can be seen in traditional legal practice is a predominantly adversarial understanding of a client's interests, which is premised upon zealous representation and limits "best interests" to the scope of the legal case.

Regardless of which ethical code is emphasized, what will be seen is that these concerns apply to all lawyers and clients, practicing in all areas of the law. However, in therapeutic jurisprudence, comprehensive law, and comprehensive justice literature, the importance of clarifying these definitions first becomes apparent.[13] Therapeutic jurisprudence, while still respecting due process, urges lawyers to deal with cases in ways that promote the therapeutic benefits of the law and reduce the anti-therapeutic consequences. The comprehensive law and comprehensive justice literature have identified various "vectors," or alternative dispute resolution mechanisms (including therapeutic jurisprudence) that are developing both internal and external to legal practice, and that take different approaches to dispute resolution. These "vectors" often embrace an expanded, or alternatively-focused, definition of justice. Additionally, these vectors have an expanded understanding of the client's best interests (the client's actual best interests) that goes beyond the narrower understanding of a client's best interests as understood in the codes of conduct (the client's legal best interests).

The crux of the problem is this: what do lawyers practicing in accordance with the prescriptions of therapeutic jurisprudence, comprehensive law, or comprehensive justice do when particular vectors embrace a view of a client's actual best interests that is at odds with what traditional adversarial legal representation assumes about the client's legal best interests? In following the requirements of the code of conduct, and advancing the legal case, the adversarial lawyer may pursue a legal-ethical course of action to the detriment of the client's actual best interests. Alternatively, the lawyer who promotes the client's actual best interests may pursue a socio-ethical course of action to the detriment of the client's legal best interests.

This Article argues that while the client's legal best interests are still relevant to decision-making, the client's legal best interests are at most a subset of the client's actual best interests. As with all things that interest people, sometimes inconsistencies arise and one must sacrifice one interest in support of another larger or more important one. One legal right is often waived in preference for another, and legal interests may need to be waived in preference for actual best interests.

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[13] *See infra* Part III.

Additionally, this Article further argues that to properly determine a client's actual best interests and to provide appropriate legal advice, lawyers may need to refer their clients to the expertise of mental health professionals, medical professionals, engineers, accountants, and any other experts required by the subject matter of the case. This will be necessary in all cases where such advice is required to enable the lawyer to properly identify, understand, and advise clients on how their legal best interests interface with their actual best interests. Further, it will be necessary in all cases where such advice is required to enable the client to properly identify his or her actual best interests and to instruct the lawyer accordingly. The goal must be for lawyers and their clients to develop a more complete understanding of the client's actual best interests, one that is cognizant of factors beyond a narrow focus on the client's legal case.

Finally, to facilitate this broader understanding, this Article suggests that certain provisions in the *Code* need to be amended or more robustly interpreted to promote the client's actual best interests; and, some initial suggestions for amendment will be set out.

II. Defining the Client's Best Interests

It is a difficult task to give an exact definition of a client's "best interests." This is because, at its core, understanding what is in a client's best interests is something that must be determined by the client. For this reason, it is impossible to craft in a lawyers' code of conduct a concise and universally applicable definition of a client's actual best interests. However, what can be done is to draft provisions for and amendments to the lawyers' codes of conduct that better guide lawyers on advising and enabling clients to identify their own actual best interests in particular legal contexts. As King has commented, "This is consistent with the emphasis that TJ places on empowerment, on the promotion of self-determination—-lawyers empowering clients to resolve problems rather than assuming that responsibility solely to themselves."[14] The clients can then provide better and more comprehensive instructions to their lawyers on how to conduct their cases in ways that are more compatible with the overall context of the clients' lives.

For clients, the question of what is in their actual best interest invokes the kind of existential concerns that have been discussed in the philosophical literature since Plato and Aristotle began considering the "function of man" approxi-

[14] E-mail from Michael S. King, Magistrate, East Kimberley, Magistrates Chambers, Magistrates Court of Western Australia, to author (Nov. 21, 2011) (on file with author).

mately 2500 years ago.[15] Beyond the philosophical literature, and at its broadest, "best interest" invokes questions like: "Why am I here?," "What is my purpose in life?," "How should I relate to my family and community?," "How do I get out of this legal mess and maintain/repair my damaged relationships?," "How can I use my legal rights to help me lead a good life?" For the clients, this is a deep and complex question pursued over the course of a lifetime. In particular legal cases, it requires the clients to identify their values and understand their legal options in sufficient detail to meaningfully advise their lawyers on how to proceed in a manner consistent with those values.

The fact that the existential questions cannot possibly be answered here is not fatal for the arguments in this Article. Rather, much can be learned from a more general regard for what is required for a client to pursue his or her actual best interests in a legal context (i.e., a process versus a content concern), and then crafting ethical obligations in lawyers' codes of ethics to accommodate these process considerations. Thus, to create operable directives for lawyers in their codes of conduct, what must be focused upon first of all is the overall respect for client autonomy. There must be recognition that defining the nature of the clients' actual best interests that will direct particular case management is something that must be done by lawyers and clients working together; and, if necessary, it must be done in collaboration with other professionals. Further, the last word on what is in the clients' actual best interests must be left with the clients.

In a previous article,[16] this author discussed the nature of clients' best interests in the context of people's desires to create, and employ, additional vectors in the comprehensive justice movement.[17] The article analyzed the development of the various vectors in the comprehensive law/justice movement, and sought to analyze how each could remain a separate and distinct movement while, at the same time, sharing common ground with each other and with the adversarial justice system. It was concluded that the various vectors in the comprehensive law/justice movement should be seen only as means to promote people's values; the vectors are not ends in themselves. As this author previously wrote:

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[15] *See* ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 7 (W. D. Ross trans., Internet Classics Archive 2009) (c. 350 B.C.E.), http://classics.mit.edu/Aristotle/nicomachaen.html; *See also* PLATO, THE REPUBLIC bk. IV (Benjamin Jowett trans., Internet Classics Archive 2009) (c. 360 B.C.E.), http://classics.mit.edu/Plato/republic.html.

[16] Dale Dewhurst, *Justice Foundations for the Comprehensive Law Movement*, 33 INT'L J.L. & PSYCHIATRY 463 (2010).

[17] The Comprehensive Law, Comprehensive Justice, and Non-Adversarial Justice literature discuss the development of various dispute resolution "vectors" such as: arbitration, mediation, litigation, mini-trials, peace-making, conciliation, collaborative law, therapeutic jurisprudence, and others.

> [A]s human beings, we are interested in broader conceptions of justice than those contained within the adversarial system alone.
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> . . . [T]hese various mechanisms are a means, not an end, for what we pursue. When the adversarial system will work to help us to obtain the virtuous results we seek, we use it; when the adversarial system won't work to address the virtuous results we seek, we look elsewhere. What seems to be clearly happening here, but not always clearly observed to be happening, is that people are employing some higher order justification as to whether the adversarial system is suitable. This is not because they want to achieve an "unjust" resolution of their problems outside of the adversarial system; instead, they are rejecting the adversarial system's definition of justice as being too narrow.[18]

With regard to properly understanding a client's actual best interests within lawyers' codes of ethics, the profession is faced with the question of how to recognize the broader conceptions of clients' interests. Clients do not seek legal counsel as an end in itself; they seek legal counsel as a means to achieving other ends. Nor do they necessarily wish to stray from their legal best interests so that they may obtain an illegal result; instead, they are prepared to sacrifice particular legal best interests because they reject those interests as being too narrow or perhaps inappropriately targeted.

Again, as previously written, "Effectively, what this asks for is a theory of justice that starts with human needs and ends with human needs: it must identify them, help us to understand their true nature, consider their interrelations, and then address how to bring them about in practice."[19] In order for lawyers to provide ethical and competent service, they must be cognizant of how case management planning interfaces with these other ends. It is a legitimate concern to ask whether a zealous adversarial defense is always in the client's best interests when: (1) the legal resolution will clearly have an extended impact upon the client's life; (2) the case involves subject matter beyond the lawyer's legal expertise; and (3) the client lacks sufficient knowledge to make competent and autonomous decisions regarding how to conduct the case in light of these other considerations.

A specific example from a criminal law context may best serve to illuminate the emerging ethical dilemmas and their practical ramifications when

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[18] Dewhurst, *supra* note 16, at 472.

[19] Dewhurst, *supra* note 16, at 468.

determining a client's best interests in a particular legal context. However, the criminal law examples discussed are illustrative only, as the scope of the arguments in this Article go beyond the particular examples examined below. To continue with the criminal law example, how does an understanding of the client's best interests affect deliberations about entering a guilty plea? The traditional role of the defense lawyer at plea bargaining or sentencing is to mitigate the sentence and minimize imprisonment. One way this is achieved is by proposing meaningful rehabilitative measures in place of punitive or deterrent sanctions. So, lawyers must understand approaches to rehabilitation—and how they fit with client needs—in order to represent their client's best interests.[20] So far, this seems rather conventional and uncontroversial.

When looked at through the lens of lawyers practicing in accordance with the principles of therapeutic jurisprudence ("therapeutic lawyers") or comprehensive justice ("comprehensive justice lawyers"), the dilemma becomes clearer. How are lawyers to determine their clients' best interests in cases where offending is directly connected to compulsive or repetitive behaviors grounded in mental health concerns? In many cases, the mental health literature maintains that punishment, accountability, and treatment are in the client's best interests. This will be discussed again in detail below,[21] but for the moment, assume it is correct. Pleading guilty when a viable defense is possible or a conviction is uncertain may be contrary to the legal case[22]—and, in fact, contrary to the client's legal best interests. Nonetheless, when extra-legal considerations urge that accountability, punishment, and treatment are in the client's best interests, not pleading guilty may be contrary to the client's actual best interests.

This draws out a distinction and possible conflict between the client's actual best interests, as considered by the various vectors, and the client's legal best interests, as considered by the lawyers' codes of conduct. Therapeutic and

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[20] For a detailed discussion see Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 245, 245-305 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) [hereinafter Winick, *Role of the Criminal Defense Lawyer*].

[21] *See infra* Part V.C.

[22] As King has stated with regard to a traditional zealous advocacy context: "Even in these cases [where a viable defence is possible], I would argue that it is not always contrary to the legal interest to plead guilty. In such cases the client and lawyer must weigh up the potential benefits (a possible acquittal) and potential adverse outcomes (conviction) to decide whether to plead guilty or not guilty. One cannot always predict court outcomes, despite having witness statements and other evidence ahead of time. Sometimes clients are not prepared to take the risk of a trial and decide to plead guilty and take steps to address their treatment needs to present a stronger case in mitigation. In such cases I would argue that the legal best interests and actual best interests coalesce." E-mail from Michael S. King to author, *supra* note 14.

comprehensive justice lawyers strive to address the clients' immediate interaction with the legal system and, in a criminal law context, they also seek to address how clients may deal with maladaptive behavioral patterns that are causing reiterative conflicts with the law. In a broader context, comprehensive justice lawyers strive to attend to all relevant consequences that affect the psychosocial well-being of clients, their families, and their communities. In other words, there is an awareness of the clients' overall actual best interests, and decisions on how to conduct proper legal representation are not limited to focusing upon the clients' legal best interests alone. Achieving these broader goals, while meeting the professional standard of care, is difficult when a lawyer must follow a code of conduct that was not drafted to include this broader understanding of the client's best interests and the lawyer's connected role.

What then should lawyers do when legal victory (i.e., legal best interests) conflicts with the client's actual best interests? In Winick's words:

> Attorneys who ignore the emotional dimensions of dealing with clients . . . risk alienating clients, who might interpret their lack of interest in the emotional aspects of the situation as coldness, insensitivity, callousness, or even antagonism. Clients tend to be more distrustful of such attorneys and are less likely to co-operate fully with them . . . . They may regard them as part of the problem, not part of the solution . . . .[23]

How should this be drawn together in response to the question of how to define a client's actual best interests? If lawyers are going to adequately address the widely divergent range of values clients bring with them, codes of conduct should be as neutral as possible when instructing lawyers how to identify and address the different personal, familial, communal, spiritual, and socio-cultural values of individual clients. Lawyers must begin with a broader focus on the autonomous nature of their clients, their needs, their interests, their choices, their happiness, etc., and then look at what is possible within the law to address those interests to the full extent.

Accordingly, for all lawyers, defining and pursuing a client's actual best interests involves supporting and informing the client's pursuit of happiness as understood by that client in the broader context of her life; and, helping the client to gain an understanding of how all these values and goals interface with the demands and available options presented by the legal system. In a Western, liberal, democratic society, this includes such things as respect for individuality, equality, personal autonomy, freedom of speech, freedom of religion, etc. These values are directly reflected in the therapeutic jurisprudence literature,

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[23] Winick, *Role of the Criminal Defense Lawyer*, *supra* note 20, at 253.

for example in Perlin's and Ronner's discussions of the therapeutic jurisprudence commitment to client dignity and the goals of facilitating client voice, validation, and voluntariness.[24] The choice of what is in the client's best interests must be left to the client to the fullest extent possible, and lawyer's codes of ethics must limit this only to the extent necessary to ensure that the lawyer is in compliance with the law in his or her service to the client.

To draw analogies with other areas of professional/expert services, when a client receives medical, financial, psychological, or spiritual guidance or consults with an engineer, environmental auditor, architect, contractor, or mechanic, these sources of expert input simply provide evidence and advice that the client must blend into her or his overall deliberations. It should be no different with legal expertise. Lawyer's codes of conduct should not be drafted in such a way that "best interests" of the client are specifically defined by the legal codes of conduct and thus become a matter of legal expertise. Rather, a lawyer's understanding of a client's "best interests" must be left as open as possible for definition and actualization by the client. Other elements of the code of conduct must be drafted to preserve the fullest level of self-determination possible for the client.

