

## Chapter 1

# UNDERSTANDING THE RULES OF LAWYERS' ETHICS

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### § 1.01 INTRODUCTION

Understanding the rules of lawyers' ethics is essential because so much turns on them. Wherever you practice in the United States, ethical rules will determine whether you can be a member of the bar and how you conduct your practice. Disciplinary sanctions against lawyers include private reprimands, public censure, suspension of the right to practice, and disbarment.

In addition, although rules of ethics are drafted principally with a view to professional discipline, courts are increasingly turning to ethical rules as sources of law in litigation. One area of major importance is malpractice actions, in which lawyers can lose substantial fees or suffer compensatory and even punitive damages for conduct that falls short of professional standards. Also, motions to disqualify counsel from representing adverse parties are increasingly common. As a result, lawyers are being ordered to stop representing valued clients, sometimes in circumstances in which disqualification could have been avoided by taking appropriate precautions in accordance with the rules.

The rules governing lawyers' conduct also have a profound effect upon the rights of our clients. In some cases these rights run against us, the lawyers. If a client has the power to discharge a lawyer without cause, for example, the lawyer has lesser contract rights than, say, a construction worker who has been hired for the duration of a building project. Other obligations that we owe to our clients may have considerable effect on the interests of others. For example, a rule of lawyer-client confidentiality might prevent the lawyer from informing the victim of a client's fraud when the lawyer has learned of the fraud from the client. Of course, if that rule were changed to permit the lawyer to help the victim to remedy the fraud, the client's rights would be diminished and some clients might be less willing to confide in their lawyers.

A further reason for studying the ethical codes is to learn how to draft and analyze statutes. Some of the ethical rules deal with specific, narrow issues, like forbidding a lawyer to commingle her funds with a client's or to talk with a judge about a case when the other party's lawyer isn't present. Others are the loosest of canons, forbidding conduct that "adversely reflects on [the lawyer's] fitness to practice law" or that is "prejudicial to the administration of justice." All the rules present questions of policy, drafting, and interpretation.

## § 1.02 SELF-GOVERNANCE

Because of the far-reaching effects of lawyers' ethical rules — extending as broadly as the administration of justice itself — we might wonder why the Congress and state legislatures have, for the most part, delegated this important public function to lawyers. With the exception of occasional statutes that deal with specific issues, the rules that govern lawyers' professional conduct have been drafted into comprehensive codes by a private organization, the American Bar Association, and these codifications ordinarily have been adopted by state courts rather than by legislatures.<sup>1</sup> Whatever merit it may have, this procedure is contrary to democratic ideals.

One justification might be that law practice is too esoteric and complex for nonlawyers to regulate. When we consider, however, that legislatures regularly draft laws governing criminal law and procedure, taxation, nuclear policy, and defense procurement, it becomes obvious that legislators are not ordinarily discouraged by the fact that they do not fully understand everything they are legislating about.

The suggestion is sometimes made that self-regulation is essential to maintaining the independence of the bar.<sup>2</sup> On one reading, the proposition is tautological: to be independent means simply to be free of regulation from others. It is true that *legislative* regulation of lawyers' ethics would impose restraints on lawyers, but any ethical regulation imposes restraints on lawyers. Another reading might be that the independence of lawyers to represent their clients zealously and without conflicting obligations to others would be in jeopardy if legislatures were to write rules of professional ethics. There is no evidence that supports that notion, however, and the established bar has not been constant in its dedication to zealous representation free of conflicting obligations to others. In fact, as we will see, the principal concerns of the established bar often have been elsewhere.

Another reason for delegating such vast public responsibility to a private organization might be that the ABA has done the job so disinterestedly and so well. That proposition does not hold up either. Three times in the past century the ABA has attempted to draft a comprehensive, coherent, and enforceable code of professional conduct for lawyers, and each time it has failed to do an adequate job.

## § 1.03 THE ABA'S ETHICAL CODES

The ABA's first codification of ethical rules was the Canons of Professional Ethics in 1908. The Canons consisted of about forty numbered paragraphs,

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<sup>1</sup> Before a code or rule of ethical conduct can be enforced against a lawyer, it must be adopted by the jurisdiction in which the lawyer is practicing. A private bar association can criticize a lawyer who acts contrary to its rules, and can expel the lawyer from membership in the organization, but it cannot affect the lawyer's status as a member of the bar.

One lawyer, upon being expelled from the American Bar Association for "advertising" himself in an autobiographical book, commented that it was a little like being told that you can no longer belong to the Book of the Month Club.

