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Stephen J. Friedman  
*Pace Law School*

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## VIII. Limitations on the Corporate Lawyer's and Law Firm's Freedom to Serve the Public Interest

By STEPHEN J. FRIEDMAN\*

### AN ILLUSTRATION OF THE PROBLEM

A young associate in a large law firm is interested in spending some of his time helping persons who are not able to afford lawyers. The firm has agreed that its associates can spend a portion of their time on *pro bono* work. Each *pro bono* case must be treated as a firm client in order to insure application of the firm's usual procedures for identifying conflict-of-interest problems and to provide some level of supervision to maintain the quality of the work. This young associate proposes to take on as clients a group of blacks who are interested in enhancing employment opportunities for blacks in large corporations in the city in which the firm is located.

The associate plans to make Molto Corporation, a publicly-held steel fabricator, the prime target for his campaign. Molto is a large employer. Among the tactics the associate plans to use are:

1. Initiating a shareholder proposal in order to bring the failure of Molto to hire a substantial number of blacks to the attention of Molto shareholders.
2. Bringing an action charging discrimination in employment before the Human Relations Commission.
3. Commencing a class action for damages for alleged violation of the State Fair Employment Practices Act. No case as yet provides or has recognized the existence of a private action for the violation of this statute, but the associate has constructed some ingenious arguments to support his clients' claim.
4. Drafting legislation which will make it harder for companies like Molto to avoid hiring blacks.

The president of a large general client of the firm has heard of the proposed activities and has called the senior partner to express his displeasure. He said that the tactics which the associate is developing could be used against his company and that the legislation to be drafted would be applicable to his company. He insists that the Human Relations Commission applies affirmative action standards in a "mindless way," that his company requires highly experienced workers and that the application of affirmative action standards to his company would seriously damage its efficiency. Accord-

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\* Member, New York Bar (currently Mr. Friedman is serving as Deputy Assistant Secretary, Department of the U.S. Treasury).

ingly, he asserts that participation by the firm or someone associated with it in such activities is unethical, and demands that the associate be forbidden to proceed.

This problem identifies important ethical and practical questions faced by most large law firms today: how to reconcile the commitment to serve the public interest of the firm and its lawyers with the increasingly widespread obligations the firm owes to an expanding group of regular clients—both paying and *pro bono* clients. The problem also pinpoints some issues that are too often ignored or ill-defined: conflicts between the interests of two or more clients that arise from one client's desire that the firm not take a specific position on a legal issue on behalf of another client or not assist another client in working toward a particular end. Here we will find, I think, that the essence of the difficulty is not found in the *pro bono* nature of the work, but in the differing interests of two clients, a state of affairs that can, and does, crop up in ordinary practice all the time.

At the end of this short piece I will return to the facts of the problem outlined above and explain how I believe the questions posed should be answered. But before doing so, I would like to explore more deeply some of the components of the problem.<sup>1</sup> The discussion below attempts to sort out different ethical and professional considerations that in ordinary practice are often viewed as a whole. This is not to say that the lawyer must review a checklist whenever he makes a decision on a conflict problem, but the process of sorting and analysis may give us greater understanding of the complexity of the decision we must make. Indeed, the range of ethical and human considerations involved is so wide that they can be resolved only by an intuitive judgment. Analysis can do no more than illuminate the problem and inform our judgment. Consider, for example, the following basic questions that are raised by the problem described above:

1. In the absence of a conflict, must the *pro bono* case be accepted as a matter of professional obligation?
2. If there is a professional obligation to accept *pro bono* work, how does that obligation weigh in the balance if there is some conflict with an existing client?
3. If there is no professional obligation to accept a particular *pro bono* client, is the firm free to give additional weight in striking a balance of potentially conflicting interests to the fact that the *pro bono* client is serving the public interest?

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1. Although I refer at some length to the Code of Professional Responsibility and its predecessor, Canons of Professional Ethics, I take it to be the purpose of this paper to explore the ways in which the legal profession ought to deal with the kind of problems under discussion; how to treat issue conflicts among existing clients and how seriously to take them when one is considering whether to take on a new client. For that reason I have used the standard materials and cases on professional ethics when I thought it appropriate, but I have not felt bound by them.

4. Assuming that there is no obligation to accept or reject the *pro bono* client, is it inappropriate for a lawyer to turn it down because of fear of losing the general client? Or is it inappropriate to bullishly ignore the wishes of the general client?

#### IS THERE A DUTY TO ACCEPT THE PRO BONO CLIENT?

I start from the proposition that ordinarily a lawyer has no obligation to accept employment by any particular client—assuming that there is no prior relationship that creates a duty and that the prospective client can find adequate counsel elsewhere.<sup>2</sup> Nonetheless, it is clear that a lawyer or a firm has a professional obligation of some kind to take on *pro bono* work.<sup>3</sup> I would like to devote a little time to exploring the concept of *pro bono* legal work and the contours of any obligation to perform it.

It is important to focus separately on the nature of specifically legal *pro bono* work and on the relationship between that concept and the nature of the client's endeavors. Is it the essence of legal services rendered *pro bono publico* that they are made available without charge? Or that they are made available to a person who would not otherwise have access to them? Or is it that the client, and therefore the lawyer, is pursuing what is perceived to be the interest of a broad group of people—a public interest—rather than his own economic interests? Access to a lawyer's skills is important to most people who undertake any complex economic or organizational endeavor in our society and essential to those who seek to establish and vindicate fundamental legal rights. It is from his possession of this scarce and important social resource that a lawyer's special public responsibilities derive. The public service aspect of the rendering of legal assistance does not flow from the client's activities or objectives, but from the fact that legal services have been made available to a person or group that needs them. Representation of an indigent criminal defendant whose sole objective is to escape serious

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2. Ethical Consideration 2-26 of the Code provides, in part, that "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline preferred employment." Note that the Ethical Considerations are viewed in the Code as "aspirational in character and [that they] represent the objectives toward which every member of the profession should strive." On the other hand, the "Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." While Disciplinary Rule 2-110 deals with the question of withdrawal from employment, neither it nor any other Disciplinary Rule addresses the question of a lawyer's obligation to accept employment.

3. Canon 2 of the Code is very clear: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." And see Ethical Consideration 2-25: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Again, the Disciplinary Rules under Canon 2 contain no references to an obligation to make legal services available.

punishment for a crime committed is *pro bono* work because our legal system requires that each player have counsel in order for the system to function properly.

I would assert that the notion of *pro bono* legal services extends no further. All else is simply the lawyer preferring to associate himself with one client rather than another. The lawyer may be totally committed to the ends his client seeks to further—prison reform, equality of education or the defense of restrictive zoning or discriminatory private schools. He may prefer to devote his services to one of those ends rather than to further the economic ends of a business enterprise. And indeed, perhaps we could all agree that he is seeking to serve the public interest. But he does so as a human being contributing his services—which happen to be legal services—in the same way that the community organizer bends his community organization skills to the urban renewal effort and the dietician serves the soup kitchen.<sup>4</sup> I do not make less of the lawyer's commitment for saying that it flows from his moral rather than his professional being. It is simply that he is not required to devote himself to a public interest project by his professional responsibilities.<sup>5</sup>

Is it mere quibbling to draw a distinction between a lawyer's obligations as a lawyer and his obligations as a human being? To the contrary, the distinction may sometimes be critical. By becoming a lawyer, a man subjects himself to a special set of obligations and restrictions that apply to the exercise of his professional function and that are not applicable to the general population. Thus, he cannot put himself in the kind of conflict-of-interest situation that may be perfectly acceptable to businessmen of high moral character. There are special rules applicable to the way in which he deals with the money of others. And there are many other examples. Within that system of limited restrictions and obligations, its own rules are accorded a higher weight in making professional decisions than ethical precepts applicable to

