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The Law of Lawyering, Geoffrey C. Hazard, Jr. and W. William Hodes

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THE LAW OF LAWYERING. By Geoffrey C. Hazard, Jr. and W. William Hodes. New York. Harcourt Brace Jovanovich. 1985. Pp. 882 $25,00.

REVIEWED BY MAYNARD E. PIRSIG*

With this book, Professors Hazard and Hodes have filled an important current need, a presentation and analysis of the Model Rules of Professional Conduct adopted by the American Bar Association [hereafter ABA] in August, 1983. The book is not a general text on the ethics and obligations of the legal profession. It is a treatise on the Model Rules. While most of the decisions of the United States Supreme Court dealing with or relating to a lawyer's professional conduct are dealt with, only a limited number of other cases or sources are cited or discussed.

The authors recognize[1] that their contribution is of special value to three groups; judges and lawyers in states which have adopted the Model Rules, those in states which are considering their adoption, and scholars in their study and examination of professional responsibility.

The value of the book is not limited to these groups. Lawyers and judges in states still retaining the 1969 Code of Professional Responsibility will find helpful analyses of ethical problems and how they have been dealt with under that Code. The ethical issues discussed in the book arise under either Code and the authors in discussing the Model Rules have noted, frequently with extended discussion, how the same issues are dealt with under the 1969 Code.

Within these parameters, the book is a significant contribution to the literature on professional ethics. Its organization is simple and clear. Each chapter first sets out verbatim the Model Rule to be discussed. The discussion may be preceded by an "Overview" which contains a general account of the subject matter to which the Rule is addressed. In some instances, a separate and more extended "Perspective"[2] is offered on the subject matter under discussion. Following the analysis of a Rule, a number of hypothetical factual situations, many from real life, are presented. The authors offer their solution to the issues so raised, as they see it under the Rule.

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1. Introduction, p. xxxviii-2

2. E.g., "Entity Clients", pp 231-238.

The authors' analysis of ethical issues and their explanation of how the Model Rules deal with them are clear, direct and generally persuasive. There is an absence of literalism and the Rules are examined in the light of basic and accepted concepts and principles. The authors have produced a significant product.

It is, therefore, with reluctance that one must note the authors' inclination to interpret a Rule in accordance with their own firmly held views when others, not so committed, would not find the interpretation warranted by the Rule. Their discussions of Rule 1.6 on confidential communications and of Rule 1.13 on organization attorneys are illustrative.

The proposed final draft of Rule 1.6, presented to the ABA by the Kutak Commission,[3] provided that an attorney may disclose confidential information received in the course of the relationship when necessary to prevent a future crime or a fraud which is likely to result in substantial injury to the financial interests or property of another. The Rule adopted by the ABA at its annual House of Delegates meeting in August, 1983, restricted the right to disclose to crimes "likely to result in imminent death or substantial bodily harm." Hence, under the adopted Rule, the attorney is restricted far more in making disclosures than under either the proposed draft or the Disciplinary Rules of the 1969 Code.[4]

Many will agree with the authors' criticism of the ABA's version that, read literally, it is an unwarranted restriction on the lawyer's right to disclose. However, their position is that, read in context, the permitted disclosure is broader than the literal language of the Rule would suggest. They base this on several grounds. First, the Rule cannot avoid laws requiring disclosure, such as tax laws, security law requirements, and orders of courts compelling disclosure.[5]

Second, the authors refer to Rule 1.6(B)(2), which provides that a lawyer may disclose confidential information "to establish a defense to a criminal charge or civil claim against the lawyer based upon

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3. The Special Commission on Evaluation of Professional Standards was appointed by the ABA in 1977 and chaired by the later Robert J. Kutak. The Model Rules are intended to supercede the Model Code of Professional Responsibility promulgated by the ABA in 1969 and currently in force, usually with some modification, in most states.

4. DR 4-101(C)(3) of the 1969 Code permits the attorney to disclose the "intention of his client to commit a crime or information necessary to prevent the crime."

The Model Rule also deleted from the Kutak proposed draft permission to disclose when "required by law." DR 4-101(C)(2) permits such disclosure.

