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Stephen E. Kalish

University of Nebraska College of Law

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Commentary

By Stephen E. Kalish*

David Hoffman's Essay on Professional Department and the Current Legal Ethics Debate

I. INTRODUCTION

A. The Role

Professional codes of ethics define the role of the individual professional in society. They describe the balance that must be struck between any number of conflicting duties or trusts. In the case of an attorney, the professional code will balance the duties to clients, to himself, to other attorneys and judges, to the public generally, to truth, and to justice.

If the balance is struck so that the attorney owes a preeminent duty to advance client interests, then the attorney's role will be frequently characterized as that of an advocate. On the other hand, if the attorney's first duty is to truth and to justice, he will be labeled an officer of the court.

In 1969, the American Bar Association adopted the Model Code of Professional Responsibility (ABA Code). It defines the attorney's role as primarily that of an advocate in an adversarial setting. Canons 7 and 4 are its essential provisions. They provide that an attorney should represent a client zealously within the bounds of the law and generally preserve the client's secrets and confidences. There are, of course, some limits on this zealous advocacy,¹ but in balance the tone is adversarial. For example, the ABA Code mandates that: (1) an attorney not reveal known facts adverse to his client's interest unless required to do so by law or rule,² (2) an attorney not reveal a client's perjury if the attorney

* Professor of Law, University of Nebraska. Research for this Commentary was made available by a Lane Foundation Summer Research Grant.

1. *See, e.g.*, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102 (1981) [hereinafter cited as ABA CODE].
2. *Id.* DR 7-101(A)(1), DR 7-102(A)(3).

learned of the lie via a privileged communication,³ and (3) an attorney use all means (with some minor exceptions) that might advance the goals of his client.⁴ Even the attorney's right to resign when asked to pursue a legally permissible but unjust course of action is severely restricted.⁵ Although the ABA Code hints at other resolutions of the attorney's conflicting duties, such as a reference to the role of the attorney as an advisor,⁶ and the very limited reference to the attorney as arbitrator or mediator,⁷ these concepts remain undeveloped.

In 1977, the ABA established a Commission on Evaluation of Professional Standards (the "Kutak commission") to evaluate the ABA Code. In January, 1980, the Kutak commission issued a discussion draft of the Model Rules of Professional Conduct.⁸ The discussion draft de-emphasizes the importance of the attorney's duty to advance the interests of the client and to preserve client confidences. It instead defines the attorney's role as an officer of the court. For example, the discussion draft permits an attorney in litigation proceedings to apprise another of known facts adverse to his client's interest;⁹ it requires an attorney to correct a manifest misapprehension of fact created by his client in negotiations;¹⁰ it requires an attorney to disclose a client's perjury, regardless of how the attorney learned of the perjury;¹¹ it permits an attorney to disclose confidential information to the extent necessary to rectify the consequences of a deliberately wrongful act;¹² and, although it permits the client control over the means and ends of proceedings,¹³ it allows the attorney to withdraw from the representation if

3. *Id.* DR 7-101(A)(1), DR 7-102(B)(1).

4. *See id.* DR 7-101(A)(1), DR 7-101(B). Ethical Consideration 7-8 of the ABA Code provides: "[T]he decision whether to forego legally available objectives or methods . . . is ultimately for the client." *Id.* EC 7-8. Ethical Consideration 7-7, however, allows the attorney to make decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client." *Id.* EC 7-7.

5. Disciplinary Rule 2-110(A)(1) prohibits withdrawal until steps to avoid prejudice to the client have been taken. *Id.* DR 2-110(A)(1). Disciplinary Rule 2-110(C)(1)(e) suggests that an attorney may not withdraw, in a matter pending before a tribunal, merely because his client insists on action contrary to the advice and judgment of the attorney. *Id.* DR 2-110(C)(1)(e).

6. *Id.* EC 7-3.

7. *Id.* EC 5-20.

8. ABA MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980) [hereinafter cited as MODEL RULES (Discussion Draft)].

9. *Id.* Rule 3.1(e).

10. *Id.* Rule 4.2(b)(2).

11. *Id.* Rule 3.1(b).

12. *Id.* Rule 1.7(b)(2).

13. *Id.* Rule 1.3(a).

the client persists in insisting on an unjust course of action.¹⁴ The discussion draft even attempts to address separately the implications of attorney conduct in several functional roles beyond that of mere advocate, such as adviser, negotiator, intermediary, and evaluator.¹⁵

In June, 1980, the Roscoe Pound-American Trial Lawyers Foundation issued its response to the discussion draft of the Model Rules. This response, the American Lawyer's Code of Conduct,¹⁶ is a vigorous attack on the discussion draft of the Model Rules. The Introduction to the Code of Conduct states that "our system of justice is an adversary system"¹⁷ and that "proponents of an alternative to this Code have forgotten that basic fact."¹⁸ In other words, it charges that the discussion draft of the Model Rules is *innovative* and *revolutionary*. The Code of Conduct defines the attorney's role as exclusively that of an advocate. The attorney's first and foremost obligations are to preserve the confidences of his client¹⁹ and to advance the interests of his client.²⁰ All other duties are of minimal importance. The Code of Conduct follows the mandate of Lord Brougham.²¹ In 1820 he wrote:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save the client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties: and he must not regard the alarm, the suffering, the torment, the destruction which he may bring on any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's sake.²²

Eleven months after the Code of Conduct was released, the Kutak commission issued its proposed final draft of the Model

14. Rule 1.16(b)(2) provides that the attorney may withdraw if the client's chosen means are "unjust," regardless of whether or not the matter is pending before a tribunal. *Id.* Rule 1.16(b)(2).

