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In Support of the Proposed Model Rules of Professional Conduct

Robert B. McKay

IN SUPPORT OF THE PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

CONCEPTS OF PROFESSIONAL RESPONSIBILITY depend upon and develop out of concepts of personal morality. So I begin with the familiar words of Polonius in his advice to Laertes:

> This above all to thine own self be true,
> And it must follow, as the night the day,
> Thou canst not then be false to any man.[1]

The ethical needs of the legal profession, while similar in some respects to everyday moral considerations, are also somewhat different. The lawyer is asked to submerge personal considerations to the interests of the client and, in the words of Queen Caroline's lawyer, "to know no other," even if the kingdom should fall.[2]

Significantly, however, the lawyer is not asked – and must not be asked – to be other than true to self, or to be false to any other. That is, no code that calls itself ethical can demand that the lawyer commit perjury or encourage perjury by a client or by any third person. In dealing with client loyalty and confidentiality questions, then, sharp distinctions must be drawn between defense of past misconduct, condonation of future misconduct, and the giving of advice that might facilitate future wrongdoing.

No one, I believe, disagrees with these propositions, but it is not easy to articulate these basic truths as they apply to practical issues involving clients, lawyers, and the public. As a result, lawyers are misunderstood, maligned, and charged with being "hired guns" in the pursuit of wrongdoing.[3]

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1. W. SHAKESPEARE, HAMLET, Act I, scene iii.

2. For a description of the circumstances surrounding Lord Brougham's statement in Queen Caroline's case, *see* J. LIEBERMAN, CRISIS AT THE BAR 50-51 (1978).

3. *See* J. LIEBERMAN, *supra* note 2, at 136-75; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Thurman, *Limits to the Adversary System: Interests That Outweigh Confidentiality*, 5 J. OF THE

Manifestly, some unscrupulous lawyers have taken refuge in the ambiguities of the Code of Professional Responsibility (Code) to act unethically or even unlawfully.[4] But, in the good name of the profession, we must endeavor to reduce that underclass of wrongdoers to an absolute minimum. Legal gamesmanship must be made as nearly impossible as the best human minds can make it. Before I discuss how the Model Rules of Professional Conduct propose to accomplish this, let me set out the matters which I will address in this paper:

1. The professional responsibility context in which the legal profession operates in comparison with ethical standards of other professions.

2. The self-regulatory nature of professional responsibility standards in the law.

3. The origins and objectives of the ABA Commission on Evaluation of Professional Standards (commonly referred to as the Kutak Commission after its chairman, Omaha lawyer, Robert J. Kutak), and

4. Selected topics from the Kutak Commission's Proposed Model Rules of Professional Conduct, which I call the four C's.

   a. Competence.
   b. Cost.
   c. Conflicts of interest.
   d. Confidentiality.

The fundamental ethical clash for lawyers is between loyalty to client, required by the Code to be "zealous," and candor to the court, said to be absolute. While there may appear to be no intrinsically irreconcilable conflict between these two concepts, inconsistency arises in their practical applications and harmonization is vital to the total structure of ethical conduct that the Code seeks to advance.

I mention this issue of values-in-conflict first, perhaps out of logical order, because it is the topic of most lively debate and seeming disagreement between the proposed Model Roles of Professional Conduct (Model Rules) and the present Code. The assertion – erroneous, I believe – is that the proposed Model Rules would drastically alter the role of the lawyer and weaken, if not destroy, the adversary system. I reject both contentions.

LEGAL PROFESSION 5 (1980); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN REL. 1 (1975).

4. *See* J. LIEBERMAN, *supra* note 2, at 35-40.

II. THE DEVELOPMENT OF ETHICAL STANDARDS IN THE PROFESSION

However useful the Golden Rule, the Ten Commandments, and various strictures of other religions may be in shaping standards of individual morality, those statements and the exegesis built around them do not offer much guidance to doctors, lawyers, accountants, and other professionals in resolving the ethical problems that regularly confront them. Despite present recognition of the inadequacy of allowing each individual to resolve such issues without direction from the profession, the notion of group responsibility to identify and provide guidance as to proper conduct was slow in coming. The majestic Hippocratic oath answers few if any real-world problems, but for almost the entire history of medicine, physicians received little help beyond those few words of moral truism.

The legal profession, which has been widely criticized by Plato, Jesus, Shakespeare, and many modern commentators, lacked even the modest comfort of the Hippocratic oath until the latter half of the nineteenth century; [5] and specifics came much more slowly.[6] In retrospect, the laggard development of ethical standards for lawyers is somewhat surprising. Lawyers even more than other professionals confront genuinely difficult choices between two or more competing claims on their professional responsibility. The lawyer's primary obligation to the client, including the requirement to maintain client confidence, not infrequently raises difficult questions as to how the lawyer, who serves as an officer of the court, can satisfy the equally important obligation of candor to the tribunal. While the physician and other health professionals accept a similar primary obligation of loyalty to patients, satisfaction of that obligation does not often lead to a conflict with ethical obligations to other individuals or institutions.

Perhaps the reality is that even lawyers who were aware of potential and actual conflicts were not very sensitive to these and other ethical concerns. The legal profession in nineteenth century United States was a rough-and-tumble activity in which too many lawyers willingly served client interests, illegal as well as legal, in ways not inconsistent with then-prevailing standards of business morality.

5. *Preface, 1969 Final Draft ABA Code of Professional Responsibility,* reprinted in AM. B. FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY xv (1979).

6. *Id.*

The first reported effort to identify and suggest answers to some of the ethical dilemmas of the legal profession was in the lectures of Judge George Sharswood of Alabama in 1854.[7] Subsequent movement was not exactly swift. Judge Sharswood's ethical principles were adopted as the Alabama Code of Ethics in 1887,[8] and they later formed the basis for the Canons of Ethics promulgated by the American Bar Association.[9] All of these, including the thirty-seven Canons of the ABA, were preachy in tone and, while a great improvement over the preceding absence of any regulation or guidance, they did not deal with many of the hard questions.

