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Rules of Legal Ethics: The Drafting Task

By GEOFFREY C. HAZARD, JR.*

In the early part of 1980, the American Bar Association Commission on Evaluation of Professional Standards published its Discussion Draft of a revision of the rules of ethics governing the American legal profession. The Commission is widely known as the Kutak Commission, after the name of its chairman, Robert J. Kutak, Esq., of Omaha, Nebraska. The Commission was created with the announced purpose of considering whether a revision of the rules of ethics was necessary. In fact, before the Commission's creation it was well recognized that a comprehensive revision was needed. Hence, the principal task of the Commission was to undertake the rewriting.

The Commission includes lawyers in practice, judges, legal scholars, persons with extensive experience in government legal service, and lay persons. Its membership is geographically diverse. After having worked with the Commission for well over two years, I can say that its members are unusual in their breadth of vision, concern for the public good, ability to concentrate, and willingness to listen. As a veteran of many drafting enterprises, I have never worked with a more thoughtful deliberative body.

The Commission's product is formidable. The Discussion Draft of the Model Rules is over 100 pages of concentrated text and comment. A comprehensive revision of that Draft is now in progress; it will come out in May or June and will probably be shorter but more concentrated in text although longer in total by reason of extensive annotations.

The Discussion Draft, as was intended, has been the subject of intensive critical review by individual lawyers and bar associa-

* Professor of Law, Yale University; Reporter for American Bar Association Special Commission on Evaluation of Professional Standards. The first part of this paper is based upon one given at the 1980 joint meeting of the American and Australian bars in Sydney, Australia. The paper expresses the views of the author, which may not correspond to those of members of the Commission. The Commission's official view will be expressed in the revised Model Rules.

tions for the last year. The revision will reflect that review. Every section of the black letter and practically every paragraph of the comment has been amended. The revision certainly will not please everyone, although I believe it will meet most of the criticisms. The Model Rules as proposed will be submitted to, and I hope adopted by, the American Bar Association. If the ABA adopts the Model Rules, they will be presented to authorities in the states. In any case the Model Rules test the present Code and various contemporary conceptions of legal ethics.

This paper explains the background of the proposed Rules of Professional Conduct and analyzes the principal issues to which they are responsive.

HISTORICAL BACKGROUND

Control over admission to practice has been exercised by the states since colonial times. Comprehensive state control over admission to practice was first asserted in the early nineteenth century, primarily with the purpose of overthrowing the bar's monopolistic system of apprenticeship. The power to admit a lawyer to practice was vested in the courts, thereby conferring ultimate authority over the profession in the judiciary as distinct from the bar. The form of admission was the right of audience before the state's courts. Admission to practice as an advocate carries with it authority to counsel and assist clients in the professional functions associated with the office lawyer.

This regulatory arrangement has had some lasting effects on the governance of the American profession. The courts of the nineteenth century were not much in the way of organized bureaucracies. In fact, so far as the bar is concerned they had virtually no enforcement apparatus. Therefore, once a lawyer was admitted to practice he could pretty well count on being left alone. He needed to avoid gross impropriety toward a court, which might excite the attention of the judges, and gross violation of etiquette in competition for clients, which would excite the attention of fellow lawyers. Hence, under the nineteenth-century judicial regime, for practical purposes the bar was subject

to ethical supervision only in matters of forensic misconduct and champerty in various forms, and even that supervision was episodic. There was no systematic development of norms of law office practice.

There was another line of development in the law of professional conduct in the nineteenth century. This had to do with the attorney-client privilege, that is, the rule that an attorney may not give testimony about matters imparted to him in confidence by a client. I have had occasion elsewhere to consider development of this rule.¹ The rule is a vital element in the lawyer's professional function, for the right to maintain client secrets is one of the lawyer's most powerful professional instruments. However, the evolution of the law of attorney-client privilege was peculiar. Although the rule addressed activity occurring in the lawyer's office—the receiving of confidences from a client—it was formulated from the post hoc perspective of the courtroom. That is, the rule had application only where a lawyer was called to testify about the confidences already received concerning transactions already completed. The courts hammered out the attorney-client privilege rule and its exceptions with little or no systematic concern for the relation of the rule to larger questions of professional ethics. As expositors of the evidentiary law of attorney-client privilege, the courts gave little systematic attention to the lawyer's role, although that was a role which the courts, as governors of admission to practice and discipline of the bar, were responsible for defining.

