



**“LEGAL ETHICS AND PROFESSIONALISM IN COMPARATIVE PERSPECTIVE:
THE CASE OF THE UNITED STATES”**

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Good evening. My name is David Shirk. I'm the director of the Trans-Border Institute here at the University of San Diego, and it is my great pleasure to introduce this evening's lecturer on Ethics and Professional Responsibility in US Law.

Welcome ... The Trans-Border Institute was founded in 1994. Since then, on topics as diverse as NAFTA, immigration, health, the environment and security, the Trans-Border Institute has worked to promote a greater understanding of complex bi-national and bi-lateral issue, providing information, analysis, and above all public dialogue and discussion. In 2005 TBI became the coordinating institution for the Justice in Mexico project, a multi-year research initiative focused on the administration of justice and the rule of law in Mexico. This project is funded by the William and Flora Hewlett Foundation and the Tinker Foundation and promotes analysis, dialogue and public policy solutions to address a variety of urgent problems related to justice sector reform in Mexico and the US-Mexico border region.

Our research for this ongoing project suggests that a major problem in the administration of justice in Mexico is the lack of professionalism and ethical conduct among lawyers and judges and other legal practitioners due in large part to challenges in the legal education system and in legal oversight. In Mexico lawyers are not expected to complete graduate legal training and are not required to pass a professional Bar Exam but will participate in a professional Bar Association in order to practice law. They are not subject to peer oversight of their ethical and professional conduct. This lack of emphasis on ethics and professional responsibility in the law stands in stark contrast to other legal systems in North America, Europe and some other advanced Latin American countries.

The consequences for Mexico's legal profession are the proliferation of poorly trained lawyers, the persistence of unethical practices among legal practitioners, and an overall lack of accountability in the justice system in that in many ways in Mexico fail to play their vital function as a check on the abuse of power. The challenges that these problems present for the rule of law in Mexico are enormous since lawyers are the primary link between the population and the judicial system and an essential check on police prosecutorial and judicial performance. Moreover, recent evidence suggests that the pervasive, negative consequences on the Mexican judicial system of corruption, poor legal representation, and a general lack of due process affects communities on both sides of the border – in the United States and Mexico. For this reason, the Tinker Foundation provided the Trans-Border Institute with general financial support to coordinate an international, inter-institutional seminar series entitled "Legal Ethics and Professional Responsibility in Comparative Perspective." This series has helped to stimulate comparative analysis and consideration of the best practices for promoting legal professionalism and ethical conduct in Mexico drawing insights from the country experiences of Mexico, Chile, Spain, Argentina and now the United States. This lecture series has taken place in forums in Mexico City, Zacatecas, and Mexicali, and now here at USD, the University of San Diego.

The series has generated, I think, a great deal of interest among a new generation of students and practitioners eager to enhance Mexico's legal profession and actively promote the rule of law. I'm very pleased to welcome some of our colleagues from south of the border tonight from the University Ibero Americana and their students who are here to listen to our lecture tonight.

Our project serves the purpose, I think, of generating beyond this lecture series educational materials on ethical conduct and professional responsibility that can be widely disseminated for instruction in Mexico and other Spanish speaking countries. The findings and outputs of this project are being disseminated electronically as working papers and also as on-line video and audio content. Indeed, this lecture this evening is being recorded for those of you who don't realize that. Please, if you do have questions later on, be sure to speak into the microphones so that your questions and comments can be recorded and also translated into Spanish.

Currently our web site, the Justice in Mexico Project web site, located at www.justiceinmexico.org hosts some of the speeches and videos that we have previously conducted as part of this series. It is our hope that they will be used by law students and practitioners at our partner institutions in Mexico. I've mentioned Ibero Americana. Also I should mention the Universidad Autónoma de Baja California and the Universidad Panamericana and others that we've worked with in Mexico to put on this important seminar series.

Tonight's lecture must be understood as part of our efforts to evaluate legal, professional conduct and legal ethics in comparative perspective, but before we begin I want to express my appreciation first to the William and Flora Hewlett Foundation which provides the base support for our project, the Tinker Foundation which specifically supports this seminar series, as well as the new School of Peace Studies at the University of San Diego which hosts our institute as well as this program tonight, as well as our co-sponsors this evening, the USD School of Law that has enabled us to offer continuing education credit to California Bar Certified lawyers who are, this very minute, responsibly demonstrating their own commitment to maintaining and enhancing their legal, professional credentials. Finally, I want to thank the staff of the Trans-Border Institute, Rob Donnelly, Charles Pope, Laurie Lopez, and others who helped us to put this presentation on this evening. Their tremendous efforts over the last several months have been essential to making this project work.

All of that said it's now my great pleasure to introduce Dr. Fred Zacharias. Dr. Zacharias is the Herzog professor at the University Of San Diego School Of Law. He clerked on the U.S. District Court in Philadelphia and practiced public interest law in Washington, D.C. Prior to coming to USD in 1990, Mr. Zacharias taught at Cornell University and George Washington University. Currently he teaches and writes in the areas of constitutional law, professional responsibility and criminal procedure. Among Mr. Zacharias' many articles are several that are pertinent to today's discussion - "Waiving Conflicts of Interest" for Yale Law Journal, "Structure the Ethics of Prosecutorial Trial Practice" at Vanderbilt Law Review, "Federalizing Legal Ethics" the Texas Law Review, so it is with great pleasure that I introduce to you Mr. Fred Zacharias for his talk on U.S. Comparative Legal Ethics. Thank you, Fred.

