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CONFIDENCES AND THE GOVERNMENT LAWYER

ROBERT P. LAWRY†

At least since Philip Shuchman's 1968 polemic¹ on the propriety of the former Canons of Ethics as a group moral code, the aptness of having the same rules and standards govern the activities of all lawyers and all lawyering jobs has been in question. Considerable differences exist among the kinds of ethical problems encountered by lawyers doing probate work or criminal work, negotiating a contract or trying a law suit, practicing with a corporation, a government agency, a law firm or on their own. The question is whether there ought to be different ethical rules and standards governing the behavior of lawyers, depending on the type of legal problem involved, the type of client being served, and the nature of the lawyer's practice. I believe the answer to that question is clearly "yes."² Broad ethical principles have been espoused without careful, differentiated rule drafting to reflect the true nature of the problems lawyers encounter in practice. Thus, the fit is either awkward or there is no fit at all.

I would not be misunderstood on the scope of the changes I believe necessary. There certainly is enough that is similar in lawyering

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1. Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968). For a brief historical account of the origins of the former Canons, see H. DRINKER, *LEGAL ETHICS* 23-24 (1953).

2. In distinguishing between lawyers who practiced with "big law firms" (BLFs) and the "little lawyers" (LLs) of the world, Professor Shuchman made a similar point: "(1) [T]he activities [of the two groups] are very different (2) but perhaps not enough so that different labels should be used (3) yet quite enough so that there should be two sets of rules (4) which should be drawn by the different groups." Shuchman, *supra* note 1, at 266. I do not subscribe to this category of propositions. I simply agree with Shuchman that there are sufficiently different lawyering activities to warrant separate rules. For example, with respect to his fourth proposition, I think it would be disastrous for each "special" group to draft the rules that apply to them. That would likely result in selfishly conceived rules all around. What the profession needs is a wider range of people assisting it in drafting its rules. Of course, we also need to have a good deal of input from each special group in order to understand from the insider's perspective what the "real" problems are.

The Final Report of the Seventh Annual Chief Justice Earl Warren Conference on Advocacy in the United States goes part of the way in endorsing the view expressed in the text. Recommendation B states: "The Code of Professional Responsibility should be redrafted to incorporate standards of conduct applicable to specialty fields within the practice of law." ROSCOE POUND-AMERICAN TRIAL LAWYER'S FOUNDATION, *ETHICS AND ADVOCACY* 10 (1978).

under any set of circumstances to warrant many identical rules and standards. If this were not so, it would be impossible to talk of lawyers as having membership in a single profession.³ Nevertheless, I believe those who draft the ethical rules and standards too often labor under certain unconscious assumptions that tend to blur important distinctions between lawyer and lawyer, law job and law job.⁴ These assumptions are based not only on historical anomalies,⁵ but are also sometimes based on deeply-felt, if often unarticulated beliefs about the nature of the adversary system⁶ or about the nature of lawyering generally.⁷ These assumptions are often simply the result of a lack of adequate conceptualization and rigorous thinking.

This article is an attempt to uncover one such assumption, embedded deeply in many provisions of the present Code of Professional Responsibility, and to demonstrate how utterly impossible it is to utilize the Code in attempting to deal with the serious problems many of those same provisions were ostensibly designed to aid the lawyer in handling. The assumption is that a lawyer's client is a "readily-identifiable-human-being." I do not mean to suggest that the draftsmen of the present Code were not aware of so-called "entity" representation.⁸ What I do mean is that this largely unconscious assumption guided the hands of the draftsmen and currently produces wholly unworkable results in too many very important instances. The context for the discussion of this assumption is the perplexing problem of confidentiality for the government lawyer. While being extremely concrete in addressing this problem, even to the point of suggesting specific changes in the Code of Professional Responsibility, my hope is that the larger issue of the inaptness of having a single set of ethical standards to govern all the various roles that lawyers fulfill, will not be lost as Philip Shuchman's similar point was lost in the promulgation of a new Code a scant year

3. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 4-10 (1953).

4. For example, in discussing the advertising question nearly 10 years before *Bates v. State Bar*, 433 U.S. 350 (1977), Professor Shuchman exposed one long-standing assumption of the profession: "The assumption that a good reputation will produce the unsolicited recommendations of others and lead to a satisfactory and stable practice *may* have been warranted sixty years ago, but for most LL's in most urban areas, a neighborhood reputation is a meaningless thing, a chimera." Shuchman, *supra* note 1, at 253.

5. See H. DRINKER, *supra* note 1, at 210-15.

6. See, e.g., Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U.L. REV. 516, 516-22 (1976). Judge Frankel calls the adversary system "The Adam Smith System of Adjudication."

7. See, e.g., Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 5 (1951). Curtis says that on behalf of his client, a lawyer "is required to treat outsiders as if they were barbarians and enemies."

8. See EC 5-18; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 86 (1932).

after the appearance of his important article.⁹

I

The draftsmen of the Code did recognize that the government lawyer has obligations that differ from those of other lawyers. DR 7-103 specifically sets forth two rules that are to guide the government lawyer involved in criminal matters: DR 7-103(A) requires that the government lawyer not institute criminal charges unless those charges are supported by probable cause;¹⁰ and DR 7-103(B) requires the government lawyer to disclose favorable evidence to the criminal defendant.¹¹ These two provisions imply that the government lawyer has a duty to "justice," or at least to "fairness,"¹² that the ordinary lawyer does not have. Indeed, the ethical considerations supporting these two provisions expressly substantiate this implication. EC 7-13 states: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."¹³ EC 7-14 states: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." Furthermore,

9. At the time he was writing, Shuchman predicted the new Code would be *déjà vu*. Shuchman, *supra* note 1, at 248 n.10.