To repeat, the suggestion of therapeutic jurisprudence is not that defining a client's best interests should be taken from the hands of lawyers and placed into the hands of therapists; rather, it is an exhortation to take this final decision-making authority away from all experts and firmly locate the authority in the hands of the clients. In Ward's terminology, what is called for is "zealous counseling."[25] For Ward, zealous counseling is about the human side of law and it is "about being reasonably comprehensive about understanding the people one represents. . . . and about assessing the case in a behavioral context, and then helping the client assess and decide what course to take."[26] As Ward relates, clients may be harshly critical, or resentful, if they are not made aware of alternate sentencing options, not asked if they want or need treatment, and not informed that these are suitable matters to discuss with their lawyers.[27] In Ward's words:

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[24] Michael Perlin, *Considering Pathological Altruism in the Law from Therapeutic Jurisprudence and Neuroscience Perspectives*, *in* PATHOLOGICAL ALTRUISM 156, 157 (Barbara Oakley, Ariel Knafo, Guruprasad Madhavan & David Wilson eds., 2011); Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

[25] Robert Ward, *Criminal Defense Practice and Therapeutic Jurisprudence: Zealous Advocacy through Zealous Counseling: Perspectives, Plans and Policy*, *in* REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 206, 206-25 (David B. Wexler ed., 2008) [hereinafter REHABILITATING LAWYERS].

[26] *Id.* at 207.

[27] *Id.*

> Clients and others can be hurt by not understanding, respecting or appreciating a therapeutic context or "moment". The "moment" has to do with the attorney being both cognitively and emotionally aware of the client's needs and desires, expressed or unexpressed. It most likely will be at the initial interview and then at any key decision point during the course of the case. It certainly has to do with choices such as going to trial or pleading guilty, and about how the client can save or repair their life or liberty.[28]

As Wexler has stated, there are significant gains to be made by moving away from an "argument culture," or an adversarial culture, and embracing law as a therapeutic agent that considers relevant behavioral science literature and explores how these findings may be creatively adapted to resolving disputes within the legal system.[29] Further, the same may be said of embracing other non-legal sources of expertise and employing them for the purpose of creative problem solving within the legal system.

With the growth of the client-centered counseling literature, there has been a growing interest in how legal practice may benefit from a deeper understanding of work in the behavioral sciences.[30] In Wexler's and Winick's words:

> The result is that a modern, well-trained lawyer is now far more equipped than before to consider his or her client in a broader social, familial, cultural context. And a lawyer is able to engage a client in robust conversations regarding potential courses of legal action and the consequences of such action in the overall context of the client's situation and complex web of relationships.[31]

It was following these words, in the *Foreword* of their book, that Brooks and Madden situated the client-centered counseling approach as a subset within a broader relationship-centered approach.[32] What is emerging is the understanding that effective client counseling, and the determination of a client's actual best interests, requires not only client-centered counseling but also counseling with a view to the relational context in which the client lives his or her life.

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[28] *Id.* at 208.

[29] David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 263-77 (1999).

[30] David B. Wexler & Bruce J. Winick, *Foreword* to RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE ix, x-xi (Susan L. Brooks & Robert G. Madden eds., 2010).

[31] *Id.* at x.

[32] *See id.* at xiii.

III. Lawyers as Adversarial, Therapeutic, or Comprehensive Justice Agents?

This author is prepared, for the purposes of this Article, to accept as a given that the single most prominent characteristic of the legal profession is its acceptance of zealous adversarialism. This is not a universal claim; i.e., it does not mean that all lawyers, in all circumstances, for all clients, operate exclusively from a zealous and adversarial framework. In fact, with the ongoing development of the various vectors in the comprehensive justice movement, the hold of adversarialism is continuing to loosen; additionally, the adversarial assumption is less supportable now than it was historically. However, the prominent image of lawyers as zealous advocates still infects both how the general public sees lawyers, and how lawyers, in general terms, understand the demands of their profession. For example, as Menkel-Meadow has written:

> [I]t is very difficult to argue that a lawyer should demonstrate care and empathy for the other side. The very structure of law, as it is created, practiced, and enforced, assumes a duality, an otherness—the defendant, the opposing side . . . . [O]ur legal system is based principally on an adversary model that asks us to see the other side as "other"—as an opponent to be beaten or at least to be gotten the better of as we zealously represent our own side.[33]

She goes on to state that "the Code of Professional Responsibility and the Model Rules of Professional Conduct, encode notions of loyalty to one's own client and a distance, disdain, and, some would say, contempt for the interests of the other side."[34] Menkel-Meadow's purpose is then to consider how, given such a framework, lawyers can possibly be convinced to conduct their practice in more altruistic ways. Menkel-Meadow ponders how lawyers should consider, and perhaps even care for, the other parties to legal disputes.[35]

In this Article, the goals are not as broad as Menkel-Meadow's. This author seeks only to consider how lawyers can be more open to, and caring about, their *own* client's broader interests, and not to consider how lawyers can be made to care for all litigants in general. As has been clearly pointed out in the therapeutic jurisprudence literature, how a lawyer conducts a particular case can have significant impacts upon the client's emotional and psychological well-being; this ought to matter to the lawyer. Accordingly, lawyers must pay

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[33] Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 Ga. St. U. L. Rev. 385, 386 (1992).

[34] *Id.* at 387 (footnotes omitted).

[35] *Id.*

more attention to the fact that their clients are in ongoing relationships with other people, and the interests of those other people are relevant at least to the extent that they reflexively link back to the client's best interests.

For those who do not accept that the single most prominent characteristic of the legal profession is its acceptance of zealous adversarialism, this author leaves it to them to disprove the assumption. The arguments in this Article do not turn upon it. Rather, the arguments are only that lawyer's codes of conduct are premised upon the assumption of this characteristic (as discussed in more detail in Part IV); and, accordingly, they no longer fit with methods of legal practice employed in various vectors of the comprehensive justice movement. Thus, it is time for the codes to be amended or reinterpreted. Should someone successfully disprove the assumption that the legal profession is zealously adversarial, the impact would be to further strengthen the arguments in this Article. The impact of such a disproof would increase the demand for amendment to the adversarial provisions of the codes of conduct to accommodate the less adversarial vectors of the comprehensive justice movement.

While zealous adversarialism has been assumed for the purposes of this Article, it is still useful to critically note examples of the impressions held in connection with zealous adversarialism. This examination will provide the foundation for a deeper understanding of: (1) how code of conduct provisions that are framed with an adversarial intent operate to create ethical problems for comprehensive justice lawyers (Part IV); and (2) how the practical case examples (Part V) demonstrate that clients' actual best interests are sometimes better addressed by moving away from a zealously adversarial approach.

For example, in 1965–1966, Thode wrote that the basic ethic of the trial lawyer is to promote the client's best interests by doing in court what the client could do if he or she was competent (i.e., as a legal advocate).[36] Thode described the only ethic available as that which the law provides.

> [W]hatever is within the framework of law is not merely a possible ethical standard – it is *the* ethical standard for the trial lawyer. . . . Any effort to set up non-authoritative standards . . . based on some brooding omniethic – is in violation of the basic ethic and should be considered unethical.[37]

Thode elevates legal duty from the status of an applied ethic to a theoretical or metaethical standard. Further, Thode emphasizes the role of the lawyer in court and omits the relational context of the client's life. Thus, the client's best interests are defined by the parameters of the legal system, nothing else.

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[36] E. Wayne Thode, *The Canons of Ethics and Trial Advocacy*, 33 TENN. L. REV. 173, 174-75 (1966).

[37] *Id.*

If Thode's statement from 1965 is considered to be an artifact of its time, consider Adams' discussion in 2003. Adams writes, "Lawyers have an ethical obligation to zealously protect the interests of their clients and if they abandoned legal norms, they would have a difficult time understanding their responsibilities."[38] This is in contrast with an approach that directs the lawyer to understand the client's values and actual best interests first, and then to look for ways the legal system may facilitate them.

An even more recent example that accepts zealous adversarialism can be seen in Macfarlane's 2005 report for the Department of Justice Canada on collaborative family law[39] in which she talks about the dissatisfaction of lawyers with the inadequacy of the adversarial approach in family law matters. She discussed how clients talked of being frightened of litigation and pursued collaborative approaches to avoid the expenses and the negative emotional and moral consequences of litigation.[40] She further discussed how clients talked about opportunities for healing and growth in the collaborative processes that were not available through the adversarial process.[41] In the preparatory interviews for Macfarlane's report, one lawyer stated that, "We impose interests on clients because we feel it's their legal right."[42] This "reflects the sometimes-ambiguous relationship between what clients need and want, and the entitlements the legal system offers them. . . . [L]awyers are struggling with the impact of their legal advice and the shadow of the law generally."[43] It is important to notice here the benevolent paternalism involved in "imposing" legal interests on clients. This Article will return to this in more detail below in connection with discussion of the debate between Wexler and Quinn.

The adversarial categorization continues in Anderson's 2007 examination of collaborative practice initiatives between lawyers and non-lawyers.[44] Anderson identified concerns about the ethical implications for both lawyers and the other professionals, given that they operate under different ethical codes and norms—especially in light of the lawyer's stance towards advocacy.[45] While lawyers are well trained in identifying and formulating legal

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[38] GEORGE W. ADAMS, MEDIATING JUSTICE: LEGAL DISPUTE NEGOTIATIONS 19 (2003) (footnote omitted).

[39] *See* JULIE MACFARLANE, DEP'T OF JUSTICE CAN., 2005-FCY-1E, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A Qualitative Study of CFL Cases 1-3 (2005).

[40] *Id.* at 22-24.

[41] *See id*. at viii, 9, 24.

[42] *Id.* at 36 (internal quotation marks removed).

[43] *Id.*

[44] Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 659-70 (2007).

[45] *Id.* at 659.

issues and positions, they are often not fully equipped to deal with the non-legal relationship issues involved in interviewing, counseling, and case planning.[46] One concern is:

> [A] lawyer working with a social worker will adjust her role responsibilities away from the typical unfettered zeal and commitment to client autonomy that her legal training has taught her. Social workers attend to a larger "moral community" and to social justice concerns; lawyers attend to the wishes of their clients.[47]

In this assessment, notice the negative connotations regarding the lawyer's role. This view continues in Anderson's table of values possessed by lawyers versus social workers. The table, among other things, paints lawyers as adversarial, zealous, and individualistic, whereas, it considers social workers to be cooperative, and focused on overall best interests and relationships.[48]

A further passage from Anderson's work states: "For those lawyers who might be considering interdisciplinary collaboration . . . a number of professional responsibility concerns arise. These include: the perceived tension between the lawyer's duty to represent the client's stated interest zealously and the social worker's duty to enhance the client's best interest and well-being . . . ."[49] Here, Anderson entirely separates zealous advocacy from best interests. On the other hand, the *Code* proceeds on the assumption that zealous advocacy either promotes or *constitutes* the client's best interests.

Further, these adversarial assumptions, and the growing challenges to them, are not limited to a North American context. As Diesen discusses, in Sweden there are many lawyers working with more holistic views and in therapeutic ways.[50] Despite the fact that Swedish lawyers are educated as adversarial agents:

> The debate about the role of the defender is dominated by the representatives of the more narrow-minded defence counsel ideals. In an aggressive tone, these members of the Bar repeat that it is always the wishes and interests of the client that the counsel has to observe and follow. But even in that perspective, the lawyer must ask himself or herself: What is in the best interests of the defendant in the long run? . . . The current

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[46] *Id.* at 661.

[47] *Id.* at 663 (footnote omitted).

[48] *Id.* at 666.

[49] *Id.*

[50] Christian Diesen, *Neither Freedom Fighter Nor Saboteur—Some Notes on the Role of Defence Counsel in Sweden*, *in* REHABILITATING LAWYERS, *supra* note 25, at 370, 370-85.

> "problem" is the tendency amongst defenders, starting some 10 years ago, to act as "hired guns," using the *unreflected* will of the defendant as the only gospel.[51]

Diesen's observation nicely portrays the assumption that a hired gun, or zealous adversarial approach, will somehow meet the best interests of the defendant. It neither directly asks the question of what defines a client's best interests nor does it deeply contemplate how one would find the answer.

What can be seen from a brief review of the therapeutic jurisprudence and comprehensive justice literature is that these conceptions of legal practice as entirely zealously adversarial are in the process of change. The problem is that many in the legal profession, and many who comment on the legal profession, are slow to recognize the growth of the various comprehensive justice vectors and their implications for revising understanding of competent legal practice. As early as 1982–1983, Redmount pointed out some of the problems with the lawyers' codes of conduct for newly developing approaches to dispute resolution.[52] For example, Redmount pointed out that the code of conduct does not look at the lawyer as a counselor or negotiator.[53] Redmount's conclusion was that the *Code* contains only a narrow idea of what constitutes legal practice.[54] In his view, legal service focused solely on advocacy provides a product that is "less than competent and complete."[55] Instead, Redmount argued for the need to probe deeper into the client's best interests and better understand the client's needs, feelings, and expectations of legal representation.[56]

It is in this spirit that the therapeutic jurisprudence and comprehensive justice literature began to emerge and continues to develop. As explained by Wexler,[57] therapeutic jurisprudence grew out of mental health law,[58] but has "now become a mental health twist on law *in general*, and in all legal areas."[59] It seeks to humanize the law and directs lawyers to consider law as a social force that can produce behaviors and consequences that are both therapeutic and anti-therapeutic.[60] Therapeutic jurisprudence neither purports to trump other justice values such as due process; nor, does it "support paternalism, coer-

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[51] *Id.* at 384-85.

