

## THE LAWYER'S ALLEGIANCE: PRIORITIES REGARDING CONFIDENTIALITY

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### I. AS ADOPTED BY THE HOUSE OF DELEGATES, THE MODEL RULES ARE INADEQUATE

The ethical rules and admonitions governing the legal profession in the United States are in a serious state of disarray and inadequacy. This condition prevails notwithstanding monumental efforts of the American Bar Association Commission on Evaluation of Professional Standards (familiarily known as the "Kutak Commission" after its late Chairman, Robert J. Kutak) during the period of six years from its appointment in the summer of 1977 until its work product was left in tattered shreds in August, 1983 as the House of Delegates of the American Bar Association (ABA) adopted the Model Rules of Professional Conduct (Model Rules).

The unfortunate fate worked upon the Kutak Commission's proposals by actions of the House of Delegates has left the country's lawyers and the highest judicial bodies of the several states, which have ultimate authority for the governance of lawyers, in confusion and without an adequate structure of ethics and professionalism. As the Model Rules now stand:

- (1) A lawyer must stand silently by though his client defrauds third persons or the government, and may withdraw only if possible in a manner protective of his fraudulent client.
- (2) The lawyer has a duty to disclose a criminal act, fraud, or perjury perpetrated by his client on a tribunal to avoid assisting the crime or fraud.
- (3) Persons involved with a corporation or other organization are free to abuse the organization and the lawyer's response is limited to withdrawal from representation. He may not expostulate to anyone who might be in a position to eliminate the abuse. He may not even advise succeeding counsel of his reason for having withdrawn.

Recent cases have provided evidence of the inadequacy and unacceptability of these rules. One dramatic example is the matter of OPM Leasing Services, Inc. (OPM), a corporation reported to have defrauded nineteen banks, in-

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This article was written during Autumn, 1983 when I was privileged to be Frances Lewis Lawyer-in-Residence at Washington and Lee University School of Law. I acknowledge with gratitude the assistance of Francis D. "Mike" Shaffer, a research intern to that program. I am also grateful to Professors Thomas L. Shaffer, Director of the Frances Lewis Law Center, and Victor Rosenblum, its then Scholar-in-Residence, each of whom reacted to a draft. Any errors, of course, are my responsibility.

insurance companies and pension funds of some 200 million dollars.<sup>1</sup> OPM accomplished its galactic scam by securing institutional loans to finance purchases of non-existent computers. OPM's major officers fabricated title documents and related writings for the computers. The loans were secured by the pledge of rents represented receivable under fictitious leases. For purposes of this article, OPM's meteoric rise from its organization in 1970 until it plummeted to grand jury proceedings and bankruptcy in February, 1981, should be considered in a succession of periods: Period I, before July 22, 1980 when OPM was represented by the ABC law firm, and during which OPM closed some 115 million dollars in phony loans; Period II, from July 22, 1980, when OPM's president admitted to ABC its fraudulent pattern of operations, to the first half of September, 1980, when senior partners of ABC "agreed that it was appropriate to resign" but were advised by outside counsel, consulted because of expertise in ethics matters, "that the withdrawal had to be accomplished in a manner least likely to cause injury to the client";<sup>2</sup> Period III, from the ABC decision in the first half of September, 1980 to September 23, 1980, when ABC formally resolved to withdraw and so notified OPM, during which period OPM bilked a lender of 6.2 million dollars in a loan closed by ABC; Period IV, from September 23, 1980 to some time in December, 1980, when the withdrawal of ABC was completed; Period V, from September 23, 1980 until February, 1981, during which OPM was represented by XYZ law firm.

XYZ had inquired of ABC why ABC no longer represented OPM, but had been put off by ABC with a meaningless explanation designed to be protective of OPM. The explanation was deemed appropriate under New York Code DR 2-110(A)(2) concerning withdrawal. ABC's action prompted the Trustee in the OPM Bankruptcy to observe:

Although the Trustee does not attempt to resolve the question whether the course adopted by [ABC] complied with the Code of Professional Responsibility, one thing seems clear: the firm could have followed other courses, consistent with its ethical responsibilities, that would have stopped the fraud. Instead, after receiving notice that it was dealing with a crook, it acted in a way that helped [the President of OPM] continue the fraud for eight additional months during which financial institutions were bilked out of more than \$85 million.<sup>3</sup>

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1. See The N.Y. Times, Jan. 9, 1983 (Magazine), at 31 (extensive review of OPM Leasing Services, Inc. matter under by-line of Stuart Taylor Jr.); Wall St. J., Dec. 31, 1982, at 1 (by-lines of Paul Blustein and Stanley Penn). Additional details of the OPM Matter are contained in the Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor (Apr. 25, 1983), filed in the United States Bankruptcy Court, Southern District of New York, *In re O.P.M. Leasing Services, Inc.*, Debtor, Reorganization No. 81-B-10533 (BRL) [hereinafter cited as *Trustee's Report*]. The Report consists of 600 pages plus 38 appendices.

2. N.Y. Times, Jan. 9, 1983 (Magazine), at 48.

3. *Trustee's Report*, *supra* note 1, at 409. Contrary to the Trustee's contention, it is not at all "clear" that "the [ABC] firm could have followed other courses consistent with ethical principles, that would have stopped the fraud." As long as it is assumed that during periods II and III ABC believed the fraud was not continuing, ABC seems to have acted "consistent with ethical" rules, though perhaps not with ethical principles.

After [ABC] resigned, OPM's in-house legal staff and [XYZ] closed fraudulent Rockwell lease financings totaling approximately \$15 million.<sup>4</sup>

In June, July, and August, 1980, fraudulent loans were placed by OPM totalling 60,787,544 dollars. Of this total, almost 22 million dollars were placed after July 22 when ABC was given direct notice of the pattern of fraud of its client.<sup>5</sup>

The shocking thing about the OPM Leasing case is neither the immensity of the swindle accomplished by OPM nor the chutzpah manifest in its conception and implementation. Rather, it is that ABC law firm probably *did conform* to the applicable prescribed rules of ethics; or, the corollary: that the ethical rules neither demand of nor permit lawyers in the situation of ABC more responsible and honorable action than the conduct of ABC. Perhaps the impact of recognizing the inadequacy of those rules is exceeded by the realization that, in the wake of the OPM Leasing debacle, the ABA House of Delegates rejected the Kutak Commission proposals and retained rules that would encourage and, indeed, require lawyers to act again as ABC acted in protection of a fraudulent client to the substantial and continuing damage of identifiable third parties. The Trustee's report in the OPM matter referred to the House of Delegates action as "outrageous and irresponsible."<sup>6</sup>

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4. *Trustee's Report*, *supra* note 1, at 408.

5. *Trustee's Report*, *supra* note 1, at Appendices 34 and 35.

6. *Trustee's Report*, *supra* note 1, at 422. The Trustee stated:

The American Bar Association recently addressed an issue bearing on one aspect of [ABC] firm's conduct—whether lawyers may disclose information concerning a client's fraud to law enforcement authorities and affected third parties. An ABA study commission advised adoption of a model rule that would have permitted, but not required, lawyers to disclose client confidences when necessary to prevent the client from committing a fraudulent act "likely to result...in substantial injury to the financial interests or property of another" or when necessary "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."

Earlier this year, the ABA House of Delegates, the organization's policy-making body, rejected the proposed rule and voted instead for a rule that would make it unethical for lawyers to divulge client secrets in order to protect third parties from an ongoing fraud. Even with the [ABC] story before it, the House of Delegates provisionally adopted a rule prohibiting lawyers from disclosing client secrets except when necessary to prevent "imminent death or substantial bodily harm," to correct false or perjured evidence, to defend malpractice actions, or to prosecute suits to recover legal fees. The Trustee considers the ABA's action outrageous and irresponsible. The Trustee hopes that the ABA will reconsider the issue and that state bar authorities will reject the rule in favor of one that goes at least as far as the proposed rule in permitting lawyers to prevent their clients from committing future frauds and from using lawyers as instruments in fraudulent schemes.

*Id.* Commenting on the same action, the *New York Times* editorialized:

Forced to choose starkly between models of the lawyer as client's mouthpiece and as caretaker of the law, the American Bar Association has opted for mouthpiece. Indeed, it held so faithfully to the role of hired gun that it left the impression it condones a lawyer's silent acquiescence in fraud. Writing a new code of ethics, the A.B.A.'s House of Delegates approved a rule that requires lawyers to keep their client's secrets—no matter what the cost of a client's dishonesty to innocent victims. Unless clarified, that

For want of a system adequate to define and implement acceptable standards of ethics and professional responsibility, the legal profession is without competence for self-regulation and, accordingly, may not satisfy the accepted definition of a profession.<sup>7</sup> At best, in the absence of an adequate set of model

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cramped view is a disservice to both the public and the profession. \* \* \* Consider a lawyer hired to offer a legal opinion about a loan request or commercial sale. On impressive letterhead the lawyer describes the transaction and proclaims it lawful to other interested parties. Later the lawyer learns that the client lied and that the opinion is in fact deceptive. If the client refuses to publish the truth, must the lawyer stay silent? That's the example put to the A.B.A. this week. It voted to *prohibit* a lawyer thus misused from telling anyone the truth. With few exceptions, the rule appears to leave the lawyer only one way out: to resign the account, without explanation. The exceptions are for cases of perjury in the lawyer's presence, risk of "death or imminent bodily harm" and *self-defense*, when the lawyer is sued for malpractice or can't collect his fee. As adopted, this rule comes close to saying that client confidentiality may be sacrificed to protect a *lawyer's* financial interests, but no one else's. It is hard to believe that a profession built on words cannot define a higher standard.

