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The Adversary Model is Bent

*by William T. Pizzi, Phillip S. Figa
and Kenneth E. Barnhill, Jr.*

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Several years ago Marvin Frankel, who was then a federal judge in the Southern District of New York, wrote a controversial law review article entitled "The Search of Truth: An Umpireal View."¹ In his article Judge Frankel argued that our adversary system rates truth too low. He suggested several sweeping changes in the Code of Professional Responsibility ("Code") which would change the adversary model in the pursuit of what Frankel called "the whole truth."

Judge Frankel is a member of the Kutak Commission and it would be inaccurate to say that the proposed Model Rules of Professional Conduct ("Model Rules") simply embody the views of Judge Frankel. Nonetheless, one can see throughout the Model Rules a softening of the adversary role of the lawyer. In many cases lawyers would be required, or at least urged, to disclose voluntarily information adverse to a client that would not be disclosed today either because such information would be viewed as confidential or because such disclosure would be viewed simply as being disloyal to the client, especially when such disclosure might lead to a less favorable result for the client.

This article considers the Model Rules which define the lawyer's role as an advocate and the lawyer's role as a negotiator. A

new role permitted by the Model Rules—the role of the lawyer as an "intermediary" between two clients—is also considered.

THE LAWYER AS ADVOCATE

Perjury and the Disclosure of Client Confidences

As initially adopted, there was confusion in the Code over the proper role of a lawyer in the situation where the lawyer's client takes the stand and commits perjury by telling a story completely at odds with what the client has previously told the lawyer. While the Code requires a lawyer to protect client confidences, DR 4-101(C)(2) permits disclosure "when permitted under Disciplinary Rules." DR 7-102(B)(1) of the Code requires a lawyer whose client has "perpetrated a fraud upon . . . a tribunal" to try to get the client to rectify the fraud and, if the client refuses, to reveal the fraud to the tribunal.

In 1974, the uncertainty over the lawyer's apparently conflicting obligations to the client and to the court was resolved when DR 7-102(B)(1) was qualified by providing that a lawyer must disclose client fraud to a tribunal "except when the information is protected as a privileged communication." Thus, DR 7-102(B)(1) as amended resolved the tension between the lawyer's duty to the

client and the lawyer's duty to the court in favor of the client by giving precedence to the duty to preserve confidences over the duty to inform.²

The Model Rules in Rule 3.1(b) reverse the Code by requiring disclosure to the court of false testimony "even if doing so requires disclosure of a confidence of the client." The CBA Ethics Subcommittee feels strongly that this provision as it applies to a client's confidences should be changed. The disclosure of client confidences even to correct client perjury would undercut the lawyer-client relationship. While client perjury places a lawyer in an uncomfortable position, the present balance which gives precedence to the duty to preserve confidences over the duty to inform is necessary to preserve the trust which must exist between lawyer and client.

A lawyer must be able to assure his client that what the client tells the lawyer is protected from disclosure by the lawyer and the client must be able to rely upon this assurance. If the relationship were otherwise, the lawyer's effectiveness in representing the client would be undermined because of the lack of truth and candor in that relationship. (See the Symposium article entitled "The Lawyer-Client Relationship as Autonomous" in which confidentiality is discussed in detail.)

Disclosure of Evidence Favorable to the Adverse Party

Another troubling aspect of Rule 3.1 is paragraph (e) which reads as follows:

Except as provided in paragraph (f), a lawyer may apprise another party of evidence favorable to that party. . . .

Paragraph (f) provides that a defense lawyer in a criminal case "is not required to apprise the prosecutor of evidence adverse to the accused." The exact intent of Rule 3.1(e) is unclear, for the Rule is written in terms of "may," not "shall," and it suggests or at least implies that with the exception of criminal defense lawyers, litigators should disclose adverse evidence to the other side.