5. P. 93.

conduct in which the client was involved." This is given a broad interpretation. If the client has used the lawyer to perpetrate a fraud, the lawyer can defend him or her self by disclosing the fraud to the victim. The charge or claim, the authors say, need not have been initiated or otherwise asserted. It is sufficient if the lawyer's efforts for his client resulted in injury to a third person. The lawyer "may feel compelled to make amends to the victim as *a method of self defense* (italics in original). Allowing the lawyer to rectify the harm is thus a way of assuring that the lawyer will not be found to have violated Rule 1.2(d),[6] or criminal or tort law."[7] He may also "feel a moral obligation to right the wrong."[8]

Third, the authors refer to a sentence in the Official Comment to Rule 1.8(b) stating, "Neither this Rule nor Rule 1.8(b)[9] nor Rule 1.16(d)[10] prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."[11]

The authors construe this provision as permitting the notice to be given to others as well as to the client. "It permits use of 'signals' to third parties - other lawyers, victims of the client's fraud, government agencies - warning that a transaction was fraudulent."[12] They do not consider this a disclosure under Rule 1.6 since the *content* of a communication is not being disclosed. If the third party receives an evasive reply from the lawyer's former client concerning the withdrawal and asks the attorney about the basis of the withdrawal, "the lawyer must respond for now a false answer or no answer would assist in a fraud on the third party."[13] They recognize that their

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6. This Rule provides in part that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."

7. P. 93.

8. P. 105. Compare the Official Comment to Rule 1.6: "The lawyer's right to respond arises when an assertion of such complicity (in the client's crime or fraud) has been made . . ."

9. This Rule prohibits use of "information relating to the representation of a client" without the client's consent.

10. This Rule deals with the attorney's duties upon termination of the representation.

11. Professor Kaufman is critical of the Comment: "This is a stunning and potentially troublemaking Comment. It was obviously inserted to take some sting out of accusations that redrafted Rule 1.6 left lawyers whose services had been used to perpetrate a crime or fraud helpless to protect themselves or the public against misuse of their services." Kaufman, Problems in Professional Responsibility, p. 210, (1984).

12. P. 108.

13. P. 107.

position literally applies to a withdrawal for reasons other than client wrongdoing but this would be a "gratuitous undermining of the confidentiality principle" and should be limited to fraud and crime cases.[14]

Whether courts adopting Rule 1.6 and their disciplinary authorities will construe the Rule as the authors interpret it may be doubted. Its adoption by the ABA was the product of full and extended discussion and debate at its August, 1983, meeting. It seems clear that, however objectionable to others the result may be, the ABA deliberately chose the final version of the Rule and clearly intended disclosures under Rule 1.6 to be confined to the client's intention to commit a criminal act likely to result in "imminent death or substantial bodily harm." If that was an unwise decision, those so believing, which includes the reviewer, should direct their efforts toward seeking a reversal by the ABA of its position, or urging state bar organizations and courts to reject the ABA version, rather than resorting to a strained construction of the Rule that contradicts the plain intention of the ABA in adopting it.

Lawyers for an organization present unique questions concerning their status and professional responsibilities. They are retained or employed by officers of the organization who direct what legal services the lawyer is to perform for the organization. If the lawyer finds wrongdoing on their part, what is the lawyer's professional obligation? The officers are not the clients of the lawyer. The organization is. Model Rule 1.13 addresses this question.[15]

Subdivision (a) of the Rule provides that a lawyer for an organization "represents the organization acting through its duly authorized constituients."

Subdivision (b) states in substance that if the lawyer "knows" of an act or refusal to act within the organization "that is a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization" and is likely to substantially injure the organization, the lawyer "shall proceed as is

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14. Compare Kaufman, Problems in Professional Responsibility, 1984, p. 211: "If a public withdrawal or disaffirmation does not constitute a violation of Rule 1.6(a), even when based on information relating to the representation, why does it make any difference what the purpose of the notice was?"

15. EC 5-18 of the Code of Professional Responsibility states that the lawyer "owes his allegiance to the entity" and "In advising the entity should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.". The Disciplinary Rules are silent on the subject.

reasonably necessary in the best interests of the organization."[16]

The authors conclude from these provisions, particularly subdivision (a), that the lawyer's status is one of equality with the other major officials of the organization and is not one of subordination to them. Normally, they work together. But, if the lawyer knows of wrongdoing on the officers' part, the lawyer's professional duty is to the "entity" and not to the officials who, in effect, are non-clients. The lawyer may seek internally to correct the wrongdoing. If this fails, the lawyer may, but need not, resign.[17]

The authors' discussion does not make clear what kind of wrongdoing is contemplated as triggering the lawyer's responsibilities. Also unclear is whether, when the lawyer does not resign, decisions made by the lawyer on behalf of the organization and overriding those of the officers, bind the organization.