The nineteenth-century law of professional ethics, as it may be called, therefore grew up around three principal problems. The first was forensic misconduct, for example, offering perjured testimony or behaving obstreperously toward a judge. The second was intraprofessional competition—ambulance chasing, advertising, and inveigling the clients of another lawyer. These two problems were dealt with as a matter of bar discipline. The third was the problem of preserving client confidences, which was the subject of a branch of the law of evidence.

These nodal points were widely separated, both analytically

and functionally. Moreover, even at these points legal development was meager. Enforcement was sporadic; there was no real government of the bar corresponding to the Law Society in England; as doctrine in legal ethics emerged, it was not consolidated into legislation, regulation, or accepted conventions. Such was the state of the bar's regulation at the beginning of the nineteenth century, and such its state remained until late in that century.

In the meantime the American legal profession had been rapidly expanding in numbers and function, paralleling the economic development of the country. Judicial decision became an important mechanism of lawmaking, and the function of advocate became of corresponding political importance. In the realm of economic development, the corporation became the primary mechanism of capital formation and entrepreneurial effort, and the corporate mortgage was perfected as an instrument of finance. The function of legal draftsman became of corresponding economic importance.² The United States was a swirl of change and expansion; the lawyers were the go-betweens. From the perspective of modern times, we sometimes look back on this period with rose-colored glasses, seeing it as the fulfillment in the young country of the ancient traditions of a learned profession. In fact, for the legal profession the nineteenth century seems to have been a period of opportunity, opportunism, and chaos.³

Concerned lawyers tried to bring forth order. The 1830s and 1840s witnessed the organization or revival of local bar associations in the United States. Several commentators made attempts at systematic statements of the ethics of the profession, seeking order by prescription. Of these, the best known in America are Hoffman's ethical precepts, published in 1817, and Sharswood's lectures, given in 1854.⁴

Both Hoffman's precepts and Sharswood's lectures were addressed to the young lawyer. They were lofty in aspiration and preachy in tone. They presumed the existence of a bar that was economically secure, apolitical but part of the civil establishment, and made up of high-minded gentlemen engaged in a learned calling for which they might receive incidental honoraria. Hoff-

man and Sharswood made much of questions of punctilio and little of ethical dilemmas of real substance. This approach to the difficult problems of professional ethics sought to surmount rather than to confront them. While the bar was in a state of near anarchy as far as professional function was concerned, the available ethical guidance consisted of Victorian moralizing at its worst.

The ethical prescriptions propounded by Sharswood were a major source for the Canons of Ethics adopted by the Alabama Bar Association in 1887. The Alabama Canons in turn became the basis of the Canons of Professional Ethics adopted by the American Bar Association in 1908.⁵ The 1908 Canons remained the American legal profession's statement of self-regulation until 1970. It is pertinent to observe, however, that the Canons were not law. They did not take the form of law: their syntax was exhortatory as often as it was obligatory and they made no pretence at precision or completeness. They did not have the authority of law, for they were not legislatively adopted as such and were regarded by the courts as advisory at most. Furthermore, they were not coordinated with the evolving law of the legal profession expounded by the courts.

THE CODE OF PROFESSIONAL RESPONSIBILITY

In 1965 the American Bar Association created a committee to revise the Canons of Ethics. The product of that drafting effort was the Code of Professional Responsibility of 1970.⁶ The Code has since been adopted, sometimes with important amendments, in virtually all states of the American union. It was in many respects a major achievement.

First and foremost, the code transformed the legal character of the rules of professional ethics by bringing them together into a systematic text. There was considerable difficulty in doing this. It is not easy, for example, to accommodate the hard law on such matters as solicitation of clientele with preachments about service to mankind. The Code sought to meet this difficulty by adopting three sets of norms. First, there were "Canons"—very general

principles, such as Canon 4 that "A Lawyer Should Preserve the Confidences and Secrets of a Client." Second, subsumed under the canons were "Disciplinary Rules"—legal regulations written in black letter and backed by the sanctions of enforcement. Side by side with these were "Ethical Considerations," statements sometimes consisting of explanations of the Disciplinary Rules and sometimes consisting of exhortations and idealisms echoing the Victorian antecedents. Many readers of the Code are still puzzled by this juxtaposition. I suspect the Code's draftsmen were equally puzzled.

