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THE NEXT STEP IN LEGAL ETHICS: SOME OBSERVATIONS ABOUT THE PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT*

*Robert J. Kutak***

I can think of no more appropriate occasion to discuss the future development of the ethics of the legal profession and the law of professional responsibility than before a gathering of future lawyers in commemoration of St. Ives of Kermartin. Although there have been a number of lawyers who have been canonized or beatified by the Catholic Church, and some saints who at one time in their lives pursued the study of law,¹ St. Ives is notable for his determination to attain the highest standards of ethics in his practice of law.²

St. Ives devoted his practice exclusively to pro bono work for the indigent, refused to pursue any action that was not just, and sought always to reconcile adverse parties to avoid unnecessary litigation. Dean Wigmore, in commenting on St. Ives, has described him as a “wonderful man who in real life set a standard — an unattainable one, perhaps — for our profession.”³ Although none of us may ever achieve such saintly standards, we should always seek to attain them.

The ABA Commission on Evaluation of Professional Standards has circulated a discussion draft of proposed Model Rules of Professional Con-

* *These remarks were originally delivered as the annual St. Ives Lecture at Catholic University's Columbus School of Law on March 28, 1980.*

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1. *See generally* J. GAYNOR, *LAWYERS IN HEAVEN* (1979). Some of the most revered saints were lawyers, including Pope Gregory I, St. Bonaventure, St. Thomas Aquinas, and, of course, Sir Thomas More. *Id.* at 28, 67-68, 73-77, 90-92.

2. *Id.* at 42-44.

3. *Id.* at 42-43.

duct to thousands of lawyers and laymen for their comment.⁴ My purpose this evening is to discuss some of the highlights of the proposed Model Rules and to give you some brief insight into the Commission's work.

Although the draft is the sixth we have produced, it remains a discussion draft. We expect it to be studied and commented on extensively, and we plan to make appropriate revisions based upon the comments we receive.

The Rules embodied in the discussion draft address a broad range of ethical issues, and I take great pride in our product because it clearly focuses attention on the most difficult issues of professional responsibility that confront the present-day practitioner. I consider high praise the words of Linda Greenhouse of the *New York Times* who said the draft "takes a pragmatic, down-to-earth approach toward a lawyer's everyday problems."⁵

During the past several months, when I have spoken at forums such as this, or have met with members of the press, I almost invariably encounter two questions. The first is, "Why? Why — after only ten years — do we need a new set of rules; what's the matter with the current Code of Professional Responsibility?" The second question is "How do the proposed Rules differ from the Code?"

While the format of the proposed Model Rules differs significantly from the current Code, that difference is to some extent misleading. We have sought to build on the foundation laid a decade ago by the Wright Committee, which undertook to revise the former ABA Canons of Professional Ethics and produced the Code of Professional Responsibility.⁶ The Rules we are now offering for comment are the result, therefore, not of revolution, but of evolution. Many of the concepts of the Code and, indeed, much of its language will be found in the proposed Model Rules.

Then why a new document? My answer is that there are a number of reasons. For one, the past decade has brought dramatic developments in the practice of law in America. There has been a significant movement away from the preponderance of lawyers in independent private practice, that is, alone or in very small firms. Provision of legal services to persons of modest means has become an established and accepted principle. Court decisions since adoption of the Code have dictated new approaches to the

4. DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* 48 U.S.L.W. 1 (Feb. 19, 1980) (special edition) [hereinafter cited as DISCUSSION DRAFT].

5. N.Y. Times, Feb. 2, 1980, § 1, at 6, col. 1.

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1979). The Reporter for the Wright Committee was John F. Sutton, Jr., now Dean of Texas University's School of Law. Dean Sutton has served as a consultant to the Commission on Evaluation of Professional Standards.

issues of advertising and solicitation. In other words, the natural process of change — of evolution — that affects every area of American law has affected the “law of lawyering” as well.

In Holmes’ familiar phrase “The life of the law has not been logic; it has been experience.”⁷ Experience alters our thinking about the premises that support a set of legal rules, and eventually leads us to modify those premises, the conclusions drawn from them, or both.⁸

Consider, for example, how much our thinking about regulation of professional competition has changed since the Supreme Court declared that broad restraints on group legal services and advertising infringed upon important first amendment rights.⁹ We no longer can say that a conception of the public interest — sometimes confused with professional self-interest — justifies all restraints on services or limits on the dissemination of information about such services. Indeed, the public interest increasingly has been recognized as requiring new methods for the delivery of legal services and the free flow of truthful information about their cost and availability.