Thank you, David, for that introduction and I'm delighted to be here today. Mark Twain used to say that the three secrets of success to public speaking are be sincere, be brief, and be seated, and I usually try to follow that advice, but I've been asked to speak for 45 minutes today and that's before you'll have an opportunity to join the dialogue. As I understand our assignments, my job is to talk and yours is to listen. It would be very said if my job, if I finished my job first. So in the hope of keeping your interested here, I'm gonna insights into the American legal profession that might not be obvious, particularly to students and practitioners in other countries. The specific charge that the sponsors of this lecture gave me is to provide law students and practitioners in Mexico with the comparative knowledge required to improve the practice of law in their country, to discuss the history and philosophy of legal ethics in the United States including the development of professional associations, ethical codes, and obligatory Bar membership. For those of you in the audience who are lawyers in the United States, I apologize if my observations are too familiar. I am an American law professor and you've come into contact with the likes of me before. You've probably all heard the story about the two balloonists who got lost in the clouds one day and as they came out of the fog they saw a man on a hill and they yelled down to him "where are we?" and the man thought for a second and yelled back "in the sky" and with that the balloonists drifted back into the fog, hopelessly lost again, and the first balloonist said to the second balloonist "that man was a law professor." The second balloonist said "how can you tell?" "Well, everything he said was perfectly accurate, perfectly useless." Despite that view of law professors I do hope that my remarks will be of some interest to the Americans among you, while still helping to inform the broader international audience that is targeted by this lecture. By the way, excuse me if I'm looking down a lot, but I have bifocals and this lectern is down low, so it causes me a little bit of problems, so please excuse that.

When I speak with my friends and relatives in foreign countries, they don't have a flattering view of American lawyers. They say that dealing with an American lawyer is like having a picnic with a tiger. You may enjoy the meal, but the tigers always eat last. When I probed my friends' complaints I find that they have in mind three specific images of the U.S. Bar. First, they consider American lawyers to be more litigious than other lawyers, far more enthusiastic about filing lawsuits. Second, they perceive American trial lawyers as more aggressive on behalf of their clients, even to the point of causing unfair or inaccurate results. And third, they also consider non-litigators in America, business and transactional lawyers, to be overly aggressive because these lawyers anticipate that all matters might eventually wind up in litigation. The lawyers, therefore, seem insistent on drafting documents in precipitously client-friendly ways and seem quick to resort to litigation when a dispute arises. Those comparisons probably are correct. The legal professions in some European countries slowly are coming to resemble the American Bar, but for now it probably is fair to say that American practice is based on an unusual, non-cooperative model. It assumes a paradigm under which a lawyer should represent all clients as if they are helpless, unsophisticated, and need the lawyer's help to resist the powerful forces of the government or an oppressive adversary. As one observer has put it "next to the confrontation between two highly trained, finely honed American lawyers, jungle warfare is a stately minuet."

Neither the economics of the American legal profession nor the natural psychological incentives of lawyers fully explain this development. There obviously are venal lawyers and some may become partisans simply because a client pays them to act that way. You may know the anecdote about a man and a woman who were walking in the cemetery one day and they came across an interesting grave. The epitaph on the grave read “here lies a good lawyer and an honest man.”

“Hm” the woman turned to her companion and said “things must be getting crowded; they’re burying them two to a grave” but pointing to American lawyers’ dishonesty or greed can’t explain everything, because there are mercenary lawyers and wealthy clients in foreign countries, too, and in some of those countries the tradition of the Bar is to focus more on helping judges identify the truth and helping transactional clients develop long term, non antagonistic, cooperative ventures. Understanding the American lawyer requires a familiarity with the development of American professional ethics and its regulation.

Before discussing that history, let me offer a few facts about the American Bar. There are over 1.1 million lawyers practicing in the United States. By some reports that’s two-thirds of all lawyers in the world. American lawyers are regulated in a variety of ways. Each state licenses its own lawyers. Lawyers are subject to the same laws as other citizens including criminal and consumer protection law. Civil malpractice lawsuits against lawyers are common providing significant deterrence against lawyer negligence, particularly the type of negligence that hurts clients. Contracts, fraud and other civil remedies apply as well, and lawyers who practice before administrative agencies can be sanctioned for violating standards those agencies set. But the main constraint on lawyer behavior is judicial regulation. Trial courts deciding individual cases set standards for whether lawyers may appear in particular matters. Trial courts also exercise supervisory authority to sanction behavior that they consider inconsistent with judicial administration. More globally, each state’s Supreme Court adopts rules of professional responsibility that govern all lawyers, litigators or not. These are known as professional or legal ethics codes. A lawyer who violates the codes may be disciplined, suspended or disbarred.

Now please keep in mind these distinct forms of regulation because they all influence the behavior of American lawyers. Yet when most people comment on the way American lawyers operate and how American lawyers perceive their role, they ordinarily thinking only of the legal ethics codes.

I know that some of you may be thinking that the very notion of lawyer ethics is an oxymoron. I once read about an attorney who drafted a simple will for a client and then told the client that his fee would be \$100.00. The client paid the lawyer with a \$100.00 bill. After the client left the lawyer noticed that two \$100.00 bills had stuck together, that the client had actually given him \$200.00 by mistake. Looking at the overpayment an ethical question arose in the lawyer’s mind “do I tell my partner?” Let’s put aside that jaundiced view of lawyers because in fact the American Bar as struggled for years to provide guidelines for appropriate lawyer behavior and typically those have taken the form of legal ethics codes.

