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The Last Hurrah: The Kutak Commission and the End of Optimism

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THE LAST HURRAH: THE KUTAK COMMISSION AND THE END OF OPTIMISM

MICHAEL ARIENS†

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I. INTRODUCTION

In 1977, Robert J. Kutak¹ was named chairman of a newly-created American Bar Association ("ABA") Committee on Evaluation of

† Professor, St. Mary's University School of Law, San Antonio, Texas. Thanks to my research assistant Dorian Ojemen for his excellent research and for his editorial assistance.

1. On the life and work of Robert Kutak, see KUTAK ROCK LLP, A CELEBRATION OF THE LIFE OF ROBERT J. KUTAK ("CELEBRATION") (on file with author). I am grateful to the members and employees of Kutak Rock LLP, especially Marilyn Herek, for allowing me to look through all of Robert J. Kutak's extant papers (save any documents protected by the attorney-client privilege) and for copying without charge any item I found of interest, including the CELEBRATION. Given his accomplishments, the YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW disserved lawyers in failing to include his biography, particularly given its inclusion of others who did little or nothing to shape the history of the American legal profession. See, e.g., Jeffrey Abramson, *Simpson, Orenthal James (O. J.)*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 497

Ethical Standards (“Kutak Commission”).² ABA President William B. Spann, Jr., asked the Commission to look at “all facets of legal ethics.”³ Though Kutak apparently knew little or nothing about legal ethics rules and guidelines, he was an inspired choice.⁴ He was a relentless optimist, building from scratch a national law firm based in Omaha, Nebraska. Although just in his mid-forties, he was an active and long-serving member of the ABA.⁵ Finally, he possessed a large appetite for work and public service,⁶ joined by more than a little personal ambition.

(Roger K. Newman ed., 2009). In addition to the CELEBRATION, see also David Margolick, *R.J. Kutak, Leader in Bar Ethics Work, Dies*, N.Y. TIMES, Jan. 25, 1983, at D25; ROBERT J. KUTAK, <http://www.kutakrock.com/robert-bob-kutak/> (last visited February 1, 2016).

2. The Committee on Evaluation of Ethical Standards initially consisted of ten lawyers. In February 1978, the Kutak Commission urged the Board of Governors to add two non-lawyers and one private practice lawyer, changing it, in ABA argot, from a special “committee” to a special “commission.” See COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS. JOURNALS, WASHINGTON, D.C., FEBRUARY 24-25, 1978, at 30 (n.d.) [hereinafter “JOURNALS”] (on file with author). The ABA agreed. For the sake of consistency, I will use “Commission” throughout.

3. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, 2 B. LEADER, Nov.-Dec. 1977, at 2, 3.

4. This assertion is based on my conversation with firm co-founder Harold Rock on Wednesday, December 10, 2014, during which he told me that both he and Kutak were asked to chair the Special Committee. They agreed that Rock would continue to work on firm business and Kutak would agree to serve as Chairman. Rock was a member of the ABA’s House of Delegates beginning in the 1971-72 year as a representative of the Nebraska State Bar Association. See 97 A.B.A. ANN. REP. 17A (1972) (listing members from Nebraska). He also served on the Standing Committee on Professional Responsibility from 1974-79. See 99 A.B.A. ANN. REP. (1974) (listing members) through 104 A.B.A. ANN. REP. (1979) (listing members). In the 1976-77 year, both Rock and Kutak were members of the House of Delegates, the latter representing the Section on Individual Rights and Responsibilities as its past Chairman. See 102 A.B.A. ANN. REP. 19A (1977) (listing members from Nebraska). Interview with Harold Rock, co-founder, Kutak Rock LLP, in Omaha, NE. (Dec. 10, 2014).

5. Kutak became a member of the Council of the Section on Individual Rights and Responsibilities in 1971. See *Dates, Places, and Attendance of Annual Meetings*, 96 A.B.A. ANN. REP. 71 (1971). He rose in office in the Section, becoming Vice-Chair in 1972-73, Chair-Elect in 1973-74, and Chair in 1974-75. See AMERICAN BAR ASSOCIATION, *ADVANCING THE LAW, PROTECTING THE INDIVIDUAL, DEFENDING HUMAN DIGNITY, PURSUING THE CHALLENGES INTO THE 21ST CENTURY: A BRIEF HISTORY OF THE AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES* 45-46 (1999) [hereinafter “ADVANCING THE LAW”] (listing officers and council members, but listing Kutak as joining the Council in 1970 and not serving in the 1971-72 year).

6. In addition to his ABA work, Kutak served as a member of the board of the Legal Services Corporation from 1975-1981. See email from Courtney Belmi, Office of Government Relations & Public Affairs, Legal Services Corporation, to author (January 28, 2016, 11:23 a.m.) (on file with author); see also ROBERT J. KUTAK, <http://www.kutakrock.com/robert-bob-kutak/> (last visited February 1, 2016). The firm notes in its tribute to Kutak that one of his favorite sayings was “Work is Joy.”

Kutak died of a heart attack at age 50 in January 1983.⁷ The next month, at its Midyear Meeting, the ABA's House of Delegates ("the House") spent five sessions voting on provisions of the Kutak Commission's proposed Model Rules of Professional Conduct.⁸ Delegates offered amendments from the first rule (Rule 1.1) to the next-to-last (Rule 8.4).⁹ It was not until the next meeting of the House, in August 1983, that the Model Rules were adopted.¹⁰ One delegate was pleased to state that "there had been a tremendous spirit of cooperation" since February 1983, in sharp contrast to the "confusion, antagonism, and polarization of viewpoints experienced a year earlier."¹¹ The Model Rules were adopted in the face of significant disagreement among lawyers and representatives of bar associations and other bar groups.¹² In contrast, when the ABA adopted its 1969 Code of Professional Responsibility, it did so without any amendment or recorded dissent.¹³ Why did such strong disagreement exist less than fifteen years after the wholehearted adoption of the Code of Professional Responsibility?

This essay argues that the six-year effort to craft the Model Rules of Professional Conduct was the last hurrah¹⁴ of optimism in the American legal profession. When the Model Rules project began in 1977, the ABA embraced the idea that lawyers enjoyed a central role

7. *Service is Set Wednesday for Lawyer Robert Kutak*, OMAHA WORLD-HERALD, Jan. 24, 1983, reprinted in CELEBRATION.

8. See *Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 289, 291-369 (1983).

9. See *id.* For a critical early assessment, see Gerard J. Clark, Commentary, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79 (1983). The House had already spent significant time on just one rule, the rule on fees, Rule 1.5, at its Annual Meeting in August 1982. See *Proceedings of the 1982 Annual Meeting of the House of Delegates*, 107 A.B.A. ANN. REP. 603, 603-24 (1982). It was unable to reach any agreement then on the rule on client confidences, Rule 1.6, and deferred consideration until the 1983 Midyear Meeting. See *id.* at 624-29.

10. See *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 763, 778 (1983).

11. See *id.* at 766.

12. That disagreement continued in the adoption process in the states, and many adapted rather than adopted the Model Rules. In Texas, for example, the process to adopt the Rules began in 1984, but was not completed until 1989, in part due to "outright errors and omissions" in the Model Rules, in part due to the need to conform the Rules to "long-standing Texas practices," and in part due to the conclusion "that the ABA had simply erred in making certain policy determinations in a number of areas." See John F. Sutton, Jr. & Robert P. Schuwerk, *Introduction*, 27A HOUS. L. REV. 1, 2 (1990); see also *Texas' New Disciplinary Rules Become Effective Jan. 1, 1990*, 52 TEX. B.J. 1023 (1989).

13. See *House of Delegates Proceedings*, 94 A.B.A. ANN. REP. 378, 389-92 (1969) (adopting Code without amendment).

14. With apologies to the late novelist Edwin O'Connor. See Edwin O'Connor, *THE LAST HURRAH* (1956) (chronicling the fall of an Irish-American mayor in an unnamed city that appears to be Boston).

in the exercise of political power, for it believed that lawyers were largely a force for social good. Lawyers were crucial to maintaining the rule of law, as recently demonstrated in the resignation from office of President Richard Nixon. Thus, though lawyers were deeply involved in the crimes of Watergate, they were also crucial to uncovering those crimes.¹⁵

The Model Rules of Professional Conduct were intended to serve as another demonstration of the ways in which lawyers acted to aid the public. The Model Rules would remedy several distinct problems found in the Code of Professional Responsibility,¹⁶ but more importantly, respond to the public's negative view of lawyers in the aftermath of Watergate. The Kutak Commission's initial draft of the Model Rules reflected the belief that law remained a public profession,¹⁷ and that lawyers served as both agents of their clients and as trustees of the public interest.¹⁸ By the end of the drafting and approval process, the idea of the lawyer as servant of the public had disappeared, as optimism waned regarding the capacity of lawyers to shape a better society. The final version of the Model Rules focused almost exclusively on the private market model of the lawyer's duty of loyalty to the client. It adopted a variant of Oliver Wendell Holmes's "bad man"¹⁹ philosophy to legal ethics, and its Chairman coined a new and telling phrase, the "law of lawyering."²⁰

15. See Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. ON MALPRACTICE AND LEGAL ETHICS 134, 174-77 (2014) (noting the impact of Watergate on the legal profession). Watergate was known, even among lawyers, as a "lawyers' scandal." See Richard B. Allen, et al., *Editorial, Watergate—A Lawyers' Scandal?*, 60 A.B.A. J. 1257 (1974) (quoting past ABA President Chesterfield Smith's observation); James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975) ("Early in its development, Watergate was characterized as a lawyer's scandal.").

16. See generally Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

17. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) ("[A profession is] a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood."); see generally ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921).

18. See generally STEVEN BRINT, *IN AN AGE OF EXPERTS* (1994) (defining social trustee professionalism).

19. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) stating,

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

See also ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 144-50 (2000) (critiquing "bad man" theory); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 222 (1993) (noting "the positivistic nature of law in [Holmes's] 'bad man' metaphor.").

20. Robert J. Kutak, *The Next Step in Legal Ethics: Some Thoughts on the Proposed Model Rules of Professional Conduct*, 30 CATH. U. L. REV. 1, 3 (1980) ("In other

Section II provides a brief introduction to the members of the Kutak Commission and its Reporters. Section III discusses the general ethical framework of the members of the Kutak Commission, a framework anchored by a belief that lawyers served in the public interest. Section III then examines the drafts of the Model Rules, and the strong reactions to those drafts. Section IV discusses the competing visions of proper lawyer behavior from 1977 to 1983. It further explains why the Commission's view that lawyers acted as trustees on behalf of the public was displaced in the adopted Model Rules by a market model that equated a private lawyer's work for clients as serving the public interest. These competing visions were evidence of a fracturing within the American legal profession. A lack of cultural unity among lawyers heightened the importance of rules as framing the bounds of permissible lawyer behavior. Section IV ends with an evaluation of the consequences of cultural fragmentation, including the death of optimism. Section V offers a brief conclusion.

II. THE KUTAK COMMISSION

A. ROBERT KUTAK

Robert Kutak was born in October 1932, the son of a Czech immigrant.²¹ After graduating from the University of Chicago Law School in 1955, he worked as a judicial clerk and then for Nebraska Republican Senator Roman Hruska until he, Harold Rock, and William Campbell formed Kutak Rock & Campbell in 1965.

Kutak was active in the ABA's Section on Individual Rights and Responsibilities by the early 1970s, becoming its Chairman in 1974.²² This Section played a small role in supporting the civil rights movement. It played a more important role in shifting the ABA from an inward-looking to an outward-focused institution²³ that spoke well beyond traditional legal institutional goals such as the creation of Law Day²⁴ and World Peace Through Law.²⁵ Kutak was appointed in 1975

words, the natural process of change—of evolution—that affects every area of American law has affected the 'law of lawyering' as well.”)

21. See *Remarks of Mr. Jerome F. Kutak*, in CELEBRATION, at 1 (printing remarks of Robert Kutak's father) (on file with author).

22. See 96 A.B.A. ANN. REP. 71 (1971) (listing Kutak as member of the Council of the Section); see also 100 A.B.A. ANN. REP. 106A (1975) (listing Kutak as Chairman of the Section).

23. See ADVANCING THE LAW, *supra* note 5, at 9-13; see also Michael Ariens, *Sorting: Specialization and the Privatization of the American Legal Profession*, 29 GEO. J. LEGAL ETHICS 579 (2016) (discussing change in ABA focus in mid-1960s); see also *infra* § IV.B.

24. Law Day was created by the ABA and first promulgated by President Dwight D. Eisenhower in 1958. See *The President's Proclamation*, 44 A.B.A. J. 342, 343 (1958) (approving May 1st as Law Day); see also Jason Krause, *Charlie Rhyne's Big Idea*, 94

to the inaugural board of the Legal Services Corporation, which was created in 1974 by Congress to serve the civil legal needs of the poor.²⁶ He left the Corporation's board in 1981.²⁷

B. MEMBERS OF THE KUTAK COMMISSION

The Kutak Commission initially comprised a group of ten service-oriented lawyers and judges largely conversant with the internal politics of the ABA. Its members included two judges, federal judge Marvin Frankel²⁸ and Alabama Supreme Court Justice Howell Heflin.²⁹ Two members were past presidents of influential American legal institutions in the United States:³⁰ Robert Meserve³¹ was a past president of the ABA, and Samuel Thurman³² was a past president of

A.B.A. J. 62, 65 (2008) (crediting ABA President Charlie Rhyne with creating Law Day); David Ray Papke, *Law Day*, in OXFORD COMPANION TO AMERICAN LAW 491 (2002).

25. The ABA's World Peace Through Law initiative was created the same year as Law Day. See Charles S. Rhyne, *World Peace Through Law*, 83 A.B.A. ANN. REP. 624 (1958).

26. Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996i (2015). The bill was signed into law by President Richard M. Nixon on July 25, 1974, two weeks before he resigned from office, and just days before the House Committee on the Judiciary voted in favor of articles of impeachment. See EARL JOHNSON, JR., 2 TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 424 (3 vols., 2014); EARL JOHNSON, JR., *Foreword to the New Edition in JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM ix-xxi* (2d ed., 1978); see also ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 19-27 (rev. 2007) (discussing the creation and early history of Legal Services Corporation).

27. See email from Courtney Belmi, Office of Government Relations & Public Affairs, Legal Services Corporation, to author (January 28, 2016, 11:23 a.m.) (on file with author).

28. See Gary P. Naftalis, *Frankel, Marvin E.*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 203.

29. See Tony A. Freyer, *Heflin, Howell*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 259. Heflin resigned from the Commission to run for Senator. He was replaced by Oregon Supreme Court Chief Justice Arno Denecke.

30. The past and current presidents and directors of the prestigious American Law Institute (ALI) were few in number. None was a member of the Commission. However, William Spann, who created and later served as a member of the Commission, was a member of the ALI. See Wm. B. Spann, Jr., *Is Nominated for President-Elect*, 62 A.B.A. J. 341 (1976). The second Reporter, Geoffrey C. Hazard, Jr., was a prominent member of the ALI, and was named its Director in 1984, a position he held until 1999. Stephen Gillers, *Hazard, Geoffrey C., Jr.*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 259.

31. See Randy Kennedy, *Robert W. Meserve, 86, Dies; Favored Stronger Legal Ethics*, N.Y. TIMES, Sept. 25, 1995, at B10; TUFTS ALUMNI, <http://tuftsalumni.org/who-we-are/alumni-recognition/tufts-notables/luminaries-2/#meserve> (last visited February 1, 2016).

32. See generally Sandra Day O'Connor, *A Tribute to Samuel D. Thurman*, (1996), [ce//content.lib.utah.edu/utlils/getfile/collection/utlawrev/id/3561/filename/17771.pdf](http://content.lib.utah.edu/utlils/getfile/collection/utlawrev/id/3561/filename/17771.pdf); Jefferson B. Fordham, *In Appreciation of Samuel D. Thurman*, 1975 UTAH L. REV. 1 [hereinafter "Appreciation"]; William H. Rehnquist, *A Tribute to Samuel D. Thurman*, 1975 UTAH L. REV. 7. Before serving as Dean at the University of Utah Law School, he was a

the Association of American Law Schools. Another member, Robert B. McKay,³³ was a future president of the Association of the Bar of the City of New York (“ABCNY”). McKay was a former NYU law school dean who served on the board of a number of legal institutions, including the New York Legal Aid Society, and on the executive committee of the ABCNY. Like McKay, Thurman was a legal academic and former law dean. Both he and McKay had written on issues of legal ethics.³⁴ In addition to Kutak and Meserve, private practice lawyers included Betty Binns Fletcher,³⁵ a prominent Seattle lawyer, and Richard H. Sinkfield,³⁶ a relatively young Atlanta lawyer. All either practiced or had practiced in large firms. The other two members were Thomas Ehrlich, the first President of the Legal Services Corporation³⁷ and a former Stanford Law School Dean, and Jane Lakes Frank (now Harman),³⁸ a government lawyer. Others appointed later included in-house counsel lawyer L. Clair Nelson,³⁹ St. Louis private practice lawyer Robert O. Hetlage,⁴⁰ both active and long-time ABA

faculty member at Stanford Law School, where fellow Kutak Commission member Thomas Ehrlich also taught.

33. See M. Carr Ferguson, *McKay, Robert Budge*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* at 373; Glenn Fowler, *Robert McKay, 70, Legal Scholar Who Led 1971 Attica Panel, Dies*, *N.Y. TIMES*, July 14, 1990, at 27; Roger J. Traynor et al., *Robert B. McKay*, 50 *N.Y.U. L. REV.* 7 (1975).

