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## The Function of a Code of Legal Ethics

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# The Function of a Code of Legal Ethics

L. RAY PATTERSON\*

*The traditional view that the function of a code of legal ethics is to define the duties of lawyers and the rights of clients is based on the perception of the lawyer-client relationship as one of simple agency in which the lawyer has the utmost duty of loyalty to the client. The author suggests, however, that this perception is a fallacy that, by overlooking the fact that clients also have duties and lawyers also have rights, can result in antilegal rules of ethics. This result can be escaped, the author proposes, by integrating rules of ethics and rules of positive law, and by recognizing that both lawyers and clients have correlative and corresponding rights and duties. The author concludes first that the function of a code of legal ethics necessarily is to define the rights and duties of both lawyers and clients, and second that the legal profession should fashion such a code before the courts intervene and invalidate antilegal rules of ethics, relying on the duties of clients, just as they have relied on the rights of clients to invalidate anticompetitive rules of ethics.*

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## I. INTRODUCTION

The purpose of a code of legal ethics is to implement the legal profession's prerogative of self-regulation. The function of a code of legal ethics, as it generally is understood, is to define the duties and obligations of lawyers in the representation of clients. Too obvious to be disputed, this understanding has served the profession well. That it will continue to do so, however, is at least problematical in view of the judicial attacks on the bar's prerogative of self-

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regulation, which began with the 1963 case of *NAACP v. Button*.<sup>1</sup> In that landmark case, the Supreme Court of the United States recognized the constitutional right of the NAACP to employ lawyers to represent litigants in suits aimed at ending racial segregation, despite a state statute and ethical canon prohibiting such employment as unauthorized solicitation.<sup>2</sup> That decision was followed by others delimiting the profession's right to control the conduct of its members: *Goldfarb v. Virginia State Bar*<sup>3</sup> gave clients the right to bargain for fees by making minimum fee schedules illegal; *Bates v. State Bar*<sup>4</sup> made legal services more easily accessible by permitting lawyers to advertise; and *In re Primus*<sup>5</sup> sanctioned some forms of solicitation.

In these cases, the Supreme Court directed its attention to anticompetitive rules of legal ethics and concluded that the profession cannot in the guise of ethical rules deprive persons of their constitutional rights<sup>6</sup> or engage in conduct contrary to the Sherman Antitrust Act.<sup>7</sup> Naturally, the bar's reaction to these revelations was less than enthusiastic. Indeed, some lawyers, whose incredulity was apparently matched only by their lack of imagination, gave the Court the opportunity to reiterate and expand the *Button* rule in three subsequent cases.<sup>8</sup>

The hostile reaction of lawyers to these pronouncements, however, was not wholly a matter of simple obtuseness. The rationalization for the rules that the Court struck down—the prohibition against group legal services, minimum fee schedules, and the prohibitions against lawyer advertising and solicitation—had its source in the lawyer's perception of his duty of loyalty to the client. The lawyer-client relationship was seen as one in which the

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1. 371 U.S. 415 (1963).

2. *Id.* The Court held that the NAACP's activities were protected by the first and fourteenth amendments to the United States Constitution.

3. 421 U.S. 773 (1975).

4. 433 U.S. 350 (1977).

5. 436 U.S. 412 (1978). The companion case to *In re Primus*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), upheld the bar's right to impose sanctions on some forms of solicitation.

6. *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

7. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

8. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971) (union has constitutional right to engage in group activity and to receive advice designed to give its injured members best access to counsel); *UMW Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (union members have first amendment right to employ licensed lawyers on salary basis to assist them in asserting their rights; this is not an unauthorized practice of law); *Brotherhood of R.R. Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1 (1964) (state's power to inquire about a person's beliefs or associations is limited by the first amendment).

lawyer had the utmost duty of fidelity to the client and the client's interests, in effect an unalloyed duty of loyalty. From this perception followed the rationalization that the lawyer's duty of loyalty would be impaired if the client were simply a group member with little say in the choice of a lawyer, if the lawyer were unable to charge a reasonable fee, and if the lawyer engaged in hucksterism through the media, or solicited clients in order to do their bidding.

The merits of these arguments vary and, because the Supreme Court rejected them, they would be of little interest except for the fact that they contain a paradox supported by a fallacy. The paradox is that the greater the lawyer's duty of loyalty to the client, the greater both his and the profession's rights and power. This paradox, of course, is a product of the fact that the lawyer acts in a representative capacity that gives rise to the duty in the first place. To fulfill this duty of loyalty to the client, the lawyer must have the right to implement the duty (for example, the right to maintain the client's confidences) and the profession must have the right to protect the lawyer-client relationship (for example, to prevent its dilution by group legal services). The fallacy, of course, is that the lawyer has an unalloyed duty of loyalty to the client, notwithstanding his duties of candor to the tribunal and fairness to others. Lawyers must perforce accept the duty of candor to the tribunal, but many lawyers refuse to acknowledge that in an adversary system of law administration there is a duty of fairness to the adversary. Indeed, one will find as much, if not more, support for the duty of fairness in the Federal Rules of Civil Procedure than in the Model Code of Professional Responsibility.<sup>9</sup>

The fallacy of the duty of unalloyed loyalty to the client means that ethical rules may not only be anticompetitive, they *can* be antilegal as well—that is, contrary to rules of law. While the Model Code of Professional Responsibility permits a lawyer to reveal “[t]he intention of his client to commit a crime and the infor-

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9. This is primarily because of the discovery rules, FED. R. CIV. P. 26-37, which prevent a lawyer from concealing information from his adversary. That lawyers may abuse the rules is not the fault of the rules so much as it is the result of the prevailing attitude that there is no duty of fairness. The ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as ABA CODE] does suggest that fairness to an adversary is not forbidden. DR 7-101(A)(1), after requiring that the lawyer not intentionally fail to seek the lawful objectives of his client, provides:

A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

mation necessary to prevent the crime,"<sup>10</sup> the intent to commit a fraud is not mentioned. The implication is that the lawyer has a duty to keep information of his client's intention to commit a fraud inviolate, at least as an ethical, if not a legal, matter. For a lawyer to whom the confidences of the client are paramount, the omission of fraud in the rule is not likely to be viewed as an oversight, as surely it was not. Yet, the fact that client-oriented rules can be antilegal is a result of the lawyer's duty of confidentiality, which in turn is a product of the duty of loyalty. As written in the Model Code of Professional Responsibility (Model Code), the rules on confidentiality create a conflict between the lawyer's duties of loyalty to the client, candor to the tribunal, and fairness to others that one cannot logically resolve under the rules. The point is worth closer examination.

The Model Code in DR 4-101(A) divides information relating to the client into "confidences" and "secrets," the former being information protected by the attorney-client privilege, the latter being all other information.<sup>11</sup> A lawyer is forbidden to reveal either confidences or secrets, except that he *may* reveal them when the client consents, when permitted by a disciplinary rule or required by law or court order, when the client intends to commit a crime, or when necessary to collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.<sup>12</sup>

On the other hand, the Model Code in DR 7-102(B)(1) requires the lawyer to reveal a fraud of the client "except when the information is protected as a privileged communication."<sup>13</sup> The quoted clause was not in the Model Code as originally adopted, and its addition by amendment in 1974<sup>14</sup> raised a question about

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10. ABA CODE, *supra* note 9, DR 4-101(C)(3) (footnotes omitted).

11. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

*Id.* DR 4-101(A).

12. *Id.* DR 4-101(C)(1)-(4).

13. A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

*Id.* DR 7-102(B)(1) (footnote omitted).

14. See AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 307 (1979).

the meaning of "privileged communication" in DR 7-102(B)(1) in light of the use of the terms "confidence" and "secret" in DR 4-101(A). The following year, the American Bar Association Committee on Ethics and Professional Responsibility resolved the question, interpreting the phrase to include both confidences and secrets.<sup>15</sup> The result, of course, was to vitiate DR 7-102(B)(1) altogether.