The Code of Professional Responsibility, approved by the ABA House of Delegates in 1969,[10] was the first serious attempt to deal with the ethical dilemmas of the legal profession. As recommended to the states for consideration in their respective decision-making processes, the Code consisted of three parts: 1) Nine Canons,[11] couched in such non-specific advice as this: "A lawyer should assist in maintaining the integrity and competence of the legal profession," [12] or this: "A lawyer should avoid even the appearance of impropriety." [13] 2) Ethical Considerations (EC's) in supplement to each Canon, aspirational in tone, intended to lead over time to improved ethical practices.[14] 3) Disciplinary Rules (DR's), intended to require or forbid specified conduct. The DR's are thus the basis for discipline against lawyers who fail to meet those standards.[15] The great bulk of all lawyer discipline has occurred since

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7. *Id.* *See also* J. LIEBERMAN, *supra* note 2, at 54-55.

8. *Id.*

9. *Id.*

10. *Preface,* ABA CODE OF PROFESSIONAL RESPONSIBILITY i (1979) [hereinafter cited as ABA CODE].

11. *Preamble and Preliminary Statement,* ABA CODE, *supra* note 10, at 1. The Code explains that:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

Id.

12. ABA CODE, *supra* note 10, Canon 1.

13. *Id.,* Canon 9.

14. *Preamble and Preliminary Statement,* ABA CODE, *supra* note 10, at 1.

15. *Id.*

1969 in reliance on these much more specific rules than anything that had gone before.[16]

Although the Code of Professional Responsibility was a significant advance toward the identification and resolution of ethical problems faced by lawyers, it did not deal with all the issues; [17] it is already outdated by subsequent developments; [18] and differing versions [19] and conflicting interpretations have robbed it of the originally hoped for uniformity of standards for lawyer conduct.[20]

The period during which the Code was drafted, 1965 through 1969, was a time of considerable ferment on the American legal and social scenes. New issues were being raised about traditional methods of law practice, including controversy regarding setting restrictions on group legal services, establishing minimum fee schedules to be enforced by lawyer discipline, allowing lawyer advertising and client solicitation, and the possibility of requiring lawyers to report client wrongdoing. More activity and change occurred in the area of professional responsibility during the decade of the 1970s than in the entire previous century.

By the mid-1970s, despite the fact that the Code was less than a decade old, many lawyers concluded that substantial modification was essential. In 1977, the late William B. Spann, Jr., then Presi-

16. For a discussion of recent statistics regarding lawyer discipline and an analysis of possible conclusions which may be drawn, *see* Steele & Nimmer, *Lawyers, Clients, and Professional Regulation,* 1976 AM. B. FOUNDATION RESEARCH J. 919 (1976).

17. For example, the current Code focuses primarily on the lawyer in the courtroom context. It provides little guidance for the problems faced by the lawyer in the office, and so does not accurately reflect modern legal practice. Patterson, *Wanted: A New Code of Professional Responsibility,* 63 A.B.A.J. 639 (1977). Questions relating to representation of clients with differing interests, the financing of litigation, and the duty to act competently are also dealt with insufficiently. Sutton, *How Vulnerable is the Code of Professional Responsibility?,* 57 N.C.L. REV. 497, 498 (1979).

18. Rules dealing with client solicitation, advertising, and trial publicity have required revision to accommodate court decisions and the changing legal practice. *See* Sutton, *supra* note 17, at 498.

19. Responding to the Supreme Court's decision in Bates v. State Bar, 433 U.S. 350 (1977), the ABA promulgated a new rule governing lawyer advertising, but proposed two versions of the rule. Alternative A set forth a regulatory approach to lawyer advertising, specifying various permissible methods of publicizing the availability of legal services, and allowing individuals to come before the appropriate agency for approval of other means of disseminating information. Alternative B is more general, taking a directive approach. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 141 (1979 Supp.). For the text of Proposal A and Proposal B, *see* 46 U.S.L.W. No. 9 (Aug. 23, 1977) (Statutes).

20. Hazard, Proposed Revision of the Rules of Legal Ethics in the United States. Paper presented at the 1980 ABA National Meeting, Sydney, Australia, August 11-16, 1980, 237, 241-43 (copy on file, Villanova Law Library). *See also* Hazard, *Rules of Legal Ethics: The Drafting Task,* 36 THE RECORD 77 (1981).

dent of the American Bar Association, appointed the Commission on Evaluation of Professional Standards to review the Code of Professional Responsibility and to make recommendations for revision.[21]

Although the Commission originally conceived its function in terms of revision by way of amendment, it soon became clear that the defects of the Code were in part structural. Since all rules were grouped under only nine subject-matter headings, which were not themselves clearly distinguishable one from another, the physical placement of rules together under the Canons was necessarily somewhat arbitrary. As a result, it is not easy to find all items of possibly relevant guidance on any particular topic. Moreover, many questions are answered ambiguously or not at all. Equally troublesome is the fact that the Code focuses somewhat disproportionately on problems that arise in the litigation context. The issues addressed therefore are those that relate to the trial process, which represents only a small fraction of the typical legal practice. Little guidance is provided for the more numerous office-practice problems that are of principal concern to most lawyers.