N.Y. Times, Feb. 11, 1983, at 26, col. 1. Two helpful articles on the issue of the lawyer's duty respecting his client's frauds are: Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Responsibility*, 67 GEO. L.J. 991 (1979) (Professor Kramer would require merely withdrawal); and Gruenbaum, *Clients' Frauds and Their Lawyers' Obligations: A Response to Professor Kramer*, 68 GEO. L.J. 191 (1979). Sissela Bok has said, "There is much truth in saying that one is responsible for what happens after one has done something wrong or questionable. But it is a very narrow view of responsibility which does not also take some blame for a disaster one could easily have averted, no matter how much others are also to blame." SISELA BOK, *LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE* 41 (1978).

7. See DENNIS M. CAMPBELL, *DOCTORS, LAWYERS, MINISTERS: ETHICS IN PROFESSIONAL PRACTICE* 21-25 (1982). Campbell lists eight common denominators of a learned "profession."

1. The professional is engaged in a *social service* that is *essential and unique*. . . .
2. The professional is one who has developed a *high degree of knowledge*. . . .
3. The professional must develop the *ability to apply the special body of knowledge that is unique to the profession*. . . .
4. The professional is part of a group that is *autonomous* and claims the *right to regulate itself*. . . .
5. The professional recognizes and affirms a *code of ethics*. . . . Codes are not as important, however, as a long tradition of ethical practice within a profession. . . . The point to be made here is that a concern for ethics is one of the *defining* characteristics of a profession.
6. The professional exhibits a strong *self-discipline* and *accepts personal responsibility* for actions and decisions. . . . Self-discipline is closely linked to the acceptance of personal responsibility for decisions made in practice. The true professional cannot be a functionary; accountability for both the procedures and results of his or her work is recognized and accepted.
7. The professional's primary concern and commitment to *communal interest* rather than merely to the self. This means that the professional places neither his or her own self-interest, nor the self-interest of those who are served above a concern for the greater good of the entire society. The professional is expected to think about the consequences of a given case in the larger context of a society's needs and interests. . . . Professionals are dealing with growing numbers of cases in which communal needs and individual needs are in conflict.
8. The professional is more concerned with *services rendered* than with *financial rewards*.

*Id.* See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (adverse criticism of the bar's rules of ethics, and specifically the Model Code, and more particularly of the motives of the bar which, Morgan charges, reverse the priorities of an appropriate

rules around which the profession generally can coalesce, the several states will end up with respective and non-uniform codes and the fragmentation of the American bar will be exacerbated. "The legal profession" may soon disintegrate into fifty, or more, collections of lawyers, each without a recognized right of self-regulation.

## II. THE TRAIL TO INADEQUACY

Examination of how the Model Rules have ended in this state begins with a look at the history of the critical ethical principle of lawyer-client confidentiality, culminating in the Kutak Commission's proposals respecting confidentiality and the reception accorded those proposals by the ABA House of Delegates.

Professor Geoffrey C. Hazard has reminded us that problems of lawyers ethics arise because there are clients:

[T]he notion of ethics as applied to lawyers entails the difficulty, common to all professions, arising from the fact that there is a client in the picture. Ethics, seriously discussed as in philosophy, usually speak in terms that require treating all other persons on an equal footing. That is, their norms are cast as universals in which in principle every "other" is entitled to equal respect and consideration in the calculation of the actor's alternatives and course of action. On the other hand, professional ethics give priority to an "other" who is a client and in general require subordination of everyone else's interests to that of the client. Indeed, the central problem in professional ethics can be described as the tension between the client's preferred position resulting from the professional connection and the position of equality that everyone else is accorded by general principles of morality and legality.<sup>8</sup>

Different but equally stressful problems in lawyers' ethics arise because there are lawyers. The problems arise not only because some lawyers may breach rules of ethics. They arise from the tensions between the client's preferred position and the position of the client's lawyer, vis-a-vis the several systems of deliverance of legal services within which the lawyer functions as the client's representative, and the position of the lawyer as an individual with a conscience and sense of personal honor and morality. This part of the problem will be a focus of this article. The question is to what limits must, or may,

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structure of lawyer's ethics). Professor (now Dean) Morgan stated:

It seems likely that the Code's biases reflect the fact that whenever the ABA or any other ethics body has come upon a tough ethical issue, it has tried to be "practical" in its solution. Because lawyers have consistently been the ones judging "practicality", at points of conflict the biases have repeatedly, albeit unconsciously, prevailed. The client's interest has moved to the forefront only when it was coextensive with the lawyer's, and the public interest—which tends to cramp a lawyers style—was made "ethically" obligatory only when it was already compelled by law.

*Id.* at 740.

8. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 3 (1978).

a lawyer be vulnerable to countenance, tolerate, or assist the perjurious, criminal, fraudulent, unfair or immoral acts of his client with respect to the tribunal or third persons in the various contexts in which the lawyer represents the client.

Professor Wigmore states that the protection of confidential communications of clients to lawyers was recognized in the 16th century reign of Elizabeth I, when it "appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion."<sup>9</sup> Until the time of our Colonial Revolution, exclusion of the evidence was rationalized by invocation of "gentleman's honor", and established a privilege held, not by the client, but by the lawyer. The "gentleman's honor" rationale supported a status of confidential privilege for communications between those of sundry relationships in addition to that of lawyer and client.<sup>10</sup> Early in the 18th century, the theory began to evolve, becoming fully established only in the 1870's, that the privilege is of the client, not of his attorney, and that the policy of the rule is to promote freedom of clients to consult with their counsel. Theoretically, that freedom is enhanced by reducing the client's apprehension of his lawyer's disclosure of the client's communications without the client's consent.<sup>11</sup>

The earliest effort of the ABA to codify lawyers' ethical rules were the ABA Canons of Professional Ethics adopted in 1908 consisting of thirty-seven Canons and later increased to forty-seven. They have been from time to time amended and are sometimes referred to as "ABA Canons".<sup>12</sup> But, it would be misleading to omit reference to sources of concern for lawyers' ethics that antedated the ABA Canons of 1908. The ABA Canons were based in part on the Alabama Code of Ethics adopted in 1887 by the Alabama State Bar Association,<sup>13</sup> which had drawn heavily on the Essay on Professional Ethics published in 1854 by Judge George Sharswood.<sup>14</sup> Sharswood's essay was pre-

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9. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW Vol. 8, #2290 (John T. McNaughton rev. (1961)).

10. *Id.* at #2286.

11. *Id.* at #2290, 2291. In #2285, Professor Wigmore lists "four fundamental conditions...recognized as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

*Id.*

12. ABA Canons of Ethics, published in Transactions of the Thirty-First Annual Meeting of the ABA 56 (1908). See *ABA Opinions On Legal Ethics* 11-199, published by American Bar Foundation, Chicago (1967) (full 47 canons).

13. 118 Ala. XXIII (1899). The rules were adopted by the Alabama General Assembly in 1899.

14. George Sharswood, Essay on Professional Ethics, *reprinted in* 32 ABA Rep. (1907). Judge Sharswood was Chief Justice of Pennsylvania and founding dean of the University of Pennsylvania Law School.

ceded by the work of David Hoffman, Esq., the first statement of professional ethics drafted for American lawyers.<sup>15</sup>

The ABA Canons originally included, as Canon No. 15, the following, drawn from the Alabama Code of Ethics:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. \*\*\* But, it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of the law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.<sup>16</sup>

The Alabama counterparts of Canon No. 15 are found in Duty No. 4th of the specific duties lawyers were sworn "not to violate" and General Rule No. 10, adopted by the Alabama State Bar Association.<sup>17</sup>

The canons mandated a lawyer's preservation of his client's confidences in Canon No. 37.<sup>18</sup> As amended in 1937, Canon No. 37 provided:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of those confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

The lawyer's responsibility to third persons with respect to unrectified fraud or deception was established by Canon No. 41, which denied the protection

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15. D. HOFFMAN, *A COURSE OF LEGAL STUDY* 752-75 (2d. ed. 1836), reprinted in HENRY S. DRINKER, *LEGAL ETHICS* 352, appendix F [hereinafter cited as DRINKER].

16. *Id.* at 313-14, appendix C.

17. *See id.* at 353, 355, appendix F.

18. ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (originally adopted July 26, 1928 (53 ABA Rep. 130)).

of confidentiality to information from whatever source concerning a client's ongoing or prospective fraud or deception:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

The ABA Canons were supplanted by the ABA Model Code of Professional Responsibility, adopted by the House of Delegates in 1969, and thereafter amended.<sup>19</sup> It is referred to as the "Model Code".<sup>20</sup>

Building from the Model Code, the Kutak Commission proposed, in successive drafts of its Model Rules of Professional Conduct,<sup>21</sup> six rules related to the lawyer-client relationship and to the lawyer's duty of confidentiality. These are rule 1.2, relating to Scope of Representation; rule 1.6, generally speaking to Confidentiality of Information; rule 1.16, specifying conditions under which the attorney has a right of Declining or Terminating Representation; rule 3.3, respecting Candor Toward the Tribunal; and rule 4.3, concerning Truthfulness in Statements to Others.

Rule 1.2 Scope of Representation, in Draft May 1981, provided that, subject to stated conditions, the client controlled decisions concerning the objectives of representation, including whether to accept an offer of settlement, and concerning the means by which those objectives were to be pursued. In a criminal case, the lawyer was to be bound by the client's decision, after consultation, respecting his plea, whether to waive a jury trial, and whether the client would testify. The conditions governing those controls of the client

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19. The Model Code was adopted by the ABA House of Delegates August 12, 1969 and was amended by the House February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980 and August 1980.

