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**The Uneven Pursuit  
Of Disinterestedness (“Désintéressement”)  
In Regulating Lawyers in the United States**

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## **The Uneven Pursuit Of Disinterestedness (“Désintéressement”) In Regulating Lawyers in the United States**

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Disinterestedness – making decisions as a professional without being influenced unduly by the pursuit of self-interest – is unquestionably an important issue for attorneys, and the concept of disinterestedness plays at least some part in the regulatory systems governing attorneys in many countries, if not all. However, a good starting place for exploration of this issue is its manifestation (“Désintéressement”) in defining the proper professional posture of the French *avocat*. In his comprehensive study of the French Bar, Lucien Karpik reports that although disinterestedness was unknown in the seventeenth century and used only occasionally in the eighteenth century, it “abounds in the writings and speeches of the nineteenth century.” Lucien Karpik, French Lawyers: A Study in Collective Action, 1274-1994 105 (1999).

The near-absolute independence of the *avocat* has long been at the very core of the professional identity of the members of the French Bar, and the Bar pursued and enforced disinterestedness even though there were numerous inconveniences and severe financial disadvantages. John Leubsdorf offers this crisp summary of the myriad ways in which the French Bar “sought to elevate itself above the market”:

From the traditional view of the *avocat*'s independence from clients, it also followed that he could not sue them for fees. He could not even submit a written bill, although he could ask for an advance payment. Curiously, *avocats* themselves imposed this ban. Precedent recognized that a lawyer could sue for fees, but starting in the eighteenth century the bars of most jurisdictions forbade their members to do so. Apparently, they did so to reinforce the independence and status of the bar. If a client owed payment to an *avocat*, the *avocat* must owe something in return, and courts would be empowered to decide if the *avocat* had earned what he claimed. Still worse, it would look as though *avocats* were interested in money. Fortunately, the bar could invoke the classical Roman theory that fees were free gifts from grateful clients (*honoraria*).

John Leubsdorf, Man in His Original Dignity: Legal Ethics in France 16-17 (2001). *See also* Karpik, supra, at 105 (summarizing the duties of lawyers that were directly linked to disinterestedness, including that the “lawyer may demand nothing from his client, either before or after trial”; that an “appointed lawyer (legal aid) may not either refuse this appointment or accept a fee”; and that “the lawyer may accept no mandate, even verbal, even for free; he does

not represent his client, he advises him”). Although there have been significant changes in recent years, the traditional “pursuit of independence caused the bar to deny itself almost all transactional and negotiating work and to confine itself to litigation.” John Leubsdorf, “On the History of French Legal Ethics,” 8 U. Chi. L. School Roundtable 341, 347, 350 (2001).

In the United States, the concept of disinterestedness comes up in many contexts, frequently as a criterion for prescribing or evaluating the performance of judges, arbitrators, and various other public officials, and as a qualification for attorneys selected to represent a bankruptcy trustee. However, there is nothing in American law that is comparable to the French ideal of disinterestedness as applied to private attorneys representing clients. As will be developed below, there certainly are specific situations where *lack* of disinterestedness is seen as a potential problem and steps are taken to regulate or oversee the attorney’s conduct. There are other instances in which disinterestedness is seen as the hallmark of especially praiseworthy professional activity, as when attorneys represent the indigent on a *pro bono publico* basis without any expectation of compensation, and perhaps even absorbing large unreimbursed expenses in doing so. However, as a general matter, it is rare to hear it argued that attorneys should aspire to the robust, thoroughgoing principle of disinterestedness that plays such a large part in explaining the restrictions under which members of the French Bar have traditionally operated.

One prominent example nonetheless demonstrates that the analysis underlying the French safeguarding of disinterestedness has not been entirely unknown in the regulation of the American Bar. After the end of the American Civil War, death and disability benefits were offered to soldiers who had served the Union, and their survivors. Claimants were allowed to be assisted by attorneys in seeking the benefits that they felt were due them. However, by statute, it was a crime for anyone to collect an attorney’s fee of more than \$10 for handling such a claim. In Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305 (1985), the Supreme Court of the United States considered the contention that the fee limit violated due process by effectively denying many claimants the opportunity to hire the counsel that they needed in order to successfully pursue their benefits claims. For anyone who was not able to secure *pro bono* representation by a relative, a friend, or a legal services office, the \$10 fee limit in effect denied the claimant the right to hire an attorney at all. The \$10 fee allowed by the statute may not have been a generous fee in 1862 when the statutory limit was adopted, but by 1985 it was really no fee at all.