Most important of all is the fact that the tripartite division among Canons, Ethical Considerations and Disciplinary Rules has not worked well. It should be recalled that the EC's were devised to clarify and resolve ambiguities in the 1908 Canons concerning which rules were enforceable by disciplinary action and which were not. It was a useful idea. In the evolution of the law of professional conduct, the Code was a valuable intermediate step. But the Code has not overcome the problem it was intended to solve, nor has it provided uniform standards throughout the nation. Six states — California, Illinois, Kansas, Massachusetts, New Mexico and Oklahoma — adopted the Code without Ethical Considerations.[22] In seven states — Georgia, Iowa, Louisiana, South Carolina, Texas, Vermont and Virginia — the Code's Ethical Considerations can be considered obligatory along with the

21. *See* Schwartz, *The Death and Regeneration of Ethics,* 1980 AM. B. FOUNDATION RESEARCH J. 953, 955. Members of the Commission were as follows: Robert J. Kutak, Chairman, Omaha, Neb.; Arno H. Denecke, Salem, Or.; Thomas Ehrlich, Washington, D.C.; Jane Lakes Frank-Harman, Washington, D.C.; Marvin E. Frankel, New York, N.Y.; Lois C. Harrison, Lakeland, Florida; Robert O. Hetlage, St. Louis, Mo.; Robert B. McKay, New York, N.Y.; Robert W. Meserve, Boston, Mass.; L. Clair Nelson, Washington, D.C.; Richard H. Sinkfield, Atlanta, Ga.; William B. Spann, Jr., Atlanta, Ga. (1979-81); Samuel D. Thurman, Salt Lake City, Utah; Alan Barth, Washington, D.C. (1978-79).

22. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct,* 1980 AM. B. FOUNDATION RESEARCH J. 1016, 1018 & n.5 and cases cited therein. As to California, *see* Rules of Professional Conduct of the State Bar of California, CAL. BUS. & PROF. CODE foll. § 6076 (West Cum. Supp. 1981).

Disciplinary Rules.[23] In those states, either by court ruling or the court's refusal to adopt the distinction between DR's and EC's, nothing is aspirational. Everything is enforceable.[24] In other states there are numerous instances where courts have enforced the presumably aspirational Ethical Considerations through censure, suspension, or even disbarment.[25]

The difficulties thus created have been identified as follows by Robert Kutak, chairman of the ABA Commission on Evaluation of Professional Standards:

> The problem with aspirational standards is that too often they do not remain aspirational. They tend to become enforceable rules. Frequently, lawyers have discovered that the language of an EC is enforceable, not at the time of their conduct, but within the context of disciplinary proceedings in which they are charged with violation of the Code.[26]

In view of the substantial uncertainty of interpretation and the increasing lack of uniformity among the states, the Commission concluded that the time had come for development of a new format.[27] The proposed structure builds in more conventional fashion on a functional arrangement of the lawyer's professional activities. The eight major subdivisions of the Proposed Model Rules of Professional Conduct are designed to facilitate the search for the applicable rule and to answer eight questions as directly and simply as possible.[28] The titles of the rules disclose their content much more clearly than do the rather vaguely worded nine Canons of the present Code, as the following comparison aptly demonstrates.

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23. Kutak, *supra* note 22, at 1017-18 & nn.3 & 4 and cases cited therein. *See also* Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUNDATION RESEARCH J. 939, 943.

24. Kutak, A Progress Report on the Proposed Model Rules of Professional Conduct 15 (unpublished remarks to the Cincinnati Bar Association, Nov. 6, 1980) (copy on file, Villanova Law Library).

25. Kutak, *supra* note 22, at 1017-18.

26. Kutak, *supra* note 23, at 1016.

27. *See* Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47 (1980). *See also* Kutak, *supra* note 22, at 1018.

28. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT, PROPOSED FINAL DRAFT (May 30, 1981), Table of Contents, xi-xii [hereinafter cited as MODEL RULES, 1981 FINAL DRAFT]. An earlier version of the Model Rules, the proposed discussion draft, used a different organization and broke down the code into ten subheadings. ABA MODEL RULES OF PROFESSIONAL CONDUCT, PROPOSED DISCUSSION DRAFT (Jan. 30, 1980) [hereinafter cited as MODEL RULES, 1980 DISCUSSION DRAFT].

CANONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY

(Current Code)

Canon 1. A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.
Canon 2. A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.
Canon 3. A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.
Canon 4. A Lawyer Should Preserve the Confidences and Secrets of a Client.
Canon 5. A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.
Canon 6. A Lawyer Should Represent a Client Competently.
Canon 7. A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.
Canon 8. A Lawyer Should Assist in Improving the Legal System.
Canon 9. A Lawyer Should Avoid Even the Appearance of Impropriety.[29]

ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1981 PROPOSED FINAL DRAFT (Proposed Model Rules)

Client-Lawyer Relationship

Rule:

1.1 Competence
1.2 Scope of Representation
1.3 Diligence
1.4 Communication
1.5 Fees
1.6 Confidentiality of Information
1.7 Conflict of Interest: General Rule
1.8 Conflict of Interest: Prohibited Transactions
1.9 Conflict of Interest: Former Client
1.10 Imputed Disqualification: General Rule
1.11 Successive Government and Private Employment
1.12 Former Judge or Arbitrator
1.13 Organization as the Client
1.14 Client under a Disability
1.15 Safekeeping Property
1.16 Declining or Terminating Representation

29. ABA CODE, *supra* note 10, Canons 1-9.

30. MODEL RULES, 1981 FINAL DRAFT, *supra* note 28, Table of Contents xi-xii.

Comparison of the structure of the current Code and the proposed Final Draft of the Model Rules of Professional Conduct demonstrates not only the improved logic of the arrangement, but also the departure from the hortatory nature of the Canons which leave considerable ambiguity as to the extent of the professional obligation. The proposed Final Draft of the Model Rules overcomes that difficulty by abandoning the aspirational language of the Canons and Ethical Considerations, substituting instead the black-letter format familiar to lawyers in specifying that which is required, that which is forbidden, and that which is discretionary. Consonant with this Restatement format, each Rule is followed by a Comment that explains and illustrates the meaning and purpose of the Rule. These Comments and the Preamble, which provides general orientation concerning a lawyer's responsibilities, are, like legislative history, intended to aid in construction of the Rules. In addition, there are Notes to each Rule with explicit comparison of the proposed Rule to provisions of the present Code, and extensive Legal Background discussion of the sources of each Rule.[31]

The Model Rules were developed over a period of nearly four years, from August 1977 to May 1981.[32] In January 1980, a Discussion Draft [Model Rules, 1980 Discussion Draft] was made available to the profession, intended to elicit comment and suggestions for improvement in working toward final recommendations.[33] Comment there certainly was, mostly of a critical nature. The sharpest complaints went to three aspects of the Discussion Draft.

