Regulation of Lawyers: Problems of Law and Ethics

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A Preface to Students

Titles like "Professional Responsibility" and "Legal Ethics" do not adequately describe the subject matter of this book. It is a book about the legal profession and about the practice of law. But the book goes beyond the legal rules governing the practice of law and includes rules contained in ethical codes and, to a lesser extent, behavior that springs from custom and experience. These laws, ethical rules, and customs can be discussed from three perspectives.

Perhaps most immediate for those about to enter on a legal career are the rules that constrain working lawyers. In such areas as competence, fees, advertising and solicitation, client secrets, conflicts of interest, negotiation, and the attorney-client relationship: what may you do, how may you behave, with confidence that your conduct will not land you before a disciplinary committee or in a civil lawsuit and, sometimes more important, will not damage your reputation among your peers?

The second perspective of the course is the relationship between the profession and society. The rules lawyers impose on themselves or that are imposed on them, taken together, define the nature and operation of the profession as an entity, and therefore, to an extent, the behavior of our legal institutions and the quality of our social justice.

For example, a rule that allows lawyers to advertise certain kinds of information will influence the conduct of individual members of the bar. But it will also affect whether, and how, large categories of people use lawyers and the size of legal fees. Similarly, a rule that prohibits or requires a lawyer to reveal certain kinds of information about a client will control the lawyer's individual conduct, but it will also affect which client populations use lawyers and how. In short, nearly every rule, whatever its source, has social and political consequences, although there is often disagreement both over what these consequences will be and whether they should be avoided or encouraged.

About to go off into law practice, you may be more interested in such questions as: "How do I behave?" and "How can I stay out of trouble?" than in asking "What are the consequences to society and justice if one or another version of a particular ethical rule is applied to America's

two-thirds of a million lawyers?" Still, the last question is important and, if not as immediate, will from time to time arise in the course of your professional life.

Both kinds of questions, but more so the second, engender different, and sometimes vehement, responses. Why? In part because to answer them we must call upon political and moral values more fundamental than the "ethics" that inform various codes; and, of course, political and moral values of different people differ substantially, sometimes diametrically.

Furthermore, in addressing these questions, we are likely to make a threshold determination, conscious or not, of the extent to which we want the answers to further our self-interest. However we couch our responses, in truth whose best interest do we mean to protect? Those of society generally? The legal profession's? The interests of lawyers in practices like the one we have or expect to have? Those of the particular client population we serve? Our firm's? Our own? Law school and law practice, it is sometimes said, encourage more rather than less self-interest in addressing the kinds of questions that will be raised here.

At the outset we wrote that rules governing the practice of law can be discussed from three perspectives and we have so far listed two. The third is the effect of lawyers' work on the people who do the work, that is, the effect of role on self. For example, a rule that requires silence though it means that another will suffer injustice may cause discomfort to those who must obey it. As men and women, we consider it laudable to speak up to prevent injustice to others. As lawyers, we may be forbidden to do so. Can we reconcile these two positions, not intellectually or theoretically, but personally, within ourselves? A similar point can be made with regard to the rule that requires lawyers zealously to pursue the lawful goals of their clients, even if these goals (or the legal strategies to achieve them) offend the lawyer's values. Little has been written on the effect of role on self in the context of lawyers' work; we shall consider some of what there is in the first and final chapters and occasionally elsewhere in the book.

A Note on Sources

References in this text to the Code of Professional Responsibility (CPR) are to the 1970 Model Code as adopted by the American Bar Association. The code as it applies in the various states often differs from the model version. Furthermore, different states may opt for different changes from the model version. References to the Rules of Professional Conduct (RPC) are to the Model Rules as adopted by the American Bar Associ-

ation in August 1983. These Model Rules are the work of a commission, appointed by the then president of the ABA which was headed for most of its life by Robert J. Kutak of Omaha, Nebraska. As a result, the Model Rules are sometimes referred to as the "Kutak Rules" or the "Kutak Code." Mr. Kutak died before final adoption of the Model Rules by the ABA House of Delegates. For interest-analyses of the Model Code and Model Rules see, respectively, Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977), and Gillers, What We Talked About When We Talked About Ethics, A Critical View of the Model Rules, 46 Ohio St. L.J. — (1985).

