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An Essay on Teaching Professional Responsibility

L. RAY PATTERSON*

We must not permit our attention to the relatively inconsequential to divert us from preparing to set appropriate standards for practices of far more consequence to society than any with which our grievance committees have been preoccupied.

—Harlan Fiske Stone

INTRODUCTION

There is, I argue, need for a new approach to teaching law students how to become professionally responsible lawyers. As evidence, I cite William Simon's article, The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology, an excellent article devoted to a spectacle that exemplifies a failure of the efforts of law schools to teach, and the bar to promote, ethical conduct by lawyers.2

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2. The precis of the article makes the point. The charges brought by the Office of Thrift Supervision against the law firm of Kaye, Scholer, Fierman, Hays, and Handler, in 1992 generated the most prominent legal ethics controversy of the decade. Despite massive attention to the case, the substance of the OTS charges has received little analysis and has been often mischaracterized. This article analyzes the charges and the bar's response to them. It concludes that the charges were plausible prima facie. It argues, further, that the responses by bar organizations and leaders has been pervasively disingenuous and irresponsible. It also identifies and analyzes some broad ethical issues raised by the case about the participation of lawyers in financial scandals. Id.

Consider also the $8.2 billion contingency fee awarded to "lawyers representing Florida, Mississippi, and Texas for obtaining settlements from tobacco companies totaling $34.4 billion over 25 years." Lester Brickman, Want to Be a Billionaire? Sue a Tobacco Company, Wall St. J., Dec. 30, 1998, at A10. As Professor Brickman points out, "Under the American Bar Association's code of ethics, fees have to be 'reasonable.' Fees that reach or exceed $100,000 per hour are clearly not reasonable." Id.
In representing Lincoln Savings & Loan, the leading Wall Street law firm of Kaye, Scholer, Fierman, Hays, and Handler (Kaye Scholer), sought to protect its client from being taken over by a government agency because it was insolvent. As Professor Simon explained, the client was a California-chartered bank wholly owned by American Continental Corporation (ACC), a holding company controlled by Charles Keating and headquartered in Phoenix. “The charges against Kaye Scholer arose from its representation of Lincoln and ACC between 1986 and 1989 in connection with examinations by the Federal Home Loan Bank Board, the predecessor of OTS.” The firm, which billed Lincoln some $13 million in legal fees from 1985 to 1989, was alleged to have engaged in conduct that most people would characterize as deceitful, fraudulent, and just plain wrong.

There were seven principal charges against Kaye Scholer. They involved misinformation relating to grandfathered loans, the resignation of accountants, linked transactions that inflated the book value of Lincoln, underwriting defects, doctored loan files, and other misrepresentations.

There are various factors to explain this conduct, but I suspect that a major one was related to the tension between private and public concerns created by three basic cultures of our society: individual rights, the free market system, and the adversary system of law administration. The common characteristic of these cultures is that each gives preference to self-interest, presumably on the theory that what is good for the individual is good for society. This is true as to some matters, but not others; for example, free speech for the individual is a universal good, but the profit motive can exceed the bounds of propriety.

The harm that self-interest as the prime motivation for human conduct generates is a limited perspective that results in what can be called “in-the-box” thinking. One of the results of this defect is that it encourages lawyers to view an ethical issue as a separate and unrelated event rather than part of an integrated whole. The lawyer who doctors loan files, for example, probably views the incident as an isolated event necessary for this client for this occasion, but not as a way of doing business. Knowledge that the conduct is wrong is not a sufficient deterrent, for the mind is a powerful rationalizer and will almost inevitably provide justification. This, of course, is not a characteristic limited to lawyers, but a human one of which lawyers make use.

5. As I use the term, “‘in-the-box’ thinking” is best exemplified by rationalization to justify inappropriate conduct, usually after the fact.
At bottom is the law of self-preservation, which is why many people argue that ethical conduct cannot be taught. But to say that it cannot be taught is to say that it cannot be learned, which is manifestly false. There are, however, two unrecognized obstacles to teaching (and learning) the law of professional responsibility. One is in the term "legal ethics"; the other is the idea that self-preservation is a matter of genes rather than culture.

The term "legal ethics" qualifies as an oxymoron. "Legal" implies mandatory rules, while "ethics" implies discretionary rules. The distinction, perhaps, is best seen in the meaning of perjury (to lie under oath) and lying (telling a falsehood). The rules against perjury have penal sanctions, the rules against lying have no designated sanctions, and such sanctions that do result are usually personal, not societal, in nature. A lie in negotiating an agreement may be fraud that vitiates what would otherwise be a valid contract, but the lie will have little effect on others. Perjury in a trial, however, has an impact beyond the courtroom since it infects the judicial process with dishonesty.

