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A Gathering of Legal Scholars to Discuss *"Professional Responsibility and The Model Rules of Professional Conduct"*

PANEL DISCUSSION*

Professors Hazard, Freedman and Patterson, and Mr. Smith, the Sixth Annual Baron de Hirsch Meyer lecturers, delivered their lectures prior to the panel discussion. The substance of the lecturers' addresses is reflected in their articles, which follow the panel discussion.

Professor Anderson: I think we have had a provocative morning and I hope the panel discussion will be equally provocative. I hope, in particular, you will push some of the views you have heard to make them intersect, or to find true clashes as opposed to mere differences in rhetoric. For example, it seems to me that both Professors Hazard and Freedman derived their conceptions of the particular problems they addressed from existing law. Professor Hazard finds analogies in positive law, in the nature of the lawyer's agency relationship, for determining when a lawyer might be sanctioned for furthering a client's unlawful or illegal conduct. On the

* The panelists were: Professor Monroe H. Freedman, Professor Geoffrey Hazard, Jr., Professor L. Ray Patterson, and Mr. Chesterfield Smith. The moderator was Professor Terence J. Anderson. The tape recording of the discussion was transcribed verbatim; however, to facilitate reader comprehension, members of the *University of Miami Law Review* added citations and slightly edited the transcript. The changes made were either strictly grammatical in nature or clarifications of ambiguities, and the staff conscientiously attempted to retain the flavor of the discussion.

other hand, Professor Freedman makes a special case for lawyers' not being subject to the same positive law requirements. He derives this from the peculiar circumstance of the criminal client operating under the protections provided by our Bill of Rights in a fundamentally adversary system.

I don't know whether these differences are as extensive as they may seem. For example, I don't know how Professor Freedman would deal with the question of whether the constitutional protections of that same Bill of Rights should provide protection to the lawyer who is drafting a prospectus for a public offering of securities and whose client wishes to withhold a meager bit of information that may only result in some folks buying stock and losing money. In that circumstance, who, in fact, is the client? The president of the corporation? The board of directors? Does the lawyer have some obligation that goes beyond the mythical entity, to its shareholders? In any event, there are questions that might narrow the area of disagreement between Professors Hazard and Freedman, areas in which that disagreement or the intellectual constructs do not quite work.

Similarly, Professor Patterson develops a concept which I had not really heard before—the notion of reciprocal rights and duties. We have tended to think of ourselves as an agency profession—a profession with duties to our clients, clients who have rights. Perhaps, except in the area of fees, we have not been willing to focus on the reciprocal duties of clients. On the other hand, like Professors Freedman and Hazard, Professor Patterson develops his model from fairly established notions of law—the notions of agency and reciprocal models.

To some extent, we are left after the three presentations with the question of whether we need a professional code at all. If all of this can be derived from existing positive law—the law of agency, the Constitution, the Bill of Rights—are we simply engaged in having the bar association develop a restatement of the law for lawyers? Perhaps that's all it is. But if that's true, then we reach the question of why we should be entitled to special status or a monopoly position at all. It seems to me that Mr. Chesterfield Smith has given us an answer that we ought to ponder. If we are entitled to special privilege, it may be that we have to assume some special duties. I hope *The Bramble Bush*¹ is still sufficiently forward in all of your minds and that you recall former Mr. Justice Holmes' re-

1. K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

marks that we must view the law "as a bad man" would.² Perhaps we ought to view a code of ethics as a bad lawyer would. If there is to be a duty, perhaps it does indeed need to be a duty with teeth.

Traditionally, the afternoon session of the de Hirsch Meyer Lectures is reserved for panel discussion provoked by your questions. We invite those of you who have questions to ask them. I hope you will address them to particular members of the panel. After the person to whom you have addressed a question has had an opportunity to respond, we will permit other members of the panel who wish to comment to do so, and, if need be, permit the original speaker to reply. Let me, at this point, simply open it to your questions.

Audience Member: Professor Freedman, I have a question on your opinion of a lawyer's duty in a noncriminal case where the lawyer has knowledge that the client is defrauding a bank and is going to falsify an application. Should the lawyer participate in any way in that fraud and should the lawyer advise the client not to proceed?

Professor Freedman: The problem that you pose is not one of the hard ones. The lawyer has an obligation to attempt to dissuade the client. He has an obligation to withdraw from representation, at least if that can be done without prejudice to the client (that appears to be the situation here), and he has an obligation to refrain from divulging the information that he has learned in the course of the confidential relationship. Bear in mind that one of the reasons that I and the Supreme Court and others have emphasized the lawyer-client privilege of confidentiality is that it puts the lawyer in a position to dissuade the client from an improper course of conduct.³ I can tell you from a good deal of experience and from what I have heard said by other lawyers that not only do lawyers give a lot of good advice, but it is very often taken. This, of course, is at a very low level of visibility. That salutary purpose of the privilege is one of the things that we would sacrifice in a misconceived search for truth. The idea is that lawyers have a great deal of truth, and we can pump more truth into the system if we will only get the lawyers to divulge it. It's true; lawyers do have a great deal of truth. To adopt such a rule,⁴ however, is self-defeat-

2. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

3. See, e.g., *Clark v. United States*, 289 U.S. 1 (1933); *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967).

4. Compare ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT rule 1.7 (Discussion Draft, Jan. 30, 1980), reprinted in 48

ing because the reason they have the truth is that clients have been persuaded that it will be treated in confidence. When or if clients were to learn that the rules were changed and that their remarks would not be treated this way, you not only would get no more truth than you have now—indeed, I think you'd get less—but you also would deprive the lawyers of the opportunity to dissuade the client. You would be pulling out of the system one of the forces that I consider to be a significant one for good. In addition, you would be casting upon the client the burden of deciding what is relevant and what is irrelevant, what is incriminating and what is exculpatory, and so on. This is not limited to the criminal context by any means. A good deal of what I was talking about earlier today comes directly or indirectly from *Hickman v. Taylor*,⁵ for example. It speaks to an attitude that we profess to have in our society toward the dignity and autonomy of the individual. I disagree with Professor Patterson in his comments regarding the lawyer making important decisions for the client.⁶ I think that having the right or the power, or however anyone wants to express it, to make those decisions is a denial of the client's autonomy. I think it's a perversion of my function, one that I do not view as elitist or paternalistic. My function is to broaden the client's autonomy, to put the client in a position to make a more informed rather than a less informed choice. And I do not view that solely in legalistic terms. It includes, however you want to call it, ethical and moral advice.

Audience Member: Are you saying that the lawyer's function is to lay out the choices that the client may make? If the client comes to you with a problem and gives you the facts, is it then your job to supply the client with the options and let him make the decision?

Professor Freedman: Yes, but I would add that those would be lawful choices that the lawyer would be presenting. I think it would be improper for the lawyer to suggest, to urge, to induce, or to encourage the client in an improper course of conduct.

Audience Member: Do you believe that it's possible for the

U.S.L.W. 1 (Feb. 19, 1980) (special ed.) [hereinafter cited as MODEL RULES (Discussion Draft)] with COMM'N ON PROFESSIONAL RESPONSIBILITY OF THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT Alternative A, rules 1.2-6 and Alternative B, rules 1.2-4 (public discussion draft released June, 1980) [hereinafter cited as LAWYER'S CODE (Discussion Draft)].