34. See Robert B. McKay, *An Administrative Code of Ethics: Principles and Implementation*, 47 *A.B.A. J.* 890 (1961); SAMUEL D. THURMAN ET AL., *CASES AND MATERIALS ON THE LEGAL PROFESSION* (1970); Samuel D. Thurman, *The Legal Profession Course: An Evaluation*, 41 *U. COLO. L. REV.* 385 (1969).

35. See Douglas Martin, *Betty Binns Fletcher Dies at 89; Liberal Stalwart on the Bench*, *N.Y. TIMES*, Oct. 24, 2012, at A28. She was appointed a federal judge after being named to the Kutak Commission, *see id.*, after which she served as a consultant to the Commission rather than as a member.

36. See RICHARD H. SINKFIELD, *LAWYER PROFILE*, <http://www.martindale.com/Mr-Richard-H-Sinkfield/867701-lawyer.htm> (last visited February 1, 2016); ROGERS & HARDIN—RICHARD H. SINKFIELD, <http://www.rh-law.com/Attorneys/RichardHSinkfield> (last visited February 1, 2016) (listing many accomplishments).

37. See *Interview with Thomas Ehrlich*, Georgetown University Law Library, National Equal Justice Library Oral History Collection 1-3 (May 2004) (copy on file with author). In 1978, Ehrlich left the Presidency of the Legal Services Corporation (“LSC”) to serve in the Carter Administration with responsibility for foreign aid policy. *See id.* at 22-23.

38. Harman later served as a member of Congress. See *HARMAN, Jane L., (1945-)*, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000213> (last visited February 1, 2016). Harman resigned from Congress in 2011 to become President of the Woodrow Wilson Center.

39. Nelson and Spann replaced Betty Binns Fletcher and Robert McKay. See *MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, 2d Discussion Draft 1980)* (listing members of Commission and indicating terms of Robert McKay and Betty B. Fletcher as 1977-80). On Nelson, *see Death: L. Clair Nelson*, *DESERET NEWS*, (Feb. 5, 1994), available at <http://www.deseretnews.com/article/334710/DEATH—L-CLAIR-NELSON.html?pg=all> (last visited February 1, 2016).

40. Hetlage served as Chairman of the World Peace Through Law Committee of the ABA in 1960-61. See Kenneth A. Burns, Jr., *Our Younger Lawyers*, 46 *A.B.A. J.*

members, William B. Spann, Jr.,⁴¹ the former ABA President who created the Commission, Oregon Supreme Court Chief Justice Arno Denecke,⁴² and nonlawyers Lois Harrison and Alan Barth.

The members of the Kutak Commission were geographically diverse,⁴³ and all met a key criterion: they possessed extensive experience in and support for public-oriented legal service work. Kutak and Thurman worked with Ehrlich when the former served on the Board of the Legal Services Corporation.⁴⁴ McKay became a member of the New York Legal Aid Society's Board of Directors in 1969, and was by 1971 its Vice-President and an Executive Committee member.⁴⁵ Kutak, McKay, Meserve, Nelson, Spann, and Hetlage were active and engaged ABA members. Hetlage, Meserve, and Spann attended President Kennedy's June 21, 1963 meeting with "leaders of the Bar to discuss certain aspects of the Nation's civil rights problem,"⁴⁶ which became the influential Lawyers' Committee for Civil Rights Under Law. Kutak and Spann had both been prominent members of the ABA's Section on Individual Rights and Responsibilities. Jefferson Fordham, the driving force behind the 1966 creation of that Section,⁴⁷ was a long-time friend of Thurman.⁴⁸ Fletcher and Heflin had served as leaders of their local or state bar associations. In addition, Fletcher was a member of the ABA Standing Committee on Ethics and Professional Responsibility for six years beginning in 1973-74, at which time

1247, 1249 (1960). Hetlage was named distinguished alumnus by his law school alma mater, Washington University, in 2000. See ROBERT O. HETLAGE, <http://law.wustl.edu/alumni/pages.aspx?id=153> (last visited February 1, 2016).

41. On Spann, see *Memorial to William Bowman Spann, Jr. (1912-1981)*, 106 A.B.A. ANN. REP. 589 (1981). As noted above, Spann and Nelson replaced McKay and Fletcher, both of whom resigned from the Commission in 1980.

42. On Denecke, see Jim Hill, *Retiring Justice's Goals: Mediation, Golf*, OREGONIAN, June 27, 1982; Pete Bysom & John Snell, *Retired Chief Justice Arno Denecke Dies*, OREGONIAN, Oct. 21, 1993, at E1 (copies on file with author). My thanks to Scott Daniels of the Oregon Historical Society for finding and sending me these articles.

43. Their educational diversity was less inspiring. Of the fourteen law-trained members who served at some point on the Commission, four graduated from Harvard Law School, and one each from the Chicago, Columbia, Stanford, and Yale law schools. Three went to strong state law schools, Alabama, Illinois, and Washington, and three graduated from near-elite private law schools, George Washington University, Vanderbilt University, and Washington University.

44. See email from Courtney Belmi, Office of Government Relations & Public Affairs, Legal Services Corporation, to author (January 28, 2016, 11:23 a.m.) (on file with author).

45. Orison S. Marden, *Robert B. McKay*, 50 N.Y.U. L. REV. 7, 17 (1975).

46. See ANN GARITY CONNELL, *THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW: THE MAKING OF A PUBLIC INTEREST LAW GROUP* 77, n. 128 (2003) (listing those who attended meeting).

47. See *ADVANCING THE LAW*, *supra* note 5, at 9 (noting Fordham urged creation of the section in 1963).

48. See *Appreciation*, *supra* note 32, at 1-2.

Harold Rock, Kutak's partner, also began serving as a member.⁴⁹ Fletcher and Rock were panelists on the *Advocacy* part of the ABA's six-part *Dilemmas in Legal Ethics* video in 1977.⁵⁰ Frankel was a former Columbia Law School professor and well-known judge and legal writer. His controversial speech to the members of the ABCNY on the limits of adversarial ethics had been recently published, which made him ideal for the Commission.⁵¹ Frankel also served as chairman of the Lawyers Committee on Human Rights for many years.⁵² Heflin possessed an outstanding reputation as a reform-minded Alabama lawyer who bested George Wallace with "the political support of African American civil rights leaders" while president of the Alabama State Bar Association in 1965.⁵³ In 1970, he was elected Chief Justice of the Alabama Supreme Court by "employing a statewide political organization outside Wallace's control."⁵⁴ Sinkfield and Harman were near the beginning of their careers, both of which have been marked by extensive public service. Spann, who created the Commission and later served as a member, was also a member of the Lawyers' Committee on Civil Rights Under Law, the American Law Institute, the National Conference of Commissioners on Uniform State Laws, the American College of Trial Lawyers, the American Judicature Society, and a board member of the Atlanta Legal Aid Society.⁵⁵

C. THE REPORTERS

The initial Reporter for the Kutak Commission was L. Ray Patterson, Dean of Emory University School of Law in Atlanta. Patterson wrote a caustic critique of the ABA's Code of Professional Responsibility published in the *ABA Journal* in May 1977.⁵⁶ A few months later,

49. See 99 A.B.A. ANN. REP. 1974 (listing members) through 104 A.B.A. ANN. REP. (1979) (listing members).

50. See ADVOCACY DISCUSSION GUIDE (1977) (listing Fletcher and Rock as two of five panelists) (copy on file with author). The ADVOCACY DISCUSSION GUIDE notes that in 1977 Fletcher was also on the Council of the ABA Section on Litigation and the National Conference of Bar Examiners, as well as on the Board of Governors of the Washington State Bar Association. See *id.*

51. See Marvin Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (criticizing excessive adversarial zeal and offering amendments to the Code of Professional Responsibility to limit such zeal). His talk and essay was expanded into book form in MARVIN E. FRANKEL, *PARTISAN JUSTICE: TOO MUCH FIGHT? TOO LITTLE TRUTH? EQUAL JUSTICE?* (1980).

52. Naftalis, *supra* note 28, at 204.

53. Freyer, *supra* note 29, at 260.

54. *Id.*

55. See Wm. B. Spann, Jr., *Is Nominated for President-Elect*, 62 A.B.A. J. 341 (1976); *Memorial to William Bowman Spann, Jr.*, *supra* note 41, at 589.

56. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).

Spann, an Atlanta lawyer, announced the creation of the Kutak Commission. Patterson was named its Reporter.

Patterson and Kutak did not work well together. Each was ambitious to leave a mark on the profession through the Commission. Patterson possessed a substantial advantage in subject-matter knowledge over Kutak, but Kutak was a dynamic and forceful leader and a quick study. Kutak was not interested in simply adopting the Reporter's substantive views. By late 1978, Patterson was replaced as Reporter by Yale Law School Professor Geoffrey C. Hazard, Jr. Hazard was an important and influential Reporter who ably defended the Commission's positions through and after the ABA's adoption of the Model Rules.⁵⁷

D. THE ABA AND THE PUBLIC DUTIES OF THE LAWYER

When the Kutak Commission was created, ABA leaders had long emphasized the public duties of a lawyer. For example, Chesterfield Smith,⁵⁸ ABA President during the height of the Watergate crisis, used the ABA as a "bold, activist vehicle."⁵⁹ He urged lawyers to consider creating "an affirmative duty" to "devote some portion of his services to public interest endeavors."⁶⁰ And though he had supported Nixon's candidacy, Smith called for an independent counsel after Nixon fired Archibald Cox in the infamous October 1973 "Saturday Night Massacre,"⁶¹ declaring, "No man is above the law."⁶² When Nixon resigned the presidency in August 1974, it appeared that the law triumphed over naked political power. Despite the fact that more than two dozen lawyers were implicated in the Watergate scandal,⁶³ the ABA believed it had played an important role in ending the scan-

57. As noted above, Hazard was also an influential member of the American Law Institute, which thus linked all of the most important American legal institutions in the Model Rules project. He served as director of the ALI from 1984-1999. See Gillers, *supra* note 30, at 259.

58. See *Chesterfield Smith; ABA Head during Watergate*, WASH. POST (July 18, 2003), https://www.washingtonpost.com/politics/chesterfield-smith-aba-head-during-watergate/2012/05/31/gJQANb9TGV_story.html (last visited February 1, 2016).

59. Jan Pudlow, *Chesterfield Smith: America's Lawyer*, 77 FL. B.J., Nov. 2003, at 8, <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/1e0d4588011d7f4685256dc90057cb2c!OpenDocument&Highlight=0> (last visited February 1, 2016).

60. Chesterfield Smith, *Address of Chesterfield Smith*, 26 ADMIN. L. REV. 379, 381 (1974); see also Chesterfield Smith, *Lawyers Should 'Tithe' for the Public Interest*, 2 B. LEADER, Nov.-Dec. 1976, at 2.

61. On the Saturday Night Massacre, see Ken Gormley, ARCHIBALD COX: CONSCIENCE OF A NATION 359-72 (1997).

62. Pudlow, *supra* note 59, at 8.

63. See *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976). One of those lawyers was the President, Richard M. Nixon.

dal. The leadership of the ABA believed its efforts demonstrated the public duty of lawyers to protect American democracy as a central aspect of the duty to serve society.

Elite lawyers at this time also believed lawyers and law could effect transformational changes in society, swept up in President Lyndon Johnson's call for a "Great Society."⁶⁴ Sargent Shriver, a lawyer and President Lyndon Johnson's director of the War on Poverty through the Office of Economic Opportunity ("OEO"), was "proudest" of the federal government's legal aid program because "it had the greatest potential for changing the system under which people's lives were being exploited."⁶⁵ In 1969, one lawyer involved in the War on Poverty said, "Legal aid will have more impact on . . . our social, economic, and political structures than anything else" in domestic politics.⁶⁶

By 1977, the ABA had worked for over a decade to show that its principal effort was service to the public, not mere self-interest. And it had succeeded through its support for legal aid programs and in promoting the rule of law in Watergate. The Kutak Commission was another effort by the organized bar to reinforce the idea that lawyers served the public good, and helped improve American social, economic, and political structures. The Commission's members had already demonstrated their interest in service to the public through the many organizations with which they were affiliated. The Commission and the ABA would reiterate the duties of the legal profession as a public profession through a legal ethics code that embraced public service.

The ABA saw itself as representing American lawyers,⁶⁷ and it took responsibility for repairing the reputation of lawyers. Improving the reputation of lawyers would occur only when lawyers, in part through the work of the Kutak Commission, demonstrated a concern for the public as well as their paying clients. However, the Kutak Commission's reformation of legal ethics standards was met by a diffuse, and later open, resistance within the bar. The Kutak Commis-

64. See RANDALL B. WOODS, PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM 55 (2016) (quoting a snippet of Johnson's "Great Society" speech to University of Michigan graduates on May 22, 1964).

65. SCOTT STOSSEL, SARGE: THE LIFE AND TIMES OF SARGENT SHRIVER 443 (2004).

66. *Id.* at 442.

67. The ABA was officially an open membership association after it eliminated its 1912 whites-only policy in 1943. See *Sessions of the Assembly*, 68 A.B.A. ANN. REP. 97, 110 (1943) (adopting resolution that membership policy "is not dependent on race, creed or color."). For more detail, see J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 543 (1993). By 1977, the ABA counted 47.5% of all lawyers (219,404/462,000) as members. See RICHARD L. ABEL, AMERICAN LAWYERS 290 (1989) (listing ABA membership over time and comparing membership with the overall number of lawyers).

sion failed to sense this resistance until it was too late to craft a more modest ethics reform.

III. THE COMMISSION'S REFORMATION

A. THE APPROACH OF THE COMMISSION

"[T]here exists within the Bar a somewhat vague, though widespread apprehension over the effectiveness of the current Code and its utility."⁶⁸

The Commission was well aware of an anxiety within the profession, resulting from a number of threats lawyers were then facing.⁶⁹ At its first meeting, the Commission listed a number of "characteristics"⁷⁰ propelling its approach in making an ethics code. In major part, the Commission intended its work to assuage the public's skepticism concerning lawyer behavior⁷¹ and to draft a comprehensive set of ethics rules that were "easy to use and easy to understand."⁷² These particular characteristics were responsive both to lawyer involvement in Watergate and to criticisms of the Code of Professional Responsibility.⁷³ One additional way in which the Kutak Commission reacted to the Code was by replacing the tripartite structure of the Code (nine Canons, followed by Ethical Considerations, and then Disciplinary Rules)⁷⁴ with a "Restatement"-like structure, consisting of "black letter" rules followed by commentary explaining the rule.⁷⁵

In addition, the Commission believed its duty went beyond modifying the ethics statements found in the ABA's 1908 Canons of Ethics⁷⁶ and its 1969 Code of Professional Responsibility.⁷⁷ One common

68. *Summary of Organizational Meeting Aspen, Colorado, September 29-October 2, 1977*, at 1 (unpublished manuscript) (on file with author). This *Summary* is printed on the letterhead of the Special Committee on Evaluation of Ethical Standards.

69. For a discussion of some of those attacks, see Ariens, *supra* note 15, at 172-76.

70. *Summary of Organizational Meeting*, *supra* note 68, at 2.

71. The new code was "not to be perceived as a self-serving document." See *Summary of Organizational Meeting*, *supra* note 68, at 3. This is also stated in *JOURNALS, ASPEN, COLORADO, SEPTEMBER 29-OCTOBER 1, 1977*, at 8-9 (on file with author).

72. *Id.*

73. See Ariens, *supra* note 15, at 175-76 (discussing Watergate as a "lawyer's scandal"); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 288 (1976) ("Like the Canons it replaced, [the Code] concentrated its energies upon the preservation of a professional monopoly, not the provision of legal services.").

74. On the reasons for the approach taken in the Code, see Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 *ST. MARY'S L.J.* 343, 433-44 (2008) (discussing the history of the Code of Professional Responsibility).

75. See *JOURNALS, ASPEN, COLORADO, SEPTEMBER 29-OCTOBER 1, 1977*, at 4 (discussing at the first meeting whether to move to a format akin to a "Restatement of Ethics"). This had been suggested by Spann in his creation of the Commission. See Spann, *supra* note 3, at 3.

76. See *Transactions of the Thirty-first Annual Meeting of the American Bar Association*, 31 *A.B.A. ANN. REP.* 3, 55, 86 (1908) (adopting Canons of Ethics).

criticism of the Code was that its approach to legal ethics was too conservative.⁷⁸ At its second meeting, when discussing the predominant understanding within and outside the profession that the lawyer's duty was exclusively to the client, at least one member of the Kutak Commission rebelled: "our Committee ought not to hesitate to promulgate statements of ethics it believes to be correct but which may not meet with the general approval of the Bar."⁷⁹

This assertion suggests the Commission's understanding that it was to lead American lawyers. The Commission effectively adopted the "law-making" approach taken by the American Law Institute in its Second Restatement. Unlike the First Restatement, which was designed to state the law as it is, a major goal of the Second Restatement was to state the law as it ought to be.⁸⁰ This latter approach guided the Commission during its initial effort to craft a set of ethics rules. The Commission's function, in significant part, was premised on the belief that lawyers needed to be educated about the meaning of legal professionalism.

Over the next two years, the Commission met bi-monthly. A summary of these meetings, compiled as the Commission on Evaluation of Ethical Standards Journals ("Journals"), was written by Kutak Rock lawyer Daniel Reynolds and was provided to each of the Commission members.⁸¹ The Journals provide some insights into the thinking of the Kutak Commission.

B. THE ETHOS OF THE COMMISSION

The Kutak Commission repeatedly discussed the extent of the lawyer's duty of client loyalty. Its members believed that a major weakness of the Code was its "basic posture of 'my client, first, last

77. See *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 378, 389-92 (1969) (adopting Code of Professional Responsibility).

78. See John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 497 (1979) (attributing rapid adoption of the Code "in no small part to its generally conservative approach.").

79. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 16.

80. See Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute The Fairchild Lecture*, 1995 WIS. L. REV. 1, 19-21 (noting a shift in stating the law as "is" in the First Restatement and declaring the law as it "ought" to be in the Second Restatement). Neither the ABA nor the ALI made law; both were private legal organizations that attempted to use their influence to assist courts and legislatures that made law.

81. Reynolds worked closely with Kutak, and attended all of the formal and informal meetings of the Commission and its members. See email from Daniel Reynolds to author (January 21, 2016, 4:39 p.m.) (on file with author).

and always,' [which] allowed little room for development of the attorney's role as an officer of the court."⁸²

The belief that the Commission needed to orient the lawyer's duties away from the Code's "basic posture" was expressed at the Commission's earliest meetings. For example, the Commission discussed the extent of the lawyer's duty of loyalty to a client at its second meeting, in December 1977.⁸³ The Securities and Exchange Commission's ("SEC") approach in the *National Student Marketing* case⁸⁴ indicated securities lawyers might owe duties to others as well as their clients. The Commission noted that the case suggested, "that at some point a new 'client' may enter the equation: the investing public."⁸⁵

Extending the idea of "client" to an amorphous, possibly indefinable entity called the "investing public" required a re-orienting of the duties of the lawyer. The Commission agreed in December 1977 that its "mission" required it "to confront the 'new law' and 'new ethics' of today and tomorrow."⁸⁶ American lawyers, particularly private practice lawyers, needed to account for "a determinable public interest" when representing private clients.⁸⁷ Although "invocation of the 'public interest' will not solve the question . . . it must certainly become a part of the equation leading to the solution."⁸⁸ This discussion summarized some of the basic precepts of the Commission: first, the Commission had a mission, part of which was to react to the conservatism of the Code by declaring a new law of legal ethics for the benefit of both the public and lawyers. Second, a determinable public interest

82. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 16 (quoting Reporter Geoffrey Hazard). Even though this statement was made near the end of the Commission's meetings, it represents the Commission's ethos from its first meeting in 1977. See *Say Revised Ethics Code Will Be 'Enforceable'*, 65 A.B.A. J. 1283, 1283 (1979) (quoting Commission member Richard Sinkfield, "A lawyer's duty is not solely to protect the confidences of the client. A lawyer has some duty and obligation with respect to the administration of justice, of candor to the court."); MODEL RULES OF PROF'L CONDUCT Chairman's Introduction (AM. BAR ASS'N, PROPOSED FINAL DRAFT 1981 [hereinafter "PROPOSED FINAL DRAFT"]); Spann, *supra* note 3, at 3.

83. See JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 14.

84. For a discussion of the matter, see Michael Ariens, "Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidences, 33 J. LEGAL PROF. 239, 248-50 (2009). After the Commission's discussion, the court issued its opinion in *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

85. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 14.

86. *Id.* It retained this view in the Discussion Draft, see MODEL RULES OF PROF'L CONDUCT Preface (AM. BAR ASS'N, Discussion Draft 1980) [hereinafter "DISCUSSION DRAFT"] (declaring "We have built on the Code's foundation, but we make no apology for having pushed beyond it. In many respects, we have been taken beyond the Model Code by events."); PROPOSED FINAL DRAFT, *supra* note 82, Chairman's Introduction ("Our drafting goal, in keeping with our mission, was to produce standards bottomed on the law as it is but facing the future of a rapidly expanding and changing profession.").

87. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 14.

88. *Id.*

existed and had to be accounted for by all lawyers. Third, resolving the competing interests of a lawyer's client and the public was not an easy task. Fourth, the Commission would attempt to generate rules guiding and regulating lawyer conduct based on drawing the lawyer away from the Code's "basic posture." These ethical precepts were the focus of a significant number of the meetings involving both Reporters. For example, Dean Patterson unveiled a Preliminary Working Draft Code of Professional Standards ("Preliminary Working Draft") at the Commission's third meeting.⁸⁹ The "black letter" rule of Part I, General Principles, began, "The Code of Professional Standards is based on the policy of fairness in the practice of law on the part of both the private and public lawyer."⁹⁰ Immediately below each black letter provision was a "Rationale." The rationale for this opening declaration defined the lawyer's "fundamental task" as "to protect and implement the client's legal rights" "in a manner consistent with 'Equal Justice Under Law.'"⁹¹ It then quoted *People v. Belge*: "an attorney must protect his client's interest, but also m[u]st observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members."⁹²

Belge was a deeply disturbing case for American lawyers. Two Syracuse, New York, lawyers represented Robert Garrow, who was charged with murder. Garrow told them that he had committed other, uncharged murders, and gave his lawyers the rough location of the murder victims' bodies.⁹³ The lawyers eventually searched for and found the remains. They said nothing about their search until after their client testified at trial.⁹⁴ The community was outraged. One of Garrow's lawyers, Francis Belge, was indicted for failing to report the locations of the bodies and for failing to provide the victims with a burial. The trial court dismissed the indictment on attorney-client privilege grounds. On appeal, the court affirmed, but in the statement quoted above, rejected any absolute claim of attorney-client privilege,

89. See PRELIMINARY WORKING DRAFT CODE OF PROFESSIONAL STANDARDS, FEBRUARY 6, 1978 (prepared by Reporter L. Ray Patterson) (on file with author).

90. *Id.* at 1.

91. *Id.*

92. *Id.* (quoting *People v. Belge*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd* 359 N.E.2d 377 (N.Y. 1976)).

93. See RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED 8-26 (2000). For the story as told by Frank Armani, the other of Garrow's lawyers, see TOM ALIBRANDI & FRANK H. ARMANI, PRIVILEGED INFORMATION (1984).

94. ZITRIN & LANGFORD, *supra* note 93, at 17.

and noted that it was not deciding “the ethical questions underlying this case.”⁹⁵

A policy of lawyer “fairness” to society certainly seemed contrary to the profession’s understanding of adversarial ethics, particularly by the late 1970s.⁹⁶ By explicitly linking fairness with the limits of the lawyer’s duty of client loyalty, the Commission was making a significant change in legal ethics. To require lawyers to undertake a “due regard” of the legal system’s necessity to provide justice for the “interests of society and its individual members” was a strong challenge to the Code’s perceived ethos of client loyalty above all else.⁹⁷

This Preliminary Working Draft was, as acknowledged by its author, Reporter L. Ray Patterson, incomplete and occasionally inconsistent. Members voiced some disagreement with parts of the Draft, including the idea of imposing an enforceable duty of pro bono publico⁹⁸ work or requiring a lawyer to accept a client unless good reason existed not to do so.⁹⁹ Commission members urged caution, but did not end such discussion.

By the end of 1978, the Commission noted that the “theme” of its proposed rules regarding the lawyer as advocate was “lawyer autonomy.”¹⁰⁰ Lawyer autonomy meant the “normative rules for advocates, . . . should leave a lawyer free *not* to do what should not be done.”¹⁰¹ Lawyer autonomy was the traditional ideal that the lawyer remained independent of the client.¹⁰² But the other side of lawyer autonomy was the legal authority to do what was not forbidden. This aspect of lawyer autonomy was muted in the Journals. Over some apparent dissent, the Commission concluded that the duty of keeping client con-

95. *Belge*, 376 N.Y.S.2d at 771.

96. See Michael Ariens, *Brougham’s Ghost*, 35 N. ILL. U. L. REV. 263, 307-12 (2015) (noting shift in understanding of the lawyer’s duty of “zealous” advocacy in 1970s).

97. See *id.* at 307-12 (detailing history of ethic of unbridled zealous representation of a client). How far the Commission intended to take this approach was unclear, for Part II of Patterson’s Preliminary Working Draft, titled *The Lawyer and the Client*, largely avoided answering this question. In provision 14, the only “exceptions” to the Duty to Maintain Confidences were client waiver and the vague standard, “as required by law under legal process.” See PRELIMINARY WORKING DRAFT, *supra* note 89, at 32.

98. Pro bono publico, “for the public good.” BLACK’S LAW DICTIONARY 1397 (10th ed. 2014). Pro bono, “Uncompensated, esp. regarding free legal services performed for the indigent or for a public cause.” *Id.*; see also Pro bono, “For the good; used to describe work or services (e.g. legal services) done or performed free of charge.” BLACK’S LAW DICTIONARY 1082 (5th ed. 1979).

99. JOURNALS, WASHINGTON, D.C., FEBRUARY 24-25, 1978, at 25-26 (noting “caution was expressed over any suggestion of rendering *pro bono* practice somehow mandatory”).

100. JOURNALS, SAN FRANCISCO, CALIFORNIA, DECEMBER 14-16, 1978, at 3.

101. *Id.*

102. See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1006-09 (1993) (discussing a tenet of lawyer independence as one of “two justifications of the idea of law as a profession”).

fidences was limited in a number of respects. Relatedly, the Commission did not object to the imposition of a duty on a lawyer to disclose “facts when necessary to correct an earlier misapprehension resulting from the attorney’s action or ‘when required to disclose by law or the rules of professional conduct.’”¹⁰³

After eighteen months of meetings, Commission members were asked what its work told the public. Two answers were, “An authoritative statement that lawyers are responsible to demands beyond those of their immediate clients’; [and] ‘regulation of a private profession in the public interest.’”¹⁰⁴

This discussion continued, with the members concluding that the traditional phrase “officer of the court” meant that a lawyer was “something more than a paid partisan, something more than a mouthpiece, but how much more?”¹⁰⁵ The Commission subsequently noted the related problem of the word “zealous.” “‘Zealous,’ it seems, has curiously come to mean ‘overzealous,’ [and s]trong sentiment was found around the table for dropping ‘zeal’ altogether as a descriptive term with ethical consequences. It carries with it simply too much baggage.”¹⁰⁶

The extent to which the Commission’s proposed rules would affect lawyer behavior unsettled some members. This concern arose when the Commission discussed whether the proposed rules would require a lawyer to warn the client that any perjury committed by the client would be disclosed to the court. As noted by Dan Reynolds, who wrote the Journals, “An underlying uneasiness was also voiced, again, that there is a subtle, or perhaps not so subtle, shift here away from traditional concepts of advocacy toward a concept emphasizing the lawyer’s status as officer of the court—a shift requiring the consideration of the full Commission.”¹⁰⁷ The Commission tentatively decided at its April 1979 meeting that an attorney possessed a duty to reveal perjury to the tribunal and needed to warn a client of the consequences of engaging in perjury.¹⁰⁸

At several 1979 meetings, the issue of requiring pro bono work was raised.¹⁰⁹ Some members noted the “enormous enforcement

103. JOURNALS, SAN FRANCISCO, CALIFORNIA, DECEMBER 14-16, 1978, at 6.

104. JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 12.

105. *Id.*

106. *Id.* at 19-20.

107. JOURNALS, OMAHA, NEBRASKA, JUNE 9-10, 1978, at 19.

108. JOURNALS, ATLANTA, GEORGIA, APRIL 7-8, 1978, at 29.

109. The Committee discussed this issue at its February, April, and June, 1979 meetings. *See* JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 24; JOURNALS, ATLANTA, GEORGIA, APRIL 7-8, 1978, at 13; JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 7.

problems" that might exist, and that such a requirement would bear heavily on "economically marginal practitioners," but the Commission encouraged continued thought on the subject.¹¹⁰ The Commission later "felt [it] necessary to create some mechanism for more fairly distributing the burden of pro bono representation throughout the bar."¹¹¹ Finally, at its June meeting, Commission members first evaluated proposed Rule 9.1, titled *Pro Bono Practice*. Some members strongly approved of a mandatory pro bono requirement "to breathe life into an otherwise high-minded but accusedly ineffective generalized statement of duty," but most "were disinclined to follow the draft approach," and no decision was reached.¹¹² When the working draft was released in August, it included the requirement, "A lawyer shall give forty hours per year to such service, or the equivalent thereof."¹¹³

C. WORKING DRAFT/DISCUSSION DRAFT

1. Working Draft

As promised,¹¹⁴ the Kutak Commission issued a "Working Draft" to a select group for discussion at the ABA Annual Meeting in August 1979. Kutak attempted to temper expectations and criticisms of the working draft when he told reporters that it had "never been voted on by the committee and, in fact, has portions with which a majority disagree."¹¹⁵ Even so, several critics registered strong negative reactions to the working draft. Professor Phillip Schuchman declared, "The commission has failed entirely."¹¹⁶ The Commission was attacked both for the limited nature of the release¹¹⁷ and the proposal's substance. Professor Monroe Freedman also called the working draft "a failure,"¹¹⁸ as well as "radical and radically wrong."¹¹⁹ The American

110. JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 24.

111. JOURNALS, ATLANTA, GEORGIA, APRIL 7-8, 1978, at 13.

112. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 7.

113. See *The Record: Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES, Aug. 27, 1979, at 26, 45 (publishing working draft, including Rule 9.1 *Service to pro bono publico*).

114. See *Commission Bites Bullet on Ethics Code Issues*, 65 A.B.A. J. 887, 888 (1979) (reporting the debate on the Kutak Commission's working draft would take place at the Annual Meeting).

115. Jonathan M. Winer, *Ethics Draft Ignites Uproar*, NAT'L L.J., Aug. 27, 1979, at 1.

116. *Id.* at 12.

117. See *The Ethics of Secrecy*, NAT'L L.J., Sept. 3, 1979, at 16 (suggesting the Commission's limited release demonstrated a lack of transparency).

118. Laura Kiernan, *ABA Keeps Ethics Code Under Wraps in Dallas*, WASH. POST, Aug. 12, 1979, 1979 WLNR 292925.

119. Winer, *supra* note 115, at 1.

Trial Lawyers Association (“ATLA”) resolved to draft its own, competing ethics code.¹²⁰ ATLA chose Freedman to serve as its Reporter.¹²¹

ATLA and Freedman were particularly concerned with the Commission’s decisions concerning the limits of the lawyer’s duty of confidentiality. As the Commission’s Journals made clear, one major goal of the Model Rules was to leave behind the Code’s “basic posture of ‘my client, first, last and always.’”¹²² The result was an apparent emphasis on the limits of a lawyer’s duty to a client rather than the extent of such duty. For example, despite the Commission’s objection to the word “zeal,” Rule 1.4 of the Working Draft was titled “Representing client with zeal.”¹²³ Yet, after declaring in Rule 1.4(a) that the lawyer “shall act with vigor and persistence in representing a client,”¹²⁴ Rule 1.4 continued in subsequent sections and subsections to note the conditions when a lawyer “may decline to pursue a course of action on behalf of a client that the lawyer considers unjust although in conformity with law.”¹²⁵ Rule 1.5 created two occasions when a “lawyer shall disclose information about a client.”¹²⁶ A First Alternative added a third provision in which a lawyer was required to disclose a client confidence,¹²⁷ and a Second Alternative added two circumstances in which a lawyer was permitted, though not required, to disclose a client confidence.¹²⁸

Further, in Working Draft Rule 3.2(a)(4):

120. *Trial Lawyers Group Parts Company with ABA on Ethics Code*, 65 A.B.A. J. 1299, 1299 (1979) (reporting ATLA planned to write code “independent of the ABA Code of Professional Responsibility”); Winer, *supra* note 115, at 1 (noting ATLA’s response to working draft). ATLA is now known as the American Association for Justice.

121. ATLA’s Discussion Draft was published in mid-1980, *see* Commission on Professional Responsibility of the Roscoe Pound-American Trial Lawyer’s Foundation, *The American Lawyer’s Code of Conduct Discussion Draft-June 1980*, TRIAL, Aug. 1980, at 44 [hereinafter “Code of Conduct”]. A revised draft was published in mid-1982, and was again critical of the Kutak Commission’s approach. *See Commission on Professional Responsibility of the Roscoe Pound-American Trial Lawyers Association, The American Lawyer’s Code of Conduct*, TRIAL, July 1982, at 55.

122. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 16 (quoting Reporter Geoffrey Hazard).

123. *See The Record*, *supra* note 113, at 28. The Working Draft was leaked after the uproar at the Annual Meeting, and published in both *Legal Times*, a weekly law newspaper in Washington, D.C., and in the *Daily Report for Executives*, *see* Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. LEGAL PROF. 31, 39 (1982).

124. *See The Record*, *supra* note 113, at 28.

125. *Id.*

126. *See id.* At its August 1979 meeting after the debate, the Commission concluded that “mandatory disclosure of acts amounting to fraud was inappropriate and that such disclosure should be permitted though not actually compelled in all cases and circumstances.” JOURNALS, ASPEN, COLORADO, AUGUST 25-27, 1978, at 23-24.

127. *The Record*, *supra* note 113, at 28-29. This third instance in which a lawyer possessed a duty of disclosure was to “prevent or rectify the consequences of a deliberately wrongful act by the client in which the lawyer’s services are or were involved.”

128. *Id.* at 29.

if a lawyer discovers that evi[d]ence or testimony that the lawyer has presented is false or fabricated, it is the lawyer's duty to disclose that fact and to take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification or fabrication.¹²⁹

This was the Commission's resolution of the lawyer's duty when the lawyer knew a client committed perjury. In Freedman's view, this rule would require lawyers to give clients a "kind of Miranda warning at the outset of their relationship."¹³⁰

Rule 1.8 was titled "Representation of an unpopular or indigent client." The Rule gave lawyers substantial discretion in choosing which clients to represent. However, the commentary admonished lawyers that "important qualifications [exist] on a lawyer's freedom in selecting clients."¹³¹ Finally, Rule 9.1 made pro bono work mandatory.¹³²

The Kutak Commission met again at the end of August 1979. It responded optimistically to criticism: "the heightened level of debate over the issues facing the group was a positive, if unexpected, turn of events."¹³³ The Commission lessened the occasions requiring disclosure of client confidences,¹³⁴ and continued to debate any requirement of mandatory pro bono. On the final day of its August meeting, the Commission agreed to a modified rule regarding pro bono service. This modified rule broadly defined pro bono, included a reporting requirement in lieu of a minimum hours measurement, and permitted a lawyer to meet the rule through a "buy-out" provision.¹³⁵

At the Commission's final meeting, avoiding the word "zeal" led to an effort to avoid its substitute, "vigor."¹³⁶ The Commission found

129. *Id.* at 36.