10. The ABA STANDARDS FOR THE PROSECUTION FUNCTION (Approved Draft 1971) offer some additional guidance on this problem in § 3.9, which has been interpreted by Professor Richard Uviller as meaning that a "prosecutor *must* abjure prosecution without probable cause, *should* refuse to charge without a durable prima facie case, and *may* decline to proceed if the evidence fails to satisfy him beyond a reasonable doubt." Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1156 (1973). For a view that the prosecutor's duties are even higher than Uviller believes them to be, see M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 84-88 (1975).

11. This duty is closely connected to the due process requirements announced by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *Moore v. Illinois*, 408 U.S. 786 (1972).

12. EC 7-13, -14.

13. The whole provision reads as follows:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-13.

A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.¹⁴

Although the ethical considerations are "aspirational in character" and are not "mandatory," they do "represent the objectives toward which every member of the profession should strive."¹⁵ Though the problem is serious, it is not necessary to quarrel at this point with the inconsistencies that plague the Code in its attempt to maintain this aspirational/mandatory distinction;¹⁶ it is sufficient to note the clear references to different duties on the part of the government lawyer "from that of the usual advocate."

The latter's duties are often considered to be exclusively dischargeable on behalf of the client. Indeed, in Lord Brougham's ringing words: " 'An 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.' " ¹⁷ Whether these words are hyperbolic or not,¹⁸ they do represent another unconscious assumption,

14. The whole provision reads as follows:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-14.

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

16. As one noted commentator has put it:

The crucial division in the Code is between the Disciplinary Rules, the mandatory minimum standards of conduct, and the Ethical Considerations, the aspirational objectives of the profession. The fact is, however, that there is no such clear-cut division in the content and function of these two parts of the Code.

A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 31 (1976).

17. Rogers, *The Ethics of Advocacy*, 15 LAW Q. REV. 259, 269 (1899) (quoting Lord Brougham's speech in defense of Queen Caroline before the House of Lords in 1820). Lord Brougham continued his declamation as follows:

"To save that client by all expedient means—to protect that client at all hazards and costs to all others, and amongst 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. Nay, separating even the duties of a patriot from those of an advocate, and casting *them*, if need be, to the wind, he must go on reckless of consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection."

Id.

18. Surely, they are often quoted as one measure of the lawyer's zeal for his client. Compare

which is at the heart of the Code of Professional Responsibility: that the world is composed of two groups, clients and nonclients; that clients are to be embraced and nonclients are to be kept at arm's length.¹⁹ This simplistic assumption coupled with the assumption that the client is a readily-identifiable-human-being leads to a perception of the lawyer's role as "the hired gun." Whatever quarrels one may have with my characterization of the duty of the usual advocate, it is clear that the duty has never been perceived to be to "justice" or to "fairness," except in an indirect or wholly derivative way.²⁰ Nevertheless, it is to those magnificent abstractions that the government lawyer is said to be directly obligated under the Code.

Not spelled out in the Code are the reasons for these higher duties to "justice" and to "fairness." Hints, however, are given. EC 7-13 notes that the prosecutor "represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers." There is also a reference to the need to be "fair to all" in matters affecting the "public interest."²¹ Obviously, the government lawyer has special responsibilities because he represents the "sovereign," which is another way of saying "the public interest," for in the United States, an axiom of our governmental structure is that the people are "sovereign."²²

Another reference in the Code to differences between the government lawyer and other lawyers is found in DR 9-101(B). That provision states: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."²³ In *General Motors Corp. v. New York*,²⁴ the United States Court of Appeals for the Second Circuit held that a former federal government lawyer, retained by the City of New York to assist in an anti-trust action against GM, was disqualified from representing the City, even though the federal government had no objection to the representation. Normally in matters involving merely private litigants, the questions involved relate either to potential conflicts of interest or to

Curtis, *supra* note 7, at 4-5, with S. THURMAN, E. PHILLIPS & E. CHEATHAM, *CASES AND MATERIALS ON THE LEGAL PROFESSION* 280 (2d ed. 1970).

19. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 45 (1978).

20. See Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958) (making classic case for proposition that if the lawyer does his partisan job properly, "justice" will be done).

21. EC 7-13, quoted in note 13 *supra*.

22. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 18 (1977).

23. DR 9-101(B).

24. 501 F.2d 639 (2d Cir. 1974).

the possible disclosure of confidential information damaging to the former client. Moreover, the problem arises when a lawyer is involved in a matter on the opposite side from his former client. Courts have worked out a "substantially related" test to govern these cases. Under that test, the court determines whether the subject matter of the present case is substantially related to the matter the lawyer worked on for his former client. If so, the lawyer is disqualified.²⁵ This is normally a prophylactic rule, so the question of the actual misuse of confidential information is not made an issue.²⁶ Of course, the lawyer is always forbidden to use a confidence or secret of his client to the client's disadvantage.²⁷ This latter prohibition obviously extends beyond the termination of the lawyer's actual employment by the client.²⁸ But in *General Motors*, none of those factors was involved. The case did not involve side-switching; the federal government was not involved in the litigation. Moreover, the Department of Justice gave an opinion that the federal conflict of interest statute did not bar the lawyer's representation,²⁹ and therefore gave its tacit approval to the undertaking. Nevertheless, because the lawyer had worked on the same matter while in the employ of the federal government, canon 9's directive "to avoid even the appearance of professional impropriety" led the court to a fairly literal reading³⁰ of DR 9-101(B) in order to prohibit the representation. The policy justification was traced to a 1931 ABA Committee on Professional Ethics Opinion, which determined that such representation should be strictly prohibited, lest a government lawyer conduct public business in a way that tempts him to seek private employment either "to uphold or upset what he had done" as a government lawyer.³¹ This prophylactic rule, depending as it does on "appearances," marks another difference in the Code's handling of the ethical responsibilities of a government lawyer. Again, the standard is higher for the government lawyer; and again, although the ethical considerations do not explicitly refer to the reasons why this standard is higher, it is not

25. The best statement of the rule is to be found in *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

26. The classic case of the prophylactic application of the substantially related test is *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). But see *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 434 U.S. 856 (1978) (recognizing some flexibility in application of test).