Part of the language problem is that the term "legal ethics" rules is used as synonym for disciplinary rules, a result of historical development. The rules of the 1908 ABA Canons of Professional Ethics were essentially hortatory rules of etiquette and it was only in the successor to the Canons, the 1968 ABA Model Code of Professional Responsibility, that mandatory rules were adopted in the form of disciplinary rules. But since the Model Code also contained "Ethical Considerations" as well as disciplinary rules, the document continued to be identified as a code of ethics with the connotation that compliance was a choice of the actor, not a mandate of the law giver. The same epithet is applied to the ABA Model Rules of Professional Conduct, successor to the Model Code.

As the Preamble to both the Model Code and the Model Rules makes clear, however, the rules are the basis only for discipline, not for liability in damages, which has led many lawyers to conclude that ethics codes have both a limited and a heightened efficacy. Their efficacy is limited because the breach of "ethics" rules does not give rise to a cause of action; the efficacy is heightened because "ethics" rules give the lawyer a pedestal on which to stand above the law. The strength of codes of ethics, then, is also their weakness, for they can be used to make the legal rule irrelevant. Thus lawyers use ethical rules to override legal rules, and they can do so because "ethical" conduct is higher in the hierarchy of American values than legal conduct. One chooses to act ethically, but is required to act legally. For example, a lay

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person, who knows that another has robbed a bank might be held responsible for his or her silence; a lawyer who knows that his or her client robbed a bank might win praise for protecting the client's secrets, even if representing the client in an unrelated matter. The bar's success in using ethical duties to trump legal duties, however, is characterized by what can be all sleight-of-the-hand reasoning. The secret is their use of the codes to redefine "ethical conduct" and give it a special meaning for lawyers by making the duty of loyalty to the client the highest value in the lawyer's lexicon.

As to the second obstacle to teaching professional responsibility—the relative importance of nature and nurture—there is no definitive answer. But I suggest that nature can be shaped by nurture in the form of culture. War, in which young men, contrary to their upbringing, learn to face death and to kill their fellow man for the sake of patriotism, is perhaps the best example. Ethical conduct, in short, can be taught and learned, but success depends in part upon an understanding of the role of culture in determining that conduct.

As these obstacles indicate, legal educators have been too little concerned with the fact that the term "legal ethics" is an oxymoron and that has been one reason for the creation of a sub-culture of professional responsibility that suffers from a dichotomy between word and deed. Despite the rule that a lawyer shall not file a suit for purposes of harassment, the lawyer is not to be held accountable to an adversary for doing so. This failing may be the result of what can be called the greatest vice of a legal education, its Balkanization of the intellectual process. As the old saw has it, the study of law sharpens a person's mind by narrowing it. Thus lawyers seek the solution to a particular problem for the client, not for the problems of society at large, and so treat legal problems in isolation, not in context. The Kaye Scholer lawyers were concerned with protecting a client in financial difficulty, not the public against the demise of an important part of the financial industry. They were, of course, properly concerned primarily with the client's problems, but they should have dispensed with the smoke and mirrors and applied the law with integrity, not manipulative tactics.

The Kaye Scholer affair is a heritage of what I see as the major fault in teaching the professional responsibility course: the reliance on ethical exhortations rather than legal rules. Unlike legal rules, the efficacy of moral platitudes recedes in direct proportion to the threat to one's self-interest. Since the client pays the fee, and since the client's willingness to continue to pay the fees is dependent, in part at least, upon results (however achieved), the

7. For one of many cases supporting this point, see Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or. 1981).
temptation to forego restrictions imposed by ethical—rather than legal—rules is obvious. Paradoxically, there is a good argument that ethics rules make unethical conduct cost effective for lawyers. This alone is reason enough to teach the course as a law course. My purpose here is to suggest how this can be done. I begin with what I deem to be the core problem.

I. THE CORE PROBLEM

The core problem in teaching the professional responsibility course is that it is a course in lawyer’s law that treats only the ethical rules, and ignores the fact that procedural and malpractice rules are also relevant. Consider the fact that the practice of law entails the administration—that is the interpretation, the application, and the making—of law for others, and that there are three separate sets of rules—procedural, malpractice, and disciplinary (called ethics) rules—to govern the lawyer’s conduct. These rules deal with the legal, intellectual, and ethical aspects of law practice and should be integrated in one course. Generally, however, the teaching of procedural rules is limited to courses in procedure; malpractice rules are usually not the subject of a special course; and the teaching of disciplinary rules is limited to the professional responsibility course.

If, however, the professional responsibility course becomes a course in lawyer’s law, it follows that it must encompass rules of procedure, rules of malpractice, and rules of ethics (which should be identified as what they are, rules of discipline). The obstacle to this integration is that these rules have long been compartmentalized for pedagogical purposes unrelated to problems of professional responsibility.