130. *See Revised Ethics Code, supra* note 82, at 1283 (quoting Freedman).

131. *The Record, supra* note 113, at 31.

132. *Id.* at 45. One unidentified source told the *National Law Journal* that this provision had been rejected in the only informal vote the Commission had taken. *See Winer, supra* note 115, at 12.

133. JOURNALS, SALT LAKE CITY, UTAH, AUGUST 24-26, 1979, at 1.

134. The Commission concluded that "mandatory disclosure of acts amounting to fraud was inappropriate and that such disclosure should be permitted though not actually compelled in all cases and circumstances." JOURNALS, ASPEN, COLORADO, AUGUST 25-27, 1978, at 23-24.

135. JOURNALS, SALT LAKE CITY, UTAH, AUGUST 24-26, 1979, at 30-31.

136. *See The Record, supra* note 113, at 28 (stating in Rule 1.4(a) "A lawyer shall act with vigor and persistence in representing a client"). At its April 1979 meeting, the *Journal* noted, "The search for a less expansive concept than zealotry goes on." JOURNALS, CHICAGO, ILLINOIS, APRIL 27-28, 1979, at 11.

“similar kinds of difficulties with the connotational baggage.”¹³⁷ It replaced “vigor” and “vigorous” with “diligent.”¹³⁸

2. Discussion Draft

The Discussion Draft was officially released on January 30, 1980. Critics attacked. The title of one article suggested the passion of those critical of the Kutak Commission’s work: “ABA Ethics Revision Criticized: Could Destroy Judicial System.”¹³⁹ The *Wall Street Journal* titled an editorial on the Discussion Draft, “A License to Squeal?”¹⁴⁰

The Discussion Draft reaffirmed the Kutak Commission’s view that “lawyers are responsible to demands beyond those of their immediate clients.”¹⁴¹ Some of the most controversial positions in the Working Draft were modified, but its general policies remained in place. For example, a lawyer was required to disclose a client confidence to prevent the death of, or serious bodily harm to, another.¹⁴² The Commission amended but retained the rule that a lawyer was forbidden to “offer evidence that the lawyer is convinced beyond a reasonable doubt is false.”¹⁴³ It also kept the requirement that a “lawyer shall render unpaid public interest legal service.”¹⁴⁴ Rule 1.7(c)(2) permitted a lawyer to disclose harms beyond crimes, which was broader than allowed in the Code. Rule 4.2, which limited the duty of client loyalty in negotiations in favor of a duty of candor to others, was expanded between the Working Draft and Discussion Draft. First, it was titled “Candor toward other parties” in the Working Draft,¹⁴⁵ and broadened to “Fairness to Other Participants” in the Discussion Draft. Second, the Discussion Draft expanded the occasions in which the lawyer’s duty of client loyalty was limited.¹⁴⁶ The Discussion Draft did add an exception to the candor requirement not found in the Working

137. JOURNALS, NEW ORLEANS, LOUISIANA, OCTOBER 26-27, 1979, at 15.

138. *Id.*

139. *ABA Ethics Revision Criticized: Could Destroy Judicial System*, DAILY REC., Jan. 17, 1980, at 6. The article extensively quoted Theodore Koskoff, President of ATLA.

140. Editorial, *A License to Squeal?*, WALL ST. J., Feb. 11, 1980, at 20; see also Editorial, *The Proposed New Code*, NAT’L L.J., Feb. 25, 1980, at 16 (noting “proposals are likely to generate controversy and heated debate within the legal profession.”).

141. JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 12.

142. DISCUSSION DRAFT, *supra* note 86, r. 1.7(b).

143. DISCUSSION DRAFT, *supra* note 86, r. 3.1(a)(3).

144. DISCUSSION DRAFT, *supra* note 86, r. 8.1.

145. *The Record*, *supra* note 113, at 40.

146. *Compare id.* at 40 (listing occasions when lawyer shall be candid with other parties), with DISCUSSION DRAFT, *supra* note 86, r. 4.2 (adding additional instances in which was lawyer’s behavior to another was constrained).

Draft: A criminal defense attorney was not required to correct another's misapprehension if the accused created that misapprehension.

The *Preface* to the Kutak Commission's January 1980 Discussion Draft forthrightly states, "the Commission soon realized that more than a series of amendments or a general restatement of the Model Code of Professional Responsibility was in order. The Commission determined that a comprehensive reformulation was required."¹⁴⁷ When the National Organization of Bar Counsel ("NOBC") issued its August 1980 *Report and Recommendations* attacking much of the Discussion Draft,¹⁴⁸ it quoted and criticized that language. Unfortunately, the NOBC misread "reformulation," as "reformation."¹⁴⁹ The NOBC's mistake is understandable. The Kutak Commission intended a reformation. It perceived its mission as reforming a lagging, possibly ossified and self-interested—if not corrupt—institution. Part of its mission was to "promulgate statements of ethics it believes to be correct but which may not meet with the general approval of the Bar."¹⁵⁰ And teaching lawyers to attend to a "determinable public interest"¹⁵¹ was a prominent theme of the Discussion Draft.

3. Reaction

The Kutak Commission invited reaction to its Discussion Draft. It may have underestimated interest in its proposal. The cover letter inviting comments stated, "We plan to submit a final version of the Rules to the House of Delegates at its February, 1981 meeting."¹⁵²

The Discussion Draft produced an "enormous response."¹⁵³ The written comments received throughout 1980 were compiled by Reporter Geoffrey Hazard and organized in four volumes.¹⁵⁴ Both bar organizations and individuals commented, with widely disparate views and interests.

147. DISCUSSION DRAFT, *supra* note 86, preface.

148. National Organization of Bar Counsel, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (DISCUSSION DRAFT OF JANUARY 30, 1980) at 2 (1980) [hereinafter "REPORT AND RECOMMENDATIONS"].

149. *Id.* at 2.

150. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 16.

151. *Id.*

152. DISCUSSION DRAFT, *supra* note 86, Cover Letter.

153. PROPOSED FINAL DRAFT, *supra* note 82, Chairman's Introduction.

154. See COMPILATION OF COMMENTS ON MODEL RULES OF PROFESSIONAL CONDUCT (4 vols., Geoffrey C. Hazard, Jr., comp. 1980) (on file with author) [hereinafter "COMPILATION"]. The first two volumes were dated June 11, 1980, and the second two volumes dated September 30, 1980. In each case institutional responses comprised the initial volume and individual responses the second volume. In the first two volumes and volume 4, the second set of individual comments, the comments are organized by Rule. In volume 3, the institutional comments are listed in alphabetical order.

The ABA Standing Committee on Legal Aid and Indigent Defendants made a comment that may encapsulate the overarching view of all commentators: “The Model Rules depart from the approach taken in earlier efforts to define the ethical basis for lawyers’ actions. The draft represents a comprehensive and far reaching effort to revise both the conceptual framework and much of the content by which the profession is to regulate its conduct.”¹⁵⁵ Although complimentary of the Commission’s work, this ABA Standing Committee rejected the Commission’s departure from the traditional conceptual framework and substantive content of the Code. The Commission’s rules, if not modified, “are likely to have a substantial adverse impact on the nature of the attorney-client relationship and on the ability to provide clients with effective assistance of counsel.”¹⁵⁶

Many other commenters agreed, and the overall reaction to the Commission’s re-orientation from the Code’s “basic posture” was negative.¹⁵⁷ The Report of the Special Committee of the New Jersey State Bar Association concluded the Preamble to the Discussion Draft “marks a significant departure from the traditional concept that the ‘duty of the lawyer to his client and his duty to the legal system are the same.’”¹⁵⁸ It continued, noting that the Rules properly accounted for the fact that the “lawyer need not act as a ‘mouthpiece’ or as a ‘hired gun.’”¹⁵⁹ But the Draft failed to “achieve an appropriate balance between the need to re-define the traditional role of the lawyer and the need to preserve the lawyer-client relationship.”¹⁶⁰ The Los Angeles County Bar Association registered its “difficulty with the concept of the lawyer as a protector of the public interest, especially at the expense of client confidences.”¹⁶¹

A comment from an individual lawyer put this criticism more passionately. Adoption of the proposed rules would cause “not only chaos but a total obliteration of the traditional adversary system They would totally destroy the very basis of American freedom.”¹⁶²

Many critical comments were made concerning the lawyer’s duty of loyalty to a client. Volume 2 of the Compilation included a number of comments regarding Rule 1.7(b), which required disclosure of a client confidence to prevent another’s death or serious injury. Most sug-

155. See 3 COMPILATION O-40, at 2 (reprinting position of ABA Standing Committee on Legal Aid and Indigent Defendants).

156. *Id.* at 26-27.

157. This might be an expected outcome, for those who concluded the Commission got it right would lack the same incentive to comment.

158. 1 COMPILATION GENERAL COMMENTS, at 8.

159. *Id.* at 10.

160. *Id.* at 11.

161. 3 COMPILATION O-47, at ii.

162. 4 COMPILATION GENERAL COMMENTS, at 2.

gested amending the proposal, sometimes to relax the rule, but occasionally to reinforce it.¹⁶³ Only a few individuals commented on the duty to disclose perjury, one of whom concluded that perjury should not be countenanced at all.¹⁶⁴ In the second set of comments by individuals on Rule 1.7, the tone was more passionate and critical. One lawyer wrote:

At the risk of sounding melodramatic, it is with great sadness that I contemplate a future where, as an attorney, I must read a prospective client a statement similar to that read by an arresting police officer. However, if Section 1.7 is adopted in its present form and is interpreted in the manner most likely, attorneys will have to advise prospective clients that anything they say may be used against them.¹⁶⁵

Institutional concerns were less emotional but often just as critical. For example, the ABA Section on Criminal Justice Committee on Ethical Considerations in the Prosecution and Defense of Criminal Cases offered a lengthy letter, including appendices, which proposed a number of amendments, including eliminating any mandatory disclosure of client confidences.¹⁶⁶ The Banking, Corporation and Business Law Section of the New York State Bar Association rejected Rule 1.7(b) because of "our belief in the paramount importance of the confidentiality between lawyer and client as one of the pillars of our system of justice."¹⁶⁷ The Committee on Professional and Judicial Ethics of the ABCNY issued a preliminary report criticizing the Discussion Draft because the "Model Rules appear to be predicated upon a perceived conflict between the lawyer's role as confidant and zealous representative of the client and the lawyer's duties to society. As a consequence, a number of the Rules mandate disclosure of client confidences."¹⁶⁸ Another committee of the ABCNY, the Committee on Cor-

163. 2 COMPILATION RULE 1.7, at 1-18.

164. 2 COMPILATION RULE 3.1, at 5.

165. See 4 COMPILATION RULE 1.7, at 2; accord 4 COMPILATION RULE 3.1, at 2 ("I am not a criminal lawyer, but the proposed rule requiring disclosure of clients' 'perjury' is objectionable. The attorney thus becomes the jury.").

166. See 3 COMPILATION O-35, at 2-3.

167. See 3 COMPILATION O-53, at 11. This view was recommended in August 1980 by a Special Committee of the New York State Bar Association. See *Report of the Special Committee to Review ABA Draft Model Rules of Professional Conduct*, NEW YORK STATE BAR ASSOCIATION 22 (1981) [hereinafter "New York State Bar"] (rejecting mandatory disclosures in Rules 1.7(b), 3.1(d), 4.2(b) and 6.2(c) (Appendix A)).

168. See Committee on Professional and Judicial Ethics, *Preliminary Report on the ABA Proposed Model Rules of Professional Conduct (January 30, 1980 Draft)*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 7 (1980) [hereinafter "Judicial Ethics"]. The Committee suggested eliminating any mandatory disclosures in Rule 1.7(b), see *id.* at 16, and rejected the view in Rule 3.1 that required disclosure of false testimony by the criminally accused. See *id.* at 37. Accord 3 COMPILATION O-52, at 14 (rejecting duty of disclosure of false testimony by client in favor of allowing client to make unquestioned

porate Law Departments, concluded, “The Model Rules propose a fundamental and undesirable change in the role of the lawyer, mandating disclosure, or expanding the scope of disclosure, of client confidences to an extent that the Committee believes to be unwise.”¹⁶⁹ It specifically urged eliminating any mandatory disclosures in Rule 1.7(b).¹⁷⁰ The Committee on Legal Ethics and Discipline of the American College of Trial Lawyers (“ACTL”) determined Rule 1.7 “would drastically change a client’s right to assume that confidential information will not be revealed by his attorney.”¹⁷¹ The Legal Aid Society of New York concurred: “Taken as a whole, these provisions appear to reflect a shift away from the traditional view of a lawyer’s role as confidant and zealous representative of the client.”¹⁷²

On the other hand, some initial institutional comments supported Rule 1.7(b)’s requirement of mandatory disclosure to prevent death or serious bodily harm to another. The ABCNY’s Committee on Professional Responsibility agreed with the Kutak Commission and thus disagreed with other ABCNY committees.¹⁷³ A majority of the Committee on Legal Aid of the New York State Bar Association “agree[d] that a lawyer should disclose information about a client when it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person.”¹⁷⁴ The Special Committee of the New Jersey State Bar Association found that the “intent and purpose of the Rule [1.7(b)] is appropriate and acceptable,”¹⁷⁵ though it concluded the language of the Rule was dangerously ambiguous.

In sum, the reaction of bar associations to the Commission’s policy requiring disclosure of a client confidence to prevent death or serious bodily harm to another was in some disarray. And those committees were often internally divided.¹⁷⁶

statement); *see also* 3 COMPILATION O-42, at 6 (noting rejection by American College of Probate Counsel of mandatory disclosure requirement in Rule 1.7).

169. *See* Committee on Corporate Law Departments, *Preliminary Report on the ABA Proposed Model Rules of Professional Conduct (January 30, 1980 Draft)*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 68 (1980) [hereinafter “Corporate Law”].

170. *See id.* at 71.

171. 3 COMPILATION O-43, at 16. It also suggested modifying Rule 3.1(f) to allow a lawyer to offer false evidence when it was lawfully demanded by the client and the lawyer was not permitted to withdraw. *See id.* at 39.

172. 1 COMPILATION RULE 1.7, at 7.

173. *See* Committee on Professional Responsibility, *Preliminary Report on the ABA Proposed Model Rules of Professional Conduct (January 30, 1980 Draft)*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, at 77-78.

174. 1 COMPILATION RULE 1.7, at 7.

175. 1 COMPILATION RULE 1.7, at 9.

176. *See, e.g.*, Separate Statement of Stephen Gillers, Committee on Professional and Judicial Ethics, *Preliminary Report*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK at 49, 51 (stating agreement with Kutak Commission on Rule 1.7 and other rules

Rule 3.1 addressed a related issue: the lawyer's duty to disclose a client's false testimony or that the lawyer had unknowingly offered false evidence. It was also the subject of divided bar association comment.¹⁷⁷ The New Jersey Special Committee believed a "lawyer should not be required to offer the perjured testimony or false evidence of his client."¹⁷⁸ The ethics Committee of the ACTL agreed: "We object to subsection (f) insofar as it would require an attorney to offer evidence which he knows to be false."¹⁷⁹ The ethics Committee of the ABCNY disagreed: "The Committee does not agree with the drafters' assumption that disclosure is desirable in a criminal case."¹⁸⁰ The ABA Standing Committee on Legal Aid and Indigent Defendants also rejected the proposed rule: "The Model Rules would better serve the bar and the public if the Rules recognized explicitly that it is an ethical obligation of the lawyer to protect and safeguard clients' constitutional rights."¹⁸¹

Rule 4.2 was another rule that appeared to promote a generalized fairness above client loyalty. It was titled Fairness to Other Participants, and applied to the ethics of negotiation. It began, "In conducting negotiations a lawyer shall be fair in dealing with other participants." Subsections (b) and (c) indicated the ethical limits of negotiating for a client. Both subsections were written in mandatory "shall not" language. This mandatory language meant a lawyer was subject to discipline if he violated the provision. Discussion Draft Rule 4.2(b)(2) created an affirmative duty to others "to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client" in any matter other than when representing the criminally accused. The ABCNY's Committee on Professional and Judicial Ethics objected to Rule 4.2(b), asserting "the incompatibility of the Rule with the adversary system."¹⁸² It called the rule "a fundamental departure from the adversary system."¹⁸³ The ABCNY's Com-

that "seek to reduced adversity, however, modestly, in favor of truth" contrary to view of Committee).

177. See 1 COMPILATION RULE 3.1, at 1-21.

178. See *id.* at 4.

179. 3 COMPILATION O-43, at 37.

180. Judicial Ethics, *supra* note 168, at 37; see also 1 COMPILATION RULE 3.1, at 8 (reporting view of Indiana State Bar Association, which itself delegated review to its Criminal Justice Section, that Rule 3.1(b) was "incomplete and unacceptable").

181. 3 COMPILATION O-40, at 31. The National Legal Aid and Defender Association urged the Commission to substitute proposed Standard 4-7.7 of the ABA Standards Related to the Defense Function (1978 ed.), which did not allow the lawyer to disclose client perjury. See also 3 COMPILATION O-52, at 14.

