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What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis

Louis M. Brown

Harold A. Brown

WHAT COUNSELS THE COUNSELOR? THE CODE OF PROFESSIONAL RESPONSIBILITY'S ETHICAL CONSIDERATIONS—A PREVENTIVE LAW ANALYSIS

Louis M. Brown* and Harold A. Brown**

INTRODUCTION

The Code of Professional Responsibility was drafted to elucidate ethical principles and standards which should guide every lawyer in the performance of his or her duties. The Code is comprised of Canons, stating general norms to which every lawyer should conform; Disciplinary Rules, providing a minimum level of conduct; and Ethical Considerations, which "are aspirational in character and represent the objective toward which every member of the profession should strive."[1] As a part of the Code, the Ethical Considerations perform two separate but interrelated functions: 1) they suggest the proper ethical behavior in response to certain, rather specific factual situations; and 2) they furnish the attorney with a role model, not only of what the ethical lawyer should do, but also of what the ideal lawyer does in the practice of law and why.

Since the Ethical Considerations provide such a role model, it is essential that they respond accurately and consistently to the various functions the lawyer performs in society today. The Ethical Considerations are basically a guide to the litigating attorney, who serves his[2] client as an advocate in preparation for and during adversary hearings. The modern lawyer, however, may also serve his client as an advisor instead of an advocate.[3]

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*Professor of Law, University of Southern California. A.B., University of Southern California, 1930; J.D., Harvard University, 1933.

**A.B., Occidental College, 1973; J.D., University of California, Berkeley, 1976.

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

2. The authors recognize that both lawyers and clients may be either men or women. For the sake of convenience, however, we have generally used the customary masculine usage. It is unfortunate to note that the Considerations, which are intended to serve as a role model, neither advert to the contributions of women, nor use the feminine gender, nor apologize for the oversight.

3. "Though litigation was once the primary activity of lawyers, today a segment of the bar which specializes in such work handles the bulk of the litigation." COUNTRYMAN AND V. T. FANMAN, THE LAWYER IN MODERN SOCIETY 188 (1966). Another author comments:

Acting as an advisor, the lawyer counsels a client in regard to his non-litigious affairs, such as planning investments, personal and business affairs, the purchase or sale of property, the borrowing or lending of money, and other anticipated courses of conduct. Unfortunately, inadequate recognition is given in the Code to the role of the lawyer as advisor and counselor in these and other preventive law functions.[4]

The roles of advisor and advocate must be carefully distinguished. Being an advisor requires skills and professional judgments different from those required of an advocate. The role of advisor not only poses different ethical dilemmas for the attorney; it may also suggest different conduct in situations that, on the surface, appear to be similar. An advisor, for example, may often accept employment with respect to a legal issue where the advocate should refuse.[5] Thus, since a lawyer may at one time act as an advisor and at another time as an advocate, the ethical responsibilities of the lawyer may vary depending on the role he plays.

The Code's failure to state standards and objectives for the advisor is probably due to many factors. Perhaps the most easily understandable is historical. Traditionally the lawyer's function

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> Although less than one-fourth of the lawyers in practice today devote a majority of their time to litigation, and most spend none at all in the traditional courtroom, there are few lawyers who do not negotiate regularly, indeed daily, in their practice.

Rubin, *A Causerie on Lawyers' Ethics in Negotiations*, 35 LA. L. REV. 577, 578 (1975).

"[W]hat is surely the largest single segment of the business of the American lawyer: [is] planning contractual transactions and relations." MacNeil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 629 (1975). *See also* Q. JOHNSTONE AND D. HOPSON, LAWYERS AND THEIR WORK at 78ff (1967).

The lawyer may serve his client in still other ways, some of which are mentioned in the Code, such as support or opposition of proposed legislation, and in some which are not mentioned, such as family advisor or marriage counsellor, *see, e.g.*, H. FREEMAN AND H. WEIHOFEN, CLINICAL LEGAL TRAINING (1972) 169-83 (1972), or lobbyist and broker, *see, e.g.*, Q. JOHNSTONE AND D. HOPSON, LAWYERS AND THEIR WORK 106, 108 (1967), or in the numerous capacities of counsellor in human matters, *see, e.g.*, T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976).

Though this article considers primarily the roles of advisor (preventive law) and advocate (litigation), we are mindful that these are not the only roles for an attorney.

4. *See* Schwartz, *The Missing Rule of Professional Conduct*, 52 L.A.B. BULL. 10 (1976).

5. *See* note 45 *infra* and accompanying text.

was almost solely that of a courtroom advocate, and as a result, the original Canons of Professional Responsibility dealt almost exclusively with the dilemmas of that role.[6] It is not surprising then, that the present Code should incorporate the bias of its forerunner. But while the emphasis on the litigator may have been deserved in 1908 when the Canons were written, it is inappropriate now.

There are perhaps several reasons why this historical bias was not remedied. Whereas the result of the advocate's effort is often of extreme public import, and occasionally political in nature, the advisor's effort is generally private and seemingly important only to the immediate parties. Frequently the advisor's most important decisions are designed to remain confidential.[7] Because the Code of Professional Responsibility serves partly as a public relations device,[8] it is only natural that the Code should focus on the more public, and more publicized, role of an attorney.

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6. "The Canons of Professional Ethics virtually neglects the area of preventive law, and, as a result, provides no standards to which counseling attorneys could look." Merder, *The Need for an Expanded Role for the Attorney in Divorce Counseling*, 4 FAMILY L.Q. 280, 290 (1970).

> [I]t is significant that the Canons of Professional Ethics—which governed conduct in the legal profession from 1908 until the American Bar Association adopted the Code of Professional Responsibility in 1970—spoke almost exclusively to the moral questions faced by lawyers who try cases.

Judge Irving R. Kaufman, "Law," SAT. REV. Nov. 1, 1975, at 15.

"The Canons, however, were framed by lawyers as if the sole function of a lawyer were courtroom advocacy." Wherry, *An Essay on Lawyers' Fees*, 25 N.Y. ST. BULL. 372 (1953).

