THE "NEW" NEW JERSEY RULES OF PROFESSIONAL CONDUCT: REORDERED PRIORITIES FOR PUBLIC ACCOUNTABILITY

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I. Introduction

A profession is the practice of a learned art in the public interest.[1] The pervasive impact on the public interest[2] of the learned professions[3] raises moral and legal issues for society, in-

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1 R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 6 (1953).

2 The concept of the public interest is vague and amorphous. A business or enterprise clothed with the public interest is something designated as a public utility. In Munn v. Illinois, 94 U.S. 113 (1876), the United States Supreme Court traced the basis upon which a state rests its power to regulate. In upholding the constitutionality of an Illinois statute regulating the maximum charges for the storage of grain, the Court stated, "[w]hen, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Id.* at 126. Although the practice of law does not constitute a public utility, it is regulated as if it were. The substantial restrictions placed on entry into the legal profession are for preserving competence and integrity, rather than limiting competition. The profession does have a monopoly on some forms of legal services and laymen do not have the capacity to assess professional performance. These factors are the general basis of regulation for protection of the public. *See generally* T. MORGAN, ECONOMIC REGULATION OF BUSINESS 18-23 (1975). Lawyers are burdened with as much regulation as some public utilities but generally do not have the advantages that flow from utility status. *See generally* B. CHRISTEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970), for the view that the legal profession should be considered as a public utility with a duty to serve all in need of legal services.

3 The learned professions are those traditionally associated with extensive learning or erudition commonly including law, medicine, and theology. In a broader sense they include any profession in the preparation for or practice of which academic learning is held to play an important part. N. WEBSTER, THIRD INTERNATIONAL DICTIONARY 1286 (1981).

dividual practitioners, and professional associations. This article focuses on some of those issues as they relate to the legal profession. The most fundamental question for professional ethics is whether those in professional roles require special norms or principles to guide their conduct.[4] For example, when the professional's duty to preserve confidential information conflicts with the duty to avoid harm to others, should the professional be excused from moral or legal responsibility for such harm? This and other similar questions are not easily resolved. Because the answers to the ethical questions that arise in the course of professional activities so vitally affect the public interest, the self-regulation characteristic of the learned professions has been overshadowed and, to a large extent, supplanted by comprehensive legal regulation.[5]

There are certain common attributes among the learned professions, and some parallel moral and legal duties.[6] The lawyer's role in the adversary system, however, makes professional ethics for lawyers different and more complex. Lawyers have long invoked the special requirements of this role to excuse conduct that to the ordinary citizen appears to be contrary to common morality.[7] Systemic justifications for morally questionable behavior have been stretched to their limits in the formulation of ethical standards for the self-regulation of the legal profession.[8] In recent years, in the aftermath of "Watergate," there has been a growing sense of public dissatisfaction with the legal profession.[9] In response, the legal profession has undertaken to reevaluate its role in contemporary society, its ethical standards, and its professional responsibilities.

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4 *See* A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 1 (1980).

5 *See, e.g.*, RULES GOVERNING THE COURTS OF NEW JERSEY, Rule 1:14-1:20B (1986) [hereinafter N.J. COURT RULES].

6 *See* R. VEATCH, A THEORY OF MEDICAL ETHICS 82-83 (1981).

7 *See* D. LUBAN, THE ADVERSARY SYSTEM EXCUSE, THE GOOD LAWYER 83 (1984).

8 *See* W. SIMON, THE IDEOLOGY OF ADVOCACY, ETHICS AND THE LEGAL PROFESSION 216-17 (1986).

9 *Id. See* C. WOLFRAM, MODERN LEGAL ETHICS 2-4 (1986) [hereinafter WOLFRAM], for a good discussion and numerous citations regarding public attitudes toward the legal profession.

II. The Nature of Legal Ethics, Professional Responsibility, and Rules of Professional Conduct

In its broadest sense, legal ethics means the moral duties or obligations of lawyers. A second sense of legal ethics refers to the morality of lawyers, both in their professional and nonprofessional roles. A third, narrower sense refers to the principles of conduct governing the legal profession—the standards of behavior adopted by the profession itself. Finally, legal ethics is used to refer to the legal regulation of lawyers' conduct, as guidelines adopted by the courts.[10]

The rules for regulating lawyers, like all rules of law, are unavoidably susceptible to the ambiguities inherent in language.[11] The law for lawyers cannot obviate the uncertainty inherent in the practice of law, any more than the law of contracts can remove uncertainty in business transactions. Thus, lawyers inevitably must exercise a degree of discretion in their interpretation and application of these rules and can only hope that reviewing authorities will agree with their judgments.

The ultimate test of the efficacy of rules of professional conduct is the extent to which they facilitate the achievement of the salutary goal of the legal profession: to give concrete expression to accepted moral values. In a pluralistic society there is difficulty arriving at universally accepted principles or standards of morality. Even though there are continuing disagreements over moral values, there is a significant amount of agreement within society on moral standards. That agreement is manifested in our legal

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[10] The academic community is split as to whether or not legal ethics should be considered as moral justification for professional conduct, or merely law for lawyers. *See, e.g.*, T. SCHAFFER, AMERICAN LEGAL ETHICS (1985), which approaches the subject of legal ethics as ethics. *See* Luban, *supra* note 7; M. DAVIS & FELLISTON, ETHICS AND THE LEGAL PROFESSION (1986), which includes a collection of essays which apply the insights of moral philosophy to the ethical problems of lawyers. *See also* L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY (1982), for a good example of the legal ethics as law approach.

[11] The inherent ambiguity of language is generally recognized; Wittgenstein, one of the most influential philosophers of the twentieth century, postulated that a given word can have different meanings and senses depending upon its use, because each word is embedded in a large, linguistic context. *See* H. FINCH, WITTGENSTEIN, THE EARLY PHILOSOPHY 73-92 (1971). *See also* Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 238-72 (1950). *See also* S. HAYAKAWA, LANGUAGE IN ACTION (1939).

traditions and institutions.[12] It is within the framework of our common moral tradition, instantiated in the decisions of courts and legislatures, that lawyers must determine their professional responsibilities.

The relationship of law and morality has been a protracted central theme of Anglo-American jurisprudence.[13] Ethical or moral foundations of law are relevant to professional responsibility just as they are to any area of law. If the behavior of lawyers qua lawyers is to be evaluated on moral grounds, it seems appropriate to ask the following fundamental questions: Are the standards of the legal profession, including the law regulating lawyers, morally justifiable? Are the legal obligations of lawyers the same as their moral obligations? Given the practical limitations of any regulatory scheme, does the law for lawyers strike a proper balance between the interests of the public, client, and lawyer? Only if the answer to each of these questions is an unqualified yes, is public confidence in the profession and its ethical standards well founded.

III. Changing Standards and the Role of the Bar

The judicially adopted standards of conduct for lawyers differ not only from state to state but also from the standards adopted by the profession itself.[14] The ethos of lawyers, (the ac-

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12 GOLDMAN, *supra* note 4, at 17-20.

13 *See* R. POUND, LAW AND MORALS (1905), for an investigation of the differences between legal obligation and moral obligation. The works of H.L.A. Hart and Lon Fuller contain similar issues. *See generally* H. HART, THE CONCEPT OF LAW (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593-629 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630-72 (1958). The now famous Hart-Fuller Debate addressed the relationship between law and morality. A major tenet of the Positivist school of jurisprudence, of which Hart is a member, is the separation of law and morals. Natural law theories of law emphasize the connection between law and morals. St. Thomas Aquinas is considered the founder of the Natural Law School. See his discussion on the nature of law in his Summa Theologica, Part II, First Part, *reprinted in* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 59-81 (1980). Finnis is an excellent contemporary exposition of the natural law position. *See also* J. RAWLES, A THEORY OF JUSTICE (1971).

