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Are the Model Rules Unconstitutional?

MONROE H. FREEDMAN*

In this article, Professor Freedman condemns the provisions of the proposed Model Rules of Professional Conduct that would require a lawyer to reveal his client's perjury to a court. Viewing these provisions as an assault on the lawyer-client privilege and the adversary system, which are protected by the fifth and sixth amendments to the United States Constitution, Professor Freedman offers the American Lawyer's Code of Conduct, for which he served as the Reporter, as an alternative. Professor Freedman views the American Lawyer's Code as the preferable alternative to the present ABA Model Code of Professional Responsibility because the American Lawyer's Code preserves "the adversary system and with it the fundamental rights of all Americans."

Two codes of conduct have been submitted to replace the present, widely discredited Model Code of Professional Responsibility.¹ One is the so-called Model Rules,² for which Professor Hazard serves as Reporter.³ The other is the American Lawyer's Code of Conduct,⁴ for which I am the Reporter. The Model Rules and the American Lawyer's Code present strikingly contrasting philosophies regarding the lawyer's responsibilities to clients and the lawyer's role in society. I think these philosophical differences are illustrated most dramatically and importantly in the provisions relating to lawyer-client confidentiality.⁵ As Reporter for the

* Professor of Law, Hofstra University; Reporter for the American Lawyer's Code of Conduct. This article is a loosely edited version of Professor Freedman's lecture given during the *University of Miami Law Review* Sixth Annual Baron de Hirsch Meyer Lecture Series on April 3, 1981. The footnotes were added by student editors and reviewed by Professor Freedman.

1. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as ABA CODE].

2. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980), reprinted in 48 U.S.L.W. 1 (Feb. 19, 1980) (special ed.) [hereinafter cited as MODEL RULES (Discussion Draft)].

3. Geoffrey C. Hazard, Jr. is a John A. Garver Professor at Yale University and the Reporter for the ABA Commission on Evaluation of Professional Standards.

4. COMMISSION ON PROFESSIONAL RESPONSIBILITY OF THE ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT (public discussion draft released June, 1980) [hereinafter cited as LAWYER'S CODE (Discussion Draft)].

5. Compare MODEL RULES (Discussion Draft), *supra* note 2, rule 1.7 with LAWYER'S

American Lawyer's Code, I find myself (in contrast to what Dean Mentschikoff said)⁶ in the position of the establishment for a change; I think Professor Hazard and his group are the young Turks.

In a recent article,⁷ Professor Stark, of the University of Connecticut, described the American Lawyer's Code as reflecting the traditional view of the Anglo-American legal system, which provides maximum protection to clients' confidences and permits divulgence of those confidences only in carefully limited circumstances.⁸ The Model Rules, on the other hand, permit disclosure in a wide variety of circumstances, and require the lawyer to violate the client's confidences when the client informs the lawyer about his perjury.⁹ The Model Rules thus reverse the evolution towards upholding attorney-client confidences that began with the Canons of Professional Ethics¹⁰ and was continued in the Model Code of Professional Responsibility.

The Model Rules have been characterized by a number of commentators as arrogant,¹¹ radical, or worse.¹² I recall, for example, that the relatively conservative American College of Trial Lawyers used the word "vicious," a rather surprising word in this context, to describe some of these very provisions. Harvard Professor Andrew Kaufman has said that the provisions will result in an extraordinary and wholly undesirable change in the lawyer's disclosure responsibilities, threatening disruption of the lawyer-client relationship.¹³

CODE (Discussion Draft), *supra* note 4, rule 1.2, Alternatives A & B.

6. Address by Dean Soia Mentschikoff, *University of Miami Law Review* Sixth Annual Baron de Hirsch Meyer Lecture Series (Apr. 3, 1981) (Dean Mentschikoff referred to Professor Freedman and his supporters as the young Turks, and to Professor Hazard as representing the establishment).

7. Stark, *The Model Rules of Professional Conduct*, 12 *CONN. L. REV.* 948 (1980).

8. Stark, *supra* note 7, at 978-79.

9. MODEL RULES (Discussion Draft), *supra* note 2, rules 1.7, 3.1, 4.2.

10. ABA CANONS OF PROFESSIONAL ETHICS (1948). Compare ABA CODE, *supra* note 1, Canon 4 with MODEL RULES (Discussion Draft), *supra* note 2, rules 1.7, 3.1, 4.2.