There are, I suggest, three interrelated reasons for this untoward result. One is that the ABA never considered the rights or duties of the client in its analysis of the problem. This failing, in turn, resulted from the fiction that rules of ethics are concerned only with the duties and obligations of lawyers in the representation of clients. And this view, in turn, means that the disciplinary rules implementing the duty of loyalty are for the most part mere abstractions, and that there is no measure of the lawyer's conduct other than positive rules of law, the applicability of which is frequently made questionable by the duty of loyalty in the first place. One example will suffice: "In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal."<sup>16</sup>

There is a circularity of reasoning here that one can escape only by interpreting the rules in light of the rights and duties of the client under the law. Thus, although the theory underlying the Model Code is that its scope is limited to the duties and obligations of lawyers, functionally it deals with both the rights of lawyers and the rights and duties of clients. Although the four major canons of the Model Code—that a lawyer should preserve the confidences and secrets of a client,<sup>17</sup> exercise independent professional judgment on behalf of a client,<sup>18</sup> and represent a client competently<sup>19</sup> and zealously<sup>20</sup>—imply that lawyers have only duties (not

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15. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINIONS, NO. 341 (1975). The Committee said:

The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).

*Id.* (parentheticals in original).

16. ABA CODE, *supra* note 9, DR 7-102(A)(3).

17. *Id.* Canon 4.

18. *Id.* Canon 5.

19. *Id.* Canon 6.

20. *Id.* Canon 7. This Canon requires that the zealous representation be within the bounds of the law.

rights) in relation to clients, and that clients have only rights (not duties) in relation to lawyers, the disciplinary rules reveal otherwise. The implication that lawyers have no rights in relation to clients, for example, is belied by DR 7-101(B), which provides that a lawyer may exercise his professional judgment to waive or fail to assert a right or position of his client, or refuse to participate in conduct that he believes to be unlawful.<sup>21</sup> The Model Code thus does define the rights as well as the duties of a lawyer in relation to his client.

The implication that clients have only rights also is belied by the disciplinary rules. In DR 7-102, for example, which requires lawyers to represent clients within the bounds of the law, the lawyer is forbidden to do for the client what is there proscribed.<sup>22</sup> That these proscriptions impose a duty on the client is indicated by the fact that under DR 2-110(C), the lawyer may withdraw from representation if the client insists upon conduct that is substantially the same as that proscribed in DR 7-102. The lawyer may withdraw if, among other things, the client "[i]nsists that the lawyer pursue a course of conduct that is illegal,"<sup>23</sup> makes it "un-

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21. In his representation of a client, a lawyer may:

- (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client;
- (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

*Id.* DR 7-101(B).

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

- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
- (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
- (8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule.

*Id.* DR 7-102(A) (footnotes omitted).

23. *Id.* DR 2-110(C)(1)(c).

reasonably difficult for the lawyer to carry out his employment effectively,"<sup>24</sup> or insists "that the lawyer engage in conduct [in a matter not pending before a tribunal] that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules."<sup>25</sup>

The conclusion that the Model Code does go beyond a statement of the duties and obligations of lawyers and in fact defines the rights of lawyers as well as the duties of clients, reflects, of course, the proposition that to define the duty or right of one party to a relationship is to define the right or duty of the other.<sup>26</sup> Consequently, whatever the theory, the proposition that the function of a code of legal ethics is to define the rights and duties of lawyers has a corollary: it also defines the rights and duties of clients.

Theory notwithstanding, this corollary has been totally rejected. Apparently, lawyers tend to interpret the prerogative of self-regulation literally. "Obviously," the Preliminary Statement to the Model Code says, "the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers . . . ."<sup>27</sup> Thus, while the corollary exists functionally, it has had little significance analytically. Yet, if the bar continues to ignore it and to insist on the theoretical distinction between the rights and duties of lawyers and clients in the face of functional reality, the inevitable result is not difficult to foresee. Just as the Supreme Court relied on the rights of clients and would-be clients to invalidate anticompetitive rules of ethics,<sup>28</sup> the Court will surely rely on the duties of clients to invalidate antilegal rules of ethics.

The difficulty in accepting the notion that rules of ethics for lawyers should encompass the rights and duties of clients explicitly is twofold: it conflicts with traditional learning, and it is contrary to the self-interest of lawyers. Limiting the reach of a code of ethics to the conduct of lawyers means that a lawyer's breach of the rules may subject him to disciplinary sanctions, but not to liability.

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24. *Id.* DR 2-110(C)(1)(d).

25. *Id.* DR 2-110(C)(1)(e).

26. This point is valid as to the rights and duties of the lawyer and client in relation to each other, but not in regard to the lawyer acting for the client in relation to others as the representative of, and on behalf of, the client. It is on the basis of this distinction that one can argue that a code of legal ethics should deal only with the duties and obligations of lawyers. The weakness in this argument is that in acting for the client in relation to others, the lawyer would only have such rights and duties as the client has. See notes 52-79 and accompanying text *infra*.

27. See ABA CODE, *supra* note 9, Preliminary Statement.

28. See notes 1-8 and accompanying text *supra*.



The Preliminary Statement to the Model Code makes the point: "The Code . . . does . . . [not] undertake to define standards for civil liability of lawyers for professional conduct."<sup>29</sup> This means, of course, that a lawyer's conduct is governed by two sets of rules, the rules of legal ethics and the rules of positive law, a term used here to distinguish rules of general law from rules of ethics.<sup>30</sup>

Among other difficulties, the presence of two sets of rules directed to the same end, fairness in the conduct of legal affairs, creates substantial problems of analysis. One set, the rules of ethics, is ostensibly directed only to the duties of the lawyers; the other, the positive law, is directed to all persons, including lawyers and clients. On the one hand, the presumption is that clients have no ethical duties under the rules of ethics; on the other hand, the source of the lawyer's ethical duties, the rules of ethics or rules of positive law, is ambiguous. It is unclear, of course, how the rights and duties of the lawyer and client interrelate in these circumstances. A court, for example, may hold a lawyer liable to his client for damages resulting from misconduct that may also serve as a ground for disciplinary sanctions.<sup>31</sup> At the same time, the misconduct that warrants civil liability may not be the basis for discipline,<sup>32</sup> and the conduct that warrants discipline may not be grounds for liability, because a lawyer whose misconduct results in harm to a third party may be subject to disciplinary sanctions, but usually is not liable to the person harmed.<sup>33</sup>

As the above examples demonstrate, unless one assumes that rules of ethics and rules of positive law have different functions, to

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29. ABA CODE, *supra* note 9, Preliminary Statement.

30. The legal status of the Canons of Professional Ethics was uncertain. See H. DRINKER, *LEGAL ETHICS* 26 (1953). One court said that the disciplinary rules of the Code of Professional Responsibility were adopted pursuant to statutory powers and therefore have the force and effect of a statute. *State v. Alvey*, 215 Kan. 460, 464, 524 P.2d 747, 751 (1974). Their effect as statutory rules, however, seems limited to the conduct of lawyers for disciplinary purposes, not for the imposition of liability. Consequently, the distinction between rules of ethics and positive law has some validity, but the two terms are used here to distinguish rules of ethics from other rules of law.

31. See, e.g., *Kuehn v. Garcia*, 608 F.2d 1143 (8th Cir. 1979).

32. A malpractice action for letting the statute of limitations run is not likely to result in disciplinary proceedings. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

33. For examples of cases involving actions brought by physicians against lawyers for filing groundless actions against them, see *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Spencer v. Burglass*, 337 So. 2d 596 (La. Ct. App. 1976). In these cases, the physicians failed. More recent cases indicate a change in attitude on the part of the courts. See, e.g., *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 439 (1980).

superimpose rules of ethics for lawyers on rules of positive law without having them also apply to clients creates a logically untenable situation. The assumption requires the acceptance of the fallacy that unethical actions and unlawful actions constitute distinct categories of conduct, each with its own pigeonhole. But the fact is that unethical actions and unlawful actions do not belong in different pigeonholes; one should recognize ethical rules as an integral part of law, and legal rules as an integral part of ethics.

The need to integrate the two sets of rules leads to the most important point: self-regulation by the bar does not depend so much on black-letter rules as it does on the underlying principles from which the rules are derived. Indeed, the major obstacle to the successful integration of rules of ethics and rules of positive law seems to be that the fundamental principles of legal ethics remain unidentified. But since principles reflect problems at the policy level, the identification is not too difficult. Any lawyer faced with the problem of analyzing an ethical issue is faced with the following questions: What is the legal nature of the lawyer-client relationship? What is the source of the client's rights and duties? What is the source of the lawyer's rights and duties? What is the interrelationship of the rights and duties of the lawyer and client?