14 New Jersey was the first state to adopt the MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. As of March 1, 1987 only 22 other states had adopted the Model Rules. There are significant differences in the rules adopted by each state by virtue of the amendments each has made to the Model Rules. A number of states have simply amended the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. Other states have established

tual value system that underlies, permeates, and actuates their thought and behavior), is not necessarily in accord with the professed values of the profession reflected in the rules of ethics or the legal rules regulating lawyer conduct. Further adding to the confusion, inherent in assessing the behavior of lawyers is the degree of autonomy permitted lawyers under the various standards.[15] The moral sense of each individual lawyer may have a greater bearing on his or her behavior than externally imposed standards. Perhaps not enough lawyers operate on a moral plane. The economic realities of the practice of law and adherence to an adversary ethic in which client interest dominates combine to distract lawyers from considerations of moral as well as legal accountability. Whenever there exists any reasonable basis for dispute concerning the morality of a lawyer's conduct, he or she needs the guidance of clear, authoritative standards. The development of the organized bar, in part, has been in response to that need.[16]

The standards of the American legal profession from Judge Hoffman's Resolutions, published in 1836,[17] to the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules), adopted in 1983, assume that the sine qua non for profes-

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their own rules. Although the judiciary has an inherent power to regulate the legal profession under the common law, the N.J. CONST. art. VI, § 2, cl. 3, specifically establishes the Supreme Court's power to regulate the practice of law. *See In Re* LiVolsi, 85 N.J. 876, 428 A.2d 1268 (1981) (Court upheld the constitutionality of fee arbitration rule N.J. COURT RULES, *supra* note 5, Rule 1:20(a) and discussed its power to regulate the practice of law).

15 The Model Rules allow for much more discretion to be exercised by the lawyer than do the NEW JERSEY RULES OF PROFESSIONAL CONDUCT [hereinafter N.J. RULES]. For example, MODEL RULES, *supra* note 14, Rules 1.6 and 4.1 permit disclosure of client confidences, while the corresponding New Jersey Rules require disclosure.

16 Bar associations have been directly involved with the establishment of the standards for the legal profession and have acted as quasi-public agencies for the enforcement of those standards. In twenty-six states there is an integrated bar, where membership in the bar association is a condition of licensure. The New Jersey Bar Association has approximately 15,000 members, a little more than half the number of attorneys licensed in New Jersey. The New Jersey Bar Association has been a major influence on the regulatory standards adopted by the New Jersey Supreme Court.

17 *See* D. HOFFMAN, A COURSE OF LEGAL STUDY (1836), *excerpts reprinted in* T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT READINGS AND DISCUSSION TOPICS 59-164 (1985).

sional responsibility is a good moral character.[18] The difficulty of defining "good moral character" or, conversely, "moral turpitude," has led to the use of the phrase "fitness to practice law" as a general description of the conduct required of lawyers.[19] It is clearly appropriate for the organized bar to ask what, if anything, professional responsibility has to do with morality or the moral character of the individual lawyer. Moreover, it is essential that the bar make periodic assessments of lawyers' performance in their professional role. An even more fundamental question is to what extent lawyers aspire to fulfill professional ideals in the performance of their role. In the end, individual perceptions of the lawyer's role shape their performances as much as, and perhaps more than, adherence to ethical rules, which set only minimum standards of conduct. The Kutak Commission, while explaining the scope of the Rules, also expressed their limitations:

> The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and

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[18] *Id. See also* MODEL CODE, *supra* note 14, Preamble.

[19] In Konigsberg v. State Bar, 353 U.S. 252, 263 (1957), Justice Black commented on the ambiguity of the term "good moral character": "[t]he term, by itself, is usually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." *Id.*

Beyond manifest dishonesty there are serious disagreements over the meaning of the term. MODEL CODE, *supra* note 14, DR 1-102(A)(3), as originally drafted, provides that a lawyer shall not engage in illegal conduct involving moral turpitude. The New Jersey version of this rule was amended and the phrase "reflecting adversely on his fitness to practice law" was substituted for "moral turpitude." This particular disciplinary standard and other standards that are vague or ambiguous provide little or no guidance to lawyers regarding permitted or proscribed conduct. *See In Re* Ruffalo, 390 U.S. 544 (1968), where Justice White states: "I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 556 (White, J., concurring). Some conduct, particularly that involving criminal offenses traditionally known as *malum in se* would warrant discipline. *Id.* at 555 (White, J., concurring). Where conduct is such that all responsible attorneys would not concur that it is improper, very general language should not form the basis for discipline. *See* J. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 714-15 (2d ed. 1984).

> finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by rules. The Rules simply provide a framework for the ethical practice of law.[20]

An important role of bar associations is to seek a consensus of professional values and to help lawyers and the public understand the behavior of lawyers. The deontology of the legal profession, the moral duties inherent in the lawyer's role, provides the "why" of these rules and principles of professional ethics. Changing perceptions of the lawyer's role and the nature of the attorney-client relationship have led to revisions in the legal profession's ethical standards. Bar associations should be concerned with the impact these different standards will have on the performances of lawyers and the functioning of the adversary system.

Bar associations serve the legal profession and the public by seeking to influence directly the standards of lawyer conduct adopted by the courts. It is the role of the organized bar to provide new responses to the following question: What can be done to raise the level of ethical sensitivity among lawyers, to foster better performance by lawyers, and to enlist more lawyers in affirmative efforts to improve the law and the legal system? Bar associations should also be concerned about: (a) the level of ethical awareness among lawyers; (b) what, in fact, lawyers do in situations that require ethical choices; (c) the affirmative obligations of lawyers to improve the law and the legal system, especially the expansion of the availability of competent legal services at affordable cost.

Whatever impact the new standards will have on lawyers, a comparison of the Model Rules and the New Jersey Rules of Professional Conduct (New Jersey Rules), adopted by the New Jersey Supreme Court, suggests that New Jersey lawyers will experience that impact in significant measure.[21]

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20 MODEL RULES, *supra* note 14, Preamble.

21 The ABA House of Delegates adopted the Model Rules on August 2, 1983. The New Jersey Supreme Court, on July 12, 1984, adopted the Model Rules with amendments pursuant to Rule 1:14. N.J. COURT RULES, *supra* note 5. The New Jersey Model Rules became effective September 10, 1984. The remaining textual discussion focuses only on the most significant changes in the recently enacted rules. It is not meant as a detailed analysis of each new rule.

IV. The New ABA Model Rules

In 1977, former ABA President Robert Meserve appointed Robert Kutak to chair a commission to reevaluate the ABA Code of Professional Responsibility (Model Code). The major criticism of the Model Code was that it was too vague, ambiguous, and internally inconsistent to guide lawyers or to serve as an effective disciplinary tool.[22] Other problems were that the Rules on advertising and solicitation had been declared unconstitutional,[23] and many of the Disciplinary Rules directly conflicted with other Rules or the Ethical Considerations that preceded them.[24] The Commission's intent to render lawyers more accountable to the public interest is reflected in the opening sentence of the Preamble to the Discussion Draft of the new Model Rules which states: "A lawyer is an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the quality of justice."[25] The Kutak Commission concluded that there was so much of the Code needing amendment that it was easier to draft an entirely new set of standards.[26]

In August, 1983, after numerous amendments and heated debate, the ABA House of Delegates adopted the final version of the Model Rules to replace the former Model Code. The Model Rules are patterned after the American Law Institute's Restatements, and classified according to the different functions lawyers perform. This black-letter law format has rules of general application followed by separate rules applicable in situations where the lawyer functions either as advisor, intermediary, legal evaluator, advocate, negotiator, public servant, or in his or her own economic interest. This functional classification of the rules is the most significant break with the past.

The former ABA Canons of Ethics, which served as the standard of the profession since the beginning of this century, and the Model Code, which replaced the Canons in 1969, do recog-

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22 *See* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977), for a thorough criticism of the Model Code; *see also* Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 A.B.A.J. 939.