7. This is not to say that such decisions are not of extreme importance. Decisions of low visibility may be of extreme importance to the individuals involved. The importance of such law office decisions is underscored in the way Thomas L. Shaffer (formerly Dean, Notre Dame Law School) puts it: "My father's will may have more to do with what my life will be like than anything the Federal Court of Appeals will ever do." T SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 3 (1976).

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations, 9-1, [hereinafter cited as EC].

Jerome Carlin suggests that one function of the formal controls of the previous Code was to forestall public criticism of the legal profession: "This interpretation is suggested by our finding that the visibility of the offense is the principal factor accounting for the severity of the official sanction." J. CARLIN, LAWYER'S ETHICS 170 (1966). The current code also seems quite concerned with the visibility of a lawyer's transgressions: "Because of his position in society, even minor violations of the law by a lawyer tend to lessen public confidence in the legal profession." EC 1-5.

Another reason for the limited viewpoint of the Considerations is that the advocate's role has been better defined by a well-delineated legal process. In contrast, the advisor performs many diverse functions for the client and generally is unconstrained by formal procedures. As a result, it is more difficult to state comprehensively the ethical considerations for an advisor.[9]

This article is an effort to analyze and help remedy these defects in the present Ethical Considerations. This approach first requires a complete understanding of the advisor's role as compared with the advocate's. The article will then examine the current Ethical Considerations for two different types of flaws: 1) an incomplete description of the practice of law because of a failure to consider the advisor's role when appropriate, and 2) an incorrect or inadequate description of the advisor's role where such a role is recognized in the Ethical Considerations. Finally, this article will provide some suggestions for revisions of the present Code.

THE ROLES OF ADVOCATE AND ADVISOR

The Advocate

The advocate's role commences when a potential client approaches a lawyer either with a complaint to assert or with the fear that someone has or will soon assert some right against the client in a court of law, in arbitration, or in any other adversary context. Once the attorney accepts the case, his goal is relatively clear: to maximize the client's recovery or minimize the client's liability.[10] In this adversary process the advocate is a skilled technician, able to handle the intracacies of the legal system. Therefore the procedural decisions are mainly made by the attorney.[11]

9. The reluctance of the Code to define the practice of law in a "single specific definition" (EC 3-5) masks the desirability and necessity of considering that there are areas of law practice for which separate principles of professional responsibility should be provided. *See* EC 3-5 and note 34 *infra* and accompanying text.

10. Recovery or liability, as the case may be, is not limited to the amount of the judgment itself. Additional factors that should be considered are fees and expenses of litigation, auxiliary costs, such as the productive time loss suffered by the litigating parties or witnesses, and emotional costs even if not quantifiable. The numerous cost factors of litigation deserve greater exposure and study than we have accorded that subject. One example, although minor and incomplete, is Rimel, *Preventive Law and the Land Sale Contract*, 38 S. CAL. L. REV. 461, 476 n. 33 (1965). To some extent these extra-legal factors, as well as the direct legal factors, are recognized in EC 7-8.

11. At least this is the traditional view. *See* Link v. Wabash R.R., 370

As long as his decisions do not adversely affect the merits of the case or substantially prejudice the rights of the client, the lawyer is allowed to manage the proceedings as he chooses.[12] The basic determination left to the client is whether to proceed with the case or to settle.[13]

Even these determinations, however, may be heavily influenced by the advocate. It is his ethical duty to insure that the decisions of the client are made *only* after the client has been informed of relevant considerations.[14] Here, the lawyer is obliged to draw upon his experience as well as his objective viewpoint. The client should be advised of the possible consequences of each legal alternative as well as the effect of extra-legal matters.[15] The force of the lawyer's influence is merited since the advocate should ideally have a trained and practiced judgment in determining when to continue or end the litigation process. The client, in contrast, will usually be inexperienced in the field and unable to protect his own interests.[16] Accordingly, the Ethical Considerations for the litigating attorney are concerned with insuring that the attorney actually represent the best interests of the client,

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U.S. 626, 647 (1962) (Black, J., dissenting). *See also* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 13 (1974) [hereinafter cited as ROSENTHAL]. Yet there is no lack of irony in this view. Although the client, as a novice, is forced to rely upon the attorney, the client may still be bound by the attorney's mismanagement. *See* Link v. Wabash R.R., *supra*, and Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1139 (1968). Rosenthal has suggested that clients who participate in the decision-making process receive better service from attorneys than passive clients. *See* ROSENTHAL, *supra* at 61.

12. EC 7-7, Disciplinary Rule 7-101. *See also* Linsk v. Linsk, 70 Cal. 2d 272, 449 P.2d 760 (1969).

The duty of the lawyer to the adversary system of justice (EC 7-19 *et seq.*) in relation to the duty to preserve client confidences (Canon 4) deserves re-evaluation. "It is urged that there are situations where the confidential duty a lawyer has to his client may be greater than the duty to allow the adversary system full freedom to explore the truth." Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 724 (1975).

13. EC 7-7. Other decisions which are solely for the client are catalogued in *Linsk v. Linsk, supra.*

14. EC 7-8.

15. *Id.* This applies only to those decisions which the lawyer cannot make alone. The consideration of extra-legal factors, while of concern to the advocate, is likely to be of greater concern to the advisor. *See* note 24 *infra* and accompanying text.

16. *See, e.g.*, Link v. Wabash R.R., *supra* note 11. *But see* ROSENTHAL, *supra* note 11.

although the interests of a lawyer desiring to settle may conflict with the client's decision to proceed with the litigation, or vice versa.