This is not to say that the lawyer articulates these questions, or even recognizes them. It is likely that he reacts intuitively and seeks a black-letter rule to support his intuition. And more often than not, he is correct in his conclusion, for usually the ethical problem is a simple one. At least it is usually one that lends itself to a simplistic solution in light of the current jurisprudence of legal ethics. Despite the fact that codes of legal ethics have been a part of our jurisprudence for almost a hundred years, beginning with the Alabama Code of Legal Ethics adopted in 1887,<sup>34</sup> the questions have remained not only unanswered, they have for the most part remained unexamined. The purpose of this article is not only to examine the questions, but also to suggest their answers. If valid, the answers constitute the fundamental principles underlying the rules of ethics. My argument, in summary fashion, is as follows.

First, the lawyer-client relationship can most usefully be viewed not as one of simple agency, with the lawyer being the agent of the client-principal, but rather as one of reciprocal agency, in which both lawyer and client occupy the roles of both principal and agent. Second, the important source of the client's rights and

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34. CODE OF ETHICS (of Alabama), reprinted in 118 Ala. XXIII-XXXIV (1887).

duties is not the positive law, but the efforts of the lawyer in interpreting that law and in using it to make particular rules for the client's situation. Third, the source of the lawyer's rights and duties is the positive law in two ways: when the issue involves the lawyer's interaction with the client, it is the positive law directly; when the issue involves the lawyer's action for the client in relation to others, it is the positive law as determined by the rights and duties of the client. And, finally, the interrelationship of the rights and duties of the lawyer and client occurs at two levels: on one level, when the lawyer interacts with the client, they are correlative in nature; on the other level, when the lawyer interacts with others on behalf of the client, they are corresponding in nature.

## II. THE LEGAL NATURE OF THE LAWYER-CLIENT RELATIONSHIP

The legal nature of the lawyer-client relationship is generally deemed to be one of agency based on contract. This simple agency theory is based on ample precedent. But if we define agency as "a consensual fiduciary relationship between one person—the agent—who agrees to act *for*, and under the direction or control of, another—the principal,"<sup>35</sup> there is other precedent that is not quite in accord with the theory. Thus, in a case in which the client's liability for his counsel's defamatory remarks was at issue, the court held that the client was not responsible because the lawyer was an independent contractor.<sup>36</sup> Further, contrary to the simple agency theory of the lawyer-client relationship, courts, more frequently than one might suspect, have given explicit recognition to the lawyer's authority to exercise his independent judgment, particularly in litigation matters.<sup>37</sup> As one court succinctly stated, "when a defendant accepts representation by counsel, that counsel has the authority to make the necessary decisions as to the management of the case."<sup>38</sup>

Perhaps the ultimate test for this authority of the lawyer over that of the client is the constitutionality of a state statute denying a client the authority to plead guilty without the consent of his lawyer, if he is charged with a felony punishable by death or life imprisonment without the possibility of parole. In *People v.*

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35. STEFFEN, AGENCY-PARTNERSHIP IN A NUTSHELL 3 (1977).

36. *Williams v. Burns*, 463 F. Supp. 1278 (D. Colo. 1979).

37. See, e.g., *Linsk v. Linsk*, 70 Cal. 2d 272, 449 P.2d 760, 74 Cal. Rptr. 544 (1969); *Warden v. Zanella*, — Pa. Super. Ct. —, 423 A.2d 1026 (Pa. Super. Ct. 1980).

38. *State v. Pratts*, 145 N.J. Super. 79, 88, 366 A.2d 1327, 1333 (1975).

*Chadd*,<sup>39</sup> the Supreme Court of California upheld such a statute. There was a very strong dissent, but the rationale for upholding the statute had been well-stated in a federal case<sup>40</sup> that denied an accused the right to refuse an automatic appeal under a related California statute. In that case, the court stated that "[i]n this and other contexts, it has been held that a defendant's waiver or attempted waiver of a right is ineffective where it would also involve the renunciation of a correlative duty imposed upon the courts."<sup>41</sup>

The fact that the court had a correlative duty did not change the fact that the client also had a duty, nor the fact that the lawyer had the authority to implement that duty. The ruling, then, demonstrates that there is a duty on the part of a client, and that the lawyer is not in all instances simply the agent of the client since he has substantial decisionmaking authority. This authority of the lawyer, of course, is less than consistent with the simple agency theory of the relationship, for with it the lawyer exercises the role of principal in some aspects of the lawyer-client relationship. If this is so, it would seem to follow that the client occupies the role of agent, and that the relationship could be characterized as one of reciprocal agency in which both lawyer and client occupy the roles of both principal and agent. The problem, then, is whether the client can be properly characterized as an agent of the lawyer. The traditional answer is no. As one court said:

Granted that for some purposes an attorney is treated as the agent of his client so that his conduct is imputed to the client . . . , the client is not the agent of his attorney. Thus, if the client is guilty of misfeasance in failure to disclose all facts . . . to his attorney or malfeasance in a false recitation, the dereliction is not imputable to counsel.<sup>42</sup>

The principal problem with the notion of the client as agent is that the client's duty to the lawyer has seldom been articulated as such. Contrary to the court's dictum, however, there is an implication here that "for some purposes" the client can be characterized as an agent of the attorney. For, if the dereliction of the client in misinforming the lawyer relieves the lawyer of liability to the client, the client has in fact breached a duty to inform the lawyer.

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39. 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981), *petition for cert. filed*, 49 U.S.L.W. 3826 (U.S. Apr. 20, 1981) (No. 80-1783).

40. *Massie v. Summer*, 624 F.2d 72 (9th Cir. 1980).

41. *Id.* at 73.

42. *Tool Research and Eng'r Corp. v. Henigson*, 46 Cal. App. 3d 675, 682, 120 Cal. Rptr. 291, 296 (1975).

The justification for this duty lies in the nature of the lawyer's task. The lawyer's efforts at all times involve the interaction of propositions of fact and rules of law. The client, of course, is the source of, and is responsible for informing the lawyer of, the facts. "Undoubtedly, it is the duty of the client to furnish to his attorney all the facts with respect to his case . . . and to do such other things as may be necessary for the prompt and diligent dispatch of business."<sup>43</sup> Indeed, a misrepresentation of the facts not only prevents the lawyer from doing a good job for the client, it can also be harmful to the lawyer in other ways. A lawyer who misinforms the purchaser of property because of misinformation provided by his client, the seller of the property, may be subjected to disciplinary action.<sup>44</sup>

True, the lawyer has a responsibility to ascertain the correctness of the facts. But this responsibility does not lessen the client's duty, for the lawyer's responsibility in this regard is directed more to others—the tribunal or the adversary—than to the client. Thus, a client may be held to be contributorily negligent by reason of his failure to exercise reasonable care in providing information to his lawyer.<sup>45</sup> In short, the relationship of a lawyer to his client "is not entirely a one-way street."<sup>46</sup> The client, then, can be usefully characterized as an agent of the lawyer for the purpose of providing the lawyer with information, for the use of the information is the lawyer's responsibility. Indeed, the protection accorded communications under the attorney-client privilege illustrates the importance of the client's duty to inform the lawyer correctly.

If the client has duties to the lawyer and the lawyer has decisionmaking authority regarding the fulfillment of those duties, there is no reason why the client cannot be characterized as an agent of the lawyer. This, in turn, means that the lawyer-client relationship may be characterized as one of reciprocal agency. Nevertheless, there seem to be two obstacles to the acceptance of this proposition; one is perceptual and the other is psychological.

The perceptual obstacle is that the issue does not arise very often. In the normal course of events, the client informs the lawyer fully and is willing to leave decisions about the implementation of his rights and duties to the lawyer. The lawyer tells the client what his rights and duties are and makes the necessary decisions, the

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43. *Sutherland v. McLean*, 199 N.C. 345, 350, 154 S.E. 662, 664 (1930).

44. *In re Banta*, — Ind. —, 412 N.E.2d 221 (1980).

45. *Hanson v. Wightman*, 14 Wash. App. 78, 86, 538 P.2d 1238, 1245 (1975).