11. Lumbard, *Setting Standards: The Courts, The Bar, And The Lawyers' Code of Conduct*, 30 *CATH. U.L. REV.* 249, 255 (1981).

12. Resolution of the National Organization of Bar Counsel (adopted Feb. 2, 1980), reprinted in National Organization of Bar Counsel, Report and Recommendations on Study of the Model Rules of Professional Conduct (Discussion Draft of Jan. 30, 1980) to the ABA Comm'n on Evaluation of Professional Standards, 96 App. A (Tent. Draft, July 31, 1980) [hereinafter cited as NOBC Report and Recommendations]; see Lumbard, *supra* note 12, at 255-58; *Kutak Rules Are Totally Rejected at Bar Convention*, *L.A. Daily J.*, Sept. 30, 1980, at 1.

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

The philosophical implications of the differences between the two proposed codes are far greater than mere disagreement concerning particular provisions. The American Lawyer's Code recognizes that rules governing lawyers' conduct give substance to, or detract from, the client's fundamental rights.¹⁴ Most importantly, the Lawyer's Code protects the client's constitutional rights because rules that govern lawyers' conduct give definition to the sixth amendment right to counsel.¹⁵

At this juncture I would like to reiterate some of the points made in the Preamble to the American Lawyer's Code.¹⁶ When formulating rules of conduct for lawyers, it is essential not to forget the public interest function that lawyers perform. This function, in our legal system, is to protect the individual rights guaranteed in the Bill of Rights. Rules of conduct should be designed and interpreted to enable attorneys to enhance their client's rights, not to inhibit them. The primary individual rights that lawyers should protect, and that rules of conduct must respect, are the rights to due process, counsel, trial by jury, confrontation, and bail, and the protections against self-incrimination, search and seizure, and cruel and unusual punishment. Additionally, the right to litigate is an essential ingredient of freedom of speech and of the right to petition for redress of grievances.¹⁷

Individual access to attorneys becomes increasingly vital as society grows more legally oriented. Due to the enormous volume and complexity of constitutional, statutory, and regulatory law, ordinary citizens require legal assistance simply to comprehend and to cope with the multifarious rules governing their actions. The lawyer, therefore, serves to protect the basic individual right of personal autonomy, that is, the right to make the decisions that most affect one's life and values.¹⁸ Absent professional assistance, individuals are often unaware of the options available to them. The assistance of counsel thus relates significantly to equal protection, since, if each person is left to his or her own resources without the assistance of counsel, disproportionate ability to cope with the complexities of the legal system would produce gross disparities

14. See LAWYER'S CODE (Discussion Draft), *supra* note 4, Introduction and Preamble.

15. The sixth amendment right to counsel "does not just mean having a lawyer at your side in court. It means effective counsel; it means a lawyer with whom you can consult; and it means a lawyer in whom you can confide, because without such confidentiality the lawyer cannot assist you effectively." *Id.* Introduction at iv.

16. *Id.* Preamble at 3-5.

17. See *id.* at 4.

18. *Id.*

and injustice.¹⁹

Our system requires that before any person is significantly affected by society, certain processes must be followed. Competent, independent, and zealous attorneys are necessary to secure those rights. Although it may be contended that the stated ideal is too frequently denied in fact, the response is that the legal community should strive to make that ideal a reality by drafting and enforcing appropriate standards. The legal system that gives meaning to basic American rights of autonomy, counsel, trial by jury, due process, equal protection, and others, is the adversary system,²⁰ which assures everyone a "champion" against a "hostile world," to help preserve and enhance individual dignity.²¹

The adversary system is also the best available means of determining truth in cases of disputed facts.²² First, the advocate on each side is responsible for ferreting out all of the facts, policy questions, and legal authority bearing on the case. The two opponents then appear before an impartial fact finder, the judge or jury, with each advocate's position subject to searching challenges by an adversary through cross-examination and rebuttal.²³ That

19. *Id.* at 5.

20. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 2 (1975).

21. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DÉFENSE FUNCTION* 145-46 (Approved Draft, 1971).