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4. Note that I am not here entering the debate on the question whether the public interest is best served by the lawyer's narrow pursuit of the interests of his client or whether he should make independent judgments as to where the public interest lies. See Krash, *Professional Responsibility To Clients And The Public Interest: Is There A Conflict?*, 55 Chi. Bar Record 31 (1974), which appears in a superb collection of materials on problems of the legal profession, Kaufman, *Problems in Professional Responsibility* (Little, Brown and Company 1976). See also Professor Fried's interesting exploration of this problem, Fried *The Lawyer As Friend: The Moral Foundations Of The Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

5. The notion that a lawyer has an obligation to serve the public interest other than by simply making his services available to those for whom legal services would not otherwise be available would be perfectly workable if it were set forth in a general way, giving the lawyer considerable latitude for choice among public causes. But if the precept were refined so as to give any particular "public interest" client a claim on a lawyer's time, many fascinating questions arise. For example, does the former ACLU lawyer have an obligation to represent an organization devoted to the defense of individual rights in the form of restrictive zoning? Or does the foundation established by a great American corporation, both paying clients, have a greater claim to representation than the corporation?

the population as a whole. For example, a lawyer may find himself duty-bound to approach the borderline of lack of candor in defending the interests of the criminal defendant, although he would not think of doing so in his personal life.<sup>6</sup> The number of positive rules of this character is few, since the Code's Ethical Considerations are "aspirational in character," the area of freedom of choice accorded to a lawyer is great. It is in exercising that freedom of choice that nonprofessional ethical precepts, including notions of public service, become operative.

This distinction takes on a special importance in the context of the problems this paper addresses. For the nature of the conflict is itself very unclear. As the discussion below indicates, I think we can begin to address the seriousness with which we take the conflict by thinking about the "legitimacy" of the existing client's expectations. Since that kind of a notion inevitably involves many fuzzy lines, a lawyer may well find himself weighing the possible existence of a professional obligation to the existing client against an obligation he feels to accept the proffered employment by the *pro bono* client. I believe that, in doing so, he may only properly take into account an obligation that derives from a professional as opposed to a more generalized ethical source. Conversely, suppose the lawyer decides that the existing client's assertion of a conflict does not, as a matter of professional ethics, *require* him to turn down the *pro bono* client? Nevertheless, he would like to do so, perhaps for fear that his angry general client will go elsewhere. In thinking about whether or not it is appropriate for the lawyer to accede to the wishes of his existing client even though he is not required to do so, he must think about whether he has a professional obligation to accept the prospective *pro bono* client. In short, when conflicts of interest are involved, the lawyer must give precedence to his professional obligations.

Assuming that a lawyer has some obligation to do *pro bono* work, he must inquire whether he has any obligation to do *pro bono* work for a particular client. Expressions of a lawyer's obligation to perform *pro bono* services are usually couched in general terms.<sup>7</sup> He is enjoined, in effect, to "do his part." A cynic might conclude that this generalized formulation was chosen to make it clear that the lawyer really has no social obligations. That objective may have motivated some segments of the organized bar. But the generality also derives, I think, from the fact that it is difficult to determine, *with respect to any particular person*, whether legal services are really unavail-

6. See Freedman, *Professional Responsibility Of The Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966); Frankel, *The Search For Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031 (1975); Rotunda, *Book Review of Freedman, Lawyers' Ethics in an Adversary System*, 89 Harv. L. Rev. 622 (1976).

7. "Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." Ethical Consideration 2-16. "The fulfillment of this objective [to make legal services fully available] requires acceptance by a lawyer *of his share* of tendered employment which may be unattractive both to him and the bar generally." [Emphasis added] Ethical Consideration 2-26.

able. So long as most segments of the bar "do their part" in doing some *pro bono* work, chances are that there will be a lawyer for many prospective clients, even though the overall supply of free legal services may be insufficient. Thus, individual responsibility is diluted and the obligation becomes merely one to "do your part." A former President of the American Bar Association has suggested that a lawyer can "do his part" by simply contributing money.<sup>8</sup> And, indeed, the problem of providing legal services has increasingly come to be viewed as a social problem to be solved by governmental action and funding. If this generalized notion of public responsibility holds, then perhaps a lawyer is not required to give special weight to the *pro bono* client in weighing a potential conflict of interest.

How about the public interest organization? Is there a professional obligation to accept as a client any particular applicant? For the reasons set forth above, I do not believe any such obligation stems from the nature of the ends sought by the organization. Could it stem from the lack of legal services available to the organization? There are those who say that the appetite for litigation of the typical environmental protection organization or civil rights organization cannot be satisfied. Whether or not that is the case, there are many such organizations that could convincingly argue that, with additional legal manpower, they could prosecute much more worthwhile public interest litigation. Is the lawyer obligated to help because this is a person to whom legal services are not available? To do so would be to turn the lawyer into a kind of super public utility, required to render services without cost to persons whose end they may abhor. Moreover, there are important differences between a lawyer's obligation to represent an indigent criminal defendant who cannot afford legal counsel and the situation under consideration. The traditional notions of a lawyer's obligations evolved in a context very different from the *pro bono* cases of today. The basic ideas were elaborated in the context of the lawyer shielding the individual from the oppressions of the State: representing criminal defendants, defending seditious libel actions and the like. In that case the lawyer acts in the courtroom, a specifically legal forum, to protect a victim of State oppression.

The kind of action contemplated by the associate in our problem is quite different. There the oppressor is not the State but industry. The victim is not an individual but the public. The forum may be the courtroom or an administrative agency, but it may also be the public press. The wrong is illegal anti-social activity that violates the civil rights of others: pollution, discriminatory hiring policies that result in the unfair allocation of economic goods, unsafe products, price fixing and the like. In classic political theory, defense of the public interest is a State function, but in our society we have decreased the public expense, and perhaps raised efficiency levels, by permitting private persons to bring class actions and other lawsuits on behalf of the public.

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8. Statement by Chesterfield Smith appearing in 60 ABAJ 641 (1974).

Here the public interest has a legal sword in hand. Some may think that the difference between helping in defense and helping in offense is meaningless. But it is not entirely so. First, the institution of offensive litigation is a voluntary act, and providing free legal services takes away the economic discipline, which I think is healthy, of having to weigh the costs of resorting to litigation against its benefits. It has the corollary effect of significantly multiplying the amount of litigation in our society, a trend which I do not favor. Second, the private enforcement of public rights is still only supplementary to the basic State function of protecting the public interest, and is not the only source of help (just as the existence of legal aid societies decreases the lawyer's obligation to take on criminal defense work for the poor). Third, our society is moving in the direction of providing economic incentives for lawyers to litigate such cases. The mere availability of class actions creates a major incentive. And some statutes now permit the court to award attorneys' fees.<sup>9</sup>

In sum, I do not believe there is a professional obligation for a lawyer to agree to represent any particular *pro bono* client, except under special circumstances.

#### WHAT IS THE LAWYER'S DUTY TO HIS EXISTING CLIENT?

Let us turn to the other side of the equation, the lawyer's obligations to his existing client. What is the ethical significance of the facts in our problem that the client is a *paying* client, an *existing* client and a *general* client? The foregoing discussion has suggested, I am sure, my conclusion that the fact that it is a *paying* client puts it on no lower or higher ground than other clients. A lawyer has no lesser responsibility to a client that is a business organization than an organization devoted to the public good. It is a professional relationship we are discussing, and once established, it must be the same for all clients within the scope of the relationship. The remaining two factors, however, give this client significant claims on the lawyer.

It is of the utmost importance that it is an existing client; the lawyer may not easily sever that relationship, and may not be able to do so at all if there is any detriment to the client involved.<sup>10</sup> For my part, Professor Fried has put it best:

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9. *But see*, Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 420 (1975).

10. *See, e.g.*, Ethical Consideration 2-32: "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client as a result of his withdrawal. . . ." Moreover, in this case the Disciplinary Rule comes close to the aspirational standard. Disciplinary Rule 2-110(A)(2) provides that "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel . . . and complying with applicable laws and rules."