The Advisor

The advisor's role[17] begins when a lawyer is contacted by a prospective client concerning a matter which the client perceives as "legal" or simply one with which an attorney might be helpful. In order to provide any assistance, the advisor must determine exactly what the client wants, since his real purpose in consulting a lawyer is likely to be more abstract than a desire to assert or defend a claim. For example, the advisor's client may want to engage in a transaction, to plan his future, to make a gift, or perhaps is just disturbed by something he thinks might be solved with a lawyer's help.[18]

The advisor's task in determining his client's purpose is made more difficult because a client may state his request for guidance in terms of a proposed solution to an unstated problem, or he may

17. The word "advisor" is chosen simply because the Code uses it. We use it to include both the counseling and advising functions of the attorney, except in the litigious context. Freeman and Weihofen feel that the word "advice" is too narrow to be the equivalent of counseling, which they say,

> [c]an be broadly defined as verbal or non-verbal advice, guidance or direction for a person submitting or constituting a problem. It is a process by which a counselor obtains information and on the basis thereof helps a counselee to solve a problem or develop a new orientation.

H. FREEMAN AND H. WEIHOFEN, *supra* note 3, at 89. While this definition may be helpful, it is important to remember that the advisor is not just any counselor, but a lawyer, a counselor with a specific area of expertise.

The designation "advisor" is, for our purposes, somewhat ambiguous or misleading. A lawyer may be an advisor in dispute situations where the client seeks "advice" as to whether the client has a cause of action or ought to proceed with proposed litigation. We mean "advisor" in the non-litigation, non-dispute resolution context. Typical of the non-litigation advisor is the lawyer who is consulted regarding a will, or estate planning, or the legal structure of a new business (corporation or partnership). There are other situations where the crucial determinative facts have not yet happened, and where the basic decisions to be made are not referable to, or determined by, a judge, arbitrator or referee. *See* Brown, *The Law Office: A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956).

18. An illustration is a parent dissatisfied with a child. An advocate would be of little help, for there is no *case*. An advisor, on the other hand, may be of considerable assistance in helping the client use legal means to influence the child.

be somewhat secretive about the basic problem, or he may not really know or be able to identify his purpose and goal.[19] To take a simple example, a client may come to an attorney to ask whether he must pay gift tax on a gift of $90,000 to his child. Although this question seems simply stated and may have a definite answer, that answer may not respond adequately to the client's needs. To provide good advice, the lawyer must, among other things, determine the client's purpose in making the gift. The client may wish to provide for the child's education, to insure that the child enter or continue in the family business, or to use the gift as part of the parent's estate plan. The lawyer can assist the client in each of these possible goals by use of legal constructs—a will, a trust, certain provisions in the articles or by-laws of the family business—but only if the attorney knows the client's purpose.

Next, the lawyer must advise the client how best to effectuate his purpose. But determining the correct advice and course of action for the client is a process which requires cooperation between lawyer and client. The proper solution must be based on an accurate appraisal of the client's desires and abilities, coupled with the lawyer's ability to develop solutions and to coordinate the appropriate solution with the client's ultimate purpose.[20]

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19. The identification and re-shaping of a client's purpose is a characteristic lawyering function in the theory and practice of preventive law. L. BROWN AND E. DAUER, THE LAWYER'S HANDBOOK A3-7 *et seq.* (rev. ed. 1975). *See also* Brown, *Anaylzing a Lawyer/Client Consultation*, 7 U. MIAMI INST. ESTATE PLAN. ¶ 73.905.1 (1973).

> But the client characteristically participates with the lawyer in numerous decisions, large and small, as to what must be done to carry out each ultimate purpose. If the client's purpose is to make money through a business venture, he will, of course, have ideas as to the particular way the money is to be made, say through a corporation or a partnership, or whether to eliminate a recalcitrant business associate. If his purpose is to safeguard property he is leaving to his children, decisions must be made on whether to use a will or a trust agreement or another alternative that the lawyer will present. He must do more than carry out the pre-conceived ideas that the client brings to him. He should help reshape the client's plans.

R. FISHER, WHAT EVERY LAWYER KNOWS 3 (1974). [The book is available at Harvard Cooperative Society, 1400 Massachusetts Avenue, Cambridge, Massachusetts 02138.]

20. The process by which this is accomplished may be intuitive. However, an analytical description of the process involves several steps. These steps are summarized in L. BROWN AND E. DAUER, THE LAWYER'S HANDBOOK A3-1 *et seq.* (rev. ed. 1975).

From the attorney's perspective, the client seeking advice can be distinguished from the litigating client not only because the former is ordinarily a greater participant in the decision-making process, but also because the client is the actor; that is, the client is the one who will engage in the transaction or execute the contract.[21] Consequently, any discussion of possible solutions must include the means of accomplishing those results. To do this, the lawyer must explain to the client in understandable terms the course and effect of each pertinent legal solution. When possible, the lawyer should also present non-legal solutions.[22]

Often the client may consult the attorney initially with an expectation of what the law can accomplish; but because the client is untrained in the law, his expectation may be incorrect. In such a case, the lawyer should help the client to re-evaluate his original purpose and make adjustments which can be accomplished either through legal or non-legal means or both.[23]

When comparing the advisor's roles and duties with the advocate's, several distinctions are immediately apparent. In the litigator's practice the client's goal is almost universally to "win the case." In the advisor's practice, the initial goal may not be explicitly stated. Secondly, because each planning solution is provisional and must be evaluated by both advisor and client, the amount of communication between advisor and client may be much greater than in the advocate's practice. In addition, since each participant has his own area of expertise, the communication must consist of an exchange of information. Finally, since the client is the actor, the number of decisions to be made by the attorney alone may be fewer and less significant than in the adversary situation. Thus, the advisor's task is to guide the client to structure the facts; that is, to act in such a manner that the result will be most beneficial. The emphasis is on planning the transaction before the legal effect is rigidified.

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21. There are, in practice, situations in which a client may delegate to a lawyer the conduct of the client's entire course of action. The client, however, remains the principal with the lawyer as agent.

22. The usefulness of presenting non-legal solutions can be illustrated by the following perhaps apocryphal story. An extremely wealthy person (we are led to believe it was the late Howard Hughes) at one time rented the entire top floor of a Las Vegas hotel. The hotel, wanting a lessee with a will to gamble, gave him notice to vacate. At that point he may have consulted his attorney(s) to find a way to remain in the hotel notwithstanding the owner's wishes. The solution was not to sue, but simply to buy the hotel.

