

St. Louis University School of Law

Thomas Deline Program On Ethics for Entering Law Students

2004-2005
I. Introduction

A. The Purpose of this Program

The purpose of this program is to confront you with ethical problems of the sort that lawyers face in practice.

B. The Problems and Materials

Each problem to be discussed is followed by questions and other materials. The questions and other materials are there to help you think about the problem to be discussed. They are not there to guide the discussion of the problem to some particular conclusion. Nor do they predict how the discussion will go or what will be covered. Nor, indeed, are they the only materials to be consulted in the discussion. Your own judgments and experience with ethical problems will play a role as well.

To understand some of the problems, you will need to know something of the substantive legal context in which they arise. Don't let that bother you. The discussion leader and the materials that accompany the problem will provide what law you will need to work through the problem. For the purpose of discussing problem 2, all you need to know is this: A judgment is a final adjudication of all related issues between the parties (the plaintiff and the defendant). In other words, if the judgment is fairly arrived at, by proper procedure before an impartial judge, the defendant is no longer allowed to deny liability to the plaintiff, even if the defendant did not put on any evidence. So, in problem 2, once the default judgment becomes final against the defendant, the latter is stuck insofar as liability is concerned, unless the default judgment is set aside.

C. The Participant's Preparation

You are expected to have read and thought about the problems and the questions and other materials that follow them, and to be prepared to discuss them. You should have tentative opinions on how the problems should be dealt with, based on what you have read, and what ethical standards and assumptions you bring with you. One of the questions that you will have to grapple with is that of the validity or defensibility of any ethical judgment you might make.

II. Problems

Problem 1: The Tennis Tournament

The Men's Intercity Tennis League consists of four tennis clubs in two cities. Each year, one of the clubs sponsors a tournament for the League. Each competition between clubs consists of three singles and four doubles matches, so eleven people are needed each week to compete. The matches are played on Sunday afternoon. Each match is between similarly ranked opponents. That is, the top singles player from one club plays the top singles player from the other in singles match #1, and the third ranked doubles team from one club plays the third ranked doubles team from the other club in doubles match #3. All singles matches and doubles match #1 are played at 12:30 P.M. and doubles matches ## 2 to 4 are played at 1:30 P.M.. The following Saturday is reserved in case of rain. Because of tennis court scheduling difficulties, no other make up time is available. Each club that wins its competition receives a trophy. The club whose teams won its competition by the greatest margin receives the "championship" trophy. The other winning club receives the "winner" trophy. To receive either trophy is considered a major event by these clubs.

This story is about a match between the Pinebrook Athletic Club, and the City Athletic Association (C.A.A.). Gary is the unofficial captain of the Pinebrook squad. He was "chosen" by default because he was willing to make the arrangements for the match. Hank is the captain of the City Athletic Association's players. He was probably selected in the same way as Gary was. Between these two organizations there is a friendly, but intense rivalry.

On Sunday, May 21, the tennis players from Pinebrook traveled to the City Athletic Association's courts to begin the tournament. After the first few matches, it began to rain. The opponents were ahead on points. After a while it began to pour, and the next matches were postponed to the next Saturday, May 27, with the same players resuming from the point at the match at which they had left off. At the end of the day, the C.A.A. led the competition 3 matches to 2. They had won all the singles matches and Pinebrook won the #1 and #2 doubles matches. All that remained to be played Saturday were ## 3 and 4 doubles matches. To win, Gary's team had to win both doubles matches, and Gary doubted that this would happen. The #3 doubles team was questionable. There was plenty of heart, but they were erratic. Sometimes they were great; sometimes not. On the basis of what he knew about the opposing #4 doubles team, Gary was confident that his #4 team would win.

During the week of May 22nd, Gary was told that one of the players on the Pinebrook #4 doubles team would be out of town and could not change his plans. If that match were to be forfeited, the whole tournament would be lost to the other club. Even if the #3 teams won, the forfeiture of the #4 doubles match would give the victory to C.A.A., 4 matches to 3. Still, Gary did not give up hope. After all, a lot of things can change in a week. On Friday the 26th, more bad news hit. A player in the #3 doubles team telephoned Gary to say that he had to attend a funeral on Saturday, and could not be at the match. Now, Pinebrook would forfeit both matches. The situation was made known to the rest of the club's players. They all understood that, if the two players did not show up, the entire tournament would be lost.

As Gary prepared to call Hank and admit defeat, Gary's telephone rang. It was Hank. Hank told Gary that two of his players would be unable to play Saturday. One of the players was from the #3 doubles team and the other was from the #4 doubles team. With those games forfeited by Hank's team, Gary's team would take the cup.

To give his team the trophy signifying a victory in this year's tournament, all Gary had to do was accept the forfeitures in the two doubles games and tell Hank nothing about his own club's inability to produce a #3 and a #4 team. You are Gary. What do you tell Hank?

Notes For Discussion of Problem 1

1. What is your role when you (Gary) receive the telephone call from Hank? How does it affect your relationship with Hank?

a. Consider a slightly different story. The game is between you and Hank for the championship of the city. There is only one day and one time available for the game. You discover that you won't be able to play because of a flare-up of an old injury. You decide to call Hank and tell him. Before you can pick up the telephone, Hank calls up and tells you that he can't make it. If you tell Hank that you can't play, there will be no winner because both you and Hank will have defaulted. If you don't tell Hank, and show up for the match (being secure in the knowledge that you won't have to play) you will win by default. Do you tell Hank?

b. Is the actual situation -- your being captain of the team -- different in terms of your relationship with Hank?

2. Normally, in competitive sports, the rule of forfeiture serves the function of schedule enforcement. If you don't show up for a match, you forfeit. This keeps the competition running in an orderly manner. Assume that, in this competition, it is possible to tie. That is, it is possible for two teams to share the championship if the two teams battle to a draw.

a. Assuming the previous statement is correct, how does that affect your (Gary's) response to Hank?

b. Do the rules of forfeiture also provide that the winner is the one who shows up *ready, willing and able to proceed*? Had Hank not called, your team would not have been ready or able to contest all matches and win. If neither team shows up ready to play, both teams would forfeit the unplayed matches, and both teams would share the championship *by default*. Does that make your picking up the trophy for the team a lie -- a representation that your team would have been ready, willing and able to proceed?

c. On the other hand, what's wrong with a little lying? Do (must) lawyers lie occasionally? See Appendix A to these materials and the notes that follow it.

3 How should you -- a person in Gary's position -- decide what to do? Assume Gary hates to lose and takes great pride in his club. Assume the team members are very competitive and hate to lose.

a. Do you decide what to do on your own?

b. Do you consult the club (how would you be able to do that without tipping Hank of that something may be amiss)?

e. Should you involve your teammates in the decision? How should you put the issue to be decided?