Of course, prosecutors have for a long time been under both an ethical and constitutional obligation to disclose exculpatory evidence to the defense. The Code imposes such an obligation in DR 7-103 and the Model Rules also incorporate the same obligation in Rule 3.10(d). However, Rule 3.1(e) goes beyond dealing with the obligations of prosecutors and appears to apply to all advocates, including those in civil cases.

The Subcommittee is troubled by this provision. While the provision is written in permissive terms, the reference to the exception for defense counsel who are "not required" to disclose such adverse evidence makes it appear that, except for the defense lawyer, the disclosure of evidence favorable to another party is professionally proper and perhaps mandatory.

Even if Rule 3.1(e) is read as being totally permissive, the Subcommittee concludes that this provision should be deleted. There are no standards or guidelines controlling the disclosure of such evidence. Some courts or grievance committees might read Rule 3.1(e) as requiring disclosure and thus mandatory. This would radically change the nature of litigation and the discovery process. In short, Rule 3.1(e) on the disclosure of favorable evidence to another party is viewed by the Subcommittee as not only unhelpful but a cause for alarm.

The Advocate as a Witness

The Code in DR 5-101 and DR 5-102 provides that lawyers should not accept employment or continue to represent a client in litigation when the lawyer will or ought to be called as a witness at the trial. There are some exceptions to this prohibition; for example, if the testimony of the lawyer relates to a technical or uncontested matter or the withdrawal would work a "substantial hardship on the client because of the distinctive value of the lawyer," then the lawyer may represent the client.

The Model Rules are substantially similar to the current provisions of the Code with one major exception, which could be of importance to law firms. The Code treats a

lawyer and a law firm the same, requiring withdrawal if the lawyer or a member of the firm will be an important witness. The Model Rules, however, in Rule 3.9(b) provide that a lawyer may continue to act as an advocate if a member of the lawyer's firm will be a witness—unless it creates a conflict of interest. Conflicts of interest are defined as those circumstances in which a lawyer has interests, commitments or responsibilities that may adversely affect the representation of a client.³ In those instances, representation of the client must be declined. However, conflicts of interest can be waived upon disclosure to and consent by the client and provided that the services of the lawyer can be performed without violating other rules of professional conduct. (For a full treatment of conflicts of interest, see the Symposium article entitled "Limited Loyalty.")

The interplay of the disqualification of a firm when a lawyer of that firm will be a witness on behalf of a client and the prohibition against conflicts of interest is not spelled out in the Model Rules. The Comment to Rule 3.9 explains the rationale behind the different treatment of the lawyer-as-a-witness conflict when a firm is involved in the following way:

The situation is usually quite different when different lawyers in the same firm or department are involved as advocate and witness. If a single lawyer is in-

involved, intermixing the roles of advocate and witness is unavoidable. On the other hand, if different lawyers are involved, the testimony of the lawyer-witness ordinarily can be presented by an advocate from the same office without undue confusion. The essential problem is that of assessing the relative significance of the burden on the client of having to retain different counsel, the burden on the opposing party of confronting an advocate-witness, and the risk of serious conflict of interest between the firm involved and its client.⁴

It is apparent here that Model Rule 3.9 tends to favor the firm as against the sole practitioner in this conflict of interest situation.

The Subcommittee finds that the Model Rule on vicarious disqualification in the advocate-witness situation is incomplete. Part of the problem facing the advocate-witness is the possible conflict of interest should the lawyer's testimony be adverse to the client. Also of importance is the jury confusion that may be caused by a lawyer testifying as a witness and arguing as an advocate in the same case. The Model Rule, which allows a member of a firm to be a witness while another member of the firm is arguing the case, speaks only to a conflict of interest with the client. The Subcommittee suggests that the Rule be expanded to avoid jury confusion by providing, for example,

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that the lawyer who will be a witness have no other role in the courtroom than that as a witness.

Other Rules of Advocacy

There are two other provisions in the Model Rules on the role of the lawyer as advocate that deserve mention because they would change the Code, although they are not as controversial as those discussed above.