Apart from inertia induced by tradition, there is a suspicion that lawyers prefer it this way because it makes lawyer’s law inefficient and the more inefficient the rules the less the accountability for violating them. Consider, for example, the rule that the breach of a rule of ethics is not the basis of a malpractice action. A client who sues a lawyer for charging an unreasonable fee in violation of the rules of ethics has not stated a cause of action.8 The remedy is to discipline the lawyer.9 And a defendant who is the victim of a frivolous complaint has no cause of action against the lawyer, but may be entitled to attorney’s fees under the rules of procedure.10 The result here is a parsing of the lawyer’s duty—and thus of accountability—that serves to

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8. Davis v. Findley, 422 S.E.2d 859 (Ga. 1992) (client’s allegation that attorney charged excessive fees for legal services, in violation of Code of Professional Conduct, was insufficient to sustain claim for professional malpractice).
protect lawyers more than clients. There is, however, a development that portends change: the American Law Institute's Restatement of the Law Governing Lawyers, which provides a unified approach that can be a basis for removing the built-in barriers that compartmentalize the concept of the lawyer's duties.

The success of the Restatement will depend in part on the extent to which legal educators adopt its unified approach. The extent to which law teachers do adopt the ALI's approach is going to be determined in part upon how they answer two questions: (1) Why is it desirable to integrate the procedural, malpractice, and disciplinary components into a coherent body of lawyer's law?; and (2) How does one achieve the integration? I deal with each of these questions in turn.

II. THE NEED FOR A COHERENT LAWYER'S LAW

A discussion of the need for course materials comprising an integrated body of rules that can be identified as lawyer's law need not be lengthy. I start with two obvious points: first, since the rules do exist, the failure to integrate them means that their relationship goes unacknowledged, which leaves students at a disadvantage in dealing with issues of professional responsibility as lawyers; and second, lawyer's law is the most important body of law in the legal system.

An example of the first point is the famous OPM Leasing Service case, in which the lawyer protected the former client's confidences by refusing to reveal to a successor lawyer that he had dismissed the client for defrauding banks. The former client thereby used his new counsel unwittingly to aid him in continuing his fraudulent scheme. The paradox the bar's position demonstrates is that while the law of fraud can be used to void the application of other rules, for example, rules that result in an otherwise valid contract, it is insufficient to void the rules of confidentiality to prevent the former client from continuing a fraudulent scheme. There is, however, a price to pay for this position. If fraud does not vitiate disciplinary (or ethics) rules, the disciplinary rules do not override the law of fraud.

11. The case was settled and there is no opinion for the point used here. The lawyer who relied on the attorney-client privilege participated in the multi-million dollar settlement of the lawsuit arising out of the fraud. For an excellent report of the events see Paul Blustein & Stanley Penn, Advice or Consent: O.P.M. Fraud Raises Questions About Role Of a Criminal's Lawyer, WALL ST. J., Dec. 31, 1982, at 1, reprinted in L. RAY PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 218 (2d ed. 1984); see also In re OPM Leasing Service, Inc., 670 F.2d 383 (2d Cir. 1982) (ruling on the waiver of attorney-client privilege by trustee in bankruptcy).
The second point is that the subject of lawyer's law is the administration of the law and so it is the only body of law that applies to all lawyers at all times in all places. Thus lawyer's law is universal in application and determinative in impact, for the administration of the law determines what it means, which is why the way in which the law is administered is more important than what it says. To state the point is to prove it, and is reason enough to develop a coherent body of lawyer's law. The most important reasons for the integration of procedural, malpractice, and disciplinary rules into a unified body of lawyer's law, however, are to prevent the law practice from being a limited liability profession, and to avoid the cultural conflict that the compartmentalization creates. Both reasons merit explanation.

A limited liability profession is a limited responsibility profession, since it requires that accountability be discounted. To make the point plainly, a plea for limited lawyer liability is a plea for limited accountability, which is important only when conduct is socially unacceptable. To say that the lawyer is not accountable, then, is to say that lawyers are entitled to engage in socially unacceptable conduct, for example, the filing of frivolous actions without accountability to the victim, an idea that seems to be a part of the legal culture.

The cultural conflict resulting from compartmentalization is a more subtle issue. Few will dispute that we all process information according to our culture in preference to the content of the information. In a society where there is a culture of racial prejudice, for example, the conviction of a defendant because of his race is more likely to be treated as an incident to be tolerated rather than a judgment to be condemned.

The dominant role of culture in our thinking, however, seems to have been largely ignored in legal education. In part, this is because the legal culture is not always congruent with societal culture, of which the famous People v. Belge\(^\text{12}\) case is an example. The lawyer who represented a defendant who had murdered a co-ed and hidden the body refused to reveal to the father of the victim the location of his daughter's body because of the attorney-client privilege. Charged with the crime of denying a decent burial to the dead, the lawyer was indeed exonerated because of his duty to protect the privilege.\(^\text{13}\)

That such clashes between legal culture and societal culture are relatively rare is no cause for complacency. Murder is relatively rare, but if

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12. 376 N.Y.S.2d 771 (1975) (this case has subsequently been referred to as the "Dead Bodies" case).
13. Id. It was reported that public reaction caused the lawyer to move from the town, presumably because he had violated societal norms.
society were not concerned, it would probably be less so. Legal culture, of course, is part and parcel of societal culture: the right of due process is as much a part of the latter as the former. But within a larger culture there are subcultures. For example, within the legal culture there is a procedural culture, a malpractice culture, and an ethical culture for lawyers, which may be consistent in word and inconsistent in deed.

