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Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications

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I. INTRODUCTION

During the past two decades the legal profession has been remarkably, even frantically active in examining and drafting standards of professional conduct. The American Bar Association (ABA) adopted the *Code of Professional Responsibility* in 1970.[1] Most states adopted the *Code* with relatively minor variations during the 1970s. The ABA re-

* Professor of Law, Vanderbilt University. The author served as moderator of the panel discussion at the Symposium featured in this issue of the *Vanderbilt Law Review*. The panel discussion was transcribed and a copy of the transcript [hereinafter Transcript] is on file with the *Vanderbilt Law Review*.

1. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE].

pealed the *Code* in 1983 and adopted, in its place, the *Model Rules of Professional Conduct*.[2] By the beginning of 1988 one-half of the states had implemented the *Model Rules*, with significant variations from the ABA version in some of these states,[3] while the remaining states either had rejected the *Model Rules* or were still studying them. Meanwhile, in 1985 the ABA established a Commission on Professionalism. The Commission's Report, rendered in 1986,[4] did not propose any changes to the *Model Rules*, but offered an extensive list of suggestions designed to enhance our professionalism. During the same two decades, the ABA completed its multi-year project on *Standards of Criminal Justice*[5] and the American Law Institute initiated a new project on a *Restatement of the Law Governing Lawyers*.[6]

Each new set of standards attempts in its own way to tell us how to deal with the conflicting duties that recur in the practice of law, such as conflicts between our duties to one client and to another client, and conflicts between our duties as zealous advocates for the client and as officers of the court. Conflicts are unavoidable because we owe duties to numerous constituencies—duties to clients, to professional peers, to directly affected third parties, and to society in general (personified by the courts when we litigate). The lawyer who is a partner or employee of a law firm, or who is employed by a corporation, governmental agency, or other entity, owes duties to the firm or entity. The dictates of our own consciences inject further complications when we attempt to accommodate our conflicting duties.

The Articles in this Symposium provide timely encouragement to reflect on our conflicting duties as they exist in today's practice of law and as they may be aggravated if the potential practice of law of the future develops along some of the lines suggested by one of the authors. I perceive that the tensions we experience from trying to accommodate these conflicting duties have already reached dangerous levels in today's practice. We urgently need to resolve the tensions that presently exist. We should be most hesitant to adopt changed forms of practice that are

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2. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

3. 4 Law. Man. on Prof. Conduct (ABA/BNA) 34 (Feb. 17, 1988) (reporting that Kansas, by adopting the *Model Rules* on January 29, 1988, became the 26th state to do so).

4. American Bar Association, Commission on Professionalism, " . . . *In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in* 112 F.R.D. 243 (1986) [hereinafter *ABA Report on Professionalism*] (Report to the ABA Board of Governors and House of Delegates, New York, N.Y., August 1986). For a critical commentary, see Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOYOLA U. CHI. L.J. 1149 (1987).

5. *See* 1-4 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE (1986) (compiled by the ABA as STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1974)).

6. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Prelim. Draft No. 1, Sept. 18, 1986).

likely to increase these tensions beyond existing levels.

II. Accommodating Conflicting Duties in Today's Law Practice

The leadership of the ABA rendered a serious disservice by conferring the title "Commission on Professionalism" upon the study group appointed in 1985. The Commission compounded the problem by taking its title seriously and insisting, in its report rendered in 1986, that lawyers indeed are and must remain "professional."[7] This label may produce some ego gratification, but will not help us articulate or accommodate our conflicting duties. We are more likely to find solutions by pursuing other lines of inquiry, for example, by considering the unique type of service we render to society and the duties inherent in that service.

A. Business, Profession, or Both?

The ABA Commission on Professionalism formulated its inquiry by asking: "Has our profession abandoned principle for profit, professionalism for commercialism?"[8] This formulation contained some troubling implications. First, the Commission equated professionalism with principle but not profit, while equating commercialism with profit but not principle. Second, the Commission implied that a person who conforms to professional principles is likely to engage in different conduct than a person who does not. Third, the Commission urged lawyers to retain their traditional status as professionals—perhaps even as an elite among other categories of professionals—and to conduct themselves in an appropriate professional manner.

One of the authors in this Symposium appears to accept the Commission's conceptual approach.[9] At the same time, that author observes that the difference between the conduct of lawyers and nonlawyers has narrowed; he reports that lawyers have been acting in a less professional manner than in the past while nonlawyers have been acting in a more professional manner than in the past.[10]

I am willing to accept that author's perception that the difference between the conduct of lawyers and others has narrowed. I find this phenomenon quite understandable, because I reject the notion that there is any inherent difference between the "professionalism" of lawyers and the "commercialism" of businesses. While the terms "profes-

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7. *ABA Report on Professionalism*, *supra* note 4, *passim*, *reprinted in* 112 F.R.D. 243 *passim*.

