

# Conflict and Trust Between Attorney and Client\*

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*Professor Burt argues that mistrust pervades relations between attorneys and clients, though practical incentives and the formal norms of the legal profession lead both attorneys and clients to resist admitting this mistrust. Professor Burt further argues that the proposals regarding disclosure of client communications in the ABA Model Rules of Professional Conduct would add new incentives for such resistance and would exacerbate attorney-client mistrust. He suggests, paradoxically, that more stringent disclosure requirements might prompt honest exploration of attorney-client mistrust and might enhance trust in professional relations generally, even though attorneys would be required in some cases to forfeit clients' trust by disclosing their communications.*

Harmony between attorney and client is a cherished aspiration of the legal profession. Codes of professional conduct from the traditional canons to the most recently proposed reformulations posit that nothing "should be permitted to dilute [an attorney's] loyalty to his client"<sup>1</sup> and that "the client must place trust in the lawyer."<sup>2</sup> These aspirations are not empty preachments. Clients at least want to trust their attorneys; they come seeking support in actual or anticipated battles with adversaries. Attorneys want to offer at least the appearance of such alliance to clients if only to attract and hold their fees; and if attorneys can feel rather than feign this loyalty, they are obviously more comfortable in their daily work.

Even if both attorney and client aspire to attain the profession's formal vision of trusting, harmonious relations, many barriers arise in practice. Many attorneys and clients mistrust one another notwithstanding their initial hopes and the insistence of the profession's formal norms that a proper relationship requires mutual trust. This divergence between ideal and practice might seem inevitable and unremarkable. The professional codes, however, both reflect and reinforce an attitude, common among attorneys, that conflict with clients should be denied, rather than acknowledged and explored. This pretense obstructs the possibility that in many typical practice situations

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 [hereinafter ABA CODE]. With modifications, every state and the District of Columbia have adopted the ABA CODE as the basic standard of legal ethics. M. PIRSIG & K. KIRWIN, PROFESSIONAL RESPONSIBILITY 2 (3d ed. 1976).

2. ABA MODEL RULES OF PROFESSIONAL CONDUCT rule 1 (Discussion Draft 1980) ("Client-Lawyer Relationship") [hereinafter ABA MODEL RULES].

attorneys and clients will transcend their initial mistrust and learn that each deserves the other's trust. Paradoxically, therefore, the codes and common attitudes of the profession may defeat aspirations for attorney-client trust by discouraging the acknowledgment of mistrust.

The primary disincentive for such acknowledgment in the traditional codes has been the hallowed rule that attorneys may not represent clients with whom they are in conflict.<sup>3</sup> Professionally impermissible conflicts appear whenever an attorney prefers outcomes contrary to the client's wishes—for example, when the client's interests conflict with the financial or psychological well-being of the attorney<sup>4</sup> or some third party more favored by the attorney,<sup>5</sup> or when the attorney regards the client's wishes as illegal or immoral.<sup>6</sup>

The traditional codes do not require that the attorney-client relationship end at the first hint of conflict. They provide various routes for ending conflict while preserving the relationship. First, the attorney might alter his affairs or his opinions so that he can offer undivided loyalty to the client. This could entail withdrawing from a business or personal relationship with an actual or potential adversary of the client.<sup>7</sup> Second, the attorney might simply persuade himself that he can disregard his "personal" misgivings and offer adequately zealous advocacy on the client's behalf.<sup>8</sup> Finally, the attorney might disclose the conflict to the client and persuade the client either to change his wishes according to the attorney's preferences<sup>9</sup> or to disregard the conflict because it does not materially interfere with the attorney's loyalty.<sup>10</sup>

Notwithstanding the skepticism in the profession's canonical language, the various permutations of these routes for eliminating actual or apparent conflict have been heavily traveled in the world of practice. The traditional codes appear to prefer withdrawal from representation because of conflict, or the appearance of conflict.<sup>11</sup> This solution, however, is a harsh prescription for most attorneys because withdrawal costs them the particular client's business and might feed through the clients' grapevine an even more costly reputation for fractious adverseness. The attorney's withdrawal also can

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3. See generally ABA CODE, *supra* note 1, Canon 5.

4. See *id.* EC 5-2 (personal interests of attorney contrary to those of client); *id.* EC 5-4 (attorney's interests in post-representation publication rights).

5. See, e.g., *id.* EC 5-14 (attorney's independent judgment precludes acceptance or continuation of conflicting employment); *id.* EC 5-15 (attorney must carefully weigh possibility of conflicting interests of multiple clients); *id.* EC 5-21 (lawyer subject to third party influence should consult client and possibly withdraw).

6. See generally *id.* Canon 7 (representation should be within bounds of law).

7. See *id.* EC 5-2 (avoidance of circumstances that might interfere with representation of client); *id.* EC 5-3 (avoidance of acquisition of property rights that might adversely affect professional judgment).

8. See *id.* EC 7-17 (lawyer under no obligation to adopt personal viewpoint favorable to client).

9. See, e.g., *id.* EC 5-3 (lawyer must explain any foreseeable conflict to client and withdraw unless client consents to continued representation); *id.* DR 5-101(A) (lawyer should accept employment presenting potential conflict only with consent of client); *id.* DR 5-104(A) (attorney may enter into business transaction with client only upon full disclosure of potential conflict and with client's consent); *id.* DR 5-107(A) (lawyer shall not accept compensation from non-client without client's consent); *id.* EC 7-9 (lawyer may ask client for permission to forego action lawyer deems unjust even if in client's best interest).

10. See *id.* DR 5-105(C) (lawyer may represent multiple clients with potentially conflicting interests if lawyer clearly able to exercise independent professional judgment for each).

11. See *id.* DR 5-101 (lawyer must refuse employment if interests impair judgment); *cf.* ABA MODEL RULES, *supra* note 2, rule 1.8, Comment (representation improper if client vulnerable despite attorney's disclosure of difference of interest and consent of client).

appear excessively costly to many clients because they are disabled at least temporarily, and sometimes permanently, from accomplishing their wishes.<sup>12</sup>

An American Bar Association (ABA) Commission recently has proposed new Model Rules<sup>13</sup> that impose substantial additional costs on attorneys and clients for an attorney's withdrawal because of disagreement with a client. The proposals permit, and at times require, an attorney who regards a client's intended future conduct as unlawful to disclose those intentions to the client's adversaries and to expose a client's false statements in civil litigation or negotiations.<sup>14</sup> This is withdrawal with a vengeance. The profession is now passionately debating the proposal. Many opponents argue that such disclosure would undermine trust in attorney-client relations because clients would withhold secrets from fear that their attorney would break their confidence.<sup>15</sup>

12. Cf. ABA CODE, *supra* note 1, DR 2-110 (withdrawal from employment). Disciplinary rule 2-110(A)(2) requires the withdrawing lawyer to take reasonable steps to avoid prejudice to the client's interests; nevertheless, withdrawal can impose significant burdens upon the client.

13. On January 30, 1980, the Commission on Evaluation of Professional Standards of the American Bar Association (Kutak Commission) released a Discussion Draft of the ABA Model Rules of Professional Conduct. If approved by the House of Delegates, the ABA Model Rules will replace the ABA Code of Professional Responsibility as the primary statement of the ethical standard of the profession. Although the Model Rules were originally scheduled for consideration in 1981, the Kutak Commission has presented a revised schedule that would provide a "proposed final draft" in the spring of 1981, hearings during 1981, and a house vote in 1982. Slonin, *Kutak Commission After More Time*, 66 A.B.A. J. 1350, 1350-51 (1980).

14. The ABA Model Rules would require an attorney to disclose information about a client that would prevent him "from committing an act that would result in death or serious bodily harm to another person." ABA MODEL RULES, *supra* note 2, rule 1.7(b). The rules also require disclosure that would correct a client's false testimony in civil litigation, *id.* rule 3.1(b); and that would correct a client's false statements made in negotiations with other parties, except for misrepresentations made by an accused in negotiations connected with a criminal case. *Id.* rule 4.2(b)(2). The attorney would be permitted to warn third parties of his client's intention to perform a wrongful act if the warning is necessary to prevent or rectify the consequences of such action. *Id.* rule 1.7(c)(2). These proposals differ in many ways from the current Code provisions that permit disclosure of client confidences in few circumstances. See ABA CODE, *supra* note 1, DR 4-101(c) (lawyer may reveal client confidences with consent, when required by court order or under Disciplinary Rules, to protect against charges of improper conduct, and if information necessary to prevent commission of crime). Except in cases of fraud, the present Code virtually never requires disclosure. See Kutak, *Kutak Responds to Major Objections to Draft ABA Ethics Code*, Legal Times of Wash., Dec. 12, 1980, at 19, cols. 1 & 4 (in 38 states DR 7-102(B) requires disclosure of fraud committed in cause of representation; in 11 states rule requires disclosure of fraud unless privileged). Andrew Kaufman has characterized the differences between the proposed rules and the Code:

While the current code gives a lawyer considerable discretion within relatively narrow areas of conduct, the discussion draft [of the Model Rules] gives considerable discretion over wide areas. The great extent of disclosure permitted means that instead of the rules defining the nature of the adversary system, to a large extent at least, each individual lawyer will have freedom to, and will be forced to, do the defining within a very wide range, from a system that recognizes nearly absolute confidentiality to one that allows for a substantial amount of disclosure of information by the lawyer over a client's objection.

Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074, 1074 (1980).

15. The Kutak Commission's discussion draft has been sharply criticized. The National Organization of Bar Counsel, for example, questions the efficacy of complete replacement of the existing Code, favoring, instead, amendment of the Code with some of the Kutak Commission's proposals. Slonin, *supra* note 14, at 1350. See generally Burke, *ATLA Unveils Ethics Code*, Nat'l L.J., June 23, 1980, at 3, col. 1; at 8, col. 1 (criticizing disclosure provisions); Hochberger, *State Bar Report Criticizes ABA Draft Code of Ethics*, 184 N.Y.L.J., Sept. 10, 1980, at 1, col. 3 (proposed rules "deficient and unacceptable"); Hochberger, *Bar Groups Oppose Revising Code of Ethics*, N.Y.L.J., May 6, 1980, at 1, col. 2 (better to change Code by

The draftsmen of the Model Rules admit that this rule would deter some clients from frank interchange with attorneys, but they argue nonetheless that the social benefit from disclosure in the prescribed circumstances will be greater than the social loss resulting from diminished attorney-client trust.<sup>16</sup> These comparative quantifications of individual and social utility are difficult to evaluate. The argument of the draftsmen fails to explain clearly why the balance traditionally struck in favor of client protection should now be changed in favor of third parties. The proponents and opponents of the proposal currently appear to be arguing past one another—the former preferring “public protection,”<sup>17</sup> the latter preferring “client protection,”<sup>18</sup> and neither able to demonstrate the social value of preferring one over the other. These goals of public and client protection may not be in conflict, however, and both goals may best be served through rules that lead attorneys to disclose their client’s intended illegal conduct. Close examination of the role of trust, and of confidentiality rules in attaining trust in attorney-client relations, will show how these two goals may be harmonious.

One argument toward this conclusion could be that attorney trust is not as important as the traditional norms have held, so that nothing much is lost between attorneys and clients if disclosure rules adversely affect trust. From this perspective there would be no conflict between the interests of clients considered as an aggregate and the interests of the third-party public recognized by the proposed rules. The draftsmen of the proposed rules do not raise this argument; and, indeed, many other provisions in the proposed rules extol attorney-client trust in rhetoric directly drawn from the traditional formulations.<sup>19</sup> Skepticism about either the reality or the necessity of trust and harmony in attorney-client relations presents a plausible explanation for the draftsmen’s apparent willingness to devalue the traditional confidentiality rule that purported to protect such trust in preference to other social values. Conflict between attorneys and clients is always present in typical relationships. Whether the draftsmen of the proposed disclosure rules meant to rest their case on the pervasiveness or ineradicability of this conflict, its existence supports reformulation of the traditional conceptions.

