

University of Miami Law Review

Volume 35
Number 4 *Sixth Annual Baron de Hirsch Meyer
Lecture Series*

Article 7

7-1-1981

The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod

W. William Hodes

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. Miami L. Rev. 739 (1981)
Available at: <https://repository.law.miami.edu/umlr/vol35/iss4/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod

W. WILLIAM HODES*

The Discussion Draft of the Model Rules of Professional Conduct created a firestorm of controversy when it was promulgated in January, 1980; during the next sixteen months the merits of the draft were attacked and defended in print, and at many formal and informal debates and roundtables. The author argues that, contrary to stereotype, the Discussion Draft did not propose radical readjustments of the lawyer's role in the adversary system. Furthermore, since lawyers are already subject to duties imposed by law outside any professional code, much of their conduct will, in practice, be controlled by that law, and lawyers will legitimately interpret a code to encompass those duties. The author concludes that a major contribution of the Discussion Draft was to expose as a myth the public's perception of the lawyer as a "hired gun," and to make explicit the fact that the question of the lawyer's obligations to the client is itself a difficult legal question that requires close analysis according to the facts of each case. In this view, an important function of any code of professional conduct is to educate not just lawyers, but clients.

In an Addendum, the author assesses some of the changes made in the Proposed Final Draft, issued in May 1981. He concludes that it is now even more clear that a radical reworking of the adversary system neither was intended nor will result. The organized Bar and individual lawyers must still take on as an affirmative duty the task of educating the public about the limitations of, and the true role of lawyers in, our legal system.

* Assistant Professor of Law, Indiana University School of Law, Indianapolis, Indiana.

Professor Richard A. Lord, visiting from the University of North Dakota School of Law, spent many hours criticising early drafts of this article. This kind of cooperation is proof that the "cross-fertilization of ideas" rationale for visiting professorships is sound. Two other persons also influenced me considerably, although they did not know the extent of it: Professor Geoffrey Hazard during a walk along San Antonio's Riverwalk at the 1981 American Association of Law Schools (AALS) Convention, and Dean Thomas Morgan in a succinct letter that showed in about two paragraphs where I had gone off track. I also benefited from interchanges with my colleagues, Paul Galanti and Bryan Schneider, as well as with Professor Charles Wolfram and Mr. Sheldon Breskow, Executive Secretary of the Disciplinary Commission of the Supreme Court of Indiana.

I. INTRODUCTION: LOOKING BACKWARD AT THE DISCUSSION DRAFT	740
II. THREE CODES, THREE STEREOTYPES, AND A SURPRISING DISCOVERY	744
A. <i>Revealing Client Confidences—Mandatory or Discretionary?</i>	754
1. A VARIATION ON THE BURIED BODIES CASE	756
2. OBEDIENCE TO "LAW": THE THREE CODES MERGE	758
3. VOLUNTEERING THE WHEREABOUTS OF A FUGITIVE	760
B. <i>Representing the Institutional Client</i>	765
C. <i>The Client Perjury Provisions: Participation, Disclosure, and Withdrawal</i>	775
D. <i>Miranda Warnings to Your Own Client: Breeding Mistrust or Educating the Public?</i>	786
E. <i>Conclusion: Drafting a Code for the Long Run</i>	787
III. ADDENDUM: THE FINAL DRAFT—A FOURTH PEA FOR THE POD AND A BRIEF LOOK FORWARD	790
A. <i>Mandatory Disclosure of Client Secrets: Textually Out—But Practically In</i>	791
B. <i>Representing the Entity Client—Narrow Disclosure Rules Clarified and Made More Narrow Still</i>	798
C. <i>Client Perjury, Lawyer Knowledge, Lawyer Belief, and Some Related Matters</i>	802
D. <i>Conclusion: Telling the Truth about the Legal Profession—A Radical Idea After All?</i>	810

I. INTRODUCTION: LOOKING BACKWARD AT THE DISCUSSION DRAFT

When the American Bar Association's Commission on Evaluation of Professional Standards (popularly known as the Kutak Commission) released its Discussion Draft of proposed Model Rules of Professional Conduct¹ (Discussion Draft) in January 1980, it perhaps got more discussion than it bargained for. Indeed, during the next sixteen months, until the Kutak Commission issued its proposed Final Draft² on May 30, 1981, the Discussion Draft was not so much discussed as it was assaulted. Lawyers and laymen alike condemned the Draft as a radical document that called for major and unwanted changes in the traditional adversary system of American law, and the role of the American lawyer in it.³

Initially, the Final Draft appears to have been better received,⁴ and even its most persistent critics appear to have muted

1. 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)].

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

3. See notes 7-11 and accompanying text *infra*.

4. This was the theme of a recent article in the *American Bar Association Journal*. Winter, *Building a New Ethics Code—Changes Wrought in Compromise*, 67 A.B.A. J. 687 (1981). The brief article, giving direct quotes from some relevant influential people, claimed that opposition to the Model Rules from the corporate and securities bar "appeared to be

their criticisms.⁵ As the Final Draft is subjected to more rigorous scrutiny, however, and as it moves towards possible adoption by the American Bar Association (ABA) House of Delegates⁶ and by the states, inevitably it will be compared to its predecessor. Is the new document substantially and substantively different from the Discussion Draft? Is it merely a cosmetic facelift? Or is it a total retreat, penned by a properly chastized group of would-be social architects?

Obviously, answers to these questions can only be based upon a full understanding of the original draft. In the main body of this article, I attempt to take that look backward at the Discussion Draft, and I conclude that the Model Rules were never the radical attack on the adversary system that they were widely assumed to be. Instead, what was new and perhaps unsettling about them was their frankness in putting out for public inspection the fact that *the adversary system itself was not what it was widely assumed to be*. If the Discussion Draft did modify the adversary system, it modified an adversary system that had probably never existed except in mythology, and certainly did not exist in fact in 1980. People who believed in the myth and were unhappy about its demise simply transferred their anger to the Discussion Draft.

A second unsettling aspect of the Discussion Draft presents something of a paradox. The Model Rules were more of a black-letter criminal law style code than had ever been proposed before,⁷ but at the same time they were written in language that softened the commands considerably, and made them subject to a rule of reason. Played out frequently in the comments to the rules and in the preamble,⁸ the theme of the Discussion Draft was that clearcut

easing," and that there was "some evidence" that the Rules were "rallying support" from previously "hostile" state and local bar associations. *Id.* at 688.

5. Professor Monroe Freedman has been quoted as saying that the Final Draft is "a lot cleaner than it was before," although he still maintains that it represents "a radical departure from the traditional lawyer-client relationship." *Id.*

6. A preliminary hearing on the Final Draft was held at the ABA's Annual Meeting in New Orleans, which commenced on August 8, 1981. The Final Draft will be submitted for a formal vote to the ABA House of Delegates at the 1982 mid-year meeting in Chicago.

7. See generally Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUNDATION RESEARCH J. 1016; Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977); Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUNDATION RESEARCH J. 953.

8. The first two paragraphs of the "Scope" section of the Final Draft, which appears immediately after the Preamble, best capture the spirit and approach of the entire document, and were carried forward virtually verbatim from the Discussion Draft:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law

answers to actual ethical problems could not be written out in advance; instead, what the Draft proposed was a *method* of analysis, despite the black-letter style. The proposal contemplated that lawyers would not be able to give advance answers, either to their clients or to themselves, about where the proper balance would lie in particular cases. Rather, *just as in other areas of the law*, specific answers would depend on specific configurations of facts, and on the ever-changing universe of law generally. This had been the case under all previous codes dealing with lawyer behavior, but it was more directly built into the Discussion Draft, and probably contributed to the uneasiness the Draft engendered.

The main body of this article is an expanded version of some

itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These prescribe or limit the lawyer's professional conduct. Others, generally cast in the term "may," define areas under the Rules in which the lawyer has professional discretion. Other Rules define the nature of relationships between the lawyer and others. Taken together, the Rules provide elements of the lawyer's professional role. The Rules are thus partly obligatory or disciplinary and partly constitutive in that they define a lawyer's professional role.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and other laws regulating the profession (such as admission to practice), laws defining specific obligations of lawyers (such as the attorney-client privilege) and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a legal structure for the ethical practice of law.

MODEL RULES (Final Draft), *supra* note 3, at 3. Typical of commentary that acknowledged the balancing required to decide individual cases was the passage in the Discussion Draft that addressed discretionary disclosure of client secrets having to do with future harms or wrongs committed during the representation but not involving danger to life:

When some lesser deliberate wrong is involved, as stated in paragraph (c)(2), the lawyer has professional discretion to make disclosure to prevent the client's act. To some extent the existence of this discretion inhibits disclosure by the client and yet enables the lawyer to inhibit the client from committing the wrongful act.

The lawyer's exercise of discretion requires consideration of the magnitude and proximity of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Exercising discretion in such a matter inevitably involved stress for the client, the lawyer, and the client-lawyer relationship. However, if the question of disclosure is not made discretionary, a categorical preference has to be adopted in favor either of immediate victims of a present client or potential victims of later clients. There is no basis upon which such a categorical preference can be prescribed.

MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7, Comment at 7.

comments I made at a panel discussion in October 1980,⁹ when I was not looking back at the discussion period, but was involved in it. Furthermore, all of the substantive work on the article was completed before publication of the Final Draft, and before I had access to it or any of the intervening working drafts.

Partly for that reason, but largely in order to avoid the grammatical nightmare of referring hypothetically to what the situation would have been under the now superseded Discussion Draft, the editors have wisely chosen to present the main body of the article from the temporal point of view of Spring 1981. The point of view is thus of one who is comparing the three rival codes referred to in the title, and who is also conscious that a revision of one of them is well under way.

In an Addendum,¹⁰ I turn to the Final Draft and comment on the retained or amended provisions that were implicated in the main body of the article. My conclusion is that the final product is a much improved one, though still far from perfect. Without sacrificing or compromising substantive content, the drafters have explained more clearly what the Model Rules are about, and have removed some of the language that was most misunderstood.

More importantly, these clarifications should help both the Bar and the public understand that the proposed Model Rules are not and never were a radical departure from the actual, as opposed to the mythical, traditions of the legal profession. Instead, the Model Rules may turn out to be radical in an ironically different way, for they force us to think more clearly about what the law of professional responsibility already is, and challenge us to serve simultaneously our clients, our legal system, *and* ourselves.¹¹

9. Indianapolis Bar Association Seminar, Indianapolis, Indiana, October 22, 1980.

10. See notes 179-255 and accompanying text *infra*.

11. The Preamble uses a particularly felicitous phrase in acknowledging that the lawyer's own interests cannot realistically be ignored, and should not be. That third interest is characterized as "the lawyer's own interest in remaining an upright person while earning a satisfactory living." By using a phrase with a slightly "old-fashioned" ring to it, the Preamble appears to me to be deliberately straddling the past and the future, and urging us not to be embarrassed about articulating personal ethical norms. More importantly, the phrase makes one of the Commission's main points: although the Model Rules are written down in a code format, actual decisions will depend upon the case-by-case judgments of individual lawyers, and individual lawyers must frequently consult personal ethical values to decide close cases. See the comparable introductory material quoted at the beginning of note 8, *supra*.

II. THREE CODES, THREE STEREOTYPES, AND A SURPRISING DISCOVERY

Between January 1980 and May 1981, three rival codes governing lawyer conduct vied for the attention and support of lawyers. Each of the three was soon stereotyped, and much of the debate then assumed that one or the other of these oversimplified models would carry the day.

The present Code of Professional Responsibility¹² (the Code), adopted in 1969,¹³ was generally regarded as a serviceable old friend,¹⁴ but one with warts that could no longer be overlooked.¹⁵

12. As explained in its Preamble, the Code of Professional Responsibility is organized into three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1 (1980) [hereinafter cited as ABA CODE]. The nine Canons are "statements of axiomatic norms," and serve as chapter headings. *Id.* The Ethical Considerations are "aspirational" and not mandatory, although they frequently track the language or at least embody the spirit of some of the formal and mandatory Disciplinary Rules. *Id.* The supreme courts of Georgia, Iowa, Louisiana, South Carolina, Texas, Vermont, and Virginia, have made the Ethical Considerations mandatory upon lawyers in their jurisdictions. *Legal Times of Washington*, Dec. 15, 1980, at 19, 20, col. 2. Other courts, including those of Kansas, Massachusetts, New Mexico, Illinois, Oklahoma, and California, have omitted the Ethical Considerations altogether. *Id.* The Disciplinary Rules, which are mandatory, set "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE, *supra*, at 1.

The focus of this article is almost exclusively on the Disciplinary Rules because the discussion concerns the extent to which written criminal-law-style rules will deter or promote conduct. This article cites the Disciplinary Rules as the Code cites them: DR 1-101, for example.

13. The American Bar Association House of Delegates adopted the Code on August 12, 1969, and it became effective January 1, 1970. ABA CODE, *supra* note 12, Preface. Most state supreme courts have adopted verbatim the Code and its various amendments, but in a number of states certain changes in text have been made or certain amendments not adopted. For a list of states with Disciplinary Rules that differ from those of the Code, see ABA NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, Table I, at iv (1980) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY BY STATE].

14. Professor Andrew Kaufman, though not hostile to efforts to improve the Code and only mildly critical of the draftsmanship of the revisions of the Code proposed by the Kutak Commission, makes the interesting point that the very familiarity of the present Code cautions against wholesale revision. Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074, 1074-75 (1980). Rather than discarding language that has ten years' worth of interpretive gloss and starting thousands of lawyers at ground zero, Professor Kaufman suggests that the ABA retain the format and the basic language of the Code to give the ultimate amendments more effect.

In response to this and similar criticism, the Kutak Commission issued its Proposed Final Draft in two formats—one as a line-by-line amendment of the Code. The language of this draft, however, does not meet Professor Kaufman's plea for continuity. It is nonetheless the premise of this article that the Model Rules carry forward much of the substance of the Code.

15. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 46 (1980); Morgan, *The Evolving Con-*

Despite a decade-long process of common law development in the courts and ethics committees, too many rough edges remained. The Code was internally inconsistent in several important places, it overemphasized litigation, and it either ignored or treated poorly the important question of defining the client and, in group practice situations, the lawyer. The Code assumed a simpler time, "down-state Illinois in the 1860's"¹⁶ perhaps, and, not ten years after its adoption, was found to be unfit to guide the conduct of lawyers who practice in groups on behalf of complex configurations of citizens.

By 1977, dissatisfaction with the Code prompted the American Bar Association to form the Kutak Commission to evaluate and revise the Code. The Commission concluded that the Code needed more than mere revision and proposed an entire new set of ethical rules and standards. The Kutak Commission released a discussion draft of proposed Model Rules of Professional Conduct in January 1980.¹⁷

The Model Rules were stereotyped as a radical response to some admitted but manageable problems, a classic case of the cure being worse than the disease.¹⁸ Critics saw the Discussion Draft as radical¹⁹ primarily, and often exclusively, because of its provisions regulating the preservation of client confidences and the situations in which the lawyer may or must disclose them. The general as-

cept of Professional Responsibility, 90 HARV. L. REV. 702 (1977); Patterson, *supra* note 7; Stark, *Review Essay, The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948 (1980).

16. G. HAZARD, *supra* note 15, at 7.

17. MODEL RULES (Discussion Draft), *supra* note 1. The original timetable called for submission of a revised final draft to the ABA House of Delegates at the Summer 1981 meeting. Because of the storm of criticism that the discussion draft evoked, the timetable has been put back a full year. The Kutak Commission released the final discussion draft in May, 1981, and will present it at the 1982 mid-year meeting of the ABA.

Because some of the criticisms concerned the format of the proposed rules, *see* note 14 *supra*, the Final Draft appears in two formats. One, like the first discussion draft, is in the style of a Restatement of the Law, and the second is nearly a line-by-line amendment of the Code. *See id.*

18. *See, e.g.,* COMMISSION ON PROFESSIONAL RESPONSIBILITY OF THE ROSCOE POUND-AMERICAN TRIAL LAWYER'S FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT 1 (public discussion draft released June, 1980) [hereinafter cited as LAWYER'S CODE (Discussion Draft)].

19. The Preface to the Discussion Draft acknowledges that the rules push beyond the Code's foundation, but in the next sentence notes that this is because of the "continuing evolution in ethical thought" that characterized the 1970's. MODEL RULES (Discussion Draft), *supra* note 1, at 1. If the Kutak Commission is correct, then its product is not "radical" at all; rather it reflects roughly the present state of the law, and demonstrates the "conservative" nature of the present Code for today's world.

sumption was that the Discussion Draft, which took into account interests other than the immediate interests of the client, represented a substantial and unwanted loosening of the obligation of confidentiality. Thus, the title of a *Wall Street Journal* editorial: "A License to Squeal?"²⁰ Thus, the subtitle of an article published in a local bar journal: "1984 is NOW!"²¹ Thus, the unsurprising report²² from a member of a state task force studying the Discussion Draft that members of the public "react adversely" when told without elaboration that the Discussion Draft requires a lawyer to reveal his clients' secrets in six instances and allows him to do so in five others.²³

In June 1980, largely as a response to the Discussion Draft, the Roscoe Pound-American Trial Lawyer's Foundation issued a third alternative, the American Trial Lawyer's Code of Conduct (the Lawyer's Code).²⁴ The Lawyer's Code was seen as the model that reaffirmed the primacy of immediate client interests above all other values in our adversary system. Admittedly, the Lawyer's Code's attack on the Discussion Draft was somewhat shrill,²⁵ and hence less effective. It is also true that the Lawyer's Code developed the claimed constitutional underpinnings of the adversary system—the liberties of the individual—in a criminal law context and then applied them willy-nilly to all areas of the law.²⁶ Still, the

20. The *Wall Street Journal*, Feb. 11, 1980, at 20, col. 1.

21. Koskoff, *Proposed New Code of Professional Responsibility: 1984 is Now!*, 54 CONN. B.J. 260 (1980) (punctuation in original). Mr. Koskoff is the President of the Association of Trial Lawyers of America, and had another opportunity to attack the Discussion Draft in his Introduction to the Lawyer's Code. See note 25 *infra*.

22. Osborn, *The Model Rules of Professional Conduct*, 24 RES GESTAE 308 (1980).

23. *Id.* at 308. The members of the public who reacted this way obviously did not know (and were not told) that the Code and the law of evidence already require disclosure in many of the same situations.

24. LAWYER'S CODE (Discussion Draft), *supra* note 18. The Foundation had formed a Commission on Professional Responsibility for Trial Practice in 1979, but the Commission did not long limit its concern to trial practice. When the Kutak Commission's Discussion Draft was published in January 1980, the Foundation's Commission saw its task as providing an alternative—which it did in June of the same year. *Id.* Introduction.

25. For example, the Introduction to the Lawyer's Code asserts:

The proponents of an alternative to this Code have apparently forgotten [the basic fact that only an adversary system protects the liberty of the individual]. Their most recent draft would erode basic constitutional protections by making the lawyer the agent of the state, not the champion of the client, in many important respects.

Id. The Introduction further claims that "the lawyer's office . . . is under attack from those who would make it a listening post for the state . . ." *Id.*

26. *Id. passim*. In the Preamble, the Foundation attempted to base the constitutional rights that affect lawyers' responsibilities not on the criminal law provisions of the fifth and sixth amendments, but on the "most basic individual right, that of personal autonomy—the

general perception remained that the Lawyer's Code was the welcome antidote to the balancing approach of the Discussion Draft and came closest to the traditional view of the attorney as the "hired gun" of the client.

Most lawyers would probably admit that the hired-gun approach, in its most uncompromising form, has never been and should not be the actual tradition of the legal profession.²⁷ Nevertheless, the client-centered approach of the Lawyer's Code has great appeal to American lawyers for at least three reasons. First, it appeals to the combative sporting instinct that is pervasive in all walks of life in the United States. Second, it appears to confirm generally held ideas about market solutions to problems: if each

right to make those decisions that most affect one's own life and values." *Id.* at 4. Earlier, the Introduction claimed *both* that the adversary system "carries forward the basic American values incorporated in the Bill of Rights," *and* that the fact that our system of justice is an adversary one is "so basic that the Constitution does not even mention it." *Id.* at ii. Professor Freedman, in his contribution to this symposium, returns to this theme. See Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685 (1981). It is well beyond the scope of this article, however, to consider whether values not actually mentioned in the Constitution nonetheless maintain a penumbral presence in the document, whether five members of the Supreme Court do well to announce their discovery, or whether this task can be allotted to lawyers who do not sit on the Court.

Recently, Professor Harry Subin noted another flaw in the argument that client confidentiality is a principle with constitutional underpinnings—a flaw that is often overlooked. National Law Journal, Jan. 19, 1981, at 22, col. 1. Professor Subin showed that even if one grants that the adversary system itself, in both criminal and civil matters, has privacy and other first amendment overtones, that is still only half of the argument. It remains to be proven that the confidentiality principle is so fundamental to the adversary system that the system cannot exist without it.

It is intuitively obvious that if there were *no* generally accepted idea of client confidentiality, clients would not tell their lawyers their secrets and lawyers could not adequately perform their functions. It is not clear, however, how much less information would flow from the client to his lawyer if incrementally more exceptions were made to the principle. Professor Subin points out that those who attack all encroachments on the confidentiality principle assume that the information flow would instantly be so affected as to destroy the adversary system itself. *Id.* This is unlikely to happen because the confidentiality principle has always had built-in exceptions, and even the Lawyer's Code retains most of the exceptions. See text accompanying notes 61, 64, and 67, *infra*.

27. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

CODE OF ETHICS (of Alabama) Canon 10, reprinted in 118 Ala. XXIII (1897). The Alabama Code was the first formal code of ethics, and the provisions of Canon 10 can readily be traced through Canon 32 of the 1908 American Bar Association Canons of Ethics to Canon 7 of the present Code: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." ABA CODE, *supra* note 12, Canon 7.

participant obtains good lawyers, and each lawyer works for his own client without considering the interests of third parties or of the public, the public interest will take care of itself, guided by the "invisible hand" of law development.²⁸ Third, it helps shield lawyers from ethical dilemmas, and possibly even criminal and tort liability, because the lawyer can try to justify his actions by claiming that the client dictated them.²⁹

At the height of the discussion period, then, the three Codes had become shorthand symbols for three clearly different views of law and lawyering. Even though everyone must have been aware that all three codes took the same basic position on many routine matters, that was often ignored. The Discussion Draft represented no less than the destruction of the adversary system; the Lawyer's Code had enshrined a somewhat unsavory (though romantic) view of the adversary system in the Constitution; the present Code was so naively out of touch with reality that it commanded little respect.

It was in this atmosphere that I was invited to take the "pro-Kutak" position at a panel discussion sponsored by a local Bar Association.³⁰ I was invited, incidentally, not because I was a known advocate of the Discussion Draft, but because the organizers of the panel could think of no one other than a law school teacher of Professional Responsibility who would fill the bill. I accepted, but not without reservations, for I was dubious about the radical reworking of lawyer-client relationships that I, too, assumed the Discussion Draft embodied.

In preparing for the panel discussion, I did what I frequently ask my students to do in "statutory interpretation" courses such as Civil Procedure and Professional Responsibility: I took apart the language of the three rival codes, line by line and word by word. Without straining the language unreasonably, what are the outer limits of meaning that can be assigned to each clause and each phrase? Could real lawyers and real judges legitimately reach those results? The fruits of my labors surprised me: using nonfrivolous—not even strained—constructions of code language, and mak-

28. Thus, the development of the law is thought to guide the public interest much like the invisible hand of competition is thought to control an unregulated economy. See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

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

30. The Indianapolis Bar Association sponsored this discussion at a seminar held on October 22, 1980 in Indianapolis, Indiana.

ing what I took to be reasonable assumptions about deterrence and compulsion, I found a marked similarity in the *results* that could be obtained under the three contending versions of rules of professional responsibility. What is more, this similarity was not limited to the fringe areas of the codes, but also appeared in the precise areas where there were supposed to be such radical differences.

This is not at all to say that statutory interpretation has no limits, that choice of language or overall tone is unimportant, and that it therefore makes no difference which code is adopted or whether we even have a code generally applicable to lawyers. The "spirit" of a code can significantly influence how it is interpreted, and there is no doubt that a different spirit informs the Lawyer's Code and the Discussion Draft. Nonetheless, my point is that there is enough play in the language of the three codes so that lawyerlike arguments can be made to reach similar results in most cases that are likely to arise in practice. Thus, while responsible lawyers will be aware of the precise language of the operative code when making difficult decisions that implicate ethical concerns,³¹ the precise language of a particular code will not itself lead inevitably to but a single result.

Lawyers will have an incentive to engage in "statutory construction" in cases that are at all close, and heavily weighted in their calculus will be such considerations as possible criminal and tort liability, malpractice, and even such old-fashioned notions as the lawyer's reputation and personal stake in maintaining his perception of himself³² as an "upright person."³³ Furthermore, all three codes, both generally and by specific cross-references, impose upon lawyers the duty to "obey law."³⁴ Given that the codes do not speak with absolute clarity, this overall duty—even though announced in general terms—will frequently be the voice that law-

31. My point that code language will not be the main impetus to action or forbearance applies *a fortiori* to irresponsible lawyers who have not read the operative code or who do not care what it says. Although I am sufficiently of this world to recognize that many such lawyers exist, probably many more than I would care to admit, I have discounted them in assessing the effects of code language. The drafters of the various codes must similarly have acknowledged the problem, shrugged their shoulders, and resumed their work.

32. In keeping with modern trends and my own political views, the early drafts of this article used both feminine and masculine pronouns for gender-neutral references. The editors of the *Review*, however, chose to use the third person masculine pronoun in gender-neutral contexts.

33. MODEL RULES (Discussion Draft), *supra* note 1, at 2. If values of this kind are truly "old-fashioned," it is ironic that they are highlighted in the preamble to the supposedly "radical" code.

34. See notes 66-67 and accompanying text *infra*.

yers heed.

If my basic premise is correct, which I hope to demonstrate in this article through a series of examples, it should affect stereotyped responses to the codes in at least three ways. First, if the legal community understands that the Discussion Draft is not radically "anti-client," but is for the most part a fuller treatment of the law of professional responsibility as it has developed over the past ten years,³⁵ it will be easier to put emotion aside and help the Kutak Commission perfect its product. Once lawyers recognize, for example, that the law of privilege³⁶ and of joint criminal and tort liability³⁷ have already substantially exploded traditional myths about the inviolability of client confidences, it will be easier to enter into serious debate about exactly where to draw the final lines, either in a code or in a particular case. Second, once affected parties understand that the Lawyer's Code is not dramatically different in practical effect from the Discussion Draft, the reason for the Lawyer's Code's existence disappears.³⁸ The reality of the Lawyer's Code is that it is not as single-mindedly pro-client as it claims to be; rather, it contains many of the Discussion Draft's exceptions to the confidentiality principle, although in disguised form.³⁹ In this respect, the Lawyer's Code is actually misleading, and deserves to be rejected. The third consequence of finding great similarities in the three codes is longer range and requires some explanation, for it implicates the very process of thinking about ethics and drafting a code.

Drafting a code to govern lawyers' conduct is itself an enterprise fraught with ethical dangers. Lawyers are adept at construing written language in a partisan way, and there is great danger that they will succumb to the temptation to use those skills to personal

35. See note 19 *supra* and note 98 *infra*.

36. See generally MCCORMICK, EVIDENCE §§ 87-97 (2d ed. 1972).

37. See Hazard, *supra* note 29.

38. The Lawyer's Code is self-conscious about its role as alternative to the Discussion Draft, which it attacks without naming. See note 25 *supra*. The following passage comes closest to admitting that without an "unacceptable" set of rules as a target, there might never have been a Lawyer's Code:

The Commission was also motivated by the fact that another group, also originally formed with a narrower jurisdiction, was both arrogating to itself the function of rewriting professional standards for lawyers, and doing so in a way that demanded that this Commission produce a viable alternative Code of Conduct, applicable to all lawyers.

LAWYER'S CODE (Discussion Draft), *supra* note 18, at ii.

39. See notes 50-56 and accompanying text *infra*.

advantage when their own conduct is under scrutiny.⁴⁰ Furthermore, lawyers are most at home performing this interpretative operation when looking at language drafted by other lawyers, whether in a contract, a statute passed by a lawyer-dominated or lawyer-influenced legislature, or a set of rules. The lawyer-reader and the lawyer-writer share a fully internalized corpus of interpretative "maxims," as well as an understanding that these maxims are themselves subject to many exceptions,⁴¹ and that all lawyer-sponsored language is subject to "reasonable" flexibility.

While each lawyer thus faces a threshold ethical dilemma when deciding how strictly or loosely to apply the language of a code of conduct to himself, the drafters of such a code have a correlative problem. Knowing full well that lawyer-readers of their product will engage in "statutory interpretation" of it, and presumably intending that at least some such flexibility will attach to the language, the drafters must choose wording that is relatively easier or harder to interpret away. Every code thus must place itself somewhere on a spectrum running from a "criminal code" model to a "vague platitudes" model, depending on how the drafters view the overall trustworthiness of lawyers, and whether they think lawyers will use code language as an evasion device or as a self-examination and planning tool.⁴²

40. G. HAZARD, *supra* note 15, at 2-3.

41. See K. LLEWELYN, *COMMON LAW TRADITION* app. c (1960).

42. Professor James H. Stark takes as a main theme the relationship between the style and format of a code and its substantive content. Stark, *supra* note 15. He thinks the Discussion Draft is "more rule-conscious and consequently less flexible" than the Code, but he does not find that to be a drawback in and of itself. *Id.* at 953. Stark praises the Discussion Draft as a technically well-drafted code that better defines and resolves many ethical issues, but he is afraid that this very clarity may render some of the key sections unpalatable to the profession. *Id.* at 951. It is ever thus: people who need to be reminded of their responsibilities with increased clarity and insistence do not thank those who perform the task.

Although no one can doubt the "criminal law" style of the Discussion Draft, the Kutak Commission's view of the mandatory nature of rules in general is most instructive:

It is assumed that compliance with the Rules, as with all law in an open society, is achieved primarily through understanding and voluntary compliance, secondarily through reinforcement by peer and public opinion, and finally, when necessary, by enforcement through disciplinary proceedings. The Rules, however, do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a legal framework for the ethical practice of Law.

MODEL RULES (Discussion Draft), *supra* note 1, at 2. Both the content and the style bear the unmistakable imprint of Professor Hazard's work. See G. HAZARD, *supra* note 15. As noted in the Introduction to this article, see note 8 and accompanying text *supra*, this passage was carried forward to the Final Draft, and quintessentially captures the flavor of what the Kutak Commission thought it was doing—drafting "law," but at the same time recognizing

After placing their code somewhere on this general spectrum, the drafters must also be aware that their final product will find different individual lawyers at different places on a personal ethical spectrum. Some lawyers need to be watched like a hawk and constrained by tightly drafted strictures, whereas other lawyers can be trusted to understand and accept the code without evasion.⁴³

What, then, is the third consequence of the discovery that the three codes under consideration are substantially different in textual language but surprisingly similar in substantive content? I believe it shows that, in addition to lawyers and ethics committees, there is a third audience for the codes whose importance has been underestimated: the public.⁴⁴ If one lawyer construes almost any language to his liking and another hardly needs a code, different ways of writing the same basic ideas will not greatly influence their conduct. Furthermore, these lawyers will agree on many points, and will also be aware that law outside of the codes will frequently control their conduct more directly than the technical wording of a new rule. Laymen, on the other hand, are not aware of extracode law. They are not even aware of the legitimate constructions that can be given to legal language that appears to have a "plain"

that "law" is an ever-shifting quicksand.

It is noteworthy that the Lawyer's Code is also considerably more rule-oriented than the Code and that the Code in turn is even more clearly rule-oriented than the 1908 Canons of Ethics that it replaced. Whether they are right or wrong, it is obvious that code drafters in recent times increasingly believe that lawyers need full scale regulation and cannot be trusted to self-police on an individual basis.

Recent code drafters undoubtedly have been influenced by two major developments. One is the significant and rapid increase in the size of the profession. The number of lawyers in this country grew by nearly 200,000 between 1972 and 1979. U.S. BUREAU CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, Table 697, at 418 (1980). The likely theory is that new lawyers cannot assimilate the traditions of the profession at a satisfactory pace unless the profession takes sterner measures. See Kaufman, *supra* note 14. The second major development is the public's increasing criticism of the legal profession with the implicit threat that if lawyers do not clean house, someone will do it for them. See, e.g., J. LIEBERMAN, CRISIS AT THE BAR 208-11 (1978); Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUNDATION RESEARCH J. 919.

43. Irresponsible lawyers, who have either not read the relevant code, or do not care what the code says, have been banished from the discussion entirely. See note 31 *supra*.

44. The Lawyer's Code is commendably explicit in its Preamble that one of the main reasons for having a code is to inform the public—potential clients—about the conduct they should expect from lawyers. LAWYER'S CODE (Discussion Draft), *supra* note 18, Preamble, at 3. The Discussion Draft has no such introductory statement as to purpose, but its "Miranda" section, rule 1.4(b), explicitly carries out this function. See notes 120 and 165-69 and accompanying text *infra*. A major conclusion of this article is that the Miranda feature of any code is its lynchpin, precisely because it provides the method by which the profession can educate individual clients about the relationships they enter into with their lawyers.

meaning, let alone the evasions which some lawyers will engage in. Laymen believe that "what they see is what they get," and it is therefore critical to the longterm relationship between the Bar and the public to make sure that what they see is sound.

The purpose of careful selection of code language is thus only partially to educate and regulate lawyers; the choice of code language is also part of a legitimate process of public relations and public education. This is so because although only a small number of laymen will be aware of any new code, and only a trivial number will have read it, lawyers will "teach" it to them, one at a time. At the very first interview, potential clients must be told the truth about what they can expect, and what they must not expect, in their dealings with lawyers.

In the pages that follow, I examine the practical effect of the language of the three alternative codes in some of the situations that provoke the most heated arguments between their advocates. I do not claim to have done any empirical research on how lawyers would actually react in the situations discussed, and I am in any event skeptical as to whether lawyers would give accurate data on such matters to social scientists, even anonymously, and whether they really even *know* how they would react before the moment of truth arrives. Furthermore, in all but the easiest cases, I do not even claim to predict the response of lawyers generally. Rather, I try to recreate their likely thought processes and assess the weight that they probably will assign to the niceties of code language. Most often I conclude that a lawyer faced with an ethical question will weigh most heavily concerns other than the precise language of the code, although that does not mean that language is irrelevant.

The next three sections of this article describe the following scenarios: 1) situations in which the lawyer must, may, or must not reveal client confidences, and the extent to which the lawyer's obligation "to obey law" either complicates or perhaps even destroys the duty of confidentiality; 2) conflict-of-interest situations inherent in the representation of entity clients; and 3) specific applications of the confidentiality principle in the context of client perjury.

A final section of this article discusses the significance of what has been called the "Miranda" provision of the Discussion Draft: the requirement that lawyers inform their clients of the limits on the confidentiality principle.⁴⁵ The Miranda feature actually brings

45. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.4(b). See notes 165-69 and

me full circle and illustrates my main point: a key function of whatever new code the ABA adopts is to educate clients, not just lawyers. Although fine distinctions in a code may not significantly affect lawyer conduct, overall tone and choice of language will affect how clients view the law and their lawyers. Most importantly, advising clients of the limits a code places on their lawyers will put ultimate responsibility for choosing a course of conduct back on the client—where it belongs.⁴⁶

A. *Revealing Client Confidences—Mandatory or Discretionary?*

I start comparison of the three codes where most people start and many stop—with the provisions involving keeping or revealing client confidences. As noted earlier,⁴⁷ the general perception is that the Discussion Draft significantly narrows the area in which the principle of confidentiality is at work.⁴⁸

Perhaps the most controversial rule of the Discussion Draft is 1.7(b), which states that a lawyer *shall* disclose information that is adverse to the client, to the extent necessary “to prevent the client from committing an act that would result in death or serious bodily harm to another person,” and to the extent required by “law”

accompanying text *infra*.

46. Surprisingly, the core principle that key strategic decisions should be made by fully-advised clients does not appear in a Disciplinary Rule in the Code, although it does appear in EC 7-7, which is worded in a more mandatory fashion than many of the Ethical Considerations. Other than decisions “not affecting the merits” or not “substantially prejudicing” the client, “[t]he authority to make decisions is exclusively that of the client.” ABA CODE, *supra* note 12, EC 7-7.

Commentary to the Miranda provision, rule 1.14(b), makes explicit the Kutak Commission's idea that this rule may tempt clients to lie to their own lawyers—but that they will then have only themselves to blame. *See* text following note 169 *infra*.

47. *See* notes 18-22 and accompanying text *supra*.

48. In purely definitional terms, the Discussion Draft may actually expand the universe of potentially protected client confidences, although there are of course exceptions, as discussed throughout this article. DR 4-101(A) of the Code defines “secrets” of a client as information “gained in the professional relationship,” ABA CODE, *supra* note 12, DR 4-101(A), whereas the comparable definition in rule 1.7(a) of the Discussion Draft refers to all information “which relates to the client-lawyer relationship.” MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(a). It is theoretically possible that some information which “relates to” the client's business was not “gained in” the course of the lawyer's actually working on the client's business.

In practice, there will not be much to this technical difference. Indeed, in Formal Opinion 341 (1975), discussed at note 134 *infra* in connection with the client perjury problem, the ABA Committee on Professional Ethics read the Code's definition to protect information gained from third parties and “in connection with” the representation. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975) [hereinafter cited as Opinion 341]; *see* text accompanying note 134 *infra*. If sound, this interpretation gives the two definitions indistinguishable and broad sweep.

or another rule.⁴⁹ Neither the present Code nor the Lawyer's Code has a mandatory disclosure provision, but both contain permissive disclosure rules which track, almost exactly, the "serious harm" and the "required by law" provisions of rule 1.7(b).⁵⁰ The controversy is thus over the word "shall," not over the idea that confidentiality has its limits.

In most of the highly-charged situations in which rule 1.7(b) of the Discussion Draft would apply, however, lawyers operating under one of the other codes would similarly find themselves inexorably pressured by the situation into disclosing the information anyway. The situation transforms the seemingly permissive language of the other codes into mandatory reality. A few hypotheticals will best illustrate this thesis.

Take first the admittedly unlikely situation in which a client states that he will kill a named person on a date certain,⁵¹ and the circumstances are such that the lawyer believes the threat to be so real that he cannot escape the responsibility of deciding for himself whether to interdict the client.⁵² Rule 1.7(b) of the Discussion

49. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(b).

50. DR 4-101(C)(3) speaks of "the intention of his client to commit a crime," and obviously includes situations involving murder and serious assaults. ABA CODE, *supra* note 12, DR 4-101(C)(3). Lawyer's Code rule 1.4 speaks of "imminent danger to human life." LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.4, Alternative A. The "required by law" language appears in the Code in DR 4-101(C)(2), and in the Lawyer's Code in rule 1.3.

51. The situation discussed is unlikely but not impossible, as can be seen from the famous case of *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), in which the future murderer confided not in a lawyer but in a psychiatrist. See note 52 *infra*.

Even though we all know that cases of this kind must be rare, they continue to hold special fascination, partly because they are so stark that they allow for sharp analysis, but also surely because of the fact that they are not impossible, and it is easy to get the sinking feeling that it *can* happen to you. The textbooks used in the Professional Responsibility courses in law schools treat these scenarios. See, e.g., M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 6 (1975); O. MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* 467-68 (1976); T. MORGAN AND R. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 276-86 (1981).

Discussion of these "unthinkable but possible" situations is frequently linked with the problem of the lawyer's coming into possession of fruits and instrumentalities of crime. One would think that cases in which criminals turn these things over to their lawyers would be rare. They are rare, but they continue to happen. See note 175 and accompanying text *infra*.

52. For a case with similar facts, see *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), in which the court held a psychologist liable for failing to warn the intended, and then actual, victim of his patient. The defendant in *Tarasoff* knew of the real danger, but did not do enough to stop the murder. In dicta, the court suggested that psychologists have the duty to reasonably assess the reality of the threats. Presumably, a lawyer does not have the same skill at assessing a similar situation, and would not be held to that duty, but the hypothetical discussed in the text assumes that the lawyer believes to his own moral certainty that the client's threat is real.

Draft does indeed mandate disclosure, but surely the rule only confirms what the lawyer already knows he must do.

A lawyer reading the present Code will find DR 4-101(C)(3), which tells him that he *may* reveal the intention of the client to commit this crime,⁵³ and a reader of the Lawyer's Code will find rule 1.4 (Alternative A), which instructs that he *may* disclose the information in order to prevent "imminent danger to human life."⁵⁴ Is there any doubt that both lawyers would prevent the murder if they were physically able to do so, despite the absence of a mandatory code provision?

It is possible, of course, that some lawyers would fail to act out of fear, ineptness, or some other extraneous reason, but it is impossible to believe that any lawyer would forbear from acting because he thought that action was "unethical." Even Professor Freedman, who is the Reporter for the Lawyer's Code and whose book⁵⁵ is the best and best-known serious defense of the confidentiality principle, has no trouble with this scenario and assumes that the lawyer not only may, but also should, interdict the client.⁵⁶

The above hypothetical is, I submit, not even controversial, although it shows the operation of what is supposedly the most controversial rule of the Discussion Draft. The example is thus a rudimentary but clear illustration of the principle that when the extra-code stakes are sufficiently high, the niceties of code language pale in significance.

1. A VARIATION ON THE BURIED BODIES CASE

A second example, and the last easy one considered in this article, can be found in one of the illustrative cases in the Lawyer's Code.⁵⁷ The example builds upon the celebrated New York case⁵⁸ in which both the court and an ethics committee found that a lawyer acted properly by not revealing the whereabouts of the corpses of his client's victims.⁵⁹ The follow-up hypothetical assumes that

53. ABA CODE, *supra* note 12, DR 4-101(C)(3).

54. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.4, Alternative A.

55. M. FREEDMAN, *supra* note 51.

56. *Id.* at 6.

57. LAWYER'S CODE (Discussion Draft), *supra* note 18, Illustrative Case 1(g). The illustrative cases in the Lawyer's Code follow each section of the rules and comments, and provide sharp examples of the reporter's view of the intent of the previous material.

58. *People v. Belge*, 82 Misc. 2d 186, 372 N.Y.S.2d 798 (1975). See also N.Y. Times, Feb. 5, 1975, at 54, col. 5.

