1981

Symposium Proceedings

Various Editors

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Evidence Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation

Available at: https://digitalcommons.law.villanova.edu/vlr/vol26/iss6/7

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
PROF. FRUG: I would like to begin this debate by asking Mr. McKay to respond to several of the charges which Mr. Freedman made in his remarks, as well as to the comments which Mr. Zerfoss raised. Mr. McKay, do you think that the current Code whipsaws the constitutional rights to counsel and privilege against self-incrimination?

PROF. MCKAY: No, I certainly don't think that is so. I was determined that no matter what the question, I was going to respond with the things I wanted to say. Let me see if I can do that within this context. Toward the close of the war in Vietnam many of us recommended that the United States declare victory and pull out of the conflict. After today's presentations, I am tempted to declare victory and pull out. However, I feel that some of you might not recognize that I am, in fact, the sole victor in this afternoon's discussion, so I thought I might add a few words of further comment. Monroe Freedman started out by saying that he wanted to identify the areas of agreement — well, that didn't take very long. As I recall the one point of agreement he found between the ATLA and the Kutak Commission was that we both repudiated the present Code of Professional Responsibility. That is true, but I think it's fair to say that we do so for quite different reasons. It appears that Monroe, and the others responsible for the American Trial Lawyers Association proposal, began, once the Kutak Discussion Draft was released in January of 1980, to look at the Code of Professional Responsibility a little more carefully than in the past. They discovered that they didn't really like the present Code. But the solution which the American Lawyer's Code of Conduct really proposes is to revert to an earlier period rather than to correct or to modernize the present Code. They seek to assure that the client is the only one whose rights are considered and they ignore the rights and duties owed to the court and members of society. Their code takes away many of the provisions made by the present Code which require or permit the attorney to disclose in some instances where it would serve greater good. Let me give just two examples from the proposed American Lawyer's Code of

(1197)
Conduct. Often the American Lawyer's Code offers alternative provisions, as is the case in the sections on disclosure of confidential information, one of the primary points of discussion today. Alternative A, under "The Client's Trust and Confidences," would allow a lawyer to "reveal a client's confidence to the extent required . . . by law, rule of court, or court order, but only after good faith efforts to test the validity" 1 of the requirement. "A lawyer may reveal a client's confidence when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life." 2 The Kutak Commission goes slightly beyond that, allowing greater latitude for disclosure. In Alternative B, the American Lawyer's Code does not allow disclosure of a confidence that the client will murder or do serious bodily harm to someone else. 3 I do not find that a very satisfactory rule nor a very satisfactory standard for lawyers to aspire toward.

I would like to discuss this point later, and discuss now just what the Kutak Commission really does propose in the way of revelation of confidences. Mr. Zerfoss indicated his organization's agreement with many of the Kutak Commission's recommendations, saying that they were excellent and should be incorporated into the draft. The main point of controversy, aside from some fringe areas, relates to the organization of the Code. Now, I do not consider that to be the most important thing. While it is my belief that the Kutak Commission Draft proposes a better and more functional organization, one that is logical and comports better with what lawyers really do, the important thing is the rules themselves. They must be responsive to the needs of lawyers and their clients, and also to the needs of the public. So if we can reach an agreement on that, we have accomplished a great deal. As Mr. Zerfoss has pointed out, we are going to present the next draft in two ways. One alternative will show our recommended rules in the new functional organization, which I strongly prefer. The other will show those same recommendations incorporated into the Code in its present format. 4 It is my feeling that when you see our suggestions incorporated into ethical considerations/disciplinary rules format,

2. Id. at Rule 1.4, Alt. A.
3. Id. Rules 1.1-1.4, Alt. B.
4. Both versions of the ABA's proposed final drafts were released in May 1981. In the interest of authenticity and accuracy, references in the debate have been left intact and do not reflect such subsequent events. Ed.
you will find that it breaks of its own weight — that it really doesn’t make sense and requires reorganization. I said before that I think the 1969 Code was a great improvement over anything that had gone before — and I reassert that — but it was an evolutionary document. It came from a point when we had only the hortatory Canons of Ethics which gave almost no guidance to lawyers, and very little help to disciplinary committees. The step forward to firm disciplinary rules supplemented by ethical considerations represented a very importance advance. However, over the last ten years we have learned that that advance was only a first step, and more needed to be done.