The Supreme Court upheld the \$10 fee limit as a permissible policy choice by Congress that did not violate due process. By effectively keeping claimants from hiring attorneys, Congress was able to assure that the entire benefit awarded went to the claimant. There was also seen to an advantage in keeping the administrative proceedings involving benefits “as informal and nonadversarial as possible.” 473 U.S. at 323-324. Although the Supreme Court does not discuss the concept of disinterestedness in so many words, the outcome of the case guaranteed that a claimant could choose only between a disinterested attorney (that is, one who was effectively working for no fee, if such an attorney was available) or no attorney at all. The traditional choice of the French Bar in favor of treating a legal fee as a gift from the client, in

order to avoid the corrupting influence of a fee-for-service arrangement, was supported by a broad array of related principles that prohibited excessive fees, fees that would burden the client, and collection of fees through a lawsuit. *See Karpik, supra*, at 106. Similarly, the \$10 fee limit was justified originally as a means of “protecting veterans from unscrupulous lawyers,” 473 U.S. at 322, and even though that particular justification was dropped in later years, the United States Government continued to defend the fee limit tenaciously and successfully. The result was to deny almost all claimants access to legal assistance, and force them to rely instead on non-lawyer representatives of various veterans’ groups. Some years later, the \$10 fee limit was abolished by Congress as part of a broad overhaul of the U.S. system for handling veterans’ benefit claims, but the Supreme Court’s emphatic support of the fee limit as late as 1985 provides an interesting counter-stroke to a system in which the participation of attorneys is usually taken for granted, and where attorneys representing parties are not required to be disinterested.

An attorney who lives up to the French ideal of disinterestedness is expected to exercise independent professional judgment that will serve the client’s interests, not those of the attorney. Despite the somewhat anomalous holding in Walters, the typical regulatory approach in the United States pays little attention to disinterestedness as such. That leads to a series of difficult questions. Without a requirement of disinterestedness, how is an attorney handling a case on the basis of a contingency fee agreement, where a significant portion of any recovery will usually be going directly to the attorney, supposed to keep his or her personal financial stake in the case from skewing the decisionmaking process? What about class action cases, where the attorneys’ financial interest may be a million times larger than that of the members of the class being represented? Also, while there is no general requirement of disinterestedness enforced as to American lawyers, the desirability of *pro bono* work by attorneys, where a selfless commitment to assist those needing legal representation takes the place of the more usual financial interest of the attorney, is frequently endorsed by almost all sectors of the Bar. But are there sufficient requirements or incentives in place to assure that attorneys actually take on such public-interest work in sufficient numbers?

The analysis below can do little more than scratch the surface of the sweeping and complex system that regulates the professional conduct of attorneys in the United States. However, the principal theme that emerges below is to emphasize the radically different approach to disinterestedness taken in the United States. In France, the professional ideal has long demanded a high degree of disinterestedness, and while modern trends have undercut to some degree the rigor with which that requirement is enforced in some contexts, the core of the traditional values is likely to remain influential. *See generally* Leubsdorf, Man in His Original Dignity, *supra*, at 125-128. In the United States, it is taken a given that an attorney usually has a personal financial stake in handling a matter for a client. Rather than denying that there is a personal interest (such as by labeling a fee as a gift), the American approach is usually to impose restrictions designed to keep the attorney from favoring himself or herself over the client. Thus, while the French model continues to insulate the *avocat* from accountability either to the State or to the client, the American approach is to use State power to impose consumer-protection regulations on the attorney to guard against exploitation of the client.

## Contingency Fees

While some other legal systems have shown a somewhat greater tolerance for contingency fees in recent years, until very recently the prevailing attitude outside the United States was one of great skepticism. Skepticism about contingency fees has, of course, been a long-standing element of U.S. Bar regulations as well, but the propriety of using such a fee structure, at least under some circumstances, has long been accepted, subject to limits. *See, e.g.*, ABA Canon of Professional Ethics 13 (1908) (“A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.”). The ABA continues to accept contingency fees as proper, except in certain criminal prosecutions and divorce cases. ABA Model Rule of Professional Conduct 1.5 (c) & (d) (2003).