How does a professional fit into the concept of personal relations at all? He is, as I have suggested, a limited-purpose friend. A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you—not an abstract relation as under the concept of justice. That means that like a friend he acts in your interest, not his own; or rather he adopts your interests as his own. I would call that the classic definition of friendship. To be sure, the lawyer's range of concern is sharply limited. But within that limited domain the intensity of identification with the client's interest is the same.<sup>11</sup>

. . . The lawyer-client relation is a personal relation, and legal counsel is a personal service. This explains why, *once the relation has been contracted*, considerations of efficiency or fair distribution [of scarce legal resources] cannot be allowed to weaken it. The relation itself is not a creature of social expediency . . . it is the creature of moral right, and therefore expediency may not compromise the nature of the relation.<sup>12</sup>

#### TYPES OF CONFLICTS AND THE SOURCE OF A LAWYER'S OBLIGATION

I would like to discuss briefly the extent which the Code of Professional Responsibility bears on the kind of conflict questions posed by our problem and then turn to a somewhat broader consideration of the conflict problem in light of the fact that the existing client is also a general client.

Disciplinary Rule 5-105 deals directly with the subject of accepting or continuing employment when the interests of another client are affected. Subdivisions (A) and (B) of that Disciplinary Rule prohibit a lawyer from accepting or continuing employment if *either* "the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the [other client], or if it would be likely to involve him in representing differing interests," except, in either case, as permitted by subdivision (C). That subdivision permits a lawyer to represent multiple interests if "it is obvious that he can adequately represent the interest of each and if each consents to the representation after a full disclosure of the possible effect of such representation on the exercise of [the lawyer's] independent professional judgment on behalf of each." When the relations of two clients are truly adverse, it is hard to see how a lawyer can adequately represent the interests of each. Nevertheless, the Code recognizes that, outside of the courtroom, lawyers believe they have considerably more latitude to represent clients with "differing interests." Ethical Consideration 5-15 reflects this approach:

A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be

11. Fried, *The Lawyer As Friend: The Moral Foundations Of The Lawyer-Client Relation*, 85 Yale L.J. 1060, 1071-72 (1976).

12. *Id.* at 1077.

justified in representing in litigation multiple clients with potentially differing interests. . . . On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

The Code defines “differing interests” as including “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.” This definition departs from the formulation in Canon 6 of the predecessor ABA Canons of Professional Ethics, which spoke of “conflicting” interests. Canon 6 provided that a lawyer represents conflicting interests “when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” Although the “definition” inches in the direction of giving meaning to the term “differing interests” it does not help us very much in deciding about the disposition of the kind of asserted conflicts represented by our problem: situations in which one client is not the subject of a litigation but desires a particular result in that litigation because of a belief that its interests would be adversely affected by the legal rule sought to be established or the other action proposed to be taken. Consider the following list of conflicts that may arise in the kind of situation posed by the problem:

*Direct Conflict.* The general client is the direct object of the proposed actions: the defendant in a lawsuit or administrative proceeding, the specific object of legislation or the subject of proposed stockholder action.

*Formal Issue Conflict.* The lawyer would be required to take a public and formal position on an issue of law that is contrary to the position the lawyer has taken or will take in the same or a similar forum. Examples of this abound: arguing both sides of the same issue before the United States Supreme Court or an administrative tribunal, or within the same Federal judicial circuit, or even perhaps with the same third party in negotiations.

*Object of Specific Regulation.* Here the *pro bono* client seeks enforcement of the law or new laws or regulations that are applicable to a specific segment of the population of which the general client is part; for example, strip-mining laws where the general client is a mining company, or anti-pollution laws when the general client discharges substantial quantities of pollutants, or drug regulation and drug companies and the like.

*Object of General Regulation.* Here the laws are applicable to vir-

tually every economic enterprise, in part because they are so written and in part because the conduct they regulate is common to most enterprises.

*Disagreement with Social Objectives.* In this situation the general client is either unaffected by the regulation or affected only as a member of the general population. Its concern arises from a disapproval of the objectives for which the *pro bono* client is working. Thus there are those who do not want "their" lawyer helping the Communists or the pornographers or those who attack restrictive zoning.

We know that in a direct conflict the lawyer may not act. And where the client merely disagrees with the lawyer's social objectives, we sense that the client is not justified in seeking to impose its will. But within those extremes, how far must a lawyer go in accepting an assertion by his client that a conflict of interest exists? A lawyer has a professional obligation to observe what we might call the legitimate expectations of his client about the consequences of the professional relationship they have established, and the nature of the relationship is the source of legitimacy. Preserving those expectations preserves many of the essential elements of a successful and desirable lawyer-client relationship: trust, confidence, respect and a generalized belief that the lawyer is not furthering any interest that adversely affects the client.

A moment's reflection suggests that the nature of a client's legitimate expectations varies at least in part with the range of the lawyer's services. If the lawyer has been retained only to reduce a real estate assessment on a plant or defend a negligence case, the client's claim on his undivided loyalty is thin. If the lawyer is consulted about every large and small problem, he may be so privy to the client's affairs and secrets that the claim is broad indeed. In terms of archetypes, the limited relationship is symbolized by the role of the classic English barrister. The contrasting archetype is that of the classical outside American general counsel, the lawyer (and firm) that has broad and multilayered interactions with the client stretching over tens of years.

It is useful to examine these archetypes in more detail. The image of the litigator rooted in the English barrister tradition is of a professional retained on an isolated matter to exercise his special skills on the client's behalf in an arena where the client is a subsidiary actor; essentially independent, but cast in a role in which his function is to pursue his client's interests single-mindedly, his zealousness proceeds not so much from identification with his client as from the proper performance of his function in the adversary system; because he is independent, his duty of fealty runs only so far as the system dictates—and when the system dictates that he be candid and forthright with the court, his obligations to his client fall away; there is, in theory, no conflict between the two duties.

Contrast this with the paradigm of the outside general counsel; the law

firm's relationship with the client is quite different: it stretches over a long period of time and has been shaped by countless problems, victories, crises, disagreements and good times; it may be institutional, with one or more partners and a larger number of associates dealing with many levels of management; unlike the courtroom, which is the lawyer's home territory in which the lawyer has the "line responsibility," here the lawyer performs more of a staff function—he is adviser, moral force, technician and sometimes counterweight; and the lawyer identifies with his client because of the nature of his relationship, not only because of his institutional role. Notice that here there is no true counterpart of the litigator's role as an officer of the court. The corporate lawyer's moral standards and sense of self-esteem may prompt him to be candid and fair, but there is no institutional obligation for him to be so. The duration and breadth of this relationship strongly affects both the lawyer's perception of himself and the client's perception of him—and in about the same way.<sup>13</sup>

### CONFLICTS AND "LEGITIMATE" EXPECTATIONS

Is it really meaningful to talk about the legitimacy of a client's expectations in matters as important as conflicts of interests? Is this notion really a guide to conduct, or is it merely a ground for argument with the client? I think it is of some use, because what we are considering is the client's sense of betrayal, and like all emotional claims, we must find a way to make a judgment about it.

In the case of a general client, the personal relationships are much closer (and therefore the potential claim for loyalty much broader) than in a more isolated transaction. Also, the client has a tendency to view his lawyer as "part of his team," a conception that leads to an ever broader claim of loyalty. And that conception is not one-sided. Many corporate lawyers, for wholly understandable reasons, come increasingly to identify themselves with their clients. This tendency is one that most lawyers feel they must resist to some degree. The identification often becomes centered on the person of the chief executive officer, and the lawyer's obligation to serve "the corporation" may lie elsewhere. Even identifying with the corporation in general

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13. The breadth of the law firm's relationship with a general client is relevant not only to the problem of Canon 5 and conflicts; it also bears on the application of Canon 4, which requires a lawyer to preserve the confidences and secrets of his client, and prohibits their revelation to third parties. Disciplinary Rule 4-101 defines a "secret" as information the disclosure of which would be likely to be detrimental to the client. If the position of the *pro bono* group is in some sense adverse to that of the general client, then the vast amount of information that the firm has acquired about the affairs of the client may make it impossible to know when secrets are being used. For example, if the *pro bono* group wishes to draft banking legislation, to what degree does prior general representation of a bank necessarily mean that the knowledge about where the industry's skeletons are buried involves the revelation of a client's secret? If that is a problem, does the same problem arise if the lawyer becomes Comptroller of the Currency?

may distort the measured advice that a corporate lawyer must give, for it is not unusual for him to be required to advise that the law requires some action, such as disclosure of a serious cash flow problem, that all would agree will damage the ability of the company to carry on its business and depress the market value of the current stockholders' investment in the company.