A premise of the procedural culture, for example, is the duty of fairness to opposing counsel and party. But the premise of the malpractice culture that the lawyer is not liable to third parties is at odds with the duty of fairness because fairness requires accountability. A premise of the ethics culture is the duty of loyalty to the client as manifested in the duty to protect clients’ confidences, which may be at odds with the lawyer’s duty of candor to the court.

The codes of ethics, of course, contain rules congruent with the procedural rules. Both Rule 11 of the Federal Rules of Civil Procedure and Rule 3.4 of the Model Rules of Professional Conduct, Fairness to Opposing Parties and Counsel, are based on the duty of fairness. Even so, the culture of loyalty enables lawyers to override both the procedural and the disciplinary rules, of which the Kaye Scholer affair is a classic example. How could respected lawyers otherwise justify misleading regulatory authorities to prevent them from dealing properly with the client guilty of malfeasance?

The best evidence of the influence of culture, however, may be the defense of Kaye Scholer’s representation of Lincoln Savings and Loan. The bar, so to speak, circled the wagons to protect against “unwarranted” attack by “ignorant” government officials. Thus New York Bar Associations failed to condemn Kaye Scholer’s conduct and instead attacked the asset freeze order; a New York disciplinary lawyer characterized the OTS charges as “thin at best,” and said they “didn’t hold up.” The treatment of the American Bar Association’s report of the Working Group on Lawyers’ Representation of Regulated Clients, was “perceived widely as a vindication of Kaye Scholer’s representation of Lincoln.” Moreover, prominent lawyers lent

14. Professor Simon points out that Kaye Scholer disputed the allegations, “the main emphasis of its campaign of self-exoneration, executed with the help of a public relations firm, was to characterize OTS’ charges as a radical departure from established norms and as an assertion of disclosure duties that would infringe confidentiality” (citation omitted). Simon, supra note 2, at 259. Professor Simons’ most devastating point, however, is that “[t]hroughout much of [the resulting literature], we find barely a hint of concern that lawyers might have contributed to the worst financial disaster in American history.” Id.

15. Id. at 262.

16. Id. at 265.

17. Id. at 263. “The report has been perceived widely as a vindication of Kaye Scholer’s representation of Lincoln . . . . In fact, the Working Group made no investigation of the OTS
their reputation in defense of Kaye Scholer, presumably to protect the loyalty culture, which, in this case at least, was self-serving in the extreme. Courts are not wholly immune to the loyalty culture, for they frequently approve the lawyer’s preference for loyalty over revelation of information detrimental to the client. This becomes apparent when we narrow the focus from a pattern of conduct to one incident. Consider the long standing rule that a lawyer has a duty to reveal adverse governing authority overlooked by the adversary. The rule is wholly contrary to the culture of loyalty, which explains why courts tend to excuse lawyers for breaching it as in Dorso Trailer Sales, Inc. v. American Body and Trailer, Inc., a case in which the lawyer not only failed to cite the relevant statute, but argued in an appellate brief that the law was contrary to the statute that he failed to cite. Although the Minnesota Court of Appeals had granted relief, the Minnesota Supreme Court reversed on procedural grounds.

The Minnesota Supreme Court, of course, had reasons for ruling as it did, but there were other equally valid reasons to affirm, as the opinion of the Minnesota Court of Appeals shows. This makes the point. The court processed information according the culture of loyalty in the context of the adversary system rather than the content of the information showing fraud.

Lawyers and judges cannot escape the impact of culture on their thought processes any more than anyone else can, and since culture is a matter of education, it would be helpful for educators to agree on the fundamental, unresolved—and perhaps unrecognized—issue in teaching lawyer’s law: is the law to be taught as a means or an end?

III. A NEW APPROACH FOR TEACHING LAWYER’S LAW

Whatever one’s position as to whether law is a means or an end, it seems clear that the subject of lawyer’s law is primarily means rather than end, for it is means that determine integrity in administering the law. Thus one can say that substantive law represents the end, procedural law the means. The distinction is important for lawyer’s law, which is basically procedural in nature.

charges, and while its report bristles with hostility to OTS, it has almost nothing to say directly about the propriety of Kaye Scholer’s conduct.” Id.

18. One was Geoffrey Hazard, “the academic authority on legal ethics best known among practitioners,” Simon, supra note 2, at 259, the other was Marvin Frankel, former federal judge, who “rushed in with a New York Times op-ed piece that the editors entitled ‘Lawyers Can’t Be Stool Pigeons.’” Id. at 261.