46. *Matarrese v. Wilson*, 202 Misc. 994, 997, 118 N.Y.S.2d 5, 8 (1952).

client acquiesces, and the lawyer acts. And although the absence of conflict between the lawyer and client may alleviate the need for analysis, it does not alter the fact that the lawyer exercises the decisionmaking authority of a principal in the relationship, nor does it change the fact that the client has duties to the lawyer.

The psychological obstacle is more subtle. The intuitive resistance to the notion that the client is an agent of the lawyer is more than just a negative reaction based on the traditional view of the lawyer as the protector of the client's interest. For the idea that the client is an agent of the lawyer increases both the client's and the lawyer's responsibilities, and psychologically, the idea is a threat to the security of the relationship. The client who tells a lawyer about his past misdeeds is secure in the knowledge of the lawyer's confidentiality. The threat is related to the lawyer's responsibility to provide information about the client's continuing or future wrongs. Recognizing the client as the agent of the lawyer would give the lawyer, as principal, a duty to reveal this intended wrong. To avoid characterizing this revelation as a breach of the lawyer's duty of loyalty to the client, it is necessary to recognize the duty of the client to reveal his intended wrong. To say that a person who, for example, intends to kill X has a duty to inform X of this fact appears to be anomalous indeed. But this is only because the lesser duty to inform is overwhelmed by the larger duty not to kill. Can it reasonably be said that if the client intends to kill X, he has a legal right not to inform X of the fact?

The anomaly of recognizing the client as agent is no greater than the paradox of viewing the lawyer as an agent whose job is only to protect the client's rights and not to implement his duties, when the lawyer's authority is ultimately derived from a source other than the client. The factor that justifies the characterization of the lawyer-client relationship as one of reciprocal agency, and that is omitted from the simple agency theory of the relationship, is the status of the lawyer. Lawyers are authorized to administer law on behalf of private citizens (and are the only persons so authorized), and therefore cannot enter into a simple agency relationship with a client.<sup>47</sup> As an officer of the legal system, he has duties

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47. The lawyer, of course, is not a simple agent of the client despite the commonly held opinion that he is. At the least, he is an agent with special powers. A reasonable question, then, is why is it necessary or desirable to characterize the lawyer as a principal and the client as an agent? The answer is that the characterization of the lawyer as an agent with special powers does not reach the heart of the problem, which is not the lawyer's authority over the client but the client's responsibility to the lawyer. The source of ethical problems is

to others than the client, and he cannot subjugate those duties to the will of the client. For the lawyer to fulfill these duties to others, he must have authority to do so, and that authority must exist in relation to the client.

To suggest that the client may be an agent of the lawyer, however, is not to say that the lawyer is a principal for all purposes, nor is it to say that the client is an agent for all purposes. Indeed, the fallacy of the simple agency theory of the relationship is that the lawyer is an agent of the principal-client for the duration of the relationship. The fallacy becomes apparent when one recognizes that the relationship between a lawyer and his client is not one relationship, but a series of relationships. The nature and consequences of those relationships change during the course of the representation. When the lawyer renders advice to the client, the relationship between the two parties is different from that which exists when the lawyer assumes the role of advocate in the courtroom. In a similar manner, the relationship changes character when the lawyer is a negotiator or private legislator for the client.

The fact that the lawyer-client relationship is a series of different relationships suggests the core problem—the allocation of decisionmaking authority (which is the authority to control the incidents of the relationship) between the lawyer and the client. The allocation of this authority, however, ultimately depends upon how one resolves three other problems: the source of the client's rights and duties; the source of the lawyer's rights and duties; and the interrelationship of the rights and duties of the lawyer and client. I will examine first the source of the client's rights and duties.

### III. THE SOURCE OF THE CLIENT'S RIGHTS AND DUTIES

The ultimate source of the client's rights and duties is the positive law. This truism is misleading, for the immediate source of these rights and duties is the efforts of the lawyer. This is because rules of positive law are necessarily general in nature, and the lawyer's task is to particularize the general rules for the client in light of the client's situation.

This task of particularizing the law may be more ministerial than discretionary in performance. When the rules are clear and settled, as are those pertaining to the drafting of a simple will, the lawyer typically uses stereotyped procedures. This, indeed, is prob-

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not the wishes of the lawyer but the wishes of the client. The ultimate point is that the client may not do through the agency of a lawyer what he could not lawfully do for himself.

ably the normal situation, for otherwise the legal system would be overburdened and would inevitably break down. But there are enough unusual situations that call for the lawyer's exercise of discretion, and these are the situations to which the rules of legal ethics are primarily directed.

The generality of rules of law requires the lawyer both to interpret the positive rules and to use them as the source for creating particular rules for the client. Consequently, whether the lawyer's task is ministerial or discretionary, he performs it in one, or in a combination, of two ways: the process of interpretation and the process of private legislation. When the client seeks only advice as to the meaning of a rule of law, the lawyer's task is limited to interpretation. When the client seeks more, the lawyer's task requires the creation of a rule for the client that, however similar to other rules, is unique to the client. In either situation, the lawyer's efforts are the immediate source of the client's rights and duties.

This is less apparent, perhaps, in the case of interpretation than it is when the lawyer drafts a document for the client. The legal system depends largely upon voluntary compliance by the persons to whom a rule applies. A rule of law that is not understood, either through ignorance of its existence or the inability to comprehend it, has neither meaning nor effect. This is why when the lawyer interprets a rule of law for a client and gives it meaning, he effectively creates the client's rights and duties under that rule. Although the rule itself remains the ultimate source of the client's rights and duties, the lawyer's interpretation is the immediate source of those rights and duties. If the lawyer misleads his client about his rights and duties through improper interpretation, he may be held accountable.<sup>48</sup> Just as the power to tax is the power to destroy,<sup>49</sup> the power to interpret law is the power to legislate, even if only for the client.

When the lawyer drafts a legal document for the client, it is obvious that he is engaged in the process of private legislation. An executed document becomes private law that is as binding, if not more so, than a public law. All the proof in the world of the testator's change of mind will not void a validly executed will.

The lawyer as advocate in litigation is also engaged in a legislative process, although to be sure it is one that is highly sophisticated and adversarial in nature. Indeed, the common view seems to

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48. *Togstad v. Vesely, Otto, Miller & Keefe*, — Minn. —, 291 N.W.2d 686 (1980).

49. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).



be that the advocate seeks to protect or vindicate the right of his client only through the application of already established rules of law. The notion is undoubtedly partly a byproduct of the nineteenth-century fiction that courts merely interpret the law, but do not create it. The "brooding omnipresence in the sky"<sup>50</sup> theory of law, however, is one long exploded.<sup>51</sup> Since courts do make law, it follows that lawyers in litigation are engaged in a legislative process.

The legislative nature of litigation is obscured by the doctrine of precedent. Courts are supposed to decide like cases in like manner, and generally they do, but they necessarily make a new rule for the parties in each particular case. Analogical reasoning should not be allowed to obscure the point. The use of law involves the interaction of facts and rules, and the unique nature of facts inevitably calls for the formulation of a new rule, even if it is similar to a prior rule.

Although the ultimate source of the client's rights and duties remains the positive law, the fact that the efforts of the lawyer are the immediate source of these rights and duties has substantial consequences for the responsibility of both the client and the lawyer. The client's interaction with the lawyer in the course of representation gives the client a much larger role in the process than has generally been recognized. The point relates back to the proposition that the lawyer-client relationship is one of reciprocal agency. It also relates forward to the problem of the sources of the lawyer's rights and duties.

#### IV. THE SOURCE OF THE LAWYER'S RIGHTS AND DUTIES

The ultimate source of the lawyer's rights and duties, like those of the client, is positive law. This truism, however, is even more misleading in regard to the lawyer than it is to the client, for it is only his relationship to the lawyer that is the client's concern. The lawyer, on the other hand, must be concerned not only with his relationship to the client, but also with his relationship to others when acting on behalf of the client. There is, in short, law that governs the lawyer's interaction with the client, and law that governs the lawyer's interaction with others as a representative of the client and on his behalf. The positive law is a direct source of the lawyer's rights and duties in regard to his direct dealings with

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50. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218, 222 (1917) (Holmes, J., dissenting).

51. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

the client; when he is dealing with others on behalf of the client, the source of the lawyer's rights and duties is the rights and duties of the client.