Even with this anomalous three-level structure, however, the Code had accomplished an important transition. Whatever might be made of the Canons and Ethical Considerations, the Disciplinary Rules constituted a no-nonsense piece of legislation. Adoption of such legislation meant that questions of legal ethics had become questions of law.

Considered as a piece of legislation, however, the Code of Professional Responsibility left a great deal to be desired. It was conservative in the negative sense of the word. For one thing, it was anachronistic in its conception of the legal profession. The Code visualized the profession as consisting essentially of practitioners in independent private practice, even though at the time about one-quarter of the members of the bar were employed by government agencies or private organizations such as corporations. The Code visualized the private practitioner as engaged in solo or small-firm practice, even though a high fraction of practitioners were associated with large or medium-sized firms or with law departments. The lawyer was visualized as typically acting as advocate in court, even though most lawyers were primarily office practitioners and many had not been inside a courtroom since the day of their admission. The typical client was visualized as an individual with an occasional legal problem, even though modern practice had come to center on corporate clientele for which lawyers serve on retainer. In short, as some critics have noted, the Code conceived of the practice of law as it was in downstate Illinois—or upstate New York—in 1860.⁷

The result of this set of factual premises about law practice was that the Code ignored many important ethical problems in the practice of law—for example, the peculiar problems presented when the client is a corporate entity and not a flesh-and-blood individual; the variant forms of conflict of interest that arise when the lawyer serves a function other than that of advocate; the responsibility of a member of a law firm for the ethical behavior of other associates in the firm. The Code was conservative, again in the negative sense of the term, in another way. It undertook to arrest an evolution in legal services that had begun in the 1950s and was in full swing in the 1960s. Broadly, the evolution concerned provision of legal services to persons of modest means. The direction of change was away from legal services on a fee basis to individual clients, toward services on a prepaid basis to classes of clients. One facet of the change was “activist advocacy,” wherein political and social groups took up causes for disadvantaged individuals. The prototype was civil rights litigation by the National Association for the Advancement of Colored People, culminating in *Brown v. Board of Education*. Another facet of the change was the arrangement whereby unions provided lawyers for their members in personal injury cases, aiming for better services at lower cost. Another facet was the transformation of legal aid into the Federal Legal Services Program, which now provides legal services on a federal scale instead of by local hand-out. Yet another was group legal services, organized like medical insurance.

All these new legal services were in one stage or another of development while the Code of Professional Responsibility was being drafted.⁸ It seems fair to say that the Code draftsmen, reflecting preponderant sentiment in the bar at the time, were wary of all and hostile to some of these developments. These new legal services had in common that they involved nontraditional ways for establishing contact between client and lawyer. The Code draftsmen therefore regarded them, at least *prima facie*, as new forms of solicitation—ambulance chasing. This attitude was manifested in the Code’s controls on the procedures whereby legal

services might be put at the disposal of clientele. About a third of the black letter of the Code of Professional Responsibility deals with this problem, ironically under the rubric of Canon 2 which provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." These unwaveringly negative regulations were adopted in the face of Supreme Court decisions plainly indicating that access to legal services is protected by the United States Constitution.⁹

The inability or unwillingness of the bar to foresee the trend of the law governing lawyers has repeated itself recently in New York. The Court of Appeals has unanimously adopted a position concerning advertising that some members of the bar may think is unthinkable.¹⁰ Insensitivity to trends in the law used to be merely antisocial. Persistent inability to accept what the law portends in this respect, however, borders on if it does not consist of antitrust liability and tortious interference with First Amendment rights. It is time that lawyers and the organized bar came to understand that they are governed by law, bound by law, and answerable before the law, like other people.

As far as bar sentiment was concerned in 1970, however, the Code had one clearly desirable attribute: it was not controversial. Accordingly, the Code was quickly adopted not only by the American Bar Association's House of Delegates but also by the several states.