23 Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

24 *See generally* Morgan, *supra* note 22.

25 ABA Comm. on Evaluation of Professional Standards, Preface (Discussion Draft 1980) [hereinafter Discussion Draft].

26 *Id.* at Rule 1.

nize and distinguish the duties of the advocate from the duties attached to other roles. As general standards, however, they had to be broad enough to allow for the advocate's special duty of loyalty to client interest. As a result, the former Canons and the Model Code reflect the model of the attorney-client relationship of the lawyer as advocate for the client accused of a crime.[27]

The justifications for certain behavior of defense counsel in the criminal litigation context are connected to the nature of the advocate's role in the criminal process. The presumption of innocence, the constitutional right to counsel, and due process of law are weighty factors which may justify a different balancing of the interests of the public, the client, and the lawyer. Although the original Discussion Draft of the Model Rules reflects a definite attempt to modify the lawyer's role,[28] especially in contexts other than criminal litigation, the final version of the Model Rules still reflects the traditional adversary ethic in which the pursuit of client interest may justify harm to the public interest and third parties.[29] The revised first sentence of the Preamble to the Model Rules indicates that there is no reordering of the priority of interests reflected in the original draft so as to put the public interest ahead of the interests of clients and lawyers. It states: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[30]

V. The New Jersey Rules of Professional Conduct

A. *The Reordered Priorities and Public Accountability*

By adopting the Model Rules with significant amendments, the New Jersey Supreme Court has established what the Kutak Commission sought to achieve: standards for lawyers that render them more accountable to the public interest. As a result, New

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27 Morgan, *supra* note 22, at 733-39.

28 The Discussion Draft Rules 1.7, 1.13, and 4.1 required disclosure of confidential information under certain circumstances. Discussion Draft, *supra* note 25. These were amended so that the final version of the Model Rules makes disclosure permissible. *See* R. POUND, AMERICAN TRIAL LAWYERS FOUNDATION, CODE OF CONDUCT (Chairmen's Introduction and Preamble 1982) for a discussion of the Model Rules' break with the past and the need for an alternative set of standards.

29 *See* Hodes, *The Code of Professional Responsibility, The Kutak Rules and The Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981).

30 MODEL RULES, *supra* note 14, Preamble.

Jersey lawyers are subject to more stringent standards than lawyers in other states. The New Jersey Rules clearly reorder the priority of interests reflected in the former New Jersey Disciplinary Rules (New Jersey DRs) and the ABA Model Code of Professional Responsibility from which they were derived. The New Jersey Rules place the public interest before the interests of both clients and lawyers, and the interests of clients ahead of those of lawyers. This reordering can be seen in the reformulation of the lawyer's three fundamental duties of loyalty to the client, candor to the court, and respect for the rights of others.[31] The New Jersey Supreme Court has given a different interpretation to the idea that in an adversarial system of justice, a lawyer's duty of loyalty to his client is the same as his duty to the legal system.[32] Although traditional adversary ethics (reflected in former rules) provide a legal and, perhaps, a moral justification to ignore the public interest when pursuing the interests of a client, the New Jersey Rules clearly do not.

A central theme of the New Jersey Rules is that accountability to the public interest, at times, requires that the lawyer subordinate the duty of loyalty to the client to the duty of candor to the court, or respect for the rights of third parties. To a large extent, the New Jersey Rules simply reaffirm long-standing policies and principles given expression in New Jersey case law.[33] In

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31 *See* PATTERSON, *supra* note 10, at 40, for the view that there are only three fundamental duties of the lawyer.

32 *See* MODEL CODE, *supra* note 14, EC 7-1, "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." *Id.*

33 New Jersey has a significant body of case law defining the appearance of impropriety standard, which is preserved in NEW JERSEY RULES, *supra* note 15, Rule 1.7(c). Part of the mandatory disclosure provisions of NEW JERSEY RULES, *supra* note 15, Rule 1.6(b), are also consistent with case law limitations on the duty of confidentiality. *See In Re* Richardson, 31 N.J. 391, 157 A.2d 695 (1960) (required disclosure of identity of party who paid legal fees); *In Re* Selser, 15 N.J. 393, 105 A.2d 395 (1954) (required disclosure of name of deceased client to aid investigation of criminal activities); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979) (required disclosure of professional confidences necessary to prevent physical harm to third person); *In Re* Grand Jury Subpoena Upon Levy, 165 N.J. Super. 211, 397 A.2d 1132 (1978) (required disclosure of evidence by public defender which might establish that fraud was perpetrated on his office by a client who knowingly misrepresented his case). *See also* N.J. COURT RULES, *supra* note 5, Rule 1:21-7, which requires a written fee agreement in connection with actions for dissolution of marriage.

a few new rules, however, there may be the beginnings of a significant modification of the lawyer's role in the adversarial system.[34] Where the previous New Jersey DRs were not always clear about the scope of the lawyer's required disclosure of client confidences, the new rules leave little doubt.[35] For example, the confusion over the apparent inconsistency of former New Jersey DR 4-101(C)(3), which permits disclosure of a client's intention to commit a crime, and New Jersey DR 7-102(B)(1), which requires disclosure of a client's fraud, has been avoided in the new rules.[36]

By adopting the Model Rules, the New Jersey Supreme Court recognized the need for separate rules for the different functions lawyers perform. Model Rules 2.2 and 2.3 and the New Jersey parallel rules are illustrative of the new rules guiding lawyers who perform in other than conventional roles.

B. *The Ethics of Counseling*

Model Rule 2.2 and New Jersey Rule 2.2 permit the lawyer to act as an intermediary. This rule has no counterpart in the former Code or DRs of New Jersey. The rule specifically requires that: (1) the lawyer obtain each client's consent to the common representation, after explaining to each client the advantages and risks involved and the effect on the attorney-client privileges; (2) the lawyer reasonably believes that the matter can be resolved in the best interests of both clients, with each client able to make reasonably informed decisions and having little risk of material

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[34] N.J. RULES, *supra* note 15, Rule 3.3(a)(5), in particular may have a dramatic impact on the advocate's role by requiring the disclosure of information necessary to avoid misleading the court. N.J. RULES, *supra* note 15, Rules 1.6(b) and 4.1 significantly expand the scope of mandatory disclosure of client confidences.

[35] *Id.*

[36] Former New Jersey Disciplinary Rules, DR 7-102(B)(1) required "[a] lawyer who receives information clearly establishing that: (1) [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." The language of this rule is very ambiguous, especially the phrase "clearly establishing." How clear must the information be? Must it be clear to a reasonably prudent lawyer? *See In Re* Callan, 66 N.J. 401, 331 A.2d 612 (1975), which held that three Legal Service attorneys were not guilty of contempt of court because of their failure to disclose disbursement of rent money held in escrow by rent strike leaders. These attorneys had advised their clients to obey the law and had not acted for personal pecuniary gain but in accordance with their duty to their clients.

prejudice if the attempt at resolution fails; and (3) the lawyer reasonably believes that the representation can be impartial and consistent with other responsibilities to any of the clients. This rule reflects an appreciation of the capacity of the lawyer to act as peacemaker, when the parties to a dispute are both clients who have already reposed trust and confidence in the lawyer. The Comment to the rule notes that it is not applicable to a lawyer who acts as a mediator or arbitrator in a dispute between non-clients.[37] The Comment also points out the significant risk to both the lawyer and the clients if the intermediation fails.[38] Failure may result in additional costs, embarrassment, and recrimination. What is most significant about the rule is that it encourages the lawyer to seek a quick and amicable settlement of a dispute at a low cost. Lawyers are often accused of exacerbating disputes in unbridled zeal for clients, or worse, in selfish pursuit of personal gain. Although the risks are many, the willingness of lawyers to undertake mediation of disputes between clients enhances the perception of the lawyer as conciliator and problem solver. It serves both clients well and consequently it fosters the strong public policy in favor of settlements.