15. *Id.* Parts 2-6.

16. THE AMERICAN LAWYER'S CODE OF CONDUCT (Public Discussion Draft, June 1980), reprinted in TRIAL, Aug. 1980, at 44. [hereinafter cited as CODE OF CONDUCT]. The Roscoe Pound-American Trial Lawyers Foundation undertook the promulgation of the CODE OF CONDUCT at the request of Theodore I. Koskoff, President of the Association of Trial Lawyers of America. See CODE OF CONDUCT, *supra*, at i.

17. *Id.* at ii.

18. *Id.* at iii.

19. *Id.* at v-vi.

20. *Id.* at iii.

21. *Id.*

22. Rogers, *The Ethics of Advocacy*, 15 L.Q. REV. 259, 269 (1899) (quoting Lord Brougham).

Rules of Professional Conduct.²³ In the Chairman's Introduction, the Chairman recognized and responded to the Code of Conduct criticisms. He wrote that "the rule of confidentiality had never been absolute"²⁴ and that properly understood "the adjudicatory process [must be] reasonable, reliable and just."²⁵ He claimed that the attorney has a special responsibility for the integrity of the adjudicatory process; in other words, the attorney is an "officer of the court."²⁶ In spite of these brave words, the proposed final draft of the Model Rules is a *retreat* from the substantive stance of the discussion draft of the Model Rules. For example, the proposed final draft provides that: (1) an attorney in litigation does not have the right to apprise another of known facts adverse to his client's interests;²⁷ (2) an attorney in negotiation need only disclose a fact adverse to his client's interest to prevent "assisting a criminal or fraudulent act;"²⁸ (3) an attorney may reveal confidences to prevent criminal or fraudulent acts by a client only if he "believes [it] is likely to result in death or substantial bodily harm, or substantial injury to the financial interests or property of another;"²⁹ and (4) an attorney called upon by a client to pursue unjust means can only withdraw as of right if the actions are "criminal or fraudulent."³⁰ Finally, the proposed final draft limits the discussion draft's effort to emphasize attorney roles other than that of advocate.³¹

B. The Rules

Ethical issues are generally perceived as matters of personal conscience; an ethically good person seeks the proper resolution of these issues regardless of sanction or punishment. Mandatory

23. ABA MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, May 30, 1981), *reprinted in* 67 A.B.A.J. 1299 (1981) [hereinafter cited as MODEL RULES (Proposed Final Draft)]. The Kutak commission also prepared a companion draft, commonly called the "Blue Edition," of the MODEL RULES (Proposed Final Draft) organized into ABA Code format with Canons, Ethical Considerations, and Disciplinary Rules. See ABA MODEL RULES OF PROFESSIONAL CONDUCT (Alternative Draft, May 30, 1981) [hereinafter cited as MODEL RULES (Blue Edition)]. The Kutak commission did not recommend the Blue Edition and the ABA House of Delegates has rejected it.

24. *Introduction to MODEL RULES (Proposed Final Draft)*, *supra* note 23.

25. *Id.*

26. *Id.*

27. Rules 1.2(a) and 3.3 provide no duty or opportunity to disclose adverse facts. MODEL RULES (Proposed Final Draft), *supra* note 23, Rules 1.2(a), 3.3.

28. *Id.* Rule 4.1(b)(2).

29. *Id.* Rule 1.6(b)(2).

30. *Id.* Rule 1.16(b)(1).

31. The proposed final draft has only two functional headings, one for counselor and one for advocate.

rules are generally perceived as externally imposed obligations; an obedient person follows them to avoid punishment. Twentieth century codes of legal ethics generally incorporate both minimum rules and aspirational goals for professional conduct. The proper balance between these rules and goals, and the differences between them, are often confused. The evolution of the ABA Code demonstrates this. In 1908 the ABA adopted hortatory Canons of Ethics.³² The relationship between the rule and goal aspects was inherently unclear, and in 1969 the ABA Code divided the Canons into aspirational statements, called Ethical Considerations, and Disciplinary Rules. The Disciplinary Rules are mandatory; the Ethical Considerations are voluntary,³³ although some courts, compounding the confusion, have interpreted them as mandatory.³⁴

The discussion draft and the proposed final draft of the Model Rules propose to resolve this confusion by offering rules in "Restatement of Law" form. Since there will only be rules, there will be no confusion or ambiguity with respect to what an attorney ought to do and what he must do. Commentators have attacked the format of the discussion draft as too new.³⁵ Additionally, the new format belittles the attorney by suggesting that appeals to his better nature will be of no avail. Only having rules for guidance suggests a criminal code. The drafts of the Model Rules imply that an attorney who does not breach a specific rule is living up to his complete professional obligation. The drafts also suggest that the means of enforcement of the rules will be some form of imposed sanction. They do not seem to expect the attorney's conscience to guide him on the route to correct professional behavior.

In 1836, David Hoffman published, as part of a more general course of study, fifty resolutions, and an accompanying short essay, on professional ethics for attorneys.³⁶ This was the first American code of legal ethics.³⁷ This code defined the role of the attorney as essentially that of an officer of the court. It attempted

32. See ABA CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter cited as ABA CANONS; V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 934-46 (2d ed. 1976).

