

# Lecture

## LAWYER FOR THE SITUATION

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### I. INTRODUCTION

In the confirmation hearings concerning Louis Brandeis before the United States Senate almost a century ago—hearings evaluating whether Brandeis was fit to be a Justice of the United States Supreme Court—Brandeis was challenged concerning his professional ethics as a lawyer. It was charged that he had involved himself in conflicts of interest, trying to assist conflicting parties in working out intense differences. When asked who he represented, he responded that he was “lawyer for the situation.”<sup>1</sup>

That response, undoubtedly, was imprudent. Mr. Brandeis could have said that he represented multiple parties with conflicting interests but that he had done so with their informed consent. The standards of professional conduct of the time recognized the propriety of multiple representation under those conditions. Canon 6 of the American Bar Association Canons of Professional Ethics, promulgated in 1908, provided: “It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.”<sup>2</sup> The standards of professional conduct still recognize the propriety of multiple representation in such circumstances.<sup>3</sup>

However, the term “lawyer for the situation” took on a life of its own. The idea had and continues to have great appeal, in contrast to the concept of lawyer as advocate. The argument is that, in various situations in practice, lawyers should consider the interests of others and moderate their conduct accordingly. My argument here is that the rules

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<sup>1</sup> See Clyde Spillenger, *Reconsidering Brandeis as People’s Lawyer*, 105 YALE L. J. 1445, 1502 n.194, 1503 n.199 (1996); John Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); see also GEOFFREY HAZARD, *ETHICS IN THE PRACTICE OF LAW* 64-65 (1978).

<sup>2</sup> CANONS OF PROF’L ETHICS Canon 6 (1908).

<sup>3</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 (2003).

of ethics and the law governing lawyers already require such moderation, to an extent perhaps not appreciated by either critics of the profession or zealous advocates of “zealous advocacy” within the profession.

Professional practice as conventionally understood requires a lawyer to advance the position and improve the situation of one party against the interests of an opposite party. Up to a point, that convention accurately describes the role of an advocate in litigation. Once a trial has started, an advocate is committed to almost unqualified loyalty to one client, pitted against an adverse party who, implicitly at least, is represented by an equally dedicated advocate. In this vision, the scene of the encounter is a courtroom and the lawyer is performing the role of barrister.

The scenario next dissolves into a conference room in which the lawyers are negotiators seated across the table from each other. In this setting the lawyers perform the role of solicitors with similarly counterposed orientations. On the logic of the adversary model, the solicitor has few if any obligations to the opposing party or its counsel.

Much of law practice conforms to this model: trials, of course, and many negotiations. Perhaps more important, the legal profession’s self-conception is based on that model. The classic formulation is that by Lord Brougham, in which he proclaimed:

[A]n advocate, in discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty. . . .<sup>4</sup>

These strong words—“first and only duty” and “knows but one person in the world”—have become the credo of many lawyers, particularly when lawyers are called to account for injury to the interests of persons other than clients.<sup>5</sup> The implications of the credo are found in

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<sup>4</sup> CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 580 (1986).

<sup>5</sup> For an exposition of the unqualified concept of advocacy, see, for example, William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29.

judicial opinions that reject the possibility of imposing legal responsibility on a lawyer toward anyone other than a client.<sup>6</sup>

However, in fact, law practice involves nearly infinite variations of “situation” in which lawyers have legal duties to persons other than their clients. Some of these duties are the minimal obligation to refrain from fraud, for example, not counseling a client to commit perjury or to destroy evidentiary documents.<sup>7</sup> Yet even the minimalist duty to avoid fraud contributes in a modest way to civilizing the relationship between a client and a third person. Other obligations to third persons are more exacting. Observance of these obligations reduces the transaction costs of total vigilance that an opposing party would otherwise be obliged to incur. By the same token, a duty to others imposes a limitation on a lawyer’s duty to his client and therefore creates something of a conflict of interest on the part of the lawyer.

Thus, the scope of a lawyer’s duties, according to the conventional advocacy model, is wholly oriented to the client, with a few exceptions dealing with extreme cases such as fraud. On the other hand, the rules of ethics can be differently understood, interpreted, and applied than according to that credo. The present analysis is an interpretation of the rules of ethics in those terms. Such an interpretation invites inquiry as to why the conventional advocacy model continues to have such attraction for the profession. That is, if we have been speaking prose all along, why do we insist that we are speaking otherwise?