182. Judicial Ethics, *supra* note 168, at 41.

183. *Id.* In a separate statement, Committee member Stephen Gillers noted his disagreement. See *id.* at 51.

mittee on Corporate Law Departments agreed: "These proposals are objectionable . . . because of ambiguity as to what may be considered fair, unfair, illegal or unconscionable and also because of an inconsistency with the attorney-client relationship."¹⁸⁴ Others also attacked the rule as "seriously objectionable,"¹⁸⁵ for it "would require the lawyer to take a position contrary to the client, and in some cases to disclose confidential information. These are not the purposes of an adversary system."¹⁸⁶ The ABA Standing Committee on Ethics and Professional Responsibility urged Rule 4.2 be abandoned.¹⁸⁷

Individual comments on the mandatory pro bono requirement, Rule 8.1, were almost always negative.¹⁸⁸ Although most lawyers agreed pro bono service should be encouraged, they argued such service should be voluntary rather than mandatory.¹⁸⁹ The American College of Probate Counsel concluded the mandatory pro bono requirement was "objectionable in its reporting requirements and there was some belief that there might be a problem of conflicts of interest if the lawyer were reporting pro bono services to a public agency."¹⁹⁰ The Los Angeles County Bar Association recommended lawyers perform pro bono service, but also concluded such service should be voluntary.¹⁹¹ The National Legal Aid and Defenders Association disagreed, commending "this Commission for its courage to recommend mandatory pro bono services."¹⁹² Even so, it could not support the proposal as written because the definition of such services was too broad.¹⁹³

Two institutions went beyond commenting on the Discussion Draft and offered codes to compete with the Model Rules: ATLA and the NOBC. As promised in its response to the Working Draft, ATLA issued in June 1980 a Public Discussion Draft of *The American Lawyer's Code of Conduct*.¹⁹⁴ Its Reporter, Monroe Freedman, had heavily criticized the Working Draft of the Model Rules, particularly its exceptions to the lawyer's duty to keep a client's confidences. The Code of Conduct kept a Restatement-like style, offering black-letter rules with accompanying commentary and illustrative cases. The Code of Con-

184. Corporate Law, *supra* note 169, at 72.

185. 2 COMPILATION RULE 4.2, at 1.

186. 3 COMPILATION O-47, at 10.

187. 3 COMPILATION O-39, at 13 (re-writing rule which returned to framework of Code).

188. See 2 COMPILATION RULE 8.1, at 1-10; see also 4 COMPILATION RULE 8.1, at 1-17.

189. See 2 COMPILATION RULE 8.1, at 1-10; 4 COMPILATION RULE 8, at 1-5, and RULE 8.1, at 1-10.

190. See 3 COMPILATION O-42, at 13.

191. 3 COMPILATION O-47, at 13.

192. 3 COMPILATION O-52, at 2.

193. *Id.* at 2-3.

194. *Code of Conduct*, *supra* note 121, at 44 *et seq.*

duct took a very different substantive approach to the idea of the lawyer as more than hired gun or mouthpiece. The Preamble of the Code of Conduct clearly indicated the perspective from which its rules were written: "The lawyer serves that most basic individual right, that of personal autonomy—the right to make those decisions that most affect one's own life and values."¹⁹⁵ Because the lawyer served the client, the emphasis of the Code of Conduct was to foster client autonomy. The Code of Conduct never required a lawyer to disclose a client confidence. It offered two Alternatives concerning the occasions when a lawyer possessed the discretion to disclose a confidence. Alternative B gave the lawyer such discretion in just two circumstances: 1) when "required to do so by law"; and 2) "to the extent necessary to defend against formally instituted charges of criminal conduct, malpractice, or disciplinary violation brought against the lawyer."¹⁹⁶ Alternative A was a bit broader, allowing the lawyer to disclose a client confidence when, in a pending case, the lawyer knew a judge or juror had been bribed or extorted,¹⁹⁷ and "when the lawyer reasonably believe[d] that divulgence [wa]s necessary to prevent imminent danger to human life."¹⁹⁸ The Comment to this section acknowledged that both Alternatives "[we]re more protective of confidentiality than are the Code of Professional Responsibility or the ABA's Model Rules."¹⁹⁹ A number of Illustrative Cases that followed the Comment indicated the extent to which this Code protected client autonomy. Freedman stated a lawyer committed a disciplinary violation in revealing the client's perjury in a civil deposition, as well as in having the criminal defendant give a narrative statement during direct examination when his lawyer knew he was giving false testimony.²⁰⁰ In any civil or criminal case, if a client informed a lawyer that he planned to testify falsely, it was the lawyer's duty, when withdrawal was unavailable, to "present[] the client's testimony in the ordinary manner, and refer[] to it in summation as evidence in the case."²⁰¹ The Illustrative Cases went further, using *People v. Belge*. First, the Code of Conduct vindicated the actions of Robert Garrow's attorneys, who did not disclose the locations of the bodies of his murder victims until after Garrow testified at his trial for another murder. Second, it held that disclosing the location of the remains to the victims' parents was a disciplinary violation, implicitly because this disclosure could or would be

195. *Id.* at 48.

196. *Id.* at 50.

197. *Id.*

198. *Id.*

199. *Id.* at 51.

200. *Id.* at 52.

201. *Id.*

traced from the lawyer back to the client and place the client in further criminal jeopardy. Third, if the lawyer found the female victim alive but seriously injured “and unable to help herself or to get help,” and anonymously called an ambulance to help save her life, no violation existed under Alternative A.²⁰² By implication, of course, this action would be a disciplinary violation under Alternative B. The lawyer would also apparently commit a disciplinary violation when he called authorities anonymously if the seriously injured victim was able to help herself, for even an anonymous landline call (this being 1980) might be traceable back to the lawyer, and through him, to his client.

The NOBC took the opposite tack, both structurally and substantively. As a structural matter, the NOBC objected to the Kutak Commission’s decision to scrap the format of the Code in favor of a Restatement-like approach.²⁰³ It declared that a change in the format “would seriously impair the acceptability and effectiveness of a Model Code.”²⁰⁴ Its proposal amended the Code, using material from the Discussion Draft to aid its work. Substantively, the NOBC rejected ATLA’s libertarian model. It urged the Kutak Commission to make lawyers even more responsible to the demands of the public. For example, it accepted the mandatory disclosure requirement of Discussion Draft Rule 1.7(b),²⁰⁵ but wanted to retain the provision in the Code allowing a lawyer to disclose the “intention of his client to commit a crime,” which the Rules had eliminated.²⁰⁶ Additionally, the NOBC kept the more specific Code rule, DR 7-102(A)(4), which stated that a lawyer shall not “[k]nowingly use perjured testimony or false evidence.”²⁰⁷ The NOBC also rejected Discussion Draft Rule 3.1(f)(3), which required a criminal defense lawyer to offer “evidence regardless of belief as to whether it is false if the client so demands and applicable law requires that the lawyer comply with such a demand.”²⁰⁸ It rejected Discussion Draft Rule 4.2 requiring a lawyer in negotiations to “be fair in dealing with other participants,” not because it rejected a duty of fairness, but because the rule “has left out the requirement of courtesy.”²⁰⁹ Finally, it rejected the mandatory pro bono rule due to the “extremely burdensome” enforcement problems of any rule mandating pro bono service, as well as the absence of any standard by

202. *Id.*

203. REPORT AND RECOMMENDATIONS, *supra* note 148, at 2, 99.

204. *Id.* at 2.

205. “The Kutak Commission recognized the needed exception where a client intends to commit an act resulting in death or serious bodily harm.” *Id.* at 33.

206. *Id.* at 33, 76.

207. *See id.* at 51, 56.

208. DISCUSSION DRAFT, *supra* note 86, r. 3.1(f)(3).

209. REPORT AND RECOMMENDATIONS, *supra* note 148, at 91.

which enforcement authorities could determine whether the rule had been violated.²¹⁰

On October 2, 1980, at Robert Kutak's request, ABA President William Reece Smith decided, "as a result of extensive criticism of the proposed Model Rules," to extend consideration of the proposed Rules for a year.²¹¹ This delayed the ABA House of Delegates' consideration of the rules to its annual meeting in August 1982.²¹²

4. Proposed Final Draft

Kutak wrote a lengthy introduction to the May 1981 Proposed Final Draft of the Model Rules. He reaffirmed and defended the Commission's decision to use a Restatement approach.²¹³ The reasons for doing so included convenience "to the average practitioner,"²¹⁴ and "substantive considerations as well."²¹⁵ The Code too often used Ethical Considerations as commentary on Disciplinary Rules.²¹⁶ Of "greater concern" was the fact that "many Ethical Considerations . . . may be viewed as incorporating obligations under law beyond the Code."²¹⁷ Overstating the case, Kutak concluded, "The law of professional responsibility is as balkanized now as it was under the 1908 Canons."²¹⁸

Kutak acknowledged the influence of the Discussion Draft comments on the Commission's substantive work. He noted the pro bono

210. *Id.* at 94.

211. See *Section Council Opposes Kutak Model Rules*, LITIG. NEWS, Jan. 1981, at 1. In a letter dated October 9, 1980, Kutak stated, "I have proposed to Reece Smith that our timetable be extended one year." See Letter from Robert J. Kutak to Dear Colleagues (Oct. 9, 1980) (on file with author).

212. *Id.*

213. The House of Delegates approved the Restatement approach at its 1982 Mid-year Meeting. See *The Midyear Meeting - House of Delegates*, 107 A.B.A. ANN. REP. 273, 301 (1982). In a letter, Kutak listed the bar organizations that supported and opposed the Restatement format. He listed eight that explicitly supported it, eight that supported it but filed no statement explicitly saying so to the ABA, and 17 opposed. See Letter from Robert J. Kutak to Dear Colleagues, at 1-2 (Nov. 25, 1981) (on file with author).

214. PROPOSED FINAL DRAFT, *supra* note 82, Chairman's Introduction.

215. *Id.*

216. *Id.*

217. *Id.* This explanation did not satisfy the Special Committee to Review ABA Draft Model Rules of Professional Conduct of the New York State Bar Association. See *New York State Bar*, *supra* note 167, at 5 (noting "decision to adopt the Restatement format is remarkable in light of the fact that the ALI authors of the various Restatements have emphatically expressed their view that the Restatement format is inappropriate to the adoption of codes intended to have the force of law."); see also *id.* at 6-7 (rejecting reasons of convenience and uncertain standards as illusory benefits).

218. PROPOSED FINAL DRAFT, *supra* note 82, Chairman's Introduction. To placate critics, he noted that the Commission was concurrently publishing "a companion document couched as nearly as possible in the format of the current Code." *Id.*

requirement had been removed,²¹⁹ and that the rule regarding client confidences (renumbered from Rule 1.7 to 1.6 in the Proposed Final Draft), “both broadens the general rule of confidentiality and narrows its exceptions.”²²⁰ Rule 1.6(b)(2) gave the lawyer discretion to disclose a client confidence the lawyer believed “is likely to result in death or substantial bodily harm.”²²¹ The Commission may have attempted to ameliorate this change by adding language allowing a lawyer to disclose a client confidence to prevent “substantial injury to the financial interest or property of another.”²²² Making life and property equivalent was pouring salt into the wound for those, such as the NOBC, supportive of the mandatory Discussion Draft rule.

Kutak did not discuss the changes made to rules concerning the duty of the lawyer to third persons in negotiations. The words “fair” and “fairness” disappeared from Proposed Final Draft Rule 4.1 and its commentary (renumbered from 4.2 in the Discussion Draft). Instead, Rule 4.1 created a legalistic standard. The Comment to Proposed Final Draft Rule 4.1(b) provided examples in which a lawyer knowingly failed to “disclose a fact to a third person.”²²³ Each of the four examples suggested that the failure to disclose exposed the lawyer to civil or criminal liability. In this light, Rule 4.1(b) appeared designed more to protect the lawyer of a devious client than the interests of a third person. Rule 4.4, Respect for Rights of Third Persons, made this clearer. The lawyer was to avoid violating the legal rights of third persons, from opposing counsel to witnesses to those from whom evidence might illegally be taken.²²⁴

Even when the Commission retained a controversial rule concerning the lawyer-client relationship, it modified its approach and language. Kutak explained the Commission’s decision to require lawyer disclosure of “a client’s surprise perjury” as rooted in the “majority view compelling such disclosure.”²²⁵ But, due to the “considerable uncertainty surrounding the proper constitutional standard,”²²⁶ the Commission added to the Proposed Final Draft (now Rule 3.3) a “CAVEAT: CONSTITUTIONAL LAW DEFINING THE RIGHT OF AS-

219. *Id.* Kutak reported that Commission members Thomas Ehrlich and Jane Frank-Harman “would be recorded as favoring our initial position.” *Id.* Rule 6.1 encouraged lawyers to “render public interest legal service,” but eliminated any duties accompanying this encouragement. See PROPOSED FINAL DRAFT, *supra* note 82, r. 6.1.

220. *Id.*; see also PROPOSED FINAL DRAFT, *supra* note 82, r. 1.6 (couching all exceptions to the rule requiring the lawyer to keep client confidences in the permissive).

221. PROPOSED FINAL DRAFT, *supra* note 82, r. 1.6(b)(2).

222. *Id.*

223. See PROPOSED FINAL DRAFT, *supra* note 82, r. 4.1(b) cmt.

224. PROPOSED FINAL DRAFT, *supra* note 82, r. 4.4 cmt.

225. PROPOSED FINAL DRAFT, *supra* note 82, Chairman’s Introduction.

226. *Id.*

SISTANCE OF COUNSEL IN CRIMINAL CASES MAY SUPERSEDE THE OBLIGATIONS STATED IN THIS RULE.”²²⁷ The caveat was wholly unnecessary, for constitutional law mandates always trump ordinary legislation. Creating a fully capitalized caveat rather than adding a sentence or paragraph to the Comment was to try to have it both ways: to maintain its position and to placate critics.²²⁸ The Comment on False or Fabricated Evidence in the Proposed Final Draft was also softened. In the Discussion Draft, the Comment concluded that “it is settled that an advocate must disclose the client’s deception to the court or to the other party.”²²⁹ In the Proposed Final Draft, the Comment was altered to “the rule generally recognized is that, if necessary to rectify the situation,” the lawyer was bound to disclose.²³⁰

Finally, Kutak noted, “Another major area of concern was the lawyer’s role as advocate in an adversary system.”²³¹ He defended the Commission’s conclusions. After arguing “that a lawyer is a representative of a client but also an officer of the court,” and thus owes “a duty of candor to the court and one of loyalty to the client,” a number of questions remain: How should this conflict be resolved? What are the lawyer’s duties to the court? What are the limits of duty to a client? Does a client have a right to use illegal or wrongful means to gain his objectives? Does a client have a right to the assistance of a lawyer in the process?²³²

Framing his questions in this manner suggested the continuing allure of creating a set of rules that embraced the view that “lawyers are responsible to demands beyond those of their immediate clients.”²³³ All but the first of these five questions was biased in favor of adopting limits on the duty of client loyalty. As posed, the questions broadly called for an understanding of “a determinable public interest.”²³⁴ These questions were more difficult to answer because the

227. PROPOSED FINAL DRAFT, *supra* note 82, r. 3.3.

228. In the Comment to Perjury by a Criminal Defendant, the Proposed Final Draft stated: “The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the *lawyer knows* that the testimony is perjurious.” PROPOSED FINAL DRAFT, *supra* note 82, r. 3.3 cmt. The Discussion Draft had used a slightly less stringent test in its commentary: “The most difficult situation therefore arises in a criminal case where the accused insists on testifying when it is *plain to the lawyer* that the testimony will be perjurious.” DISCUSSION DRAFT, *supra* note 86, r. 3.1 cmt.

229. *Id.*

230. PROPOSED FINAL DRAFT, *supra* note 82, r. 3.3 cmt.

231. PROPOSED FINAL DRAFT, *supra* note 82, Chairman’s Introduction.

232. *Id.*

233. JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 12.

234. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 14.

Proposed Final Draft had bent toward the Code's "basic posture of 'my client, first, last and always.'"²³⁵ By mid-1981, the Commission was attempting to hold on to whatever gains it had made in reminding lawyers of their duty to the public as well as their clients.

IV. THE END OF OPTIMISM

A. DISCOVERY ABUSE

In 1976, the Judicial Conference of the United States Conference of Chief Justices and the ABA held a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.²³⁶ It was a celebration of and rumination on Roscoe Pound's famous speech to the ABA in 1906,²³⁷ and known as the Pound Conference. The opening speech by Chief Justice Warren Burger offered nine "areas of concern" about which "we must probe for fundamental changes and major overhaul rather than simply 'tinkering.'"²³⁸ None involved remedying poor lawyer behavior.²³⁹ None of the other ten published speeches focused on bad lawyers.²⁴⁰ Excessive lawyer conduct was discussed briefly in just two essays.²⁴¹ One of those essays did use the word "abuse" in discussing the work of lawyers in pretrial discovery. Even then, the author specifically limited such abuse to complex civil cases.²⁴² One author-judge later declared, "Abuse in the use of discovery was a major concern at the Pound Conference,"²⁴³ but that was apparently only true in a small number of cases.

235. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 16 (quoting Reporter Geoffrey Hazard).

236. See 70 F.R.D. 79 (1976). A discussion of the path from the Pound Conference to the 1983 amendments is beyond the scope of this paper. For a skeptical view, see Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

237. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. REP. 395 (1906).

238. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-95 (1976).

239. Burger mentioned the negative view of lawyers only in the context of the ability of a "handful" to mar the reputation of the great majority. See *id.* at 92.

240. One essay lamented the obligation of the criminal defense attorney to "raise every conceivable objection," but viewed that approach as merely a way to inoculate the lawyer from a later charge of malpractice. See Walter E. Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 170 (1976).

241. Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976). One other speech mentioned the problem of civil discovery in broad terms. See Simon H. Rifkind, *Are We Asking too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

242. Kirkham, *supra* note 241, at 202.

243. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1977).

A post-Pound Conference paper written in 1977 by federal judge William H. Becker concluded that abusive discovery by lawyers in recurring civil cases was rare: "it is a tribute to the good sense and the good faith of the Bar that the necessity for judicial action in an ordinary conventional civil case is an exceptional occurrence."²⁴⁴ Federal Judge Milton Pollack, writing in 1978, agreed: "Few, if any, abuses of discovery exist in connection with ordinary litigation."²⁴⁵

Yet by 1983 the Federal Rules of Civil Procedure were twice amended to remedy the problem of discovery abuse, including adding a provision to Rule 11 allowing the court to sanction lawyers.²⁴⁶ What happened?

Between the Pound Conference and 1980, more lawyers and judges argued discovery abuse had infected ordinary civil cases. ABA President William Spann wrote in his monthly *ABA Journal* column that discovery abuse was a cause of court congestion.²⁴⁷ In the Spring 1978 issue of *Litigation*, a quarterly magazine of the ABA Section on Litigation, federal judge John F. Grady attacked the increase in litigation costs, which he placed at the feet of lawyers.²⁴⁸ In Grady's view, "Much pretrial work is done primarily for the purpose of generating fees."²⁴⁹ Many in the legal profession agreed with the 1980 Report of the Special Committee for the Study of Discovery Abuse of the ABA Section on Litigation: "The special committee continues to believe that there is serious and widespread abuse of discovery."²⁵⁰ The complaints continued. A lawyer opened a 1981 essay by stating, "Discov-

244. *Id.* at 277; accord Peter Gruenberger, *Discovery from Class Members: A Fertile Field for Abuse*, *LITIGATION*, Fall 1977, at 35.

245. Judge Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1978). This was also the view taken by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States: "abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases." *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 332 (1979).

246. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521 (1980); *Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983).

247. Wm. B. Spann, Jr., *President's Page*, 64 A.B.A. J. 157, 157 (1978).

248. John F. Grady, *Trial Lawyers, Litigators, and Clients' Costs*, *LITIGATION*, Spring 1978, at 5.

249. *Id.* at 58. He also noted that "featherbedding practices" were a basic problem of ethics, which could be improved only "from changing attitudes and determined effort on the part of concerned lawyers and judges." *Id.*

250. Philip H. Corboy, *Second Report of the Special Committee for the Study of Discovery Abuse (January 1980)*, *LITIG. NEWS*, Apr. 1980, at 9, 10. Justice Powell, dissenting from the decision to forward to Congress the 1980 amendments for approval, quoted that language in agreement. See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. at 521 (Powell, J., dissenting) (quoting ABA Section of Litigation, *SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE* (1980)).

ery has become an instrument of abuse and oppression,” a situation “caused” by lawyers.²⁵¹

The Kutak Commission did discuss briefly the ethics of lawyer behavior in pretrial discovery matters. The first such mention in the *Journal* is during its June 1978 meeting. The Commission discussed whether “dilatatory tactics” by lawyers should be subject to a standard of concededly “questionable enforcement value.”²⁵² It made no recommendations, and the issue was not again touched upon before the Discussion Draft was issued in January 1980.

In a 1980 case, Judge Grady excoriated the lawyers representing AT&T in a memorable exhortation: their conduct was “disgraceful . . . the worst possible example that one could find of all the things that we all decry so much about what the so-called litigators are doing to the court system of this country.”²⁵³ He continued:

Every time I look at something that AT&T has done in this case by way of pretrial discover[y] . . . I come away with a feeling of depression that I find difficult to describe to you and I hope that you have some sense of shame for what you have done in this case.²⁵⁴

Shame is predicated on the idea of honor. Honor is conferred by a community to one whose actions conform to the values held in that community, and shame is reserved for those who fail to act honorably.²⁵⁵ The claim of the duty of client loyalty required a lessening (or even severing) of any duty to “the court system.” In this world, one lawyer’s discovery abuse was defended as another’s due diligence on behalf of the client. The Discussion Draft intended to create enforceable limits to such behavior. Such limits had been subject to “extensive criticism,” and in the Proposed Final Draft the Commission had largely reversed itself. It was no wonder that L. Ray Patterson, the Kutak Commission’s first Reporter, declared in a 1980 essay, “The prevailing notion among lawyers seems to be that the lawyer’s duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer.”²⁵⁶

251. Weyman I. Lundquist, *Trial Lawyer or Litigator*, LITIGATION, Summer 1981, at 3.

252. JOURNALS, OMAHA, NEBRASKA, JUNE 9-10, 1978, at 7.

253. Timothy S. Robinson, ‘Discovery’ Cases Abuse Due Process, WASH. POST, May 19, 1980.

254. *Id.*

255. See generally BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH (1982). I discuss the importance of honor in David Hoffman’s concept of legal ethics in Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 594-98 (2014).

256. L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 918 (1980).

B. "A DETERMINABLE PUBLIC INTEREST"

The earliest meetings of the Kutak Commission embraced a vision of lawyering requiring the private practice lawyer to take into account "a determinable public interest" when representing one's clients.²⁵⁷ That vision was not unique to the Commission: it was consonant with the ABA's shift to an outward-looking body strongly supportive of lawyer service in the public interest.

Chief Justice Burger's opening address at the 1976 Pound Conference praised the ABA for moving from an "elite group that reacted with hostility to Pound in 1906 into a progressive body composed of 210,000 representative lawyers."²⁵⁸ For those who believed President Richard Nixon's nomination of Burger to the Supreme Court was a conservative response to the liberalism of the Warren Court,²⁵⁹ Burger's praise of the ABA's progressivism appears out of place. It was not. Praise for progress remained commonplace.²⁶⁰ This was largely due to the embrace by many influential lawyers and judges, including in part Chief Justice Burger,²⁶¹ of "legal liberalism."²⁶²

Legal liberalism was the view that lawyers and courts could bring about needed social reform.²⁶³ Its foundation was the 1954 decision in *Brown v. Board of Education*,²⁶⁴ and more generally, the decisions of the Warren Court from 1963-69.²⁶⁵ It was exemplified by the program

257. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 14.

258. Burger, *supra* note 238, at 87.

259. See, e.g., VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983).

260. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 23 (2008) (noting support of the ABA and other establishment institutions to "liberalize the legal profession" due to fact that "[b]y the 1960s, liberalism had become the philosophy of the middle ground"). Legal liberalism also fit comfortably within the Great Society, which echoed through much of the 1970s.

261. Burger was quoted as chastising "young people who go into the law primarily on the theory that they can change the world by litigation in the courts," LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 64 (1999) (quoting DAVID BRODER, *CHANGING OF THE GUARD: POWER AND LEADERSHIP IN AMERICA* 235 (1980)). On the other hand, he threatened to resign his Chief Justiceship if Richard Nixon appointed any one of six desultory nominees publicly leaked to replace Hugo Black or John Marshall Harlan II in late 1971. Nixon's alleged response to Burger was "Fuck him. Fuck the ABA." See RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 605 (2008). But Nixon acquiesced in major part, nominating former ABA president Lewis F. Powell, Jr., and William H. Rehnquist to replace Black and Harlan. See OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1148 (2d ed., 2005). Burger rejected some of the broader implications of legal liberalism, but wrote for the Court in the racial desegregation/busing case of *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

262. See generally KALMAN, *supra* note 261.

263. *Id.* at 2.

264. 347 U.S. 483 (1954).

265. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 207 (2000) (titling the section on the Court in that period as "History's Warren Court").

of legal services for the poor (LSP) and the view of Sargent Shriver and others on the capacity of the legal system to generate positive social change. By 1970, radical lawyers contemplated rejection of legal liberalism.²⁶⁶ Few prominent lawyers promoted conservatism, with the echo of disgraced 1950s McCarthyism.²⁶⁷ Liberal legalism seemed a middle way between radicalism and “far right” conservatism. The ABA and other elites fostered legal liberalism through claims for the primacy of law during Watergate.²⁶⁸ Earlier the ABA championed “new public interest lawyers,”²⁶⁹ as proposed by Yale law students. This effort was another part of the ABA’s decade-old support for expanded civil legal services for the poor.

In 1963, after meeting with President Kennedy, a group of elite and civil rights lawyers created the Lawyers’ Committee for Civil Rights Under Law.²⁷⁰ The principal goal of the Lawyers’ Committee was to serve as a liaison between lawyers and government and between local lawyers and national experts to aid the civil rights movement.²⁷¹ The co-chairmen of the Lawyers’ Committee were Harrison Tweed²⁷² and Bernard “Bernie” Segal.²⁷³ Tweed was a founding and named partner of the large New York law firm of Milbank, Tweed,

266. See Ariens, *supra* note 15, at 161-67 (discussing rise of “movement” lawyers, those who supported the civil rights, student and anti-Vietnam War movements, and who were estranged from liberal solutions to social problems).

267. See AUERBACH, *supra* note 73, at 7 (noting that during Cold War lawyers “not only permitted but encouraged the sacrifice of the rights of politically unpopular lawyers and defendants to public (and professional) hysteria.”); see also *id.* at 237-39 (noting ABA proposed loyalty oaths and worked otherwise to drive “Communist” lawyers from the profession). For a corrective, see Rebecca Roiphe, *Redefining Professionalism*, 26 U. FLA. J.L. & PUB. POL’Y 193, 221-29 (2015) (noting internal dissent within ABA in 1950s regarding Cold War threats and McCarthy).

268. See Jonathan Simon, *Law after Society*, 24 L. & SOC. INQ. 143, 173 (1999) (noting Watergate “crisis and its result seemed a striking victory for both the left and for legal liberalism in particular”); see also text accompanying note 62; Alexander Bickel, *Watergate and the Legal Order*, COMMENTARY, Jan. 1974, at 19 (noting danger of making law primary to all other social goods).

269. Robert Borosage et al., *The New Public Interest Lawyers*, 79 YALE L.J. 1069-70 (1970).

270. See CONNELL, *supra* note 46, at 74-114 (discussing creation and early development of Lawyers’ Committee); see also ADVANCING THE LAW, *supra* note 5, at 9 (discussing creation of Lawyers’ Committee and its relation to creation of ABA Section of Individual Rights and Responsibilities).

271. CONNELL, *supra* note 46, at 102-05.

272. On Tweed, see Robert MacCrate, *Tweed, Harrison*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 555; Roger K. Newman, *Tweed, Harrison*, in DICTIONARY OF AMERICAN BIOGRAPHY, SUPPLEMENT EIGHT 1966-1970, at 662 (John A. Garraty & Mark C. Carnes eds., 1988); *Harrison Tweed, Lawyer and Civic Leader, Dead*, N.Y. TIMES, June 17, 1969, at 47.

273. On Segal, see Arlin M. Adams, *Segal, Bernard G.*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 488; *Bernard G. Segal*, 129 U. PENN. L. REV. 1023 (1981).

Hadley and McCloy. He was a long-time legal aid proponent²⁷⁴ and the “most democratic of aristocrats.”²⁷⁵ Among other public service activities, Tweed served three terms as President of the ABCNY. In his 1945 inaugural address he asked the audience to “engage more whole-heartedly . . . in things which concern the public good.”²⁷⁶ Segal was a founding and named partner of a large Philadelphia firm. As one biographer wrote, “Segal was a passionate advocate for his clients, for the legal profession and judiciary, and for the rights of the poor and disadvantaged.”²⁷⁷ Segal was an active ABA member who served as ABA President in 1969.²⁷⁸ A tribute by lawyer William T. Coleman, Jr., praised Segal for emulating Louis Brandeis’s practice of serving as “counsel for the situation,” a lawyer who acted to resolve problems beyond simply the legal needs of his client.²⁷⁹

The ABA created a Special Committee on Civil Rights and Racial Unrest to draft a resolution concerning civil rights after the Kennedy meeting.²⁸⁰ The ABA then adopted the Special Committee’s recommendation.²⁸¹ That same year, Lewis Powell²⁸² became President of the ABA. Two of his three priorities were creating a committee to draft a new ethics code and expanding legal services available to the poor through increased private funding.²⁸³ The Wright Committee

274. See JOHNSON, JUSTICE AND REFORM, *supra* note 26, at 8 (quoting Tweed, “Anybody who has had anything to do with legal aid knows that local bar associations do not always rally to a man in a fight to the finish for the establishment of adequate service to the poor.”). Tweed was criticized by a Ford Foundation-supported entity, Mobilization for Youth, for suggesting civil legal needs of the poor had lessened between the 1920s and 1960s). See *id.* at 46 (quoting deputy director of Mobilization for Youth).

275. *Id.* at 556.

276. *Id.*

277. Adams, *supra* note 273, at 488.

278. Arlin M. Adams, *Bernard G. Segal*, 129 U. PENN. L. REV. 1023, 1026-27 (1981). He also served as President of the American College of Trial Lawyers in 1964, an elite and national organization of lawyers. See *id.* at 1027; see generally MARION A. ELLIS & HOWARD E. COVINGTON, JR., SAGES OF THEIR CRAFT: THE FIRST FIFTY YEARS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (2000).

279. William T. Coleman, Jr., *Bernard G. Segal: Lawyer for the Situation*, 129 U. PENN. L. REV. 1035 (1981). Coleman himself is a well-known and highly-regarded lawyer. See Louis H. Pollak, *Coleman, William Thaddeus, Jr.*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW at 123. On Brandeis and the “counsel for the situation,” see John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965); see generally MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009).

280. ADVANCING THE LAW, *supra* note 5, at 10.

281. *House of Delegates Proceedings*, 89 A.B.A. ANN. REP. 395-96424 (1964) (adopting resolution to implement principles stated in Special Committee’s Report); see also *Report of the Special Committee on Civil Rights and Racial Unrest*, 88 A.B.A. ANN. REP. 614 (1963). William B. Spann, Jr., was a member of this Committee.

282. On Powell, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994).

283. *Sessions of the Assembly at the Annual Meeting of 1964*, 89 A.B.A. ANN. REP. 348, 364 (1964) (listing three priorities, the last of which concerned the representation of indigents charged with committing a crime).

drafted the Code of Professional Responsibility adopted by the ABA. Expanding civil legal services for the poor soon changed in dimension.

In fall 1964, the newly-created Office of Economic Opportunity (“OEO”), located in the executive branch and directed by Sargent Shriver, began considering creating a federal program of civil legal services for the poor.²⁸⁴ Powell was quickly persuaded of its benefits. He persuaded a somewhat reluctant House of Delegates to support the program. It did so in a unanimous vote in February 1965.²⁸⁵

Once the ABA decided to support the LSP, it was all-in. Lawyers working in the LSP program were engaged in significant law reform efforts by 1968.²⁸⁶ California Senator George Murphy introduced in October 1969 an amendment (the Murphy Amendment) “to prevent legal services programs from handling cases against governmental agencies and officials and from engaging in test cases, both of which are integral parts of the national OEO legal services program.”²⁸⁷ The ABA Section on Individual Rights and Responsibilities took the lead in organizing ABA opposition to the Murphy Amendment. The Section was created by the ABA in 1966 to supplant the Special Committee on Civil Rights and Racial Unrest.²⁸⁸ It adopted a resolution opposing the Murphy Amendment for ABA approval.²⁸⁹ ABA President Bernie Segal cajoled the board of governors into unanimously approving the resolution,²⁹⁰ and the ABA succeeded in killing the Murphy Amendment.²⁹¹ One early assessment concluded the ABA was “instrumental in defending [the LSP] from attacks which in effect

284. See JOHNSON, *JUSTICE AND REFORM*, *supra* note 26, at 39–43.

285. See *generally id.* at 49–70; see also TELES, *supra* note 260, at 32–34 (discussing ABA’s decision to support federal civil legal aid program); JEFFRIES, POWELL, *supra* note 282, at 197–201 (noting Powell’s influence in obtaining support by House of Delegates for legal services program). *House of Delegates Proceedings*, 90 A.B.A. ANN. REP. 95, 110–11 (1965) (noting vote).

286. JOHNSON, *JUSTICE AND REFORM*, *supra* note 26, at 192; see also STOSSEL, *supra* note 65, at 441 (listing March 17, 1967 as the date law reform was made the top priority of the LSP).

287. John D. Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A. J. 329, 329 (1970). This was the second time Murphy introduced his amendment; see also JOHNSON, *JUSTICE AND REFORM*, *supra* note 26, at 219–33.

288. See *ADVANCING THE LAW*, *supra* note 5, at 10.

289. See *Report No. 3 of the Section of Individual Rights and Responsibilities*, 95 A.B.A. ANN. REP. 390, 390 (1970) (noting Committee led “the fight to defeat the Murphy Amendment which would have placed crippling restrictions on the legal services programs of the nation.”).