[52] Robert S. Redmount, *The Nature of Client Counselling and the Code of Professional Conduct*, 47 SASK. L. REV. 186, 194-99 (1982-83).

[53] *See id.* at 195.

[54] *Id.*

[55] *Id.* at 186.

[56] *See id.* at 186, 189-90.

[57] David B. Wexler, *Therapeutic Jurisprudence: An Overview*, *in* REHABILITATING LAWYERS, *supra* note 25, at 3.

[58] *Id.* at 6.

[59] *Id.* at 7.

[60] *Id.* at 3.

cion, and so on."[61] What it does recognize is that "[m]uch of what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law."[62] As Perlin has stated, the "ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential, while not subordinating due process principles."[63] These are considerations that are important to clients, i.e., they affect the client's best interests, but they lie outside the narrowly construed legal case.

In 2000, Stolle, Wexler, and Winick's book[64] attempted to identify and consolidate some of the benefits to be derived from alternative approaches to conflict resolution. In developing elaborate systems of legal rights, and increasingly technical and detailed legal procedures, the concern was that lawyers were losing sight of the people and values the law was supposed to serve.[65] Rather than trying to replace or supplant the adversarial system, the collection of authors in the book strove to examine how psychological and emotional health of individuals can be promoted as important factors among the other principles of rights and justice that vie for superiority of place.

In 2003, Adams provided an insightful examination of the growing beneficial role of mediation as a legal dispute resolution mechanism.[66] Part of his focus examined a lawyer's ethical obligations to zealously defend a client.[67] However, he went on to acknowledge that new duties to advise and encourage settlement had begun to temper some of the adversarial extravagances.[68] In a similar vein, Daicoff has examined some of the values emerging from these alternative approaches.[69] In her view, law is beginning to be seen as an agent of positive change for individuals and society; however, to achieve positive change, extralegal considerations must be undertaken.[70] The unifying features of the comprehensive law movement seek to promote the optimization of human well-being, and the comprehensive law movement embraces a rights-

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[61] *Id.* at 4.

[62] *Id.*

[63] Perlin, *supra* note 24, at 156.

[64] PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 20, at 5-24.

[65] EDWARD A. DAUER, *Foreword* to PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 20, at xiii-xiv.

[66] *See generally* ADAMS, *supra* note 38.

[67] *Id.* at 136-37.

[68] *See generally id.* at 8-12.

[69] *See generally* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L. J. 1, 4-5 (2006).

[70] *Id*.

plus approach to law. Whereas, in Daicoff's view, the traditional approach to law substantially downplays, or even ignores, these extralegal considerations.[71]

For Daicoff, the culmination of these discussions has resulted in what she terms the "comprehensive law movement."[72] As Daicoff has written, there are several "vectors" or alternative approaches to conflict resolution developing as adjuncts within the legal system, as movements external to the legal system, and those that possess elements both internal and external to the legal system.[73] For Daicoff, the developing vectors include areas such as collaborative law, creative problem solving, holistic justice, preventive law, problem-solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.[74]

Adding to Daicoff's work, King et al., in *Non-Adversarial Justice,* identify some additional vectors such as participatory justice, proactive law, comprehensive law, visionary law, diversion, indigenous courts, truth and reconciliation commissions, and managerial justice.[75] Finally, in the recently developing comprehensive justice literature, this author has written that other developments "could also be included, such as peacemaking . . . traditional mediation and arbitration (including interest arbitration and grievance arbitration), and the list may continue to grow."[76] These expanding vectors are resulting in what may be termed the "comprehensive justice movement."[77] If and when these broader understandings of clients' best interests are clarified in legal codes of ethics, then all lawyers (not only the subset of comprehensive justice lawyers) will be required to address these broader concerns. What is now only persuasive for many could become mandatory for all.

Finally, the debate about the suitability of therapeutic jurisprudence versus a more traditional approach to legal representation was at the heart of the dialogue between Wexler and Quinn in Wexler's 2008 book *Rehabilitating Lawyers*.[78] In her articles, Quinn rejects Wexler's suggestion that the incorporation of therapeutic jurisprudence could improve the criminal defense bar.[79] Quinn is of the opinion that many of Wexler's proposed changes are not substantiated

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[71] *Id.* at 4-5.

[72] *Id.* at 3.

[73] *Id.* at 1-3.

[74] *Id.* at 1-2.

[75] *See generally* MICHAEL KING, ARIE FREIBERG, BECKY BATAGOL & ROSS HYAMS, NON-ADVERSARIAL JUSTICE (2009).

[76] Dewhurst, *supra* note 16, at 464.

[77] *Id.*

[78] REHABILITATING LAWYERS, *supra* note 25, at 91-141.

[79] Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, *in* REHABILITATING LAWYERS, *supra* note 25, at 91 *passim*.

and others "such as calls for creative plea bargaining, are already part of the practice of *quality* defense attorneys."[80] Quinn's position is:

> [A] TJ defense lawyer may be overly paternalistic, imposing his interpretation of the facts and his standards of appropriate behavior on the accused; such a lawyer also may not comport with express ethical standards. Instead, the tradition of *zealous and quality* advocacy, whether in a law school clinic or in a public defender's office, best serves the *interests of defendants*.[81]

It is interesting to note that, throughout her articles, Quinn does not sufficiently define what she means by "quality," or more importantly, what criteria should be used to assess it. Further, she seems to link zealousness with quality without providing her own basis to substantiate this link. As well, she refers to the best interests of defendants without providing a foundation for analysis of how one determines those best interests.

With regard to the allegation of paternalism, drawing upon the literature, Quinn relates a concern presented by critics of therapeutic jurisprudence indicating that it is paternalistic and that there are no fixed guidelines as to when an approach is considered therapeutic verses anti-therapeutic.[82] One way this critique may be posed is as follows: What is to be done in a particular case where a therapeutic lawyer is attempting to determine the actual best interests of the client but it becomes clear that there are numerous but inconsistent viable options? One therapeutic lawyer may support a client's taking responsibility for his or her criminal actions. Another therapeutic lawyer might support a client's receiving proper medical or psychiatric care. A third therapeutic lawyer might support the client's removal from an abusive relationship. Finally, a fourth therapeutic lawyer might see the therapeutic value of receiving a judgment from a court following zealous representation in a full trial of the issues. The critique concludes by asking, "How should the therapeutic lawyer arrive at the decision of what is in the client's actual best interests?"

In response, it may be stated that the hypothetical fact scenario is certainly not unusual. The problem comes from how the role of the therapeutic lawyer is understood within the critique. It has not been the position in the therapeutic jurisprudence literature that it is up to the therapeutic jurisprudence lawyer to "arrive at the decision" or "support" one particular case management strategy over another. Nor, does the therapeutic jurisprudence literature embrace a "we know what's best for you" perspective. Rather, it is up to the therapeutic law-

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[80] *Id.* at 91 (emphasis added).
[81] *Id.* (emphasis added).
[82] *See generally id.*

yer to canvas all of the relevant possibilities with the client. Again, as stated by King, a therapeutic jurisprudence lawyer should:

> [E]xplore with the client what the client considers as options to resolve his/her problem. If counselling is not included in the options the client mentions, then the lawyer should raise it as appropriate. Where appropriate, the lawyer could also use motivational interviewing strategies in dialogue with the client. The lawyer should as far as possible support the client's own problem-solving skills. TJ values not only client's choice but their involvement in developing solutions, where possible.[83]

Accordingly, where necessary and client appropriate, the lawyer should recommend appropriate counseling experts to enable the client to make better-informed decisions. Then, it is up to the client to decide what is in his or her actual best interests; the therapeutic lawyer's only remaining task is to support the client by doing what is possible within the law to promote those objectives. Lawyers who begin with a broader focus on their clients—their needs, their interests, their choices, their happiness, etc.—and then look at what is possible within the law to address those interests to the full extent possible, avoid the paternalism critique.

In Wexler's response to Quinn on this point, after having attempted to address her critique, he writes:

> I replied that I thought she had (unintentionally) constructed a "strawperson," and had then proceeded skilfully to tear it down. I tried to explain why what Professor Quinn thought I was saying was not actually what I said or proposed—that, despite some obvious differences, we were, in fact, much closer on many issues than she had suggested. Her response was puzzling to me. Basically, she responded, "Nope, that's not what you're saying!"[84]

Despite Wexler's protestations, and the bulk of the therapeutic jurisprudence literature, Quinn maintained the view that a lawyer practicing in accordance with the principles of therapeutic jurisprudence would somehow be paternalistic, or, at least the lawyer would be more paternalistic than a zealous advocate

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[83] E-mail from Michael S. King to author, *supra* note 14.

[84] David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, *in* REHABILITATING LAWYERS, *supra* note 25, at 129, 129.

who has his or her own approaches that the client must fit into.[85] This does not square well with the comments discussed above from Adams, Anderson, Macfarlane, or with the comments of some of the lawyers in Macfarlane's study. In all of these sources, the authors present us with adversarial lawyers determined to paternalistically impose legal rights on their clients. It seems that paternalism is likely more closely aligned with the style of the particular lawyer rather than the theory of practice to which he or she claims to adhere. None of the approaches—adversarialism, therapeutic jurisprudence, comprehensive justice—mandates paternalism. However, paternalism can occur in any of the approaches, and needs to be guarded against equally vigilantly in each.

With regard to issues of "good" practice, Quinn is willing to accept Wexler's suggestions when they are already "wholly consistent with current conceptions of *good* defense lawyering."[86] She indicates that she will "continue with [her] prior (somewhat similar) engagement of striving to provide good old-fashioned 'zealous' and 'quality' criminal defense representation, and encouraging [her] students to do the same."[87] The question here is, what criteria is Quinn using to conclude what is 'good' or 'quality' legal practice? This is not to say that Quinn has no such criteria; however, they are not sufficiently identified or expanded upon in her articles to fully support her counter-arguments against Wexler's assertions.

For example, Quinn states that "good defense lawyers . . . know that representation of each defendant calls for a range of skills and approaches in the light of defense attorneys' legal and ethical obligations, existing practice standards, and the goals and wants of that individual client."[88] She then further seeks to support this view with reliance upon the National Legal Aid and Defender Association publication of criminal defense standards entitled *Performance Guidelines for Criminal Defense Representation*.[89] Her basis for objecting to Wexler boils down to reliance upon existing ethical obligations and existing practice standards as having the final authoritative word. To the extent that Wexler is arguing for a change in practice standards—as this Article argues for a change in ethical standards—it begs the question to effectively say: "No, your suggested amendment is to be rejected based upon the authority of the existing practice standards and existing ethical standards." When practice standards and ethical standards are being questioned, one cannot simply reas-

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[85] Mae C. Quinn, *Postscript to an RSVP*, *in* REHABILITATING LAWYERS, *supra* note 25, at 137, 137-40.

[86] *See* Quinn, *supra* note 79, at 93 (emphasis added).

[87] *Id.*

[88] *Id.* at 108.

[89] *Id.* at 109.

sert them forcefully as a conclusive counter-argument that rejects the proposed change.

This is not to say that Quinn's position is completely rigid or inflexible. Quinn is clearly prepared to accept a broader range of skills than purely adversarial skills when she states:

> What constitutes "zealousness" or "quality" obviously depends on the particular circumstances, [sic]. Indeed, in some, but by no means all, instances this might mean attempting to improve a client's circumstances, or assisting in client rehabilitation efforts. Thus, good criminal defence attorneys have long recognized their job calls for them to wear any number of hats throughout the course of a given case, not just that of trial lawyer or dogged adversary.[90]

The problem is, how is Quinn (or anyone else for that matter) to know when an additional hat is properly worn and when it should be left off? It is not adequate to simply define what one agrees with as "zealously adversarial" and then to conclude that it is therefore justified, while at the same time defining what one does not agree with as non-zealously adversarial, and then reject it as unjustified.

Quinn is legitimately concerned that recourse to the principles of therapeutic jurisprudence not infringe individual autonomy or personal freedom.[91] However, as discussed above in connection with the paternalism critique, it is not the intention of the therapeutic jurisprudence practitioners, or those practicing in accordance with the principles of the other vectors, to do so. This author argues throughout this Article (particularly in Parts V.B and V.C below) that, in fact, it is only by conceptualizing the client's best interests in their broader context, i.e., by recognizing the client's actual best interests, that one fully respects the client's autonomy and personal freedom. To limit legal representation to the confines of a client's legal best interests necessarily risks sacrificing extralegal values that the client embraces.

Importantly, for the purposes of this Article, Quinn is concerned that practicing in accordance with therapeutic jurisprudence principles does not comply with existing and express ethical standards for legal practice. This author is in partial agreement with her on this point but for opposite reasons. This Article submits that when Quinn does choose to attempt to "improve a client's circumstances" or to assist in "client rehabilitation," she could as easily run afoul of the code of ethics, as could any other comprehensive justice lawyer practicing

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[90] *Id.* at 109-10 (footnotes omitted).

[91] *Id.* at 94, 97.

in accordance with the principles of a particular vector. The solution is not in defining what lies within zealous adversarialism and what lies external to zealous adversarialism. Rather, the solution lies in analyzing, with the client, what meets the client's actual best interests and then amending/ interpreting the rules of conduct in ways that allow for those actual best interests to be pursued.