Perhaps the precise focus of the analysis should be made even clearer. I am not suggesting that the rules of ethics should require wider scope in representation of multiple parties or necessarily that they should be changed to require lawyers to take greater account of the interests of parties other than clients. There is much to be said for such changes, and much has been said in support of them.<sup>8</sup> The analysis here is based on the rules as they now are, including the rules of ethics and the rules of law. By rules of law, I refer to the complex general law that

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<sup>6</sup> The most extreme conception of legitimate partisanship in transaction practice is perhaps *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991), which countenanced a lawyer’s transmittal of a financial statement that, as alleged, he knew to be false.

<sup>7</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.2(d), 3.3, 3.4(a) and (b) (2003).

<sup>8</sup> For a pioneering analysis of such an approach, see Nancy Moore, *Expanding Duties of Attorneys to “Non-Clients:” Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659 (1994).

governs everyone, including lawyers, and specifically to application of that law to lawyers when representing clients.

## II. THE "SITUATION" OF AN ADVOCATE

Even in the core function of advocacy in litigation, the lawyer has duties beyond those to clients. The rules of legal ethics that most sharply express the model of advocacy are those governing loyalty and the rule of confidentiality and its corollaries. The basic rule concerning loyalty is expressed negatively in terms of conflict of interest. Model Rule 1.7(1)(a) of the American Bar Association Model Rules of Professional Conduct prohibits a lawyer from undertaking a representation if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer.<sup>9</sup>

The epitome of representation "directly adverse" to a client is litigation against the client. A lawyer is not permitted to sue a party that the lawyer concurrently is representing in the same or another matter. This rule is generally protective of the client, but it goes further, because a client cannot consent to such adverse representation. This limitation is explained in the Restatement of the Law Governing Lawyers: the rationale is not simply the interest of the clients involved, but it serves the interest of the judicial process in our adversary system. Its aim is that the court be presented with the strongest statements of the contending positions, so that the judge may more fully understand what is at issue.<sup>10</sup> Thus, even the simplest rule of loyalty to the client—prohibiting the representation of opposing parties in litigation—is justified in part by reference to third party interests, in this case the interests of the court and its judges.

More fundamentally, our adversary system considers that litigation is not a street-fight. On the contrary, the system involves a complicated cooperative interaction between contending advocates. The interaction commences not later than the filing of the complaint and continues through the process of preliminary motions and discovery prior to

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<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2003).

<sup>10</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 (1997).

possible trial. Indeed, in filing a complaint, the plaintiff's advocate is required to exercise some scrutiny of the substantiality of the claim being asserted for his client. Rule 11 of the Federal Rules of Civil Procedure, and its state law analogues, is not a very demanding standard, but it is not entirely empty.<sup>11</sup>

Beyond the stage of filing the complaint, most litigation is terminated not by trial but by settlement. A settlement by definition requires the advocate to consider—that is, to think seriously—about the interests of the opposing party. Arriving at a settlement proposal that might be seriously considered requires an understanding of the case from the opponent's viewpoint. Moreover, there are decisions that have set aside settlements in which the advocate for one party failed to consider the interests of the opposing party in the course of supposedly providing adequate representation of the interests of his own client. Here I have in mind the now famous case of *Spaulding v. Zimmerman*.<sup>12</sup>

If a case goes to trial, the competitive-cooperative interaction continues, in that the advocates are primarily responsible for presentation of evidence and legal contentions. The normal process of trial is a highly mannered but nevertheless cooperative portrayal of the competing versions of truth and the disputable issues of law. The judge is much more than an umpire, but the advocates have the laboring oars.

The procedure is intensely regulated. In this regulatory scheme the ethical rules are essentially secondary. The rules of ethics generally incorporate by reference the rules of criminal and civil procedure that directly govern the parties and, through them, the advocates. Rule 3.1, for example, prohibits frivolous legal contentions, but it does not define "frivolous."<sup>13</sup> Instead, Rule 3.1 refers to the law of procedure for a definition.<sup>14</sup> Rule 3.4 similarly has a catalogue of prohibitions cast in terms of the standing law of procedure; for example, Rule 3.4(a) states

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<sup>11</sup> See FED. R. CIV. P. 11; see, e.g., *In re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988); *In re Jafree*, 444 N.E.2d 143 (Ill. 1982); Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986).