33. "The Ethical Considerations are aspirational in character. . . ." *Preliminary Statement to ABA CODE*, *supra* note 1. "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." *Id.*

34. See *Committee v. Behnke*, 276 N.W.2d 838 (Iowa 1979), *appeal dismissed*, 444 U.S. 805 (1979).

35. See, e.g., Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A.J. 1628, 1632 (1981).

36. D. HOFFMAN, *A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* (2d ed. 1836).

37. T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY, PROBLEMS AND MATERIALS* 15 n.1 (2d ed. 1981).

to persuade attorneys to be better by aspirational appeal. In substance, it is much closer in spirit to the discussion draft of the Model Rules than to the ABA Code, the American Lawyer's Code of Conduct, or the proposed final draft of the Model Rules. In form, it is closer to the ABA Code than to the discussion draft and the proposed final draft of the Model Rules.

This Commentary will examine certain features of Hoffman's resolutions and his essay on professional deportment. Part II will briefly discuss Hoffman and his *Course*; Part III will examine his reliance on persuasion; Part IV will focus on his emphasis of the attorney as an officer of the court; Part V will briefly conclude.

II. HOFFMAN AND HIS *COURSE*

David Hoffman was one of the leading American legal educators³⁸ in ante-bellum America.³⁹ In 1816 he left a profitable law practice to attempt an ambitious and single-handed reform of legal education at the University of Maryland.⁴⁰ After twenty-five years, as a result of difficulties with the University's administration, he resigned.⁴¹ In 1836 he published *A Course of Legal Study Addressed to Students and the Profession Generally*.⁴² This was an expanded version of a course he had published two decades earlier at the University of Maryland.⁴³

The principal purpose of the *Course* was to "produce a learned and accomplished lawyer; and, perhaps . . . to aid the researches of the Counsellor, the Judge, and the Statesman."⁴⁴ More particularly, Hoffman was aware that unsystematic and unsupervised law study was difficult. He published this outline "to reclaim the time and labour thus often and unprofitably expended, by selecting what was valuable in legal learning, and so arranging as best to adopt it to the complete and ready comprehension of the student."⁴⁵ In all, the outline was 845 pages long. Hoffman estimated that it would take at least seven years to finish it.⁴⁶ Hoffman prudently outlined shorter courses for "those who intend to reside in

38. F. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 89-91, 102-03 (1940); 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 203-06 (1965); P. MILLER, *THE LEGAL MIND IN AMERICA* 83-84 (1962).

39. This period refers to the decades before the Civil War.

40. 2 A. CHROUST, *supra* note 38, at 205-06.

41. P. MILLER, *supra* note 38, at 82.

42. D. HOFFMAN, *supra* note 36.

43. The first edition was published in 1817 but did not contain the *Resolutions in Regard to Professional Deportment*. See Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 913 (1980).

44. D. HOFFMAN, *supra* note 36, at 43-44.

45. *Id.* at 29.

46. *Id.* at 826.

either of the maritime cities,"⁴⁷ for "those who desire to hasten to the bar, after a careful study of about three years,"⁴⁸ and for "those alone who are to practice their profession in the country, that is out of the maritime cities."⁴⁹

The *Course* was divided into thirteen titles: (1) Moral and Political Philosophy; (2) Elementary and Constitutional Principles of the Municipal Law of England, of the United States, and of the Roman Civil Law; (3) The Law of Real Rights and Real Remedies; (4) The Law of Personal Rights and Personal Remedies; (5) The Law of Equity; (6) The *Lex Mercatoria*; (7) The Law of Crimes and Punishment; (8) The Law of Nations; (9) Maritime and Admiralty Law; (10) The Civil or Roman Law; (11) The Constitution and Laws of the United States; (12) The Constitutions and Laws of the Several States; and (13) Political Economy. The *Course* also included nine divisions: (1) The Geography, and Civil, Statistical, and Political History of the United States; (2) Forensic Eloquence and Oratory; (3) Legal Biography and Bibliography; (4) Legal Reviews, Essays, Journals, Magazines, etc.; (5) Codification and Proposed Amendments of Law; (6) Medical Jurisprudence; (7) Military and Naval Law; (8) Logic; and (9) Professional Department.⁵⁰

The format of each title or division was the same. Hoffman provided a list of readings, and he then appended notes, raising questions about the materials, pointing out areas of controversy, and in a few instances, stating his own views.

Division IX related to Professional Department.⁵¹ In an introductory note, Hoffman asserted that the subject was "almost wholly new,"⁵² and that "on the peculiar duties and conduct of the lawyer, little that is very valuable, has been written."⁵³ After listing several books, the first four of which were the Proverbs of Solomon and the Books of Ecclesiastes, Ecclesiasticus, and Wisdom,⁵⁴ and after including several notes on the assigned reading, Hoffman offered his own views on professional department in Note 18, "Observations on Professional Department, with some Rules for a Lawyer's Conduct through Life."⁵⁵ Hoffman believed this division most important, and he insisted that it not be deleted from any of

47. *Id.* at 827.

48. *Id.* at 835.

49. *Id.* at 841.

50. *Id.* at 56-58.

51. *Id.* at 720.

52. *Id.* at 723.

53. *Id.* at 724.

54. *Id.*

55. *Id.* at 744-75.

the shorter courses.⁵⁶

This Commentary focuses on Note 18. Its claims are that: (1) Hoffman's views can be seen as a legitimate predecessor to the substance of the discussion draft of the Model Rules and (2) Hoffman's views as to format have not been followed in the drafts of the Model Rules. It makes no general historical claims. Although there is some evidence that others in ante-bellum America, such as David Dudley Field, believed as Hoffman did, it is not certain how widespread their assumptions were.⁵⁷ Moreover, it is uncertain if practitioners acted the way Hoffman preached. It is probable that they did not. This was a period of Jacksonian equalitarianism, and the sense of elitism which permeated Hoffman's *Course* was absent in real life.⁵⁸ The general trend was to permit anyone to be an attorney. Roscoe Pound called this era a period of deprofessionalization.⁵⁹ Hoffman's resolutions may in fact suggest what attorneys did not in fact do. Since there were no institutional mechanisms to implement any code of ethics, Hoffman might have believed that he had to persuade attorneys to act differently and as he wished.