5. 329 U.S. 495 (1947).

6. Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695 (1981).

lawyer to give bare-bones advice without any suggestion at all about a particular course of conduct?

Professor Freedman: No. I wasn't suggesting that at all. I think that possible courses of conduct are part of what the advice entails. But I would not volunteer—if there are three lawful choices and a dozen unlawful ones—to the client that he has fifteen choices. I would say that there are three choices. Then perhaps the client would say that he's got some ideas—four through fifteen. First of all, I wouldn't know about his ideas at all, but for the client's assurance that I would not be blowing the whistle. That's when I would have the opportunity to say, "Well, yes, I could have imagined those myself, but those are unlawful; they're wrong. I would suggest to you that it's dangerous; you would not want to find yourself the kind of person who would do that kind of thing. And, indeed, if you were to do that, I would not want to be associated with you hereafter." Would I blow the whistle? No.

Professor Anderson: The question was what are the lawyer's obligations if he is confronted by a client who intends to pursue an unlawful course of conduct, such as attempting to defraud a bank. I understood Professor Freedman to say that at that point the lawyer should counsel against the unlawful act; if the client persists, he should, if possible, withdraw from representation, but he has neither the right nor the duty to make third-party disclosure.

The second question went to the extent to which the lawyer should affirmatively intervene in the client's decision-making process or should respect the client's own autonomy. Do any of the other panelists wish to comment?

Mr. Smith: I don't suppose I disagree with Dean Freedman, but I sell time. He doesn't sell time. Clients before long get great confidence in me and they don't want me to tell them all of the alternatives. They want me to tell them what to do. I do it and charge them. [Laughter and applause] I do say that they have to develop a confidence that I have thought of all of those other options and that I have rejected them myself. Once they have that confidence, they feel that I'm wasting their time if I make them make any kind of choices.

Professor Anderson: Professor Patterson, do you want to comment on whether the agency is reciprocal or just one way?

Professor Patterson: One of the things that has always impressed me when lawyers talk about the comprehensiveness of the duty of confidentiality is that the American Bar Association Model

Code of Professional Responsibility (ABA Code) permits the lawyer to reveal the confidences made between himself and the client in order to collect his fee.⁷ There seems to be something of an anomaly there. I think that we can emphasize this duty of confidentiality too much. I think, also, that the duty or the right of confidentiality tends to be a self-serving duty for the lawyer. If the lawyer can keep everything in confidence, if he can withhold information, then he increases his power of control. I don't think that you can give a "yes" or "no" answer that is applicable to a question of this kind in all circumstances. As I indicated in my presentation,⁸ I think that a lawyer has got to have some discretion in this matter. In determining the discretion that he should exercise, I think he can and should take into consideration such factors as the nature of the client, the role of the lawyer, and the legal process that he is engaged in. In other words, I think that we have to deal with this problem of the right and duty of confidentiality on a much more sophisticated level than we have done in the past.

Professor Hazard: I understood the question to be, "What does a lawyer do when midway through the transaction he finds that his professional endeavors are being used in pursuance of a scheme which, if brought to fruition, would constitute fraud?" It is clear to me that if the lawyer is apprised by the client at the outset of the nature of the transaction, and if that transaction would constitute fraud, the lawyer has, as Professor Freedman says, an obligation to advise the client not to do it. He has an obligation to withdraw if the client insists on proceeding and he has the obligation not to say anything about it to anyone.

The hard problem doesn't arise that way. There are cases in the books that are much more realistic. For example, a client comes in and asks for some help in a transaction and doesn't tell the lawyer certain facts. The reason that he doesn't is because he knows damn well that the transaction is fraudulent. After all, the classes of conduct that fall within this area of illegality, in general, do not require great discerning ability to identify. There are borderline cases, to be sure; but fraud is a fairly elementary notion (except as interpreted by the SEC sometimes). So, the client comes in and you are invited to set up a transaction. The papers are now

7. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980) [hereinafter cited as ABA CODE].

8. Address by Professor L. Ray Patterson, *University of Miami Law Review* Sixth Annual Baron de Hirsch Meyer Lecture Series (Apr. 3, 1981). See generally Patterson, *supra* note 6.

prepared and, because of your employment, you had to signal the other side—you had to talk to the bank. You now discover that the transaction is a fraud by your client. On Tuesday morning when the closing is scheduled, you don't show up. If I were the banker I would think, "I wonder why he didn't show up?" In that situation, how can the lawyer withdraw without giving a signal of something? Precisely analogous is the problem of whether the lawyer, in a situation where the client starts to perjure himself, can withdraw without giving some indication that there is some relation between the testimony and the lawyer's withdrawal. The problem is, "What does the lawyer do then?"

I don't believe that the draft that we are working on changes the law. The law regarding the lawyer's responsibility is clear—he is not to involve himself in a commission of fraud.⁹ If that requires deporting himself in a way that may signal the situation, then the duty to avoid implication (i.e., furthering the client's wrongful act) takes precedence over the obligation to protect the client from the possibility that others might know his purpose. I certainly agree that the two obligations are incompatible in certain circumstances. You cannot have it both ways. I put it to you that the law today is quite clear that the lawyer's obligation is to withdraw even if it entails a signal.¹⁰ The law is also, I think, quite clear that the lawyer has a privilege to go beyond that; that he may reveal things told him by his client in order to prevent the illegal act.¹¹ That is, I believe, settled law. And I really believe that if the law were otherwise, the profession would soon be in dire jeopardy. At the margin would be lawyers who would be quite willing to lend their office to these things. They already are. If it now became a legal privilege to further purposes you knew to be illegal on the grounds that the client was entitled to this kind of autonomy, I think society would say, "Who needs it?"

Autonomy is not the only relevant social value. In my fraud

9. See generally ABA CODE, *supra* note 7, at DR 7-102(B).

10. See *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959); *In re Carroll*, 244 S.W.2d 474 (Ky. 1951); M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 33-42 (1975). See generally ABA CODE, *supra* note 7, at DR 7-102(B).

11. See *People v. Fentress*, 103 Misc. 2d 179, 197-98, 425 N.Y.S.2d 485, 496-97 (Dutchess County Ct. 1980); ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, *MODEL RULES OF PROFESSIONAL CONDUCT* rule 1.6, Comment at 47 (Proposed Final Draft, May 30, 1981) [hereinafter cited as *MODEL RULES (Final Draft)*]; Address by Robert Kutak, *Proceedings of the Forty-First Annual Judicial Conference for the District of Columbia Circuit* (June 3, 1980), *reprinted in* 89 F.R.D. 231, 236-37, 237 n.11. *But cf.* ABA CODE, *supra* note 7, DR 4-101(C)(3) (only revelation of client's intention to commit a *crime* is permissible).

example, unbridled autonomy by the borrower is unprotected vulnerability on the part of the person defrauded. We can turn this case around, so it does not involve some little person stealing money from a big bank. Let's turn it around, and imagine a case where a bank is stealing money from some little person by building usurious interest into the system of promissory notes. If a license were given to protect the secrets of the client at all costs and regardless of purpose, in the normal course of events, the organizations that would be most likely to avail themselves of this privilege would be the ones that can already afford lawyers. If that is what our profession is about, society would soon ask, "How does this advance the overall interest?"