First, Rule 3.3 deals more aggressively with the issue of delay than does the Code. Not only are frivolous motions for purposes of delay improper, but the Rule provides that every lawyer has an affirmative obligation to expedite litigation. Delay simply to further the financial interest of a client "is not a legitimate interest of the client" which a lawyer should try to seek. While this may be only a change in emphasis, the strong statement against improper delay is welcomed by the Subcommittee.

A second change that seems sensible to the Subcommittee is an expanded obligation on the part of counsel to inform the court of pertinent legal authorities. The Code in DR 7-106(B)(1) obligates lawyers to inform the court only of "directly adverse" legal authority in "the controlling jurisdiction." Model Rule 3.1(c) broadens that obligation by requiring lawyers to inform the court of any legal authority "known to the lawyer that would probably have a substantial effect on the determination of a material issue." The following principle underlies this Rule:

Legal argument is a discussion among the advocates and the tribunal, seeking to determine the legal premises properly applicable to the case. The extent of disclosure is at times a matter of judgment. An advocate is not required to present the full array of opposing authority. Where the lawyer knows of authority that the court clearly ought to consider, the court should be advised of its existence if the opposing party has not done so.⁵

By the same token, baseless or frivolous

legal argument is not condoned because it would be in fact misleading. The Model Rule eliminates the ambiguity of "directly adverse" legal authority and the questionable criterion of "the controlling jurisdiction" as now provided in the Code. In the Subcommittee's judgment, this provision is an improvement over the Code.

Although the Subcommittee finds the Rules to be some improvement over the Code, their reaction to the section on the role of the advocate is, on balance, severely negative. The Subcommittee feels that the complete reversal from the Code on the disclosure of a client's false testimony would injure severely the confidential relationship between the lawyer and the client. The Subcommittee is also very troubled by Rule 3.1(e), which seems to suggest that lawyers ought to disclose adverse evidence. Even if rules such as these would produce "the whole truth," the Subcommittee feels that the sacrifice of an important premise—confidentiality in the lawyer-client relationship—is too high a price.

THE LAWYER AS NEGOTIATOR

Section 4 of the ten sections of the Model Rules is devoted exclusively to the role of the lawyer as negotiator. Lawyers in all areas of specialty spend considerable time as negotiators. The client's cause or desires often may be best advanced through a negotiated settlement of civil litigation, compromise in a business deal or plea bargaining in a criminal case. The Model Rules mandate that a lawyer adopt a negotiating stance that is less adversarial and more conciliatory than what appears to be permitted under the Code.

Under the Model Rules, a lawyer would be required to bend over backwards out of an overabundance of fairness when functioning as a negotiator. The Model Rules seek to convey a new mood in negotiations—lawyers must value scrupulous fairness to opposing parties and their lawyers in negotiations over the zealous representation of

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their own clients. Whether such a concept can be adopted in practice is uncertain. What is certain is that the change in attitude demanded by the Model Rules would create new uncertainties in the negotiating context.

Negotiations Under the Code

The Code does not single out the negotiation process as a distinct subject for guidance regarding professional conduct. A lawyer's conduct during negotiations on behalf of a client is governed by the general maxims and precepts of the Code.

Canon 7 of the Code requires that "A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law." DR 7-102 requires, among other things, that a lawyer shall not engage in illegal or fraudulent conduct or counsel or assist his client to engage in such conduct. That Disciplinary Rule also provides that if a lawyer learns that his client has perpetrated a fraud upon a person, the lawyer shall reveal the fraud to the affected person, except when the information constitutes a privileged communication.

DR 7-104 requires that lawyers not communicate with an opposing party known to be represented by a lawyer, unless the inquiring lawyer has the prior consent of the lawyer representing such other party, or is authorized by law to do so. Also, EC 7-10 states:

The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

In sum, these provisions of the Code provide little guidance to a practicing attorney as to the obligations of professional conduct in a negotiating context, except for a minimum standard of fairness.