Now I would like to return, as promised, to a substantive point I touched on earlier. Really, the only thing that has been seriously debated today, although there may be other controversies, is the client confidentiality question. Now, Monroe raises some horribles in his hypotheticals. I don’t think those ever would have been answered in the way he suggests, even under the January 1980 discussion draft of the Kutak Commission.5 Certainly they would not be so answered under the draft that we are now considering, and certainly not under the one that will be presented for debate in May, and to the ABA House of Delegates next year.6 Let me explain to you what it is that the Kutak Commission really says about the requirements of and limitations upon disclosure. You must recall, in the first place, that the present Code requires the disclosure of fraud — any fraud with only certain limited exceptions, and permits the disclosure of any crime, no matter how petty.7 We think that is much too broad. So, the Commission cut back the disclosure requirement to what I think is a more reasonable scope. Rule 1.6, which deals with confidentiality in the new version of the Kutak Commission Report 8 provides that a lawyer may reveal confidential information to the extent the lawyer believes necessary to serve the client’s interest, which is not really a concern here. He may also disclose to prevent the client from committing criminal or fraudulent acts that the lawyer believes are


7. See ABA Code of Professional Responsibility, DR 2-102(B), DR 4-101(C)(3), (4) (1979) [hereinafter cited as ABA Code].

likely to result in substantial injury to the person, financial interest or property of another — permissive not mandatory disclosure — to rectify the consequences of a criminal or fraudulent act by the client in connection with which the lawyer's services were employed. In short, when the lawyer himself has been used by the client as the instrument of crime or fraud, the lawyer may reveal — not must — but may. Although we haven't really touched on it here today, there has been a great deal of controversy revolving around disclosure in the corporate context — the so-called whistle-blowing provision. Let me tell you what it really amounts to. There is no mandatory disclosure under the provision. Rule 1.13 embodies the current requirement. It deals with the organization as the client, first making the point that the corporation is the client, not the officers or the employees or the stockholders, but the corporation. That is a difficult concept and therefore requires complex rules. Let me read part of Rule 1.13 to you:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in material injury to the organization, the lawyer shall proceed as is necessary in the best interests of the organization.  

Those reasonable efforts are to be exercised within the corporation — that is by going up through the hierarchy, trying to persuade the wrongdoers to change their minds, going all the way to the board of directors if necessary. If the lawyer has gone to the organization's highest authority, and is unsuccessful in dissuading action that is clearly a violation of a legal obligation to the organization by officers, employees, directors, or a violation of law which reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer may take further steps. Scarcely revolutionary. A disclosure is made in the interest of protecting the organization, the client, from harm by its own agents. Now, I don't consider that very radical. We go from there to two other circumstances. One is in the section called

9. Id. Rule 1.6.
10. Id. Rule 1.13(b).
"Candor Toward the Tribunal," and provides that a lawyer shall not offer evidence that the lawyer knows to be false. Nobody could disagree, at least I hope nobody could disagree. If a lawyer has offered material evidence and comes to know of its falsity before the conclusion of trial — in the trial setting, not something outside that situation — the lawyer shall, except as law may otherwise require, take suitable measures to rectify the consequences, including if necessary, disclosure of the falsity. This rule deals with the client imposing upon the lawyer, the honest lawyer, client perjury. A somewhat similar provision as to fraud conducted by the client in the course of negotiations imposes an obligation in some circumstances to disclose. That's all there is. You can see this rule does not affect the bizarre hypotheticals Monroe raised. In those cases there would not be a requirement of disclosure. Disclosure is required in three limited circumstances, and is permissive in a few others. The new rule actually cuts back the rather broad requirements and permission under the present Code. I understand Monroe's objection to disclosure requirements. That is why in the ATLA proposal they cut back even further, allowing disclosure in almost no circumstances, no matter how great the harm to client or third persons. That really goes back to the ultimate question — the one that was originally asked of me regarding the need for some sort of Miranda warning. How is it possible, Monroe asks, to get a client to disclose in confidence all that is necessary in order to give effective representation? Wouldn't it be necessary to tell a client of these potential traps for the unwary? No lawyer gives a Miranda warning to clients at the present time, in spite of the current Code's very substantial requirements and permissions for disclosure of clients' confidences. There is nothing radically different; the new rule is more relaxed, and more defined, but there are no Miranda warning problems as far as I can determine.