Although sharp criticism has been leveled at the code of Professional Responsibility, here and elsewhere, I believe the Code was a major advance. For one thing, a more forward-looking revision probably could not have been enacted in 1970—not one of the better years for political deliberation. Substantively, the Code sorted out several ethical problems. It differentiated between issues of professional conduct warranting serious legislative attention and those that are matters of etiquette or personal taste. The Code recognized the new forms of legal services, even if it did so grudgingly. The Code adopted a large number of very sensible rules that will stand for some time to come. Finally, because it undertook to be serious legislation, the Code made a contribution

to reconsideration of the ethics of the profession. Before the adoption of the Code of Professional Responsibility, legal ethics was disparaged by legal intellectuals and given lip service by most practitioners. Since then, legal ethics has become very serious legal topic.

Nevertheless, the deficiencies in the Code of Professional Responsibility are now substantial. The ethical problems of the lawyer for the corporation have become too manifest to be resolved by a merely exhortative proposition that the "client is the entity." Conflict-of-interest problems have become too complicated to be handled under a single rubric. And so on. There is no real disagreement on this point. Even the most choleric critics of the Discussion Draft of the Model Rules acknowledge that the Code needs major rewriting. They argue, however, that it should take the form of revision of the Code and not a new format. There is something to be said for this viewpoint and it is possible to work the substance of the Model Rules into the form of the Code. Indeed, the Kutak Commission plans a format doing just that. However, it is essential to face the difficulties in moving in that direction.

THE TRIPARTITE DIVISION

Serious defects in the present Code derive from its three-level set of norms—the "axiomatic" Canons, the Ethical Consideration, and the Disciplinary Rules. But the apparent virtue of this format should be acknowledged, for many lawyers find comfort in it: The Canons and Ethical Considerations contain the lofty pronouncements of the 1908 Canons, while not going so far as to convert these sentiments into real legal obligations.

Illustrative of this rhetorical virtue is the treatment of advertising. Canon 2 says that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available," and Ethical Consideration EC2-1 says that "the need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel."

These passages offer reassurance that the legal profession acknowledges its public trust to provide all who need it with legal assistance. At the same time, the Disciplinary Rules prevent individual lawyers from being any more assertive in telling laymen about their legal rights than the courts require under the First Amendment. These Rules in effect protect established elements of the profession from the competition of legal services based on advertising, even though advertising is probably the most efficient way of making legal counsel more widely available.

There is a similar split vision in the Code regarding certain aspects of conflicts of interest. Canon 5 says that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration EC 5-1 says that "The professional judgment should be exercised . . . solely for the benefit of his client and free from compromising influences and loyalties." These propositions are merely aspirational, however. Disciplinary Rule DR 5-104(A), governing the inherently conflicted matter of business deals between client and lawyer, is much more narrowly drawn. It says that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." This Rule is full of loopholes. To begin with, the Rule does not acknowledge that if the transaction is between "client" and "lawyer," it is between them in their roles as such, and not as autonomous strangers. A transaction between a client and lawyer as such involves necessarily, and not merely contingently, some element of "professional judgment for the protection of the client." The Rule thus implicitly allows business deals between client and lawyer even where the client relies on the lawyer's professional judgment in the transaction. Having done this, the Rule requires as protection for the client only that there be "disclosure" and "consent"; it does not require that the deal meet the standard of objective fairness which the law generally requires in transactions between persons in a confidential relationship. In schizophrenic fashion

Canon 5, EC 5-1, and DR 5-104(A) taken together assert a noble fiduciary principle but leave largely untrammelled the lawyer's opportunity to engage in free trade with a client.

In this same vein we may consider the Code's treatment of the delicate matter of drafting a will containing donative provisions benefiting the draftsman. Ethical Consideration EC 5-5 says that "If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances." Even this Ethical Consideration does not quite say that the donor should obtain independent *legal* advice. It also does not say that the advice should be obtained before the donor provides for the gift, but only that the advice be obtained before the lawyer *accepts* the gift. How can that be done when the donor is now dead? In any case EC 5-5 is merely an ethical consideration. The Disciplinary Rules are silent on the subject of donative provisions benefiting the lawyer. That pregnant silence impliedly make it legitimate for a lawyer to draft a will providing him with a testamentary gift—a transaction the law recognizes as suspect and which most laymen probably regard as lawyer avarice in its purest form. But under the Disciplinary Rules such a transaction is entirely compatible with exercise of independent professional judgment on behalf of a client.