Devaluing the importance of trust in attorney-client relations is not, however, the only way to support the proposition that attorneys should disclose client confidences in circumstances now disfavored by traditional professional norms. Rules mandating such disclosures might work in practice

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amendment); Kaufman, *supra* note 14, at 1075-79 (questioning both process of developing Model Rules and substance of proposed changes).

The Association of Trial Lawyers of America has promulgated a code of professional ethics as a response to the Kutak Commission’s proposals. This code contains disclosure provisions designed to protect the client’s confidences. See AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER’S CODE OF CONDUCT rule 1 [hereinafter ATLA CODE].

16. See ABA MODEL RULES, *supra* note 2, rule 1.7, Comment.

17. See *id.*

18. See Burke, *supra* note 15, at 8, col. 1 (the ATLA President, Theodore I. Koskoff, charges that the proposed ABA rules would “erode basic constitutional protections by making the lawyer the champion of the state, not the champion of the client”).

19. Compare ABA MODEL RULES, *supra* note 2, rule 1, Introduction (“To provide . . . advice and assistance, the lawyer must be skillful, diligent, and trustworthy.”) and *id.* rule 1.7, Comment (“The rule of client-lawyer confidentiality facilitates legal advice.”) and *id.* rule 1.8, Comment (“Loyalty is an essential element in the lawyer’s relationship to a client.”) with ABA CODE, *supra* note 1, Canon 4 (“A lawyer should preserve the confidences and secrets of a client”).

to enhance mutual trust between attorneys and clients generally, even though such rules would require attorneys to forfeit trust with some specific clients by disclosing their communications to third parties. This essay will explore the trust-enhancing possibilities of disclosure rules.

The essay will begin by identifying some inevitable sources of mistrust in attorney-client relations and some reasons, both practical and ideological, that both attorneys and clients resist open acknowledgment of this mistrust. It will then suggest that the specific disclosure provisions proposed in the Model Rules would add new incentives for such resistance and would most likely increase deception and exacerbate attorney-client mistrust. Paradoxically, however, the essay will argue that more stringent disclosure requirements than proposed in the Model Rules would prompt more open admission of conflict between attorney and client and, in this way, could work to enhance mutual trust in many new circumstances. Aspects of relations between criminal defense attorneys and their clients will then be considered to identify ways that unacknowledged mistrust jeopardizes the professional's sense of integrity and capacity to offer effective representation, and ways that this jeopardy extends to attorney-client relations beyond criminal defense work. The essay will conclude by suggesting parallels between law and medicine that lead practitioners in both fields to ignore the true extent or significance of mistrust with clients and patients, and to discount the possibility that open exploration of mistrust and conflict in professional relations could have beneficial results.

#### PERSISTENT CONFLICT IN ATTORNEY-CLIENT RELATIONS

Though an attorney and client may want a harmonious relationship, recurrent aspects of their dealings inevitably interfere with this goal.<sup>20</sup> There has been little systematic empirical investigation of this question. The legal profession has not pressed for such investigation; and, as will be developed below, attorneys have many incentives to avoid acknowledging mutual mistrust in their dealings with specific clients and in their general ruminations concerning professional roles. The profession currently assumes the importance and attainability of attorney-client trust.<sup>21</sup> Some speculation will, however, reveal enough possible, recurrent sources of attorney-client mistrust to justify a reexamination by the profession of its current assumptions that are unsupported by clear data.

Consider, for example, the effect of an attorney's advice that the client's position is contrary to law and therefore that the client's adversary will likely prevail. The client rarely welcomes this enunciation and its delivery can breed suspicion that the attorney is not committed wholeheartedly to the client's cause. The attorney may expect this suspicion when he realizes that he lacks sympathy for the client because, for example, he approves of the law opposing his client's interests. Even when the attorney disapproves of the law that adversely affects the client or regards the law as morally neutral, the client nonetheless might believe the attorney secretly harbors disapproval.

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20. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 8 (1978).

21. Cf. ABA CODE, *supra* note 1, EC 4-1 (both fiduciary relationship between lawyer and client and proper functioning of legal system require preservation by lawyer of confidences and secrets).

Many attorneys recognize this mistrust through the old adage that the messenger of bad news is always despised.<sup>22</sup> Many clients, however, attempt to hide their suspicion because they fear the attorney's anger and abandonment or because they hope ultimately to persuade the attorney to their side. Moreover, many attorneys see, and only want to see, their own good intentions toward the client and fail to notice the suspicion engendered by their unwelcome prognosis and advice. Thus, mistrust that influences the entire course of the relation between attorney and client can arise though neither is prepared to acknowledge this fact to the other.

Well-disguised though palpably influential mistrust between attorney and client does not end here. Even when the attorney gives the most favorable prognosis—that the client's wishes will ultimately prevail over his adversaries'—some clients remain unassured. Some clients find conflict, or even the anticipation of conflict, psychologically intolerable. Like Vince Lombardi, these clients feel that winning is not the important thing, but the only thing. They find the prospect of any loss unacceptable; even a brief delay before total victory may be viewed as a defeat. Like Lombardi, some of these clients openly flaunt their aggressiveness. Thus, their insatiability and consequent irrational mistrust might be apparent even to an attorney unambivalently committed to their cause. Many such clients, however, do not reveal this attitude to their attorneys and might not admit even to themselves that any defeat is intolerable and that they resent anyone, including their attorney, who fails to satisfy their wishes at once.

No one is wholly free from this insatiable attitude. It is characteristic of an infant's expectations toward its parents. Although every infant is weaned away from this attitude during the slow maturational process toward adulthood, this insatiable, mistrustful wish for complete, instantaneous satisfaction inevitably reappears, even if only momentarily, for every adult in times of emotional stress.<sup>23</sup> Adults most noticeably exhibit this attitude in relations between physicians and patients. It furnishes the psychological basis for the common medical view of most patients as child-like, and therefore blindly trusting, when gripped by serious illness.<sup>24</sup> Many physicians fail to understand the concomitant anger directed at them by patients who demand, though often only unconsciously, that their painful illness be cured totally and at once. Physicians typically believe they have no quarrel with their patients and that they and their patients equally regard the patients' illness as the enemy to be defeated. Consequently many physicians resent their patients' anger; and many patients, sensing this, hide their anger.<sup>25</sup>

Attorneys might not see great pain or emotional stress as routinely as physicians. Yet some legal practice, such as domestic relations or criminal defense work, is similar to medicine on this score. Many attorneys view this work with considerable distaste substantially because they understand that such practice seldom yields a grateful or satisfied client.<sup>26</sup> Most legal practice involves clashes of financial interest where a client's personal emotional stake

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22. Cf. W. SHAKESPEARE, *ANTONY AND CLEOPATRA* Act II, scene 5, line 73 in *THE COMPLETE WORKS OF SHAKESPEARE* 1341 (I. Ribson & G. Kittredge eds. 1971) ("Rogue, thou hast liv'd too long.").

23. Cf. Freud, *The Doctor-Patient Relationship*, in *EXPERIMENTATION WITH HUMAN BEINGS* 636 (J. Katz ed. 1972).

24. See *id.*

25. Cf. *id.*

26. See A. BLUMBERG, *CRIMINAL JUSTICE* 106 (1967).

is less intense than for criminal defendants or for sick patients. Nonetheless, even these apparently impersonal settings produce fertile ground for psychologically similar suspicions by clients of their attorneys' common interest and good wishes.

In disputes involving only money, clients and their attorneys often have directly conflicting financial interests because the attorneys' fees do not depend on the clients' success against their third-party adversaries.<sup>27</sup> Indeed, the more difficult, less assuredly victorious battles frequently demand more lawyers' time; legal fees mount as prospects for success progressively appear more questionable. Although some clients might reap great financial rewards from the ultimate defeat of their adversaries, many clients cannot avoid suspecting that their attorney is the only assured beneficiary in these long, drawn-out battles. This suspicion may be perceived by attorneys and might lead them to propose compromises that feed greater client suspicion that the attorneys are "selling them down the river."<sup>28</sup> Contingent fee arrangements in personal injury cases do not fully solve this problem because even the financially successful client might feel left with a long-term disability and only a portion of his "true financial due" while the lawyer pockets a large chunk of the recovery and enjoys it in good health.<sup>29</sup>

No amount of self-righteous professional preaching about the basic harmony of interest between lawyer and client can obscure this particular intrinsic conflict: Lawyers grow rich on their clients' troubles and greater woe to the client typically means greater profit to the lawyer.<sup>30</sup> Legal and medical practice are the same in this respect, and it is not surprising that intense suspicion of financial gouging pervades consumer attitudes toward both professions.

Legal and medical practice differ, however, in one way that feeds greater consumer suspicion of lawyers than of doctors. Medicine's adversary is physical illness; the law's, another person who invariably makes some plausible claim to sympathy. An attorney might swear, and actually believe, that he has only contempt for his client's opponents or for the specific law that falls heavily on his client. Yet when the attorney fails to slay either opponent at a single stroke, the client's unhappiness can readily feed his suspicions that his attorney somehow secretly sympathizes with the other side. This suspicion is likely to mount when the other side is represented by an attorney who, in the client's mind at least, has more common bonds with

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27. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 98-99 (1974).

28. Rosenthal describes the rational basis for this suspicion among clients:

The source of pressure upon the lawyer most likely to affect adversely the client's interest, and which can most easily be documented, is the strain of prolonged litigation and the economics of case preparation. Simply put, a quick settlement is often in the lawyer's financial interest, while waiting the insurer out is often in the client's financial interest.

*Id.* at 96.

29. *See id.* at 97-98 (although contingent fee seems better guarantee of attorney's disinterested service than hourly billing, client survey revealed resentment toward excessiveness of many personal injury contingent fees thought unrelated to effort expended).

30. *See generally id.* at 95-116. Rosenthal notes that: "[T]he inexorability of the economic conflict of interest between lawyer and client in so many cases, raises a serious question about the appropriateness of the traditional ideal that an ethical and competent lawyer can and will make the client's interest his own." *Id.* at 111-12.

fellow professionals than any client can claim with any attorney. A physician's patient, in contrast, does not see another physician participating in his case who avowedly promotes the malignant course of his illness.

These reasons, both rational and irrational but all intensely gripping, provoke many clients to mistrust their attorneys and, at the same time, to hide this attitude. Even when neither client nor attorney mistrusts the other, each finds it difficult to ignore the possibility that mistrust will arise in the course of their dealings. Conflict and potential conflict pervade attorney-client relations, and prompt an unspoken wariness that inevitably interferes with the profession's canonical aspirations toward a relationship of undiluted client trust and attorney loyalty.

This conclusion is not startling to any attorney who scans a list of his clients and asks himself which of them he wholeheartedly trusts and which reciprocally trusts him. The professional aspiration of harmonious relations is not necessarily impeached because it is never fully attainable and, when flatly espoused, has a naively utopian flavor. What else are aspirations for? Legal professionals have made peace in the past with this inevitable disjunction between aspiration and attainment. Recently, however, the terms of this truce have been shaken within the profession. The newly proposed ABA Model Rules regarding disclosure of client confidences both reflect and promote this unsettling.<sup>31</sup> Attorneys and clients always may have fallen short of wished-for harmony, but today this aspiration appears less accessible and this new remoteness appears more troublesome than in past times.