59. *People v. Belge*, 82 Misc. 2d 186, 372 N.Y.S.2d 798. See also N.Y. STATE BAR COMM'N ON PROFESSIONAL ETHICS, OPINIONS No. 279 (1978). In that ethics opinion, the ethics

the lawyer finds one of the victims not yet dead, but in serious need of medical attention she cannot procure for herself. Should the lawyer call an ambulance? Because the very participation of the lawyer and the very discovery of the injured woman may later come back to haunt the client, the confidences question is presented full force. Because the hypothetical involves not a corpse, but a dying woman, the "danger to life" exception is also center stage.⁶⁰

Although a technical argument can be made that rule 1.7(b) of the Discussion Draft does not actually *require* action that could lead back to the lawyer's client,⁶¹ few lawyers would read it that way, or would want to read it that way. Indeed, if they even thought about a code of ethics at all in the exigencies of the situation, most lawyers would be glad to have a code that reinforced what they knew was their moral duty the instant they saw the injured woman.

A lawyer operating under either the present Code or rule 1.4 (Alternative A) of the Lawyer's Code would similarly feel bound to act, and, just as in the first example, *not* constrained by code language.⁶² The moral duty to act is clear; both the Code and the Lawyer's Code *permit* action and so the lawyer will act. In this second hypothetical, then, the difference between supposedly mandatory disclosure and supposedly permissive disclosure is nil: an ambulance will be called one hundred percent of the time.

Alternative B of rule 1.4 of the Lawyer's Code, however, purports to go one step further and actually *prohibit* action in the second hypothetical.⁶³ Alternative B pointedly omits even the "danger of life" exception, and the commentary clearly implies that in this situation, the client's interests come first. Calling the ambulance for the dying woman would therefore be a disciplinable offense.⁶⁴

committee found that the attorney acted properly not only in withholding the information, but in later using the information, with his client's consent, to engage in plea bargaining. *Id.*

60. See text accompanying notes 49 and 50 *supra*.

61. A lawyer could argue that rule 1.7(b) of the Discussion Draft, which speaks of preventing the client from "committing an act" which will result in death, would not apply because the client already committed the "act." Real-life lawyers would not seek out such an argument, however, and would reject it if it came into their minds. Lawyers universally would call the ambulance, and *then*, if need be, find the easily acceptable interpretation that the client committed a second and continuing "act" by leaving the woman to die.

62. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.4, Alternative A; ABA CODE, *supra* note 12, DR 4-101(C)(3).

63. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.4, Alternative B.

64. "The Lawyer has not committed a disciplinary violation under Alternative A." *Id.*

This absolutist position is, of course, pure fantasy and pure bravado, but it illustrates my point that frequently code language is intended to impress the lay public and not lawyers. (Whether this is a particularly good fantasy to advertise to the public I leave to the drafters of Alternative B).⁶⁵ Lawyers who read Alternative B, noting the absence of an applicable exception and understanding the implications of the commentary, would still call the ambulance. Either they would engage in "statutory construction" and conclude, in lawyerlike fashion, that even a provision without any exceptions must have implicit exceptions to avoid absurdity, or they would deliberately disobey the rule, confident that the occasion for civil disobedience was unequivocally at hand. Laymen, on the other hand, might believe that Alternative B really means what it says.

2. OBEDIENCE TO "LAW": THE THREE CODES MERGE

The two hypotheticals considered thus far were too easy to provide a true test of the three codes, although they do begin to show how code language alone is not determinative. The examples were easy because there is no disagreement among lawyers—nor could there be—as to what would constitute proper conduct in the hypothetical situations, and therefore the particular language of any code is assumed to embody that universal agreement. The more difficult and more important testing scenarios involve issues upon which there is not general agreement, but instead robust and legitimate debate.

Ironically, even in the difficult and truly controversial cases, the relevant language of the three codes is almost identical; each code either requires or permits disclosure of client confidences to the extent required by law or court order.⁶⁶ Obviously, the content of that "law" is critical in assessing what conduct the codes permit or require. Furthermore—and this is my main point—since lawyers generally have an affirmative duty to obey "law,"⁶⁷ the supposedly

Illustrative Case 1(g) (emphasis added).

65. Although Professor Freedman is the reporter for the Lawyer's Code, Alternative B is contrary to his position on this issue. See text accompanying notes 52-56 *supra*.

66. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.3; ABA CODE, *supra* note 12, DR 4-101(C)(2); MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(b).

67. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 8.1; ABA CODE, *supra* note 12, DR-102(A)(3), (4), (5), (6); MODEL RULES (Discussion Draft), *supra* note 1, rule 1.3(b) and 10.4(b). In addition, of course, lawyers are citizens who share the obligation of all citizens to obey law. One way of looking at the issues discussed in this section of this article, however, is to ask whether the special relationship of lawyer to client *vitiates* the duty to

permissive disclosure rules of the Code⁶⁸ and the Lawyer's Code⁶⁹ can very easily be transformed into mandatory rules.

Indeed, if lawyers universally agreed on what the non-code "law" is, the practical effect of the three codes would be the same. For if a lawyer acknowledged that he was "required by law" to divulge a certain confidence, and no code prohibited the disclosure, he would disclose. The rub is that lawyers either do not agree on the scope of non-code law—such as the law of privilege, the law of joint tort liability, the law of joint criminal responsibility, and the law of agency—or they do not fully accept that all three of the codes require them to obey precisely those same "laws." In the examples that follow, then, it is important to remember that while lawyers may disagree vehemently on the proper course of action, they will not often disagree about the meaning of the contending codes. Rather, they will disagree about what "the law" is, or should be. That reformulation of the disagreement is the main point of this article.

The question whether to reveal knowledge of the whereabouts of a client who has jumped bail or dodged the draft provides an excellent example of how the seemingly different codes can run together in practical impact. Suppose such a client consulted a lawyer and somehow the authorities learned of the consultation. Assume further, in order to simplify things, that the government committed no fourth amendment or other constitutional violation in the process of making this discovery. If the law in the particular jurisdiction requires "all persons" with knowledge of the whereabouts of a bail jumper to reveal that information, the following scenario will unroll in wholly predictable fashion. The prosecutor will demand that the lawyer divulge the information. The lawyer will refuse, claiming attorney-client privilege and that the "law" makes an exception for lawyers who have such information about their clients. The prosecutor will then attempt to get a court order, which the lawyer will resist, taking an interlocutory appeal if necessary.⁷⁰ In the end, all the lawyers' efforts will fail, the "law" will

obey law that lawyers would otherwise have.

68. ABA CODE, *supra* note 12, DR 4-101(C)(2).

69. See LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.3.

70. The Lawyer's Code is commendably explicit on this point. It requires such "good faith efforts to test the validity of the law, rule or order," before disclosure is even permitted. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 1.3. This requirement can easily be read into the other codes. Lawyers *should* do so, lest they too easily retreat from uncomfortable situations at the expense of their clients. Better yet, the Kutak Commission should take its cue from the Lawyer's Code on this point and make the "good faith" requirement

be confirmed by a court order explicitly rejecting the claim of privilege and explicitly commanding the lawyer to divulge the client's location.

Unquestionably, many lawyers would feel caught at this point in a moral and professional crisis. They would perceive the situation as one involving two conflicting duties, both high level, and would agonizingly try to engage in a balancing process of some kind to determine which duty should prevail. Furthermore, lawyers and commentators who saw the hypothetical this way and, in addition, believed that the duty to the client was the more weighty of the two, would lash out at the Discussion Draft for commanding the "radical" solution of disclosure rather than disobedience.

As shown earlier, however, the disagreement is not properly with the Discussion Draft. Rather, the disagreement is with the conclusion of the court as to what the law is. Indeed, if the court rules as hypothesized above, there is not even a dilemma, even for a lawyer operating under one of the other supposedly discretionary codes, for the court order extinguishes one horn of the dilemma, the originally valid duty of silence. As the case concludes, a judge is telling the lawyer that he will go to jail unless he reveals, while the lawyer's code of professional ethics is telling him that he may reveal. Obviously, he must reveal. Any other action would be to confuse the lawyer's identity with that of his client and would be professionally irresponsible.⁷¹

Legal principles outside the code thus convert "may reveal" into "must reveal," just as surely as the moral obligation does in the first two examples. The only difference is that many lawyers faced with this third situation would not accept the law's command so readily, but would instead attack the Discussion Draft's rule, as if it were the major impetus to disclosure, and as if things would somehow be different under another code.

3. VOLUNTEERING THE WHEREABOUTS OF A FUGITIVE

The confidentiality problem can be made more difficult by

explicit in its next draft.

71. I recall reading, in a book of reminiscences, advice that went something like this: "If it comes down to a situation in which either you or your client *must* go to jail, make sure it's your client." Unfortunately, neither I nor the editors can find the source. I will take full responsibility for the basic proposition in the text, however, though I do not put it as dramatically. *Unnecessarily* going to jail for a client is unprofessional, precisely because it demonstrates that the lawyer has already allowed his independent judgment to be clouded by emotional ties to the client.

asking whether there are circumstances under which the lawyer should *volunteer* information about the whereabouts of a fugitive. It is useful to consider simultaneously two "companion" hypotheticals. Assume that, in a well-publicized and fully litigated case, the highest court of a state had recently confirmed the duty of a lawyer to reveal such information when asked, as in the previous example. Assume further that the court explicitly discussed what its ruling would be in the case of a lawyer who knew but was not asked, and in "well-considered dicta" stated that the result should be the same because unless the lawyer volunteered the information, he would be "obstructing justice" or "aiding escape." In the second hypothetical, suppose that the highest court of a sister state actually upheld the conviction of a lawyer for obstructing justice, merely for failure to volunteer.

In both states, some lawyers would conclude that they now had an affirmative duty to reveal the information voluntarily, and they would do so. But many other lawyers would resist such a result—even in the second state—first by legal reasoning, then perhaps through civil disobedience. Will the specific language of the various codes affect the actions of real lawyers in these ethical crises?⁷²

On the face of it, the rules of the Discussion Draft seem to create a much more powerful incentive to disclose than do the other codes. The key rule, still 1.7(b),⁷³ states that a lawyer *must* reveal what he is required by law to reveal and in the hypothetical, the highest court has just announced what is required by law. Assuming a situation not legitimately distinguishable from the facts discussed in dicta in the first case, or the actual holding of the second case, the lawyer who refuses to volunteer the information not only risks being implicated in crime, but also risks being disciplined for an ethical violation under the Discussion Draft.

But would the lawyer operating under the Lawyer's Code or under the present Code feel less pressure to reveal the information? True, he can argue that the Code gives him the discretion to

72. Only lawyers in the first state actually face a dilemma, although concededly lawyers in both states would *think* so. Many lawyers in the second state would be tempted to analyze the situation as presenting two conflicting duties, as in the hypothetical involving an affirmative order to divulge the whereabouts of a fugitive client. See text following note 70 *supra*. As demonstrated there, this analysis is wrong, for one of the duties has been extinguished, leaving only a single clearcut duty to obey the law, even if the law is distasteful.

The reason lawyers in the first state face a true dilemma is that there the "law" is not clear, as the court has not ruled directly on the point.

73. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(b).

disclose in "required by law" cases, and that in this case he chooses not to disclose. Alternatively, he can argue that the case law in the first state does not truly "require" him to volunteer the information. But this does not negate the lawyer's potential criminal liability, which promises to be more severe and more public than any discipline he might receive at the hands of an ethics committee. Because the lawyer knows that the committee *cannot* discipline him for divulging, which is within his discretion and hence permissible, but that he may have criminal liability if he does not disclose, the pressure to divulge is still intense—not because of anything in the codes, but because of the law existing outside of the codes.

Furthermore, the lawyer who resists disclosure cannot be certain that failure to volunteer the information is permissible, even under the codes. Lawyers have other duties that may be implicated, even if the present Code and the Lawyer's Code appear to vest discretion in the lawyer whether to comply with "law." Under the present Code, for example, a lawyer "shall not engage in conduct that is prejudicial to the administration of justice,"⁷⁴ or "engage in any other conduct that adversely reflects on his fitness to practice law."⁷⁵ More specifically, a lawyer "shall not conceal or knowingly fail to disclose that which he is required by law to reveal."⁷⁶ Can the lawyer be sure which of the conflicting provisions—the rules on permissive disclosure,⁷⁷ or those that command obedience to the law⁷⁸—the ethics committee will choose to emphasize? The safer course, looked at strictly from the point of view of the commands of the Code, may be to volunteer the information.

Indeed, the annotations to the present Code, even given the Code's seemingly permissive disclosure language, suggest that the lawyer in such a situation has a duty to volunteer the information. Footnote fifteen to the official version of DR 4-101(C),⁷⁹ for example, cites with apparent approval ABA Opinions 155⁸⁰ and 156,⁸¹ which were written during the reign of the old Canons of Ethics. This footnote also quotes enough of the opinions to make it clear

74. ABA CODE, *supra* note 12, DR 1-102(A)(5).

75. *Id.* DR 1-102(A)(6).

76. *Id.* DR 7-102(A)(3) (emphasis added).

77. See text accompanying note 68 *supra*.

78. See text accompanying notes 74-76 *supra*.

79. ABA CODE, *supra* note 12, DR 4-101(C) n.15.

80. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 155 (1936).

81. *Id.* No. 156 (1936).

that the lawyer must volunteer such information: because the lawyer-client privilege does not apply, the duty to obey "law" puts the lawyer on the same footing as any other citizen who has knowledge of the whereabouts of a bail jumper or parole violator.⁸²

Informal Opinion 1141,⁸³ which was written in August 1970, is a hopelessly conflicted and circular treatment of the same kind of problem in a case involving a military deserter, but it eventually reaches the same result. After stating that the critical question is what is meant by the phrase "required by law," and that the Committee on Professional Ethics does not answer such questions of law, the opinion nonetheless goes on to say that a lawyer must volunteer information about his client's whereabouts if the consultation involved the deserter's wishes to continue to evade the law. The opinion recognizes its own circularity, for it admits that one of the key elements in defining the "law" is the applicability of the attorney-client privilege. But its final analysis is similar to that of Opinions 155 and 156; if the privilege does not apply, then Canon 4⁸⁴ is no bar to disclosure, and therefore disclosure is mandatory because of other duties that arise from the commands of the Code and other sources.

If the ABA Committee on Professional Ethics views the Code as *commanding* voluntary disclosure, just as the rules of the Discussion Draft do, it is once again hard to paint the Discussion Draft as radical,⁸⁵ and hard to blame it for obligations that the general law imposed at least ten years before the Draft's inception.

Even under the Lawyer's Code, supposedly the most anti-disclosure oriented code, there is considerable room for doubt as to a lawyer's duty to volunteer the location of a fugitive client. This doubt stems not only from the possibility that the authorities may view the lawyer as an accomplice of the fugitive, but also from the code language itself. Rule 3.4, for example, prohibits a lawyer from "knowingly encourag[ing] a client to engage in illegal conduct,"⁸⁶ and rule 3.5 prohibits his knowing participation "in unlawfully concealing or destroying evidence."⁸⁷ Does letting the client know that you will not turn him in "encourage" him to stay at large? Is the person of the fugitive "evidence" which must not be con-

82. ABA CODE, *supra* note 12, DR 4-101(C) n.15.

83. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1141 (1970).

84. ABA CODE, *supra* note 12, Canon 4.

85. See note 19 *supra*.

86. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 3.4.

87. *Id.* rule 3.5.

cealed? Perhaps not—but why should a lawyer take chances?

Although Illustrative Case 1(h)⁸⁸ asserts without qualification that a lawyer commits a disciplinary violation if he reveals his client's whereabouts in a case of this kind, this is simply not so in the second hypothetical given above. According to rule 1.3, there is a violation only if the lawyer fails to exhaust "good faith efforts" to challenge the law involved.⁸⁹ If the recent state supreme court case is indistinguishable on any non-frivolous grounds, then there are no further "efforts" to be exhausted and disclosure is no longer prohibited, but is discretionary. Once, however, the lawyer discovers that he may disclose the information and cannot be disciplined or prosecuted for so doing, but that he runs a real risk of both if he remains silent, the pressure to reveal the information is strong. Perhaps there is just one twist of the screw less than under the Discussion Draft, but probably not enough to make a practical difference in the case of lawyers who would be wavering in any event.

Once again, the practical effect of all of the code texts is roughly the same; when considered in conjunction with existing criminal law, they all put roughly the same amount of pressure on lawyers to volunteer the information about a fugitive client's whereabouts.⁹⁰ Only the public will attach significance to surface differences in language, or to incomplete explanations of a rule, such as Illustrative Case 1(h).⁹¹ Any code, including the three under consideration, that *permits* a lawyer to do what the law *requires*, hands over to the courts de facto control of what lawyers will actually do. Thus, while the drafters of the Lawyer's Code are entitled to dislike exceptions to the principle of confidentiality, and to argue against them in court or lobby against them in a legislature, they are not entitled to write a code that pretends to ignore them.

Finally, before turning to another controversial area, I should note that although the practical effect of all three codes is to encourage voluntary disclosure in the examples given, surely there are many lawyers, perhaps a majority, who would refuse to do so. This does no damage to my thesis, but merely reinforces my claim

88. *Id.* Illustrative Case 1(h).

89. *Id.* rule 1.3.

90. The question of whether "the law" requires the lawyer to *volunteer* information about the whereabouts of a client is reminiscent of the problem of whether "the law" requires similar action when the lawyer comes into possession of the fruits or instrumentalities of crime. See note 175 and accompanying text *infra*.

91. LAWYER'S CODE (Discussion Draft), *supra* note 18, Illustrative Case 1(h).

that the precise wording of the contending codes will not greatly influence a lawyer's action—other concerns will. Lawyers who refuse to divulge the information voluntarily will not do so as a result of a carefully reasoned argument to themselves, based upon the niceties of the code language just considered. They will refuse *despite* the pressure to divulge, either because they think they will not be discovered, or because they so violently disagree with the pro-disclosure implications or commands of all three codes that they will simply engage in civil disobedience.

There is, of course, only a fine line separating criminal or illegal conduct from civil disobedience, a line having to do, in part, with the actor's intent and attitude towards being discovered. True civil disobedience has a well-established place in the process of law development in the United States, for frequently open challenge to a law is the only way to test its validity.⁹² In any event, it is sufficient for purposes of this article to note that lawyers who engage either in illegal activity or in civil disobedience of this kind will likely find themselves equally out of favor with the ethics committees, regardless of the precise language with which the ethics committee is working.⁹³ Once again, lawyers will make the hard decisions without a great deal of help from the codes.

B. *Representing the Institutional Client*

The second area in which the Discussion Draft has created great controversy involves representation of entity clients, particularly corporations.⁹⁴ By daring to even contemplate the possibility

92. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). But see *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Recall too that lawyers Bates and O'Steen only got their right to advertise their legal services vindicated in the Supreme Court of the United States after they openly violated then-existing rules. *Bates v. State Bar*, 433 U.S. 350 (1977).

93. Professor Hazard has made the point that it may sometimes be morally and professionally right to "run ethical risks," or even to violate a code of professional responsibility, and that those who have the courage to make such a choice after mature consideration may well be the most "responsible" of all. G. HAZARD, *supra* note 15, at 10. (Perhaps he would agree that Bates and O'Steen were "responsible" in this sense. See note 92 *supra*.) He does not shrink from the concept that conduct can be both "unlawful" and "right." G. HAZARD, *supra* note 15, at 11.

Still, as the *Walker* case shows, and the *Shuttlesworth* case implies, see note 92 *supra*, the morally right but disobedient lawyer must accept punishment as part of the price of being right, if the law does not accept his view of the law or his method of challenge to it.

94. In an article published in the fall of 1980, while the revision process was well under way, Mr. Kutak identified the three areas that had generated the most negative comment: client confidences, representation of corporate clients, and a proposal, since dropped, to establish a mandatory and enforced duty for all lawyers to provide some level of uncompen-

that corporate counsel might be forced to "blow the whistle" outside the confines of the boardroom,⁹⁵ the Discussion Draft caused considerable unease and outrage.⁹⁶ Once again, though, careful line-by-line study of the rules of the Discussion Draft shows that they are not a radical departure from the Code,⁹⁷ and that they do not markedly differ from the alternative proposed by the American Trial Lawyers Foundation. Furthermore, significant extra-code law exists or is developing in the securities and tax areas that threatens to preempt the codes as chief regulators of lawyers' conduct, just as it has in the client confidences arena generally. This law makes lawyers potentially jointly liable for the torts and crimes of their corporate clients and, in some circumstances, imposes affirmative reporting requirements.⁹⁸

sated pro bono legal services. Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. UNIV. L. REV. 1 (1980).

95. But this situation would actually arise only in extremely limited circumstances. See text accompanying note 112 *infra*.

96. The *Wall Street Journal* editorial entitled "A License to Squeal?," cited at note 20 *supra*, criticized this section of the Discussion Draft. *Wall St. J.*, Feb. 11, 1980, at 20, col. 1. See also Kutak, *supra* note 94, at 10-11.

97. Because of the significant extra-code developments summarized in note 98 *infra*, and because these developments all preceded the promulgation of even the first discussion draft of the Model Rules, securities attorneys Dennis Block and Nancy Barton concluded that "it is not at all clear that the Model Rules significantly change the Code and the ABA's interpretation thereof with respect to the tension between the disclosure requirements of the federal securities laws and the confidentiality requirement of the attorney-client relationship." Block & Barton, *Securities Litigation*, 8 SEC. REG. L.J. 333, 343 (1981).

98. For a good account of the developing law and the tensions it creates for the corporate lawyer, see Block & Barton, *supra* note 97.

The authors considered the following cases and reports:

1) *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978). In this case, the court found lawyers civilly liable as aiders and abettors for maintaining silence and allowing a merger to go through when they had knowledge of material inaccuracies in the financial data submitted by their client.