So what are these codes? Each of the 50 states has adopt its own, but virtually all of the codes are based in some fashion on model rules produced by the American Bar Association, a voluntary association, a voluntary organization, of lawyers. Because the codes stem from the work of a membership organization the natural instinct is to assume the codes simply are suggestions, ideals set by lawyers as guidance for the profession and potentially self serving ideals at that. But because state Supreme Courts amend and adopt the codes as law, they are far more influential than that. American lawyers know that violations can result in severe sanctions. That’s where the regulation of American lawyers stands today and with that background we can now discuss how American lawyers operate in practice and why this came to pass.

Because of our British roots, the United States has an adversarial legal system. This may be foreign to lawyers in Mexico. As most of you know in the adversary system clients are each represented by lawyers who are supposed to act as their champions. By putting forth the client’s strongest arguments and pointing out weaknesses in the other side’s presentation, lawyers help the decision makers – judges and juries – identify the truth, or at least to reach an appropriate verdict given the state of the information presented. The system has significant inefficiencies, for example by making more issues contested than they would be in a scientific inquiry, and it certainly doesn’t always make sense to the side issues based on competing one-sided arguments rather than a collaborative effort to identify the truth, but lawyers’ alliance with their clients has side benefits that are important to the American system including encouraging clients to use and trust lawyers,

making clients feel fairly treated by the legal system, and enabling clients to make autonomous decisions – their own decisions – about matters that will affect their fate. Still, characterizing ours as an adversary system doesn't mean too much in and of itself because an adversary system can prescribe roles for lawyers in addition to that of being a pure hired gun. Most adversary systems, for example, forbid lawyers to bribe jurors or to suborn perjury. Every adversarial legal system includes rules of the game.

There's a joke about a farmer who was sitting on his porch one day when a stranger came up the walk. "Is that your cow down by the road" the stranger asked. "Is she brown" replied the farmer. "Yes." "That's Bessie" the farmer said. "Well, let me ask you a question" the man asked. "How much is the cow worth?" The farmer responded thoughtfully. "It depends. Do you want to buy the cow, are you the tax collector, or have you just run her over?" What that joke illustrates of course is that reasonable people often have different perspectives and nowhere is that more evident than in the American debate about the adversary process. In Hannington the adversary system is attention. At one level the competition in the system is designed to achieve reasonably accurate results. At another level, however, the system honors procedural justice – protecting litigant's rights, their dignity, and their autonomy – over accuracy. At the core of the American legal ethics regime is a fierce debate starting in the 1800s and continuing today about the role that lawyers as clients' champions should play in the quest for truth and fairness, and in the American the question is not "do lawyers do enough for their clients" but "do they do too much?" The argument centers on a statement about the adversary system by an early nineteenth century English politician and lawyer, Henry Lord Brougham. Lord Brougham espoused the most client-centered position possible and here's what he said about what a lawyer should be and do.

"An advocate in the discharge of his duty knows but one person in all the world and that person is his client. The lawyer and his representation of that one person must not regard the alarm, the torment, or the destruction which he may bring to others."

Now modern American ethicists have reacted to Brougham's proposition by dividing into three camps. Some scholars and practitioners treat Lord Brougham's statement as gospel. Professor Monroe Freedman for example calls it "the fundamental principle of the law of lawyering." In Freedman's world lawyers must interpret all legal constraints on their behavior in light of their exclusive obligation to serve the client's interests. A second group of scholars suggest that Brougham's statement is simply not an accurate description of the American adversary system. The third camp assumes that Lord Brougham's prescription does dominate American legal practice but challenges its appropriateness as a norm for lawyer behavior. At least one scholar has termed Brougham's statement "hyperbolic nonsense."

Which view controls legal ethics regulation and the practice of lawyers is not just a question of philosophy or theory. It has very real applications in a way that lawyers respond to day-to-day issues they face. We can discuss some of those in the question and answer period if you'd like, but for now please take it on faith that the debate is important.

Excuse me for looking at my watch. It's just that I'm not used to giving long lectures like this. My rule of thumb for public speaking has always been the advice of the famous trial lawyer, Louis Nizer, who used to say about making closing arguments "if you haven't struck oil in 15 minutes, stop boring." Having spoken that long already, though, I really hope that you're still with me.

To understand why the theoretical controversy about the lawyer's role persists today, even in America's well developed legal system, one needs to reflect on the history of American law. There always have been lawyers in America and some of the founding fathers of the country including John Adams and Alexander Hamilton have from time to time been characterized as great lawyers. For a long time, however, there were no American law schools as we know them today and no organized Bar. These both developed in fits and starts throughout the nineteenth century. It was not until the early twentieth century that mandatory bars and professional law schools really began to take hold. Most lawyers during the early periods learned by experience. Some apprenticed themselves or served as clerks to established practitioners. Others read for it, in other words trained themselves for the Bar. Regulation of lawyer conduct to the extent that it existed came from the courts. Judge's regulatory power stemmed from their authority to admit lawyers to practice before them. Courts could forbid lawyers from appearing, sanction lawyers for misconduct, or punish them in more indirect ways. But for a very long time, no code of conduct or other written standards for lawyer behavior existed. Against this background it was natural that informal norms of practice developed, professional understandings regarding

how lawyers should behave. Lawyers talked to each other. They visited in groups at local inns and eating clubs, and depended on each other for reciprocal courtesy that made the practice of law dignified, civil, and relatively efficient. So, for example a collegial assumption developed that lawyers would not lie to each other. Lawyers followed the mandates of judges who insisted that lawyers not present false evidence. In addition, because clients' willingness to hire lawyers depended on society's perceptions that lawyers were educated gentlemen, a patina of courtesy and decent treatments of clients developed. This included the notion that a gentleman would not betray his client's secrets.

