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THE LAWYER'S OBLIGATION TO BE TRUSTWORTHY WHEN DEALING WITH OPPOSING PARTIES

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It is desirable that lawyers be trustworthy in dealing with opposing parties.[1] It is impractical, however, to go very far in formulating rules of professional conduct that require lawyers to be trustworthy.

I. DEFINING TERMS

At the outset, some definition of terms may be useful. By "lawyer" is meant lawyers in the practice of law generally. This includes lawyers in private practice and in public service, in independent firms and in law departments, in large organizations and in solo practice; civil and criminal lawyers, specialists and generalists. Lawyers perform a broad range of functions including counseling and advocacy, but this article focuses on those functions that concern direct dealings with opposing parties on behalf of a client.[2] In this analysis, the term "vouching lawyer"

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1. Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47, 48 (1980); Rubin, *A Causerie on Lawyer's Ethics in Negotations*, 35 LA. L. REV. 577 (1975).

2. *See, e.g.*, Meserve, *Lawyers in Modern Society*, 49 N.Y.S.B.J. 94, 96 (1977); Garrett, *The Social Responsibility of Lawyers in their Professional Capacity*, 30 U. MIAMI L. REV. 879, 882 (1976).

refers to a lawyer who is making a representation to an opposing party.

By "opposing parties" is meant those persons, other than clients and officials of a tribunal, with whom vouching lawyers deal during the course of representing clients. Lawyers, of course, have special duties of trustworthiness in dealing with tribunals[3] and owe equally exacting and even broader fiduciary duties to their clients.[4] The present analysis focuses on the duty to opposing parties, not in derogation of vouching lawyers' duties to client and court, but for purposes of clarification. The analysis presupposes and holds constant these other duties, particularly duties owed to clients. The term "opposing parties" in its exclusive connotation thus signifies those other than client and court. In its inclusive connotation, the term specifically refers to persons of adverse interest and their legal counsel,[5] including opposite parties in contract or property transactions, formation of partnerships and corporations, negotiations aimed at settling litigation, and negotiation and mediation in interpersonal, interorganizational, interdepartmental, and political or social controversies of all kinds. Adversary relationships are ubiquitous in modern society, and the participation of lawyers in defining and transforming adversary relationships is commonplace. Ordinarily, whenever a lawyer acts for a client, a party of actual or potential opposing interest also exists.

Finally, by "trustworthy" is meant truthfulness in statements made as representations. The definition is limited to "statements made as representations" because conventions governing social intercourse do not require strict truthfulness at all

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3. *See generally* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102, -103, -106, -108 to -110 (1977).

4. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101 (confidentiality), 5-101 to -107 (avoidance of conflicts of interest)(1977).

5. For purposes of this analysis, the term "opposing party" includes the party's lawyer. A lawyer's duty of trustworthiness as regards an opposing party should not vary according to whether that party has representation. Indeed, the fact that opposing parties have representation generally makes it easier for vouching lawyers to discharge their own professional obligations. It simplifies communication, for lawyers can communicate in mutually understood jargon. Also, lawyers can generally assume that an opposing party is adequately represented and that an adequately represented party has the narrowest latitude for subsequently asserting that the transaction was infected by mistake, fraud, or other infirmity. The fact that an opposing party is represented by a lawyer, however, generally changes the potential for effective sanctions against violation of the duty of trustworthiness.

times. On the contrary, those conventions give license to make certain kinds of statements that are literally false.[6] Thus, a lawyer is allowed to say at certain stages of negotiation that his client will not offer or accept a specified sum, concession, or interest when, in fact, the client is not intransigent. Indeed, the lawyer may so describe the client's position when that position has been taken on the lawyer's advice. A statement that a client will not offer or accept specified terms thus means only that the client will not presently accept such terms and instead wants to extend the risk and cost of nonresolution in the hope of reducing the price he must pay for resolution. Negotiations can reach a point of no return, however, when a party's anticipated gain in a negotiated resolution is less than the anticipated cost of the resolution. When the opposing party's situation begins to approach that point, it is time for the negotiator to shift from chaffering to bargaining in earnest. A lawyer's professional skill should include the ability to project where the points of no return are, both for his client and for the opposing party. The lawyer must also have the ability to signal when his statements are to be taken as representations, that is, when he is vouching for an assertion. Thus, trustworthiness is not simply the moral virtue of veracity but is an amalgam of moral virtue, market sense, and physiological and political discernment. It is the ability to understand what truth is, to understand when the truth is called for, and to instill in others confidence that one has such understanding.