In prosaic terms, the practice of law requires lawyers to analyze the facts, to identify the problem, and to use judgment in applying the rule. This second task is the difficult one when the facts come within the words, but not the purpose, of the rule. The way to deal with this problem is with what I call the concept of rule jurisdiction. It is based on the notion that all rules of law are designed to be applied to a particular type of factual situation. If the facts in issue are congruent with the facts the rule was designed to deal with, they are within the rule's jurisdiction. If the factual pattern is aberrant in terms of the situation the rule was designed to deal with, it is not within the rule's jurisdiction. The contract rule of damages, for example, is not used to determine the recovery for harm resulting from an automobile accident.

If a problem is not within the rule's jurisdiction, it is necessary to find another rule from a different body of law or to resort to legal principles and make a new rule to resolve it. The rule's jurisdiction, however, is not always clear. For example, if a lawyer seduces an emotionally unstable client, is the lawyer liable for malpractice? The Georgia Court of Appeals held yes, while the Georgia Supreme Court disagreed. The higher court concluded that the factual pattern was not within the jurisdiction of the malpractice rule of liability for negligence, but was within the jurisdiction of a rule derived from the principle that the lawyer is a fiduciary of the client.

The point here is simple but subtle. The fact that law consists of rules to solve problems means that there are two approaches to legal analysis: one can analyze the rule or one can analyze the problem to which the rule is directed. Consider, for example, a city ordinance that forbids four-wheeled vehicles in city parks. Does the ordinance apply to four-wheeled baby carriages? If the issue is analyzed in terms of the rule, the answer is "yes." If analyzed in terms of the problem to which the rule is directed, the answer is no, for the problem is the danger to park patrons that such vehicles represent, which excludes baby carriages. The issue, then, can be viewed as a choice-of-law issue. Does one apply the rule as written or does one apply the rule of statutory construction that a statute is to be interpreted in light of its purpose.

An actual case that demonstrates the difference between analyzing the rule and analyzing the problem is Spaulding v. Zimmerman. The lawyer for

23. "A lawyer is a fiduciary . . . ." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 28 cmt. b. (Proposed Final Draft No. 1, 1996). It is interesting to note that apparently the lawyer is not identified as a fiduciary in either the ABA Model Rules of Professional Conduct or the Code of Professional Responsibility.
24. 166 N.W.2d 704 (Minn. 1962).
the defendant in a tort action arising out of an automobile accident had the plaintiff examined by a physician who informed the lawyer that the plaintiff had a life threatening aortic aneurysm that had resulted from the accident and of which the plaintiff was ignorant. The issue was whether the defendant's lawyer should abide by the ethics rule of confidentiality or the tort rule of the duty to warn.

The choice, then, was to analyze the issue in terms of a rule of information control or in terms of the problem of saving a human life. The lawyer in Spaulding analyzed the issue in terms of the ethics rule, ignored the problem, and kept quiet. Had he analyzed the problem in terms of the tort rule and acted accordingly, he would have saved his client much trouble, for the court later overturned the settlement secured by complying with the rule of confidentiality.

The Spaulding case contains an important lesson. The analyze-the-rule approach works when the facts are within a rule's jurisdiction, but not when the facts are beyond the rule's jurisdiction. When this is so, the probability is that the rule from another body of law has jurisdiction and that is the rule to be applied. The confidentiality rule, for example, is designed to enable the client to provide the lawyer with all information relevant to the representation without fear of disclosure and to protect the client's right of privacy. In the Spaulding case, the information did not come from the client, did not involve the client's right of privacy, and the facts were not within the jurisdiction of the ethics rule. The facts, however, were within the jurisdiction of the duty-to-warn tort rule and that was the rule to apply.

A useful test for determining whether the facts are within the jurisdiction of a disciplinary rule is whether the application of the rule creates a dilemma for the lawyer. In Spaulding, the lawyer's choice was to comply with the disciplinary rule and possibly cause a person's death or to apply the tort rule and save a person's life, a choice that creates a dilemma in form if not—for most people—in substance.

Had the plaintiff properly requested production of the doctor's report under the rules of discovery, the defendant's refusal would have created a problem of a different order: For then the facts would have been within the rule's jurisdiction and the problem would have been simple, not dilemmatic. The point here is that problems of professional responsibility within a rule's jurisdiction tend to be simple ones; problems not within a rule's jurisdiction tend to be dilemmatic. The conclusion is obvious. When the problem is simple, the analyze-the-rule approach is sufficient; when the problem is dilemmatic, the analyze-the-problem approach is desirable.
IV. RULES OF ANALYSIS FOR RESOLVING PROFESSIONAL RESPONSIBILITY PROBLEMS

There are two types of rules for analyzing professional responsibility problems, policies and principles. I deal first with policies.

A. POLICIES RELEVANT TO THE ANALYSIS OF P/R PROBLEMS

Since culture consists of ideas, the bases for a common culture are core ideas that can be identified as policies and that all can accept as being sound. In a legal culture, the ideas should promote both fairness and its counterpart, accountability, which requires integrity in the administration of the law. Three interrelated propositions provide the basis for this integrity: (1) power is the source of responsibility; (2) rights must be exercised in good faith; and (3) duties must be fulfilled in good faith. The first explains the importance, the latter two the meaning of integrity in administering the law.