8. *Id.* at 1, *reprinted in* 112 F.R.D. at 251.

9. Bowie, *supra* 41 Vand. L. Rev. 741, 755 (1988).

10. *Id.* at 748.

sion" and "business" have been used with varying meanings, I prefer to read the term "profession" as meaning a type of occupation engaged in for compensation; the term "business" means, in my view, an enterprise conducted for profit. Using these definitions, I regard a law firm as a business that engages in the profession of practicing law.

In many respects lawyers are indeed different from individuals engaged in other occupations. These differences pertain to many attributes, including education, standards for admission, average income, type of work, and so on. Of special importance to this Symposium is the task of perceiving the duties owed to clients and to others, and of evaluating lawyers' compliance with these duties. We do not facilitate this task by attaching the label "profession" to the type of work we do, or by separating ourselves from other segments of society by attaching the label "business" to the type of work they do. In order to perceive the duties of lawyers, we must look beyond definitions.

B. Duties to Numerous Constituencies

Law firms and other businesses engaged in the vast number of today's professions owe complex sets of duties to clients and others. These duties are inherent in any situation in which a business offers any type of goods or services to other members of society. The precise contours of these duties vary from one profession to another, depending on the nature of the goods or services and the setting in which they are offered. Naturally, the duties that inhere in any specific situation are perceived differently by different observers, but broad consensus views are often achieved, and these views are sometimes expressed in laws or professional standards of conduct.

One recurring theme is that a business—no matter what profession it conducts—generally owes duties to numerous constituencies, duties that are likely to come into conflict from time to time. These constituencies typically include the client, professional peers, directly affected third parties, and society in general. In addition, an individual who is an employee or partner of a firm owes a duty to that firm. The individual, in attempting to choose from among conflicting duties, also has to cope with the ambition to maximize current or potential future income, as well as with the dictates of conscience. The choice becomes even more complicated if the business or individual is under a significant amount of coercion, as when the economic stakes are unusually high, or an individual is threatened with physical harm to self or family.

1. Duties of a Lawyer—An Example

To illustrate the concepts discussed above, assume that a corporate client asks a lawyer engaged in sole practice to prepare false documents for filing with the Securities and Exchange Commission (SEC). The lawyer's duty to his client is unclear, for reasons I will indicate below. To the extent this duty requires the lawyer to assist the client, this duty collides with the lawyer's other duties—duties to potentially affected third parties who may detrimentally rely on the documents; to professional peers, whose standards clearly prohibit this type of conduct; and to society in general, which has reached a consensus that the conduct in question is undesirable. The lawyer may also face conflicts with his own conscience, and with his desire to avoid personal exposure to the type of financial injury that could result if he assisted the client and both were caught.

Of course the lawyer first should make certain that a problem exists. The lawyer should therefore review the facts and law to confirm his original conclusion that the client's request will indeed call for preparation of false documents. Some lawyers at this point may engage in selective ignorance or self-delusion designed to protect them from any certainty about the falsity of the requested documents. Once the lawyer has confirmed his original conclusion that the documents would be false, the lawyer should make certain that the client really wishes the lawyer to prepare false documents. The lawyer should counsel with the officer of the client who made the original request. If this counseling does not produce a change of mind, the lawyer should go up the client's chain of command until the highest level of management fully understands the nature and potential consequences of the original request and has been given an opportunity to countermand it.[11] If the lawyer has exhausted these avenues and is confronted with a direct request, by the highest level of the client's management, to prepare and file documents that the lawyer knows to be false, the lawyer cannot escape recognizing that he faces a conflict of duties.

The duty to the client is not clear. If the lawyer sincerely believes that the falsity of the documents is unlikely ever to be discovered, and that the corporation's investors are likely to prosper despite this falsity, the lawyer may conclude that his duty to the client calls for him to comply with the request. In other circumstances, the lawyer may decide that his duty to the client requires him to refuse compliance as one final attempt to protect the client from its own folly in proposing to prepare and submit the false document.

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11. This solution is implied by *Model Code*, *supra* note 1, EC 5-18, and is explicitly provided in *Model Rules*, *supra* note 2, Rule 1.13.

In evaluating the impact of the client's request on the lawyer's own ambition to maximize current or future income, the lawyer may face similar uncertainty. If the lawyer complies with the client's request and the client gets away with its conduct with impunity, the lawyer also is likely to get away with his participation, and the client is likely to remain a client, with appreciation of the lawyer's services. If, however, the lawyer's participation in the preparation of false documents is discovered by disciplinary or law enforcement authorities, or by the public media, the lawyer risks adverse consequences to professional reputation and future income.

