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Review Essay, the Model Rules of Professional Conduct

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REVIEW ESSAY, THE MODEL RULES OF PROFESSIONAL CONDUCT

*by James H. Stark**

Lawyers discovered ethics during the 1970's. Or at least so it seems. Since the promulgation in January 1970 of the ABA Model Code of Professional Responsibility [the Code],¹ there has been an explosion of interest in the subject of legal ethics. The number of articles and casebooks written on the subject has increased dramatically.² Disdaining the so-called "pervasive" method of teaching ethics, American law schools have introduced a half-generation of law students to the subject in discrete and often required courses.³ Legal ethics is now covered on most state bar examinations.⁴ Enforcement

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1. The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 to become effective for ABA members on January 1, 1970. Since its effective date, it has been in a virtually continual state of revision, having been amended seven times—February 1970, February 1974, February 1975, February 1976, August 1977, August 1978, and February 1979.

2. In the past decade alone nine new casebooks have been published. *See* R. ARONSON, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1977); L. BROWN & E. DAUER, *PLANNING BY LAWYERS* (1978); A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1976); D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973); D. MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* (1976); T. MORGAN & R. ROTHUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (1976); L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* (1971); N. REDLICH, *PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH* (1977); S. THURMAN, E. PHILLIPS & E. CHEATHAM, *CASES ON THE LEGAL PROFESSION* (1979). For the three year period for 1964-67, the Index of Legal Periodicals lists 97 entries under the title "Legal Ethics." The index for the period 1973-76 lists 158 entries.

3. Monroe Freedman and Andrew Kaufman, two leading commentators in the field of legal ethics, like to joke about the "pervasive" method, saying that they learned about professional responsibility the same way,—in practice, having heard nothing whatever about the subject in law school. *See Foreword* to R. ARONSON, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* at xv (1977). By contrast, a recent survey of 163 law schools revealed that all of them now offer courses in professional responsibility and that 85% of them require these courses for graduation. *See NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY* 21-24, 30, 33 (P. Keenan ed. 1979).

4. *NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY* 48-49 (P. Keenan ed. 1979).

mechanisms, reported to be in a "scandalous" state in 1970,⁵ have been revitalized as a consequence of increased budgets and greater public attention.⁶ Significant legal ethics questions are now regularly addressed by our highest courts, as groups and individuals challenge some of the profession's most established tenets.⁷

No one factor has been responsible for this extraordinary activity. But to a significant extent, the Code has itself been a catalyst. To a much greater extent than its genteel and hortatory predecessor, the Canons of Ethics, the Code is a formal regulatory document, susceptible to systematic analysis, interpretation and enforcement. To be sure, the Code has been roundly criticized since its adoption.⁸ It has been observed, for example, that the Code is too much concerned with issues of manners, etiquette and self-service, according equally prominent status, and significantly greater space, to rules limiting advertising, solicitation and unauthorized practice and to the rules defining the basic fiduciary obligations of a lawyer;⁹ that it focuses too much on sole practitioners, in particular, trial lawyers serving individual clients, neglecting other lawyering roles and other ethical issues which arise when lawyers work in groups or serve large institutions;¹⁰

5. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

6. See generally Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUNDATION RESEARCH J. 917 [hereinafter cited as Steele & Nimmer]; Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193 (1974).

7. See, e.g., *In re Primus*, 436 U.S. 412 (1978) (public interest solicitation); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (commercial solicitation); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee schedules). See also *People v. Belge*, 50 App. Div. 2d 1093, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976) (lawyer-client confidentiality).

8. See, e.g., Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273 (1976); Brown, *ABA Code of Professional Responsibility: In Defense of Mediocrity*, 16 CATH. LAW. 314 (1970); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639 (1977); Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 WASH. L. REV. 211 (1979); Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

9. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 68-106, 213-14, 222-23 (1978) [hereinafter cited as HAZARD]. Another useful critique of the Code's inverted priorities is Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

10. This is a central theme of Professor Hazard's book. See HAZARD *supra* note 9, at 7, 150-51. See also Patterson, *A Preliminary Rationalization of the Law of Ethics*, 57

and, perhaps most critical of all, that the Code is an ambiguous patchwork rife with inconsistencies and obscure footnotes, resolving few of the difficult questions which actually arise in practice.¹¹ But it is the range and diversity of criticism which seem more striking than the validity or persuasiveness of any particular view. As the profession's first attempt to prescribe a body of enforceable regulations respecting a broad and inevitably controversial subject matter, the Code has fostered a re-examination of some fundamental issues pertaining to the adversary system.

Now comes a proposal for an entirely new code, the Model Rules of Professional Conduct [the Rules]. Drafted by the ABA Commission on Evaluation of Professional Standards,¹² the Rules were published on January 30, 1980 in discussion draft form. The drafting commission has invited written comments from the bar and the public and has scheduled a series of public hearings during 1980 at which interested persons are invited to express their views. A "final" ver-

N.C. L. REV. 519 (1979). Ironically, the Code was intended to address this problem. In 1966, John F. Sutton, the Reporter for the ABA Special Committee on Evolution of Ethical Standards (which drafted the Code) told the New York City Bar Association that the Canons of Ethics have been "often criticized—and I think justly so, for [their] great attention to the work of trial lawyers and [their] neglect of other areas," like those related to the work of the corporate lawyer. Sutton, *Revision of the Canons of Ethics of the American Bar Association*, 21 REC. A.B. N.Y.C. 472 (1966).

11. See, e.g., Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273 (1976); Comment, *The Failure of Situation-Oriented Professional Rules To Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 WASH. L. REV. 211 (1979).

12. The Commission is comprised of lawyers and non-lawyers, critics, and established members of the organized Bar. Its members are: Robert J. Kutak (chairman), a private practitioner in Omaha and a member of the Standing Committee on Ethics and Professional Responsibility; Samuel D. Thurman, a law professor at the University of Utah; Thomas Ehrlich, former Dean of Stanford Law School and president of the Legal Services Corporation; Marvin Frankel, a former United States District Court Judge, now in private practice; Robert McKay, formerly Dean of N.Y.U. Law School, now president of the Aspen Institute; Arno Denecke, Chief Justice of the Supreme Court of Oregon; Jane Lakes Frank, Chief Counsel to the United States Senate Constitutional Rights Committee and a critic of the ABA; Lois Harrison, public member and past president of the Florida League of Women Voters; Robert O. Hetlage, a private practitioner in St. Louis, Missouri, and past president of the Missouri State Bar Association; Robert Meserve, a private practitioner in Boston and formerly president of the ABA, and Richard H. Sinkfield, a private practitioner in Atlanta. William Spann apparently joined the Commission at some point during its tenure; his name is now listed as a member of the Committee. Alan Barth, an author, non-lawyer, and civil libertarian, served on the Commission until his death in 1979. The reporter to the Commission was Geoffrey Hazard, a Professor of Law at Yale. Those who are familiar with Hazard's thoughtful and beautifully written monograph, *Ethics in the Practice of Law* (1978) will recognize many of the themes of the Model Rules as derivations of that work.

sion of the Rules will not be submitted for vote to the ABA House of Delegates until February 1981. Yet even given their tentative posture, one may observe that these Model Rules are not in any sense a series of amendments to the existing Code. They are, as their preface states, a "comprehensive reformulation"¹³ of the rules now in force—an entirely new document.

The Rules have been in the making for two and one-half years. The drafting Commission was formed in August 1977 by William B. Spann as one of his first acts as president of the ABA. Spann expressly charged the Commission with the task of drafting a new code. His judgment apparently was that no series of amendments could rescue the existing Code from its essentially flawed structure.¹⁴ Many of the Rules' provisions, indeed its basic structural revisions, can be seen as a direct response to criticisms of the Code. The Rules' framers have wholly abandoned the Code's organization, redrafted most of its language, identified some significant new ethical problems and utilized an entirely different manner of regulation. The Rules give principal emphasis to fiduciary questions arising in the lawyer-client relationship, rather than to other, more peripheral matters.¹⁵ The redrafted language resolves many of the ambiguities and inconsistencies of its predecessor¹⁶ and identifies new issues in a generally helpful manner.¹⁷

Nevertheless, the Model Rules resist easy labelling. Technically, they are well-drafted; but the fact that they more clearly define and resolve ethical issues may, as I shall discuss, render certain sections unpalatable to the profession as a whole. For the most part, they are "client-centered," concerned to a greater extent than the Code with improving the availability and quality of legal services to the public. Yet at the same time they define far more stringent limits on what an

13. *Preface* to MODEL RULES OF PROFESSIONAL CONDUCT at i (Discussion Draft 1980).

14. LIEBERMAN, CRISIS AT THE BAR 213, 217 (1978) [hereinafter cited as LIEBERMAN].

15. For example, the unauthorized practice of law rule is carried forward from the Code, but is buried at the end of the Rules in Rule 10.4(e)—a subprovision entitled "Misconduct." For a discussion of the new organization of the Rules and their impact on the document as a whole, see notes 23-63 *infra* and accompanying text.