27. DR 4-101(B)(2).

28. EC 4-6.

29. See 501 F.2d at 642-43.

30. The word "private," for example, simply meant "private practice" for remuneration, rather than the opposite of "public." See *id.* at 650.

31. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931); see 501 F.2d at 649.

unreasonable to assume that the obligations to justice and to the public interest are operative in this situation, as they were in the cases under the cited provisions of canon 7.³² Indeed, EC 7-13 and EC 7-14 seem to reinforce DR 9-101(B).

Aside from DR 7-103 and DR 9-101, and their supporting ethical considerations, the only other reference to government lawyers in the Code of Professional Responsibility is under canon 8.³³ Under DR 8-101, a lawyer who "holds public office" is cautioned against using that position to obtain special advantages "for himself or for a client." Without belaboring the point, it seems obvious that these provisions remind the government lawyer once again of his special duties to justice, fairness, and the public interest.

There are no further references in the Code to the special obligations of the government lawyer.³⁴ This omission is indeed unfortunate, for the most serious problem for the government lawyer is, therefore, simply not addressed. For purposes of this article, it is sufficient to state the problem as one of "confidentiality." In order to understand the nature of the difficulties, however, the question of client-identity must be examined first. It is regarding this question of client-identity that the assumption that the client is a readily-identifiable-human-being shows its distorting influence.

II

I have argued elsewhere that the question "who is the client?" is the wrong question to ask in addressing the central problems of professional responsibility for the government lawyer.³⁵ The primary reason this is the wrong question is that the answer to it does not automatically answer other, separate questions of immense practical importance, not the least of which is the question of confidentiality. Under the present Code of Professional Responsibility, if the client can be identified as a single human being, the answers to the following practical questions are identical and can be automatically deduced from the mere identification of the client: (1) Who shall the lawyer take directions from in matters to be decided "by the client"?³⁶ (2) Whose "interests" is the

32. See notes 10-22 and accompanying text *supra*.

33. EC 8-8; DR 8-101.

34. A provision such as EC 7-11 seems simply to refer to the substantive provisions in EC 7-13 and EC 7-14, and therefore imposes no new obligations on the government lawyer.

35. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, — Fed. B.J. — (1979).

36. See notes 42-45 and accompanying text *infra*.

lawyer trying to foster or protect?³⁷ (3) Whose "confidences" is the lawyer obliged to respect?³⁸ There is but one person, one person's interests and one person's confidences that need concern the lawyer.

For the government lawyer, however, the answer to each of these three questions is not necessarily the same. Even within a single question, the answer may differ from situation to situation. Under the Code, there is no indication that the draftsmen were even aware of this serious discrepancy. This unawareness has had the effect of making many provisions of the Code inapplicable to government lawyers. Among those provisions are all of canon 4, the confidentiality canon of the Code. I believe the problem was created by the mysterious workings of the client-as-readily-identifiable-human-being assumption. As Hazard has stated in reference to the client-identity question: "The legal profession's rules of ethics provide what is perhaps worse than no guidance. Instead of saying how or on what grounds the question of client identity is to be resolved, they assume it has somehow been resolved *ex ante*."³⁹ Because it is necessary to resolve the client-identity problem before provisions such as those relating to confidentiality can be intelligently applied, the literature is replete with articles arguing for one candidate or another.⁴⁰ At least four plausible candidates have emerged: (1) society or the public interest; (2) the government itself, viewed as a self-contained bureaucracy (the "state" as opposed to "society"); (3) the agency or department of the government, considered as a self-contained unit or entity; and (4) one or more officials of the agency or department, considered in their official capacities.⁴¹ Examination reveals, however, that no matter which candidate is selected as appropriate in the abstract, no consistent application of that choice is possible under the Code. To support this argument, it is necessary to examine the Code with respect to the three client-identity questions previously listed.

37. See notes 46-59 and accompanying text *infra*.

38. See notes 60-61 and accompanying text *infra*.

39. G. HAZARD, *supra* note 19, at 45 (1978).

40. See, e.g., *Risher Speaks on Legal Ethics, Calls for Decisions of "Conscience,"* FORUM, Jan. 1977, at 1 (newsletter of District of Columbia Chapter of Federal Bar Association); *Debate on Legal Ethics Continues*, FORUM, Apr. 1977, at 3.

41. The "public interest" is referred to in EC 7-13; the "government" is clearly the client for Hazard, G. HAZARD, *supra* note 19, at 54; "the agency and its officials" is the client for the Professional Ethics Committee of the Federal Bar Association, see notes 46-49 and accompanying text *infra*. For interesting philosophical distinctions among terms like Society, the State and the People, see J. MARITAIN, *MAN AND THE STATE* 1-27 (1951).

Question One: Who shall the lawyer take directions from in matters to be decided "by the client"?