III. PERSUASION

To appreciate Hoffman's reliance on exhortation as a means to control attorney behavior, it is important to note that he believed that rules and appropriate sanctions could be effective tools of reform in other arenas of life. This is most evident when one examines his general attitude toward legislative or judicial rule-making. His essay on codification in Division V of his *Course* reveals his beliefs.⁶⁰

Hoffman believed that codification, although not a panacea for all problems, would be desirable reform. He wrote "that an approximation is better than no approach to perfection."⁶¹ However, he believed that this would only be true if codification were done

56. *Id.* at 834.

57. See P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 261-63 (1965); Schudson, *Public, Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 *AMER. J. LEGAL HIST.* 191 (1977).

58. 2 A. CHROUST, *supra* note 38, at 171.

59. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 221-42 (1953).

60. D. HOFFMAN, *supra* note 36, at 672-88. The problem of codification beset the ante-bellum legal mind. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* 138 (1975); P. MILLER, *supra* note 57, at 119. Attitudes ranged considerably. Some, informed by an extreme anti-English bias and a fear of judicial law-making, believed that all laws must be legislative. M. BLOOMFIELD, *supra*, at 84-85. Others, informed by a faith in the common law, resisted all change. *Id.* at 85.

61. D. HOFFMAN, *supra* note 36, at 673.

by the right persons. "Mere common lawyers"⁶² or persons of "mere local knowledge and prejudice"⁶³ could not do it; instead, the work had to be "entrusted to scholars in the law."⁶⁴ Although Hoffman did not explicitly so state, he probably meant elite members of the bar who had studied his reading list.

Codification was to result in three codes: a simplified, indexed, and arranged code of statutes annotated with relevant judicial opinions; a simplified, indexed, and "well expressed digest of merely expository judicial law,"⁶⁵ on the order of a restatement; and a code of professional forms.

Hoffman's belief that codification would facilitate reform was most evident, however, in his proposed temporary code of unascertained law. He suggested that his "scholars in law" examine, among other things, treatises, foreign laws, and customary usages for desirable new laws. They would then "clothe [these potential laws] . . . in proper language"⁶⁶ and insert the language in the statutory and judicial codes for consideration by the legislature or the judiciary, respectively. Hoffman's proposed code was to be temporary because it would constantly be modified as the suggestions were either accepted or rejected. In effect, what Hoffman recommended was a modern law review commission.

Hoffman was also aware that law was constantly changing. Since any codification would, by its very nature, require change, he recommended that a Board of Censors, made up of scholars in law, constantly review legislative and judicial developments, and annually recommend an updating of the respective codes. Moreover, the Board of Censors would also annually produce "a digest of unascertained law, or proposed law, for the consideration, adoption, modification, or rejection"⁶⁷ of the political institutions. Hoffman viewed reform as an ongoing process.

With respect to the legal profession and the legal process, however, Hoffman relied on individual moral persuasion rather than on rules to encourage good behavior. The use of resolutions, written in the "I shall" format, demonstrated this attitude. Moreover, Hoffman continually reminded his students to be better persons.⁶⁸ Avarice, for example, was morally undesirable.⁶⁹ He also emphasized the potential for personal moral taint if his students should misuse

62. *Id.* at 679.

63. *Id.* at 685.

64. *Id.* at 686.

65. *Id.* at 675.

66. *Id.*

67. *Id.* at 682.

68. See D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 171-73 (1973); P. MILLER, *supra* note 38, at 84.

69. D. HOFFMAN, *supra* note 36, Resolution XLIX, at 774.

their talents or become partners of their clients in immoral conduct. In Resolution XI he worried about "lending myself to a dishonourable use of legal means"⁷⁰ and in Resolution XII he asserted that "[the client] shall never make me a partner in his knavery."⁷¹ Hoffman consistently tried to persuade his students to lead a good moral life.

One reason, perhaps, that Hoffman ignored enforceable rules as a means of causing change in the legal profession was that there were no institutional mechanisms capable of implementing an ethical code. This was a period of individualism and of deprofessionalization,⁷² and there was no realistic hope of effective external regulation of attorneys. There were no common institutions, schools, or means of policing undesirable behavior. The necessary bar cohesiveness of the late 18th century had passed, and it would not return until a sense of professionalism, nurtured by law schools and bar associations, developed in the late 19th century.⁷³ Hoffman was sensitive to this lack of professional community and tried to stimulate it.

Many of his resolutions are devoted to this end. He reminded his reader to "be always courteous . . . [to his] professional brethren,"⁷⁴ not to "envy him the fruits of his toil or good fortune,"⁷⁵ to "ever be kind and encouraging . . . to [his] juniors,"⁷⁶ and "[w]hen age and infirmities have overtaken [his fellow attorneys], [his] kindness [should] teach them the loveliness of forgiveness."⁷⁷ Community was further encouraged by his belief that all attorneys should avoid the "taking of half fees,"⁷⁸ that is, the undercutting of a fee established by "usage or law."⁷⁹ Moreover, he asserted, no attorney should take a cause in which another attorney had been previously retained; this was to avoid client piracy.⁸⁰ Concern for

70. *Id.*, Resolution XI, at 754.

71. *Id.*, Resolution XII, at 754.

72. See note 59 *supra*.

73. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 525-66 (1973).

74. D. HOFFMAN, *supra* note 36, Resolution V, at 752.

75. *Id.*, Resolution XXXVII, at 768.