Other illustrations can be provided of similar ways in which the Canons and Ethical Considerations move in opposite directions from the Disciplinary Rules. The Canons and Ethical Considerations posit a high degree of professional punctillio and an integrity befitting an honorable profession. But the Disciplinary Rules refuse to deliver when it gets down to cases. The profession has thus writ for itself a document that gives in the big print and takes away in the small, except that the Code gives in the italics and takes away in the black letter.

The consequence is not simply dissonance as between pretension and performance. The Code manifests, reflects cynicism or innocence as to the nature of legal rules. The theory of the Code

is that the Canons provide a general framework, the Disciplinary Rules provide a legal floor, and the Ethical Considerations provide a higher plateau to which lawyers may aspire but which they are not legally obliged to reach. As already suggested, this structure is inherently ambiguous in that it pretends professional responsibilities that are not delivered. But the three-level system has even more insidious effects on the meaning of the black-letter Disciplinary Rules.

Simply put, the Canons and Ethical Considerations *narrow* the meaning of the black-letter Disciplinary Rules. They do this by preempting any extensive interpretation that the Disciplinary Rules might be given in penumbral areas around the black-letter. This effect requires explanation through examples.

To return to DR 5-104(A), the Disciplinary Rule states that a lawyer shall not enter a business transaction with a client if they have "differing interests" unless there is "full disclosure" by the lawyer. This rule could fairly be read to mean that "full disclosure" requires the lawyer to analyze the deal critically from the client's perspective, and enter the deal only after such devil's advocacy. On that reading, DR 5-104(A) would comport with general principles governing transactions involving a fiduciary. However, the Ethical Considerations implicitly preclude such a reading of DR 5-104(A). Alongside DR 5-104(A), and speaking to the same subject, is Ethical Consideration EC 5-3, which says: "A lawyer shall not seek to persuade his client to permit him to invest in an undertaking of his client. . . ." If DR 5-104(A) and EC 5-3 are read together, under the principle of *expresio unius* it follows that a lawyer's "seeking to persuade" a client to cut him in on a deal is *not* incompatible with "full disclosure." Thus, DR 5-104(A) when read *alone* might be reasonably interpreted to mean that a lawyer's use of "persuasion" on a client regarding a business deal between them is incompatible with the lawyer's exercising "professional judgment . . . solely for the benefit of the client." But when DR 5-104(A) is read along with Ethical Consideration EC 5-3, it follows that a lawyer can use such persuasion without violating the Rules. Anyone who is even mildly skeptical

about the efficacy of "full disclosure" in such a situation will wonder whether DR 5-104(A), as a practical matter, prohibits anything except fraud.

There are many other such situations under the Code. Two further examples may suffice. The first concerns the duty of diligence on behalf of the client. Canon 7 says "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Ethical Consideration EC 7-8 refers to "best efforts" for the client and EC 7-9 refers to "best interests" of the client. However, the Disciplinary Rule, DR 7-101(A)(1) says that "a lawyer shall not intentionally fail to seek the lawful objectives of his client." The standard set by this Rule is not that of reasonable care or even minimal care, but only avoidance of intentional nonfeasance. This construction is reinforced by the reference in the Canons and Ethical Considerations to "zeal" and "best efforts," which by necessary implication are measures of effort *not* required by DR 7-101 (A)(1).

A second example is the problem of conflict of interest with a former client. The Code's only black-letter provisions on a lawyer's responsibility to a former private client are that the lawyer refund any unearned fee and turn the client's papers over to successor counsel, see DR 2-110(A), and that the lawyer not "knowingly" use a client's confidence to the disadvantage of the client, see DR 4-101(B). Canon 4 says that "A Lawyer Should Preserve the Confidences and Secrets of a Client," which could be construed to refer to confidences of *former* clients. However, such a construction of the *Canon* by implication reinforces the interpretation that *Rule* DR 4-101(B) applies only to a person who has the status of client at the time the information in question is used. That interpretation excludes former clients.