20. See *supra* note 19. The Model Code, DR 6-101(A), for the first time codified a requirement that a lawyer handle a client's matters with competence, preparation and care: A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

To the Model Code's requirements of competence, preparation, and care, the Kutak Commission proposed to add "efficiency" as an express part of competence. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (Discussion Draft Jan. 30, 1980; Second Discussion Draft Oct. 9, 1980; Draft May 30, 1981). This seemed a rather reasonable proposal consistent with appropriate client expectations. Nevertheless, the rocky road ahead for the Kutak Commission proposals was foretold when this requirement that a lawyer be efficient was deleted before the Draft August 1983.

21. The three drafts of the Model Rules of Professional Conduct to be referred to frequently in this paper are: (1) Discussion Draft, completed January 1980 [hereinafter cited as *Discussion Draft*]; (2) Proposed Final Draft, May 30, 1981 [hereinafter cited as *Draft May 1981*]; and (3) Draft submitted to the ABA House of Delegates, August 1983 [hereinafter cited as *Draft August 1983*]. As adopted August 2, 1983, the Model Rules appear in the centerfold of the ABA Journal, November 1983.



were: (1) If the client were to insist upon pursuing an objective ("means" are not included) that the lawyer considered "repugnant or imprudent", the lawyer might withdraw if withdrawal could be "accomplished without material adverse effect on the interests of the client;"<sup>22</sup> (2) The lawyer is, in all events, prohibited from counseling or assisting a client in conduct the lawyer knows or reasonably should know is criminal or fraudulent or in the preparation of a written instrument containing terms legally prohibited, provided, that the lawyer may counsel or assist a client "in a good faith effort to determine the validity, scope, meaning or application of the law."<sup>23</sup>

As adopted in the Model Rules, condition (1), effectively intact, was moved to rule 1.16(b)(3). Condition (2) was changed by limiting its application to conduct that the lawyer "knows" to be criminal or fraudulent, and to eliminate those situations in which the lawyer "reasonably should know." The second condition was further weakened by deleting express reference to the preparation of written instruments including legally prohibited terms (presumably including unenforceable terms). The proviso allowing the lawyer to counsel or assist a client's effort to determine the validity, scope, meaning, or application of the law, but only when the client's effort is "in good faith," is in the adopted rule 1.2(d) and is an important limitation. It is designed to prohibit the lawyer's encouragement of perjury which was one of the alternatives presented and left as a reader's quandary by the author of *Anatomy of a Murder*.<sup>24</sup> Rule 1.2(d) also offers to the lawyer a defined route to avoid being used by an exploitive client. In either case, the difficulties of identifying the client's "good faith" are obvious.

Rule 1.6 Confidentiality of Information, as proposed by Draft May 1981, prohibited a lawyer from revealing "information relating to representation of a client," except with the client's consent, and subject to other specific exceptions. The distinction between "confidences" and "secrets", in the Model Code<sup>25</sup> was abandoned. The prohibition applies to all "information" of any kind relating to the representation, regardless of the source or the circumstances under which it came to the attention of the lawyer. The prohibition was substantially broader than the definition of confidentiality recognized as privileged by the rules of evidence.

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22. *Draft May 1981*, *supra* note 21, at rule 1.2(c). Rule 1.2(c), in revised form, is included in the adopted Rules as rule 1.16(b)(3). It extends the lawyer's discretionary right to withdraw beyond those provided in the Model Code, DR 7-101(B): "In his representation of a client, a lawyer may: .... (2) Refuse to aid or participate in conduct which he believes to be *unlawful*, even though there is some support for an argument that the conduct is legal." *Id.* (emphasis added).

23. *Draft May 1981*, *supra* note 21, at rule 1.2(d).

24. ROBERT TRAVERS, *NOM DE PLUME OF VOELKER*, JOHN D. (1958).

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1979). DR 4-101(A) provides: "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

*Id.*

The specific exceptions to this broad general area of protected confidentiality have been subject to radical changes, ending with severe limitations in Model Rule 1.6 as adopted. An understanding of this requires first a look at the Model Code as adopted in 1969. Under its provisions, a lawyer was given discretion under DR 4-101(C) to reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them;
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order;
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime;
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Concurrently, the Model Code imposed upon the attorney mandatory duties of disclosure in DR 7-102(B):

- (B) A lawyer who receives information clearly establishing that:
- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.<sup>26</sup>
  - (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

The combination of these provisions, DR 4-101(C) and 7-102(B), vested in the lawyer: (1) a discretionary right to reveal the intention of the client to commit a prospective crime and the information necessary to stop it, and (2) a mandatory duty to reveal unrectified fraud perpetrated by the client *in the course of the representation* upon a third person or a tribunal. With this authority and duty, the lawyer's position continued as it had been cast under Canon No. 41. The lawyer was in control of his relationship to his client and was not vulnerable to being used or exploited to assist or conceal a client's fraud or abuse of others.

The continuity seems to have been too reasonable and responsible to survive. In 1974, after the 1969 Model Code had been in effect for only five years, the House of Delegates undertook to restrict the duty to reveal unrectified fraud perpetrated by the client. The House of Delegates added to DR 7-102(B)(1) the words, "except when the information is protected as a privileged communication." The extent to which this amendment defeated the prior form of DR 7-102(B)(1) and the duty of the lawyer to disclose his client's unrectified fraud is a matter of some question and difference of opinion.

First, the 1974 amendment was first explained by Lewis H. Van Dusen, Jr., then a member of the ABA Standing Committee on Ethics and Profes-

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26. This language follows closely Canon 41.

sional Responsibility, as having relatively narrow application, limited to excepting from the lawyer's duty to disclose only those items of information that qualified as "confidences" under DR 4-101(A), and leaving a duty to disclose "secrets" as defined.<sup>27</sup>

Second, in 1975 the ABA Committee on Ethics and Professional Responsibility, of which Lewis H. Van Dusen, Jr. was then chairman, issued its Formal Opinion No. 341. Notwithstanding doubts previously acknowledged<sup>28</sup> respecting the exception to DR 7-102(B)(1), Formal Opinion No. 341 defined privileged communications as "those confidences *and secrets* that are required to be preserved by DR 4-101." (emphasis added). The opinion claimed that

"[s]uch an interpretation does not wipe out DR 7-102(B), because DR 7-102(B) applies to information received from any source, and it is not limited to information gained in the professional relationship as is DR 4-101. Under the suggested interpretation, the duty imposed by DR 7-102(B) would remain in force if the information clearly establishing a fraud on a person or tribunal and committed by a client in the course of representation were obtained by the lawyer from a third party (*but not in connection with his professional relationship with the client*), because it would not be a confidence or secret of a client entitled to confidentiality." (emphasis added).

But, this construction of Formal Opinion No. 341 affords cold comfort. The parenthetical condition leaves so remote a possibility as to make the 1974 exception of almost certain application, thus destroying DR 7-102(B)(1). The "professional relationship" almost invariably would establish the only basis the lawyer might have for any interest in or contact with the evidence, whether the evidence comes to the lawyer's attention through the client or a third person. Moreover, including secrets as defined in DR 4-101(A) as well as con-

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27. As a participant in a panel discussion on *Responsibility of Lawyers Advising Management* in March 1975, Lewis H. Van Dusen, Jr., said,

The Committee on Ethics and Professional Responsibility suggested this change [adding to DR 7-102(B)(1), the words, "except when the information is protected as a privileged communication"], which has been very controversial. The SEC people were unhappy about it, and perhaps it was suggested without full consideration. But the thought was that the privilege with respect to confidential communications and secrets was so fundamental that we ought not to put a lawyer in the position of being required by the Code to divulge confidential communications if the state law provided he couldn't do so. Some governmental authorities have taken the position that in no state is there such a protection with respect to communications related to fraudulent activities. I do not know what the law is of the fifty states. That may or may not be the fact. The thought is that if any state says that a given communication is privileged, then its disclosure would not be required by the Canons, and there is considerable discussion going on as to whether this is an appropriate amendment for the reason I've given.

30 Bus. Law. 13, 20 (1975). This would have left intact the lawyer's duty to disclose under DR 7-102(B) with respect to all information coming to the lawyer's attention, though in the professional relationship and from whatever source, which qualifies as a "secret", but not as a "confidence" under DR 4-101(A).

28. See *supra* note 27.

fidences within the meaning of privileged communication in the 1974 amendment goes far beyond the plain meaning of the amendment as originally explained by Mr. Van Dusen. Despite the Committee's claim that Formal Opinion No. 341 "does not wipe out DR 7-102(B)," it is evident that Formal Opinion No. 341 goes beyond the intent of the 1974 amendment to DR 7-102(B), which undertook to except only those privileged communications protected by law. The Committee's position was repeated in Informal Opinion No. 1349, dated October 6, 1975, and Informal Opinion No. 1458, dated August 22, 1980.<sup>29</sup>

Third, much of the information coming to the lawyer regarding what may be his client's frauds is not "information...protected as a privileged communication" under the law respecting the traditional lawyer-client relationship. The information coming to the lawyer as secrets, from whatever source, is substantially greater, but is not "protected as a privileged communication."<sup>30</sup>

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29. Always to be considered, of course, is what effect, if any, Informal Opinion No. 341 has on DR 7-102(B)(1), as amended. It is doubtful that the action of the Committee can amend or extend the provision of the Model Code as adopted by the House of Delegates. The ABA Standing Committee on Ethics and Professional Responsibility was first established, *sub nom.* Committee on Professional Ethics, in 1914. 39 ABA Rep. 559 (1914). The name was changed in 1919 to Committee on Professional Ethics and Grievances. 46 ABA Rep. 302 (1921). The name was changed in 1971 to Standing Committee on Ethics and Professional Responsibility. Its authority is now defined in Article 30.7 of the Bylaws of the ABA. See MARTINDALE-HUBBELL LAW DIRECTORY Vol. VII, pt. VIII, at 51 (1983). The statement of jurisdiction gives the Committee authority to issue opinions but does not suggest that an Opinion amends or controls provisions of the Model Code or other adopted rules. The Committee's Informal Opinion 1420, dated June 5, 1978, discounts the effect of the opinions. See also Written Submission of the Securities and Exchange Commission on S.485, The Lawyer's Duty of Disclosure Act (Apr. 28, 1983) [hereinafter cited as *SEC Submission re: S.485*]. The SEC Submission reported, *inter alia*, that on May 25, 1978, the Institute for Public Representation, affiliated with Georgetown University Law Center, requested the SEC to promulgate the following rule, as an amendment to the Commission's rule 2(e):

A lawyer who receives information clearly establishing that (1) his client has, during the course of representation, perpetrated a fraud upon any person or upon the SEC with respect to any law administered or enforced by the SEC, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or to the SEC, *except when the information is protected as a privileged communication (as distinguished from a confidential communication)*; (2) a person other than his client has perpetrated a fraud upon any person or the SEC with respect to any law administered or enforced by the SEC, shall promptly reveal the fraud to the SEC. "Fraud" includes a material misrepresentation or omission of material fact.