The American Bar Association Commission's proposal of a comprehensive reformulation of the rules of professional conduct indicates uneasiness within the profession. The present Code of Professional Responsibility was formulated in 1969 by the American Bar Association. The ABA might reject the new Commission's efforts, but it is striking that the Commission set out so soon to revise its predecessor's work. The Canons had been adopted by the ABA in 1908, "based principally" on the Alabama State Bar Association Code of 1887 which in turn traced its lineage directly to Judge Sharswood's 1854 lectures and David Hoffman's 1836 resolutions.<sup>32</sup> The ABA Commission's wish to supplant the 1969 Code appears, by comparison, a speedy rejection of the recent past.

The Model Rules purport to break with the past in part by admitting openly that conflict is an inevitable aspect of lawyering. The Preamble announces that:

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. . . .

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict in a lawyer's responsibilities to clients, to the legal system, to the general public, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.<sup>33</sup>

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31. See note 14 *supra*.

32. Preface to ABA CODE, *supra* note 1, at i (as amended Feb. 1979).

33. ABA MODEL RULES, *supra* note 2, Preamble.



Any thoughtful attorney should not be surprised by the existence of conflicts among these responsibilities.<sup>34</sup> The profession, however, has never acknowledged such conflicts so openly in its formal code of ethics.

In some degree, this unusually open admission bears the traces of Watergate. The prominent roles of highly-placed attorneys in the scandal clearly affected leaders of the organized bar.<sup>35</sup> The central embarrassment, of course, was the attorney-President, followed closely by the Attorney General and many other lawyers serving the President who apparently were willing to justify deception, bribery, burglary, and possibly even murder on the basis of their supposed professional obligation of undiluted loyalty to their client.<sup>36</sup>

Watergate suggests a loss of public confidence in attorneys. But an even deeper worry about trust in lawyer-client relations is also evident among the profession's leaders. This concern was the pervasive, though mostly implicit, agenda of an important symposium on legal ethics convened in 1976 at the Seven Springs Center. Professor Geoffrey Hazard, one of the participants, distilled the results of this symposium and added his reflections in a recent book.<sup>37</sup> Questions regarding relations with clients dominated the Seven Springs discussions. Such questions included fees, conflicts of interest, and problems in identifying "the client" in corporate representation or in complex negotiations when lawyers might better serve as "intermediaries" or as "lawyers for the situation" than as advocates for one party.<sup>38</sup>

Hazard's book, and by extension the symposium, has been criticized for the apparent narrowness of this focus. Professor Laura Nader observed that the book "reflects the specialized practitioner's passion for technical skill—a

34. See D. ROSENTHAL, *supra* note 27, at 95 (role balancing demanded of attorney in professional and private life source of continuing pressure because roles continually in conflict).

35. Cf. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 2-3 (1975).

36. See G. LIDDY, WILL 196-98, 335 (1980) (other techniques suggested by Liddy for serving his clients included drugging opposition, kidnapping, hiring professional killers, eavesdropping, and spying). In 1972, G. Liddy was Counsel to the Committee to Re-Elect the President. *Id.* at 196.

Commenting on the prominent role played by attorneys in the Watergate scandal, Professor Wasserstrom recounts John Dean's testimony:

When John Dean testified before the Senate Select Committee inquiring into the Watergate affair in the Spring of 1973, he was asked about one of the documents that he had provided to the Committee. The document was a piece of paper which contained a list of a number of the persons who had been involved in the cover-up. Next to a number of the names an asterisk appeared. What, Dean was asked, was the meaning of the asterisk? Did it signify membership in some further conspiracy? Did it mark off those who were decision makers from those who were not? There did not seem to be any obvious pattern: Ehrlichman was starred, but Haldeman was not; Mitchell was starred, but Magruder was not. Oh, Dean answered, the asterisk really didn't mean anything. One day when he had been looking at the list of participants, he had been struck by the fact that so many of them were lawyers. So, he marked the name of each lawyer with an asterisk to see just how many there were. He had wondered, he told the Committee, when he saw that so many were attorneys, whether that had anything to do with it; whether there was some reason why lawyers might have been more inclined than other persons to have been so willing to do the things that were done in respect to Watergate and the cover-up. But he had not pursued the matter; he merely mused about it one afternoon.

Wasserstrom, *supra* note 35, at 3.

37. See generally G. HAZARD, *supra* note 20. Professor Hazard was the Reporter for the ABA Commission that drafted the Model Rules. ABA MODEL RULES, *supra* note 2, Transmittal Message.

38. Nader, Book Review, 89 YALE L.J. 1442, 1443-44 (1980) (reviewing G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978)) (emphasis in original).

value that seems to override what most people think the central purpose of law should be: a more just society.<sup>39</sup> Nader, however, misses the significance of the participants' virtually exclusive attention to the attorney-client relationship. This attention reflects their underlying belief that there are pervasive problems in this relationship that traditional ethical precepts do not address adequately. The participants did not directly consider the role of attorneys or the attorney-client relationship in constructing "a more just society." Nevertheless, their concern about the possibility of conceiving and implementing an adequately just relationship between lawyer and client directly impinges on this apparently more macrocosmic question.

In liberal democratic philosophic tradition the just society comes into being as the cumulated product of individuals' interests, individually defined.<sup>40</sup> Attorneys traditionally have conceived their role in the realization of a just (liberal democratic) society as advocates for individuals in conflict with others pursuing their individual self-interests, either directly represented by other attorneys or cumulatively represented by government agencies (and their attorneys).<sup>41</sup> The Seven Springs participants testified to a corrosive difficulty with the conception not only of an attorney's proper role but also of the just society in the liberal democratic tradition. The participants, reflecting attitudes of "the country's professional elite,"<sup>42</sup> acknowledged that they could not find a comfortable common ground with their clients.<sup>43</sup> This acknowledgment led to the further, uncomfortable conclusion that these attorneys and their clients were disabled from working toward justice as traditionally conceived because the client's individual interests could not be transported readily into the attorneys' agenda. Yet the attorneys found themselves without any other satisfactory guide to set the agenda in their professional role as attorney.<sup>44</sup>

The Seven Springs participants did not speak in high-flown philosophic abstractions and did not reach their misgivings by detached reflection on the ideological crisis of the Western philosophic tradition. Watergate was the immediate background of their deliberations. More fundamentally, however, their misgivings derived directly from their professional practices as "partners of large prestigious law firms located in major cities, general counsel of large corporations, the chief counsel of a large legal aid agency, . . . [and] lawyers of similar rank in the government . . . ."<sup>45</sup> From such promontories, these attorneys perhaps saw that legal practice has been transformed subtly, but unmistakably, in recent decades with consequent increased awareness by attorneys and clients of the prospects for mutual mistrust. This intensified awareness of mistrust might have come from the explosive impact of government regulation of corporate activity that is most evident in the elite practice of law. The exponential growth of Washington law practice and of major firms elsewhere staffed by Washington-oriented specialists is one effect

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39. *Id.* at 1444.

40. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 327-48 (1980).

41. This conception has been termed "Positivist Advocacy." Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29, 39-61.

42. Greene, *Foreword to G. HAZARD, supra* note 20, at ix.

43. See G. HAZARD, *supra* note 20, at 56-57.

44. See *id.*

45. Greene, *supra* note 42, at ix-x.

of this government regulation.<sup>46</sup> The increasing reliance among large corporations on outside retained counsel for special expertise in complicated regulatory matters, at the same time that corporate in-house counsel offices are growing numerically to handle recurrent, routine aspects of corporate legal affairs, also reflects this impact.<sup>47</sup> Client and outside corporate attorneys in this high-powered practice are increasingly coming to one another as strangers, drawn only by a limited, though highly remunerative, transactional nexus without the experience or expectation of long-term personal or business involvement with and loyalty to one another. Indeed, in many matters, outside attorneys deal solely with in-house counsel who purport to speak as "the client," even though corporate identity is actually a complicated bureaucratic amalgam.<sup>48</sup> This reality suggests to outside attorneys that in-house counsel might not speak reliably for the corporate client because no single voice can articulate the competing perspectives housed within this amalgamated enterprise; in a sense, this client seems intrinsically unknowable.<sup>49</sup>

In these contexts, lawyer and client tend to approach one another more warily. They are more alert to potential and actual conflicts than in settings more suffused with long-standing, personal ties. The concluding paragraph in Hazard's book, apparently celebrating the participants' prominence and high competence, at least suggests the costs of losing all but one communal bond between lawyer and client:

If practicing ethically includes performing with all the care and thoroughness that one is capable of, practice on behalf of the big corporations may be the most ethical kind. At any rate, critics of corporation lawyers might also notice that the most proficient doctors are at the big hospitals and not the county health services, that the most proficient journalists are with the national media and not the *Utica Tribune*, and that leading sociologists do not teach in junior college.

Then, of course, there is the money.<sup>50</sup>

There is indeed. It may, however, have been more good clean fun to practice law in Utica, or at least easier in Utica to reconcile "the lawyer's own interest in remaining an upright person while earning a satisfactory living."<sup>51</sup> Of course there is the money. Nonetheless, the question remains whether the attorney values the client for any other reasons. If there is nothing more, if the attorney has neither connection with nor investment in a client beyond this financial nexus, then both attorney and client can readily sense that each is only tenuously loyal to the other and that the attorney's proclaimed

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46. See M. GREEN, *THE OTHER GOVERNMENT* 7 (rev. ed. 1978). "Growth appears inevitable because of the happy lot of lawyers: they prosper when times are good, . . . and when times are bad as bankruptcies rise and government regulation must be kept at bay." *Id.* (emphasis in original).

47. Cf. Lauman & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUNDATION RESEARCH J. 155, 157-58 (1977); N.Y. Times, May 16, 1980, § D, at 1, col. 4.

48. See Forrow, *Special Problems of Inside Counsel for Industrial Companies*, 33 BUS. LAW. 1453, 1453-56 (1978).

49. See generally G. HAZARD, *supra* note 20, at 46-54.

50. *Id.* at 153.

51. ABA MODEL RULES, *supra* note 2, Preamble.

professional commitment to serve the client's interests "with undiluted loyalty" is little more than going through the motions.<sup>52</sup> This discomfiting realization may in part lie beneath the eagerness of prominent members of the Bar, as represented by the draftsmen of the Model Rules, to dissociate themselves sharply and publicly from the seamier aspects of legal practice and clientele. Disclosing clients' illegalities may be one way for attorneys to reclaim self-respect when they are no longer certain of public approbation or their own righteousness.

All of these various elements may have led the draftsmen to have a greater sensitivity toward conflict between attorney and client and a greater willingness to admit the existence of such conflict than was apparent in the previous professional canons. Despite this unusual admission, however, the Model Rules fall back on traditional ideas. Although the draftsmen see pervasive conflict, they do not understand how attorney-client relations can persist in the face of such conflict. The proposed disclosure rules break with the confidentiality tradition of attorney-client relations, but this break serves the more fundamental, traditional conception from which the obligation of confidentiality takes root—the idea that harmonious trust is the essential attribute of the professional relationship.

This idea appears on the face of the draftsmen's claim that conflicts can be satisfactorily eliminated. As noted earlier, the Preamble to the Model Rules states that "[v]irtually all difficult ethical problems arise from conflict in a lawyers' responsibilities . . ."<sup>53</sup> The immediately following sentence in the Preamble makes this bold promise: "[T]he Rules of Professional Conduct prescribe terms for resolving these conflicts."<sup>54</sup> Thus, at their outset, the Model Rules turn away from the possibility that many, most, or all of these conflicts cannot be resolved. The rules turn away, moreover, with an observation drawn essentially from the pious homilies of the Canons: "A lawyers's responsibilities as an officer of the court, a representative of clients, and a public citizen are usually harmonious."<sup>55</sup>

This quick juxtaposition of clear-eyed appreciation of attorney-client conflict and misty wishing it away characterizes the Model Rules. When the Rules or Comments bow to the traditional vision of essential harmony

52. Compare the critique by Dauer and Leff of Charles Fried's romantic conception of an attorney's role in *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976):

A lawyer is a person who, without expecting any reciprocal activity or inclination thereto, will attempt to forward or protect the interests of a client, within the rules of a legal system, so long as he is paid a sufficient amount to do so, and so long as doing so does not inflict any material unforeseen personal costs.