16. See, e.g., notes 43-48 *infra* and accompanying text.

17. For example, the Rules analyze the counselling obligations of a lawyer with a mentally disabled or infant client (Rule 1.14); the ethical relationship and responsibilities of supervisory and subordinate lawyers (Rules 7.1 and 7.2); and the ethical responsibilities of the lobbyist (Rule 3.12). For an extended discussion of newly identified lawyer roles, see footnotes 32-42 *infra* and accompanying text.

attorney may properly do for a client and on the scope of attorney-client confidentiality. Finally, the Rules as a whole cannot easily be characterized as "liberal" or "conservative." Some Rules provisions carry forward Code sections in substantially unchanged form; others reflect clear judicial developments during the past decade; still others modify or alter existing ethical standards where judicial developments have been inconsistent or unclear.

In explaining its perception that a "comprehensive reformulation" of the old Code is in order, the Commission speaks of a "continuing *evolution* in ethical thought that has characterized much of the professional debate of the 1970's."¹⁸ There is indeed much that is "evolutionary" in the Rules: the substantially liberalized provisions pertaining to advertising and solicitation;¹⁹ the newly drafted provisions pertaining to the quality of lawyers' performance, creating for the first time duties of "diligence," "promptness" and "adequate attention";²⁰ the redrafted sections governing conflicts of interest,²¹ and

18. *Preface* to MODEL RULES OF PROFESSIONAL CONDUCT at i (Discussion Draft 1980) (emphasis added). I was struck by the use of the term "evolutionary." Webster's Third New International Dictionary provides two preferred definitions of "evolution": "A series of related changes in a certain direction," and "a process of continuous change from a lower, simpler or worse condition to a higher, more complex or better state."

19. The Rules' advertising provisions would permit all advertisements (through all media including television) except those containing "false, fraudulent or misleading statement[s] about the lawyer or the lawyer's services. . . ." See Rules 9.1 & 9.2. The solicitation section would allow direct mail solicitation, for commercial purposes, of a prospective client, unless:

- (1) The lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) The person solicited has made known a desire not to receive communications from the lawyer;
- (3) The solicitation involves coercion, duress, or harassment.

Rule 9.3(a)(1-3).

These advertising and solicitation provisions can be seen as evolving directly from the language and spirit, if not the actual holdings, of *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) respectively.

20. Rules 1.5, 1.2, 1.4. See also 1.6(b) (requiring lawyers to reduce fee agreements to writing). These sections and others pertaining to the adequacy of lawyers' performance are a direct outgrowth of recent empirical research identifying the more frequent complaints that clients lodge against attorneys. Recurring problems include fee disputes, allegations of delay, neglect, breakdowns of communication between lawyer and client and inadequate or negligent performance. See generally Steele & Nimmer, *supra* note 6, at 946-64.

21. Conflict of interest questions are frequently addressed by courts in the course of ruling on motions to disqualify counsel. Thus, more than other legal ethics subjects, conflict of interest has acquired a substantial judicial gloss. On issues such as "vicarious disqualification," where the absolute prohibition against a partner or associate of a

more. These provisions will undoubtedly receive substantial attention as the Rules are disseminated for comment and discussion.

At the risk of a slightly imbalanced presentation, I choose to emphasize the last categories of rules—the rules which, in the words of the Commission, “[push] beyond the Code’s foundation”²²—but without firm judicial support. In particular, I shall focus upon the rules governing the adversary function. It is questionable whether these rules are “evolutionary” in any sense. To the extent that they are not, they raise the most interesting and difficult questions both about the Rules in particular and about the purposes of and justifications for formal ethics codes in general.

I. ORGANIZATION AND STRUCTURE

Understanding the Rules’ organization and structure is essential to an appreciation of its substantive provisions. Two fundamental changes are striking. First, the Code’s division of the total corpus of professional rules into component duties, as embodied in the nine Canons, has been abandoned. While this organization has been helpful in delineating the conflicting role obligations which a lawyer may encounter in practice to the court, to the client, to society, etc., it has been, as I shall discuss, less helpful in resolving these conflicts. Second, the Rules have wholly discarded the Code’s formal distinction between nonenforceable, “aspirational” objectives, Ethical Considerations, and mandatory, enforceable prescriptions, Disciplinary Rules. The result is a document which is more rule-conscious and consequently less flexible in its approach.

Compared to the rococo style of the Code, the Model Rules’ structure is remarkably simple. The Rules are divided into two basic parts. Part A, “The Practice of Law,” describes the incidents of the lawyer-client relationship—the fiduciary responsibilities of the lawyer and the limitations on what a lawyer may properly do for a client. These rules constitute the bulk of the document, forty-six out of a total of fifty-seven rules. Part B, “The Responsibilities of a Public Profession,” primarily addresses questions regarding legal service delivery—pro bono representation, solicitation, advertising, etc.

disqualified lawyer representing a client has been substantially relaxed, judicial trends have been fairly clear. The Rules capture these evolutionary developments. See, e.g., Rule 7.1. For a useful review of recent conflict of interest caselaw developments, see Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977).

22. *Preface* to MODEL RULES OF PROFESSIONAL CONDUCT at i (Discussion Draft 1980).

Part A of the Rules consists of seven sections. The first section, the "Client-Lawyer Relationship"²³ lists sixteen separate rules. Many are familiar: for example, the basic provisions pertaining to conflict of interest,²⁴ safekeeping property,²⁵ the duty of competence,²⁶ and withdrawal from representation²⁷ are carried forward from the Code in substantially unchanged form. Others, including broad duties of "prompt attention,"²⁸ "adequate communication,"²⁹ "diligence,"³⁰ and the specific duty to reduce fee agreements to writing,³¹ are entirely new. Again, for my purposes, these new fiduciary obligations, while an essential theme of the Rules, will not receive primary attention.

A. *The Development of "Role-Rules"*

Significant changes are embodied in sections two through six of Part A of the Rules. These sections are role-oriented: they prescribe rules which focus upon and subject to regulation specific tasks practicing lawyers are called upon to perform. The Committee has identified six discrete lawyering roles: advocate,³² lobbyist,³³ ad-

23. In choosing the title "client-lawyer relationship" (rather than "lawyer-client" relationship), the Rules' drafters did not reverse nouns unintentionally. The Rules assume that the client should be the principal decisionmaker in the relationship, adopting a "participatory" model of the counselling process. See, e.g., Rule 1.3 (client autonomy), Rule 1.4 (adequate communication), Rule 4.1 [disclosure to a client (as to negotiation)]. See also D. ROSENTHAL, *LAWYER-CLIENT, WHO'S IN CHARGE?* (1974); Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639, 642 (1977) ("Contrary to the common notion, the fundamental relationship in legal ethics is not the attorney-client relationship, but the client-attorney relationship, for the client is what standards are all about.") For a view that the allocation of responsibility for decision-making between lawyer and client is unclear under the Code, see Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

24. Compare Rules 1.8-1.10 with DR 5-101 & 5-103 to 5-105.

25. Compare Rule 1.12 with DR 9-102.

26. Compare Rule 1.1 with DR 6-101(A). This Rule attempts to define what is meant by competence; the Code does not. The definition is problematic, however, in that it encompasses matters pertaining to both innate legal skill and the degree of effort exercised in a particular case. These effort factors overlap with other provisions of the Model Rules. Cf. Rule 1.5 (diligence).

27. Compare Rule 1.16 with DR 2-110. The Rule retains the Code's distinction between permissive and mandatory withdrawal.

28. Rule 1.2.

29. Rule 1.4.

30. Rule 1.5.

31. Rule 1.6(b). Rule 1.6(a) also contains a duty to "adequately explain" the lawyer's fee.

32. Rules 3.1-3.11.

33. Rule 3.12 (Advocate in Nonadjudicative Proceedings) (refers to a duty of fairness

visor,³⁴ negotiator,³⁵ intermediary,³⁶ and legal evaluator.³⁷ Each is subjected to individual analysis.

From what I can ascertain, this revised, role-oriented structure achieves two principal objectives: First, it enables the Committee to identify, analyze and ultimately sanction certain lawyering roles not expressly recognized in the Code. Second, it clarifies the extent to which certain ethical principles—applicable in the main—apply to particular lawyering tasks.

An illustration of the former type of provision is Proposed Rule 5.1. This Rule prescribes situations in which a lawyer may properly serve as an intermediary between clients, a conflict of interest situation not specifically addressed by the Code. The rule would apply, for example, to the attorney approached by two businessmen seeking legal advice on a prospective joint venture. Should an attorney attempt to provide advice to both persons? When should the attorney advise separate representation? Such situations as recognized by the Model Rules are in some sense analogous to the role of "lawyer for the situation," an ethical and professional posture of some dispute.³⁸ The Code focuses almost exclusively on the role of the lawyer as advocate and presumes a degree of loyalty on his part to the client that is arguably inconsistent with his acting as "lawyer for the situation." As a result, the attorney who undertakes this role has historically entered into marginal ethical territory.

Responding to the Code's omission, the Rules recognize this dual role, explore some of the difficult questions posed by the role and provide a conditional justification for undertaking it. Does the attorney-client privilege attach to communications among the lawyer and clients if the relationship deteriorates and litigation ensues? In most jurisdictions, no. What are the factors a lawyer should consider in deciding whether to assume the intermediary's role? They include, among others, the likelihood of prejudice if the relationship collapses,

and a duty to identify the client whom the attorney represents unless privileged; other advocate duties are incorporated by reference).

34. Rules 2.1-2.5.

35. Rules 4.1-4.3.

36. Rules 5.1-5.2.

37. Rules 6.1-6.3.

38. The term "lawyer for the situation" was coined by Louis Brandeis, whose ethics were questioned during Senate hearings to confirm his appointment to the Supreme Court. For an account of the Brandeis case, see Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

the bargaining styles and compatibility of the parties. May one party to the transaction discharge the lawyer and, if so, may the lawyer continue to represent the other party[ies]? Yes, to both questions, the latter being subject to conflict of interest limitations.³⁹ And so on.