2) *Chiarella v. United States*, 445 U.S. 222 (1980). In *Chiarella* the Court reversed the conviction of a printer who had learned about a pending takeover bid and had used the information to his trading advantage, on the theory that he had no duty to disclose. The question is then properly raised whether a lawyer would have such a duty, and if so, from where it might arise. The authors discuss a post-*Chiarella* prosecution of a lawyer before the District Court for the Southern District of New York. *United States v. Hall*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,675 (S.D.N.Y. Oct. 28, 1980). See also *SEC v. Hall*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,292 (D.D.C. Feb. 22, 1980). The issue in *Hall* is circular in a familiar way: the lawyer either has a duty *not* to disclose, and so is not liable under *Chiarella*, or he has a duty to present stockholders that grows out of his relationship to "their" entity, and breaches that duty by maintaining silence.

3) *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,165. In *Carter*, the Administrative Law Judge recommended that the SEC sanction two lawyers who did not go to the board of directors after management repeatedly declined to follow their advice to make further disclosures in a prospectus. Although the lawyers' conduct was clearly unpro-

A major and valid criticism of the Code has been its poor, almost non-existent, treatment of the critical question, "Who is the client?"⁹⁹ in the corporate or other institutional context. There is no disagreement at all among the three codes, however, on a formal definition of the "client"—it is the entity itself,¹⁰⁰ even though the entity acts and receives legal advice via highly placed human agents. The codes differ only as to the kind of concrete advice that they give to lawyers on how to handle the conflict of interest problems that arise when one group of agents is at odds with other

fessional, the SEC ultimately dismissed the disciplinary proceedings since the SEC had not then "adopted or endorsed standards of professional conduct which would have applied to respondents' activities during the period here in question, and since generally accepted norms of professional conduct . . . did not unambiguously cover the situation in which [these lawyers] found themselves . . ." *In re Carter*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 (Feb. 28, 1981) (No. 3-5464).

4) The report of an ABA Committee that takes the view that in clear cases of known misstatements of material matter, counsel has a duty to come forward, because the "reveal fraud" provisions of DR 7-102(B)(1) convert the discretion to reveal secrets contained in Canon 4 into a mandatory duty (a conversion mechanism described in the text accompanying notes 131-35 *infra*, and similar to the "required by law" conversion described at text accompanying notes 70-71 *supra*). ABA Committee on Counsel Responsibility Liability, *The Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Law Practice: A Report by the Committee on Counsel Responsibility & Liability*, 30 BUS. LAW 1289, 1301 (1975).

5) A Policy Statement of the ABA that expressed concern that SEC attempts to strengthen affirmative disclosure requirements could not be reconciled with the general duty of confidentiality, but that urged that if further requirements were to be imposed, they be imposed by statute. ABA, *Statement of Policy Adopted by the ABA re Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by the Clients with Laws Administered by the SEC*, 31 BUS. LAW 543 (1975).

6) The "Georgetown Proposals." These were far-reaching proposals drafted by the Institute for Public Interest Representation of Georgetown University Law Center, and issued for public comment by the SEC, without a recommendation. Sec. Exch. Act Release No. 16045, 44 Fed. Reg. 44,881 (1979). They would have required corporations to *instruct* their counsel to engage in certain disclosures, and would have required corporations to disclose the circumstances under which counsel either resigned or were fired. *Id.* The SEC rejected the proposals because of their impracticality and their effect on attorney-client relationships, and because of the initiatives in this area taken by the legal profession, especially the discussions concerning the Model Rules. Sec. Exch. Act Release No. 16769, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,501, *reprinted in* 45 Fed. Reg. 30, 454 (1980).

I believe it is fair to say that 1) the area is unsettled and volatile; 2) there is an overall movement toward the disclosure end of the spectrum; 3) adoption of the Model Rules would significantly speed up that movement; and 4) the more the law develops in this direction the less significant all codes of ethics will become as chief regulators of conduct, even if initially such a code aided in law development.

99. See G. HAZARD, *supra* note 15, at 7, 43-57.

100. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 2.5 (by implication, as explained in the commentary); ABA CODE, *supra* note 12, EC 5-18; MODEL RULES (Discussion Draft), *supra* note 1, rule 1.13(a).

agents of the same entity. But interestingly enough, even though the substance of the advice offered differs, the three codes are alike in that they each are content to limit themselves to giving advice on how to proceed, and do not issue more clear-cut substantive commands, as they do not hesitate to do in other areas. Even where code language appears to be mandatory, the accompanying commentary and examples, as well as other internal clues, all combine to soften the directives considerably.

The present Code contains no mandatory provisions directly applicable to this subject. EC 5-18 simply asserts that the lawyer "owes his allegiance to the entity and not to a stockholder, director, employee, representative or other person connected with the entity," without further amplification.¹⁰¹ A studious attorney could perhaps find mandatory directions in Canon 5 of the Code under the general rubric of impairing "independent professional judgment,"¹⁰² but the linguistic fit is not comfortable.

DR 5-105(A), for example, speaks to the problem of when a lawyer should decline *proffered* employment, if the new employment would *create* a conflict of interest. It could be said that this rule applies when a director or officer of a corporation confides in counsel and seeks help, for the lawyer already represents the corporate entity. But the very problem presented by many of the conflicts scenarios that arise in this context is that the trusting relationship between the lawyer and the entity's human representative has *already developed* over a long period of time, during which the lawyer technically has been representing only the entity. The conundrum can be solved by having the lawyer assume that past communications from the representative have been strictly "on behalf of" the entity, but that now the person is presenting himself as a potential new client in his own right. Under such a reading, the lawyer probably is bound to reject this new client and demand that he get counsel of his own, if there is a serious split in legal interests.

Unfortunately, cutting off certain individuals from the assistance of corporate counsel may be part of the problem, not the solution. There is, first of all, the problem of frustrated expectations: if the would-be client confided *as if* he were the client, revealing his secrets would violate the main policy behind the

101. ABA CODE, *supra* note 12, EC 5-18.

102. ABA CODE, *supra* note 12, Canon 5. The "axiomatic" statement of Canon 5 is that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." *Id.*

confidentiality principle, which is to encourage maximum communication to lawyers about legal problems. On the other hand, if the lawyer withholds the information on behalf of this would-be client, great damage may be done to the existing entity client. The situation becomes considerably more difficult when the "person" at odds with the interests of the entity is not simply a single defalcating vice-president, but management generally, or the whole board of directors. Is the "entity" in this situation a majority of the stockholders, or is it that same board of directors, which may have legal authority to define what is in the best interests of the entity? In practical terms, how often can we expect house counsel to turn away from the group that hired him and continues to pay his salary, in favor of an ill-defined "entity"?

DR 5-105(B) addresses the lawyer's obligation not to *continue* multiple employments when impossible conflicts develop. Technically, this provision should not apply at all, for rigorous analysis would insist that the lawyer never had more than one client in the first place. Nonetheless, the problem of disentangling what has in practical terms been a multiple representation will be just as difficult as in the "proffered employment" situation just discussed.¹⁰³

The present Code, then, has little to say about the realities of intracorporate conflicts that can blossom overnight. The entity is the client, the lawyer must serve the client, and the lawyer must not let others impair his independent professional judgment. With those easy truths as their only gospel, lawyers must develop on their own a response to these conflicts. With such an amorphous standard, it is extremely unlikely that the fear of discipline will itself be a significant inducement or deterrent to action.

The Lawyer's Code gives some sound practical advice on handling intracorporate conflicts before they develop, but the substantive approach is essentially the same as that of the present Code. Rule 2.5 of the Lawyer's Code provides that when a corporation hires a lawyer, the lawyer shall warn the board of directors about

103. DR 5-105(C) allows the lawyer to take on a new client under DR 5-105(A), or to continue multiple employment under DR 5-105(B), if two conditions are met. All clients must consent after full disclosure of the potential conflict, which is likely to be difficult given the confidences problem, and it must be "obvious" that the lawyer can "adequately" represent each. *Id.* DR 5-105(C). Even assuming that "adequately" means "with the full zeal required by Canon 7," it is difficult to comprehend how a lawyer sensitive enough to have thought seriously about a conflict could ever convince himself or his clients that there is "obviously" no problem. It is like the old chestnut about the difficulty of *not* thinking about a polar bear with a polka-dotted bow tie.

possible future conflicts of interest,¹⁰⁴ and ask in advance how the board wants them handled. The Lawyer's Code thus continues the idea that the entity is the (only) client, but is more explicit that the board (alone) speaks for the entity, even when conflicts within the entity are involved.

The commentary to rule 2.5 explains that if the board requires the lawyer to report fully to the board, officers will be on notice and will not speak to the lawyer against their own personal interests. Or, the commentary continues, if the board prefers to encourage fuller communication between the lawyer and other corporate agents, it can state in advance that the board should not be told about officers' confidences even if the information affects the corporation.¹⁰⁵ This advance warning mechanism can indeed prevent many intracorporate conflicts, especially those that involve frustrated expectations of secrecy. But substantively, the lawyer may still be at sea, for he may still have a problem deciding where the client's actual interests lie.

For example, take a situation in which the board has decided that it does not want to know what the lawyer knows, and the lawyer finds out about a fraudulent marketing practice perpetrated by two or three top officers in one of the company's regional offices. The board had told the lawyer to maintain the officers' confidences, but will the *entity* be well served if the fraud is ultimately revealed in headline-creating litigation? Presumably the stockholders will in retrospect have something to say about that, and will claim that the board's studied ignorance was not in the best interest of the corporation. Indeed, as discussed below,¹⁰⁶ the lawyer may have a duty to disobey the board, in order to better serve the entity.¹⁰⁷

104. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 2.5. It is ironic that the Lawyer's Code contains this Miranda feature—a hallmark of the Discussion Draft. See notes 115-19 and accompanying text *infra*.

105. LAWYER'S CODE (Discussion Draft), *supra* note 18, at 202-04.

106. See note 109 and accompanying text *infra*.

107. This is not a necessary result. It is possible that the stockholders are wrong and that the interests of the corporation may actually be better served by continuing the illegality. Such might be the case, for example, if the unlawful conduct is the violation of a minor regulation, the chances of discovery are only slight, and the cost of corrective action is high. Such a scenario was suggested at a panel discussion on the Discussion Draft at the Association of American Law Schools meeting in San Antonio last January.

Whether the organization would in fact benefit from continuation of the illegality is a difficult question, the answer to which depends on the business and moral judgment of the relevant corporate decisionmakers involved. The lawyer's responsibility is to develop a mechanism to discover what are the actual "best interests" of the entity when the organiza-

The above example demonstrates that the Lawyer's Code simply begs the question of who prevails in a clash between the board and the entity by assuming that the board is the entity and that the board can therefore always decide in advance on a proper course of conduct for the entity's lawyer. The question-begging is even more pronounced in the more difficult case, in which the lawyer becomes convinced that the board itself created the legal problems that the entity is about to face. Rule 2.1 requires the lawyer to give "undivided fidelity" to the client's interests "as perceived by the client,"¹⁰⁸ but that is a tough order to fill if the client is not itself "undivided." Furthermore, there is a serious question in that kind of case as to who is the eyes and ears of the entity, capable of "perceiving" anything on its behalf.

Although it still leaves much unanswered, the Lawyer's Code's solution for intracorporate conflicts is an improvement over the present Code's solution, which is to ignore the problem and leave lawyers to work out a response for themselves. But despite some mandatory-sounding language in parts of the Lawyer's Code, it also gives the overall impression of being little more than helpful practical advice. The section states that the lawyer *shall* give the advance warnings described and receive the instructions on what to do, but there are no directions about the extent to which the lawyer must follow those instructions when the situations for which they were designed actually arise. There is nothing preventing a lawyer from deciding that in a particular situation—such as in the hypothetical just posed—the interests of the entity as a whole require him to disobey the prior instructions of the board. Indeed, if the lawyer determines that the interests of the entity are in fact opposed to the board's position,¹⁰⁹ it may be his *duty* to disobey the board, because of the duty imposed by rule 2.1 to be loyal to the client.

Again, it seems hard to imagine that the precise language of the Lawyer's Code, or any other code, will be uppermost in the

tion is internally split on this question.

After performing this first difficult task, the lawyer must still resolve the question of whether confidences of a client involving crime or other wrongdoing must or may be revealed. That question is largely controlled by the "required by law" provisions of all three of the codes. See notes 66-71 and accompanying text *supra*.

108. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 2.1.

109. It is an unusual task for the *lawyer* to determine where the client's best interests lie, but when the client is itself incapable of making this decision because it is divided on the question, it may be the responsibility of the lawyer to resolve the conflict on behalf of the client. See note 107 and accompanying text *supra*.

mind of a lawyer facing one of these difficult situations. Even more clearly, it is difficult to believe that a lawyer actually could be disciplined merely for failing to solicit advance instructions from the board. Yet that is the only actually mandatory provision of the Lawyer's Code on this subject. Furthermore, rule 2.5 is one of the very few in the entire Lawyer's Code that is not accompanied by a hard-hitting Illustrative Case that ends with a flat assertion that the lawyer has or has not committed a disciplinary violation. This suggests that the draftsmen were less sure of themselves on this point and intended more to advise than to command.

The Discussion Draft's approach to the problem of representing an institutional client is also an improvement over the simplistic nonapproach of the present Code, but it still leaves much to the discretion of the involved lawyer, and also, therefore, seems more like practical advice than harsh command. Rule 1.13 first restates the basic definition that all three codes share: the entity is the client. The rule then postulates a conflict and directs the lawyer to consider a series of measures, of escalating seriousness and involving higher and higher levels of corporate responsibility, in his attempt to solve the problem.¹¹⁰ Only if all other attempts fail is the lawyer allowed to go outside the corporation to resolve the conflict and even then the lawyer is specifically directed to consider "the best interest of the organization."¹¹¹

The Discussion Draft thus gives more guidance to the lawyer than the other codes because it specifically allows him to reach the result postulated for extreme situations under the Lawyer's Code: the lawyer might be forced to conclude that even the board of directors is not acting in the best interests of the organization as a whole, and he therefore must disobey the board in order to be fully true to his one and only client. But while the Discussion Draft gives more practical and more comprehensive guidance, it too is clearly couched in nonmandatory terms, in recognition of the fact that situations of this kind never involve easy answers, but always involve a good faith balancing of competing interests. Discretionary language abounds in rule 1.13: it is activated if there is a likelihood of "significant harm" to the entity; the lawyer shall use "reasonable efforts" to prevent the harm; and the lawyer shall give "due consideration to the seriousness of the legal violation" and choose steps "designed to minimize disruption and the risk of dis-

110. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.13.

111. *Id.* rule 1.13(c).

closing confidences.”¹¹²

Under any one of the codes, lawyers suddenly caught up in intra-entity conflicts will work them out as best they can, seeking guidance from other lawyers, from the body of conflicts of interest law, and from their own common sense and sense of rightness. The codes are helpful in varying degrees in suggesting practical solutions, but in the great majority of cases, a code will not likely control the lawyer's decision to act or forbear.

Furthermore, it should not be forgotten that once the lawyer sorts through the internal conflicts of the entity client, he will still be under considerable pressure from extra-code law on the merits.

112. The full text of the rule is as follows:

1.13 AN ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained by an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in or intends action, or a refusal to act, that is a violation of law and is likely to result in significant harm to the organization, the lawyer shall use reasonable efforts to prevent the harm. In determining the appropriate measures, the lawyer shall give due consideration to the seriousness of the legal violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization of the person involved, and the policies of the organization concerning such matters. The measures taken shall be designed to minimize disruption and the risk of disclosing confidences. Such measures may include:

- (1) Asking reconsideration of the matter;
- (2) Seeking a separate legal opinion on the matter for presentation to appropriate authority in the organization;
- (3) Referring the matter to higher authority in the organization, including, if necessary, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of the law and is likely to result in substantial injury to the organization, the lawyer may take further remedial action, including disclosure of client confidences to the extent necessary, if the lawyer reasonably believes such action to be in the best interest of the organization.

(d) A lawyer representing an organization may also represent any of its directors, officers, members, or shareholders subject to the provisions of rule 1.8. A lawyer undertaking such dual representation shall disclose that fact to an appropriate official of the organization other than the person so represented.

(e) When a shareholder or member of an organization brings a derivative action, the lawyer for the organization may act as its advocate only as permitted by rule 1.8.

(f) In dealing with an organization's officials and employees, a lawyer shall explain the identity of the client when necessary to avoid embarrassment or unfairness to them.

MODEL RULES (Discussion Draft), *supra* note 1, rule 1.13.

In the securities and tax areas particularly, legal requirements have developed or are developing that substantially circumscribe the lawyer's freedom of choice.¹¹³ Just as in the "required by law" examples involving the fugitive client,¹¹⁴ this developing law will often preempt the practical effect of whatever code for lawyers is adopted.

There is a final similarity between the Discussion Draft and the Lawyer's Code treatment of the intra-entity conflict problem that is particularly ironic. The last subsection of rule 1.13 of the Discussion Draft, which requires the lawyer to explain to officers and employees the identity of the true client "when necessary to avoid embarrassment or unfairness to them,"¹¹⁵ mirrors exactly the "advance warning" solution of the Lawyer's Code.¹¹⁶ Both codes thus accept the possibility that the lawyer may effectively warn off individuals whose interests conflict with those of the organization they are supposed to be serving, so that they will cease giving useful information to the lawyer.

These provisions are actually specific applications of the more generalized "Miranda warnings" feature that many find objectionable in the Discussion Draft.¹¹⁷ Rule 1.4(b) requires a lawyer to advise a client about "relevant legal and ethical limitations to which the lawyer is subject," but apparently only when the lawyer "has reason to believe that the client may expect assistance not permitted by law or the Rules of Professional Conduct."¹¹⁸ This

113. See cases and articles cited at note 98 *supra*.

114. See notes 70-71 and accompanying text *supra*.

115. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.13(f).

116. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 2.5; see note 93 *supra*.

117. The unedited transcript of Professor Freedman's talk at this symposium indicates that there was laughter in the audience when he said: "The Model Rules at one point required the lawyer to give a Miranda warning to his own client—not the best way to establish a relationship of trust and confidence." Address by Monroe H. Freedman, *University of Miami Law Review* Sixth Annual Baron de Hirsch Meyer Lecture Series (Apr. 3, 1981). The requirement does not seem so odd to me when one considers that its purpose, as well as the purpose of the real Miranda rule, is to warn people about the true state of affairs, when they have reason not to be aware of the truth. I suspect that Professor Freedman's real objection is that he dislikes the fact that there is an element of adversariness in the lawyer-client relationship. See text accompanying notes 165-70 *infra*. For a discussion of lawyer-client mistrust, see notes 248-54 and accompanying text *infra*.

Each time I have taught the course in Professional Responsibility, the class has independently suggested Miranda warnings be given to clients in various conflicts of interest situations (such as the supposedly "uncontested" divorce), before the class was exposed to the Discussion Draft. Even the Code may be thought of as containing a Miranda requirement, in DR 5-105(C), which requires that *fully counseled* clients consent to joint representation. See ABA CODE, *supra* note 1, DR 5-105(C).

118. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.4(b).

provision is often criticized as introducing an unhealthy gust of chilling air into the lawyer-client relationship at its very inception, making the relationship partly trusting but partly adversarial as well. The irony is not only that the supposedly "pro-client" Lawyer's Code also contains a derivative of this Discussion Draft feature, but also that it appears there in fuller force, at least in the entity representation context. Whereas Discussion Draft rule 1.4(b) requires this kind of warning to a new client only after the lawyer has made a judgment that the client is one who needs to be disabused of the idea that lawyers will do anything and everything for a client, the Lawyer's Code requires such warnings in *every* entity client case, in effect assuming that conflicts are likely to develop.¹¹⁹

The Miranda feature of the Discussion Draft, though ironically not as forceably put in the limited context of representing entity clients, is nonetheless more generally applicable, and is in fact one of the lynchpins of the Kutak Commission's work. Though concededly producing some awkward moments, and perhaps even killing off some budding lawyer-client relationships, the Miranda feature is a main mechanism for educating the public about lawyers, and telling the truth about the profession. It is deliberately designed to eliminate, over a period of time, the "hired gun" mythology.

Before returning to discussion of the necessity of a Miranda feature for any sound code, I will discuss one more controversial area—one that, not by accident, implicates this feature most clearly: what should a lawyer do when his client is about to commit perjury, and the lawyer knows it?

C. *The Client Perjury Provisions: Participation, Disclosure, and Withdrawal*

Anyone who wanted to debunk the point of the title of this article would surely turn first to the client perjury provisions of each code of professional responsibility under consideration. Where else, after all, could one expect to find a more clearcut battleground for the competing ideas? Either the idea of litigation as a search for truth and justice is supreme,¹²⁰ or the adversarial ideal

119. LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 2.5.

120. Then Judge Frankel's article is probably the best known defense of this position. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). For a similar defense of openness in negotiations, as opposed to litigation, see Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

is paramount.¹²¹ Lawyers must either sacrifice perjurious clients who try to abuse the system, or tolerate and shelter some abusive clients so that future clients will have enough faith in the system to confide in their lawyers in the first place.