At the core, however, the question of how aggressive lawyers should be on behalf of clients was always unclear. From the beginning Lord Brougham's statement was heavily debated. Some practitioners apparently honored it, but not without question. In a famous opinion written in 1850 Chief Justice Gibson of the Pennsylvania Supreme Court stated "it is a popular mistake, but gross mistake, to suppose that a lawyer owes no fidelity to anyone other than a client or that the client is the keeper of the lawyer's professional conscience." Important to an understanding of this early period is a recognition of who the lawyer heroes of the period were: John Adams who represented unpopular British soldiers against the mentality of a mob prepared to lynch them; Luther Martin who defended Aaron Burr against the bogus charge of treason. These lawyers were honored because they vindicated the rule of law and protected the innocent. They were not hired guns who set aside all notions of truth, candor to the courts, and fair play out of a belief that the lawyer should know no one but the client. So, in the middle to late nineteenth century we see a real debate about lawyers' ethics blossom. The Brougham view, know no one but your client, was prominent, but so was a contrary view led by David Hoffman that what is morally wrong cannot be professionally right. Hoffman proposed 50 resolutions for professional deportment that emphasized moral considerations over client orientation. This debate raged in the absence of formal Bar examinations or specific legal ethics regulation codifying lawyer's responsibilities. Lawyer conduct continued to be controlled, if at all, through a judicial regulation of lawyers in the context of admission to practice and judicial supervision of litigating lawyers.

What approach to advocacy did this judicial regulation take? Courts certainly did not adopt Brougham's model of open warfare blind to truth and justice. One old-time judge, when asked how he selected lawyers for cases, answered "I always appoint a gentleman and if he knows a little law so much the better." Most judges, however, took the issue of the lawyer's role very seriously. Justice Gibson, whom I've already mentioned, suggested that lawyers had multiple obligations – some to their clients and some to the courts – which required lawyers to balance the competing interests according to a professional conscience. What that conscience consisted of was not entirely clear, but it was not David Hoffman's personal sense of morality. Rather, it represented a set of professional norms, professional understandings, and responsibilities as officers of the court that had developed and would develop further over time. The notion of professional conscience assumed that legal ethics was contextual. Lawyers were not to be pure hired guns doing everything conceivable to help their clients. On the other hand, to act morally lawyers, unlike lay persons, did have to take institutional considerations into account to consider how their actions would affect the courts and society's willingness and ability to use lawyers.

It may have been the uncertainty created by the debate over the lawyer's role and the undefined nature of the lawyer's professional conscience that prompted Bar organizations to try to formulate standards that would inform and guide the Bar. The original informal associations of lawyers, the eating clubs, had actually declined in number in the early nineteenth century, but with the market increase in the number of lawyers after the Civil War, lawyers began to organize themselves. The American Bar Association first came into being in 1878 as an association of elite lawyers whose purpose was to raise the economic and social status of the Bar. State Bar Associations developed subsequently. They too were private organizations of successful, like minded, lawyers. They hoped to exert their influence over other lawyers and to exert their influence over the ways society viewed and regulated the profession.

It was probably not coincidental that governmental regulation of lawyers was just beginning to be discussed around this time. In most states lawyers had been admitted to practice informally, through oral examination by judges or through a diploma privilege upon graduating from a law school. Although one state, Massachusetts, administered a written Bar examination as early as 1855, central examining boards only became common around the turn of the twentieth century.

In any event, legal ethics codes were a mechanism by which private organizations of lawyers could have input into what courts were saying about the lawyer's role. Other factors clearly contributed to the development of the professional codes as well including the rise of law schools around the turn of the century, an unusual spurt and scholarly attention to the issues, and an increasing number of lawyers who needed direction. Whatever the reasons, the first legal ethics code was adopted in the state of Alabama in 1887. The first model code was promulgated by the American Bar Association in 1908 called the Canons of Ethics and here the story of modern legal ethics really begins.

Whenever I give a lecture like this I try to keep in mind Samuel Johnson's famous description of a bad speaker. "He is not only dull himself" Johnson said "he is the cause of dullness in others." I also think of the way a former Speaker of the House described a wordy member of the legislature. "He never opens his mouth" the speaker noticed "without subtracting from the sum of human knowledge."

I do hope that I haven't lost your attention by focusing so much on the early history, but it really is essential to an understanding of how we came to the modern state of affairs which began with the Canons of Ethics. Before getting into the substance of the Canons I should note that the Canons have absolutely no legal force. They were the creation of the private American Bar Association. The ABA had no power to bind the courts or state legislatures. Certainly the drafters of the Canons hoped to influence the regulators, but the Canons mainly were an effort to guide lawyers and judges about the content of the so called professional conscience, the norms and understandings of good lawyers. Because the core debate concerning the advocates' functions was ongoing, one could not expect a sudden consensus among lawyers to be reflected in the first legal ethics code.