Again, it begs the question for Quinn (or any other critic for that matter) to object to Wexler's arguments by submitting the very standards that Wexler wants to change as an authoritative barrier to the proposed change. Quinn is concerned that Wexler's "model not only runs the risk of displacing existing defense and clinical community values, but may well conflict with ethical and legal mandates for defense attorneys."[92] But this is the very point at issue, existing defense and clinical community values, and existing ethical standards, need to be amended to the extent that they do not identify and promote a client's actual best interests.

IV. Provisions of the Code Creating Ethical Tension

A. The Canadian Code

Tension between legal and actual best interests can be seen right at the outset of the *Canadian Code*; and, as will be discussed below, the *U.S. Code* is only marginally better and in only limited ways—neither is sufficient to resolve the tension between legal and actual best interests. In the Interpretation of the 2006 version of the *Canadian Code*, the legalistic requirements of the *Canadian Code* are given an early priority: "The term 'lawyer' . . . extends not only to those engaged in private practice but also to those who are employed by governments . . . . in all . . . professional matters, if the requirements or demands of the employer conflict with the standards declared by the Code, the latter must govern."[93] This directive was not limited to refusing to follow illegal instructions; rather, it placed the traditionally conceived role of the lawyer ahead of the client's instructions.

As this provision no longer appears in the 2009 version of the *Canadian Code*, the *Code* does not specifically answer the question of whether the employer's demands or the standards declared by the *Code* are to govern in cases of conflict. To be more responsive to the client's actual best interests the concluding portions of this passage could be amended to read:

> *D1. . . . in all . . . professional matters, the lawyer's first duty is to promote the best interests of the client, limited only by the applicable laws. In fulfilling this first duty the lawyer must*

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[92] *Id.* at 93.

[93] Can. Code of Prof'l Conduct Interpretation (Can. Bar Ass'n 2006).

> *comply with the standards declared by the Code to the full extent possible. Where the best interests of the client conflict with the provisions of the Code the best interests of the client must govern and the lawyer shall not be subject to discipline for acting contrary to the provisions of the Code in such a case.*

A similar concern arises in the provisions regarding the independence of the bar. The *Canadian Code* states: "A lawyer must . . . at all times act in the *best interests* of the client. Many of the professional duties set forth in other chapters of this Code may be seen as aspects of the independence of the bar, including the duty"[94]:

- to discharge all duties with integrity;[95]
- to be honest and candid when advising clients;[96]
- to hold information in strict confidence;[97]
- not to act when there is a conflicting interest;[98]
- to represent the client "resolutely and fearlessly."[99]

The provision regarding the independence of the bar opens with a directive to promote the client's best interests. It then provides examples of how the lawyer must perform her legal duties. The assumption is that acting within the legalistically construed confines of the *Canadian Code* simultaneously meets the client's best interests. In actuality, the referenced provisions do nothing to define the client's "actual best interests" or to require the lawyer to work with the client to identify and assert those interests through a collaboratively constructed plan for legal representation.

Some examples of possible amendments to these passages follow. The Chapter III Rule, which states that "The lawyer must be both honest and candid when advising clients,"[100] could be revised in the following manner:

> *D2. . . . When advising clients the lawyer must always respect the client's autonomy to make final decisions at key decision points during the course of the case. As advisor, a lawyer must provide the client with an informed understanding of the client's legal rights and obligations, explain the practical*

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94 CAN. CODE OF PROF'L CONDUCT ch. XXII, cmt. 1 (Can. Bar Ass'n 2009) (emphasis added).
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.* ch. III.

> *implications that various courses of legal action may have, and recommend that the client consult with other professionals as may be required to come to a fully informed decision on the conduct of the client's case.*

The directive that the lawyer should represent the client resolutely and fearlessly is contained in Commentary 1 to Rule IX. Rule IX reads, in part, as follows: "[T]he lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law."[101] Commentary 1 reads in part:

> The advocate's duty to the client is "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" . . . .[102]

This rule could be revised as follows:

> *D3. When representing the client and proposing possible legal courses of action for the client's consideration, the lawyer must advise the client of the foreseeable consequences that waiving or enforcing any particular legal right may have on the client's other legal rights and extra-legal interests. Where particular rights are to be waived this should be done only with the client's consent, preferably in writing.*

Returning to an examination of the *Canadian Code*, the priority for the lawyer's traditional role continues. "In adversary proceedings, the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged . . . to assist an adversary or advance matters derogatory to the *client's case*."[103] Further, "counsel must be fearless and independent in the defence of his client's rights. . . . He must be completely selfless in standing up courageously for his client's rights, and he should never . . . sacrifice[ ] his *client's interests* on the altar of expediency. . ."[104] This direction is unfortunately linked to "client's interests" and "client's case" in the same unexamined ways discussed above. As well, note the classification of other parties as an

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[101] *Id.* ch. IX.

[102] *Id.* ch. IX, cmt. 1 (footnote omitted).

[103] *Id.* ch. IX, cmt. 17 (emphasis added).

[104] *Id.* ch. IX, n.1 (alteration in original) (emphasis added) (internal quotation mark omitted) (quoting J. A. Schroeder, *Some Ethical Problems in Criminal Law*, *in* LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 1963, at 87, 102 (1963)).

"adversary," as someone the lawyer has no obligation to assist. This is the operative and adversarial definition of 'justice" and "ethical legal representation" of the client that lies underneath the structure of the *Canadian Code*.

These commentaries, again, fall under the Chapter IX rule to represent the client resolutely, honorably, and within the limits of the law. They clearly indicate the adversarial foundation upon which this rule has been interpreted. The rule could be amended, or the commentaries could be revised, in the following way:

> *D4. In adversary proceedings, the lawyer's function as advocate is openly and necessarily partisan and is to be directed at attaining the client's best interests. However, in pursuing the client's best interests the lawyer is permitted to assist an adversary and to advance matters derogatory to any of the client's particular legal rights if doing so promotes the client's broader best interests and is done with the client's consent, preferably in writing.*

Another example where the "interests of the client" are insufficiently examined occurs in the provisions dealing with competence and quality of service. The *Canadian Code* states that "[t]he lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf."[105] Competence here goes beyond formal qualification to practice law. "It includes knowledge, skill, and the ability to use [both] effectively in the *interests of the client*."[106] In King's words: "this will be needed to ensure a therapeutic outcome as well as one that is in the client's legal best interests. A lawyer needs to be competent in TJ skills, which TJ would see as rightly within the legal arena."[107]

Thus, supporters of a more robust understanding of the client's actual best interests still want lawyers to use their knowledge and skills effectively in the best interests of the client. But again, the current emphasis centers on the demands of the legal case. No expanded analysis of the "interests of the client" is provided. There is neither a clear indication that the lawyer's knowledge and skill must extend to considerations beyond the legal arena, nor is there a requirement for the lawyer to engage the assistance of other professionals to supplement the lawyer's legal knowledge, skills, and abilities. This is akin to a cardiac surgeon performing open-heart surgery without the benefit of assistance and advice from an anesthesiologist. Further, a medical code of conduct provision that required the cardiac surgeon to consult with an anesthesiologist would

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105 *Id.* ch. II, R. 1.

106 *Id.* ch. II, cmt. 1 (emphasis added).

107 E-mail from Michael S. King to author, *supra* note 14.

not be interpreted as requiring the cardiac surgeon to *become* an anesthesiologist. By analogy, a legal code of conduct requiring lawyers to consult with other experts as required should not be interpreted as requiring lawyers to *become* experts in all these other areas. Here, the Code could be amended with the inclusion of a provision of the following kind:[108]

> *D5. When advising a client, and obtaining the client's instructions, the lawyer must be guided first and foremost by respect for the client's autonomy. The lawyer must work with the client to determine the client's best interests and this shall include consideration of the client's legal interests and how those legal interests impact upon the client's broader non-legal needs, interests and desires. The lawyer should at all times strive to achieve the most effective resolution of the client's dispute. This may include advising the client at appropriate stages as to the desirability of attempting a settlement and/or providing references to alternative dispute resolution opportunities and other experts as required to facilitate the identification and attainment of the client's best interests.*

Perhaps it is assumed that by providing appropriate instructions, the client will be able to take care of his or her own best interests. However, clients often require expert advice that goes beyond expert legal advice. In a business context involving the purchase of land, the client may need the advice of environmental auditors or tax accountants. In a lawsuit over deficient construction, the client may need the advice of an architect or engineer. In the case of criminal charges involving sexual offenses within the family, the client may require information from psychologists, counselors, social workers, government child protection agencies, and perhaps many others. It is the lawyer's duty to identify these needs and arrange for/recommend the necessary consultations. This is in keeping with Ward's concept of "zealous counseling," and is in accord with this author's arguments regarding the lawyer's ethical obligation to work with the client to identify and promote the client's actual best interests.

Knowing only what is possible within the law may not provide sufficient information for the client's deliberations. It may not provide the client with all that is necessary for rational decision-making, or with the level of counseling expertise necessary to challenge irrational decision-making. If a client's decision-making process is irrational or counterproductive, then counsel's unquestioningly following the client's instructions by pursuing the narrow legal case

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[108] Here this author draws upon, in part, the provisions of the *Code of Conduct for Lawyers in the European Union*, § 3.7.1. CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION § 3.7.1 (Council of Bars & Law Societies of Eur. 2002).

simply perpetuates that irrationality. This says nothing of cases where a client claims to want one thing, but acts at odds with the expressed goal. The problem of weakness of the will, and doing what one knows is bad for him, is not just an academic discussion in the philosophical literature. If the client is engaging in poor decision-making, or if there is cognitive dissonance between a client's stated goals and actions, the client may need advice from someone with more specialized training than the lawyer possesses. As Birgden has stated, "the defense lawyer can engage the offender to move to contemplation of change rather than increase resistance."[109] Further, this author submits that when such a contemplation of change is in keeping with the client's actual best interests, then the lawyer ought to have a professional obligation to engage the offender in this contemplation. Even when clients are fully cognizant of their actual best interests there may still be problems in determining how their interests interface with their legal rights. If the lawyer consulted with other experts—either directly or in collaboration with the client—it would facilitate legal outcomes more compatible with the client's actual best interests.

Returning to the *Canadian Code*, a final example in which the traditional understanding poses potential difficulties may be drawn from the *Code* provisions regarding public statements about the client's affairs. The *Canadian Code* states: "before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the *best interests* of the client and *within the scope of the retainer*."[110] On a first analysis, this seems eminently reasonable. But what does it reveal about the underlying attitude in the *Canadian Code*? Clearly one hires a lawyer for the lawyer's legal expertise in connection with a particular legal concern. However, while the particular legal issue may appear to be quite narrow, it does not follow that the client's actual best interests are that narrow. Yet, this provision equates the scope of the retainer with the narrowly understood boundaries of the client's legal best interests, and it limits the lawyer's service to those narrow constraints.

Instead, there should be an understanding of the client's actual best interests first, and then a consideration of how the scope of the retainer is to be understood. Even from a strictly "legal best interests" viewpoint, there are times when particular legal rights are waived for overall legal benefits. Legal adversaries make concessions to strengthen their overall position or to eliminate secondary issues so their time, resources, and energy can be directed more effectively. From the broader philosophical perspective, rights are useful only

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[109] Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 351, 360 (2004).

[110] CAN. CODE OF PROF'L CONDUCT ch. XVIII, cmt. 2 (Can. Bar Ass'n 2009) (emphasis added).

when they support autonomy and facilitate pursuit of particular interests. If a lawyer is not aware of a client's actual best interests, how can he effectively advise the client on when to assert or waive rights—to promote positive consequences and avoid undesirable repercussions overall?

To summarize this brief examination, one does not see *Canadian Code* provisions that define how lawyers are to understand the client's best interests. Instead, one sees explanations of the lawyer's duties to:

- prioritize the code over conflicting client's interests;
- measure professional expertise, independence, quality, and competence of legal services by preserving and promoting the client's legal rights;
- advance the client's legal case by acting as a partisan advocate;
- interpret the client's best interests and the application of the lawyer's professional skills within these bounds; and
- limit representations to the scope of the retainer as traditionally and narrowly understood.

Without a more detailed analysis, the legal result may be in keeping with the client's legal best interests, but significantly less than optimal for the client's actual best interests.

B. The U.S. Code

In the *U.S. Code*, the situation is somewhat more amenable to a broader view of the client's best interests; however, the broader view is not directly embraced, and the narrower view focused on legal best interests, is always close at hand. For example, Section 2 of the Preamble of the *U.S. Code* states:

> [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. . . . As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[111]

When acting as an advocate, the pre-eminence of the adversarial model and the best interests of the legal case are clear; the rules of the adversary system dictate the scope of the lawyer's intervention. When acting as an adviser or evaluator, there would seem to be more room for an analysis of the client's actual best interests, depending on how broadly one interprets "practical implications"

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[111] MODEL RULES OF PROF'L CONDUCT pmbl. § 2 (2010).

and "legal affairs." However, despite some added room for broader considerations, there is no definitive direction for lawyers to be guided by the client's actual best interests. Instead, subsequent revisions tend to limit the scope of these broader considerations, rather than expanding upon them. This provision could be amended in ways similar to *D2* above.

As examples of provisions that limit the scope of these broader considerations, one can consider Sections 3 and 9 of the Preamble. Section 3 states: "[A] lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."[112] Here, it is reasonable to assume that the comprehensive justice lawyer, pursuing resolution of the dispute along a different dispute resolution vector, could be guided by the framework of the vector.

