# Ethical Opportunity in the Practice of Law†

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## INTRODUCTION AND SUMMARY

It is well known that the professional conduct of lawyers is governed by an elaborate set of legal rules. It is also well known that the actual conduct of lawyers, taken as a whole, falls short of what the rules require. A criticism of the rules is that they countenance aggressive and hurtful behavior that should not be permitted. Another criticism is that lawyers, in their professional conduct, are not faithful to the spirit of the professional rules, which reaches above and beyond the letter of the law.

These dissatisfactions with the ethics of the profession have provoked several responses intended to remedy, or at least ameliorate, the deplorable situation. One remedy is to adopt more exacting rules and more effective machinery for disciplinary enforcement. A second remedy is to adopt "codes of civility," intended to formalize standards of conduct at a level above the obligatory rules. A third set of remedies includes various endeavors aimed at improving what may be called the legal profession's institutions of ethical nurture and support. In general, these developments are commendable. I have serious reservations about the desirability of "codes of civility," but surely the provision of increased resources to disciplinary enforcement is warranted, as are efforts to strengthen institutions that nurture higher levels of professional ethics.

There are other appropriate responses to the perennial "crisis at the bar" as well. Among them is seeking a clearer understanding of the relationship between professional ethical standards and professional practice. This relationship is between the formal norms that

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govern lawyers in their profession and the actual behavior of lawyers in practicing their profession. Such is the nature of the present inquiry.

There are basic steps to this inquiry. First, in considering the rules governing the lawyer's office, it is important to consider not only the rules that regulate lawyers but also the rules that confer special powers on lawyers. By rules of empowerment I mean rules such as those conferring on lawyers the right to conduct litigation in matters not involving their own personal interests. These rules of empowerment are what make special regulatory rules necessary.

Second, in contemplating the rules, a shared sense of realism about the structure and functions of the legal profession is necessary. The operative significance of the rules, both those of regulation and those of empowerment, is determined to an important extent by the lawyer's situation in practice. For example, a lawyer representing a respectable business corporation from a position in a large established law firm is in a different practice situation than a lawyer in a small firm doing primarily criminal defense or domestic relations work. Whatever a lawyer's situation in practice may be, that situation is located in a normative milieu far more complex than that specified in the codes of professional ethics. The lawyer's normative milieu includes norms of work setting, family and community, and subjective religious and personal moral predispositions. Given these variables in ethical context, the ethical possibilities open to a lawyer are highly situation specific. Indeed, in a strict sense, each lawyer's ethical possibilities are unique.[1]

From the choice-making viewpoint of the lawyer, therefore, the realm of professional ethics is not a rule-determined domain. Rather, it is a domain where the lawyer has pervasive marginal discretion guided by a few fundamental legal rules and constrained by circumstances of practice.[2] Discourse on professional ethics typically addresses ethical duty. I suggest that we also look at the same problem in terms of ethical opportunity.

This approach delivers bad news and good news. The bad news is that the legal profession must accept the prospect that there are serious and intractable limitations on successfully improving general standards of professional ethics by changing the rules or by more rigorously enforcing the rules as they stand. It may also be bad ti-

1. *See* Hazard, *My Station as a Lawyer*, 6 GA. ST. L. REV. 1 (1989).

2. *See* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Professor Simon develops well the proposition that lawyers have ethical discretion in lawyering and, therefore, moral responsibility for the ways in which they exercise that discretion. If this proposition were not disputed so tiresomely by members of the profession, it would not require reiteration. At the same time, I believe Professor Simon gives inadequate attention, or at least inappropriately unsympathetic attention, to the constraints to which lawyers are subject in exercising ethical choice.

dings, if not news, that lawyers are morally responsible for their actions, if for no other reason than that they do not have to continue being lawyers.