A fair summary of the 1908 Canons is that they consisted of a set of hortatory ideals, some of which conflicted and some of which predicted essential concepts of modern legal ethics. The most important of these were a promise of basic loyalty to clients, a recognition of the need for some level of attorney-client confidentiality, and the notion that lawyers have some obligation to act as officers of the court. The 1908 Canons were important as the first serious attempt to codify a role for American lawyers. The Canons were accepted throughout the United States until the next ABA model code was adopted 61 years later. But because the Canons were so general and internally inconsistent, they did not provide a solid basis for the discipline of lawyers. Discipline was left to state courts and legally mandated committees which enforced the general notions that lawyers must be fit to practice law and could not engage in conduct prejudicial to the administration of justice.

Although the legal ethics codes were not reformed during the early twentieth century the Bar did change. Local bar associations grew and achieved more political power. The soon began to seek control over the profession. In the 1920s a movement began to produce court rules or statutes requiring all practitioners to belong to state Bar organizations. This allowed the Bar associations to collect fees, control and limit admission to the Bar, and participate in the discipline of lawyers. By the mid twentieth century over half the states had mandatory Bars. Not all of them do today, by the way, even today. But these organizations increasingly saw as their mission elevating the of law as a profession, both for economic reasons and in the hope that self regulation would prevent outside regulators from treating lawyers as ordinary businessmen.

There are a variety of explanations for what happened next and why, but by the early 1960s a move to replace the Canons of Ethics began. Some historians tell a story based on changing demographics among lawyers after the Korean War. The return of soldiers from the war led to a dramatic expansion of the Bar which continued for three decades. This included a wave of women, minority, and public minded lawyers inspired by the labor and civil rights movements and these movements' challenges. In response, the more traditional elite members of the Bar allegedly sought to impose standards of conduct that sanctified their own practices and types of clients. Whatever the reasons, in 1969 and again in 1983 and again in 2002, 20 year gaps or so between all of them, the American Bar Association developed new models of professional conduct that all 50 states eventually adopted in some form as binding law. Felix Frankfurter's wife – Felix Frankfurter was a famous Supreme Court Justice – and his wife used to say "there are two things wrong with Felix's speeches – first he tends to get off the subject, second he always comes back to it."

At the risk of repeating Frankfurter's error, let me fast forward to what the history I've discussed means for lawyer conduct in modern times. The three modern model codes are increasingly specific, more legalized in nature than the Canons of Ethics and therefore more easily enforced. Each code survives in some form in

some states. Although they have their differences the three codes share a core. They all are based on the paradigm of lawyers as litigators in the adversary system. Although they govern all practice include non litigation, their provisions do not actually focus much on lawyers who engage in transactional representation or on matters in which clients are more interested in cooperation than pitched battle. Unlike the Canons, the 1969 code of professional responsibility for the first time truly emphasized adversarial notions and firm allied lawyers with their clients. In the intervening 61 years what America considered to be heroes among lawyers had changed. America still revered lawyers like Abraham Lincoln whose skillful cross examination proved the innocence of his clients, but we had also come to respect strong advocates for the guilty, for example Clarence Darrow and Max Stoyer. We admired their willingness to represent even unworthy clients to make sure justice was served in a procedural sense. We also had learned to honor lawyers of the civil rights movement who treated underprivileged clients with dignity and assured them an equal day in court.

Consistent with that shift in emphasis the modern professional codes were calculated to safeguard the interests of the most unsophisticated and dependent client. The codes also shared a vision of autonomous clients. They assume that clients, when informed and helped by a lawyer, can understand and control their representation and will be able to make decisions in their own interest. The client's guilt or innocence, their worthiness or unworthiness, became irrelevant to the lawyer's ethic because the lawyer is seeking to ensure procedural justice. Here are the outlines of the modern codes' mandates. Consistent with adversarial norms they demand loyalty to clients. Lawyers may not represent multiple clients with conflicting interests. They must be diligent, zealous and competent on behalf of clients. Attorneys are deemed fiduciaries which means that other than receiving their agreed upon fees they may not put their own interests ahead of their clients. The Canons of Ethics alluded to all of these notions, but the modern codes give them teeth, set them forth as rules that lawyers must obey rather than as ideals lawyers simply should take into account. Hence the current understanding of American lawyer that his role, at least in part, is to serve as a zealous advocate. The modern codes did even more to reinforce this understanding because they elevate the position of the client in the attorney-client relationship. The codes treat lawyers as clients' agents. Lawyers may be the experts in the law, but the risk in legal matters belongs to clients. As the principals, the theory goes, clients should control their representation. The American lawyer thus is cautioned to keep clients fully informed, to enable clients to make decisions, and to obey client's demands on the objectives to be achieved.

If you were to read the contemporary, scholarly literature you would find that the most controversial concept in the field of American legal ethics is attorney-client confidentiality. Interestingly though, it's controversial only at the margins. The codes all agree that a lawyer ordinarily must keep everything the client tells him secret. Disputes about whether the lawyer may reveal confidential information arise only in extreme cases, for example when disclosure might be necessary to protect the life of another person or to prevent a new criminal act by the client. Secrets about past bad acts, however, are indisputably sacrosanct so as long as a lawyer stays in the case he must continue to represent the client loyally and aggressively even when he knows the client is guilty or legally in the wrong. In these senses then, the codes incorporate Lord Brougham's model. The American lawyer is the client's champion. He must do his best and assert all non-frivolous claims for even the unworthy client. He must keep the client's secrets and, for the most part, he must abide by the client's decisions.