The lawyer's duty to professional peers and to society is clear. Standards of lawyers' conduct and the general laws of society prohibit the lawyer from preparing or filing documents he knows to be false,[12] and public opinion would surely support these standards and laws. Finally, the lawyer's own conscience will be the arena in which the competing duties are evaluated and accommodated. I assume that very few lawyers would assist this client, unless the client applied strong coercion. If coercion is applied at increasing levels of severity, a point may be reached at which more lawyers would comply with the client's request, perhaps by rationalizing that the falsity of the document was, after all, not completely clear.

An additional issue is whether a lawyer who refused to carry out the client's request should attempt to protect potential investors, for example by reporting the client's proposed fraud to the SEC, to law enforcement authorities, or to the news media. In technical terms, the question is whether a lawyer may disclose information received in confidence from a client, when the information relates to the client's proposed fraudulent conduct. In terms of duties owed to various constituencies, the question is whether the lawyer's duty to preserve a client's confidences is outweighed by the lawyer's duties to potentially affected third parties and to society, when the confidential information pertains to the client's proposed fraud. This type of question has led to deep divisions of opinion within the organized bar in recent years. One view is that disclosure should be required; another would prohibit disclosure; and another would leave it to the lawyer's discretion.[13]

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12. MODEL CODE, *supra* note 1, DR 1-102(A)(4), DR 7-102(A)(5), (6), (7); MODEL RULES, *supra* note 2, Rules 1.2(d), 3.3(a)(4), 8.4(c).

13. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 12.6 (1986); 1 Law. Man. on Prof. Conduct (ABA/BNA) §§ 55:1-55:2003 (1987). Still another view should be mentioned, although it has no direct bearing on the hypothetical facts under discussion. This view requires or permits disclosure only if a lawyer discovers, after the fraud has been committed, that he was an unwitting participant in it. *See* Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984).

The example becomes more complicated if we change the facts to the more realistic scenario that the lawyer is now an employee or partner in a law firm. The question then has a two-fold dimension: first, whether the firm as an entity will agree to comply with the client's request; second, assuming the firm agrees, whether the individual lawyer will perform the conduct upon request by a supervisor within the firm.

The law firm's response to the client, let us assume, is formulated by someone else in the firm—the partner responsible for servicing this client. That person should go through the process indicated above, to ascertain that the proposed documents are really false and that the highest level of the client's management understands this and insists on the preparation and filing of these documents. During this process of exhausting the avenues of review within the client's organization, the responsible law firm partner should consult appropriately with colleagues in the law firm. Let us assume that the responsible partner, after consulting with the client and with colleagues, decides that the law firm should comply with the client's request, and that the partner instructs a subordinate lawyer in the firm to carry out the assigument.

The subordinate lawyer's first obligation is to ascertain whether or not a problem exists; that is, whether the proposed documents really would be false, and whether the highest level of the client's management understands this and insists on the preparation and filing of the documents. Assuming the subordinate lawyer concludes that the problem indeed exists, she faces a conflict of duties. First, she should independently evaluate the law firm's decision, although she is unlikely to have access to all the information or opinions that formed the basis of that decision.

If she is uncomfortable with the firm's decision, her duty to the law firm is to express her concerns to the responsible partner so as to give this person an opportunity to reconsider.[14] Assume that this consultation does not cause any change in the firm's decision. The subordinate's duty to the law firm at this point is not clear. One duty to the firm is to carry out superior orders, so that the firm can proceed efficiently with the conduct of its business. Another duty to the firm is to try to protect the firm from engaging in impropriety, especially if the proposed conduct carries a risk of injuring the firm. The subordinate lawyer may seek additional consultation within the law firm, to make sure that the highest available level understands and supports the partner's decision after hearing the subordinate lawyer's opinion. If this consultation is unavailable or ineffective, the subordinate lawyer may consider seeking

14. The theory is derived from Levinson, *To A Young Lawyer: Thoughts on Disobedience*, 50 Mo. L. Rev. 483, 501-02 (1985).

consultation outside the law firm. This, however, is a hazardous undertaking which, among other dangers, may compromise the confidentiality of information obtained from the client.

Beyond consultation, the subordinate may ask to be reassigned to another case. This request may place a strain on the lawyer's relationship with the firm—more so in some firms than in others[15]—and may therefore pose a threat to the lawyer's future income. The threat may reach coercive proportions if the law firm is likely, in this type situation, to terminate employment and give unfavorable references to other potential employers. The threat becomes especially acute if the subordinate is in dire need of current income. On the other hand, reassignment may protect the lawyer's future earning power from injurious consequences that could result to the lawyer if she participated in the fraud and, upon discovery of the facts, she and the firm were disciplined or prosecuted.

The subordinate lawyer may also consider the possibility of reporting the law firm and its client to disciplinary or law enforcement authorities, or to the news media. Such disclosure would probably be disastrous to the subordinate lawyer's career, since it would be perceived as an act of gross disloyalty to firm and to client. The subordinate lawyer's conscience is, of course, the arena in which these conflicts are played out and resolved.