*Id.* (emphasis added). This proposal, adapted from DR 7-102(B) of the Model Code, follows the more conservative of the alternative constructions of the 1976 amendment. The proposal was denied by the Commission April 30, 1980, pending consideration then being devoted to matters of professional ethics, including ABA involvement with the Discussion Draft of the Model Rules. SEC Act Release No. 16769, 19 SEC Docket 1300 (Apr. 30, 1980). The SEC, in *In the Matter of Carter and Johnson* expressly noted, "This case does not involve, nor do we here deal with, the additional question of when a lawyer, aware of his client's intention to commit fraud or an illegal act has a professional duty to disclose that fact either publicly or to an affected third party." See *infra* note 37 at 292-329 n. 78.

30. See Gruenbaum, *supra* note 6, at 195-98 (discussion of these limitations with copious

Fourth, the more important aspect of the 1974 exception tagged to DR 7-102(B)(1) is what has not happened. The 1974 amendment was adopted by only seventeen states and one of these, Pennsylvania, is about to repeal it.<sup>31</sup> Three states and the District of Columbia have no provision comparable to DR 7-102(B)(1). The remaining thirty states have to date declined to amend DR 7-102(B)(1), thus indicating their resistance to withdrawal of the lawyer's duty to disclose his client's fraud. This indicated resistance is of high relevance to discussion of the fate of the Kutak Commission's proposed Model Rule 4.1.<sup>32</sup>

The Kutak Commission undertook a relatively gentle effort of restoration and repair of the Model Code's DR 7-102(B)(1) as amended in 1974. In rule 1.6, Draft May 1981, the Commission proposed that the lawyer have a discretionary right to reveal information, otherwise confidential, that the lawyer believes necessary:

- (1) To serve the client's interests;
- (2) To prevent the client from committing a prospective crime or fraudulent act the lawyer believes likely to cause death or substantial bodily harm, or substantial harm to the financial interests or property of another;
- (3) To rectify the consequences of a client's past criminal or fraudulent act in the commission of which the lawyer's services had been used;
- (4) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.

By the time of adoption of the Model Rules in August 1983, rule 1.6 had been reduced to afford the lawyer only a discretionary right to reveal information the lawyer *reasonably* believes necessary:

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citations); *see also supra* notes 19-29; *infra* notes 31-37.

31. The jurisdictions which adopted and retain the 1974 Amendment to DR 7-102(B)(1) are: Arizona, Arkansas, Colorado, Illinois, Maine (rule 3.6), Massachusetts, Minnesota, Nebraska, Nevada, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Vermont, West Virginia and Wyoming. Pennsylvania initially adopted the 1974 Amendment but presently contemplates its imminent repeal by adoption of the MODEL RULES OF PROFESSIONAL CONDUCT with rule 1.6 modified to permit disclosure. *See* Order of Pennsylvania Supreme Court (Dec. 13, 1983), *Legal Times*, Dec. 26, 1983, Vol. 6, #30, at 2.

The 1974 Amendment has not been adopted by Alaska, Connecticut, Delaware, Florida, Georgia (*see* Standard of Conduct 28(b)(2) and Directory Rule 7-102(B)(1)), Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia (rule 4-101(C)(3)), Washington or Wisconsin. *See* NAT'L REP. ON LEGAL ETHICS & PROF. RESP., published by University Publications of America, Inc.

Iowa mandates disclosure under DR 7-102(B)(1) subject to a modified 1974 amendment excluding violations of § 622.10 of the Iowa Code which relates only to the *evidentiary* privilege accorded client-attorney confidentiality. Alabama, California, District of Columbia and North Carolina have no provision comparable to DR 7-102(B)(1) permitting disclosure.

32. *See infra* note 43.

- (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The lawyer, therefore, is given the right to use information relating to representation, from whatever source required, if it will serve his own ends of collecting his fee or protecting himself from liability for the client's criminal or fraudulent conduct, or protecting himself in any other proceeding concerning his representation of the client. At the same time, he is left without the effective right, much less the duty, of protecting any third person from harm or injury occasioned by the past or future fraudulent conduct of the client. Moreover, the lawyer must stand silently by, without warning a third person of a client's prospective and intended criminal conduct likely to result in substantial damage to the third person's property or financial interests.<sup>33</sup> The lawyer can reveal information, otherwise confidential, to prevent the client from committing a prospective criminal act, only if the crime is likely to result in *imminent* death or substantial bodily harm. In all of the other circumstances described in the proposed rule 1.6, the lawyer has only the option under rule 1.16(b)<sup>34</sup> to withdraw from representing the client, and that option is absent

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33. A commentary to rule 1.6 offers some confusion and inconsistency which some believe provide a means for the lawyer to protect third persons from the client's fraud:

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

The obvious inconsistencies between this comment and rule 1.8(b) ("a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation") and rule 1.16(d) ("[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests....") throw into grave question the efficacy of the Comment in light of the Model Rules Preamble, subdivision "Scope", which provides, "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983). Rule 1.16(b) provides:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) The client has used the lawyer's services to perpetrate a crime or fraud;
- (3) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) The client fails substantially to fulfill an obligation to the lawyer regarding the

if the lawyer is ordered by a tribunal to continue the representation notwithstanding good cause for terminating.<sup>35</sup>

The Kutak Commission undertook in its rule 1.13, relating to The Organization as Client, to resolve some issues not addressed by the Model Code, arising in the context of abuse of a client organization by an officer, employee or other person associated with the organization. Rule 1.13, Draft May 1981, began by providing in subsection (a) that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." This principle was anticipated in the Model Code<sup>36</sup> and is consistent with established law.<sup>37</sup> When Model Rule 1.13(a) was finally formed as adopted in August 1983, it had been garbled beyond recognition or meaning. It provides:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

If that rule means anything, it means something very different from what it meant as originally proposed.

Subsection (b) of Model Rule 1.13 provides that if a lawyer for an organization "knows"<sup>38</sup> that an officer, employee or other person associated with the organization is engaged in, or intends to act or refuses to act in a matter related to the lawyer's representation in a way that violates an obligation to the organization or that is a violation of law which might be imputed to the organization, the lawyer is obliged to proceed "as is reasonably necessary in the best interest of the organization." Additional provisions make it apparent that these efforts shall be confined within the organization, but appropriate measures "may" be found to include "[r]eferring the matter to...the highest authority that can act in behalf of the organization as determined by applicable law."<sup>39</sup>

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lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

*Id.*

35. Rule 1.16(c) provides: "when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id.*

\* 36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18, EC 5-24, DR 5-107(B) (1979).

37. See, e.g., *Lane v. Chowning*, 610 F.2d 1385 (8th Cir. 1980); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978). See also *In the Matter of Carter and Johnson*, SEC Act of 1934 Release No. 17597 (Feb. 28, 1981) Admin. Proc. File No. 3-5464, reported in SEC Docket, Vol. 22, No. 3, at 292-329 (Mar. 17, 1981) (reporting, *inter alia*, on the SEC anticipation of finalization of pending work on ABA ethics standards) [hereinafter cited as *Matter of Carter and Johnson*].

38. Model Rules as adopted include a section titled "Terminology" providing definitions of terms including, "Belief" or "Believes", "Knowingly", "Known", or "Knows", "Reasonable belief", or "Reasonably believes" and "Reasonably should know".

39. The meaning of "highest authority" is not clear. Although in corporate theory it would probably be the shareholders, it seems unlikely that such was intended.

Subparagraph (c) of rule 1.13 suffered a material revision between Draft May 1981 and adoption. The earlier proposal provided that when a matter has been referred to the organization's "highest authority" in accordance with subparagraph (b), and no suitable remedy is undertaken, and substantial injury to the organization threatens, "the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization." The remedial action might have included revealing to directors, shareholders or to persons or officials outside the organization's structure, information relating to the representation of the organization.

As ultimately adopted, subsection (c) was shorn of the lawyer's discretionary right to "take further remedial action" of any kind. If his efforts within the organization as permitted by subsection (b) are unavailing, the lawyer is left with only an option to "resign in accordance with Rule 1.16."<sup>40</sup>

Model Rule 3.3 Candor Toward the Tribunal experienced some rearrangement, but no material change between Draft May 1981 and the form ultimately adopted.<sup>41</sup> It prohibits a lawyer from "knowingly"<sup>42</sup> making a false

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40. See SEC submission re: S.485, *supra* note 29. The SEC Submission reported, *inter alia*, that on November 22, 1978 the Institute for Public Representation petitioned the SEC to adopt, as a clarification of its May 25, 1978 proposal, the following reference to misconduct by one within an organization:

In calling upon the client to rectify the fraud, the lawyer shall bring the facts and legal implications of the fraudulent conduct to the attention of management, including if necessary the chief executive officer. If management does not take action considered by counsel to be necessary to rectify the fraud, the lawyer shall bring the facts and legal implications of the fraudulent conduct to the attention of the Board of Directors.