If this were the end of the story my foreign acquaintances would be fully vindicated in their conception of American lawyers, but American practice actually is more complex because none of the codes ever have fully adopted the Brougham model. The influence of judicial regulation remains prominent as illustrated by a number of rules that incorporate the old notion of professional conscience. For example, the codes continue to treat lawyers as officers of the court. A lawyer may not lie to a judge or jury or allow his client to lie. He may not use false evidence. He must obey discovery rules and court orders. The lawyer even must advise the court of controlling precedent in the jurisdiction. The codes provide separate rules encouraging lawyers to make sure the legal system works in its intended fashion. A lawyer may not communicate directly with represented persons even if that would help the lawyer's own client. A lawyer may need to advise the other side that it has mistakenly disclosed privileged documents so that the adversary has a chance to ask the court for their return. I said before that the client gets to control the objectives, but on the tactics used to achieve those objectives the codes expect a lawyer to exercise professional judgment. He may not follow a client's request that he violate the law, court rules, or ethical limits. Anticipating the argument that a lawyer's independent judgment should be exercised exclusively to defer to the client's interests, the codes specifically note that a lawyer is not bound to press for every advantage that might be realized for a client.

I don't want to overstate the case here. I take as my model Cordell Hull, a former Secretary of State who was known for being a very cautious man. Just as an example he was traveling on a train with a friend one day when the train passed a flock of sheep. To make conversation the friends said "look sir, those sheep have been recently shorn." "It appears so" Hull replied "at least on the side facing us." Like Hull I have to note some caveats in talking about the lawyer's independence to control legal tactics. Consistent with the ongoing debate about the lawyer's role the three modern codes differ on what should happen when a lawyer and client disagree about whether to employ legal, but morally questionable tactics. My point here is simply that all of the codes do recognize interests other than the client's and sometimes encourage lawyers to take them into account. Indeed, in some respects the modern codes directly contradict the Brougham model by specifying obligations to non-clients. For example, exceptions to attorney-client confidentiality allow lawyers to protect the life, safety, and sometimes even the financial interests of third parties. A lawyer is forbidden to engage in deceit or to take advantage of unrepresented persons. A lawyer has discretion to discuss moral considerations with clients. In short, while American legal ethics regulation places a premium on the advocacy of the client's interest, it does not adopt the Brougham approach wholesale. The codes prescribe a variety of roles – as the client's champion, officer of the court, protector of the legal system and person with integrity that complicate the American lawyer's life. He is supposed to accommodate the conflicting demands which the codes often do not spell out with a great deal of specificity.

Here is where it gets tricky. Many of the rules that allow lawyers to consider third party interests like the exceptions to confidentiality are vague or discretionary. In the confidentiality example the code drafters anticipate some situations in which lawyers should disclose confidences, but the drafters are uncomfortable prescribing too broad or too specific an exception. So they leave it to lawyers to balance the competing interests. That means lawyers need to have an understanding of what their roles are and not all lawyers agree about that role. You know, put two lawyers in a room, you get three opinions. The ambiguities and discretion granted in the codes also mean that lawyers who don't take their professional conscience seriously can ignore the spirit of the code and simply pursue their client's or their own economic interests. Some lawyers take to heart _____ who roots advice. He said "half of the job of any decent lawyer is to tell clients they are damned fools and should stop" but other lawyers do not obey that warning. From the 1960s on, we see a dramatic example of economic incentives driving the Bar's conduct. When the drafters of the 1969 code of professional responsibility emphasized client-oriented lawyering, they envisioned the paradigm of the unsophisticated criminal defendant who needs a lawyer to deal with the pressures of the criminal justice system. The U.S. Supreme Court, having a similar paradigm in mind, simultaneously expanded the Constitutional rights of litigants. Corporate law firms representing sophisticated clients quickly learned that the same rules applied to them. That gave rise to the proliferation of litigation and aggressive lawyering that the American Bar is now known for. The desire to please their clients led these firms to appreciate the Brougham model, to interpret the code constraints and advocacy narrowly, particularly where the codes accord lawyers discretion, and this has had its costs in terms of making the resolution of disputes in the United States unpleasant and expensive.

I used to tell my own clients when I practiced as a trial lawyer that litigation is a machine which you go into as a pig and come out of as a sausage. That is why the debate between Brougham proponents and those who suggest that lawyers must act with restraint, independence and moral judgment continues today. The lawyer codes don't resolve the issues. They simply provide parameters requiring diligent pursuit of client objectives while setting limits on extreme behavior and calling upon lawyers to consider systemic and non-client interests. As my foreign friends have correctly noted, in practice American lawyers have grown ever more aggressive.

From American citizens' perspectives, it's fair to say that America's lawyer heroes also have changed over the last 25 years. Of Johnny Cochran, O. J. Simpson's attorney, we say "wasn't he a terrific lawyer using the system to secure an acquittal when almost everyone believes O. J. Simpson is guilty." We do not admire Cochran because he vindicated fair process, but rather because of his exercise of skill on behalf of his client. Whatever we think of Simpson himself, our expectations of lawyers today prevents us from even questioning Cochran's morality in helping put Simpson back on the streets. Oh, America has its detractors of lawyers. Shakespeare's famous statement in Richard II "kill all the lawyers" is a common sentiment among lay persons, particularly after an event like the O. J. Simpson verdict. The work of American trial lawyers has become a political issue in presidential campaigns and we still have our share of lawyer jokes. You may have heard, for example, that American scientists are substituting lawyers for rats in their laboratory experiments. Why? Because lawyers breed more easily, scientists become less attached to them, and there are some things that rats just won't do.