Model Rule 2.3 and New Jersey Rule 2.3 recognize that the lawyer sometimes has a duty to non-clients when rendering a legal evaluation for a client. Although this rule, which has no counterpart in the former Code or New Jersey DRs, has particular significance in securities practice, it has a much broader application. For example, the lawyer's response to a request from an auditor for an opinion on the contingent liabilities of a client requires careful consideration of the interests of non-clients,[39] in

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[37] MODEL RULES, *supra* note 14, Rule 2.2 comment points out that the lawyer who acts as an arbitrator or mediator between non-clients may be subject to the Code of Ethics for Arbitration in Commercial Disputes prepared by a Joint Committee of the American Bar Association and the American Arbitration Association.

[38] MODEL RULES, *supra* note 14, Rule 2.2 comment notes that there are definite limitations on the lawyer's role as intermediary and that where the risks of failure are great it may be impossible for the lawyer to act as intermediary.

[39] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (1981), which held that a lawyer should not issue a tax shelter opinion letter in the absence of a "reasonable likelihood" that the investing taxpayer would obtain the tax benefit. ABA Comm. on Ethics and Professional Responsibility (revised 1982), abandoned this absolute rule in favor of a general prohibition against a "false opinion which ignores or minimizes serious legal risks." *See also In Re* Carlsen, 17 N.J. 338, 111 A.2d 393 (1955), for the view that an attorney must act in his business

that it will obviously be relied upon by an auditor who requests it, and third parties will rely on both that opinion and the auditor's conclusions derived from it. The ABA has established guidelines for the rendering of such opinions which reinforce the lawyer's duty of fairness to others when providing a legal evaluation for a client upon which others are likely to rely.[40]

The most pervasive lawyer role is that of counselor.[41] In conjunction with every role he or she may perform, a lawyer always has the duty to counsel clients about available choices. Although the rules of professional conduct are divided into rules of general application and rules applicable to specific roles, it may not always be clear which rules apply in a specific situation. Moreover, in the performance of different roles, the rules may provide some guidance but rarely do they, nor can they, give clear and certain answers.

The Model Rules and the New Jersey Rules set forth affirmative duties and specific limitations on the lawyer's role as counselor. Rule 1.1 requires competent representation, and is one of the few Model Rules which is more stringent than the corresponding New Jersey version. A single act of simple negligence can be the basis for discipline under Model Rule 1.1. New Jersey Rule 1.1 provides for gross negligence or a pattern of negligence or neglect as the standard of prohibited conduct.[42]

In both versions, Rule 1.2(a) requires the lawyer to respect the client's right to control the objectives of the representation, although Rule 1.2(c) permits the lawyer to limit the objectives of the representation if the client consents after consultation. Rule

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transactions with the same high standards as when he acts as a lawyer, and cannot shed his professional obligations to persons who have reason to rely on him, even though they are not strictly his clients. *See also* Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976), *cert. denied*, 72 N.J. 459, 371 A.2d 63 (1976). *Cf. In Re* Palmieri, 76 N.J. 51, 385 A.2d 856 (1978). *See generally* Annotation, *Attorney's Liability, To One Other Than His Immediate Client, for Consequences of Negligence In Carrying Out Legal Duties*, 45 A.L.R. 3d 1181 (1972). Similar situations in which a lawyer might owe a duty to third parties justifiably relying upon his professional performance might include purchasers of a limited partnership interest where an attorney prepared the offering documents, purchasers of corporate debt or equity securities where an attorney prepared the prospectus, or purchasers of subdivided real estate where an attorney handled the subdivision.

40 *See* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 369-73 (3d ed. 1984).

41 WOLFRAM, *supra* note 9, at 687-770.

42 NEW JERSEY RULES, *supra* note 15, Rule 1.1.

1.2(d) prohibits the lawyer from counseling or assisting the client in the perpetration of a criminal or fraudulent act. New Jersey Rule 1.2(d) goes further than the Model Rule by also prohibiting counseling or assisting a client in performance of an illegal act, and proscribing the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law. In both versions, Rule 1.3 requires diligence and Rule 1.4 requires communication with the client.[43]

Rule 1.13 of the Model Rules and Rule 1.13 of the New Jersey Rules require a lawyer for an organization to proceed as is reasonably necessary in the "best interests of the organization" when confronted with wrongful conduct by its officers, employees, or agents. Although the rule does not permit disclosure to persons outside the organization, it does permit the attorney to resign as counsel for the organization. The original version of this rule in the Discussion Draft of the Model Rules authorized disclosure of an intention of an officer, employee, or agent to commit an illegal act threatening serious harm to the entity. The final ABA version and the New Jersey version of Rule 1.13 require the lawyer to "blow the whistle" on wrongdoing by an officer, employee, or agent of an organization, at least to the extent that disclosure to the highest authority of the entity is required. In *Pierce v. Ortho*,[44] the New Jersey Supreme Court held that the firing of a professional for refusing to perform acts in violation of his profession's code of ethics was a wrongful discharge.[45] *Pierce* offers encouragement to corporate and government lawyers to act in the public interest and to invoke the rules of conduct in defense of their position.

There is a consistent thread in the ABA Canons, Model Code, Model Rules, and New Jersey Rules distinguishing the lawyer's role as a counselor from other roles lawyers perform.[46] A lawyer may refuse to assist a client in actions which may be legally

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[43] The failure of lawyers to communicate with clients has been a major reason for client dissatisfaction and ethical complaints.

[44] 84 N.J. 58, 417 A.2d 505 (1980).

[45] *Id.* at 73.

[46] *See, e.g.*, MODEL CODE, *supra* note 14, EC 7-3, which states:

> A lawyer may serve simultaneously as both an advocate and advisor but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as

permissible but morally repugnant to the lawyer.[47] Considerations of the right to counsel and other constitutional guarantees granted to a criminal defendant have no bearing on a lawyer's conduct in civil matters. This obvious fact is often ignored by those who seek to justify an extreme adversary ethic.

How should a lawyer decide to exercise his or her discretion in limiting the scope of representation, or deciding not to accept or continue representation? Are such decisions a matter for the individual lawyer's conscience or are there professional values that transcend the rules and guide lawyers in the exercise of their autonomy? When a lawyer acts as a representative of a client in contexts where, for example, constitutional rights to counsel and due process apply, to what extent should the values of truth and justice be considered paramount to the narrow interests of the client? Professional rules of conduct cannot provide comprehensive answers to these kinds of questions.

C. *The Ethics of Advocacy*

The adversary system is often invoked as a justification for assisting clients to do what is legally permissible but morally wrong.[48] Particular aspects of the adversary system, such as the right to counsel, and the lawyer's duty to preserve client confidences, however, do not necessarily require the subordination of the values of truth and justice. There are a number of approaches one may consider in light of the competing interests of the client, the lawyer, and the public. The problem of client perjury for example can be dealt with in different ways. One approach, advocated by Dean Monroe Freedman, a staunch defender of adversary ethics, is to consider the constitutional rights of the client as primary, thus subordinating the public interest in ascertaining the truth to those constitutional rights.[49] A lawyer's conduct should therefore be judged on the basis of the loyalty owed to the client rather than the competing duties to the

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advisor primarily assists his client in determining the course of future conduct and relationships.

Id.

47 *See, e.g.*, MODEL CODE, *supra* note 14, DR 2-110, which allows withdrawal, as does MODEL RULES, *supra* note 14, Rule 1.16.

48 *See* Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. REV. 63 (1980).