This question involves the client as "directing authority." EC 7-7 states the traditional position regarding lawyer-client relations in the United States: "[With minor exceptions] the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." It is for the client to decide whether to take a settlement offer, what plea to enter in a criminal case, or whether an appeal should be taken.⁴² Who is the client as directing authority for the government lawyer? In the day-to-day course of business, the answer seems to be the lawyer's superior or superiors within the agency or department. First of all, obedience to superiors may be essential if the lawyer is to retain his job and protect his possibilities for advancement. But it is not clear the lawyer ought to accept his superior's decisions in the same way he clearly ought to accept the decisions of his private client. Under the Code, the government lawyer is said to have obligations to justice that are different from the usual advocate.⁴³ As a public prosecutor, the lawyer may be responsible for making decisions "for the client," who is referred to under EC 7-13 as the "sovereign."⁴⁴ Under EC 7-14 "[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." Moreover, even when he lacks discretionary power, a government lawyer "who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation."⁴⁵ But the particularizations of EC 7-13 and 7-14 are not tied in any comprehensible way to the traditional statement in EC 7-7 concerning the right of the client to make decisions "binding" on the lawyer. Some consistency could be maintained if the special obligations contained in EC 7-13 and 7-14 were simply explained away as not applicable whenever the lawyer's government superior directs him to do something he considers unfair but that is legal. This is not only unacceptable because it negates the specialness of the government lawyer's obligations under the Code, but it is also contrary to the axiomatic norm of canon 5: "A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client." EC 5-21 expounds on that

42. EC 7-7. The examples cited in the text are referred to as "typical."

43. EC 7-13, *quoted in* note 13 *supra*.

44. *Id.*

45. EC 7-14, *quoted in* note 14 *supra*.

axiom as follows: "The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. . . . A lawyer subjected to outside pressures should make full disclosure to his client" It is therefore critical to know who is the government lawyer's client under EC 5-21, because only then will it be possible to determine who is a "third person." Clearly the assumption is working here again: there is an identifiable client, all others are potential "third persons," subjecting the lawyer to "outside pressures." But those pressures may be coming, not from the outside, but from within. When the drafters of the Code focused on these pressures, they recognized this problem, yet they failed to do anything about the anomaly. EC 5-18 is the relevant provision:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

This is the sole reference in the Code to entity representation, and not one of its examples is drawn from the world of government. Working with this provision by analogy, it would seem that to call the agency official the client for purposes of answering the first question is not clearly appropriate. Unlike the corporate lawyer, for whom it may frequently be easiest merely to follow the orders of his corporate superiors even though he knows they are not his client, the government lawyer has an obligation to justice or fairness because he represents the sovereign. Thus, for the government lawyer, the answer to the first question requires more than identification of a client. How much more may well depend on the answers to questions two and three.

Question Two: Whose interests is the lawyer trying to foster or protect?

In an important opinion of the Federal Bar Association's Ethics Committee, it was argued that the government lawyer is to serve "the public interest sought to be served by the governmental organization of which he is a part."⁴⁶ Proceeding upon this policy statement, the Committee went on to declare that the agency or department was the government lawyer's client.⁴⁷ The opinion was more complex than these

46. Professional Ethics Committee, Federal Bar Association, *Opinion 73-1*, 32 FED. B.J. 71, 72 (1973) [hereinafter cited as Professional Ethics Comm.].

47. *Id.*

statements indicate, and certainly more ambiguous in its practical analysis of the meaning of having the agency as a client.⁴⁸ Nevertheless, one government attorney who is deeply involved in teaching professional responsibility to government lawyers, stated that the opinion comes down "squarely on the side of the agency and its administrators as the clients of the government attorney."⁴⁹

At some level of generality, that position makes good sense. Working for the Environmental Protection Agency or the Department of Agriculture, the government lawyer concentrates his attention upon matters in a way that seems to foster or protect the interests of the environment or of our nation's farmers, which have been given over to each agency by legislation and administrative regulation. Each government lawyer, however, has an additional obligation to justice and fairness. If this devotion to the interest of the agency or department blinds the lawyer to the larger public interest to which each public official should be duty-bound, then the Federal Bar Association's position is too narrowly conceived.⁵⁰

The Code is clear on how a lawyer who is working for a private non-entity client is to handle cases in which other interests are involved. For example, if a wealthy man named Rex Lear wants to disinherit his longtime favorite daughter, Cordelia, because she will not profess her love for him in the same extravagant terms as her sisters, Goneril and Regan, surely it is the lawyer's obligation to draft the will as Lear wants it or else resign.⁵¹ There is no third option; the client's interests alone are the lawyer's responsibility, and the client himself is conclusively presumed to be the proper judge of his own best interests.⁵² Of course, the lawyer may try to change the client's mind when the act is foolish or unjust; the lawyer may even have an obligation to

48. See Lawry, *supra* note 35, at —.

49. W. Robie, *The Teaching of Professional Responsibility to Federal Government Attorneys: The Uneasy Perceptions* (unpublished paper delivered at National Conference on Teaching Professional Responsibility on Oct. 1, 1977). Robie is the Associate Director, Legal Education Institute, U.S. Civil Service Commission.

50. The government lawyer is a "public official." See the remarks of Dean Redlich in *ASS'N OF THE BAR OF THE CITY OF NEW YORK, PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG* 94 (W. Galston ed. 1977) [hereinafter cited as *THE MURKY DIVIDE*].

51. Richard Wasserstrom believes it is necessary to resign in such a case on moral grounds. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUMAN RIGHTS* 1 (1975). Monroe Freedman argues that it is moral arrogance to substitute one's own opinion for that of the client's in cases like that of Rex Lear. Freedman, *Personal Responsibility in a Professional System*, 27 *CATH. U.L. REV.* 191 (1978). Obviously, neither author questions the main point made in the text: the lawyer either drafts the will as requested or he resigns. There is no third choice.