But the reality is that the things that American citizens detest most about our lawyers – their aggressiveness and willingness to sanctify their clients' concerns over fairness or the public interest are precisely the qualities American citizens want and expect of their own lawyers when they become involved in the legal system and for the most part our form of the adversary system allows, though it does not always require, extreme client-centered behavior. The ongoing tension is that some lawyers and many observers do not like that approach.

But please remember my starting point. The professional codes are only part of the law governing lawyers. Criminal, civil, and administrative law often prescribe different standards than those in the codes. The use of these constraints on lawyer behavior has grown dramatically in recent decades. Trial judges also continue to regulate lawyers in litigation, sometimes referring to the codes, sometimes implementing independent standards. These judges continue to have a less Brougham-like attitude towards what lawyers should do. Their main interest, after all, is to allow relevant evidence to be introduced and to reach a fair verdict. The American lawyer, therefore, cannot look solely to the professional codes in determining how to act. He must have an understanding of the theory of legal practice – of his role or roles – and a recognition of the many different constraints on his behavior and because the prevailing standards leave room for the exercise of discretion, at the core of every lawyer's practice lies a personal judgment of how he will accommodate legal, moral, and economic incentives in light of the spirit and theory of American legal ethics.

I mentioned that the dominant legal ethics codes have been reformed three times in the last 40 years. There also has been a restatement of the law governing lawyers – another disguised attempt at reform. Far more professional responsibility scholarship is being produced than ever before, much of it focusing on the debate I've discussed today. What this constant reconsideration of legal ethics reflects is an uneasiness with where the profession stands and a recognition that defining the American lawyer's role is an ongoing process. My understanding is that the Mexican legal profession is relatively young and has some developing to do. American with its 1,000,000 plus lawyers and extensive legal tradition has room to grow as well. As legal cultures develop in Mexico, Europe and Asia and come to grips with globalization and the economically driven world, America will be able to learn from other countries' insights just as the other countries can learn from our experience. That at least is the process that this series of lectures is trying to stimulate.

I hope that my remarks today have in some small way contributed to that effort.

Question and Answer Session

Q: We're going to initiate a series of questions, and I'm going to take advantage of the microphone to ask the first question. First of all, congratulations on a very excellent talk. I think I learned a great from this. I guess one thing that this presentation helped to correct in my mind is perhaps a misunderstanding that I had previously that professional autonomy of lawyers and self regulation was very central to the American model, and I think your emphasis on the role of the state, especially the role of courts and codes in regulating lawyers, really opened my eyes to another side of that. I guess it raises a question for me, though, especially given that the codification of certain regulations of legal conduct occurred seemingly in waves in the United States. My question would be: what was it that provoked different states to act, to control, or try to establish codes for legal conduct? What was it that caused them to do that? Were lawyers being particularly bad or was it in fact the foundations created by some of the professional and autonomous standards that lawyers developed themselves? I'm curious about that. A second minor question has to do with tort litigation, tort lawyers themselves. To what extent does U.S. tort law prevent lawyers from misbehaving, the idea that perhaps they might be sued by their clients?

A: I think they're all part of the same question in some fashion. Lawyers would like to self regulate and that has been a driving force behind the promulgation of the codes. As I said, you had judicial regulation and the Bars developed and hopefully tried to influence that regulation by giving content to the notions that the courts were implementing and hopefully hope that the courts would actually adopt their position. The problem in the United States was they never were in a position to fully self regulate. Because of the history, judicial regulation was the core and so what drove – what's drove states to codify – it wasn't states that were driven. It was lawyers that were driven to codify these codes in an effort to in some fashion control their own lives, but in light of the fact that they were being regulated, and they are a heavily regulated industry in lots of different ways. Tort regulation that you mentioned is one of those ways. The problem in the United States for lawyers is perhaps

that you have too many forms of regulation that sometimes provide inconsistent standards, and that's interesting because the codes are judicial regulations. State Supreme Courts adopt them, yet tort law for example is also a judicial law and judicial supervision of lawyers and litigation including standards for conflict of interest and what lawyers may do in litigation is also judicial law. Trial courts make that – make that law, and they don't always look to the other forms of law. So you sometimes have inconsistent law and of course the American Bar Association is always had its deepest dream that the codes will govern, that lawyer self regulation will control it all. But that's not the way it works in the United States and clearly shouldn't because lawyer regulation isn't capable of handling all of the situations that will arise and so one of the trends in modern times is some notion of – well, forget this whole notion of self regulation. More important is the notion of figuring out how the law governing lawyers fits together and perhaps even some scholars, myself included, _____ Bar Association should embrace outside regulation and actually incorporate it in the code sometimes and look to it in other areas where the codes just aren't good ways of regulating lawyers.

Q: Professor Zacharias, first thanks for bringing your expertise to this talk as well as the University Of San Diego School Of Law. I wondered if you'd focus that expertise for a moment on the model rules themselves and tell us what, if you were the god of the rules, how you would take the rules and modify them.