4. Does your social relationship to Hank make a difference to your decision as to what to do? Assume you are a friend of Hank's. Does your role as friend (and your desire to retain that friendship) interfere with your role as captain of a team? If you decided not to tell Hank (for the sake of the team), should your role as Hank's friend lead to tell Hank about the actual situation with the team?

Problem 2: Gotcha!

On December 27, 1992, Harry Blesse was injured when a cart, which was rented from the Gross Building Materials Company, tipped over and threw drywall onto him. Blesse was hospitalized and lost a substantial amount of time at work. After he left the hospital, Blesse went to the office of John Strait, a lawyer in private practice, who specializes in personal injury, commercial fraud and domestic relations litigation. Strait heard Blesse's story. He indicated that he had some doubts about the likelihood of success against the only solvent defendant -- Gross Building Materials Company -- but said he would accept the case on a 40% contingency fee basis.

After some investigation, Strait drew up a petition which set out a claim against Gross Building Materials Company. He filed the petition with the clerk of court on May 3, 1993. Personal service of the summons and petition was had on the defendant's president, Wilfred Gross, on Friday, May 7. On the following Monday, May 10, Gross's secretary walked the papers over to the offices of the company's liability insurer. The clerk who received the papers from Gross's secretary immediately copied the documents, put the copy in a file, and sent the original by runner to the law offices of Fee & Garbie, to be given to Hektor Fee, who normally represented Gross Building Materials Company and other similar businesses who were insured against liability by the insurance company.

A Note about Rules of Court:

For the purpose of this problem, assume that, under the applicable rules of court, an answer must be filed within 15 days of the day on which the petition is served on the defendant. If no motion to extend that time is granted before the 15 days is up, the defendant is in default. At any time after that default, the plaintiff may move that a judgment of default be entered and prove damages. The court then enters an interlocutory judgment of default, which may be set aside if the defendant moves to do so within 20 days from the day the interlocutory judgment is published. Just about any reason to set aside the interlocutory judgment is adequate, so long as the defendant's answer is submitted with the motion to set aside. If the interlocutory judgment of default is not set aside by the end of the 20th day after the judgment is published, the judgment becomes final. Thereafter, the judgment may be set aside only "upon good cause shown" which has been held not to include administrative or secretarial mix-ups at the office of counsel for defendant.

Not knowing who defense counsel was, nor having received any papers that indicated that the defense intended to do anything about the lawsuit, Strait moved for a judgment of default on Friday, May 28. On Monday, May 31, Strait put on evidence to support the amount of damages claimed, and an order granting an interlocutory judgment of default (that is a temporary judgment, pending the issuance of a permanent judgment) was entered on the same day. A notice of the motion and a verbatim report of that judgment was printed in the Daily Record for Wednesday, June 2. Unless the court withdrew its interlocutory judgment before then, the judgment would be final against the defendant at the close of business (4:30 P.M.) on June 22.

On June 10, Fee's answer on behalf of the defendant, Gross Building Materials Company,

was filed with the circuit court, and a copy was sent to plaintiff's counsel, Strait. Strait called his client, Blesse and told him that he had received a copy of the answer filed in his case, but that it was filed too late. If defendant's counsel does not move to set aside the interlocutory default by June 22, a final judgment of default would issue against the defendant. Before the 22nd, as indicated above, it would be fairly easy to set aside the interlocutory default judgment and allow the defendant to file an answer, so long as the defendant shows that the reason for lateness is not the gross or culpable fault of that party or counsel. However, if a final judgment of default is entered, the court is not likely to set it aside if the grounds for setting it aside do not indicate truly extraordinary and unavoidable circumstances.

Strait then asked his client what he should do. Should he inform counsel for the defendant that an interlocutory judgment for default was entered, or should he just sit on the case for twenty more days and then move for a final judgment of default? Blesse was puzzled. "What if you tell the other side and the court lets them go ahead? We can still win, can't we?" Strait answered: "We can, but as I told you when I took this case, it is awfully dicey. We could lose on the question of liability." "Oh," said Blesse, "I guess you should just keep quiet then, right?" "If that is your instruction," said Strait, after which he wished his client a good afternoon and hung up the telephone. Strait waited the necessary time, and a few days extra, before going to court and filing his motion to enter a final judgment by default in the amount of \$1,500,000. The motion was granted the following Monday. Shortly thereafter, Strait informed Fee of the final judgment.

Fee filed a motion to set aside the default judgment and to allow him to file his answer late. Fee's motion was accompanied by several affidavits, setting out what occurred between the time his office received the petition in this case and the filing of the final default judgment. A copy of the motion and affidavits was sent to Strait. In summary, the motion and affidavits set out a credible story of how a very well-organized and effective system for following cases and checking on deadlines broke down in two places. First, the secretary of the lawyer to whom the defense was assigned mislaid the papers to be filed with the court and sent them to the insurance company with the original and a copy of the answer to be filed. Then, a claims manager at the insurance company, who received the pleadings for approval and signature, mislaid all the papers. His secretary found them and sent them directly to Fee, who told his law clerk to file them with copies to the lawyer for the plaintiff. No one pointed out to Fee that the papers were late, and that he should check to see if a default had been entered, and file a motion for permission to file late. That is why the answer was filed on June 10 without any accompanying motions.

At argument on the motion to set aside the default judgment, the judge noted that the motion filed by Fee would have been successful without doubt, had it been filed before the 22nd of June. However, as was forcefully argued by Strait, the grounds for setting aside the judgment entered on the default were much stricter and it was quite plain from the affidavits and the motion that they were insufficient. So, Fee lost his motion and Strait won a judgment for his client.

Notes For Discussion of Problem 2

1. Is Strait's role different from or similar to that of Gary in Problem 1? Is the rule and function of forfeiture the same or different? Strait has a legal "duty of loyalty" that Gary doesn't have. On the other hand, Strait's duty does not require Strait to seek *every possible* advantage for the client.

2. What if Strait had informed defense counsel that the latter was out of time and that Strait intended to seek a judgment on default if defense counsel did not file an answer before the time to ask for such a judgment arrived? Would that be a betrayal of his client?

There may be a legal problem here. The information that Strait has with respect to the defendant's lawyer's conduct may be confidential information under the appropriate rules governing lawyers' conduct.

Assume for the sake of discussion that the rules do not prevent a lawyer from informing another lawyer of the latter's lateness (e.g., by contacting the other lawyer to complain about the lateness of the latter's pleading) and does not prevent a lawyer from agreeing to extend the time for the other lawyer's performance (e.g. by agreeing to a joint motion to extend the time for the other lawyer's performance).

It is worth asking whether the rules should clearly prohibit plaintiff's counsel from informing defendant's counsel of the latter's risk of default and a judgment on the default. Should it matter whether the rules prohibit or allow Strait to tell Fee?