*Id.* See *supra* note 29 (May 25, 1978 proposal). Compare this proposal with rules 1.13(c) in Model Rules Draft May 1981 and the adopted Rules. The proposal was denied by the Commission April 30, 1980. See *supra* note 29.

41. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (Draft August 1983). As adopted; rule 3.3 provides:

*Rule 3.3 CANDOR TOWARD THE TRIBUNAL*

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

*Id.*

42. MODEL RULES OF PROFESSIONAL CONDUCT (Draft August 1983). The Model Rules provide: "'knowingly' . . . denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *Id.*



statement of fact or law to a tribunal. It prohibits the lawyer from knowingly failing to disclose to a tribunal a material fact to avoid assisting a criminal or fraudulent act by the client, obviously including perjury. Model Rule 3.3 obliges the lawyer to disclose legal authority adverse to the position and interests of his client, not disclosed by opposing counsel. It prohibits the lawyer from offering evidence he "knows" to be false; it imposes a duty in the event previously offered material evidence is discovered to be false, to "take reasonable remedial measures."<sup>43</sup>

Model Rule 4.1 Truthfulness in Statements to Others suffered at the hands of the House of Delegates. As proposed in Draft May 1981, the rule prohibited a lawyer from knowingly:

- (a) making a false statement of fact or law to a third person; or
- (b) failing to disclose to a third person a material fact when:
  - (1) failure to make disclosure is equivalent to making a material misrepresentation; or
  - (2) when disclosure is necessary to avoid assisting a crime or fraudulent act; or
  - (3) when disclosure is necessary to comply with other law.

As adopted in August 1983, rule 4.1 included subparagraph (a) prohibiting the making of a known false statement of fact or law to a third person. Subparagraph (b), however, was reduced to prohibit a knowing failure to disclose a material fact to a third person when disclosure is necessary for the lawyer to avoid assisting in a crime or fraudulent act by a client, *unless disclosure is prohibited by rule 1.6 Confidentiality of Information*. Obviously, this exception prevents any meaningful effort by the lawyer to protect a third person from the client's wrongful act.

The reader will recall that thirty-five states have thus far declined to adopt the 1974 Amendment to Model Code DR 7-102(B)(1). The House of Delegates, in putting its axe to Model Rule 4.1 has done so either in negligent ignorance of the fate of its meddling with DR 7-102(B)(1), or in ill-advised defiance of the indicated dispositions of the Supreme Courts in thirty-five states. In either event, the predictable result is that at least this important Model Rule will be found unacceptable by most Supreme Courts.

The treatment accorded proposed Rule 3.2 Expediting Litigation bears mention as representative of the House of Delegates action. In Draft May 1981, proposed rule 3.1 provided: "A lawyer shall make reasonable effort consistent with the legitimate interests of the client to expedite litigation." As adopted, August 1983, the rule is the same except that the word "legitimate" is deleted. Result? The proposal to eliminate unwarranted delays and stalling of litigation has been transformed to an invitation to engage in dilatory practice any time it serves the client's interest, legitimate or not.

This emasculation of rule 3.2 has apparently cast aside years of tradition.

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43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, accompanying notes, note 12 (1983) (definition of "reasonable remedial measures").

Canon 30, adopted in 1908 provided, "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is merely to harass or to injure the opposite party or to work oppression or wrong...". This spirit was included in the Model Code DR 7-102(A):

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

### III. THE RULES ARE TOO LITIGATION ORIENTED: THE LAWYER'S CONSCIENCE

The ultimate responsibility for the sad fate of the Kutak Commission's efforts and the resulting deplorable state of the Model Rules must be placed at the doorstep of the House of Delegates. The House, however, was assisted to its unfortunate errors of judgment by the urgings of others, led by factions of the trial bar.<sup>44</sup> The influence of the trial bar has tended to perpetuate the long-endured problem that lawyers' ethics have been oriented excessively to concerns and interests of courtroom advocacy. This problem is not new, nor only recently identified. At least as early as 1958, with publication of the report of the Joint Conference on Professional Responsibility,<sup>45</sup> critics appreciated that the Canons were predominantly addressed to matters of the lawyer's role as an advocate in open court and that, as a result, there was need for statement of the lawyer's obligations and rights relative to his other roles as counselor to his client and in service to the public. Thoughtful observers have despaired that from the Joint Conference and the Model Code there came no adequate relief from the dominance of concerns for the lawyers' advocate's role, to the near exclusion of the non-advocate roles.<sup>46</sup>

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44. Documentation too voluminous to justify summary here may be found by the reader in proceedings of the Kutak Commission, including: Discussion Draft, January 30, 1980; Second Discussion Draft, October 9, 1980; Working Draft, October 26, 1980; Reference Materials, November 13, 1980; Proposed Final Draft, May 30, 1981; Reference Materials, October 15, 1981; Digest of Comments Received, May 1981-June 1982; Proposed Final Draft, June 30, 1982; House Report 401, Responses to Final (June 30, 1982) version of MRPC, August 1982; Proposed Final Draft, October 12, 1982; House Report 401, Synopsis of Amendments to House Report 400, February 1983; Proposed Final Draft, June 1, 1982; and Final Draft, August 1983. The materials are on file in The National Center for Professional Responsibility offices with the ABA in Chicago. See Successive Drafts of THE AMERICAN LAWYER'S CODE OF CONDUCT (published by The Roscoe Pound/American Trial Lawyers Foundation, and including at least (1) Public Discussion Draft, June 1980, and (2) Reporter's Draft, August 1981); see also PROPOSED REVISION OF THE CODE OF PROFESSIONAL RESPONSIBILITY (May 1982) (published by same foundation); Freedman, *Professional Responsibility in D.C., a Survey*, RES IPSA LOQUITUR 60 (Fall 1972).

45. Jointly sponsored by Association of American Law Schools and American Bar Association, the Conference was established in 1952. Its Report, approved by AALS in 1958 and by the ABA in 1959, is published in 44 A.B.A.J. 1159 (Dec. 1958).

46. See Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 966-70 (1978); see also Schwartz, *The Professionalism and Accountability of Lawyers*, 66

Moreover, there has been a tendency to confuse and commingle the ethical problems attendant to criminal litigation with those related to civil litigation. The most skillful and visible among those critics who champion rigid application of the lawyer-client confidentiality principle, and who thus oppose the position of the Kutak Commission in its proposals to allow or mandate disclosure of client fraud or wrong-doing hurtful to third persons, is Professor Monroe H. Freedman. Professor Freedman has written copiously on these matters and argues with great earnestness that constitutional requirements of the Fourth, Fifth, and Sixth Amendments mandate sanctity of client confidences and the attorney's highest duty of care for their inviolability.<sup>47</sup> Professor Freedman's opening volley in the fray, his 1966 article in the *Michigan Law Review* titled *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, is discretely directed to criminal litigation. His subsequent writings, however, have not been so restricted. Professor Freedman's widely cited book, *Lawyers' Ethics in an Adversary System*, and others of his works are understandably interpreted to claim for his thesis application to the total adversary process, including civil as well as criminal litigation. Moreover, I have discovered no place where Professor Freedman has undertaken comment recognizing that non-litigation functions of lawyers require

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CALIF. L. REV. 669, 672 (1978); Sears, *A Re-evaluation of the Canons of Professional Ethics—A Professor's Viewpoint*, 33 TENN. L. REV. 145, 147-48 (1966); Thode, *The Canons of Ethics and Trial Advocacy*, 33 TENN. L. REV. 173-74 (1966). The Sears and Thode articles were among a series of papers presented at a Round Table sponsored by the Committee on Education for Professional Responsibility of the AALS at its annual meeting in Chicago, December 29, 1965, considering in anticipation the work of the newly appointed ABA Committee on Evaluation of Ethical Standards (the "Ed Wright Committee") which drafted the Model Code adopted in 1969. See also Thode, *The Ethical Standards for the Advocate*, 39 TEX. L. REV. 575, 579 (1961).

Although it might not have been so apparent at the time, with the benefit of hindsight, it is astonishing that the panel raised none of the issues of confidentiality and lawyer's responsibility for the frauds of his client that have been so much a part of the Kutak Commission's concerns and so much a part of the resistance to the proposed Model Rules.

It may be of some relevance that the Ed Wright Committee was composed of 12 members of whom nine were practitioners. Of the nine, six were members of the American College of Trial Lawyers. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970).

More recently, and in connection with its coverage of the OPM Leasing case (*see supra* notes 1-6), THE NEW YORK TIMES MAGAZINE reported:

The whistle-blowing provisions of the new code (proposed Model Rules) are not universally admired. John C. Elam, a past president of the prestigious American College of Trial Lawyers, is the leader of that group's opposition. He denounces the proposals as "a tremendous assault on the traditional role of the lawyer: If clients cannot be sure that their lawyers' lips are sealed, he reasons, they will not disclose plans that might be illegal, and lawyers will not have any opportunity to persuade them to obey the law."

N.Y. Times, Jan. 9, 1983 (Magazine), at 52.

47. Among Professor Freedman's better known pieces are: *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); and *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

ethics not controlled by constitutional mandates. For purposes of this article, we can set to one side Professor Freedman's position insofar as it applies to criminal litigation. If there are points over which the passage to the area of criminal defense should be disputed, they can await another day.<sup>48</sup> The constitutional bases of the Freedman thesis respecting criminal defense litigation, however, have no relevant application to civil litigation. Putting both cats in the same bag has produced a quite unmanageable snarl. The confusion covers more than the lumping of criminal and civil litigation. The other lawyers' functions also need special ethics considerations.

