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A PRELIMINARY RATIONALIZATION OF THE LAW OF LEGAL ETHICS

L. RAY PATTERSON†

rationalize, v.t. 1. To give a rational or rationalistic explanation of; as: a To make conformable to principles satisfactory to reason.

The American Bar Association’s Canons of Professional Ethics of 1908, and its successor, the Code of Professional Responsibility, adopted in 1969, present a jurisprudential problem of more than passing interest that has received less than concentrated attention. Are the rules they embody rules of ethics or rules of law? Perhaps the absence of commentary on this question has to do with the difficulty of distinguishing law and ethics in relation to the lawyer’s conduct, a difficulty made more acute by the common law characteristic of making law after the fact: what was perceived as an ethical rule becomes a legal rule by decision of the court, at least for the case decided. The concern here, however, is not with any one rule, but with a body of rules, and the problem of characterization is simplified if we treat it as essentially one of perception. As the lawyer perceives them, the profession’s rules of conduct are a matter of ethics rather than law, a perception that is not wholly without its advantages to members of the bar: ethical rules are only commendatory in nature, whereas legal rules are mandatory.

The difference takes on particular importance in an adversary system of law administration, for in terms of the lawyer’s traditional learning, the adversary system requires loyalty to the client above all else.²

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1. WEBSTER’S COLLEGIATE DICTIONARY (5th ed. 1941).
2. Lord Brougham’s famous speech in defense of Queen Caroline before the House of Lords is perhaps the best known statement of the lawyer’s duty of loyalty to the client.

[A]n advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other.
what the lawyer can do for the client that is not unlawful is ethical, and
sometimes, it has been argued, even the unlawful is ethical. So the
profession's bias is for viewing the rules as ethical, a bias generally
shared, at least in the past, by judges who tended to view the Canons as
ethical rules. That courts tend to view the disciplinary rules as legal
rules in those states in which the Code has been adopted does not
solve the ethical-legal problem for the federal courts, nor does it neces-
sarily alter the lawyer's view. Indeed, the Code functions much the

W. Forsyth, Hortensius the Advocate 380 (Jersey City, N.J. 1822). In fact, the statement
was a political threat rather than a statement of the advocate's duty. As Lord Brougham ex-
plained it, "The real truth is, that the statement was anything rather than a deliberate and well-
considered opinion, it was a menace, and it was addressed chiefly to George IV, but also to wiser
men, such as Castlereagh and Wellington.'" Id. n.1 (quoting letter from Lord Brougham to W.
Forsyth (1859)).

Loyalty to the client, however, may not have always had the preeminence it has had in the
last century.

I want to suggest that by the 1870's leading American lawyers were coming to espouse a
responsibility to their clients as their primary and even exclusive moral obligation as
lawyers. There is reason to accept Mark DeWolfe Howe's thesis that the professional
loyalties of lawyers after the Civil War moved from "parties and their principles" to
"clients and their interests."

Schudson, Public, Private, and Professional Lives: The Correspondence of David Dudley Field and
Review, 60 HARV. L. REV. 838 (1947) (reviewing 1 R. Swain, The Cravath Firm and Its Prede-
cessors, 1819-1947 (1946)).

3. See Curtis, The Ethics of Advocacy, 4 STAN. L. REV. 3 (1951); Freedman, Professional
Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV.
1469, 1474 (1966).

4. "The Canons of Ethics of the State and American Bar Associations are not binding obliga-
tions and are not enforced by courts as such; however, they constitute a safe guide for profes-
sional conduct and an attorney may be disciplined for not observing them." In re Heirich, 10 Ill.
2d 357, 386-87, 140 N.E.2d 825, 839-40, cert. denied, 355 U.S. 805 (1957). See also In re Krasner,
32 Ill. 2d 121, 204 N.E.2d 10 (1965). As Drinker said, "While it is clear that a lawyer may be
disciplined for violating a Canon which forbids something not otherwise proscribed, the court
decisions are not entirely clear as to the legal effect of a lawyer's violation of such a Canon." H.
Drinker, Legal Ethics 26 (1953).

5. The disciplinary rules of the Code, having been adopted pursuant to a statutory
power, have the force and effect of a statute; and conduct of any attorney licensed by this
court to practice law in this state may be subject to discipline if his conduct falls below
the standards contained in these rules.

631, 633 (Del. Super. Ct. 1971) ("The duty and obligation of a lawyer under the Canons of Profes-
sional Ethics supersedes any requirement of a City Charter such as we have here which would
seem to require that he or a member of his staff represent even though there might be a conflict of

6. Federal courts appear to use the Code as a source of law rather than as law per se.
"[T]here exists no statutory obligation upon the federal courts to apply the Code as enacted by any
state jurisdiction or as adopted by the American Bar Association." Greenebaum-Mountain Mort-
disqualification] in this Circuit is, of course, little more than a reinforcement of the Code of Profes-
sional Responsibility, ethical considerations, and disciplinary rules, promulgated by the Ameri-
can Bar Association and adopted by the Supreme Court of Louisiana effective July 1, 1970." Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977). "The
same as the old Canons of Professional Ethics for lawyers. Despite the mandatory "shall" in the disciplinary rules, attorneys by and large still view the Code primarily as a matter of ethics, a not unreasonable view since two of its three parts, the canons and the ethical considerations, are clearly stated as ethical rather than legal precepts. The view is further substantiated by the Code's lack of sanctions for violating a disciplinary rule, and also because it explicitly eschews the idea that the rules are standards for determining the civil liability of lawyers.7

History and tradition support the lawyer's view that the profession's rules are ethical in nature—more than commendatory, perhaps, but less than mandatory. The Canons of 1908 prescribed rules of propriety, largely reflecting, it seems, the naive notion that precatory rules can serve as effective guidelines to ensure moral conduct. But it would be surprising had it been otherwise, since the antecedents of the Canons were, for the most part, moral, if not moralistic, in tone, exhorting the lawyer to do good.8 In addition to the profession's rules of conduct, however, there is a large body of similar rules in the form of positive law,9 and the question is whether the profession's rules should be

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7. "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

8. See Armstrong, A Century of Legal Ethics, 64 A.B.A.J. 1063 (1978) (reviewing history of statements of standards of conduct for lawyers). The first formal statement was 2 D. HOFFMAN, Resolutions In Regard to Professional Department, in A COURSE OF LEGAL STUDY 752 (2d ed. 1836) (1st ed. Baltimore 1817). The second statement was G. SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (Philadelphia 1854). Both of these documents formed the basis for the Code of Ethics of the Alabama State Bar Association, written by Thomas Goode Jones, and adopted in 1887, 118 Ala. XXIII-XXXIV (1899), which in turn served as the basis for the ABA CANONS OF PROFESSIONAL ETHICS, adopted in 1908.

9. State statutes regulating bar membership often contain provisions relating to professional conduct. See, e.g., ILL. ANN. STAT. ch. 13, §§ 21 (prohibiting barratry), 22 (prohibiting maintenance) (Smith-Hurd Supp. 1978). Rules of practice and procedure also often contain rules of conduct. The Indiana statute is perhaps the most comprehensive on the duties of lawyers. It provides:

It shall be the duty of an attorney:

First. To support the Constitution and laws of the United States and of this state.

Second. To maintain the respect that is due to the courts of justice and judicial officers.

Third. To counsel or maintain such actions, proceedings or defenses only, as appear to him legal and just; but this section shall not be construed to prevent the defense of a person charged with crime, in any case.

Fourth. To employ for the purpose of maintaining the causes confided to him, such means, only, as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law.
treated as having the force of such law.

There is a hidden issue here—the lawyer's ability to determine the appropriateness of his own conduct in a given situation. To treat ethical rules of conduct as legal rules denies him the choice the former gives, and so constitutes a threat to his exercise of discretion and hence to his independence and authority. The lawyer's concern for preserving these qualities is consistent with history, for the tradition of the independent lawyer responsible only to the client reflects the larger traditions of the dignity of the individual and of individual rights that loom so large in the reservoir of general ideas that underlie our legal heritage. Thus, even when his effort conflicts with the larger concerns of the law, ethical rules enjoin the lawyer to give the individual every benefit of doubt. The lesson of the Code is that to err in favor of the client is the lesser evil. 10

The paradox is that to give the lawyer discretion to be ethical through the medium of ethics is also to give him the discretion to be unethical. Thus, unless we correlate rules of ethical and legal conduct for the lawyer, the result will often be less than either. 11 Yet a common justification for retaining ethical rules is that they provide a maximal level of conduct, while legal rules provide only the minimal level of

10. "While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." EC 7-3.

11. "Compliance or noncompliance with Canons of Ethics frequently do not involve morality or venality, but differences of opinion among honest men over the ethical propriety of conduct." Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977). See, e.g., In re Ryder, 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713 (4th Cir. 1967) (former Assistant United States Attorney representing client accused of bank robbery sought, and followed, advice on disposition of stolen money and sawed-off shotgun given him by client; lawyer was suspended from practice for 18 months).
conduct, a point manifested by the aspirational nature of the ethical considerations in the Code. If minimal and maximal rules of conduct are in fact appropriate for the lawyer, the justification has some merit, despite its self-serving character. But the premise is subject to considerable question. Competence is competence whether commended by an ethical rule or commanded by a legal rule, and the factors that result, for example, in a conflict of interest do not change with the efficacy of the rule proscribing it.

Beyond this truism, two bodies of rules, one ethical and one legal, are likely to be competitive rather than complementary, at least so long as there are bad as well as good lawyers. Such competition creates a hidden cost, for it means that the price of a separate body of ethical rules is both opportunity for the cynical and confusion for the conscientious lawyer. To command with one rule what is merely commended by another frequently gives a choice, whether intended or not, and the effect is to detract from the efficacy of the legal rule. The advantage goes to the unethical lawyer, since the ambiguity created thereby gives an opportunity to apply the ethical or legal rule as expedience dictates. The point is best illustrated, perhaps, by the rules regarding the lawyer's duty to maintain the confidences of the client. Thus, DR 4-101(C) states, "A lawyer may reveal: . . . (2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order . . . ." As ABA Opinion 341 makes clear, the option to reveal or

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12. "The Ethical Considerations are aspirational in character and represent objectives toward which every member of the profession should strive." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

13. Compare DR 4-101(C) (providing that
[a] lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct),
with EC 4-2 ("The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform professional employment, when permitted by a Disciplinary Rule, or when required by law."). The ethical consideration seems to give the lawyer discretion to keep the client's confidences even when the law requires him to reveal it.