3. What if defense counsel suddenly realized that time for filing an answer had passed, called Strait and asked for an extension of a week to file the answer? The usual way in which this is done is for defense and plaintiff's counsel to join in a motion for leave to extend the time for filing to a specified date.

a. May Strait agree to the extension if it is requested by the other side? Assume that defense counsel needs the extension in order to do an adequate job for the defendant? Does the reason for the agreement matter? What if he agrees to the extension out of courtesy, or a sense of fairness to the other side, or because it is helpful to Strait's current and future clients to keep good relations with opposing counsel?

b. If Strait may agree to the extension because it is the right thing to do, how is this different from telling the opponent that time is about to run? If you think Strait may not agree to the extension if it is not plainly in his own client's interests to do so, then do you reject the relevance of consideration for others or fair play in this context?

4. Try a slightly different story – one in which the defendant did file in time, but under the wrong case number. Strait knows about the misfiling. When the time for default comes up, Strait goes to court and asks for a judgment. Under the rules of court, there is no requirement that the party moving for judgment on default notify the opposing counsel of the motion or the date of hearing on the motion. Could Strait have notified opposing counsel anyway? As a courtesy? See *Owens v. Neely*, 866 S.W.2d 716 (Tex. App. Houston, 1993). If you say that he could, should he? Is this case different from the case set out in Problem 2?

5. If the plaintiff had served the wrong defendant, but the right defendant showed up and delayed the proceedings until the statute of limitations had run. He then moved to dismiss on the ground that service was wrong. Is this simply playing by the rules, or is it chicanery? See *Lybbert v. Grant County*, set out in edited form in Appendix B to these materials. Is this kind of conduct by the plaintiff different from the conduct you expect from Strait in Problem 2?

6. Assume that a person came to your office and asked for your help in a matter. You

discover that the person is asking for help which would harm the interests of a client of yours.

a. Do you sit and listen to the person, asking leading questions to obtain information that would help your client, or do you tell the person that you cannot help him and advise him to say no more?

b. If the period of limitations is running on that person's claim, may you tell him so? If you may, should you?

7. Part of the difficulty in problems 1 and 2 has to do with honesty. Is it ever ethically permitted (if permitted is it required) to lie for the purpose of obtaining an advantage for your client? What counts as lying? Is it proper to mislead your opponent for the purpose of obtaining an advantage for your client? What is the difference between misleading and lying? Now, consider the following:

In the early 1960s the Mattachine Society, an activist Gay Rights organization in Washington, DC, decided to convene a national conference to discuss the status and rights of homosexuals in the United States. The society contracted with the Manger Hotel, one of a chain of hotels, to house the conference. The purpose of the conference and its subject matter were made plain to the manager, who nevertheless agreed to provide space for the event. Two weeks before the conference was to be held, and after publicity had been sent to many parts of the United States, the home office of the hotel chain insisted that the contract with the Mattachine Society be broken.

Counsel for the Society filed suit for a temporary restraining order, preliminary injunction and specific performance of the contract. He then began negotiations with the manager's lawyer. The Manger would not recede from its position, and the courts in the District of Columbia were not sympathetic to the plaintiffs' cause, so the plaintiff focused on getting a settlement. The president of the plaintiff Mattachine Society, Frank Kameny, told counsel that he would be very pleased if the settlement came to \$1,000 for the plaintiff. One of the arguments made early on during the negotiations is that it would be virtually impossible to find a substitute site, and thereby mitigate losses suffered as a result of the breach of contract.

Early in the discussion, counsel for The Manger suggest that the parties settle for \$1,000.00, Sensing more might be offered if the negotiations continued, counsel for the plaintiff waived the offer aside scornfully, and stated that I was not authorized even to consider anything below five figures. Plaintiff's counsel then contacted Kameny, told him about the offer and recommended that the negotiations continue. Kameny agreed.

Eventually, an offer of \$2,000.00 was made and plaintiffs counsel contacted Kameny with the news. During the conversation, Kameny told counsel that the Park Sheraton, which was better located than The Manger, agreed to have the conference there, under terms identical to those in the contract with The Manger Hotel. With the conference being held at the Sheraton, there was no longer any basis for requiring The Manger Hotel to perform the contract. Moreover, the losses resulting from the breach of contract by The Manger became negligible.

When counsel for the plaintiff called defendant's counsel to accept the \$2,000.00 settlement offer, defendant's counsel asked "By the way, how are your efforts to mitigate the damages coming along?" "Nothing definite yet", answered plaintiffs counsel. As a result, the Mattachine Society won a substantial settlement (\$2,000) and had its conference as planned. (Based on Monroe Freedman, Cases and Controversies, Legal Times, 12-12-1994 and 2-20-1995)

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- a. Reconsider the Abrams piece in Appendix A. Does Abrams's argument apply to the case noted above?
- b. Can a factually accurate statement be a lie? Consider the statements by the lawyer for the Mattachine Society concerning settlement and the possibility of finding an alternative location. They were both factually accurate, taken alone. Does the context make a difference in determining what was actually and intentionally communicated?
- c. What if counsel for the Mattachine Society, thinking he could get more, told his opponent that his client had told him that he would be glad of a settlement for \$1,000, but counsel would tell him to hold out for more? Would that have been malpractice? Betrayal of client confidences? Disloyal?
- d. What if counsel for the Mattachine Society, while speaking over the telephone to opposing counsel about the \$2,000.00 settlement, answered their question about "mitigating damages" by telling the other lawyer that there was an offer of hotel space outstanding from the Park Sheraton? Would that have been malpractice? Betrayal of client confidences? Disloyal?

Problem 3: Whom Shall I Serve? How shall I Serve?

The Lushhus Food Company makes a broad range of prepared foods, including candies, and soft drinks. One of its soft drinks, Frutola, was first sold four years ago. It is very popular throughout the United States and Canada, and is becoming popular in Europe, where it has been marketed for the last year. The drink is made with an ingredient called Marvelline, the recipe for which is a well-guarded secret. Four months ago, a public interest group named the Scientists in the Public Interest (SPI), published a report on soft drinks in its periodical, The SPI Bulletin. In that report, it was stated that Frutola contains ingredients that make it addictive to adolescents and, if drunk in "large quantities" over a period of six months, could induce cancer of the stomach, the colon and the rectum. This report was picked up by CNN and mentioned in its news programs two weeks ago. Already, some consumer groups have sent mail to the president of Lushhus Food Company, as well as to the editors of newspapers in major metropolitan areas and nationally distributed news magazines, demanding that Frutola be pulled from the market. They have also contacted the United States Food and Drug Administration, asking that it take action against Lushhus Food Company with respect to this drink.