I think it useful occasionally to refer to what the law is because the law's shape is not accidental. I do not regard the law as holy writ; however, it represents an intergenerational transmission of sad experience. Such experience is not to be disregarded lightly.

Professor Freedman: I do not disagree with the conclusion that Professor Hazard stated in this case. And indeed, it is consistent with rule 6.5 in the Code that I drafted.¹² Unfortunately, I understand, none of you are familiar with it because you studied the wrong code. [Laughter] I am happy to say that unless the Kutak Commission's Code (Model Rules)¹³ is radically rewritten, it is quite clear that it has about as much chance of being adopted by the American Bar Association as an orange tree in Antarctica. I have some confidence that the American Lawyer's Code of Conduct¹⁴ (Lawyer's Code) will be adopted.

There is a provision in that code that does deal specifically with this situation and that would make an exception for it. What we have tried to do is not to be absolutist on confidentiality. Always, when you're writing rules in any important area, especially rules that are so full of conflicting values as those of lawyers' responsibilities, you have the problem of falling into either the trap of absolutism on the one hand or of risking inconsistency on the other. We have opted for a limited kind of inconsistency, trying to provide the exceptions in cases that are both rare and ex-

12. In any matter other than criminal litigation, a lawyer may withdraw from representing a client if the lawyer comes to know that the client has knowingly induced the lawyer to take the case or to take action on behalf of the client on the basis of material misrepresentations about the facts of the case, and if withdrawal can be accomplished without a direct violation of confidentiality.

LAWYER'S CODE (Discussion Draft), *supra* note 4, rule 6.5.

13. MODEL RULES (Discussion Draft), *supra* note 4.

14. LAWYER'S CODE (Discussion Draft), *supra* note 4.

treme—cases, that is, where one can both justify the exception and reach an informed rational judgment that the situation will be unusual enough, or in some other respect not be inconsistent with your basic principle, so as not to jeopardize it. So, in this particular situation, it is possible, in my judgment, to have made an appropriate exception.

I would like to comment very briefly on something that Professor Patterson said. He said that confidentiality is in the lawyer's self-interest and that it puts the lawyer in control. On the contrary, it has been correctly pointed out that the lawyer's real control, and this has been stated candidly by those who support the power of the lawyer to blow the whistle, is blackmail. "Do it my way" is the only alternative offered a client. The decision is no longer the client's individual decision, as it should be in a free society, but lies with the professional elite.

Audience Member: Dean Hazard, I understand that the May draft¹⁵ will be a substantive rewrite of the current draft¹⁶ of the Model Rules that we're discussing. Could you make general comments on the substantive changes? Also, in light of Professor Freedman's comments, could you indicate the chances of the ABA's adopting them? Could you comment on Mr. Chesterfield Smith's suggestion for an ethical obligation to provide free legal services?¹⁷

Professor Hazard: We will take those in reverse order. As Mr. Smith said, the Kutak Commission (Commission) has decided at this point that the obligation with regard to pro bono should be cast in the form of "should" rather than "shall." I agree with Mr. Smith that this formulation is feasible. It would not result in a disorganization of the legal profession or in an unduly onerous burden. If I were to vote on his proposal (I will not, because I serve the Commission as legal counsel and hence do not vote), I would vote against it. But I profoundly respect Mr. Smith's view, and it is a view shared by many people whom I deeply respect. I think the reason the Commission backed off was the firestorm of criticism. In any of these endeavors, you have to be mindful of the political realities. It is said that Mr. Smith himself is sometimes attentive to them in the way he does things. I think that the majority of the Commission, if left to their own devices, would come out where he

15. MODEL RULES (Final Draft), *supra* note 11.

16. MODEL RULES (Discussion Draft), *supra* note 4.

17. See Smith, *A Mandatory Pro Bono Service Standard — Its Time Has Come*, 35 U. MIAMI L. REV. 727 (1981).

does, but we are never left to our own devices.

Second, on the chances for adoption, I just don't know. I believe that something like eighty percent of the text will be relatively noncontroversial and well-received. We will turn out a format such that those provisions could be treated as amendments to the present ABA Code. We were told to do that and we will do it. There are many provisions in the Kutak draft that are obviously needed. For example, I believe that there has to be some kind of a rule about the responsibilities of partners and others in authority in a firm for maintaining a firm's ethical climate. There is law on the books right now to that effect,¹⁸ but we thought it useful to codify, articulate, and clarify it.¹⁹ We occasionally get some bizarre criticism of even that sort of rule, for example, that it recognizes the difference between solo practitioners and firms. I just don't know how to handle that objection. The fact that a person is in a firm does have significant consequences for his responsibility, I think. But there are a lot of provisions like that where the rework has expressed better, more generally shared views.

There remain some very controversial issues. I believe that the most controversial issue is the perjury question. The draft at all times, and now even more clearly, defers to applicable constitutional law. That is, it recognizes not only the cases that Professor Freedman cited,²⁰ but also some that actually held the proposition that he's talking about. No Supreme Court decisions speak directly to the point, but there are some lower court decisions that do, including one that's right on point in the Ninth Circuit, that hold the position that Professor Freedman adopts, if I read it correctly.²¹

As to the perjury question, I believe, for essentially the same reasons advanced by Professor Freedman, that the rule on perjury is of sufficiently general social interest that it probably ought to be resolved in some forum outside the legal profession itself. The adversary system is not of interest simply to the legal profession. It is of social consequence to everyone. Whatever the courts want to say in a particular jurisdiction, we defer to that. The rule could be dif-

18. See, e.g., *In re Neimark*, 11 A.D.2d 676, 214 N.Y.S.2d 12 (App. Div. 1961) (an attorney should be disciplined for his own carelessness and failure to adequately supervise the operation of his office).

19. MODEL RULES (Discussion Draft), *supra* note 4, rule 7.2.

20. Address by Professor Monroe Freedman, *University of Miami Law Review Sixth Annual Baron de Hirsch Meyer Lecture Series* (April 3, 1981). See Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685 (1981).

21. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

ferent in different states, and I think it may well be. The most controversial question is not going to be the criminal defense case. I can see a rationale for precluding the lawyer from revealing perjury in the criminal defense case. The much more difficult situation is the civil case. That gets back to our bank transaction. Perjury in civil cases amounts to taking private rights or money on the basis of the equivalent of fraud. That's a tough one.

Another tough one is the question of "whistle blowing" (a term which I think is a perversion of the point), which is a question of the loyalties of a lawyer retained by an organization. We have worked that one over carefully, balancing delicately between the importunities of the SEC and other persons concerned with the public good, as they see it, and the corporate bar. The views are not harmonious, to put it mildly. We have a text that is a reasonable accommodation between profoundly conflicting objectives, but it is a controversial text. Some people will say we sold out to the corporations. Others will say we sold out to the knee-jerk liberals. I've got mail to prove it.