II. THE USES OF TRUSTWORTHINESS

If a lawyer is trustworthy, then a statement made as a representation by the lawyer may be taken by an opposing party as a firm factual component of a transaction. This enables the opposing party to appreciate the situation and recognize what alternative resolutions are practicable. That, in turn, facilitates assessment of the opposing party's interests by the vouching lawyer's client, thereby further clarifying the available alternatives. In the economist's view, the lawyer's voucher, if accepted

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6. *See* White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,* 1980 AM. B. FOUNDATION RESEARCH J. 926, 927.

as such, reduces transaction costs.[7]

This economizing effect of trustworthiness can be more fully appreciated upon consideration of the alternative means for verifying the factual components of a transaction. Two alternatives are available to an opposing party. The party can independently investigate the factual problem in question or employ someone else to investigate the situation. For example, a purchaser of real property can take the word of a seller's lawyer that there are no liens on the property or can obtain an independent title search. A party interested in learning the testimony of a key adverse witness can take the word of the opposing lawyer or can take the witness' deposition. Clearly, independent investigations will in many situations be preferred to reliance on the opposing lawyer. Investigations may be made when there is inadequate confidence in the particular lawyer's trustworthiness or, as in the case of independent title searches, in accordance with a convention calling for an independent investigation so that a particular lawyer's trustworthiness will not have to be put to the test.

Nevertheless, independent investigations are costly. The most definitive—and often costliest—form of independent investigation is a trial. By comparison, the cost of a reliable voucher may be slight.

The benefits of trustworthiness may be put in loftier terms by noting that the quality bestows honor upon lawyers in whom it is embodied. Yet trustworthiness is not only socially esteemed but also socially useful. It is both esteemed and useful in all social transactions—between politicians, business people, bureaucrats, acquaintances, and spouses. It is generally accepted as a prime aspect of social maturity.

Trustworthiness is especially useful for lawyers because of the kinds of transactions into which lawyers are drawn and because of lawyers' peculiar access to the facts. Lawyers are drawn into situations that have a high element of uncertainty about what will happen or what has happened—contracts with serious risk of uncertainties in the future and disputes based on ambiguous evidence of what has occurred in the past. Lawyers are rarely involved in spot market transactions or circumstances in which twenty bishops will testify to an event. By contrast, they

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7. *See, e.g.*, Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979).

are commonly retained in transactions entailing uncertainties over which the parties may choose to litigate. Holding the stakes constant, the relative value of vouching as a means of resolving uncertainties becomes proportionately higher as uncertainty increases. Lawyers' usefulness in vouching to matters that would otherwise remain uncertain is thus greatest in transactions whose uncertainties and stakes make the lawyer useful in the first place.[8]

Lawyers are in a unique position, resulting from their relationships with their clients, to make truthful recommendations and resolve uncertainties. As spokesmen for their clients' interests, lawyers have peculiar access, arising from the lawyer-client relationship, to the facts that surround a given transaction.[9] First, the client is supposed to give the lawyer the whole truth, untempered by pride or pretense. This provides the lawyer with more information than it is ordinarily possible to get under other circumstances—most if not all of the truth as perceived by the client. Second, lawyers have access to documentary and background information and normally to all other sources of information available to their clients. Finally, inquiry is greatly aided by the guarantee of confidentiality.[10] These elements combine to give lawyers a more complete and accurate picture of the facts than that usually possessed by any other person involved in a given transaction.