It might be useful to review some of the events of the seventies which persuaded the Commission that a basic reconsideration of the Code of Professional Responsibility, both in form and in substance, was necessary:

— In 1971, as I have noted, the Supreme Court invalidated, on first amendment grounds, the Code’s restrictions on group legal services.¹⁰

— During 1972 and 1973, the Securities and Exchange Commission and the courts began suggesting that an attorney’s duty to the public in a securities transaction may sometimes override his duty to his client.¹¹ More recently, the *National Student Marketing* decision, which recognized such a duty, sent reverberations of concern throughout the profession.¹²

7. O. HOLMES, *THE COMMON LAW* I (1881).

8. *Compare In re Maclub of America*, 295 Mass. 45, 3 N.E.2d 272 (1936) with *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

9. *See In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass’n*, 389 U.S. 217 (1967). *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (invalidation on antitrust grounds of minimum fee schedules); *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded on other grounds*, 571 F.2d 205 (4th Cir. 1978), *cert. denied*, 436 U.S. 941 (1979). *See generally* Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. REV. 559 (1979); Comment, *Legal Services Within the Reach of the Average American: A Review of the Tunney Hearings*, 27 BAYLOR L. REV. 603 (1975).

10. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

11. *See generally* Smith, *Preventing Errors in Securities Transactions*, 30 S.C.L. REV. 243 (1979).

12. *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978). A lengthy bibliography is available in Hoffman, *On Learning of a Corporate Client’s Crime or Fraud — The Lawyer’s Dilemma*, 33 BUS. LAW. 1389, 1404 n.38 (1978).

— In 1974, then Senator John Tunney, chairman of a U.S. Senate subcommittee holding hearings on the availability of legal services, warned that while no one wanted to “reach the point where the organized bar is substantially regulated by some Federal authority . . . if something isn’t done soon to provide greater consumer access to lawyers, this will have to happen.”¹³

— In 1975, the Seventh Circuit invalidated substantial portions of the Code’s rules governing pretrial publicity.¹⁴ In addition, the Supreme Court held that minimum fee schedules enforced through regulatory processes in local bar associations violated the Sherman Antitrust Act.¹⁵

— In 1977, *Bates v. State Bar of Arizona*¹⁶ dramatically changed the profession’s power over advertising.

— In 1978, the Supreme Court held that the application of solicitation rules to contacts made by an attorney for the purpose of furthering political goals was unconstitutional.¹⁷

— In 1979, the SEC disciplined two lawyers for negligently failing to disclose information about their securities clients.¹⁸ In recommending that the ABA require advocacy training in law schools, the Chief Justice of the Supreme Court observed that “the legal profession is vastly underregulated, both in quality control and in the enforcement of the standards of ethics and professional responsibility.”¹⁹ The Chief Justice further stated that “if the bar, the judges and the law schools do not resolve this problem . . . there is one direct solution.”²⁰

I recite these developments not with the notion that I am telling you something new, but rather to suggest how sweeping are the swift winds of change. Clearly, as a profession, we are engaged in an intensive reexamination of the most fundamental questions in ethics, spurred in part by our experiences, but impelled as well by the forces of public opinion.

But a revision of the Code of Professional Responsibility is called for by

13. *Recent Developments in Prepaid Legal Services Plans: Hearings on S. 2686 Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 157 (1974).

14. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

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

16. 433 U.S. 350 (1977).

17. *In re Primus*, 436 U.S. 412 (1978). Solicitation restrictions were limited in *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265, *cert. denied*, 444 U.S. 917 (1979).

18. *In re Carter*, [1979] Transfer Binder FED. SEC. L. REP. (CCH) 82,175.