Going back to the first question: what is the lawyer's duty when he discovers that he is involved in a transaction constituting a legal wrong? The difficult problem does not arise when the lawyer is told in advance before becoming involved. It arises when the lawyer finds out halfway through the transaction. As I read the law as it now stands, the lawyer has the privilege to disclose the transaction if it constitutes a crime. Most of these transactions are incipiently criminal—mail fraud, for example. The Code has an extraordinarily murky provision on the obligation to disclose fraud.²² The case law pretty strongly indicates that the lawyer has an obligation to disclose.²³ If you look at the articulation made by courts as distinct from the articulation made by the bar associations, the

22. DR 4-101(C)(3) provides that "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." ABA CODE, *supra* note 7, DR 4-101(C)(3) (footnotes omitted).

DR 7-102(B)(1) provides:

[A] lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id. DR 7-102(B)(1) (footnotes omitted).

23. See, e.g., *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945); *Hinds v. State Bar*, 19 Cal. 2d 87, 119 P.2d 134 (1941); *In re A*, 274 Or. 225, 554 P.2d 479 (1976).

rule looks rather different. That will be controversial.

If I read the mail correctly, most of the other problems with the first draft—and there were many—have been reasonably well ironed out. The issues I have mentioned, however, could hang it. I don't know whether the proposal will pass. I know the problems won't.

Professor Anderson: Mr. Smith is a knowledgeable observer. Would you like to comment on the prospects of the Code and on pro bono generally?

Mr. Smith: The American Bar Association quite properly is a very diverse organization representing all of the complexities of the legal profession. The loudest of that group are trial lawyers. They are always full of sound and fury originally, but they are not the ones who ultimately carry the day. I think that the Model Code will pass. It may be Dean Freedman's draft,²⁴ but by then they'll call it the Model Code. The American Bar Association never quits and never loses. It is the largest professional association in the world and its impact is such that something acceptable will ultimately come out. I commend the dialogue that's been going on about this code. I think, as Professor Hazard says, the May draft²⁵ in most respects (some of the changes I don't agree with) will be far more acceptable to the majority of American lawyers than the first draft.²⁶ There are some great advances in it over the present Code—things that the legal profession needs. But far more importantly, there are some things in it that will benefit the public that lawyers serve; I feel quite confident that most of those things will become, in time, part of the American Bar Association Model Code, regardless of where they came from.

Professor Freedman: Apropos of the movement of the Model Rules towards the American Lawyer's Code of Conduct was Professor Hazard's comment about the exception for deferring to constitutional law. I read into that comment a somewhat more generous attitude toward the constitutional concerns that I was talking about than actually appears in the draft. That might signal more movement in that regard as well, because as the Model Rules are now phrased in the Discussion Draft, the only exception in constitutional terms is "except as law may otherwise provide."²⁷ That vague provision is supposed to embody a constitutional law

24. LAWYER'S CODE (Discussion Draft), *supra* note 4.

25. MODEL RULES (Final Draft), *supra* note 11.

26. MODEL RULES (Discussion Draft), *supra* note 4.

27. MODEL RULES (Discussion Draft), *supra* note 4, rule 3.1(f)(1). *See also id.* rule 1.7.

exception.

In addition, the provision is drafted in a way that is calculated to chill the exercise of the constitutional point of view, because as it is written, the lawyer who violates the constitutional rule (as I understand it) is not in jeopardy. The lawyer who chooses to disclose cannot be disciplined even if it turns out that he is incorrect. Thus, the rules are clearly written, as of now, in a way that chills a lawyer who would maintain confidentiality and encourages a lawyer who would violate it.

Furthermore, the comment to the most recent draft of the Model Rules, although it does cite a couple of lower court decisions, says, "There is, however, contrary authority";²⁸ that is, authority against the constitutional position I was taking. And the comment cites an Illinois case²⁹ and a California case,³⁰ and then adds, significantly, "[A]nd these latter cases seem more consistent with the general constitutional theory applied by the Supreme Court when considering the rights-perjury dichotomy."³¹ Then follows the citation for the two Supreme Court cases I mentioned as being the only ones cited, *United States v. Havens*³² and *Harris v. New York*.³³ So, if a lawyer wants to avoid disciplinary proceedings, the lawyer will violate confidentiality. And if the lawyer has uncertainty about that and turns to the comment for guidance, the lawyer will be further encouraged to violate confidentiality. Therefore, as the draft is written now, the pressure is away from the constitutional position that I was explicating with reference to uncited Supreme Court decisions (uncited in the Model Rules) earlier today.

With regard to civil cases, my position is basically the same. Again, I find the adversary system rooted in the Constitution; I believe that we should write and enforce our laws in a way that will enhance those values. I do not accept the idea that if we can get away with cramping those values, we should do so. It is the same position that I adopted, for example, several years ago with regard

28. MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

29. *People v. Lowery*, 52 Ill. App. 3d 44, 366 N.E.2d 155 (1977), *cited in* MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

30. *In re Branch*, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969), *cited in* MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

31. MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

32. 446 U.S. 620 (1980), *cited in* MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

33. 401 U.S. 222 (1971), *cited in* MODEL RULES (Final Draft), *supra* note 11, rule 3.3, Comment at 133.

to lawyer advertising.³⁴ I remember having a debate about it and analyzing the first amendment, and the lawyer on the other side commenting, "I wish Professor Freedman would forget about the Constitution and stick to the merits."

As I see it, the Constitution informs us of the merits, and just because the Supreme Court might draw a line at a particular point and say the Constitution does not forbid the state or the organized bar from cribbing or from cramping these rights in a particular way, there is no reason for us to do it that way. Let me give you, briefly, two civil cases that I think illustrate the point.³⁵ A woman in a custody case represented by a lawyer tells her lawyer, after being urged to reveal everything, that she had sexual relations with a man other than her husband once during the period of separation preceding the divorce. The lawyer says, "Well, that's too bad if that comes out because this particular judge would hold that very heavily against you with regard to custody." The woman is then asked by the husband's lawyer whether she committed adultery before the decree became final and she answers "no." Under the Model Rules, the wife's lawyer would be required to divulge that falsehood.³⁶ I think that's wrong. I think the lawyer learned about it in the confidential relationship. The lawyer can encourage the woman to correct the false testimony but it is not the role of the lawyer to betray the confidence in that situation.

Turn it around. A lawyer represents a husband in a divorce matter and the wife is represented by a so-called "bomber" who

34. See FREEDMAN, *supra* note 10, at 113-24; Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 193 (1976). See also LAWYER'S CODE (Discussion Draft), *supra* note 4, rule VII, Comment at 702. The comment to rule VII of the Lawyer's Code states that:

Access to the legal system is essential to the exercise of fundamental rights, particularly those rights relating to personal autonomy, freedom of expression, counsel, due process, and equal protection of the laws. Yet members of the public are frequently unaware of their need for legal assistance and of its availability. It is therefore important for lawyers to provide members of the public with information regarding the availability of lawyers to serve them, the ways in which legal services can be useful, and the costs of legal services. Lawyers are therefore encouraged to advertise and to solicit clients, subject only to restrictions relating to false and misleading representations, harrassment, violation of reasonable time and place regulations, and including violations by others of contractual or other legal obligations.