A quick reading of the codes will reward the debunker. The Discussion Draft does appear to say that a lawyer will be disciplined if he knowingly presents the perjured testimony of a client,¹²² while the Lawyer's Code appears to say that the lawyer will be disciplined *unless* he does so.¹²³ The Code appears to be true to form also—internally inconsistent and circular at the same time.¹²⁴

A more careful reading reveals that the stereotype holds up only with respect to the Code provisions. This is true especially when those provisions are considered together with the equally unclear pronouncements of the roughly contemporaneous Standards Relating to the Defense Function (the Defense Function Standards).¹²⁵ The Discussion Draft, on the other hand, is *not* significantly more "anti-client" than the Lawyer's Code, especially in the all-important criminal law context. In some significant testing scenarios, the Discussion Draft is actually *more* protective of the lying client's secrets.¹²⁶

As originally drafted in 1969, DR 7-102(B)(1) of the Code provided that a lawyer who discovered that his client had clearly "perpetrated a fraud upon a person or tribunal" should demand rectification by the client, and if that failed, the lawyer was required to

121. See M. FREEDMAN, *supra* note 51, at 27-78; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1955). Professor Freedman, Reporter for the Lawyer's Code, also sharply criticized Judge Frankel's article. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1974).

122. MODEL RULES (Discussion Draft), *supra* note 1, rule 3.1(a)(3). This rule states: "A lawyer shall not [except in certain circumstances in criminal cases] offer evidence that the lawyer is convinced beyond a reasonable doubt is false" *Id.*

123. Illustrative Case 1(i) of the Lawyer's Code states: "The lawyer does not present the client's [false] testimony as she otherwise would. . . . The lawyer has committed disciplinary violations." LAWYER'S CODE (Discussion Draft), *supra* note 18, Illustrative Case 1(i).

124. See notes 126-37 and accompanying text *infra*.

125. The ABA adopted the original set of standards during the period 1968-73. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1974) [hereinafter cited as 1973 Standards]. The House of Delegates adopted a second edition of the Standards. ABA, STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) [hereinafter cited as 1979 Standards]. This book contains the Standards and accompanying history and commentary.

126. This is so because the Discussion Draft's provisions for disclosure of client perjury apply only when the lawyer knows "beyond a reasonable doubt" that the client has lied or will do so. See notes 143-52 and accompanying text *infra*.

"reveal the fraud to the affected person or tribunal."¹²⁷ When coupled with the strictures of DR 7-102(A)(4) and (A)(7), which forbade the knowing use of perjured testimony or assisting a client's known illegal conduct, DR 7-102(B)(1) seemed to handle the problem of client perjury rather easily—keep it out of court, even in a criminal case, and even if it meant blowing the whistle on a lying client after the fact.¹²⁸

The original 1971 Defense Function Standards took a somewhat different view. The commentary baldly stated that DR 7-102(B) did not "embrace" the giving of false testimony in a criminal case, despite the lack of any qualifying language in the rule.¹²⁹ With that point of view expressed in the commentary, one might expect to find that the Standards counseled the unrestrained presentation of perjured testimony on behalf of a criminal defendant. But one looks in vain for such directions. Instead, the Defense Function Standards adopted what was presented as a compromise position: counsel faced with client perjury must withdraw if possible, and, when this is not possible, counsel must neither question his client nor argue his testimony to the jury. Rather, the client must be cut adrift to "tell his story" while the lawyer looks on, stony faced and silent.¹³⁰ The theory was that the lawyer was not violating DR 7-102(A)(4) or (A)(7), because he was not "using"

127. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969). Just how "clear" the perjury must be is nowhere defined and little discussed in the literature. There is the possibility that all such disclosure provisions are disguised non-disclosure provisions because of a lawyer's ability to circumvent "knowledge" of the perjury. See text following note 151 *infra*.

128. The Code does not explicitly discuss the option or duty to withdraw in the context of client perjury. DR 2-110(B)(2), however, requires withdrawal if the lawyer sees an "obvious" violation of the Disciplinary Rules on the horizon, and DR 2-110(C) permits withdrawal in similar circumstances. ABA CODE, *supra* note 12, DR 1-110(B)(2), (C).

Cases that actually implicate the Disciplinary Rules cited in the text will therefore be the rare cases of total surprise, or cases in which the client's intention to commit perjury comes to light at trial or immediately preceding trial, when it is too late to withdraw according to the practice in most criminal courts. In all other realistic cases, the lawyer already will have withdrawn, or should have.

129. 1973 Standards, *supra* note 125, Standard 1.7, Comment.

130. 1979 Standards, *supra* note 125, Standard 4-7.7. Significantly, this section was the only one that the ABA House of Delegates did not adopt in 1979. The question of what to do when the client lies was referred instead to the Kutak Commission, which was then nearing the end of its first phase of work. The Discussion Draft rejects this approach completely. See text following note 142 *infra*.

It should be noted that Standard 4-7.7 only applies in extremely limited circumstances: when the client has admitted the perjury to the lawyer and the lawyer has independently "established" the admissions. See text accompanying notes 141-60 *infra* for a discussion of disclosure devices that never actually arise in practice.

perjured testimony, nor was he "assisting" illegal conduct. And as DR 7-102(B)(1) had been dismissed by fiat, the lawyer was not forced to take affirmative corrective action either. As almost every commentator now agrees,¹³¹ this compromise was no compromise at all, because in a real life court room, counsel's sudden change of style would be a fully effective, though implicit, disclosure of the perjury.

Although the Standards thus spoke with two voices, the official Code contained unequivocal language prohibiting the lawyer from presenting perjured testimony and requiring disclosure. Then, in 1974, the ABA amended the Disciplinary Rule to add an exception that accomplished a complete reversal of the thrust of the Rule: the lawyer must reveal the fraud of the client "except when the information [establishing the fraud] is protected as a privileged communication."¹³² The next year, Formal Opinion 341 confirmed this about-face by interpreting the exception extremely broadly, stating that the words "privileged communication" were meant to include not only information coming to the lawyer's attention via the client, but also information coming from third parties, unless "not in connection with" representation of the client."¹³³ Since the lawyer would normally not even know of the client but for the professional relationship, it is virtually impossible to imagine a case in which DR 7-102(B)(1), as amended and as interpreted, would require disclosure.¹³⁴ But even this does not end

131. Professor Wolfram dryly remarks that the proposal "has not found wide acceptance." Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients and the Adversary System*, 1980 AM. B. FOUNDATION RESEARCH J. 964, 974 n.58. The proposal is associated with then Judge Warren Burger, who was chairman of the committee writing the original Defense Function Standards. Professor Freedman asserts that Judge Burger was the only advocate of this solution. Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26, 29 (1974). This is obviously somewhat of an exaggeration, because at least a majority of the drafting committee agreed with Judge Burger.

132. ABA CODE, *supra* note 12, DR 7-102(B)(1).

133. Opinion 341, *supra* note 48.

134. Professor Wolfram traced the entire checkered career of the client perjury provisions through a series of conflicting opinions. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977). He states that trying to conjure up situations in which there would be a duty to disclose, under the Committee's reading, "has become something of a law school parlor game." *Id.* at 837 n.106. My students and I have played and lost.

Professor Rotunda latched on to another sentence in the same paragraph in Opinion 341 and showed that the now familiar circularity might still be present. Rotunda, *Officers, Directors, and Their Professional Advisors—Rights, Duties, and Liabilities*, 1 CORP. L. REV. 34 (1978). Amended DR 7-102(B)(1) still mandates disclosure of that which is not privileged under Canon 4, but Canon 4 allows disclosure of what the law requires the lawyer to reveal, or of the intention of the client to commit a crime, including perjury. *See id.* at

the matter. Lawyers practicing in only one state may be unaware that only twelve states have adopted the 1974 amendment.¹³⁵ Presumably this means that Formal Opinion 341 is completely irrelevant in the other states, and in those states the 1969 version of DR 7-102(B)(1) still controls and unequivocally requires an attorney to reveal his client's perjury.

Meanwhile, the Defense Function Standards persisted in the so-called compromise position of neither disclosing the perjury nor actively assisting it, but withdrew the commentary that expressed the view that DR 7-102(B)(1) did not apply to criminal cases.¹³⁶ That commentary was never authoritative with respect to the Code, but its withdrawal caused further confusion as to what was proper conduct for a lawyer. The amended Code, as interpreted, prohibited disclosure; the Defense Function Standards prohibited disclosure, but counseled action that virtually guaranteed it. At the same time, nearly seventy-five percent of the states adhered to a mandatory disclosure rule, at least on paper.¹³⁷

The question of how this bewildering array of conflicting Code

38-39.

The opinion elsewhere recognizes this circularity, and implies that the purpose of the 1974 amendment was to cut the knot and end up with a nondisclosure rule. Opinion 341, *supra* note 48, at 2-3. Professor Rotunda has thus probably been too generous in allowing play to Opinion 341. That is not the point, however. The point is that if two experts in the field can disagree over the impact of an opinion that was supposed to clarify an amendment which was not clear upon first reading, it is unfair to expect practicing lawyers to perform this kind of fine textual analysis on a daily basis, especially upon pain of a disciplinary proceeding if they err.

135. CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, *supra* note 13, at 761L-802L.

136. The ABA section on Criminal Justice presented the Standard stating the compromise position, 4-7.7, to the ABA House of Delegates, but the House of Delegates did not adopt it. Standard 4-3.7(d) states that a lawyer may reveal the intention of his client to commit a crime, thus echoing DR 4-101(C)(3), and then states that the lawyer must do so in cases of danger to life, thus echoing Model Rule 1.7(b). 1979 Standard, *supra* note 125, at Standard 4-3.7(d). This Standard originally contained a cross-reference to the problem of client perjury and the Standard 4-7.7 solution, but the current version does not contain such a reference.

137. The qualification "at least on paper" is necessary, because some state ethics committees or supreme courts may reach the nondisclosure result even in the face of unequivocal language stating otherwise. Indiana Ethics Opinion 1979-1, for example, states that the original version of DR 7-102(B)(1) does *not* mandate disclosure of the perjury if to do so would reveal a confidence or secret of the client. INDIANA ETHICS OPINIONS, OPINION 1979-1.

Professor Freedman has argued that even without the amendment, DR 7-102(B)(1) should not apply to criminal defense lawyers, because of the constitutional right to counsel and due process and because otherwise a guilty client could not testify, thus implicating the fifth amendment also. M. FREEDMAN, *supra* note 51, at 29.

These possible constitutional implications of a disclosure rule are discussed briefly later in this article. See text accompanying note 158 *infra*.

language and interpretations of it would affect the conduct of lawyers in this most controversial area prompted an anonymous survey of Washington, D.C. lawyers in 1972.¹³⁸ It is well known, of course, that talk is cheap, and that anonymous talk is even more of a bargain. Still, the results of the survey were overwhelming enough to mean something, for at a time when the Code appeared to unequivocally require disclosure, with no apparent exception for criminal cases, ninety percent of the questioned attorneys stated that they would call the defendant as a witness, knowing that he was going to lie, and would question him in a normal fashion.¹³⁹ This suggests that responding to client perjury is one of the areas where the beliefs of individual lawyers are so firmly held that much more than code language will be needed to influence their conduct. It suggests further that regardless of how strongly any new set of rules imposes a duty to disclose, there will be significant civil disobedience, at least in the early years.

What does the Discussion Draft say, then, about this most sensitive area? Does it doggedly press forward, demanding that lawyers betray their clients at wholesale, even though the drafters must know full well that such a command would be disobeyed frequently? It does not. Although the basic rule is indeed one of mandatory disclosure,¹⁴⁰ even at the expense of admitted client confidences, the impact of this rule is softened considerably in three important ways, and in practice may be tantamount to a nondisclosure rule.¹⁴¹ Furthermore, in most cases involving client perjury, the lawyer will have withdrawn before the crisis point.¹⁴²

First, the Kutak Commission repudiated as barely worthy of serious discussion the compromise position of the Defense Function Standards. Section 4-7.7 of the Standards, which states the compromise, was the only section that the ABA House of Delegates did not adopt in February, 1979.¹⁴³ This section of the Standards

138. Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 *Res Ipsa Loquitur* 60.

139. *Id.*

140. Model Rule 3.1(a): "A lawyer shall not: . . . (3) Except as provided in paragraph (f), offer evidence that the lawyer is convinced beyond a reasonable doubt is false, or offer without suitable explanation evidence that the lawyer knows is substantially misleading." MODEL RULES (Discussion Draft), *supra* note 1, rule 3.1(a).

141. It may be argued that the Model Rule is unrealistically narrow—so narrow, in fact, that cases to which it applies will never arise and that it is therefore in effect a nondisclosure rule, or alternatively that it is a disclosure rule designed to be evaded. See note 151 *infra*.

142. See note 163 *infra*.

143. 1979 Standards, *supra* note 125, Standard 4-7.7.

was referred to the Kutak Commission for special reconsideration in light of its obvious relationship to the Commission's overall task. In the commentary to the Discussion Draft, the Commission labeled the compromise as essentially a pro-disclosure device, but one which also had an adverse impact on the moral standing of the involved lawyer and the profession generally, and which therefore embodied the worst of both worlds.¹⁴⁴

But it should not be thought that the Kutak Commission rejected an implicit disclosure device merely to clear the decks for an explicit and broad disclosure rule. The language of rule 3.1(a)(3) of the Discussion Draft, although explicit, is itself very narrow in scope, for it prohibits the offering of false evidence only when the lawyer is "convinced beyond a reasonable doubt" that it is false.¹⁴⁵ And this standard apparently applies even in civil cases.

The choice of this "beyond a reasonable doubt" language cannot have been accidental, for one of the questions that always arises when lawyers discuss client perjury is what it means to "know" that the testimony is false. It seems likely that the Kutak Commission implicitly adopted, on this point of what "counts" as knowledge of perjury, the views expressed by Kenneth Pye in a 1978 article¹⁴⁶ that the Kutak Commission cited as a resource for this section of the Discussion Draft. Pye distinguished between cases in which the client tells the lawyer both the truth and the proposed perjured version,¹⁴⁷ and cases in which the client tells a doubtful story from the beginning, but adheres to it. In the latter cases, the lawyer may harbor grave suspicions, but he does not know beyond a reasonable doubt that the testimony will be false,¹⁴⁸ and rule 3.1(a)(3) directs that the attorney present the testimony to the court. It is unclear whether there are other situations in which the lawyer may be viewed as having knowledge beyond a reasonable doubt, but presumably they are relatively few.

The Lawyer's Code has an excellent separate introductory section on the question of knowledge¹⁴⁹ derived from the chapter that Professor Freedman devoted to the subject in his book.¹⁵⁰ That

144. MODEL RULES (Discussion Draft), *supra* note 1, rule 3.1, Comment.

145. *Id.* rule 3.1(a)(3).

146. Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921.

147. *Id.* Even here, the lawyer cannot be absolutely sure which of two unsworn statements by the client is true, although in practice most lawyers are probably worldlywise enough to "know" which story is true and which is false.

148. *Id.*

149. LAWYER'S CODE (Discussion Draft), *supra* note 18, at 8-10.

150. M. FREEDMAN, *supra* note 51, at 51.

section rightly points out that imprecision on this point allows lawyers to evade many ethical problems by simply defining them out of existence: if one never "knows" that perjury is being presented, there is never a dilemma.¹⁵¹ The commentary also properly criticizes other sections of the Discussion Draft for its vagueness on this most crucial definitional point, and it is therefore doubly significant that the Discussion Draft has chosen this one area in which to be perfectly clear.

Under the language of rule 3.1(a)(3) of the Discussion Draft, lawyers can in the vast majority of cases legitimately argue that they do not know beyond a reasonable doubt that the proposed testimony is false, and in those cases they are bound to present the case in normal fashion and with full zeal, just as they would under the Lawyer's Code. Indeed, it may well be argued that the rule is so narrow that it will never apply, and that it is therefore actually a disguised nondisclosure rule. If that was the intention of the drafters of the rule, then they may be guilty of the kind of evasion against which Professor Freedman and the Lawyer's Code railed. They may be guilty of the further sin of seeming to proclaim to the public a duty which would not in reality exist under the scheme of the Discussion Draft. The one thing they would not be guilty of is drafting an "anti-client" provision.

If rule 3.1 is actually a nondisclosure rule, one may debate the wisdom, and perhaps the morality, of displaying wares to the public in a misleading fashion, but one can no longer claim that the Discussion Draft and the Lawyer's Code differ significantly in their practical impact. If lawyers interpret the extremely narrow reach of the the disclosure provisions as a license to disobey the technical command of the provision, that is further indication that the true audience for all of the codes is in fact the public.¹⁵²

151. On the impropriety of using this escape device, Professors Hazard and Freedman are for once united. According to Hazard, lawyers frequently violate the rule against assisting perjury, but "seek escapes from moral responsibility for having done so." G. HAZARD, *supra* note 15, at 130. The evasion device discussed in the text is "pure casuistry." *Id.* Professor Freedman states that "such reasoning is morally irresponsible . . . [a] kind of sophistry." M. FREEDMAN, *supra* note 51, at 52, 55.

152. Because Professor Hazard, Reporter to the Kutak Commission, shares Professor Freedman's view concerning the impropriety of ducking the moral issue by abolishing "knowledge," note 151 *supra*, it is unlikely that the Discussion Draft intended that rule 3.1 be an evasion device. The Discussion Draft probably adopted Professor Pye's dichotomy. In addition, the drafters probably had in mind situations in which a lawyer, considering all the circumstances, is driven to a conclusion, much as a jury is driven to its conclusion. At one point, the commentary uses the phrase "it is plain to the lawyer that the testimony will be perjurous." MODEL RULES (Discussion Draft), *supra* note 1, rule 3.1, Comment at 15. Per-

Even in the few cases where the lawyer knows the perjured testimony is false in the sense described, the Discussion Draft contains a third feature that provides an additional escape hatch. Subsection (f) of rule 3.1, which explicitly provides an exception in criminal cases if "applicable law" so requires, further limits the "Candor Toward Tribunal" requirements of rule 3.1.¹⁵³ The commentary to this rule makes it clear that the phrase "applicable law" is intended to refer to case law, gradually developing in some jurisdictions,¹⁵⁴ which holds that the constitutional rights of a criminal defendant to due process and effective counsel outweigh the ethical duty of the lawyer to reveal even known perjury. In those jurisdictions, "applicable law" controls, just as it did in all of the cases of "obedience to law" discussed earlier in this article.¹⁵⁵

As in so many other areas, the Discussion Draft recognizes, in the context of client perjury, that legal developments outside any code of legal ethics shape what is proper for lawyers to do on behalf of clients. It is proper to move to suppress "truth" in the form of clearly relevant and trustworthy evidence that was obtained by unconstitutional means, for example, because "the law" in certain circumstances makes that evidence objectionable.¹⁵⁶ It is proper to undermine the credibility of a truthful witness¹⁵⁷ by cross-exami-

haps this better captures the intention. In any event, the concern that Model Rule 3.1 might become a nondisclosure rule is valid and the Commission or the ABA House of Delegates should address it.

153. MODEL RULES (Discussion Draft), *supra* note 1, rule 3.1(f).

154. See, e.g., cases cited at MODEL RULES (Discussion Draft), *supra* note 2, rule 3.1, Comment.

155. See notes 67-71 and accompanying text *supra*.

156. This reflects the "exclusionary rule," which prohibits the use in a criminal trial of evidence that was seized in contravention of the defendant's constitutional rights. See *Mapp v. Ohio*, 367 U.S. 643 (1961) and its progeny.

157. This problem presents one of Professor Freedman's original "three hardest questions." Freedman, *supra* note 121. His position on this point, however, is now barely controversial and represents the consensus view. In his book, Professor Freedman notes that his antagonist on the other questions, Chief Justice Burger, agreed with him on this question as early as 1966. M. FREEDMAN, *supra* note 51, at 43, 44-45.

Reversing its earlier view, the ABA, in its Standards for Criminal Justice, now states that defense counsel is "not precluded" from cross-examining a witness he thinks is telling the truth, but this belief "should, if possible, be taken into consideration" during the questioning. 1979 Standards, *supra* note 125, Standards 4-7.6(b).

The commentary to this Standard quotes with approval Justice White's opinion in *United States v. Wade*, 388 U.S. 218 (1967). Justice White noted that when the defendant does not testify and the State is put to its proof, frequently the only tactic that counsel will have is to create doubt about the testimony of the state's witnesses. That, he concluded, is part of the price we pay for our "modified adversary system," in which it is "honorable" for defense lawyers to do things unrelated to the search for truth. *Id.* at 257-58 (1967) (White, J., dissenting in part, concurring in part).

nation, even with stale convictions that do not involve veracity, because "the law" in many jurisdictions makes those convictions relevant.¹⁵⁸ If the Supreme Court were ever to rule that the assistance of counsel guaranteed by the sixth amendment includes counsel that will assist in presenting perjured testimony,¹⁵⁹ then without further amendment, the Discussion Draft would properly authorize such behavior. Similarly, if "the law" develops what is in effect a personal privilege to engage in perjury¹⁶⁰ for those accused of and guilty of crimes, then all ethical codes will be amended pro tanto in that regard as well, and lawyers will present the testimony without qualms.

There is actually a fourth escape route from the seemingly mandatory disclosure provision of the Discussion Draft, although it is really a preventive device. In common with the present Code and the Lawyer's Code, the Discussion Draft contemplates that in virtually all civil cases and many criminal cases, the lawyer will have withdrawn from representation of the client before being faced with the client perjury dilemma. Surprisingly, none of the codes clearly imposes a duty to withdraw in the context of client perjury,¹⁶¹ and none contains an explicit cross-reference that would allow easy confirmation of this point. Nonetheless, Professor Wolf-

158. The evidence rules of many states and Rule 609 of the Federal Rules of Evidence put severe restrictions on the use of prior convictions to impeach the credibility of a witness. The restrictions generally concern the staleness of the convictions and limit admissible convictions to those involving falsehood or dishonesty. *See, e.g.*, FED. R. EVID. 609.