49 *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

legal system and the public interest. This approach would allow the lawyer to remain silent about client perjury because it emphasizes the value of individual autonomy and respect for individual rights. A second solution in determining the scope of permissible lawyer conduct in a client perjury problem is to consider the public interest in ascertaining the truth as primary, rather than the constitutional rights of the client.[50] Here, the lawyer's role as an officer of the court and as a public servant would require disclosure of the perjury, or refusing to allow the client to commit perjury. A third approach to the problem is to balance the competing interest. An ABA proposed Standard on Professional Responsibility provides that the lawyer may tolerate the client's perjury, but requires that the lawyer disassociate from the perjurious testimony by not eliciting it in the ordinary manner, and not referring to it in summation.[51]

Perhaps the best approach is to consider the limitation on the client's constitutional rights as the primary factor in determining the lawyer's duty.[52] Simply put, there is no constitutional right to commit perjury; therefore, a lawyer cannot have a duty to assist a client in committing perjury.[53]

Model Rule 3.1 and New Jersey Rule 3.1 limits the amount of zeal required of the advocate. The rule proscribes actions by the lawyer that are frivolous.[54] It is not frivolous for the lawyer to make a good faith argument for an extension, modification, or

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50 *See generally* Frankel, *The Search for Truth; An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

51 *See ABA Standards Relating to the Administration of Criminal Justice*, Standard 4-7.7, *reprinted in* 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (T. Morgan & R. Rotunda eds.) (Standard 4-7.7 has not been approved by the ABA House of Delegates).

52 PATTERSON, *supra* note 10, at 239.

53 Additionally, perjury is both a crime and a fraud perpetrated upon a tribunal; it is well-settled that a lawyer may not counsel or assist a client in such an action. *See* Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976).

54 An attorney may be disciplined for violation of N.J. COURT RULES, *supra* note 5, Rule 1:4-8, which requires an attorney to certify "that he has read the pleading or motion; that to the best of his knowledge, information and belief there is good ground to support it; that it does not contain scandalous or indecent matter, and that it is not interposed for delay." *Id.* Rule 11 of the Federal Rules of Civil Procedure is virtually the same as the New Jersey rule. *See* Risinger, *Honesty in Pleading and Its Enforcement: Some Striking Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 52 (1976), for a good discussion of what constitutes grounds to support a pleading or motion.

reversal of existing law, or where a client may be incarcerated to insist on proof of every required element of the case.

Under Model Rule 3.3 and New Jersey Rule 3.3, a lawyer must not offer evidence he or she knows to be false, and may refuse to offer evidence reasonably believed to be false. When confronted with the fact that his or her client has committed perjury, the lawyer is required to take remedial measures which include remonstrating the client, withdrawal as counsel, or disclosure to the court. When confronted with the fact that a client intends to commit perjury despite the attorney's threat of disclosure, and the refusal of the court to allow withdrawal, an attorney has a Hobson's choice. If he or she refuses to go forward with the case, the court may order the attorney to continue and hold him or her in contempt for refusing. Conversely, if the lawyer elicits the perjury, he or she will violate the rule. In a recent Florida case, *State v. Rubin*,[55] a lawyer was held in contempt for his refusal to comply with a court order on the ground that compliance would require him to elicit perjury. *Rubin* squarely addresses the question of whether the lawyer's duties as an advocate and as an officer of the court may justify sacrificing the intrinsic value of truth to the values of the adversarial system.

In *Strickland v. Washington*,[56] the U.S. Supreme Court held that relief for deprivation of the Sixth Amendment right to effective assistance of counsel may only be had with a showing of serious attorney error and prejudice, which deprives the defendant of a fair trial.[57] The Court found that the right to counsel does not require a particular standard of professional conduct:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.
>
> More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. *See*

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55 490 So.2d 1001 (Fla. Dist. Ct. App. 1986).

56 466 U.S. 668 (1984).

57 *Id.* at 684-87.

Michel v. Louisiana, 350 U.S. 91, 100-101 (1955).[58]

Recently, in *Nix v. Whiteside*,[59] the U.S. Supreme Court determined that it was not a violation of the defendant's right to counsel when his lawyer's threat to reveal his perjury induced him to abandon his alibi defense. The Court reaffirmed the *Strickland* standard for effective assistance of counsel under the sixth amendment[60] and refused to intrude into a state's authority to define and apply standards of professional conduct.[61]

New Jersey Rule 3.3(a)(5), which has no counterpart in the Model Rules, raises more questions about the scope of the advocate's duty of candor. This rule, perhaps more than any other, illustrates the modification of the adversary system so as to render it more consistent with the value of truth. The rule provides that the lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that the tribunal may tend to be misled by such failure. The rule seems to conflict with the basic premise that an advocate must present a client's cause in its best light.[62] It has long been recognized that the lawyer has no duty to reveal adverse facts or to come forward with adverse witnesses.[63] The advocate has a duty to offer evidence which is the truth; however, it need not be the whole truth. The basic assumption is that the truth will emerge out of the clash of adversarial presentation of the evidence.

The language of New Jersey Rule 3.3(a)(5) is extremely broad, and requires the advocate to make difficult decisions concerning which facts may be material or misleading to a court if not disclosed. Applicable to criminal and civil litigation contexts, this rule applies to facts that are at issue in the case, as well as to facts relating to the management of the case. Although a court's interpretation of the rule would have to take into account the constitutional rights of a criminal defendant, the rule requires the advocate to assist the court directly in the search for the truth. The implications for the trial lawyer are far reaching. This rule may have an undesirable chilling effect on zealous advocacy. Advocates will surely tread more lightly

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58 *Id.* at 687-88.

59 475 U.S. —, 106 S. Ct. 988 (1986).

60 *Id.*

61 *Id.*

62 *See* H. BERMAN, TALKS ON AMERICAN LAW 30-43 (1960); L. FULLER, THE ADVERSARY SYSTEM 30. *See* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 120-35 (1978). *See also* MODEL CODE, *supra* note 14, EC 7-19.

63 FREEDMAN, *supra* note 49, at 2-3.

in the face of the affirmative obligation to disclose adverse facts. It may impose too great a burden on defense counsel in criminal cases, especially in the absence of a clear, fixed standard for the sixth amendment guarantee of effective assistance of counsel.[64]

The absence of an adversarial presentation of the facts in an *ex parte* proceeding necessitates a fair presentation of the facts by a lawyer so as not to mislead a tribunal. Model Rule 3.3(d) and New Jersey Rule 3.3(d) require a lawyer in such a proceeding to inform the tribunal of all relevant facts, which will enable the tribunal to make an informed decision about which facts are adverse. This rule further underscores the duty of the lawyer as an officer of the court to avoid overzealous advocacy.

D. *The Ethics of Negotiation*

When a lawyer negotiates on behalf of a client with another lawyer or with an unrepresented party, Model Rules 4.1-4.3 and New Jersey Rules 4.1-4.3 are applicable. New Jersey Rule 4.1 requires a lawyer to make disclosure of a material fact to third persons when necessary to avoid assisting a criminal or fraudulent act of a client. The duty of disclosure under New Jersey Rule 4.1 applies even if compliance requires disclosure of confidential information otherwise protected by New Jersey Rule 1.6.[65] Model Rule 4.1 is a permissive rather than a mandatory rule and permits disclosure of material facts to third persons only if the information is not protected by Model Rule 1.6. When one considers the complete absence of mandatory disclosure requirements under Model Rule 1.6, it is unlikely that disclosure to third parties of a client's crime or fraud will occur.[66]

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64 Strickland v. Washington, 466 U.S. 668, 684-87 (1984).

65 N.J. RULES, *supra* note 15, Rule 1.6 creates an affirmative duty to disclose client confidences as follows:

> as soon as, and to the extent necessary, to prevent the client (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

66 MODEL RULES, *supra* note 14, Rule 1.6(b) permits disclosure of a client's confidential information to the extent the lawyer reasonably believes necessary to prevent the client from committing the criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm or in self-defense of a charge brought against the lawyer.

Neither the Model Rules nor New Jersey Rules specifically address two important issues that arise in a negotiation context: (1) What duty does the lawyer have to investigate facts to determine the truthfulness of representations made by the client? and (2) What are the limits of negotiation tactics?