Mr. Kutak's commission proposed several drafts of the Model Rules between the time of its creation and the acceptance of the final draft by the House of Delegates in August 1983. Occasionally, we will cite to and excerpt sections from one of the publicly released drafts of the proposed Model Rules. These drafts are dated January 30, 1980, May 30, 1981, and June 30, 1982, respectively. We will especially refer to them when the substance of a proposed rule differs significantly from the corresponding rule finally adopted by the ABA in 1983, or where there is no corresponding rule adopted by the ABA.*

Different jurisdictions accord the code varying degrees of authority. The New York Court of Appeals, for example, has ruled that the code does not have "the status of decisional or statutory law." But the court has also said that "the courts should not denigrate [the code] by indifference." In re Estate of Weinstock, 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976). See also New York Criminal and Civil Courts Bar Assn. v. Jacoby, 61 N.Y.2d 130, 136, 460 N.E.2d 1325, 1327, 412 N.Y.S.2d 890, 893 (1984). On the other hand, the Pennsylvania Supreme Court has ruled that the code has "the force of statutory rules of conduct for lawyers." Slater v. Rimar, 462 Pa. 138, 338 A.2d 584 (1975). Federal courts often rely on code provisions, although it is sometimes said that there is no obligation to do so. See, e.g., Rosen v. NLRB, 735 F.2d 564, 575 (D.C. Cir. 1984); Freschi v. Grand Coal Venture, 564 F. Supp. 414, 417 (S.D.N.Y. 1983): "There exists no statutory obligation upon the federal courts to apply the Code as enacted by the American Bar Association. Although the Code does set guidelines for the professional conduct of attorneys appearing before the federal bar the application of the Code is a part of the court's general supervisory authority to ensure fairness to all who bring their cause to the judiciary for resolution." These references have treated the code, but presumably the Model Rules will enjoy a similar reception where adopted.

*For a discussion of the role and possible motives of the ABA in preparing and adopting ethics codes, see Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639 (1981); Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689 (1981); Frankel, Why Does Professor Abel Work at a Useless Task?, 59 Tex. L. Rev. 723 (1981).

Finally, students should be aware that in most jurisdictions, bar associations have ethics committees that will give an inquiring lawyer an opinion on the propriety of particular conduct the lawyer contemplates taking. In this way, a lawyer faced with an ethical dilemma can obtain the counsel of his or her colleagues with regard to the propriety of a proposed course of action. The American Bar Association's Committee on Ethics and Professional Responsibility, perhaps most prominently, also offers this service. We have used ABA opinions, and opinions of local and state bar associations, throughout this book.

There are many sources of information, both primary and secondary, on the legal and ethical regulation of lawyers and law practice. Some of the traditional ones are cases, law review articles, and treatises — but there are some other sources particular to this area. You will find a full bibliography at the end of the book.

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Abrams, Floyd, The Right Chairman for a Panel on Crime, New York Times, Aug. 14, 1983, p. 18.

American Bar Association, Formal Ethics Opinions 335, 341, 342; Informal Ethics Opinions 1202, 1314. Excerpted from Recent Ethics Opinions, Copyright © American Bar Association.

American Bar Association, Statement of Policy, 61 A.B.A.J. 1085-1086

(1975). Reprinted by permission from the American Bar Association Journal.

Association of the Bar of the City of New York, Ethics Opinions 80-4, 80-23, 80-46, 80-94, 81-82, 82-75, 82-79. Republished by permission of the Association of the Bar of the City of New York and Oceana Publications, Inc.

Auerbach, Jerold S., Welcome to Litigation, The New Republic, Jan. 17, 1981, 19-21. Copyright © 1981 by The New Republic, Inc. Reprinted by permission.

Baker, Russell, Lawyers for Cars, New York Times, June 8, 1983, p. 23. Copyright © 1983 by the New York Times Company. Reprinted by permission.

Bok, Derek, 1981-1982 Report to Harvard University Board of Overseers.

Brazil, Wayne, The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice, 3 J. Legal Prof. 197 (1978).

Cox, Meg, Some Divorcing Couples Find Mediation Cheaper and More Humane Than Battles in Courtroom, Wall Street Journal, Nov. 15, 1983, p. 60. Reprinted by permission of The Wall Street Journal, © Dow Jones & Company, Inc., 1983. All rights reserved.

D'Amato, Anthony & Edward J. Eberle, Three Models of Legal Ethics, 27 St. Louis L.J. 761, 764-773 (1983).

Developments in the Law — Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244 (1981). Copyright © 1981 by the Harvard Law Review Association.

Duke, Steven B., Judge Kaufman is Wrong for the Organized-Crime Commission, New York Times, Aug. 7, 1983, p. 20.

Fiflis, Ted J., Choice of Federal or State Law for Attorney's Professional Responsibility in Securities Matters, 56 N.Y.U. L. Rev. 1236, 1240-1244 (1981). Copyright © 1981 by New York University Law Review.