Letter from Edward A. Dauer & Arthur Leff to the Editors of the *Yale Law Journal*, reprinted in 86 *YALE L.J.* 573, 579 (1977).

53. ABA MODEL RULES, *supra* note 2, Preamble.

54. *Id.*

55. *Id.*; see ABA CODE, *supra* note 1, EC 1-1 (lawyer's ethical responsibility to maintain integrity and improve competence of bar); *id.* EC 4-1 (lawyer's fiduciary relationship and proper functioning of legal system require attorney to preserve client's confidences); *id.* EC 7-9 (lawyer should act in manner consistent with best interests of client); *id.* EC 7-10 (lawyer's duty to represent client zealously does not militate against obligation to treat with consideration persons involved in legal process and avoid infliction of needless harm); *id.* EC 9-6 (duty of lawyer to act as member of learned profession dedicated to public service, to reflect credit on profession, and inspire confidence, respect, and trust of clients and public).

between lawyer and client, the strain of suppressed conflict is evident. This tension is apparent in the restatement of the traditional canon that a lawyer owes undiluted loyalty to the client.<sup>56</sup> One proposed rule specifies that a lawyer must be "uncontrolled by the interests or wishes of a third person, or by the lawyer's own interests or wishes."<sup>57</sup> In the Comment to the rule governing conflict of interest between lawyer and client, however, the draftsmen observe: "It is practically impossible for a lawyer to be entirely unencumbered by obligations that might conflict with those of a client."<sup>58</sup> The strain is unmistakable in the awkwardness of this sentence—"practically impossible . . . entirely unencumbered . . . might conflict"—so different from the clarity and occasional elegance of the document's general rhetoric.

The draftsmen's conflict in acknowledging mistrust is more than rhetorical. It appears most strikingly in the proposed disclosure rules.<sup>59</sup> Whether or not the Commission intended this result, the most likely effect of these rules would be to reinforce the traditional response of the legal profession to conflict between attorney and client: to pretend that mutual trust exists by discouraging examination of possible sources of mistrust and suppressing awareness of conflict. The disclosure provisions of the Model Rules, whether mandatory or discretionary, apply only when the attorney knows that a client intends to commit, or is intentionally committing, an illegal act.<sup>60</sup> If the attorney remains ignorant of a client's intentions, the attorney sleeps untroubled and the client's secrets remain safe. The proposed rules do not require the attorney diligently to pursue suspicions regarding a client's harmful ends. Similarly, the rules do not require the attorney to alert a client to the risks of harming others that the client, however negligently, fails to see. Instead, the rules provide powerful incentives for clients to deceive their attorneys and for attorneys to acquiesce in the deception if they are inclined to avoid conflict with their clients.

Furthermore, the proposed rules mandate that certain attorney-client relations begin with an explicit warning to the client of consequences potentially adverse to his interests if the client reveals too much about himself.<sup>61</sup> Consequently, the new disclosure rules would not lead to substantially increased disclosure of client confidences than has occurred under the current practices. This result would not necessarily come from attorneys' determination to disregard the new disclosure rules but rather because clients will withhold information that might trigger the disclosure rules for their attorneys.

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56. Compare ABA MODEL RULES, *supra* note 2, rule 2.1 (lawyer shall exercise independent and candid judgment, uncontrolled by own interests or those of third party) with ABA CODE, *supra* note 1, EC 5-1 (neither lawyer's personal interests, interests of other clients, nor desires of third parties should be permitted to dilute attorney's loyalty to client).

57. ABA MODEL RULES, *supra* note 2, rule 2.1.

58. *Id.* rule 1.8, Comment.

59. See generally *id.* rule 1.7; *id.* rule 1.13; *id.* rule 3.1.

60. See note 14 *supra* (requirements of disclosure provisions).

61. ABA MODEL RULES, *supra* note 2, rule 1.4(b). Proposed rule 1.4(b) provides: "A lawyer shall advise a client of the relevant legal and ethical limitations to which the lawyer is subject if the lawyer has reason to believe that the client may expect assistance not permitted by law or the Rules of Professional Conduct." *Id.* See generally Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

Clients currently hesitate to share their illegal intentions with their attorneys.<sup>62</sup> Attorneys currently are unwilling to press for their clients' confidences in these matters.<sup>63</sup> The reasons for this mutual wariness might be so powerful in current practice that the proposed rules would add no substantial new provocations for greater mistrust and deception between client and attorney than already occurs. The proposed rules, however, will not reduce the incentives already at work. Their likely effect, if any, would be only to increase mistrust between attorney and client and to diminish either's willingness to discuss the reasons for that mistrust.

The draftsmen of the proposed rules might not have foreseen or intended this result. Nevertheless, it corresponds comfortably with the long-standing view of the attorney's proper professional role. Traditionally, the attorney and the client had no need to explore any disagreements because the attorney was permitted, often encouraged, and perhaps obliged to disregard his own "merely personal" views and to adopt those of the client for representational purposes.<sup>64</sup> From this perspective of lawyer as "mouthpiece" or "hired gun," the attorney, like a playactor, appears instructed to obliterate his independent personality to avoid conflict and to represent the client in the way a mirror reflects the object placed before it.

This role has never been fully endorsed by the legal community.<sup>65</sup> Limits have always been placed on an attorney's freedom to accept a client's directives without question.<sup>66</sup> Yet observing these limits does not necessarily require extended discussion between attorney and client. The limits in effect were formulated as conversation-stoppers. If a client directed an attorney to

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62. Cf. Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991, 1000 n.49 (1979) ("[C]lients who perpetrate frauds usually do so without their lawyers' advance knowledge."); Whiting, *Antitrust and the Corporate Executive II*, 48 VA. L. REV. 1, 17 (1962) (among corporate executives involved in 1960 electrical industry antitrust violations, "[o]ne of the unwritten rules was not to tell the lawyers anything").

63. This attitude occasionally becomes public after a client's illegalities have become widely known. Cf. SEC v. National Student Marketing, 457 F. Supp. 682, 712-13 (D.D.C. 1978) (defendant attorneys, charged with aiding and abetting fraudulent stock sale, failed to prevent consummation of merger although aware of principal's fraudulent conduct because they believed such action would go beyond accepted role of attorneys in securities transactions and would inhibit client's business judgment and candid attorney-client communication); *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82, at 175 (attorneys representing issuers of securities failed to fulfill professional responsibilities by neglecting to assure proper disclosure, or communicating to board of directors management's failure to make such disclosures). This attitude is also reflected in the proposed ATLA Code: "[T]he lawyer shall give undivided fidelity to the client's interests as perceived by the client, unaffected by any interest of the lawyer or any other person, or by the lawyer's perception of the public interests." ATLA CODE, *supra* note 15, rule 2.1.

64. Cf. ABA CODE, *supra* note 1, EC 7-7 (in areas affecting merits of cause, client has exclusive authority to make decisions; if lawful, decisions are binding on lawyer); *id.* EC 7-8 (in final analysis lawyer should remember that decision to forgo legally available objectives or methods because of non-legal factors ultimately for client and not for himself); *id.* EC 7-17 (obligation of loyalty to client applies only to lawyer in discharge of professional duties and implies no obligation to adopt personal viewpoint favorable to interests or desires of client).

65. Cf. G. HAZARD, *supra* note 20, at 3 (central problem in professional ethics is tension between client's preferred position resulting from professional connection and position of equality accorded everyone else by general principles of morality).

66. See ABA CODE, *supra* note 1, DR 2-109 (attorney cannot accept employment if aware of client's intent to harass or maliciously injure opponent, or if, absent good faith, client's claim or defense unwarranted under law); *id.* DR 2-110(B) (attorney must withdraw if obvious that client bringing action to harass or injure, or if employment will violate Disciplinary Rule).

lie in court, professional norms obliged the attorney to refuse.<sup>67</sup> The attorney is not obliged, however, to be suspicious of, or to find independent verification for, a client's assertions regarding the truth of matters to be presented in court.<sup>68</sup> Although the lawyer is not required to act the fool in accepting the client's word as gospel, a considerable amount of willful gullibility has been considered permissible and perhaps appropriate. Under prevailing norms, aggressive skepticism is the business of the client's adversary and the adversary's attorney; the question of ultimate truth-finding is the business of the judge or jury.<sup>69</sup>

Although the Canons and their successor Code might not instruct the attorney explicitly to maintain a posture of affable gullibility toward his client or to mask any suggestions of conflict, professional norms do not instruct otherwise. This omission, if not an invitation toward gullibility, is consistent with practical pressures that make this the easiest and most profitable course for an attorney to pursue. The openly suspicious attorney risks losing the client. The client might be offended by the attorney's attitude, or the open admission and discussion of conflict might lead the attorney to conclude that he cannot work with the client. Whether the breach is initiated by the client or the attorney, most attorneys do not fervently desire this result.

Even aside from calculations of financial loss that might result from openly admitted suspicion, a deeper motive works against acknowledgment of mistrust, particularly for those attorneys who understand the multiple ways mistrust inevitably pervades the attorney-client relationship. If these attorneys believe that extensive mistrust makes any sensible working relationship with clients impossible, then they could not understand how they or anyone could practice law. These attorneys therefore strike some balance in their own minds between an appreciation of the inevitable mistrust in the attorney-client relationship and a calculation of the precise quantum of mistrust inconsistent with that relationship. The attorney who admits he is engaged in this calibration is likely to understand that open admission and extended discussion of mistrust with any client will magnify the significance of this conflict for both of them. This attorney is not intent on avoiding such magnification simply because he wants to protect his fees. More fundamentally, the attorney avoids this result in order to protect his professional identity and the idea that it is possible for anyone, and for him in particular, to serve as a lawyer representing clients.

Thus, there are three paths that lead attorneys to avoid open admission and exploration of conflict with clients: First, some attorneys see no problem in achieving harmonious relations with clients; second, some attorneys see, but discount, problems because they want clients' fees; and finally, some attorneys see but discount these problems because they want to believe that at least in some cases the practice of law is a realistic, honorable possibility, and these attorneys generally are uneasy about their capacity precisely to identify such

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67. *Id.* DR 7-102(A)(5) (in representing client, lawyer shall not knowingly make false statement of law or fact).

68. This professional stance embodies what has been termed the "moral isolation" of attorney and client. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231, 242-44 (1979).

69. See ABA CODE, *supra* note 1, EC 7-1 (lawyer's duty, both to client and legal system, to represent client zealously).

cases. This last attitude is evident in the disclosure provisions of the proposed Model Rules.<sup>70</sup>

If the speculation is correct that the draftsmen of the Model Rules were influenced by the profession's increasingly uncomfortable awareness of the pervasiveness of mistrust in attorney-client relations, they plausibly would want to dampen rather than exacerbate that conflict. It is not clear, however, that the draftsmen seriously considered the possibility that, in many cases, open, extended discussion of conflict between the attorney and the client is preferable to avoiding such discussion. Moreover, it is unclear whether they considered the absence of such discussion to be a problem in attorney-client relations that rules of professional conduct might usefully address. Had the draftsmen approached their task from these perspectives, they need not have eschewed disclosure requirements; they should instead have made them more stringent.