The Model Rules and Negotiations

The Model Rules change the format of professional responsibility concepts as

applied to negotiations by specifically focusing on the negotiating context and the role of the lawyer as a negotiator. The Introduction to the section of the Model Rules which applies to the lawyer as negotiator provides an overview and certain guidelines which a lawyer should follow in representing a client in negotiations. Its tone is conciliatory. For example, it states, "The lawyer should help the client appreciate the interest and position of the other party and should encourage concessions that will effectuate the client's larger objectives." The Subcommittee feels that such a course of conduct is desirable under some, but not all, circumstances. While the intent is laudable, the Introduction may create confusion in the mind of any lawyer reading it as to the requirements of proper conduct in negotiations because it appears to be primarily aspirational and provides little concrete guidance.

Disclosures to a Client

The first requirement in the Model Rules when a lawyer conducts negotiations on behalf of a client is that the lawyer must inform the client of relevant facts and communications from the other side, including offers.⁶ This is consistent with EC 7-7 of the Code, and appears to be duplicative of Rule 1.4 of the Model Rules which requires "Adequate Communications" in all lawyer-client relations. The Subcommittee has no objection to elevating to a mandatory rule the requirement that a lawyer inform his client fully of the material aspects of any negotiations. In effect, this Model Rules changes an aspirational statement in the Code to a duty when a lawyer negotiates on behalf of a client.

Fairness to Other Participants

Rule 4.2 of the Model Rules requires a lawyer to deal fairly with other participants in negotiations, avoid sham negotiation and otherwise avoid legal and ethical improprieties. For the most part, Rule 4.2 is a paraphrase of DR 7-102 and DR 7-104. One

significant change, however, is paragraph (b) of Rule 4.2, which, among other things, provides:

A lawyer shall not . . . fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is . . . necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client. . . .

This requirement appears to differ from the Code because, under Rule 4.2, a lawyer must disclose in negotiations adverse facts where the other side *misapprehended* a previous representation, even where the previous representation constituted full and honest disclosure by the lawyer or the lawyer's client. Thus, under Rule 4.2, a lawyer has an obligation to rectify unilateral mistakes about facts or law made by other parties or their counsel, even in the absence of fraud or negligence by the lawyer and his or her client.

The Subcommittee is divided as to whether a lawyer should be required to correct unilateral mistakes made by opposing counsel or other negotiating adversaries. Aside from not understanding the contours of the requirement, some members of the

Subcommittee believe that in a negotiating context lawyers have no obligation to protect opposing parties and their counsel from their own self-created errors. On the other hand, the Subcommittee recognizes that disclosures as required pursuant to Rule 4.2(b) may foster attainment of a client's objectives in the long run and therefore the requirement has merit.

In any event, the Subcommittee is in unanimous agreement that in the context of litigation, particularly during settlement discussions after the commencement of trial, this disclosure obligation of Rule 4.2(b) should not apply because of the overlapping obligations of a lawyer as an advocate and as a negotiator. Thus, for example, if the lawyer representing a party in litigation negotiates a settlement with opposing counsel who is negotiating under the erroneous premise that the testimony of a witness at trial was complete and accurate, the lawyer should not be required to correct that erroneous impression of opposing counsel,

The Subcommittee on the whole is wary of the thrust of Rule 4.2, which is entitled "Fairness to Other Participants." Lawyers should not have any affirmative obligation to be "fair" with those persons on the other side of the negotiating table because the term "fairness" is fraught with ambiguity.



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It is believed, however, that lawyers should be honest and not mislead adversaries. Thus, the Subcommittee thinks that both in title and substance Rule 4.2 should be changed to "Honesty to Other Participants."