2. Duties of an Automobile Mechanic—A Similar Result

Individuals and businesses practicing other professions face similar conflicts of duties. Consider, for example, the self-employed automobile mechanic whose customer asks him to turn back the odometer on a car which the customer intends to sell. The mechanic's duty to his customer is as unclear as the lawyer's in the preceding example. The mechanic may conclude that he will do his customer a favor by refusing to participate in this dangerous scheme; or, if the risk of detection is minimal, the mechanic may decide that he owes a duty to the client to carry out the request. Assuming the mechanic reaches the latter decision, his perception of his duty to his customer collides with the mechanic's duties to refrain from participating in fraud against the potential buyer of the car, to refrain from violating the laws and accepted standards of society in general, and to protect the integrity and reputation of other members of his profession. The mechanic must decide, in the light of his own conscience and his ambition to maximize income,

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15. The practice of reassigning associates without penalty received some support at the Symposium on which this issue of the *Vanderbilt Law Review* is based; see remarks by James Jones in the panel discussion Transcript, *supra* author's note.

which set of duties predominates. The situation becomes further complicated if the mechanic is subjected to unusual coercion, or if he is an employee of a business that has already agreed to carry out the customer's request.

C. *Distinctiveness of Lawyers' Duties*

The preceding examples illustrate a basic similarity in the conflicts of duty facing a lawyer and a mechanic when a client requests assistance in fraudulent conduct. This does not mean, however, that each of these two professions should adopt identical standards of professional conduct. Members of each profession owe distinctive duties to their several constituencies, based on the distinctive types of goods and services offered and the settings in which they are offered. Members of each profession are obliged, in distinctive ways that match their distinctive duties, to resolve conflicts of duty.

1. The Service Offered by the Legal Profession

In the case of the legal profession, the service we offer is making society's legal system accessible to society. The settings in which we offer these services range throughout society, including, but by no means limited to, society's own court system. Because of the public nature of the service we offer, ours is a public, or at least a quasi-public type of service. This aspect of our service adds a public dimension to the types of duties we owe to our constituencies and the manner in which we resolve conflicts of duty. In addition, our duties are affected by the adversary nature of society's legal system.

2. The Adversary Connection

The American legal system has traditionally been pervaded by adversariness. The Bill of Rights' provisions on search and seizure, self-incrimination, due process, right to counsel, and trial by jury guarantee that the federal and state governments will maintain adversary systems of criminal and civil litigation. The first amendment guarantees adversariness in public debate, while the provisions on the election of executive and legislative officials guarantee adversariness in the electoral process. The surveys of public opinion in the report of the ABA Commission on Professionalism reveal no popular dissatisfaction with the adversary system itself, although many respondents criticized the conduct of lawyers.[16]

One distinctive function of lawyers is to represent clients in adver-

16. *ABA Commission on Professionalism*, *supra* note 4, at 3, *reprinted in* 112 F.R.D. at 254.

sary confrontations with other parties, either in court or during out-of-court negotiations. Even when a lawyer renders advice to a client in a nonadversarial setting, the lawyer must be mindful of the potential adversary confrontations that may follow; for example, a lawyer who drafts a will for a client must keep in mind the possibility of challenges to the will during probate.

The representation of clients in adversary settings is a central feature of the practices of many lawyers, but by no means all. Some lawyers represent no clients—law professors, legal authors, and legal publishers are examples. Other lawyers are employed as in-house counsel, as government counsel, or in other settings that may or may not place them in adversary situations. The representation of clients in adversary settings is, however, a well-recognized and distinctive function of the legal profession. Even those lawyers who are not personally engaged in performing this function have a responsibility, as professional peers, to participate in articulating and enforcing appropriate standards for its conduct.

Lawyers have been aware, throughout history, of the potential for conflict between the duties owed to the client in an adversary setting and their other duties, such as those owed to directly affected third parties and to society in general (sometimes personified by the judge and jury). In each successive version of our standards of professional conduct, we have continued to seek the appropriate accommodation. Our current standards of conduct, for example, assert the lawyer's duty to the client by requiring a lawyer to preserve the confidences of the client; but this rule is subject to exceptions when disclosure is required or at least permitted because of duties owed to other parties or to society in general.[17] As another example, our standards assert the lawyer's duty to the client by requiring a lawyer to present the client's case zealously—but not to offer false evidence nor to take a frivolous position in litigation, since this conduct would violate duties owed to other parties or to society in general.[18]

One of the authors in this Symposium cites various writings published in the last century for the proposition that the accepted approach in those days differed fundamentally from today's adversary ethic.[19] My comment on this thesis starts with an attempt to clarify the term "adversary ethic." In our legal system, which I perceive as an essentially adversary *system*, many types of disputes are resolved by an

17. MODEL CODE, *supra* note 1, DR 4-101(B),(C), DR 7-102(B)(1); MODEL RULES, *supra* note 2, Rules 1.6, 3.3(b).

18. MODEL CODE, *supra* note 1, DR 7-101, DR 7-102; MODEL RULES, *supra* note 2, Rules 1.1, 3.1, 3.3, 3.4.

19. Shaffer, *supra* 41 VAND. L. REV. 697, 698-709 (1988).

adversary *process*. The so-called adversary *ethic* appears to be the tendency of practitioners to take the adversarial nature of the *system* and *process* into account when resolving conflicts between the duties owed to clients and to others. Obviously the adversary ethic in any particular community and at any particular historical period can be portrayed only in the most impressionistic terms, as an indication of how practitioners generally, in that community and at that time, appear to solve conflicts of duty.