52. EC 7-8: "In the final analysis, however, the lawyer should always remember that the

try to change the mind of a client like Rex Lear.⁵³ If Lear is adamant, however, the lawyer drafts in accordance with the testator's wishes or the lawyer resigns.

There are some who believe the identical lawyer-client relationship exists between a government lawyer and the agency official who gives him directions. Richard H. Kuh, former District Attorney for New York County, has stated publicly his position on this matter: "If there is a problem, you are bound by the ethics of the official for whom you work, and if that is anathema to you, you hand in your resignation and write a book."⁵⁴ A longtime government lawyer, John Carlock, put it this way:

The theory seemed to be that the lawyer . . . had acquired some duty . . . to be the final arbiter of right and wrong. I cannot agree with this philosophy . . . I do not believe that the ritual of becoming a member of the bar invests a government lawyer with a power of life and death over the agency he serves. The agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion. In carrying out his responsibility to decide policy, the agency head looks to his lawyer's counseling as one of his strongest supports; but the lawyer's counsel can never usurp the decision which must be made by the responsible head of the agency.⁵⁵

Carlock also believed the choice is between compliance and resignation.⁵⁶

But think of EC 5-18 once again. The lawyer's obligation is not to the individual but to the entity. I remain unconvinced that the decision of the official is the decision that conclusively determines the interests the government lawyer must foster or protect. Former canon 15 even contained an admonition against obeying the client's conscience rather than one's own.⁵⁷ How much more problematic is the case of obeying the conscience of one who is not clearly the client? I am also unconvinced that the particular "interest sought to be served by the governmental organization of which he is a part"⁵⁸ is the interest the

decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

53. *Id.* "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."

54. THE MURKY DIVIDE, *supra* note 50, at 111.

55. Carlock, *The Lawyer in Government*, in LISTEN TO THE LEADERS IN LAW 255, 268-69 (1963).

56. *Id.*

57. ABA CANONS OF PROFESSIONAL ETHICS No. 15 provides in part: "He [the lawyer] must obey his own conscience and not that of his client."

58. Professional Ethics Comm., *supra* note 46, at 72.

government lawyer must foster and protect; nor is the interest even the interest of the "government."⁵⁹ The interest that the government lawyer labors for is the public interest. He is a public official, and the public must be the lawyer's client for purposes of answering the second question.

There is a sense, however, in which this answer is so abstract that it becomes merely rhetorical. Only when one encounters the implications of the answer to the third question dealing with confidentiality can the complexity of the client-identity problem be brought to a sufficiently concrete level to allow us to determine who is the government lawyer's client.

Question Three: Whose confidences is the government lawyer obliged to respect?

If a government lawyer has an ethical disagreement with his superior or if he believes the superior is not acting in the public interest, to whom may he turn for help or even for mere discussion of the problem? Under canon 4 of the Code, a lawyer may not reveal the confidences or secrets of his client.⁶⁰ Thus, the lawyer will first have to know who his client is before he can answer this question. Obviously, if the lawyer's client is an abstraction, an entity like a corporation or the sovereign itself, the practical problem is who speaks for the corporation or for the sovereign for purposes of canon 4. To answer that the head official of the agency is the client for a government attorney simply will not do. One example will immediately show why.

Under the express terms of canon 4, the lawyer may not disclose past illegalities unless his client consents.⁶¹ But what if the agency determines it is in the best interests of everyone not to disclose certain past illegalities perpetrated by agency officials. Is the government lawyer thus foreclosed from making that disclosure? Choosing the government as the client raises the specter of cover-ups of governmental wrongdoing. For what if the Attorney General concurs with the judgment of the agency head? Or the President himself? Or the entire matter seems to get lost in an avalanche of red tape or paperwork? Is the

59. Certainly not if the "government" is considered the "state," a part of the body politic, "a set of institutions combined into a topmost machine." See J. MARITAIN, *supra* note 41, at 12.

60. DR 4-101(B)(1).

61. There is an exception for future crimes, DR 4-101(C)(3), but not for past illegalities, except in the specialized case of fraud, and then only if the information is not privileged. DR 7-102(B)(1). For a discussion of the controversy surrounding DR 7-102(B)(1), see Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653.

government lawyer to be ethically bound by the Code of Professional Responsibility to perpetual silence? If one wants the answer to be "no" to this last question, then clearly the provisions of canon 4 must be substantially revised to fit the unique circumstances in which the government lawyer finds himself.

Of course, one could call the public interest the client and be realistically done with confidentiality altogether. If the public interest were the client, and the lawyer objected to a negotiating strategy or a trial tactic determined by his superior to be useful or necessary in securing a government contract or in winning a lawsuit, presumably nothing in canon 4 would prevent the lawyer from phoning the other side or writing a letter to the *Washington Post* while the matter was still pending. That alternative seems no more acceptable on its face than those that declared the agency or the government to be the client. The problem is that the conceptual apparatus of client and confidentiality simply does not work for the government lawyer in canon 4 terms.

III

For those who ponder the question of confidentiality and the government lawyer, canon 4 poses no serious problem, because although commentators still deal in the language of canon 4, it is effectively ignored.⁶² It should not be forgotten, however, that government lawyers remain bound by the Code operative in the jurisdiction where the lawyer has bar membership.⁶³ Ethically, canon 4 rules the lawyer in these matters. The resulting confusions cannot be ignored.