It becomes apparent when one examines this rule and others, especially the rules pertaining to the "legal evaluator," that the roles being described are complex. They are also wholly outside the compass of the Code. To the extent that these provisions identify and analyze the ethical duties and conflicts which the roles entail, they clearly perform a valuable function.

As an example of the second function of these new "role-rules"—application of general ethical precepts to particular lawyering situations—consider the problem of negotiation bartering. Employing seemingly universal language, the Code prohibits positive fraud by an attorney: "In his representation of a client, a lawyer shall not knowingly make a false statement of law or fact." The context of the prohibition, however, suggests that the rule is intended to govern attorneys' communications to the court. A commonly raised question is whether this rule can be understood to bar certain deceitful practices prevalent in negotiation.⁴⁰

Take for instance the false claim that "my client won't accept a penny less than \$10,000." Is this sort of bluff permissible, notwithstanding the Code's apparent prohibition? Some would say yes, relying on the doctrine of implied consent, the notion that in negotiation certain types of false claims of fact are the convention, impliedly agreed to in advance by the parties.⁴¹ Others might well disagree, citing the seemingly unequivocal language of the Code. What is the lawyer to do when faced with this question in practice—when the morality of the formal rules conflicts with the morality of the marketplace?

The Code's failure to focus upon the process of negotiation *per se* leaves the question unresolved. In contrast, the Model Rules address this problem, and other similar "situational ethics" problems, squarely. The resolution of this particular issue is unequivocal. Rule 4.2 "Fairness to Other Participants" states:

39. See Rules 5.1-5.2 and accompanying comments. For an excellent discussion of the problem, see HAZARD, *supra* note 9, at 58-68, 73-86.

40. For an excellent discussion of negotiation ethics problems, see Rubin, *A Cause-
serie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975). See also LIEBERMAN,
supra note 14, at 169-72.

41. See S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 109-10 (1979).

- (a) In conducting negotiations a lawyer shall be fair dealing with other participants.
- (b) A lawyer shall not make a knowing misrepresentation of fact or law⁴²

Thus the general rule, no false statements of fact, is expressly applicable at the bargaining table.

In addition to addressing the Code's omissions, the Rules' drafters have attempted to resolve the Code's ambiguities. With regard to the most difficult professional responsibility questions—those having to do with an attorney's conflicting obligations in an adversary system, the Code has taken what might uncharitably be called a "smorgasbord" approach—providing a little something to satisfy lawyers of all ethical persuasions. Take as a paradigm an ethics problem familiar to all students of professional responsibility: the case of the criminal defense lawyer whose client insists on committing perjury. The client tells the lawyer that he wants to lie on the stand. The lawyer tells the client that perjury is a crime and he will have no part of it. The client insists on going forward. What is the lawyer to do?

Forced to choose between the loyalty to client which requires keeping all client confidences secret and the duty of candor to a tribunal, commentators have urged responses ranging from withdrawal to ordinary zealous advocacy.⁴³ The Code, however, takes an equivo-

42. See also Rule 3.2, reaching a similar conclusion.

43. In a well-known and controversial article, Monroe Freedman explores the principal options available: (1) withdrawal, without disclosure to the court of the client's intended fraud; (2) withdrawal, with disclosure to the court if necessary (as is usually the case) to accomplish withdrawal; (3) "mild advocacy" on behalf of the client, involving continued representation but no active assistance in or use of the client's perjury, e.g., lawyer says "tell your story," but does not ask any directive questions during direct examination, and makes no reference to the false evidence during closing argument; and (4) ordinarily zealous advocacy on the client's behalf. To the consternation of many, Freedman adjudges the first option impractical, the second and third options undesirable and opts for the fourth. Freedman believes that anything less than zealous advocacy on behalf of the client penalizes and thus deters the client's candor with the lawyer, and that without a completely open relationship, effective legal representation—in the constitutional sense—is impossible. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470-78 (1966). The central ideas of this article are elaborated and slightly revised in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

A spate of articles expressing many different views appeared immediately following the publication of Freedman's piece. See, e.g., Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 28 (1966); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Burger, *Standards of Conduct for Prosecution and*

cal position on the issue.⁴⁴ The attorney is told on the one hand that he "shall not knowingly use perjured testimony,"⁴⁵ and on the other that he "may reveal the intention of his client to commit a crime."⁴⁶ If a lawyer cannot avoid proffering the client's perjured testimony except by revealing his client's intent to commit that crime to the court, *must* he do so? Or *may* he? Not surprisingly, those who have analyzed the Code's treatment of this question have expressed strong views both ways.⁴⁷

The Rules resolve the lying client issue in an entirely novel way. In a lengthy and careful discussion, the comments following Proposed Rule 3.1 call for disclosure of perjury to the court, subject to legal defenses regarding the scope and meaning of "due process" and the "right to counsel."⁴⁸ These defenses apparently may be developed on a jurisdiction-by-jurisdiction basis. In the absence of a caselaw trend in this direction, it therefore can be expected that disciplinary committees will choose to invoke a general duty of disclosure against the defense bar.

B. *Abandonment of the Distinction Between "Rules" and "Aspirations"*

The second principal structural change in the Rules is the abandonment of the Code's formal distinction between Ethical Considerations and Disciplinary Rules. In their place, the drafters of the Rules

Defense Personnel: A Judge's Viewpoint, 5 AM. CRIM. L.Q. 11 (1966); Friedman, *Professional Responsibility in D.C.: A Survey*, 1962 RES IPSA LOQUITUR 60 (1972); Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65 (1965); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L.Q. 17 (1966). This is only a partial listing, containing principally the earlier articles. For additional source materials, see the "references" section to Rule 3.2, at 70.

44. *But see* ABA Informal Opinion No. 1314 (1975) ("It is axiomatic that the right of a client to effective counsel in any case . . . does not include the right to compel counsel to knowingly assist or participate in the commission of perjury. . . .").

45. DR 7-102(A)(4).

46. DR 4-101(C)(3) (emphasis added). DR 7-102(A)(4) and DR 4-101(C)(3) directly address the problems of the perjurious client. The confusion of these contradictory rules is exacerbated if one takes into account the broad omnibus language of DR 1-102, especially DR 1-102(A)(5): "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."

47. *See* note 43 *supra*.

48. *See* Rule 3.1 and accompanying comment. By adopting this rule the drafters rejected the "compromise" resolution of "mild advocacy," now embodied in the ABA's Standards Relating to the Defense Function, Rule 7.7 (1971).

have substituted a more straightforward structure of "rules" and "comments." To be sure, the line between aspirational objectives and mandatory rules has never been clear or precise. The Code, for example, contains Ethical Considerations which, far from being merely aspirational, explicate and clarify disciplinary rules and can thus be ignored only at the attorney's peril.⁴⁹ The converse is true as well. The Code sets forth certain Disciplinary Rules which, while phrased in obligatory language, contain so many discretionary qualifiers as to be virtually unenforceable.⁵⁰

Notwithstanding its blurred edges, the dichotomy has been extremely useful. Indeed, the legal philosopher Charles Frankel thought it "in many contexts . . . indispensable."⁵¹ First, the distinction reminds us of the limited efficacy of rules in commanding high moral behavior. Professional codes, like other bodies of law, cannot

49. Many examples could be used to illustrate this point. The Code's conflict of interest provisions are instructive. The Code creates a sliding scale approach to conflict of interest. As a general rule, an attorney may not represent multiple parties with differing interests. DR 5-105 (A & B). As an exception to the rule, an attorney may represent multiple parties with differing interests "if it is obvious that he can adequately represent the interest of each and if each consents . . . after full disclosure of the possible effect of such representation" DR 5-105(C). Nothing in the disciplinary rule itself helps resolve when dual representation can "adequately" be undertaken. For explication, the attorney must turn to the Ethical Considerations (e.g., EC 5-15: "A lawyer should never represent in litigation multiple clients with differing interests") Any attorney who believes himself free to ignore such language because it is nominally an ethical consideration is inviting professional difficulties.

50. One example I particularly like is DR 2-106 (Fees for Legal Services):

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.

For a view that this "eight-factor formula produces a wide range of outcomes, particularly [because] some of the factors are indeterminate," see HAZARD, *supra* note 9, at 97.