76. *Id.*, Resolution XVII, at 758.

77. *Id.*, Resolution XXXVIII, at 768.

78. *Id.*, Resolution XXVIII, at 763 (emphasis omitted).

79. *Id.*

80. Resolution VII provided:

VII. As a general rule, I will not allow myself to be engaged in a cause to the exclusion of, or even in participation with the counsel previously engaged, unless at his own special instance, in union with his client's wishes: and it must, indeed, be a strong case of gross neglect or of fatal inability in the counsel, that shall induce me to take the cause to myself.

Id., Resolution VII, at 753. Except for extreme cases, Resolution VII gave the first attorney a veto over whether the client could retain a second attorney.

community was also reflected in Hoffman's several resolutions with respect to an attorney's relationship with a judge. He opined that "I will ever be respectful" to judges,⁸¹ and regardless of how treated, "a firm and temperate remonstrance is all that I will allow myself."⁸²

Hoffman's reliance on persuasion as a means of regulating attorney conduct, however, was more than just a second-best form of control, useful only because there were so few institutional mechanisms capable of implementing rules. Hoffman also believed that attorneys, more than most men, could be encouraged to better behavior. This is demonstrated by his not infrequent recasting of a problem of legal rule or procedure into a defect of a particular attorney's character or personal morality. Hoffman consistently perceived department problems where others might have seen faulty institutions. Once seen in this way, Hoffman would exhort the offending attorneys to better conduct.

For example, common law pleading was the normal civil procedure in ante-bellum America. It came under considerable criticism from reformers, and within a few decades many jurisdictions replaced it with David Dudley Field's code pleading.⁸³ In his note on "Pleas & Pleading,"⁸⁴ Hoffman asserted, however, that the system was "wonderfully free from important or mischievous defects;"⁸⁵ it was admirably designed to "obtain an answer, from the court or the jury, on a defined point in controversy."⁸⁶ He did admit that certain "excrescences"⁸⁷ had been added to common law pleading, and he believed that those ought to be removed. The principal problem with common law pleading, however, was that it could be "perverted to very bad purposes"⁸⁸ by unworthy practitioners. In Hoffman's view, however, proper reform rested with improving the deportment of practitioners rather than with any structural change in the system. As Hoffman wrote:

It would be no difficult task to point out many abuses of this noble science, and to suggest simple and adequate remedies; but as these abuses are attributable, much more to the faults of those who cultivate it, than to inherent defects in the science itself, the subject would seem to belong quite as much to the head of Professional deportment, as to that of the Philosophy of Pleading.⁸⁹

This rule was consistent with those cases which required court approval to change attorneys in order to protect the rights of the first attorney. See *Mumford v. Murray*, 1 Hopk. Ch. 369 (N.Y. 1825).

81. D. HOFFMAN, *supra* note 36, Resolution III, at 752.

82. *Id.*, Resolution IV, at 752.

83. L. FRIEDMAN, *supra* note 73, at 340-50.

84. D. HOFFMAN, *supra* note 36, at 348-57.

85. *Id.* at 349.

86. *Id.* at 351.

87. *Id.* at 352.

88. *Id.* at 350.

89. *Id.* at 355.

Hoffman also revealed this tendency to perceive an issue in the civil procedure arena not as one of bad law, but rather as one of character defect, subject to his exhortations, in his discussion of arbitration. Arbitration in the early 19th century had become a discovery tool rather than a method of dispute resolution. Hoffman reported that many attorneys tended to use arbitration not "to prevent expensive and dilatory judicial litigation,"⁹⁰ but "as the means of procuring an inquiry, merely preliminary to ultimate proceedings in a court of justice."⁹¹ Hoffman did not perceive the problem as one of defective law or process. The true problem was misuse of the system by some dishonorable practitioners, and Hoffman referred the problem to his discussion of deportment. In his note, "Arbitrament and Award, Accord and Satisfaction,"⁹² he wrote: "The avoidance of [this] gross abuse . . . , and the cultivation of those elevated morals, which would render it impracticable, would be topics more proper for our head of Professional Deportment. . . ."⁹³

The drafts of the Model Rules rely on rules to control attorney conduct. Any aspirational appeal is considered either confusing or useless.⁹⁴ Hoffman, both because the legal community of his time did not have the institutions to enforce rules and because he believed attorneys, even those of ante-bellum America, would respond favorably to proper professional goals, sought to persuade attorneys to be better persons and better lawyers. Hoffman's method of persuasion has been abandoned by the drafts of the Model Rules.

IV. OFFICER OF THE COURT

The basic premise underlying the substance of the ABA Code, the Kutak proposed final draft of the Model Rules, and the American Lawyer's Code of Conduct is that in most situations there will not be a clear moral right and wrong. This fundamental moral ambiguity helps to justify the concept of the attorney as an advocate, with his one-sided balance of duties. Hoffman did not accept this assumption. Instead, Hoffman believed that in most cases one party was clearly morally right. He wrote: "[I]n most cases one of

90. *Id.* at 359.

91. *Id.*

92. *Id.* at 358-60.

93. *Id.* at 359.