Solicitation refers to spoken communication, in person or by telephone, intended to induce the other person to become a client.

Id.

35. See the LAWYER'S CODE (Discussion Draft), *supra* note 4, Illustrative Cases 1(a)-(c).

36. MODEL RULES (Discussion Draft), *supra* note 4, rules 1.7(c), 3.1.

has no value in life other than stripping the husband of every penny and piece of property that he has, at whatever cost to the personal relations and children, or anything else. The husband, in depositions and in response to the subpoena, turns over his tax returns for the previous three years and testifies that they are complete and accurate. The husband's lawyer says, subsequently, "I've been going over your tax materials, and it seems to me that you have omitted income and it ought to be reported and we ought to tell your wife's lawyer about it." The husband says, "Look, let me deal with one thing at a time. I give you my word, as soon as this is over, I will go with you to the IRS and I will reveal everything that you say has to be revealed, but, please, I am not going to introduce that which you say is undisclosed income in the context of this divorce proceeding." According to the Model Rules, the husband's lawyer is required to reveal what he believes to be the undisclosed income.³⁷ I think that's wrong. I think that's a betrayal of the client's confidence.

Now don't misunderstand me. I don't mean that I favor perjury. I don't like what the wife did in the hypothetical; I don't like what the husband did. I would like to think, although I don't know, that if I were in the position of the client I would tell the truth. But I don't see it as that particular lawyer's job to correct that particular wrong. That lawyer has other important functions in society. And one of the beauties of the adversary system is that it is designed, through cross-examination and through incentives to the other side, to provide machinery for uncovering falsehood. The one way it should *not* be done is by ultimately getting the message across to the public, "Don't talk to your lawyer; it's the most direct pipeline to your adversary."

Professor Patterson: I think probably enough may have been said on this subject. I would like to add that, in terms of client perjury, it seems to me that the problem is not so much an ethical problem as it is a legal problem at this point. The courts are sending the lawyer different signals as to the rights and duties of the client in this situation. So long as that continues to happen, the lawyer is going to continue to be in an ethical limbo. It seems to me that the courts have a duty to make up their minds. Either the client has the right to commit perjury or the client does not have the right to commit perjury. When the courts tell lawyers what the law is on this point, I think what lawyers should do will

37. *Id.*

be clear.

Professor Anderson: Professor Hazard, did you want to reply to the commentary?

Professor Hazard: There has been a growing recognition, starting with the paper that Professor Freedman wrote fifteen years ago,³⁸ that you can't have it both ways. If you trace the doctrine down to recent years, you will find a remarkable unwillingness to face that fact. So, we are met with the dilemma of which way should we go? Should the rule be different in criminal cases than in civil? Whatever one says about the criminal case, I simply disagree with Professor Freedman about what the law is and what it ought to be in the civil case. In his hypothetical, you can call the woman's lawyer a "bomber" who will strip the husband. I can paint that wife as being out in the cold and rain, with the snow about to come down, two babes in her arms, and show how the husband has squirreled it all away in the Caribbean for his honey. Where the hell are we? You can't make these cases turn on the underlying merits. We are talking about, in the fundamental sense, the procedural rule. And the question is, what shall be the procedure? It is not that I don't regard the other position as intelligible. Of course, it's intelligible. The question is what, on balance, ought to be the rule?

For the reasons Professor Patterson has indicated, the law until twenty-five years ago assumed that the lawyer had superintendence of the presentation. For that reason he would tell the client to refrain from perjury. As master of the presentation, the lawyer was entitled to carry that order out by cutting off the client if the client said otherwise. I would not, however, analyze the lawyer's legal situation quite the way Professor Patterson does. I believe the lawyer is an agent and never becomes a principal. The lawyer is an agent with legally conferred powers of discretion. That's not a novel idea. Compare the agency relationship in the sale of securities or real estate. If you want to sell securities today, or an interest in real property in states in which real estate brokerage is regulated, you can do so *in propria persona*. If you do, you are directly responsible in the law for the way it is done. But for a variety of reasons it is often useful to use agents called "underwriters" or "brokers." Those underwriters or brokers, though they are your agents, have, in law, obligations that entail discretion as to the way

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

they do the job. They will tell you how they are going to do it because the law, in defining their office and licensing them, sets constraints on how they can do it. Hence, the notion that a principal may lack unfettered authority to direct the way in which an agent executes the agency is not at all an unusual idea. The lawyer is simply an agent having unusual powers, not the least of which is the right to maintain, in general, matters that are confidential. This right or legal power is not conferred generally; it is not conferred on such people as accountants or business consultants, or on other people involved in the ordinary course of commerce. So the law confers it on the lawyer's office. Its origin, as Professor Patterson intimated, is in the notion that the lawyer is an officer of the court. The notion was that, for a fee, you could obtain the intercession of one who is a member of the court. That is where barristers originated.

The burdens of office come with the powers of office. A lawyer is a specially constituted form of agent. Our question here is, "What shall be the terms of office?"

Audience Member: How should the associate who accompanies the partner to court react when, in his presence and to his knowledge, the partner makes a misrepresentation to the court, and what is the nature of the agency involved?

Mr. Smith: It's a simplistic answer, but it wouldn't give me an ethical problem; it would only create an economic problem. I'd get the hell out of there. I wouldn't practice law with a senior partner who lied to the court.

Professor Anderson: Would you blow the whistle on him?

Mr. Smith: Well, I would not participate in any way in the perjury, and if I thought the misrepresentation would materially affect the outcome of the case or impede the administration of justice, I would blow the whistle on him in a confidential communication to the court and allow the judge to determine how to handle it.

Professor Hazard: I think that's the right answer. The case you're talking about, of course, is *Berkey v. Eastman Kodak*.³⁹ The Model Rules speak to this kind of problem and are an advance on the present Code. We also speak to other problems regarding the responsibility of the partner for the associate.

Addressing the question posed, the first issue is whether you could say that the junior in that case is professionally involved in

39. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

the representation. On the facts of the case to which you refer, the answer is clearly "yes." I point out, however, that the associate could have been just "carrying the briefcase" to court that day and may not have been, in any sense, "on the case." Let's assume that the junior was on the case. The Model Rules would say that where a partner resolves an arguable question of professional ethics in a reasonably defensible way, the junior does not violate the rule if he conforms his conduct to the course of action indicated by the senior.⁴⁰ But as Mr. Smith's answer implied, where the case is not arguable, the junior who is as much a member of the profession as is the senior has an independent obligation as a lawyer to conform to the rules of professional conduct. In this case, I think that he has an obligation because he is associated with the misrepresentation. The correct way to resolve such a case is, as Mr. Smith indicated, by that mode of disclosure minimally necessary to do the job. The way he suggested proceeding would allow the court to make inquiry and find out, for example, if there might have been a mistake or if it might not have been material. But I take it that the lawyer has to do something.