19. National Law Journal, July 16, 1979, at 4, col. 2.

20. *Id.* Chief Justice Burger’s remarks are taken from his speech before 400 lawyers and law school faculty at the 4th Circuit Judicial Conference in Hot Springs, Virginia, on June 29, 1979.

reasons other than the process of evolution. A more fundamental problem is that the Code is simply incomplete. At the time the Code was adopted, in 1969, its focus was on the lawyer as a private practitioner working alone or in a very small firm. The Code cast the attorney primarily in the role of an advocate in court and the client as an individual with an occasional legal problem. As Geoffrey Hazard has observed, the Code conceived of the practice of law as it was in downstate Illinois in the 1860's.²¹ However, this is 1980: lawyers represent corporations, estates, and other impersonal entities; lawyers function outside the courtroom as advisers, negotiators, mediators, and evaluators; lawyers handle client problems through administrative agencies, appear before legislative assemblies, and increasingly associate in large law firms rather than function as sole practitioners.²²

And what does the Code say about the obligations of the adviser and the evaluator, the special problems of corporate counsel, and the implications of lawyers practicing together? Frankly, either nothing or very little.²³ These additional aspects of modern day lawyering, the Commission concluded, compel a fundamental rethinking of the Code.

To the second question, "How does the Discussion Draft differ from the Code?" my temptation (which I generally resist) is to respond with Elizabeth Barrett Browning's "Let me count the ways," because they are many.

As students of the law, you will immediately recognize the changed format. What the Commission has done is to take the underlying structural thrust of the Code — its bifurcation of Disciplinary Rules and Ethical Considerations — to its next logical step by drafting rules that are the legal foundation of good professional conduct. We have borrowed heavily from the format of the American Law Institute's Restatements of Law which, as you know, were introduced half a century ago.

Each Model Rule is set forth as a black-letter statement of professional standards and is accompanied by extensive explanatory comment. The Commission believes there is substance as well as form to this change because we made a considered decision to make the Model Rules more truly legislative in both technical style and intended function. Yet, the proposed Rules are not so much a penal code for the legal profession — although in part they are that — as they are black-letter statements of the practice of

21. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 16-19 (1978).

22. *See generally* Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* (1967).

23. The current Code acknowledges the role of adviser in E.C. 7-5, E.C. 7-8, and D.R. 7-106 and refers to the role of counselor in D.R. 7-102(A). The role of intermediary is specifically mentioned in E.C. 5-20. The role of the evaluator, a role that is often involved in securities work, is not discussed in the Code. The special problems confronting lawyers representing organizations are treated in E.C. 5-18.

ethical lawyering as it is perceived by our profession in the closing decades of the twentieth century.

Our Commission has undertaken to confront the facts as they are: today's lawyer is not only an advocate, but is also an adviser, a negotiator, a mediator, a legal evaluator — roles in which many lawyers function to the exclusion of the traditional advocacy role. Although basic concepts of loyalty, integrity, candor, and competence are constants, subtle variations in choice among competing values are likely to arise in these different settings of practice. The proposed Rules thus treat each of these roles separately in the conviction that a statement of professional standards facilitates their development, and so ought to acknowledge any of the differences that may evolve in expectations about attorney behavior.

An implicit theme running through the draft is the recognition of a certain professional discretion when confronted by a situation demanding a choice between two legitimate, competing values.²⁴ No code, no single set of rules can dictate in every case what the proper choice must be. The dilemmas of ethical choice simply depend too much on the subtle variations of factual background which can arise in one's day-to-day practice. But codes and rules can — and I believe the discussion draft does — compel the reasoned exercise of that discretion. It is the essence of professional responsibility that difficult choices be responsibly made. As professionals, we must look to the controlling rules of our craft to inform those reasoned choices.

An excruciatingly difficult set of ethical dilemmas suggests another theme of the draft: that the practice of law requires careful consideration of the rights of nonclients. Both in the Code and, increasingly, in the past decade's scholarship and debate, it is recognized that in the representation of clients the ethical lawyer has duties that run to persons and institutions who are strangers to the client-lawyer relationship.²⁵ An authoritative

24. See generally Hazard, *Proposed Revision of the Rules of Legal Ethics in the United States*, in ABA, *AMERICAN/AUSTRALIAN/NEW ZEALAND LAW: PARALLELS AND CONTRASTS* 237 (1980) [hereinafter cited as *Proposed Revision*].

25. See *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978); *State v. Krutchen*, 101 Ariz. 186, 417 P.2d 510 (1966), *cert. denied*, 385 U.S. 1043 (1967); *People v. McCann*, 80 Colo. 220, 249 P. 1093 (1926); *In re Integration of the Neb. State Bar*, 133 Neb. 283, 275 N.W. 265 (1937); *Fite v. Lee*, 11 Wash. App. 21, 521 P.2d 964 (1974). See generally Ferren, *The Corporate Lawyer's Obligation to the Public Interest*, 33 BUS. LAW. 1253 (1978); Frank, *A Higher Duty: A New Look at the Ethics of the Corporate Lawyer*, 26 CLEV. ST. L. REV. 337 (1977); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Gruenbaum, *Corporate/Securities Lawyers: Disclosure, Responsibility, Liability to Investors, and National Student Marketing Corp.*, 54 NOTRE DAME LAW. 795 (1979).