51. Frankel, Book Review (CODE OF PROFESSIONAL RESPONSIBILITY), 43 U. CHI. L. REV. 874, 877 (1976).

effectively compel standards of excellence, if those being regulated are incapable of achieving that excellence.⁵² Thus, despite the Rule's good intentions, one may be skeptical of the feasibility of achieving "competence" through the device of disciplinary command. Second, the distinction is useful in emphasizing the limitations imposed by language. As to certain realms of professional conduct, rules cannot be codified in a fashion precise or comprehensive enough to account for the complexities of human behavior. Excessive rule-making, according to this view, creates a risk of insensitivity "to subtle differences between ethically problematic situations, to small variations in relationships that call for quite different courses of action, and to the fact that pretending to govern one's conduct solely by reference to rules is either self-deceptive or a pretense."⁵³

The abandonment of Ethical Considerations contributes to the draft's overall rule-consciousness and a certain inflexibility. There are virtually no "should" provisions, comparable to the Code's Ethical Considerations, anywhere in the draft. There are, to be sure, "may" provisions, but they are far outnumbered by "shall" and "shall not" provisions.⁵⁴ As in the Code, there is some inevitable language imprecision in some of the Rules;⁵⁵ but the meaning and purpose of

52. *Id.* at 877-80. By distinguishing between ethical considerations and disciplinary rules, the Code's structure embraces Lon Fuller's distinction between the "morality of duty" and the "morality of aspiration." The morality of aspiration is the morality of the Good Life, of excellence, of the achievement of man's fullest capabilities. Such achievement is surely to be rewarded but is outside the scope of law. The morality of duty, on the other hand, focuses on the basic rules without which an ordered society is impossible. Fuller himself recognizes that all moral arguments are about "where duty leaves off and aspiration begins." L. FULLER, *THE MORALITY OF LAW* 1-6, 10 (1964). For a critique of the notion that the morality of duty is "rationally discoverable and objective," see Hart, Book Review (*THE MORALITY OF LAW*), 78 HARV. L. REV. 1281 (1965).

53. HAZARD, *supra* note 9 at 4.

54. As compared to 103 provisions which direct that an attorney "shall" or "shall not" do something, only 28 are phrased in permissive "may" language. It is interesting to note that the sections dealing with advertising (Rule 9.2), solicitation (Rule 9.3(b)) and limited practice, (Rule 9.4) are phrased in predominantly permissive terms. These sections may meet with substantial opposition from the organized bar, but unless the individual attorney chooses to advertise or solicit, the Rules impose no affirmative obligations upon him.

55. Many of the rules are phrased in language which requires the exercise of discretion by the lawyer to determine if the situation confronting him requires a mandatory response. A paradigm is the frequent use of the word "substantial" as a qualifier, as in Rule 3.9(a): "A lawyer shall not act as an advocate . . . in litigation . . . in which the lawyer is likely to be a witness, unless: . . . (3) disqualification of the lawyer would work *substantial hardship* to the client" (emphasis added). The word appears often throughout the Rules. See, e.g., Rules 1.10(a)(1) (conflict of interest—"substantially related matter"); 3.1(c) (duty to report adverse legal authority—"substantial effect on the determina-

particular sections is often made clear by the comments sections, which follow the rules and, almost exclusively, endeavor to explicate and justify them.⁵⁶

I should make clear that the abandonment of Ethical Considerations and the adoption of "role-rules" does not inevitably lead to inflexibility. The Rules' framers have been inconsistent in this regard. They have drafted some nominally mandatory rules which, as a result of fluid and multifaceted standards, seem deliberately to foster the exercise of discretion. An example is the Model Rules' approach to the ethical problems of corporate lawyers—the subject of a raging controversy in recent years.⁵⁷ Questions such as to whom does the corporate lawyer owe a fiduciary duty and in what circumstances must corporate illegality be reported and to whom remain unresolved under the "mandatory" directives of the Rules. Under Rule 1.13 the lawyer, in taking "appropriate measures," must give "due consideration" to such things as the seriousness of the offense, the lawyer's responsibility in the organization, the significance of harm to the organization which would result from disclosure or nondisclosure of agents' wrongs and "company policy." If illegality persists despite the lawyer's advice, he must disclose client confidences concerning the ille-

tion of a material issue"); 3.3(a) (duty to avoid procedures "having no substantial purpose other than delay"); 3.4(b) (similar to 3.3(a)); 10.3 (duty of lawyers to report "substantial" Rules violation by another lawyer).

Other indefinite words include "adequate" [Rules 1.1 (adequate competence); 1.2 (adequate attention); 1.5(b) (adequate disclosure of reasons not to pursue with diligence); 1.6 (fees—adequate explanation)] and "material" [Rules 1.10(a)(1) (conflict of interest—no representation if interest adverse in material respect); 3.1(c) (duty to disclose legal authority on material issue)]. In defense of such terms, it may be said that attempts at more refined, precise language would have risked making the Rules either unduly rigid or unwieldy.

56. For example, Rule 10.3, requires lawyers to report "substantial" Rules violations by other lawyers. The accompanying comment adds a measure of clarity and substance to the Rule by apprising lawyers that: "it is especially important to report a violation where the victim is the offending lawyer's client and it is unlikely that the client will discover the offense" and further, "when circumstances indicate the offense is serious, or is indicative of persistent violations, there is a . . . firm obligation to report . . ." Rule 10.3 (comment) at 132.

57. See, e.g., *SEC v. National Student Marketing Ass'n*, 360 F. Supp. 284 (D.D.C. 1973); LIEBERMAN, *supra* note 14, at 143-53; Sargent, *The SEC and the Individual Investor: Restoring His Confidence in the Market*, 60 VA. L. REV. 553, 572 (1974); Sommer, *The Emerging Responsibilities of the Securities Lawyer*, 1973-1974 FED. SEC. L. REP. No. 79.631; *Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW. 543 (1975); ABA FORMAL OPINION NO. 341 (1975).

gality only if he believes it to be in the "best interest of the organization."⁵⁸

The Rules thus sanction a kind of balancing process which accords the corporate attorney exceedingly broad discretion. This is not an accident. The Rules' framers have made a conscious judgment that in this realm of conduct, the limits of appropriate and inappropriate behavior cannot effectively be captured by rules.⁵⁹ Though denominated as such, this rule is hardly a "rule" at all.

If this were a typical provision in the Rules, one might want to explore the desirability of its approach. What after all are the potential costs and benefits, to attorneys and clients, of phrasing discretionary provisions in nominally mandatory terms? But it is not a typical provision. The lying client and negotiation tactic provisions far better represent the principal thrusts of the Rules—to take clear positions on issues, to resolve uncertainty, and to increase uniformity and predictability of results.

58. The full text of Rule 1.13(b & c) reads as follows:

- (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in or intends action, or a refusal to act, that is a violation of law and is likely to result in significant harm to the organization, the lawyer shall use reasonable efforts to prevent the harm. In determining the appropriate measures, the lawyer shall give due consideration to the seriousness of the legal violation and its consequences, the scope and nature of the lawyers' representation, the responsibility in the organization of the person involved, and the policies of the organization concerning such matters. The measures taken shall be assigned to minimize disruption and the risk of disclosing confidences. Such measures may include:
 - (1) Asking reconsideration of the matter;
 - (2) Seeking a separate legal opinion on the matter for presentation to appropriate authority in the organization;
 - (3) Referring the matter to higher authority in the organization, including, if necessary, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may take further remedial action, including disclosure of client confidences to the extent necessary, if the lawyer reasonably believes such action to be in the best interest of the organization.

59. HAZARD, *supra* note 9, at 43-57 *passim*.

It is difficult to imagine a set of prescriptions that could definitively offer . . . guidance [in this area], any more than definitive prescriptions can be supplied for resolving the moral dilemmas of everyday life. If that is so, the lawyer has to let his judgment, perhaps one might say his conscience, be his guide.

Id. at 57.

The Model Rules and the Code, from a purely mechanical point of view, are thus polar opposites. The Code often merely identifies ethical dilemmas; the Model Rules provide a rule oriented structure replete with numerous and specific role illustrations and explanatory comments which take lawyers firmly by the hand and lead them through the ethically "proper" course of action.

While the Model Rules' endeavor to replace the Code's ambiguity with clarity and inconsistency of enforcement with predictability is laudable, it is nonetheless achieved with certain costs. One cost is the prospect of substantial dissension within the profession regarding the Rules' resolution of certain difficult ethical issues. The language and structure of the Code have permitted the profession to avoid the unpleasant task of achieving a broad consensus on such problems. The problem of the lying client serves as an illustration of this point. It is probably safe to assume that the ambiguity in the Code and wide-ranging debate in literature have emboldened the criminal defense lawyer with the perjurious client to reach a personal moral choice, confident at least that whatever choice is exercised will find a modicum of support. Personal choice in this realm may or may not be a desired result. Considering the ambivalence of the profession about this particular question,⁶⁰ however, it has certainly been a convenient one.

A second potential cost of the Rules' structure involves the possibility that it will unnecessarily limit the exercise of individual discretion. Lawyers, of course, have no claim to absolute discretion in the field of legal ethics. To paraphrase Holmes, most laws forbid men from doing some things they want to do and ethics is no more exempt from law than other areas.⁶¹ Nevertheless, even in situations where the essential determinants may vary dramatically from one fact pattern to another despite ostensible similarities, in other words, where the exercise of individual discretion is most desirable, the drafters of the Rules sometimes insist upon an intractable standard of ethical behavior.

In any event, the preface of the Model Rules seems ironic when it states as one of its underlying assumptions: "there are limits as to what a legislative statement can effectively address. [N]o worthwhile

60. See note 86 *infra* and accompanying text.

61. See *Adkins v. Children's Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

human activity can be completely defined by legal rules."⁶² If one is looking for deregulation of the profession as a guiding principle of these rules—for fewer rules,⁶³ fewer "shalls," more "mays"⁶⁴ and wider latitude of autonomy and freedom of choice—one will surely be disappointed.

II. THE ADVERSARIAL FUNCTION

In the process of clarification and rulemaking, the Model Rules express a powerful substantive direction toward modification of the adversary function. While the Code's central fiduciary obligation is "zealous advocacy within the bounds of the law,"⁶⁵ the concept of "zealous advocacy" is not a part of the Rules.⁶⁶ This, I believe, was not an oversight. The Rules take as their premise that it is desirable to restrain zealous representation by lawyers and to increase the obligations of candor and fairness owed by lawyers to tribunals and to opposing parties.