Professor Freedman has stated that:

The concept of a right to counsel is one of the most significant manifestations of our regard for the dignity of the individual. No person is required to stand alone against the awesome power of the People of New York or the Government of the United States of America. Rather, every criminal defendant is guaranteed an advocate—a "champion" against a "hostile world," the "single voice on which he must rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." In addition, the attorney serves in significant part to assure equality before the law. Thus, the lawyer has been referred to as "the equalizer," who "places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried."

M. FREEDMAN, *supra* note 20, at 5 (footnotes omitted) (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra*, at 145-46).

22. "[T]ruth is a basic value, and the adversary system is one of the most efficient and fair methods designed for determining it." M. FREEDMAN, *supra* note 20, at 3.

23. In discussing the virtues of the adversary system, Professor Freedman has observed:

That system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence in as thorough and persuasive a way as possible. The truth-seeking techniques used by the advocates on each side include investigation, pre-trial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation. Thus, the judge or jury is given the strongest possi-

process has two important effects: it encourages thoroughness and accuracy in the development of the facts and pertinent law, and it permits the judge and jury to remain aloof from partisan involvement.

I think it significant that Professor Hazard, in discussing the general law relevant to legal ethics, chose to refer to the laws of tort and agency²⁴ with citation to the Restatement of Agency, but made no reference to constitutional law and no citation to the Bill of Rights. What I would like to focus on today are the fifth amendment privilege against self-incrimination and the sixth amendment right to the effective assistance of counsel.

The Supreme Court of the United States has held that the privilege against self-incrimination "is the essential mainstay of our adversary system";²⁵ similarly, the effective assistance of counsel has been described as "a defendant's most fundamental right 'for it affects his ability to assert any other right[s] he may have.'"²⁶ The interrelationship between the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel is clear. As Justice Rehnquist has said, "the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney."²⁷ Chief Justice Burger has reasoned that this lawyer-client privilege is rooted in the imperative need for confidence and trust between lawyer and client, and the need for the lawyer, as an advocate and a counselor, to know all that relates to the client's reasons for seeking representation.²⁸ Accordingly, as Professor Whitebread noted in his treatise on criminal procedure,²⁹ the Supreme Court has extended the fifth amendment protection to an attorney for the benefit of his client's privilege for the express purpose of encouraging the uninhibited exchange of information between citizens and their attorneys.³⁰

The Supreme Court recently reiterated and reaffirmed these

ble view of each side, and is put in the best possible position to make an accurate and fair judgment.

Id. at 4.

24. Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981).

25. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

26. *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir. 1973) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

27. *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting).

28. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

29. C. WHITEBREAD, *CRIMINAL PROCEDURE* (1980).

30. *Id.* § 14.02 at 257.

basic precepts in *Upjohn Co. v. United States*.³¹ Justice Rehnquist, speaking for eight members of the Court, concluded that the crux of the attorney-client privilege is the necessity that the lawyer know all the essential facts to properly represent his client.³² Assistance of counsel can only be safely used when it is free from the apprehension of disclosure. Thus, the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination have been inextricably linked with the lawyer-client privilege as constitutional expressions of the adversary system.

The Model Rules, with their assault on confidentiality, attack the adversary system and therefore the Constitution.³³ Professor Stark attributes this position in the Model Rules to the ABA Commission's overriding skepticism about the adversary system.³⁴ Robert Kutak, the chairman of the Commission, has denied any hostility to the adversary system,³⁵ but he has admitted on behalf

31. 449 U.S. 383 (1981). In *Upjohn*, a manufacturer of pharmaceuticals made payments to a foreign government official in order to benefit the company's overseas operations. The company's general counsel was made aware of these facts and began an investigation regarding these "questionable payments." *Id.* at 386. The company attorney sent out confidential questionnaires to foreign managers requesting information. The IRS, during a tax investigation, issued a summons demanding that the company turn over both the confidential questionnaires and the notes from attorney interviews. *Upjohn* refused to produce the documents "on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation." *Id.* at 388.

32. *Id.* at 389-91.

33. Professor Stark believes that the MODEL RULES (Discussion Draft), *supra* note 2, modify the adversary function in that:

(1) The Rules propose new restraints and new obligations on attorneys involved in *ex parte* proceedings and proceedings against unrepresented parties

(2) The Rules propose a new obligation on attorneys to keep litigation moving forward. . . .