The duty of mandatory disclosure of material facts to third parties is at its highest in securities law practice. Section 11 of the Security and Exchange Commission Act of 1933 (SECA) has been interpreted to require that the lawyer who is subject to the Act fulfill the same duty of disclosure as his or her client.[67] Even negligent failure to make required disclosures has resulted in liability of a lawyer for aiding and abetting a violation of SECA Rule 10(b)(5).[68] In a securities context, therefore, a lawyer may have a duty of due diligence akin to that of an independent auditor. In *Rosenblum v. Adler*,[69] the New Jersey Supreme Court held an accountant-independent auditor liable to third parties for money damages. The Court reasoned that he should have reasonably foreseen that negligent misrepresentation in a financial statement would have been relied upon. Attorneys have also been held liable to third parties not truly their clients, under circumstances where the third party had a reasonable basis for reliance upon the attorney.[70] The mandatory disclosure provisions of New Jersey Rules 1.6 and 4.1, as well as New Jersey Rule 1.2(d)'s prohibition against counseling or assisting a client in the commission of an illegal, criminal, or fraudulent act may ultimately lead to a similar duty of due diligence imposed upon lawyers negotiating for clients in a business context. As reflected in the Restatements, the development of the concept of fraud in tort and contract law creates risks of civil liability for negligently or innocently made false statements or nondisclosures in negotiating.[71]

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[67] *See* SEC v. Nat. Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978). *See also In Re* Carter and Johnson, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb 28, 1981).

[68] SEC v. Nat. Student Mktg. Corp., *supra* note 67, at 710 and cases cited therein.

[69] 93 N.J. 323, 460 A.2d 1057 (1983).

[70] Stewart v Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976). *See also* Annotation, *supra* note 40.

[71] RESTATEMENT (SECOND) OF TORTS §§ 551, 552 (1977), sets forth the standards for tort liability for nondisclosure that could conceivably be a basis for a lawyer's liability to third parties where he is silent about material facts or facts basic to the transaction.

If lawyers are deemed to have a duty to be advocates for the public interest, their conduct will be scrutinized in that light. The mere presence of a lawyer in a transaction is, perhaps, a basis for reliance by third parties. Outside a litigation context, the adversarial system excuse loses its force. There are no fundamental rights of a client to expect the silence of the lawyer in the face of questionable circumstances. Because their roles are radically different, it would not be fair to impose a duty of due diligence on lawyers negotiating for clients which is equal to that of auditors. It is not unreasonable, however, to expect lawyers to refrain from conduct in negotiations that may be so misleading as to be tantamount to fraud.

Regarding the scope of negotiation tactics, one issue may be whether it is proper for a lawyer to attempt to gain an advantage over another lawyer or an adverse party by threatening to use information that is embarrassing or harmful, but totally unrelated to the subject of the representation. This may be improper, but the difficulty of applying such a standard is obvious: When is information irrelevant or totally unrelated to the subject matter of the representation?

Many of the negotiation tactics employed by lawyers may appear to the ordinary person to be violations of common stan-

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§ 551 Liability for Nondisclosure:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question;

(2) One party to a business transaction is under a duty to disclose to the other before the transaction is consummated, . . .

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the custom in the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

§ 552. Information Negligently Supplied for the Guidance of Others:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . .

dards of morality.[72] The deliberate attempt to mislead the adverse party as to the state of mind of a client is typical of such tactics. The willingness of a client to settle a disputed claim for a certain sum of money, for example, need not be communicated to an adverse party. The lore of the profession or the "rules of the game" permit attorneys to be less than candid.[73] It is standard practice for defense counsel attempting to settle a claim, to assert that his or her client will pay nothing or an amount far less than what the client has actually authorized. There are many other negotiating techniques, with various labels, that raise questions about the veracity of lawyers. They include puffing, feigned anger, the use of ultimatums, play acting, delaying, trial ballooning, playing dumb, deliberate misstatement, and outright lying.[74] The ethical propriety of any one of these techniques depends upon their potential to induce reasonable reliance on the part of the adverse party. The knowledge that lawyers regularly engage in such tactics minimizes the possibility that such posturing will constitute improper conduct. Actions appearing to the ordinary person to be wrongful per se may be justifiable when viewed in the context of the lawyer's role, conflicting duties, and legitimate competing interests.

Perhaps moral and legal evaluations of the lawyer's conduct have to take into account the difference between the lawyer's and the logician's view of truth. To a logician a proposition is either true or false. Some statements of a lawyer, however, may not be true in any ultimate sense (i.e. an absolute sense) but the lawyer may not necessarily be lying (i.e. making a false statement). In fulfilling the role of negotiator, a lawyer may make many statements which are not factual assertions or propositions and which are not to be taken literally.

The negotiation function also involves a certain amount of advocacy. As an advocate, a lawyer illuminates or emphasizes those facts which place the client's position in its best light. The Model Rules applicable to the advocate set forth the only guide-

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72 *See generally* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

73 P. SPERBER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS 781-82 (1985). *See also* White, *Machiavelli and the Bar: Ethical Limitations On Lying in Negotiations*, 1980 A.B.A.J. 926.

74 SPERBER, *supra* note 73, at 793-98.

lines which are permitted the lawyer in statements made on behalf of clients. Model Rule 3.3 (Candor Toward the Tribunal) prohibits a lawyer from making a false statement of material fact, failing to disclose a material fact when necessary to avoid assisting a criminal or fraudulent act by a client, or offering evidence the lawyer knows to be false. The Comment indicates that the Rule is applicable when assertions are made purporting to be based on the lawyer's own knowledge. Most statements lawyers make, however, are not based on personal knowledge, but on information acquired from the client and other sources. The rule does not set forth limitations upon the lawyer's use of truthful information. Model Rule 8.4, which is the same as the New Jersey version, provides no specific limitation on the use of truthful information by lawyers. Rule 8.4 states, in part, "it is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."

Additionally, New Jersey Rule 3.3(a)(5), which has no counterpart in the Model Rules, puts a substantial limitation on the latitude permitted to the lawyer in making statements on behalf of a client. What may be a moral dilemma for a lawyer bound by Model Rule 3.3, is also a concrete legal problem for New Jersey lawyers faced with mandatory compliance with New Jersey Rule 3.3(a)(5). The traditional adversary system excuse for speaking in half truths, or making truthful representations that may be misleading is no longer viable in the light of New Jersey Rule 3.3(a)(5).

E. *The Appearance of Impropriety*

New Jersey Rules 1.7-1.12 (conflicts of interest) include the "appearance of impropriety" standard. The Kutak Commission concluded that such a standard is too vague to be appropriate for disciplinary purposes and did not include it in the Model Rules.[75]

New Jersey Rule 1.7(c) maintains the positions established in case law and ethics opinions prohibiting consent by a public entity in cases involving actual or apparent conflicts. This Rule also prohibits representation where there would be an appearance of

[75] *See* MODEL RULES, *supra* note 14, Rule 1.7 comment.

impropriety,[76] and states that such an appearance exists where "an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients." The language of this rule, perhaps as much as any language in the New Jersey Rules manifests the primacy of the public interest over client and lawyer interests.

The scope of imputed disqualification under New Jersey Rules 1.10 and 1.11 is extensive. The impact of these rules on the mobility of lawyers and the capacity to recruit the best lawyers for government service should concern the bar.[77] Model Rule 1.11 adopts the so-called Chinese Wall approach, screening lawyers in a firm subject to disqualification because of the lawyer's participation in, or responsibility for a matter while they were employed by a government agency. This approach still permits the firm to supply representation. New Jersey Rule 1.11, however, does not permit screening of a disqualified lawyer unless the disqualification is based on the ground of an appearance of impropriety. New Jersey is alone among the twenty-two states adopting the Model Rules in maintaining the appearance of impropriety standard. A review of the case law preserved by New Jersey Rule 1.7(c) indicates that lawyers are not likely to be disciplined for violating the appearance of impropriety standard where there is no actual conflict of interests.[78] Its inherent ambi-

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[76] *Report of the Supreme Court Committee on the Model Rules of Professional Conduct*, N.J.L.J., July 28, 1983, at 3 [hereinafter Report of Committee on Rules of Conduct].