What then is the scope of the general client's legitimate expectations about his lawyer's loyalty. Certainly in the case of what I have called a "direct conflict," in which the general client is to be the object of the proposed action, the lawyer should not accept the second client and the Code probably forbids it in all cases. At the other extreme, it is not proper for a lawyer to be influenced in his professional judgments by the wishes of anyone, including existing clients. Thus, the fact that a general client does not like the objectives of the *pro bono* group should be disregarded—the client may not legitimately expect his lawyer to follow his wishes in that regard.<sup>14</sup>

Is it wrong for a lawyer to "cave in" to even extreme expectations? Certainly if the *pro bono* group has been accepted as a client, the relationship may not be terminated because of the disapproval of another client. If the question is whether the proffered employment of the *pro bono* group should be accepted, and assuming that the circumstances are such that the lawyer has no professional obligation to the *pro bono* group, it is my view that he should have no professional obligation to accept the group as a client. The decision is one which, as a matter of professional ethics, he should be free to make either way, although as a matter of "aspiration" I would hope the lawyer would not be influenced by his client's wishes.

What, then, of the cases in the middle? I would assimilate to direct conflicts both issues conflicts and situations where the general client is part of a subgroup, such as a regulated industry, that is the object of the proposed action. The case of the regulated industry is relatively clear. There is a kind of adversary relationship between a regulated industry and the regulations, and I think a general client is entitled to feel that his lawyer will not work to refine and tighten the regulations, even if that area of regulation is not within the area in which the law firm functions.<sup>15</sup>

The question of issue conflicts is more fraught with problems. If it is simply a matter of taking a position in court on behalf of one client that is different from the position taken in the same or a related court on behalf of another client, most of us would agree that a client has good reason to

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14. See, e.g., Ethical Consideration 2-27: "A lawyer should not decline representation because a client or cause is unpopular. . . ."

15. But see Ethical Consideration 7-17: "The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interest or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client."

object. But if this idea is extended much beyond the courtroom or administrative tribunal, it carries many subtle permutations that cannot be resolved by general principles. For example, many firms represent both financial institutions that lend money and general clients that borrow. If a non-client lender seeks to realize on a security interest granted by a general client borrower, is it wrong for the lawyer to attack the validity of the whole security arrangement, even though it is widely used and has been used by that firm in behalf of its lender clients? I suspect most lawyers would conclude that it is not improper for the firm to do so. But it is an extremely uncomfortable situation. Would it make a difference if the law firm had “invented” the security arrangement?

Suppose the second client is in the business of attacking the interests of the first client? I understand that many law firms that specialize in bankruptcy work believe they must represent only creditors or only debtors, but not both. And the conflict is even more likely in the case of *pro bono* groups that specialize in a particular industry of which a general client is part. Here the likelihood of a direct issue conflict is so great that a lawyer should not put himself in the position of taking on the *pro bono* group.

That leaves the vague class of cases where the client is part of the general population. The facts of each case will, of course, play a major role in determining whether a case falls in this group. In most cases, I would put here antidiscrimination rules, securities laws (insofar as they apply to issuers), corporate laws, the antitrust laws, ERISA and the like. I do not think a general client has the right to expect its firm to refuse to act for the plaintiff in a class action asserting a violation of the securities laws, except perhaps if the lawyer knows that the legal principles involved bear directly on a situation affecting the general client or some other direct issue conflict. In effect, the client is doing no more than asserting his dislike for the closing circle of laws and regulations that circumscribe our conduct. He is entitled to his views, but should not expect that he can impose them on his lawyer.

It is a corollary of this analysis that I do not believe that the differences, posed in the problem that began this paper, between established law and new law, or among legislation, litigation and administrative actions, ought to be given much weight. There *are* differences, but they are too fine for our purposes. We are dealing with a highly emotional human transaction—a client’s sense of betrayal. It can be dealt with in part by education in advance and in part by the moral strength of the lawyer’s position. Neither admit of fine distinctions.

Turning, then, to the problem with which we began, I would conclude that the firm could properly tell its general client that it will accept the *pro bono* group. May it decide otherwise? Assuming it has no special obligations to the *pro bono* group, I think it would be justified in doing so.

Suppose there were special facts that created an issue conflict of some sort with the general client. May the firm take on the *pro bono* group anyway,

building a "Chinese wall" between the associate and the group of lawyers that represent the general client? Disciplinary Rule 5-104(D) expressly forbids that course, and that result accords with good practice. As firms grow larger, the possibility of conflicts of interest among existing clients, and of taking on a new client with interests adverse to some existing client, multiply. This is not a reason to relax procedures designed to avoid and resolve conflicts, but to intensify them. One cannot pass off a professional problem with the idea that the "young associate" is somehow not associated. And that is particularly true in the case of a general client that may deal with many lawyers throughout the firm. There is a significant sense in which the *firm* is the client's lawyer, and that institutional relationship cannot be disregarded.

Although I have concluded that the firm has a good deal of latitude on the facts of our problem, my analysis leaves the firm with a good deal less freedom than I would like. I would have preferred a conclusion that exalted the "hired gun" aspects of the legal profession, leaving the lawyer free to apply his skills on behalf of whomever he desires, subject only to avoiding direct conflicts of interest. Alas, I think that conclusion is not consistent with the corporate lawyer's obligations to his general client. The intimacy of that relationship is a precious part of the practice of corporate law, and a lawyer should not be required to sacrifice it.

## **Introduction by Professor Robert H. Mundheim \***

THIS MORNING'S program will cover a potpourri of problems, and our first speaker of the morning, Steve Friedman, will begin by analyzing the conflicts between the interests of two or more clients that arise from one client's desire that the law firm not take a specific position on a legal issue on behalf of another client or not assist another client in working toward a particular end.

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\* Professor of Law, University of Pennsylvania Law School (currently Professor Mundheim is serving as The General Counsel of the U. S. Treasury).





## Supplemental Remarks by Mr. Friedman:

I THINK that, before beginning to actually summarize some of the analysis that I tried to do in this paper, it would be worthwhile to emphasize two facts. The first is that what we are dealing with here is not what a lawyer wants to do or the way we would like him to act, but a relatively narrow set of prescriptive rules that require him to act in a certain way, *i.e.*, rules that tell him that he must or may not do something, which are also pre-eminent in the sense that they take precedence over general moral or ethical precepts in general. Accordingly it is important that we think very carefully about how to go about solving these problems.

While the Code of Professional Responsibility begins to address them, it is very obvious that the range of combinations and permutations of factual situations is enormous here, and accordingly I have a great preference for Andy Kaufman's inductive approach to begin to deal with these problems. I think we need to talk about them a great deal and talk about them publicly before we can begin to formulate principles that are truly meaningful.

Secondly, I think it is worthwhile to emphasize that what we are dealing with is not conflict of interest, but conflict of obligations and the conflicts of the lawyer's obligation. Loeber Landau told me a story last night about a conversation he had with a lawyer who seemed to be representing two clients with very different interests. Loeber raised the question with the lawyer about how he could do that, and the lawyer said, "Well, I have no conflict of interests. My clients have conflicting interests." He was right. He was right, perhaps he had conflicting obligations.

I want to spend just a minute to briefly outline what the problem was that Bob Mundheim posed to me, that in turn provided the focus for my paper. The problem concerned a law firm that had a policy of encouraging its associates to take on *pro bono* work. An associate comes to the firm with a prospective client, a group of blacks who want to encourage employment of blacks in your area. He has worked out a variety of tactics, of which a particular company in the area (not your client) is the focus; and the tactics stretch along a broad spectrum, ranging from making proposals at shareholders' meetings, to introducing legislation in the state legislature and perhaps bringing in administrative proceedings.