In Federal Bar Opinion 73-1, the Ethics Committee of the Federal Bar Association made a serious and thoughtful attempt to deal with the problem raised by the incongruities of canon 4 and the realities of the government lawyer's practice. Because of the tradition of treating confidentiality as a concept directly allied to client-identity, however, the Committee believed it necessary to answer the question "who is the client?" before addressing the central question of confidentiality. The answer was that the agency and its officers were the clients of the government lawyer. This answer meant that the relationship was a confidential one.⁶⁴ The Committee then discussed specific kinds of conduct by government officials, asking under what circumstances disclosures

62. See, e.g., *THE MURKY DIVIDE*, *supra* note 50, at 93-113; Professional Ethics Comm., *supra* note 46.

63. See W. Robie, *supra* note 49.

64. Professional Ethics Comm., *supra* note 46, at 72.

of that conduct might be made, and to whom.⁶⁵ Possible conduct by a government official was divided into four categories: corruption; clear illegalities with scienter; illegalities clear to the lawyer but subject to reasonable differences of opinion; and gross negligence.⁶⁶

These categories in no way correspond to the categories of conduct included in the exceptions to canon 4's prohibitions against disclosing confidences or secrets of the client.⁶⁷ Under the strict terms of canon 4, there would be no question that none of this past conduct could be disclosed without the consent of the client.⁶⁸ If the agency and its officials are the client, therefore, confidences or secrets could not be disclosed without permission of the head of the agency. Of course, the Committee did not analyze the question in those terms. It simply offered a series of prudential statements, which ultimately came to this: corruption and clear illegalities with scienter can always be disclosed, at least to the Attorney General;⁶⁹ possibly illegal and grossly negligent conduct ordinarily need not be disclosed beyond the personnel of the agency.⁷⁰ Of course, one suspects that ordinarily the first two classes of conduct will not have to be reported beyond the agency level either. These are obviously prudential maxims, however. More care should be given to the possibility that the lawyer may be wrong or "making a mountain out of a molehill" in the second two classes of cases. In the final analysis, however, the standard seems to be the same for all categories of conduct. The opinion states:

[D]isclosure beyond the confines of the agency or other law enforcing or disciplinary authorities of the Government, is warranted only in the case when the lawyer, as a reasonable and prudent man, conscious of his professional obligation of care, confidentiality and responsibility, concludes that these authorities have without good cause failed in the performance of their own obligation to take remedial

65. *Id.* at 73-74.

66. *Id.* at 71. "Corrupt" was defined as "venal conduct in violation of law and duty." "Illegal" conduct was divided into two categories. Category I was "[t]he willful or knowing disregard of or breach of law, other than of a corrupt character." Category II was "considered to be that about which the lawyer may hold a firm position as to its legality but which he nevertheless recognizes is in an area subject to reasonable differences of professional opinion as to its legality." "Grossly negligent" was said "not to lend itself to greater clarification than those words themselves indicate." *Id.* Presumably, "gross negligence" would be the "failure to exercise even slight care." See W. PROSSER & Y. SMITH, *CASES AND MATERIALS ON TORTS* 213 (3d ed. 1962).

67. Those categories are: (1) when clients consent; (2) when permitted under disciplinary rules or required by law or court order; (3) when necessary to prevent future crimes by clients; and (4) when necessary to collect a fee or defend oneself against accusations of wrongful conduct. DR 4-101(C).

68. See DR 4-101(B)(C).

69. Professional Ethics Comm., *supra* note 46, at 73.

70. *Id.* at 74.

measures required in the public interest.⁷¹

In analyzing similar questions involving the government lawyer and confidentiality, Dean Redlich arrived at conclusions almost identical to that of the Federal Bar Association's Ethics Committee in Opinion 73-1.⁷² Redlich gave the following hypothetical: Suppose you represent the City of New York, and you are questioning a police officer who allegedly drove negligently and injured a citizen. Although the city charter states that the city lawyer serves as lawyer for the police officer,⁷³ there is no doubt, says Redlich, that the lawyer has an obligation to disclose the information received from the officer to his superiors in order for those superiors to report it to the appropriate law enforcement people. Moreover, if the report is not made by the superiors to the appropriate law-enforcement people, the lawyer should make it himself, going outside the chain of command to see that it is done. And if nothing is done at the law-enforcement level? Redlich does not specifically answer this question, but he clearly indicates his belief that the lawyer as a public official has an "affirmative duty" to bring the relevant information concerning the wrongdoing "to the attention of someone who can do something about it."⁷⁴ Redlich does believe there is room for traditional ideas concerning confidentiality in cases in which the government lawyer, in giving legal advice to an official, explains the strengths and weaknesses of possible positions. But respecting wrongdoing on the part of an official, whether criminal or noncriminal,⁷⁵ Redlich sees "little if any room" for the operation of the traditional confidentiality concept.⁷⁶

Several important issues emerge from an examination of opinions like those of the FBA's Ethics Committee and Dean Redlich. The central question seems to be whether there should be bars of confidentiality placed between the lawyer and a potentially conflicting obligation to disclose information he has received as a government lawyer indicating that illegalities have occurred in the operations of the government. Depending on the answer to that question, a range of secondary issues emerge.

If one believes strongly in confidentiality, the issues are: What are the limits of confidentiality? Which officials are those with whom the

71. *Id.* at 74-75.

72. THE MURKY DIVIDE, *supra* note 50, at 95-97.

73. *Id.* at 95.

74. *Id.* at 97.

75. *Id.* at 96.