<sup>12</sup> 116 N.W.2d 704 (Minn. 1962). The defense lawyer ignored the significance of medical information that plaintiff had much more serious injuries than the plaintiff or his counsel were aware of; plaintiff was a minor. *Id.*

<sup>13</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

<sup>14</sup> See *id.*

that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document . . . .”<sup>15</sup>

These and similar rules obviously confer legal protection on persons other than the client. Immediate beneficiaries are opposing counsel and the opposing party, and secondary beneficiaries are the courts. The ultimate beneficiary is the public, which needs a law-abiding adjudicative system.

The law on this set of obligations is vacuous when stated in general terms but endlessly complex when examined in detail. Stated in general terms, the Restatement of the Law Governing Lawyers § 105 says only, “[i]n representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.”<sup>16</sup>

At the same time, the “rules of procedure and evidence” constitute a huge compendium of duties and responsibilities, being entire legal subjects unto themselves. These rules typically are enforced through the old-fashioned technique of monitoring by opposing counsel, reciprocity among the advocates and remonstrance and, if necessary, by retribution by opposing counsel. The fact that the governing rules are typically enforced through informal mechanisms does not diminish their standing as rules. Indeed, one could say that the rules, as enforced through professional interaction of advocates, are the “situational” norms of advocacy itself.

However, the rules governing advocacy are also defined, and sometimes enforced, through formal process. A few examples will suffice. Rule 11 of the Federal Rules of Civil Procedure imposes an obligation of minimal integrity and diligence in making allegations against an opposing party. The rule is not very strict but it is not empty.<sup>17</sup> Rule 26, governing discovery, imposes responsibility on the advocate to intercept discovery responses by his client that the lawyer knows to be false.<sup>18</sup> There are decisions enforcing that obligation.<sup>19</sup> Rule 16, dealing with pre-trial conferences, imposes a duty on counsel to

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<sup>15</sup> *Id.* R. 3.4(a).

<sup>16</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 105 (2000).

<sup>17</sup> *See* FED. R. CIV. P. 11; *see, e.g., In re Solerwitz*, 848 F.2d 1573, 1581 (Fed. Cir. 1988).

<sup>18</sup> *See* FED. R. CIV. P. 26.

<sup>19</sup> *See, e.g., Comm. on Prof'l Ethics v. Crary*, 245 N.W.2d 298 (Iowa 1976) (knowingly permitting client to give false testimony in deposition); *Miss. Bar v. Land*, 653 So. 2d 899 (Miss. 1994) (false responses to interrogatories).

attend and participate on pain of forfeiting the client's case.<sup>20</sup> Concerning conduct in the trial itself, Rule 3.4(e) requires that a lawyer "not allude to any matter that . . . will not be supported by admissible evidence," a duty that has been sometimes enforced.<sup>21</sup> The law of evidence imposes restrictions on the kind of proofs an advocate is permitted to present, for example, those governing expert testimony.<sup>22</sup> And so on.<sup>23</sup>

The point can be summarized in two propositions. First, as stated in Canon 7 of the ABA Model Code of Professional Responsibility, in representation of a client in litigation, "[a] lawyer should represent a client zealously" but "within the bounds of the law."<sup>24</sup> And second, the limits imposed by law on zeal in advocacy are extensive and intensive. Furthermore, in my observation these limits are generally observed by lawyers in our system, even in an era of intense partisanship.

### III. "SITUATIONS" IN TRANSACTION PRACTICE

The circumstances in which a lawyer has obligations to persons other than a client are far more extensive in transaction practice than in litigation. Partly this is because litigation, by definition, places other parties in a position adverse to the client and hence at an outer region of responsibility on the lawyer's part. In transaction practice, in contrast, the configuration of relationships covers a wide range. At one end of the range, the lawyer may, on the basis of informed consent, represent two or more clients whose interests conflict to some degree. That situation would have been an apt description by Mr. Brandeis of his role in at least some of the "situations" under discussion in his confirmation hearing. At the other end of the range, the lawyer may perform some incidental service for an opposing party that entails an arguable element of justifiable reliance giving rise to legal obligation.

#### A. *Multiple Representation on the Basis of Informed Consent*

The rules concerning conflicts of interest in transaction practice permit almost any multiple representation, if—and it is a strong "if"—

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<sup>20</sup> See FED. R. CIV. P. 16; *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639 (1976).