Then a general client of the firm calls up and expresses outrage at the thought that the firm might do this, saying that, while his firm is not involved in any of these proceedings, exactly the same tactics could be used against his firm, and that it is improper of you and your firm to act in that way.

I think the key to begin to deal with these questions is to examine first of all the extent of the existence and the extent of the lawyer's obligation to clients and prospective clients. It is my own view that, except in the rarest case, the lawyer has no obligation to take on any particular client, including

*pro bono* clients. So it seemed to me that the firm was free, if it so desired, to bend its knee and do as its existing client wished.

A more interesting duet of questions, I think, is: what is the firm's obligation if it chooses, all other things being equal, to take on the *pro bono* client, and what is the extent of its obligations to the existing client.

I think that, in order to deal with that question, one has to look very closely, in effect, at the lawyer's engagement, *i.e.*, his engagement with the existing client, because the extent to which we will accord legitimacy to a client's claim of loyalty or a client's claim that a lawyer is acting disloyally is a function of the kind of relationship the lawyer has with the client. It seems very clear to me that if the relationship is an isolated one and the lawyer is just doing a particular piece of litigation or handling a particular financing or real estate transaction or any other isolated transaction, then the client's legitimate claim is a relatively narrow one and is basically confined to having the lawyer not act directly against that client, *e.g.*, not suing, nor against the general subject matter of the work the lawyer is doing.

The situation is quite different, I think, in the case of a general client, where the range of advice the lawyer gives is very broad; stretches over a variety of issues; the relationship between the client and the firm being multi-layered and the product of years of crises, events and problems, successes and failures. There I think that the client's claim, *i.e.*, the client's right to say that his lawyer ought not to be working against his interests, is much broader. Which leaves open the question of the limits, even of that claim. In order to approach that question, what I have tried to do is to outline some categories of issue conflicts or positional conflicts for which I do not claim any validity. But I think they are a useful way to begin to think about some of these problems, and I thought I might spend just a minute and outline them for you.

At one end of the spectrum are the obvious cases and the traditional kinds of conflicts of interest: You cannot represent both sides in a litigation; You cannot represent a dissident share holder at a share holders' meeting of your client; You cannot take direct action against your client.

I would put in basically the same category situations where what is involved is a specific regulatory scheme that has special application to your client, and there are lots of examples of that. For example, it seems to me that a lawyer ought not to be working in an area of strip mining legislation or regulation that is antithetical to the interests of his mining client. Broker dealer regulation is another example.

I contrast that with what I will call the general regulations, which are ordinarily tax matters, SEC 1933 Act matters, things like ERISA. Now, general regulations may be specific in a case of particular clients. If your client is the trust department of a bank, then ERISA takes on a very different kind of a cast. It seems to me that in this area a general client, at least, has the right to say that you ought not to be working against his interests. In the area of general regulation I think he has no specific claim on you.

A related area is what many people call issue conflicts: the case where a lawyer is obligated or finds himself in a position where he is taking the opposite side of an issue of law for different clients. In my mind this is the most difficult and subtle of all these problems, and one in which my mind changes most often.

It seems to me that, if possible, a lawyer ought to avoid, if he can, being put in that position. Accordingly he ought not to take on new clients if it is foreseeable (*i.e.*, reasonably foreseeable) that he is going to be in the position of asserting on behalf of that client a position which is contrary to a position he asserts on behalf of another client. I feel the same way about things which are less directly related to clients, *e.g.*, law review articles. I think a lawyer has to think long and hard before he writes a law review article on a particular issue of concern to his client in which he comes to a conclusion—perhaps even in which he comes to *any* conclusion—but certainly in which he comes to a conclusion antithetical to his client's interests. As I am sure all of you know, that is a problem that raises particular internal management problems in a firm, because it takes a long time for associates to come around to that point of view.

On the other hand, I think all of us have had the experience of being in the course of general representation of a client, in a situation where you are required to take a position which, though opposite to a position you are actually taking for another client, is clearly antithetical to their interests.

Most general law firms represent both lenders and borrowers. And lenders and borrowers have different interests in the outcome of issues concerning the validity of security instruments, different interests in most bankruptcy issues.

I think in those cases that a client is, in effect, held to have accepted that risk and has to recognize the fact that a general law firm represents many clients and cannot step down simply because a result may be one that is hurtful to another client or even that client's industry.

Lastly, on what I have called the other end of the spectrum are client's, in effect, disagreement with the social views represented by the causes espoused by either the firm or its client. And here I think that, in terms of what I call these narrow rules, a client has no claim on the lawyer: that a lawyer is at least ethically free to do whatever he chooses. I think he is also ethically free in terms of these rules to say, "My economic interests lie with your social interests, and I will do as you say."

I view that as a human problem and not a professional one.



## Discussion by Participants and Panel:

**PROF. MUNDHEIM:** Steve's discussion raises another aspect of our public responsibility as lawyers. Jerry Kurtz, the new Commissioner of Internal Revenue, lamented in an interview last week the fact that tax lawyers were not providing comments on proposed regulations. He thought their reticence stemmed from the view that it would be unethical for them to give comments because the regulations would impact on their clients in a very specific way.

How do you view our ability to do bar association work which affects our clients? We do a lot of it. Do we leave our clients at the door? Do we bring them in, but say to the world, "You know, I am here purporting to do bar association work, but actually I am here representing my client"?

**MR. FRIEDMAN:** I think, Bob, that it depends. I gather that this was what was involved in Kurtz' remarks. I do not think that a lawyer has any obligation to his clients not to make a legal system work properly, nor, simply because it may be to a client's narrow economic interests, to allow a regulation to be defectively drafted that has a hole that you could drive a truck through. I do not think that the lawyer has an obligation not to point that out.

On the other hand, I am troubled by what I have called these areas of specific regulations. As I think I told you on other occasions, it has been my own experience on Securities Committees, for example, that lawyers tend to act very differently in a broker dealer area than they act in the 1933 Act area. In the broker dealer area it has been my experience that lawyers have very much represented the interests of their clients, whereas in the 1933 Act area, which is much more diffuse, they tend to pursue their own intellectual analytical bents so long as there are no particular issues involved in which they are otherwise dealing.

**MR. WEINSTOCK:** I think there is a disclosure problem here, and I might say that I have occasionally sat in on gatherings which are more susceptible to the point of view of specific clients than this one has been. Occasionally I have been troubled by the fact that I had the impression that when somebody was saying something, he really represented the viewpoint of the client or himself as a special pleader. I do not think there is anything wrong with that. Indeed, I think one of the ways in which our overall system has worked as a practical matter has been that there are special pleaders who are paid or otherwise have an interest in pleading the way they do.

As a matter of fact, we, as lawyers, should be no strangers to that process. But the danger comes when somebody expresses an intellectual view, when he says, "This is what I think is the best view," but fails to say, "By the way, you ought to know that this is very important to my client, and he is going

to be very unhappy if this view is not adopted." Once he has said that, I think it is very definitely a useful part of the overall process because when a regulation comes out, whether it is an SEC or a proposed regulation of any government bureau, it is less than perfect; and if the lawyers who represent private clients are not going to be free to criticize, who will do the necessary job in that respect?

**MR. FRIEDMAN:** Lou, let me respond. I think the thrust of what I am saying is that it is more than a disclosure problem: that a lawyer may have a professional obligation in that context to, in effect, represent the interests of his client and not go the other way.

**PROF. MUNDHEIM:** The professional responsibility in your view is limited to not joining a position which adversely affects the client. You are not arguing that a lawyer has an obligation to argue his client's case in the bar association discussion. It would be sufficient for him to say: "I can't participate" in this problem.