The proposed disclosure provisions might have been designed to provide powerful incentives for open exploration of conflict between attorney and client. An attorney might be required to do more than disclose his knowledge of a client's illegal intentions. The draftsmen might also have proposed that an attorney must pursue reasoned suspicion of clients in order to discover illegalities that might trigger the attorney's disclosure obligations. The draftsmen, that is, might have proposed a negligence standard to govern this aspect of professional conduct.<sup>71</sup> They also might have proposed that attorneys who fail to act on their suspicions or who negligently fail to be reasonably suspicious of their clients could be held directly liable for consequent damages suffered by third parties. They might have required attorneys to testify in subsequent third-party litigation against their clients regarding whether the attorneys had concluded that their clients were acting unlawfully and whether they had warned their clients to desist.

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70. See note 14 *supra*.

71. Cf. G. HAZARD, *supra* note 20, at 151-52:

The Code [of Professional Responsibility] conveys the impression that, except in relations with other lawyers, a lawyer is never in the picture of what his client may do. He simply finds loopholes or acts as a mouthpiece, just as folks have always said.

If this is the bar's portrayal of the lawyer's role, it is not an attractive one. It certainly does not resemble the self-image of other professionals. Certified public accountants, for example, see themselves as being judges of their clients and not merely their advocates. Doctors if anything err on the other side, assuming to make decisions for their patients that many observers think should at least be shared by the patient, through the mechanism of "informed consent." And the portrait of the lawyer as merely a technical adviser and spokesperson is false. The fact is that the modern legal adviser is an actor in the situations in which he gives advice. And as such he is accountable.

Perhaps lawyers hang on to the old claim of immunity because they cannot see an acceptable alternative. Once it is said that a lawyer is responsible for some of what his client does, there does not seem to be any stopping place that can be clearly described in a rule. But of course rules can be devised to deal with open-ended problems, as they have been in the rules lawyers write for others. The technique is to say that one should act as "a reasonable person" would act in the circumstances. This is the standard that applies to doctors, accountants, trustees, manufacturers, and motorists. A rule of that kind does not give definite guidance, but that is a peril that can be lived with. If lawyers are waiting for a more definitive rule they should know better. Certainly the absence of certitude is no justification for lawyers refusing to accept their moral involvement in the matters in which they act and advise.



The draftsmen of the proposed rules decided against applying a negligence standard to attorneys in these matters.<sup>72</sup> In addition, they did not clearly address the question of attorneys' direct liability to third parties or attorneys' obligation to testify against clients in third-party litigation. The silence of the Model Rules regarding enforcement, and their substantive adherence to *mens rea* standards for both attorneys and clients,<sup>73</sup> might simply have been tactical maneuvers to avoid arousing opposition within the profession to the disclosure proposals. The rules' substance, however, would seem to rest on more than a short-run tactical judgment. The substance seems to follow from a belief that any third-party disclosure requirement is inconsistent with the basic tenets of the attorney-client relationship. The draftsmen stated a willingness to sacrifice harmonious attorney-client relationships when the conflicting interests of third parties appeared more important.<sup>74</sup> The idea that disclosure requirements necessarily harm clients and undermine the integrity of the attorney-client relationship seems to be the basic reason the draftsmen retreated from more demanding disclosure provisions. The draftsmen apparently did not consider whether a stringently enforced, negligence-based, disclosure requirement would lead attorneys to consider more rigorously and to discuss more openly the possibility of conflicts with clients. The draftsmen also apparently ignored the possibility that open recognition of conflicts would lead to a clearer acknowledgment and more satisfactory resolution of mistrust between attorney and client.

Stringently enforced, negligence-based disclosure requirements could harm clients and the attorney-client relationship if the regime led attorneys into quick or regular betrayal of clients' confidences to third parties. Such a regime, however, need not have this effect. If the attorney believed that under a negligence standard, he could be liable because of the client's intentional or negligent conduct toward third parties, the attorney would have a powerful motive to insist on honest conversation with clients. When such conversations revealed the client's unlawful designs, most attorneys, if only to protect themselves, would attempt to persuade their clients to change their minds. The attorney would argue, among other things, that his required testimony in later third-party proceedings inevitably would prove the client's illegal intent,

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72. One observer suggests, however, that the disclosure provisions of the Model Rules could be pressed toward this result:

Some government agencies that wish to expand lawyer's obligations to turn their clients in will find support in this change [proposed in the Model Rules] from a forbidden to a voluntary disclosure policy and might well seek to require lawyers to exercise their discretion in favor of disclosure in certain specific situations.

Kaufman, *supra* note 14, at 1078.

73. See note 14 *supra* (discussing disclosure provisions of Model Rules).

74. The draftsmen provided attorneys with the following guidance:

The lawyer's exercise of discretion [in disclosing client confidences] requires consideration of the magnitude and proximity of the contemplated wrong, the nature of the lawyer's relationship with the client and those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Exercising discretion in such a matter inevitably involves stress for . . . the client-lawyer relationship.

ABA MODEL RULES, *supra* note 2, rule 1.7, Comment.

and this argument would in turn provide the client with a powerful incentive for changing his plans.

Every attorney-client encounter would not lead to this happy, law-affirming result. Many clients who would have reason to change their conduct under pressure from scrupulously self-protective attorneys would avoid such attorneys. Notwithstanding the most stringent disclosure rules imaginable, some attorneys undoubtedly would accept these clients and the concomitant risk of subsequent professional censure or third-party liability for failure to question such clients or disclose their illegalities. Clients who want such risk-taking attorneys will find them. No such formal incentive structure, however, currently operates within the legal profession to motivate unscrupulous lawyers and clients to seek out one another on the basis of this shared characteristic. Moreover, the dominant incentives at work within the profession today move both attorneys and clients away from sustained inquiry into the other's scruples.<sup>75</sup>

The absence of such inquiry can be justified by the a priori assumption that most attorneys and clients are honest and honorable and that suspicion by one insults the other. If, however, either attorney or client does not believe this, or if either knows reasons for considerable mistrust to exist between them, then the absence of mutually suspicious inquiry readily could appear to confirm the existence and power of that mistrust. In these circumstances, the absence of inquiry robs both attorney and client of the opportunity to learn that each can adequately trust the other. Admittedly unscrupulous attorneys and clients are not driven self-consciously together because scrupulous attorneys currently do not aggressively probe clients' intentions. Instead, the scrupulous and the unscrupulous are mixed together and attorneys and clients never test one another's principles with sufficient rigor to learn about the other's scruples. Unspoken mutual suspicions persist and may even be magnified among attorneys and clients who have no ultimate reason to fear honest disclosure with one another. A sustained conversation might cure these suspicions. Under the present incentive structure, however, neither is likely to initiate this conversation. Each approaches the other more fearful of than open to probing conversation because both know their mutual suspicions a priori much more vividly than their mutual trust. In these circumstances, only an added incentive will overcome the initial mistrust that makes both attorney and client unwilling to test whether either can trust the other.

The attorney's promise to guard the client's confidences is an inadequate incentive. Even if the client believes this promise, it provides no affirmative reason to share secrets. If the client secretly, even though unreasonably, suspects that he and the attorney have antagonistic interests, the attorney's promise not to disclose those antagonisms to third parties offers no incentive for the client to share this particular, troubling secret. If, however, the attorney has a strong incentive at the beginning of the relationship both to mistrust the client and to explore the basis underlying that mistrust, then it becomes possible to work toward, though not always attain, mutual trust.

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75. Similar incentives operate among officers of large-scale corporate bureaucracies. See Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1127-36 (1977) (discussing relations between directors, management, and operations).

Stringently enforced third-party disclosure obligations governed by a negligence standard would provide an incentive for the attorney to engage in sustained, probing, honest conversation with the client regarding an important aspect of their relations. The attorney's knowledge that the client's dishonesty could bring seriously harmful consequences not only to the client or to unwarned third parties but also to the attorney, provides the attorney with the necessary incentive to initiate such a dialogue. Thus, the attorney's self-interested demand for honesty from his client might assist both attorney and client in transcending the mistrust and conflict that inevitably pervades their relationship.

This added incentive for sustained inquiry would have a similar effect in corporate representation. At present, outside retained attorneys often accept unquestioningly their customary corporate contact's statements regarding others' alleged knowledge and approval of proposed actions on behalf of the corporation. The attorney's contact might be in-house counsel, a vice president, or even the chief executive officer who purports to speak to the attorney "for the corporation." The proposed Model Rules provide that attorneys must report any intended illegalities by corporate officers resolutely up the corporate hierarchy to the Board of Directors—and perhaps even beyond.<sup>76</sup> Many practical considerations cut against observing this norm. The proposed rules' *mens rea* standard for this intra-corporate disclosure obligation will confirm these incentives in ways noted in the earlier discussion of third-party disclosure rules.<sup>77</sup> A negligence-based standard for corporate representation would prompt outside counsel to question more rigorously the authority of those corporate contacts whose directives they currently are content to accept.

As a result, attorneys would compel the corporate bureaucracy to consider and resolve some currently troubling ambiguities surrounding the identity of "the client" in corporate representation.<sup>78</sup> A stringent intra-corporate disclosure obligation would compel the attorney to demand clear-cut corporate decisions on questions that both the attorney and corporate officers now are inclined to leave vague. The disclosure obligation would create a client for the particular question at hand when previously only a complicated amalgam of bureaucratic actors existed, some of whom had addressed the question, some of whom were innocently ignorant of the question, and some of whom knew they wanted to remain ignorant. Of course, forcing the corporation to identify itself with a single voice on a particular question might lead neither the corporate officers nor the outside counsel to trust one another more deeply. The attorney, however, at least would know the client's true identity, and consequently its true moral character. The attorney's capacity to ask whether he chooses to trust this particular client in this particular matter depends upon this knowledge.

In these various ways mutual trust between attorney and client, in corporate and non-corporate settings, could be enhanced by requiring attorneys to breach client confidences. The draftsmen of the Model Rules did not offer this apparently paradoxical argument to support their proposal. Opponents currently attack the disclosure proposal on the ground that it

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76. See ABA MODEL RULES, *supra* note 2, rule 1.13 (organization as client).

77. See notes 68-75 *supra* and accompanying text.

78. See generally G. HAZARD, *supra* note 20, at 43-53.

would undermine mutual trust.<sup>79</sup> Both the draftsmen and their opponents, however, have focused on those attorneys who, under the proposed disclosure rules, would learn of the client's illegal intentions and thus be permitted or required to divulge these intentions to third parties. Opponents of the disclosure proposal, particularly securities law practitioners, have argued that many attorneys would be caught in this way.<sup>80</sup> The Securities and Exchange Commission has been pressing its own version of attorney disclosure obligations for years.<sup>81</sup> The draftsmen of the Model Rules appear to argue that their disclosure requirement would not bite hard in ordinary practice because it is limited to a client's intentional commission of future illegalities. The securities practitioners in particular rebut any comforting assurances in this formula by pointing to the puzzling obscurities of intent standards for illegality in securities law and the difficulties of distinguishing between a client's past illegal conduct and the future harmful effects on third parties of the client's refusal to disclose that past.<sup>82</sup>

In effect, these opponents argue that the disclosure provisions will destroy trust between attorney and client because many new circumstances will arise in which attorneys will consider themselves permitted, or even obliged, to disclose clients' secrets. This view overlooks the possibility that the disclosure provisions also would create many new circumstances in which attorneys learn to trust clients whom they had previously mistrusted. The Model Rules' draftsmen disregard this possibility by designing rules that would make it less likely for attorneys to learn, or want to learn, anything about their clients' trustworthiness. Both the draftsmen and the current opponents of the Model Rules clearly see that attorneys and clients have much to fear from any disclosure provisions. They fail to realize, however, that this fear of disclosure rules may derive from current, widespread mistrust between attorneys and clients, and that this fear itself can shut off attorney-client conversations revealing that each has less reason than previously imagined to fear any disclosure provisions or to mistrust and fear one another.