First, a number of bar associations and individual lawyers objected to the new format which they feared would create unnecessary confusion because of its departure from the structure of a Code scarcely more than a decade old.[34] The Commission's answer, as already noted, was that the present Code, contrary to the hopes of its drafters, has not promoted unity of professional responsibility rules, is inflexible, difficult to use, and not responsive

31. The Notes, comparisons, and Legal Backgrounds represent changes included in the 1981 Final Draft and were not part of the 1980 Discussion Draft.

32. *See* note 21 and accompanying text *supra*.

33. *See* Preface to the Discussion Draft, MODEL RULES, 1980 DISCUSSION DRAFT, *supra* note 28, at i-ii.

34. *See* NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT ON A STUDY OF THE PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH RECOMMENDATIONS (1980); Zerfoss, *Revision not Rejection is the Way to Modernize the Code of Professional Responsibility*, 26 VILL. L. REV. 1177 (1981).

to present, let alone future, needs of the profession and the public it serves.

In order to address the concern with change of format, the Commission issued on May 30, 1981, along with its revision of the proposed Model Rules, a revised version of the present Code, containing all the substantive changes made by the proposed Model Rules and eliminating all provisions inconsistent with the recommended version, but working these modifications into the current Code's format. The profession will thus be able to judge which version makes the greater functional sense. The Commission believes that, if the *substantive* changes are acceptable, the revised format will sell itself.

Second, the January, 1980 Discussion Draft provision for mandatory *pro bono publico* service by lawyers[35] drew perhaps the strongest attacks.[36] While conceding that lawyers *should* assure representation to those who cannot pay for legal assistance and *should* assist in law reform and other public service activities related to the law, few lawyers were willing to accept a mandatory obligation. The Commission has been persuaded (with some dissents) that the overwhelming sentiment of the bar should be respected.[37] The May 30, 1981 version reads as follows:

> *Pro Bono Publico Service*
>
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession.[38]

Notably, this is the only place in the proposed Model Rules where the operative verb is "should." Elsewhere, the controlling language is "shall," "shall not," or "may."

Third, the provisions in the January 1980 Discussion Draft relating to confidentiality of client communications drew substantial fire from the organized bar and from individual lawyers.[39]

35. MODEL RULES, 1980 DISCUSSION DRAFT, *supra* note 28, RULE 8.1.

36. *See* Slonim, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A.J. 33 (1981); Slonim, *Commission Votes Down Pro Bono Reporting*, 66 A.B.A.J. 951 (1980).

37. *Id.*

38. MODEL RULES, 1981 FINAL DRAFT, *supra* note 28, RULE 6.1.

39. Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUNDATION RESEARCH J. 981.

Interestingly, much of the criticism was directed at provisions which were taken directly from the present Code as interpreted by the courts.[40] Many lawyers, made aware for the first time of provisions in the present Code, concluded that they were unhappy with the already rather extensive exceptions to the requirement of confidentiality. Publication of the 1980 Discussion Draft served its purpose well. Differences have been aired, explanations have been advanced, and language has been modified to clarify intention and to meet well-grounded objections. The subject of confidentiality, as a major theme in the Proposed Model Rules, is further discussed below.

While the May 30, 1981 draft is identified as the "Proposed Final Draft: American Bar Association Model Rules of Professional Conduct," even that is almost certainly not the absolutely final version. In the fall of 1981 hearings will be held before a specially designated ABA Commission, which will then report its views to the ABA Board of Governors.[41] After the Kutak Commission is given a final opportunity for any revisions it cares to make in light of those comments, the final version will be presented formally to the American Bar Association for debate and vote, at the midwinter or annual meeting in 1982.[42]

III. HIGHLIGHTS OF THE PROPOSED MODEL RULES: THE FOUR "C's"

Every part of the Proposed Model Rules is intended to provide guidance to lawyers in particular aspects of professional responsibility. Accordingly, no Rule is unimportant. Nevertheless, some aspects of the Rules deserve special attention because of recurring questions and the difficulty of resolving competing claims. There are, for example, a number of problems that arise in connection with the not infrequent conflicts between the duty of loyalty to the client and the obligation of candor to the court.[43] There are also difficult tactical questions about how much disclosure to opposing parties is appropriate and how to draw the fine line between frivolous claims or defenses and legitimate strategies of representa-

40. *See* notes 80-82 and accompanying text *infra*.

41. Slonim, *Kutak Commission After More Time*, 66 A.B.A.J. 1350 (1980).

42. *Id. See also* Letter from Robert Kutak to Members of the ABA, Dec. 5, 1980 (on file, Villanova Law Library).

43. *See* A. KAUFMAN, *supra* note 26, at 111-88 (1976), 61-104 (1979 Supp.); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

tion.[44] As in the case of day fading into night, it is hard to say precisely where the line is drawn at dusk; but at high noon there is no problem of definition. It is the aim of the proposed Model Rules to shed the light of day on as many of the seeming imponderables as possible, while identifying quite explicitly those areas of dusk or dawn when the lawyer must shape an answer in regard to circumstances that cannot be fully specified in black-letter text.