**MR. FRIEDMAN:** What I am saying is that your range of choice on a variety of substantive positions may be sharply limited. And, yes, it is partly a disclosure issue in the sense you ought to tell the people with whom you are pontificating about those limits. But it is also, I personally think, an uncomfortable position to be in. For my own part I prefer to deal with issues on which my range of choice is more free. I don't like being in that position.

**MR. FLEISCHMAN:** With the permission of Mr. Bialkin I would like to tell those here who are not members of the Committee on Federal Regulation of Securities that this matter was discussed at some length at the last committee meeting in Washington, less than a month ago. This has been a live issue within the Committee of Federal Regulation of Securities, and it was brought to the floor by the Chairman just a month ago.

I believe that the bottom line, as you put it, was that the committee or at least those who were assembled there concluded that, to the very largest extent possible, we do leave our client prejudices at the door when we attempt to respond to proposals by the SEC and other agencies. We come as lawyers to these comment letters as objectively as we possibly can; and therefore, with rare exceptions, it was the feeling of the committee assembled there that we will not specifically draw attention to the fact that we may have client interests which are adversely affected.

Those rare exceptions have come up in the past as Steve indicates, particularly in the broker dealer area. I had not focused as closely as Steve apparently has on the fact that that area, in fact, has historically given us the most trouble. But on reflection, I think that he is correct. I cannot really account for that at this point.

I do not think that it is by any means limited to that area. As Steve indicates, perhaps it is because the legislation or regulation is a bit more specific and biting or binding in the broker dealer area. But certainly I have a very strong feeling, so far as that committee is concerned at least, that the lawyers

who work on its comments to the federal agencies and to the Congress really come to it on the best professional level that they can, having tried to the best of their abilities to leave their client prejudices at the door.

**PROF. MUNDHEIM:** In that area where you recognize that it has been very hard either for lawyers to leave their client interests at the door or, where one accepts Steve Friedman's view, that it would be unethical to leave them behind: was there thought as to whether you need only to disclose that fact among yourselves during the discussion, or is there a need to inform the general public about the interests of the lawyers who participated in the formulation of the Bar Association's comments?

**MR. FLEISCHMAN:** The particular instance that comes to my mind, after the introductory paragraph of the formalities that this is not a position, was the very next paragraph, which stated, "Please be aware that particularly the draftsmen of this letter, not the whole Committee by any means, [but] the draftsmen of this letter represent clients who would be adversely affected by this proposed regulation."

**MR. CREEDON:** I think that the Bar Association Committee requires, in submitting data to the House of Delegates, that there either be a statement to the effect that the particular participants making the recommendation have no particular interests that they are representing, or else there should be some kind of disclosure. In many cases in the House of Delegates, a disclosure is made that someone has a certain affiliation and so forth.

**PROF. MUNDHEIM:** But that rule would not apply, for example, where a committee or subcommittee makes a comment directly to a public body.

**MR. CREEDON:** I guess that has never been really explored. Maybe it should be.

**PROF. MUNDHEIM:** One of the purposes of this conference is to raise those kinds of issues for exploration.

**MR. HERSHMAN:** A good many years ago this issue came up before the Association of the Bar of the State of New York in connection with the Tax Committee, because tax acts are notoriously the consequences of issues of special pleadings. The conclusion was that they simply must check their interests at the door; and traditionally the members of the Tax Committee have acted that way, even though their conclusions in many instances were adverse to the interests of clients of particular committee members.

**MR. FRIEDMAN:** I would like to push that just a bit. The insurance companies have a special system of taxation, and I am interested. You would be very miffed if a firm with which you have had long and extensive dealings, or a leading partner of that firm, took a strong public position in favor of a substantially more onerous system of regulation of insurance companies than you would if he took a position on, say, capital gains tax. Or are insurance companies so special it is hard to think of something general that also applies to insurance companies?



**MR. HERSHMAN:** You are making the cheese a little binding, but as a member of the Bar Association Committee, no, I think I could not.

**MR. FRIEDMAN:** Is that because the responsibility is more diluted there?

**MR. HERSHMAN:** That is right. It is representative of a profession, professional views and not just the views of that particular committee member.

**SPEAKER:** Bob, one further comment in response to what Steve said from the point of view of securities regulations. There are issues, and they are not infrequent, where proposed regulations are susceptible of some loyalty analysis, basically economic in focus. In many instances the subcommittees of the Federal Securities Regulation Committee simply refuse to participate in what might otherwise be a normal process of response. We have no obligation to respond and where, as Mendes puts it, the cheese gets binding, *i.e.*, where the pocketbook is involved on both sides of the issue, we do not respond.

**PROF. MUNDHEIM:** I might say that the Subcommittee on Market Structure has pretty uniformly taken that position.

**SPEAKER:** I wonder if a relevant distinction is between cases when the lawyer himself is identified publicly as taking a position and where he is a participant on a committee, the committee taking a position.

**MR. FRIEDMAN:** Yes, I think that is an important distinction.

**SPEAKER:** One other point. If a lawyer works on a committee, does he have an obligation to discuss with the affected clients the position he may take in that committee. Even if he were free to take a position which may be adverse, he has a communication problem with his client.

**MR. FRIEDMAN:** You mean you have an obligation to warn him that it is coming?

**SPEAKER:** Yes. I mean you are taking an adverse position. Do you tell him that the committee is going to discuss this and that maybe he would like someone else to support his views?

**MR. FRIEDMAN:** I would not think so.

**SPEAKER:** How do you reach the possible conclusion that maybe you cannot even take an adverse position, but then you say, "Well, if you can, you don't even need to discuss it."?

**MR. FRIEDMAN:** Because as I told Bob last night, I keep changing my mind about all these issues at a rapid rate, and I am not bound by my own mistakes even of five minutes ago; because I really view this essentially as a negative thing in which, in effect, we are saying to a client: "Yes, you have got the right<sup>e</sup> to restrict me from doing things that I would otherwise do, but I don't think that a lawyer has an obligation to actively represent his client's interests in every phase of his personal life, and I view Bar Association activity as a personal thing." I do not think he has to look out for his

client's interests at the Bar Association. I think he may have some obligation not to publicly take positions that are directly contrary.

**SPEAKER:** Say he generally represents an insurance company. The ABA is now considering whether or not to advocate a special tax burden for insurance. As a part of your general representation you ought to advise your client of what is going on and how it may be affected.

**MR. FRIEDMAN:** Oh, sure, but that is really saying, "Look, this Committee is doing something that affects your interests. You had better get somebody there." It is a very different thing.

**MR. SOMMER:** I really think it is a disclosure problem. I agree with what Lou suggested before: I am not sure that we can really separate ourselves from our client's interests, either emotionally or intellectually. I think, particularly when we get involved in something, whether on a personal level or pleading a cause for a client, that may take a large amount of our time, it is sometimes very difficult for us to separate that. And I think that at the front end there is a need to disclose because I am not sure—while I think probably when we get comments that members of the Commission staff are probably aware of some of the client interests, so to speak, that individuals may be representing—I am not sure that the public appreciates that. These are public comments, and I am not sure that there is not a need to disclose.

It would be as if I were to appear before Congress and say, "I am testifying as a member of the Bar who practices before the Securities and Exchange Commission, and I think that the Commission ought to have a larger budget and a bigger office building," without disclosing to the Congress that I work there, and am personally interested in the outcome. I think, to some extent, that there is a need to disclose. I am not sure that it goes much beyond that, but I think that, particularly since most of these comments are public and are disseminated, there is a need to alert the public to this.

If you like, it may be a mosaic of institutional biases or intellectual biases that come about as a result of our background and representation.

**MR. EVANS:** Is this a negative prohibition, or an ethical obligation, or is it really just good client relations? I gather, Steve, that you think it is an ethical obligation. If so, what do you point to in the Code that would say that? Is it Canon 9—the avoidance of the appearance of impropriety?