The current Code recognizes a number of such limits, though their phrasing is at times

evaluation of professional standards must explore those shifting boundaries of the client-lawyer relationship. The draft does so in many of its provisions — sometimes firmly defining where the usual demands of that relationship cease;²⁶ at other times compelling the exercise of professional discretion in a given case and guiding the exercise of that discretion.²⁷

Since I have no reason to suspect that the students and faculty of Catholic University are radically different from normal people, I know you would like me now to talk about the most controversial parts of the Commission's work. After all, controversy is the meat and drink of lawyers, no less than laymen. Still, I am reminded of Bertrand Russell's observation that "[t]he most savage controversies are about those matters as to which there is no good evidence either way."

I suspect that there are few parts of the discussion draft which are completely free of controversy. Yet, on the basis of what we have heard so far, almost everyone agrees that three issues stand out. The first concerns the area of confidentiality of client communications. As Professor Hazard has so nicely put it, "The problem is not so much *whether* there should be a

misleading or ambiguous. See ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102; Swett, *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325, 350 (1977); Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C.L. REV. 671, 672 (1979); Note, *Disbarment: A Case for Reform*, 17 N.Y.L.F. 792, 796 (1971). The problems presented by ambiguous or sweeping standards in the disciplinary context are discussed thoroughly in Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980).

26. *E.g.*, Rule 1.7(b) ("A lawyer shall disclose information about a client to the extent it appears 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 or the rules of professional conduct.") DISCUSSION DRAFT, Rule 1.7(b), *supra* note 4, at 6.

27. *E.g.*, Rule 1.13(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 . . . 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 in behalf of the organization as determined by applicable law.

Id. at 10.

rule of confidentiality, but rather how the zone of confidentiality should be defined."²⁸

Consider the situation in which a client proposes to commit an illegal act. It is accepted that the lawyer should not assist in such purpose. And what if deterrence fails? Does the lawyer blow the whistle on his client? The Commission has taken the position that the answer depends on the nature of the proposed crime. If a client proposes action threatening death or serious bodily harm to another, the proposed Rules say the attorney must disclose information sufficient to prevent that very grave injury to appropriate authorities.²⁹ Where some lesser harm is threatened, the Rule does not *mandate* disclosure but *permits* a lawyer to disclose the information in order to prevent that harm.³⁰

In analyzing rules that limit the scope of confidentiality and impose a limited duty to disclose otherwise confidential information, our starting point is DR 7-102(B)'s requirement that a lawyer must disclose any unrecertified fraud committed by a client in the course of representation and DR 4-101(B)'s grant of discretionary power to disclose any intended crime.³¹ I believe that these provisions should be narrowed and limited.

But it would be irresponsible, and contrary to the great weight of authority, to draft a rule of absolute confidentiality prohibiting any disclosure of client misconduct irrespective of its nature or consequences. Lawyers have traditionally been called upon to disclose perjury,³² and a number of courts have said that a lawyer can never sit silently by while a client commits fraud in negotiations.³³ Our profession's code cannot ig-

28. *Proposed Revision, supra* note 24, at 245.

29. DISCUSSION DRAFT, Rule 1.7(b), *supra* note 4, at 6. For text of Rule 1.7(b), see note 26 *supra*. By law such information does not enjoy the protection of the attorney-client privilege. *E.g.*, *Cernoch v. State*, 128 Tex. Crim. 327, 81 S.W.2d 520 (1935); *Ott v. State*, 87 Tex. Crim. 382, 222 S.W. 261 (1920); *Pearson v. State*, 56 Tex. Crim. 607, 120 S.W. 1004 (1909).

30. Rule 1.7(c) states:

A lawyer may disclose information about a client only . . . to the extent it appears necessary to prevent or rectify the consequences of a deliberately wrongful act, except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences

DISCUSSION DRAFT, Rule 1.7(c)(2), *supra* note 4, at 6.

31. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6. In 11 states, DR 7-102(B) incorporates privilege as a limit on the duty to rectify a fraud. The effects of this amendment are uncertain, *see* *Committee on Professional Ethics v. Crary*, 245 N.W.2d 298 (Iowa 1976), and the amendment has not been adopted by the vast majority of the states.

32. *See, e.g., In re Carrol*, 244 S.W.2d 474 (Ky. 1951); *In re King*, 7 Utah 2d 258, 322 P.2d 1095 (1958); *Gebhardt v. United Rys. Co.*, 220 S.W. 677 (Mo. 1920).

33. *E.g., In re Corey*, 55 Hawaii 47, 515 P.2d 400 (1973), *cert. denied*, 417 U.S. 911 (1974); *In re Sherman*, 271 A.D. 462, 65 N.Y.S.2d 802 (1946). *See also* *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

nore these traditional principles.

The Supreme Court has not yet expressly addressed the relationship between the reach of constitutional rights and the limits to confidentiality. A few lower courts have said that a *criminal* defendant's perjury cannot be disclosed, but there is contrary authority as well as much confusion in this area.³⁴ It is doubtful, in light of its decisions on analogous questions, that the Supreme Court would conclude that constitutional rights can be used to conceal perjury. In a very recent case, the Court said this: "[A]rriving at the truth is a fundamental goal of our legal system. We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences."³⁵ In the context of civil litigation, I know of no case in which a court has held that constitutional rights safeguard perjury from disclosure.³⁶

The position that the Commission has taken on the question of confidentiality is explained in the Comment to Rule 1.7 of our proposed Rules.³⁷ The Rule proceeds from the basic premise that a client's right to assistance of counsel is qualified in part by the purposes for which assistance is sought. Assistance for such lawful purposes as defending against an accusation of criminal conduct is a basic entitlement shared by all Americans. But no one is entitled to assistance from a lawyer for the purpose of furthering an illegal course of action. Any protection that is extended to the attorney's relationship with a potential wrongdoer is intended, not for the protection of the wrongdoer, but to encourage others to seek legal advice so that they might *comply* with the law.³⁸

Fashioning a duty for the attorney which accommodates both the interests of persons who might be deterred from seeking advice in the future by a rule of disclosure and the interests of potential victims of wrongful con-

34. See, e.g., *Maddox v. State*, 28 CRIM. L. REP. (BNA) 2131 (Tex. Crim. App. 1980). Compare *State v. Trapp*, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977) and *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) with *People v. Lewis*, 75 Ill. App. 3d 560, 393 N.E.2d 1380 (1979) and *In re Branch*, 74 Cal. Rptr. 238, 449 P.2d 174 (1969). See generally, Wolfram, *Client Perjury: The Kutak Commission and ATLA on Lawyers, Lying Clients, and the Adversary System*, 1980 A.B.F. RES. J. 964 (Nov. 1980).

35. *United States v. Havens*, 48 U.S.L.W. 4596, 4598 (1980). See also *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954).

36. See note 32 *supra*; Wolfram, *supra* note 34.

37. DISCUSSION DRAFT Rule 1.7, Comment, *supra* note 4, at 6-7.

38. *Id.* at 7. See, e.g., *Sawyer v. Stanley*, 241 Ala. 39, 1 So. 2d 21 (1941); *Vittitow v. Burnett*, 112 Ark. 277, 165 S.W. 625 (1914); *Ridener v. Commonwealth*, 256 Ky. 112, 75 S.W.2d 737 (1934); *State v. Johns*, 209 La. 244, 24 So.2d 462 (1945); *State v. Childers*, 196 La. 554, 199 So. 640 (1940); *State v. Phelps*, 24 Or. App. 329, 545 P.2d 901 (1976). See also *People v. Fentress*, 425 N.Y.S.2d 485 (1980).

duct by an immediate client is a difficult process indeed. Ultimately, no categorical rule could adequately respond to all the interests at stake in any specific situation. The Rule proposed by the Commission, though providing absolute protection to most client communications and mandating disclosure of life-threatening client conduct, permits disclosure of lesser client wrongs. Thus, where fraudulent client conduct threatens financial injury to third persons, the lawyer may choose to disclose — or not to disclose — based on his professional analysis of the potential harm, his relationship to the client, and his own involvement in the transaction.³⁹