<sup>21</sup> See, e.g., *In re Mack*, 519 N.W.2d 900 (Minn. 1994) (continuing suspension for failure to correct client's testimony known by the lawyer to be false).

<sup>22</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>23</sup> See generally John Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433 (1986).

<sup>24</sup> CANONS OF PROF'L ETHICS Canon 7 (1908).

there is adequately informed consent of all affected clients. In formal terms, the rule prohibiting “direct adversity” can apply to transaction matters. That is, at least in principle some transaction matters present “nonconsentable” conflicts. Comment [7] to the Rule, as amended by the ABA in 2002, states that “[d]irectly adverse conflicts can also arise in transactional matters.”<sup>25</sup> No doubt this is true. However, no example of such a conflict is offered in the Comments. Rather, Comment [7] continues, “[f]or example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.”<sup>26</sup>

The Comment therefore does not define or give examples of direct adversity in transaction matters. Instead, it specifies how such a conflict might be overcome, i.e., the familiar formula of informed consent. This suggests that the category of absolutely “nonconsentable conflicts” in transaction practice is very narrow indeed.<sup>27</sup>

Of course, a lawyer who proceeds with multiple representation on the basis of client consent takes a significant risk. The risk is that the relationship among the clients can undergo change, with resulting increased conflict in their positions. So also there is risk that an affected client will later become disaffected and assert that the consent was invalid. Typically, the claim will be that an inadequate disclosure was made concerning the implications of multiple representation. The risk to lawyers of client defection appears to be much greater these days than in the past, simply because clients are more willing to challenge lawyer probity and to obtain other legal assistance to do so. Nevertheless, lawyers every day undertake multiple representations on the basis of client consent.

Any case in which a lawyer properly obtains a conflicts consent or waiver can be viewed as a “situation” in the Brandeisian sense. A valid consent requires adequate disclosure of the existence and implications of the dual representation. Adequate disclosure of the implications

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<sup>25</sup> MODEL CODE OF PROF'L CONDUCT R. 1.7 cmt. 7 (2003).

<sup>26</sup> *Id.*

<sup>27</sup> A recent decision that suggests a “nonconsentable” conflict involved the pursuit of a patent on behalf of one client while also representing another client engaged in developing patentable compounds of a similar type. See *G.D. Searle & Co. v. Pennie & Edmonds LLP*, 308 A.D.2d 404 (N.Y. App. Div. 2003).



requires attention to the reasonably possible “worst case” scenarios of mutual hostility. Consent by the clients reflects decisions on their part to forego extreme measures so that a single lawyer or law firm can carry on for the benefit of both. When the representations involve the same matter, the result is a “situation.”

*B. The Confidentiality Rule*

At this point, it would be well to bring forward a second basic rule of responsibility to a client, the rule of confidentiality. The confidentiality rule is a basic support of the duty of loyalty, which has been addressed above in analysis of the advocate’s role.

Fulfilling the duty of loyalty in a representation typically involves a measure of confidentiality, i.e., concealment of sensitive facts and strategic purposes. Hence, prima facie a lawyer keeps sensitive facts and strategic purposes from everyone but the client. By the same token, acting for the benefit of two or more people—which is what a multiple representation “situation” entails—requires a substantial measure of disclosure among the several intended clients. Such a disclosure is required in the predicate for consent, i.e., that the consent be “informed.” Hence, the concept of lawyer for the situation entails a modification of the principle of confidentiality, as well as the principle of loyalty.

This modification of confidentiality is the predicate of the obligations imposed on a transaction lawyer who undertakes representation of multiple clients. On the one hand, the lawyer is required to maintain the confidences of each client, except as disclosure is necessary to obtain informed consent from the other client. On the other hand, an adequate disclosure is necessary to obtain valid consent. The definition of “adequate” is not simple. As formulated in the Restatement of the Law Governing Lawyers § 202, Comment *c(i)*:

[T]he information should normally address . . . contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed . . . the effect of . . . the process of obtaining other clients’ informed consent upon confidential information . . . any material reservations that a disinterested lawyer might reasonably harbor . . . if such a lawyer were representing only the client being advised; and the consequences and

effects of a future withdrawal of consent by any client  
 . . . .<sup>28</sup>

It is readily apparent that this formula affords opportunity for subsequent contentions that a disclosure was inadequate. As a precautionary matter, a lawyer ordinarily should obtain the consent in writing, even in jurisdictions where a writing is not required.<sup>29</sup> Where the client is a corporation, or other organization with its own law department, the consent should be signed or countersigned by the company counsel. Even so, the standard for validity of consent is that the lawyer be able to provide each client the full measure of loyalty, competence, and diligence that is owed to a client represented alone.<sup>30</sup> Such are the responsibilities of a lawyer for a "situation" in which the lawyer has undertaken representation of multiple clients on the basis of client consent.