The good news is that emphasis on ethical opportunity can open moral possibilities not yet adequately explored. Lawyers can find fulfilling ethical opportunity in law practice, not because their vocation is unambiguously virtuous, but precisely because it is not unambiguously virtuous. Apart from this purely personal vantage point is the prospect of ethical opportunity for the bar as a group. Nurturing institutions that enlarge and encourage ethical opportunity in the practice of law may yield better returns than we have assumed. Poorly run courts and poorly run law firms conduce to bad forms of professional conduct, while well-run courts and law firms provide a foundation for more exemplary professional conduct. On the one hand, it is time to recognize that substantial changes in standards of professional ethics are, like personal virtue, beyond the reach of legal compulsion. On the other hand, fuller realization of exemplary conduct may be achieved by considering professional ethics as not only a matter of legal obligation but also of volition exercised individually and collectively under difficult circumstances.

## THE LEGAL RULES

The legal profession has had a codified set of professional standards for a long time. The first formal codification on the national level was the 1908 *Canons of Professional Ethics* (*Canons*) of the American Bar Association (ABA). Those *Canons* were recognized as more or less official by both courts and bar associations over a sixty year period. Interpretation and application of the *Canons* helped legal authorities to elaborate on many important issues. For example, the old *Canons* recognized that a lawyer should not be party to a fraud committed by his client,[3] a counterpart to rules of law that a lawyer could be held liable civilly and criminally if he violated that restriction.[4] The *Canons* recognized a duty of loyalty that was formulated negatively as a prohibition against conflict of interest.[5] Case law articulated the standard to preclude undertaking adverse representation in matters "substantially related" to those in which a lawyer had served another client.[6]

3. CANONS OF PROFESSIONAL ETHICS Canon 41 (1908).
4. *See, e.g.*, United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964).
5. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).
6. *See, e.g.*, T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268

In some states such as California, the *Canons* and decisional law were augmented by statutory provisions regulating the "office" of attorney. For example, the *California Business and Professions Code* imposes a duty of truthfulness to the court on lawyers.[7] This provision has stood in the books for over a century even though many contemporary California practitioners seem unaware that they are governed by such an onerous standard.

It is also well known that in 1970 the ABA promulgated a new formulation of professional standards, the *Model Code of Professional Responsibility* (*Code*). The *Code* made clear that many of the lawyer's central obligations were unmistakably legal, that is, they were obligations resting on norms having the force of law backed by the state's coercion. For example, doubt was removed about whether the duty to avoid conflicts of interest was a matter of polite sensibility or one of legal obligation: avoiding conflicts of interest was unmistakably made a matter of legal obligation.[8] The distinction between legal duty and other kinds of ethical obligation was formalized, if not made fully comprehensible, in the *Code*'s distinction between Disciplinary Rules and Ethical Considerations.

However, the substantive content of the *Model Code of Professional Responsibility* was retrograde in some respects in relation to the realities of law practice. The *Code* was notoriously oblivious to Supreme Court decisions concerning access to legal services.[9] The *Code* also failed to take adequate account of developments in the law of criminal and civil misrepresentation. Evolution of the law of misrepresentation away from caveat emptor necessarily modified the lawyer's duties of loyalty and confidentiality toward clients, particularly in securities, real estate, and commercial practice. The bar was not ready to deal with these consequences.[10]

Unfortunately, many of the same problems reappeared when the ABA took a new comprehensive look at its standards of professional conduct through the Kutak Commission, which produced the *Model Rules of Professional Conduct*.[11] Nonetheless, though the terms of the law governing lawyers remain unclear in many respects, it is now quite clear that lawyers, like everyone else, are governed by binding

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(S.D.N.Y. 1953).

7. *See* CAL. BUS. & PROF. CODE § 6068(d) (West Supp. 1990).

8. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 to -107 (1980).

9. *Compare* NAACP v. Button, 371 U.S. 415 (1963) (decided before the promulgation of the *Model Code of Professional Responsibility*) *with In re* Primus, 436 U.S. 412 (1978) (holding invalid the application of restrictions on solicitation in the *Code*).

10. *See generally* Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984).

11. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (holding invalid advertising restrictions in *Model Rules of Professional Conduct*).

legal obligations emanating from statutes and decisional law. The practice of law is governed by a voluminous body of law, which includes codes of legal ethics; the general law of contract, tort, and crime; and the common law pertaining to the practice of law as such.