In many respects, the duties imposed on the lawyer in his relation to the client are the same as those applicable to all persons. Embezzling funds, whether or not the victim is a client, is as much a criminal offense for the lawyer as it is for anyone else, just as it is extortion to induce a client to pay fees to which the lawyer is not entitled.<sup>52</sup> In other respects, the duties are collectively unique to the lawyer, although they may apply individually in other situations. Thus, the positive law directly governs the lawyer's duty of competence, the breach of which may give rise to a malpractice action.<sup>53</sup> The positive law also requires the lawyer to keep the client fully informed as to the matter of representation. Failure to do so may cause the lawyer to be held liable for the client's loss.<sup>54</sup> Further, the positive law places a high premium on the client's right of confidentiality, as cases on lawyer disqualification demonstrate. Finally, the positive law may provide relief to one harmed by a conflict of interest on the part of the lawyer, for example, because of the lawyer's business dealings with the client.<sup>55</sup> All of these duties, of course, are contained in the rules of ethics, but this does not alter the fact that the positive law imposes them directly.

The lawyer's relationship with the client when he is acting for the client in dealing with others is a more complex problem. The source of the lawyer's rights and duties remains the positive law, but in a different way than when he is dealing with the client directly. When one acts in a representative capacity on behalf of and in the interest of another there are two issues. One is the existence of his responsibility to the third party. The other, assuming its existence, is the measure of that responsibility: Is it his own rights and duties or the rights and duties of the person he is representing?

On the one hand, as the cases tell us, the lawyer's duty is to his client. "[T]he lawyer must be loyal to his client, and there is no room for existence of a duty running to the adversary."<sup>56</sup> On the other hand, as the cases also tell us, the lawyer may have a duty to

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52. *United States v. Blitzstein*, 626 F.2d 774 (9th Cir. 1980).

53. *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980).

54. *Spector v. Mermelstein*, 361 F. Supp. 30 (S.D.N.Y. 1972), *aff'd in part*, 485 F.2d 474 (2d Cir. 1973).

55. *In re Brown*, 277 Or. 121, 559 P.2d 884 (1977).

56. *Tappen v. Ager*, 599 F.2d 376, 378 (10th Cir. 1979).

the adversary. "We hold that it is a per se violation of an attorney's duty for him to draw a note which is on its face usurious . . . [and] that duty runs at least to the named parties to the note . . . ." <sup>57</sup> Moreover, a lawyer whose conduct results in a mistrial may be liable to his adversary for attorney's fees. <sup>58</sup>

More frequently, however, the cases speak of the lawyer's duty to the court: "Attorneys, as officers of the court, have a duty to cooperate with the court to preserve and promote the efficient operation of our system of justice." <sup>59</sup> This is dictum frequently reiterated in the cases. On occasion, however, the duty is made more specific. "Counsel have no duty to support a motion having no basis in fact, and, indeed, have an affirmative obligation to inform the court of the falsity of a client's assertions." <sup>60</sup> Even in these cases, the court recognizes an implicit duty to the adversary when it speaks of the duty to the court, for it is the adversary upon whom the consequences are visited.

The duty of the lawyer to both the adversary and the tribunal clearly exists. <sup>61</sup> The existence of the duty, however, does not provide its measure. Is that measure the rights and duties of the lawyer or of the client? Superficially, the answer appears to be the rights and duties of the lawyer, for it is the lawyer's conduct that is of concern. But there is something of a paradox here. The sanctions for the lawyer's misconduct are most frequently imposed on the client, although they are indirect in nature. It is the client who suffers the main loss when the judgment is reversed or the agreement invalidated because of the lawyer's misconduct. The point is made even more sharply by the fact that courts on occasion do recognize the anomaly here and impose sanctions directly on the lawyer in the form of fines for his fault. <sup>62</sup> Even so, the notion that the responsibility for the lawyer's misconduct is that of the client dies hard, particularly in view of the simple agency theory of the

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57. *Silver v. George*, 618 P.2d 1157, 1159 (Hawaii Ct. App. 1980).

58. *Employers Ins. v. Hall*, 49 N.C. App. 179, 270 S.E.2d 617 (1980), *cert. denied*, 301 N.C. 720, 276 S.E.2d 283 (1981).

59. *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979).

60. *State v. Gilcott*, 420 A.2d 1238, 1240 (Me. 1980).

61. The duty is not limited to the judicial process. Although the courts will reverse a client's judgment because of the lawyer's misconduct, they will also invalidate an agreement the parties have made in the private legal process for unfairness on the part of the lawyer.

62. *Moran v. Rynar*, 39 A.D. 718, 332 N.Y.S.2d 138 (1972). "In such cases, we have held that an attorney's neglect or inadvertent error should not deprive his client of his day in court; and that it is proper to save the action for the client, while imposing upon the attorney, personally, a penalty for his neglect." *Id.* at 719, 332 N.Y.S.2d at 141 (citations omitted).

lawyer-client relationship. Thus, in *Decker v. Anheuser-Busch*,<sup>63</sup> the court held that notice to the lawyer is notice to the client and quoted the following language from *Link v. Wabash Railroad*:<sup>64</sup> "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"<sup>65</sup>

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63. 632 F.2d 1221 (5th Cir. 1980). The issue in the case was whether an action under Title VII of the Civil Rights Act of 1964 had been filed within the ninety-day statutory period. It was filed 88 days after the client received notice, but 91 days after the lawyer received notice. The district court ruled in favor of the plaintiff on the premise that the period began when notice was delivered to the client. The appellate court reversed. Following the statement quoted in the text accompanying note 65 *infra*, the court said: "It is prudent, expedient and entirely consistent with the essence of the attorney-client relationship and the responsibilities assumed by the attorney. We see no reason to question the propriety of its application in the matter now before us." *Id.* at 1223. Judge Rubin dissented: "In effect, my brethren substitute a malpractice claim against counsel for the statutory right to relief. . . . A malpractice claim is a paltry remedy; I would not thrust it on a claimant allegedly denied her statutory rights." *Id.* at 1225.

64. 370 U.S. 626 (1962).

65. *Id.* at 634 (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879), quoted in *Decker v. Anheuser-Busch*, 632 F.2d at 1223. The following excerpt from an excellent article discusses the import of the *Link* case:

A dissenting opinion in the Supreme Court has even suggested that dismissal of a case because of the lawyer's misconduct may be a matter of constitutional moment, although the case came to the Court in its capacity as supervisor of the federal procedural system. In *Link v. Wabash Railroad Company*, a personal-injury action, the district court dismissed with prejudice for failure of prosecution, after the attorney had failed to appear at a scheduled pretrial conference. To the suggestion that this was unfair to the client the court replied: "[P]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation . . . ." To Justice Black, in an opinion joined by Chief Justice Warren, however, it seemed "contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as his record shows, was simply trusting his lawyer to take care of his case as clients generally do"—so far contrary that the dissenting opinion suggested that the dismissal amounted to the taking of property without notice and hearing, thereby depriving the plaintiff of due process of law: "How could he know or why should he be presumed to know that it was his duty to see that the many steps a lawyer needs to take to bring his case to trial had been taken by his lawyer?" As an alternative general rule the dissent proposed that "no client is ever to be penalized . . . because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head."

The battle thus joined continued when the Court came to adopt amendments to the rules of procedure 4 years later. In a dissent from the order amending the rules, Justice Black proposed that rule 41, which governs dismissals, be amended to add the following provision:

No plaintiff's case shall be dismissed or defendant's right to de-

The telling phrase in this quote is "representative litigation," for it makes the point that the lawyer acts for the client only in a representative capacity. The answer to the question of the measure of the responsibility of the lawyer thus seems obvious: it is the rights and duties of the client whom he is representing. The lawyer's rights and duties in acting for the client, in short, are derivative in nature.<sup>66</sup>

The derivative nature of the lawyer's rights and duties becomes clearer when we realize that when the issue is whether a lawsuit has been properly filed, the problem is not the lawyer's right to file the action, but the client's right to do so. This analysis explains the unwillingness of courts to hold a lawyer liable to the defendant for filing a groundless action against him. As one court rationalized, to hold the lawyer liable would be to chill citizens' right of access to the courts.<sup>67</sup> Consequently, a lawyer has no right to intervene in a client's action for the purpose of protecting his fee.<sup>68</sup> Even a defendant in a criminal case has no right to a frivolous appeal, which may be dismissed upon a determination that it is frivolous.<sup>69</sup> Similarly, it follows that when the issue is whether to reveal information to an adversary in a negotiating process, the question is not the lawyer's duty to reveal but the client's, for it is the client's agreement that may be invalidated.<sup>70</sup>

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fend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense.