Others have appreciated the need for variations in the ethics rules governing lawyers in diverse functions.<sup>49</sup> Drawing upon the work of the Joint Conference, Professor Harry Jones distinguished the lawyer's open courtroom advocacy from his role in counseling, exemplified by "devising a course of business conduct, a standard form contract, or a complex scheme of land acquisition and development." Performing as a counselor, the lawyer works when

no opposing lawyer is there to represent the equities of the many persons who may be affected by the lawyer's plans, no judge is present to monitor the fairness of the arrangements, and there are no fires of controversy to keep the counselor honest and purge his client's specifications of overreaching self-interest.<sup>50</sup>

Professor Jones is accurate as far as he goes, but, with all deference, he undertakes no distinction between criminal and civil advocacy. Neither does he treat with the lawyer's role as negotiator, which requires, it seems to me, discrete consideration because of its bifurcated character. Negotiation is a role per-

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48. At another time, reasons may exist to challenge Professor Freedman's earnest support of confidentiality in the context of criminal litigation. See Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921. Professor Pye stated:

The propriety of courtroom conduct does not depend upon its importance to counsel in justifying a fee, its value to a client in obtaining an acquittal or its symbolic value to a movement or cause. Unlike the ascertainment of truth, these cannot be said to be fundamental values of the institutions of justice. Nor may a lawyer's conduct be justified solely by the (partially inaccurate) observation of Justice Frankfurter that "ours is the accusatorial as opposed to the inquisitorial system" (citing *Watts v. Indiana*, 338 U.S. 49, 54 (1949)), and that the adversary system will be weakened unless counsel is permitted to undertake whatever action will improve the chance of his client to prevail in the case.

\* A trial is not an athletic contest in which each side should have an equal chance to win. A defendant should win only when he is innocent or when the state cannot prove his guilt beyond a reasonable doubt by competent evidence according to law. A defendant whose guilt can be proved by competent evidence has no inherent right to an acquittal. He may be acquitted because the prosecution errs, or for some other reason not related to his guilt, but not because of any sense of entitlement. *Id.* at 926.

49. See Report of the ABA and AALS Joint Conference, 44 A.B.A.J. 1159 (Dec. 1958); Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

50. Jones, *supra* note 49, at 968-69.

formed out of the presence of an umpire to monitor fairness and without expressed rules of procedure; however, counsel are present representing and protecting the interests of adverse parties. Professor Jones' valid criticism that the Model Code, and the Canons which were its predecessor, are inadequate to their task is based on the recognition that "the all-out partisanship acceptable in courtroom advocacy is not to be carried over lock, stock and barrel in the performance of the lawyer's role as counselor."<sup>51</sup> At the same time, and for comparable reasons, the patterns of permissible advocacy established by the Fourth, Fifth, and Sixth Amendments for criminal courtroom advocacy should not be carried over lock, stock, and barrel to civil advocacy; neither should be carried lock, stock, and barrel to the negotiation context.

In a similar approach, also springing from the Report of the Joint Conference, Professor Murray L. Schwartz saw the need for recognizing different ethical postures for diverse lawyering functions.<sup>52</sup> He categorizes those functions as *advocacy*, being functions performed within the adversary system, that is in the presence of a third-party arbiter, and *nonadvocacy*, being functions performed in the absence of a third-party arbiter, a distinction which "fundamentally changes the lawyer's role" according to Professor Schwartz.<sup>53</sup> It seems clearly open to question whether this claims too much for the presence of a third-person arbiter. To the extent that what is submitted to the arbiter is profaned as a result of litigation excesses, defined as those influences that distort accuracy and the reaching of reality as a goal of the litigation process,<sup>54</sup> the result of litigation cannot be presumed credible. Under the conditions of criminal litigation, where those excesses are most flagrant, the process is regarded as credible merely because of the constitutional requirements. If a duty is not present to protect the process by seeking to eliminate perjury, to cross examine fairly, and to clarify misunderstandings of fact, the presence of the arbiter is something of a sham, or, at least, the influence of the arbiter is more apparent than real.

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51. *Id.* at 968.

52. Schwartz, *supra* note 49.

53. *Id.* at 671.

54. The habit of lawyers in referring to the litigation process as "a search for truth" seems pretentious. Subject, as it is, to the uncertainties and inaccuracies which flow from witnesses' errors of perception and memory, from the occasional instances of conscious, intentional perjury and from the much more frequent, if not customary and usual, distortions introduced by the course of "preparation" of the witnesses, testimonial evidence is unlikely to be the matrix in which truth is found. Moreover, litigation does not aspire to realize truth as an understanding of reality. Rather, it seeks dispute resolution based upon the opinion of an arbitrary portion of those persons who comprise a cluster of arbitrary size, randomly drawn from an arbitrary sample. The process asks only that the opinion of that portion of jurors be judged by them to be beyond a *reasonable doubt* or by a preponderance of the evidence. The preponderance or civil test contemplates that only one result be found slightly more likely than another or others. If in addition to these inherent limitations on accuracy, there is further margin for those errors occasioned in the criminal litigation process by the several constitutional protections of the defendant and his expectations of his assistance from counsel, as seen by Professor Freedman (*see infra* note 55), the special unreliability of the criminal litigation process is evident.

Professor Schwartz contends that "[t]he adversary system obliges the advocate to assist the client even though the means used or the ends sought may be unjust."<sup>55</sup> For that reason he urges:

two principles are posited as necessary to the effective working of the adversary system: a Principle of Professionalism, which obliges the lawyer within professional constraints to maximize the likelihood that the client will prevail, and a Principle of Nonaccountability, which relieves the advocate of legal, professional, and moral accountability for proceeding according to the first principle.<sup>56</sup>

The principle of Nonaccountability, is suggested by Professor Schwartz as applicable to the lawyer as advocate in both criminal and civil litigation contexts. It serves both as a protective fetish and as an absolution imparted prospectively over the lawyer's conduct. Whether or not Schwartz' principle is constitutionally mandated in the lawyer's role in criminal litigation, in civil litigation the client has no constitutional entitlements that commit his lawyer to engage in or to tolerate conduct the lawyer deems fraudulent or dishonorable.<sup>57</sup> It is one thing to permit a client to interfere with a lawyer's assumed responsibilities for handling litigation, and to have the lawyer acquiesce in the client's decisions concerning strategy. It is quite another thing to place the lawyer at risk of being used and exploited by reason of a commitment to follow and participate in what the lawyer perceives as the moral errors of the client.

Professor John T. Noonan, Jr., sensitive to the mischief done by supplying for the lawyer a convenient escape from moral responsibility in the form

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55. Schwartz, *supra* note 49, at 679. In his lecture, *The Legal Ethics of the Two Kingdoms*, Professor Thomas L. Shaffer commented on the position of Professor Freedman (*see supra* note 47).

Professor Monroe Freedman of Hofstra University says (citing Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L.REV. 191 (1978)), "Once a lawyer has assumed responsibility to represent a client, the zealotry of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause." He argues that if the client wants to lie in court, the lawyer-as-advocate should help the client lie; if the client appears to be the sort who will use legal advice to do evil, the lawyer-as-advisors [sic] should nevertheless give the advice. He argues that the lawyer's fealty, in either case, is to the law, the adversary system, the Constitution, and that this duty requires that professional life have its own morality.

For Professor Shaffer's espousal of the position contrary to that of Professor Freedman, and based upon the contention of Atticus Finch, the lawyer in Harper Lee's novel, *TO KILL A MOCKINGBIRD* (1960) that, "I can't live one way in town and another way in my home," see Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U. L.REV. 3 (1983).

56. Schwartz, *supra* note 49, at 671.

57. To avoid unfairness to Professor Schwartz, it is appropriate to recognize that he has defined out of the scope of his article the issue whether his Principle of Nonaccountability can be morally justified. His thesis expressly presumes that "the Advocate's Principle of Nonaccountability in all of its dimensions is necessary for the effective operation of the adversary system." Schwartz, *supra* note 49, at 674. However, bearing in mind he who was observed to have "begun with an invalid premise and then marched inexorably to a faulty conclusion," there should be room to challenge what Professor Schwartz would include within the adversary system. *See id.*

of assignment of vicarious liability of the sort suggested by Professor Schwartz' Principle of Nonaccountability stated:

While I understand the attractiveness and even the inescapability of the catch phrase, "I'm doing it for my client," I also see the phrase functioning as a kind of carapace. The phrase functions as a defense against various moral claims, a defense against empathy with someone else's feelings, a defense against responsibility. If a lawyer can utter this incantation and can take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.<sup>58</sup>

Professor Schwartz urges that the absence of a third-party arbiter in the negotiation/counseling context, categorized as nonadvocacy, alters the lawyer's role and

calls for a different professional rule for the nonadvocate which would require as a matter of professionalism that the nonadvocate lawyer refrain from assisting a client by 'unconscionable' means or from aiming to achieve 'unconscionable' ends, with the term 'unconscionable' drawing its meaning from the substantive law of rescission, reformation, and torts.

As a corollary, Professor Schwartz denies to the nonadvocate lawyer deliverance from moral accountability through his Principle of Nonaccountability afforded the lawyer in his advocate role. The nonadvocate would be held morally accountable for his conduct in representation of his client "though the lawyer is neither legally nor professionally accountable."<sup>59</sup> This approach represents clear and certain progress and is a definite improvement over the tradition-encrusted cliches that leave the nonadvocate subject to ethical rules identical to those adapted for the lawyer in criminal defense litigation. Nevertheless, the theory seems to fall short of the achievable optimum.