290. JOHNSON, *supra* note 26, at 224 (noting Segal’s persuasive skills and quoting resolution).

291. See Editorial, *Defeat of the Murphy Amendment*, 56 A.B.A. J. 244, 244–45 (1970); see also F. RAYMOND MARKS WITH KIRK LESWING & BARBARA A. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 186 (1972).

were saying that the reform elements of the program were either too controversial or too effective.”²⁹²

The ABA was not an outlier. President Richard Nixon, through his appointee as head of OEO, Donald Rumsfeld, had told LSP staff in May 1969 that “we support Legal Services.”²⁹³ In November, Rumsfeld testified before Congress and gave a “full-throated defense of law reform including the kinds of cases Senator Murphy had made clear he was intent on quashing.”²⁹⁴ In addition, nearly all of the organized bar joined the ABA in opposing the Murphy Amendment, and most agreed that LSP should engage in law reform as part of providing “a full spectrum of services.”²⁹⁵

The approach of the LSP thus departed from the traditional idea that lawyers acted in service of their clients’ needs. To allow LSP lawyers to go beyond that model and engage in law reform efforts “invited [LSP lawyers] to become ‘lawyers for the situation’ and not merely advocates for the immediate client and his immediately articulated needs.”²⁹⁶ This invitation led to resistance by some state and local governmental officials sued by LSP lawyers.²⁹⁷ One example involved the funding controversy between California Governor Ronald Reagan and California Rural Legal Aid.²⁹⁸

Shortly after defeat of the second Murphy Amendment, Jerome Shestak,²⁹⁹ chairman of the ABA Section on Individual Rights and Responsibilities, successfully obtained funding from the Ford Foundation for a proposal that involved “‘the higher calling of law’—the obligation of lawyers to become involved in the overriding concerns of society.”³⁰⁰ The Section, Ford, and the ABA Board of Governors eventually agreed on a project aiding interested private law firms that wished to create “public interest branches of their firms.”³⁰¹

292. *Id.* at 186.

293. JOHNSON, ESTABLISH JUSTICE, *supra* note 26, at 208.

294. *Id.* at 231.

295. Robb, *supra* note 287, at 331.

296. MARKS, *supra* note 291, at 55-56.

297. See generally SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990) (noting successes of LSP lawyers in taking cases of the poor to the Supreme Court in the late 1960s and early 1970s).

298. JOHNSON, ESTABLISH JUSTICE, *supra* note 26, at 273-306.

299. On Shestak, see Adam Liptak, *Jerome Shestak, Diplomat and Bar Association Leader, Dies at 88*, N.Y. TIMES (Aug. 24, 2011), http://www.nytimes.com/2011/08/24/us/24shestack.html?_r=1 (last visited February 1, 2016). Shestak worked in the same firm as Bernard Segal and was later a president of the ABA. He was a driving force in the 1963 creation of the Lawyers’ Committee for Civil Rights Under Law. See CONNELL, *supra* note 46, at 96-97.

300. MARKS, *supra* note 291, at 189.

301. *Id.* (quoting ABA staff proposal).

The ABA created a number of committees and generated reports detailing the work of public interest lawyers and programs during the early and mid-1970s. For example, the 1977 *Annual Report* of the ABA's Fund for Public Education noted the receipt of "nearly nine million dollars . . . during fiscal year 1977," most of which came from "foundations, government agencies, and corporations."³⁰² These gifts showed the "philanthropic community's regard for the ABA's ability and willingness to initiate studies into new areas of professional and public interest."³⁰³ The first two of four programs funded were for professional impact on public issues projects, and access to justice and legal services projects.³⁰⁴ The first set of projects "focused on exploring legal aspects of complex social and economic issues in such fields as corrections, mental health, regulatory reform, and medical malpractice."³⁰⁵ These projects were aided by the creation of commissions by the ABA, including the Commission on Correctional Facilities and Services in 1970, a Commission on the Mentally Disabled in 1974, and Commissions on Law and the Economy and on Medical Professional Liability, both created in 1975.³⁰⁶

The second project area was access to justice. As stated in the *Annual Report*, "For a number of years, the ABA has been interested in this area, particularly as it relates to the availability of legal services for low and middle-income Americans."³⁰⁷ One of the many projects funded in this program area aimed "to find long-term, institutionalized solutions for financing law practice in the public interest."³⁰⁸

In August 1975, the ABA House of Delegates approved a resolution from the Special Committee on Public Interest Practice "that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest services."³⁰⁹ It also approved the Special Committee's definition of a "public interest legal service" as

302. *About the FPE, 1977 Annual Report*, THE FUND FOR PUBLIC EDUCATION OF THE AMERICAN BAR ASSOCIATION 1 (n.d.) (noting 75% of receipts "provided by foundations, government agencies, and corporations").

303. *Id.* at 2.

304. *Id.* at 4. The third and fourth program areas were model codes and other legal standards projects, and professional service and education projects. *Id.*

305. *Id.*

306. *Id.* at 4-7.

307. *Id.* at 8.

308. *Id.*; see also Justice Thurgood Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487 (1975).

309. See *House of Delegates Proceedings*, 100 A.B.A. ANN. REP. 642, 684 (1975). The House of Delegates amended the resolution by replacing "obligation" with "responsibility"; see *Report of the Special Committee on Public Interest Practice*, 100 A.B.A. ANN. REP. 965 (1975) (printing original resolution); PUBLIC INTEREST LAW: FIVE YEARS LATER 45 (1976) (re-publishing Recommendations of Committee in Appendix A).

work provided at a reduced fee or for no fee, in one of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, or the administration of justice.³¹⁰ The last category, which included bar association activities, had been added since the House of Delegates had postponed action on the Special Committee's resolution at the Midyear Meeting in February 1975.³¹¹ The first three categories of public interest legal services, poverty law, civil rights, and public rights, were the mainstay of work undertaken in the LSP. Public interest law, as Justice Thurgood Marshall wrote in a *Foreword* to the Special Committee's booklet on this topic, was "built upon the earlier successes of civil rights, civil liberties and legal aid lawyers," but had now been extended to encompass "a broad range of relatively powerless minorities—for example, to the mentally ill, to children, to the poor of all races."³¹² Two years later, the Special Committee issued a report titled "Implementing the Lawyers' Public Interest Obligation."³¹³

The ABA's legal liberalism reached a peak in 1977. That year the Section on Individual Rights and Responsibilities asked the ABA House of Delegates to adopt a resolution asking state legislatures "to repeal *all* laws providing for the imposition of the death penalty."³¹⁴ This resolution, made after the Supreme Court reinstated the option of the death penalty in *Gregg v. Georgia*,³¹⁵ indicated the view of a substantial number within the ABA: they were to lead legislatures, courts, and society. Although the resolution failed in the House, it was apparent ABA leaders strongly supported a "philosophy of modernization and progress."³¹⁶

Legal liberalism represented a faith in the power of law and of lawyers to effect positive social change. For elite lawyers, this faith in legal progress, which included repeated declarations concerning the duty of lawyers to the public interest, allowed them to categorize the

310. *House of Delegates Proceedings*, 100 A.B.A. ANN. REP. 642, 684 (1975); *Report of the Special Committee on Public Interest Practice*, 100 A.B.A. ANN. REP. 965 (1975).

311. *Compare Report of the Special Committee on Public Interest Practice*, 100 A.B.A. ANN. REP. 392 (1975) (printing original resolution postponed at Midyear Meeting), with *Report of the Special Committee on Public Interest Practice*, 100 A.B.A. ANN. REP. 965 (1975) (printing amended resolution filed for Annual Meeting).

312. Thurgood Marshall, *Foreword* to PUBLIC INTEREST LAW: FIVE YEARS LATER 6 (1976).

313. See 63 A.B.A. J. 678 (1977) (reprinting report in part). The Report used its original word "obligation," not "responsibility," as the resolution was approved by the ABA House of Delegates.

314. *Report of the Section of Individual Rights and Responsibilities*, 102 A.B.A. ANN. REP. 385 (1977). Debate on the resolution is found in *House of Delegates Proceedings*, 102 A.B.A. ANN. REP. at 230-32.

315. 428 U.S. 153 (1976).

316. TELES, *supra* note 260, at 34. Teles emphasizes the influence of the Ford Foundation in supporting the ABA's work in support of public interest law. *Id.* at 34-35.

actions of lawyers in the Watergate scandal as an outlier.³¹⁷ It also led them to embrace a model of legal ethics that emphasized the lawyer's duties to the public.

Despite the defeat of the Murphy Amendment in 1970, the LSP remained controversial, and its location within the executive branch of President Richard Nixon concerned those who supported it. In early 1971, the ABA Section on Individual Rights and Responsibilities and the ABA Standing Committee on Legal Aid and Indigent Defendants approved a jointly created document, *The Corporation for Legal Services: A Proposal*.³¹⁸ A bill creating a Legal Services Corporation was introduced in the House of Representatives by Wisconsin Republican William "Bill" Steiger.³¹⁹ In late July 1974, Congress passed the bill creating the Legal Services Corporation.³²⁰

Kutak was one of the first persons asked to serve on the Board of the Legal Services Corporation.³²¹ A second member of the Kutak Commission, Samuel Thurman, was also appointed to the inaugural board,³²² and a third, Thomas Ehrlich, was the Corporation's first President. All three believed in public service, and each accepted the premise that law and litigation were an opportunity for public good.

The members of the Kutak Commission were committed to the ABA's liberal legalism. They embraced a faith in law, and believed that lawyers who confessed an attachment to the public profession of law would aid in society's progress. Kutak Commission members also believed they were leaders whose work "ought not to hesitate to promulgate statements of ethics it believes to be correct but which may not meet with the general approval of the Bar."³²³

In a recent assessment by Earl Johnson, who served as the second director of the LSP, "Many if not a majority of mainstream Republicans were on OEO-LSP's side, along with most but not all Democrats. It was the far right Republicans and a few Southern Democrats who were the loudest and most determined critics."³²⁴

317. See Ariens, *supra* note 15 (discussing response by ABA leaders to Watergate).

318. See John D. Robb, *New Niche for National Legal Services*, 57 A.B.A. J. 557, 558-59 (1971).

319. JOHNSON, ESTABLISH JUSTICE, *supra* note 26, at 358.

320. *Id.* at 424-25. Two months earlier, the conservative publication *Human Events* warned Nixon not to allow any Legal Services Corporation bill to become law, or see his waning political support further fall away. California Governor Ronald Reagan also urged Nixon to veto the bill. *Id.* at 416-17.

321. *Id.* at 452-53.

322. *Id.* at 454.

323. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 16.

324. *Id.* at 443.

By 1975, about ninety liberal public interest law firms existed.³²⁵ Although those assessing the effectiveness of public interest law were concerned about defining public interest,³²⁶ the general perception of what constituted public interest law was close to the ABA's definition: poverty law, civil rights law, and public rights law, joined together in large part by the goal of assisting those persons with little or no political power (as well as protecting the environment).

In the last half of the 1970s, conservative lawyers began to create public interest law firms to compete with liberal public interest firms.³²⁷ Edwin Meese, who worked for Governor and President Reagan, helped establish the Pacific Legal Foundation,³²⁸ and by 1978, a number of other conservative public interest law firms had been created.³²⁹ One goal of these firms was to “challenge[] the suggestion sometimes made by liberal public interest law groups that the *positions* they took reflected the public interest.”³³⁰ As one conservative public interest lawyer wrote, liberal public interest groups “are, in fact, *special interest* groups and no different from . . . attempts to lobby public opinion and garner governmental support for a particular cause. Their use of the ‘public interest’ label is a ruse and a disguise.”³³¹

Ronald Reagan handily won the 1980 presidential election. Four years earlier, though he had been labeled too conservative,³³² he nearly wrested the Republican presidential nomination from the more moderate Gerald Ford, who became President after Nixon's resigna-

325. ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 12 (2008); cf. BURTON A. WEISBROD et al., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 50-51 (1978) (concluding 86 public interest law firms existed by the end of 1975).

326. See WEISBROD, *supra* note 325, at 22, 26-29.

327. This was part of a broader effort by conservatives to found and fund think tanks. The Heritage Foundation was formed in 1973, the Cato Institute in 1976, and the Pacific Research Institute in 1979. See CHARLES MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* 3 (2015).

328. SOUTHWORTH, *supra* note 325, at 15.

329. *Id.*

330. *Id.* at 16 (emphasis in original).

331. *Id.* at 17 (emphasis in original) (quoting Dan Burt). A concerted effort to reform conservative public interest law groups took place in 1980, with the goal of creating conservative public interest law firms that were more “vibrant, intellectually respectable” centers capable of competing with the best liberal public interest law firms. *Id.* at 19 (quoting Michael Horowitz); see also TELES, *supra* note 260, at 67 (quoting Horowitz, “young men and women are tired, as is everybody, of the old answers. Yet, nobody has sufficiently offered young lawyers the sense that one can be caring, moral, intellectual, appropriately ideological, while at the same time being radically opposed to the stale views of the left.”).

332. See generally RICK PERLSTEIN, *THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN* (2014).

tion.³³³ Reagan's election was a triumph for political conservatism, and offered some vindication to conservative lawyers who dissented from the consensus view that liberal public interest law was public interest law. By 1980, this consensus was challenged by more than just "far right Republicans and a few Southern Democrats." Reagan proposed abolishing the Legal Services Corporation soon after taking office.³³⁴ The conservative challenge to the definition of "public interest" made it that much more difficult for ordinary lawyers to discern what it meant to act in the public interest. The conservative challenge, occurring at the same time as the Kutak Commission began its work, increased the difficulty of the Kutak Commission's mandate. The Kutak Commission's desire to require lawyers to serve "a discernable public interest" was not just controversial, but possibly incoherent.

C. "A DOG-EAT-DOG WORLD"

In a posthumously published essay in the book *The Good Lawyer*, Kutak defended the Commission's proposals on the limits of client confidences. Those limits existed, he wrote, because "[i]t may be a dog-eat-dog world, but one dog may eat another only according to the rules."³³⁵ Kutak's declaration may have meant more than he knew.

First, this statement offers a process-based understanding of law, including the emerging law of lawyering. A lawyer could engage in substantively execrable conduct as long as he or she followed the rules. More specifically, a lawyer could engage in horrifying behavior if the rules of lawyer conduct did not ban such behavior. Second, a process-based understanding seemed contrary to the initial ethos of the Commission, which called on lawyers to keep in mind the public's interest as well as their clients' interests. One telling example of this shift may be found in Kutak's essay: on three occasions when discussing the limits of the lawyer's duty to keep client confidences, he used the phrase "public interest," each time in quotation marks.³³⁶ Third, a process-based approach required a keen attention to the language of the rules, for that was the only measure of one's behavior. Two consequences of this approach were 1) the elimination of guiding standards in favor of bright-line rules, and 2) a "winner take all" mentality among those debating and eventually voting on the Commission's proposals. Reporter Geoffrey Hazard had reminded the Commission in

333. *See id.*

334. For a contemporaneous discussion, see Alexander D. Forger, *The Challenge Facing the Legal Profession*, B. LEADER, May-June 1981, at 18 (noting proposal).

335. Robert J. Kutak, *The Adversary System and the Practice of Law in THE GOOD LAWYER* 172, 175 (David Luban ed., 1984).

336. *Id.* at 183-84.

mid-1979 that its job was “to draft rules that are the legal foundation of good professional conduct but are not exhaustive of the subject.”³³⁷ For lawyers interested in “lawful” rather than “good” professional conduct, rules were all that mattered. Fourth, a “dog-eat-dog” world is a social Darwinian world, one in which only the strongest survive. Kutak reiterated this later in his essay, accepting that the American adversary system was “in most respects Darwinian.”³³⁸

Kutak’s *Good Lawyer* essay noted that competition in the adversary system was common to American institutions: “The basic premise of virtually all our institutions is that open and relatively unrestrained competition among individuals produces the maximum collective good.” Implicit in this statement is the belief that each individual will decide whether, and if so how, to compete in this relatively free market. The job of the government is to enforce the rules of competition. This free market vision, of course, had been re-framed by the rise of the regulatory state during and after the New Deal, which was both entrenched and challenged in 1980. More specifically, this vision conflicted with the initial ethos of the Kutak Commission. The Commission’s mission included a duty “to confront the ‘new law’ and ‘new ethics’ of today and tomorrow,”³³⁹ to fearlessly “promulgate statements of ethics it believes to be correct but which may not meet with the general approval of the Bar,”³⁴⁰ and to move lawyers from the “basic posture” of client loyalty to service on behalf of the public. Its initial efforts were the epitome of social trustee professionalism rather than “dog-eat-dog” individualism. The Commission emphasized that the clarification and implementation of legal ethics rules protected society by demanding lawyers meet “high practice standards” and undertake to act in “service in relation to the interests of public safety, convenience, and welfare.”³⁴¹ Social trustee professionalism had a long shelf life within the American legal profession.³⁴² However, that professional ideal was unraveling as the Kutak Commission worked.

337. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, at 16.

338. Kutak, *Adversary System*, *supra* note 335, at 177-78.

339. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 16. It retained this view in the Discussion Draft, *see* DISCUSSION DRAFT, *supra* note 86, preface (declaring “We have built on the Code’s foundation, but we make no apology for having pushed beyond it. In many respects, we have been taken beyond the Model Code by events”); PROPOSED FINAL DRAFT, *supra* note 82, Chairman’s Introduction (“Our drafting goal, in keeping with our mission, was to produce standards bottomed on the law as it is but facing the future of a rapidly expanding and changing profession.”).

340. JOURNALS, NEW YORK CITY, NEW YORK, DECEMBER 16-17, 1977, at 16.

341. BRINT, *supra* note 18, at 36.

342. *See id.* (quoting lawyer John F. Dillon’s 1894 Address to the American Bar Association).

The 1975 decision by the ABA to declare it a “professional responsibility” of lawyers to perform public interest services suggests the strength of the social trustee vision of elite lawyers. The author of a 1973 book on large New York law firms concluded with the call that such lawyers become “more detached, more independent, someone paid by the client but responsible to the general public.”³⁴³ Archibald Cox, the fired Watergate prosecutor, gave a talk to the ABA Section on Individual Rights and Responsibilities shortly after Nixon resigned in 1974. He called for “more sustained and wider study of where the balance should be struck between the conflicting duties of ‘hired gun’ and ‘servant of the law.’”³⁴⁴ He offered the warning that “under modern circumstances loyalty is often more easily given to the client’s interests than to the people’s interests or the law.”³⁴⁵ Through much of the 1970s, elite lawyers expressed an optimism that lawyers remained trustees who acted for the benefit of society, despite the Watergate scandal. But for many lawyers, the 1970s were a time of great economic struggle. For elite lawyers, the repeated call for greater public interest services was central to their mission as trustees. For many lawyers, such calls were irrelevant to their struggles.