94. Introduction to MODEL RULES (Proposed Final Draft), *supra* note 23.

the disputants is *knowingly* in the wrong"⁹⁵

Hoffman believed that it was extremely important for attorneys to keep clear consciences and not to seek unjust goals or use unjust means on behalf of clients. The principal threat to proper attorney conduct was the temptation an attorney might feel to be a strong advocate for his client. Hoffman expressed this concern in his Note 18 Essay in which he wrote:

But such an office brings its ministers into a too intimate and dangerous acquaintance with man's depravity; it places them in the midst of temptations; and whilst engaged in rescuing others, they sometimes fall the only lamented victims. . . . The success of the client is always that of the counsel: the interests and feelings of the latter become in a measure identified with those of the former, and be they meritorious or the reverse, the tie is often of such a nature as to generate the seeds of moral evil. Perhaps in a majority of legal disputes some dereliction of sound morals lies on one side or the other; not that cases do not arise in which the question is honestly and justly disputed by both of the litigant parties. But believing, as we do, that in most cases one of the disputants is *knowingly* in the wrong, the lawyer's vocation must of necessity expose him to some portion of those feelings, and agitating passions which either generate these causes, or protract them to a long and vexatious period. In point of *interest*, also, as well as of feeling, the lawyer is occasionally too intimately connected with his client not to feel the force of those passions which lessen the ardour of virtue.⁹⁶

His resolutions clearly reflected this attitude. The first resolution set the negative tone. A lawyer ought *not* to let "professional zeal . . . carry [him] beyond the limits of sobriety and decorum."⁹⁷ As has been noted, Hoffman cautioned his students against "lending [them]selves to a dishonourable use"⁹⁸ or becoming "partner[s] in [their clients'] knavery."⁹⁹ Other resolutions further

95. D. HOFFMAN, *supra* note 36, at 746. See also Simon, *The Ideology of Advocacy: Procedural Justice & Professional Ethics*, 1978 WIS. L. REV. 29.

96. D. HOFFMAN, *supra* note 36, at 745-46 (emphasis in original). Hoffman further wrote:

[The lawyer] is made familiar with the artful devices of cunning; the ingenious contrivances of fraud and oppression; the well guarded schemes of the shrewd, artfully made by them to amble on the very confines of dishonesty, yet speciously to avoid an overt breach of morals; and finally, he is compelled to learn the most dangerous of all lessons, viz: the vast power, conferred by intellectual superiority, over the rights and possessions of the ignorant, or the necessitous. And though the lawyer's obligation to be faithful in the discharge of the numerous trusts reposed in him, be of the most solemn and honourable kind, yet the temptations to some indirection are so insidious, so various, and so powerful, that he needs the constant presence of the best guarded, and most confirmed moral principles, to counteract their almost insensible operation.

Id. at 746.

97. *Id.*, Resolution I, at 752.

98. *Id.*, Resolution XI, at 754.

99. *Id.*, Resolution XII, at 754.

support this tone. In Resolution XIV Hoffman wrote: "My client's conscience, and my own, are distinct entities . . . and . . . I shall ever claim the privilege of solely judging to what extent to go."¹⁰⁰ In Resolution XXXIII Hoffman stated:

What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom. . . . If, therefore, there may be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing, I unhappily come in collision with what is (erroneously I think) too often denominated the policy of the profession.¹⁰¹

These attitudes—that an attorney could know what was just and that he should do nothing to advance injustice—permeated all of Hoffman's resolutions. They informed his resolutions with respect to whether or not an attorney should accept a case. On the whole, Hoffman was willing to rely on the market to distribute legal services, but he was sensitive to the problem that there would be a number of situations in which potential clients would not be able to pay any fee, normal or contingent.¹⁰² In these cases, he believed that each attorney had an obligation to provide legal services to those who otherwise could not afford them. However, this obligation was limited to only those clients who had "just" causes.¹⁰³ Hoffman rejected a pro bono obligation which focused exclusively on the means of the client. For Hoffman, if the cause was not just, the attorney had no obligation to the indigent client.

This attitude with respect to not accepting a case to advance the unjust ends of a client was even more apparent in the criminal law area. Hoffman did not view a client's goal to be free as an acceptable reason to represent a client if the attorney knew that the client was in fact guilty of a major and serious crime. Hoffman cited Cicero, with approval, that "an orator may *defend* the guilty, *provided* his case be not wholly villanous and abominable."¹⁰⁴ It is the proviso which suggests Hoffman's true attitude—the devil was not entitled to an advocate.¹⁰⁵

Once a client had been accepted, Hoffman certainly did not place as much importance on the confidentiality of a client's com-

100. *Id.*, Resolution XIV, at 755.

101. *Id.*, Resolution XXXIII, at 765.

102. Hoffman reluctantly endorsed the contingent fee arrangement. He recognized that if this method were not used "the poor man . . . , could neither prosecute, nor be defended." *Id.*, Resolution XXIV, at 761.

103. *Id.*, Resolution XXXIII, at 760.

104. *Id.* at 84 (emphasis added on "provided").

105. Hoffman's attitude was strikingly different from Dr. Johnson's. Johnson responded to Boswell's question, "But what do you think of supporting a cause which you know to be bad?" with "Sir, you do not know it to be good or bad till the Judge determines it." D. MELLINKOFF, *supra* note 68, at 164 (quoting Dr. Samuel Johnson).

munications as does the American Lawyer's Code of Conduct, which makes the client communication the central, and most important, feature of the attorney-client relationship.¹⁰⁶ Hoffman never explicitly mentioned the duty to keep a confidence. He must not have seen it as a fundamental duty. At most, it was only one aspect of what constituted diligent representation.