(3) The Rules establish new obligations of fairness to opposing lawyers and parties in negotiation and other litigation processes. . . .

(4) The Rules expand the attorney's obligation to deal candidly with courts and tribunals about legal authority. . . .

(5) The Rules expand the attorney's obligation of candor with respect to facts. . . .

(6) . . . [T]he Rules impose on the attorney greatly expanded obligations to prevent or rectify the consequences of a client's misconduct, even if this requires disclosure of client confidences to a court or a third person.

Stark, *supra* note 7, at 965-66 (footnotes omitted).

34. Professor Stark states that several of the comments to the Model Rules "express the drafters' deep concern, their overriding skepticism about the adversary system—about the capacity of courts, as presently structured, to achieve substantial justice . . ." *Id.* at 965 (see MODEL RULES (Discussion Draft), *supra* note 2, rule 3.1, Comment, and rule 3.2, Comment).

35. See Kutak, *Proposed Model Rules of Professional Conduct*, 36 BUS. LAW 573

of his commission that "as useful as [the model of the adversary system] may have been in an earlier day, it simply is neither accurate nor functional as an organizing principle around which we can order our thinking about professional responsibility in 1980."³⁶

Let me illustrate the constitutional aspect with a recent case.³⁷ A man named Henry was in prison, pending trial following his indictment for robbery. The FBI paid Nichols, Henry's cellmate, to report any incriminating statements that Henry might make as they were talking together.³⁸ Nichols, according to the Chief Justice's majority opinion, "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements."³⁹ The Court held that evidence of incriminating conversations between Henry and Nichols, which came to the government through Nichols, had to be suppressed as a violation of Henry's sixth amendment right to counsel even though Henry's lawyer had not yet been appointed.⁴⁰

Under the Model Rules, Henry's own lawyer would be required to do what his cellmate could not, that is, to establish a relationship of trust and confidence, to deliberately elicit incriminating information, and then to divulge that information to the Court.⁴¹ Former Judge Marvin Frankel, who has served as an influential member of the ABA Commission on Evaluation of Professional Standards, and who, oddly enough, has supported these novel and radical proposals for destroying the adversary system, wrote, in an often cited and quoted opinion, that the privilege of confidentiality "would be a thin illusion if the government could

(1981); Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 47 (1980); Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1 (1980); Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUNDATION RESEARCH J. 1016.

36. Pacific Business News, July 31, 1980 (ABA Bonus Edition), at 18.

37. *United States v. Henry*, 447 U.S. 264 (1980).

38. *Id.* at 266.

39. *Id.* at 274.

40. *Id. Cf. Estelle v. Smith*, 101 S. Ct. 1866 (1981) (use of psychiatrist's adverse testimony at penalty phase of murder trial violated accused's fifth and sixth amendment protections). In *Estelle*, Chief Justice Burger reasoned that when the psychiatrist went

beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, *his role changed and became essentially like that of an agent of the State* recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] person[] acting solely in his interest."

Id. at 1875 (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)) (brackets in original) (emphasis added).

41. See MODEL RULES (Discussion Draft), *supra* note 2, rules 1.7, 3.1, 4.2.

have for the asking what it has, in rare lapses, sought by less genteel means."⁴² If the Model Rules were adopted, there would be no need for the Government to pay Nichols to induce trust and confidence and elicit self-incriminating information for the prosecution, because the Kutak Commission would have the lawyer do it.

Although it is sometimes said that the perjury problem is rare, the perjury problem is present in every case, because from the first interview the lawyer must decide how to handle that problem, should it arise. The lawyer must also establish a relationship of trust and confidence with the client. In the discussion draft of the Model Rules, a comment acknowledges that requiring the lawyer to give the client a Miranda warning may result in less effective representation.⁴³ The final draft has deleted that acknowledgment, but the effect of the warning nevertheless remains the same.⁴⁴ Moreover, word of lawyers' practice of betraying clients gets out anyway, as was the case with the Washington, D.C. public defender's office.⁴⁵ Perjury, of course, would still occur under the Model Rules, if they were adopted. The difference is that lawyers would be ignorant of it, and ignorant of a good deal more besides. Clients would not know what information to divulge to the lawyer and what information to hold back because it would be too dangerous to divulge. Indeed, there would probably be more perjury under the Model Rules, because lawyers would lose the opportunity to dissuade their clients.⁴⁶