14. DR 4-101(C) (emphasis added).

15. ABA COMM. ON PROFESSIONAL ETHICS, RECENT ETHICS OPINIONS, No. 341 (Sept. 30, 1975).
not is that of the lawyer, surely an unwarranted assumption of authority in the face of what the law requires. Even so, the risk of discipline in such a case is minimal, for discretionary ethical rules create doubt that enables reasonable men to disagree, and the disagreement is usually sufficient to preclude the imposition of sanctions.

The vice of rules of conduct as ethical rather than legal, however, goes even deeper. For as they create opportunity for the cynical lawyer, enabling him to do what the law prohibits, they create dilemmas for the conscientious lawyer, providing him with a rationale for not doing what the law permits or requires. The Code of Professional Responsibility, for example, tells us, "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law." Yet, "In his representation of a client, a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." The application of these rules to the problem of taking a default judgment against a party represented by a lawyer demonstrates the dilemma. Is this a legal or an ethical problem? The rules on default judgments are based on the duty of a party to respond to the court's processes, and the failure to respond gives the plaintiff the legal right to judgment. The failure in this case, however, is that of the lawyer, and the intuitive feeling is that the defendant should not be compelled to pay for his lawyer's sins. As an ethical matter, the judgment should not be taken, but to preclude this action as a matter of law, we need a legal duty for the plaintiff's lawyer as justification. We find that duty, ultimately, in a principle of fairness. Once this principle is recognized, a rule emerges: The plaintiff's lawyer should not take the default judgment without notice to his fellow lawyer. The duty of fairness imposed by this rule, however, must be legal rather than merely ethical in nature to justify what would otherwise be the lawyer's failure to represent his client with zeal.

17. DR 7-101(B)(1).
18. This is the position taken in the Code of Trial Conduct of the American College of Trial Lawyers: "When [a lawyer] knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT No. 14(a) (rev. ed. 1972).
19. As an ethical rule, the rule is merely a rule of etiquette. In Cook v. Aurora Motors, Inc., 503 P.2d 1046 (Alas. 1972), the lawyer filed a motion to dismiss an appeal for noncompliance with the court rule requiring a concise statement of the grounds of appeal exactly 30 days after the judgment without ever contacting opposing counsel. The court approved the provisions of rule 14(a), AMERICAN COLLEGE OF TRIAL LAWYERS, supra note 18, saying: "This practice is a highly
But even this does not reach the real issue. Most of the disciplinary rules in the Code reflect positive rules of law. Why should two rules of substantially the same content create confusion for the conscientious and opportunity for the cynical? The answer seems to lie in the defects of the Code, which result because its rules are not properly derived from appropriate principles. For present purposes, a principle can be defined as a general rule, adopted or professed as a guide to action, that serves as a source for particular rules of conduct. Loyalty to the client is such a principle. In the legal context, the necessary standard of conduct generates the principle: The lawyer represents a client in resolving legal issues in an adversary system, the resolution of which requires, for example, competence and the avoidance of conflicts of interest. From this, it follows that the client has a right that the lawyer be competent and that he avoid conflicts of interest, which, of course, are his correlative duties to the client. Thus, the principles imply the rules, and the rules state the rights and duties.

This point takes us to the two defects of the Code. The first is that its disciplinary rules are derived from ethical rather than legal principles. The point is not as paradoxical as it sounds. Most rules of law start with felt notions of right and wrong and so have an ethical basis. And most rules of law are derived ultimately from ethical principles. But before an ethical principle can serve as a satisfactory source for legal rules, it must be accepted as a legal principle. To attempt to derive legal rules from ethical principles, as has been done in the Code, is to undermine the efficacy of the rules since the principle can be used to avoid application of the rule.²

This last point is related to the even more serious second fault, desired courtesy to the opposing side, which can help avoid unnecessary, time-consuming motions before the court.” 503 P.2d at 1049 n.6. Conduct that results in “unnecessary, time-consuming motions” involves more than a matter of courtesy. Cf. ABA CANONS OF PROFESSIONAL ETHICS No. 25 (“Taking Technical Advantage of Opposite Counsel; Agreements with Him”).

² This is most likely to occur with the ethical principle of loyalty to the client. Thus, canon 7 of the Code states: “A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law.” The lawyer can use the duty to represent a client with zeal as an excuse for avoiding the rules requiring that his representation be within the bounds of the law in DR 7-102. One of the problems is the uncertain bounds of the law. DR 7-102(A)(3) says a lawyer shall not “conceal or knowingly fail to disclose that which he is required by law to reveal.” Is a lawyer required to reveal that plaintiff has sued the right defendant under the wrong name, naming an unincorporated business as a corporation, if he files an answer to the complaint and defends the case? In Halloran v. Blue & White Liberty Cab Co., 253 Minn. 436, 92 N.W.2d 794 (1958), the lawyer did not reveal his client’s (plaintiff’s) mistake in this regard. The case resulted in a $1,000 judgment and was before the municipal court of Minneapolis four times and the Minnesota Supreme Court twice, an unconscionable situation sanctioned by the ethical duty of loyalty to the client.
which is that in the Code of Professional Responsibility only one principle has been articulated—the principle of loyalty to the client. This point has been obscured because of the confusion in the Code about principles and rules. Three of the four main canons, 4, 5 and 6, having to do with confidentiality, conflicts of interest and competence, purport to be principles, but they are in fact merely different aspects of the principle of loyalty to the client. The three canons, in short, are rules disguised as principles, for each is necessary to implement the principle of loyalty, which is inartfully stated in canon 7 as the duty to represent the client zealously within the bounds of the law. As the language of the canon makes clear, the principle of loyalty to the client is not, and cannot be, absolute. Yet, the Code contains no countervailing principles and the result is that the principle of loyalty is counterbalanced only by mitigating rules. There is, for example, no canon in the Code stating a principle of candor to the tribunal or a principle of fairness to others. The mitigating rules requiring that a lawyer be candid with the court or that a lawyer be fair to an opponent are overwhelmed by the principle of loyalty to the client, to whom the lawyer looks for his fee.

The purported limitation contained in the statement of the principle—that the client is to be represented within the bounds of the law—does not do the job, for the principle of loyalty to the client is too powerful. The lawyer who does not reveal his client’s fraud on the court in violation of a rule, for example, can always plead loyalty to the client in defense. And, indeed, he will have good company in doing so, for even the prestigious Legal Ethics Committee of the American Bar Association has wavered on the issue.21 The confusion in the Committee’s opinions points up the problem. The rule requiring the lawyer to reveal to the court a client’s fraud on the court, DR 7-102(B), can properly be derived only from a principle relating to the court. Yet, in the Code, the rule purports to be in implementation of the principle relating only to the client. Logically, the construction of canon 7 has the defect that a dangling participle has in grammar.

The major reason for the Code’s defects seems to be the failure to

21. Compare the following opinions of the ABA Committee on Legal Ethics: ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 23 (1967) (“An attorney for a fugitive from justice should not disclose the fugitive’s hiding place to the prosecuting authorities when he learns of it from information given to him by relatives.”); id. No. 155 (“An attorney, whose client has fled the jurisdiction of the court while out on bail, must reveal the whereabouts of his client even if received in confidence from the client.”); id. No. 287 (“An attorney who secured a divorce for a client should not reveal the truth to the court when the client informs him that he committed perjury in securing the divorce.”).
recognize the function of rules of conduct for lawyers, which is to define more precisely the nature of rights and duties stated only generally in rules of positive law. Another reason is the failure to acknowledge the role of principles in our law. Legal principles underlie all rules of law, but the doctrine of stare decisis tends to obscure their importance. Precedent makes similar facts fungible, and the lawyer wants the rule of a case in point in order to persuade the court. The problem is that the infinitude of facts tends to limit the usefulness of precedent, and inevitably sound legal reasoning requires a return to principles and the justifications for them, which is the point we are approaching with legal ethics. One reason we have not reached it is that it is not at all clear why lawyers as lawyers should have duties that are different from the duties of all others in the application of the law. The justification is that lawyers assume special, as opposed to general, duties\textsuperscript{22} when they choose to be lawyers.

General duties, the simplest example of which are the duties not to rob, rape or plunder, are applicable to all. Special duties are those duties that are applicable only to certain persons who by reason of their conduct have chosen to assume them. Marriage imposes special duties on the spouses; the acceptance of an official position imposes special duties on the officeholder, as does the acceptance of a license to practice medicine by a physician. The lawyer, then, assumes special duties because he or she is a lawyer, that is, a person authorized by the state to administer law on behalf of individual citizens. The basic duty is to uphold the law, and the lawyer fulfills this duty by fulfilling his duty to the client whom he represents, to the tribunal whose procedures he invokes on behalf of the client, and to the opposing parties against whom he acts for the client in accordance with the requirements of the law. The question is what should the law require of the lawyer? It is a question with which the profession has not quite come to grips, because lawyers have not yet fully accepted the fact that the lawyer's oath imposes upon him or her the primary responsibility for making the system of law administration function properly.\textsuperscript{23}

It is because the lawyer voluntarily assumes these obligations that

\textsuperscript{22} For a discussion on general and special duties, see Hart, Are There Any Natural Rights?, 64 PHILосOPHICAL REV. 175, 183-88 (1955).