23. *See* L. BROWN AND E. DAUER, THE LAWYER'S HANDBOOK ch. 3 (rev. ed. 1975).

The advisor determines the facts which will occasion the most profitable result by an examination of legal and extra-legal indicators, the most well-recognized of which is how a court will respond to a given factual situation. Thus, if the advisor knows that a court will rule unfavorably if certain facts occur, he can advise the client to prevent their occurrence.

But predicting a court's response to a specific situation is not sufficient. The advisor should also be concerned with all the potential—legal and nonlegal—consequences for his client.[24] The predictions which the counselor makes include the additional important factor of whether the litigation process will be put to use.[25] If the cost of the entire series of events exceeds its ultimate value because of the cost of litigation, the attorney's prediction that the client would ultimately prevail in the courts will be of little solace. Rather, in retrospect, the client who won in the courtroom will have lost money by relying on the favorable prediction.

The attorney should not be preoccupied with protecting the client against the possibility of harmful effects; the attorney's task includes maximizing possible gain. Thus, the attorney should advise the client how to act not only to prevent the assertion of claims against the client, but also to aid the client in asserting a claim against another. Similarly, the advisor should help a client act so as to maximize recovery even when there is no potential adversary. For example, the lawyer may know that the client might be entitled to a benefit the client is not now receiving, such as

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24. This is true of the advocate as well. But the range of non-legal effects is much broader to the advisor. *See* note 21 *supra* and accompanying text.

25. Unfortunately, although legal literature contains discussions concerning criteria for prediction of appellate court decisions, it contains fewer discussions of predictions of results of trial decisions, and scarcely anything about predictions as to whether the adversary process will be instituted. Law school teaching materials are particularly vacuous in this area. Even with respect to the adversary process, there is almost nothing about the decision "not to file a lawsuit." Clinical education programs may, when circumstance arises, discuss the decision to file or not file a law suit. The Ethical Considerations stress the duty of the lawyer to the adversary system (EC 7-19, EC 7-39), to a "position in litigation" (EC 7-4), to "ultimate decision of the courts" (EC 7-5), and to "avoidance of unfair litigation" (EC 7-14). Far less attention is given to the settlement of disputes by alternative processes, although most disputes are determined by processes short of judicial decisions. Bearing in mind that the Code gives so little stress to alternatives to the adversary process, it is not surprising that even less attention is given to the lawyering process in preventive law practice.

social security benefits; the client may be advised to apply for the benefit. Or the client may be entitled to have a claim defended by an insurance company instead of providing his own defense.[26]

In advising his client on a course of action, the attorney should be aware that future changes both in the law and in the client's situation may seriously affect present proposals. In order to render complete services to the client, the attorney practicing preventive law has at least two responsibilities regarding subsequent events. First, the attorney should advise the client of any facts that may arise which might be legally significant and which the client may not be capable of dealing with adequately. Thus, a client who is discharged in bankruptcy should be told to obtain further legal counseling if a former creditor should seek recovery.[27] A person who makes a will should be informed that marriage, divorce, or an after-born child may affect the will.[28] Secondly, the attorney should, when possible, notify the client of any changes in the law upon which his advice was based and the effect of such changes.[29]

The advisor is in a peculiarly important relation to the client. In matters involving dispute resolution, the litigating lawyer is the client's representative in a process in which the ultimate decision is to be made by a judge, referee or arbitrator. But the preventive law lawyer is the client's authoritative legal decision-maker for the legal matters upon which he is consulted.[30]

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26. In some circumstances this might involve an adversary, but in many cases no conflict is likely to ensue—the client is entitled to a defense but still is required to ask for it.

27. Brown, *Follow Through*, 39 CAL. ST. B.J. 152 (1964).

28. *See* H. FREEMAN AND H. WEIHOFEN, *supra* note 3, at 307; Brown, *Ethical Requirements*, 39 CAL. ST. B.J. 913 (1964). *See also* Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161 (1969) (client married after will executed).

29. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 210 (1941):

> It is our opinion that where a lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty, to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the Will. Periodic notices might be sent to the client for whom a lawyer has drawn a Will, suggesting that it might be wise for the client to re-examine his Will to determine whether or not there has been any change in his situation requiring a modification of his Will.

Id.

30. Court decisions are regarded as finally determinative of legal rights and duties of the parties to the extent of the judgment. Even so, a trial court judgment is reversible, sometimes by the court (motion for

THE ETHICAL CONSIDERATIONS

In General

The Ethical Considerations rarely focus on the distinction between advocate and advisor or on the advisor's function in particular. Rather, because the Ethical Considerations purport to establish singular objectives toward which all lawyers should strive, they negate distinctions drawn between lawyers. It is important not only that the Considerations themselves apply to advisors, but also that the description of the profession in the Considerations is as accurate a portrayal of the advisor as of the advocate.

Unfortunately, the Considerations do not succeed in this task. Our observation in this regard is based on various statements and features of the Code of Professional Responsibility. Beginning with the preamble, an immediate inference arises as to the reason for the Considerations' failure. The Considerations indicate:

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in the *legal system.*[31]

This proposition is later followed by an elucidation of "legal system" in Consideration 7-19: "Our legal system provides for the adjudication of disputes governed by the rules of substantive,

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a new trial granted), and sometimes by an appellate court. Compare this with the binding force of client conduct. Client action is often binding and without some of the safeguards accorded the adversary system. A signed contract is customarily legally binding on the contracting parties. The legally binding effect is reversible, not so much by the use of the adversary process, but rather by a process of renegotiation and amendment, if available. A fully executed will is a binding document in which legally effective choices are made. The designation of an executor becomes, in the usual situation, a legally effective determination, subject to modification in a subsequent testamentary document and to the willingness of the designated executor to accept the appointment. The power of the court to decline the designated nominee is so rarely exercised as to be of negligible significance. The point is that the testator's designation is a legally final and binding designation, even if the choice was poorly exercised. The adversary process is of no avail if, for example, the testator's nomination of his second wife as executrix turns out to be a poor choice because family difficulties later arise between the executrix and her stepchildren.

31. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (emphasis added).

evidentiary, and procedural law."[32] This reference to the *legal system* in the preamble seems to indicate the simple progression of the Code's position: lawyers play a role in a system (i.e., the adversary system) which plays a vital role in society. Yet this statement fails to indicate all the ways in which lawyers operate without formally resorting to the adversary system and, as a result, it limits discussion of the ways a lawyer can serve a client.[33]

Another illustration of this constricted vision is the Considerations' reluctance to define the practice of law:

> It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of a lawyer is his educated ability *to relate the general body and philosophy of the law to a specific legal problem of a client.*[34]

This passage is a two-edged sword, but it is dull on both edges. It appears under Canon 3, "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law," that it would seem necessary to specify what constitutes the practice of law to determine when certain conduct is unauthorized. But when such a definition proves elusive, the Code proceeds to restrict a lawyer's function unnecessarily. The essence of an advisor's judgment is not limited to relating *the law* to a specific *legal* problem of the client, but of giving legal and sometimes even extra-legal advice on *any* matter the client presents to his lawyer. The problem may have some connection with the law, but the judgment which the lawyer exercises may be of a purely personal or business nature. In such a situation the lawyer should be prepared to offer non-legal advice, but he should inform the client that the proposed solution is not strictly within the legal realm. At any rate, many problems will have both legal and non-legal aspects, and the lawyer should consider both.

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32. EC 7-19. The "system" is not defined in the Code, but the word implies a formal system of justice—the adversary system or its equivalent. *See Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J 1159 (1958).

33. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rule Making*, 89 HARV. L. REV. 637 (1976).

34. EC 3-5 (emphasis added).

The difficulty here is not only with the word "legal" but with the word "problem" as well. The assumption is that one need not see a lawyer until one has a problem.[35] Thus, one of the best sections of the Code from an advisor's perspective exhorts the legal profession to "assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed."[36] Since the early diagnosis of potential legal difficulties is an important aspect of the advisor's practice, it is imperative that a client in the early stages of a transaction understand that although there may not be any apparent legal problems, a lawyer may be of great assistance. The earlier the lawyer becomes involved, the greater the opportunity to plan the transaction to achieve the greatest possible gain. But unfortunately this assistance to the client in recognizing problems is limited to advice that the client should take legal action. To the extent that the Code regards legal problems as synonymous with matters ripe for litigation, the Code overlooks the fact that some of the lawyer's most beneficial services are best performed before the client has committed himself to a course of conduct. Rather, the Code should recognize that a client has a legal concern whenever he acts in a way which has legal consequences. Again, those legal consequences may not only be concerned with minimizing the risk of dispute (which might result in litigation), but may equally as well maximize rights and opportunities which have no litigation counterpart.

The failure to distinguish between the problems which are already coins in the litigator's pocket and those which are only shadows in the advisor's mind is bound to mislead both lawyers and the public. It misleads the public and attorneys into believing that the lawyer's only, or principal, function is representation in the adversary process. It misleads attorneys and clients in failing

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35. The converse is also presented in the Code, that once a "problem" exists, an attorney should be called:

> [T]he legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-7. This, too, presents a very narrow view of legal problems and matters having legal consequences. Every time someone signs a check, drives an automobile, buys an airline ticket, or eats a sandwich there are potential legal consequences, yet it is certainly not unwise to do so without consulting an attorney. Rather, one of the functions of an attorney may be to educate the public on how to act without consulting an attorney in matters having minor legal consequences. *See* Brown, *The Education of Potential Clients*, 25 S. CAL. L. REV. 183 (1951). The Code is not clear on this subject, however. *See also* note 38 *infra* and accompanying text.

36. EC 2-2. *See also* EC 3-7.

to encourage lawyers to take the initiative regarding the future conduct of a client's affairs.[37] One result of the Code's failure is that the lawyer who seeks to educate people to recognize their legal problems is cautioned to avoid giving general solutions for fear that the public may be misadvised.[38] Yet the advisor, who seeks to inform the members of the public about their legal difficulties and solutions, must speak in generalities if he wants to inform at all. The advisor in individual situations often functions by utilizing rules of general applicability. Surely no one would doubt the soundness of the general advice to "read before you sign," or to "inspect a house for defects before you buy." Yet if the concept of "legal problem" includes problems which may be prevented by such advice, the advice is not encouraged by the Considerations. If the concept of "legal problem" does not include such prospective problems, then it is seriously deficient for failing to recognize an important aspect of law practice.

The concept of "legal problem" is not the only misleading feature of the Considerations. The Considerations' view of the client also reflects the prejudice of the Code in favor of the adversary system. As previously discussed, the advisor's client is a decision-maker. In litigation, however, almost all decisions are wrapped up in the adversary process and therefore may be made by the attorney alone. Because the ethical evaluation of the attorney's relationship with his client depends on whether the client is a "litigation" client or an "advice" client, the Code should carefully avoid confusion.

When, at times, the Code avoids confusion, it does so at the cost of treating all clients as "litigation" clients. Perhaps the clearest example of the Code's attitude toward clients is Canon 5: "A Lawyer Should Exercise Independent Professional Judg-

37. Brown, *Preventive Law, Ethical Requirements*, 39 CAL. ST. B.J. 913 (1964) (reprinted in VI Law Office Economics and Management, No. 4, at 533 (Feb. 1966), and in 71 CASE AND COM., July-Aug. 1966 at 27).

38.

> A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

EC 2-5.

ment on Behalf of a Client." The phrasing of this Canon presupposes an active attorney who *independently exercises professional judgment*; that is, he makes decisions the client may be incapable of making. Since the client does not contribute to the decision-making process, the lawyer must act *on behalf of* the client. This interpretation overlooks a substantial portion of the customary advisor-client interchange. Indeed, the client under Canon 5 is hardly more than a mirage—appearing substantial from a distance but vanishing upon closer inspection.