In the jurisdictions where no such limitations exist, *see, e.g.*, CAL. EVID. CODE §§ 785, 788 (West 1966); IOWA CODE ANN. §§ 622.2, .17 (1950), however, it is clear that defense counsel may—actually must in most cases because of the duty to act with zeal on the client's behalf—present the witnesses' convictions.

159. Professor Wolfram doubts that the Court will rule that way, citing a series of cases in which the Court implicitly or explicitly rejected the view that a criminal defendant who testifies is immune from having his testimony impeached. Wolfram, *supra* note 131, at 977 n.73. Typical is the statement in *Harris v. New York*, 401 U.S. 222, 226 (1971) that even constitutionally based exclusionary rules should not be "perverted into a license to use perjury by way of defense." I share Professor Wolfram's doubts.

160. In his contribution to this Symposium, Professor Freedman in effect argues for such a privilege, because of his insistence on the autonomy of the individual. Freedman, *supra* note 26. Professor Hazard also recognizes that even in civil cases, when the stakes are high enough, the urge to self-preservation may be virtually irresistible: "to require a party to choose between imprisonment or financial self-destruction on the one hand, and complete truthfulness on the other, is to impose a moral burden that may simply be too heavy." G. HAZARD, *supra* note 15, at 130.

The law, however, is contrary and is not likely to change in this respect. *See* note 159 *supra*.

161. *See* note 128 *supra* for a discussion of the present Code's treatment of the duty to withdraw. Note 163 *infra* and accompanying text discuss the treatment by the Discussion Draft and the Lawyer's Code of this issue.

ram, in his recent article that focused specifically on the client perjury provisions of the Discussion Draft and Lawyer's Code,¹⁶² not only had little trouble tracking down the withdrawal provisions in both codes, but concluded that this feature is "by far the most important point of agreement" in the two codes.¹⁶³

Most of the shouting, then, is over a small number of criminal cases, in which the lawyer discovers the perjury after it is too late to withdraw. Even in those instances, lawyers who operate under the Discussion Draft must reveal the false testimony to the court in a normal fashion, unless they know "beyond a reasonable doubt" that the testimony is false, or unless the courts continue to develop constitutional law theories which grant criminal defendants a special privilege to lie. Also, because the Discussion Draft appears to contemplate "beyond a reasonable doubt" disclosure chiefly in cases in which the client has admitted the perjury to the lawyer,¹⁶⁴ the Miranda warnings feature of the Draft takes on an added significance, and it is to that last item that I now turn.

162. Wolfram, *supra* note 131.

163. *Id.* at 969. Rule 1.16(a)(1) of the Discussion Draft requires withdrawal if "continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Rules of Professional Conduct," MODEL RULES (Discussion Draft), *supra* note 1, rule 1.16(a)(1), and is thus reminiscent of the present Code's DR 2-110. See note 128 *supra*. Professor Wolfram neatly demonstrates that the Model Rules imprecisely state this duty because rule 3.1 requires the lawyer to report the perjury, and therefore no improper conduct "will result." The intention is clear, however, and rule 3.1 needs only a technical amendment.

The Lawyer's Code requires withdrawal, even in criminal cases, "to avoid commission by the lawyer of a disciplinary violation," LAWYER'S CODE (Discussion Draft), *supra* note 18, rule 6.6. Rule 3.7 makes it a disciplinary offense to knowingly present false testimony. *Id.* rule 3.7. Rule 1.2, however, which prohibits direct or indirect divulgence of client confidences, qualifies rules 6.6 and 3.7, and rule 1.2 explicitly makes the confidentiality obligation superior. In practice, this means that the lawyer can withdraw only in cases where he discovers the perjury early enough so that the withdrawal will not imply that the lawyer believes that he expects the client to lie. In those early discovery cases, however, withdrawal is mandatory.

164. Limiting the disclosure rule to situations in which the client has admitted the perjury makes rule 3.1 of the Discussion Draft reminiscent of the discredited Standard 4-7.7. As noted at the end of note 130 *supra*, that Standard was only triggered when the client admitted the perjury and the lawyer's independent investigation established the truth of the confession. The Standard was thus subject not only to the criticism that it counseled conduct that inevitably disclosed the fact that the client was in the process of testifying falsely, but also to the criticism that it applied in so few cases that it was in actuality an evasion device.

As discussed at note 151 *supra*, Model Rule 3.1 could be subjected to this latter criticism if it were limited to cases involving admitted perjury only, but it is likely that the Kutak Commission intended that it cover at least a few more than those cases.

D. *Miranda Warnings to your Own Client: Breeding Mistrust or Educating the Public?*

Rule 1.4(b) of the Discussion Draft, which discusses "adequate communication" with the client, contains the Miranda feature of the Draft. This rule requires lawyers to advise clients about "the relevant legal and ethical limitations to which the lawyer is subject"¹⁶⁵ when the lawyer becomes concerned that the client expects prohibited assistance. In short, lawyers must tell clients about limitations on the principle of confidentiality, rather than pretend that the principle is absolute. As demonstrated earlier,¹⁶⁶ a client's confidences are subject to far less than absolute protection, regardless of which code is in effect, especially because of the circular but far-reaching exception that requires the lawyer to reveal what "the law" requires to be revealed.¹⁶⁷

By placing this provision early in the Discussion Draft, as part of a long introductory section that discusses lawyer-client relations generally, the Kutak Commission surely meant to highlight its centrality to the relationship itself. Since the lawyer is the one best able to ascribe significance to the outside "law," and because the client may well be infected by the "hired gun" mythology, the spirit of full disclosure—"truth in lawyering"—seems to demand such a warning. Thus viewed, the warning may be the fullest flowering of the trusting relationship, rather than its death knell.¹⁶⁸

Admittedly, many clients who consult a lawyer hoping to obtain prohibited assistance may be disappointed, but they will have no right to feel betrayed by *their lawyer* or to feel that their lawyer acted other than in a trustworthy and forthright manner. *Clients of this type have been betrayed not by their own lawyers, but by the variance between their idea of what a lawyer should do and reality.* By disabusing them of their ideas at the earliest possible stage, the lawyer has served them well, not poorly. Furthermore, by giving the now forewarned client a chance to back out immediately, the lawyer has also displayed his trustworthiness in concrete terms, for the most plausible alternative that the lawyer has thus eschewed is that of accepting the client's money now but betraying

165. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.4(b).

166. See notes 47-65 and accompanying text *supra*.

167. See notes 67-71 and accompanying text *supra*.

168. For a discussion of this ironic but important possibility, see Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) and notes 248-54 and accompanying text *infra*.

him later if he persists in the perjury.¹⁶⁹

In the client perjury context, this kind of candor carries an obvious price. If the lawyer tells the client that admitted, but not suspected, perjury will be revealed to the court, the client who is inclined to perjury will have an incentive to get his perjured story straight the first time. There is also the risk, unavoidable in any model that puts any limitations on the lawyer's participation, that the client will tell one lawyer a perjured story, get rebuffed, and then go to another lawyer and reveal nothing. On the other hand, a client who deceives his own lawyer and tries to go it alone with a story that is easy to refute runs a tremendous risk that the scheme will come undone suddenly and dramatically in court. The end result for the client will actually be worse than if he had told the truth to his lawyer in the first place, and kept mum at trial.

The commentary to the Discussion Draft explicitly recognizes both sides of this dilemma, and solves it by noting that in the end the client is the one who, properly counseled, makes the critical choice. The Miranda feature of the Discussion Draft and the comparable initial counseling contemplated by the Lawyer's Code¹⁷⁰ thus bring me full circle—a real function of these codes is to educate *clients* about what to expect from and how to use their lawyers. Each client is counseled early on by the individual lawyer, and all potential clients are eventually counseled as the legal profession demystifies itself via wide dissemination of information about whatever code is finally adopted.

E. Conclusion: Drafting a Code for the Long Run

A significant audience at which the proposed codes are directed is the public at large, potential clients of lawyers generally. This is so because in areas of total agreement amongst lawyers, differences in code language will be interpreted to encompass that agreement,¹⁷¹ and in areas of controversy, developments outside the codes will largely control how the codes will be interpreted and

169. A Miranda warning of this kind should be equally necessary under the Lawyer's Code, because that code also requires the lawyer to withdraw or not to accept the case if the client reveals his intention to commit perjury early enough. LAWYER'S CODE, *supra* note 18, rule 1.16. See note 163 *supra* for a discussion of this Lawyer's Code provision. Obviously, a lawyer could not escape this duty to withdraw by taking steps to remain ignorant of the perjury.

170. See LAWYER'S CODE (Discussion Draft), *supra* note 7, rule 1.1, discussed further at text accompanying note 179 *infra*.

171. See text following note 69 *supra*.

how lawyers will act.¹⁷² As consensus is gradually reached, the codes will be amended to conform to the consensus by the similarly gradual process of common law interpretation.

The Lawyer's Code explicitly targets the general public as an important audience in its Preamble, and the President of the American Trial Lawyers Foundation in his introduction¹⁷³ referred to the Lawyer's Code as a "Bill of Rights for Clients." It is no accident that both proposed codes discuss initial contacts with clients in a prominent place at the very outset, the Lawyer's Code in rule 1.1, and the Discussion Draft in rule 1.4.

As we have seen,¹⁷⁴ the Miranda feature of rule 1.4 of the Discussion Draft is a central part of the document because it tells clients forthrightly that the lawyer will use all of his skills and knowledge for the client, but that there are certain rare cases in which other policies will outweigh the client's right to use the lawyer to further his own ends. This is a needed educational function, for literature, films, and television have engendered a myth that the lawyer-client privilege is unlimited, and that a lawyer will do, in fact must do, anything and everything for a client.

Surely, for example, most criminals who bring in the murder weapon or the sack of stolen money to their lawyers have some vague idea that once those items are in the lawyer's hands, they are forever immune from discovery. If a generation from now it is widely understood that this is not true,¹⁷⁵ fewer such turnovers will occur, but that is a small price to pay for a generation of telling the truth about the legal profession.

The final surprise, though by now it should be predictable, is that the initial client interview provisions of the Lawyer's Code also serve this educating and "warning-off" function, though more obliquely. Rule 1.1 stresses that the lawyer must make every effort to win the trust of the client and impress upon him the need for total candor. Presumably as part of the entreaty to full disclosure, the lawyer is directed to "explain to the client the lawyer's obliga-

172. *See id.*

173. LAWYER'S CODE (Discussion Draft), *supra* note 18, at ii.

174. *See* notes 166-69 and accompanying text *supra*.

175. In reality, the cases in this area are surprisingly uniform in holding that not only is the active hiding of the fruits or instrumentalities of crime improper, *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967), and the refusal to honor a subpoena improper, *In re January 1976 Grand Jury*, 534 F.2d 719 (7th Cir. 1976); *State v. Howell*, 64 Wash. 2d 828, 394 P.2d 681 (1953), but affirmative action to turn the items over to the authorities may be required. *Morrell v. State*, 575 P.2d 1200 (Alaska 1978).

tion of confidentiality.”¹⁷⁶ But what is that obligation? Surely a lawyer cannot lie to the client and claim that the obligation is absolute, because even the Lawyer’s Code contains a number of exceptions to the confidentiality principle, some of which can turn out to be uncomfortably broad in practice. Should the lawyer give some examples of the exceptions, such as the hypotheticals considered in this article?

Should the lawyer acknowledge that if “the law” changes materially during the course of the representation, a redefinition of the obligation might take place? Should the lawyer give advance warning as to what he would do if the SEC actually promulgated, rather than proposed, a rule requiring affirmative disclosures by securities counsel?¹⁷⁷ How specific should the lawyer get in warning about intra-corporate conflicts of interest that may develop in the future and the impact those conflicts might have on the obligation of confidentiality?¹⁷⁸

The point is that much as the drafters of the Lawyer’s Code might prefer to have an absolute rule of confidentiality, they are just as powerless as the drafters of the Discussion Draft to achieve it. Regardless of what they promulgate in a code, the drafters must admit and disclose that matters outside their work product exert the more significant influence on lawyer conduct.

To be as fair to clients as the Lawyer’s Code claims to be, the key sentence in rule 1.1 must be extended to read: The lawyer shall explain to the client the lawyer’s obligation of confidentiality *and its limitations*. Once that is done, of course, there is no longer any difference at all between the codes. Under each of them, the lawyer must educate the client about ethical limits on lawyer action, and the codes themselves serve to educate society as a whole. This is not because the codes will be read by a significant number of nonlawyers, but because lawyers will “teach” the codes to their clients, and word will begin to get out.

When the organized Bar turns its attention to the Kutak Com-

176. LAWYER’S CODE (Discussion Draft), *supra* note 18, rule 1.1.

177. See note 98 *supra* for a discussion of extra-code legal developments affecting securities counsel, including the possibility that the SEC will at some later date return to rulemaking. See *ABA Opposes Securities Lawyers’ Code*, *The National Law Journal*, Dec. 7, 1981, at 5, col. 1 (ABA criticizes SEC’s proposed establishment of a standard of ethical conduct as ambiguous, conducive to creating confusion within the profession, and without legal basis).

178. See text following note 104 *supra* for a discussion of the lawyer’s warning obligation in the context of the intracorporate conflicts problem and representation of entity clients.

mission's next draft, or a revised Lawyer's Code, I do not suggest that draftsmanship be ignored, or that tone is irrelevant, or that expert commentary and finely tuned examples be jettisoned. What I do suggest is that we concentrate more on explaining to the public what the implications of our work product are.

In the areas in which lawyers agree, let the public be told in concise language that admits of as little doubt as possible. Where lawyers disagree or, more commonly, where the answer to a problem cannot be stated in absolute terms but depends on balancing a variety of subtle factors, let the public be told of this uncertainty. Clients are accustomed to consulting lawyers about complex legal problems, and lawyers are accustomed to admitting that "the law" is rarely clearcut. It is time to accept the fact that one of the complex and unclear legal questions to which lawyers must give tentative answers is that of their own shifting responsibilities to their clients.

The only alternative to this course of action is to supply clients with services to which they are not entitled, or—perhaps worse—to promise those forbidden services in order to keep the cash flowing and then not deliver.

III. ADDENDUM: THE FINAL DRAFT—A FOURTH PEA FOR THE POD AND A BRIEF LOOK FORWARD

The Kutak Commission issued its proposed Final Draft¹⁷⁹ of the Model Rules of Professional Conduct on May 30, 1981. Two things are striking about the Final Draft: First, it demonstrates that the Commission was listening when its critics were assaulting the original draft, for many subtle changes in the text are clearly designed to mollify them; second, the overall substantive impact of the final product is virtually indistinguishable from that of its predecessor.

The answer to the questions put in the introduction to this article¹⁷⁹ is thus that the Final Draft is not a substantive or substantial retreat from the Discussion Draft; it is a fourth pea for the pod. The changes are indeed largely cosmetic, but I do not use that term with any pejorative intent. To the contrary, the Commission has properly "cleaned up"¹⁸⁰ some of the language that was ill-advised or widely misunderstood, and has thus allowed us to debate

179. See text following note 6 *supra*.

180. Professor Freedman, a most persistent critic of the Discussion Draft, was quoted by the American Bar Association Journal as conceding that the Final Draft is "a lot cleaner." Winter, *supra* note 4, at 688.

the real merits of the proposal, instead of a straw man.

Since the Final Draft is the one that will be debated line by line, and since I have never claimed that code language is irrelevant—only that it is not dispositive—I also use the opportunity provided by this Addendum to take a first look forward at what life under the Model Rules would be like. What guidance do they give to lawyers thinking through tough ethical problems? What threats do they make? And perhaps most importantly, since the Miranda feature is retained,¹⁸¹ how do they help lawyers explain to clients the truth about law and lawyering?

A. *Mandatory Disclosure of Client Secrets: Textually Out—But Practically In*

The Commission's revised treatment of the Discussion Draft's most controversial and most misunderstood mandatory duty to reveal client secrets in exigent circumstances quintessentially captures the Commission's approach. The Final Draft represents a compromise in language without compromise of principle, but it also makes subtle changes that are nontrivial.

Textually, the Final Draft contains no provisions calling for mandatory disclosure of client secrets, and this feature alone will doubtless convert many erstwhile critics to at least grudging supporters. But the commentary to the basic rule on confidentiality (now renumbered 1.6 from 1.7) makes it explicit that the effect of other rules, both in and out of the Model Rules, will be to compel disclosures—convert “may” to “shall”—mostly because of the retained “required by law” provision¹⁸² discussed at length in the main body of this article.¹⁸³

Rule 1.6(a) first actually simplifies and broadens the basic rule of confidentiality, for it applies to all information “relating to”¹⁸⁴ representation of a client, and there are no preliminary determinations to be made about whether the information would be “embarrassing” or “detrimental” to the client, as was the case under both

181. MODEL RULES (Final Draft), *supra* note 2, rule 1.2(e).

182. The “required by law” provision appears in the Final Draft at rule 1.6(b)(5), and permits discretionary disclosures to the extent necessary “to comply with the Rules of Professional Conduct or other law.” MODEL RULES (Final Draft), *supra* note 2, rule 1.6(b)(5). The significance of this reformulation is discussed at notes 201-08 and accompanying text *infra*.

183. See notes 66-71 and accompanying text *supra*.

184. MODEL RULES (Final Draft), *supra* note 2, rule 1.6(a).

the Code and the Discussion Draft.¹⁸⁵ Nor, as was previously the case, need the client request that the information be held inviolate in order for confidentiality to attach.¹⁸⁶ Instead, a specific informed consent by the client is required to disestablish confidentiality.¹⁸⁷ These changes are not mere window dressing, for the basic analytic structure of the confidentiality rule has clearly been strengthened: the principle is a universal one with limited itemized exceptions. Previous codes and drafts, on the other hand, had an initial threshold for application of the principle and then engrafted exceptions, some of which turned out to be quite broad in practice. Under the Final Draft, we may debate the wisdom or the clarity of the exceptions, but that is *all* we have to debate.

Rule 1.6(b) lists five exceptions to the basic rule of confidentiality, all of which are discretionary and may be invoked only to the extent the lawyer believes necessary to accomplish the purpose of the exception involved.¹⁸⁸ This is also an analytic improvement over earlier versions, for the qualifier "to the extent necessary" did not unequivocally apply to all the exceptions in either the Code or the Discussion Draft.¹⁸⁹ Tailoring the exception to the precise needs of the situations is, of course, fully consistent with the overall approach of the Kutak Commission: lawyerlike balancing, case by case.

The Discussion Draft imposed a mandatory disclosure rule in only two circumstances: when future acts might involve death or serious bodily injury, and when "required by law."¹⁹⁰ These exceptions now appear in separate subsections, 1.6(b)(2) and (b)(5), respectively, and are both discretionary. In addition, the first of these subsections also permits disclosure of future "substantial"

185. See ABA CODE, *supra* note 12, DR 4-101(A); MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(a).

186. See ABA CODE, *supra* note 12, DR 4-101(A); Discussion Draft, *supra* note 1, rule 1.7(a), 1.7(c)(1).

187. MODEL RULES (Final Draft), *supra* note 2, rule 1.6(a).

188. *Id.* rule 1.6(b).

189. DR 4-101(C)(4) allows revelation of confidences or secrets "necessary" to help a lawyer collect a fee or defend against a charge of wrongdoing, and should surely be read as if it included the words "to the extent necessary." Some subsections of DR 4-101(C), however, contain no language of necessity at all, although the overall content of the rule cries out for such a reading. Rule 1.7 of the Discussion Draft also clearly contemplated such a limited reading, but some of the subsections did not contain actual language to that effect.

The draftsmanship of the Final Draft is superior, because the placement of the limiting language before the list of exceptions makes it explicit that *each* exception is so limited. MODEL RULES (Final Draft), *supra* note 2, rule 1.6(b).

190. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(b).

frauds.¹⁹¹

Assessing the effect of these provisions is complicated, for they must be compared to both the Code and to the Discussion Draft, and one must take into account arguments not only that the new provisions still permit or require disclosure of *too much*, but also that they may have swung the pendulum too far the other way, and now permit disclosure of *too little*.

The fact that disclosure is no longer mandatory in the most serious cases—rare situations involving advance warning of murder or mayhem—should have no practical impact at all. As discussed early on in the main body of the article,¹⁹² these cases are easy no matter what the precise code language happens to be, because the moral imperative irresistably transforms “may reveal” into “must reveal,” and even Professor Freedman does not disagree.¹⁹³

Serious cases of a lower order—the Final Draft classifies them as frauds involving “substantial injury to the financial interest or property of another”¹⁹⁴—will present genuine cases of discretionary disclosure and will involve genuine moral dilemmas. In these cases, unlike the cases involving death, lawyers may differ on the proper moral judgment; indeed, it is the very possibility of choice that that gives these scenarios their bite. The lawyer has three options: go along with the fraud, withdraw from the case but remain silent, or withdraw and reveal the fraud in time to prevent it.

The first option is of course an unethical choice, and is clearly prohibited by every code discussed in this article, including the Lawyer’s Code.¹⁹⁵ A lawyer who chooses that route may be liable as joint tortfeasor or criminal co-defendant with the client, may be subject to professional discipline, and in no event will be heard to claim that his conduct was proper because directed by the client. Lawyers taking that route are not really affected by a code; they ignore it as they ignore all law.