Professor Freedman: I agree in one respect. The Lawyer's Code, if I recall my reading of the present draft of the Model Rules correctly, is more stringent in this regard. First of all, I disapprove of the provision to which Professor Hazard just referred. The rule says something like this: Where the senior or the supervising lawyer has resolved a debatable issue of ethics in a way that is not unreasonable, then the subordinate lawyer who goes along should not be professionally responsible—should not be disciplined.⁴¹ Not only do I agree with that but it seems to me that the senior lawyer should not be disciplined. If we as a profession have not succeeded in drafting the rules clearly enough, if we leave an ethical issue in a state that is debatable and in which the senior lawyer could reasonably resolve it the "wrong way" without being on notice that it was the wrong way, then the senior should not be disciplined either in that situation. I think the more precise question that was being asked is "to what extent can the junior be comfortable in passing the buck to the senior," and I would urge that the buck does stop with him. Certainly, he can be guided by people who have more experience and who may have thought more about the issue, but among other things he is not limited to that one person. If he has

40. MODEL RULES (Discussion Draft), *supra* note 4, rule 7.3(b).

41. *Id.*

serious doubts about what the senior has decided, he is not foreclosed from posing the question hypothetically to other lawyers with equal experience and perhaps without the particular involvement in that case.

The point at which I think the Lawyer's Code goes further than the Model Rules is that the Lawyer's Code would continue the present rule in the ABA Code of Professional Responsibility that requires a lawyer to reveal professional misconduct on the part of another lawyer without being asked.⁴² My recollection of the Model Rules is that you have an ethical obligation if you are asked by a disciplinary committee to tell them what you know about another lawyer's misconduct.⁴³ I think that we have a very strong and serious obligation to police our own profession. I approve of what is called, disparagingly, the informer rule. I think we have no business applying to our profession rules that might be appropriate to the alley, or the school yard, or the Mafia, and which should have no place in forming a lawyer's judgment as to whether to reveal, to the court or to disciplinary authorities, knowledge that another lawyer has acted in an unprofessional way. I think that is a very important obligation and one that should be restored in the Model Rules (if I am correct in my understanding that they left it out this time), and enforced.

Professor Hazard: You're incorrect. There are two separate provisions. One has to do with the duty to be forthright, which is what you're talking about, in connection with applications to the bar or a disciplinary proceeding.⁴⁴ The other is a separate obligation to report.⁴⁵ But I think we agree in substance.

Professor Patterson: Well, I agree with the point that the junior does have a duty to inform the court and in the most discrete way possible. The only thing that I would add is that the junior also has a duty to confront the senior before he goes to the court in order to make sure that there is no mistake and to give the senior an opportunity to make the correction himself.

Professor Hazard: Can I add one other observation about

42. Compare ABA CODE, *supra* note 7, DR 1-103(B) with LAWYER'S CODE (Discussion Draft), *supra* note 4, rule 8.2.

43. Rule 10.3 of the MODEL RULES (Discussion Draft) requires lawyers to report professional misconduct to disciplinary committees. MODEL RULES (Discussion Draft), *supra* note 4, rule 10.3 provides: "A lawyer having information indicating that another lawyer has committed a substantial violation of the rules of professional conduct shall report the information to the appropriate disciplinary authority."

44. MODEL RULES (Discussion Draft), *supra* note 4, rule 10.1.

45. *Id.* rule 10.3.

this? On another point, the draft reflects what the law is, although the cases are few and unclear. It says that a person who is a partner in a firm has a responsibility to see that the firm makes reasonable efforts to see that the lawyers within it conform their conduct to the requirements of professional responsibility.⁴⁶ Until recently, there has been an embarrassed silence in many firms about the problem of establishing ethical conformity. Let me be very blunt about this. When I went into practice with a very good firm, one of the most disturbing things I noticed was the discrepancy within the firm as to what was the right thing to do. I'm not talking about plainly illegal stuff, but, for example, harrassment of the other side in litigation. Some lawyers, I would have to say, certainly did that systematically. They would schedule things in such a way as to make it difficult for the other side. Other lawyers just wouldn't do that.

I think it would be interesting to hear from Mr. Smith on this. [Laughter] I'm talking about the problem of a responsible lawyer running a large law firm and generating an ethical climate. I believe that the partners, like the masters of a ship, set the tone. They set the level of conversation—whether you can talk about these issues if you run into a difficult problem in practice, particularly if you run into a difficult problem that involves interaction with another partner, and whether there is some recourse inside the firm, some established procedure whereby you can unload your troubles and get some intramural disposition.

Mr. Smith: Pass! [Laughter] I, of course, don't have a solution. I will say that it is a real problem in law firms. The way that most law firms handle it, including my law firm, is peer pressure. If people talk about taking hard line tactics in litigation, such as filing those usual motions that some call "the four horsemen" when there is no reason to file such motions (other than delay), and if other lawyers frown on such practice, before long the lawyers who do it will stop. But I do think we continually upgrade ethical standards in the courtroom. Unfortunately, I'd say the rate of improvement is about five percent a year and you die before you get to the top.

Audience Member: Dean Hazard, given the fact that many statutes carry only monetary penalties, are there circumstances in which the cost of compliance with the statute could be greater than the cost of noncompliance? This puts an attorney in a situa-

46. *Id.* rule 7.2.

tion in which, if he informs his client that it's cheaper for him to abrogate the statute, he in a sense conveys the impression that the client will be able to successfully engage in illegal activity. On the other hand, if he simply says, "Well that's just illegal and you can't do it," or if he doesn't even let the client know what the consequences of breaching the statute are, he may be abrogating a duty to the client to fully inform him of his options and tell him about the law. Is there any way that these two values can be reconciled? Is one superior to the other? How would this situation be worked out? I'd also like to ask Mr. Smith if, in fact, that value or that duty to inform a client of all his options does indeed exist?

Professor Hazard: There is a critical distinction between giving advice and any further step of facilitation. There is, however, no absolutely clean factual boundary there. The problem of perjury, in my opinion, begins with the fact that the lawyer is presenting the case. It would be one thing if the client asked you, "Look, I left out a lot of income in last year's tax return. What should I do?" In that situation a lawyer can say, "There are severe penalties if they catch up with you; they will be heavy. I have to tell you that the auditing is selective. For someone in your income tax bracket with the kind of income you have, as I understand what they do (and they don't generally tell us), the chances are statistically remote that they will question it. It's for you to decide what you want to do. I consider it my obligation to tell you what the enforcement situation is, as well as what the law is." There is no question what the law is and I can't further the client's purpose, and I haven't done so. There's also no doubt that you don't tell anybody. That's it. If the client wants to do it, that's his problem. The same holds true when you're talking about other kinds of violations.

The problem in practice is often trickier than that, however. Frequently, particularly these days, clients not only have the responsibility of compliance, they also have the responsibility to file reports. They may ask you some questions about the reports. Take the case in which an SEC report requires the lawyer's signature. I just don't see how the lawyer is in any different situation than an income tax preparer signing a tax return. On the other hand, the lawyer can say, "I will look at your report and tell you what the law is." Again what you have done is give advice. You can give advice that tells the client what the law is and what enforcement practices are, as long as you are not involved in executing the purpose. In doing so you do not violate the law and you do not violate

legal ethics.