Strong hints about the framers' governing attitudes towards the adversary system are scattered in interstitial remarks throughout the document, *viz.*:

A lawyer should not merely avoid harassing litigation, but should engage in litigation only when a negotiated settlement cannot be obtained on satisfactory terms.⁶⁷

...

A trial should be conducted with a sense of propriety and respect for its purpose of arriving at a just and fair result. While a trial in its nature is a contentious proceeding, the

62. *Preface* to MODEL RULES OF PROFESSIONAL CONDUCT at ii (Discussion Draft 1980).

63. Whereas the Code contained 41 basic rules, the Rules list 57. This may be misleading, however. If one takes into account the various subprovisions, qualifications, exclusions and the like which both documents contain, they are roughly comparable in their regulatory scope.

64. See notes 23-63 *supra* and accompanying text.

65. Canon 7 of the Code states: "A Lawyer Should Represent a Client Zealously Within the Bounds of Law."

66. The closest analog in the Rules is Rule 1.5, entitled "Diligence." Both this rule and the accompanying comment emphasize that a lawyer is "not bound to press for every advantage that might be realized for a client." Rules § 1.5 (Comment) at 16. Most of the provisions of the rule state exceptions to the basic requirement that a lawyer vindicate his client's cause by all lawful means, allowing, for example, a lawyer to "limit the nature and purposes of his representation" if this can be done without prejudicing the client's interest. *Id.* 1.5(c).

67. Rule 3.2 (Comment) at 69-70.

law's procedure aims to determine a controversy nonviolently and, if possible, in an atmosphere of tranquility.⁶⁸

. . . .

There is controversy whether disclosure is required of a fact that would substantially affect the determination of a material issue but which has not been preserved by opposing counsel When an adversary has failed to present . . . a [probably decisive] fact, the system manifestly has suffered breakdown (The Commission considered, but did not adopt a provision requiring the disclosure of facts known to a lawyer which "would probably have a substantial effect on the determination of a material issue.")⁶⁹

These statements are not rules, but they express the drafters' deep concern, their overriding skepticism about the adversary system—about the capacity of courts, as presently structured, to achieve substantial justice, about the social costs of litigation, and above all about the image of trial lawyers as "streetfighters,"⁷⁰ owing only limited obligations to those not their clients.

This outlook is reflected in numerous rule revisions. Some of the more important are:

(1) The Rules propose new restraints and new obligations on attorneys involved in *ex parte* proceedings and proceedings against unrepresented parties. Seeking to rectify the imbalance that such proceedings present, attorneys in *ex parte* proceedings are required to "disclose all relevant facts" even if adverse and "seek no greater relief than is legally justified."⁷¹ Attorneys appearing against unrepresented parties are advised to "refrain from exploiting that party's ignorance of the law"⁷²

(2) The Rules propose a new obligation on attorneys to keep litigation moving forward. Whereas under the Code a lawyer had a duty, phrased in negative terms, to avoid frivolous or dilatory proceedings,⁷³ the Rules would impose a positive duty to "make every effort consistent with the legitimate interests of the client to expedite litigation."⁷⁴

68. *Id.* at 69.

69. Rule 3.1 (Comment) at 62-63.

70. HAZARD, *supra* note 9, at 134.

71. Rule 3.5.

72. Rule 3.6.

73. DR 7-102(B).

74. Rule 3.3(a).

(3) The Rules establish new obligations of fairness to opposing lawyers and parties in negotiation and other litigation processes. I have already spoken of the obligation to avoid misleading statements of fact and law in negotiation. Another duty would require the attorney to audit the results of a negotiated settlement, *viz.*: "A lawyer shall not conclude an agreement that the lawyer knows or reasonably should know . . . would be held unconscionable as a matter of law."⁷⁵

(4) The Rules expand the attorney's obligation to deal candidly with courts and tribunals about legal authority. Whereas under the Code an attorney has a duty to disclose legal authority in the controlling jurisdiction directly adverse to his client's position,⁷⁶ that obligation would be broadened to require disclosure of any "legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue."⁷⁷

(5) The Rules expand the attorney's obligation of candor with respect to facts. As alluded to earlier, the Code's prohibitions have traditionally been limited to positive fraud, for example, a lawyer may not "knowingly make a false statement of fact or law."⁷⁸ In addition to prohibiting positive frauds, the Rules prohibit half-truths, statements which although true by themselves, "without suitable explanation" are "substantially misleading."⁷⁹ The Rules also penalize attorneys who fail to correct representations which, although true when made, are later discovered to be untrue or misleading.⁸⁰

(6) Finally, and most dramatically, the Rules impose on the attorney greatly expanded obligations to prevent or rectify the consequences of a client's misconduct, even if this requires disclosure of client confidences to a court or a third person. For example, in civil representation if a lawyer discovers, even after the fact, that a client has committed perjury, the lawyer would be required under the Rules to disclose the client's perjury to the court.⁸¹ This rule simply reverses a parallel section in the Code.⁸² With regard to completed client misconduct other than fraud, the Rules would for the first time permit disclosure of that misconduct in order to "rectify the conse-

75. Rule 4.8.

76. DR 7-106(B)(1).

77. Rule 3.1(c).

78. DR 7-102(A)(5), discussed notes 40-41 *supra* and accompanying text.

79. Rule 3.1(a)(3).

80. Rule 3.1(d)(2).

81. Rule 3.1(b).

82. DR 7-102(B)(1).

quences of a deliberately wrongful act."⁸³ And, in addition to the absolute prohibition against lawyers offering testimony known to be false,⁸⁴ attorneys are given explicit authority to refuse to offer "untrustworthy testimony," as part of a new and more general right to decline to assist a client in an "unjust course of conduct."⁸⁵

It is no exaggeration to say that these changes, taken together, constitute a radical modification of the lawyer's traditional adversarial posture. Many, it is already clear, will not be received with open arms by the organized bar.

Take, for example, the problem of the lying client. As a result of a 1972 survey, we know that the Rules' proposed resolution of this problem—requiring as a general rule that the defense lawyer reveal his client's perjury to the court if necessary to avoid presenting it—flies in the face of the practices and the apparent beliefs of the overwhelming majority of the criminal defense bar.⁸⁶ Likewise, the obligation to apprise the court of adverse legal authority is out of step with the perceptions of practicing attorneys. The same survey posed the following hypothetical:

Opposing counsel has not raised cases you know to be contrary to the proposition you have set forth. You have a list of these cases. It is obvious that opposing counsel has done a poor research job, because these cases are squarely against your position. Do you have an obligation to make the Court or opposing counsel aware of these contrary authorities? Would you?

In response to this question, roughly one-half of the trial lawyers surveyed believed that the Code obligated them to inform the court

83. Rule 1.7(c) provides:

A lawyer may disclose information about a client only . . . (2) to the extent it appears necessary to prevent or rectify the consequences of a deliberately wrongful act by the client, except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences.

84. Rule 3.1(a)(3).

85. Rule 3.1(e) states: "Except as provided in paragraph (f) [criminal defense cases] a lawyer may . . . refuse to offer evidence that the lawyer believes with substantial reason to be false." See also Rules 3.1(e) (Comment) at 67.

86. Friedman, *Professional Responsibility in D.C.*, 1972 RES IPSA LOQUITUR 60. Of 135 defense attorneys polled in this survey, 128 (95%) answered that they would put a perjurious client on the stand rather than seek withdrawal, and if necessary, expose the client's perjury to the court. 115 attorneys (87%) said that they would question the witness just as they would any other. *Id.* at 81.

about the adverse cases. But 93% indicated that they would nevertheless not do so.⁸⁷

Of course, discussion of the prognosis for successful passage of the Rules, or the extent to which they reflect what lawyers do in practice, misses the point. Clearly the Rules' drafters knew that the task they were undertaking was not merely a descriptive one—to identify and perpetuate customary morality. The drafting committee is to be commended for its willingness to assume a normative ethical function, even at the risk of taking controversial positions. Those who would prescribe normative ethical rules, however, take on the burden of providing objective, principled justifications for them. The liberalized provisions in the Rules regulating advertising and solicitation find clear support in the pages of *United States Reports*.⁸⁸ The proposed new sections creating duties of diligence, adequate communication and prompt attention have an empirical basis in the client complaint records of state grievance panels.⁸⁹ The justifications for modifying the adversary system and the advocate's role are not so clear.

For purposes of analysis, the rules concerning the adversarial function can be divided into two principal, related categories. The first category of rules has as its primary objective increasing the advocate's responsibility, personally and directly, to assist the functioning of the adversary system. Falling into the first category of rules are the provisions pertaining to ex parte proceedings and proceedings against unrepresented parties, the expanded obligation imposed on attorneys to expedite litigation, and the rule prohibiting the proffer "without suitable explanation [of] evidence that the lawyer knows is substantially misleading," among others. The second category of rules expands the role of the lawyer to audit and monitor the client's conduct by increasing the attorney's obligation to prevent the client from abusing the adversary process, prevent the client from committing harmful acts towards third persons and rectify the client's wrongful conduct once it has been completed. Both categories of rules have as their main objective preventing breakdowns in the adversary process. Both categories of rules have as a potential by-product a substantial reduction in the protections of secrecy and confidentiality which have historically been accorded to the lawyer-

87. *Id.* at 83.

88. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

89. See Steele & Nimmer, *supra* note 6, at 946-63.

client relationship. But this latter result is more pronounced as to the second category of rules.

On the face of it, the first category of rules is unremarkable. Like the capitalistic system of economic organization, the Anglo-American adversary system has at its root the ideal of individual competition.⁹⁰ Ordinarily an advocate has a limited responsibility to present one side of a contested matter; the conflicting position is expected to be presented fully and forcefully by opposing counsel.⁹¹ Rules constraining the advocate when an opposing party is either absent entirely from the courtroom or unrepresented by counsel seem in this context eminently sensible. They are designed to remedy the more extreme disparities of knowledge and power which can occur when one side is unrepresented during adversary proceedings.

The rule creating expanded obligations on lawyers to take all steps consistent with "legitimate"⁹² client interests to expedite litigation is similar in purpose. In drafting this rule, the Commission has

90. S. THURMAN, E. PHILLIPS & E. CHEATHAM, *CASES ON THE LEGAL PROFESSION* 287-88 (1970); Friedman, *Professional Responsibility in D.C.*, 1972 *RES IPSA LOQUITUR* 60, 61.

91. Rule 3.5 (Comment) at 74.

92. Rule 3.3 states that a

lawyer shall make every effort consistent with the *legitimate* interests of the client to expedite litigation. Realizing financial or other benefit from otherwise improper delay . . . is not a legitimate interest. . . . A lawyer shall not engage in any procedure or tactic having no substantial purpose other than delay or increasing the cost of litigation to another party.

The comment to the rule notes the difficulty of defining precise standards because of the danger on the one hand that "[a] claim or defense having little or no authority in existing precedent may have great potential for inviting a change in the law" and on the other hand that lax standards would make commonplace "all but the most flagrant abuses of procedure." The Comment supplies the following test: "[t]he essential question is whether reasonably competent counsel could conclude in good faith that the claim or defense in question has substantial basis." Rule 3.3 (Comment) at 72.

For a proposal similar to the one adopted in the Rules, see Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 *FORDHAM L. REV.* 1069 (1976). The author, a senior federal judge, notes that other remedies (taxation of costs, striking of pleadings) are theoretically available against dilatory counsel but are in fact utilized in only the most extreme cases. *Id.* at 1069-72. See also 28 U.S.C. § 1927; FED. R. CRV. P. 7(b)(2), 11. Despite recent concerns about increased delays in the administration of justice, this ought not to be surprising. Judges are rightly sensitive to the dangers of undue interference with the conduct and methods of trial lawyers. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 *HARV. L. REV.* 702, 735-37 (1977). Just as the court rules have not been vigorously enforced, one may have doubts whether the proposed standards in the Rules can or will be utilized by local grievance committees. There is also the question of whether the standard is precise enough to avoid challenges on the ground of vagueness.

attempted to address the significant problem of under-representation. Lawyers well know that inequality of resources among parties and law firms leads to daily abuse in the conduct of pretrial litigation.⁹³ Just as the laissez-faire theory of capitalism has been modified to account for monopolistic and anti-competitive practices, this rule proposes to modify the adversary ideal of zealous advocacy to achieve cheaper, more expeditious resolution of disputes. The costs of unduly protracted litigation are borne not only by the parties but also by society as a whole. Thus, if this rule achieves its purposes, it will surely be justified in utilitarian terms.⁹⁴

Where both parties to a litigation are fully and adequately represented, however, rules limiting the adversary function are more open to question. The rule prohibiting advocates from offering "substantially misleading evidence" without "suitable explanation" is a case in point. To illustrate the workings of this rule, consider the case of Sacco and Vanzetti.

Sacco and Vanzetti were charged with the murder of one Berardelli. In order to identify them as the murderers, it was vital to identify one of the fatal bullets as a bullet coming from Sacco's pistol. At the trial a ballistics expert testified on direct examination as follows:

Q. Have you an opinion as to whether bullet No. 3 [Exhibit 18] was fired from the Colt automatic which is in evidence [Sacco's pistol]? A. I have.

Q. And what is your opinion? A. *My opinion is that it is consistent with being fired from that pistol* [emphasis added].⁹⁵

After the defendants' conviction, the expert swore by affidavit that he was unable through tests to link the bullet to Sacco's particular pistol; that all he could say definitively was that the bullet came from a Colt automatic *like* that owned by Sacco; that the prosecutor knew these facts and that he consciously framed his examination questions as he did so as to withhold this crucial evidence. No questions about this

93. The most forthright of lawyers occasionally own up to the practice themselves, gloating about their own versions of *Jarndyce v. Jarndyce*—the antitrust case kept in discovery for 10 years, the poor widow papered to the point of voluntary dismissal, and so forth. See, e.g., LIEBERMAN, *supra* note 14, at 163-66. Cf. C. DICKENS, *BLEAK HOUSE* (1853).

94. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 706 (1977) (arguing a utilitarian thesis that expeditious dispute resolution is a higher value than achieving or satisfying the interests of clients).

95. F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 76 (1927).

line of testimony were asked by defense counsel on cross-examination.

A perversion of justice? Perhaps. Two men went to their deaths on the basis of incomplete, potentially misleading, and crucial expert evidence. Yet putting aside special prosecutorial obligations contained in the Code,⁹⁶ this sort of questioning has always been presumed to be well within the realm of permissible trial tractics. The rationale, of course, is that defense counsel, attentive to the weaknesses in the prosecution's case, can and will expose them on cross-examination. It seems clear that the proposed rule, prohibiting substantially misleading questions, would relieve defense counsel of this obligation and place the responsibility for presenting a more complete account on the shoulders of the prosecutor.

In examining the justifications for limiting the adversary role when both parties have full and adequate representation it is well to consider the several competing views of the adversary system. The traditional justification of the adversary system is that it is the best available mechanism for achieving impartial justice. According to this view, the presentation of evidence through zealous opposing counsel to a passive adjudicator forestalls the natural human tendency to reach premature conclusions and lends itself best to a full and complete exploration of facts.⁹⁷

According to a second view, the Legal Realist school, the idea that the adversary system has as its primary goal the ascertainment of "truth" is mere myth. Whatever the theoretical justifications of the adversary system, some eminent scholars believe that trials are a ritual, a civilized substitute for a fight or brawl, in which the only value truly served is the satisfaction of the parties.⁹⁸ It is, of course, difficult to define normative limits on the advocate's role if one subscribes

96. DR 7-103(B), incorporating the constitutional rule of *Brady v. Md.*, 373 U.S. 83 (1963), requires a prosecutor to disclose to defense counsel evidence that, *inter alia*, "tends to negate the guilt of the accused." This provision is carried forward in somewhat broadened form in Rule 3.10(d), requiring the prosecutor to "seek all evidence, whether or not favorable to the accused, and make timely disclosure to the defense of all evidence supporting innocence or mitigating the defense." Whether either of these provisions would have obligated the prosecutor in *Sacco and Vanzetti* to disclose his expert's inability to trace the fatal bullet to Sacco's gun is questionable. As the Comment to the Rule states, "[p]recisely how far the prosecutor is required to go in this direction is a matter of debate." Comment to Rule 3.10, at 83.

97. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

98. C. CURTIS, *IT'S YOUR LAW* (1954); J. FRANK, *COURTS ON TRIAL* (1949); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

to a "fight" theory of the adversary system. So it is not surprising that the Rules' framers have rejected this theory.

A third view of the adversary system—a variant of the first and second—is that the system serves two objectives: the ascertainment of truth and the ideal of party participation. According to this view, the presentation of evidence through competing counsel lends itself reasonably well to achieving fair results. At the same time, the representation of parties by committed and zealous advocates gives the litigant a sense of involvement in and control of the trial process, underscoring our nation's philosophical and constitutional commitment to individual autonomy and political freedom.⁹⁹

A fourth view of the adversary system regards it as exaggerated and extreme, involving systematic distortion of the truth and perceived by the public with "cynical abhorrence."¹⁰⁰ This school of thought is hardly new. Dean Roscoe Pound, writing in 1906, argued that the "sporting theory of justice" was a principal cause of public dissatisfaction with the legal profession.¹⁰¹ Proponents of this school seek to limit or substantially modify the adversary function and occasionally argue for adoption of some form of civil law or interrogative system, whereby the adjudicator participates more actively in the investigation and determination of facts.

The Model Rules' reformulation of the adversary's role reflects a fairly recent resurgence of interest in restraining the adversary function. Those who are familiar, for example, with the articles of Marvin Frankel and Alvin Rubin will recognize the deep imprint of their ideas on the proposed Rules.¹⁰² "Modify the adversary ideal; make truth a paramount objective; impose a duty upon litigants to pursue

99. Jerome Frank has stated the proposition as follows:

Many lawyers maintain that the "fight" theory and the "truth" theory coincide. They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favorable to that side. Macaulay said that we obtain the fairest decision "when two men argue, as unfairly as possible, on opposite sides"

J. FRANK, COURTS ON TRIAL 80-81 (1949).

For a discussion of the political and philosophical roots of the American adversary system, see HAZARD, *supra* note 9, at 120-22, 134-35.

100. The phrase, again, is Professor Hazard's. See HAZARD *supra* note 9, at 124.

101. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404 (1906).

102. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975). Mr. Frankel, it bears emphasizing, was a member of the Rules drafting commission.

that objective"¹⁰³—these are themes common to both articles. They are interesting and provocative articles. I require my students to read them. But, by themselves, and considering the competing views of the principal objectives of the adversary system, it is questionable whether they establish a case for its fundamental revamping.

Discussion of the second category of rules—requiring the advocate to prevent and rectify client wrongs even if this requires disclosure of client confidences—illustrates the extent to which the Rules propose fundamental changes in the adversary function.¹⁰⁴ I shall not discuss each of the particular rule revisions; one example must bear the entire burden. I shall speak of the lawyer's duty to inform the court of his client's completed fraud.

In order to flesh out this problem, I offer the following hypothetical. A lawyer represents a minority plaintiff in an employment discrimination case. Strong prima facie evidence exists to support the claim. Throughout the proceedings the presiding judge has been hostile to the plaintiff, the lawyer, and the claim. At an early stage, he granted a motion by defendant for summary judgment, a ruling which was peremptorily reversed by the court of appeals. On remand, the judge is now unreasonably pressing the parties toward a trial date, thereby restricting the plaintiff's ability to pursue discovery. He sets a trial date for the day after Christmas. The day is inconvenient for both attorney and client, the client having planned to be with his family in another state. Five days before the trial date, the client telephones the lawyer from the other state and tells him that he has suffered serious internal injuries in a car accident. The lawyer informs the judge, who demands a notarized letter from the client. The client supplies one; the judge reluctantly grants a three-month continuance. One month later, the lawyer meets again with his client. The client admits to the lawyer that while he did have an accident and was

103. See Frankel, *The Search for Truth: An Umpirical View*, 123 U. PA. L. REV. 1031, 1052 (1975). "Our relatively low regard for truth seeking," says Frankel, "is perhaps the chief reason for the dubious esteem in which the legal profession is held." *Id.* at 1040. Rule 3.1(a)(3) prohibiting lawyers from offering "without suitable explanation evidence that the lawyer knows is substantially misleading," is virtually identical to the central proposal of Frankel's article. *Id.* at 1057-58. The impact of Judge Rubin's ideas on the negotiation provisions of the Rules is equally clear.

For some critical responses to Frankel's proposals, see Nessen, *Rethinking the Lawyer's Duties to Disclose Information: A Critique of Judge Frankel's Proposals*, 24 N.Y.L. SCH. L. REV. 677 (1979); Uviller, *The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1965).

104. See notes 89-90 *supra* and accompanying text.

shaken up he did not suffer serious injury as stated in his letter. The client says to the lawyer, "Now we've got time to pin down a few more key facts, don't we?"

Must the lawyer disclose the client's fraud to the judge? Under the Canons of Ethics from 1953 to 1969, no. Under the Code from 1970 to 1974, maybe. Under the Code subsequent to 1974, clearly not. Under the Rules, a resounding "yes." Recall that the Rules' drafters have claimed that their revisions reflect a "continuing evolution in ethical thought." Let us review the "evolution" with respect to this problem.

From 1953 to 1969, the prevailing rule was stated in ABA Formal Opinion 287. In that opinion, the ABA considered the problem of whether a lawyer, learning from a former client that he had given materially false testimony during a deposition in a divorce case, must disclose the perjury to the court. The Committee held no, reasoning that the duty of the lawyer to preserve a client's confidences prevails over the duty to reveal a client's fraud.

When the Code was originally adopted in 1969, it contained two provisions relevant to this issue. DR 7-102(b), the fraud section, read: "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 [if the client fails to rectify it] reveal the fraud to the affected person or tribunal." DR 4-101(C)(2), an exception to the confidentiality rules, allowed a lawyer to reveal client confidences where "permitted" under the disciplinary rules. It was certainly possible to construe these rules together as an attempt to alter the result in Opinion 287. DR 7-102(B), however, contained the ambiguous footnote, "But see ABA Opinion 287." The effect of this footnote was to perpetuate, indeed to exacerbate, the conflict between the confidentiality and fraud provisions, leaving courts, lawyers and disciplinary panels to resolve the conflict on a case-by-case basis.¹⁰⁵

In February 1974, DR 7-102(B) was amended to add the qualifying language "except when the information is protected as a privileged communication." The purpose of this amendment was "to relieve lawyers of exposure to . . . diametrically opposed professional duties" and to "reinstate the essence of Opinion 287," holding that the duty to preserve a client's confidences prevails over the duty to expose a client's frauds.¹⁰⁶

105. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 147 (1975).

106. ABA FORMAL OPINION NO. 341 (1975).

The Rules' drafters have resolved to overturn the status quo. Their proposed rule is firm and unambiguous:

Except in [criminal defense cases], if a lawyer discovers that evidence or testimony presented by the lawyer is false, the lawyer shall disclose that fact and take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification.¹⁰⁷

What is the rationale for this revision? Surely no "evolution of ethical thought." The bar's inconsistent treatment of this particular problem over the last quarter century is symptomatic of its deep ambivalence about the conflicting responsibilities of the attorney in an adversary system. The problem of the lying client, and others like it, raise the most difficult questions in professional responsibility. Indeed, they are intractable, because they pit against each other values as fundamental as they are irreconcilable:¹⁰⁸ the fiduciary's obligations of loyalty and secrecy vs. the duties of honesty and of avoiding harm to others.¹⁰⁹

Can this new rule, and others like it, be justified in utilitarian terms? Probably not. The Rules' framers assume that provisions that require lawyers to reveal their clients' frauds and create other exceptions to established principles of confidentiality will engender, systemically, more "truth." But it is also clear that these rules will exact a price on the free flow of information between individual lawyers

107. Rule 3.1(b).

108. If one examines, for example, the literature on Monroe Freedman's lying client problem, one discovers that it is extensive, sometimes self-righteous, occasionally vitriolic and on the whole inconclusive. See, e.g., Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 RES IPSA LOQUITUR 60, 61 n.7 (1972) (supporting Freedman's resolution of the problem and suggesting that many distinguished attorneys including Anthony Amsterdam and Thurman Arnold do as well); see also Berger, *Standards of Conduct for Prosecution and Defense Personnel*, 5 AM. CRIM. L.Q. 11, 12 (1966) ("The proposition that perjury may ever be knowingly used is . . . pernicious . . . [It] is so utterly absurd that one wonders why the subject need even be discussed among persons trained in the law."); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Note, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 571 (1978).

109. Jethro Lieberman considers many of these problems under the rubric the "ethics of doing harm." Although he concedes its historical importance, he is critical of the "basic tenet of the lawyer's creed that it is ethical to aid those bent on acting unethically." LIEBERMAN, *supra* note 14, at 136-75. For a philosophical treatment of this problem, see Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

and clients. To some degree then, rules limiting lawyer-client confidentiality will inhibit client candor, resulting in less effective representation by lawyers and in lawyers having fewer "truths" about their clients to disclose. "Truth," said Knight-Bruce, C.J., "like all other good things, may be loved unwisely, may be pursued too keenly—may cost too much."¹¹⁰ Without access to lawyers' offices where consultations occur, we as a society will have no means of measuring what the cost of these proposals are and whether the benefit was worth it.

III. CONCLUSION

The rule-oriented, task-specific format of the Rules gives clear guidance to attorneys facing ethical problems in a way the Code most emphatically did not. Nevertheless, the application of this format to the most difficult litigation ethics issues raises the spectre of a divisive struggle over the Rules as a whole. If one examines the most radical changes in the Rules, they mostly pertain to trial advocacy and to negotiation—the principal litigation functions.¹¹¹ One problem remains to be considered: why did not the Rules' drafters adopt more flexible standards in these areas, similar to the rule proposed for "organizational lawyers?"¹¹²

One answer, though not a very charitable one, is that the Rules' drafters are as deeply disdainful of trial lawyers as they are of the adversary process itself. This attitude pervades Geoffrey Hazard's *Ethics in the Practice of Law*, a direct lineal ancestor of the Rules and otherwise a very balanced work. It is found in comments like: "It would

110. *Pearse v. Pearse*, 1 DeGex and Sm. 28, 29 (1846), quoted in D. EMMET, *RULES, ROLES AND RELATIONS* 161 (1966).

111. See notes 57-59 *supra* and accompanying text.

112. See notes 71-85 *supra* and accompanying text.

Take my employment hypothetical, a loaded one to be sure. Instead of a rigid rule requiring the advocate in all cases to "blow the whistle" on his client, one can imagine a substitute rule such as the one which follows:

Rule 3.1(b) If a lawyer discovers from his client that evidence or testimony presented by his client is false, the lawyer shall call on the client to rectify the situation. If the client refuses to do so, the lawyer has two options—to disclose the client's fraud or to protect the client's confidence. In considering which duty is paramount, the lawyer shall consider the strength of the evidence, under relevant law, that a penal violation has occurred, the seriousness of that penal violation, the materiality of the false evidence to the merits of the case and the extent to which presentation of the false evidence has harmed third parties.