This provision was designed to reach the situation in the *Link* case that had provoked the earlier dissenting opinion. Despite its narrow emphasis on failure to obey a court order, as far as can be seen, the rest of the Court ignored the proposal. Meanwhile, back in the district court, Link's lawyer was trying a case for a new client. When the lawyer failed to appear at the time set for trial, the court dismissed with prejudice.

Mazor, *Power and Responsibility in the Attorney-Client Relationship*, 20 STAN. L. REV. 1120, 1126-27 (1968) (footnotes omitted).

66. This, of course, is the basis for the rationalization that sanctions for the lawyers' misconduct may properly be imposed indirectly on the client under the simple agency theory of the relationship. When one recognizes the lawyer-client relationship as one of reciprocal agency, the rationale becomes less rational. There is a difference between determining the measure of one's responsibilities and holding one accountable for the failure to fulfill those responsibilities.

67. *Spencer v. Burglass*, 337 So. 2d 596 (La. App. 1976).

68. *American Gen. Inv. Co. v. St. Elmo Lands*, 391 So. 2d 570 (La. App. 1980).

69. *Bethay v. State*, 237 Ga. 625, 229 S.E.2d 406 (1976).

70. *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

Canon 7 of the Model Code of Professional Responsibility, which states that a lawyer should represent his client zealously within the limits of the law, reflects the idea that the lawyer's rights and duties in acting for the client are derivative of the client's rights and duties. Thus, DR 7-102 requires that a lawyer represent a client only within the bounds of the law. He cannot "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harrass or maliciously injure another."<sup>71</sup> Nor can he "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."<sup>72</sup> The only way the lawyer can comply with the rules in determining whether his intended conduct is permissible is to determine the client's rights and duties under the law. In one case, for example, a lawyer was disciplined for, among other things, advising his client to file a false application for a liquor license.<sup>73</sup> Obviously, the lawyer had a duty to determine the client's right or duty under the law and to act accordingly.

Most lawyers probably act in accordance with the above analysis, at least intuitively. Nevertheless, it has not become a conscious analytical concept, apparently because lawyers do not perceive the client's rights and duties under the law as a source of their own rights and duties in the representation of the client. Consequently, the rights and duties of the lawyer, at least under the rules of ethics, are viewed as being separate and distinct from those of the client. This attitude was well expressed by a district court in ruling on a motion to disqualify. After saying that the court would neither tell clients whom they could hire as lawyers, nor tell lawyers whom they could represent as clients, the court said: "Breaches of attorney-client privileges or other ethical duties shall be raised in appropriate grievance proceedings or in other separate actions against counsel."<sup>74</sup>

The rights and duties of the lawyer in acting for the client, of course, cannot be separated from the rights and duties of the client. The fault in assuming otherwise is in assuming that the signif-

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71. ABA CODE, *supra* note 9, DR 7-102(A)(1).

72. *Id.* DR 7-102(A)(7).

73. *In re Nullo*, 127 Ariz. 299, 620 P.2d 214 (1980).

74. *Musicus v. Westinghouse Elec. Co.*, 621 F.2d 742, 743 (5th Cir. 1980) (quoting the district court's unpublished opinion). The appellate court disagreed with these sentiments, reversed, and held that "[a] district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it." *Id.* at 744.

icant relationship involved is that of the lawyer with the tribunal or the lawyer with the adversary. Reflection demonstrates that the assumption is wrong, but the fault arises naturally from two factors: the status of the lawyer as an officer of the court and of the legal system, and the fact that rules of ethics are procedural rather than substantive in nature. The combination of these factors makes it appear that it is the lawyer's relationship, not the client's, that is the significant one.

The status of the lawyer notwithstanding, it is the client's right that is to be vindicated or his duty that is to be implemented. In regard to the second factor, the recognition of rules of legal ethics as procedural rules seems to be a subsumed proposition to which little thought has been given in terms of either justification or effect. That the proposition is justified is indicated by the fact that ethical rules are for the lawyer acting for the client, and by definition a lawyer can exercise and implement only the procedural, not the substantive, rights and duties of the client. As one court stated: "The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself."<sup>75</sup>

The effect results from the fact that rules of procedure are for the lawyer, and not for the client to use. By nature, they are more readily and easily manipulated than substantive rules, particularly in an adversary system of law administration. The point is best illustrated, perhaps, by the abuse of the rules of discovery. Some lawyers use these rules without compunction to the detriment of an adversary and in flagrant breach of the purpose or intent of the rules themselves. The proposition that these rules do, in fact, define the rights and duties of clients is indicated by the fact that "[a]lthough a defendant has a right to try his own case, he 'is bound by the same rules of procedure as those admitted to practice law and is entitled to no indulgence he would not have received if represented by counsel.'"<sup>76</sup>

The derivative nature of the lawyer's rights and duties in acting for the client suggests an interrelationship between rules of positive law and rules of ethics that has generally been ignored. Yet, courts are further along in recognizing that relationship than

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75. *Linsk v. Linsk*, 70 Cal. 2d 272, 276, 449 P.2d 760, 762, 74 Cal. Rptr. 544, 546 (1979).

76. *Shelton v. Julian*, 610 S.W.2d 129, 130 (Mo. App. 1980) (quoting *Commerce Bank v. Conrad*, 560 S.W.2d 385, 392 (Mo. App. 1977)).

most lawyers may realize. The fact that courts have gone a long distance toward integrating the rules of legal ethics and rules of positive law is reflected when they use the doctrine of collateral estoppel to employ the findings made in a previous disciplinary proceeding against the lawyer in support of a grant of summary judgment in a malpractice action,<sup>77</sup> impose costs on the lawyer and the client for abuse of discovery,<sup>78</sup> and rule that the trial judge may properly include an attorney disciplinary rule in his charge to the jury in a non-malpractice case.<sup>79</sup>

The interrelationship between the two sets of rules, though not always acknowledged, does exist. It is this interrelationship that explains the source of the lawyer's rights and duties. When he is interacting with the client, the source is the positive law directly. When he is interacting with others on behalf of the client, the source is the positive law by way of the client's rights and duties under the law. And since the positive law is usually reflected in rules of ethics, there is the problem of the interrelationship of the rights and duties of the lawyer and client.

#### V. THE INTERRELATIONSHIP OF THE RIGHTS AND DUTIES OF THE LAWYER AND CLIENT

The interrelationship of the rights and duties of the lawyer and client occurs at two levels and in two different ways. The first level is the rights and duties of the lawyer and client in relation to each other; the second level is the rights and duties of the lawyer and client in relation to the tribunal and adversaries when the lawyer acts for the client as his representative.

At the first level, the rights and duties of the lawyer and client may be characterized as correlative. For example, the client has a right to a competent lawyer and the lawyer has a duty to be competent. The client has a duty to provide the lawyer with full information concerning the problem he wants the lawyer to resolve, and the lawyer has a right to be given full information.

At the second level, the rights and duties of the lawyer can be characterized as corresponding in nature, since the lawyer's rights and duties in acting for the client are derived from the client's

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77. *Kuehn v. Garcia*, 608 F.2d 1143 (8th Cir. 1979). The appellate court reversed on this point since jurisdiction was founded on diversity and the state law still retained the mutuality doctrine, but it affirmed the grant of summary judgment as being the only permissible result on the stipulated facts.

78. *Dorey v. Dorey*, 609 F.2d 1128 (5th Cir. 1980).

79. *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).



rights and duties. The lawyer's right to appeal the case, for example, depends upon whether the client has a right that the case be appealed.<sup>80</sup>

The central problem underlying the interrelationship of the rights and duties of the lawyer and client is the allocation of decisionmaking authority between the two parties. If the relationship were one of simple agency, the presumption would be that the authority to make decisions belongs to the client as principal. But the lawyer's unique status precludes this, for not only does the lawyer have authority to make certain decisions, his efforts can be seen as the immediate source of the client's rights and duties. At the same time, when he is acting for the client, his authority is measured by the client's rights and duties under the positive law. The relationship between lawyer and client, then, is a reciprocal one in which both parties have decisionmaking authority.