Lawyers for whom a code has any independent meaning, then, must choose between the two remaining alternatives, and the choice is indeed difficult. Assuming that the lawyer has knowledge only, and has not participated in any way in preparing the fraud, or facilitating it,¹⁹⁶ there are legitimate policy and moral argu-

191. MODEL RULES (Final Draft), *supra* note 2, rule 1.6(b)(2).

192. See text accompanying notes 49-65 *supra*.

193. M. FREEDMAN, *supra* note 51, at 6. See text accompanying notes 55-56 *supra*.

194. MODEL RULES (Final Draft), *supra* note 2, rule 1.6(b)(2).

195. LAWYER’S CODE, *supra* note 18, rule 3.6.

196. Rule 3.6 of the Lawyer’s Code uses the phrase “participate in creating” to describe

ments to be made on both sides.

It can be argued that the societal value in preventing frauds is high, and that people who are daily involved with the law are the most appropriate ones to take action voluntarily. In this view, lawyers have *more* of a duty than the average citizen to take affirmative action, and should not merely bemoan the sorry state of a world that has fraud in it. But it can also be argued that the societal value of the confidentiality principle over the long run outweighs the harm to the victim of any one fraud. The reasoning is not merely that society has an interest in having people consult lawyers about legal problems and that such consultations will be curtailed if inroads are made on the privilege; the further argument is that over the long run increased consultations will *decrease* the total number of frauds, because often clients genuinely in doubt about a course of conduct will be dissuaded from fraud by their lawyers. Under this view, lawyers have *less* of a duty to prevent a particular fraud than do people generally; instead they have a duty not to prevent it, if the fraud is to be perpetrated by their clients.

The Final Draft leaves the calculus of a particular case to the involved lawyer, merely suggesting in the commentary some of the factors that may usefully be weighed, such as the seriousness of the fraud and the likelihood that it will actually take place.¹⁹⁷ No pretense is made that the balance is an easy one, or that a linguistic formula can make the difficulty disappear; taking responsibility for decisionmaking is seldom comfortable.

As noted earlier, the sliding scale approach of the Final Draft is hard to assess, for it combines a number of features that pull toward opposite ends of the secrecy-disclosure spectrum. The basic rule against disclosure applies to more information, and there is no

the conduct it bars; for a lawyer, this would surely encompass both direct aid and various forms of "facilitation." The Final Draft in numerous places distinguishes between mere lawyer knowledge and lawyer participation, but takes a broad view of what "counts" as participation. The commentary to rule 1.2, for example, notes that even when the lawyer assists a client under the mistaken belief that a transaction is nonfraudulent, mere withdrawal may not be enough, for the "involvement" of the lawyer, though innocent, may constitute assistance or facilitation. The commentary to rule 1.6 returns to this hypothetical, and reiterates that even though the initial lawyer action was itself not improper, "the lawyer's professional services were made the instrument of the client's crime or fraud."

197. The likelihood that the client may not actually carry out his scheme is a subtle factor to assess, since it may itself largely depend upon whether the *client* thinks the lawyer will take interdicting action. A lawyer may thus actually be able to prevent some client frauds merely by surfacing the *possibility* that the lawyer will act, or by stating affirmatively that he will.

longer any situation (in the language of the rule itself) that calls for mandatory disclosure; yet at the same time disclosure *is* permitted in certain cases not involving bodily injury, and there *are* cases in which disclosure becomes mandatory because of the operation of other rules. Overall, how does the Final Draft's broad-ranging license to decide compare with what went before?

Compared to the Code, the Final Draft does not represent a widening of lawyer discretion, for the Code's "future crimes" exception to the confidentiality principle almost certainly applies to frauds.¹⁹⁸ Indeed, it is hard to think of a substantial fraud that is not a crime. Compared to rule 1.7(c)(2) of the Discussion Draft, the Final Draft permits no broader disclosure, for that rule, probably because of poor draftsmanship, had permitted disclosures necessary to prevent a "deliberately wrongful act" by the client, arguably including most intentional torts and perhaps even anticipatory breaches of contract.¹⁹⁹

Actually, the Final Draft narrows the lawyer's permitted range of disclosure in a large number of cases. The Code permits disclosure of *any* contemplated crimes, whereas the Final Draft limits even permitted disclosures to life-threatening crimes and substantial fraud crimes. The Final Draft and its commentary and research notes are crystal clear that a lawyer *may not* reveal the intention of his client to commit, say, bicycle theft, bigamy, moonshining, or desertion from the Armed Forces.²⁰⁰ In all but the two most serious cases, the Final Draft has weighted the balance for lawyers, ruling in advance that the future rewards to the system of maintaining confidentiality outweigh any present harm.

Some may argue that the Final Draft has thus actually gone too far in the opposite direction, and has insulated too many nasty plans behind the wall of secrecy. In the corporate field particularly,

198. See ABA CODE, *supra* note 12, DR 4-101(C)(3).

199. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.7(c)(2). Dean Norman Redlich subjected this aspect of the Discussion Draft to particularly cogent criticism in a recent article. Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUNDATION RESEARCH J. 981, 985-86. He was especially distressed by the Discussion Draft's broad definition of "deliberately wrongful act," which appeared to include everything involving an element of scienter barring only pure negligence. Dean Redlich argued that even such innocuous conduct as failing to pay a debt might fall within this definition, allowing a lawyer to reveal the "wrongful act" to another.

Certainly, if that were the intent of the Discussion Draft, it was far too broad. Many other statements in the Draft's commentary, however, convinced me that a much narrower rule was intended, and that the problem was one of draftsmanship. In any event, the provision is wholly absent from the Final Draft.

200. MODEL RULES (Final Draft), *supra* note 2, rule 1.6, Comment, Notes.

critics may accuse the Final Draft of helping cover-up frauds and misrepresentations, and perhaps even major violations of the securities laws, so long as no identifiable individual is threatened with "substantial" financial injury. It is true, of course, that rule 1.6(b)(2) prohibits disclosure of the fraud in such cases, but it is precisely in such cases that subsection (b)(5)—the "required by law" exception—may step into the breach.

The potential reach of the Final Draft's formulation of this fifth exception to the basic rule of confidentiality, "A lawyer may reveal such information to the extent the lawyer believes necessary . . . to comply with the Rules of Professional Conduct or other law,"²⁰¹ is obviously very broad. The exception is not limited to future plans or to serious crimes and frauds; it is, in fact, as broad as the lawmaking organs of government choose to make it. Furthermore, since "law" is constantly changing, the exception is also almost limitlessly expandable. But the point to remember is that this catch-all exception to the principle of confidentiality is present in all three of the codes considered in the main body of the article, including the supposedly absolutist Lawyer's Code.²⁰² Just as is the case now, lawyer conduct under the Final Draft *de facto* will be most significantly influenced by law being developed outside of lawyer codes.

If society, through the combined action of its courts, legislatures, and agencies, chooses to single out a certain area, and there impose affirmative reporting requirements that it does not impose in other areas,²⁰³ then lawyers will in practice be forced to go along. If the Final Draft "permits" a lawyer to volunteer a client's secret, but well-established tort, criminal, or regulatory law will punish the lawyer who does not, the exercise of the discretion supposedly given is hardly an unfettered one.

Although the broad implications of the "comply with law" exception should be self-evident, the commentary to rule 1.6 is commendably frank in reminding us that within the Model Rules themselves there are some direct prohibitions and some affirmative commands, so that in situations implicating them disclosure is mandatory, despite the absence of that red-flagged word in the text.²⁰⁴

201. *Id.* rule 1.6(b)(5).

202. See notes 66-69 and accompanying and following text *supra*.

203. The two areas that come most readily to mind are tax and securities regulation. See the sampling of securities material discussed in note 98 *supra*.

204. The commentary isolates rules 1.2(d)(ban on assisting client's fraudulent conduct),

Under rule 1.2(d), for example, a lawyer may not "counsel or assist" a client in committing any "criminal or fraudulent" acts, even if those acts are not the kind of serious violations that may invoke a lawyer's moral duty to disclose them upon mere knowledge. Commentary to that rule notes that if a lawyer has begun representation in the mistaken belief that no illegality is involved, but subsequently learns the truth, he will not only have to withdraw immediately, but he may also have to take affirmative steps to disassociate himself from the impending harm to avoid criminal or tort liability.²⁰⁵ The commentary to rule 1.6 therefore reminds us that although rule 1.6(b) itself makes affirmative disclosures only permissive, some disclosures may become mandatory *in order to comply with* rule 1.2(d).²⁰⁶

Similarly, since rule 3.3(a)(4), which is discussed below,²⁰⁷ continues the absolute ban on presenting perjured testimony and false evidence, and requires that the lawyer take remedial action if he learns of the falseness later (as in the case of surprise perjury), the combined effect of this rule and rule 1.6(b)(5) is to *require* that confidences be breached, even though the latter rule is phrased in permissive terms.

Overall, the Commission has surely spent its time well in re-drafting its final views on the general principles of confidentiality. If the word "mandatory" was such a red flag that it precluded rational discussion, take it out—so long as it is clear that in the most exigent situations the duty is in fact still mandatory. If the intermediate cases are too hard to judge in advance, say so, and let lawyers work out the proper solution on a case by case basis—so long as it is clear that the line is always drawn at *participation* by the lawyer. If the less serious cases should be automatically screened from disclosure, say that also—so long as the "required by law" or "comply with law" exception continues to remind us that many positive commands of law are beyond our direct control.²⁰⁸

3.3(a)(4)(ban on use of false evidence), and 4.1 (requirement of truthfulness in lawyer's own representations) as the rules that will sometimes transform "may reveal" into "must reveal." The first two situations are discussed immediately following the text accompanying this footnote.

205. MODEL RULES (Final Draft), *supra* note 2, rule 1.2, Comment at 13.

206. *Id.* rule 1.6, Comment at 39.

207. See notes 225-30 and accompanying text *infra*.

208. Although I have noted many times that a code for lawyers will often be "trumped" by extra-code legal requirements, it should not be forgotten that lawyers as citizens, and even more so as lobbyists, exert *some* control over the development of that outside law.

B. *Representing the Entity Client—Narrow Disclosure Rules Clarified and Made More Narrow Still*

The basic approach of the entity representation rule in the Final Draft, which is still numbered 1.13, is the same as it was in the Discussion Draft. The entity is the one and only client; when activity and conflict within the entity threaten harm to the entity, the lawyer must discern the entity's best interests and act to further them; in rare cases, such as when the highest authority in the entity is part of the problem, not the solution, the lawyer may have to go outside the entity altogether. As to tone, the rule continues to be liberally peppered with words counseling moderation, and to prescribe a step-by-step reasoned balancing of impending harm against the harm of either lawyer action or lawyer inaction.

Two matters deserve special comment despite the overall similarity of the Final Draft to its predecessor: a sharper analysis of what is really at stake for the lawyer in intra-entity conflicts situations, and two new thresholds to lawyer action that reflect that analysis, but also result in an even narrower disclosure rule.

One of the best statements of the Final Draft's position on the intra-entity conflict situation is not contained in a rule or its commentary, but in Chairman Kutak's special introduction.²⁰⁹ The Commission rejected the view, he notes, that the problem is simply a variant of the general conflict of interest problem that arises when two or more clients vie for the loyalty of the lawyer. This is so because there is only one client—the entity—and therefore the problem really is that nonclients (officers, employees, perhaps even the entire board of directors) may be hurting the client by their actions. In this view, even the extreme step of going totally outside the corporation should not be seen as "whistle-blowing" on the entity, but rather a desperate cry for help *for* the entity.²¹⁰

This view is consistent with the discussion in the main body of this article,²¹¹ for I proposed that in certain situations the lawyer might have a *duty* to disobey the previously expressed wishes of the board of directors, and that it simply begged the question to call the entity the client, but then allow the board always to speak for the entity, even when the board's own decisions were at issue.

The lengthy research notes²¹² to rule 1.13, however, provide an

209. See MODEL RULES (Final Draft), *supra* note 2, at i.

210. *Id.* at ii.

211. See notes 106-12 and accompanying text *supra*.

212. In addition to rules and commentary, the official version of the Final Draft con-

even sounder basis for this result. They show that agency law recognizes an important distinction between co-agents and subagents, and that even if the principal (the entity) has directed its agents to hire another agent (the lawyer), the latter is an agent of the principal only, and owes *no* duty to the agent who hired him.²¹³ Furthermore, once it is agreed that the lawyer is the lawyer of the corporation, and others in the corporate family are mere co-agents and not clients, then there is another familiar reason for insisting that in the end the lawyer must make the final decision: what today's Canon 5 would call the duty to exercise independent professional judgment.²¹⁴ Clearly, it is appropriate for the lawyer to consult with others whose high position in the entity shows that the entity values their judgment. But just as clearly, the ultimate *legal* judgments must be made by the lawyer alone, on behalf of the client.

The very "cleanness" of this analysis and Mr. Kutak's one paragraph summary of it leads to my only criticism of the basic scheme of rule 1.13: at least some of this analysis should be moved to the commentary, where only the barest traces can now be found. If the Final Draft is adopted, its format for mass distribution and use will probably be sans special introduction and sans research notes, and it would be a shame to lose these important and explicit insights.

The commentary does make an important follow-up point that is a frank reminder that the drafters of the Model Rules were not only powerless to change extra-code law, but also included a few generally applicable affirmative duties of their own.²¹⁵ Thus, although it is true that in the specific situations covered by rule 1.13 the lawyer may be going outside the entity *on its behalf* to protect it from false friends within, the commentary reminds us that other rules may permit or require disclosures *against* the interests of an entity client, just as in the case of an individual. The permissive

tains extensive "Research Notes" for each rule. These notes compare the new provisions to the relevant Code provisions, and also discuss relevant case law, ethics opinions, and critical literature.

The Research Notes do not merely provide invaluable assistance in understanding the Final Draft; their mere existence makes the important point that writing and applying a code for lawyer conduct cannot be divorced from "law" generally, and indeed that the new Code is itself an important legal development.

213. MODEL RULES (Final Draft), *supra* note 2, at 87-88 (citing, among other sources, W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 7 (1965); RESTATEMENT (SECOND) OF AGENCY § 5, app. 25-38 (1957)).

214. ABA CODE, *supra* note 12, Canon 5. Under the Code, all of the rules regarding conflict of interest are ultimately traceable back to this single "axiomatic norm."

215. MODEL RULES (Final Draft), *supra* note 2, at 84.

disclosure rules of rule 1.6, for example, still apply, and that means that in effect certain disclosures may be mandatory, as discussed earlier.²¹⁶ Direct lawyer involvement in entity crime or fraud is still prohibited, and still calls for lawyer withdrawal, and probably for rectifying action as well.²¹⁷

In the situations that do directly implicate rule 1.13, it appears that what might be called "friendly disclosures" will be even more rare than under the Discussion Draft, because of two subtle thresholds newly built into the rule.

The first of these is an overall trigger for operation of the rule; it describes the situations in which the lawyer should start considering a measured climb up the entity's ladder of decisionmaking responsibility. Other than cases of violation of internal entity rules (for which disclosure to higher-up co-agents seems the obvious answer and not controversial), rule 1.13 allows such disclosures only when the lawyer "knows"²¹⁸ that the actor's "violation of law" is one that "reasonably might be imputed to the organization," and in addition the injury to the organization is "likely" to be "material."²¹⁹ The phrase "violation of law" is the same as in the Discussion Draft and is clearly meant to cover more than criminal conduct, but the second phrase is new. It makes more explicit the notion that entity harm is what is at stake, but it also requires the lawyer to pause for an extra beat to consider the possibility that the misconduct will be found to be *ultra vires* or otherwise not imputable to the entity. If the "violation of law" is not imputable to the entity, or is not likely to cause material injury even if it is imputable, the lawyer is directed *not* to get involved in the intra-entity infighting.²²⁰

Perhaps more significantly, and definitely more soothingly, the Final Draft has also added a threshold at the opposite end of the spectrum when the lawyer is considering the most extreme measure of going over the head of even the highest decision-making body. The Final Draft allows lawyers to make disclosures outside the entity only if revealing the information is in the best interests of the organization (which is redundant, since rule 1.13 is other-

216. See notes 204-08 and accompanying text *supra*.

217. See note 196 *supra* for a discussion of the Final Draft's broad view of "participation" and "involvement," and the consequent necessity to take rectifying action.

218. For a discussion of the Final Draft's treatment of the important question of levels of lawyer knowledge and belief, see notes 235-47 and accompanying text *infra*.

219. MODEL RULES (Final Draft), *supra* note 2, rule 1.13(b).

220. *Id.*

wise inoperable anyway), and if, *in addition*, the lawyer is convinced that the board of directors or other "highest authority" is acting for private gain.²²¹

This means that in a case in which the board of directors is on record in favor of, say, open violation of a government regulation, and it is clear that the board genuinely believes this action to be in the best interests of the corporation,²²² the lawyer is powerless to do anything but resign, even if subsequent discovery of the violation would badly hurt the organization. Furthermore, in the example given the lawyer would also be powerless to reveal the organization's secrets under rule 1.6, since by hypothesis there is no question of life-threatening crime or substantial fraud. And only in the unlikely event that the regulation imposed an affirmative duty on the lawyer to report violations (and such a regulation were found to be valid by the courts) would the disclosure requirements of rule 1.6(b)(5) be applicable.

Narrowing an already narrow rule in this fashion will no doubt help the corporate bar come to terms with the Final Draft, for corporate lawyers will usually be able to convince themselves to defer to the board and thus relieve themselves of the responsibility for making some tough choices. An argument can be made, though, that in this one instance the Commission has retreated unnecessarily far from its previous position, which, as I demonstrated in the main body of this article,²²³ was hardly radical.

If the Commission's analysis is that the corporation is the client, and that even the board of directors is only a group of co-agents, then it would seem that the lawyer should not allow a group of nonlawyers to interfere with—veto—his giving of *legal* advice to the client. Although cases in which the board is betraying the entity for venal reasons may more easily support a lawyer's decision to go outside the organization, they should not be the only possible ones if *legal* harm to the client is the test.

On the other hand, the Commission's position can be de-

221. *Id.* rule 1.13(c).

222. In a recent article commenting on the Commission's final product, Mr. Kutak drew a powerful analogy to the "business judgment" rule in corporation law, and noted that the effect of revised rule 1.13 would be to insulate decisions of this kind from further scrutiny by counsel. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116, 1118 (1981).

The possibility that it may be "right" to violate certain regulations is discussed at note 107 *supra*. Compare this with Professor Hazard's notion of "running ethical risks," discussed at note 93 *supra*.

223. See text accompanying notes 112-14 *supra*.

fended, even within its own analysis. It can be argued that ultimately the fiction of an entity "consulting" a lawyer and accepting or rejecting his advice must break down, and that the board's action can be interpreted as a case of a well-counseled client making an informed decision to reject the lawyer's advice. Once we assume a well-intentioned "highest authority," we can with more equanimity accept the notion of that body acting on behalf of the organization for the specific purpose of evaluating the lawyer's advice. Indeed, the Commission could argue, a contrary rule might make the lawyer the sole arbiter of the validity of his own advice, or might require the entity to hire a second lawyer to evaluate the advice of the first.²²⁴

In any event, the overall structure of the rule is still sound, and its analytic underpinnings have been explained with more clarity. The rule contains many qualifiers ("give due consideration," and "minimize disruption" are retained from the Discussion Draft, along with a number of "reasonably believes," and "if warranted") that should make clear its limited and discretionary scope.

C. *Client Perjury, Lawyer Knowledge, Lawyer Belief, and Some Related Matters*

The Final Draft, in rule 3.3, continues the Discussion Draft's ban on presentation of false evidence or perjured testimony and continues to require affirmative remedial action on the part of the lawyer, even at the expense of client confidences.²²⁵ There is a significant textual change, however, which reflects the Commission's acceptance of what was probably Professor Freedman's most cogent criticism of the whole scheme of the Discussion Draft, and the client perjury provisions in particular. Ironically, the Commission's adoption of Professor Freedman's draftsmanship (though not his substantive views) has resulted in a rule calling for disclosure of

224. In *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977), a civil action against the government and some of its employees, the court held that under DR 5-105(C), each co-defendant must consent to waive any potential conflict of interest involved in sharing a lawyer, and that the involved lawyer was himself incapable of properly counseling the defendants about his own possible inadequacy.

If this court's theory were applied generally to intra-entity conflict situations, especially when the soundness of the lawyer's advice was at stake, hiring a second lawyer to evaluate the advice of the first would be a frequent necessity. The Fourth Circuit reversed this case, however, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978), after finding "no authority or reason to support the theory" 570 F.2d at 1201.

225. See MODEL RULES (Final Draft), *supra* note 2, rule 3.3(a)(4), (b).

client confidences in *more* situations than under the Discussion Draft, not fewer.

The Discussion Draft, it should be recalled, set the trigger for disclosure at "convinced beyond a reasonable doubt," a standard that would rarely be met in practice.²²⁶ Indeed, it was Professor Freedman's point that this standard was so unrealistically narrow that it bordered on the disingenuous: What profited the Commission to mandate disclosure if lawyers could use the Commission's own language to convince themselves that the occasion for disclosure would never arrive? Furthermore, a special Introduction to the Lawyer's Code (adapted from Professor Freedman's book)²²⁷ properly criticized the whole scheme of the Discussion Draft for paying insufficient attention to defining the all-important concepts of "knowledge" or "knowing."²²⁸ According to that Introduction, the Discussion Draft used as many as nine different standards of knowledge at various points, in seemingly haphazard fashion.