\textsuperscript{23} The lawyer stands in a unique position in our society . . . . “An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term, but is an officer of the court. He is, however, in a sense an officer of the state, with an obligation to the courts and to the public no less significant than his obligation to his clients. The office of attorney is indispensable to the administration of justice and is intimate and peculiar to its relation to, and vital well being of, the court.”
the rules governing his or her conduct should be rules of law. Self-interest is too large an element of the adversary system to permit that system to be operated by lawyers guided by discretionary rather than mandatory rules. At the same time, there is no reason to suppose that making heretofore ethical rules mandatory would eliminate discretion, for the system must have some leeway, room for give and take. The rules of conduct must not constitute a strait jacket that would make the lawyer an agent of the state and thus do indirectly what the state cannot do directly—destroy the initiative of the individual. That the duties to the client, to the tribunal, and to opposing parties all differ in some measure, thus creating a healthy tension, is an antidote to this danger. But to make the antidote effective, the rules must be rational rules derived from principles of conduct that are conformable to reason and reflect ultimately the purpose of the legal system itself. Thus, it is necessary to rationalize the principles. We proceed to the task, first identifying the principles to be rationalized and then providing a preliminary rationalization for them.

I. The Principles of Conduct

We begin with the question: What are the principles of conduct for the lawyer? An obvious, yet tentative answer is: Loyalty to the client, candor to the tribunal, and fairness to the opponent. The real question is whether the list is complete, that is, whether these three principles will serve as a sufficient source for rules to enable the lawyer to solve any, or almost any, ethical problem that may arise. Categorical answers to such broad questions are fraught with difficulties, but if we limit our concern to the lawyer as lawyer in an established lawyer-client relationship, the answer seems to be yes, a conclusion examined later. This qualification enables us to avoid the issues involved in legal services, which is not to say that legal services is not an important


24. The phrase "legal services" means different things to different people, but the problems under this heading are essentially administrative in nature, having to do with the delivery of legal services: providing legal services for the poor, group legal services, advertising, minimum fees, unauthorized practice, interstate practice, the representation of the unpopular client, and so forth. The issue in such matters is essentially to what extent shall the profession provide legal services, not the manner of providing them once the lawyer is employed. As the Supreme Court has made clear, the profession's power is limited in this regard. See, e.g., Bates v. State Bar, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); NAACP v. Button, 371 U.S. 415 (1963). The point, however, is not that the profession should not deal with such issues, but that
subject, but only that it extends beyond the present concern to broader issues.

The optimistic response to the qualified question rests on two foundations: reason and precedent. Reason tells us that principles of conduct for the lawyer have to do with duties and that duties result from relationships. The basic relationships of the lawyer are only three in number: with the client, with the tribunal, and with opposing parties. Ethical problems for the lawyer will arise with the client when he does not provide the client with good and faithful service, that is, fails in his duty of loyalty to the client; with the tribunal when he is not honest in his presentation to the tribunal, that is, fails in his duty of candor; and with the opposing party when he is overreaching in his tactics, that is, fails in his duty of fairness. The difficult question, reserved for later, is what do we mean by loyalty, by candor, and by fairness?

The second foundation of the conclusion, precedent, is found in the two most generally accepted statements of rules of conduct for lawyers: the ABA Canons of Professional Ethics of 1908 and the ABA Code of Professional Responsibility. Except for the rules dealing with legal services and the rules of etiquette, the Canons of Professional Ethics deal only with issues involving the three principles. An analysis of the Code of Professional Responsibility yields substantially the same results. Despite the lack of logical structure for both of these documents, the rules can be grouped under the three principles, dealing first with the duty of loyalty to the client, then candor to the tribunal, and, finally, fairness to the opponent.

The rules in the Canons of Professional Ethics on loyalty to the client treat four different aspects of the duty: competence, communication, conflicts of interest and confidences. Dealing with the issue of competence are canon 4 and canon 5, which require the lawyer to “exert his best efforts” in behalf of an indigent prisoner and “to present

the problems they represent are different in kind from the problems arising from an established lawyer-client relationship. A new code should thus have a separate part dealing with legal services.

25. Classification of such general rules as the canons will vary, but approximately 15 of the 47 canons dealt with what can be characterized as legal services, including: fees, ABA CANONS OF PROFESSIONAL ETHICS Nos. 12, 13, 14, 34, 38; advertising, id. Nos. 27, 43; right to decline clients, id. No. 31; specialization, id. Nos. 45, 46; partnership names, id. No. 33; expenses, id. No. 42; newspapers, id. No. 40; and aiding the unauthorized practice of law, id. No. 47.

every defense that the law of the land permits" in defense of a person accused of a crime. In terms of the importance of the duty, the rules are primitive, but their very existence, even for special situations, implies the existence of the duty generally, a point the Code affirms. Canon 6 of the Code states that "A Lawyer Should Represent A Client Competently" and implements the duty with two disciplinary rules.

The rules in the Canons deal with the duty of communication in almost as primitive a manner as with the duty of competence. But canon 8, "Advising Upon the Merits of a Client's Cause," does provide that the lawyer is "bound to give a candid opinion of the merits and probable result of pending or contemplated litigation," and canon 11, "Dealing With Trust Property," requires the lawyer to report and account to the client for such property. Canon 6 states the duty of the lawyer at the time of retainer "to disclose to the client all the circumstances . . . which might influence the client in the selection of counsel." But this duty is in conjunction with the duty to avoid conflicts of interest, and it is only in this respect that the Code deals with the duty of communication with the client at all. Thus, the Code provides that a lawyer may not accept employment if his professional judgment will or may be affected by his own financial, business, property or personal interests, "except with the consent of the client after full disclosure."27

The Canons give the duty to avoid conflicts of interest more extensive treatment than either competence or communication receives. Although canon 6, "Adverse Influences and Conflicting Interests," does not treat the problem in a very helpful way, there are other canons directed to the same point: Canon 10 precludes a lawyer from purchasing an interest in litigation he is conducting; canon 35 precludes the use of intermediaries; and canon 38 provides that a lawyer should not accept compensation, commissions or rebates from others without the consent of the client after full disclosure. These three rules are directed to the basic problem of conflicts of interest, the exercise of independent judgment. In the Code, seven disciplinary rules implement the principle,28 which is expressed in canon 5, "A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client."

27. DR 5-101(A).
28. See DR 5-101 ("Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment"); DR 5-102 ("Withdrawal as Counsel When the Lawyer Becomes a Witness"); DR 5-103 ("Avoiding Acquisition of Interests in Litigation"); DR 5-104 ("Limiting Business Relations with a Client"); DR 5-105 ("Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"); DR 5-106 ("Settling Similar Claims of Clients"); DR 5-107 ("Avoiding Influence by Others Than the Client").
The matter of maintaining the confidences of a client is the subject of canon 37, which was amended in 1937 to make the duty more definitive. Thus, before the amendment, the canon began, "The duty to preserve his client's confidences outlasts the lawyer's employment . . . ." It was changed to read, "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . . ." The Code treatment in canon 4, "A Lawyer Should Preserve The Confidences And Secrets Of A Client," is based on that of the Canons.

The second basic duty of the lawyer, candor to the tribunal, is combined in the Canons with the duty of fairness in canon 22, in which the duty of fairness receives more attention than the duty of candor, indicating that candor is only an aspect of fairness. But other canons also deal with candor. Canon 15, "How Far a Lawyer May Go in Supporting a Client's Cause," states that "[t]he office of attorney does not permit . . . any manner of fraud or chicane." Canon 3 precludes "marked attention and unusual hospitality on the part of a lawyer to a judge," and canon 26, "Professional Advocacy Other Than Before Courts," states that "[i]t is unprofessional conduct for a lawyer so engaged to conceal his attorneyship, or to employ secret solicitations, or to use means other than those addressed to the reason and understanding, to influence action." The Code, taking its cue from the Canons, also deals with candor in a tangential way, that is, in limitation of the duty of loyalty to the client and in relation to the duty of fairness. Thus, the duty of candor is not commanded per se, but is stated in terms of representing a client within the bounds of the law under canon 7, for the effect of DR 7-102(A) and (B), DR 7-106, DR 7-108 and DR 7-110 is to require candor from the lawyer in the situations specified.

The duty of fairness to an opponent is the subject of thirteen of the old canons, the largest number devoted to any subject except legal services. This is as it should be if the purpose of rules of conduct is to ensure fairness in the administration of the law; indeed, the surprising point is not their number, but that they are not always recognized as rules of fairness. Apart from canon 22, "Candor and Fairness," the Canons prohibit negotiation with the opposite party;29 enjoin the lawyer to restrain the client from improprieties;30 require fairness in the treatment of adverse witnesses and suitors;31 prohibit the lawyer from

29. ABA CANONS OF PROFESSIONAL ETHICS No. 9.
30. Id. No. 16.
31. Id. No. 18.
appearing as a witness for the client;\textsuperscript{32} prevent the lawyer from engaging in a newspaper discussion of pending litigation;\textsuperscript{33} give the lawyer the right to control the incidents of the trial;\textsuperscript{34} prohibit a lawyer from taking technical advantage of opposing counsel;\textsuperscript{35} prohibit the lawyer from engaging in unjustifiable litigation;\textsuperscript{36} preclude employment of a retired public official in connection with matters he dealt with while in office;\textsuperscript{37} give the lawyer free access to witnesses of the opposing side;\textsuperscript{38} and command the lawyer to rectify fraud or deception unjustly imposed upon the court or a party.\textsuperscript{39}