The position of the client under Canon 5 is demonstrated by a rather peculiar, ironic Consideration:

> Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.[39]

This Consideration provides the only example under Canon 5 in which the client is to make a final, controlling decision. That situation is limited to cases in which two lawyers unable to agree are, like titans, struggling for control of matters vital to the client.[40] The implication is that at all other times decisions which affect the client are to be made by a lawyer or lawyers. This can be contrasted with the proper functioning of the planning lawyer. The crucial question is whether the client agrees with a proposed course of action rather than whether other attorneys agree. It is the client who must, for example, "sign on the dotted line"; the client has the ultimate decision.[41]

Perhaps the illusory nature of the client's participation under Canon 5 could be excused if the problem were remedied elsewhere in the Code. But it is not. The client appears throughout the Code as an object of the lawyer's services rather than the lawyer's *raison d'etre*. Accordingly, under Canon 6, "A Lawyer Should Represent a Client Competently," the basis and need for competence revolves around the attorney's vital role in the *legal pro-*

39. EC 5-12.

40. It does seem a bit ironic that the most difficult of decisions—those where equal co-counsel cannot agree—should be put in the lap of the client, whereas other decisions in the adversary process, though they may be vital to the client's interests, may proceed independently of client decision.

41. This, of course, does not mean the attorney should give certain advice merely because the attorney believes the client will agree. There is still the obligation to act competently. Canon 6.

cess,[42] rather than, as one might assume, the damage which could be done to the client by incompetence. The attorney's competence is entirely divorced from the service he renders to the client. Nowhere in the Considerations' discussion of competence is the lawyer's personal relationship with his client mentioned. To deal with the client competently under the Considerations requires only knowledge and preparation in the law. Yet knowledge, preparation and even willingness are of no avail to the lawyer who cannot determine how to apply his knowledge to serve a particular client. To the contrary, the advisor's first and most basic task is determining what the client wants and how he can best serve the client.

The Advisor In Particular

As previously shown, the Considerations which address themselves to lawyers in general fail to provide standards applicable to the advisor. Certain sections of the Considerations, however, do recognize that "the action of a lawyer may depend on whether he is serving as an advocate or advisor."[43] These sections are somewhat helpful since they at least stress differences between the advocate and the advisor in areas where those differences are most acute. But they do so without fully comprehending the advisor's role, and as a result, they create as many difficulties as they solve. These sections could provide the initial foundation needed to remedy the Considerations' failure to furnish a model for the advisor. As might be expected, however, these sections alone cannot and do not cure the flaws of the entire document.

Although the word "advisor" is not mentioned prominently in the Code until Canon 7, the Considerations under Canon 5, while discussing conflicts of interest, do distinguish between litigating and non-litigating situations:

> A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which we would be justified in representing in litigation multiple clients with potentially differing interests.[44]

In matters not involving litigation the attorney can in many instances represent clients with potentially differing interests,

42. EC 6-1.
43. EC 7-3.
44. EC 5-15.

particularly if the interests vary only slightly, provided that the client "be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires."[45] If the potentially conflicting interests of a litigating attorney do become actual conflicts, the attorney would have to withdraw, with the likelihood of resulting hardship to the client; whereas the withdrawal of a non-litigating lawyer, it is stated, is less likely to have a disruptive effect upon the transactions of his clients.[46]

The difficulty is that although the distinction in these effects is generally correct, the reasons given for the distinction are spurious. The withdrawal of an advisor may have just as deleterious an effect upon the client as the withdrawal of a litigator. Yet neither advisor nor advocate is asked to weigh the potential harm of withdrawing against the benefits of accepting employment. The reason is much more complex than the Code indicates. The validity of the distinction rests both on an analysis of factors such as the benefit of having one lawyer and also on a determination of who is in a better position to weigh the risks of the potential conflict and the alternatives if a conflict does arise.

In the non-litigating situation the client is in a good position to weigh the possible costs and benefits of hiring counsel who represents a potentially conflicting client. Of course, the client must be informed of the legal ramifications of the common representation. More importantly, the client knows how important the particular lawyer is to him. The lawyer's past knowledge of the client's affairs or the past rapport between them may be extremely valuable to the client in this situation. In addition, the client may be in a better position than the lawyer to determine the likelihood that a conflict will in fact arise and what its effects may be. For example, where two or more persons employ one lawyer to form a partnership, the lawyer knows that the partners may have potential conflicts. The partners themselves may be in a better position than the lawyer to determine whether a conflict requiring separate representation will develop and whether the cost of hiring two or more attorneys instead of one is a cost that should be incurred.[47]

45. EC 5-16. *See also* Ball, *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A.J. 63 (1976).

46. EC 5-15.

47. The cost of hiring two attorneys may be avoided in some instances of litigation. For example, in some divorces the facade of the adversary

An even more important difference between the litigating and non-litigating situations is what constitutes a potential conflict and its effect should it materialize. A potential conflict means different things to an advisor and advocate. Because a litigator's decisions are based on the application of law to established facts, a potential conflict means a conflict which already exists but may not yet be recognized. As the litigator uncovers the facts, the presence of the conflict becomes clear. At that point, since the interests of the clients actually clashed before the attorney was hired, the attorney's fate is pre-ordained. He must withdraw from representing at least one client, regardless of the costs to the client.[48]

To the advisor, however, a potential conflict means that a situation exists which may in the future evolve into a conflict. Since the advisor and the client mold the future, the recognition of a potential conflict may provide the basis for its resolution before there is in fact a conflict. For this reason, parties with potential conflicts, such as business partners or spouses, often see an attorney to insure that no conflict does develop.[49] To require the attorney to withdraw from advising clients in such a situation, when the clients are capable of giving their informed consent to the mutual representation, would be to sacrifice flesh and blood to a mythical beast. Fortunately, the Code is civilized enough not to require it.