Audience Member: Given the responsibility of what we call the organized bar to exert peer pressure to police the ranks of our profession, I'd be interested in hearing what your position is on the appointment of lay persons to legal grievance committees to evaluate the course of conduct of individual attorneys. If, indeed, we are professionals, why should there be a need, if there is one, to go outside the ranks of the profession for evaluation of our own?

Professor Freedman: There is a need and the answer to your question is that it is being done too late to serve the purpose that prompted it. Some of us many years ago tried to induce the organized bar to introduce nonlawyers into disciplinary proceedings and were rebuffed out of hand. But what has happened since then is that lawyer malpractice has burgeoned and the bar has suddenly realized that what we did to the doctors is now being done to us. Just as the doctors covered up for each other and did not give real satisfaction to patients who had been treated inappropriately, so the bar has not in any serious way gone about the process of enforcing sanctions for misconduct by lawyers. Clients have wised up (as patients have) and have decided: Why go to a bunch of lawyers for satisfaction when we can go to twelve nonlawyers for satisfaction. Suddenly, the bar got interested in introducing nonlawyers into the disciplinary proceedings for the wrong reasons, and, I'm happy to say, it's too late.

Mr. Smith: I have a slightly different perception. I think that, at least in Florida, the disciplinary procedures of the organized bar have been tremendously effective. The Florida Bar routinely has gone after the scoundrels and, whenever they've found them, they've kicked them out. The bar has purged people that shouldn't be lawyers from its ranks. I've been basically proud of the efforts of the bar and its disciplinary procedures, as distinguished from the medical profession, or all other professions. I had the misfortune or fortune, whichever it is, to serve as the spokesman for the national legal profession during Watergate. It is a great pleasure to me that Richard Nixon is no longer a lawyer. It's a great pleasure to me that John Ehrlichman is no longer a lawyer, that Egil Krogh, Jr. was disbarred, that Richard Kleindienst was censured, that John Dean III is no longer a lawyer, and that many of the other lawyers involved are no longer members of the legal profession.

The reason that lay people sit on disciplinary boards, in my judgment, is not to do a better job, because the boards already generally do a fine job, but because the legal profession serves the

public and the public has a right of stewardship. The public has the right to know that the bar is doing a good job. Those lay people on the board are ambassadors from the public, watchdogs, with a duty to report whether we are doing a good job. We need them only for that reason.

Professor Freedman: I'm glad to hear that Florida is different from every other jurisdiction that was checked out not many years ago by the Clark Commission,⁴⁷ which reached the conclusion that nationwide enforcement was in a deplorable state.

Mr. Smith: But not in Florida! [Laughter]

Professor Freedman: No, not in Florida. And, of course, the Watergate people were disciplined, which is consistent with the findings of the Clark Commission that in cases of very high visibility, the bar did act and indeed sometimes overreacted. But in the run-of-the-mill cases, day-to-day, the bar protected its own and, apart from Florida, I have no reason to believe that circumstances have changed significantly since then, except for the phenomenon of burgeoning lawyer malpractice. And lawyer malpractice, I think, will bring home to the bar the message that disciplinary proceedings have been unable to convey.

Audience Member: I would like to go back to the issue we were discussing earlier about reporting fraudulent practices, and I'd like to address this question to Professor Hazard and Mr. Smith. I think most of us were raised with the idea that we shouldn't be tattle-tales. And that's something that has been pervasive in most of our lives. I'd like to know what effect you think there would be on other clients whose own business practices and procedures might very well fall within that doubtful area that Professor Hazard discussed earlier today? What psychological, rather than real, effect would reporting such practices have on other clients that we serve?

Professor Hazard: Psychology isn't real? [Laughter] "Tattle-tale" is a word used by twelve-year-olds to refer to a responsible citizen. [Laughter] One of the hardest things in growing up is to report wrongdoing, whether it's reporting another lawyer who may be an old friend, or reporting some business person that isn't a client, or reporting a client. It's an onerous responsibility for the reasons Professor Freedman stated about the maintenance of the

47. See Wright, *Self-Discipline of the Bar: Theory or Fact?*, 57 A.B.A. J. 757, 758 (1971) (commenting on findings of the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by Mr. Justice Tom C. Clark).

integrity of the profession. If everyone lets George get away with it, it's not going to get done. The ethic that you're referring to leads to the society fairly described in *The Lord of the Flies*,⁴⁸ a society of mendacity, irresponsibility, cruelty, and disorder. A system of orderly government presupposes a willingness of its citizens to invoke authority. If you have ever been in a school in which no one "tattled," you know it is as I have described.

So far as what clients think, you have to use good judgment at the margin. You don't go blowing the whistle as your first recourse. One of the things you must have is the courage to tell the client what to do. That brings to mind a good story from the firm I went with. When I was being interviewed, one of the lawyers was writing a resignation letter, firing a client. That impressed the hell out of me. The lawyer was obviously quite distressed by doing it because he had represented the client for quite a while. But this client had been involved in two fraud cases and now had gotten into a third. The lawyer knew these were not accidents. This is just the way the client did business. I'm sure people asked why that firm no longer represented that company, but I believe the firm was far better off without that client. That firm was terribly interested in maintaining its reputation for trustworthiness in its representations. The State Tax Commission and the Internal Revenue Service would believe us if our people made a statement as to what the situation was. That was of great value to the firm; it was of great value to the firm's clients. Most businesses want to be represented by lawyers who have a first class reputation for integrity because their legal counsel's reputation reflects on them. It's just about that simple.

Professor Patterson: The question of "what you should do about telling on a client?" raises all sorts of specters in your minds. I suspect—and I would like to ask Mr. Smith about this—that ninety percent of the time you don't have any problem with the client who wants to engage in wrongdoing. You tell them what is right and they do it, because I suspect that by far the great majority of clients are honest, responsible people who want to do the right thing. Am I right or wrong?

Mr. Smith: You were right until you got to that last sentence. [Laughter] I think that we have had no trouble in our firm telling clients that they had to make disclosure to authorities of past violations of things such as consumer frauds or environmental

48. W. GOLDING, *THE LORD OF THE FLIES* (1962).

prohibitions. We've had people who either wittingly or unwittingly violated environmental regulations that upper management didn't know about. Upper management would find out about it, and they'd talk to the lawyer and the lawyer would immediately advise that they had to disclose it and, invariably, I have seen them disclose it with no problem to the lawyers. All we had to do was advise them to disclose—they then disclosed and it cost them millions of dollars. I've seen that happen multiple times, especially to larger corporate clients. I will say, because I don't want to be too old and too smug, that it sure is a lot easier to tell a client to do right after you have a lot of clients. [Laughter]

Audience Member: I wonder if I could ask a procedural question, probably directing it to Professor Hazard? All fifty states and the District of Columbia now have adopted a professional conduct examination as a prerequisite for admission to the bar. Now the examination is multiple choice, which makes it important, at least from the point of view of all of us who are going to be taking this examination in the next year or two, that the answers be reasonably certain and that they be publicized. If and when the ABA Code of Professional Responsibility is revised, is there any mechanism whereby the National Board of Bar Examiners, or others who are concerned with this examination, will issue instructions on what the right answers are to these difficult questions so that they won't be throwing curves at the students and the law applicants who have to take the examination? [Applause]

Professor Hazard: You touched a sympathetic cord there. First of all, there is considerable variation in the rules between states today that is not always noticed. For example, there are very distinct provisions in California (I'm a member of the Bar out there), particularly on some of these very tough issues.⁴⁹ There are sharp differences in the rules on the obligation to turn in a fellow lawyer. It doesn't exist in Massachusetts. [Professor Freedman: It was stricken in the District.] I hope that the national examiners are mindful that they've already got the problem to which you refer.