The Code's rules implementing the principle of fairness are similar to those in the Canons, but they are in a more structured context, for they are found in the disciplinary rules under canon 7, which states, "A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law." This Canon is the Code's expression of the duty of loyalty, and the placing of the rules directed to fairness under it indicates that fairness to an opponent is in fact a limitation on the loyalty to the client. DR 7-101(B)(1), for example, gives the lawyer the right "to waive or fail to assert a right or position of the client," and DR 7-101(B)(2) gives a like privilege to "[r]efuse to aid or participate in conduct that he believes to be unlawful." Indeed, except for DR 7-101(A), all of the rules under canon 7 can be construed as being directed to the problem of fairness as indicated by their headings: "Representing a Client Within the Bounds of the Law";\textsuperscript{40} "Performing the Duty of a Public Prosecutor or Other Government Lawyer";\textsuperscript{41} "Communicating With One of Adverse Interest";\textsuperscript{42} "Threatening Criminal Prosecution";\textsuperscript{43} "Trial Publicity";\textsuperscript{44} "Communication With or Investigation of Jurors";\textsuperscript{45} "Contact With Witnesses";\textsuperscript{46} and "Contact With Officials."\textsuperscript{47}

\begin{itemize}
  \item \textsuperscript{32} Id. No. 19.
  \item \textsuperscript{33} Id. No. 20.
  \item \textsuperscript{34} Id. No. 24.
  \item \textsuperscript{35} Id. No. 25.
  \item \textsuperscript{36} Id. No. 30.
  \item \textsuperscript{37} Id. No. 36.
  \item \textsuperscript{38} Id. No. 39.
  \item \textsuperscript{39} Id. No. 41.
  \item \textsuperscript{40} DR 7-102.
  \item \textsuperscript{41} DR 7-103.
  \item \textsuperscript{42} DR 7-104.
  \item \textsuperscript{43} DR 7-105.
  \item \textsuperscript{44} DR 7-107.
  \item \textsuperscript{45} DR 7-108.
  \item \textsuperscript{46} DR 7-109.
  \item \textsuperscript{47} DR 7-110.
\end{itemize}
Although the rules can be placed under the three headings loyalty, candor and fairness, the classification in some cases may appear strained; this difficulty, however, arises more because of the way in which the rule is expressed than because of the problem to which the rule is directed. A rule prohibiting a lawyer from taking technical advantage of opposing counsel is clearly based on the concept of fairness; a rule regulating newspaper discussion of pending litigation is not so clearly based, but the purpose is to avoid prejudicial publicity, which may give one side an unfair advantage over the other. A rule giving the lawyer the right to control the incidents of a trial appears not to be germane to the problem of fairness until one realizes that one of its purposes is to provide the lawyer with the authority to resist the demands of an overreaching client. "In such matters no client has a right to demand that his counsel be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety."

We return to the earlier question, whether the three principles, loyalty, candor and fairness, are sufficient sources for rules of conduct for the lawyer. All the issues dealt with in the Canons and the Code seem to be covered by these principles, yet there is room for doubt. This is partly because the Canons and Code give some of the issues only an inchoate treatment: for example, the duty of communication with the client. Primarily, however, because the principles for the rules have been neither articulated nor rationalized, there is no unity, and without unity, the logic escapes the reader. The result is a complete lack of structure in the Canons and an underdeveloped structure in the Code.

The point is not so much a criticism of the draftsmen as it is a recognition of the way principles develop. They do not emerge full blown and Athena-like from the brow of a Zeus. They evolve in a much more human-like fashion, emerging at first in the form of rules directed to particular problems. Only after the accretion of enough rules to provide a sufficiently broad perspective of the problems do we have a large enough view to state the principles. In a sense, then, the principles are a product of rules, but once properly articulated and rationalized, principles assume the dominant role. They provide structure for the rules, give them both order and reason, and become the source for new rules to deal with new problems. The process requires time and experience, and often results in false starts and unsatisfactory statements of principles, with a concomitant confusion in the rules.

48. ABA Canons of Professional Ethics No. 24.
Canon 7 of the Code is an example of the last point. It reads, "A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law." As indicated earlier, this is an inartful statement of the principle of loyalty to the client; in fact, the canon states two principles: loyalty to the client (represent a client zealously) and respect for the law (represent a client within the bounds of the law). But the term "law" is comprehensive, with the result that the disciplinary rules under the canon reflect all three principles of conduct: loyalty to the client, candor to the tribunal, and fairness to an opponent. Indeed, only DR 7-101 deals with loyalty to the client, for the remaining rules are concerned with keeping the lawyer within the bounds of the law.

The confused state of affairs is reflected partly in the content of the rules (they are not sharply focused), but primarily in their order and structure, a problem we can trace directly to the language of canon 7. To state a principle requiring a duty to a person (or legal entity) and in the same principle to attempt to limit that duty with the statement of a duty to an abstraction (the law) is to dilute the former and to diffuse the latter. Duties arise only out of relationships: one does not have a duty to "the law." The duty to stay within the bounds of the law is in fact a duty to others, for it is a duty to conduct oneself in relation to others in accordance with the requirements of the law. But if the others are not properly identified, there is no sound basis for the others to complain.

The Code, for example, deals with the problem of pleadings and motions in two rules: DR 7-102(A)(1), precluding a lawyer from filing a suit, asserting a position, conducting a defense, delaying a trial, or taking other action when the purpose is merely to harass or maliciously injure another, and DR 7-102(A)(2), prohibiting the lawyer from advancing a claim or defense that is unwarranted under existing law, except when such action "can be supported by good faith argument." The principle from which these rules purport to be derived relates only to the client, the rules being merely limitations on the duty of loyalty to the client rather than affirmative recognition of duties either to opposing parties or to the tribunal.

The central stumbling block to recognition and acknowledgment of these principles is that the focus has been on the lawyer as he relates to the client and to the law, and not on the lawyer as he relates to the legal system as it does, or should, function. The lawyer's conduct in relation to the tribunal and to opposing parties is no less important to the proper functioning of the legal system than his conduct in relation
to the client. Thus, the need is to rationalize the principles governing his conduct in all three relationships.

II. THE RATIONALIZATION OF THE PRINCIPLES

The principles must be rationalized in terms of the function of the legal system because their purpose is to provide direction in the administration of law. If they reflect the proper functioning of that system, they can provide for that system the necessary stability and flexibility; if principles are the source of stated rules for the ordinary situations, they can also be the source for creating rules to accommodate the unique situations. Thus, a knowledge of general principles helps the lawyer to serve the client in a way that particular rules often do not: they can be used to prevent the unjust operation of a rule in a given situation. This is because one can better determine whether a rule is being properly applied by understanding its purpose, which in turn one can more easily determine by reference to the principle from which it is derived.

There is one further point before we proceed to the task of justifying the three principles of conduct—loyalty to the client, candor to the tribunal, and fairness to the opponent. The terms in which these principles are couched vary in complexity. Loyalty is a complex concept that can have many different components, depending on the context. Loyalty to one's spouse requires different conduct than loyalty to one's employer. Candor is a simple concept without degrees of comparison. While a person may be more candid or less candid, in terms of the completeness of disclosure made, the result in respect of any particular fact is either candor or it is not. There may be disagreement on which facts one was or was not candid about, but with any given fact, one is not candid, more candid, or most candid, for an approximation of candor is not candor. Fairness is a pluralistic concept embracing many ideas rather than one, and is subjective in nature, for one's view of what is fair or unfair is determined by how he is affected.

With such disparate concepts, one cannot approach them in the same way. It would be fruitless, for example, to ask simply what is loyalty, what is candor, and what is fairness. Instead, questions that will yield helpful answers for the lawyer should be asked. They are: What conduct on the part of the lawyer constitutes loyalty? When in a proceeding is candor required? And what is a reasonably objective measure of fairness?
A. The Duty of Loyalty to the Client

The origin of the word loyalty is law, which makes it an appropriate notion to express the duty of fidelity to the client's interest: the ultimate function of the lawyer is to individualize the law for the client. The duty of loyalty is required by law, and the legal command places it in the category of professional rather than personal loyalty, for the lawyer-client relationship exists not merely to serve the purposes of the individuals involved, but also to serve the ends of order and justice in an organized society. The lawyer's duty of loyalty, thus, cannot be contrary to the principles of order or the requirements of justice, a point the Code makes by requiring that the lawyer's representation of a client be kept within the bounds of law, zealous though it may be. Even so, the lawyer often sees the injunction to remain within the law's limits as being mitigated, if not superceded, by the duty of zeal. What then is the justification for this duty of loyalty?

Most lawyers think of themselves only as advocates and of their function only as advocacy on behalf of the client, a perception that is surely too narrow in view of the conflicting considerations involved in the administration of law. The lawyer is a person licensed by the state to handle the affairs of another, and in doing so he fulfills several roles. He serves as an adviser, interpreting the meaning of the law; as an advocate in litigation; and as an agent in many capacities; as a private legislator in the drafting of a will, a trust instrument, a corporate indenture, or a simple contract; as a negotiator or mediator in reaching agreements and settling differences; or as an intermediary in securing a benefit from the government, such as welfare benefits, a building permit, a registration of securities, or the grant of a license for a television station. The task of the lawyer, in short, involves nothing less than the private administration of law: his ultimate function is to individualize

49. "The lawyer who does not represent his client with undivided loyalty is not ordinarily entitled to compensation for his services." Rolfstad, Winkler, Sues, McKenney, & Kaiser, P.C. v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974). "The rules of law applicable to principal and agent control the relation between an attorney and his clients." State v. Weinstein, 411 S.W.2d 267, 272 (Mo. Ct. App. 1967).

50. One court noted:
A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. It is no excuse for an attorney to say that he only did what he did because directed to do so by his client. The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. It is for the lawyer, not the client, to make this decision.

the law for the client. Indeed, the lawyer's office can be characterized as a private administrative agency, and the fundamental role of the lawyer can be said to be that of administrator of law.

The state's function, on the other hand, is to provide people with the protection of law, for a primary purpose of law is to ensure order for society. To this end, law imposes restraints on the liberty of all individuals in the form of legal duties that give rise to legal rights in all individuals. But at any given time, the scope of a particular right or duty for a given individual may be uncertain. When a person faces an issue concerning his right or his duty, he may, if it is a simple one, resolve it himself, and in simple societies, the law of self-help usually governs. But ours is not a simple society, and the state that grants rights and imposes duties in the first place must provide a means for resolving the issues they create. Moreover, the means must be one that results in just resolutions, at least most of the time, for order in a free society requires justice. So the state licenses lawyers to serve the individual who seeks the protection of the law; it was not mere coincidence that before the legal profession fully developed, one who wanted a person to represent him in court in England had to obtain the permission of the king. Custom and convenience eventually dictated otherwise, so with the general privilege to represent came the obligation to represent well. We state this obligation in the form of the principle, loyalty to the client. This, then, is the justification for the duty of loyalty to the client. The lawyer, licensed by the state, is a private individual performing a public function, and in this role he assumes certain responsibilities of government, for he "is a part of the judicial system of the state." His duty is to provide protection of the law for his client, a duty best expressed, perhaps, in terms of the constitutional command of equal protection.