<sup>2</sup> See, e.g., Model Rules of Professional Conduct, Preamble (1983).

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each expressing a norm and, in some instances, a brief explanatory comment or explanation.

The Canons were not inspired purely by disinterested concerns with improving the ethical conduct of lawyers. Rather, they were largely motivated by the influx of Catholic immigrants from Italy and Ireland and Jews from Eastern Europe in the latter part of the nineteenth century. Just as labor unions of the time joined in demanding restrictive immigration laws to restrain competition for jobs, the established bar adopted educational requirements, standards of admission, and “canons of ethics” designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession. It is not coincidental that immigration into the United States reached an all-time peak in 1908, the year the Canons were promulgated by the ABA.

As Jerold Auerbach has shown in his excellent book, *Unequal Justice*, leaders of the bar left no doubt about why the new Canons of Professional Ethics were necessary. “What concerns us,” said a member of a bar admissions committee, “is not keeping straight those who are already members of the Bar, but keeping out of the profession those whom we do not want.”<sup>3</sup> In other public statements, establishment lawyers identified the ethical threat as second-generation Americans who, they said, “are almost as divorced from American life and American traditions as though they and their parents had never departed from their native lands.”<sup>4</sup> Because of the “historical derivation” of these new citizens, “it will be impossible that they should appreciate what we understand as professional spirit.”<sup>5</sup> As if these failings were not enough, the pained observation was made of these aspiring lawyers that even their “gestures are unwholesome and over-commercialized.”<sup>6</sup>

One of those who spoke out about the threat posed by new citizens to the bar’s ethical standards was Henry S. Drinker, a chairman of the ABA’s Committee on Professional Ethics and Grievances, and long regarded as the bar’s leading authority on lawyers’ ethics. Drinker complained publicly of lawyers who had come “up out of the gutter,” and who were “merely following the methods their fathers had been using in selling shoe-strings and other merchandise.”<sup>7</sup> His particular concern was those he referred to as “Russian Jew boys.”<sup>8</sup> Drinker’s own ethical sensitivity is illustrated further by his analysis of the meaning of “conduct involving moral turpitude” as a ground for professional discipline.<sup>9</sup> A case that Drinker considered “difficult” to judge in terms of moral turpitude was that of a lawyer who had participated in the lynching of an African-American.<sup>10</sup>

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<sup>3</sup> JEROLD AUERBACH, *UNEQUAL JUSTICE* 125 (1976).

<sup>4</sup> *Id.* at 123.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 127.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Model Code of Professional Responsibility, DR 1-101(A)(3) (1969).

<sup>10</sup> HENRY DRINKER, *LEGAL ETHICS* 43 (1953). Another close case of “moral turpitude” in Drinker’s view was that of a bona fide conscientious objector who had refused to further the war effort. *Id.*

Women, African-Americans, and lawyers of Asian and Latin descent were not a principal focus of the bar's new "ethical" rules because they were being excluded from the profession by rules and practices that denied them admission to law schools and membership in the bar. In addition, those few who finally did get into law schools faced widespread discrimination. Until 1954 the ABA denied membership to African-Americans.<sup>11</sup> When A. Leon Higginbotham, Jr. graduated from Yale Law School in 1952 with an outstanding record and a high recommendation from the Dean, he was told by a Yale alumnus in Philadelphia that his only chance of a job was with "two colored lawyers" who practiced in the city. Years later, Higginbotham became the Chief Judge of the U.S. Court of Appeals for the Third Circuit.

Few law schools admitted women until the middle of the twentieth century, and then only in small numbers. When women were belatedly admitted to Harvard Law School, they were welcomed by the Dean with the announcement that he had opposed their admission because each of them was "taking the place of a good man." In 1952, Sandra Day O'Connor graduated near the top of her class at Stanford Law School. The future Supreme Court Justice was then offered a position at a good law firm as a secretary. Five years later, Justice Ruth Bader Ginsburg graduated first in her class at Columbia Law School, but was rejected by law firms in New York City. As recently as 1964, Roberta Cooper Ramo (who became the first woman president of the American Bar Association in 1995), could not find a law firm position in the Raleigh-Durham-Chapel Hill area because of her gender.

Because the 1908 Canons of Professional Ethics were vague and self-contradictory, they were effective weapons for discriminatory enforcement. Predominant attention in enforcement was given to the canons proscribing advertising and solicitation — rules that were designed to make competition from nonestablished lawyers more difficult. As is shown in Chapter Twelve, *infra*, some of the early solicitation rules that overtly discriminated on socioeconomic grounds have been carried over in ABA codes and in state and federal ethical rules that are still being enforced.