Illegal, Fraudulent or Unconscionable Transactions

Rule 4.3 prohibits a lawyer from concluding an agreement, or assisting a client in concluding an agreement, that would be illegal, fraudulent or unconscionable. It is consistent with DR 7-102(A)(7) and DR 7-102(A)(8), which prohibit a lawyer from counseling or assisting a client in conduct that the lawyer knows to be illegal or fraudulent, or knowingly engaging in illegal conduct or conduct contrary to a Disciplinary Rule. Rule 4.3 is actually narrower than the Code in that the Rule applies only to the end result of negotiations, mainly concluding an agreement, rather than to improper conduct occurring during the course of negotiations. However, Rule 4.3, in conjunction with Rule 4.2, covers the entire scope of the negotiation process including its formal consummation. The Subcommittee thus has no objection to the adoption of this Rule.

Conclusion as to New Negotiator Rules

The Model Rules as they apply to negotiations for the most part are edifying and useful. Those Rules seek to minimize combativeness and emphasize candor. In an overly litigious society, such an attitude is a virtuous sentiment. However, in a code of professional conduct, any disclosure requirement to the extent that it requires correcting an adversary's unilateral mistakes compromises a lawyer's effectiveness and obligations as an advocate. Indeed, under the Model Rules, a client sometimes may be better off strategically by undertaking negotiations himself, rather than through a lawyer. The client would not be bound by rules of "fairness" which might undercut some of the effectiveness of the lawyer as a negotiator.

THE LAWYER AS INTERMEDIARY

Should a lawyer be allowed to act as an intermediary between two clients whose interests differ? Are there circumstances in which a lawyer may perform a valuable public service by attempting to complete a transaction or resolve a minor dispute among several clients?

It is axiomatic that it is in the interest of the legal profession to attempt to find ways to provide legal services at lower costs.⁷ A lawyer who represents two different clients who become involved in the same transaction would probably be able to represent both clients more economically than if two or more lawyers were needed to handle the same transaction. However, the appropriateness of a lawyer acting as an intermediary between two clients continues to be the subject of considerable debate.

The Present Code and Multiple Representation

The Code prohibits representation of multiple clients if the interests of the clients differ, whether such interests be conflicting, inconsistent, diverse or otherwise discordant and if employment by one client will adversely affect the lawyer's judgment on behalf of or dilute his loyalty to the other client or clients. A lawyer may represent multiple clients if each is fully informed of the potential conflict of interests, if each consents to the multiple representation, and if the interests do not become actually differing.⁸ Of course, if a serious conflict develops, then a lawyer will probably have to withdraw from representing any of the clients.

The Definition of a New Role

The Model Rules attempt to change these concepts and to provide guidelines for a lawyer acting as an "intermediary" between two or more clients.

The numerous conditions which must be met before a lawyer can properly act as intermediary are best explained by quoting the Rule:

5.1 *Conditions for Acting as an Intermediary*

- (a) A lawyer may act as an intermediary between clients if:
- (1) The possibility of adjusting the clients' interests is strong; and
 - (2) Each client will be able to make adequately informed decisions in the matter, and there is little likelihood that any of the clients will be significantly prejudiced if the contemplated adjustment of interests is unsuccessful; and
 - (3) The lawyer can act impartially and without improper effect on other services the lawyer is performing for any of the clients; and
 - (4) The lawyer fully explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation.
- (b) While serving as intermediary a lawyer shall explain fully to each client the decisions to be made and the considerations relevant to making them, so that each client can make adequately informed decisions.

The lawyer role of the intermediary under the Model Rule should be assumed only after full disclosure and informed consent by the clients. The clients must understand that the lawyer could not act as an advocate or negotiator in the traditional sense.

Rule 5.2 of the Model Rules governs withdrawal as an intermediary. It requires that a lawyer withdraw if either client so requests, if any of the conditions set forth in Rule 5.1 quoted above cannot be met, or if it becomes apparent that a mutually advantageous adjustment of interests cannot be made. The Rule then states that a lawyer may continue to represent any of the clients only to the extent compatible with his or her responsibilities to the other client or clients.