1. Power is the Source of Responsibility

That power is the source of responsibility is a significant proposition of professional responsibility because lawyers have enormous power over the affairs of the client for a very simple reason: law is the primary repository of power in a free society. While most lawyers know this, they do not appreciate their authority, and there is an explanation for this unwarranted modesty. So long as lawyers do not acknowledge their power it does not become a part of their culture and they do not have to be concerned about exercising that power responsibly. The culture that a lawyer is merely a citizen with a license to practice law provides a measure of freedom to misuse the law because it diminishes accountability. The lawyer, for example, who files a frivolous pleading in a lawsuit in the belief he or she is serving the client’s interest misuses the law, a problem to which Rule 11 of the Federal Rules of Civil Procedure is directed. Thus lawyers who ignore the fact that law is an instrument of power that affects the lives and welfare of others, ignore their responsibility as persons privileged to interpret, apply, and make law for clients.

2. Rights Must be Exercised in Good Faith

The second proposition is that rights must be exercised in good faith, a truism that ironically is obscured by the rights-oriented nature of the legal system. Good faith requires a recognition of responsibilities that the emphasis on rights obscures, apparently because recognition of responsibilities is deemed to diminish the rights. But to disregard responsibility in the exercise
of a right means that one need not exercise that right in good faith, which undermines the freedom of action that rights create. Abuse of the discovery process, for example, has led to amendments in the Federal Rules of Civil Procedure that restrict the right to refuse information to the adversary.

Good faith requires one to comply with the rules in light of their purpose as one understands that purpose. Thus the lack of good faith is the basis of the law of fraud and deceit. But the value of the principle is more in what its absence implies than its content. For not to say that good faith in the administration of the law is required is to imply that we accept bad faith as part of the process. But the good faith proposition is important because good faith is the basis of integrity and thus is protection against misuse of the law, an error easy to commit in the adversary system.

3. **Duties Must be Fulfilled in Good Faith**

The third proposition is that duties must be fulfilled in good faith. This is the good-faith-rights principle applied to duties, and the reasons that apply to the good faith exercise of rights also apply to the good faith fulfillment of duties. The good-faith principle in both its aspects, it should be noted, is intended to combat intellectual dishonesty, the occupational hazard of lawyers. Jonathan Swift made the point when he defined a lawyer as one who seeks to prove that white is black or black is white according to how he is paid. The core propositions thus serve to guard against the infirmities of intellectual dishonesty.

**B. PRINCIPLES ARE NECESSARY TO IMPLEMENT THE POLICIES**

The statement of policies is at such a high level of abstraction that most will agree that they are sound. The difficulty is implementation, which is best approached from the standpoint of principles that serve as tools of analysis. Principles, as the source of rules, must be universal in application, that is encompass all lawyers, all clients, and all law relevant to the representation. Being fundamental, they are general, but to be useful, they must be tools for dealing with particulars. These requirements mean that they are essentially principles of relationship to be used for analysis. The principles are: (1) a lawyer is a fiduciary of both client and court; (2) the client's rights and duties are the source of the lawyer's rights and duties as lawyer; (3) a lawyer has only two kinds of duties in relation to the client (to the client and of the client); (4) there are only two kinds of clients (a client in an individual and a representative capacity); and (5) procedure is the basis of fairness in the administration of the law.
1. A Lawyer is a Fiduciary of the Client and the Court

The most common term to describe a lawyer is "fiduciary," a legal term applicable to all agents. But the fundamental question of why an agent—and thus a lawyer—is a fiduciary is usually ignored. Analysis, however, suggests that the answer is that an agent exercises both his or her own power and also the power of the principal. A lawyer, then, is an agent with unusual power because he or she administers law for clients and law is the repository of power in our society.

By this measure, the lawyer is a fiduciary of both the client and of the court. Although the phrase commonly used to describe the lawyer's relation to the court is "officer of the court," it seems clear that this is a synonym for fiduciary because he or she exercises the power of the court as well as the client. This follows from that fact that both the client and the court are sources of the lawyer's authority to act as lawyer, the former being the source of the specific authority to act in the particular case, the latter the source of general authority to act in any case.

The practical concern for the lawyer is that in addition to the normal fiduciary principles there is a principle that applies to the lawyer as a dual fiduciary. Three important normal principles are: (1) the lawyer must adhere to the highest standard of conduct in relation to the beneficiary, client or court; (2) the lawyer must subordinate his or her interest to the interest of the beneficiary, client or court in regard to the subject matter of the relationship; and (3) the lawyer cannot negate the rights of another in order to benefit the client. There is also an additional principle that is a special application of this last principle. A dual fiduciary cannot negate the right of one beneficiary to benefit another beneficiary.