However, the scope of this permission is quickly limited by the requirements of Section 9 of the Preamble that states:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.[113]

It would appear the tenents of the alternative dispute resolution vector would only be acceptable for so long as those tenents do not conflict with the adversarial requirements of the *Code*. This seems to be the inevitable conclusion when one interprets Section 3 in light of Section 9. Section 9 discusses the resolution of ethical problems arising from conflict between the demands of the legal system, the lawyer's own ethical tenets, and the lawyer's obligations to her client. The Section initially appears to acknowledge the need for more comprehensive ethical consideration in the resolution of these disputes when it

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[112] *Id.* pmbl. § 3.
[113] *Id.* pmbl. § 9.

calls for "sensitive professional and moral judgment."[114] However, the breadth of this provision is quickly reined in by mandating that these judgments are to be "guided by the basic principles underlying the Rules. . . . includ[ing] the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law . . . ."[115]

This conclusion is further supported by analysis of Section 15 in which the Preamble considers the possibility of larger context for properly conducting legal practice; however, the breadth of this possibility is quickly limited in scope by confining the broader considerations to the scope of the "larger legal context." Section 15 of the Preamble states that the larger legal context "includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."[116] These provisions could also be amended in ways similar to *D1* and *D5* above, with an emphasis on the lawyer's first duty—to promote the client's best interests limited only by the applicable laws. Then, the provisions could be amended to direct the lawyer to consider alternative resolution mechanisms that may be more effective in resolving the client's legal and extra-legal concerns. Effectively, this would allow and direct lawyers to apply the principles underlying the various vectors of the comprehensive justice movement without running afoul of the code of conduct for doing so.

Returning to Sections 3, 9, and 15 of the Preamble, the lawyer may act in a dispute resolution capacity, but when conflicts arise in this broader capacity, or in practice in general, the lawyer is to be guided by the basic principles underlying the *Code*. Those basic principles require the lawyer to zealously protect the client's legal interests and to prioritize the larger legal context over broader ethical considerations. Based upon this, is it reasonable to conclude that the lawyer's obligations are constrained to promotion of the legal case and the legal best interests of the client? Here, Section 16 of the Preamble provides a somewhat conflicting response. Section 16 states:

> Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely

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114 *Id.*

115 *Id.*

116 *Id.* pmbl. § 15.

> defined by legal rules. The Rules simply provide a framework for the ethical practice of law.[117]

It is difficult to understand how to reconcile the first portion of this directive with the second. The opening portion of this directive clearly indicates that compliance with the rules is enforceable through disciplinary proceedings, and Section 19 affirms this by stating: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."[118] Section 20 goes on to enforce the pre-eminence of the Rules when it states, "[S]ince the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[119] However, these tensions would be reconciled by the suggested amendment in *D1*: "Where the best interests of the client conflict with the provisions of the Code the best interests of the client must govern and the lawyer shall not be subject to discipline for acting contrary to the provisions of the Code in such a case."

Given that a lawyer is subject to disciplinary proceedings for failure to comply with the Rules, it is not exactly clear how to adequately define these expanded worthwhile moral and ethical considerations. It also is not clear how and when to draw upon these considerations to countermand or supplement the Rules' directives without a provision like *D1*. This author's argument is that promotion of the client's actual best interests justifies such a direction, and further, that the *Code* must be revised where necessary to clearly recognize the nature of a client's actual best interests and the legitimacy of the comprehensive justice lawyer's decision to conduct the case in accordance with them. In King's words:

> [If this] interpretation is not correct, it is difficult to see how lawyers could practice in drug courts, mental health courts and the like in the kind of cases . . . referred to above (e.g., pleas of guilty where a possible defence arises) without compromising ethical principles. Perhaps the very existence of these courts in the established legal framework lends support to . . . [the] wider interpretation.[120]

Other examples may be drawn from the *U.S. Code* to demonstrate how Rules that initially appear to allow for broader consideration of the clients' situations are soon constrained by the requirements of the legal adversarial

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[117] *Id.* pmbl. § 16.
[118] *Id.* pmbl. § 19.
[119] *Id.* pmbl. § 20.
[120] E-mail from Michael S. King to author, *supra* note 14.

arena. For example, Rule 1.2(a) on its face appears to provide more latitude for legal representation to be worked into the overall purposes of the client's life. It states:

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . .[121]

But, how is this understood in practice? Commentary 1.2 [1] sheds light on how this directive is practically understood. The Commentary states: "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."[122] To highlight the gist of this Commentary, the client has ultimate authority but only within the scope of the lawyer's professional obligations. In some ways, this is eminently reasonable. The client could not possibly expect to direct the lawyer outside of the boundaries of the lawyer's professional obligations and expertise. So far so good. The problem, however, comes with the restricted understanding of the "lawyer's professional obligations" as discussed above and elsewhere in this Article. Here, no draft amendment is required. The provisions of Rule 1.2(a) would be adequate if uncoupled from the adversarial directive on how to interpret them. Here is where a more robust interpretation is required to promote the client's actual best interests.

Further explanation regarding the lawyer's obligation to consult the client comes in Rule 1.4(a)(5), which states that the lawyer shall "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct . . . ."[123] In a similar vein, Rule 1.16(a)(1) requires the lawyer to withdraw if the representation will "result in violation of the rules of professional conduct."[124] Two observations may be made here. First of all, the argument throughout is that legal practice understandings of what is permitted by the Rules needs to be expanded. Secondly, rather than simply drawing limits

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[121] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010).
[122] *Id.* R. 1.2, cmt. 1.
[123] *Id.* R. 1.4(a)(5).
[124] *Id.* R. 1.16(a)(1).

around the scope of legal representation, and thus presumably leaving the client to deal with out-of-scope issues on his or her own, the Rules could impose an obligation upon the lawyer to recommend consultation with experts in other fields. This is what is contemplated in proposed amendment *D5*. Alternatively, or additionally, *D5* could be supplemented with an additional rule directing the lawyer to work as part of an interdisciplinary team when necessary to ensure that proposed legal resolutions are compatible with the non-legal elements of the client's actual best interests. Such a rule could read as follows:

> *D6. Where the client chooses to consult with other experts, or pursue alternate dispute resolution opportunities, the lawyer should advise the client regarding the impact of these choices on the client's legal rights. The lawyer may work with other non-legal experts as part of an interdisciplinary team to assist the client's decision making. Where the client elects, preferably in writing, to forgo particular legal rights in pursuit of broader best interests, the lawyer shall not be in ethical breach by facilitating implementation of the client's election.*

Perhaps the most positive affirmation of client autonomy and support for the client's actual best interests in the *U.S. Code* is set out in Rule 2.1 which states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[125] If other provisions in the *U.S. Code* were more consistent with this Rule, and expanded upon it, there would be more room for lawyers to respond to the client's actual best interests. But, as has been seen in the analysis of some of the other Rules, this internal consistency has yet to be achieved.

However, in the commentaries on Rule 2.1, the extended implications of the Rule are beginning to be recognized. For example, Commentaries 2.1[4] & [5] state:

> [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a rec-

[125] *Id.* R. 2.1.

> ommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.[126]
>
> [5] . . . Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.[127]

This Rule and the related commentaries are promising for an expanded understanding of the client's actual best interests and lawyer's obligations to come to grips with those broader best interests and facilitate them when possible. Unfortunately, at present they appear as exceptions to the general tenor of the *U.S. Code* rather than forming its central premise.

V. Case Examples

A. Case Law Examples on Proper Representation and Professional Negligence

Let us return, then, to the initial question asked earlier (in Part II): how does an understanding of the client's best interests affect deliberations about entering a guilty plea? Also, given the adversarial tenor of the codes of conduct, the related question is how will lawyers be dealt with if they stray too far from these adversarial directives as they pursue their client's best interests? Therapeutic jurisprudence directs lawyers to consider how the legal process and rehabilitation affects the psychosocial well-being of clients, their families, and their communities.[128] Social-normative values must be balanced with the normative values of the rule of law and other legal practice principles.[129] In Winick's words:

> [T]hese consequences should be taken into account in reforming law, when consistent with other important normative values, in the direction of making it less antitherapeutic and more therapeutic. It is a mental health approach to law and the way it is applied, suggesting the need for law makers and law appliers to be sensitive to law's impact on psycholog-

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[126] *Id.* R. 2.1, cmt. 4.

[127] *Id.* R. 2.1, cmt. 5.

[128] *See* Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* Practicing Therapeutic Jurisprudence: Law as a Helping Profession, *supra* note 20, at 5-44.

[129] *Id.*

> ical health and to perform their roles with an awareness of basic principles of psychology.[130]

How would this apply to cases where conviction is uncertain without the accused's cooperation, and when the accused is not initially prepared to admit the necessary criminal elements? What if a psychosocial understanding of the client's best interests suggests it would be preferable to plead guilty to the offense charged, and also to self-disclose and plead guilty to other similar offenses with which the accused has not yet been charged?

Given traditional perceptions of legal defense work, these questions are counter-intuitive at best. In the *Canadian Code*, the lawyer may enter a guilty plea to the offense charged only when:

> (a) an acquittal is uncertain or unlikely;
> (b) the client admits all the required criminal elements;
> (c) the client knows the consequences of the plea; and
> (d) the client so instructs, preferably in writing.[131]

In contrast with the developing approaches, the adversarial model simply looks at what is possible within traditional perspectives on proper legal practice (most often in isolation from other disciplines) and fits the client's best interests within that narrow range of legally-derived possibilities. If an acquittal is possible, then plead not guilty; additionally, in all cases provide a rigorous defense.

What follows is not intended to be in any way a comprehensive analysis of the case law on professional negligence, the propriety of entering a guilty plea, or the provisions for withdrawing a guilty plea. Rather, this very brief analysis is intended only to identify the kinds of issues that require additional consideration. Further, this brief commentary is limited to Canadian case law; undoubtedly there will be many parallels with, and some differences from, American case law and the case law of other jurisdictions that require further consideration.

Given these provisos, it may be stated that the case law supports the adversarial slant of the *Canadian Code*. The professional negligence cases hold that a lawyer is negligent if a course of conduct was undertaken that failed to meet the same standard as an ordinarily competent solicitor would have pursued.[132] If the comprehensive justice lawyer undertakes an action that results in harm to the client (e.g., more extensive jail time, conviction on charges for which the

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[130] *See* Winick, *Role of the Criminal Defense Lawyer*, *supra* note 20, at 251-52.

[131] CAN. CODE OF PROF'L CONDUCT ch. IX, cmt. 13 (Can. Bar Ass'n 2009).

[132] *See* Negligence by Lawyer, 2003 CANADIAN ENCYCLOPEDIC DIGEST § 468, at X.1.(b); *see also* Cent. & E. Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 150-51 (Can.), *varied on rehearing* [1988] 1 S.C.R. 1206 (Can.).

client may otherwise not have been convicted, etc.), there is a potential claim against the lawyer for professional negligence.

To get an idea of the currently relevant standard, it is instructive to look briefly at the case law surrounding permission to withdraw a guilty plea. Motions to withdraw a guilty plea are sometimes seen when the sentence imposed is more severe than anticipated by the client. The client, having second thoughts, hires a new lawyer to undo the work of the initial lawyer. The courts have held that an accused may change his plea if there are "valid grounds" for doing so.[133] For example, if the accused did not appreciate the nature of the charge, did not intend to admit guilt, or upon the admitted facts the accused could not have been convicted of the offense charged.[134] As well, the plea may be changed if the accused pled guilty out of hopelessness[135] or coercion, or if the plea was in some other way non-voluntary.[136]

Basically, an accused may change a guilty plea if there are valid reasons to believe an acquittal was possible but not actively pursued. For as long as the "ordinarily competent lawyer" is focused on a narrower form of legal representation than the comprehensive justice lawyer, the actions of the comprehensive justice lawyer may not be sufficient to avoid a claim in negligence. It may not be sufficient despite the fact that the lawyer's approach deals more effectively with factors beyond the client's narrow legal rights. While a claim in negligence for improperly entering a guilty plea(s) is by no means certain to succeed, it is a plausible cause of action. Lawyers may protect themselves by obtaining fully informed consent, evidenced by clearly signed written instructions from their clients. However, this accepts traditional legal practice as the default position. It does nothing to specifically address how lawyers ought to understand and promote their client's overall best interests.

B. A Brief Review of Sexual Offender Treatment Literature

Before reviewing some actual case examples in Part V.C. and considering what they tell us about how our understanding of the client's best interests affect deliberations about entering a guilty plea, it will be useful to provide a brief review of the sexual offender treatment literature to support the examples that will be discussed in more detail below. To repeat what has been stated several times throughout, the discussions involving sexual offenders are presented as examples only; they are not exhaustive of the scope of the arguments being made in this Article.

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133 R. v. Bamsey, [1960] S.C.R. 294, 298 (Can.).