First, Professor Schwartz would limit the nonadvocate's expression of his moral accountability to withdrawal from the representation. He posits no responsibility to the third party victimized by the client's unrectified fraud. Indeed, he expressly declines to offer a rule permitting "the lawyer to subvert the client's interests without the client's consent." Accordingly, Schwartz of-

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58. Noonan, *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227, 230 (1981). Professor Thomas L. Shaffer sounds this relevant caveat: "It isn't conscious evil and shoddy excuse you have to cope with when you study our professional history; it is the self deception of noble motives." Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U. L. REV. 3, 38 (1983).

59. Schwartz, *supra* note 49, at 671. A different and complicating problem for the suggested advocate-nonadvocate classification is presented by the hybrid role of the lawyer who has filed pleadings on one side or the other of civil litigation, has taken, or had his client submit to, depositions under the applicable rules and in conformance to Professor Schwartz' Principle of Professionalism, and is now in the course of trying to negotiate a settlement. Which role is he in? What if he discloses things in an effort to be "fair" as a negotiator and the settlement effort fails and the matter must be tried?

fers nothing to obstruct a recurrence of the OPM Leasing absurdity. Second, Professor Schwartz would establish substantive law decisions as the standard of unconscionability and hence as the standard of client conduct which the lawyer has a duty or right to tolerate, assist, and promote. In the absence of some overriding reason that has not yet been advanced, it would seem preferable to let the standard of client conduct unacceptable to the lawyer, whether labeled "unfair", "unconscionable" or "repugnant"<sup>60</sup> "though not unlawful", be tested according to the lawyer's conscience. At least this would seem indicated insofar as the lawyer's action is limited to his election to withdraw from representation of the client and from involvement in the client's conduct the lawyer deems unacceptable.<sup>61</sup>

Professor Harry Jones urges an additional dimension of lawyers' concern:

Is it fair to suggest, as I have [been] doing for years, that the lawyer as counsellor must answer in conscience for the social worth as well as the formal legality of the results he accomplishes in his clients' service and on their behalf?<sup>62</sup>

This goes beyond a concern for the honesty, fairness and morality of the means by which the client pursues his objectives in litigation, negotiation, or planning. It would impose on the lawyer a correlative duty of concern for the social and moral significance of the client's objectives if achieved.

Another variation has been offered by Professor L. Ray Patterson who demonstrates the need for formalizing the concept of client's rights *and duties*

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983). See *supra* note 34 and accompanying text. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1979) with *id.* at EC 7-9. Regarding the inadequacies of the Model Code, Professor Harry Jones stated:

...[[T]he Model Code] fails painfully in two major respects. First, it is still a barristers' code, focused far too much on the ethical problems that arise in courtroom advocacy and giving much sketchier guidance on what matters more to most lawyers—the ethical problems that arise in a lawyer's work as counselor, draftsman and engineer of transactions. And, second, the *Code* does not really come to grips with the deeper questions raised by what the profession has long taken for granted, the moral and social ambiguities, contradictions and strains of the ethics of partisanship, with whether the lawyer, as a moral man, may—perhaps even is under an obligation to—do for his clients what he would not think it right and just to do in his own interest.

Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 960 (1978).

61. Professor James Boyd White has published a very perceptive article dealing with the lawyer's right to act honorably, grounded in the lawyer's contract with his client and also in his character as an ethical person. Professor White contends that the lawyer's ethical behavior is important to his professional effectiveness and success. Moreover, a lawyer's ethical and honorable conduct may well be consistent with the desires and goals of the client whose respect for the "decencies of life" is often underrated by his lawyer. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 CHI. L. REV. 849, 891-93 (1983). See also Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200-201 (1978) (Professor White's confidence in motives of clients).

62. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 972 (1978), citing Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961).



vis-a-vis his lawyer and the concept of lawyer's duties *and rights* vis-a-vis his client. Patterson, however, urges that those respective rights and duties be rationalized by resort to a somewhat tortured theory of reciprocal agency. To conceive of the lawyer as the client's agent seems to risk unnecessary confusion respecting the lawyer's independence of judgment. If that risk is to be avoided by describing the relationship as one of qualified- or quasi-agency, it would be simpler and less confusing to treat the rights and duties as adjuncts of the client *qua* client and the lawyer *qua* lawyer.<sup>63</sup>

This article's position is that whatever may be the ethical rules and constraints appropriate for lawyers in criminal litigation and to whatever extent they are affected by relevant constitutional protections, the presence of a third-party arbiter or other umpireal figure should not be controlling in considerations of ethical principles.<sup>64</sup> Subject to characteristics peculiar to negotiation,<sup>65</sup> a lawyer's role in negotiation is the equivalent of his role in civil litigation for purposes of defining suitable ethical principles. A lawyer's role in counseling differs from his role in negotiation only in that third parties who may be affected by the plans and products of the counseling may not be present, involved, represented, or identified at the time the services are performed. Finally, the lawyer's right to conduct himself honorably and in a manner consistent with his personal sense of morality should be fully within his control whether his role be in civil litigation, negotiation or counseling.

#### IV. NEGOTIATION PRESENTS UNIQUE PROBLEMS

Special consideration must be given to the ethics governing the lawyers' role in negotiation. For better or for worse, the negotiation process has assumed routinized formalities and posturings of a ritual dance, the gyrations and required observance of which qualify rules of generally expected behavior. The formalities have at least two apparent characteristics of negotiation. First, is the need for each party, and his lawyer, to come off with a demonstrable "victory". This can be satisfied by a showing that the opposite party has moved from his initial position.<sup>66</sup> In anticipation of that move, each party routinely pads his initial demand to leave bargaining room to engage in "horse trading". Second, application of the Peter Principle proclaims that work will expand to fill available time. Present in many forms of negotiation, but especially visible in negotiation of labor contracts, is the necessity to extend the efforts to the last available moment ("the courthouse steps") in order to persuade the respective constituencies that their realizations have been maximized and

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63. Patterson, *The Function of a Code of Ethics*, 35 U. MIAMI L. REV. 695 (1981). See *infra* note 80 and accompanying text (comment on additional portion of Professor Patterson's article).

64. *Contra* Schwartz, *supra* note 49, at 477-78 (Professor Schwartz contends that presence of third-party arbiter is significant distinction).

65. See *infra* section D (Negotiation Presents Unique Problems).

66. Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 131 (1968) ("Now negotiation clearly implies that each side will surrender something from its position.").

the best possible terms have been wrung from the process and, thereby, from the opposing side.

Neither of these characteristics enhances the efficiency of the negotiation process. Each, however, is a present reality and, at least the first, the need for a victory, is part of a syndrome of misrepresentation, albeit not unexpected by the adverse party, with manifest ethical dilemmas.<sup>67</sup> Commenting upon Model Rule 4.2(b) of the Discussion Draft, Professor James J. White recognized with approval the proposal which required the lawyer "to disclose a material fact known to the lawyer, even if adverse, when disclosure is...necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client. . . ." White applied that provision to the hypothetical case that a lawyer has negotiated for a tenant a 2,000 dollar settlement of a property damage case based upon the representation that the tenant's stereo included in the damaged property was worth 1,500 dollars, as represented by the tenant. The receipt now brought by the tenant to the lawyer shows that the stereo was purchased for 200 dollars. Professor White points out that the settlement has been reached on the basis of "a material misrepresentation that would allow any agreement to be overturned on the grounds of fraud or mistake." He asks, "Would it not be anomalous, then, if the rule said to the lawyer, 'You must accept this settlement or at most you can resign, but because these were privileged documents and privileged information you may not disclose them to the other side'? Such a rule would require a lawyer to facilitate an agreement that, if the facts were known would be unenforceable. Rule 4.2 would require the lawyer to come forward and to tell the other side the stereo's true price."<sup>68</sup> The then proposed rule 4.2 of which Professor White spoke was winnowed out of the Model Rules in the course of further consideration and was left on the threshing floor. Its impotent successor, rule 4.1, subject to prohibitions of rule 1.6, is discussed above.<sup>69</sup> It leaves the tenant's lawyer, together with the lawyers of OPM Leasing Services, Inc.,<sup>70</sup> in precisely the anomalous position deplored by Professor White.

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67. See White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 A. B. FOUND. RESEARCH J. 926. Professor White addressed the matter of truth telling in analyzing the MODEL RULES OF PROFESSIONAL CONDUCT Rules 4.1, 4.2, 4.3 (Discussion Draft, Jan. 30, 1980). Those rules were substantially altered before the Draft May 1981 was considered and direct references to the role of the lawyer in negotiation was deleted; but the importance of the article is not discounted. Professor White urges:

If the comments or the body of the Rules are to refer to truthfulness, they should be understood to mean not an absolute but a relative truth as it is defined in context. That context in turn should be determined by the subject matter of the negotiation and, to a lesser extent, by the region and background of the negotiators. Of course, such a flexible standard does not resolve the difficulties that arise when negotiators of different experience meet one another.

White, *supra*.

68. White, *supra* note 67, at 935.

69. See *supra* text accompanying notes 43-44.

70. See *supra* text accompanying notes 1-6.

Professor White has posed five cases to test the limits of permissible lying by a negotiating lawyer: (1) "misrepresentation of one's opinion about the meaning of a case or a statute"; (2) "distortion concerning the value of one's case or of the other subject matter involved in the negotiation"; (3) "use of the so-called false demand", or the padding referred to above; (4) in response to a question from opposing counsel, misrepresentation respecting the lawyer's authority to settle; and (5) under circumstances in which A and B have advised their lawyer that they plan to plead guilty to a shoplifting charge under any circumstances, and C, jointly charged, has advised the lawyer that, if the charges are not dropped, he wants to go to trial, the lawyer for the three says to the prosecuting attorney, "A and B will plead guilty only if the charges are dropped against C." Professor White suggests that the first three cases involve permissible lying and cases (4) and (5) probably do not.