The command inevitably exceeds compliance, but that does not denigrate the goal. And if we accept the duty to provide protection of

51. "The power to appoint an attorney was a privilege to be conceded by royal grant; the appointment must be strictly proved; and in the royal courts an attorney must be appointed by the litigants in court." 2 W. Holdsworth, History of English Law 315-16 (3d ed. 1923). By the end of Elizabeth I's reign, apparently anyone could appoint an attorney without a special writ. Id. at 316-17; see Bellot, The Origin of the Attorney-General, 25 Law Q. Rev. 400 (1909).

52. State v. Turner, 217 Kan. 574, 581, 538 P.2d 966, 973 (1975) (citation omitted); cf. State v. Jackson, 162 Conn. 440, 449, 294 A.2d 517, 523 (1972) (quoting In re Griffiths, 162 Conn. 249, 253, 294 A.2d 281, 284 (1972), rev'd on other grounds, 413 U.S. 717 (1973)) ("Further, attorneys in Connecticut have interwoven dual functions as members of the Bar and as commissioners of the Superior Court, and 'are charged with using these powers and acting by the authority of the state in the interests of justice.'").
the law as the rationalization of the principle of loyalty to the client, the rules follow logically, for they have to do with the conduct necessary to implement the principle. What conduct constitutes loyalty in the context of our legal system is best viewed from the perspective of the client, albeit only the mythical reasonable client. We can assume that this client wants, and has a right to expect, the following: He wants the lawyer to be competent; he wants the lawyer to keep him informed; he wants the lawyer to represent his interest and not someone else's; and he wants the lawyer to keep information about his affairs in confidence. In short, the conduct necessary for the lawyer to fulfill the duty of loyalty has to do with competence, communication, avoiding conflicts of interest, and confidentiality. All of these elements of loyal conduct are covered in the Canons of Professional Ethics and the Code of Professional Responsibility. But, as we have seen, the treatment is disparate and uneven.

The principle of loyalty thus gives rise first to a rule imposing a duty of competence, for the lawyer who is not competent cannot very well provide protection of the law for his client. And the fulfillment of the duty of competence to the client fulfills the lawyer's obligation to the state as well. The state's license to practice is an imprimatur of competence, and the quid pro quo is the proper administration of law by the lawyer in behalf of individual citizens. Thus, incompetence on the part of the lawyer, whether by negligence in preparation, ignorance of the law, or lack of zeal, can be viewed as a fraud on the state as well as on the client.

The justification of the duty of communication, that is, to be accountable to the client and to keep him informed, is in further implementation of the duty of loyalty. The lawyer is the agent and the client is the principal, but the functions of the lawyer make him a unique agent with an unusual power. Because clients are usually ignorant of the law and are under substantial stress, the lawyer has an unusual degree of control; indeed, he is frequently characterized as a fiduciary

53. "The client may be entitled to damages for losses resulting from his attorney's failure to exercise the degree of care, skill and diligence commonly exercised by reasonable and prudent lawyers within the State." Rolfstad, Winkjer, Suess, McKennett & Kaiser, P.C. v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974) (citing Feil v. Wishek, 193 N.W.2d 218 (N.D. 1971)).

54. Thus, courts may exercise summary jurisdiction over lawyers for misconduct. See In re Sarelas, 360 F. Supp. 794 (N.D. Ill. 1973), aff'd mem., 497 F.2d 926 (7th Cir. 1974), in which the court, quoting Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1868), said: "'If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice, . . . [lawyers] become subject to the summary jurisdiction of the court.'" 360 F. Supp. at 796.
in order to increase his accountability. The duty of communication with the client, then, is a means of ensuring that the lawyer will be responsible and responsive to the client. In one sense, it can be viewed as a device of quality or competence control, which serves to protect both the client and the lawyer. "It has long been an accepted rule of conduct that an attorney should be ready and willing to make full disclosure to his client at any time concerning his actions in the conduct of a case and all developments therein."\(^5\)

The duty to avoid conflicts of interest is, perhaps, the aspect of loyalty that is most susceptible to superficial justification. To say that no man can serve two masters will not suffice: the lawyer serves many masters in the form of many clients. The question is which aspect of the lawyer-client relationship creates the risks arising from conflicts of interest. Canon 5 of the Code, "A Lawyer Should Exercise Independent Judgment On Behalf Of A Client," gives a clue. The exercise of independent judgment requires that the lawyer's decisionmaking process not be polluted with factors detrimental to that process. Thus, the type of situation that gives rise to conflicts of interest is the dilemmatic situation in which irrelevant factors preclude proper decisionmaking in the interest of the client. The extreme example would be the advocate who attempts to represent both the plaintiff and the defendant in the same litigation. He cannot at the same time argue that plaintiff should win and defendant lose, and that defendant should win and plaintiff lose. The problem seldom exists in so stark a form, although it may, for example, when one lawyer seeks to represent both spouses in a divorce action.\(^6\) More commonly, the problem exists in representing multiple plaintiffs or defendants, especially in criminal cases,\(^7\) or in representing both parties to a business transaction.\(^8\) And sometimes the problem involves the self-interest of the lawyer, as when a client wishes the lawyer to name himself as a legatee in the will the lawyer is preparing for the client.\(^9\) The justification for rules requiring the lawyer to avoid


conflicts of interest, as these examples demonstrate, is to ensure, insofar as possible, integrity in the lawyer's decisionmaking process. This integrity is essential if the client is to receive protection of the law consistent with the lawyer's duty of loyalty.

The duty of confidentiality is a favorite of lawyers, and it is commonly justified on the ground that a client must be able to reveal all relevant information to the lawyer. The justification is reasonable on its face and consistent with the lawyer's duty to provide protection of the law, but it is not sufficient. The client clearly has a right to give his lawyer all the information about his problem, but this right does not have as its correlative a duty on the part of the lawyer not to reveal the information. Correlative rights and duties must be related to the same subject, and the right of the client to reveal information to the lawyer has as its correlative the lawyer's duty to use the information in the representation of the client, which may, and usually does, require that he reveal it. Moreover, there may be instances in which the law requires the lawyer to reveal the information, for example when it is necessary to do so to prevent a crime. The lawyer's duty of confidentiality, in short, must also reflect the client's right to a properly functioning legal system. That right is to enable individuals to implement their legal rights and to fulfill their legal duties. The proper functioning of the legal system requires such interference with the individual's affairs as is consistent with its purpose. To the extent that information from and about the client is concerned, the interference is limited to information necessary and relevant to the issue involved, and the lawyer, as the client's agent, has a duty not to reveal more than the necessary and relevant information. In short, the client has a right of privacy, which is both consistent with, and characteristic of, one of the purposes of the legal system in a free society: to protect the dignity of the individual.

The rationalization of the lawyer's duty of loyalty, then, can be summarized as follows: The duty is justified with reference to the lawyer's function to provide the client with protection of the law. The performance of this function requires competence to be able to provide the protection; communication with the client to ensure responsibility and responsiveness to the client; the avoidance of conflicts of interest in order to maintain integrity in the lawyer's decisionmaking process; and the duty of confidentiality to protect the client's right of privacy.

B. The Duty of Candor to the Tribunal

Both in justification and in implementation, candor is the most subtle of the three principles of conduct. The recognition that truth is difficult to ascertain is a fundamental predicate of the adversary process. Like beauty in the eye of the beholder, truth is very much in the mind of the speaker. Thus, in the adversary system we emphasize candor as a means of finding the truth, and, indeed, often treat it as a synonym for truth, even though in fact it only implies sincerity. A candid person can, and often does, convey wrong information. The right to cross-examine witnesses, for example, is not predicated upon the premise that witnesses commit perjury—although they may—but that they may be mistaken. They may have perceived incorrectly, their memory may be faulty, their command of the language may be inadequate, or, of course, they may lie. So the proper functioning of the adversary trial does not depend so much upon truth as it does upon sincerity in the presentation of a case, for if there is sincerity the truth will most likely come out. The duty of candor, then, precludes the fabrication of either issues or evidence, and therein lies the reason the system requires candor: the lack of candor results in an obstruction of justice. The justification for the lawyer's duty is that he has willingly and voluntarily undertaken the responsibility for making the system work by becoming a member of the bar.

A major difficulty in developing rules to implement the principle of candor is that candor is subjective; we can measure it only against "the truth" that eventually comes out, often from many sources. We can infer that a person is not being candid if we know the fact about which he is speaking or if his story is internally inconsistent, but we cannot know that he is being dishonest. The duty of candor to the tribunal thus has been one of the most difficult both to articulate and to apply.

A more serious difficulty in developing rules of candor is the apparent dilemma the duty poses for the lawyer. As an advocate in the courtroom, the lawyer wants to present only such information, and in such a way, that will benefit his client; the judge, in contrast, simply wants accurate and complete information. The lawyer may violate his duty of loyalty to the client if he presents accurate information, and he may violate his duty of candor to the tribunal if he does not. There is something wrong here, and it is the assumption that the lawyer's duty of candor is an independent duty that arises simply from his relationship to the tribunal, apart from the duty of loyalty to the client. If the
assumption were right, it would mean that the lawyer has two different duties relating to the same subject (information presented) to two different persons (the client and the judge). The reason the assumption is not right is that the duty of candor is, in fact, a derivative duty, predicated not upon the lawyer's duty, but upon the duty of the client to the tribunal. The point has been obscured because we tend to think only in terms of the lawyer's, not the client's, relationship to the tribunal. Yet, the crucial relationship is that of the client.

It is the tribunal, not the lawyer, that renders the judgment for or against the client as litigant. The rights of the client under the law thus are ultimately against the tribunal, which has correlative duties to him. The lawyer's role, then, can best be described as an instrumental one, for he is an agent of both the client and the tribunal.61 This is the crucial point, for it means that his duties to both the client as litigant and to the tribunal must be consistent. Thus, the lawyer's rights and duties as advocate were all instrumental in nature, being derived from the client's rights and duties in one instance and from the tribunal's rights and duties in the other.