Unfortunately, there are many decisions imposing liability on lawyers who have proceeded on the basis of supposed consent where it was subsequently disputed whether consent had been sought and obtained, or where the disclosure on which consent was based was determined to be inadequate. However, imposition of malpractice liability in such situations is consistent with the notion that a lawyer's duty runs exclusively to clients. In a multiple representation, the "relevant others" are indeed clients.

#### 1. Responsibilities of Transaction Lawyers to Nonclients

Many lawyers seem to think that, when representation of only one client is involved, such is the end of the matter. But the rules of loyalty and confidentiality are, and always have been, subject to manifold exceptions and qualifications. Some of these exceptions and qualifications are directly referenced in the rules of ethics, but others are recognized by cross reference or by implication.

Taken together, these exceptions and qualifications permit or require a lawyer in various circumstances to make disclosures of information or

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<sup>28</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. c(i) (Proposed Final Draft No. 1, 1996).

<sup>29</sup> Written consent has long been required in a few jurisdictions, notably California. See CALIFORNIA RULES OF PROF'L CONDUCT R. 3-310 (2002). Under the amendments to the ABA Model Rules adopted in 2002, a consent must be confirmed in writing in jurisdictions adopting the amendment. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2003).

<sup>30</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. h (1997).

take other action that would otherwise be covered by the primary duties to the client. These exceptions and qualifications, in other words, are recognitions that lawyers have obligations to nonclients. Assembling a complete catalogue of these “situations” would be difficult, if not impossible, but a substantial array can be readily brought into focus.

## 2. Impliedly Authorized Disclosures

An initial exception to the rule of confidentiality is the lawyer’s right, prescribed in Rule 1.6(a), to make disclosures “impliedly authorized in order to carry out the representation.”<sup>31</sup> Of course, there is also an exception for expressly authorized disclosures, for example, where a client directs the lawyer to make a settlement offer in a negotiation. But the scope of implied authorization is functionally much broader. In the typical client-lawyer relationship, the details of the engagement are not explicated; rather, they are implied from the undertaking itself.

The undertaking in a client-lawyer relationship primarily concerns transmission of information—making contentions and proposals and supporting them with argument and information. Transmissions that would “reasonably” further the objectives of the representation are impliedly authorized, the “reasonably” concept referring to professionally recognized standards and professional judgment. Thus, a lawyer can disclose the availability of his client for an interview, or the acceptable scope of a due diligence visitation by an external auditor, or the status of client filings with a regulatory authority, and so on—all without express authorization of the client.

However, these disclosures are governed through regulation, rules of professional ethics, and legal obligations imposed by the general law. Under Rule 4.1 of the ABA Model Rules, a lawyer may not give false information in such a disclosure.<sup>32</sup> Giving false information that is material would constitute fraud under general principles of law. As such, it would be a violation of Rule 1.2(d) of the professional rules, which forbids assisting in a crime or fraud, and would also be a basis for civil and possibly criminal liability on the part of the lawyer.<sup>33</sup> Moreover, under tort law as it has evolved, fraud includes not only positive falsity but disclosures that are misleading because incomplete. As stated in Comment [1] to Rule 4.1, “Misrepresentations can also occur

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<sup>31</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2003).

<sup>32</sup> *Id.* R. 4.1(a).

<sup>33</sup> *Id.* R. 1.2(d).

by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”<sup>34</sup>

In many circumstances, the lawyer’s implied authority to make truthful disclosures becomes a mandatory duty to do so. A lawyer is always governed by the duty under Rule 1.3 to provide diligent representation. Diligent representation includes the obligation to transmit information to the extent reasonably expected under recognized standards of competence. Hence, lawyers have duties to convey information that is not misleading.