Four areas of particular difficulty in the determination of professionally responsible conduct are here selected for further inquiry. They are the four "C's" of competence, cost, conflicts of interest, and confidentiality. I shall discuss them in that order.

A. *Competence*

Everyone talks about lawyer competence;[45] but sometimes it seems not much is being done about it. Although judges often complain about incompetent performance by lawyers, they seldom report those failures to the disciplinary authorities, or even to the lawyers themselves.[46] Similarly, while lawyers vigorously criticize to each other the conduct, performance, and ethical abuses of other lawyers, they seldom report those deficiencies and ethical breaches to the relevant disciplinary authorities, despite the provision in the Code that requires a lawyer to report violation of a Disciplinary Rules to the appropriate authority.[47] Only clients seem inclined to report lawyer incompetence, but such complaints most often charge delay, failure to communicate adequately or involve disputes over fees. Clients are, in fact, not ordinarily in a very good position to judge lawyer competence. They are more likely to make judgments about competence in terms of results favorable or unfavorable to their own cause, which is by no means the best basis for such judgment.

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44. Thurman, *Limits to the Adversary System: Interests That Outweigh Confidentiality*, 5 J. OF THE LEGAL PROFESSION 5, 16-19 (1980).

45. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); McKay, *Competence and the Professionally Responsible Lawyer*, 31 EMORY L.J. 1 (1981).

46. Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUNDATION RESEARCH J. 105, 144. *See also* Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 617 (1977).

47. ABA CODE, *supra* note 10, DR 1-103(A).

There are, to be fair, good reasons for lawyer failure to report the incompetence of other lawyers. The present Code offers little guidance. Canon Six merely asserts that "A Lawyer Should Represent a Client Competently." [48] The relevant Ethical Considerations do not help much,[49] and the only applicable Disciplinary Rule says only this:

> (A) A lawyer shall not
>
> > (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
> >
> > (2) Handle a legal matter without preparation adequate in the circumstances.
> >
> > (3) Neglect a legal matter entrusted to him.[50]

The short of it is that there is nowhere a definition of competence, which is treated as though the term were self-defining. Nothing could be further from the truth.

The May 30, 1981 Proposed Final Draft of the Model Rules acknowledges the importance of the matter by placing the subject of competence as the first item addressed:

> *Competence*
>
> A lawyer shall provide competent representation to a client. Competence requires the legal knowledge, skill, thoroughness, preparation and efficiency reasonably necessary for the representation.[51]

The proposed Rule is an improvement over the present Code in its clear statement that competent representation is mandatory and that failure to meet the defined standard is a matter for discipline. While this definition more fully particularizes the elements of competence than the present Code, Rule 1.1 does not provide a standard of comparison for judging competence. Is the standard the level of competence of the typical general practitioner, or is it the level of the practitioner who specializes in the particular matter? And what comprises the community of generalists or specialists against whose performance the standard of

48. *Id.*, CANON 1.

49. *Id.*, EC 6-1 through EC 6-6.

50. *Id.*, DR 6-101, Failing to Act Competently.

51. MODEL RULES, 1981 PROPOSED FINAL DRAFT, *supra* note 28, RULE 1.1.

competence is to be judged? The accompanying Comment and Legal Background notes provide guidance for answering these and related questions.

Despite the modesty of the Model Rule's attempt to provide further definition of this most basic obligation of every lawyer, complaints have been raised that the proposed language favors the specialist and casts the general practitioner into some kind of outer darkness. It is hard to read that result into these seemingly innocuous words. It is to be hoped that the proposed standard has real bite in moving toward truly competent representation of clients, which *should* be the goal of every lawyer, and *must* be the goal of the organized profession.

B. *Cost*

Judge Irving Kaufman, Chief Judge Emeritus of the Second Circuit, has described cost and delay as the "twin devils" of the legal profession.[52] Corporate and individual clients complain increasingly about the cost of legal representation.[53] The American Bar Association, recognizing the seriousness of the problem, has established an Action Commission to Reduce Court Costs and Delay.[54] Manifestly, it is the lawyer's professional obligation to keep fees within reasonable limits and to avoid unnecessary delay. As always, however, there is difficulty in ascertaining what fees are "reasonable" and what delay is "unnecessary." Understandably, the present Code does not definitively answer these questions,[55] nor do the proposed Model Rules. The useful achievement of the Model Rules is that the lawyer obligation is stated in mandatory

52. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1 (1976).

53. Ralph Nader, who generated at least his share of work for lawyers in the name of public interest litigation, this year mounted a conference to seek ways of reducing legal fees. *See A Corporate Campaign to Slash Legal Costs*, BUSINESS WEEK 90 (May 25, 1981).

54. Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A.J. 1323 (1979). *See also* Hufstedler & Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A.J. 965 (1980).

55. ABA CODE, *supra* note 10, Canons 6-7 and accompanying Ethical Considerations and Disciplinary Rules. DR 6-101(A)(3) requires that a lawyer not "[n]eglect a matter entrusted to him." EC 6-4 states that a lawyer should "give appropriate attention to his legal work." CANON 7 states that "A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF LAW." DR 7-101(A)(1) provides that "[a] lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ." DR 7-101(A)(3) provides that "[a] lawyer shall not intentionally . . . prejudice or damage his client during the course of the relationship . . . ."

form, in simple declaratory sentences, along with helpful Comment and Legal Background. The provisions relevant to cost and delay are:

Rule 1.3 (Diligence), which requires a lawyer to "act with reasonable promptness and diligence in representing a client."