Because the lawyer is the principal actor in the courtroom, this point is less than obvious. We tend to say, for example, that the lawyer has a right to cross-examine witnesses against his client. This is correct, but it is only a derivative right in furtherance of the client's primary right. And the correlative duty to this primary right is in the tribunal. If the lawyer, for example, chooses not to cross-examine for reasons of tactics, there is no error for appeal. If the judge denies the opportunity for cross-examination, there is error, but because of harm to the client, not to the lawyer. Similarly, if the lawyer wishes to present immaterial evidence, he is denied the opportunity to do so because the client has no right that such evidence be presented. As one court stated: "He [the lawyer] does not represent himself as an individual. He is in the proceeding as the representative and alter-ego of his clients. His acts and appearances are those of his clients and are regarded as having been done by, and binding on, the clients."62

Ultimately, then, the lawyer's rights and duties as advocate must be determined by the rights and duties of the client and of the tribunal,

61. "A dual trust is imposed on attorneys at law. They must act with fidelity both to the courts and to their clients." State v. Jackson, 162 Conn. 440, 449, 294 A.2d 517, 523 (1972) (quoting State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 234, 140 A.2d 863, 870 (1958)).

which can be ascertained only by the law governing the situation. A major problem is that the law is not always clear, and, indeed, at times is in conflict. So long as the law is ambiguous concerning the client's rights or duties, the advocate will, and should, act according to the interpretation most favorable to his client. But any confusion results from the ambiguity of the positive law stating the rights and duties of the client, not from any conflict in the duties of loyalty and candor, a point that emphasizes the need to integrate rules of conduct and positive law.63

Another reason that development of rules concerning the duty of candor has been inadequate is that attention has been concentrated almost wholly on the communication of the witness rather than on the communication of the lawyer with the tribunal. And there has also been a failure to acknowledge that candor in litigation is a complex legal concept. We gain a better perspective, first, if we step back and recognize that candor is a quality of communication, and that the primary problem is the communication of the lawyer, not the witness, with the court; and second, if we recognize that what constitutes candor in a trial is determined by rules of law as well as by the facts.

The lawyer's communication with the court takes four different forms: pleadings, motions, examination of witnesses and argument. Pleadings are, perhaps, the most important communication of the lawyer, for they are the basis for motions, for the examination of witnesses, and for argument. The problem here is that there are offensive and defensive pleadings, which differ in purpose and function. The complaint states the grounds for relief and sets the machinery in motion; the answer is the defendant's response and serves to create the issues to be tried. Thus, the defendant who is clearly liable may properly deny liability, because he is not liable until the plaintiff has convinced the trier that this should be so. The answer, in short, is a procedural device and not a statement that necessarily reflects the facts, although when it purports to do so, it should do so accurately.

Motions, too, differ in purpose and function. They may be based

on information already before the tribunal and serve as procedural devices to protect the record, as with a motion for a directed verdict, or to dispose of issues as a matter of law, as with a motion to dismiss. Or they may be based upon information presented as true and accurate for the court’s disposition without submitting the case to a jury, as with a motion for summary judgment.

The examination of witnesses presents the most complex problems because the lawyer communicates with the court through a third party and is limited by rules of evidence to ensure that the trier will get, as near as possible, an accurate picture of what happened. The requirements that the witness speak only of matters of which he has direct knowledge (except for the ubiquitous exceptions to the hearsay rule) and that he be subject to cross-examination serve to promote this goal.

The last form of communication to the court is argument, which may be on a point of law to persuade the judge to rule in one’s favor, or which may be on the evidence to persuade the trier of fact. The common characteristic is that both kinds of arguments, as does all argument, consist of inferences. The difference is that argument based on law usually consists of direct inferences, the source of which—the case or statute—is available to all participants. The question may take one of two forms: What does the law require? Or what should the law require? Both are legitimate, and both are usually present. With either question, however, all relevant law should be before the court, and this explains why candor in the citation of authority has long been required.64

Argument to persuade the trier of fact based on the evidence is usually a matter of indirect inferences, which consist of two kinds: inferences on the credibility of the witnesses; and, once the credibility has been accepted, inferences to determine the conclusion to which the evidence is directed. The goal of the lawyer is to persuade, a goal that is often sought through appeal to emotion rather than to intellect. The problem with such a subjective process is how to implement a duty of candor, a point to which we return later.

Implicit in all of these communications is the point that what constitutes candor in the trial of a case is a matter of law as well as fact. The complaint cannot merely state facts; it must state facts upon which the law will grant relief. The answer, except when it includes affirmative defenses, need not reflect the facts accurately, for that is not its

64. ABA CANONS OF PROFESSIONAL ETHICS No. 22; DR 7-106(B)(1).
purpose. Motions may fall into either category, for they may be based on either facts or law. Argument, by its nature, is subject to general, but not specific, limitations. But the requirement for all of these communications is relevance, and the point is that the rules of law determine the relevance of candor for the particular communication.

Rules relating to the lawyer's duty of candor thus must take into account three important factors: the duty of candor is a derivative duty, determined by the rights and duties of the client and of the tribunal; there are four types of communication with the tribunal; and candor to the tribunal is a matter of law and fact. From these factors, the principle of candor emerges: The lawyer shall have a reasonable basis in law and fact for communication with the tribunal. The problem is to develop the rules to implement the principle.

The rules evolve naturally to deal with pleadings, motions, evidence, and argument, and, in fact, they already exist in the law governing the conduct of litigation. The difficulty is that this law states the rights and duties of litigants in only a general way, and the natural tendency of the lawyer is to maximize the rights and minimize the duties of the client. The right to file a lawsuit is predicated on the existence of injury resulting from another's wrong, but does a client have a right to file a strike suit to force a settlement when no wrong has occurred? Obviously the answer is no, but to state this limitation in the rule would be to pose too great a threat to the right to file lawsuits generally. After all, the very purpose of the lawsuit is to determine if a wrong was committed. This is where the law of legal ethics comes in. The lawyer's job as advocate is to secure the client's rights, but it is a job to be performed with judgment and discretion in accordance with what those rights are. The law of legal ethics serves to define the rights and duties of the client more precisely and thereby to provide the lawyer with more effective guidelines for the exercise of sound discretion.

Consider, for example, the matter of pleadings. A client does not have a right to file a lawsuit unless there is a reasonable basis in fact and law for doing so. Thus, in complaints, the lawyer has the responsibility to see to it that the complaint presents only accurate facts as best he can ascertain them, based on a legal right as best he can determine under the law. In short, he must be completely candid. But an answer requires a lesser measure of candor, for the defendant has no choice but to respond, and the answer is essentially a procedural device for forming the issues. If the answer presents an affirmative defense, the measure of candor applicable to the complaint applies.
Motions are subject also to varying measures of candor. Some of them do not involve an issue of candor—for example, the motion for a directed verdict at the close of the opponent’s case. A motion to dismiss involves only a question of law. But a motion for summary judgment is proper only if the facts as completely and accurately presented show that there is no issue of fact. On the other hand, in ruling on an ex parte motion, the judge depends wholly on one side’s presentation of the facts, which requires complete candor by the party making the motion.

The presentation of evidence creates the most difficult problems of candor, for the lawyer’s communication with the court in presenting testimony is through another. Does the lawyer have a responsibility for the candor of the witnesses he presents? The answer must be yes, for two reasons: first, the lawyer has a duty to make an independent determination of the accuracy of the witness’ information; second, the lawyer determines by his questions what information the witness has the opportunity to present. Thus, to say that the lawyer has no responsibility for the candor of the witness is to suggest that a lawyer has no responsibility to the tribunal and that his role as an officer of the court must be relegated to the realm of fiction.

The point is clear regarding the examination of one’s own witnesses, but it is also relevant to the cross-examination of opposing witnesses. Insincerity in the cross-examination of the opposing witnesses constitutes as much an abrogation of the duty of candor on the part of the lawyer as the subornation of perjury by one’s own witnesses. The object is the same: to misinform the trier of fact. To test the witness’ perception, memory, language or sincerity is one thing; to attempt to trick and browbeat him is another.

The more difficult problem for the lawyer is the client witness who wishes to, or does, commit perjury, particularly when the client is a criminal defendant. As to the matter of the civil client who commits perjury, there can be little dispute if we are to maintain integrity in our system of trial. The problem of the accused’s perjury is too complex to permit more than a few general observations here, but the basic issue is this: Does a person’s accusation of a crime give him a right to commit perjury? The question is made more complex than it deserves to be because of other legal rights of the accused: the right to a lawyer, the right to testify, the right to be sworn as a witness, the right against self-incrimination, and so forth. Can a lawyer provide effective representation for an accused if he has a duty to inform the court of his client’s
perjury? The lawyer for the accused will vigorously assert that he cannot, and that, indeed, such a duty would violate the client’s privilege against self-incrimination. The reason is simple: most persons tried for a criminal offense in fact committed the act for which they are being tried. And a person who insists on being tried for the offense with which he is charged and which he committed cannot reasonably be expected to get on the witness stand and admit that he did the act. So the question comes down to this: Does our sense of fair play require that an accused be given an opportunity to deny his guilt regardless of the facts? Courts, not bar committees, will answer this question.

The purpose of argument is to persuade, which often means that it is directed more to emotion than reason. The lawyer has a right, and a duty, to urge upon the trier of fact both the credibility of his witnesses and any reasonable inference that can be drawn from the evidence. But he does not have a right to seek to persuade the trier to believe the perjurious witness or to use perjured evidence as a basis of decision. Thus it is important to state a duty of candor in regard to argument. But here we must make some concession to the subjective nature of argument. The lawyer must have broad latitude within certain limits. The problem is to define the limits, and we define these limits in terms of relevancy. What type of inference is clearly irrelevant to the decision of the case? The obvious answer is bogus inferences, which may be of two types: those without any basis in the evidence, which can be easily determined; and those directed to the irrational prejudices of the trier—racial, ethnic, class, religious or provincial. To the extent it can preclude such inferences, the duty of candor has a real function in regard to argument, and the difficulty of implementing the rules should not prevent their promulgation.