Two kinds of wrongdoing may be distinguished. One includes those falling within subdivision (b), that is, violations of legal obligations to the organization or violations of law imputable to the organization.[18] The other includes conduct by officials which the lawyer is convinced is contrary to the best interests of the organization but not necessarily illegal. For example, contrary to the officers' conclusion and decision to proceed, the lawyer may deem it harmful to the organization to merge with another organization, or expand into new products, or liberalize or restrict benefits to employees, or reject offers of settlement regarded by the lawyer as highly favorable. Situations such as these are not covered by subdivision (b). The authors appear to suggest that they are covered by subdivision (a) under which the lawyer, with his independent status, has the power and responsibility to override the decisions of the officers. They state:[19]

"Since the lawyer and other agents of the entity are on the same legal footing, the lawyer may have to exercise his independent judgment in some situations to determine what is truly in the client's best

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16. The remainder of the subdivision and subdivisions (c) and (d) spell out how this obligation may be implemented by the lawyer.

17. Rule 1.13(c) provides that if the lawyer's other efforts within the organization have failed, "the lawyer *may* resign in accordance with Rule 1.16". (italics added)

18. For a description of the difficulties facing organization lawyers attempting to persuade, for example, the board of directors that officers are guilty of these violations, see HAZARD, ETHICS IN THE PRACTICE OF LAW, pp. 46-57 (1977).

19. P. 241.

interest - overruling, if need be, the views of other highly placed agents."[20]

If this is the interpretation to be placed on Rule 1.13, it goes beyond the generally recognized propriety of counsel offering advice to clients, including organizations, on non-legal matters.[21] It places organization counsel in a powerful and controlling position which neither an organization nor its counsel is likely to contemplate or accept.[22] The Rule need not and should not be so construed.[23]

It may be that it is premature to undertake to define the ethical status and duties of an organization lawyer, considering the limited consensus on what they should be. They may well turn on a number of distinctions, such as the distinction between house counsel and outside counsel, between small unincorporated groups without an organizational structure and corporations with a staff of officers, directors, etc., and between private and government organizations.[24] They may turn also on whether the relationship to an outside counsel is an on-going one or exists only for an isolated case. The relationship to outside counsel will also be different if the organization has house counsel in its employ as well.

Distinctions of this kind have not been drawn by either the Model Rules or the authors. Both appear to assume a single type of relationship, primarily that of house counsel employed by the organization.

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20. The authors add: "This approach should help the lawyer understand his responsibilities not only in the specific cases of intra-entity strife referred to in Rule 1.13(b), but in other contexts as well." See also p. 235, stating, "The lawyer has an independent responsibility to assess what is truly best for the organization as a whole. If need be, he can even litigate on behalf of the entity against its former constituents, *because they do not qualify as former clients for purposes of Rule 1.9*" (italics in original). Rule 1.9 deals with conflicting interests of former clients.

21. Model Rule 2.1 states the lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors. See also EC 7-8.

22. See generally Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firms*, 37 STAN. L. REV. 503 (1985).

23. Compare the Official Comment to Rule 1.13:"Decisions concerning policy and operations, including ones entailing serious risks are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law."

24. That Rule 1.13 applies to "unincorporated associations" and "governmental organizations" see Official Comment to the Rule. See also the authors' discussion, p. 241, stating the Rule "may also apply to informal groups who come together only for the purpose of seeking legal representation."

At least this recognizes house counsel as having a professional status and stature which, until recently at least, have too often not been accorded them.

The suggestion that the authors' contribution may contain some limitations should not detract from the inherent value of what the authors have produced. They have succeeded in what they undertook to do, to present a careful and systematic description, analysis and evaluation of the Model Rules. A better presentation of the Rules will not be found. Examination by judges and lawyers of questions of professional ethics will not be complete without having consulted this book and ascertained what the authors have to say about them. It will also serve as a useful supplement to law school courses on professional responsibility, whether or not the Model Rules are considered as they should be. That the authors, in interpreting the Model Rules, may, at times, have incorporated their views of what is desirable is not surprising or altogether objectionable. The underlying merits of the book remain.