The 1908 Canons governed lawyers' conduct for about sixty years. They were finally repudiated by the ABA, with the explanation that the Canons failed to give adequate guidance, lacked coherence, omitted reference to important areas of practice, and did not lend themselves to meaningful disciplinary enforcement.<sup>12</sup> That is, of course, a devastating indictment of the rules under which the established bar had been governing the profession for over half a century.

The next comprehensive body of ethical rules was the ABA's Model Code of Professional Responsibility in 1969.<sup>13</sup> The Model Code was quickly adopted,

<sup>11</sup> The National Lawyers' Guild, an organization committed to pursuing social justice, was founded in 1936 as an alternative to the ABA. Black lawyers were welcomed into the Guild. See ANN FAGAN GINGER & EUGENE TOBIN, *THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN* (1988).

<sup>12</sup> Model Code, Preface.

<sup>13</sup> The word "Model" was actually a later addition to the title, in order to persuade the Department of Justice that the codification was merely an academic model and not a scheme among bar members to lessen competition in fees and advertising in violation of the antitrust laws.

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with some variations of substance, by virtually all jurisdictions, and remains in force in a small number of states, notably New York.

In 1977, only eight years after promulgating the Model Code, the ABA appointed a commission to reconsider it. The commission was chaired by Robert J. Kutak, and became known as the Kutak Commission. Kutak characterized the Model Code as incoherent, inconsistent, and unconstitutional, and noted that its ambiguous and contradictory language could be used unfairly against lawyers in malpractice actions. The Model Code was also attacked by Robert W. Meserve and Geoffrey C. Hazard, Jr. Meserve was a former president of the ABA and succeeded Kutak as Commission Chairman; Hazard was Reporter for the Commission. Meserve and Hazard condemned the Model Code as internally inconsistent, ambiguous, unrealistic, and harmful to effective service to clients.<sup>14</sup> Anyone who thinks the ABA's Model Code is working well, they concluded, is "living in a dream world."<sup>15</sup>

Once again, therefore, the failure of the ABA to produce a serviceable codification of ethical rules for lawyers was acknowledged in the strongest terms by the ABA's own leadership.

The work of the Kutak Commission culminated in the ABA's adoption of the Model Rules of Professional Conduct in 1983.<sup>16</sup> Almost all jurisdictions have adopted the Model Rules, California<sup>17</sup> and New York being the major exceptions.<sup>18</sup> The Model Rules improve upon the Model Code in some respects. However, we believe that the Model Rules are, in many respects, less satisfactory overall than the Model Code. Our reasons are given throughout this book.

The way the ethics codes are interpreted and redrafted will be influenced by the American Law Institute's Restatement of the Law Governing Lawyers (Third) (1998).<sup>19</sup> The Restatement is a mix of improvements, failed opportunities, and bad rules, but it is a major work and cannot be ignored in attempting to understand the rules of lawyers' ethics.<sup>20</sup>

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<sup>14</sup> Robert Meserve & Geoffrey Hazard, *We Should Adopt the Model Rules of Professional Conduct*, 26 BOSTON BAR J. 6, 7 (April 1982). Ironically, both the authors had previously defended the Model Code against similar criticisms that Professor Freedman had made.

<sup>15</sup> *Id.*

<sup>16</sup> The names are, unfortunately, confusingly similar. The best thing to do is to memorize which is which and be done with it.

<sup>17</sup> California has a distinctive set of rules and statutes.

<sup>18</sup> The District of Columbia has adopted a variant of the Model Rules, but the District's version is substantially different in many important respects.

<sup>19</sup> The ALI is a private organization of lawyers, law professors, and judges that publishes what it calls "Restatements" of various areas of law. Although the Restatement of the Law Governing Lawyers is called the "Third" (because of the date of its adoption), it is the first Restatement of the Law Governing Lawyers.

<sup>20</sup> See Monroe Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641 (1998); Monroe Freedman, *The Life-Saving Exception to Confidentiality: Restating the Law Without the Was, the Will Be, or the Ought to Be*, 29 LOYOLA (L.A.) L. REV. 19 (1996).

## § 1.04 THE PURPOSES OF CODES OF LAWYERS' ETHICS

Presumably, we write, interpret, and apply rules of lawyers' ethics for one or more purposes. What purposes, then, are we trying to achieve with these rules? Obviously, the answer to that question will make important differences in the rules themselves.