The legal profession usually conceives of this body of law in terms of the regulatory controls it imposes on lawyers. These regulations can be subsumed under four broad headings: competence, conflict of interest, confidentiality, and conformity to law. Under the rule governing competence, lawyers should not undertake a matter that is beyond their professional skills;[12] professional malpractice liability may result if that norm is disregarded.[13] Under the rules governing conflict of interest, lawyers may not undertake concurrent representations that involve antagonistic positions between the clients, nor may lawyers undertake a matter adverse to a former client that is "substantially related" to one for which the lawyer previously had been engaged on behalf of the former client.[14] Under the rules governing confidentiality, lawyers may not reveal client confidences and should resist, through the attorney-client privilege, attempts by governmental authorities to compel testimony concerning communications covered by the privilege.[15] Under the rules concerning conformity to law, lawyers must conform their conduct to the requirements of criminal and civil law. For example, lawyers must avoid misrepresentations in court and complicity in client misrepresentations.[16]

However, an inventory of the laws governing lawyers that is limited to regulatory controls is quite incomplete. The regulatory controls on lawyers are unintelligible except through presuppositions about the professional activity that these rules regulate, which is the "office" of lawyer. The "office" of lawyer is not simply a cultural artifact or a matter of custom, although law practice includes conventions and traditions. The "office" of lawyer is constituted by rules of positive law. These rules confer great powers on lawyers and corresponding opportunities for discretion in exercising the powers.

The basic constitutive rule is that a lawyer is a person who is "admitted to the bar." Admission to the bar is not simply a ceremony, nor simply a memorialization of the fact that the applicant has successfully negotiated the bar examination. Admission to the bar is the

12. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1989).
13. *See generally* R. MALLEN & J. SMITH, LEGAL MALPRACTICE (3d ed. 1989).
14. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-.12 (1989).
15. *See id.* Rule 1.6.
16. *See id.* Rule 1.2(d).

legal transformation of a lay person into an officer of the legal system, effectuated by law through the act of the supreme court of the jurisdiction or some similarly constituted authority. The act of transformation empowers the person to appear before all courts in the jurisdiction and therein to perform acts within the exclusive province of members of the legal profession.[17] These acts include filing litigation, conducting trials and appeals, and performing services incidental thereto such as settlement negotiations.

Lawyers may easily underestimate the enormous leverage of their power to operate the machinery of litigation. This power is not unbridled, particularly in light of such sanctions as those provided in Rule 11 of the *Federal Rules of Civil Procedure*.[18] However, assuming that the client has a marginally arguable legal cause or defense, a lawyer has authority to inflict the full measure of due process on a prospective antagonist. One of our most revered judges, Learned Hand, reminded us of the measure of resulting misery that it is within our province to inflict: "As a litigant I should dread a lawsuit beyond almost anything short of sickness and death."[19]

An important legal incident of the powers of an advocate is an absolute privilege under the law of defamation for statements made in or in connection with litigation.[20] The practical weight of this power should not be underestimated. Consider the kinds of injurious utterances that can be made about an opposing party in litigation, the serious consequences that can result from these statements apart from their effect in court, and the absence of any remedy against a lawyer, not even a procedure for securing apology. A person who can cause these consequences without incurring legal liability is exercising a legal power of great moment.

The other great power conferred on lawyers is the authority to document out-of-court transactions in law office practice.[21] This is the "office" of the solicitor, to use the traditional English nomenclature. The powers of the solicitor include formation of economic and political relationships and creation of the primary legal evidence whereby such relationships may be proved if legally challenged. Exercise of these powers is illustrated by organizing a corporation or executing a real estate transaction. The boundaries of this domain

17. The significance of admission as an advocate is manifested in the consequences that follow when a person is denied such admission. *See, e.g.*, Leis v. Flynt, 439 U.S. 438 (1979) (no right of lawyer admitted in one state to be admitted pro hac vice in another state).