Even admitting the pervasiveness of attorney-client mistrust and recognizing that properly conceived disclosure rules could work to diminish such mistrust, it would not necessarily follow that such rules should be adopted. Disclosure, or the prospect of disclosure, will always destroy the possibility of trust between certain attorneys and clients. If disclosure rules would not have this effect in all cases and, conversely, would enhance trust in some, the decision for or against more wide-ranging disclosure rules should turn on a comparative evaluation of the prevalence of each kind of case and the relative importance to legal practice of the different problems created by each. This evaluation would identify which problem should be ignored or made more difficult in order to address the other. This kind of inquiry is difficult and not subject to precise resolution. Whatever its difficulties, however, such an

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79. See Wall St. J., Feb. 6, 1981, at 44, cols. 1 & 2 (clients uncomfortable discussing issues with lawyer if aware that lawyer is obligated to make disclosure; client will lie, withhold information, or avoid counsel).

80. See generally Freeman, *Lawyer's Duty Should Be to Client Not Government*, Legal Times of Wash., Aug. 25, 1980, at 11, col. 1; at 12, col. 1; Krash, *A Profoundly Mistaken View About Lawyers*, Legal Times of Wash., Nov. 19, 1979, at 53, col. 1; at 54, col. 1.

81. See Cooney, *The Registration Process: The Role of the Lawyer in Disclosure*, 33 BUS. LAW. 1329, 1331 (1978).

82. *Id.* at 1335-37.

inquiry should at least be acknowledged as relevant by the draftsmen of the Model Rules and by their most vocal opponents.

It is tempting to dismiss this inquiry by excessively discounting possible problems arising from the absence of probing, honest conversation between attorney and client—problems that might be solved by negligence-based disclosure rules—and by magnifying the possible problems created by such rules through client betrayals and attorney losses. If the speculation advanced earlier in this essay is correct—that the Model Rules' draftsmen were influenced by a keener awareness of attorney-client conflict than the profession commonly has acknowledged—this very awareness could lead the draftsmen to shy away from the negligence-based disclosure rules. Because the draftsmen more palpably saw mistrust in typical attorney-client relations, they might conclude quickly that the relationship cannot benefit from, or perhaps even survive, added pressure from openly mistrustful conversations that would be provoked by negligence-based disclosure rules. From this perspective, the *mens rea* disclosure rule would appear preferable precisely because it would work to close off conversation between attorney and client and lead both to suppress acknowledged awareness of conflict between them.

This might be a correct, persuasive argument; but it does not favor the draftsmen's *mens rea* rule. As the opponents of the Model Rules have seen, this argument cuts against any mandatory or permissive disclosure rules. The argument, moreover, has an ironic, troubling twist. Assume that mistrust is an important problem in the profession today and that open conversation in many cases would dispel this mistrust but that both attorney and client are excessively fearful of such conversation precisely because each initially mistrusts the other. From these assumptions, it readily follows that the disclosure provisions of the Model Rules would both symptomatize this excessive fear and exacerbate the problem creating this fear by leading attorneys and clients to acknowledge new, more palpable reasons to fear the consequences of honest conversation with one another.

These assumptions might be wrong. In any event, their accuracy cannot be demonstrated readily. Thus, it is difficult to demonstrate that the Model Rules excessively discount the problem of attorney-client mistrust. One area of legal practice, however, does graphically show the costs of unacknowledged mistrust between attorney and client: the representation of blue-collar criminal defendants. Mistrust and its harmful consequences for attorneys and clients in this context might be irremediable, or at least not readily remedied by open admissions of mistrust between attorney and client. The legal profession, however, does not commonly acknowledge that mistrust is a root problem in criminal defense work. By identifying the forces that have led the profession to discount the significance of mistrust in criminal defense work, we also might see more clearly how these same forces would distort the profession's collective judgment in considering the importance of, and possible solutions for, attorney-client mistrust in all aspects of practice.

#### REPRESENTING CRIMINAL DEFENDANTS: A PRECATORY LESSON

It is not surprising that attorneys and clients in criminal defense work often mistrust one another. They are typically separated by vast differences in social status and economic prospects. Race differences also frequently accompany

these other indicia of social distance and mutual incomprehension. As if these barriers to trust were not sufficiently impenetrable, defense attorneys often believe that most criminal defendants are guilty.<sup>83</sup> Many attorneys discount the effect of this belief on their capacity to give effective representation either on the ground that they personally oppose imprisonment for its brutality and inefficacy no matter how wrongful their client's conduct, or on the ground that they personally believe that the police and the prosecutor are more dangerous to social order and justice than most criminal offenders. When attorneys invoke these justifications, however, they cannot claim that their representational efforts are motivated by wholehearted commitment to their clients; these attorneys are using their client's predicaments to promote their own view of social justice. This does not necessarily mean that defense attorney and client are working toward different or conflicting ends; both may agree, each for his own reason, that avoidance of the defendant's imprisonment is the goal of their relationship. Nevertheless, the palpable difference between their perspectives is one element among many that shades all of their dealings with a wariness, a mutual belief that they are only tenuously bound together in a common enterprise.

Such wariness is characteristic of relations generally between criminal defense attorneys and clients. Attitudes toward truth-telling illustrate this. Defense attorneys frequently believe that their clients lie to them,<sup>84</sup> undermining the attorney's capacity to give effective representation. Criminal defendants often believe that their attorneys lie to them and betray them to their official adversaries.<sup>85</sup>

Plea bargaining practices heighten these mutual suspicions between client and attorney into intense and often unmanageable conflict. Defendants frequently believe that the bargain struck between the defense attorney and the prosecutor sacrifices the defendant's interests in order to serve the attorney's personal advantage in cementing good relations with prosecutors or judges, particularly where attorneys depend on court appointments for their livelihood.<sup>86</sup> Defense attorneys might justify plea bargains to clients on

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83. As Professor Heumann notes:

The most important thing the new defense attorney learns is that most of his clients are factually guilty. . . . Newcomers have difficulty coming to grips with the factual culpability of most defendants. They begin their jobs with a vague notion that "many" defendants are innocent. After several months in the system, they offer estimates that about 50 percent are guilty. The figure contrasts with the 90 percent estimate given by almost all experienced defense attorneys. It takes time for the newcomers to learn about, to accept, and to be comfortable with the factual guilt of their clients.

M. HEUMANN, PLEA BARGAINING 59 (1977).

84. See *id.* at 59 (less experienced defense attorney more likely to believe defendant's version of what happened; experienced attorneys become "veritable cynics" in evaluating defendant's story).

85. As Blumberg observes:

In his relations with his counsel, the accused begins to experience his first sense of "betrayal." He had already sensed or known that police and district attorneys were adversaries, and perhaps even a judge might be cast in such a role, but he is wholly unprepared for his counsel's performance as an agent [of the court system] or mediator [between him and the system].

A. BLUMBERG, *supra* note 26, at 66.

86. Professor Casper notes:

grounds that appear to transcend any narrowly selfish or excessively prosecution-minded motive—for example, that the clients would not be heard sympathetically by judge or jury and that the attorneys had bargained hard for the best deal possible.<sup>87</sup>

Attorneys might explicitly or implicitly offer clients the further justification for the bargain that the clients are obviously guilty.<sup>88</sup> The client may nonetheless believe his guilt is irrelevant to the prospects of imprisonment because he sees equally guilty associates regularly loose on the streets and because he believes that the entire criminal justice system is fundamentally corrupt, that everything can be and regularly is, bought and sold. This client believes his attorney could have secured a more favorable bargain from the prosecutor if he had offered the right price; the attorney's failure to get this better bargain necessarily means that someone paid the attorney a better price in return. Although the defense attorney may know that the bargain struck was in no way tainted, he cannot avoid knowing, or suspecting, this client's belief in his corruption.<sup>89</sup> Furthermore, the attorney cannot avoid resenting the client's belief in his corruption.

None of these suspicions and mutual recriminations is likely to be allayed or, indeed, even discussed in the formal courtroom sentencing recitations mandated by the Supreme Court ostensibly to bring the plea bargaining

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Interpersonal relations, debts owed and receivable, the necessity to establish tolerable working relationships with those with whom one comes into daily contact are crucial aspects of the criminal justice process. None of these requires or necessarily implies that a public defender will sell out his client in the interest of harmony and amicable relations with judges and prosecutors. They do provide an explanation, though, for the role that the public defender appears to the defendants to play in keeping the system operating. When a defendant thinks of the public defender as one of "them" rather than as someone on "his" side he is, in an organizational sense, probably right.

J. CASPER, *AMERICAN CRIMINAL JUSTICE* 105 (1972).

87. See M. HEUMANN, *supra* note 83, at 84-85 (illustrating attorneys' belief that plea bargaining aids defendants).

88. See *id.* at 91 (factual culpability important factor for attorney in decision to plea bargain).

89. Casper reports that, of a sample of 49 criminal defendants he interviewed, 80 percent represented by public defender "felt that their lawyer was not on their side," J. CASPER, *supra* note 86, at 105-06, and that "the key to their analysis was the notion of a financial transaction between lawyer and client. By paying an attorney, you can make sure that he is 'yours.'" *Id.* at 112. Casper also notes that most of these defendants had never had experience with paid attorneys and were "simply expressing blind faith in street lawyers and distrust of the public defender." *Id.* at 114. Several defendants (many from lower-middle or middle-class backgrounds) who were represented by paid attorneys, "took it as a kind of *given* that the lawyer was on their side" though most were dissatisfied in some way with their representation. *Id.* at 117 (emphasis in original). Note, however, Blumberg's observation of criminal defendants represented by paid attorneys:

Defense lawyers make sure that even the most obtuse clients know there is a firm connection between fee payment and the zealous exercise of professional expertise, secret knowledge, and organizational "connections" in their behalf. They try to keep their clients at the precise edge of anxiety calculated to encourage prompt payment of fee. The client's attitude in this relationship is often a precarious admixture of hostility, mistrust, dependence, and sycophany. By playing upon his client's anxieties and establishing a seemingly causal relationship between the fee and the accused's extrication from his difficulties, the lawyer establishes the necessary groundwork to assure a minimum of haggling over the fee and its eventual payment.

A. BLUMBERG, *supra* note 26, at 111.

process into open air.<sup>90</sup> The ineradicable persistence of these mistrustful attitudes underlies proposals advocating the elimination of plea bargaining.<sup>91</sup> These proposals assume that penal sanctions and specified offenses can be tightly limited by clear statutory language. But in any realistically attainable criminal justice system, there will always be room for dispute about concordance between the available evidence and the charge or between the charge and the sanction.<sup>92</sup> Prosecutors would be untrue to their proper social role if they assumed the worst about the prospects for obtaining stringent convictions or sanctions. Defense attorneys would equally be untrue to their proper role if they assumed that the prosecutors' evaluation of the state's prospects put the case for the defendants in the most favorable light possible.

Some commentators propose that the defense attorney and the prosecutor should be barred from discussing these inevitable differences in perspective except in the presence of the defendant and the judge.<sup>93</sup> If, however, the goal of this or any reform proposal regarding plea bargaining is to ensure that all affected parties believe in one another's honesty and integrity, this goal will be difficult, perhaps impossible, to implement in relations between the defense attorney and the client. Moreover, the inevitable persistence of mistrust in the attorney-client relationship reinforces and encourages the belief that plea bargaining is a fundamentally flawed process in which the rights of criminal defendants are regularly, excessively, and even casually bargained away.