A study of the history of American economic productivity gains calls 1870-1970 the “special century.”³⁴⁶ It also concludes “economic growth since 1970 has been simultaneously dazzling and disappointing.”³⁴⁷ Lawyers have been both the beneficiaries and victims of this post-1970 volatility in economic growth. The economic premium awarded lawyers and others possessing more than bachelor’s degrees dropped slightly from 1945-75, and rose slowly through the early 1980s.³⁴⁸ For lawyers, the decline was steeper. The economic premium earned by the median income lawyer compared with the median income worker was 1.85 in 1969, so a lawyer earned almost twice as much as the median American worker.³⁴⁹ By 1979, that premium declined to 1.35 times the median American worker.³⁵⁰ As noted by Richard Sander and Douglass Williams, in constant 1983 dollars the median lawyer in 1979 earned \$36,716, compared with \$47,638

343. PAUL HOFFMAN, *LIONS IN THE STREET* 227 (1973).

344. Archibald Cox, *The Loss of Mystical Qualities Makes It Harder to Revere the Law*, *STUDENT LAW.*, Feb. 1975, at 8, 10.

345. *Id.* at 10.

346. ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 7 (2016).

347. *Id.* at 2.

348. *Id.* at 616.

349. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQ.* 431, 448-49 (1989).

350. *See id.*

earned by the median lawyer in 1969.³⁵¹ The decline may be attributed to macroeconomic forces, for the premium seemed to strike all those who possessed graduate or professional degrees. It also may be attributable to the increase in the number of lawyers from 355,242 in 1970 to 542,205 in 1980.³⁵² A third reason was the greater sorting of private practice lawyers into two hemispheres, those who served corporations, and lawyers who largely represented individuals.³⁵³ Lawyers representing corporations began taking home a rising proportion of monies spent on legal services from the 1960s through 1980.³⁵⁴ This left the majority of lawyers in solo practice or working in small firms with less of the economic pie, thus driving median income down. In other words, the division of legal services income among lawyers was shaping into a pyramid with a wider (lower-income) base and a narrower (higher-income) top.

The Discussion Draft was premised on the optimistic ideal that lawyers could and should act both within and outside the market for their legal services. In sum, they should serve both their paying clients and a public interest. By 1980, private practice lawyers began rejecting that ideal in favor of an inward-looking technocratic profession.³⁵⁵ The competition to provide legal services to paying clients required lawyers to demonstrate their technical competence as well as their loyalty to the client. It may also be the case that lawyers who represented individuals decided the creation of the Legal Services Corporation altered their public mission: the rise of professional, paid public interest lawyers eliminated any duty of lawyers representing individuals to serve the poor. Their mission was solely to serve their paying clients well, or in the language of the Model Rules, diligently and competently.

D. FRACTURED

The Final Draft of the Model Rules was published in the ABA's 1982 Annual Report.³⁵⁶ It further modified the modifications made in

351. *Id.*

352. ABEL, *supra* note 67, at 280.

353. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 127 (rev. ed. 1994) (“[W]e have advanced the thesis that much of the differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals.”).

354. See Sander & Williams, *supra* note 349, at 435-36.

355. For an interesting view from the mid-1970s of the “unofficial” power of lawyers, see MARK J. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS (1975).

356. See *Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. ANN. REP. 828, 833-920 (1982) [hereinafter “FINAL DRAFT”] (printing in June 30, 1982 Final Draft).

the Proposed Final Draft, particularly in Rules 3.3 and 4.1. Rule 3.3(a) made more limited the lawyer's duty to disclose facts to a tribunal. The failure of the lawyer to disclose a fact was no longer equated with a lawyer's making a material misrepresentation.³⁵⁷ Further, a lawyer was required to disclose a "fact necessary to prevent a fraud on the tribunal," only "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."³⁵⁸ The Final Draft also deleted the unnecessary Caveat regarding constitutional law.³⁵⁹ It retained the rule barring a lawyer from offering evidence the lawyer knew to be false, including perjury by the criminally accused.

Rule 4.1 was amended to limit any duty to disclose "material" facts,³⁶⁰ and the duty to disclose material facts arose only when disclosure was necessary for the lawyer to avoid assisting a client in a fraud or crime. The Final Draft added a provision clarifying the duty to disclose even when this required disclosure of a client confidence.

The *Report* by Robert Kutak accompanying the Final Draft stated the Commission's work rested on three "broad principles: the transcendent importance of confidentiality in the professional relationship, the duty of loyalty to clients, and the requirement that lawyers conform their conduct to law."³⁶¹ This seems hardly a list of principles at all. The third principle required the lawyer to follow the law, but surely that is required of every person subject to American law. The first principle, "confidentiality," is a subset of the lawyer's duty of loyalty to the client, not a separate principle. While everyone agreed the lawyer's duty of loyalty to clients was a first order principle (it was the "basic posture" of the Code), part of the Commission's initial goal was to remind lawyers that client loyalty was not the only duty they possessed. Noticeably absent from the list is any duty of the lawyer to the public. More specifically, the list omits any duty of the lawyer to serve as an officer of the court. Just fifteen months earlier, Kutak's *Introduction* to the Proposed Final Draft argued the lawyer was not only "a representative of the client but also an officer of the court."³⁶² The language "officer of the court" was absent from Kutak's *Report*. A similar phrase was left in the *Preamble: A Lawyer's Responsibilities*, but it was reduced in significance. In the Proposed Final Draft, the *Preamble* began, "A lawyer is an officer of the legal system, a repre-

357. *Id.* at 873 (deleting language in Rule 3.3(a)(1)).

358. *Id.* (amending language in Rule 3.3(a)(2)).

359. *Id.* at 874.

360. *Id.* at 882. That the fact be "material" was also added to Rule 3.3(a).

361. *Report*, 107 A.B.A. ANN. REP. at 829. He repeated that statement in his opening address to the House of Delegates. See *House of Delegates Proceedings*, 107 A.B.A. ANN. REP. 603, 615 (1982).

362. PROPOSED FINAL DRAFT, *supra* note 82, Chairman's Introduction.

sentative of clients, and a public citizen having special responsibility for the quality of justice.”³⁶³ In the Final Draft, the order was changed: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”³⁶⁴ The “basic posture” of the Code remained enshrined in the Model Rules.

The *Report* explained why the Final Draft required the lawyer to disclose perjury and barred the lawyer from knowingly offering false material evidence. It did so largely for reasons of lawyer self-protection. If a lawyer was not allowed to disclose that she had unknowingly introduced false evidence, and now was aware it was false, then she was effectively required “to assist in a client’s crime of fraud.”³⁶⁵ And if the Commission (and the broader legal profession) failed to answer this question in the Model Rules, it was “abdicating the bar’s responsibilities of self-regulation.”³⁶⁶ That might lead to the imposition of rules of conduct by outside regulators, long anathema to the bar.

In all, a “fair study of the Model Rules’ confidentiality provisions” demonstrated they were not “an attack on the adversary system [nor did they] tilt away from a concern for clients toward a concern for third parties and society at large. In fact, the Rules work[ed] no such shift in the profession’s values.”³⁶⁷ Kutak reiterated this point later in the *Report*. In again justifying the proposals regarding the limits of keeping client confidences, he argued the Model Rules met the goal of “guiding lawyers in their duties of zealous representation of clients and honest dealings with others.”³⁶⁸ The return to the adjective “zealous,” after zealous efforts to scrub it from the Model Rules, indicates the extent to which the Commission wished to avoid any appearance of a threat to the “basic posture” of the lawyer as agent or “hired gun”³⁶⁹ of the client. The only use of “zealous” in the approved version of the Model Rules is found in the *Preamble*. It was added after the Proposed Final Draft, and replaced the word “vigorous.”³⁷⁰

363. *Id.*

364. FINAL DRAFT, *supra* note 356, at 834; *see id.* at 835 (also reversing the order of the lawyer’s status later in the Preamble).

365. *Id.* at 829.

366. *Id.*

367. *Id.* at 830.

368. *Id.* at 832.

369. The phrase “hired gun” was not used to refer to lawyers in any law or bar journal until 1970. *See Ariens, supra* note 23, at 587–88 (discussing etymology of “hired gun” as applied to lawyers). By 1980, it had become both much more commonplace, and a phrase that was embraced as often as it was viewed as an epithet. *See id.*

370. *See Report of the Commission on Evaluation of Ethical Standards*, 107 A.B.A. ANN. REP. 828, 835 (1982) (showing marked up changes between Proposed Final Draft (1981) and Final Draft (1982)). The Commission had earlier replaced “zealous” with “vigorous.”

The Commission made these changes because that was its only option. If the Model Rules were to be adopted by the ABA after years of controversy, the Commission needed to pledge fealty to the “basic posture.” Three years had passed since the working draft had been given to a select group. Since then, as Kutak drily noted, “the Commission has had the benefit of extensive comments from hundreds of bar associations and individuals.”³⁷¹

Substantive discussions in the House of Delegates at the 1982 Annual Meeting produced a cacophony of positions, some more nuanced than others, and often contradictory.³⁷² The House began with Model Rule 1.5, governing fees. Its discussion was lengthy. The terse report of the *Proceedings* in the House notes that, after the first proposed amendment to Rule 1.5 was made, debate was twice interrupted “with parliamentary and procedural inquiries.”³⁷³ Amendments were offered, some of which passed, and others of which failed.³⁷⁴ Exasperation set in. Even after the House agreed to the amended Rule, a member asked for another change, which failed.³⁷⁵

The House then moved to Rule 1.6 on confidences. A delegate moved to amend the Rule by making it mandatory for a lawyer to disclose a client confidence about a future crime likely to result in another’s death or serious bodily injury (this was in Discussion Draft Rule 1.7(b), but changed to a permissive disclosure in Proposed Final Draft Rule 1.6(b)(2) and Final Draft Rule 1.6(b)(1)). Hazard then listed amendments from nine different bar organizations on Rule 1.6. Some wanted to make some disclosures mandatory; others wanted to eliminate some of the Final Draft’s proposed permissive disclosures. After several motions to amend failed, Commission member and House delegate Robert Meserve urged the House to defer consideration of the Model Rules until its February 1983 Midyear Meeting.³⁷⁶ Another delegate offered a substitute motion to discharge the Commission, thank the members for their service, and appoint a Special Committee to report back, because “a fresh approach was needed.”³⁷⁷

371. *Id.* at 830. Exhibit D of the Report listed comments from over 100 persons and associations on the Proposed Final Draft. *See id.* at 920-21 (listing commenters). This did not include some of those who had only commented on the Discussion Draft, which itself consisted of four volumes.

372. *Id.* at 830 (noting that in reviewing comments to Proposed Final Draft, the Commission had “the consequent disadvantage of having to reconcile sometimes irreconcilable views.”).

373. *House of Delegates Proceedings*, 107 A.B.A. ANN. REP. at 616.

374. *Id.* at 617-22.

375. *Id.* at 624 (noting request of Erwin N. Griswold).

376. *Id.* at 627.

377. *Id.* at 628.

The substitute was defeated, and the Meserve motion was adopted. The fate of Rule 1.6 was deferred for six months.

The 1983 Midyear Meeting was also contentious. Reporter Geoffrey Hazard ruefully noted the delay "gave the opposition time to organize, which it did very effectively."³⁷⁸ The Drafting Committee reported "thirty-eight organizations and individuals submitted 216 proposed amendments" to the Final Draft of the Model Rules.³⁷⁹ These amendments were proposed after the Rules had undergone significant changes between the time of the Proposed Final Draft in mid-1981 and the Final Draft of mid-1982.³⁸⁰ For example, the Final Draft prohibited a lawyer from counseling or assisting a client in criminal or fraudulent conduct, but only when the lawyer "knew" the client was engaged in such conduct. The Proposed Final Draft had imposed that prohibition when the lawyer "reasonably should know" the client's conduct was criminal or fraudulent.³⁸¹ Even so, the delegates were not finished with Rule 1.2(d), which was further amended after a lengthy discussion and in a 158-144 vote.³⁸²

On and on it went, for five sessions over two long days. Rule 1.6(b), which addressed exceptions to client confidences, was amended to reduce the instances of permissive disclosures. The House agreed to eliminate the lawyer's discretion to disclose a client's statement about a future fraud or crime that would cause substantial injury to another's financial interests or to rectify the consequences of a fraud in which the lawyer's services were used.³⁸³ The final provisions regarding exceptions to client confidences were almost a complete turnaround from the Working Draft, and now nearly mirrored ATLA's Code. A subsequent effort failed to make mandatory the disclosure of a client confidence when another's life or physical safety was threatened.³⁸⁴

378. Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 302 (1984).

379. See *Report of the Drafting Committee*, 108 A.B.A. ANN. REP. 728, 728 (1983); see also *Report of the Drafting Committee*, 108 A.B.A. ANN. REP. 1136, 1137 (1983) (printing approved version of Model Rules of Professional Conduct, including Preamble, Scope, and Comments).

380. The changes can be seen in a marked up version found as Exhibit A to *Report of the Commission on Evaluation of Ethical Standards*, 107 A.B.A. ANN. REP. 828, 833 (1982).

381. See FINAL DRAFT, *supra* note 356, at 840. The Final Draft eliminated much of the "reasonably should know" language found in the Proposed Final Draft.

382. Compare PROPOSED FINAL DRAFT, *supra* note 82, r. 1.2(d), with *House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 289, 293 (deleting above-quoted language).

383. *House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 289, 295-98. On Hazard's disagreement with the decision of the House of Delegates, see Hazard, *supra* note 378.

384. *House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 289, 299. On subsequent changes to this provision, see Ariens, *supra* note 84.

The success of those amending Rule 1.6 indicated similar changes might come to Rule 3.3, which required disclosure to the tribunal if a lawyer learned he introduced false evidence, and Rule 4.1, which concerned the duty to disclose material facts to a third person to avoid assisting the client in a crime or fraud. A series of five amendments to Rule 3.3, all designed to lessen or eliminate the duty to disclose perjury or the introduction of false evidence, failed.³⁸⁵ Rule 4.1 was amended by a recorded vote of 188-127 to eliminate any duty to disclose if “disclosure is prohibited by Rule 1.6.”³⁸⁶

The House completed its amendments to the rules in February. At its August 1983 meeting, it finally agreed to the contents of the Preamble, Scope, and Comments.³⁸⁷ It then adopted the Model Rules of Professional Conduct.

V. CONCLUSION

When the House of Delegates met in August 1983 to approve the Model Rules, a delegate moved to strike the following statement in the *Preamble*: “Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” The sentence was apparently offensive because it might imply that a lawyer was subject to discipline if the lawyer failed accurately to “determine the competence of the opposing party’s lawyer.”³⁸⁸ This statement, other than the word “vigorous” rather than “zealous,” was in the Discussion Draft *Preamble*, and remained unchanged through the Final Draft.³⁸⁹ Hazard spoke in opposition to the amendment on the grounds that a comment was not a disciplinary rule and more cryptically, that the “adversary system contemplates opposing parties of substantial competence,” and when such is not the case, “the assumptions of the adversary system are not met.”³⁹⁰ On its face, Hazard’s explanation is clear and sensible. The American adversary system is premised on the idea that each party’s lawyer is competent and diligent. However, Hazard’s comment is cryptic because it may imply some fuzzy duty of lawyers to work to effectuate the premises of the adversary system, some duty of the lawyer to consider the larger interests of the public and of the society in which many lawyers prosper. But he never says so.

385. *House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 289, 333-40.

386. *Id.* at 347-48.

387. *House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 766-778 (1983) (adopting Model Rules).

388. *Id.* at 767.

389. DISCUSSION DRAFT, *supra* note 86, pmb1.; PROPOSED FINAL DRAFT, *supra* note 82, pmb1.

390. *House of Delegates Proceedings*, *supra* note 387, at 767.

The report of the *Proceedings* indicates no additional debate occurred. But someone called for a recorded vote, which suggests strong feelings within the House. The request may have been made because the delegate was uncomfortable charging a lawyer with any responsibility to see that “justice is being done.” Alternatively, the delegate who requested a recorded vote may have wanted to renew attention to the duty of lawyers to serve the public by seeing that justice, as well as law, must be done. In any event, thirty-eight percent of the delegates supported deleting the sentence.³⁹¹

The optimism that fueled the Kutak Commission had largely departed the legal profession. In 1984, the ABA created a Commission on Professionalism to attack the belief that “the Bar might be moving away from the principles of professionalism and that it was so perceived by the public.”³⁹² The Model Rules were intended to assuage the public’s concern that lawyers cared only for their clients and themselves, and not necessarily in that order. As adopted by the House, that goal for the Rules seemed farther out of reach.

In the language of law, lawyers were agents and their clients were principals. The 2014 edition of *Black’s Law Dictionary* explains, “This relationship is similar to that of master and servant, but that terminology applies to employments in which the employee has little or no discretion, whereas the agent has considerable latitude.”³⁹³ Whether a lawyer continued to possess the discretion to make him or her an agent rather than a servant after adoption of the Rules became more intensely debated by American lawyers. The triumph of legal skill³⁹⁴ reflected the end of the outward-looking lawyer, as well as the end of optimism about the social good lawyers could accomplish. The Kutak Commission tried. And its publicly-oriented ethics rules were found wanting.

391. *Id.* at 767.

392. *Report of the Commission on Professionalism*, 111(2) A.B.A. ANN. REP. 369, 373 (1986).

393. BLACK’S LAW DICTIONARY 1385 (10th ed. 2014).

394. See Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: \$1,500 an Hour*, WALL ST. J., Feb. 9, 2016, at A1.