18. FED. R. CIV. P. 11.

19. Hand, *The Deficiencies of Law to Get at the Heart of the Matter*, in 3 ASS'N OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 87 (1926).

20. *See* C. WOLFRAM, MODERN LEGAL ETHICS 230-32 (1986).

21. *See, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) (unauthorized practice of law in divorce documentation by nonlawyer).

are less well marked than in litigation, for the definition of the "unauthorized practice of law" is notoriously fuzzy as applied to office practice.[22] Nevertheless, the power to document transactions includes, without question, the classic tasks of the conveyancer and the scrivener in an array of transactions running from corporate finance to family mediation to lobbying the legislature.

Lawyers have no legal monopoly in this domain except in certain narrow traditional functions such as the preparation of deeds and wills. The function of documenting transactions nevertheless is dominated by the legal profession. This position of dominance is founded on a legal rule. I am referring, of course, to the attorney-client privilege.[23] The special powers of lawyers in documentation of transactions flows not from a legal monopoly over the activity, as in the case of litigation, but from an auxiliary rule of secrecy that appertains only to lawyers.

The attorney-client privilege protects the secrecy of communications with lawyers and applies broadly to all types of law office practice. In this respect, it is instructive to compare the definition of the term "law practice" applied in the context of the rules governing the unauthorized practice of law with the definition applied in the context of the attorney-client privilege. Although lawyers have no monopoly over many services that are arguably "legal," virtually all services that are significantly "legal" are enshrouded in the secrecy of the attorney-client privilege if they are performed by a lawyer.[24] Hence, compared with financial analysts, accountants, auditors, social workers, real estate brokers, and management consultants, lawyers can provide assistance under a mantle of secrecy qualified only by the requirement that the transaction not be in furtherance of a crime or fraud.

While the attorney-client privilege confers no monopoly, it does confer a franchise that has equivalent practical value. The basic empowerments of the "office" of lawyer, therefore, are to use the machinery of litigation with its potent coercive effect and to plan out-of-court aggressive maneuvers under the veil of secrecy. Not only are these empowerments the creature of law but the rules conferring them are administered by our very own kind, the judges.

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22. *See* Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).
23. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981).
24. *See, e.g.*, Hercules, Inc. v. Exxon Corp. 434 F. Supp. 136 (D. Del. 1977).

## THE AMBIGUITY OF THE RULES

The rules regulating lawyers and the rules conferring powers on them are highly ambiguous. Some of the ambiguities are the product of muddled thinking; others are deliberate. However, most of the ambiguity in the law governing lawyers results from the law itself being unavoidably ambiguous. In the more eloquent terminology employed by Professor Hart, law is "open textured."[25]

Law is no less open textured as it seeks to govern the practice of law. For example, a lawyer clearly has the power to file a suit that is well grounded in fact and warranted by current law.[26] But given the indeterminacy of the governing legal rules, a lawyer also has the power, for practical purposes, to file a suit resting on no firmer ground than a client story that cannot be contradicted by indisputable evidence. The lawyer also is empowered to bring litigation that has no legal basis except a good faith argument for extrapolation of the law from its present state at any time. Since the boundaries of the impermissible are ill-defined, the lawyer's powers of office are correspondingly broad and legally unconstrained.[27]

Similarly, the scope of the attorney-client privilege runs all the way to the boundary of the crime-fraud exception on the one hand,[28] and to the boundary of the "predominantly business purpose" on the other.[29] The boundary imposed by the crime-fraud exception is fairly clear in legal concept, but for obvious reasons it is rarely marked by clear evidence. Evidence of complicity on the part of the lawyer is often hard to come by, at least if a lawyer is carefully self-protective. Hence, without legally implicating themselves, lawyers can give fairly clear signals to clients about operating on the dark side of the border between legitimate transactions and crimes or fraud. So also, if a lawyer maintains a clear professional identity when involved in business transactions, the attorney-client privilege will apply even if the issues concern business strategy[30] rather than the application of clearly legal doctrines such as the rule against perpetuities.