This brings us to the reason for articulating rules relating to the four aspects of the lawyer’s communication with the tribunal. The duty is comprehensive, and candor at a later stage may depend upon candor at an earlier stage. Lack of candor in the complaint requires a lack of

65. See Lakeside v. Oregon, 435 U.S. 333, 342 (1978) (Stevens, J., dissenting). The conclusion is not based on empirical data, but if it is not true, something is sadly wrong with the many safeguards in the system to ensure that it is true—police investigations, probable cause, the grand jury, preliminary hearings, and so forth. The “presumption of innocence” that militates against accepting the proposition is a procedural device to require the prosecutor to prove guilt. This is not to say that innocent persons are not indicted, but they have every reason to testify in their own defense.

candor in making motions, in presenting evidence and in argument. On the other hand, candor in the complaint does not necessarily preclude lack of candor at a later stage. Indeed, to state a rule of candor for the presentation of evidence and to ignore pleadings, motions and argument is to imply the lack of a duty of candor in regard to conduct involving these aspects of communication with the tribunal. And to state the rule only in general terms—in the form of a principle—does not provide the lawyer with meaningful guidelines.

That the lack of candor to the tribunal constitutes an obstruction to justice is the justification for the duty of candor to the tribunal. The problem with accepting this justification may be that lawyers are not concerned so much with justice as they are with winning. At least this must be so for half the lawyers in any trial, a point that helps to explain the attraction of the adversary system. To lawyers, it is a means of winning a case. But if that system is to survive, lawyers (and clients) must recognize that the adversary system is only a means of presenting a case, and when they do not present the case with candor, they distort the system.

C. The Duty of Fairness to Opposing Parties

The duty of fairness to opposing parties may well be the most complex of the lawyer's fundamental duties because our system of law administration is a competitive one. Moreover, contrary to the common notion, the competitive aspects of the adversary system are not limited to the judicial process, for inevitably the characteristics of litigation in the judicial process are carried over into the administrative, legislative and private legal processes. So the continuing problem in an adversary system of law administration is fairness.

The essence of the adversary system, however, is not that it is competitive, but that it is a legal system which seeks to ensure equal rights for all. Every person in our society has the same rights as every other person, and it is this fundamental fact that is the basis for justifying the lawyer's duty of fairness. If all persons have equal rights, they are entitled to equal treatment under the law in accordance with their legal rights and duties. Lawyers, as administrators of law, determine to a large extent whether persons do receive this equal treatment. In dealing with opposing parties, for example, the lawyer seeks to impose legal duties on them. Because our legal system provides that persons can be compelled to perform their legal duties only in a manner consistent with the requirements of law, any person against whom the lawyer acts
has a right that the lawyer comply with the requirements of the law. The notion is most succinctly expressed in the phrase “due process,” often considered applicable only to the government. But due process is applicable whenever the exercise of legal power is involved, and by analogy it extends to the function of the lawyer in the form of private due process. The right of all persons to due process, both public and private, is thus the justification for the lawyer’s duty of fairness.

The more difficult problem is implementing the duty, because it is necessary to determine the measure of fairness. Perhaps because the concept is so broad that in the abstract it is meaningless, we are uncomfortable in dealing with fairness alone and usually treat it in terms of specific duties arising out of particular relationships. Loyalty to the client and candor to the tribunal, for example, are but particular applications of the concept of fairness. The lawyer who fails in his duty of competence, communication, confidence, or avoiding conflicts of interest is being unfair to the client, even though we do not find it necessary to resort to the higher level of abstraction in order to be able to provide a remedy. The wrong committed has more specific bases, which we find in the common interest shared as a result of the relationship. The lawyer who fails in his duty of candor to the tribunal is being unfair to the opposing party as well as to the tribunal, a point we overlook because the duty is directed to the tribunal. This duty is imposed because of the importance of the lawyer’s role in the administration of justice, but unlike the lawyer’s relationship with the client, the lawyer’s relationship with the tribunal is not one of a completely shared community of interest.

The problem with a duty of fairness to opposing parties is that there is no shared community of interest, which is another way of saying that we do not recognize the existence of a legal relationship between, for example, plaintiff and defendant, as we do between lawyer and client and between lawyer and tribunal. Thus, there seems to be no basis upon which to impose a duty of fairness directly. At present we do it indirectly by requiring that the lawyer be candid with the tribunal. Yet, it may be done directly, for if we define a legal relationship as one in which the parties have legal rights and legal duties vis-à-vis each other, it is clear that opposing parties do have a legal relationship. The plaintiff has a legal right, for example, that defendant respond to proper service of process, and the defendant has a duty to do so.

We perceive, therefore, a two-track legal relationship, one to the opposing party, and one to the tribunal. The disadvantage in this view
is that if we fulfill one of the duties, we feel free to ignore the other. Even worse, if we breach the duty to one and receive no sanctions, we feel free to ignore the duty to the other. Specifically, if the tribunal does not respond negatively to misinformation the lawyer presents, he or she will feel no duty to the opposing party to correct the information. And, of course, the tribunal ordinarily will have no way of knowing when misinformation is presented.

Yet because of the competitive nature of the adversary process, we do not acknowledge the legal relationship between opposing parties, and therefore do not recognize the legal rights and duties that they have in relation to each other. And until we recognize the nature of this relationship, we will continue to attempt to deal with the issue of fairness indirectly rather than directly. Lawyers will continue to view the adversary litigation primarily as a means of winning a case when in truth it is also and more fundamentally a means of fairly presenting a case.

Even if we recognize the legal relationship between opposing parties, there remains the matter of how to measure fairness. On this point, it is helpful to return to the particular applications of fairness, loyalty to the client and candor to the tribunal. In these cases, the existence of a legal relationship is manifest, and it is apparent that the measure of the lawyer's conduct is the rights and duties of the client. Once we accept the legal relationship between opposing parties, the same measure becomes applicable in the context of the relationship to opposing parties as is applicable in the different contexts of the relationships to client and tribunal. And although different applications of the fairness principle result in these divergent contexts, the common thread is that each is essentially the product of the reliance the client's rights and duties justify placing in the lawyer. Thus the client has a right to rely upon the lawyer's competence, communications, and so forth, because the lawyer assumes these obligations when he or she agrees to represent the client. In a similar way, the tribunal has a right to rely upon the lawyer's representations because the lawyer is an officer of the tribunal. The obligations a lawyer assumes in relation to opposing parties, however, are not so clear, and consequently it is more difficult to measure properly the reliance that an opposing party has a right to place in the lawyer's actions.

One's perception of what is fair is determined largely by self-interest, so there must be some reasonably objective standard. The issue is essentially the same as that in measuring the duty of loyalty to
the client and candor to the tribunal, and so the measure is the same: the legal rights and duties of the client. But it is clear that the duty of loyalty to the client and candor to the tribunal must encompass more than the duty of fairness to an opponent. How do we make the distinction in terms of the legal rights and duties of the client?

A first step is to recognize that there are two kinds of rights involved: substantive and procedural. It is through the exercise of procedural rights that we determine the applicability, in a given case, of substantive rights. Procedural rights, in other words, are instruments for determining substantive rights, and serve as the primary instrument for the lawyer in both protecting and implementing the substantive rights of his client. It is here, then, that the issue of fairness arises, for it is in the abuse of procedural rules that unfairness most often occurs. The rules of procedure for litigation serve to illustrate the point and aid in understanding why this is so.

Rules of procedures state general requirements for specific types of situations, the particulars of which are infinitely variable. Consequently, they are easily subject to manipulation by a skillful lawyer. If the rule requires an answer within thirty days, file the answer at closing time on the thirtieth day. If the rule requires service of process within the jurisdiction, trick the defendant into coming into the jurisdiction. If the plaintiff names the wrong defendant, file an equivocal answer and move to quash any judgment. If the rule permits interrogatories, swamp the opponent with interrogatories. If the opponent has a limited budget, drown him with discovery depositions. And so on ad infinitum under the motto, "protract, prolong, and procrastinate."

A good lawyer, of course, does not usually engage in such tactics, and for good reason: they usually do not succeed, at least not if the issue is brought before the court. That the court usually rejects them points up the question. If the lawyer complies with the requirements of the rule as stated—that is, files within thirty days, serves the defendant within the jurisdiction, follows the rules relating to interrogatories, and so forth—why are the results rejected? The answer, of course, is that he

70. The tactics failed in cases cited notes 67-69 supra.
was not complying with the rules in terms of their purpose and function, as the opposing party has a right to expect him to do in accordance with a principle of fairness. He was not, in other words, exercising the legal rights of his client fairly.

When these problems are analyzed, then, it is apparent that the courts are concerned with a duty of fairness. The problem is how to make this duty apparent for the lawyer before he acts. There are two approaches, both of which are problematic. One is to recognize that any legal right contains an implied duty that it be exercised in accordance with its purpose and function, that is, an implied duty of fairness. The other is to define the legal right more precisely and to state the purpose and function as a part of the rule. Neither approach, however, is satisfactory from the standpoint of positive law. Apart from theoretical problems to which the first approach gives rise, to limit a legal right by an implied duty of fairness in its exercise constitutes a threat to its existence. The chilling effect can be difficult to counter. And to attempt to include in the statement of all rules their purpose and function is to assume an impossible task.