For example, in drafting rules on advertising and solicitation by lawyers, a desire to prevent competition among lawyers will produce a restrictive rule. However, a policy to maximize access to legal services for people who are ignorant of their rights and their need for a lawyer will produce a more liberal rule. Also, a concern that some lawyers might take unfair advantage of unsophisticated clients might require a modification of the latter rule or the inclusion of a separate rule specifically addressing that problem.

Yet another purpose of ethical rules (including those on advertising) might be to improve the "image" of the profession, either by adopting rules that will appear to say the "right" thing or by forbidding conduct considered unseemly. For example, during consideration of the ABA's Model Rules, the managing editor of a news journal for lawyers wrote an opinion piece titled, *Ethics Review Needed to Polish Public Image of Bar*.<sup>21</sup> The same concern with image was expressed by the then-Chairman of the committee that produced the Model Rules. Upon adoption of the Model Rules by the ABA, Meserve announced with satisfaction that "[t]he legal profession has taken a step which should improve its image."<sup>22</sup> As we will see, some of the ABA's difficulties in drafting coherent rules appear to have come from a reluctance to make hard decisions on issues raising problems of image.<sup>23</sup>

## § 1.05 LAWYERS' ETHICS AND CLIENTS' RIGHTS

Some issues of lawyers' ethics require us to go deeper into our purposes and our values than others. In the past thirty years or so there has been an intense debate over whether one can be a good lawyer and a good person at the same time. Put otherwise, can effectively representing a client's lawful interests properly subject a lawyer to criticism on moral grounds?<sup>24</sup>

<sup>21</sup> Diana Huffman, *Ethics Review Needed to Polish Public Image of Bar*, LEGAL TIMES, Jan. 31, 1983, at 9.

<sup>22</sup> Robert Meserve, as quoted in Kathleen Sylvester, *At the ABA: From Bias to Ethics; Humor in the Court*, NAT. L. J., Aug. 15, 1983, at 5.

<sup>23</sup> Similarly, Professor Ted Schneyer has commented: "To maintain its authority inside as well as outside the bar, the ABA must in a time of professional ferment display its authority. One way to do so is to refurbish its image as lawgiver for the entire profession." Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989). Schneyer's article shows that a concern with institutional image affected the substance of important ethical rules. See also William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. TIMES, July 31, 2001, at A1, A17 (noting the concern about the public image of lawyers at the 2001 ABA annual meeting at which rules changes were considered).

<sup>24</sup> As Charles Curtis noted a half century ago, "[w]e are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy. We are talking about the special moral code which governs a man who is acting for another." Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 16 (1951).

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For example, what should the lawyer do when a client insists upon taking action that is lawful but that, in the lawyer's view, is also immoral? Does the lawyer hire out her conscience when accepting a retainer? Is it justifiable for the lawyer to impose her values on the client? The subject is developed in Chapter 3, but it is useful to introduce it here.

In analyzing the issue of the "good lawyer," commentators have analogized the lawyer's relationship to the client to that of a friend.<sup>25</sup> or even of a spouse.<sup>26</sup> Thus, Professor Charles Fried argues that a lawyer, like a friend, will not (or should not) impose her moral values on the other, while Luban argues the opposite — that a lawyer, like a spouse, will (or should) prevent the other from acting immorally. You might find both of these analogies to be somewhat strained and artificial, and the conclusions that are drawn from them to be less than compelling.

Professor Thomas Shaffer has suggested that we can best understand the issue of the good lawyer by looking to "[t]he distinctive feature of ethics in a profession":<sup>27</sup>

The distinctive feature of ethics in a profession is that it speaks to the unequal encounter of two moral persons. Legal ethics, which is a subject of study for lawyers, then often becomes the study of what is good — not for me, but for *this other person, over whom I have power*. Legal ethics differs from ethics generally: Ethics is thinking about morals. *Legal ethics is thinking about the morals of someone else*. It is concerned with the goodness of someone else.