A: Well, I think the problem with the model rules is they don't recognize their place in history. When the 1969 model code was adopted there was no clear role for lawyers and the model code was very important in establishing this notion of lawyers as clients' champion – that the lawyer's fundamental role in representing their clients' interests – maybe not above all else but certainly as a highly significant part of their function. That's now ingrained in all lawyers. All lawyers know that. All lawyers feel that. If anything, the problem is they go overboard in that respect. And the problem with the model rules is they continue to depend on trying to reinforce that role rather than saying “okay, we are more developed at this point. We have our starting point and now maybe its time that we make some more fine distinctions. Maybe we shouldn't treat all lawyers alike. Maybe lawyers practicing matrimonial law should be able to take into account interests other than, say, the one person – his client. Maybe he should be able to take into account the interests of the children.” That's inconsistent with the Brougham model. Maybe in other situations clients should be differentiated. Sophisticated clients should be differentiated from corporate clients who act through their own corporate counsel when dealing with lawyers, and so I'd say the model rules have to take a better note of their place in history and start recognizing that the core is established and now maybe some – it's important to start distinguishing among lawyers and clients to fine tune the system.

Q: Could you comment on the situation in California over the last 15 years, maybe longer, where you had at least three institutions who thought they were in charge of lawyers. You had the California Bar Association, the legislature, and the California Supreme Court all of whom at one time or another were trying to make rules or implement policies and procedures not always in agreement with the other players in that game. Does that make sense?

A: Yeah. No, I mean you're right that you have that and as I descried the history in the United States to some extent you always had it. I mean you have the Bar Associations that have no power by themselves. They want to influence law. You have judicial regulation. They actually, in most jurisdictions control the promulgation of legal ethics codes but then you have legislature sitting out there who also think that they have to pass laws that supervene state supreme courts and there's a fight in a lot of jurisdictions about who gets the control, and that is what I was referring to when David asked his question. If you do have some problem of overlapping regulation and not enough attention made to consistency. In California you have the interesting situation in which you have the legislature having made some rules and the California Supreme Court said well, if there are gonna be changes the legislature has to make it even though the Bar has proposed changes in rules and we agree with them. So, the legislature has to take responsibility in that. Leaving a situation with California's confidentiality rules where we had a very bizarre confidentiality rule that was the only one of its kind in the 50 states that couldn't be changed for many years. So this process of multiple regulatory bodies exists to a lesser extent or to more extent in different states, but that's one of the things that has to be worked out is the harmonization of regulation because we have a lot of regulation at this point.

Q: I'm not sure if perhaps we have any questions from our Mexican participants.

Q: Professor, first thank you for the speeches, really. I think it is really good for people who are coming from different – from parts of the world and basically from Mexico you were talking about the Mexican _____ and it's – in countries or nations where you have instilled legal assistance in certain development and trying to get the legal _____ in the right place and you have on the other hand the legal community and the professional – the legal profession and in some way regulated in a very different way than the United States, in Europe and other parts of the world. What would you suggest to the legal community or to the legal – to the legal – yeah, to the attorneys, to the lawyers in different countries, if they are still waiting or not waiting, but if they are facing a situation where the legal system still needs some changes and would you suggest to go in the direction to try to regulate, try to promote in the legislature our legal responsibilities in a way that is gonna be helpful anyway if we don't have a legal system that it needs also reforms or something like that?

A: I mean, that depends – I mean it's in part it's a question of power, right – what you can do and what you can't do. The one problem that exists if there is no regulation and if its left essentially for lawyers to determine their own ways and different jurisdictions doing different courts doing different things, is then economic incentives or what's gonna drive lawyers. Lawyers are always gonna do what's best financially or psychologically for themselves. So, probably at some point you need some form of regulation and regulation will inevitably fill that vacuum by someone. It may come as in the United States it came from the courts. It may come from legislatures or if the Bar is organized enough and as you saw in America the Bar was not organized at all until the 1920s, 150 years after the Revolution, if the Bar is organized enough then it can attempt to influence that significantly. But the point is, something has to be done to regularize it. Otherwise, economic incentives are all that drives it and the free market is not something that can appropriately regulate how lawyers act because then clients will be treated completely differently and based on their economic status and results of cases will not be based on any notion of fairness or any notion of appropriate results, but rather who has the most ability to buy results. And so, some form of regulation has to develop and where that is developed from really depends on the culture of the jurisdiction.

Q: Thank you.

Q: That's such an important point that came up earlier in the series. If lawyers don't act to regulate themselves and shape the process of regulating the practice they will be acted upon in some ways by the courts or by the state.

Q: I have more of a general question referring to how many lawyers you said there currently are and from a student's perspective what is a very popular field, especially at USD with the law school, and I was wondering how far or how much longer do you think that the law and education for students will be increasing and do you see there a point where there's not gonna be much opening in the law field and there's gonna be just so many that the law field is going to start to die out for students.

A: Well, the kicker in that question is the term "the law field" because lawyers do all sorts of different things, and that's why I said by some counts the 1.1 million lawyers in America is 2/3 of all the practicing lawyers in the world. The problem with that count is different people are – in different countries label people as lawyers differently and some different people do aspects of what lawyers do in the United States. So, are we coming to an end in the increased number of lawyers? That's not what the statistics show. It's ever increasing. Are all lawyers who graduate from law schools going to be able to do exactly the same things as they always have been. No, the more lawyers you have the more they have to find different ways of practicing, but no I don't think – I don't think necessarily you see an end because the practice of law – the legal training trains lawyers and can train lawyers to all sorts of kinds of – all sorts of different jobs and so the question really is will law become more specialized, will the training become different rather than will the number of lawyers change?

Q: Well, thank you Dr. Zacharias. I'd like to show our appreciation by offering you two of our latest publications and thank you on a really excellent lecture and discussion period. Thank you so much. Thank you all and good night.