To determine the allocation of this authority, it is well to begin with the three principles of conduct governing the relationship of the lawyer and client with each other and their relationships with the tribunal and with adversaries. These principles are *loyalty* as to the relationship of lawyer and client, and *candor* and *fairness* as to their relationship with the tribunal and with adversaries. A moment's reflection will demonstrate that the principle of loyalty gives rise to correlative rights and duties, and the principles of candor and fairness give rise to corresponding rights and duties.

The lawyer's duty of loyalty has four components: competence, communication, confidentiality, and conflicts-of-interest.<sup>81</sup> Each of these components, except confidentiality (a point to which we will return) represents a duty of the lawyer for which the client has a correlative right. It is therefore easy to see that the client's right that the lawyer be competent imposes upon the lawyer a duty to be competent, the client's right to be fully informed carries with it the duty of the lawyer to keep him fully informed, and the client's right to the lawyer's independent professional judgment creates the lawyer's duty to avoid interests that might interfere with the fulfillment of this duty.

Correlative rights and duties, however, present no problem regarding the allocation of decisionmaking authority, for that allocation has been made by definition. The lawyer, having the responsibility to fulfill his duties, has the authority to make the decisions

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80. See note 69 and accompanying text *supra*.

81. See ABA CODE, *supra* note 9, Canons 4-6.

relative to those responsibilities. The question that arises is whether the duty has been, or is being, fulfilled or breached. There may be disputes between lawyer and client about whether, for example, the lawyer should call a certain witness. Since this decision comes within the purview of the lawyer's competence, the decision is his.

The problem of allocating the decisionmaking authority between the lawyer and client arises when the lawyer is acting for the client in relation to third parties. The issue is one of corresponding rights and duties that occur under the principles of candor to the tribunal and fairness to others. In dealing with these problems, there is no allocation of decisionmaking authority by definition between the lawyer and client as in the case of correlative rights and duties. Nor can there be such an allocation, since the lawyer's rights and duties are derived from the client and are, therefore, the same as the client's.

Since the lawyer's primary concern is the client's rights, the problem of who makes what decisions seldom arises in regard to the rights of the client unless the lawyer unwittingly usurps the authority of the client to make decisions about his substantive rights. He does this, for example, when he stipulates the vicarious liability of his client in litigation. In reaching this conclusion, the court in *Graves v. P. J. Taggares Co.*<sup>82</sup> said in response to its rhetorical question of what is a substantial right:

In this jurisdiction, substantial rights have been held to have been compromised by surrendering property without securing a rescission of the contract to purchase . . . ; settlement of a tort cause of action . . . ; not recording the testimony necessary for review in a parental deprivation proceeding . . . ; stipulating to a contingent consent judgment . . . ; stipulating that the client is mentally ill without a hearing . . . .<sup>83</sup>

In these situations, the lawyer usurps a right of the client, and, as the cases show, a lawyer cannot exercise a substantive right of the client. The caveat to remember is that a lawyer can exercise only procedural rights and duties of the client. When there is a substantive right of the client at issue, the decision is for the client.

The procedural rights and duties, however, are the same for the lawyer and his client. This factor suggests that the decisional authority of the lawyer relates to procedural rights and duties,

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82. 94 Wash. 2d 298, 616 P.2d 1223 (1980).

83. *Id.* at 304-05, 616 P.2d at 1227-28 (citations omitted).

which are corresponding in nature. There are several reasons for this. First, the matters involved are matters of law which are the province of the lawyer. Second, the lawyer is the immediate source of the client's rights and duties. And third, the lawyer, as an officer of the legal system, has a responsibility in the administration of the law that the client does not share.

The difficulty arises when the lawyer finds it necessary to implement a client's duty in compliance with the duty of candor to the tribunal or fairness to others. Here, the lawyer has, or should have, decisionmaking authority over the client's procedural rights and duties. But since the distinction between procedure and substance is not always clear, the lawyer also has decisional authority over the client's substantive duty to remain within the limits of the law—for example, not to file a false application for a liquor license.<sup>84</sup>

Although these rights and duties may relate in form to different kinds of conduct, they all ultimately reduce to a question of revealing or concealing information. The maxim that knowledge is power has no application more appropriate than to the practice of law. Candor to the tribunal requires the absence of lies; unfairness has its genesis in deceit, and concealment enables the lawyer to go beyond the limits of the law for his client. This fact narrows the issue to that of the client's right and the lawyer's duty of confidentiality. Is confidentiality a correlative duty of the lawyer or is it a corresponding right?

The traditional answer is that it is a correlative duty, and, indeed, it appears to be such. The client has a right that the lawyer not discuss his affairs in idle gossip, and the lawyer, we assume, has a correlative duty not to do so. The point overlooked, however, is that the issue does not arise in the interaction of lawyer with client that gives rise to correlative rights and duties. It arises only when the lawyer interacts with others against whom the client has a right that the information not be revealed. Analytically, then, confidentiality is a corresponding right, a point which explains the fact that the attorney-client privilege belongs to the client and not the lawyer.

The point becomes more clear when we recognize that confidentiality is the reverse of candor. Since candor is a corresponding duty, it follows logically that confidentiality is a corresponding right. To say that the client has a right to confidentiality and the

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84. See note 73 and accompanying text *supra*.

lawyer a duty of candor in regard to the same information creates an antinomy. That is why it is necessary to deal with the issue in terms of corresponding rights and duties.

The exemplar of the problem, of course, is client perjury. While the resolution of the problem is not by any means characterized by case law consistency, Professor Charles Wolfram, in a notable article, has concluded: "[M]ost courts that have discussed the issue agree that the attorney is under a professional obligation to disclose known client perjury to the court unless it is corrected by subsequent client testimony."<sup>85</sup> As one court said: "[N]o duty exists to the client when the client perjures himself to the knowledge of the attorney. Such conduct by the client falls outside the attorney-client relationship."<sup>86</sup> The relationship, however, continues to exist, and it seems analytically better to say that the lawyer may exercise the client's duty in this regard. This analysis destroys the self-serving defense of loyalty to the client, for the lawyer's implementation of the client's duty for the client cannot be correctly characterized as an act of disloyalty. As one court stated the point:

We cannot permit a member of the bar to exonerate himself from failure to disclose known perjury by a self-serving statement that in his judgment he had a duty of non-disclosure so as to protect his client which is paramount to his duty to disclose the same to the court, of which he is an officer, and to which he in fact, owes a primary duty under circumstances such as are evidenced in this case.<sup>87</sup>

What is true for civil cases, however, is not necessarily true for criminal cases. Courts tend to treat the matter of client perjury differently in the two types of cases. In *Lowery v. Cardwell*,<sup>88</sup> the court held that an accused was denied due process when her lawyer in effect revealed her perjury to the judge, who was also the trier of fact. The conflict between the statutory duty not to commit perjury, and the constitutional right to due process, to testify, and to have effective assistance of counsel, however, only supports the analysis of the lawyer's right or duty in regard to confidentiality as corresponding in nature. It demonstrates that the problem is not one of the rights and duties of the lawyer but of the client. Until the courts resolve the issue in terms of the client's rights and du-

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85. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 868 (1977).

86. *Committee on Professional Ethics and Conduct v. Cray*, 245 N.W.2d 298, 306 (Iowa 1976).

87. *In re King*, 7 Utah 2d 258, 262, 322 P.2d 1095, 1097 (1958).

88. 575 F.2d 727 (9th Cir. 1978).

ties, the lawyer is left in an ethical limbo.

Client perjury is only one aspect of the problem that may be characterized as the confidentiality-candor problem. The above analysis of this problem applies not only to the duty of candor to the tribunal but also to the duty of fairness to others, a problem that most frequently reduces itself to the matter of revealing or concealing information.

The interrelationship of the rights and duties of the lawyer and client thus leads into the final point—the function of a code of legal ethics.

## VI. THE FUNCTION OF A CODE OF LEGAL ETHICS

The function of a code of legal ethics is twofold: to define the rights and duties of lawyers and to define the rights and duties of persons acting through the agency of a lawyer as clients. Yet, the proposition that a code of legal ethics should define the rights and duties of clients as well as lawyers is not one that has been prominent in the jurisprudence of legal ethics. Reasons for this limited view, speculative though they may be, are worth considering.