Shortly after the report on soft drinks was published in the SPI Bulletin, the food scientists who worked in the Lushhus Food Company's food research and development department were asked to review the report and check on its accuracy. As part of its research, the Department asked the SPI for a description of the research which formed the basis for the soft drinks article. The report requested was sent a week later. The chief of the Food Research and Development Department, a Ph.D. in Biochemistry with 20 years of experience in the food chemistry field, sent a report to the president, marked "Confidential" which commented on the article in the SPI Bulletin and the research on which it was based, and on the testing of the drink and the additive, Marvelline done in the Department under the chief's supervision.

The report by the chief of the food research and development department to the president of Lushhus Food Company stated: (1) The research which supported the SPI article was

poorly designed and easily attacked for reliability and accuracy; (2) The conclusions of the Department's study of Marvelline's effects on experimental animals, which had been done during the previous year at the request of the vice president in charge of food marketing agreed with the conclusions of the SPI article. In fact, the danger of cancer of the stomach, the colon and the rectum increased markedly after consumption of far less Frutola than was indicated in the SPI study. (3) Those and other studies indicate that Marvelline probably induces a strong craving for more Marvelline in people between twelve and twenty-five years of age (and a weaker craving in older persons), which weakens if the person does not ingest Marvelline for ten days to two weeks. (3) The Department was working on a less harmful, non-addictive substitute for Marvelline which would probably be ready for testing in six to eight months. If that substitute did essentially what Marvelline did for the taste Frutola, it could go into production within another six months and be substituted for Marvelline in all Frutola in a further two months.

You are a partner in the firm Lushhus normally uses for litigation. Last week, you conferred with the president of Lushhus to discuss the report and what should be done about it. You learned that recall of all bottles of Frutola, and stopping the sale of that drink until an adequate substitute for Marvelline is found and produced in sufficient quantities, would cost many millions of dollars and seriously hurt Lushhus Food Corporation's public image and good will. Moreover, according to Lushhus's in-house counsel, if Lushhus admitted that its additive likely caused cancer, it would be exposed to liability in such an amount as would seriously cut into Lushhus's resources. You know that the financial condition of the corporation was not good. A serious financial jolt, such as one threatened by the Frutola matter, could send the corporation into bankruptcy.

The president wants you to find a way to prevent this harm. He asks your opinion of a public attack on the SPI report on the ground that it was based on poor research. The president also tells you that he has ordered all copies of the report concerning Marvelline destroyed, and retrieves your copy just before you leave the office (so far as you know, the destruction of the documents is not illegal, there being no investigation going on or impending, but you say nothing to the president about that before handing back your copy of the report).

You tell him you want to consider what should be done, and will get back to him within a few days.

Notes For Discussion of Problem 3

We look at two problems of the ethics of representation. (1) The duty of loyalty, which was discussed in the first two problems. (2) When one may willingly aid a principal (employer, client) in exposing others to danger, and perhaps thereby contributing to harm to others. If the representative or agent does not intend to help the principal the agent can always withhold services by resigning. What if the agent does not resign, but simply refuses to further the achievement of the principal's ends, or even takes steps that may impede achievement of those ends. Is such conduct by the agent unethical? May an agent sabotage the principal's achievement of its goals?

1. The the President of Lushhus Food Company.

a. Consider the multiplicity of roles played by the president of Lushhus Food Company. He is a husband and a father, he runs a business on which large numbers of employees depend

for their sustenance, and he operates a corporation for the benefit of shareholders who are, in theory, the real owners of the company. He also has close friends, and some friends who are not so close. Frutola is a popular drink, the president's two teen-age daughters drink it in large quantities. So do his nephews (both in college). So do his friends and their children. One of his teen-age daughters appears in a television advertisement for the product, thirstily emptying a bottle. Are his duties to all these various constituencies the same? Where they conflict, is there a way out of the conflict without betraying one of them? Consider answering the following questions as if you were the corporation's president.

- 1). May he stop his daughters' drinking Frutola? Does he tell them why (but swear them to secrecy)? What if their stopping drinking Frutola may be noticed and thereby harm the corporation?
- 2). May he warn members of his family? Does he tell them why (and swear them to secrecy)? What if he can't trust the nephews to keep their mouths shut about Frutola?
- 3). Does he warn his close friends? What if they have children? What if they ask him about the publicity produced by the SPI report?
- 4). Is there any moral difference between trying to prevent his daughters and his nephews from drinking Frutola and trying not to prevent the continued ingestion of Frutola by the rest of the population of the United States, Canada and Europe?

b. Can the president and the corporation do nothing?

- 1). What should be done if news reporters ask for interviews concerning the SPI report? Could the president say something like "no comment" or "we're looking into the matter carefully"?
- 2). May the corporation continue to advertise Frutola as if nothing had been learned about its potential harm? May the company advertise: "Those who question Frutola's safety as a drink have given no reliable evidence to support their intemperate attack on this delicious beverage."
- 3). Should the president ask members of the United States Congress, to whose campaigns the corporation has given substantial amounts of money, to interfere with any potential investigation of Frutola by the Food and Drug Administration.

2. The Lawyer for Lushhus Food Company.

a. Now, become the lawyer of Lushhus Food Company. A lawyer may be asked to represent a person whose activities threaten harm to others. The lawyer might already represent a person and be asked to further activities that threaten harm to others. This lawyer has precisely the same multiplicity of roles problem that the corporate heads have. She has her own interests to consider, as well as the interests of friends, her community, her parents, spouse and children. Her decision to represent (or not to represent) the potential client occurs in two contexts. In one context, she is not yet counsel for the company. She has absolute discretion as to whether to represent someone in that context. In another context, she is already counsel for the company in a particular matter and may wish to withdraw as counsel in that matter. Her ability to withdraw is limited. If she would prejudice the interests of the client, she cannot withdraw without the consent of the client or without good cause, and such cause does not include a desire not to represent the client. There is a third way to refuse help, albeit an illegitimate one. Counsel might simply refuse to continue help the client with a particular

task. That is equivalent to withdrawing from representation; it is more like sabotage, isn't it?

1). One could justify the lawyer's decision to represent the producer of the suspect drinks by referring to the right of each person to competent and diligent legal assistance in the pursuit of that person's legal rights, without regard to the consequences.

2) Is there such a right outside of a right to representation in a criminal trial? Should there be such a right to legal assistance?

3) If there is such a right, does that mean that a lawyer should take a case for no fee if he can achieve the goals of the prospective client? If the right of a person to representation is limited by the lawyer's desire for money, is it also limited by the lawyer's moral concern for the effects of the representation?

4) If there is no such right, is there nevertheless some duty to represent someone whom no other (capable) attorney would represent?

b. What do you decide with respect to the representation of Lushhus Food? If you represented the company you would have to take every legally defensible measure to prevent anyone from stopping the effort to sell Frutola?