In the tripartite division of the Code, the Canons and Ethical Considerations were supposed to be a higher normative level built upon the Disciplinary Rules as a firm legal foundation. On the contrary, they do not turn out that way. The Canons and Ethical Considerations by implication depress the Rules to the lowest level of meaning that their literal words admit. That is not

law, but less than law—legal rules with anti-contextual provisions and counter-commentary.

In some instances, this gap between the aspirational norms and the black letter Rules is so great that the courts have simply ignored the Rules. The best illustration concerns the matter of representation adverse to the former client, just referred to. The Disciplinary Rules only prohibit “knowingly” using confidences to the former client’s disadvantage. Canon 9, however, says that “A Lawyer Should Avoid Even the Appearance of Impropriety.” The courts have simply treated Canon 9 as a Rule.¹¹

Thus under the Code, for any given ethical situation, there are three possible legal rules: the black letter Rules read normally as a statute; the black letter Rules read hyper-narrowly in light of what the Canons and Ethical Considerations say the Rules do *not* mean; and the Canons or Ethical Considerations read as rules that supplement or displace the Disciplinary Rules.

PROFESSIONAL RULES AS A PENAL CODE

The Code is written as a penal code, and this is a mistake.

In the scheme of the Code, the Disciplinary Rules really mean business, i.e., enforcement is contemplated. Hence, the black letter provisions were called Disciplinary Rules. In this conception, a rule whose enforcement could not be contemplated is not a rule, and therefore must be only an Ethical Consideration or a Canon. All Rules in the Code therefore are in the form of prohibitions, like a penal code.

This approach overlooks the fact that real legal rules include ones that are not prohibitory. Indeed, many very important legal rules are not prohibitory, but rather are constitutive—“organic” or “empowering.” Such rules prescribe ways in which public authority and private endeavors may validly be organized and conducted. For example, the rules of the United States Constitution, the New York Corporation Law, and the Uniform Commercial Code are mostly constitutive.

Much relevant law governing the legal profession is similarly constitutive. The rules governing admission to the bar are con-

stitutive, for they prescribe the terms under which a person can validly act as a lawyer. The rules allowing a lawyer to appear in court on behalf of a client are likewise constitutive. And so on. Directly to the point of the Code of Professional Responsibility, many of the rules governing the client-lawyer relationship are constitutive. For example, it is *because* a lawyer is constituted an officer of the court that the lawyer is authorized to receive confidential communications from the client. From that situation follows the lawyer's obligation to maintain confidentiality of the matters communicated. The prohibition on disclosure of confidences, which of course is a penal provision, is unintelligible unless the lawyer's role as an advocate or counsellor is first legally posited.

The relevance of this point to the Code is this: Some rules—"real" rules—governing the lawyer's role are more coherently stated in constitutive form than in the form of prohibitions that presuppose the constitutive predicate. For example, case law on the lawyer's role recognizes that the lawyer has broad ranges of professional discretion. One such area is the lawyer's authority to grant extensions of time, overlook minor defaults, etc., with regard to an opposing party, even if the client wants to be vindictively technical. The most direct way of recognizing this authority is to state that a lawyer has discretion as to the means employed in representing a client, or words to that effect. The Code is unable to do this directly, however, because it allows itself to speak only in prohibitions. The result, in DR 7-101, is as follows:

"(A) A lawyer shall not intentionally . . . (1) Fail to seek the lawful objectives of his client . . . except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel. . . . etc."

"(B) In his representation of a client, a lawyer may . . . (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."

The key point is the lawyer's professional discretion. How-

ever, the point is buried as an exception to a prohibition against failing to serve the client. Even in this subordinate position the discretion is defined in empty terms of "where permissible." Nowhere does the Code indicate what is permissible." This may have been an oversight, or the result of reluctance to undertake a definition. However, it seems equally plausible that professional discretion was not defined because the Code's rule-making material—Disciplinary Rules—cannot speak in constitutive terms, or at best can do so awkwardly.

The preoccupation with prohibitions seems to have affected the substance of the Code in subtler ways. For example, with regard to fees, the general principle governing professional fees is that the fee be reasonable. This can be simply stated in affirmative terms that a fee "shall be reasonable." In the Code, DR 2-106(B), this requirement is transformed into a prohibition against a fee "in excess of a reasonable fee." Such a formulation shifts orientation from the center of the fee range, connoted by the term "reasonable," to the upper boundary of the fee range where "excess" begins. The ground upon which a client can complain about a fee is correspondingly narrowed. There are other illustrations of this tendency.