Both the ABA Model Rules and the regulations adopted by many states manifest great concern that under some circumstances attorneys will elevate their own interest in a contingency fee case over the well-being of the client. Thus, fee agreements with clients should “preferably” be in writing in ordinary situations, but a contingency fee agreement “shall be in a writing signed by the client.” *Compare* ABA Model Rule 1.5(b) *with* ABA Model Rule 1.5(c). To an individual client who has never hired an attorney to handle a personal injury lawsuit before, the typical contingency fee contract will be bewildering – it is likely to have a complex formula for calculating attorneys’ fees under various circumstances, provisions relating to costs, and a number of other details about how the case is to be prosecuted and how the proceeds are to be handled. In order to protect clients from possible overreaching by attorneys, both the ABA Model Rules and many states regulate various large and small aspects of contingency fee agreements. It is recognized that a prospective client may not understand how much difference it makes whether the attorneys’ fee is calculated before or after costs and expenses are deducted from the gross recovery, so many states require that the agreement specify “whether such expenses are to be deducted before or after the contingent fee is calculated.” ABA Model Rule 1.5(c); *see* California Business & Professions Code § 6147(a)(2) (the agreement must state “how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client’s recovery”). Another common requirement is that the plaintiff in certain types of cases, such as contingency fees cases involving personal injury claims, be informed in writing whether the attorney carries liability insurance covering professional negligence.

Despite the extensive consumer-protection regulations applicable to contingency fee agreements in most states, generally the attorney and client are free to agree on whatever percentages they wish in providing for the division between them of any possible recovery, so long as the fee is reasonable under the circumstances. However, it has long been argued that there should be limits on the percentage of the recovery that can be paid to an attorney in a contingency fee case, and various states have adopted such limits, at least for certain types of cases. Thus, in California personal injury claims for medical malpractice are regulated under the Medical Injury Compensation Reform Act (MICRA). Under MICRA an attorney is not allowed

to contract for or collect a fee in such a case that exceeds 40% of the first \$50,000 recovered, with the allowable percentages being reduced for higher awards. The attorneys' fee on the portion of any recovery that is over \$600,000 cannot exceed 15%. The MICRA legislation has been extremely controversial, since it sets limits on attorneys' fees well below those often agreed to in personal injury cases. One result is that some potential plaintiffs who would be able to find attorneys to handle their cases in an unregulated market, cannot find an attorney willing to take on the cases for the fee percentages set in the statute. One of the justifications traditionally given for MICRA, and for the many similar statutes that have been adopted or proposed in other states, is that higher fee percentages create an incentive for attorneys to file and pursue cases that are frivolous, simply because they are seeking the high fees potentially available to them. In California, there was a ballot initiative that would have extended MICRA-type limits on contingency fees to all personal injury cases (not just those for medical malpractice), but the proposal was narrowly defeated at the polls. This remains an active area of debate in many states. There are also federal statutes in place that limit the percentages of contingency fees in certain types of cases, such as those seeking Social Security benefits or to recover under the Federal Tort Claims Act.

### Class Actions

Contingency fee cases are ones in which the attorney has a personal financial stake that is a fraction of the client's overall claim. As discussed above, in most situations the client and attorney are free to set the fee percentage as they choose, so long as it is not unreasonable. However, it will be a rare case in which the attorney's interest is as large as the client's. In personal injury cases, fee percentages of about 1/3 are common, sometimes rising to 40% or 45% if the attorney must handle the case on appeal. In contrast, not only are the absolute amounts of recoveries and fees often much larger in class actions, but the relationship between the magnitude of the attorney's interest and that of any individual client may be radically different. The type of case for which the class action is best suited may be one where a large number of individuals (perhaps many thousands or even millions) have been defrauded of small amounts (often only a few dollars). Without the possibility of a class action, the defendants' wrongdoing would not realistically be subject to challenge in private litigation. Of course, government enforcement action is a possibility, but often resources are stretched so thin that many provable violations never lead to any enforcement action.

The beauty of the class action device (from the plaintiffs' point of view) is that it provides a convenient mechanism by which numerous small claims can be aggregated, making it economical to proceed. The merits of the vigorous, long-running controversy over the desirability of class actions is beyond the scope of this presentation. However, for present purposes it is appropriate to recall that it is sometimes alleged that some (or even many) class actions are unjustified, and that they put irresistible pressure on even innocent defendants, who may not be willing or able to run the risk of litigating the case fully and risking an enormous judgment that could lead to financial devastation or even bankruptcy. Thus, most class actions in which plaintiffs are successful are resolved by settlement rather than by trial. Although winning plaintiffs in litigation in the United States do not automatically recover attorneys' fees

from their adversaries, in class actions attorneys for successful plaintiffs will recover attorneys' fees in the form of a slice of the "common fund" created by the payments received from the defendants. The theory is that it would be unfair to permit members of the class to benefit from the action without paying their fair share of the attorneys' fees needed to generate the recovery, so a portion of the recovery is directed to the attorneys for the class before the rest of the funds are distributed.