**MR. FRIEDMAN:** I am going to avoid the question this way. It seems to me that the undertaking we are really engaged in here is to try to apply notions of conflict of interest or conflict of obligation to a series of situations where they have not been applied before in a formal sense. What I tried to suggest was that I think that we are going toward a reformulation of the formal rules, perhaps even of the disciplinary rules of the notions of conflict of interest or conflict of obligation. It will encompass some of these situations. Now, I do not think, that one can focus on appearance of impropriety. That certainly covers some of these things, but I think that an ethics com-

mittee would be hard put today to conclude that anyone had violated a disciplinary rule in a lot of these areas.

What I am suggesting is that the claim of clients in some of these areas is a legitimate one, and to extend its legitimacy ought to be a professional obligation. It is also, obviously, good client relations. The reason it is good client relations, what we really mean when we say that, is that it is an important element of the lawyer-client relationship; and that, in a sense, is what a lot of the Code of Professional Responsibility is about. It is about the way lawyers ought to act for their clients, and that is what we are discussing.

**PROF. MUNDHEIM:** I noticed in the draft of Lloyd Cutler's talk that was handed out it is suggested that Steve Friedman's position on positional conflicts would divide us into a plaintiff's and defendant's bar. I also gather Lloyd thought that the result would be basically unhealthy.

**MR. CUTLER:** I do think that it is unhealthy. It seems to me that, on the issue that you have just been discussing, I think ethically the lawyer is perfectly free to take any position he wants provided, as Mr. Sommer suggested, he discloses his interest; but he certainly ought to be free to take a position that may be adverse to some of his client's general interests that he does not happen to represent.

**MR. FRIEDMAN:** How about a specific interest?

**MR. CUTLER:** If he represents a specific interest of the client in a case, or if it is a matter of continuing advice, I suppose he has a duty to not take a conflicting law suit or a conflicting matter in which, if he is successful in advocating an opposite position, it would hurt the first client. But I should think he is entirely free to take a position as a member of the bar as to what he thinks. That it may cost him the client is certainly true; but he has, certainly, the ethical freedom to say what he thinks, even though the client may decide he wants another lawyer. But I think most clients will not want another lawyer.

In one particular case you described, the associate takes on a racial discrimination employment case. Well, we have had that situation. We have taken a number of those cases, even though we also have clients who are employers who we have represented in the employer racial discrimination context. We have never had any such client say to us, "We object to your doing that."

**MR. FRIEDMAN:** Lloyd, as I am sure you know, I came to the same conclusion.

**MR. CUTLER:** I realize that.

**MR. FRIEDMAN:** Let me press you one step, if I can. Suppose what you had done was design a very creative financing mechanism for a client, in which they had billions of dollars of financing resting, and then one of your partners wanted to write a law review article that pointed out that this

sort of deal was probably invalid under some provision of the bankruptcy law?

**MR. CUTLER:** Or wanted to testify before the Congress to get the law changed?

**MR. FRIEDMAN:** That would be prospective, which is a little different.

**MR. CUTLER:** I would think since your partner is, in effect, bound by the opinion you gave, that unless he has a sincere recantation and the full firm does, that it presents a conflict. I would agree. But there is almost never, it seems to me, that kind of a case, in part because lawyers become advocates, and they almost always tend to take the positions of the people they represent.

**PROF. MUNDHEIM:** But that is not necessarily true when you take the case of the associate who has not been sufficiently indoctrinated. Is he also bound?

**MR. CUTLER:** You get into another subject there. The way we try to run pro bono cases, as I will get to later, a partner is always responsible for that case. It is just like any other case in the office. It is subject to exactly the same conflict rules, and the new associate is indoctrinated with the problems of the law firm and who are its clients from the day he gets there.

**PROF. MUNDHEIM:** I was thinking of the law review article because I have had a number of young graduates of our law school come back and say, "You will never believe what has happened to me: they won't let me publish that article."

**MR. CUTLER:** Of course, I suppose from the standpoint of canons of ethics, you cannot distinguish between the partner and the associate. But I should think I would hesitate a long time, and have to have a very clear case of true conflict and ethical breach, before we would say to an associate or a partner that he cannot write that article.

I also think, and I think this is what you asked me in the beginning, Bob, that we ought to try to avoid as much as we can the notion that we are not only specialists in a field, but specialists on one side of a field. It seems to me we should be just as willing to take plaintiff's antitrust cases as defendant's antitrust cases, to sue on one side of section 10b-5 as well as to defend on the other side. That is vital to a sense of self-respect and public respect for the entire profession.

**SPEAKER:** Does it have any bearing that, in many cases, clients do not object to their firm dealing with the needs of other clients, even though those activities may have some adverse effect on them.

**MR. CUTLER:** It has certainly been our experience that the great majority of corporate clients are extremely tolerant of that kind of conflict and largely leave the issue up to the lawyer. It is very, very rare, at least in our experience, to feel you need a consent or an acquiescence from an earlier client, or that the earlier client will say, "No, we don't want you representing him."

**MR. FRIEDMAN:** I think we have very different kinds of practices.

**MR. CUTLER:** Perhaps so.

**MR. FRIEDMAN:** That has not been my experience at all, and I think that I know many clients who have been very unreasonable about being uncomfortable with our representing competitors. It has to do, I think, with the intimacy of the relationship between a lawyer and a general client, a very complex human relationship.

**PROF. MUNDHEIM:** Which raises the following point. You premised the ethical obligation on expectations, and expectations are subject to educative processes. If your clients have those kinds of expectations you can ask whether they ought to be re-educated. That is Lloyd Cutler's point. He says that if clients have those kinds of expectations it produces an unhealthy situation within the bar. I suppose that is the next level of the question.

**MR. FRIEDMAN:** I think it is a matter of degree. Obviously what we are talking about is designing the lawyer-client relationship. Most of what I did when I gave my brief little speech was to describe what I thought was characteristic of a relationship with a general client.

**MR. WEINSTOCK:** I think this example of the law review article is illustrative of one of the problems we all have when we differ between what we say are the standards of the bar and what a young man is apt to discover when he comes into the office for the first time. I think we ought to observe a distinction between on the one hand his right or lack of right to intellectual freedom, *i.e.*, to say anything he wants to, and on the other to put into print something which harms a specific interest of a client—which really comes down to a conflict of interest.

In the latter case the refusal to allow him to publish the article is certainly not unethical on the part of the senior partner. In the former, I certainly don't think it is unethical either, even though it is not the type of personality I would like to encourage in my own firm; because I think one of the elements of personal morality is to allow young men to disagree with you, even where it hurts when they disagree. So when the partner says, "You cannot publish that article," although that may be undesirable conduct, I do not think it is unethical.

**MR. SMITH:** A fairly recent case in New York is interesting in this very area—an associate of a firm left that firm and filed a lawsuit that related to issues of the bond counsel's former client. An objection was made of conflict of interest that was represented by this young associate who felt very strongly on public policy grounds about the position he was asserting. The trial court judge said that he thought the objection was certainly a serious one that should be considered. However, he thought the issue was of such importance he wanted to go ahead and decide it, so he went ahead and decided it.

I do not know whether those issues are going up on appeal. A part of the case is going up on appeal now in the case of Washburn against the Municipal Assistance Corporation, a case that is very relevant to this.

**PROF. MUNDHEIM:** That raises another question. If there are ethical obligations arising out of your relationship with a general client, how long do they last? Suppose the general client leaves the firm. When can you begin to take on matters that would adversely affect that client, laying aside matters in which that particular ex-client is the defendant in a litigation?

**MR. FRIEDMAN:** I would think immediately.

**PROF. MUNDHEIM:** Does everybody agree that the problem abates immediately?

**MR. COONEY:** No, Bob, I do not agree. I think the Third Circuit, at least, has ruled quite contrary in at least one case where an associate in a law firm had participated in an SEC investigation; the associate became interested in the client, thought the management was great, and bought some stock. A few years later the associate became disenchanted with the client and brought a suit arising out of matters subsequent to the investigation.

The Third Circuit nonetheless barred the individual who sued per se from participation in the proceeding, even as plaintiff or as counsel on the theory that he may have learned some things about the company and its proclivities and so forth that would affect overall the appearance of the fact that lawyers are supposed to be dedicated to their clients.