Although the factual basis for this belief has not been documented,<sup>94</sup> it persists because most defense attorneys understand, though often without explicit articulation, that pervasive mistrust constantly creates temptations for retaliatory actions between them and their clients. Defense attorneys generally may suppress these retaliatory impulses against clients in their negotiations with prosecutors. This suppression, however, inevitably requires considerable emotional effort to overcome the ill-defined but persistent resentment toward clients. Attorneys frequently express this resentment through the charge that criminal defendants are never "grateful" even though they have been represented energetically and advantageously.<sup>95</sup>

90. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (record must indicate guilty plea knowingly and voluntarily made); cf. *Santobello v. New York*, 404 U.S. 257, 262 (1971) (prosecutor must keep promises made during plea bargaining); *Brady v. United States*, 397 U.S. 742, 756-58 (1970) (emphasizing importance of counsel's presence during choice of plea).

91. See Callan, *An Experience in Justice Without Plea Negotiation*, 13 L. & SOC'Y REV. 327, 327-30 (1979); Rubinstein & White, *Alaska's Ban on Plea Bargaining*, 13 L. & SOC'Y REV. 367, 378-81 (1979).

92. Cf. Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 L. & SOC'Y REV. 393 (1979).

93. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 53-57 (1974); Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 L. & SOC'Y REV. 349, 364-65 (1979).

94. See Casper, *Reformers v. Abolitionists: Some Notes for Further Research on Plea Bargaining*, 13 L. & SOC'Y REV. 567, 570-71 (1979).

95. Platt & Pollock have examined this resentment:

[E]xplicit prejudice [against clients] is rare among ex-[Assistant Public Defenders]; typically, their hostility is implicit and ambivalent, reflecting feelings of guilt about the betrayal of their original liberal idealism:

About the time I was getting ready to leave, I'd almost figured I was as eager to prosecute my client as I was to defend him. I think that's psychologically the time when you've got to get out of that sort of situation. . . . I got disillusioned. [Interview 15].

I started out with some kind of avenging zeal to protect these people who'd been



Jailed clients frequently demonstrate their absence of gratitude through their claims for post-trial relief on the ground of ineffective assistance of counsel. Though such accusations expose the adversarial relationship between the defendant and his former attorney, the attitude is neither new nor surprising to either party. Because defense attorneys expect that most of their clients eventually will be convicted and unhappy, the attorneys also expect that this unhappiness will frequently emerge in charges of ineffective assistance. Any sensible criminal defense attorney knows he must carefully protect himself against his client at the same time that he represents the client against others; this realization is one palpable way that mistrust between attorney and client pervades the representational relationship.<sup>96</sup>

Some have commented on the ethical tensions created for criminal defense attorneys by their obligations to represent clients whose conduct they find morally abhorrent.<sup>97</sup> These tensions undoubtedly are sources of concern to defense attorneys and contribute to their feelings of internal conflict. Defense attorneys, however, are able to address this tension more easily than to confront their suspicion that neither they nor their clients trust the other and that the relationship between them fails even to remotely resemble the harmonious image projected by the norms of the profession. The standardized versions of legal ethics give defense attorneys many plausible ways to believe in the social propriety of aggressively representing an accused murderer, for example, even though the attorney morally disapproves of murder and

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ensnared in the clutches of the law. And I grew progressively sourer and had progressively less patience with them as I stayed there, and it finally got so that my animosities for them were very thinly disguised. I just didn't like them by and large. Nobody else liked them either really, but some of them were a little more patient finally than I became . . . [Interview 20].

Various Assistants claim that their clients lie, are sullen and distrustful, and are ungrateful. As one Assistant reflected, "in all the cases I handled in the Public Defender's Office, even if I won a fantastic victory, the defendant never said 'thank you.'" [Interview 40].

Platt & Pollack, *Channeling Lawyers: The Careers of Public Defenders*, in *PSYCHOLOGY AND THE LAW* 98 (G. Bermant, C. Nemeth & N. Vidmar eds. 1976). Similarly, Blumberg reports:

Most of the [criminal defense] lawyers in Metropolitan Court say they would enter other professions than the law "if I could do it over again." These same individuals would not want their children to be lawyers—or at least not to practice criminal law. "You're everyone's goat."—"a patsy," "no matter how a case comes out—you lose in the eyes of your client." "You're caught in the middle—even when you've won a tough trial, the client complains. You've reduced a felonious assault to a disorderly conduct charge—still they're not satisfied. . . ."

A. BLUMBERG, *supra* note 26, at 106.

96. See Brown, *Protect Yourself! It's Later Than You Think*, 41 *TEX. B.J.* 599, 600 (1978) (counselling attorneys to "be wary of court-appointed criminal cases" because of subsequent possible malpractice liability); cf. *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979) (no immunity under federal law for court-appointed counsel in state malpractice suit). This wariness is not limited to criminal practice. See McCabe, *The Lawyer as Target: Today's Client Is Tomorrow's Plaintiff*, 48 *PENN. B.A.Q.* 525, 525, 530 (1977) (discussing new "preoccupational status" of malpractice liability for attorneys generally and the correlative "need to treat every client contact as a potential source of professional liability."). See also Stern & Martin, *Mitigating the Risk of Becoming a Defendant in a Malpractice Action by Your Former Client*, 52 *FLA. B.J.* 112 (1978).

97. See ABA CODE, *supra* note 1, EC 2-29 (withdrawal for compelling reasons does not include belief of client's guilt); Shaffer, *Serving the Guilty*, 26 *LOY. L. REV.* 71, 71-85 (1979).

believes his client to be a murderer.<sup>98</sup> These professional norms, however, do not explain to the attorney how to retain his self-respect if he believes that he is violating a primary norm of his profession: that nothing "should be permitted to dilute his loyalty to his client."<sup>99</sup> Attorneys cannot help suspecting—or must exert constant intellectual effort to avoid the suspicion—that no one can represent criminal defendants while remaining true to professional norms of representation. In short, the very depiction "criminal defense attorney" ultimately appears close to a contradiction in terms.

This paradoxical belief in the inherent inconsistency between proper lawyering and criminal defense work is a powerful, though typically unacknowledged, argument that drives law students away from this work and that leads many of those who pursue a criminal defense practice after law school to "burn out" quickly and move to other areas of practice.<sup>100</sup> Many law school teachers are puzzled to see the repeated transformation of student attitudes toward criminal defense practice from enthusiasm at the first moments of matriculation to rueful aversion at graduation. Critics, even many students themselves, ascribe this process to the financial seductions of corporate practice, the disdain of law faculties for criminal work, and the shallowness of first year students' ideological commitment to representing "underdogs." Only the first, financial factor carries any real explanatory weight. Monetary considerations alone, however, fail to account adequately for the changed attitudes that lead so many students to avoid public defender work at least in the first years after graduation when the income differential is not vast and can be readily recouped by later career shifts. The transformation appears even more puzzling upon observing many students' willingness to condemn their own motives, charging themselves with "selling out" their initial idealism in order to serve Mammon.

This common derogation might not be accurate. Law students might be drawn away from criminal practice toward corporate firms in order to protect their initial idealism rather than to abandon it. This underlying, though unacknowledged, motive would explain the tone of relief and even boastfulness heard when many students announce that they have decided to avoid criminal work. These students have come to believe—some through clinical exposure—that the ideals that led them to law school cannot be realized in the representation of criminal defendants. These students have come to understand that their own idealism cannot survive in the crucible of the pervasive mutual mistrust they anticipate with their criminal-defendant clients.

Of course, even initially, the financial rewards of corporate practice are more substantial. Beyond these tangible rewards, however, students can more readily believe that they can find common ground with corporate clients and truly offer service which will be received gratefully—a reward which does not seem possible with a criminal-defendant clientele. With such beliefs, students can easily conclude that they would sacrifice much more than financial rewards in criminal work; they would impair their own sense of moral integrity by purporting to represent clients whom they viewed, and who

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98. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470-72 (1966).

99. ABA CODE, *supra* note 1, EC 5-1.

100. Platt & Pollock, *supra* note 95, at 99.

viewed them, virtually as enemies locked in unresolvable, pervasive conflict. Students recognizing this situation see no alternative except to withdraw from the representation of any criminal defendants. Even those who persist in their commitment to criminal defense work by entering public defender offices immediately after law school graduation typically leave this work after two to three years.<sup>101</sup> Though these young lawyers leave for more lucrative practice, they frequently speak of the demoralization resulting from criminal defense work as an important motive for their departure.<sup>102</sup>

These law students and young lawyers are addressing the same ethical problem that has been identified, from the Canons to the Model Rules, as conflict of interest between lawyer and client. The students and young lawyers solve this ethical problem in the same manner that the legal profession has traditionally counseled—withdrawal from professional relations to avoid or to end conflict with the client.<sup>103</sup>

The premise underlying this solution is that conflict between lawyer and client must be avoided or quickly resolved. This same premise leads idealistic law students away from difficult practice situations such as those commonly found in criminal defense work. Instructors do not teach law students that criminal defense work is unworthy or uninteresting or that representation of corporate interests is the highest calling of legal practice. Students learn, instead, that they will encounter especially difficult and stressful ethical conflicts in criminal defense work and that they will not be equipped to deal with those conflicts in any way other than flight.

This professional attitude is not limited to criminal law practice. The conflict between defense attorney and criminal defendant is so stark, however, that even first-year law students see it more clearly than in other areas of practice. The conflict is made visible by the social status differences between the lawyer and the criminal defendant client and the compelling personal liberty stakes for the client. In general legal practice, by contrast, the pervasiveness of attorney-client conflict has been less visible, not only to law students but even to many practitioners who have regarded conflict with clients as exceptional and easily resolvable.<sup>104</sup>

The underlying reason for this traditional ostrich-like posture becomes explicit in the equally traditional aversion to criminal defense practice among lawyers. Criminal defense work forces lawyers to recognize that they and this particular class of clients often regard one another as adversaries; with this explicit recognition lawyers do not understand how they can behave as professionals. If lawyers in general practice admitted the pervasiveness of conflict with clients, they would confront a more troubling dilemma: how to serve any client as a lawyer. Once pervasive conflict is admitted, the possibility of any proper professional relationship seems to vanish. This is, of course, the ultimate reductive absurdity for the legal profession. No wonder that most lawyers, and the profession's collective view of itself in its formal ethical pronouncements, recoil from this admission.

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101. *Id.* at 96.

102. *Id.* at 96-99.

103. See note 5 *supra* and accompanying text.

104. Cf. ABA CODE, *supra* note 1, Preamble ("A lawyer's responsibilities as an officer of the court, a representative of clients, and a public citizen are usually harmonious").

This instinctive recoil is one among many forces that has discouraged careful, particularized inquiry into the reality of trust in attorney-client relations. The desultory character of current mechanisms for enforcing professional standards of conduct is one powerful indication of the profession's disinclination to probe the attorney-client relationship.<sup>105</sup> Disciplinary actions by the organized bar are suspiciously rare occurrences,<sup>106</sup> especially given the number of attorneys in practice and the number of transactions in ordinary affairs where the abuse of clients' interests is both possible and tempting for attorneys. The statistics suggest either that bar admissions committees have found the virtually infallible litmus to screen out all but the most scrupulous and reliably self-policing among applicants or, more plausibly, that the organized bar turns a collective blind eye to substantial numbers of inappropriate attorney-client transactions.<sup>107</sup>

Some spokesmen for the profession will admit that current disciplinary procedures miss many abusive cases but argue, nonetheless, that important countervailing interests are protected by this regulatory imprecision. The character of these interests appears to vary depending on the precise argument for the more aggressive regulation being met. To the argument that attorneys should be subjected to extra-professional or lay regulation, the profession has invoked the mysteries of the law—the special knowledge that alone can qualify initiates to understand and therefore to regulate one another intelligently.<sup>108</sup> To the argument that some attorneys should more aggressively scrutinize other attorneys in order to protect the lay public, some within the profession have invoked the extraordinary mysteries of the law's inner sanctum—the special character of the attorney-client interaction which is so intimate and complex that it cannot adequately be understood and evaluated by any outsider to this specific relationship, even by another attorney.