76. *Id.* at 97.

lawyer has a confidential relationship? If one believes there should be no final bar preventing the lawyer from ultimately disclosing such information, what rules or guidelines shall be established to deal with the common sense notion that everything that is said or done within the government should not become a matter of instantaneous public knowledge? This issue is obviously part of a larger public policy issue, most often connected with calls for "sunshine laws"⁷⁷ or with interpretations of the Freedom of Information Act.⁷⁸ The question being dealt with here, however, is narrower. It concerns the scope of ethical behavior on the part of lawyers working for the government. It is possible that government lawyers should not be bound by the Code of Professional Responsibility at all, that the nature of their positions as public officials places them outside (or perhaps above) the cares and concerns of ordinary lawyers. The choice to release government lawyers from the bonds of the Code should not be made, however, without prolonged and careful study.

In the interim, I would offer suggestions to amend the Code to deal with the problems of the government lawyer that have been discussed in this article. To do so, I must be candid about my policy choices. I believe the government lawyer must never be prevented from disclosing information he reasonably believes indicates that there have been illegal acts committed that touch the public business.⁷⁹ The lawyer should not be required to disclose such information; he should simply not be fettered by the Code of Responsibility if he chooses to disclose. On the other hand, I believe matters of policy, including issues of justice and fairness, are for the appropriate government officials; so long as no illegalities are involved, discussions and decisions made by officials are to be held in confidence by the lawyer. In order to defend these choices, the underlying policy justification for confidentiality must first be examined.

The modern policy justification for attorney-client confidentiality is the same as that which justifies the attorney-client privilege: the fear that there will be less freedom of communication from a client who is

77. See Note, *The Federal "Government in the Sunshine Act": A Public Access Compromise*, 29 U. FLA. L. REV. 881 (1977).

78. See Cox, *A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1977).

79. There seems to be widespread agreement on this point. See THE MURKY DIVIDE, *supra* note 50, at 97; Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B.N.Y.C. 649, 649-50 (1977); Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966); Professional Ethics Comm., *supra* note 46. But see Carlock *supra* note 55.

not certain his lawyer will be bound to silence and who may therefore be reluctant to risk being harmed by a subsequent disclosure.⁸⁰ It has been argued that there is less justification for this policy in entity representation than in personal representation.⁸¹ The protection offered by the policy is less certain for the large corporations to which no clear rules apply because of the differences in the theories that protect one or another group of employees from having the lawyer-client privilege apply to them.⁸² Moreover, since the policy is clearly a utilitarian one, the more issues become public ones, the harder it is to justify allowing the privilege to prevent the full truth from being obtained.⁸³

Whether or not there is less justification for the lawyer-client privilege in entity representation, and thus less justification for the ethical norm of confidentiality, it may be assumed that a government official would be somewhat "chilled" by the knowledge that his disclosures may not always be confidential. These disclosures may, in fact, not only be made to superior officials, but also in some cases to law-enforcement officers or even to the public. Presumably, this chilling effect on the official increases the more the lawyer himself is freed from any strictures of confidentiality. The tradeoff, of course, is that an inflexible rule may permit the cover-up of serious, illegal conduct in matters of public concern. Although this is a policy question of some magnitude, my guess is that, in light of Watergate, there has to be an opportunity for lawyer disclosure. The opposite result would be unacceptable. Whistleblowers have had a notoriously difficult time holding their jobs after public disclosures of government corruption,⁸⁴ but they still wear the mantle of hero or patriot to most of the citizenry, even if the internal squeeze is often diametrically opposed to the public good.⁸⁵ In light of this phenomenon, it ought to be made clear that government lawyers cannot hide behind the ethics of the profession in maintaining

80. J. WIGMORE, EVIDENCE § 2291, at 543 (J. McNaughton rev. 1961); see H. DRINKER, *supra* note 1, at 132; M. FREEDMAN, *supra* note 10, at 4-5; Lawry, *supra* note 61, at 666-69.

81. Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 473-77 (1977).

82. *Id.* The Board of Directors may also determine after the fact that all lawyer-client confidences shall be waived for all corporate officers. A recent example of this is the decision by Gulf to allow one of its lawyers to testify before a grand jury concerning conversations the lawyer had with Gulf officials about bribes and pay-offs. See Wall St. J., Jan. 2, 1976, at 5, col. 2; Jan. 13, 1976, at 40, col. 1; Jan. 15, 1976, at 1, col. 6.

83. Note, *supra* note 81, at 477.

84. See WHISTLE BLOWING 39-179 (R. Nader, R. Petkas & K. Blackwell eds. 1972).

85. The most famous case is that of Ernest Fitzgerald. See *id.* at 39-54.

silence about known illegalities.⁸⁶

The problem, I take it, is basically with the word "should" that Dean Redlich uses in discussing his police officer case.⁸⁷ The Code of Professional Responsibility is already an intriguing document because of its unsteady mixture of "shoulds," "mays" and "musts."⁸⁸ The ethical considerations are supposed to contain "shoulds," that is, provisions that urge the lawyer to higher standards of behavior. The disciplinary rules are mandatory, but contain quite a few provisions that give lawyers the option of behaving in one way or another.⁸⁹ Canon 4 absolutely forbids disclosures of the client's confidences and secrets, but allows four exceptions.⁹⁰ Those exceptions, broadly worded, are all "mays." The lawyer may disclose a client's intent to commit a crime, but he does not have to.⁹¹ A lawyer may disclose a client's confidences when "required by law or court order," but he does not have to.⁹² The reason the Code is drafted in this way is that a strong presumption exists in favor of nondisclosure. There are cases, however, in which a competing policy would seem to be so strong that the lawyer should weigh everything in the balance before deciding whether to disclose. The Code should offer no artificial protection in cases that present the lawyer with this hard but important choice. Take the case of the future crime exception, for example. In Florida the language has been changed to make disclosure mandatory.⁹³ Under pain of disciplinary sanction, therefore, the Florida lawyer has to disclose "the intention of his client to commit a crime and the information necessary to prevent the crime."⁹⁴ But what if the crime is a relatively harmless misdemeanor, like putting a slug in a parking meter?⁹⁵ Or what if the lawyer

86. The point is simply that lawyers ought not to be able to justify failures to disclose illegalities because of alleged professional ethics. The justification must be personal, although it can obviously be made as a principled decision based on the individual's own conception of what is in the public interest.