Contrasts between one community and another, and between one historical period and another, may well be discernible. I am quite willing to accept the notion that today's lawyers—at least in some communities—tend to give more weight to their duty to clients and less weight to other duties than did the lawyers of the early nineteenth century. The tendency to give more weight to duties owed to clients may well have become salient during the latter part of the nineteenth century. This tendency may well have motivated the authors of those days to criticize contemporary practitioners. This does not mean that the adversary ethic started to exist during the latter part of the nineteenth century, but merely that the prevailing manner of resolving conflicts of duty had, by that time, perceptibly shifted in favor of the duties owed to clients, to the detriment of other constituencies.

3. Lawyers' Duties to Society

Because of the nature of the services lawyers offer and the adversary system in which we offer them, our duties are tilted toward both the client and society, and we should take this tilt into account when coping with conflicts of duties. Lawyers have consistently recognized and society has accepted, for the most part, the notion that our duties tilt toward the client. Members of the general public can empathize with a client's expectation of loyalty, confidentiality, and zealous representation from a lawyer.

Less attention has been paid to the tilt of lawyers' duties toward society in general. We are at least partly to blame, because we have not articulated those duties to society with sufficient clarity. This discussion of duties to society does not suggest that lawyers should forswear the acquisition of wealth.[20] The pursuit of wealth is as legitimate an enterprise for lawyers as for anyone else. Lawyers must respond, however, with heightened sensitivity to situations in which the pursuit of wealth—or the pursuit of any other objective—comes into conflict with

20. See remarks of Thomas Shaffer, observing that the biggest problem with lawyers is the excessive size of their incomes, in Transcript, *supra* author's note; and Bowie, *supra* 41 VAND. L. REV. 741, 743-48, (1988).

other duties, especially if these duties are owed to clients or to society in general.

In the most general terms, our duties to society resemble those owed by other professions—lawyers should serve their clients in a manner that conforms to the laws and general expectations of society. Some exceptions may be recognized in cases of extreme duress, or when a lawyer's act of conscience challenges society's laws or standards, or when a special standard of professional conduct overrides the lawyer's apparent duty to society.

This last possibility is illustrated by the much-discussed case in which two attorneys preserved the confidentiality of information received from their client concerning the location of his victims' bodies, during a period of months when the victims were missing persons and their families were in anguish.[21] When the facts were revealed, the attorneys were prosecuted for the misdemeanor of failing to notify public health authorities about an unburied corpse. The attorneys defended on the grounds that the attorney-client privilege prevented them from disclosing this information. In accepting their defense, the court acknowledged, in effect, that the duty of confidentiality owed to the client by these attorneys outweighed the general duties that they, in common with other citizens, owed to society with regard to reporting unburied corpses. The court's rationale, it appears, was that society in general has an interest in preserving the attorney-client privilege, for the sake of members of society who wish to communicate with their attorneys. Accordingly, society, personified in this case by the court, is willing to allow attorneys to place the attorney-client privilege ahead of other duties.

This case does not, on its own, explain the unique set of duties owed by lawyers. A similar result would be reached if the defendants could assert any other type of professional privilege, such as that of a priest or a psychiatrist. What makes the duties of lawyers unique is, as indicated earlier, our public role of making society's legal system accessible to society. This places us in a fiduciary position because of our ability to manipulate, improve, or abuse the system that has been entrusted to our care. Our obligation has some aristocratic elements, based on our familiarity with the legal system, our continuing interest in it, our capacity to observe its strengths and weaknesses, and our ability, within limits, to prescribe and implement the changes that we believe, in good faith, will fulfill the aspirations of society for the best possible legal system. We generally take the initiative in evaluating and

21. People v. Belge, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

changing the legal system, and our duty is to continue doing so. Despite our own efforts to fulfill this duty, we are prodded from time to time—probably not often enough—when society in general perceives a scandal, a gross deficiency, or another major reason for change. Our duty then is to give earnest attention to society's concerns.