**PROF. MUNDHEIM:** Is that case premised on the possible use of special information received as a consequence of the lawyer's position?

**MR. COONEY:** No, not on specific information.

**MR. FRIEDMAN:** The former client is the defendant though. I was not in the least suggesting you could sue him the day after he leaves your office, but I am saying that . . .

**PROF. MUNDHEIM:** Taking your strip mining legislation case, the next day a lawyer could actively participate in devising strip mining legislation which he could not have done while representing the client?

**MR. FRIEDMAN:** Yes.

**PROF. MUNDHEIM:** And would you have the same feeling of freedom for somebody to go to the government where they might be able to design better strip mining legislation?

**MR. COONEY:** I have serious reservations.

**MR. FRIEDMAN:** I would like to talk about the question of going to the government. I think, as I suggested in a footnote, I mean this in effect as a kind of generally recognized exception to most of the rules in this area. I mean, ex-government officials use the confidences and secrets of their client all the time; and that is the reason they get good jobs. In the sense that, for example, the knowledge gained from government service, if analogized to the knowledge gained from serving one client, which is clearly prohibited—if the situation were two private clients, it would clearly prohibit the lawyer from acting as here, but the series of restrictions are much narrower in the case of the government, and there is a good public policy reason for that.

**PROF. MUNDHEIM:** In your view the notion of responsibility based on

expectation only hold as long as the client relationship remains. That would be a curious result unless there are sharp restrictions on resigning a client.

**MR. CUTLER:** The Code comes out exactly the opposite on the former government lawyer. Anyone else who switches sides or whose client leaves him has an obligation relating to client confidences, as was just mentioned. But the former government lawyer has this further obligation about doing anything that would give the appearance of switching sides on a particular matter. I think the former government lawyer is clearly subject to a much stricter test than someone else's former lawyer.

**SPEAKER:** It does not even have to be a side switching lawyer. Under Canon 9 you can be on the same side if you leave the government, and if it is the same matter you are out.

**MR. FRIEDMAN:** What I am talking about is, for example, before the Freedom of Information Act, when all the internal procedures of the Internal Revenue Service that are now public were not public, so that knowledge of the way the government works, the way the Service works or the Treasury works is very important knowledge for a tax lawyer who is dealing with the government or advising a client.

I mean the knowledge of what is in the *Field Agent's Manual* (or so I think it is called) is critical for an accountant who is filling out tax returns; as I understood it the Code did not reach that problem at all, and it would clearly do so in the case of an individual client. I mean those would be confidences of Internal Revenue Service, and you could not begin to advise anyone else on matters in which that touched at all.

**MR. SMITH:** Bob, I think we should not let go the problem of the lawyer going into the government and what he can do there. I think it should be very clearly stated that once you take that oath of office in the government you should be calling the shots the way you see them, whether they are adverse to the general interests of former clients or not; that if you do anything less than that you are doing less than the oath of office.

**PROF. MUNDHEIM:** I think that is generally true. The question is whether or not you have got to exclude yourself from serving with respect to certain matters, or whether to even take the job in the first place because it involves particular problems which will adversely affect present clients. Is there an ethical proscription on those points?

The other point I want us to discuss relates to walling off parts of a firm from each other. Steve Friedman thinks that the firm has to be viewed as one entity. I worry about that conclusion at a time when law firms are going national. Law firms have branch offices separated geographically by the whole country and in some cases by oceans. Add law firms partially amalgamating by having one or two joint partners. Are we stuck with the imputation rule in all of these cases? If we are talking about client expectations can we devise procedures for walling off and advise clients that we have wall-

ing off procedures and that therefore their expectations about imputations, if they have them, are unreasonable?

**MR. FRIEDMAN:** You know, in a way a more interesting aspect of that question is the implication of what you are suggesting for law firms and the way they organize themselves. I think that the firms I know, including my own, that are examining a question of other offices are very concerned in part about conflicts, and there have been some recent notorious, horrible examples of problems.

**MR. CUTLER:** I would not want to do anything to help the formation of national law firms, but I do think it is possible to wall off. It is not just walling off—it is walling off with the consent, of course, of the former client or the other client, including the government.

There is a case within the last month, as I noted in my paper. The Court of Claims has now come down four square, Lew, in favor of Opinion 342 and the absolute need to have the government capable of giving its consent to practice before the government by the partners or associates of a former government lawyer who is walled off, subject to the supervision of the court to step in wherever it thinks there is still an impropriety.

**SPEAKER:** Our firm has offices that are separated by oceans, and we find that the expectations of clients are entirely different when offices that are widely separated are involved. They are entirely different, at least in our experience, than when a matter may come up in one office; and when you discuss these kinds of conflicts with those clients, we find them to be quite reasonable, at least in our terms.

**MR. CUTLER:** There is such a case right now, you know, involving the Kirkland and Ellis firm who are counsel for Westinghouse in the uranium cases, including the antitrust case against the foreign uranium companies in Chicago. Their Washington office was counsel for the American Petroleum Institute in defending against the proposed legislation that would keep oil companies out of the uranium business.

In the course of that case, their Washington office went to Kerr McGee, a member of the API, and allegedly acquired various kinds of confidential information about Kerr McGee's uranium business. Kerr McGee is a defendant in Westinghouse's Chicago case and moved to strike Kirkland and Ellis as counsel for Westinghouse on that ground, and the court has that case under advisement right now in Chicago.

**MR. SCHNEIDER:** I have had a variation of the problem come up. Suppose again the hypothetical where you devise some kind of a very clever financing plan. Another client wants to use that method of doing business. Let us assume it is not proprietary. It is reflected in public documents that are filed with the SEC and somebody else wants to use it. You spent six months working on it with no action letters in your research in your plan for the first person. Can you use it for another client?



**MR. FRIEDMAN:** Yes, I would think that in the ordinary case, the answer is certainly yes, and firms do it all the time.

**MR. CUTLER:** The real question is: can you charge as much the second time.

**MR. BIALKIN:** On that last question, I do not think the answer is quite as simple as Steve suggests, because it may be that the effort of the law firm provided a special benefit to the client for whom the matter was devised and giving that benefit, even though it would otherwise be separately devised for a separate client could minimize the benefit to the first client. For example, we had an experience last year when, on behalf of a particular client, we obtained a particular kind of ruling from the Treasury Department which permitted a particular company to engage in a particular kind of conduct which gave it a competitive advantage in its industry. The ruling became public, and another client asked us whether we could obtain a similar ruling for them.

The obtaining of that ruling could be done by any law firm, except we had applied once. We knew the considerations of the agency. We knew the kinds of submissions of presentations of facts that could facilitate it. But we felt that we could not do that without consulting the first client, even though it was a free country; and the first client objected to our seeking a ruling on behalf of the second client and in effect using the forms devised for the first client, since it felt that another company coming in and having the same opportunity could adversely affect its market. In that case we did not accept the assignment, even though I suppose within the framework of your answer we could have.

**MR. FRIEDMAN:** I agree with that. I mean, there are cases where you have done something so special, and there is a major competitive edge.

**MR. BIALKIN:** Even though it is in the public domain, you can do it; but you cannot do it because you helped your client to an advantage. I think you . . .

**MR. FRIEDMAN:** The municipal bond client, it seems to me is a kind of example where applications were pending for years.

**MR. BIALKIN:** It was not on a case but . . .

**MR. FRIEDMAN:** But it is the same. I mean, that seems to me the kind of example where there are serious problems.

**DEAN REDLICH:** I just want to mention that for six years I was editor in chief of the *Tax Law Review*. I never knew of a single case where an article came to us in which the lawyer identified the fact that some position that he was advocating in the article would redound to the benefit of a client. There were innumerable cases where I would ask lawyers to write on a particular subject, and they informed me that they could not do so because the position they might like to take was one which was adverse to positions in the firm, *i.e.*, positions of clients in the firm, so that there seems to be a one-way street on the way this operates, at least among tax lawyers.