The Commission responded to these sound criticisms in two ways in the Final Draft. First, there is now a glossary of terms which includes definitions for "believes," "knows," "reasonably believes," and "reasonably should know."²²⁹ Second, the client perjury or false evidence trigger in rule 3.3 is now simply that the lawyer may not "knowingly" offer evidence that the lawyer "knows" is false, and if false evidence is unwittingly presented, the lawyer must take corrective action when he "comes to know of its falsity."²³⁰ The definition of the key terms in the rule is a simple one: actual knowledge, which may be inferred (proved) from the circumstances.²³¹ As before, the rule of mandatory disclosure is subject to a possible constitutional caveat in criminal cases, if the law should develop that way.²³²

The resulting rule is analytically clear, and can be applied in the real world. There is still, of course, the epistemological question of what we mean by "actual knowledge," and the related problem of proof, but those are matters that the law contends with daily in many areas of both civil and criminal law, whenever the

226. See text accompanying notes 148-51 *supra*.

227. M. FREEDMAN, *supra* note 51.

228. LAWYER'S CODE (Discussion Draft), *supra* note 18, at 8-9 (Introductory Comment on "Knowing"); see text accompanying notes 149-52 *supra*.

229. See MODEL RULES (Final Draft), *supra* note 2, at 5.

230. *Id.* rule 3.3(a)(4).

231. *Id.* at 5.

232. See text accompanying notes 152-60 *supra*.

state of mind of the actor is relevant.²³³

Lawyers are men and women of the world and are at least as able as people generally to make up their minds about what is and is not true. Under the Final Draft, a lawyer may still defend against a charge of presenting false evidence on the basis of lack of knowledge, but often the defense will be unconvincing. If it required something close to what Professor Freedman in a related context called "brute rationalization"²³⁴ to conclude that the client was not lying, then guilty knowledge (and subsequent evasion or suppression of that knowledge) may properly be inferred. In a litigated disciplinary proceeding, "knew" may in practice be the equivalent of "must have known."

But although the trigger for disclosure adopted in the Final Draft is thus certainly broader than the unrealistically narrow "beyond a reasonable doubt" standard of the Discussion Draft, it is important to note that the Commission stopped short of imposing the even broader standard of "reasonably should know." The Commission did not impose a duty upon lawyers to aggressively *ascertain*²³⁵ the truth of the matter by cross-examination and investigation of their own clients.

But why? Does stopping short of requiring a lawyer to find out about the evidence he is offering to a court represent the proper balance of competing interests? Why does the Commission use "know" as the trigger in one rule, and "reasonably should know" in another? What is the Commission's general theory about the criti-

233. When first confronted with the language of rule 3.3 in class, one of my students remarked that whenever a code purports to make the level of the lawyer's knowledge relevant, it instead makes relevant what the trier of fact finds was the level of knowledge.

Because this student was clerking for the Disciplinary Commission of the Supreme Court of Indiana at the time, I take it that he is a budding legal realist, not a cynic. Indeed, although Mark DeYoung did not assist me in writing this article in the traditional role of research assistant, I am indebted to him for shaping my thinking about this section of the article.

234. One of Professor Freedman's "Three Hardest Questions," from his famous article, see Freedman, *supra* note 121, involved the "Anatomy of a Murder" problem of giving the client legal information that might help the client create perjured testimony.

In chapter six of his book, M. FREEDMAN, *supra* note 51, entitled "Refreshing Recollection on Prompting Perjury," Professor Freedman retreated a little from his original position, and stated that while he still believed the lawyer should be reluctant to impute ill motives to his client, "there does come a point, however, where nothing less than 'brute rationalization' can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury." *Id.* at 75.

235. "Reasonably should know," according to the Final Draft, "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." MODEL RULES (Final Draft), *supra* note 2, at 5.

cal question of lawyer knowledge?

In answer to these questions, it is instructive to take a quick march through some of the key rules, to see what level of knowledge calls forth ethical duties in the related contexts of accepting and rejecting clients, counseling and assisting clients, disclosure of client secrets, withdrawal from representation, and the making of representations by the lawyer in the service of the client's cause. This quick survey appears to me to show that the Commission is still not one hundred percent sure of its ground on the question of lawyer knowledge, and that both the rules and the commentary still need a little work. Although the *practical* difference between "knows" and "reasonably should know" may be relatively small, largely because of problems of proof,²³⁶ the Commission may have missed a good opportunity to perform its didactic mission in an area where it is most needed.

The question of lawyer knowledge makes its earliest appearance in the Final Draft quite early indeed, in rules 1.2(d) and (e). These two may be called the "Anatomy of a Murder" rule and the Miranda rule, and both are central to the very establishment of the lawyer-client relationship.

Rule 1.2(d) prohibits the lawyer from counseling or assisting the client in conduct which the lawyer "knows or reasonably should know" is criminal or fraudulent.²³⁷ It speaks to the "Anatomy of a Murder" scenario in which the lawyer—wittingly or unwittingly—puts into the client's hands information that will help in the fabrication of testimony or the commission of crime or fraud. As Professor Freedman demonstrated so brilliantly in his book,²³⁸ there is only a fine line between giving information that will allow a client who is genuinely in doubt to act properly, giving information that will jog the memory of the client who has suppressed information unconsciously or in the mistaken belief that it is adverse, and giving information that is simply helpful in planning crime or fraud.²³⁹ The Commission's commentary is to like effect, though not so detailed or so elegant. The Commission does

236. See note 233 and accompanying text *supra*.

237. MODEL RULES (Final Draft), *supra* note 2, rule 1.2(d)(emphasis added).

238. M. FREEDMAN, *supra* note 51, at 59-77.

239. Professor Freedman tells of one case in which a woman who had shot her husband suppressed the fact that he had attacked her with a knife, in the mistaken belief that it was adverse evidence. When her lawyer explained the defense of self-defense, she testified truthfully, and the lawyer's "prompting" thus served both the client and truth. *Id.* at 4-5, 75.

The dividing line between proper and improper information, for Professor Freedman, is at "brute rationalization." M. FREEDMAN, *supra* note 51, at 75; see note 234 *supra*.

not, however, explain why the lawyer must take steps to *ascertain* the client's motivation.

Rule 1.2(e) is the repositioned and renumbered Miranda feature discussed near the end of the main body of this article.²⁴⁰ It too requires action when the lawyer "knows or *reasonably should know*," in this case, whether the client "expects assistance not permitted by" the Final Draft or law generally.²⁴¹ Putting the two rules together, it appears that the client is fishing for advice or help that the lawyer is prohibited by rule 1.2(d) from giving; rule 1.2(e) requires the lawyer to figure it out, level with the client, and refuse forthrightly.

As I argue at the conclusion of this Addendum, these early rules are still at the very core of the whole Final Draft, and still represent not a betrayal of lawyer-client trust, but rather the elevation of that trust to a higher plane. Even before reaching that conclusion, though, it should be evident that requiring lawyers to be active in assuring themselves that they are not being used or played the fool is fully commensurate with the idea that lawyers' services are limited, and that clients should be told about those limitations early on. When it is still easy for the lawyer simply to refuse to become involved with the client, it makes good sense to require the lawyer to be *active* in taking responsibility for deciding whether to cast his lot with the particular client. Lawyers who accept clients unwisely will not lightly be heard to argue that they were caught unawares, for these rules impose a duty of vigilance at the very gates of access to the profession. As we shall see, the very rightness of the Commission's choice of the "reasonably should know" standard here casts doubt on the Commission's refusal to use that standard in the rule on client perjury.

A knowledge standard next appears in the Final Draft in rule 1.6, the general rule on discretionary disclosure of client secrets. Surprisingly, the Final Draft states that disclosures under this rule may be made to the extent the lawyer "believes" necessary, and eschews the requirement that the belief be "reasonable." Rule 1.6(b)(2), which pertains to interdiction of the most serious client crimes and frauds, follows up by allowing this discretionary choice when the lawyer "believes" the harm will be that serious, again without imposing a requirement of reasonableness. Furthermore,

240. See notes 164-69 and accompanying text *supra*. Rule 1.4(b) of the Discussion Draft contained this Miranda feature.

241. MODEL RULES (Final Draft), *supra* note 2, rule 1.2(e).

in what is surely a case of lax draftsmanship and not a deliberate substantive choice, the rule says nothing about how much knowledge or belief the lawyer must have *that the conduct will take place at all*.²⁴²

The use of mere belief as the standard in this rule, which is already controversial enough and hard enough for lawyers and ethics committees to apply, seems questionable; it seems to sanction shooting from the hip. It is doubly surprising and questionable when one considers that this is the *only* rule in which the mere belief is the standard. The best solution is surely to jettison the definition altogether, and require that all lawyer beliefs that are relevant to an ethical issue be reasonable beliefs in order to pass muster.

Rule 1.16 speaks to lawyer withdrawal from representation of a client not only in certain innocuous situations, but also in the highly charged cases involving possible client misconduct that may draw the lawyer into dangerous waters. Rule 1.16(a)(1) mandates withdrawal (or an initial refusal to undertake the representation) when the representation "is likely to result in" a violation of an ethical or other legal duty by the lawyer.²⁴³ Again surprisingly, the Commission used none of the definitions that it had so carefully prepared, and did not even advert to the question of how sure the lawyer must be that the impending problem is "likely." Rule

242. The full text of rule 1.6 of the Final Draft is as follows:

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To serve the client's interests, unless it is information the client has specifically requested not be disclosed;

(2) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(3) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(4) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(5) To comply with the rules of professional conduct or other law.

MODEL RULES (Final Draft), *supra* note 2, rule 1.6.

243. *Id.* rule 1.16(a)(1).

1.16(b)(1), by contrast, allows withdrawal (even if harmful to the client) when the lawyer "reasonably believes" that the client is using the lawyer to further fraudulent or criminal purposes.²⁴⁴

The second usage seems appropriate, for the lawyer should not be required to stick with a situation that is rapidly deteriorating until he *knows* that he is being used for an improper purpose, for it may then be too late to withdraw. Furthermore, if the lawyer does wait until some improper action has been taken with his help, he will have the further dilemma of deciding whether to take rectifying action, which is permitted under rule 1.6(b)(3) and may be mandatory in practice.²⁴⁵ This may well put the client in a worse position than if the lawyer simply withdraws early on. On the other hand, lawyers should be made of sterner stuff than to withdraw at the first whiff of malodor—a reasonable belief is properly required.

The failure of the Commission to use *any* of its definitions as the trigger for mandatory withdrawals in the first half of rule 1.16, however, suggests that it could not decide whether cases of approaching misconduct were more like initial decisions to take on a client ("reasonably should know" standard of rule 1.2(d)), or more like cases of courtroom perjury ("knows" standard of rule 3.3(a)(4)). Refusing to make a decision is not an acceptable solution for a drafting committee, however; the problem will not go away.

A final area for comparison has to do with cases in which the lawyer's own out of court representations are at issue, as opposed to actions or evidence of the client himself. Rule 4.1 applies the standard of "knowingly" to each of its subparts, which prohibit lawyers from making false statements of law or fact, and from failing to disclose facts, in situations in which the failure is tantamount to affirmative misrepresentation.²⁴⁶ In none of these cases is the additional requirement of seeking knowledge imposed by use of the term "reasonably should know." Again the question: Why is this requirement imposed at the initial interview stage, but not here?

Putting together all of the key provisions in which the lawyer's level of knowledge is important, it is hard to find a consistent and principled theory at work in the Final Draft. Sometimes the duty to find out is imposed, and sometimes it is not. Sometimes that

244. *Id.* rule 1.16(b)(1).

245. See notes 196-206 and accompanying text *supra*.

246. MODEL RULES (Final Draft), *supra* note 2, rule 4.1.

question is left hanging. There appear to be direct inconsistencies as well, for although a lawyer cannot assist a client's criminal conduct generally if he *should know* of its character, the lawyer is barred from assisting the specific crime of perjury in court only when he *knows* the truth.

If there are subtle differences in some of the situations just discussed that properly call for subtly different rules, we should expect to find enlightenment in the commentary. Unfortunately, the commentary actually exacerbates the confusion, for in at least two important instances, the commentary attributes an incorrect standard to the very rule it is discussing, exactly at the point when precision is needed to flush out the reasons, if any, for the difference in standard chosen.²⁴⁷

It may be argued, particularly by people who had taken the main body of this article to heart, that in practice there may not be a great deal of difference between the competing standards. Proving that a lawyer "knew" of his client's fraudulent plans is concededly difficult unless, of course, the client tries to bring the lawyer down with him. But proving that "a lawyer of reasonable prudence and competence would ascertain" that the client was planning fraud may prove to be almost as difficult, unless the client once again acts as chief witness. This is because the lawyer may falsely assert that the client told a story that on its face raised no suspicions whatsoever, one that would have fooled the average lawyer with ease. It is hard to say how often the client will have an interest in blaming the lawyer, and how often the client will maintain the innocence of both himself and his lawyer, but the percentages should be the same no matter what a code has said.

For lawyers who are attempting to evade responsibility, then, code language (indeed, the very idea of a code) will be an inconve-

247. The commentary to rule 3.3(a) states that a lawyer's own representations in open court "may properly be made only when the lawyer *knows* the assertion is true or *believes* it to be true on the basis of a *reasonably diligent inquiry*." MODEL RULES (Final Draft), *supra* note 2, at 125 (emphasis added). The text of the rule refers to "knowingly" only.

The commentary to rule 4.1 (concerning the lawyer's out of court representations) refers back to rule 1.2(d) in these words: "The critical elements under Rule 1.2(d) are the nature of the client's purpose, whether the lawyer *knew* of the purpose and whether the lawyer assisted in carrying it out." *Id.* at 162-63 (emphasis added). This is incorrect, for the standard in rule 1.2(d) is actually "*knows or reasonably should know*." *Id.* rule 1.2(d) (emphasis added).

The Commission's uncertainty is strikingly illustrated in Mr. Kutak's recent article in which he incorrectly ascribes the "reasonably should know" standard to rules 3.3(a) and 4.1, and in the next sentence "clarifies" that standard by stating that it does *not* involve investigation by the lawyers. Kutak, *supra* note 222, at 1120.

nience and little more. But for the great majority of lawyers, who we expect will use a code as a self-study tool and see it as the embodiment of the profession's aspirations for itself, a change of language will carry an important message. Using the phrase "reasonably should know" will alert lawyers to the necessity of being vigilant at certain key points in their relationships with their clients.

My own view is that in all of these rules wherein lawyer knowledge of what the client is up to is important, it would be preferable to impose a duty of inquiry upon the lawyer. If, upon the very first meeting of the lawyer and the client, rule 1.2(d) warns the lawyer to find out about what he is getting into, and rule 1.2(e) requires him to tell the client that that is what he is about, the relationship will either terminate on the spot, or it will go forward on the basis demanded by those rules. But once the client has accepted the idea that the lawyer has certain obligations to the legal system that will not be denied, it seems pointless to allow the client to *later* engage in misconduct through use of the lawyer's services, so long as the client makes the conduct subtle enough that the lawyer will not "know" of the misconduct without inquiry.

But is a relationship in which the lawyer is constantly allowed—even urged—to scrutinize the client a healthy one for the profession and for the public and society? That is the subject of some concluding remarks, prompted by an important recent article by Professor Robert Burt²⁴⁸ that reexamines our assumptions about what trust means in the context of lawyer-client relationships.

D. *Conclusion: Telling the Truth About the Legal Profession—A Radical Idea After All?*

The main body of this article concluded with the theory that since the reality of today's law practice is that lawyers cannot blindly follow the orders of their clients, and that lawyers may even have to reveal client confidences in certain situations (no matter which code of lawyer conduct is in effect), a kind of "truth-in-lawyering" principle demands that clients be told about that reality. In this view, the Miranda feature of the Discussion or Final Draft could lead to more client trust of lawyers, not less: clients seeking prohibited assistance would at least be warned off rather than betrayed later, and clients seeking legitimate help, even if at

248. Burt, *supra* note 168.

the margins, could better understand and be more assured that they truly had the full, loyal help of their chosen counsel.

Professor Burt's article lends support to this theory, for it posits as a paradox the idea that if there are more incentives for lawyers to reveal the secrets of their clients, there may be more incentives for lawyers to talk to clients openly about that possibility, with the result that the trusting relationship, having weathered the storm, may become real rather than merely proclaimed.²⁴⁹

In brief, Professor Burt's argument proceeds in this fashion. First, he notes that despite the mythology of the legal profession that lawyers gain the trust of clients by assuring them about the confidentiality principle, the reality is that lawyer-client mistrust is a pervasive fact.²⁵⁰ Certain conflicts are inherent in the relationship,²⁵¹ and many others develop because personality clashes or minor doubts about tactics and goals are allowed to fester and escalate instead of being worked out by frank discussion. Even when there is not an actual conflict, clients frequently harbor suspicions that their lawyers are not fully on board, and lawyers worry that their clients may be withholding information or seeking unjust or unrealistic ends.

The observation that lawyers may harbor suspicions about what their clients are up to sets the stage for the major insight of the article: because traditional rules of confidentiality command the lawyer's silence unless he "knows" of impending client misconduct, and because there is no incentive for him to find out, lawyers soon develop mechanisms to avoid both knowledge *and discussions that may lead to knowledge*.²⁵² In this way lawyers avoid personally distasteful conversations, and also hold on to clients that perhaps they should not. But if a new code instead provided an incentive for lawyers to find out about client misconduct, then lawyers would suddenly have an incentive to initiate and follow up on open discussion of such matters. The result might well be greater trust,

249. *Id.* at 1019.

250. Like the present article, Professor Burt's contains little empirical data to substantiate it. His postulates about problems in the lawyer-client relation have a ring of truth to them, however, and are certainly no *less* believable than what he characterizes as the myth. To me it appears intuitively obvious that at least *some* lawyer-client conflict is inevitable. See note 251 *infra*.

251. These include conflicts that may develop when an attorney advises a client that the client's adversary will likely prevail or that probable victory will be delayed, or conflicts that are created by the differing financial interests of the attorney and client. See Burt, *supra* note 168, at 1019-21.

252. *Id.* at 1027-29.

not less—in no small part because it would most often appear that clients were honest and lawyers were zealous after all.

The incentive to open lawyer-client discussion of ethical issues that Professor Burt advocated was to impose what he often referred to as a “negligence standard” upon lawyers, based on what the lawyer “should know” about his clients.²⁵³ Since lawyers could be held responsible for such knowledge unless they disassociated themselves from client misconduct whenever a reasonable lawyer would have done so, lawyers would be on inquiry, and would take the initiative.

Writing at a time when only the Discussion Draft was available, Professor Burt complained that although the drafters seemed to recognize the problem of lawyer-client mistrust, their rules did little to ameliorate the situation, and may have made it worse. This is because, he argued, the Discussion Draft not only called for more disclosures of client secrets,²⁵⁴ but also (in the Miranda provision) sometimes²⁵⁵ required the lawyer to warn the client about the consequences of leveling with the lawyer. The Discussion Draft disclosure provisions were thus self-defeating, in his view, for even assuming that lawyers would reveal what the Discussion Draft urged them to reveal, clients would simply not tell their lawyers anything of substance, and the lawyer-client dance of mistrust would continue. This state of affairs would create *disincentives* for lawyers and clients to engage in frank discussion of the ethical issues underlying their relationship, and would prompt lawyers to omit the Miranda warnings whenever possible.

As noted earlier, I agree with Professor Burt’s statement of the paradox: acknowledgement of the fact that lawyers are not hired guns can clear the air and demystify the profession, thus putting lawyer-client trust on a firm and realistic basis. He is also no doubt correct in suggesting that a negligence standard for measuring lawyer responsibility will help prompt lawyers to take the lead in establishing that new trust. Presumably, he will therefore join in my applause for the Final Draft’s adoption of the “reasonably should know” standard (especially in rules 1.2(d) and 1.2(e) regarding the crucial initial interview) and he will also join in my

253. *Id.* at 1030-31.

254. *Id.* at 1022. Professor Burt, in common with many observers, attributed broader scope to the disclosure provisions than I did.

255. The Discussion Draft required the lawyer to give the Miranda warning if he had “reason to believe” that the client was seeking prohibited assistance. MODEL RULES (Discussion Draft), *supra* note 1, rule 1.4(b).

complaint that the Final Draft does not carry this standard through to all the other related areas involving possible client misuse of attorney services.

Actually, the Final Draft's inconsistency in following up on the "reasonably should know" standard does not cause me as much pain as it must Professor Burt, for throughout this article I have tried to demonstrate that the incentives he calls for *already exist in the law generally*. Regardless of what any lawyer code says, the law of tort, agency, and joint participation in crime already commands thoughtful lawyers to find out what uses are to be made of their services, and to act accordingly. Lawyers already have powerful incentives to admit to themselves, and then put out for public consumption, the facts about the important but limited role that lawyers can and should play in our society.

Do the Model Rules, then, merely reflect and codify a preexisting reality? Or do they strengthen and quicken the trend toward lawyer responsibility by imposing within the profession some full-blown rules that are still developing outside of it? The answer is probably that they do a little of each.

In either event, the Model Rules envision a society in which lawyers are not the mere passive tools of their clients, or the mere passive receptacles for their clients' secrets. Instead, lawyers are assigned the difficult task of assessing each situation and their own moral position in it, making an ethical judgment, and then living with the consequences. That is much the way it has always been, but to purveyors and followers of the myth, it represents a brave new world indeed.

In the final analysis, perhaps the Model Rules of Professional Conduct are radical after all, but in a very different way than their critics charged during the discussion period. They may be radical *not* because they change the law of professional responsibility so much—since they change it so little. Instead, the radical contribution of the Model Rules may be their honesty about what the law already is, their willingness to admit the uncertainty of that law, and their challenge to us not only to measure up, but to bring our clients along with us.