The first principle is hornbook fiduciary law that needs no elaboration, except that it is appropriate to point out that the highest standard of conduct requires integrity in one's actions relating to the beneficiary. The second principle is a logical consequence of the fact that the fiduciary exercises the power of the beneficiary. Its purpose is to prevent the fiduciary from benefitting himself or herself at the expense of the beneficiary should the occasion to do so arise, which it often does in the client-lawyer relationship. The overlooked point is that this principle does not require any sacrifice, because the fiduciary is not entitled to the subordinated interest in the first place.

The third principle—that a lawyer cannot negate the rights of another to benefit the client—is obvious, but the additional principle merits some explanation. Its importance is based on the fact that the lawyer is a unique fiduciary in that he or she is a high level, as opposed to a low level, fiduciary.
The difference is that the low level fiduciary has duties to only one class of beneficiaries, as in the case of a private trust. The high level fiduciary has duties to two or more classes of beneficiaries, in the case of the lawyer, to the client and to the court. The important point about the fiduciary role is that a fiduciary cannot negate the right of another to aid the beneficiary, which has particular application for the lawyer as a high level fiduciary. The application of this principle, however, is inordinately difficult unless one recognizes that the source of the fiduciary authority is the law governing the beneficiary.

2. The Client's Rights and Duties are the Source of the Lawyer's Rights and Duties as Lawyer

Law is the source of the rights and duties of all persons in a civilized society, and despite its division into rules of procedure, rules of malpractice, and rules of ethics, the law of professional responsibility (or lawyer's law), is properly viewed as a single body of law that governs both rights and duties of both client and lawyer.

Since the client and lawyer have a principal-agent relationship, their rights and duties are interrelated. When a person is an agent, the rights and duties of the principal determine his or her rights and duties. The principal, for example has a right that the agent be competent and the agent has a correlative duty to be competent. When the agent acts for the principal, it is the same as if the principal were acting and the agent’s rights and duties correspond to the rights and duties of the principal. This is clear enough with regard to the usual agency, but there is some confusion when a lawyer is the agent and a client is the principal.

Part of the reason for the confusion is the codes of ethics and part of the reason is the adversary system. Lawyers tend to view codes of ethics as a special body of rules for lawyers, and the adversary system causes them to view rules of ethics as giving them special rights independent of the general law. The duty of confidentiality, for example, justifies silence despite knowledge of the client’s intent to commit a fraud. This anomaly, however, should not be allowed to obscure the fact that as a practical matter the lawyer’s job is to determine the client’s rights and duties and to act accordingly.

Thus the proposition that the source of the lawyer’s rights and duties is the law governing the client follows from the fact that the lawyer exercises the power of the client. And if the lawyer exercises the power of the client, it follows that he or she not only protects the rights, but also fulfills the duties

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of the client, apart from the lawyer's own duties to the client. The inescapable conclusion, then, is that the client's rights and duties are the source of the lawyer's rights and duties as lawyer. The practical consequence of this is that the client's right and duties are the boundaries of the lawyer's conduct. Obviously, the lawyer's duties to the client cannot exceed the client's rights, the lawyer cannot have greater rights to act for the client than the client has, and logically the lawyer's duty to exercise the client's rights encompasses the duty to fulfill the client's duties.

3. A Lawyer Has Only Two Kinds of Duties

The fact that the lawyer has two kinds of duties is a truism made apparent by the fact that the conduct of all agents has two aspects: conduct in relation to, and conduct in acting for, the principal. This is because a principal employs an agent to act for him or her. Thus all agents act in relation to the principal when they inform the principal, and also act for the principal when they inform another on behalf of the principal. All agents have the same duties to their principals: competence, communication, no conflicts of interest, and confidentiality. But the agent exists to act for the principal, which is why the agent's role is not only to exercise the rights of the principal, but also to fulfill the duties of the principal within the confines of the relationship.

The lawyer's duties to the client thus are the traditional ethical duties: competence, communication, avoidance of conflicts-of-interest, and confidentiality, which are the subject of the codes of ethics. But the duties "to" the client are less important than the duties "of" the client, because the latter duties have an impact on others. Thus, the lawyer's role in fulfilling duties of the client for the client is operative when the lawyer files an answer, responds to interrogatories, or negotiates a contract, each of which entails duties of the client.

Unlike duties to the client, however, the duties of the client are not—and cannot be—stereotypical because they are determined by the law that governs the client's particular situation. The derivative nature of the lawyer's duties means that in acting for the client the lawyer's ethical duties are ultimately determined by the governing law and the rules of ethics are only to facilitate the application of the law. Thus, legal ethics is an integral part of law and law is an integral part of legal ethics.

To develop this point, it is important to note that while the client is the source of both kinds of duties, there is a difference between those duties. Some duties are independent, other duties are dependent in nature. The duties to the client—competence, communication, conflicts-of-interest, and
confidentiality—are independent of the client’s duties (except that the duty of confidentiality may also be dependent when the lawyer is acting for the client). This means only that the duties are applicable regardless of the client’s identity because the duties to the client are a product of the client’s rights, which are the same for all clients. For example, the client has a right that the lawyer be competent and the lawyer has a duty to act competently even though the client may be a villain guilty of a heinous crime. The lawyer’s choice is not to modify the duty of competence but to dismiss the client.