The problem is one for a law of legal ethics, for that law is a set of rules to govern the conduct of lawyers as they exercise and implement the legal rights of their clients, and these things that cannot be done in positive law can easily be done in the law of legal ethics. Thus, it is appropriate to recognize as a legal principle the lawyer's duty of fairness to opposing parties, a principle that will help to make clear that all legal rights contain an implied duty to exercise them in light of their purpose and function. And it is equally appropriate to state rules of conduct for the lawyer to implement the duty of fairness by defining the purpose and function of the procedural rules. This, in fact, is the approach attempted in the Code of Professional Responsibility in DR 7-102, "Representing a Client Within the Bounds of the Law." Thus, DR 7-102(A) provides:

In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

The rule is a rule of fairness, which makes the point that the rights stated are to be exercised in light of their purpose and function. Unfortunately, the structure of the rule prevents the point from being clear, because it is stated negatively and treats the duty of fairness indirectly. The rule is both clearer and more explicit if it is read as follows: "A
lawyer shall file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client only if there is a reasonable basis in law and fact for doing so, and shall not take such actions merely to harass or maliciously injure another.” So stated, the rule constitutes an explicit recognition that there is a right to file a lawsuit only if there is reasonable basis for doing so. In similar manner, the law of legal ethics can articulate what the procedural rules only imply: The exercise of legal rights is limited by a duty of fairness.

The important point is that when a lawyer files a lawsuit merely to harass or injure another maliciously, he is not exercising a legal right, for the right does not extend so far. So it follows that in filing such a suit, he is infringing the rights of the defendant. It is the failure of courts (and lawyers) to recognize this point that enables lawyers to prevail so often on the basis of the form of the rule rather than its substance, as when a lawyer takes a default judgment against a party represented by a lawyer. But, of course, the law of legal ethics cannot fulfill the function of supplying a legal duty of fairness until the profession’s rules of conduct are accepted as legal rather than ethical rules. We must, in short, fully recognize that standards for the lawyer are an integral part of the law and that law is an integral part of standards for the lawyer.

The law of legal ethics implementing the principle of fairness, then, need be little more than an annotation on the rules of procedure for litigation, broadened to encompass the rules of the lawyer other than as advocate. The Federal Rules of Civil Procedure, for example, represent a continuing effort in quest of fairness in the adversary system, the essence of which is reliance, that is, the absence of surprise or deception. Thus, a party should have notice of actions his opponent intends to take in the resolution of the dispute; a party should be able to rely upon the pleadings and motions of his opponent; and a party should have access to the information his opponent is relying upon. The federal rules fulfill all of these requirements. From the standpoint of the law of legal ethics, the most important of these rules is rule 11, requiring honesty in pleading:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action
may be taken if scandalous or indecent matter is inserted.71

The rule demonstrates as well as any could that rules of law are an integral part of ethical standards, and that ethical standards are an integral part of the law.

Merely to annotate the rules of procedure, however, is not sufficient, for the duty of fairness to opposing parties is not limited to the courtroom. Nor does the absence of formal rules of procedure in non-litigation contexts deprive the lawyer of an effective guide to fairness, for all of the lawyer's work, in a sense, depends upon procedures, formal or informal. In the office no less than in the courtroom, a lawyer should have notice of actions opposing counsel intends to take in the resolution of a dispute; a lawyer should be able to rely upon the words of his counterpart; and a lawyer should have access to the relevant information his opponent is relying upon. The analogy, of course, is not exact. Negotiating a contract is not the same as trying a lawsuit. But the essentials of fairness—the absence of deception and the reliability of another's word—are relevant in all the lawyer's work.

The justification for the duty of fairness to opposing parties, then, is the right of all persons that legal duties be imposed upon them only in accordance with the requirements of law, the right of private due process. The measure of this duty of fairness we find in rules of procedure, both formal and informal, applied in light of their purpose and function.

III. Conclusion

We return to the question with which we began: Should the profession's rules of conduct be rules of ethics or rules of law? The argument for the latter alternative rests on the proposition that the three principles of conduct for the lawyer—loyalty to the client, candor to the tribunal, and fairness to opposing parties—state fundamental principles of law administration, for it is on these principles that the implementation of the rights and duties of the individual in our society and under our adversary legal system ultimately depend. Thus, the lawyer's duties of loyalty, of candor and of fairness should be recognized as being derived from legal, rather than merely ethical, principles, naturally giving rise to legal rules. To do otherwise is to create a continuing risk to the rule of law, for we thereby vest in private lawyers, who

administer the law in the service of private (and paying) clients, a vast amount of untutored discretion.

The ultimate question is this: Are the profession's rules of conduct to enable the lawyer to aid the client in exercising nonexisting rights and in violating existing duties? The obvious answer is no, but how are the scope of the client's rights and the measure of his duties to be defined in order that these bounds are not overstepped? Lawyers cannot be expected to perform this task since between them the issues are matters of dispute, and properly so. Thus we come back to an earlier point: the function of the law of legal ethics is to define for the lawyer as precisely as possible the rights (and duties) of the client that he seeks to implement.

The point warrants further comment, even at the risk of repetition. A legal right is not a matter of degree but of kind: either one has a legal right or he does not; if he has it, he may exercise it. But the statement of a right does not always make clear the content of the right. Language has its limits, and the rule of law cannot cover all the factual situations to which the right it entails applies or ostensibly applies. Thus, I have a right to enter into a contract, but I do not have a right to enter into a fraudulent contract, one I have neither the intention nor the capability of performing. As a litigant, I have a right to testify, but not to commit perjury. As a businessman, I have a right to register an offering of stock with the SEC, but not to falsify my registration. As a citizen, I have a right to avoid, but not to evade, the payment of taxes.

The point is not always clear to the client. Even if he did induce a party into signing the document by fraudulent misrepresentations, he nevertheless has a contract. For the statement of a legal right per se is seldom sufficiently precise to negate conduct that appears to be the exercise of the right, but that in fact is the breach of a duty that is correlative to some other right held by someone else. The law of legal ethics thus can define more precisely for the lawyer the rights and duties of the client stated in general rules of law and thereby make explicit what the lawyer may and may not do in implementing those rights and duties for the client. This law does not simply reflect the positive law, but refines it as well, and so serves a function not dissimilar to that which equity served in relation to the old common law: as a body of rules complementary to, and not competitive with, the positive law, the law of legal ethics will help to provide flexibility in the administration of law and thus promote greater stability. With the law of legal ethics delineating rights more precisely, disagreements can be concentrated
more on the merits and less on the tactics in the resolution of legal disputes.

This has been the goal of rules of conduct for the lawyer since the adoption of the Alabama Code of Ethics in 1887. That it has not been fully achieved may be because the goal has something of the characteristics of the Holy Grail; still, the search is desirable. Three factors have impeded its success. The first is that the rules of conduct for the lawyer have been limited for the most part to the role of the lawyer as advocate. The reason for this, it seems, is that the law for the advocate, the rules of procedure, has been the most highly developed and clearly stated area of the law. Thus, it has been relatively easy to reflect and to refine that law in terms of rules of conduct for the lawyer. DR 7-102 of the Code of Professional Responsibility is the prime example. But it is difficult to find, for instance, statutory rules defining the role of the lawyer as adviser or agent, that is, as negotiator, mediator, private legislator, and so forth.

The second impediment is related to the first, for it is the failure to realize that the lawyer in the representation of a client exercises only the procedural rights of the client. Admittedly, the term procedural in this context must be given a broad, almost generic, meaning. But in drafting a contract, drawing up a will, applying for a license, and so forth, the lawyer must follow procedural rules no less important, even if they are less definitive and structured, than those he follows in trying a case. Perhaps the point becomes clearer when we recognize that lawyers *ex hypothesi* cannot exercise substantive rights of their clients; they can draft the legal document, but only the parties can execute the contract.

The procedural law for the lawyer as adviser and agent exists, some of it in statutes, but most of it in the cases. The problem is to extract this law and then to define the rights it entails in the law of legal ethics. The result will not be too much different from the procedural law for litigation, for the same fundamental principles apply whether the lawyer is acting as adviser, advocate or agent, and whether he does so in the administrative, the judicial, the legislative, or the private legal process. The principles are substantially the same, but the application of the principles, and the rules derived therefrom, will be different. The adversary trial in the courtroom involves considerations that are different from those involved in the negotiating session in the lawyer’s office.

A third factor that has constituted an obstacle to the success of
rules of conduct for lawyers is more subtle and complex. Lawyers, no less than other people, tend to act as they are expected to act. This is important because lawyers have defined their own expectations, in the form of rules of ethics, as wishes rather than commands. Precatory rules are, of course, inordinately difficult to enforce, and so injunctions concerning ethical conduct for the most part remain fallow. Moreover, the lawyer who chooses to be unethical in his conduct finds protection not only in the ambiguity of precatory rules, but also in the cumbersome procedure for disciplining those who violate the rules. One can venture to guess that analysis will reveal that lawyers are disciplined not so much for conduct violating the Code of Professional Responsibility as for violating rules of positive law—fraud, perjury, theft, and so forth. And even then, the Code, with its emphasis on the duty of loyalty to the client, provides the basis for a defense that persuades even though it does not convince. Without principles of candor and fairness coequal with the principle of loyalty, it is exceedingly difficult to impose sanctions on the lawyer who acts under the umbrella of the latter.

The greatest problem, therefore, is not in black and white areas, but in the gray penumbra, the area of marginal competences, inadequate preparation, dilatory tactics, technical defenses, and resort to techniques such as the use of extensive discovery to beat down a poor opponent. Of such conduct judges are too often sympathetic, affected perhaps by remembrances of their own sometime failings at the bar; the need for precise and well-defined rules of conduct is not only for the guidance of the bar, but to aid the bench in giving this guidance the force of law.

So we conclude with these last few words: The basic principles of the lawyer’s conduct—loyalty to the client, candor to the tribunal, and fairness to opposing parties—remind one of Holmes’ aphorism that we need study of the obvious more than investigation of the obscure. Once we examine the basic relationships of the lawyer in terms of the function of the legal system the principles become obvious, for the adversary system of law is based on the premise of equal rights for all, to be administered primarily by private persons licensed by the state for that purpose.

The identification and rationalization of the principles of conduct for the lawyer, however, is only the beginning of the task, for to state them is one thing, to develop and apply them is another. As suggested above, the principles of conduct and the rules derived from them do not apply with equal force and in the same measure for the lawyer in
all his different roles, in all the legal processes, and for all clients. To understand why requires the development of the principles and rules of application, and that task is for another day.