1). Do you decline to represent Lushhus? Before you answer consider: Lushhus is a good and substantial client of the law firm's. It has been a client for ten years and has contributed substantially to the firm's income. There are other firms who are able to serve Lushhus's needs in this matter, but if they take the case, they will likely take Lushhus from your firm as a client as well.

2). If you decide to represent Lushhus, would you go all the way, or are there some things you will not do? If there are, should you tell the president of Lushhus? Here are some of the things you might foresee doing if you take the case:

a) Do you go through the corporate files to determine whether there are any documents that might disclose that Lushhus Food knew that its additive increased the danger of cancer and was addictive? Do you then advise the corporation as to how to keep these documents from being discovered and, if they were not needed for further research, which documents should be destroyed?

b) If you know and are friendly with members of the federal Food and Drug Administration, do you use your influence to prevent any FDA investigation of Frutola?

c) If Lushhus discovered an adequate and safe substitute for Marvelline, and, given the normal sales of Frutola, Lushhus could completely replace all stocks of Frutola with the new Frutola with the new, safe additive within a year, would you try, to delay FDA action against Lushhus for a year and then get the FDA to call off further action relating to the Marvelline-infused Frutola on the ground that Frutola had been substantially changed?

d) Do you help direct an attack on the SPI report? The attack would be truthful as far as it went. The reason for the attack is to prevent the report from being read and believed, and by inference to help people draw the inference that it is false. Does that resolve the matter of the ethics of making the attack? How?

c.. Is there any difference between taking on this matter for Lushhus Food Company, and agreeing to defend that company against a lawsuit for damages arising from harm suffered as a result of consuming Frutola? A criminal prosecution brought against Lushhus for negligent

homicide in a case in which the consumption of Frutola caused cancer which went undetected until it was too late to cure? legally enforceable. If your client admitted the existence of the agreement, however, then the requirement of a writing was waived.

d. A person comes to you for help in avoiding penalties for the commission of a crime. During the course of the conversation, you discover that the person actually committed the crime with which he is charged. Moreover, from his account, you suspect that there is no available excuse. If what he says is accurate and complete, then there is also a good chance that you can prevent him from going to prison.

Appendix A Why Lawyers Lie By Floyd Abrams

As the O. J. Simpson case has transfixed the public, it has also taught it. Not only have the attorneys in the case been on constant public display, but other lawyers have served as television commentators, explaining, critiquing and judging the performance of their colleagues. Never before has so wide a swath of the public been subjected to such detailed, thought-by-thought analysis of how real lawyers think and what they do.

It is not always an attractive portrait, even to lawyers themselves. Viewed through my own prism of almost 35 years of practice, the Simpson case raises broad questions about just what it is our society asks lawyers to do, and the rather breathtakingly amoral way in which they do it.

Consider first the rules that govern the conduct of lawyers. They are not quite given James Bond's license to kill. But as lawyers, they have a license that requires them to defend their clients whether they are guilty or not; their responsibility is to attack those who have accused them, whatever the truth of those accusations. Regardless of whether Simpson committed the murders of which he is accused, it is Robert Shapiro's job as Simpson's lawyer to attack the validity of the DNA tests, to impugn the credibility of the police and, if useful and at all plausible, to attack the character of Simpson's former wife whom he is accused of murdering. Only lawyers are expected to do such things.

Lawyers are not asked to do justice. They participate in what everyone hopes is a system of justice, a system that seeks justice by asking lawyers on both sides to represent their clients zealously. Lawyers are the legal embodiment of \bar{A} , the spokesmen for \bar{A} , those clients. Subject only to the constraints of criminal law (a lawyer may not break open a mailbox as the Paul Newman character did in the movie "The Verdict") and the canons of legal ethics (a lawyer may not plant a spy within the camp of opposing counsel as the James Mason character did in the same movie), a lawyer is supposed to do whatever can be done to defend and vindicate the client's position in a case. Those are wide, extraordinarily wide, boundaries. Within them, lawyers for rapists and murderers have accused their clients' victims of being responsible for their plight. Lawyers for warring husbands and wives have dropped the equivalent of tactical nuclear weapons on families, destroying all within range -- children included.

All, all for clients. Prosecutors are, at least in theory, supposed to be governed by somewhat different standards. Although no less zealous than defense counsel, they are supposed to indict only those they think guilty and to understand that, as the Supreme Court

put it 60 years ago, the interest of the government "in a criminal prosecution is not that it shall win a case, but that justice shall be done." It is not always so. Certainly the potentially prejudicial comments of the Los Angeles District Attorney, Gil Garcetti, on "This Week With David Brinkley" suggesting that Simpson might well admit to the killings of which he is accused -- and proffer some form of Menendez brothers-like psychological defense -- offered little basis for thinking so.

Public statements of prosecutors and defense counsel alike must be viewed with the greatest skepticism. The Robert Shapiro who asserted, in one of his unending series of interviews, that Simpson was innocent was not the Shapiro one might have met before he was retained by Simpson. He is now Simpson's Shapiro, Simpson's representative, sometimes Simpson's flack. Whatever he says is said for Simpson's benefit, not because it is true.

So with Alan M. Dershowitz, when he was representing Mike Tyson. The frequent public assertions by Dershowitz of Tyson's innocence after he began to represent him were not those of the Bill of Rights-protecting Harvard Law School Professor Alan Dershowitz. The Tyson-defending Dershowitz was, in the end, little more than a better-spoken Tyson, Tyson in Harvard garb. That does not make what Dershowitz said of Tyson untrue. It does not mean that he did not mean what he said. But we should take care not to get our Dershowitzes confused.

So with all of us. Shortly after I argued before the Supreme Court representing a death row inmate in Parchman, Miss., I received a call from a newspaper in the small town in which my client had been tried, convicted and sentenced to death. "I know you only sought to persuade the Supreme Court to set aside the death sentence in the case," the reporter observed. "What I'd like to ask you is whether you believe he committed the crime."

I paused. It was true that I had only argued that the death sentence imposed upon my client was unconstitutional, a sentence the Supreme Court later set aside. It was also true that my client continued to deny his guilt. And it was true that I had never reached for myself any definitive conclusion as to his guilt.

But I was his lawyer. Silence might be taken as assent to his guilt. Even a "no comment" might have sounded as if I did not believe him. And so, without a gulp, I answered, "I believe he is not guilty."

I did what I think a lawyer was supposed to do. Whether my client was guilty or not, whether I suspected he was guilty or not, I was obliged to defend him. But you are not obliged to believe me when I do so.

Nor should you take too seriously many of the published and broadcast reactions to the Simpson case of lawyers who represent criminal defendants. Their personal posturing aside, they often confuse what might be useful for his defense with what might serve justice. When the fact was first revealed that Simpson had been interviewed for three hours by the police days before his arrest, for example, defense counsel around the country expressed shock. "It was horrendous," said Harland Braun, a Los Angeles defense counsel. "It really hems in tremendously what Bob Shapiro can do, in terms of strategy."