134 Adgey v. R. (1973), [1975] 2 S.C.R. 426, 426-27 (Can.).

135 R. v. Lodge, [1996] O.J. No. 2365, para. 13 (Can. Ont. Gen. Div.).

136 R. v. Lundberg, 2008 CarswellSask 212, para. 3 (Can. Sask. C.A.) (WL).

While there are several theories about why sexual offending occurs, what is generally agreed is that treatment for sex offenders is a public relations disaster. The general public wants ever more severe punishments in the mistaken belief this will stop recidivism.[137] What this attempts to promote is punishment and deterrence for the offender, and prevention of harm to future victims; what it ignores, almost entirely, is accountability and rehabilitation for the offender and restitution to past victims. Instead, there is a direct relationship between increasing the severity of punishment and the offender's motivation to avoid responsibility. As Birgden summarizes, "Sentencing laws *per se* do not reduce reoffending and empirical evidence indicates that intensified criminal sanctioning and deterrence can even increase reoffending."[138] As Winick concludes, there is a lack of evidence that such approaches are effective in reducing offending.[139]

While it is not possible to resolve the debate on the effectiveness of sex offender treatment in this Article, a few of the more salient points are worthy of note. First, for those who maintain that there is no evidence of the effectiveness of sex offender treatment, research studies have shown that the average rate of recidivism over a five-year period is between fourteen and twenty percent for Canadian and American offenders in the community.[140] Sexual recidivism rates vary according to the type of offense and the level of treatment that an individual experiences.[141] For example, incest perpetrators have the lowest rate of recidivism, i.e., between four and ten percent.[142]

Layton MacKenzie performed a comprehensive and detailed examination of 284 intervention policies and programs involving rehabilitation and offender treatment, addiction treatment, punishment, and deterrence theories. She was able to provide evidentiary support for the conclusion that virtually all successful programs were based upon "human service components" and "not based on a control or deterrent philosophy."[143] In her words:

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137 TONY WARD, DEVON L. L. POLASCHEK & ANTHONY R. BEECH, THEORIES OF SEXUAL OFFENDING 263 (2006).

138 Birgden, *supra* note 109, at 355 (drawing upon research findings from McGuire).

139 Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 213, 219-20 (Bruce J. Winick & John Q. La Fond eds., 2003).

140 W. L. Marshall & H. E. Barbaree, *Outcomes of Comprehensive Cognitive-Behavioral Treatment Programs*, *in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363, 378-79 (W. L. Marshall, D. R. Laws & H. E. Barbaree eds., 1990).

141 *Id.* at 371-79.

142 *Id.* at 371.

143 DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS 333 (2006).

> None of the interventions focusing on punishment, deterrence, or control were found to reduce recidivism. . . . There is now a sufficient body of research to draw conclusions that programs such as boot camps, Scared Straight, arrests for domestic violence, intensive supervision . . . are not effective in reducing recidivism. These programs may fulfill other goals of corrections but they are not effective in reducing recidivism. . . . There is some evidence that punishment, deterrence, or control-type programs could be effective if they included human service, rehabilitation, or treatment components; however, as yet, there is little research examining such combined programs.[144]

Further, these evidentiary results were consistent with Layton MacKenzie's theoretical meta-analysis and with the theoretical meta-analysis of other researchers whose work she reviewed.[145] Perhaps most importantly, "There is sufficient evidence to reject the 'nothing works' mantra."[146]

At a November 2011 conference of the Association for the Treatment of Sexual Abuse, the consensus was that the American approach to the incarceration of sexual offenders only increases the likelihood that they will reoffend. Instead, these researchers emphasized the importance of treatment to reduce recidivism rates.[147] Certainly public, governmental, and justice system support for the opinions of these experts is not unanimous.[148] However, one initial research study found that treatment initiatives can reduce recidivism by as much as seventy percent; and, a second study, attempting to replicate the results of the first study in a different community, achieved results of up to an eighty-three percent reduction in recidivism.[149]

Rather than adopting a punitive model not supported by the data, two of the approaches that seem to be producing the most effective results are the Risk-Needs-Responsivity Model ("RNR") of offender rehabilitation and the Good Lives Model ("GL"). In the RNR Model, risk is assessed as the possibility for

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144 *Id.* at 334.

145 *Id.* at 53-65, 333.

146 *Id.* at 345-46.

147 Tracy Clark-Flory, *Child Abuse: We're Making the Problem Worse*, SALON (Nov. 13, 2011, 10:00 AM), http://www.salon.com/2011/11/103/child_Abuse_were_making_the_problem_worse.

148 *See* Tom Blackwell, *Sex Abuse Researchers Tout Rehab, Not Prison*, NAT'L POST (Can.) (Nov. 11, 2003), http://news.nationalpost.com/2011/11/03/health-care-approach-better-at-curbing-sex-abuse-than-jail-expert.

149 Robin J. Wilson, Franca Cortoni & Andrew J. McWhinnie, *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 412, 412 (2009).

causing harm.[150] Risk assessments are founded upon value assessments drawn from various sources.[151] They may include: (1) factors of personal disposition such as psychopathic or antisocial character disorders; (2) historical factors that indicate prior participation in, or exposure to, harmful, criminal, or violent situations; (3) contextual factors such as deviant social networks or absence of social supports; or (4) psychological factors related to mental disorders or poor levels of functioning.[152] Once these factors have been determined, the next step is to identify the corresponding client needs. The goal of therapy is to provide the necessary support and counseling to minimize the risks of future harmful events and to promote accountability if harm does occur.[153]

In the RNR Model, therapeutic interventions are designed to manage thoughts, feelings, attitudes, and behaviors that lead to sexual offending. It has been found that:

> [P]rograms that target specific criminogenic needs appear to be the most effective. . . . [These needs may include addressing the problems of] access to potential victims, insufficient or inappropriate employment, inappropriate living circumstances, inappropriate use of leisure time, substance misuse, intimacy deficits, emotional management deficits, sexual preoccupation, deviant sexual interests, deviant sexual arousal, attitudes supportive of offending, antisocial lifestyle and associates, and lack of cooperation with supervision.[154]

What can be clearly seen is that offending behavior occurs in the context of the accused's life. If the defense lawyer wants to respond to the accused's actual best interests she cannot view a particular crime as occurring in isolation. The RNR Model has demonstrated growing success both in predicting the possibility of future crime and in providing rehabilitation focus that has produced notable reductions in recidivism. This should be a wake-up call to an adversarial system approach that conceptualizes the legal best interests as being equivalent to actual best interests.

The GL Model goes further than the RNR model. Rather than focusing only on preventing future harm and accountability, the GL Model looks at the

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150 JAMES BONTA & D.A. ANDREWS, PUB. SAFETY CAN., 2007-06, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION 3-7 (2007).

151 *Id.*

152 TONY WARD & SHADD MARUNA, REHABILITATION: BEYOND THE RISK PARADIGM 46 (2007).

153 *Id.* at 45.

154 ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, PRACTICE STANDARDS AND GUIDELINES FOR MEMBERS OF THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS 19 (2005).

clients' strengths to engage clients in proactive life changes.[155] What is critical is that the GL Model does not postulate some objective external standard in order to live a good life. What is required is that people identify their strengths and employ them in pursuing a good life. This approach is able to account for differences in capacities and cultures while the individuals still remain directive and determinative of a positive life path. The GL Model goes one step further than the RNR Model. Not only must offending behavior be seen in a relational context, rehabilitation must incorporate therapeutic and social interventions that help the offender to structure a more virtuous life.

As Birgden explains, "clinicians should consider moral questions such as what constitutes a meaningful life."[156] "A strength-based approach asks what an offender can contribute."[157] "From this viewpoint, rehabilitation should be based on a good lives model (GLM) that is holistic and driven by sex offender well-being."[158] She goes on to state:

> [T]he GLM determines the necessary conditions required to meet offenders' needs in more adaptive ways. Internal conditions are skills and capabilities (e.g., interpersonal skills) and external conditions are opportunities and supports (e.g., meaningful employment away from access to children). The GLM addresses strengths and deficits and aims to develop an individually tailored plan for treatment that combines the promotion of human goods with risk reduction. A primary goal is to motivate offenders to ask "How can I live my life differently?" and in this respect, the GLM is an example of a lifestyle rebuilding approach.[159]

By starting with an examination of the offender's skills, capabilities and strengths, and then building upon them, the GL Model is more compatible with the offender's actual best interests.

Obviously, much more could be said about theories of offender rehabilitation. What is clear is that these new approaches go beyond the adversarial approach, beyond the legalistic skills of the lawyers. However, implementation of the tools of the legal system in conjunction with expert advice on the RNR

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155 *The Theory – More Detail*, GOOD LIVES MODEL, http://www.goodlivesmodel.com/glm/GLM_Theory2.html (last visited June 11, 2013).

156 Birgden, *supra* note 109, at 352 (citing Tony Ward & Claire A. Stewart, *The Treatment of Sex Offenders: Risk Management and Good Lives*, 34 PROF PSYCHOL: RES. AND PRAC. 353, 353 (2003)).

157 *Id.* (citing Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry court" Concept From a Strengths-Based Perspective*, 4 W. Criminology Rev. 91, 97 (2003)).

158 *Id.* (citing Ward & Stewart, *supra* note 156, at 356-60).

159 *Id.* at 353.

model and the GL model, for example, can no longer be avoided in ethical and competent legal practice. Lawyers must actively engage other professionals if they have any hope of meeting their clients' actual best interests. Without this engagement, a criminal defense strategy to avoid accountability and legal sanction attempts to resolve the legal issues at the expense of creating additional problems. With an acquittal (i.e., in cases where offending behavior has actually occurred), because "antisocial behaviour is reinforced through rewards or escape from painful stimuli, it is likely to be strengthened and become part of a person's general repertoire in the future."[160] Unless offenders are held accountable and offered positive opportunities for rehabilitation and growth, the tendency will be for them to seek support for the patterns of thinking that facilitate their offending behaviors. In the cycle of offending, offenders engage in cognitive dissonance to separate them from behaviors they know are socially unacceptable. The offender's cognitive dissonance is supported by a legal system focused on denial of offending behavior and lack of responsibility.

As stated at the outset of this Part, it is beyond the scope of this Article to pursue the issue of the effectiveness of treatment for sexual offenders at any deeper length or to conclusively prove the overall efficacy of sex offender treatment. Further, it is clearly not possible to consider the relevant treatment possibilities for all other areas of offending or the possible expert contributions for clients who have other legal concerns. The main point to take away from the brief discussion above is that lawyers must engage with other experts as necessary to find out the possible contributions that the other experts can make to determining and providing for the actual best interests of clients in the given fact situation of the case. The lawyer's task is then to use her legal expertise to the full extent possible to interface with these other available expert services. It is only in these ways that the client's actual best interests can be uncovered with the client's direct input, and optimally realized with the legal expert's services.

To reiterate, lawyers do not need to be intimately familiar with this literature so that they can provide psychological treatment or other expert advice for their clients. Instead, they must only be sufficiently familiar with the literature to understand when treatment is a viable option and potentially facilitative of the clients' actual best interests. It is intended that the process of uncovering the clients' actual best interests would apply for those involved with substance abuse problems, pipeline construction approval, tax evasion proceedings, negligent construction, or virtually any other issue that brings a client to the lawyer's office. In those cases, the lawyer would need to be sufficiently acquainted with scope of practice of addiction counselors, environmental auditors, forensic

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[160] WARD, POLASCHEK & BEECH, *supra* note 137, at 265.

accountants, civil engineers, or other relevant experts. The additional skill that needs to be possessed by the lawyer is the ability to meaningfully and actively incorporate this broader advice into the lawyer's case planning considerations when advising the client and seeking the client's instructions.

C. Client Case Examples

The possibility of conviction being in the accused's actual best interests was introduced above. This author suggested that this might be the case even if the client is not initially prepared to admit the necessary criminal elements. These ideas are based upon mental health literature that argues accountability; punishment and treatment are often in the client's actual best interests. In what follows, examples of sexual offenders who engage in compulsive and repetitive behavioral crimes are being used because they clarify the need for intervention beyond simple legal intervention. They are also being used because they may well be the most difficult case to make due to: doubts about the efficacy of treatment; lack of empathy and public support for sexual offender rehabilitation; and the visceral reactions elicited by these kinds of offenses and their perpetrators. If the arguments in this Article are plausible in the case of sexual offending, then it should be a much easier case to make similar arguments in other areas of law. Of course, the particular issues, evidence, and extra-legal expert advice required in other cases will vary with the facts of those cases.

To bring life to these assertions, it is useful to look at some actual case examples. In the Foster case the accused was a seventh-to-ninth-grade teacher charged with nine counts of sexual assault against students spanning a sixteen-year period.[161] After a vigorous defense the teacher was convicted on five charges, and received six-and-one-half years on the first charge, with all other sentences to be served concurrently.[162] He appealed and lost.[163] After serving his sentence, Mr. Foster was re-arrested and charged with additional offenses from the same sixteen-year period.[164] He was again convicted and sentenced for offenses that could have been dealt with concurrently at the time of the first trial.

In the Toft case, the accused worked at a juvenile reform school.[165] He pled guilty to thirty-four sexually related assaults involving nineteen young

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161 R. v. Foster, 1995 CarswellSask 116, paras. 2-3 (Can. Sask. C.A.) (WL).

162 *Id.*

163 *Id.* at paras. 1, 46-49.

164 BARB PACHOLIK & JANA G. PRUDEN, PAPER COWS & MORE SASKATCHEWAN CRIME STORIES 117, 117 (2009).

165 *Kingsclear Scandal Reopened*, CBC NEWS (Feb. 24, 2000, 5:59 PM), http://www.cbc.ca/news/story/2000/02/24/nb_msking_000224.html.

males over a twenty-year period.[166] He was sentenced to thirteen years imprisonment and was ordered to serve at least one half of that term before parole.[167] Subsequently, fifteen new charges arose, and Mr. Toft faced additional legal expense, stress, and the possibility of additional jail time.[168] Ultimately, the additional charges were stayed in favor of an inquiry.[169] The victims associated with the stayed charges felt justice had not been done.[170] So, each time Mr. Toft came up for parole, these victims and other past victims opposed release.[171] As a result, Mr. Toft spent more time in jail than he may have otherwise.