Rule 1.4 (Communication), which deals with what is probably the most common complaint against lawyers – failure to inform clients about legal strategy and progress on the subject matter of the representation. There is no direct counterpart to this provision in the present Code; it is brand new, and is a useful addition. The rule requires a lawyer to "keep a client reasonably informed about a matter by periodically advising the client of its status and progress and by complying with reasonable requests for information." [56] It also requires a lawyer to "explain the material legal and practical aspects of a matter and reasonable alternative courses of action to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." [57]

Rule 1.5 (Fees) deals directly with the question of cost, an issue of primary concern to clients. Problems have typically arisen because of misunderstandings about fees and the basis for calculating charges. The rule proposes to mandate a written fee agreement in most circumstances, stating:

> (b) The basis or rate of a lawyer's fee shall be communicated to the client in writing before the lawyer renders substantial services in a matter, except when:
>
> (1) An agreement as to the fee is implied by the fact that the lawyer's services are of the same general kind as previously rendered to and paid for by the client;
>
> or
>
> (2) The services are rendered in an emergency or where a writing is otherwise impractical.[58]

The Proposed Model Rules continue authorization of the contingent fee, but specify with some particularity the various elements to be included in or excluded from calculation of the fee.

Referral fees have also caused considerable client misunderstanding and resentment. But they do serve a useful purpose in reducing the risk that a lawyer will seek to handle alone a matter

56. MODEL RULES, 1981 FINAL DRAFT, *supra* note 28.

57. *Id.*, Rule 1.4(b).

58. *Id.*, Rule 1.5(b).

beyond the lawyer's effective capacity. To protect against the possibility of abuse and to prevent the charging of fees above the reasonable value of the services rendered, the proposed rule provides as follows:

> (d) A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) The division is in proportion to the services performed by each lawyer, or by written agreement with the client all lawyers assume responsibility for the representation;
>
> (2) The client consents to the participation of all the lawyers involved; and
>
> (3) The total fee is reasonable.[59]

Protection against frivolous proceedings and unreasonable delays is provided by the proposed Model Rules in several places. For example, under the heading "Meritorious Claims and Contentions," the Model Rules provide:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a reasonable basis for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.[60]

As a corollary to this negative injunction, the next provision, titled "Expediting Litigation," imposes an affirmative duty on the lawyer to "make reasonable effort consistent with the legitimate interests of the client to expedite litigation.[61]

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59. *Id.*, Rule 1.5(d).

60. *Id.*, Rule 3.1.

61. *Id.*, Rule 3.2. *See also* Rule 3.4 (Fairness to Opposing Party and Counsel) which prohibits unlawful obstruction of access to evidence (Rule 3.4(a)); forbids, in pretrial procedure, making "a discovery request that has no reasonable basis, or [failing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party" (Rule 3.4(d)); and forbids, during trial, allusion to "any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ." (Rule 3.4(e)).

Finally, Rule 4.4 (Respect for Rights of Third Persons) provides that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."

C. *Conflicts of Interest*

An essential ingredient of professional responsibility standards for lawyers is an effective statement defining conflicts of interest and sanctioning violations. The present Code contains provisions to that effect, but they are scattered and somewhat inconclusive.[62] Benefiting from experience with the Code, it is now possible to clarify and improve the conflict of interest rules. Model Rule 1.7 consolidates the provisions found in Canon Five of the present Code into a single standard that applies whether the source of possible conflict exists because of the personal interest of the lawyer, or because of a commitment made by the lawyer to another client or to any other third party. Rule 1.7 goes beyond the current Code's DR 5-105(A) in requiring that, when the lawyer's interest is involved, not only must the client consent after disclosure, but also that, independent of consent, the representation must reasonably appear to be compatible with the best interests of the client.[63]

As noted above, Model Rule 1.7 states the general conflict of interest rule. Rules 1.8 through 1.12 deal with the standards applicable to particular situations. The essence of those Rules may be summarized as follows: Most of Rule 1.8 is as straightforward and clear as words permit.[64] Only one provision requires further

62. *See e.g.*, ABA CODE, *supra* note 10, DR 5-101 through 5-107; DR 8-101; DR 9-101.

63. MODEL RULES, 1981 FINAL DRAFT, *supra* note 28, RULE 1.7. The text of the rule follows:

> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
>
> (b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:
>
> (1) The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interest of the client; and
>
> (2) The client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

64. The text of Rule 1.8, Conflicts of Interest: Prohibited Transactions provides:

> (a) A lawyer shall not enter into a business, financial, or property transaction with a client unless the transaction is fair and equitable to the client.

explanation. Rule 1.8(e) seeks to resolve the much-discussed question of the extent to which lawyers may make cash advances to clients in connection with pending or contemplated litigation. The resolution conforms to actual practice, for which there is considerable justification, allowing a lawyer to advance court costs, expenses of litigation and medical and living expenses, all contingent on the outcome of the matter. (In the case of indigents the lawyer may pay court costs and expenses of litigation without expectation

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after disclosure.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the relationship.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after disclosure.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client consents after disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not participate in offering or making:

(1) A partnership or employment agreement that restricts the right of a lawyer to practice law after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

(i) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation may be appropriate in connection therewith.

(j) A lawyer related to another lawyer as parent, child, sibling or spouse may represent a client having an interest adverse to a person represented by the other lawyer only upon consent by the client after disclosure of the relationship.

Id.

of repayment out of recovery.) In earlier times such advances, unaccompanied by promises of repayment (however unrealistic), would have been forbidden as one or more of that terrible trio — barratry, champerty, and maintenance. But the modern realities of the contingent fee, public interest litigation, and representation of indigents on a non-fee basis all suggest the desirability of modifying the rule to conform to the realities of litigation.