INCOHERENCE OF ARRANGEMENT

The topical arrangement of Disciplinary Rules in the Code is chaotic. This probably resulted from the tripartite system of norms, wherein a Rule had to be subsumed under one of the nine Canons even if it involved more than one normative principle. Whatever the cause, the consequence is plain.

For examples, harrassing an opposing party is dealt with in DR 2-109(A), DR 2-110(B), and DR 7-102(A); neglecting a client matter is dealt with in DR 6-101(A) and DR 7-101(A); withdrawal from representation is dealt with in DR 2-110, DR 5-102, and DR 5-105; conflicts of interest are dealt with in DR 5-101 through 5-107, 6-102, 8-101 and 9-101; payments to a retired member of a law firm are dealt with in DR 2-108(A) and DR 3-101(A)(3); fees are dealt with in DR 2-106, 2-107, and 5-103.

Looking at the organization of the Code in another way, the Disciplinary Rules grouped under Canon 2 deal with advertising, solicitation, division of fees among lawyers, agreeing in a settlement not to be involved in similar cases, and withdrawal from representation; those grouped under Canon 5 regulate advancement of litigation expenses as well as conflicts of interest; and those under Canon 7 regulate neglect of a client, harrassment of other persons, client perjury, disclosure of client fraud, observance of local customs of the bar, and trial publicity. Then again, DR 1-102(A)(1) and (3) provide that a lawyer shall not "violate a Disciplinary Rule" or "engage in illegal conduct involving moral turpitude," while DR 7-102(A)(8) provides that a lawyer shall not "knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule."

THE CENTRAL ISSUES

The Kutak Commission's rejection of the Code format did not emanate from a preference for novelty. It resulted from a quest for coherence. That quest began with consideration of basic ethical issues that arise in the practice of law. I believe coherent rules of professional conduct can be forthcoming only with such an orientation.

The beginning point for the Kutak Commission has been that adversarial representation of clients is in the public interest. This proposition is not self-evident, or even demonstrable. The adversary system as we know is regarded by many civilizations to be barbaric. Many thoughtful business, religious, and other lay leaders in our own national community hold the same belief, as can be discovered by examining public sentiment about lawyers. Moreover, there is no proof that the adversary system of trial yields truth more often than other systems of trial; that, too, is an article of faith, because there is no way to conduct a reliable experiment. The system of adversarial representation indeed is probably better justified as an institution for safeguarding liberty and privacy than for eliciting truth. Whatever the justifica-

tion for the system, however, the premise is one accepted by virtually all lawyers, including those on the Kutak Commission.

From the premise of adversarial representation, two general propositions derive. The first is that of confidentiality—that information concerning a client should be kept secret. The second is that of loyalty to client—the lawyer should act in the client's interest. I believe it will be discovered that the forthcoming revision of the Model Rules has broader and more definite statements of these general propositions than in either the Disciplinary Rules of the Code of Professional Responsibility or the 1908 Canons. The general propositions concerning confidentiality and loyalty are not really difficult to formulate. For that reason little is gained by repeatedly reiterating them, or reiterating the essential virtue of the adversary system.

Unfortunately, most of the comments addressed to the Discussion Draft have begun and ended with such exhortations. What is needed is not exhortation but analysis, particularly analysis that focuses on formulation of the exceptions to the general principles of confidentiality and loyalty. Such a focus is required not because commitment to the general principles is equivocal, but because that commitment is not unqualified. No responsible commentator—as far as I know, no one at all—has proposed unqualified rules of confidentiality and loyalty. The problem is how to draft the qualifications.

In my judgment the proper drafting approach is to think of concrete cases, and to ask where and in what terms to draw lines among them. In the Kutak Commission we have done that through the laborious means of drafting and redrafting. It does not seem to be generally understood that the draft leaked in August, 1979, and the draft released in January, 1980, were part of the drafting effort and not end product. The Commission's end product is not due until May or June. At this point it is sufficient to array the tough cases and to invite general deliberation about them.