>>[172] A final, current example is the case of Graham James.[173] The initial Graham James case was a high profile case as Mr. James was a junior hockey coach, and some of his offenses were perpetrated against victims who subsequently became stars in the National Hockey League.[174] Mr. James's first conviction related to allegations of sexual abuse involving Sheldon Kennedy and another player.[175] Mr. James pled guilty to 350 assaults against the two players, was sentenced to three-and-one-half years, and Mr. Kennedy predicted that other players would come forward as Mr. James neared his parole eligibility

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166 R. v. Toft, 1992 CarswellNB 423, para. 4 (Can. N.B. Q.B) (WL).

167 *Id.* at paras. 33-36.

168 COMM'N FOR PUB. COMPLAINTS AGAINST THE ROYAL CAN. MOUNTED POLICE, KINGSCLEAR INVESTIGATION REPORT (2007) [hereinafter KINGSCLEAR INVESTIGATION REPORT], *available at* http://www.cpc-cpp.gc.ca/cnt/decision/pii-eip/Kingsclear/rep-rap/kingsclearRp-eng.aspx.

169 KINGSCLEAR INVESTIGATION REPORT, *supra* note 168; *N.B. Inquiry in Abuse Case Going Ahead*, GLOBE & MAIL (Toronto), Oct. 30, 1993, at A8. Given the principles of concurrent sentencing, and the lengthy sentence initially imposed, the Attorney General felt that the court would be unlikely to increase the sentence sufficiently to justify the time and financial and emotional expense of additional trials. KINGSCLEAR INVESTIGATION REPORT, *supra*.

170 *Karl Toft Parole Hearing Galvanizes Opposition*, TELEGRAPH-JOURNAL (Saint John, N.B.), Aug. 5, 2004, *available at* ProQuest, Doc. No. 423207542.

171 Michael Staples, *Toft Refused Parole*; *Sex Offender Can't Get Board to Give Him More Freedom*, DAILY GLEANER (Fredericton, N.B.), Aug. 6, 2004, *available at* ProQuest, Doc. No. 413005784; Tali Folkins, *Toft Hearing Set For Aug. 5; Sex Offender Seeks Release From Halfway House in Edmonton*, TELEGRAPH-JOURNAL (Saint John, N.B.), July 13, 2004, *available at* ProQuest, Doc. No. 423228736.

172 The passages between " >> . . . << " were originally written for a version of this paper submitted in December 2011, prior to final sentencing in the Graham James case. These passages have been left as written in late November 2011, subject to minor copy edits only. What can be seen by contrasting the originally written text with the post-sentencing information is that, in fact, many of the predicted outcomes came to pass.

173 *See* Chinta Puxley, *'Predatory' Behavior: Ex-hockey Coach Graham James Gets 2 Years for Sex Abuse*, Brandon Sun (Brandon, Man.) (Mar. 20, 2012, 3:28 PM), http://www.brandonsun.com/breaking-news/graham-james-to-be-sentenced-in-winnipeg-for-molesting-two-of-his-players-143443826.html?path=/breaking-news&id=143443826&sortBy=oldest.

174 *Id.*

175 *Id.*

date.[176] After serving his time, Mr. James was granted a very controversial pardon in 2007, which subsequently enabled him to move to Mexico and take up residence there.[177]

As reported by CBC News,[178] the next chapter in Mr. James's saga took place following the release of a 2009 book, *Playing with Fire*, which was written by Theo Fleury.[179] Mr. Fleury alleged that Mr. James repeatedly assaulted him while he was a teenager.[180] Following the release of his book, Mr. Fleury went to the Winnipeg police, filed a complaint, and a warrant was issued for Mr. James's arrest.[181] Additional unnamed players also filed complaints with the police, and in 2010, new charges were laid in connection with the alleged offenses against Mr. Fleury and two other men.[182] CBC News then contacted Evan Roitenberg, lawyer for Mr. James, who was quoted as stating: "Mr. James has always expressed a willingness to deal with these matters and not run away from them."[183] On October 13, 2011, the proceedings on these additional allegations were set over to November 3, 2011, when dates were to be set for the case to proceed to trial.[184] However, on November 3, 2011, the matters were remanded until December 1, 2011, as defense and Crown counsel were continuing their discussions.[185]

Because these matters are still before the courts, it is not possible to fully know what transpired. It is possible that the additional allegations from Mr. Fleury and the two other men will not support a guilty verdict. However, it is interesting to consider whether Mr. James and his lawyer had discussed possi-

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176 *Graham James Found in Mexico*, CBC NEWS (May 13, 2010, 1:20 AM), http://www.cbc.ca/news/canada/story/2010/05/12/graham-james-mexico.html; *James Under Investigation Again*, THE PROVINCE (Vancouver, B.C.), July 13, 1997, at A68, *available at* ProQuest, Doc. No. 267586730.

177 *Graham James Found in Mexico*, *supra* note 176.

178 *Graham James Faces Sexual Assault Charges*, CBC NEWS (Oct. 14, 2010, 1:45 AM), http://www.cbc.ca/news/canada/story/2010/10/13/graham-james.html.

179 Charlie Gillis, *Theo Fleury Was Abused: "An Absolute Nightmare, Every Day of My Life"*, MACLEAN'S (Oct. 9, 2009, 11:28 AM), http://www2.macleans.ca/2009/10/09/theoren-fleury-was-abused-an-absolute-nightmare-every-day-of-my-life.

180 *Graham James Faces Sexual Assault Charges*, *supra* note 178.

181 *Former Hockey Coach Gets Bail; James to Remain In Custody As Conditions of Release Ironed Out*, WINNIPEG FREE PRESS, Dec. 8, 2010, at A3, *available at* 2010 WLNR 24276098; *Graham James Found in Mexico*, *supra* note 176.

182 *Former Hockey Coach Gets Bail; James to Remain In Custody As Conditions of Release Ironed Out*, *supra* note 181.

183 *Graham James Faces Sexual Assault Charges*, *supra* note 178.

184 *Sex Charges on Ex-Coach Graham James Remanded*, CTV NEWS (Oct. 13, 2011, 3:51 PM), http://www.ctv.ca/CTVNews/Canada/20111013/sex-charges-remanded-against-graham-james-111013/#ixzz1akbO1lIP.

185 *Still No Trial Date or Plea From Graham James*, TSN (Nov. 3, 2011, 5:53:54 PM), http://www.tsn.ca/nhl/story/?id=379579.

ble additional situations that might lead Mr. James into future conflict with the law when they determined how to deal with the initial charges relating to the offenses against Mr. Kennedy. If, factually, Mr. James had committed the actions necessary to support a guilty finding in a court of law in connection with the 2011 allegations by Mr. Fleury and the two additional men, the potential increase to Mr. James's initial sentence, had these matters been dealt with at the same time as the allegations by Mr. Kennedy, are likely significantly outweighed by the disruption, costs, and potential additional sentences with which Mr. James now has to deal.

In the June 2010 edition of the *Canadian Lawyer* magazine, the results of the survey of more than 600 lawyers from across Canada indicated that the costs of a one-day criminal trial ranged from $2900–$10,000, with an average cost of $4300.[186] These are the costs for the trial day only and do not include legal costs for all of the necessary preparation leading up to trial. In a 2008 research study by the Department of Justice, Canada, the overall cost of crime in Canada was estimated to be $99.6 billion for a country with a population, at the time, of 33.5 million people.[187] Of these costs, $8.587 billion related to policing, $672 million related to court costs, $528 million related to prosecution costs, $373 million related to legal expenses, and $4.836 billion related to corrections costs.[188]

Leaving aside the system costs for the moment, and returning to Mr. James's case, had he dealt with the additional charges at the first trial when he was facing 350 offenses, his three-and-one-half years sentence would likely only have been marginally increased. Now, he is faced with tens of thousands of dollars in legal fees, additional jail time, revocation of his pardon, an inability to return to his home in Mexico, and certainly all kinds of personal stress and family disruption. Are these consequences in his actual best interests? It is a steep price for Mr. James to pay to preserve his legal best interests—is it worth it? Further, from a systemic point of view, based on potential cost savings alone, there is much to be gained from a less adversarial but more accountable method of dealing with these kinds of charges.

The answer to the above questions may never be publicly known and this author makes no allegations that Mr. James's legal representation has been unethically conducted or that it was improper in any other way. However, in hindsight, was Mr. James's situation one that cried out for a deeper analysis of his actual long-term best interests when he was dealing with the initial allegations by Mr. Kennedy? Is Mr. James's situation still crying out for these con-

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[186] Robert Todd, *The Going Rate*, CANADIAN LAW., June 2010, at 36, 39.

[187] TING ZHANG, DEP'T OF JUSTICE CAN., rr10-05e, Costs of Crime in Canada, 2008, at 6, 13 (2008).

[188] *Id.* at 7.

siderations as he now deals with the allegations by Mr. Fleury? The further outstanding question is whether there are yet other possible complainants who could emerge at some future point? Mr. Kennedy predicted that future charges would come forward after the first trial and it turns out he was correct. Will this cycle continue to be repeated? <<

As previously stated,[189] the passages between " >> . . . << " were originally written for a version of this Article prepared in November 2011, prior to final sentencing in the Graham James case. These passages have been left as written in late November 2011, subject to minor copy edits only. Since the original text was written, final sentencing has been passed in Mr. James's case and the Crown has appealed the sentence. In December 2011, Mr. James pled guilty to the new charges and on February 22, 2012, he appeared in court to speak to sentence.[190] At the time of the submissions, Mr. Kennedy attended court in person, Mr. Fleury filed a written victim impact statement, and a previously-unnamed victim, Todd Holt, appeared in person to read his victim impact statement to the Court.[191] Mr. Holt indicated that his decision to go public was because he decided that it was finally time to take a stand, stating, "I'm not a victim anymore, I'm a survivor."[192] Additionally, charges were stayed against a third victim, Greg Gilhooly, who requested that the publication ban be lifted so that his name could be released.[193] Regarding Mr. Holt and Mr. Gilhooly, as predicted, previously unnamed individuals had come forward to have the allegations dealt with publically and openly.[194]

Between the date of submissions to sentence, and the date of sentencing, Mr. Holt urged other victims to also come forward.[195] In a radio interview, Mr. Holt indicated that he wanted "others to know they can speak out and be safe."[196] Clearly, the implication here is that there are still other victims who have yet to come public with their stories or lay information with the police. Mr. James must continue to live with the uncertainty as to whether there are, in fact, additional victims that will come forward—to put him back in the criminal justice cycle once again.

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189 *See supra* note 172.

190 Mike McIntyre, *James Apologizes to Victims; Former Coach to be Sentenced in March*, EDMONTON J., Feb. 23, 2012, at C3, *available at* 2012 WLNR 3864177.

191 *Id.*

192 Paul Waldie, *Stepping Forth to Confront Abuse, Hockey's Shame; Former Coach Graham James Apologizes for Sex Assaults on Teenagers, Including a Victim Previously Unknown*, GLOBE & MAIL (Toronto), Feb. 23, 2012, at A6, *available at* 2012 WLNR 3862316.

193 McIntyre, *supra* note 190.

194 *Id.*

195 *Victim of Former Hockey Coach Graham James Speaking Out About Abuse*, CANADIAN PRESS, Feb. 28, 2012.

196 *Id.*

In the submissions to sentence in February 2012, the Crown asked for a six-year sentence; the Defense asked for a twelve-to-eighteen month conditional sentence that would allow Mr. James to remain free in the community.[197] In March 2012, the trial judge handed down a two-year sentence.[198] Following the sentence, the Crown promptly appealed, arguing that the trial judge erred in overemphasizing the impact of the former sentence, and the appeal date was set for December 3, 2012.[199] On February 15, 2013, the Manitoba Court of Appeal overturned the two-year trial sentence as being too lenient.[200] In its place, a five-year jail sentence was imposed.[201] As discussed in *The Winnipeg Free Press*, "In their notice of appeal, the Crown argued [the] provincial court . . . erred in her approach to the sentence, overemphasized the significance of prior sentences for similar offences and erred in assessing the 'totality principle,' which holds that jail time for multiple offences must be fair and reasonable when added together."[202]

In summary, Mr. Kennedy predicted additional victims would come forward; they did, and additional charges were laid. Mr. Holt has urged yet others to come forward; only time will tell whether there are further charges to come. Mr. James received three-and-one-half years for the initial offenses, and was sentenced to five years for the subsequent offenses, upon appeal. The eight-and-one-half year combined sentence is likely higher than it would have been had there been a concurrent sentence passed on all of the offenses in 1997. Mr. James's pardon has been revoked[203] and, in part as a direct response to Mr. James's offending,[204] the Canadian Federal Government has passed new legislation that makes it more difficult (and in some cases impossible) for offenders to obtain a pardon when they are convicted of sexual crimes against a minor.[205]

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197 McIntyre, *supra* note 190.

198 Puxley, *supra* note 173.

199 *Crown Appeal of James's Two-Year Sentence Set for December*, WINNIPEG FREE PRESS, Oct. 19, 2012, at A8, *available at* 2012 WLNR 22176879.

200 Mike McIntyre, *Manitoba Appeal Court Increases Sentence for Sex Offender Graham James*, WINNIPEG FREE PRESS (Feb. 15, 2013, 11:09 AM), http://www.winnipegfreepress.com/local/Manitoba-Appeal-Court-increases-sentence-for-sex-offender-Graham-James-191410631.html.

201 *Id.*

202 *Id.*

203 McIntyre, *supra* note 190.

204 Stacie Snow, *Airdrie-Born Bill Becomes Law*, AIRDRIE CITY VIEW (Airdrie, Alta.) (Mar. 16, 2012, 3:43 PM), http://www.airdriecityview.com/article/20120314/ACV0806/303149965/airdrie-born-bill-becomes-law.