The term “not misleading” of course implicitly requires identification of those who might be misled. For example, a communication adequate to an experienced liability insurance executive ordinarily would not be adequate in a communication to an ordinary householder. Often communication must be made to several people or many. Gauging the circle of addressees and the terms of the communication must be based on assessment of the circumstances, i.e., the “situation.”

### 3. “Blowing the Whistle”

The most intense debates about the rules of professional ethics in recent years have involved other exceptions to the rule of confidentiality. These exceptions were pejoratively characterized as “blowing the whistle” and understandably caused great concern within the bar. The professional debate began with the presentation of the Kutak Committee recommendations concerning Rule 1.6, which were largely rejected by the ABA House of Delegates in 1983. The debate at the national level more recently culminated in the adoption of the Cheek Report recommendations by the House of Delegates in 2003. The revisions of Rule 1.6(b) adopted in 2003 essentially corresponded to the revisions rejected twenty years earlier.

Rules 1.6(b)(1), (2) and (3) now would permit (but not require) a lawyer to disclose client confidences to prevent death or serious bodily harm or to prevent or mitigate financial fraud in which the lawyer’s services have been exploited by a client.<sup>35</sup> For legal, reputational, or moral reasons, a lawyer may feel required to make disclosures that these exceptions permit. Hence, in operative effect they can indeed involve

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<sup>34</sup> *Id.* R. 4.1 cmt. 1.

<sup>35</sup> *Id.* R. 1.6(b)(1), (2), and (3).

“blowing the whistle.” Accordingly, the question then becomes: When and to whom is a whistle to be blown?

The answer to the question of “when” is simply but opaquely “when the lawyer reasonably believes necessary,” as stated in Rule 1.6(b).<sup>36</sup> The obvious answer to the question “to whom” is the prospective victim, but, as noted in Comment [6] to Rule 1.6, there are instances when it would be appropriate to make disclosure “to the authorities.”<sup>37</sup> The more general point is that a lawyer can feel an unavoidable obligation to protect third parties from victimization by the lawyer’s client.<sup>38</sup> Lawyers only rarely have to deal with clients threatening victimization in the form of homicide or assault. But, given that much of law practice involves dealings with money and property, clients who may be committing fraud are more commonly encountered. Determining how to proceed often can be a “tough situation.”

### C. *Escrows and Other Fiduciary Undertakings*

Another kind of “situational” responsibility arises from various fiduciary undertakings to third parties that are designed to complete a transaction. A common type is acting as an escrow agent to assure proper transfer of money (or other property) to consummate an agreement. Examples include escrow of purchase money or title deeds in a real estate closing; filing of legal documents that regularize or officially record a transaction; after settlement of a litigation claim, the disbursement of funds among the client and other designated recipients such as health care providers; obtaining required verifications of corporate or government documents; and so on.<sup>39</sup>

It is perfectly clear that in all such undertakings, the lawyer is undertaking obligations to third persons. The rules of ethics explicitly recognize some of these obligations, particularly those concerning the handling of money. Rule 1.15 treats money due to third persons on a par with money due to a client, so far as the lawyer is concerned. Accordingly, the lawyer is required to keep the funds in a trust account and to embargo a distribution if there is a dispute as to proper allocation of the funds. Parallel obligations can be derived from other ethical

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<sup>36</sup> See *id.* R. 1.6(b).

<sup>37</sup> See *id.* R. 1.6 cmt. 6.

<sup>38</sup> See *Purcell v. Dist. Attorney*, 676 N.E.2d 436 (Mass. 1997) (threat to commit arson).

<sup>39</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56, cmt. e (1997).

obligations, particularly the obligation to be truthful (Rule 4.1) and to avoid conduct involving dishonesty (Rule 8.4(c)).

Courts are coming to recognize that these ethical obligations should be reinforced by legal obligations in favor of third persons injured by their breach.<sup>40</sup> However, many courts still resist this conclusion. There is understandable fear about putting lawyers in positions adverse to the immediate interest of clients, or in positions where the lawyer has to make a judgment call. There remains some resistance to the idea that a lawyer can ever be civilly liable to someone other than a client. Imposition of liability, in my opinion, could properly require a high standard of proof, based on the idea that a lawyer is an officer of the legal system and, as such, is entitled to a kind of *prima facie* immunity. But the evidence of breach can be quite plain. A common example is the improper distribution of settlement proceeds in litigation. What possible social interest is furthered by exonerating a lawyer who gave all the settlement proceeds to the client (except, of course, the contingent fee!) and stiffed the hospital and the doctors?