I have noted above that our society presently appears willing to retain an adversary system of law, an adversary process of ascertaining rights under the law, and an adversary ethic that motivates professional attorneys to place their duties to clients in a highly preferred position. Assuming that my perception of society's preference is correct, lawyers should make every effort to preserve and improve the legal system in the general format that society prefers—the adversary model. Lawyers should not attempt to discard or undermine society's preferred model, unless lawyers believe that society is seriously misguided, that the preferred model poses serious danger to society, and that dialogue in the public forum is not likely to produce a desirable change. In this unlikely situation, lawyers may be tempted to claim the moral authority to save society from its own folly. I see no indication that current conditions or attitudes call upon lawyers to override the wishes of society. Accordingly, lawyers should support the adversary model, and should not try to replace it with another model, even though the substitute may appear more efficient.

Another of our functions is to serve collectively as a bulwark against governmental tyranny. This function is fulfilled, to some extent, by operation of the adversary system when lawyers represent citizens in cases against the government. Justice Stevens, dissenting in *Walters v. National Association of Radiation Survivors*,[22] recognized the constitutional dimensions of a citizen's right to obtain private legal advice on a matter affecting that citizen's relationship with the government.[23] But beyond advising and representing citizens, lawyers have a public duty to make sure that the legal system in general will deal fairly and responsively with all types of cases, including those involving the government. This duty cannot be fulfilled just by the efforts of advocates in these very cases. Instead, the entire persuasive power of the legal profession is required to assure achievement of these goals. Even without a client to represent, each lawyer is obliged to remain aware of developments in governmental affairs, to participate in civic activities, and to enter the public forum to defend, improve, or otherwise have an impact

22. 473 U.S. 305, 358 (1985) (Stevens, J., dissenting).

23. *Id.* at 370-72 (Stevens, J., dissenting). The Justice reminds us that the infamous phrase in *Henry VI*, pt. II, Act IV, scene 2, "The first thing we do, let's kill all the lawyers," means in context that "Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." *Walters*, 473 U.S. at 371 n.24.

on our public institutions.

This obligation, in my opinion, is derived from our public role in the legal system. Naturally, we may be unable to reach consensus, either among lawyers or between lawyers and society in general. Our obligation is, nevertheless, to participate in the process vigorously and in good faith. Some lawyers might prefer not to have these duties. In my opinion, these duties are inescapable. We acquire them when we take the oath as attorneys, and we retain them throughout our careers, because of the public nature of our profession.

III. Risk of Aggravated Conflicts in the Potential Law Practice of the Future

The author of the Symposium paper entitled *The Challenge of Change: The Practice of Law in the Year 2000*[24] portrays a number of features that may become characteristic of the law practice of the future. Some of these features, in my opinion, will drastically alter the array of conflicting duties facing lawyers and will produce new and dangerous tensions in the practice of law.

A. The Lawyer-Entrepreneur

The author describes the lawyer-entrepreneur as a "new breed of professional who, like the venture capitalist, is prepared to 'broker' new technologies and other new ventures as a full partner of his clients."[25] The lawyer-entrepreneur furnishes one example of a lawyer's involvement in the client's business. Other examples have been apparent for some time, including lawyers who take their fees in the form of an ownership interest in the client's business or property (colloquially referred to as a "piece of the action"), and lawyers who are involved in the client's business as officers, directors, or substantial investors.

Any involvement of a lawyer in the client's business significantly changes the duties owed to each of the lawyer's constituencies. First, the lawyer's duty to the client becomes complicated because the lawyer owes two types of fiduciary duties to the client: the duty as attorney and the duty as business partner, officer, director, or substantial investor. The lawyer must also cope with two types of self-interest: the self-interest as attorney, in establishing adequate fee arrangements and minimizing exposure to malpractice liability, and the additional self-interest as the client's business partner, officer, director, or substantial investor.

In many situations, the lawyer's duty as attorney coexists comfort-

24. Jones, *supra* 41 Vand. L. Rev. 683, (1988).
25. *Id.* at 685.

ably with the same person's duty as partner, officer, director, or substantial investor and with the related types of self-interest. In other situations, however, the combination of multiple duties and self-interests impairs the individual's ability to render objective advice in the best interests of the client entity as a whole. For example, the lawyer/director may be asked to support a certain faction of the board of directors regarding one issue in return for receiving support from that faction on another issue. As another example, when the entity faces important choices, such as whether to go public or whether to sell substantial amounts of its property, the lawyer/partner may be in a position to cast an influential or decisive vote. In each of these situations, the combination of multiple duties and self-interests may render the lawyer unable to provide legal advice in the best interests of the entity as a whole.

The lawyer who serves as both attorney and partner, director, officer, or substantial investor in the client may compromise his duties to professional peers. First, if the lawyer is a partner in a law firm, his law partners may not be able to share equally in the benefits derived by the individual lawyer through his involvement in the client's business. Second, other law firms may not be able to compete on an equal basis for the opportunity to represent the lawyer's captive client.