205 Susan Munroe, *Conservative Omnibus Crime Bill*, CANADAONLINE.ABOUT.COM, http://canadaonline.about.com/od/crime/a/omnibus-crime-bill.htm (last updated July 25, 2012); Debbie Ward, *Crime Bill C-10 Passed by Parliament and its Impact on Canada Pardons*, CANADIAN LEGAL RES. CTR. INC., http://canadianlegal.org/crime-bill-c-10-passed-by-parliament-and-its-impact-on-canada-pardons/ (last visited June 11, 2013).

Mr. James's legal fees have continued to mount throughout these repeated court appearances. These, and many similar consequences, were entirely predictable. Although they were not certain to come to pass, the principles of therapeutic jurisprudence advocate that it would have been entirely appropriate to consider them when planning Mr. James's case management. It is impossible to know what would have happened had the decision been made to deal with all of the charges and potential charges differently in 1997. However, it is not unreasonable to believe that the additional stress, disruption, cost, and other consequences that Mr. James has faced may well outweigh any interest in the simple protection of his legal best interests. What appears certain is the therapeutic jurisprudence directive to consider all of the circumstances (i.e., Mr. James's actual best interests) is well advised.

Turning from the case law, another source of examples can be derived from an oral presentation given in 1998 by seven convicted sexual offenders on parole in the Edmonton, Alberta area.[206] These individuals chose to give a community presentation as the completion project for their treatment program.[207] In the presentation, five of the seven indicated that they had originally pled not guilty.[208] Following treatment, all seven believed that incarceration had been beneficial in meeting their best interests.[209] They believed that their adversarial defense was a negative experience, and not simply because five of them lost their cases.[210] Some of the reasons they presented in support of their position are set out below.

The first reason involved their desire to have their behavioral and legal problems end.[211] A rigorous adversarial defense did not meet this desire. In pursuing a zealous defense, and maintaining the necessary mindset to proceed with such a defense, the individuals were invested in denying and minimizing their behavior. They were not in a position to accept responsibility or examine how they may improve their lives.

The problem was that a zealous adversarial defense was premised upon the idea that an acquittal would end the accused's problems. The mistake is in equating legal with actual best interests. Sexual offending is patterned repetitive behavior; intervention and education are necessary to stop it.[212] Intervention is also necessary to bring internal harmony to the offenders and to provide

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206 Address by seven Convicted Sexual Offenders on Parole at the Edmonton Area Parole Office (Oct. 6, 1998) (notes on file with author).

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 Interview with Ann Marie Dewhurst, Clinical and Forensic Psychologist, Athabasca Univ. (Nov. 14, 2011) (notes on file with author).

a foundation for external harmony in their relationships with family and community.[213] A zealous defense does not address these realities.

When accused plead not guilty, therapists often refuse to provide the needed intervention or education. Alternatively, the accused's lawyer objects to therapy to ensure that therapeutic admissions cannot be used as evidence at trial. These legal tactics, designed to protect the client's legal best interests, delay the change process required to promote the client's overall best interests for internal and external harmony. So, the accused's behavioral problems continue.

A second desire the presenters shared was to avoid stress, family disruption, and further criminal charges.[214] Again, this was not achieved. Adversarial procedures involve lengthy periods between charge and trial when the accused's stress increases and when suicidal ideation, family disruption, and a high risk of re-offending are often present. As well, individuals who plead not guilty to sexual offenses involving family victims are often barred from having contact with their family; whereas, treated offenders can begin the family reunification processes.[215] Therefore, they may be estranged from their children and partners for one to two years, or sometimes longer, as they await trial.

One presenter spoke about how he had successfully led his wife to believe he was not guilty.[216] He maintained this pretense for several years until he was finally convicted.[217] Then, when he entered mandated treatment, he had to deal with his issues.[218] This included telling his wife that not only had he committed the offenses but also that had he lied to her convincingly enough to maintain her support throughout the entire litigation process.[219] It was then that his marriage broke up.[220]

The third interest the presenters shared was to avoid lengthy incarceration.[221] Again, this interest was not met. This is because sentences after trial are, on average, longer than those imposed after a guilty plea. Judges are known to effectively punish the accused for wasting court time and are less likely to display leniency when the accused is found guilty after a full trial as opposed to cases when the accused has accepted responsibility and pled guilty. In King's words, ". . . we in the judiciary would say that a plea of guilty is

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213 *Id.*

214 Address at the Edmonton Area Parole Office, *supra* note 207.

215 Interview with Karen Nielsen, Clinical Social Worker, Athabasca Univ. (Nov. 9, 2011) (notes on files with author).

216 Address at the Edmonton Area Parole Office, *supra* note 207.

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

evidence of remorse, saves trauma to victims and wasted resources and is thus deserving of a discount on sentence."[222] The goal of avoiding lengthy incarceration may have been more achievable if they had dealt with all potential offenses at the outset and received concurrent sentences.

Clearly, there are cases when offending has not been as extreme or as prolonged as in the Foster, Toft, and James cases and it is possible that if an accused successfully defended one or two charges he would not have to face the legal system again. As well, there is no evidence as to how typical the cases of the seven presenters were. Other types of cases will, of course, command other types of intervention. However, while the adversarial assumptions of the *Code* may deal nicely with particular cases, they do not effectively direct or promote the client's actual best interest in the broader range of cases.

In all these cases—Foster, Toft, James, and those of the individuals in the Edmonton Parole presentation—their actual best interests would have been furthered by a thorough self-analysis of their offending, accepting responsibility for all of the charged offenses, and self-reporting any additional related offenses for which charges had yet to be laid. This seems extreme but it would be preferable for their actual best interests nonetheless given the Canadian courts' approach to concurrent sentencing, and, given the opportunities full accountability would provide for rehabilitation and closure. Even in jurisdictions where rehabilitation is not readily available, a full adversarial defense may still not promote the client's actual best interests. As we saw in Mr. James's case, he has incurred additional legal fees, additional jail time, revocation of his pardon, inability to travel, and personal and familial stress. All of these must factor into considering whether full accountability would have been better for his actual best interests than repeated iterations of an adversarial defense; and this says nothing of the possible benefits of rehabilitation. Of course, as Wexler has pointed out, it must always be kept in mind that "these conversations with counsel are delicate, sensitive, should be written, clearly giving no guarantees, [and with] written consent."[223]

What, if anything, does this prove? Ten anecdotal discussions that point to problems with zealous adversarial representation are not indisputable proof positive that zealous adversarial representation must be abandoned. Nor is this the claim being made. Rather, the ten anecdotal observations are offered as a categorical disproof of an opposite claim. If someone makes the claim that "all ravens are black" then it only takes one observation of a white raven to absolutely disprove this claim. So, for those who claim that zealous adversarial

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[222] E-mail from Michael S. King to author, *supra* note 14.

[223] E-mails from David Wexler, Director, Int'l Network on Therapeutic Jurisprudence; Professor of Law, Univ. of P.R.; Distinguished Research Professor Emeritus of Law, Univ. of Ariz. James E. Rogers Coll. of Law, to author (Nov. 18, 2011) (on file with author).

representation is *the* best (or only viable) way to pursue a defendant's best interests, they are metaphorically faced with ten white ravens. Further, these ten anecdotal observations could, undoubtedly, be supplemented by many more examples; the flock of white ravens grows.

What is being argued for is the contention that, at least *sometimes*, there is certain proof that something other than a zealous adversarial defense will be better suited to achieving the client's actual best interests. Further, because this may be a live possibility in any *particular* case, ethical lawyers must canvass this possibility in *every* individual case to determine which approach to representation is most appropriate to meet the client's actual best interests. Finally, the statement above bears repeating. These examples of sexual offending were examined because they may well be the most difficult case to make. If these arguments are plausible in the case of sexual offending, then it will be a much easier to make similar arguments in other areas of law.

The conclusion here is not to suggest a whole-scale replacement of the adversarial system with some kind of therapeutic or alternative dispute resolution intervention. In a previous article, this author argued that a higher order set of norms could effectively determine when to employ an adversarial approach or when one should have recourse to one of the other vectors in the comprehensive justice movement.[224] In support of this conclusion, this author identified fourteen different theories of justice including theories such as: corrective justice, distributive justice, juridical/procedural justice, and justice as social justice.[225] The conclusion was that the adversarial system was particularly effective in its role of achieving juridical/procedural justice; and, as well, it had certain strengths in other areas. In cases when these elements of justice had a higher priority, then recourse to the tools and principles within the adversarial system clearly had a role to play. However, in other instances, the justice response desired may be better achieved by one or more of the other vectors. Accordingly, the adversarial system clearly has a role to play as a vector (perhaps the most major vector) within an effective justice system. However, the adversarial system must give up the pretense of being *the* justice system. This is one reason to resort to therapeutic jurisprudence or other vectors in the comprehensive justice movement when responding to clients' legal concerns.

Further, as discussed in Part III above, particularly in the review of the debate between Wexler and Quinn, it can now be concluded that there is an additional reason to use therapeutic jurisprudence and to employ additional vectors from the comprehensive justice movement. That additional reason is that it is necessary for lawyers to do so in order to identify and meet the client's

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[224] Dewhurst, *supra* note 16.

[225] Dewhurst, *supra* note 16, at 467-68.

actual best interests. What is clearly required is for lawyers to develop the necessary interpersonal, client counseling, and therapeutic jurisprudence skills necessary to promote a more therapeutic outcome; and, it requires lawyers to properly engage expert consultation whenever it is necessary to go beyond simple legal expertise to determine and pursue the client's actual best interests. This should be an ethically-mandatory consideration in the lawyers' codes of conduct. Further, this exhortation would apply to all legal cases in which the lawyer and client, given the subject matter under consideration, would benefit from the expert input of other non-legal professionals. This does not turn lawyers into psychological, medical, environmental, or structural engineering experts. What it does do—if a lawyer wants to practice ethically and competently—is it requires lawyers to consider the full range of input the client requires in order to make meaningful legal choices in the context of the client's broader best interests.

VI. Important Observations, Limits, and Conclusions

In all cases, for so long as one respects the autonomy and independence of the client's decision making, and avoids the temptation for a lawyer to decide what is in the client's actual best interests, then the profession is on a path to providing a more comprehensively-just response to the client's legal concerns. In the Part V.C. examples, had the accused defendants received thorough mental health counseling along with their legal consultations, they may have decided to plead guilty at the outset. This may have been the case even though convictions were not certain. They may also have decided to disclose and plead guilty to other related offenses. In this way, their actual best interests would have been served by putting all issues behind them and by moving ahead with accountability, restitution, and rehabilitation efforts. The counseling they inevitably received may have been received at an earlier date, giving them a better chance of preserving their family and community relationships. The emotional and financial cost of extended litigation would have been avoided.

It is important to consider how many lawyers know enough about psychological counseling and treatment to know that it often works, is in the client's actual best interests, and improves recidivism rates; versus, how many lawyers use their clients' treatment records as tools to speak to sentence if their clients are convicted at trial. Of course, major drawbacks to all of these proactive possibilities include: the stigma that some offenses carry with them; the variability of sentencing laws across jurisdictions; and, the availability of rehabilitative measures across various jurisdictions. For example, community reactions to sexual offenders, sex offender registries, and calls for more severe punishments serve to provide an incentive to offenders to avoid responsibility. Clearly, these legal case management decisions must be based upon situational

considerations. If one murder conviction would result in jail time but two or more would result in the death penalty, there is obviously a severe disincentive to disclose and plead guilty to additional offenses. But, even where rehabilitation options are unavailable, there are many other relevant factors that impact upon the client's actual best interests that are not captured by consideration of the legal case alone.

Leaving aside the examples of sexual offending, lawyers must also consider obtaining the advice of other experts as necessary to fully inform their clients' decisions. In practice, lawyers seem to have less hesitation in consulting with an environmental auditor, a tax accountant, or a medical expert in relevant cases. That there should be so much lingering resistance to consulting with therapeutic experts seems unwarranted.

For now it is sufficient to conclude that the client's "actual best interests," and the focus on the *legal case*, are not necessarily compatible. Often they may interact to create ethical dilemmas. To properly advise clients, lawyers may need to draw upon the expertise of other professionals to develop a more complete understanding of the client's actual best interests. However, if the client has received complete advice from lawyers and mental health professionals and still decides to proceed with a vigorous defense, then the lawyer must proceed with that defense. The lawyer is not ultimately hired to act as the client's judge or to force a resolution upon the client that is not in keeping with the client's values. Rather, what has been argued is that the lawyer needs to do much more to provide full and proper advice about what legal resources are compatible with the client's values. This may take some soul searching and involvement with counseling on the client's part in order to separate his underlying values from the situational values that appear on the surface of the current legal concern.

What we are left with is an understanding that if lawyers wish to promote the client's actual best interests, then in many cases zealous and partisan advocacy should be seen only as one possible resort not as the default method of proceeding. All lawyers who take seriously the duty to promote the client's best interests will need to draw upon the expertise of other professionals and experts from time to time. Accordingly, various provisions of the codes of conduct require amendment, or more robust interpretation, to allow for these recommendations and possibilities.

In conclusion, it may be seen that while the client's legal best interests are still relevant to decision making, the client's legal best interests are at most a subset of the client's actual best interests. As with all things that interest someone, sometimes inconsistencies arise and one must sacrifice one interest in support of another. One legal right is often waived in preference to another; and, legal interests may need to be waived in preference to a client's actual best

interests. Codes of ethics that better facilitate the principles of the various vectors in the comprehensive justice movement are required to support the client's actual best interests. This broadening of the codes of ethics is justifiable even at the cost of a thorough shakeup of traditional conceptions of what it means to provide competent and ethical legal representation.