[77] New Jersey Supreme Court opinions are laced with repeated references to the appearance of impropriety as an important principle in determining whether an attorney had an impermissible conflict of interest or should otherwise be prohibited from multiple or successive representation, but there appears to be no case in which an attorney was disciplined solely for violating the appearance of impropriety standard. *See, e.g.*, *In Re* A & B, 44 N.J. 331, 209 A.2d 101 (1965); Reardon v. Marlayne, 83 N.J. 460, 470, 416 A.2d 852 (1980); Perillo v. Advisory Comm. on Professional Ethics, 73 N.J. 123, 128-29, 373 A.2d 372 (1977); *In Re* Cirpiano, 68 N.J. 398, 346 A.2d 393 (1975); Ahto v. Weaver, 39 N.J. 418, 189 A.2d 27 (1963); *In Re* Opinion 452, 87 N.J. 45, 432 A.2d 829 (1981).

[78] *See* Reardon v. Marlayne, 83 N.J. 460, 416 A.2d 852 (1980), where the New Jersey Supreme Court rejected the notion that status in a law firm and problems of job mobility should be significant factors in determining conflict of interests questions. The violation of the "appearance of impropriety" standard has never been used as the sole ground for disciplining an attorney in New Jersey. *See supra* cases cited in note 77.

guity poses difficulty for both lawyers and reviewing authorities and is in stark contrast to the specificity and concreteness generally characteristic of the new rules of conduct. The flexibility of the standard, however, suggests the degree to which the New Jersey Supreme Court will be solicitous of the public interest. This standard is so overly broad that its application threatens to undermine important social interests. Absent a convincing demonstration based on empirical data that the rule has a definite and substantial adverse affect on the costs of legal services, the employment prospects for lawyers, and the recruitment of lawyers for government service, the New Jersey Supreme Court is not likely to abolish the rule. As long as the dangers inherent in a blanket application of the doctrine are avoided, continued application of the balancing approach can foster the public interest without undermining client and lawyer interests.

F. *The Economic Interest of Lawyers*

Model Rule 1.5 and New Jersey Rule 1.5 require a lawyer's fees to be reasonable. Both set forth the same eight factors to be considered in determining the reasonableness of a fee.[79] New Jersey Rule 1.5(b) requires that the basis or rate of the fee be communicated in writing to a client not regularly represented either before or within a reasonable time after commencing the representation. Model Rule 1.5(b) merely provides that the basis

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79 MODEL CODE, *supra* note 14, DR2-106, contains the same eight factors. These are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

See MODEL RULES, *supra* note 14, Rule 1.5(e); N.J. RULES, *supra* note 15, Rule 1.5(a); MODEL CODE, *supra* note 14, DR2-106.

or rate of fee shall be communicated "preferably in writing."[80]

Model Rules 5.1-5.6 and New Jersey Rules 5.1-5.6 outline the standards applicable to lawyers in their economic relations with other lawyers and non-lawyers. Model Rule 5.1(a) requires a partner of a law firm to make reasonable efforts to insure that all lawyers in the firm comply with the rules of professional conduct. New Jersey Rule 5.1 differs slightly, and requires "every law firm and organization authorized by Court Rules to practice law" to make such efforts. The New Jersey version of Rule 5.1 also varies from its Model Rule counterpart in that it does not impute responsibility upon a partner for the ethical violations of other lawyers unless the partner had direct supervisory authority over them.

Rule 5.2 is the same in the New Jersey Rules and the Model Rules. It requires a lawyer to comply with the rules of conduct despite the directions of a superior to act contrarily. The rule does, however, permit a subordinate lawyer to act in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. This rule, which has no counterpart in the former Model Code, provides at least some guidance to the subordinate lawyer faced with pressure to act in the face of questionable circumstances.

Model Rule 5.3 and New Jersey Rule 5.3 require lawyers to take reasonable measures to insure that a non-legal assistant maintains conduct compatible with a lawyer's professional obligations. Additionally, the New Jersey version of the Rule requires a lawyer to make a reasonable investigation to determine if a non-legal assistant has a propensity for such conduct.[81]

Model Rule 5.4 and New Jersey Rule 5.4, entitled Professional Independence of a Lawyer, proscribe fee sharing with a non-lawyer, but permit payment of money to a deceased lawyer's estate as compensation for services performed. The Rule also allows inclusion of non-lawyer employees in a compensation or

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80 MODEL RULES, *supra* note 14, Rule 1.5, as originally drafted, required a writing setting forth the basis for a legal fee. It was among the most controversial provisions of the new Model Rules. N.J.L.J. Supp., July 28, 1983, at 10-12. A similar rule was already in place in New Jersey in connection with actions for the dissolution of marriage. *See* N.J. COURT RULES, *supra* note 5, Rule 1:21-7(a).

81 *See* N.J. RULES, *supra* note 15, Rule 5.3 comment. *See also* Dicosala v. Kay, 91 N.J. 159, 169-80, 450 A.2d 508 (1982).

retirement plan. Rules 5.5 and 5.6 are identical in the Model Rules and the New Jersey Rules. Rule 5.5 prohibits a lawyer from assisting in the unauthorized practice of law so as to protect the public against rendition of services by unqualified persons. Rule 5.6 proscribes the making of an agreement that restricts the right of a lawyer to practice after termination of a relationship, except through an agreement concerning retirement benefits, or as a settlement of a dispute between private parties.

Model Rules 7.1-7.3 and New Jersey Rules 7.1-7.3, addressing advertisement and solicitation, permit lawyers to aggressively market their legal services. These Rules incorporate the United States Supreme Court decisions which have afforded limited first amendment protection to commercial speech by lawyers. In *Bates v. State Bar of Arizona*,[82] states were barred from imposing blanket prohibitions against truthful advertising of routine legal services. The Court concluded that such a blanket prohibition "serves to inhibit the free flow of commercial information and to keep the public in ignorance."[83] The Court in *In Re R.M.J.*[84] held that a Missouri statute which restricted the advertising of attorneys to specific statements regarding their field of practice was unconstitutional when applied to an attorney who used a different description that was completely truthful and not misleading. The Court indicated that state regulation of attorney advertising may go beyond merely restricting false and misleading statements if the regulation passed the three pronged test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[85] If the restriction is designed to serve a substantial state interest, and, in fact serves that interest, and if it is the least restrictive alternative available, then it is in accord with the *Central Hudson* formula, and therefore consistent with the requirements of the first amendment.[86]

The Court in *In Re Primus*[87] determined that an attorney's offer of free legal services in pursuit of ideological goals of a nonprofit organization of which the attorney is a member constituted

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82 433 U.S. 350 (1977).
83 *Id.* at 364.
84 455 U.S. 191 (1982).
85 447 U.S. 557 (1980).
86 *Id.* at 566.
87 436 U.S. 412 (1978).

protected political speech.[88] In *Ohralik v. Ohio State Bar Association*,[89] decided on the same day as *Primus*, the Court held that it was not a denial of constitutionally protected commercial speech to prohibit an attorney's in-person solicitation for pecuniary gain.[90]

Rule 7.1 is identical in the Model Rules and the New Jersey Rules. It proscribes false and misleading communications about a lawyer or the lawyer's services, and sets forth the criteria to determine if a communication is false or misleading. New Jersey Rule 7.2, as originally adopted, differed substantially from the corresponding Model Rule. Both versions of 7.2(a) permit a lawyer to advertise through all forms of public media. The New Jersey Rule, however, as originally adopted, also required all advertisements to be presented "in a dignified manner without the use of drawings, animations, dramatization, music or lyrics." New Jersey Rule 7.2(b) requires that a copy of the communication be kept three years after its dissemination while the corresponding Model Rule requires it be kept only two years.