Several Considerations under Canon 7 focus upon the distinction between advocate and advisor; but, like the Considerations under Canon 5, the discussion demonstrates the limits of the drafters' understanding of that distinction. Because of the wording of Canon 7, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," and since specifically, the word "zealously" seems not to apply to the advisor,[50] the Considerations are forced to define what the Canon means to an advisor. The distinction is advanced in a somewhat confusing fashion:

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process is preserved by having the lawyer represent one of the parties while the other party appears *pro se*.

48. Disciplinary Rule 5-105 [hereinafter cited as DR]. The exception in DR 5-105(C), i.e., multiple clients consenting to representation, would not apply if the interests of the clients involved in the same litigation were adverse to each other. In litigation it would not be obvious that the attorney could adequately represent both sides. DR-5-105(C).

49. *See* F. H. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS (1975).

50. DR 7-101, "Representing the Client Zealously" and DR 7-102, "Representing a Client Within the Bounds of the Law," concentrate on the litigating process.

> *Where the bounds of law are uncertain*, the action of a lawyer may depend on whether he is serving as an advocate or advisor. A lawyer may serve *simultaneously* as both advocate and advisor, but the two roles are essentially different.[51]

The first clause is confusing. Certainly the action of an advisor may be different from those of an advocate, even when the bounds of the law are certain. The advocate attacks, admits or defends with respect to a past set of facts to which legal consequences attach; the advisor molds the facts in order to achieve legal consequences so that the client may take advantage of the law or avoid being disadvantaged by it.

The use of the word "simultaneously" is equally confusing. Clearly one attorney may act as an advisor to one client while simultaneously acting as an advocate to another. But whether the same attorney can act simultaneously as an advisor in a preventive law matter and as advocate to the same client in the same matter is another question. Indeed, it may well be impossible. The point of drawing the distinction between advocate and advisor at all is that one person cannot be zealous and objective at the same time—at least not without a clear recognition of the duality of the task. In addition, the two roles are essentially different: the advocate seeks to assert or defend disputed claims; the preventive law advisor seeks to plan transactions or situations. Yet the difference is undermined by the word "simultaneously."

The Considerations then continue with a definition of advisor and advocate. The definition of advisor is as follows:

> A lawyer serving as advisor primarily assists his client in determining the course of future conduct and relationships. . . . In serving a client as advisor, a lawyer in appropriate circumstances should give his professional opinion as to what *the ultimate decisions of the courts would likely be as to the applicable law . . . and by informing his client of the practical effect of such decision.*[52]

This definition is like a political commercial—it communicates most notably by what it does not say. The advisor does more than inform the client of the courts' ultimate decisions and their practical effect. He also should advise the client about the *non-ultimate*

51. EC 7-3 (emphasis added).

52. EC 7-3; EC 7-5 (emphasis added).

decisions and *inapplicable* law. The advisor deals in probabilities of what other people may see as the ultimate decisions in order to prevent or minimize the cost of litigation to the client, whether or not the client will ultimately prevail. Similarly, it is not enough to inform the client of the probable effect of any decision without telling the client ways to proceed in light of this information. It is not sufficient to tell the client not to act so as to jeopardize himself if the advisor knows of no alternative which is as good. In such a situation, the best service the advisor can offer the client is to help him devise alternative ways to proceed which will maximize the client's gain and minimize his risk.

The ability of a lawyer to plan future facts and thereby to change the legal consequences is presented in Consideration 7-3: "A lawyer serving as an advisor primarily assists his client in determining the course of future conduct and relationships." However, the only concrete example in the Code of this function is to further the adversary process by allowing the lawyer to represent a client contemplating "a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action."[53]

The Consideration continues:

> Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.[54]

The development and preservation of evidence favorable to a client in case of future dispute culminating in a trial is a function of an advisor. But the irony is that, having recognized the ability of the lawyer to shape facts, the drafters use it only to extricate a lawyer from an ethical dilemma in the adversary process; they fail to advance it in any concrete way as a technique for helping a client in the planning context.

53. *See* EC 7-3. *See also* H. FREEMAN AND H. WEIHOFEN, *supra* note 8, at 309.

54. EC 7-6.

Having made the distinction between advisor and advocate, the Considerations let the distinction fade in an area in which it should instead have been clarified; specifically, the considerations fail to distinguish which decisions are to be made by a lawyer and which by the client.

> In certain areas of legal representation not affecting *the merits of the cause* or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil *cases* it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense . . . .[55]

The decision-making process is seen at work in the framework of litigation. Ultimate decisions are left for the client, and other decisions are made by the lawyer. The distinction between the advocate and the advisor has virtually disappeared. This Consideration deals with *cases*, and the decisions involve litigation strategy and settlement rather than future behavior.

The distinction is also missing from the next Consideration, which deals with the lawyer's influence on the decisions of the client:

> A lawyer should exert his best effort to insure that the decisions of his client are made only after the client has been informed of all relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from the assertion of legally permissible positions. *In the final analysis, however, the lawyer should*

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[55] EC 7-7 (emphasis added).

> *always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.*[56]

This section speaks mainly to the advisor, since the advisor's client will have more decisions to make than the advocate's. Again this section does not reflect the advisor's capability to form alternatives and advise upon their legal effect. But it does bring out two important aspects of the advisor-client relationship not previously stressed: the lawyer's advice need not be confined to purely legal considerations, and the client is to evaluate non-legal factors and make the ultimate decision. These points are helpful to a clearer understanding of the advisor's role. However, some caveats should be included. Permitted by this section to base advice on both legal and non-legal considerations, the attorney should have to disclose what part of the advice is legal and what is extra-legal.[57] This is necessary because the client, who is not trained in the law, may not recognize the difference. As a result, by imputing too much importance to the non-legal considerations stressed by the lawyer and not enough to other non-legal considerations, the client may act based upon a misconception of what is legally significant.