This latter argument resonates with the idea of the confessional and the priestly function. The analogy may appear limited by the formal rules in legal practice breaching the confidentiality barrier. The client's explicit waiver will force his attorney to divulge prior confidences;<sup>109</sup> the client's implicit waiver through actions (for example, a client's suit against his attorney) will permit the attorney to divulge confidences.<sup>110</sup> Although the confidence of the religious confessional is less subject to mortal manipulation and more obviously sacrosanct than this, priestly notions of impenetrable confidentiality nonetheless have powerful counterparts in legal practice. These notions especially appear when an angry client attempts to waive the confidentiality barrier and secure external scrutiny of his attorney's conduct. The barrier

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105. See M. BLOOM, *THE TROUBLE WITH LAWYERS* 157-91 (1968) (castigating absence of internal discipline in legal profession); Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 196 (1974) (analyzing "endemic inability" of legal profession to regulate its members). See generally Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RESEARCH J. 917 (1976).

106. See Steele & Nimmer, *supra* note 105, at 979 (few complaints result in sanctions). See generally Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981).

107. Cf. Steele & Nimmer, *supra* note 105, at 937 (enumerating disciplinary sanctions imposed from 1960 to 1974).

108. Becker, *The Nature of a Profession*, in [1962] YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION pt. 2, at 27, 37-39 (N. Henry ed. 1962) (professionals presumed sole qualified judge of peers' work).

109. ABA CODE, *supra* note 1, DR 4-101(C)(1).

110. *Id.* DR 4-101(C)(4).

remains impenetrably high in two ways: first, the client complains only before other attorneys; and second, those reviewing attorneys invoke, both explicitly and implicitly, an evidentiary presumption of regularity that favors their fellow attorney's version of the now-disputed transaction.<sup>111</sup>

This evidentiary burden has particularly stark implications in judicial proceedings in which criminal defendants allege ineffective assistance of counsel.<sup>112</sup> Among the many disadvantages suffered by criminal defendants as a class, at least two have special relevance to allocating the burden of proof in post hoc review proceedings regarding attorney conduct. First, because most defendants are poor and depend on either appointed attorneys, salaried public defenders, or paid attorneys who must generate considerable client volume to earn their livings from fees, market forces prompt attorneys to attend more assiduously to the interests of wealthier clients. Second, because most criminal defendants are commonly viewed as guilty of the offense charged, an attorney's consistently losing record in representing his client does not carry the same self-evident condemnatory implications or the same marketplace disciplines that would arise from a similar record of failures with other kinds of clients. These two considerations cast some doubt on the factual accuracy of the presumption that criminal defendants regularly receive effective assistance of counsel.

Even greater doubt arises about the accuracy of this presumption, or at least about its credibility from the defendant's perspective, when these two factors are added to the elements discussed earlier that make distrust between attorneys and criminal defendants the norm rather than the exception. Neither judges nor the legal profession have been willing to acknowledge the plausibility of these doubts and accordingly design more stringent post hoc review procedures regarding the adequacy of criminal defense representation.<sup>113</sup> Common reformist attitudes toward plea bargaining reflect this unwillingness. Abolishing the practice makes less sense than designing procedures forcing defense attorneys and prosecutors to reveal and to justify the precise terms of their bargain to some independent third party.<sup>114</sup> The ritual courtroom recitations prompted by the Supreme Court's prescriptions hold little promise for accomplishing this goal. Aggressively inquisitorial procedures would be required, with provision for independent investigation of the factual basis for the prosecutor's charges and the thoroughness of the defense counsel's attention to his client. These procedures obviously would be more costly and burdensome than existing practices, though not so much as providing a jury trial with full adversarial trappings for every criminal case. This added financial burden and the general disrepute of criminal defendants have served as arguments, though usually not explicitly admitted, against giving serious attention to such procedures regarding either plea bargaining or ineffective assistance of counsel.

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111. Steele & Nimmer, *supra* note 105, at 983.

112. See Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 29 (1973) (presumption of regularity survives finding of gross incompetence).

113. See *United States v. Decoster*, 624 F.2d 196, 206 (D.C. Cir.) (en banc) (plurality opinion) (accused must show deficiency likely deprived him of otherwise available, substantial defense to sustain ineffective counsel claim), *cert. denied*, 444 U.S. 944 (1979).

114. See M. HEUMANN, *supra* note 83, at 166-68 (reform policy ought not be geared toward abolition).

Another argument particularly diminishes the attractions of rigorous inquiry into the representation of criminal defendants. This argument—the specific focus of attention in this essay—is that the legal profession is unwilling to acknowledge the reality that criminal defendants do not trust, and have few objectively considered reasons to trust, their attorneys. Stringent post hoc review procedures regarding representation of criminal defendants would force this mistrust into higher visibility in two ways. First, the review procedures would offer a general overview of the representational process. Although the cases exposed to public scrutiny would not necessarily be a systematic sample of all criminal cases, if patterns of abuse regularly appeared in the exposed cases, the legal profession would be required to argue that these abuses were in fact unrepresentative. This argument may be true, but neither attorneys nor criminal defendants comfortably believe it. Second, the review procedures would provide incentives for criminal defense attorneys to give closer attention to satisfying their clients, and the mistrust that bars this satisfaction would come into sharper focus as the attorney attempts to avoid the burdens of post hoc review. If this mistrust appears to impeach the relationship in any post hoc review and nonetheless appears to be irremediable, most defense attorneys obviously would not welcome the prospect of stringent post hoc reviews.

Attorneys' suspicion that the representational relation, if closely examined, would not pass muster against the professional norm of attorney-client trust would thus serve as a powerful argument against such scrutiny. This argument ironically overlooks the possibility that stringent post hoc procedures themselves might enhance trust in the relationship by giving criminal defendants some reason to believe that they were not helpless in finding later protection against their attorneys. The current privacy of the relationship and its ostentatious reliance on an implausible a priori assumption of mutual trust may serve as barriers to the development of any trust between attorneys and criminal defendants. At the same time, this mistrust itself makes attorneys unwilling to consider a plausible antidote: to abandon the attorney-client confidentiality shibboleth and its a priori assumption of mutual trust in favor of post hoc review processes organized on contrary principles.

I suggested earlier that this same judgmental distortion may have unwittingly influenced the decision of the Model Rules' draftsmen to limit attorney disclosure provisions by utilizing only a *mens rea* standard. The ironic incentive for greater deception between attorney and client provided by this standard parallels the likely consequences of current reform proposals to abolish plea bargaining in criminal practice. Given the inevitable differences in perspective between the prosecutor and the defense attorney, the practical imperatives that have produced such bargaining cannot be removed from the criminal justice system. The most likely result of formally abolishing plea bargaining would be to force the practice underground, and consequently even less available for honest acknowledgment and scrutiny than under current practice.<sup>115</sup> Proponents of abolition might not consciously desire this result any more than the draftsmen of the Model Rules intended to increase attorney-client mistrust through their disclosure provisions. The potential results of both proposals suggest a similar underlying flaw: that both are

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115. See Heumann & Loftin, *supra* note 92, at 401-07, 424-25 (arrest warrant manipulation undercuts mandatory sentencing and abolition of plea bargaining).

responding to an uncomfortable suspicion about the absence of attorney-client trust by suppressing that suspicion.

### CONCLUSION: TRUST IN LAW AND MEDICINE

Legal professionals are not unique in wishing to suppress the suspicion of mistrust. The formal norms and predominant practices of the medical profession in its relations with patients illustrate this same suppressive impulse. From Hippocrates to modern times, patients were not expected or permitted to question doctors' orders; physicians demanded obedience and unquestioning trust.<sup>116</sup> Patients, today at least, may generally resist these demands. In any event, such demands for blindly offered trust, even if accepted by patients, might be more obstructive than helpful for most patients' prospects of ultimate cure.<sup>117</sup> The medical profession has been slow to acknowledge, however, and even slower to pursue empirically based systematic investigation of these issues. Jay Katz persuasively argues that this reluctance comes from the medical profession's unwillingness to acknowledge, either to patients or to themselves, the true magnitude of the physician's uncertainty in diagnosing or treating most serious illnesses.<sup>118</sup> The peremptory demand for obedience makes probing conversation between physician and patient unnecessary and even normatively inappropriate, thus effectively avoiding any possibility that the physicians' uncertainty and consequent mistrust between patient and physician might be acknowledged explicitly.

Legal institutions in recent years have sought to displace the traditional medical authoritarian norm with the proposition that physicians are obliged to obtain patients' "informed consent" for all interventions.<sup>119</sup> This legal reform ostensibly mandates frank conversation so that patients can reach independent judgments about whether and how much they choose to trust their physicians. Katz has examined several hidden contradictions that undercut the goal of patient autonomy promised by the judicial formulations of this apparently radical reform.<sup>120</sup>

Even if these doctrinal contradictions were eliminated, however, it seems likely that the conception of patient rule over physicians, a conception implicit in the idea of "informed consent," would itself tend to cut off rather than to promote probing conversation.<sup>121</sup> This result would evolve in the same

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116. See Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137, 140-41 (1977).

117. See B. BARBER, *INFORMED CONSENT IN MEDICAL THERAPY AND RESEARCH* 27-28, 91-101 (1980).

118. See Katz, *Disclosure and Consent in Psychiatric Practice: Mission Impossible?* in *LAW AND ETHICS IN THE PRACTICE OF PSYCHIATRY* 91, 101-03 (C. Hofling ed. 1980).

119. See Spiegel, *supra* note 61, at 44-49.

120. For example, violation of the duty to inform generally does not subject the doctor to liability for battery; rather, breach of this duty at most gives rise to an action for negligent failure to warn. Katz, *supra* note 116, at 146 & n.22. Thus, the law undercuts the reciprocal relation between disclosure and consent. *Id.* at 147. In addition, the defense of "therapeutic privilege" not to disclose dilutes the apparent protections for patient autonomy. *Id.* at 155-56 & n.57. Judicial "preoccupation with physicians' plight in determining what to disclose has prevented" courts from giving proper attention to the patient's right of choice. *Id.* at 159.

121. See R. BURT, *TAKING CARE OF STRANGERS* 119-21 (1979).

way that the idea of client rule in legal practice encourages attorneys to conceive of themselves as "hired guns" obliged to accept clients' marching orders without question. Attorneys resist this parody in many ways; presumably physicians would be at least equally resistant. Nonetheless, there are powerful disincentives for lawyers to engage in sustained, openly acknowledged dispute with clients about the propriety of their marching orders and the ultimate authority to give orders. Apparently different incentives guide medical practice, but to the same result and ultimately for the same reason. Both professions are reluctant to engage in open exploration with clients/patients regarding the amount of trust offered or deserved by either party. Both professions suspect, but then recoil from acknowledging the suspicion, that such exploration would readily lead to the conclusion that there is no sufficient realistic basis for trust. Both professions thereby miss many opportunities for cultivating a more confidently trusting relationship that does not rest fundamentally on suppressed suspicions that mutual trust could not survive the open acknowledgment of doubts.

The physicians' traditional demand for unquestioning obedience is the functional equivalent of the attorneys' traditional posture that clients approach them with basically trustful attitudes. The legal profession has been content to assume that clients need attorneys' services in order to prevail over adversaries. The medical profession also has traditionally held to the assumption that patients will trust physicians because their illness demands such trust. Neither profession has been willing to acknowledge that trust must be earned in each individual encounter, and that trust can be earned only by the time-consuming task of overcoming deep-rooted, and often deeply concealed, mistrust on both sides. Neither profession has been prepared to design incentives in its formal norms and enforcement mechanisms that would seriously press practitioners to engage in this difficult enterprise. It's about time.