In terms of defense strategy, Braun is undoubtedly correct. A defendant who says one thing to the police may have difficulty persuading a jury of something else. A defendant who lies to the police about some things may not be viewed as credible by a jury when he swears to something else -- his innocence, for example.

But wait a minute. Is this really a bad thing? From society's point of view, if not that of a potential defendant, is it anything but admirable when someone voluntarily speaks to the police about a crime of which he has knowledge? The individual interviewed may provide useful information which can aid the police in apprehending a criminal. He may demonstrate to the police his own innocence. He may inadvertently but justifiably incriminate himself. He may even confess.

If he does, and if the confession is true, we -- if not his lawyer -- should be pleased. As Justice Antonin Scalia of the Supreme Court observed in a 1990 dissenting opinion, "the procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. . . . We should, then, rejoice at an honest confession, rather than pity the 'poor fool' who has made it."

Recall now the most telling part of Braun's statement: that the Simpson statement to the police might "hem in" what his counsel could later argue. Translate the statement into plainer English. Because Simpson has told one story to the police, if he tells another at his trial, he does so at his peril.

Or say it even more directly. Because Simpson has either told some truths or some lies to the police -- or some of both -- his lawyer cannot be as creative, as fertile in framing a defense. Is the public really supposed to feel sorry about that?

Lawyers are trained to think that way. Most people, when confronted with a problem, gather whatever information they can and reason toward an answer. Lawyers start with the answer -- their clients' answer -- and then search for evidence to support it. So, inexorably, their reasoning veers toward Braun's: if I am to argue that Simpson cannot be proven guilty, I must either maintain that he was not at the scene of the crime; or that if he was there, he either did not stab the two inconveniently dead victims or that if he did, he did so in self-defense; or that if he did kill them, there was some legally sanctioned psychological reason for doing so. All are possibilities. Anything Simpson said to the police limits my options. Isn't it awful?

The problem with all this is not its lack of logic; it is perfectly logical. It simply has nothing to do with truth. While it is not the role of Simpson's lawyer to take any step that might result in his conviction, Shapiro is not a novelist, free to create an entirely fictional world into which Simpson comes and goes -- or came and went.

And so for the rest of us. Some arguments are not only implausible; they are impossible. Some scenarios are not only untrue; they could not have been true. It may be that society should ask both more and less of lawyers. More willingness to say to clients that there are some arguments that lawyers will not make, less willingness to counsel lawful conduct that is morally odious. More willingness of lawyers to view themselves as part of a system of law, less willingness to view themselves as the alter egos of their clients.

Judges need to rethink their roles as well. There are times, as Rudolph J. Gerber, an Arizona appellate judge, has observed, when "judicial spectatorship" at lawyers' antics amounts "to indefensible patience when righteous anger would be appropriate." A little more anger directed at lawyers when they misbehave might go a long way.

Attorneys have frequently played valiant roles, defending the innocent, prosecuting the guilty, vindicating principle, settling disputes that should never have been litigated in the first place. They must continue to play those roles. But it is time to ask whether it really leads to

justice to have a system in which many lawyers spend far more time avoiding truth than finding it. And it is never too late to ask whether we can continue to justify creating a sort of legal game in which the players lose sight of why they started playing in the first place and the spectators forget that what they are watching was not supposed to be a sport at all.

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Questions

1. In the context in which Abrams's discussion is couched, is the defense lawyer really lying? Isn't the lawyer doing what one expects (indeed, requires) a lawyer to do under the circumstances? When a lawyer says "my client is not guilty", is that statement taken for anything more than a line from a play? Is it made for the purpose of getting others to believe it and act in reliance on its truthfulness, or does it simply mean that the defendant will try to avoid punishment?
2. Is this piece a general defense of lying in the service of your client? Is it limited to litigation? Is it limited to particular events in the course of litigation, in which telling the truth betrays information that the client told the lawyer in confidence?
3. If the Abrams piece is a defense of lying, does it apply to all cases, civil and criminal? All kinds of lies? Does it apply to cases in which the representative of "the other side" has no reason to believe that you are lying? Does it apply to omissions as well, in which you hope and expect the other side will act in accordance with expectations you have planted or reinforced?
4. What is wrong with lying, when it will suit your or your client's (or friend's or spouse's or child's) purposes?

Appendix B

McGEE v. REYNOLDS
COURT OF APPEALS OF INDIANA, THIRD DISTRICT
618 N.E.2d 40
(1993)

STATON, J.

Eddie McGee sustained personal injuries in an automobile accident with Traci Reynolds. Later, McGee's attorney had considerable negotiations with Reynolds' insurer to settle McGee's claim for damages. When the negotiations reached an impasse, McGee's attorney filed suit without notifying McGee's insurer and obtained a default judgment. Because of an incorrect address on the summons, McGee's attorney failed to serve Reynolds. Twice the trial court denied McGee a default judgment -- once on the original service and again on publication of notice. In the meantime, Reynolds' insurer sent McGee's attorney a letter inquiring as to the status of the claim, but McGee's attorney ignored the inquiry and did not

respond. Finally, McGee served copies of the summons and complaint on the Secretary of State, as Reynolds' agent. n1 A default judgment for \$ 85,000.00 was granted.

n1 Pursuant to Ind. Trial Rule 4.4(b) and 4.10, when the Secretary of State is served as the defendant's agent, the Secretary is required to mail the defendant copies of the Complaint and Summons. In the present case, the Secretary mailed the Complaint and Summons to an address McGee knew was incorrect. In October, the Secretary's mailing was returned unopened. The test for sufficiency of service under due process requires the service be reasonably calculated to inform. *Glennar Mercury-Lincoln, Inc., v. Riley* (1975), 167 Ind. App. 144, 338 N.E.2d 670, trans. denied. In the present case, McGee's publication notice was more reasonably likely to inform than the Secretary's mailing.

Later, seven months after the entry of the default judgment, Reynolds received notice of the default judgment and filed a motion to set it aside. The trial court granted Reynolds' motion. McGee appeals that order. While McGee presents two issues **[**3]** for our review, we need only address whether the trial court abused its discretion in granting Reynolds' motion to set aside McGee's default judgment under Ind. Trial Rule 60 (B)(3).

We affirm.

Trial Rule 60(B)(3)

McGee contends the trial court abused its discretion in granting Reynolds' motion to **[*41]** set aside the default judgment. Reynolds' motion relied, in part, on T.R. 60(B)(3). T.R. 60(B)(3) provides for relief from a default judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party". Reynolds contends McGee, through counsel, committed misconduct.