However, Hoffman probably did accept an attorney-client privilege as defined by the law of evidence. The evidence books which Hoffman recommended enunciated the rule.¹⁰⁷ An attorney could not be compelled to disclose certain communications. How extensive a privilege Hoffman was comfortable with is uncertain. The parameters of the rule were questionable, especially in America, and there was even some resistance to its adoption as a rule of evidence.¹⁰⁸

It is probable, however, that Hoffman would not have wished to extend the rule of evidence beyond its narrow parameters. To do so would have exaggerated the importance of maintaining client confidences, and Hoffman's failure to refer to the problem indicates that he did not give it much importance. This position is further supported by an important statement in Hoffman's note on Cicero's *Offices*.¹⁰⁹ Hoffman approved of much of what Cicero wrote, for he said that there was little of "false morality" in it.¹¹⁰ Cicero believed that it was equally as bad to conceal as to affirmatively mislead.¹¹¹ Hoffman recounted that Cicero decried a merchant who sold goods to a buyer who believed them scarce when the merchant knew a large shipment was in transit and did not tell the buyer; the merchant should have revealed his knowledge.¹¹² Since Hoffman held individuals, including attorneys, accountable as persons, he probably would have concluded that an attorney had an obligation equivalent to the merchant. Hoffman

106. See note 19 & accompanying text *supra*.

107. See, e.g., 1 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 103 (3d Am. ed. 1830).

108. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

109. D. HOFFMAN, *supra* note 36, at 81.

110. *Id.* at 83.

111. *Id.*

112. *Id.* at 83-84. Hoffman wrote:

The case put is where the merchant of that city had shipped to Rhodes a quantity of grain, when that article was extremely scarce and dear at that place, but great quantities had been shipped for Alexandria to Rhodes, and were then on the way; which fact, known to him alone, he *did not conceal*, but merely *did not disclose*. The justification he says is a distinction without a difference, and to be resorted to only by 'your shifting, sly, cunning, deceitful, roguish, crafty, foxish, juggling kind of fellows.'

Id. (emphasis in original).

therefore believed that an attorney would have to tell about the shipment, regardless of how he got his information.

Hoffman's attitudes about an attorney's knowledge of the morally just and about what was proper conduct on behalf of a client also inform the resolutions which focus specifically on the particular means an attorney might use as a civil and criminal litigator, a negotiator, and a counselor.¹¹³ In general litigation, he advised his students not to advance a cause if the motives were "envy, hatred or malice,"¹¹⁴ he had his students resolve not to use vexatious defenses to press another into "an unjust compromise."¹¹⁵ Always he was as concerned with the moral, as the legal, aspect of a case. In Resolution XI, he wrote: "If, after duly examining a case, I am persuaded that my client's claim or defence (as the case may be), cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it."¹¹⁶ By using the phrase, "rather ought not to be sustained," Hoffman implied that some causes could be, but ought not to be, sustained. This is the distinction between law and morality. Even if one could predict that the courts would sustain the claim, Hoffman asserted that the claim should not be raised if, as a question of morality, it "ought not to be sustained."¹¹⁷

Further examples of Hoffman's recommendations in a litigation

113. Attorneys owed their clients the duty of competent representation, *id.*, Resolution XX, at 759, as well as representation without conflict. *Id.*, Resolutions V at 752-53, VII at 753, XIV at 755, XXI at 759, XXIII at 760, XXXV at 766. In addition, Hoffman believed that both attorney and client ought to treat each other justly. At several points in the resolutions, Hoffman charged his students not to take advantage of their clients. For example, when the client wanted to settle, a lawyer ought not: "*keep up the ball* (as the phrase goes) at [his] client's expense, and to [his] own profit," *id.*, Resolution XIX, at 758-59 (emphasis in original); neglect the small clients, *id.*, Resolution XXIII, at 760; retain or commingle a client's funds so that "it will be less liable to be considered as [the lawyer's]." *Id.*, Resolution XXVI, at 762. Hoffman was equally concerned that an attorney not allow his client to treat him unfairly. The attorney, for example, was instructed to charge only a just fee. Once this was assessed, however, there could be no compromise. Since it was a fair fee, to permit a compromise would be to allow the client to treat the lawyer unjustly by paying less than the fair fee. *Id.*, Resolution XLIX, at 774. Hoffman's no-client-piracy rule was also, in good part, designed to prevent the client from unfairly treating the prior-retained lawyer. *Id.*, Resolution VI, at 757.

114. *Id.*, Resolution II, at 752.

115. *Id.*, Resolution X, at 754.

116. *Id.*, Resolution XI, at 754. Resolution XI further provided:

To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a *portion* of that, the *whole* of which I have reason to believe would be denied to him both by law and justice.

Id. (emphasis in original).

117. *Id.* Hoffman's position was strikingly different from Holmes' "Bad Man" theory of law. Holmes wrote:

situation were his resolutions on pleading either the statute of limitations or incapacity because of infancy.¹¹⁸ Hoffman knew that these defenses could be raised legally, but he also recognized that they were available for particular reasons, such as to encourage creditors to bring timely suits before witnesses disappeared. To use these defenses to promote their legitimate ends was permissible, but to use them for no other purpose than to win a case was, in Hoffman's view, dishonorable. The client might want the defense used and it might be available at law, but Hoffman insisted that no attorney should use it.¹¹⁹ It would create an unjust result.¹²⁰

There were also limited modes of persuasion properly available to an attorney in litigation. Appeals to rationality and to justness were all that Hoffman permitted. Resolution XLVII prescribed that persuasion should only be done "through the medium of logical and just reasoning"¹²¹ and that attorneys should only "appeal to the sympathies of our common nature as are worthy."¹²² Hoffman particularly cautioned against using one's talents, even intelligence, to advance unworthy goals. In Note 18, writing of the attorney tempted to immorality, Hoffman concluded: "[H]e is compelled to learn the most dangerous of all lessons, viz: the vast power, conferred by intellectual superiority, over the rights and possessions of the ignorant, or the necessitous."¹²³

This moralistic attitude toward practice techniques was even clearer in Hoffman's discussion of criminal defense work.¹²⁴ His

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question. What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

118. D. HOFFMAN, *supra* note 36, Resolutions XII, XIII, at 754-55.

119. *Id.*

120. *Id.*

121. *Id.*, Resolution XLVII, at 773.