The duties of the client that the lawyer exercises are dependent in nature simply because the lawyer must look to the client’s duties to determine what action he or she may or may not take. This follows from the fact that the duties are a product of the law governing the client, and that law also governs the lawyer acting for the client as the client’s agent. In practical terms, then, a lawyer must look to the client’s duties (and rights) to determine what actions he may or may not take on behalf of the client.

4. There Are Only Two Kinds of Clients

The most overlooked truism in the law of professional responsibility is that there are only two kinds of clients: clients in an individual and clients in a representative capacity. The oversight may be because clients come in all shapes and sizes, but so do people and there are only two sexes, every person being one or the other.

The client in an individual—or personal—capacity is what the term implies, a client who acts only for himself or herself. The client in a representative capacity is one who acts for others, a category that abounds with members: trustees, executors and administrators, corporate officials, and office holders, both public and private. Since they are all agents, the common feature of representative clients is that they are fiduciaries, which means that we have the unique situation of the lawyer fiduciary representing clients who are fiduciaries. This is why the proposition that the client is the source of the lawyer’s rights and duties is important for utilizing the dichotomy of the individual and representative client. The CEO of a corporation has rights and duties as CEO that differ from his or her rights and duties as an individual, which means that the lawyer’s rights and duties differ accordingly.

5. Procedure is the Basis of Fairness

Procedure is the basis of fairness in our legal system, a truism that has more importance than is apparent. For if procedure is the basis of fairness, the abuse of procedure is unfair. It follows, then, that the lawyer who abuses
procedural rules is being unfair. The point is important because the
characterization of conduct is a major factor in determining how to act. It is
one thing to characterize the abuse of procedure as being loyal to the client,
another to characterize it as being unfair to others.

There are, however, two obstacles to the acceptance of the importance
of fairness. One is that fairness is deemed to be subjective in nature. The
other is that procedural and substantive rights are treated as being different in
kind rather than degree.

The subjective nature of fairness, of course, is the reason for the
importance of procedure. The problem is that this very fact gives procedure
an undue weight so that it can be used as an instrument of unfairness. Consider,
for example, the rules of discovery. The purpose of the rules is to
enable both parties to learn all the relevant facts, but the rules are often
misused and they serve the cause of injustice. Consider, for example, the
lawyer who seeks "to destroy" an expert witness to prevent the expert from
fulfilling the role of an expert, which is to aid the jury.26

Procedural rights, of course, are different from substantive rights, but the
difference is more a matter of degree than kind. Moreover, the effect of
treating the rights as being different in kind is significant. The dichotomy
between procedural and substantive rights creates the tendency to treat
procedural rights as ends rather than means. The effect is often to equate
procedural rights with justice as a matter of form, but not substance. More
importantly, the treatment serves as a barrier to common sense in applying the
law.

Procedural abuse is almost always a product of the adversary system,
which may be the major obstacle to ethical conduct by lawyers.27 The
anecdote begins with a recognition that procedural abuse is the equivalent of
being unfair, which brings us back to the importance of three policies
discussed above. That power is the source of responsibility, that rights are to
be exercised and duties fulfilled in good faith, are the basis of integrity in the
practice of law and integrity is the basis of fairness. And if law is not fair in
application, it will not long be the law.

26. See, e.g., Walter R. Lancaster, Choosing Your Weapons: The Art of Expert Cross-
Examination, 24 Litig. 46 (1997) ("[Y]ou want to leave the expert in a pool of blood. . . . With
experts, it's better to cut their poison into little pieces." Id. at 48-49. Presumably, the author
is convinced that the end justifies the means, that is, winning is more important than integrity
in the process.

27. See supra note 26.
CONCLUSION

I return to the Kaye Scholer affair. In retrospect, it seems clear that the goal of the lawyers representing Charles Keating and Lincoln Savings and Loan was to avoid client accountability and to this end the lawyers could not exercise their rights or fulfill their duties in good faith or avoid ignoring the principles of lawyer's law.

We can assume that Kaye Scholer viewed itself as a fiduciary only of the client, not the court—in this case, the regulatory agency. Nor did Kaye Scholer act as if the rights and duties of the client are the source of the lawyer’s rights and duties. Indeed, the only rationalization for the conduct is that the lawyer’s duty of loyalty to the client places the lawyer above the law. Having failed to recognize this point, Kaye Scholer could not recognize the difference between duties to the client and duties of the client. It goes without saying that Kaye Scholer did not recognize the difference between Charles Keating as a client in an individual and a representative capacity. Finally, Kaye Scholer seems to have transformed its role as transaction lawyer into the role of advocate with no duty of fairness.

The ultimate question, perhaps, is whether the ideas presented in this essay would have made a difference in the conduct of Kaye Scholer. We cannot know. What we can know is that the lawyers acted as they did without them. And that, I suggest, is reason enough to give the ideas serious consideration.