There is, of course, the traditional view that the function of a code of legal ethics is merely to promulgate rules of conduct for the lawyer. The justification for this limited role of the rules is that they are drafted by lawyers for lawyers, and the profession's jurisdiction is limited; that is, lawyers have no right to legislate either the rights or duties of clients. This view overlooks the fact that the profession only proposes, and the court disposes, since the rules do not become effective until a court adopts them.<sup>89</sup>

This justification, however, has a psychological basis in that it almost surely has its genesis in the notion that the lawyer's role is to protect the client's rights, not to enforce the client's duties. To give explicit recognition to the rights and duties of the client in rules of legal ethics would constitute a threat to the lawyer's freedom to act only for the client's benefit. To be a protector of the client's interest *prima facie*, at least, provides protection for both the lawyer and the client against sanctions for a lawyer's less-than-professional conduct. In an adversarial system of law administra-

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89. It is not necessary to limit the argument to this point. If a person can conduct his legal affairs only through the agency of a lawyer, lawyers can properly establish the conditions for conducting legal affairs so long as the conditions are consistent with positive law. These conditions necessarily include a consideration of the client's legal rights and duties. Indeed, the exclusion of the rights and duties of clients from codes of legal ethics is what results in antilegal rules of ethics.

tion in which the client acts through a lawyer, it is easy to argue that the client is not responsible because "the lawyer did it," and the lawyer is not accountable because "he did it for the client." This argument overlooks the fact that ultimately the positive law governs the conduct of both lawyer and client, and the advantages sought by limiting the application of rules of ethics to lawyers may be, and often are, not only illusory, but harmful to both lawyer and client.

Finally, there seems to be an assumption abroad that ethical conduct and legal conduct constitute discrete categories, each with its own pigeonhole. If so, it is because the wish is father to the thought, for unethical conduct cannot always be clearly distinguished from unlawful conduct. The two overlap and intersect, and at times exist on a continuum with unethical conduct changing imperceptibly into unlawful conduct. Is the lawyer who takes a default judgment because of the oversight of adversary counsel guilty of unethical or unlawful conduct? If it is legal, so the assumption goes, it is ethical. But if the court sets aside the default judgment, was the lawyer's conduct unethical, unlawful, or neither? The answer is not clear, and perhaps not important, but the problem makes the point: the treatment of rules of ethics as a body of rules separate and distinct from the positive law is based on a fallacy.

Reasons why something has not been, however, are less persuasive than a reason why it should be. This reason we find in the benefit to the lawyer of defining the rights and duties of clients in codes of legal ethics. To do so provides the lawyer with a basis for analyzing ethical problems and thus for exercising discretion in the representation of clients that is otherwise lacking. Experience with both the American Bar Association's Code of Professional Ethics<sup>90</sup> and its successor, the Model Code of Professional Responsibility,<sup>91</sup> has demonstrated the point.

The principal analytical difference between the Canons and the Model Code is that the former employed the hortatory "should,"<sup>92</sup> while the latter employs the mandatory "shall"<sup>93</sup> in the disciplinary rules, with the significant exception of DR 4-101(C),<sup>94</sup> which permits the lawyer to reveal the client's confidences in certain situations. The difference in the "should" and "shall" termi-

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90. ABA CODE OF PROFESSIONAL ETHICS (1948).

91. ABA CODE, *supra* note 9.

92. See, e.g., ABA CANONS OF PROFESSIONAL ETHICS No. 22.

93. See, e.g., ABA CODE, *supra* note 9, DR 1-101 to -103.

94. *Id.* DR 4-101(C).

nology, of course, is that the former term appears to make the rules discretionary, the latter to make them mandatory.

It is easy to criticize the Canons for their "should" and to praise the Model Code for its mandatory "shall." But there is reason to say that the Canons, properly interpreted, were nearer to being correct in their approach than the Code is in its approach. The hortatory "should" in the Canons surely was not intended to be merely hortatory; almost certainly, it was to provide the lawyer with a measure of discretion in the representation of a client. The hortatory "should" in the Canons says, in effect, that in the normal situation, the lawyer shall do what the Canon requires, but he may do otherwise if in his judgment the circumstances require it.

In using the hortatory "should," the draftsmen of the Canons were responding intuitively to a problem that they could not, or at least did not, articulate. The problem was that the lawyer in the representation of a client must have a measure of discretion. This is so for the simple reason that both clients and their situations vary widely. But being concerned only with the duties of lawyers, and not clients, the draftsmen did not know how to provide that measure of discretion other than by the use of the hortatory "should." This point was not recognized, and, not surprisingly, the approach did not work; most lawyers viewed the Canons as being wholly discretionary.

Except for DR 4-101(C),<sup>95</sup> which is wholly discretionary and which, incidentally, involves the fundamental issue in legal ethics, the lawyer's right or duty of confidentiality, the Model Code of Professional Responsibility goes to the other extreme with the mandatory disciplinary rules. The draftsmen of the Code, however, did recognize the need for the lawyer to have discretion in the representation of a client, for they dealt with the problem in the Ethical Considerations. Thus, EC 7-11 reads in part: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . or the nature of a particular proceeding."<sup>96</sup> And EC 7-12 reads in part: "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer."<sup>97</sup> The Model Code, however, does not incorporate these considerations into the disciplinary rules. Having

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95. *Id.*

96. *Id.* EC 7-11.

97. *Id.*

rejected the attempt in the Canons to provide a basis for the lawyer's exercise of discretion, the Model Code failed to provide any substitute. Both documents suffer from the same fundamental failing: the absence of any meaningful measure of the lawyer's exercise of discretion.

The appropriate measure of the lawyer's exercise of discretion in the representation of clients, of course, is the rights and duties of the client. This is why one of the functions of a code of ethics is to define the rights and duties of clients, and this is why it should be done explicitly rather than implicitly. The logic of the conclusion is inexorable if the factors discussed above are valid: the nature of the lawyer-client relationship is a reciprocal one; the lawyer's efforts are the immediate source of the client's rights and duties; the lawyer's rights and duties in acting for the client are derived from the client's rights and duties; and it is the interrelationship of the rights and duties of the lawyer and client that provides the basis for the allocation of decisionmaking authority between them.

## VII. CONCLUSION

The ultimate function of a code of legal ethics is the same as that of any set of ethical rules: it is to keep within reasonable bounds the law of self-interest that operates at all times and in all places. The proposition is more realistic than cynical, for self-interest is the source of human motivation. Within the reasonable bounds imposed by rational rules of legal ethics, such self-interest is both necessary and desirable for the lawyer. But without a recognition of the client's duties, as well as his rights, the rules of ethics too often prove to be less than rational; they provide the lawyer with a loophole in the law of self-interest. He acts, he can say, not in his self-interest, but in the interest of the client. The fiction is hard to refute, for it not only contains a measure of truth—it is the pervading myth of the profession. Lawyers, more than any other group, have made much of the psychological disposition of humans to be loyal to those they are called upon to help. There is, however, something amiss when the lawyer feels justified in co-opting the procedures of the legal process to the exclusive benefit of his client. In attempting to defeat a legitimate claim by the frivolous use of expensive depositions against an impecunious party, for example, the lawyer corrupts the process.

The power to corrupt the process is the concern, and it demonstrates the difference between legal ethics and other rules of eth-



ics. Legal ethics is coupled with a power that affects not only the lawyer and the client but others as well. The private lawyer is engaged in the administration of law no less than the public official, and how he performs his task is no less important, perhaps more so. Herein lies the importance of having rules of legal ethics that are not only valid, in that they are consistent, but also useful, in that they provide the lawyer with a sound basis for resolving ethical problems in the representation of a client. To do this, one must bring the client directly into the equation of interests that the lawyer must solve. The time has come to dispense with the fiction that rules of legal ethics are only for lawyers, not for their clients. And the profession should act before it becomes necessary for the courts to do so. *NAACP v. Button*<sup>98</sup> and its progeny contain a lesson that applies not only to anticompetitive rules of ethics but to antilegal rules of ethics as well.

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98. 371 U.S. 415 (1963).