Finally, the current revision of the Model Rules, referred to as the final draft, cites none of the foremost constitutional authorities on point to support its position that a lawyer has an obligation to reveal his client's perjury to the court.⁴⁷ Although there are blocks of string citations in the final draft, many are not relevant or complete and do not contain a single reference to the constitutional authorities I have been discussing. The only constitutional authorities that arguably support the position of the Model Rules are

42. *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

43. MODEL RULES (Discussion Draft), *supra* note 2, rule 1.4(b); see NOBC Report and Recommendations, *supra* note 12, § V, Comment to rule 1.4(b) at 69.

44. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT rule 1.2(e) (Proposed Final Draft, May 30, 1981) [hereinafter cited as MODEL RULES (Final Draft)].

45. J. ALLEN, ASSAULT WITH A DEADLY WEAPON: THE AUTOBIOGRAPHY OF A STREET CRIMINAL xxiii-xxiv, 153-54 (P. Heymann & D. Kelly eds. 1977).

46. See generally *Fisher v. United States*, 425 U.S. 391, 403 (1975) (if client knows that damaging information can be obtained more readily after disclosure, he will be reluctant to confide in his lawyer, making it difficult for lawyer to give fully informed advice).

47. MODEL RULES (Final Draft), *supra* note 45, rule 3.3(a)(4).

*Harris v. New York*⁴⁸ and *United States v. Haven*.⁴⁹ Those cases are cited by the Model Rules for the proposition that "defendants must testify truthfully or suffer consequences."⁵⁰ They deal, however, with the exclusionary rule under the fourth amendment, that is, unlawful searches and seizures resulting in inadmissible evidence. Unlike lawyer-client confidences, the exclusionary rule does not have constitutional status, and, moreover, it is disfavored by the Supreme Court.⁵¹ In both *Harris* and *Haven*, the Government obtained evidence of a crime through an unlawful search and seizure. Although the evidence was excluded from use in proving the prosecution's case, the government was permitted to use the unlawfully seized evidence for impeachment purposes when the defendant took the stand and denied the crime.⁵² Interestingly, in these two cases the Supreme Court expressed no criticism of the lawyers who had elicited the false testimony, although, of course, the lawyers knew about the contradictory suppressed evidence. The Court merely held that when a defendant commits perjury, the exclusionary rule will not require that the perjurious defendant be "free from the risk of confrontation with prior inconsistent utterances"⁵³ or with real evidence in the government's possession.⁵⁴ In other words, the defendant can testify perjuriously, and obviously with the knowledge of his lawyer, but if the defendant does testify perjuriously, his credibility can be impeached despite the exclusionary rule. That is hardly authority for the proposition that the defendant's attorney has the obligation to reveal the perjury to the court; indeed, if the attorney had such an obligation, impeachment by the government would be unnecessary.

Judge James G. Exum, Jr. of the North Carolina Supreme Court has stated that the lawyer is the defendant's only advocate.⁵⁵ The American Bar Association describes the lawyer as the defendant's only champion against a hostile world.⁵⁶ Judge Exum stresses that the lawyer cannot also become the client's accuser.⁵⁷

48. 401 U.S. 222 (1971).

49. 446 U.S. 620 (1980).

50. MODEL RULES (Final Draft), *supra* note 45, rule 3.3(a)(4), Comment at 133.

51. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Peltier*, 422 U.S. 531 (1975).

52. 446 U.S. at 621-23; 401 U.S. at 223-24.

53. 401 U.S. at 226.

54. 446 U.S. at 627-28.

55. Exum, *The Perjurious Criminal Defendant: A Solution to his Lawyer's Dilemma*, 6 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 16 (1980).

56. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 21, at 145-46.

57. Exum, *supra* note 55.

A conviction under our system must be at the hands of the jury, not the defendant's lawyer. The Model Rules would have it otherwise. The American Lawyer's Code of Conduct would preserve the adversary system and with it the fundamental rights of all Americans.