122. *Id.*

123. *Id.* at 746.

124. Resolution XV provided:

xv. When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympa-

first premise was that "foul offenders" deserved "merited penalties."¹²⁵ Hoffman would therefore not permit an attorney to use certain techniques, such as "eminent talents [and] exalted learning" if "justice, and the substantial interests of the community" would not be served.¹²⁶ Hoffman believed that the more capable the attorney, the greater the moral culpability for him to use his talents to forestall merited punishment.

This insistence that technique not be used to advance unjust results extended into the negotiations arena. For example, Hoffman insisted that an attorney not take advantage of another's ignorance. Hoffman strongly advised an attorney not to deal directly with a nonlawyer antagonist,¹²⁷ and if it were absolutely necessary to do so, to communicate only in writing.¹²⁸ This was primarily to protect the nonlawyer from his own ignorance. However, Hoffman carried this a step further, for even if the attorney were dealing with another attorney, he was cautioned that "no man's ignorance or folly shall induce me to take any advantage of him."¹²⁹

Furthermore, Hoffman added a most revealing resolution on negotiation itself. In Resolution XXXII he wrote:

thies of weak juries, or of temporizing courts—to my own personal weight of character—nor finally, to any of the overweening influences I may possess, from popular manners, eminent talents, exalted learning, &c. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community. Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession, whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all, (and certainly shall be by me), as ministers at a holy altar, full of high pretension, and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents, and exalted learning.

Id. at 755-57 (emphasis in original).

125. *See id.*

126. *See id.*

127. *Id.*, Resolution XLIII, at 771.

128. *Id.*, Resolution XLIV, at 771.

129. *Id.*, Resolution V, at 752.

I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other, by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all of the other machinery used by this class of tacticians, to the vulgar surprise of clients, and the admiration of a few ill judging lawyers. On the contrary,—my resolution in such a case is, to examine with great care, previously to the interview, the matter of compromise; to form a judgment as to what I will offer, or accept; and promptly, frankly, and firmly to communicate my views to the adverse counsel. In so doing, no lights shall be withheld that may terminate the matter as speedily, and as nearly in accordance with the rights of my client as possible; although a more dilatory, exacting, and wary policy, might finally extract something more than my own, or even my client's hopes.¹³⁰

The attorney was to make a judgment as to what he would settle for. His decision was to be informed, *inter alia*, by his sense of justice. It was not legitimate to extract more from an opponent than what was deemed just merely because it was more. To achieve this just settlement, Hoffman insisted that the negotiation process be done in the most candid, straight-forward way possible. Not only were many tactics specifically disapproved, such as the clever use of silence, but the attorney was mandated “promptly, frankly, and firmly to communicate [his] views to the adverse counsel.”¹³¹ Hoffman’s negotiator’s ethics were equivalent to his litigator’s ethics.

With respect to counseling, Hoffman wrote: “Counsel, in giving opinions. . . , should act as judges. . . .”¹³² By using the phrase “as judges,” Hoffman suggested a role that went beyond the ABA Code’s concern with giving clients accurate predictions about what might happen in the future.¹³³ An accurate prediction could lead to an unjust result, for in a particular case, future judges might be

130. *Id.*, Resolution XXXII, at 764-65. Hoffman further cautioned: “Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character; shrewdness is too often allied to unfairness,—caution to severity,—silence to disingenuousness—wariness to exaction, to make me covet a reputation based on such qualities.” *Id.*

131. *Id.*, Resolution XXXII, at 765.

132. *Id.*, Resolution XXXI, at 764 (emphasis omitted). Resolution XXXI provides in full:

xxxI. All opinions for clients, verbal, or written, shall be *my opinions*, deliberately and sincerely given, and never *venal and flattering offerings to their wishes, or their vanity*. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion, than their wishes or hopes thwarted by a sound one, yet such assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as *judges*, responsible to God and to man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability—though the certain consequence be the loss of large prospective gains.

Id. (emphasis in original).

133. ABA CODE, *supra* note 1, EC 7-5.

informed by the letter of the law rather than its spirit. Hoffman believed that when an attorney advised like a judge, he merged his sense of moral ought-to-be into his legal opinion. This would result in the attorney giving morally responsible advice.

V. SUMMARY

Is the attorney primarily an advocate or an officer of the court? Commentators attacked the discussion draft of the Model Rules for emphasizing the latter and for abandoning the adversarial system.¹³⁴ They claimed that the draft was revolutionary in departing from traditional ways. This Commentary has suggested that there has been no departure, for David Hoffman, in 1836, also believed that an attorney was more an officer of the court than an advocate.

Should proper attorney conduct be mandated by rules or should ethics be essentially a matter of personal and professional conscience? The drafts of the Model Rules answer that proper conduct can, and should, be guided only by rules. This is new, and a departure from traditional methods. The 1908 ABA Canons and the ABA Code do not rely on rules only. Hoffman's resolutions were not legally enforceable duties.

This Commentary has offered an historical perspective on the current legal ethics debate. It has shown that in spite of claims to the contrary, the discussion draft of the Model Rules is traditional in substance while both the discussion draft and the proposed final draft are new in format. Such a showing, however, will not determine what is the best code or the best format for today. Proper legal ethics change as social needs and assumptions change. The legal profession is coming to grips with this fact.

134. See notes 17-20 & accompanying text *supra*.