Shaffer thus identifies two aspects of the lawyer-client relationship that will affect our view of lawyers' ethical obligations. One is the inequality inherent in the relationship, in which the lawyer frequently has considerable power over the client. The second is a concern with the client's goodness (or, more accurately, the client's lack of it) and with the extent of the lawyer's responsibility (and perhaps risk) through association with the client as a lesser moral being. As Shaffer accurately observes: "Modern legal ethics assumes that clients corrupt lawyers — that they are, to use an old Catholic notion, occasions of sin, like R-rated movies and bad company."<sup>28</sup>

Although we agree that the concerns expressed by Shaffer are important to lawyers' ethics, our approach to clients and, therefore, to the ethical issues, has a different emphasis. In expressing the distinctive feature of ethics in the legal profession, we would identify the client not as "this other person, over whom I have power," but as "this other person whom I have the power to help." In this view, the central concern of lawyers' ethics is not (as Shaffer says, quoting Plato) how my client "can be made as good as possible." Rather, it

<sup>25</sup> Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1071 (1976).

<sup>26</sup> DAVID LUBAN, *LAWYERS AND JUSTICE* 166–69 (1988); compare Curtis, *supra* note 24, at 8 (stating that "[t]he relation between a lawyer and . . . client is one of the intimate relations").

<sup>27</sup> Thomas Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319 (1987) (first emphasis added). Cf. Monroe Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331 (1987). See also, THOMAS SHAFFER, *AMERICAN LEGAL ETHICS* (1985).

<sup>28</sup> Shaffer, *supra* note 27, 36 CATH. U.L. REV. at 320.

is how far we can ethically go — or how far we should be required to go — to achieve for our clients full and equal rights under law.

Put otherwise, Shaffer thinks of lawyers' ethics as being rooted in moral philosophy, while we think of lawyers' ethics as being rooted in the moral values that are expressed in the Bill of Rights. In the words of Justice William Brennan, Jr., "Our Constitution is a charter of human rights, dignity, and self-determination,"<sup>29</sup> and, as explained in Chapter Two, these values have been incorporated into the American adversary system and should inform our rules of lawyers' ethics.

Again, these are differences in emphasis only. Shaffer is not unconcerned about individual human rights nor are we unconcerned about the personal morality of ourselves, our clients, and others. Nevertheless, these differences in emphasis are important when it comes to drafting or interpreting rules of lawyers' ethics.

In varying degrees, the codes of lawyers' ethics reflect the drafters' conceptions of the lawyers' role and of the lawyer-client relationship.<sup>30</sup> To the extent that such a conception is expressed and consistently carried out, a code will at least have coherence. One thing you should watch for, therefore, is the extent to which the rules in each code succeed in carrying out the drafters' expressed conception of the lawyers' role.

The Model Code of Professional Responsibility recognizes that the lawyer's role is grounded in "respect for the dignity of the individual and his capacity through reason for enlightened self-government."<sup>31</sup> Thus,

The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.<sup>32</sup>

At the same time, the Model Code is affected by a concern with public image. According to the Model Code, ethical conduct is not impelled principally by what the 1908 Canons called the lawyer's "conscience" or the lawyer's "own sense of honor and propriety."<sup>33</sup> Nor does the Model Code view the lawyer's ethical conduct as deriving from what Shaffer calls "character" or "integrity."<sup>34</sup> Rather, for the drafters of the Model Code, "in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."<sup>35</sup> The Model Code also says

<sup>29</sup> William J. Brennan, Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, at D13.

<sup>30</sup> See, e.g., THE AMERICAN LAWYER'S CODE OF CONDUCT, Preamble.

<sup>31</sup> Model Code, Preamble.

<sup>32</sup> *Id.*, EC 7-1.

<sup>33</sup> Canons of Professional Ethics 15 and 24.

<sup>34</sup> Shaffer, *supra* note 27, 36 CATH. U.L. REV. at 329–30.

<sup>35</sup> Model Code, Preamble.



that the professional judgment of the lawyer must be exercised “solely for the benefit of his client and free of compromising influences and loyalties.”<sup>36</sup> Note, however, how an undue concern for “the respect . . . of the members of . . . society” could be the kind of compromising influence that the Model Code warns against, particularly if the lawyer is representing an unpopular client or cause.

The Model Rules of Professional Conduct reflect a significantly different view of the lawyer’s role and of the lawyer’s relationship to the client. As expressed by Professor Norman Redlich, who was one of its strongest proponents, the Model Rules “project a different set of values” from those of the Code, and “[t]he fate of the entire project may well hinge on the bar’s willingness to accept the altered role model that the Model Rules envision.”<sup>37</sup>

Those differences are apparent in the Model Rules’ description of the lawyer in the opening sentence of its Preamble. As we have seen, the Model Code begins by stressing the client — “respect for the dignity of the individual and his capacity . . . for enlightened self-government.” By contrast, the Model Rules begin: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” In a sense, of course, the description is simply a truism, but the difference in emphasis is intended to convey the altered role model to which Redlich referred.