Model Rule 1.9, titled "Conflict of Interest: Former Client" provides a new rule to deal with an old problem nowhere specifically resolved in the present Code. The sensible resolution is the following:

> A lawyer who has represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents upon disclosure; or
>
> (b) Use information relating to the representation to the disadvantage of the former client unless the former client consents after disclosure or the information has become generally known.[65]

Model Rule 1.10 seeks to answer questions about the extent to which a lawyer's disqualification can be imputed to other members of the firm with which the lawyer is associated. The current Code sets forth a general rule of imputed disqualification of the entire firm.[66] But that does not answer all the questions; the Model Rules now provide those answers.[67]

65. MODEL RULES, 1981 PROPOSED FINAL DRAFT, *supra* note 28, RULE 1.9.

66. ABA CODE, *supra* note 10, DR 5-105(D).

67. MODEL RULES, 1981 PROPOSED FINAL DRAFT, *supra* note 28, RULE 1.10

Imputed Disqualification; General Rule

(a) When lawyers are associated in a firm, none of them shall undertake or continue representation when a lawyer practicing alone would be prohibited from doing so under the provisions regarding conflict of interest stated in Rules 1.7, 1.9 and 2.2.

(b) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently become associated, shall undertake or continue representation that involves a material risk of revealing information relating to representation of a client in violation of Rule 1.6, or of making use of information to the disadvantage of a former client in violation of Rule 1.9.

(c) Subject to the limitations of Rule 1.7, a disqualification prescribed by this rule may be waived by the consent of the affected client after disclosure.

Id.

Another area of continued concern is addressed by Model Rule 1.11 which deals with the sensitive issue of the revolving door between public and private employment. Under the Model Rules, the crucial test, whether the earlier employment was public or private, is whether "the lawyer participated personally and substantially" in the matter at issue.[68] In the case of public-to-private employment, the relevant government agency may waive the disqualification.[69] Absent such a waiver, other members of the firm may avoid imputed disqualification if "the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom." [70]

Model Rule 1.12 generally parallels Rule 1.11 in foreclosing an adjudicative officer, arbitrator or law clerk from further participation in any matter in which the lawyer "has participated personally and substantially . . . unless all parties to the proceeding consent after disclosure." [71]

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68. *Id.*, RULE 1.11.

69. *Id.*, RULE 1.11(a).

70. *Id.*, RULE 1.11. The text of the rule provides:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after disclosure.

(b) A lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable the agency to ascertain compliance with the provisions of the rule.

Id.

71. *Id.*, RULE 1.12(a). The full text of the rule provides:

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a

Finally, the Rule concerning the lawyer as intermediary[72] provides realistic answers to the question whether and when a lawyer may represent two or more clients in the same matter. The common wisdom is that multiple representation is never permissible because of potentially divergent interests. But that concept is unduly restrictive. When two or more parties embark upon an amicable and mutually advantageous relationship — or even when agreement is reached to dissolve a marriage or a business relationship — it may be unnecessary, unwise, even hurtful to introduce an adversary relationship into the negotiations. Reductions in cost and delay may also be achieved through the use of a lawyer as intermediary in an appropriate case. With these considerations in mind, Rule 2.2 establishes conditions and limitations upon the intermediary relationship, setting them out as follows:

Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer discloses to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation; and

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and

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matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Id.

72. *Id.*, RULE 2.2.

without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, if the conditions stated in paragraph (a) cannot be met or if in the light of subsequent events the lawyer reasonably should know that a mutually advantageous resolution cannot be achieved. Upon withdrawal, the lawyer shall not continue to represent any of the clients unless doing so is clearly compatible with the lawyer's responsibilities to the other client or clients.[73]

D. *Confidentiality*

Easily the most controversial part of the present Code or the Proposed Model Rules, the provisions relating to the confidentiality of client communication have received extremely careful consideration in preparation of the Proposed Model Rules. No language could conceivably satisfy those at one extreme, who insist that there be no exceptions to confidentiality, or those at the other extreme who believe lawyers are too often abused by clients who seek to use lawyers as the instruments of their own wrongdoing under the cloak of silence compelled by the rules of confidentiality. Two important rights require reconciliation if ethical standards for the legal profession are to succeed. Loyalty to the client is acknowledged as essential to the lawyer-client relationship in order to insure that the client disclose to the lawyer all information necessary for effective representation. But it is equally important that the client not be given license to commit illegal or fraudulent acts upon the advice of counsel as to how to accomplish such wrongful results.

These questions raise fundamental issues regarding the adversary system — a system that controls the practice of law in the Anglo-American world, although not elsewhere. The adversary process at its best serves well the interests of justice, premised as it is on the assumption that all parties will be represented by counsel who will provide competent and diligent representation. The adversary system is designed to facilitate as accurate a recon-

73. *Id.*

struction of past events as is possible under the limiting rules of evidence and the restraints of constitutional doctrine. To make the system work, it is as important that counsel observe the requirements of candor to the court as it is that counsel respect the obligation of loyalty to the client.

Some would argue that a lawyer must serve the client first and disregard the obligations to the court.[74] This is justified, it is argued, because the lawyer "should be an officer of the court only in the sense of serving the court as a zealous, partisan advocate of one side of the case before it." [75] Attractive though this theory may be to some lawyers and some clients, the courts have never accepted a second-rank position for themselves. The Nebraska Supreme Court, for example, said this:

> An attorney owes his first duty to the court. He assumed his obligations to it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyer cannot serve two masters; and the one [he has] undertaken to serve primarily is the court.[76]

The adversary system does not impose an unrealistic obligation on the lawyer to volunteer facts adverse to the lawyer's client or to argue both sides of the law on an issue. The adversary system is premised on forceful competition from which truth will emerge; but there are limits on the competition. Few would disagree with propositions advanced in the Proposed Model Rules that require truthfulness in lawyer conduct. Thus, the Model Rules provide that "[a] lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited . . . ." [77] Similarly, it is scarcely surprising to find a rule providing that "[a] lawyer shall not knowingly offer

74. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer Client Relationship,* 85 YALE L.J. 1060 (1976); Freedman, *supra* note 43.