This store of information is a highly useful resource. Strong justification has been advanced above for making it fully available to opposing parties. A question nevertheless remains whether the rules of professional conduct should *require* that this information be made fully available to opposing parties.

III. THE DISCLOSURE PROBLEM

The primary reason why all information available to lawyers should not be disclosed to opposing parties is that the prospect of disclosure would impair the lawyer's investigation in the first

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8. Consider the role of lawyers in negotiating the settlement that led to the release of the Americans held hostage by Iran. *See* N.Y. Times, Jan. 9, 1981, § A, at 8, col. 1.

9. The point about a lawyer's peculiar access to the facts was made to me by my esteemed colleague, Professor Arthur Leff.

10. *See Upjohn v. United States*, 101 S. Ct. 677, 682 (1981); ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1 (1977).

instance. This concern is the basis of rules that protect lawyers against disclosure of information acquired in representing clients. The attorney-client privilege provides that lawyers may not be compelled to divulge confidential information supplied by their clients.[11] The work-product rule sharply limits the extent to which an opposing party may compel production of other information acquired by the lawyer in preparation for litigation.[12] Finally, lawyers generally may not disclose on their own initiative information relating to the representation of a client except for the purpose of furthering the client's interests.[13]

The basic rules protecting the confidentiality of information gathered by lawyers while representing clients are taken as working premises for the present discussion. Within the framework of these rules, however, it is possible to argue for the proposition that when a lawyer undertakes to act for a client outside of court, a concurrent duty exists to make full disclosure of relevant facts known.[14] In light of the lawyer's duty of candor inside a courtroom, a question arises whether lawyers should also be required to be fully candid when speaking for a client outside of court. Such a requirement would seem to be a true measure of trustworthiness.

Problems of lawyer trustworthiness can arise in two different contexts. The first, out-of-court transactions to resolve disputes over legal rights, can result in a trial if settlement negotiations fail. The second, out-of-court transactions that contemplate some type of contract, generally offers no further alternative if negotiations fail.

Transactions that can go to trial upon the failure of negotiations will be examined first. Debate persists over whether greater candor should be required in trials.[15] With regard to disclosure in the forensic setting, the modern rules of discovery[16]

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11. 101 S. Ct. at 682.

12. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). *Accord*, 101 S. Ct. at 686-88.

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101 (1977).

14. *See* Rubin, *supra* note 1, at 591.

15. For a discussion of the benefits and detriments of increased candor before a tribunal, see Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Ideas*, 123 U. PA. L. REV. 1067 (1975).

16. *See* FED. R. CIV. P. 26-37.

expose a considerable portion of lawyers' evidence-gathering to the opposing party. Furthermore, the rule governing the courtroom requires that any representation of fact, as distinct from a statement about what someone else asserts as fact, that is made to the court must be truthful according to the lawyer's knowledge.[17] It has been urged that forensic candor go further. Marvin Frankel argued while on the bench that advocates should be required to disclose everything they know, perhaps excepting communications from clients.[18] That proposal has failed to attract support. Dispute also continues concerning whether lawyers must reveal the fact that their clients' testimony is perjurious when the lawyer knows that is the fact. It is my view that advocates should, to the following limited extent, vouch for their clients' testimony: they should be obliged to vouch that they have not violated their own duty to avoid use of fabricated evidence, even if the evidence is a client's testimony. Conversely, the position is defensible that lawyers should not be required to disclose their clients' perjury, especially in the case of defendants in criminal proceedings.[19]

Forensic disclosure, however, is peripheral to the exploration of truthfulness between opposing parties in negotiation. Trial supplies the factual premises for resolution of a transaction and imposes a resolution based on those premises. Trial is a costly and stressful alternative that can sometimes be avoided by negotiations.[20] The event of a trial shows that the less costly alternative has failed in a particular case.