The mechanics of class actions in the United States are extremely complex, and a full description and analysis is not called for here. Rule 23 of the Federal Rules of Civil Procedure provides a detailed structure for the litigation and settlement of class actions. The defining characteristic of this system is the potential for close, continuing oversight by the presiding judge to protect the interests of the class. Extensive amendments to the Rule were made as recently as 2003 in an effort to make it more likely that judicial oversight, which has always had the potential to guard against abuse by attorneys, will in fact be undertaken with appropriate aggressiveness. Rule 23(g) was added to give the court explicit authority over the appointment of counsel for the class, and there is now a procedure for the court to consider multiple applicants to serve as class counsel, in which case the court is to select the one "best able to represent the interests of the class." Rule 23(g)(2)(B).

Under Rule 23, the court decides whether the case should be certified as a class action, regulates the notice given to class members, and supervises the settlement process. "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Rule 23(e)(1)A). However, some of the questions that have been raised about the role of plaintiffs' attorneys in class action settlements emphasize the practical realities of class action settlements. Until the defendants reach an accommodation with the plaintiffs' attorneys on a possible settlement, the case proceeds in an adversary fashion, and every action taken by the plaintiffs' attorneys is subject to scrutiny by the defendants' attorneys, and often to vigorous opposition. However, once the defendants have reached an agreement to settle the case on certain terms, they have very little (if any) interest in how the proceeds will be split between the class members and their attorneys. While it is true that the court will need to approve any attorneys' fee to be paid to the attorneys representing the class, courts have often had before them nothing more than the potentially self-serving papers filed by the attorneys to justify their fee claim.

The difficulties in establishing how large a fee is fair have been especially notable in cases in which the value of the relief received by the class is difficult to evaluate. Imagine that there has been an allegation of price-fixing by those selling a certain type of electronic device, and the settlement will give a \$20 coupon to each of 2,000,000 past purchasers of the device, for a nominal settlement value of \$40,000,000. Assume that the defendants are willing to also pay \$4,000,000 in cash as part of the settlement, which is intended as attorneys' fees and described as being "only" 10% of the settlement. However, it is not easy to say what the settlement is really worth. How many of the past customers are interested in buying another of the devices? How many of the coupons will actually be used? Is there a potential problem with a system that allows attorneys to get \$4,000,000 while none of the injured parties get any cash, and most of

them get a coupon that they don't want that does no more than attempt to induce them to buy another product from the company that cheated them the last time? Of course, without a class action of this sort, no injured party would be able to bring an action in the first place, and the defendants might well feel that they could continue to fix prices without any substantial risk.

The problems sketched out above have stimulated a lively debate for many years, and many issues remain unresolved. The 2003 amendments to Rule 23 added Rule 23(h), which gives explicit authority to the court to regulate the fee process. The authoritative Advisory Committee Notes to this new part of the rule give some guidance to the courts on how to handle the potential tension between the true interests of the class and the financial interests of the class counsel. The Notes recognize that "Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions." The Notes describe the disagreement among the courts on whether fees in "common fund" class actions should be computed as a percentage of the recovery or on a "lodestar" basis (reasonable hours times an appropriate hourly rate), but do not resolve the dispute. The Notes also make it clear that the court has authority to, and may need to, carefully consider the nature of the relief obtained for the class (especially if it is in the form of coupons or other nonmonetary relief) in order to make sure that the fee awarded to plaintiffs' attorneys is appropriate.

The courts have extensive experience in dealing with class actions in which the attorneys for the plaintiff class are not only not disinterested, but in fact have an interest that dwarfs that of any class member. The courts' success in protecting the class under such circumstances has been somewhat uneven. Nonetheless, the remedy chosen has not been to substantially curtail consumer class actions on the ground that the attorneys for the class are inadequately disinterested. Instead, Rule 23 was amended to bolster the regulatory power of the presiding judge (which had already been substantial) to emphasize that in such crucial matters as certification of a class action, selection of class counsel, approval of a settlement, and determination of attorneys' fees the court must closely supervise the proceedings to make sure that the interests of the class are being adequately protected.

### Pro Bono Activities

A classic opportunity for an attorney to be completely disinterested is when he or she undertakes *pro bono* representation of those who cannot afford to pay for legal services. This type of public service work by attorney has long been lauded by the organized Bar and by many other segments of the community, though there are disagreements about what types of legal work fall under this principle and how the Bar can best motivate attorneys to contribute such free legal work. It is sometimes urged with enthusiasm that attorneys should be required to fulfill a specified minimum amount of *pro bono* work, but that is not the approach that has generally been adopted. ABA Model Rule 6.1 does provide: "Every lawyer has a professional responsibility to provide legal services to those unable to pay." The Rule continues, saying that each lawyer "should aspire to render at least (50) hours" of such services each year and listing some of the types of services that would qualify. The entire tone of the Rule makes it clear that it provides guidance and encouragement to Bar members without imposing fixed obligations.