New Jersey Rule 7.2 was challenged in the recent case of *In the Matter of the Petition of Felmeister & Isaacs*.[91] In *Felmeister*, the New Jersey Supreme Court concluded "that the public interest would be better served by a revised rule requiring that all attorney advertising be predominantly informational, and limiting the use of drawings, animations, dramatization, music or lyrics to television advertising."[92] The Court's revised rule, effective January 1, 1987, eliminates the requirement of presentation "in a dignified manner," but continues the prohibition on false and misleading advertising.[93] The Court based its decision on public policy and federal constitutional grounds.[94] The prohibition on the use of "drawings, animations, dramatization, music or lyrics" was considered unwise policy and unconstitutional, at least as applied to print advertising.[95] The New Jersey court was bound by the United States Supreme Court's decision in *Zauderer v. Office of*

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88 *Id.* at 431.
89 436 U.S. 447 (1978).
90 *Id.* at 468.
91 104 N.J. 515, 518 A.2d 188 (1986).
92 *Id.* at 516, 518 A.2d at 188-89.
93 *Id.* at 553, 518 A.2d at 208.
94 *Id.* at 517.
95 *Id.*

Disciplinary Counsel.[96]

In *Zauderer*, an attorney was sanctioned for, *inter alia*, placing an advertisement in thirty-six Ohio newspapers publicizing his willingness to represent women who had suffered injuries as a result of their use of a contraceptive device known as the Dalkon Shield Intrauterine Device.[97] The advertisement featured a drawing of the Dalkon Shield and related helpful advice and other truthful and non-misleading information.[98] The Court held that a state could not prohibit truthful, non-misleading advertising indicating an attorney's experience with a particular kind of litigation and containing limiting advice, nor non-deceptive illustrations that not only attract attention to the ad but convey information.[99]

New Jersey Rule 7.3 is much more extensive than the corresponding Model Rule. Both versions of the rule reflect the rational of *Ohralik v. Ohio State Bar Association*,[100] but New Jersey Rule 7.3 is much more explicit. The Model Rule prohibits solicitation of "a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." The Model Rule permits the sending of letters or general distribution of advertising circulars "to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." In contrast to the general language of the Model Rule, New Jersey Rule 7.3 is very specific. As such, it affords greater protection of the public against the potential abuses of lawyers seeking to advance their personal economic interest. New Jersey Rule 7.3 provides in part, as follows:

> (b) A lawyer shall not contact, or send a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that

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96 471 U.S. 626 (1985).
97 *Id.* at 635.
98 *Id.* at 647.
99 *Id.* at 647-49.
100 436 U.S. 447 (1978).

the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves direct contact with a prospective client concerning a specific event when such contact has pecuniary gain as a significant motive.

Both Rules also set forth the standards for a lawyer's participation in a group or prepaid legal service plan. A lawyer may assist a public agency, a private non-profit organization, or a bona-fide prepaid or group legal services plan to promote the use of its legal services.

G. *Public Interest Legal Service*

Model Rule 6.1 and New Jersey Rule 6.1 are entitled differently but they are substantively the same.[101] Rule 6.1 is a hortatory expression rather than a rule. It states that lawyers should render public interest legal services. Public service is broadly defined to include: providing legal service at no fee or a reduced fee to persons of limited means, or to public service or charitable organizations; law reform activities; and financial support for organizations that provide legal service to persons of limited means.

The original draft of the Model Rules included a mandatory pro bono rule. The New Jersey Supreme Court rejected the recommendations of both the New Jersey State Bar and the Debevoise Committee for a mandatory rule. Opponents of a mandatory rule argue that such a rule: (1) undermines the sense of professional obligation to provide such services voluntarily; (2) constitutes a special tax on the legal profession; (3) places an unfair burden on the legal profession to perform an obligation of the society; and (4) would require a costly and cumbersome bureaucracy to enforce it.[102]

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[101] MODEL RULES, *supra* note 14, Rule 6.1; N.J. Rules, *supra* note 15, Rule 6.1.

[102] Report of Committee on Rules of Conduct, *supra* note 76, at 3.

H. *The Implications for Attorney Malpractice Liability*

In the preamble to the Model Rules there is a disclaimer of any intention to establish standards for civil liability for violation of the Rules. The New Jersey Supreme Court did not adopt that Preamble, and in *Malewich v. Zacharias*,[103] violation of disciplinary rules was held to be a basis for civil liability for malpractice.[104] The ethics rules are part of the implied terms of a contract between lawyer and client based on custom and usage of the legal profession. Just as violation of the rules of conduct can provide the basis for civil liability, the standards for civil liability may also provide the basis for discipline. The dramatic growth of the law of professional responsibility and legal malpractice suggests that lawyers can no longer think of professional ethics solely in terms of abstract principles. Some of the purposes of the two bodies of doctrine are the same. The civil liability of lawyers may serve as effectively as the threat of professional discipline to deter improper conduct and to protect the public interest. By their fidelity to the Rules of Professional Conduct, lawyers not only advance the public interest but also their own. Good ethics is good practice.

VI. Conclusion

Just as ethics and moral philosophy are subjects much wider in scope than law, professional responsibility transcends the law regulating the conduct of lawyers. The subject of professional responsibility has two different, but related, aspects: (1) the moral duties of lawyers; and (2) the legal duties of lawyers. Both aspects of professional responsibility are indissolubly interconnected. Because all law has ethical content, so too does the law governing lawyers. There is a reciprocal relationship between the standards of the community and those of the lawyer. In advising the client in a way which acknowledges the interests of others, the lawyer is aiding the client and also helping to shape the standards of the community.

Lawyers have been subjected to the charge that their professional conduct is immoral, or, at least, amoral. Much of the public criticism of the Bar springs from a misunderstanding of the

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[103] 196 N.J. Super. 372, 482 A.2d 951 (App. Div. 1984).
[104] *Id.* at 377.

nature of law, the adversary system, and the special duties inherent in the lawyer's role. Continuing efforts to educate the public about law and lawyers is an important function of bar associations. Their primary role is to insure that the standards of professional conduct meet the changing needs of both lawyers and the public. Maintaining public confidence in the competence and integrity of the legal profession is essential to the preservation of the rule of law and the proper functioning of our legal system.

The traditional model of the attorney-client relationship is that of the lawyer as advocate for a client in a criminal case. That model has served as the basis for codes of ethics which have consistently placed the interest of clients before the interest of the public. In New Jersey, at least, concern for the public accountability of lawyers has led to what may prove to be a significant modification of the lawyer's role in the adversary system. The New Jersey Supreme Court has clearly shown that it is the unavoidable responsibility of the lawyer to strike an appropriate balance of the competing interest of the public, the client, and the lawyer. By adopting the Rules of Professional Conduct, the Court has recognized the different roles lawyers perform and the special problems attached to each role. The New Jersey Rules do not reflect the traditional adversary ethics; thus, the response of the profession to these Rules will significantly affect the future of the bar in New Jersey.

The future of the legal profession depends upon the commitment of individual lawyers to render competent service to their clients while serving the profession and the public. The New Jersey Rules of Professional Conduct are not a panacea for the ills of the legal profession. They are, however, clearer, more concise, more concrete, and more comprehensive than the former Disciplinary Rules which they replace. As such, they are a more effective disciplinary tool. More importantly, they provide better guidance to lawyers faced with difficult ethical questions that arise from the unavoidable necessity to balance legitimate, competing interests. Experience with the New Jersey Rules will show whether lawyers are capable of being more accountable to the public without sacrificing the fundamental attributes of the lawyer's role as a representative of clients in the adversary system.