75. ROSCOE POUND – AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT 7 (Public Discussion Draft, 1980).

76. *In re* Integration of the Nebraska Bar Ass'n., 133 Neb. 283, 275 N.W. 265, 268 (1937). *See also* State v. Krutchen, 101 Ariz. 186, 417 P.2d 510 (1966); Colorado Bar Ass'n. v. McCann, 80 Colo. 220, 249 P. 1093 (1926).

77. MODEL RULES, 1981 PROPOSED FINAL DRAFT, *supra* note 28, RULE 1.2(d).

evidence that the lawyer knows to be false." [78] Equally unsurprising is the requirement that "In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law to a third person . . . ." [79]

Moreover, the general principle of maintaining in confidence disclosures by clients in the course of representation is subject to a number of exceptions in the current Code. For example, the Code *requires* the disclosure of *any* fraud committed by a client in the course of representation.[80] In addition, the Code *permits* the lawyer to disclose a client's intent to commit *any* crime.[81] Ironically, these two sections together create the anomaly of mandating disclosure of fraud and merely permitting disclosure of intent to commit murder. The Code also permits the lawyer to reveal "confidences or secrets necessary to establish or collect his fees or to defend himself or his employees against an accusation of wrongful conduct." [82]

The Proposed Model Rules contract the mandatory and permissive disclosures present in the current Code in some respects, while expanding both in other respects. The net result follows:

Model Rule 1.6(b) states the general prohibition against revealing information relating to representation of a client, except as permitted (not required) in the following circumstances:

> A lawyer may reveal such information to the extent the lawyer believes necessary:
>
> (1) To serve the client's interests, unless it is information the client has specifically requested not be disclosed;
>
> (2) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;
>
> (3) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

78. *Id.*, RULE 3.3(a)(4).

79. *Id.*, RULE 4.11.

80. ABA CODE, *supra* note 10, DR 7-102(B). This provision has been amended in a minority of states to except cases where the information is protected as a "privileged communication"; but that adds new confusion, since "privilege" applies only where the lawyer is under court order to disclose. Accordingly, in a non-court context any client fraud must still be disclosed.

81. ABA CODE, *supra* note 10, DR 4-101(C)(3).

82. *Id.*, DR 4-101(C)(4).

> (4) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or
>
> (5) To comply with the rules of professional conduct or other law.[83]

It will be observed that Rule 1.6(b)(2) narrows the present exception in the reporting of an intent to commit a criminal or fraudulent act. The only broadening of the exception appears in Rule 1.6(b)(3), which allows the lawyer to disclose confidences while it still remains possible to rectify the criminal or fraudulent conduct in which the client used the lawyer as the unsuspecting instrument of wrongdoing. Both results seem fair in vindication of the lawyer's own integrity.

Addressing the difficult question of an organization as the client, the Proposed Model Rules are concerned primarily with defining the status of the lawyer who represents a corporation or other organization. In the course of such representation, the lawyer may discover unlawful conduct that might result in material injury to the client-organization. In such a case, the rule outlines the steps the lawyer must take to seek correction of the wrong, working initially within the organization.[84] If unsuccessful in that effort, the rule permits, but does not require, the lawyer to "take further remedial action that the lawyer reasonably believes to be in the best interest of the organization," [85] but only if the lawyer reasonably believes that:

> (1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
>
> (2) Revealing the information is necessary in the best interest of the organization.[86]

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83. MODEL RULES, 1981 PROPOSED FINAL DRAFT, *supra* note 28, RULE 1.6(b).

84. *Id.*, RULE 1.13(b). The rule provides, essentially, for the lawyer to work up through the organization to the highest authority in an attempt to rectify the situation.

85. *Id.*, RULE 1.13(c).

86. *Id.*

Could a profession committed to serve the public interest do less?

Model Rule 3.3, entitled "Candor Toward the Tribunal," continues the provision of the current Code that requires the lawyer to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ." [87] As previously noted, Rule 3.3(a)(4), forbids the offering of false evidence. The present Code is ambiguous as to the lawyer's obligation upon discovering that he or she has unknowingly presented such evidence. That ambiguity is directly resolved in the proposed rule with this language: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." [88] Should a lawyer do less in the interest of personal and professional integrity?

Under the heading "Truthfulness in Statements to Others," the Model Rules provide that "[i]n the course of representing a client a lawyer shall not knowingly fail to disclose a fact to a third person when in the circumstances failure to make the disclosure is equivalent to making a material misrepresentation . . . ." [89] That provision may require disclosure of some client confidences, but is it more than a logical extension of the conceded proposition that a lawyer may not present false or fraudulent testimony?

The above-cited provisions are those that permit or require disclosure of client confidences. Who is to say that they are ill-advised or that clients would be likely to withhold relevant information from a lawyer because of provisions in the Proposed Model Rules? What can be said is that lawyers may practice their profession with a clear conscience if they are permitted to protect against intended criminal or fraudulent acts that threaten substantial injury, and if they are not required to remain silent when clients seek to impute their own wrongs to their lawyers.

IV. CONCLUSION

It is too early to predict whether the Proposed Final Draft of the Model Rules will be accepted, modified or rejected. What can be said with confidence is that these rules ask the hard questions and provide reasoned answers, with thoughtful explanations.

87. *Id.*, RULE 3.3(a)(3).

88. *Id.*, RULE 3.3(a)(4).

89. *Id.*, RULE 4.1(b)(1).

The black-letter text and accompanying Comments and statements of Legal Background offer a splendid teaching tool for law students, lawyers, judges, and the general public.

The proposed Model Rules are, I am satisfied, impossible to ignore.