Subcommittee's Conclusion—A Split Decision

The Subcommittee believes that although there are potential advantages to clients when a lawyer serves as intermediary, if the differences between the clients deepen, as often happens in negotiations or other attempts at dispute resolution, the lawyer not only will be unable to continue to function as an intermediary for the clients, but will likely have to withdraw from representing any of the parties. This may result in additional costs to the clients and embarrassment and recrimination for the lawyer.

Problems of confidentiality and attorney-client privilege are significant when a lawyer acts as an intermediary. Maintaining adequate communication with each client as required by other Rules while protecting client confidences would require a delicate balance in that relationship. If such balance cannot be maintained, the common representation is improper. Furthermore, it must be assumed that in the event of litigation between the clients, none of the lawyer's communications or the communications between the clients would be protected by the lawyer-client confidence privilege.

The Subcommittee is evenly divided on the intermediary rule. Some of the members conclude that there are special, limited circumstances in which an attorney may perform a real service for existing clients, at a lower cost to them, by acting as intermediary while still representing each party and performing all the tasks required of an attorney in such a representative capacity.

Other members of the Subcommittee recognize the social desirability of economy in the rendition of legal services but feel that the occasions on which a lawyer could successfully act as an intermediary are likely to be very few. Moreover, it is thought that, as a practical matter, it is impossible to represent one client in matters involving another client without compromising the interests of one of the clients.

This division within the Subcommittee indicates that the specification of the lawyer role of intermediary and the rules of professional conduct incident to that role are matters which will require further analysis and discussion. Since the enumeration of the intermediary role is a new concept, time and study will be needed to digest its consequences. As proposed in the Model Rules, the lawyer role of intermediary does not fit within the traditional idea of the advocate.

CONCLUSION

Without question, the proposed Model Rules which deal with the roles of the lawyer as advocate, negotiator and intermediary raise some of the more complex and controversial issues in the work of the Kutak Commission. Tradition is being questioned in the light of the needs for truth and justice and the rendition of effective legal services in contemporary society. Concepts long deemed fundamental to the assurance that the legal system will be just are under attack. Without doubt, the issues raised in these several proposed Rules touch and question what many lawyers deem to be the very essence of the nature and purpose of the legal profession in the United States.

Regardless of the outcome of the debate

on these issues, that debate will help to clarify for lawyers the fundamental principles which guide them in being professionally responsible. As a result, the limits, if any, upon the role of the lawyer as an advocate as well as the guidelines for professional conduct by lawyers in nonadvocacy roles will be, or can be, made clearer.

The role of the lawyer in a corporate or governmental organization poses special problems in modern times. The next Symposium article deals with the way in which the Model Rules address these problems.

NOTES

1. 123 *U. Pa. L. Rev.* (1975), p. 1031.
2. See, ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 341, Sept. 30, 1975.
3. ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct* (Jan. 30, 1980), Rule 1.8.
4. *Id.*, Comment, Rule 3.9.
5. *Id.*, Comment, Rule 3.1.
6. *Id.*, Rule 4.1.
7. ABA Special Committee on Evaluation of Ethical Standards, *Code of Professional Responsibility* (1969), Canon 2; EC 2-1.
8. *Id.*, DR 5-105(C); see also, EC 5-20 (the lawyer acting as an impartial arbitrator or mediator).

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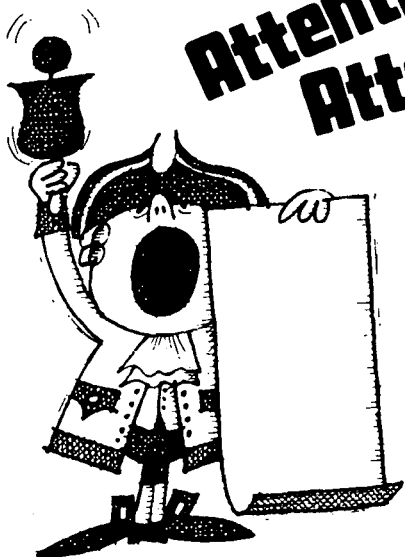
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