Directly affected third parties who receive opinion letters or other representations from the lawyer may not be able to rely on the lawyer's objectivity to the extent they could if the lawyer were fully independent. Society in general may ultimately suffer if lawyers and law firms become so identified with their clients as to impair the independence of the legal profession at the macro level. I concede that society does not expect an attorney to possess the detachment of a judge or of an independent auditor.[26] Society, however, has come to expect a lawyer to be reasonably independent of the client, so that the lawyer can make a reasonable attempt to accommodate the duty to the client with the lawyer's self-interest and with duties to other constituencies.

B. The Multidisciplinary Law Firm

The author portrays a law firm that will engage in a multidisciplinary approach to problem solving under the "one-stop shopping" concept.[27] The members of various professions will be associated with the law firm or with one of its affiliated enterprises.

Of course, I recognize that many clients need the combined services

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26. *See* Levinson, *Professional Independence: New Rules Needed for Lawyers and Law Firms*, 18 VAND. LAW., Fall 1987, at 12, 14.

27. Jones, *supra* 41 VAND. L. REV. at 688-92, 693-94 (1988).

of specialists in numerous disciplines, but I object to housing the members of these disciplines in a single law firm, or in a conglomerate enterprise controlled by a single law firm. This arrangement impairs the firm's duty to its clients as well as to society in general.

Duty to clients is impaired because the practitioners of each discipline or profession are not independent of each other.[28] Therefore, the practitioners are not in a position to give the client one of the important components of professional service—an independent evaluation of one another's qualifications or performance.

Duty to society is impaired, because if such firms become characteristic of professional practice they are likely, over a period of time, to reduce the distinctiveness of law as a separate profession. Indeed, the multidisciplinary law firm may become indistinguishable from multidisciplinary groups organized by members of other disciplines, such as accounting, business management, or financial management. The multidisciplinary firms—regardless of the discipline in which their organizers were trained—may turn out to be simply general problem solvers, with no significant orientation to any of the traditional disciplines.

I have previously expressed the view that lawyers perform a unique role, by making society's legal system accessible to society. In order to perform this role effectively, lawyers should retain distinctive attitudes, traditions, and methods of reasoning and analysis. This does not mean we must be locked into archaic processes. Of course, we must constantly update and refine our techniques, but we should do so as lawyers, with full regard to the duty we owe to society's legal system.

C. Nonadversary Problem Solving

The author proposes to de-emphasize the adversary method of solving problems and to use other techniques, including those that are characteristic of disciplines other than law.[29] This proposal is related to the above discussion of the multidisciplinary law firm, since the presence of nonlawyers in the firm is likely to stimulate the use of problem-solving techniques derived from nonlaw disciplines.

My objections to this proposal are similar to those stated above, regarding the multidisciplinary law firm. The author's proposed deemphasis of the adversary process creates a risk of transforming that process into a general problem solving technique that blends the traditional methods of lawyers with those of other professionals.

I see no evidence that society wants us to make this transformation; to the contrary, I perceive that society, despite its perennial com-

28. Levinson, *supra* note 26, at 14-15.

29. Jones, *supra* 41 VAND. L. REV. at 694-95 (1988).

plaints and lampoons about lawyers, generally accepts and wants an adversary process, conducted by lawyers who perform a distinctive role and who are imbued with an adversary ethic. Society would probably be even more anxious to maintain our existing type of system if we effectively articulated the duties we owe to society, and if we conscientiously carried them out.

D. Nonlawyer Ownership of Interests in Law Firms

The same author joins others in seeking to change the rules so as to allow nonlawyers to own interests in law firms.[30] If the purpose of this proposal is to accelerate the creation of multidisciplinary firms by offering attractive inducements to competent nonlawyers, I find the proposal objectionable for the same reasons I find the multidisciplinary firm itself objectionable.

If the purpose of allowing nonlawyer ownership is to facilitate financing by inactive investors, I find the proposal even more objectionable because it is likely, over a period of time, to impair the capacity and desire of law firms and, ultimately, of the legal profession itself, independently to articulate and fulfill the public duties to society I have discussed above. This result is predictable because law firms will incur a set of duties to new constituencies—duties to investors and to the investment market. These duties will probably not detract seriously from the firms' duties to individual clients, but are more likely to impair the law firms' perception and performance of duties to society in general.

The situation could be further aggravated if investor-owned firms were embroiled in merger-and-acquisition struggles which, over time, resulted in the consolidation of the practice of law into a few firms servicing large corporate clients, and a few other firms servicing other clients. We may speculate, further, that major law firms could be owned by a political party, or a religious organization, or a labor union, or an investment conglomerate, or a chain of retail stores or fast-food restaurants, or a cartel of foreign oil producers. The law firms' perception of their duties to society could radically change. The law firms could become active agents of the politico-social policies of the owners; or, perhaps even more to be feared, the law firms could limit themselves to the representation of selected clients, with the maximum feasible neutrality in the social arena. In addition, nonlawyer ownership of law firms could build pressures to relax various rules of professional conduct, such as those dealing with conflict of interest resulting from the mobility of individual practitioners from one firm to another.[31]

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30. *Id.* at 694.