In support of Reynolds' T.R. 60 (B)(3) motion, she relies on *Boles v. Weidner* (1983), Ind., 449 N.E.2d 288, 290, reh. denied. *Boles* is factually similar to the present case even though *Boles* was decided under T.R.60(B)(1). While there is no general duty to inform the defendant's insurer of a lawsuit, in *Boles*, the supreme court concluded the plaintiff's failure to notify the defendant's insurer of the existence of the lawsuit after negotiations had occurred was a valid consideration in determining whether **[**4]** to set aside a default judgment. *Supra*, at 290. The court also concluded that such failure, standing alone, was insufficient to set aside a default judgment. *Id.*

In the present case, the failure of McGee's attorney to give notice of the lawsuit after negotiating with Reynolds' insurer does not stand alone. McGee's attorney knew of the insurer's duty to defend Reynolds. Additionally, in July of 1990, after the denial of McGee's first motion for a default judgment, the insurer wrote to McGee's attorney and inquired about the status of McGee's claim. The inquiry was ignored by McGee's attorney.

The decision of McGee's attorney not to answer this inquiry showed a lack of good faith to settle the claim and was a decision to conceal the status of his client's law suit. This

failure to answer a direct inquiry from an insurer concerning his client's claim when coupled with failure to provide the insurer with notice of the pending law suit smack of chicanery and unfair advantage. This conduct cannot be tolerated.

We conclude that the trial court did not abuse its discretion in determining that the actions of McGee's attorney constituted misconduct sufficient to set aside the default [**5] judgment.

We affirm.

RUCKER, J., CONCURRING IN RESULT

I agree the trial court did not abuse its discretion in setting aside the default judgment. However, I do so for reasons different than those discussed by the majority. First, I am not persuaded McGee's attorney engaged in either fraud, misrepresentation, or other misconduct contemplated by Ind. Trial Rule 60(B)(3) which would afford relief to Reynolds. On the other hand, Ind. Trial Rule 60(B)(4), the alternative ground upon which Reynold's motion was based, permits the court to set aside a default judgment where judgment was entered against a party served only by publication and without actual knowledge of the action.

The record here reveals the two attempts to personally serve Reynolds with the summons and complaint failed and thus she was served only by publication. The record also reveals Reynolds had no actual knowledge of the lawsuit nor the subsequent default judgment until several months after judgment had been entered. Under these circumstances the default judgment was properly set aside. [**6] See *Duncan v. Binford* (1972), 151 Ind. App. 199, 278 N.E.2d 591; *Keiling v. McIntire* (1980), Ind.App., 408 N.E.2d 565. Further, contrary to McGee's assertion, where a default judgment is set aside because it was entered without notice or proper service, a meritorious defense need not be shown. *Shotwell v. Cliff Hagan Ribeye Franchise, Inc.* (1991), Ind. 572 N.E.2d 487, 490.

Appendix C
Lybbert v. Grant County
SUPREME COURT OF WASHINGTON
141 Wn.2d 29; 1 P.3d 1124
(2000)

ALEXANDER, J.

Kay and Norma Lybbert brought suit against Grant County (...County) for personal injuries they allegedly sustained in an automobile accident on a Grant County road. The County thereafter moved for a summary judgment dismissing the Lybberts' suit, contending that service of process by the plaintiffs was defective. The trial court agreed with the County and dismissed the suit, concluding that the plaintiffs failed to properly serve their summons and complaint on the County within the applicable statute of limitations. The Court of Appeals reversed the trial court, holding that the County was not entitled to rely on the affirmative defense of insufficient service of process because (1) it had waived the defense and/or (2) was equitably estopped from asserting it. We granted the County's petition for review and now affirm the Court of Appeals on the basis that the County waived the defense of insufficient service of process. The Lybberts claim that they were both injured in early 1993 when their automobile struck a hole in a Grant County road. On August 30, 1995, the Lybberts filed a summons and complaint in the Adams County Superior Court in which they sought damages from the County for the injuries they contend they sustained as a consequence of the County's alleged failure to maintain its roadway in a safe condition. ... Pursuant to RCW 4.28.080(1), the Lybberts were required to serve their summons and complaint on the County auditor. ... They mistakenly served process on the administrative assistant to the County commissioners. Nonetheless, a few days after the "service," counsel for the County filed a notice of appearance in which it was indicated that the County was not "waiving objections to improper service or jurisdiction." ...

For the next nine months the County acted as if it were preparing to litigate the merits of the case that the Lybberts were attempting to mount against it. For example, shortly after filing its notice of appearance the County served the Lybberts with interrogatories, requests for production, and a request for a statement setting forth general and special damages. In this discovery effort, the County made no inquiry regarding the sufficiency of the service of process. The County also associated counsel from an outside law firm and duly filed a "notice of association of counsel." Thereafter, one of the attorneys for the County had conversations over the telephone with the Lybberts' attorney about insurance coverage and potential mediation. During these contacts, the attorney for the County did not make any mention of an issue surrounding sufficiency of the service of process. The Lybberts' attorney claims that one of the attorneys for the County told him that the County was working on its answer to the complaint and that it would be provided "as soon as possible." CP at 30. On February 29, 1996, the Lybberts' attorney served one of the attorneys for the County with interrogatories and a request for production of documents. One interrogatory asked the County whether it would be relying on the affirmative defense of insufficient service of process. In April of 1996, a County sheriff's detective, ostensibly acting on behalf of the County, contacted the Lybberts' attorney in order to ascertain what type of information the Lybberts were requesting in their interrogatories. According to an affidavit from the Lybberts' attorney, the detective said that the

County would fully cooperate in providing all of the requested discovery information.

On May 6, 1996, the Lybberts responded to the County's interrogatories, as well as to its requests for production and statement of damages. On June 21, 1996, the County filed its answer to the Lybberts' complaint and asserted, for the first time, the affirmative defense of insufficient service of process. The County then filed a motion for summary judgment, based on the alleged insufficient service of process, and requested that the case against it be dismissed on the ground that the applicable statute of limitations had run on the Lybberts' claim. ... The trial court granted the County's motion and dismissed the Lybberts' complaint with prejudice. The Lybberts appealed to Division Three of the Court of Appeals. The Court of Appeals reversed the trial court, holding that the County waived the defense of insufficient service of process and was equitably estopped from asserting it. We granted the County's petition for review.

* * *

II. Equitable Estoppel

The Lybberts argue here, as they did at the Court of Appeals, that the County is equitably estopped from asserting the defense of insufficient service of process. Equitable estoppel is based on the notion that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." ... The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." ... Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. ... Equitable estoppel must be shown "by clear, cogent, and convincing evidence." ... We are satisfied that the Lybberts have established two of the elements of equitable estoppel. In that regard, it is readily apparent that the County acted in a way that was inconsistent with its eventual assertion of the defense of insufficient service of process. For nine months following its attorneys' appearance in response to the Lybberts' duly [*36] filed summons and complaint, the County gave multiple indications that it was preparing to litigate this case.