The Comment to the Rule confirms that the responsibility set out in it “is not intended to be enforced through disciplinary process.”

Those attorneys providing legal representation to the indigent, the accused, the unpopular, have long been heroes within the legal profession and within the population at large. There are few, if any, corporate attorneys who can match the professional stature of the attorneys who defended the most notorious criminal defendants, fought for civil rights and school desegregation, have led the battles for consumer and worker rights, and have sought environmental protections. However, within the United States legal system the choice to engage in such activities is almost entirely left up to individual lawyers. While aspirational standards such as Model Rule 6.1 are common, the organized Bar and the regulatory authorities do little to force participation by those who are reluctant.

In considering litigation that has the potential to benefit the public but may not be economically viable, Congress and the state legislatures have frequently acted to create a financial interest that will induce attorneys to conduct the litigation. There are hundreds of different statutes that, typically, provide that a prevailing plaintiff will be able to recover a reasonable attorneys’ fee from the defendant. Thus, an attorney will face the question of whether to represent an indigent plaintiff in such a case, or an environmental group unable to pay the attorney’s usual fees. However, the attorney may well be more willing to take on the case if there is a statute that will assure compensation in the event of success. Congress and the state legislatures often adopt such statutes with an awareness that public enforcement resources are inadequate to assure compliance with the law. As a result, many critical environmental, civil rights, securities, antitrust, and open-government statutes deliberately create a potential interest in a fee recovery in order to make it more likely that private parties seeking to enforce their rights will be able to find attorneys to represent them.

#### Other Rules

The discussion above gives a number of examples in which the issues surrounding the concept of disinterestedness are dealt with within the American system for regulating attorneys. The approach usually taken is not to require disinterestedness, but rather to assume that the attorney has an interest and attempt to devise regulatory approaches that will control it to assure that the client is well served.

The notion of disinterestedness is so broad in its potential application that it is very difficult to identify all possible situations in which it would be relevant. However, here is a listing of some of the areas that would merit further examination as part of an effort to build a complete picture of how disinterestedness is addressed in the United States.

ABA Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer): French attorneys place great emphasis on their independence, both from the State and from their clients. In the United States, attorneys “shall abide by a client’s decision concerning the objectives of representation” and consult as to the means to be utilized. Clients decide on

possible settlements. Criminal defendants decide what plea to enter, whether to waive a jury trial, and whether to testify in their own defense. The Comment to this Rule elaborately, but inconclusively, explores the boundaries of an appropriate interaction between attorney and client in making various decisions about how the matter will be handled.

ABA Rule 1.4 (Communication): There are detailed requirements concerning the attorney's obligation to keep the client informed about developments in the matter being handled. These requirements have tended to be stiffened in recent years, since historically many attorneys have minimized communication with clients in order to maintain their own freedom of action.

ABA Rule 1.5(e) (Division of Fees): Division of fees within a firm is not regulated by the Bar. However, division of fees among lawyers not in the same firm has long been a matter of intense scrutiny, particularly with regard to "referral fees" paid to an attorney who originates a case, does little or no work on it, and yet may obtain an agreement from the attorney receiving the referral to share in the fee. Increasingly such arrangements are required to be disclosed to the client, and the agreement is void unless the client consents.

ABA Rule 3.7 (Lawyer as Witness): Although there are a number of exceptions, an attorney is not permitted to act as an advocate at a trial in which the attorney is likely to a necessary witness.

ABA Rule 5.4 (Professional Independence of a Lawyer): This Rule contains a number of restrictions designed to protect an attorney's independent judgment by forbidding the splitting of fees with those who are not lawyers, restricting the types of entities within which lawyers are permitted to practice law, and guard against interference by those who may be paying the lawyer to provide legal services to another.

### Conclusion

The regulatory approaches taken in the United States to guard against the potential intrusion of an attorney's personal interests into the handling of client matters have been less systematic, and in many ways less ambitious, than the efforts made by the French Bar to assure disinterestedness. The restrictions designed to manage the attorney's own interest in the case of contingency fees and class actions tend to be piecemeal rather than part of a coherent definition of professional role. As particular abuses have come to light, specific regulations have been devised to attempt to protect the interests of clients.