31. *Id.* at 687-88; *see* MODEL CODE, *supra* note 1, DR 5-105(D); MODEL RULES, *supra* note 2, Rule 1.10.

IV. CONCLUSION

All four features discussed above—the lawyer-entrepreneur, the multidisciplinary law firm, nonadversary problem solving, and nonlawyer ownership of law firms—pose serious dangers to the legal profession. These practices, if adopted on a widespread basis, threaten to complicate our conflicts of duties, escalate our level of tension, and transform the manner in which we perceive and accommodate our duties to our various constituencies. The transformation is likely to deemphasize our duty to society. Consequently, we are likely to breach the societal duty that is inherent in the type of service we offer—making society's legal system accessible to society.

Our standards of professional conduct now prohibit only one of these four features—nonlawyer ownership of law firms.[32] Our standards allow the other three features—the lawyer-entrepreneur, the multidisciplinary law firm, and nonadversary problem solving. The most highly visible of these features in contemporary practice is probably the type of lawyer-entrepreneurship that exists when the lawyer is involved in the client's business as a member of the board of directors. Some commentators have urged lawyers to decline invitations to serve on their clients' boards so as to avoid two significant risks—the risk of compromising the privileged nature of information received in the dual capacity of lawyer and director, and the risk of personal liability as corporate director for corporate improprieties.[33] Despite these salutary warnings, many lawyers are likely to retain their positions on their clients' boards of directors.

I advocate the adoption of rules of professional conduct to prohibit lawyers from representing clients in which the lawyers are involved as partners, directors, officers, or substantial investors. If, however, this practice cannot feasibly be prevented, I advocate the next best remedy—rules should require disclosure of this relationship in any documents prepared by the law firm for the use of third parties and in any negotiations conducted by the law firm with third parties.[34]

Rules should, in addition, prohibit law firms from engaging in a multidisciplinary practice. If adoption of rules to this effect is not feasible, the next best remedy is to require disclosure of a firm's multidisciplinary nature in all documents and negotiations in which this information may be relevant. In addition, law firms should resist the

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32. MODEL CODE, *supra* note 1, DR 5-107(C)(1); MODEL RULES, *supra* note 2, Rule 5.4(d)(1).

33. *See, e.g., Lawyers for Corporations Told Not to Sit on Boards*, 3 Law. Man. on Prof. Conduct (ABA/BNA) 391 (Nov. 25, 1987).

34. See similar disclosure requirements in certain reports filed with the SEC, 17 C.F.R. § 229.509 (1987) (interests of named experts and counsel).

temptation to convert their practices into multidisciplinary ones. The legal profession should regard the existing examples of this type of practice, neither as models to be imitated nor as leaders inviting competition, but rather as reckless experiments—reckless because the widespread use of this type of practice could affect our future capacity to serve society in a manner that cannot be ascertained but may be serious and even catastrophic.

Nonadversary problem solving presents a more difficult issue. Society and affected parties clearly stand to benefit from the simplification and expedition of the process for resolving disputes. At the same time, society would not be well served by significant dilution or abandonment of our adversary tradition, for the reasons suggested earlier in this paper. Perhaps the only feasible remedy at the present time is to deepen our understanding of the benefits of the adversary tradition, and to remain sensitive to the dangers of impairing it.

The final issue is nonlawyer ownership of law firms. Both the *Code* and the *Model Rules* prohibit it, although the early drafts of the *Model Rules* would have allowed nonlawyer ownership,[35] and proposals to allow it continue to attract national attention.[36] I strongly support the existing rules prohibiting nonlawyer ownership. Nobody can predict the consequences that would result from relaxation or abolition of these rules. I anticipate that the changes would be drastic, that they would serve as a symbol encouraging relaxation or abolition of other rules of professional conduct, that the changes would be irreversible, and that the result would be a radical alteration of the array of duties we owe to various constituencies and the manner in which we accommodate these duties. The ultimate consequence, I fear, would be disaster for the legal profession and for the society we would no longer be able to serve independently.

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35. S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 314-16 (1985); Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

36. *See, e.g.*, Dwyer, *Soon Anybody May Be Able to Own a Law Firm*, BUS. WEEK, Jan. 26, 1987, at 42; *What Now, The Dow?*, Nat'l L.J., Jan. 19, 1987, at 12, col. 1 (both commenting on pending proposals to amend the *Rules of Professional Conduct* Rule 5.4 in the District of Columbia and in North Dakota); Brill, *Psst! Wanna Buy A Hot Stock?*, Am. Law., Nov. 1987, at 3, col. 2; *see also* Jones, *supra* 41 VAND. L. REV. at 694 (1988).