The tough cases can be put in four groups:

1. *Exceptions to confidentiality.*

Is a lawyer (permitted) (required) to disclose information about a client when the client:

a) Seems (clearly) (possibly) bent on (homicide) (serious bodily injury to another) (fraud) (legally wrongful destruction of property) (any crime) (intentional act violating the legal rights of another)?

b) Has committed a (crime) (fraud) (intentional act violating the legal rights of another) that has resulted in serious injury, the reparation of which could be aided by the disclosure? What if the client used the lawyer's services to commit the act?

c) Accuses the lawyer of a legally wrongful act, or refuses to exonerate the lawyer where both of them are accused of a wrongful act?

d) Gives testimony that the lawyer (strongly suspects) (reasonably believes) (knows) is (erroneous) (perjurious)? Does it make a difference if the client is an accused in a criminal case?

2. *Limits on assistance to a client.*

May a lawyer:

a) Advise a client how to commit a (serious crime) (crime) (fraud) (intentional tort) (breach of contract)? Advise the client of the likelihood of getting caught in such conduct under various circumstances?

b) Prepare documents or other means that the client (intends to) (probably will) (might) use to commit a legal wrong on another? That (may) (are likely to) result in (avoidance) (possibly illegal avoidance) (evasion) of taxes or governmental regulation?

c) Volunteer an admonition to a client when he (knows) (suspects) the client is bent on committing (crime) (fraud) (intentional legal wrong) that is likely to have (serious) consequences to another?

3. *Loyalty to organization client.*

When a lawyer represents a corporation, government agency

or other organization, what should the lawyer do when he or she (knows) (reasonably should know) (reasonably suspects) that:

a) A lower level employee is engaged in (fraud against) (self-dealing against the interest of) the client? (Has filed) (Is about to file) a false tax or regulatory return on behalf of the client? (Is engaged) (Is about to engage in) illegal price-fixing, or a swindle of third parties?

b) What if the person involved in the foregoing is a high level employee?

c) What if the board or governing committee is involved?

d) In exploring any such problem with an employee or board member who (is) (might be) involved, is the lawyer (required) (permitted) to give that individual a "Miranda warning" to the effect that the client is the organization and not the individual?

4. *Clients with conflicting interests.*

May a lawyer (upon disclosure to all concerned) (where it is in their best interest) (otherwise) represent both parties to a proposed:

a) Purchase of realty as tenants in common?

b) Formation of a business partnership or closely held corporation?

c) Sale and purchase of realty? Also the mortgage?

d) Antenuptual agreement?

e) Dissolution of a business partnership or closely held corporation?

f) Division in kind of the assets of an estate among distributees?

g) Property settlement between spouses in (friendly) (not embittered) contemplation of separation or divorce? Child custody agreement?

One has to work out answers to these and related questions in order to draft rules of professional conduct, or for that matter seriously to analyze the present Code. In May or June the Kutak Commission will have done its best in that task. I hope its answers

will be accepted, although they will no doubt be rejected by some members of the bar. But the questions will not go away.

FOOTNOTES

¹ See Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 *Calif. L. Rev.* 1061 (1978).

² See Rodgers, *The Corporate Trust Indenture Project*, 20 *Bus. Law.* 551 (1965).

³ See, e.g., Baldwin, *The Flush Times of Alabama and Mississippi* (1853); *Autobiography of George Templeton Strong* (Nevins and Thomas ed., 1952).

⁴ See Kaufman, *Problems in Professional Responsibility* 29 (1976).

⁵ Drinker, *Legal Ethics* (1953).

⁶ See Wright, *The Code of Professional Responsibility—Its History and Objectives*, 24 *Ark. L. Rev.* 1 (1970).

⁷ See Hazard, *Ethics in the Practice of Law* 16 (1978).

⁸ See Christensen, *Lawyers for Persons of Moderate Means* (1970); Countryman, Finman, and Schneyer, *The Lawyer in Society* 567 et seq. (2nd ed. 1976).

⁹ *E.g.*, *NAACP v. Button*, 371 U.S. 415 (1962).

¹⁰ *In re Koffler, Koffler*, 51 N.Y.2d 140, 412 N.E.2d 927 (1980).

¹¹ See, e.g., *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).