Only after the statute of limitations appeared to have run on the Lybberts' claim did it raise the affirmative defense of insufficient service of process. Furthermore, allowing the County to assert the defense of insufficient service of process after the statute of limitations has run would be injurious to the Lybberts because they would be without a forum in which to pursue their claim against the County. We are satisfied, though, that the Lybberts have not established that they justifiably relied on the actions of the County's counsel. We reach that conclusion because the statute governing service of process on counties is explicit in specifying that the county auditor is the person who is to be served with process. ... Given the clear statutory mandate to serve the county auditor, it was not at all reasonable, much less justifiable, for the Lybberts to rely on the County's failure to expressly claim, prior to the expiration of the statute of limitations, that the service upon it was ineffective. ...

...While we agree with the basic proposition that the government should be just when dealing with its citizens, ... we do not believe that an attorney representing the government has a duty to maintain a standard of conduct that is higher than that expected of an attorney for a private party. If we were to impose such a heightened duty on attorneys for the government we

would be creating a two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties. We are loathe (sic) to do so, particularly in light of the generally recognized view, embodied in the Preliminary Statement to the Rules of Professional Conduct, to the effect that "the rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." ...

In sum, even after viewing the evidence in the light most favorable to the Lybberts, we are satisfied that they have not established the element of justifiable reliance by clear, cogent, and convincing evidence. Therefore, the County is not equitably estopped from asserting the defense of insufficient service of process. * * *

III. Waiver

The Lybberts ... claim that the County is precluded from asserting the defense of insufficient service of process because it acted in an inconsistent and dilatory manner. This court has discussed the doctrine of waiver in this context on only one occasion. ... Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. ... It can also occur if the defendant's counsel has been dilatory in asserting the defense. ... We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action."... If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it. ... Despite embracing this doctrine of waiver, we quickly add that the doctrine does not alter the traditional duties litigators owe to their adversaries. Those duties, which are memorialized in the Rules of Professional Conduct and refined by case law from this court, remain the same. ... Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.

We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present- day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.

In applying the doctrine, we first observe that there are no material facts in dispute. ... It is, therefore, appropriate for this court to apply the doctrine of waiver to the undisputed material facts to determine if the County is precluded from asserting the defense of insufficient service of process in this case. In this process, the well-reasoned decision of the Court of Appeals in *Romjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57, is instructive. There, a process server did not make proper service on the defendants. Nevertheless, the defendants' attorney filed a notice of appearance and subsequently served plaintiff's attorney with interrogatories and a request for production of documents. The attorney for the plaintiff responded to the

discovery requests and then served the defendants with his own interrogatories and requests for production of documents. Plaintiff's attorney also sent a letter to the defendants' attorney stating, "it is my understanding that the defendants have been served in the above matter... The attorney for the defendants did not respond to this letter, but instead waited for the statute of limitations to run and then asserted the defense of insufficient service of process. The issue there, as here, was whether the defendants waived the defense by participating in discovery and failing to assert the defense prior to the expiration of the statute of limitations. The *Romjue* court quite properly noted that the mere act of engaging in discovery "is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service." ... This is so because in some circumstances it may be entirely appropriate for a party to engage in discovery to determine if the facts exist to support a defense of insufficient service. ... The County's conduct was similar to that of the defendants in *Romjue*. In particular, we note that the County's discovery efforts were not aimed at determining whether there were facts that supported the defense of insufficient service of process. Indeed, because the process server's affidavit was filed by the plaintiffs, the County knew or should have known that the defense of insufficient service of process was available to it. ... Moreover, the County did more than just undertake discovery. As noted above, its detective contacted Lybberts' counsel in order to make certain that the County correctly understood the nature and extent of the Lybberts' interrogatories. Furthermore, there were telephone calls between counsel for the respective parties at which there was a discussion about potential mediation. ... Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense.

The County asserts that because the Lybberts were several months tardy in providing answers to the County's discovery requests, the Lybberts cannot fault it for its delay in answering discovery and asserting the defense. We disagree. The record reveals that the Lybberts' delay in answering was justified because they "were still actively treating and that complete answers to interrogatories, which were served in October 1995, would be delayed so that a complete history of the injuries and damages could be submitted." ... This reason stands in stark contrast to that provided by the County, which was that the County "routinely avoid[s] answering a complaint, until a motion for default is brought." ... It is also of no significance to our waiver analysis that the notice of appearance, filed by one of the attorneys for the County, included a statement that counsel was appearing "without waiving objections to improper service or jurisdiction." ... That is so because we have said that the mere appearance by a defendant does not preclude the defendant from challenging the sufficiency of service of process. ... Thus, even if the caveat had not been included, the County could have challenged the sufficiency of the service of process. In other words, it was not necessary for the County to indicate that it was appearing "without waiving objections to improper service" in order to subsequently challenge the service of process. Since the filing of a notice of appearance without including the caveat cannot constitute a waiver of the defense, we see no reason why filing the notice of appearance with the caveat should serve as a vehicle to preserve it. According to the dissent, the County did not waive the defense because it "filed a notice of appearance expressly reserving the right to assert the defense of insufficient service of process." ... To the degree the dissent suggests that a notice of appearance is the functional

equivalent of an answer or other responsive pleading, we disagree. The civil rules require that the defense of insufficient service of process be brought forth in a pleading. See CR 12(b) ("Every defense ... shall be asserted in the responsive pleading"). The rules are quite clear as to what constitutes a pleading. See CR 7(a) (A pleading is one of the following: a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and a third party answer.).

... Finally, the County argues that if we were to affirm the Court of Appeals on the waiver issue, such a decision would conflict with this court's decision in *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234. We disagree, being satisfied that our decision today is in complete harmony with *French*. In *French*, the plaintiff argued that the defendant waived the defense of insufficient service of process by filing an untimely answer, objecting to a trial date, taking a deposition, and consenting to amendment of the complaint. The plaintiff also argued that the defendant waived the defense because he delayed in filing his answer to the complaint. We held there was no waiver because the defendant preserved the defense by pleading it prior to objecting to the trial date, taking a deposition, and consenting to amendment of the complaint. ... Moreover, the answer, although late, was filed more than a year before the statute of limitations extinguished the plaintiff's claim. Although we expressed displeasure at the defendant's failure to file a timely answer, we noted that "'mere delay in filing an answer does not constitute a waiver of an insufficient service defense.'" ...

By contrast, here, the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. *French* does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action. ...

CONCLUSION

For the reasons stated above, we conclude that the County is not equitably estopped from asserting the defense of insufficient service of process. It did, however, by the actions of its representatives waive the defense. We, therefore, affirm the result reached by the Court of Appeals.