Trial can thus be viewed as the failure of the parties to stipulate the facts; that is, counsel have been unable to establish the facts by reciprocal representation and must establish them through trial. The causes of this failure have been alluded to: the evidence is not strong enough to enable counsel to induce the client to authorize concessions, counsel lack the competence to recognize that the evidence justifies certain concessions, or one counsel is simply willing to inflict the cost of a trial on the other side, regardless of the evidence. If any one of these conditions exists, a trial results. But if these conditions exist, it seems

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(5) (1977).
18. *See* Frankel, *supra* note 15, at 1057-59.
19. *See* Freedman, *supra* note 15, at 1063-66.
20. *See* 1 M. BELLI, MODERN TRIALS § 109 (1954).

futile to try to remedy the situation by demanding greater candor at trial. If concessions have not been forthcoming in the relative privacy and repose of pretrial negotiations, what inducements could make them more forthcoming in the more antagonistic circumstances of a trial?

This analysis suggests that shortfall in voluntary disclosure at trial is simply a remanifestation of shortfall in voluntary disclosure before trial. Therefore, consideration of the problem of candor at trial leads to consideration of the problem of trustworthiness in negotiations.

Although negotiations may be categorized as aimed at either settling legal disputes or trying to consummate deals, these two categories of negotiations would collapse into a single type were it not for the availability of a court to which parties could resort upon failure of negotiations concerning a legal dispute. Consider, for example, negotiations in the international situation[21] or negotiation of claims based on moral rights as distinct from those based on legally recognized rights.[22] No trial is available if the negotiations fail. This same situation exists when there is a collapse of negotiations aimed at a deal: the transaction aborts, leaving the parties where they stand. In any event, a trial is an event contingent upon failure of negotiations. Because trial is costly, there is some value in avoiding it. Therefore, even in dispute-settlement negotiations, a stage exists at which mutual incentives to avoid trial arise. At that stage, negotiations aimed at settlement are like negotiations aimed at a deal: there is a net value to all parties in a consensual resolution if the facts can be established on which to base that resolution.

The natural conclusion is that every inducement for increased trustworthiness should be fostered. Why then does the law of professional conduct fail to require disclosure on the part of lawyers participating in negotiations?

IV. REGULATION OF TRUSTWORTHINESS

The present regulation of lawyers' trustworthiness is modest. The Code of Professional Responsibility, in DR 7-102(A)(5),

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21. See note 8 *supra.*

22. Negotiations within the legislature may be regarded as negotiations over moral rights. Such negotiations are backed by the parliamentary sanction of resolution through majority vote.

provides that "[i]n his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."[23] This provision might be characterized as a minimalist formulation of the law of disclosure. It prohibits only misrepresentation and requires no affirmative disclosure. It is limited to statements of "fact" as distinguished from evidence, indications, portents, opinions, possibilities, or even probabilities of which the lawyer may be aware. It is limited to matters that are false as distinguished from those of which the lawyer is skeptical or even suspicious.

The Code of Professional Responsibility contains two other provisions that augment this basic rule. Yet these standards also fail affirmatively to require a high level of trustworthiness in dealing with opposing parties. The first, DR 7-102(A)(3), provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."[24] This provision clearly does not go far in the direction of a disclosure requirement. Instead of specifying the matters that must be revealed, it incorporates by reference general requirements laid down by the law at large. Thus, rules such as those imposed on lawyers by securities regulations require affirmative revelations.[25] The law of fraud as generally understood requires revelation where necessary to correct a material misstatement when the lawyer has become aware of an inaccuracy.[26]

The second relevant provision is DR 7-102(B)(1), which provides that

> [a] lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person . . . shall promptly call upon his client to rectify the same, and if his client refuses . . . he shall reveal the fraud to the affected person . . . except when the

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23. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(5) (1977).

24. *Id.*, DR 7-102(A)(3).

25. For example, under securities regulations lawyers are required to make certain disclosures in their representation of corporate clients. *See* 15 U.S.C. § 77www (1976); Lipman, *The SEC's Reluctant Police Force: A New Role For Lawyers,* 49 N.Y.U.L. REV. 437, 439 (1974).