This rule was not difficult to draft. It takes account of several factors that might affect how an attorney would execute discretion in a particular case. Why did the Commission eschew such an approach?

be better if there were a larger constituency that understood, with Judge Learned Hand, that being in litigation, whatever its outcome, can justly be compared with sickness and death"¹¹³ and in the extended discussion at the close of the book as to why "good lawyers represent big corporations" and why the securities, antitrust and tax bars are "competent" and "highly esteemed."¹¹⁴

A second answer is that the Commission well knew that they were drafting a public document and that the nature of certain issues would not lend themselves well to explicit grants of discretion. This was a decade, after all, in which the public witnessed prominent lawyers stand by while their clients shredded documents and lied to legislative committees. It would not have done, I suppose, to grant lawyers freedom of choice to permit their clients to commit frauds, even "insubstantial" or "harmless" ones.

To the extent that this latter view is a correct one, the Rules can be seen as an attempt to address the post-Watergate surge of public antipathy toward the legal profession. It is not an irresponsible effort. Perhaps the drafters are correct that over-zealousness by trial lawyers is a principal reason for this antipathy. On the other hand, one suspects that the public is more deeply ambivalent about the adversary function than the Rules' drafters might care to admit. Lawyer as "mouthpiece," lawyer as champion—these are but two sides of the same coin. The warrior lawyer, advocating his client's case against all odds, knowing no cause but his client's¹¹⁵—this lawyer remains a powerful, evocative figure in Anglo-American law and politics, a figure to whom many citizens and lawyers can be expected to be deeply, even angrily committed.¹¹⁶

113. HAZARD, *supra* note 9, at 135.

114. *Id.* at 150-53.

115. Cf. Lord Brougham's classic oral argument in defense of Queen Caroline:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save the client by all expedient means—to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest and the most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting *them*, if need be, to the wind, he must go on reckless of the consequences, if his fate should unhappily be, to involve his country in confusion for his client's protection.

BROUGHAM'S SPEECHES, i. 103-5 reprinted in Rogers, *The Ethics of Advocacy*, 15 L.Q. REV. 259, 269 (1899).

116. Trial lawyers tend, for their part, to be extremely zealous defenders of the adversary system. It has been suggested that this posture is one kind of defense mecha-

Resistance of a general kind has already surfaced toward the new Rules. Some lawyers believe that the current Code is sufficient and can be expected to oppose any substantial change in the status quo.¹¹⁷ To some extent, this reaction may reflect the conservative instincts of the legal profession—a belief that the fundamental ethical precepts of the profession do not, or at least ought not, change each decade.

But developments taking place as this article goes to press make it clear that a substantial number of lawyers are unmitigatedly hostile towards the proposed Rules and have objections to it which are highly specific and emphatic. Beginning in June 1980, yet *another* proposed ethics code, "The American Lawyer's Code of Conduct" [American Code]¹¹⁸ was publicly disseminated. Drafted by the Roscoe Pound-American Trial Lawyers Foundation under the reportage of Monroe Freedman, this document is clearly intended as a response and a counterweight to the Model Rules.¹¹⁹ In breadth of coverage, the American Code is not as comprehensive a document. But as to the issues I have been addressing, lawyer-client confidentiality, loyalty to client interests and adversary zealotry on behalf of clients, it is a ringing reaffirmation of the adversary system,

nism needed by lawyers to reduce the psychological pain of representing clients known to be guilty or who wish to commit unfair acts toward others. See Kelso & Kelso, *Conflict, Emotion and Legal Ethics*, 10 PAC. L. REV. 69, 79-80 (1979). Whatever its source, it is a viewpoint which will have to be reckoned with as the Rules are debated.

117. Hostility toward the idea of a new code surfaced as early as 1977 when the drafting commission was formed. See LIEBERMAN, *supra* note 14, at 217. Since the Rules were disseminated in February 1980, a new wave of opposition has emerged. For example, at a day-long public hearing on the new rules recently held in New York City, spokesmen for the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers Association unanimously rejected the concept of a completely rewritten Code. "When you have this kind of dramatic change in form as well as substance," said the President of the New York State Bar Association, "the burden of proof is on those proposing the change to show why we need it." Note, *Bar Groups Oppose Revisory Code of Ethics*, N.Y.L.J., May 6, 1980, at 1, col. 2.

118. THE AMERICAN LAWYER'S CODE OF CONDUCT (Discussion Draft, June 1980).

119. Both the introduction and preface to the American Lawyer's Code of Conduct are highly critical of the Model Rules. For example, the introduction, written by Theodore Koskoff, President of the Association of Trial Lawyers of America, takes the Rules to task for "erod[ing] basic constitutional protections by making the lawyer the agent of the State, not the champion of the client, in many important respects." *Id.* at iii. And the preface by Irwin Birnbaum, the chairman of the drafting committee, is even more direct: "Unfortunately, the Model Rules make few improvements over the CPR; in several significant respects, they are inferior to it. With all its serious flaws, the Code of Professional Responsibility is preferable to the Model Rules." *Id.* at 1.

repudiating the Rules' proposed concept of "limited advocacy."¹²⁰ If anything, the American Code narrows the Model Code's exceptions to lawyer-client confidentiality rather than broadens them¹²¹ and reiterates the view that the American system of justice is an adversary system "because only such a system protects the liberty of the individual."¹²² Moreover, the structure of this alternative draft is not given to conciliation and compromise. Like the Model Rules, it is comprised of highly specific "rules" and "comments." Indeed it goes one step further than the Model Rules, appending at the end of each section "illustrative cases" which supply a great deal of detail and particularity to its sometimes highly controversial proposals.¹²³

120. The Rules' concept of limited advocacy is most clearly expressed in Rule 1.5(b), which, subject to principles of informed consent, advises that "a lawyer may decline to pursue a course of action on behalf of a client that the lawyer considers repugnant or imprudent although in conformity with law" In contrast, in a section entitled "Fidelity to the Client's Interests," the American Code admonishes the lawyer to "give undivided fidelity to the client's interests as perceived by the client, unaffected by any interest of the lawyer or of any other person, or by the lawyer's perception of the public interest." *THE AMERICAN LAWYER'S CODE OF CONDUCT*, Rule 2.1. Similarly, the comments to the American Code's sections on zealotness state that "[o]nce the lawyer is committed to represent a client . . . the lawyer has no discretion, short of grounds for withdrawal, to fail to provide the client with every legal recourse that is consistent with the retainer agreement, reasonably available, and in the client's interests as the client perceives them."

121. The drafters of the American Code were divided on the question of what exceptions should be permitted to the rule of lawyer-client confidentiality. Accordingly, two alternative drafts are presented. Both alternatives are as a whole more protective of lawyer-client confidentiality than either the Code or the Model Rules. "Alternative A" of the American Code permits disclosure of confidences (but does not require it): first, under compulsion of law (but only after good faith efforts to test the validity of the law), second, in cases involving imminent danger to life, third, to avoid proceeding before a corrupted judge or juror and fourth, to defend the lawyer or his associates from "formally instituted charges" of misconduct. "Alternative B" is even narrower, omitting the second and third exceptions. Both alternatives reject the Code's formulation, permitting violation of confidentiality in cases of "future (or continuing) crimes." See *THE AMERICAN LAWYER'S CODE OF CONDUCT*, Pt. 1, The Client's Trusts and Confidences, at 101-10. Compare the Code, DR 4-101(C) and the Model Rules, 1.7, 3.1.

122. *Introduction to THE AMERICAN LAWYER'S CODE OF CONDUCT* at ii. (Discussion Draft, June 1980).

123. For the sake of familiarity, consider the American Code's resolution of the lying client problem, contained in Illustration 1(j):

A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer reasonably believes that a request for leave to withdraw would be denied and/or would be understood by the judge and by opposing counsel as an indication that the testimony is false. The lawyer does not seek leave to withdraw, presents the client's testimony in the ordinary manner, and refers to it in summation as evidence in the case. The lawyer has not committed a disciplinary violation.

One can only speculate as to what set of rules will emerge from full debate of these proposals and counterproposals. But considering the similar structure of these documents, the radically different views of the adversary system which they represent and the apparent reluctance of the Rules' drafters expressly to sanction the exercise of individual discretion in this area, it is doubtful that these two proposals can be effectively compromised. Failing a compromise, it may well be that the basic ideas of the Model Rules will prevail. Trial lawyers, after all, constitute a minority of the American legal profession and their commitment to the adversary ideal is not necessarily shared by the majority of American lawyers. It is therefore plausible, even likely, that they will be unable to resist the Rules' and the profession's new directions.

Or possibly, a compromise might be reached—a decision to retain the basic format of the Code of Professional Responsibility and to incorporate within it some of the less controversial and disruptive recommendations of each of the two drafting committees. From this writer's perspective, that would not be such an unfortunate resolution. There is much to be said for the view that the Model Rules' drafting commission has exceeded its charge, that the radical changes it has proposed, not only as to the structure of the present Code but as to its basic substance, are unnecessarily disruptive to orderly developments in the field of legal ethics, inviting equally extreme responses. There is also something to be said for the proposition that the inconsistencies and ambiguities of the Code have served an extremely useful function. Thomas Hardy said that the British Constitution owed much of its success in practice to its inconsistencies in principle.¹²⁴ The Code's ambiguities in defining the proper limits of the adversary function reflect to a great extent the ambivalence of American lawyers. No matter, therefore, what one's views are about the adversary system or the lawyer's proper role within it, the Code has thus far successfully avoided what must surely be an unhappy resolution—the imposition by majority rule of categorical imperatives, of rigid "shalls" and "shall nots" in a sensitive field, upon a deeply divided profession.

124. T. HARDY, *THE HAND OF ETHELBERTA* 80 (1905).