Nothing so far has been said of the ambiguity in the regulatory rules governing the profession. The ambiguity in the rules governing competence, for example, is manifest in that disciplinary prosecution for incompetence is sustainable only when the ineptitude is both supine and persistent.[31] Ambiguity in the rules governing conflict of

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25. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).
26. *See* FED. R. CIV. P. 11.
27. The indeterminacy of the governing rule is revealed in, e.g., Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).
28. *See* Hazard, *supra* note 10.
29. *See* C. WOLFRAM, *supra* note 20, at 251.
30. *See* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147-48 (D. Del. 1977).
31. *See* Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986).

interest is manifest in the complexity of the law in disqualification cases.[32] Ambiguity in the rules of confidentiality is manifest in that many lawyers do not appreciate that they may have to blow the whistle on a client either in self-interest or out of concern for third parties. Ambiguity in the rules requiring conformity to law is manifest in that lawyers, with support from some judges, still half believe that somehow the law at large does not apply to them.[33]

Enough has been said to make clear that the "office" of lawyer is a creature of law. Positive law confers important powers on those who hold the "office," and the scope of those powers is ambiguous in broad areas around the core definition. This means that a lawyer has many arguable and therefore assertable powers beyond those acknowledged in a narrow reading of the law constituting his "office." Put bluntly, the lawyer has wide prerogative to act at will. In one direction, the lawyer can refuse to go further than clearly authorized under the powers conferred by the "office." As stated in Model Rule 1.2(c): "A lawyer may limit the objectives of the representation if the client consents after consultation."[34] Further, Model Rule 1.16(b) states: "A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[35] In the opposite direction, a lawyer can exercise the powers of the "office" to the limits of arguable authority and, if desirous of trying to get away with it, beyond that.

## THE LAWYER'S SITUATION IN PRACTICE

Lawyers' broad powers are subject, however, to the practical constraints imposed by their situation in practice. A universal constraint is the lawyer's dependence on the client's objectives and wishes. A lawyer is an agent, not a principal. Having taken on a client, a lawyer is not free to pursue the client's objectives only to the extent that the lawyer may see fit. The lawyer has to go forward to the point that the client sees fit, within the limits of the law. Openly deviating

32. *See, e.g.*, Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982); Note, *Developments in the Law-Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981).
33. *See, e.g.*, Commonwealth v. Stenhach, 356 Pa. Super. 1, 514 A.2d 114 (1986).
34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1989).
35. *Id.* Rule 1.16(b).

from a client's purposes is professional disloyalty, and covertly deviating from them involves professional dishonesty as well.[36]

Client objectives impose substantial constraints on a lawyer's ethical autonomy. Clients retain lawyers to pursue heavy purposes, hard purposes, purposes that are manifestly onerous to others. Litigation involves infliction of direct legal coercion on others. Negotiation involves struggles over money, power, and allocation of risk. Clients are not well disposed to suggestions that their interests in such matters are selfish or their objectives unworthy. Recognizing this reality is not meant to disparage the concept of a lawyer's independence of professional judgment. On the contrary, recognition that the client's objectives must prevail, as long as they are within the limits of the law, makes the concept of independent judgment ethically more important even while rendering it more complex and elusive. For the present inquiry, the point is simply that the ethical position of every practicing lawyer begins within constraints imposed by the client's objectives.

The aggregate of a lawyer's positions on behalf of clients constitutes her situation in practice. At the outset, I suggested that the situation of a partner in a large firm representing a bank is different from the situation of a lawyer in a small firm engaged predominantly in criminal practice. This merely illustrates a general point: differences in practice situations strongly determine the operative significance to an individual lawyer of the legal constraints and empowerments governing the lawyer's "office."[37] This is not to say, as is often suggested, that the constraints and empowerments all favor large firm lawyers representing banks. The structure of advantage is often, but not always, so.