In addition, the strong position of the lawyer in this passage as provider of all relevant considerations as well as moral advice leaves the impression that the client, like a judge, may accept or reject this advice by fiat. Although this can be the case, it ignores the more effective practice of cooperation between lawyer and client.

To the extent that cooperation requires the active participation of both advisor and client, it is not only compromised by the emphasis given the lawyer at the expense of the client, but also by the power the attorney in a non-adjudicatory matter wields over the client:

> In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from employment.[58]

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56. EC 7-8 (emphasis added).

57. *See* L. BROWN AND E. DAUER, THE LAWYER'S HANDBOOK A3-6 (rev. ed. 1975).

58. EC 7-8.

Thus, the lawyer is in a position to say, "Do it my way because in my judgment it is best for you, or do it without my help." The ability of the attorney to continue or withdraw in cases in which the client has a large investment—both personally and financially —in the services of an attorney practically insures that the decisions can, in fact, be made by the attorney rather than the client. Ironically, in contrast, it is a violation of disciplinary rules for the advocate to withdraw because of a decision by the client contrary to the lawyer's judgment.[59]

SUGGESTIONS

As demonstrated, the Considerations fail to portray accurately the legal profession because, in general, they describe only litigating lawyers and not advisors. Even in those sections where the Considerations are addressed to advisors, they betray an incomplete understanding of the advisor's role. Since the problem is inherent throughout the Considerations, the solution involves more than a linguistic touch-up. Rather, the framework of the Code must be changed so that the Considerations embody, rather than merely advert to, the role of the advisor.[60]

The idea that the practicing lawyer often determines the law and its effects rather than pursuing an interpretation of the law

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59. The advocate, except in unusual circumstances, has no power to withdraw from a case because of a decision by the client contrary to the lawyer's judgment. The exceptions enumerated include cases where the client (1) has made it unreasonably difficult for the lawyer to carry out his employment effectively; (2) wants to pursue an illegal course of conduct; (3) wants the attorney to do so; (4) or insists upon pressing an unsupportable claim or defense. DR 2-110(A). And the withdrawing advocate, unlike an advisor, must take reasonable steps to avoid prejudice to the client caused by the withdrawal. DR 2-110(A)(2).

60. In some instances the Code moves in the wrong direction, excluding the advisor rather than including him. For example, the section of the preamble which states that fulfillment of the role of lawyers in society "requires an understanding by lawyers of their relationship with and function in our legal system," cites as support the following statement by the Report of the Joint Conference on Professional Responsibility:

> [T]he lawyer stands today in special need of a clear understanding of his obligation and of the vital connection between these obligations and the role his profession plays in society.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble note 3, citing *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958). Somewhere in the translation the lawyer's "role *in society*" is changed to his "function in our legal system." This is a thin column on a broad base.

was known to the drafters. The Report of the Joint Conference on Professional Responsibility, which paved the way for the present Code, flatly stated that:

> The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, *where the lawyer's quiet counsel takes the place of public force.*[61]

Yet this knowledge was overshadowed by the Conference's own view of its purpose, to write a "reasoned statement of the lawyer's responsibilities, *set in the context of an adversary* system."[62] Of course, in such a context the advisor was doomed to be lost like a star in the daylight.

The preventive law advisor does stand in the position of the final and authoritative legal decision-maker for the client in the planning of transactions and the doing of future acts. One aspect of that role is to guide the client so as to avoid the necessity to use, or be subjected to, the adversary process. That role should not be overshadowed, as it now is, by the Code's strong and almost exclusive emphasis on the adversary system.

The zealousness required by the present Canon 7 is meaningful primarily to advocates. When put in the role of advisor, an overly zealous advocate adhering to law and legal results may harm the client's practical goals. There is no need to risk such a consequence.[63] Canon 6, "A Lawyer Should Represent a Client Competently," should be expanded to include within the notion of competence the all-inclusive objectivity (legal and extra-legal) expected of the advisor, as well as the zealousness of the advocate. We view the advisor's aspirations of competence as including the knowledge and skill to grasp the client's goals, to reframe them if necessary, to initiate discussion of alternative courses of conduct and, along with the client, to be creative regarding the uses of the law.

In addition, the Code should provide illustrations of the relationship between the ethical advisor and his client. The advisor is dependent upon his client to provide the premises and the goals upon which any advice must be based. At the same time, however,

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61. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958) (emphasis added).

62. *Id.* at 1159 (emphasis added).

63. A meaningful discussion of professional zeal from the point of view of religious ethics is found in Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 730-43 (1975).

the advisor cannot be afraid to suggest actions where the legal health of his client is jeopardized. Therefore the advisor should not await the client's express statement of need, which usually means need to use the adversary process, when the advisor knows that the client's desires will probably be unnecessarily frustrated by the client's present improper actions. Rather, our Code should encourage lawyers to offer affirmative assistance to help the client maintain and improve his legal position[64] including, when necessary, suggesting return visits by the client.

Once the framework of the Code is thus changed to reflect a broader picture of the way the law operates in this country, the specific language of the Code can be revised to incorporate the role of the attorney as advisor in a meaningful and visible way. Each time the word "attorney" is used, thought must be given as to whether it refers to all attorneys or only to advisors or advocates. The myriad ways that attorneys, acting in their professional capacities, serve the public should be enunciated in a general way, so as to allow for the continual expansion of the ways attorneys serve society. This revision of the Code, of course, will take great care, just as the ethical practice of law takes great care. But in this day, when the role of ethical standards and goals is receiving increased attention from lawyers and law students, and when the Code is used for didactic purposes as much as for regulatory ones, it is essential that the Code fully respond to the roles of the attorney in society in order to impress upon all attorneys the ethical considerations which should buttress their professional conduct.

64.

> Where the lawyer has information regarding his client's legal facts, it is not only his right, but it may even be his duty, to advise his client of legal matters posed by those facts, especially where those legal matters concern the legal health of his client.

Brown, *Ethical Requirements*, 39 CAL. ST. B.J. 913, 915 (1964).