Secondly, I am told that the bar examiners don't give very many really difficult questions. In answering the questions, you are almost certain to be right if you will pick the nobler—in a simple-minded sense—resolution. That's in the nature of bar exams; they

49. California Rules of Professional Conduct, CAL. BUS. & PROF. CODE § 6076 (West Supp. 1981).

do the same thing in the substantive questions. They have to pose questions for which they can defend the model answer even if it calls for an idiotic result. That's just the bureaucratic process of examination. The risk of pitches around the corners of the plate, as distinct from stuff that's either right down the middle of the plate or three feet outside, is, in the bureaucratic nature of bar examinations, not too serious.

The final point, I think, is that on a lot of these points the present Code is just extremely difficult to fathom. It's just a question of internal obscurity. That then requires the examiners to write fairly simple-minded questions. The biggest trap is that they will write questions that are geared to specific local decisions.

Professor Freedman: I can recall seeing exams—papers with different colors, one was yellow, one was blue, one was brown, one was pink, something like that—that purported to be questions and answers based on the Code of Professional Responsibility. A significant number of the answers were demonstrably wrong—not one of these difference-of-opinion things, but in citing and quoting the Code of Professional Responsibility, they were demonstrably wrong. On at least one of them you wouldn't even have gotten a passing grade if you used the model answers. They corrected them the next year. They changed the colors, so anybody trying to connect the article with the sheets would have great difficulty. I was teaching a bar review cram course at the time and I told the students to memorize the questions and answers to suit the people who were going to be grading them, not me or the drafters of the Code of Professional Responsibility.

If, to become a member of the bar, what you have to do on ethics questions, as well as substantive questions, is to memorize for a relatively short time what a bunch of trained gorillas want you to learn, memorize it that way. You're going to forget it promptly anyway. But it is a shame. And that goes to the whole question of bar examinations, which are an abomination, and I hope that, unlike most of the people in the profession, after you've gotten through them you will remember what an arbitrary, unfair, irrational, and unreasonably burdensome experience it is and that you will do something to end it. [Applause]

Professor Anderson: I recall an old *Doonesbury* cartoon. In the early panel some professor of law has been distilling the essence of his heart in some philosophical ethical issue. In the last panel, a student in the audience raises his hand and, in some frustration, asks, "Will that be on the exam?" I would hate to end our

discussion on two bar exam questions. Are there other questions?

Audience Member: Yes, I have a question directed generally to Mr. Smith. About your plans for pro bono work, in light of the recent proposal to cut back severely on federal funding of legal services, do you see the ABA as stepping in and taking a more active role to satisfy the needs of the poorer classes? I wonder what role you see for the ABA as opposed to the legal profession.

Mr. Smith: The American Bar Association has had a good record, I think, on legal aid. They supported the original government sponsored legal service program in 1964 and have continued to support it vigorously, including an effort that President Reese Smith of the American Bar Association is now making to continue the existence and federal funding of the Legal Services Corporation. President Smith had representatives from over fifty bar associations in Washington on Wednesday of this week who were buttonholing congressmen and senators in support of federally funded legal services. It is my personal belief that, in spite of the opposition of the Office of Management and Budget, the Legal Services Corporation will survive, although in modified form and with greatly reduced federal funding. The American Bar Association realizes that, despite the sometimes massive contributions of individual lawyers, there is no way that the private bar can produce an effort that is equivalent to the \$370 million now spent by the federal government on legal services programs, even with mandatory pro bono. It is now recognized that legal aid for the poor is not an obligation of the legal profession alone. It has to be a responsibility of government. Perhaps a legitimate debate, currently at issue, is whether the federal government or other governments should fund such programs. The Attorney General of Florida, Jim Smith, proposes that the State of Florida pick up the burden if it is dropped by the federal government and actually slightly increase the total contribution in Florida, which is about \$8 million. Florida would then fund its own legal services program if Congress terminates federal legal services. It is interesting to note that in 1964, when the Equal Employment Opportunity legal services program began, one of the finer moments in the history of the legal profession was its support of the federally funded legal aid program. Throughout America, there were volunteer lawyers participating in legal aid. The total funding for all the legal aid programs in the United States in 1963 was \$6 million. You can thus see what voluntary efforts by lawyers can do—\$6 million against a present need of perhaps \$800 million.

Audience Member: Mr. Smith, doesn't your suggestion about the pro bono law conflict with the rules with regard to large law firms? As you state, you are in one of the largest law firms in the state. Since that type of large firm generally represents corporate clients that pay for your services, doesn't that mean that under present ABA rules you could have conflict of interest problems? And does the panel agree with the present ABA Code position that if a lawyer has ever worked for an interest that is now opposed to that of a client of the firm, it would be imputed to the whole firm?⁵⁰ Do you think that you should be able to separate that person and not impute his knowledge to the rest of the firm?

Mr. Smith: I think that my firm has the ability easily to represent people who have views contrary to the views of other clients. The fact that a bank may like usurious interest, and that we represent that bank, wouldn't keep us from trying to get the usury statute changed. That's not a direct conflict. It's not a legal conflict. We don't have client representation there. We're not so employed, nor do we have any material information that we obtained from the client that would specifically affect that representation. I think insofar as pro bono is concerned, most of the corporate clients, with rare exception, don't care what you are doing as long as you don't sue them. They don't care if you sue one of their corporate friends or somebody else; just don't sue them. There is no real problem within the profession with individual lawyers supporting law reform—lawyers seeking, through litigation in the nature of class actions or otherwise, to achieve social goals—so long as that representation doesn't directly conflict with somebody that they or their firm is then representing or somebody from whom they obtained information in a confidential way that might be used in that suit. I think that in my own law firm we spend time equivalent to several thousand dollars a year checking conflicts out. It's a big problem; we worry about it all the time; everybody worries about it all the time. Somebody right now in Tampa is probably suing some of our clients in Miami. We may have to have a conference in the morning to get rid of one or the other of those clients. It happens every day.

Audience Member: Mr. Smith, one more pro bono question. Do you perhaps see mandatory pro bono as a suspension of our thirteenth amendment protection against involuntary servitude? [Laughter]

50. ABA CODE, *supra* note 7, DR 5-101(A).

Mr. Smith: No, I don't. I think that you don't have to be a lawyer if you don't want to. If you accept the privilege of being a lawyer and are granted a special status by the will of the people in which they say you are the prime advocate for other people—you're the prime counselor on legal matters for other people, you're the prime negotiator for other people—when they give you that monopoly, they chill the development of those skills to all other people.