This article does not propose to attempt to construct answers, much less to rationalize answers, regarding those cases or others. It suffices to illustrate that negotiation offers situations in which lying of a kind generally regarded as intolerable in other contexts may be found to be anticipated, probable, reasonable, and permissible.<sup>71</sup> There are, of course, those distinguishable instances in which one wishing to buy or sell makes an opening "best offer" with the announced intention that there is to be no negotiation of price or terms and the offer is submitted only for acceptance or rejection.

Where the line defining acceptable misrepresentation in the course of a negotiation can or should be drawn is not clear. Some misrepresentations clearly would be intolerable by any standard such as knowing submission of inaccurate financial statements or phony title documents. On the other hand, it may be that misrepresentation in negotiation should be permissible if it relates to the state of mind of the lawyer or the client, respecting any matter about which the client might be free to change his mind or position pending final resolution of the negotiation. This would apply to a misrepresentation of the state of mind of the lawyer or client as of the current or any past moment. It would apply to authority to settle. Nevertheless, this does not establish a workable dichotomy. There is too much gray area between misrepresentation relating to state of mind and clear factual misrepresentation. Moreover, one's state of mind is not a precise concept distinguishable from its sources. One's state of mind may be distinguishable from a financial statement because the latter is tangible and capable of empirical proof; but the lawyer's state of

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71. White, *supra* note 67, at 927-28. Professor James J. White stated:

I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. That is true of both the plaintiff and the defendant in a lawsuit. It is true of both labor and management in a collective bargaining agreement. It is true as well of both the buyer and the seller in a wide variety of sales transactions. To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.

*Id.* See Bok, *supra* note 6, at Chapt. XI, 146 (fascinating treatment of general subject of lying: *Lies Protecting Peers and Clients*).

mind respecting his authority to settle may have been established by his client's instructions given in either oral or tangible form.

Where the appropriate rules applicable to negotiation ultimately may be found to lie is not now apparent. One is tempted to search for a formula, but if there is one it has thus far eluded this writer. What is clear is that respecting negotiation the matter needs further attention. It should not lie unattended with the imprecise and inadequate rules that now apply.

#### V. A RETURN TO THE DRAWING BOARDS

The general need for change in the Model Rules as now adopted and applicable in other than the criminal litigation context, flows from two sources: first, to provide the means whereby a lawyer may, or must, act to protect third persons from injury caused by unrectified fraud or misrepresentation by the lawyer's client committed in the course of the representation; and, second, to provide the means whereby a lawyer may avoid acting, or avoid omitting to act, contrary to his personal standards of honor, decency, and morals, though to do so may frustrate and disclose fraud or misrepresentation perpetrated, or a crime in prospect, by his client to the injury of a third person(s) or the lawyer. The client should have no overriding right to use and exploit the lawyer. If the lawyer is willing to prostitute himself for the client, it may be that he should be free to elect to do so in those rare situations in which neither the court nor a third party is at risk from the client's misconduct. But, if the alternative is to act in a manner consistent with his personal honor and self respect, the lawyer should have that as an option, if not as his duty.

One additional consideration, tangential but relevant to matters of a lawyer's allegiance, requires attention. It is time to reconsider whether it is enough for a code or system of lawyers' ethics to address only the important but limited concerns of professional discipline. The Model Code expressly asserts that it does not "undertake to define standards for civil liability of lawyers for professional conduct."<sup>72</sup> Similarly, the Model Rules proclaim a restricted purpose:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that an independent legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.... The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.<sup>73</sup>

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72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1979).

73. MODEL RULES OF PROFESSIONAL CONDUCT Scope, pt. 5 (1983).

Notwithstanding these efforts to protect lawyers from third party use of the rules, an increasing likelihood exists that this protective barrier will not stand, and that the future will see an increase of sustainable claims by third parties based upon the negligence of lawyers with whom the claimants are not in privity, and an increasing use by courts of the provisions of adopted ethical codes as measures of lawyers' liability to clients or third parties.<sup>74</sup> The broadening exposure of lawyers to third party claims is not limited to claims founded on breach of disciplinary rules. Actions brought under rules of professional malpractice liability have demonstrated that the lawyer's exposure to persons with whom he is not in privity may be real and expensive.<sup>75</sup>

Yet another area of lawyer exposure is establishing itself in the form of liability evolving from the trend and prospect of increased activity of administrative agency involvement with lawyer regulation and control. The Securities and Exchange Commission (SEC) historically relied upon the legal profession, and specifically the ABA and the several states bars, to adopt and enforce ethics rules adequate to protect the public in those matters within SEC jurisdiction.<sup>76</sup> A discernible crack, however, has appeared, suggesting a weakened confidence on the part of the SEC and a new resolution to take things in its own hands. In 1978, the SEC adopted, with respect to whether a law firm is permitted to appear before the SEC in a matter from which an individual lawyer in the firm is personally disqualified by reason of prior employment by the SEC, a rule more exacting than that stated in Formal Ethics Opinion No. 342 of the ABA Standing Committee on Ethics and Professional Responsibility.<sup>77</sup> Despite the SEC's denials, the fact that it is striking off to

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74. See *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); *Biankanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (1958); RONALD E. MALLIN & VICTOR B. LEVIT, *LEGAL MALPRACTICE* ## 7, 67, 256 (2d ed. 1981); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979). See also MALLIN & LEVIT, *LEGAL MALPRACTICE* #94, at 135-36 (2d ed. 1981) (cases concerning damages for attorneys' breach of confidence).

75. To settle claims filed by shareholders of National Student Marketing Corporation (NSM), the company's former counsel, White & Case, are reported to have offered \$1,950,000. Regarding the same matter, former counsel for one of a number of companies absorbed into NSM, Lord, Bissel & Brook, are reported to have settled by payment of \$1,300,000. N.Y.L.J. 1 (Sept. 13, 1982); N.Y.L.J. 1 (Sept. 20, 1982). Background information may be found in reports regarding a suit for injunction brought by the SEC as reported in *SEC v. NSM*, 360 F. Supp. 284 (D.D.C. 1973) and 457 F. Supp. 682 (D.D.C. 1978). Regarding the OPM Leasing Services, Inc. matter (*see supra* notes 1-6 and accompanying text), THE NEW YORK TIMES MAGAZINE reported on January 9, 1983 that a tentative settlement had been reached of lawsuits against five defendants including the law firm of Singer, Hunter, Levine & Seeman (referred to in this article as "ABC"). The settlement was reported to contemplate payment of \$65 million, of which Singer Hunter's share would be about \$10 million.

76. 17 C.F.R. § 200.735-2(b) (1983).

77. See Securities Act of 1933 Release No. 5953 (Aug. 15, 1978); issued also as Securities Exchange Act of 1934 Release No. 15064; Public Utility Holding Company Act of 1935 Release No. 20673; Trust Indenture Act of 1939 Release No. 511; Investment Advisers Act of 1940 Release No. 636; and Investment Company Act of 1940 Release No. 10551. Formal Opinion No. 342 was dated November 24, 1976. Formal Opinion No. 342 held that partners and associates in the firm of an individual partner personally disqualified from participation in a matter before

itioner may be at risk in conforming to a bar-adopted rule that varies from his obligation either to his client or to third persons as defined under positive law. The logic applies as well if "rules of positive law" is read to include the ethical proscriptions of administrative agencies, such as the SEC and IRS, which undertake to discipline or otherwise to regulate lawyers appearing before them. It would seem inevitable that, to the extent the code of lawyers' ethics fails to meet and exact the standards of lawyer conduct perceived necessary by such agencies, the agencies will promulgate rules of their own contrivance. To the extent that the bar-adopted rules vary from the agency rules, both a dilemma and a trap will exist for the practitioner. The practitioner may be in doubt concerning which rule should command his conformance; or he may conform to the bar-adopted rule unaware that he is thereby in violation of an inconsistent agency rule.

## VI. CONCLUSION

The Model Rules insofar as they address the concept of confidentiality stand in need of amendment to conform to the proposals of the Kutak Commission. It is the fate of these proposals in the House of Delegates that prompted Robert W. Meserve, Esq., former President of the ABA who succeeded Robert Kutak as Chairman of the Kutak Commission, to urge:

...I surely hope that the American bar will eventually agree that considerable harm is done to the lawyer and the legal process by the fraudulent client who makes the lawyer, through false representations, a part of his scheme to defraud. This conduct should not be something the lawyer is forced to conceal or not disclose. This, in simple terms is what the majority of the House has required of us by its New Orleans action.<sup>81</sup>

It is incumbent upon the ABA House of Delegates to attend to this need promptly and on its own motion. Damage is certain from the delay of actions eventually forced by the demands of the Federal Government, a wary and weary and dissatisfied public, or state courts unwilling to accept the present provisions. Remedial attention can be more efficient and malleable while the iron remains hot, if the emotions of New Orleans can be held in lawyer-like check.

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portant point: self-regulation by the bar does not depend so much on black-letter rules as it does on the underlying principles from which the rules are derived. Indeed, the major obstacle to the successful integration of rules of ethics and rules of positive law seems to be that the fundamental principles of legal ethics remain unidentified.

*Id.* See also Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S. C. L. REV. 281 (1979).

81. *States Should Scuttle Disclosure Curbs*, NAT'L L. J. 20 (Aug. 1, 1983). The "New Orleans action" referred to was the action of the House of Delegates at its midwinter meeting in February 1983. The article was written and published in anticipation of the action taken by the House at its annual meeting August 2, 1983.

When the Kutak Commission's original proposals have been put in place, the legal profession shall have regained its right to claim, as it did in Canon 15:

....it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of the law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.