26. *See* RESTATEMENT (SECOND) OF TORTS § 551 (1976). *Cf.* RESTATEMENT (SECOND) OF AGENCY § 348 (1957)(agent subject to tort liability for fraudulent representation made on behalf of principal).

information is protected as a privileged communication.[27]

In light of the exception in the last clause, it is doubtful whether the provision can ever be operative.[28] Even if it could be operative, it only applies to fraud and even then only when the fraud is "clearly" established. Thus the disclosure required by DR 7-102(B)(1) is little more than that required for lawyers to escape complicity in their clients' fraud. If so, the provision is redundant in light of DR 7-102(A)(7),[29] and the net requirement of the Code of Professional Responsibility is that lawyers avoid fraudulent representations. Such a precept falls far short of requiring trustworthiness.

Comparison may be made between these provisions and those promulgated by the American Bar Association Commission on Evaluation of Professional Standards, familiarly known as the Kutak Commission. Its provision on this subject, in the Commission's Proposed Final Draft, May 30, 1981, is as follows:

> Rule 4.1 *Truthfulness in Statements to Others*
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> In the course of representing a client a lawyer shall not:
>
> (a) Knowingly make a false statement of fact or law to a third person; or
>
> (b) Knowingly fail to disclose a fact to a third person when:
>
> (1) In the circumstances failure to make the disclosure is equivalent to making a material misrepresentation;
>
> (2) Disclosure is necessary to prevent assisting a criminal or fraudulent act, as required by Rule 1.2(d); or
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> (3) Disclosure is necessary to comply with other law.[30]

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27. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (1977).

28. *See* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 21-33 (1978).

29. DR 7-102(A)(7) provides that "[i]n his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(7) (1977).

30. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, May 30, 1981). Proposed Rule 1.2(d) provides as follows:

> A lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

Id.

Proposed Rule 4.1(a) corresponds to DR 7-102(A)(5)[31] and proposed Rule 4.1(b)(1) is a corollary. Proposed Rule 4.1(b)(2) corresponds to DR 7-102(A)(7). Proposed Rule 4.1(b)(3) corresponds to DR 7-102(A)(3).[32] The only other difference between proposed rule 4.1(b) and the provisions of the present Code of Professional Responsibility concerns the question of preserving client confidences. The present Code does not explicitly determine whether the disclosure requirement of DR 7-102(A)(3) operates when the required disclosure will reveal adverse information about the client—as it almost inevitably will. The term "confidences" in the present Code, however, probably does not include information that effectuates a fraud.[33] The Comment to proposed Rule 4.1 clarifies this point.

Upon careful consideration, it thus is clear that the Kutak Commission's proposed rules on trustworthiness do little to alter the status quo as set forth in the Code of Professional Responsibility. Yet the Commission considered and ultimately rejected a more sweeping proposal. Its Discussion Draft of January 30, 1980, included the following formulation:

> 4.2 *Fairness to Other Participants*
>
> (a) In conducting negotiations a lawyer shall be fair in dealing with other participants.
>
> (b) A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:
>
> (1) Required by law or the Rules of Professional Conduct; or
>
> (2) 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 . . . .[34]

Proposed paragraph (a) went well beyond the fraud standard, prescribing a general requirement that lawyers be "fair." This certainly encompasses a concept of truthful representations. On

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31. See text accompanying note 23 *supra*.

32. See text accompanying note 24 *supra*.

33. *See* 8 J. WIGMORE, TREATISE ON EVIDENCE § 2298 (McNaughton Rev. 1961 & Supp. 1980); ABA CANONS OF PROFESSIONAL ETHICS No. 37 (1908).

34. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 88 (Discussion Draft, Jan. 30, 1980).

the other hand, paragraph (b) restates DR 7-102(A)(5) and subparagraph (b)(1) does not depart radically from the present Code. Subparagraph (b)(2) parallels the *Restatement (Second) of Agency,* which provides that under certain circumstances, if a lawyer does not correct a manifest misapprehension on the part of the opposing party, the lawyer could incur civil liability.[35] Furthermore, the lawyer would probably be guilty, under existing legal principles, of the ethical offense of "assisting" the client in "illegal" conduct.[36]

The idea underlying the Kutak Commission's original proposal was not very complicated: the lawyer, as the instrument of a transaction, should be the guardian of its integrity.[37] The proposal did not purport to hold lawyers strictly liable for the integrity of transactions or even burden them with a duty of reasonable care. Their only duty was to disclose facts of which an opposing party was obviously ignorant and which might affect the integrity of the transaction.[38]

Much more fundamental objections were leveled at the proposal, particularly at the requirement that lawyers be "fair." Many members of the Commission and certainly the Reporter were surprised at the vehemence of the objections. "Vehemence" is the correct word, since much more heat than light was forthcoming in the reaction to the proposal. The Commission's surprise was compounded because the proposal seemed appropriate to the lawyer's role and appeared to reflect one interpretation of the lawyer's duty as established in the decisional law.[39]

Although the explanation of the bar's aversion to the January 1980 proposal is complex, some concerns can be identified. First, many members of the bar do not realize or are unwilling to accept the fact that the law at large applies to lawyers.[40] Perhaps these members of the bar believe an immunity attaches to lawyers against the civil liabilities imposed by the law on other

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35. RESTATEMENT (SECOND) OF AGENCY § 348, comment c (1957).

36. *See* Hazard, *How Far May a Lawyer Go in Assisting a Client In Conduct that Might Be Illegal?*, ___ U. MIAMI L. REV. ___ (1981).

37. *See* Rubin, *supra* note 1, at 591.

38. In this regard, use of the term "material facts" in the January 1980 proposal would have been more precise.

39. *See* Kutak, *Evaluating the Proposed Model Rules of Professional Conduct,* 1980 AM. B. FOUNDATION RESEARCH J. 1016, 1021 n.22.

40. *See* HAZARD, *supra* note 28.

intermediaries such as real estate brokers or securities underwriters. More subtly, perhaps lawyers recognize that the law at large applies to them but do not wish to be accountable for that obligation in the context of professional discipline.

Still subtler concerns were involved. The fundamental difficulty appears to stem from the lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the lack of settled and homogeneous standards of technique in the practice of law.[41] This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation. The lack of this consensus means that lawyers lack the language to express norms of fairness in negotiation and the institutional means to give effect to these norms.

The underlying disagreement about standards of fairness is not difficult to understand. Lawyers' standards of fairness are necessarily derived from those of society as a whole,[42] and subcultural variations are enormous. At one extreme lies the "rural God-fearing standard," so exacting and tedious that it often excludes the use of lawyers. At the other extreme stands "New York hardball," now played in most larger cities using the wall-to-wall indenture for a playing surface. Between these extremes are regional and local standards[43] and further variations that depend on the business involved, the identity of the participants, and other circumstances. Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties and thus a correlative standard that should govern their legal representatives.

The second area of disagreement concerns professional technique. Lawyers differ widely in the technical sophistication they expect of themselves and of others with whom they deal.[44] As a result, their expectations regarding their own or their opponents' knowledge in the context of a given transaction may vary widely. Among practitioners having a very high level of technique, it is

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41. *See* White, *supra* note 6, at 935-37.

42. *See id.* at 927.

43. These were brought home to me dramatically when I entered the practice of law in Oregon after attending law school in New York City.

44. *See generally* Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference,* 1977 AM. B. FOUNDATION RESEARCH J. 155.

expected that a lawyer has carefully investigated and compiled relevant information, is familiar with recent developments in applicable law, recognizes all tax implications of a transaction, and anticipates secondary transactions likely to be involved in the transaction at hand. At another level of technique, lawyers may use a standard form for a transaction and hope for a satisfactory result.[45]

Professional transactions within any given level of technique proceed according to implicitly understood conventions that allay all but ordinary anxiety on the part of the lawyers. Professional transactions that combine diverse levels of technique pose much greater difficulties. Lawyers accustomed to less sophisticated techniques are understandably fearful that they will be outmatched or even hoodwinked, with the possibility of loss to their clients and humiliation or even worse for themselves.