#### D. *Corporate Clients*

Much, if not most, of modern law practice involves representation of corporations and other organizations. The basic rules are set forth in Rule 1.13 of the ABA Model.<sup>41</sup> These rules apply in representing business corporations and nonprofit corporations, partnerships, unincorporated associations, and, with certain modifications, government agencies. All of these organizations can be regarded as "situations." That is, they involve interactions with persons who are not clients, who have interests of their own that may not be wholly consistent with the clients' interests, but whose aims and concerns have to be taken into account by the lawyer in the course of representing corporate clients.

The beginning point is stated in Rule 1.13(a), that the organizational client is "acting through its duly authorized constituents."<sup>42</sup> Comment [1] to 1.13 recognizes the simple fact that the entity "cannot act except through its officers, directors, employees, shareholders and other constituents."<sup>43</sup> Rule 1.13(b) recognizes that conflicting interests can be

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<sup>40</sup> See *id.* § 42.

<sup>41</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* R. 1.13 cmt. 1.

involved. Thus, the corporate constituents may be engaged in acts or have purposes that are “a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization” with consequent “substantial injury to the organization.”<sup>44</sup> If so, the lawyer “shall proceed as is reasonably necessary in the best interest of the organization.”<sup>45</sup>

Rule 1.13(b) identifies various responses the lawyer may undertake to fulfill the responsibility to act in the best interests of the corporation. All of these responses in one way or another would interrupt or overrule the proposed course of action of the corporate operative. If necessary, what is called for is “referral to the highest authority that can act on behalf of the organization as determined by applicable law.”<sup>46</sup>

Rule 1.13(f) moves in a somewhat different direction. That rule requires the lawyer to explain the identity of the client (i.e., that it is the corporation) to a corporate constituent who does not seem to understand the direction of the lawyer’s primary loyalties.<sup>47</sup> This explanation is by hypothesis addressed to someone who is not the client, or at least not the only client. As recognized in Rule 1.13(g), a lawyer may represent both the organization and one of its constituents.<sup>48</sup> But such a dual representation is governed by the conflict of interest standard in Rule 1.7 and the disclosure and consent provisions in that Rule. The newly adopted Sarbanes-Oxley statute and regulations appropriate these concepts into a federal regulation of companies whose shares are publicly traded.

The issues involved in representation of corporations and other organizations are almost endlessly complex. They certainly have evoked almost endless discussion—generally very serious discussion—by members of the corporate bar. However, the point for present purposes is simple, even if, perhaps, not simply understood.

The people that a lawyer deals with in representing a corporate client are not clients. In legal contemplation, none of them are clients—the members of the board, the high level management, the corporate officials at intermediate levels, and the ordinary operatives at the

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<sup>44</sup> See *id.* R. 1.13(b).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* R. 1.13(f).

<sup>48</sup> *Id.* R. 1.13(g).

bottom.<sup>49</sup> Yet, their interests must be considered at every stage of a corporate representation. Indeed, a lawyer's representation of a corporation would be a practical impossibility except by consideration of the interests of the corporation's "constituents." From this viewpoint, representation of a corporation is yet another "situation."

#### IV. CONCLUSION

The idea of "lawyer for the situation" is nearly an anathema to lawyers who embrace the good old fashion religion uttered by Lord Brougham. They hold to the proposition that a lawyer "knows no other duty" than to a client. At the same time, the idea of "lawyer for the situation" is eagerly embraced by many critics of the profession, particularly those concerned with excessive partisanship on behalf of powerful clients. It is not always clear exactly what obligations these critics would impose – perhaps a responsibility always to be a mediator. However, as I hope the foregoing analysis has shown, the obligations of advocates and transaction lawyers in modern practice involve many and varied duties to third persons. Many of those duties are enforceable under the law of professional malpractice as it stands and is evolving. Whether some of those duties should be extended or more fully explicated is another question.

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<sup>49</sup> For recognition that ordinary working people in a corporate structure are relevant participants in a corporate lawyer-client relationship, see *Upjohn Co. v. United States*, 449 U.S. 383 (1981).