The point, for purposes of ethical analysis, is that lawyers' situations in practice are not all the same. Every lawyer has a unique measure of influence and power—with other lawyers; with courts and government agencies; in the bar association; in the business corporate world; in political parties and interest groups; and in religious communities, civic associations, and local neighborhoods. These differences, in turn, affect the effective scope of a lawyer's ethical discretion.

We have seen that the rules governing the lawyer's professional

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36. *See, e.g.*, Fin. General Bankshares, Inc. v. Metgzer, 523 F. Supp. 744 (D.D.C. 1981), *rev'd on other grounds*, 680 F.2d 768 (D.C. Cir. 1982).

37. As demonstrated by the sociology of law practice. *See generally* J. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962); T. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT (1987); J. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY (1967); J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); K. MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985).

office are open textured—that they do not and cannot closely regulate how the lawyer's "office" is fulfilled. Beyond the unavoidable indeterminacy of legal rules as such, rules regulating the legal profession suffer a special indeterminacy arising from the variation in the practice situations to which they apply. Consider the rules of competence, for example. If the rules of competence applied to a profession comprised exclusively of solo practitioners engaged in conveyancing, the operative meaning of competence would come to be fixed in conventions of conveyancing practice. If civil litigation consisted solely of routine automobile cases, the operative meaning of competence in trial advocacy would assume a similarly established meaning. However, office practice actually runs from residential real estate closings to international corporate finance; civil litigation runs from nuisance claims to corporate takeovers and massive toxic tort cases.

When the term "competence" is supposed to apply alike to the work of a small firm practitioner in small town general practice, and to the work of the metropolitan tax and takeover specialists, the meaning of the term becomes indeterminate to the point of unintelligibility. So also the rules on conflict of interest would assume more settled meaning if law practice were limited to conveyancing and trial of automobile accident cases. Similarly, the term "conformity to law" cannot mean the same thing when applied to a lawyer specializing in trust administration as when applied to a lawyer specializing in tax fraud cases.

The broad variations in application have similar effects on the meaning of the empowering rules. If all civil litigation consisted of automobile accident cases, and criminal litigation was confined to occasional homicides and embezzlements, the definition of the advocate's powers would take shape in conventions concerning those specific types of litigation. However, civil litigation in this country involves claims and defenses that can undermine or destroy businesses[38] and political institutions,[39] and full-blown procedural due process has become the mode in our administration of criminal justice.

As a consequence, we lack a fine-textured definition of the trial advocate's authority. The controversy about the advocate's responsi-

38. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981) (attorney-client privilege applied to internal investigation of illegal payments by corporate officers).

39. United States v. Nixon, 418 U.S. 683 (1974) (subpoena of confidential documents in criminal investigation of President's office).

bility when the client threatens to commit perjury, for example, is an immediate manifestation of these ambiguities.[40] In this perspective, what looms large to the critical mind is not how far the rules of professional conduct might go in improving the profession. Rather, what looms large is the very limited effect that such rules can have, given the nature of legal rules and the complex contexts of their application in our version of modern society.

## CONCLUSION

The conclusion seems inevitable: the central problem of ethical responsibility for lawyers is not whether they can comply with the formal rules of ethics. Complying with the rules is, of course, important, and many lawyers seem to have difficulty knowing how to do so. But compliance with the rules is simply the beginning point. From there, a broad if not infinite array of possibilities stretches that cannot be dictated or more than loosely governed by legal rules. As a consequence, every lawyer's practice situation involves an ethical potential for which that lawyer alone is effectively responsible.

Each lawyer's exercise of ethical judgment and discretion involves continuous interaction between present ethical opportunities and future ethical potential, for no set of relationships is static. Over the course of time—eventually over the course of a career—some lawyers develop ethical strength. Others remain about where they stood upon graduating from law school, unblemished perhaps, but perhaps also ethically inert. The manner in which a lawyer exercises ethical opportunity over time establishes that lawyer's ethical standing and identity. Recognition of this fact may direct greater attention to ways in which each of us can make fuller and bolder use of the ethical opportunities that necessarily come our way in everyday practice.

40. *See* Nix v. Whiteside, 475 U.S. 157 (1986).