Lawyers accustomed to more sophisticated techniques have a correlative but perhaps less apparent dilemma. First, signs of bumbling on the other side cannot necessarily be taken at face value; there is such a thing as country-slickering and it occurs even in the city. Second, sophisticated lawyers are at risk precisely because of their technical sophistication. High-level technicians recognize aspects of transactions that lawyers of lesser sophistication may overlook. But what is to be done with that knowledge? If it is withheld, the transaction becomes vulnerable to rescission because of the lawyer's nondisclosure. The lawyer's professional competence, if not fully deployed for the benefit of the opposing party, thus becomes a potential infirmity for the transaction.[46] Conversely, if the lawyer's competence is deployed for the benefit of the opposing party, where does the deployment properly stop, short of a takeover of the transaction and assumption of responsibility for the interests of both parties?[47]

In the ebb and flow of practice, lawyers can and do adjust to these exigencies. The high level technicians deal with each other

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45. *See, e.g., Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

46. This consideration became pivotal in the Kutak Commission's decision to withdraw proposed Rule 4.1(a) of the Discussion Draft, Jan. 30, 1980.

47. *Cf.* 329 U.S. at 516 (Jackson, J., concurring)("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

with circumspection but confidence. Lawyers in other strata of the professional community have their own conventions. When levels are crossed, the less sophisticated lawyer must decide whether to trust the opponent or to associate someone else, research into the night, or perhaps even abort the transaction. The more sophisticated lawyer must decide whether to risk later recriminations about the transaction if the bargain is too hard, whether to make particular disclosures to protect the deal but at the risk also of killing the deal, or whether to handle the transaction for both sides.

This range of possibilities is difficult to govern by regulation. A rule based on the premise that the legal profession is substantially homogeneous in technical sophistication would put the technically sophisticated lawyer in a hopeless dilemma when dealing with an unsophisticated opposing counsel. Such a lawyer could straightforwardly be a partisan of his own client unless it became evident that the other side was inadequately represented. But in that case, the superior technician would have to assist the other side to guard against the risk of a subsequent charge of nondisclosure or fraud. Yet until a transaction is well underway, a lawyer cannot know which course of action is required. At the same time, the lawyer who is unsophisticated or is simply acting according to his idea of the applicable conventions of openness would be in jeopardy of giving away his client's position. Thus, in a situation where the opposing lawyers differ substantially in technical sophistication, a rule requiring reciprocal disclosure could not yield genuine reciprocity.

On the other hand, it would be practically impossible to formulate a general rule that accounts for variations in technical sophistication. Consider the difficulties with the concept of specialization and with the definition of specialization once the concept was accepted,[48] or with the problem of "incompetence" among the trial bar.[49] Could we imagine rules of disclosure that were based on a distinction between Type A Lawyers and Type B Lawyers? Anyone who is sanguine about overcoming these difficulties should try drafting the criteria by which to differentiate the technically sophisticated practitioner from the bar at large.

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48. *See, e.g.*, Fromson, *The Challenge of Specialization: Professionalism at the Crossroads*, 48 N.Y.S.B.J. 540, 542 (1976).

49. *See, e.g.*, Smith, *Peer Review: Its Time Has Come*, 66 A.B.A.J. 451 (1980).

In light of these constraints, legal regulation of trustworthiness cannot go much further than to proscribe fraud. That is disquieting but not necessarily occasion for despair. It simply indicates limitations on improving the bar by legal regulation.[50]

50. *Compare* Schwartz, *The Death and Regeneration of Ethics,* 1980 AM. B. FOUNDATION RESEARCH J. 953, 960.