The second major controversial issue deals with the provision of legal services to corporate clients. We have proceeded from the premise — which, incidentally, is found in the Code — that corporate counsel represents the corporation rather than any one of its various parts.⁴⁰ In Rule 1.13, we have sought to build on the language of the Code by focusing on clearly illegal conduct which threatens substantial harm to the corporation and by providing that the corporate attorney must take reasonable steps within the corporation to prevent injury to the corporation.⁴¹

The *Wall Street Journal* recently criticized our proposal in an editorial, stating that it appeared to them we were simply offering our corporate

39. DISCUSSION DRAFT Rule 1.7(c)(2), *supra* note 4, at 6 (text at note 30 *supra*). The Commission's Comment to Rule 1.7(c)(2) reads in part:

The rule of confidentiality therefore has three aspects. When no serious wrong is in prospect, client confidences must be preserved, as stated in paragraph (a). When homicide or serious bodily injury is threatened by the client, the lawyer must make disclosure to the extent necessary to prevent the wrong, as stated in paragraph (b). In such a case, the loss to the immediate victim ought to be prevented even if making the disclosure may to some extent inhibit other clients on other occasions from revealing such a purpose. 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 involves 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.

Id. at 7.

40. ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 5-18. *Accord*, Lane v. Chowning, 610 F.2d 1385 (8th Cir. 1979).

41. *See* note 27 *supra*.

brethren a lifeboat to escape liability.⁴² I believe the paper missed the point. Our Rule provides guidance to corporate counsel, not for the purpose of providing lawyers with a lifeboat to abandon a corporation under assault from some government agency, but to ensure that the lawyer stays on board to protect the interests of his corporate client.

I should tell you that informal and preliminary comment from the Securities and Exchange Commission suggests that we may not have gone far enough. Representatives of the corporate bar, on the other hand, as well as the *Wall Street Journal*, have said we have gone too far. At this juncture, I take this to be evidence that we may have gone just far enough.

Finally, let me deal with one issue to provide a bit of insight as to how the Commission approached its task. Some of us on the Commission believed that there should be a mandatory requirement for pro bono service by all lawyers and suggested it be forty hours a year.⁴³ We were aware that a special committee of the Association of the Bar of the City of New York was proposing a mandatory pro bono obligation with a general minimum standard of thirty to fifty hours per year with the potential for a later increase to a range of forty to sixty, or fifty to seventy hours.

At the Commission's meeting in Seattle in late June of last year, we found that we were not unanimous in our enthusiasm for such a requirement. Some even challenged the legal soundness of the proposal. If a state can impose such requirements on its attorneys, why not on its licensed contractors, plumbers, or morticians? Further, it was argued, the provision of basic legal services is ultimately the duty not of the profession, but of the community at large. And it is the community that ultimately should bear the cost of that duty. The uneven availability of legal services results inevitably from the uneven distribution of income produced by a competitive economic system. To place the legal services burden on the profession, ran the argument, could be to plant the seeds of destruction for the government-provided legal services already in place after some hard-fought battles.

At our meeting in Salt Lake City in August, 1979, there evolved a kind of consensus that the basic concept of an unenforceable obligation was sound, but that the Rule should leave the amount and manner of service to each individual.⁴⁴

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

43. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 2-25.

44. DISCUSSION DRAFT, Rule 8.1, *supra* note 4, at 27. The Rule now provides that each lawyer must render uncompensated public interest legal services and submit a report concerning such service to the appropriate disciplinary authority on an annual basis.

I recount that episode, not only to relate to you how we approached the pro bono issue, but to tell you something about how the Commission has worked, cooperatively and constructively, to solve the troublesome problems we faced.

No member of the Commission, least of all its chairman, has any illusion that our task is finished. We are pledged to retain a sense of objectivity about our undertaking. While each of us is prepared to explain how we arrived at the language of each proposed Rule, it is neither our purpose nor our intent to defend each word aggressively. If, in the course of the next several months, a better approach, a more rational solution, is proposed to us, it will be welcomed and incorporated into the Model Rules.

It is in that spirit that I invite you, either individually or as a group, to study carefully the discussion draft and to share with us your comments and your observations. I think it is safe to say that, as prospective lawyers, you have a greater stake in this matter than has the faculty of this law school or any member of the Commission. Our proposed Rules are written for the decade of the 1980's and beyond. They are written for the generation in the law schools today and tomorrow. I offer you the challenge to respond to them.