87. *THE MURKY DIVIDE*, *supra* note 50, at 97; see text accompanying notes 72-76 *supra*.

88. Each of the axiomatic canons contain the word "should." Provisions such as DR 7-102 all contain the obligatory word "shall." Each exception to the obligatory "shall" language of DR 4-101(B) is a permissive "may." DR 4-101(C).

89. In addition to DR 4-101(C), see DR 2-110(C), which deals with permissive withdrawals, DR 5-105(C), which deals with conflicts of interest, and DR 7-101(B), which deals with limitations on zealotry.

90. See note 67 *supra*.

91. DR 4-101(C)(3).

92. DR 4-101(C)(2).

93. See A. KAUFMAN, *supra* note 16, at 115.

94. Florida Code of Professional Responsibility, DR 4-101(D)(2), FLA. STAT. ANN. rules (Harrison 1977).

95. The example is loosely drawn from A. KAUFMAN, *supra* note 16, at 113.

is not certain or wants to try to talk the client out of committing the deed? Surely there is good sense in allowing the lawyer some freedom ethically to try to do the best thing under all the circumstances. Just as surely, a statement should be included that the lawyer is not ethically constrained from trying to prevent a future serious harm.

My answer to the confidentiality question for the government lawyer is therefore (and not coincidentally) consistent with the present framework of the exceptions to confidentiality under canon 4. Thus, if the present format of the Code is maintained, I would suggest the following amendment to canon 4, which would become a new provision, DR 4-101(C)(5):

When employed as a government lawyer, any information that relates to illegal conduct by any public official in connection with any public matter or that relates to irregularities or illegalities reasonably believed to have occurred, to be occurring, or yet to occur in connection with any public matter, may be disclosed by the government lawyer to appropriate law-enforcement officials for action in the public interest.

If the appropriate law-enforcement officials fail to act upon the matter in a way reasonably consistent with the public interest, the government lawyer may disclose the information to the press or to whomever else he reasonably believes will be able to act upon the matter in a way that will be beneficial to the public interest.

In order to make this amendment work within the language of canon 4, the words "client" and "government lawyer" would have to be defined. New definitions, to be numbered (9) and (10) under the present Code structure, could read like this:

(9) A government lawyer is a lawyer who is employed by any government or any agency or department thereof, or by any public or quasi-public body, and who is acting in the capacity of a lawyer on behalf of his employer.

(10) The client for the federal government lawyer is the head of the agency or department or the head of the public or quasi-public body to which the lawyer is currently attached under appropriate governmental organizational practices or rules.

This definition of client would allow the government lawyer to disclose any information to the head of his department or agency on any matter. I do not think it useful to attempt to limit the range of confidential matters to officials lower than this, although there is no doubt that the same "chilling effect" is possible at all administrative levels. It seems to me that a rather free-wheeling discussion ought to be allowed

within the agency itself; and the top official ought to be the one to decide whether nonillegal matters go further. I realize this places the questions of fairness and justice in the hands of the head of the agency, not with the lawyer. I see no way a rule could be administered if these questions were also left to the lawyer. It is here that resignation becomes the only alternative. Since, however, these fundamental questions may not be aired under the present constraints, perhaps a rule indicating that the lawyer may disclose confidences concerning policy matters may be appropriate after he terminates his employment with the government. I may well support such a rule, but I would want to have a caveat to prevent such disclosure "while a matter is pending." There are questions of efficiency and responsibility here that seem to me to outweigh the need for immediate revelation of what are obviously matters upon which reasonable minds could differ.

IV

As an ABA blue-ribbon panel embarks upon the task of revising or rewriting the Code of Professional Responsibility, it must ask itself fundamental questions. One such question has been addressed in this article: How far shall the limits of confidentiality extend for the government lawyer? Before this question can be answered, a reappraisal of the concepts of client and of confidentiality must be undertaken. However much these two concepts are necessarily yoked together within the traditional context of a single private attorney and a single readily identifiable human client, the automatic application of these concepts to entity representation is unworkable. To attempt to make such an application is to be led into confusion by an unconscious assumption concerning the meaning of the word client. In representing an entity, the client may be one person or group for purposes of taking orders, another for determining the interests to be served, and still another for purposes of determining whose confidences ought to be respected. The problem is compounded for the government lawyer because, as a public official, he seems to have a special obligation to every citizen that is very different from that which an ordinary lawyer has in serving a private client.

My suggested changes in the Code solve only the most immediate problem, a problem brought about by prior conceptual confusions and unconscious assumptions; it is a problem that must be solved in light of the present, apparently widely shared policy agreement that no government lawyer should be deemed to be acting unethically if he chooses to

divulge information concerning illegalities in the performance of the public's business.

Presently, canon 4 is irrelevant to the government lawyer; consequently, amendments such as those suggested in this article are absolutely necessary, whether the Code is otherwise altered or not. My hope, however, is that my suggestions will spur others to engage in some fundamental rethinking of the conceptual framework of the Code. If this is done, I am convinced that detailed rules will be found necessary to govern the behaviors of different kinds of lawyers engaging in different kinds of practices for vastly different kinds of clients.