## § 1.06 THE LAWYER AS “OFFICER OF THE COURT”

Particularly significant in the Preamble to the Model Rules is the phrase “officer of the legal system,” which is similar to “officer of the court.” Those who seek to minimize the lawyer’s role of service to individual clients commonly characterize the lawyer as an “officer of the court.”<sup>38</sup> The implication is that the lawyer’s job is primarily to be an agent of the state. The Supreme Court has recognized, however, that the lawyer’s traditional function is to serve the lawful interests of individual clients, even against the interests of the state.

For example, Justice Lewis Powell made only perfunctory reference to the lawyer as an “officer of the court” in writing for the Supreme Court:

[T]he duty of the lawyer, subject to his role as an “officer of the court,” is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States

<sup>36</sup> EC 5-1.

<sup>37</sup> Norman Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 A.B.F. RES. 981–982. Redlich was referring specifically to the disclosure provisions of the 1980 Discussion Draft of the Model Rules. However, he reprinted this portion of his article subsequent to adoption of the present version of the Model Rules. See NORMAN REDLICH, *PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH* (2d ed. 1983). Moreover, as we will see below, the Model Rules also project a different set of values with regard to the client’s autonomy. The “altered role model” to which Redlich referred, therefore, is no less significant than his comment suggests.

<sup>38</sup> The question-begging nature of that characterization has been recognized for some time. See, e.g., ABA Opin. 287 (1953); Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966).

or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.<sup>39</sup>

Eight years later, writing for a majority of eight, Justice Powell sharpened the point: “[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’”<sup>40</sup> In short, in a free society the lawyer’s function, as an officer of the court, is to serve the undivided interests of individual clients.

In recasting “the officer of the court” as “an officer of the legal system,” the drafters of the Model Rules appear to be seeking a substitute for discredited rhetoric. In any event, the intention of some supporters of the Model Rules to reject the client-centered values of the Model Code is clear, and troubling.

## § 1.07 MORAL VALUES AND ETHICAL CHOICES

As this discussion suggests, you will find it extremely useful in understanding the rules of lawyers’ ethics to have an opinion (however tentative) about your role as a lawyer and what your relationship should be to your client. You can then analyze and appraise each rule by asking whether the ethical purpose being advanced by the rule is consistent with your own model of the lawyer’s role and of the lawyer-client relationship. That observation takes us to the ultimate reason for understanding the rules of lawyers’ ethics — the self-understanding that can come from applying our own moral values to important issues of lawyers’ professional responsibilities. An anecdote illustrates the point.

Several years ago, a friend of Freedman’s expressed his disappointment that he could never serve on a jury. At that time, the Jury Commission used a questionnaire that asked, among other things, whether the potential juror had moral objections to the death penalty. Anyone answering yes to that question was automatically disqualified from serving. Since Freedman’s friend believed, as a matter of religious conviction, that human life is sacred and paramount to all other moral values, he was disqualified each time he submitted the questionnaire.

Freedman suggested to his friend that his conduct was inconsistent with his asserted moral priorities. Human life was not paramount for him — telling the truth to the Jury Commission was. His scruples about answering the questionnaire truthfully made it impossible for him to serve on a jury and, as a juror, to vote against death. On reflection, Freedman’s friend decided to lie on the next jury questionnaire.

This decision by Freedman’s friend can be, and has been, debated. Our concern here, however, is not whether the decision was right or wrong, but only that you cannot have it both ways. Either telling the truth is more

<sup>39</sup> *In re Griffiths*, 413 U.S. 717, 724, 93 S.Ct. 2851, 2856, n. 14 (1973). See also Justice Powell’s quotation from *Cammer v. United States*, 350 U.S. 399, 76 S.Ct. 456 (1956), Application of *Griffiths*, 413 U.S. 717, 728–29. Cf. Justice Burger’s dissent in *Griffiths*, 413 U.S. at 731–32.

<sup>40</sup> *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S.Ct. 445, 450 (1981).

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important than saving life, or saving life is more important than telling the truth. Accordingly, when moral values are in conflict, the ways in which we resolve those conflicts show what our true moral priorities are. In that sense, ethics is applied morality, or morality in action. In making a series of ethical decisions, we create a kind of moral profile of ourselves.

You should be conscious, therefore, of how your own decisions on issues of lawyers' ethics establish your moral priorities and thereby define your own moral profile. In understanding lawyers' ethics, you may come to better understand your moral values, and yourself.