Frankel, Marvin E., Partisan Justice 11-19 (Hill & Wang 1980). Excerpt adapted from Partisan Justice by Marvin E. Frankel. Copyright © 1978, 1980 by Marvin E. Frankel. Reprinted by permission of Hill & Wang, a division of Farrar, Straus & Giroux, Inc.

Freedman, Monroe H., Book Review, 90 Yale L.J. 1486, 1492-1495 (1981). Reprinted by permission of the author and The Yale Law Journal Company and Fred B. Rothman & Company from The Yale Law Journal, Vol. 90, 1486, 1492-1495.

Freedman, Monroe H., Lawyers' Ethics in an Adversary System 27-38 (1975). Copyright © 1975 by Monroe H. Freedman.

Fried, Charles, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 34, 54-58 (1981). Copyright © 1981 by Charles Fried.

Friedman, Lawrence M., A History of American Law 81-83, 265-266

(Simon & Schuster 1973). Copyright © 1973 by Lawrence M. Friedman.

Gillers, Stephen, Lawyers: Paid For Doing Nothing?, New York Times, June 13, 1979, p. 25. Copyright © 1979 by the New York Times Company. Reprinted by permission.

Gould, Dr. Brian S., Burnout: Law and Disorder, National Law Journal, Apr. 30, 1984. Copyright © 1984 by The National Law Journal. Reprinted by permission.

Green, Mark, The Other Government 126-131 (1975). Reprinted by permission of Ralph Nader.

Hazard, Geoffrey C., Jr., Ethics in the Practice of Law 47-57 (1978). Copyright © 1978 by Yale University Press. Reprinted by permission.

Kaufman, Irving R., Utopia Without Lawyers?, New York Times, Aug. 14, 1983, p. 19. Copyright © 1983 by the New York Times Company. Reprinted by permission.

Lewin, Tamar, Generic Ads on TV Promoting Lawyers, New York Times, Apr. 11, 1983, p. D1. Copyright © 1983 by the New York Times Company. Reprinted by permission.

Luban, David, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454. Copyright © 1981 by Wisconsin Law Review. Reprinted by permission.

Martyn, Susan R., Informed Consent in the Practice of Law, 48 Geo. Wash. L. Rev. 307 (1980). Copyright © 1980 by Susan Martyn.

New York State Bar Association, Ethics Opinions 404, 479, 486.

Note, DR 7-104 of the Code of Professional Responsibility Applied to the "Government Party," 61 Minn. L. Rev. 1007 (1977). Copyright © 1977 by Minnesota Law Review. Reprinted by permission.

Note, Legal Ethics and the Destruction of Evidence, 88 Yale L.J. 1665 (1979). Reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company from The Yale Law Journal, Vol. 88, 1665.

Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, 84 Yale L.J. 1540, 1542 (1975). Reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company from The Yale Law Journal, Vol. 84, 1540, 1542.

Rifkind, Simon H., The Lawyer's Role and Responsibility in Modern Society, 30 The Record of the Assoc. of the Bar of the City of N.Y. 534 (1975). Copyright © 1975 by Simon H. Rifkind.

Rubin, Alvin B., A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 577 (1975). Copyright © 1975 by Louisiana Law Review. Reprinted by permission.

Scott, Janny, After Law School: Trials and Tribulations, The [Bergen] Record, July 21, 1983, p. A1. Reprinted by permission of The Record, Hackensack, New Jersey.

Shapiro, Isaac, Japan: Land of Law Graduates, If Not Lawyers . . . , New York Times, July 4, 1983, p. 18.

Shipp, E. R., Fear and Confusion in Court Plague Elderly Crime Victims, New York Times, Mar. 13, 1983, p. A1. Copyright © 1983 by the New York Times Company. Reprinted by permission.

Sommer, A. A., The Emerging Responsibilities of the Securities Lawyer, 1974-75 Fed. Sec. L. Rep. ¶79,631. Reproduced by permission of the author and publisher from Federal Securities Law Reports, published and copyrighted by Commerce Clearing House, Inc., 4025 West Paterson Avenue, Chicago, Illinois 60646.

Spiegel, Mark, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41, 67-68 (1979).

Stern, Philip M., Lawyers on Trial 152-154 (Times Books 1980). Copyright © 1980 by Philip M. Stern.

Werner, Leslie M., President Chooses 20 as Members of Organized Crime Commission, New York Times, July 29, 1983, p. A1. Copyright © 1983 by the New York Times Company. Reprinted by permission..

White, James J., Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Research J. 926.

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