PROF. FRUG: Now I wish to ask Mr. Freedman a question, and I imagine it will again be relegated to the bottom of the list to which I see he's been preparing to respond. Mr. Freedman, would you elaborate on your comments and tell us why are we entitled to a champion against the world if that championship requires individual lawyers to be amoral? Why can't we accept a system wherein the

11. Id. Rule 3.3.

12. Id.
championship to which all of us are entitled is a more limited, more moral kind of championship?

Prof. Freedman: First, I would like to say that I am puzzled by Professor McKay's comment that I only analyzed and came to disagree with the initial Code of Professional Responsibility after the Kutak Commission began its work. In fact, the ABA Journal has credited my book with prompting the movement to review and rewrite the Code. Regarding confidentiality, the illustrations I gave are commonplace, and are not bizarre as Professor McKay suggested. I purposely picked two of the most ordinary situations one would face: the husband on the one hand and the wife on the other in domestic relations matters. Professor McKay says that he doesn't think any Miranda type warning is given, or necessary, or even desirable. I suggest that he read the Code he is supporting. On page 14 after suggesting that a warning be given, it notes that the "warning may lead the client to withhold or falsify relevant facts from the lawyer, thereby making the lawyer's representation more difficult or less effective." The Code comment concludes that in the final analysis the choice must lie with the client.

Ironically, you will be unable to find any reference in the early literature dealing with professional responsibility that proposes such a provision as the Kutak Commission has adopted regarding imminent threat to human life, other than my own writings. The Kutak provision came directly from my book and from an earlier article I wrote. Under alternative A, of the American Lawyer's Code, the lawyer is indeed permitted to divulge confidential information in the case of a threat of imminent harm to human life.

Professor McKay does properly criticize Alternative B of the American Lawyer's Code rule on confidentiality. It was not my doing, and I am confident it will not survive as part of the draft. My own preference, and I think there's a chance of that ultimately winning approval, is to make disclosure a requirement in a number of

17. American Lawyer's Code, supra note 1, The Client's Trust and Confidences, Rules 1.4, Alt. A.
18. Id. Rules 1.1-1.4, Alt. B.
instances. But, all this discussion of mandatory or permissive disclosure may be just a quibble in view of other sanctions, including possible malpractice actions under authorities such as the Tarasoff case in California. I'm not sure that it's going to matter a great deal whether disclosure is required by the Code or not. But my own preference is that it be required in limited circumstances.

Professor McKay defends his position today by referring to a Kutak Commission draft which I haven't seen. I am sure, as Mr. Kutak himself said on one occasion publicly, that this version is really going to be dynamite, but it is awkward to attack or evaluate something that one hasn't seen. Now, incidently the one that is coming is not, as the Commission has called it, their second version, it is version number seven. I have seen one through six. This draft that we have seen is the product of three or more years of hard work, so I think it is not unfair to hold them to it. Professor McKay says that he stands by Rule 1.7(b) of the Kutak draft, as I'm sure all right thinking people would. But, I submit to you that the problems in the confidentiality area are more difficult and more sophisticated than the members of the Kutak Commission appear to recognize.

Let me give you an illustration. You represent a client who is accused of possession of drugs. In the course of the representation you find out that the reason your client is in possession is that he is a dealer. The case progresses to a conclusion — there may be a plea, there may be a trial, there may be a sentence, the client may serve time, but you know that the day the client walks out of jail or walks out of the courthouse, he is going right back to plying his trade as a dealer in drugs. You know that because of what he has told you in the confidential relationship. Under the Kutak provision, you are required to divulge sufficient information about your client, information which you have learned through the attorney-client relationship, to prevent him from successfully dealing in drugs again. Now I submit to you that that may appear to be a nice result in the case where you happen to have learned

---

19. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 354 (1976) (Psychologist held liable for not breaching psychiatrist/patient confidentiality to warn young woman of patient's threat to harm her and his dangerous propensities).

20. Model Rules 1981 Proposed Final Draft, supra note 6. The proposed final draft was not yet released to the public at the time of the Symposium. Professor McKay did, however, quote from an unpublished copy of the Commission's work on the final draft. Ed.

what your client does. But I submit to you further, that you are never again going to find out. The reason you know it today is because your client has not received the Miranda warning provided for on page fourteen of the Kutak code. The reason you know it today is precisely because your client knows that he can speak in confidence without fear of disclosure. This self-defeating fallacy — if only we have the lawyers divulge, we will know everything — overlooks the fact that clients will stop telling lawyers everything. That will be harmful to all of us — lawyers, clients, the courts and the public. And recognize that it will be harmful to all of our clients, because it is not only the drug pushers who will be wary and will begin concealing information from their lawyers.

Professor McKay has also suggested that the rules relating to required disclosure apply only in the trial setting; he used that phrase. But let me give you another illustration. You are a lawyer representing a buyer in negotiating the sale of a piece of real estate. Both sides know that the buyer wants to use the property for a commercial purpose, but that it is not now zoned for commercial use. One day you meet with your client and you say “I have two pieces of good news. First, the other side is willing to settle to sell the property on our terms; and second, I have succeeded in persuading the zoning board to give a variance to allow commercial use of the lot, but the decision is not public knowledge yet.” You continue, “Of course we will have to tell the other side to reopen negotiations.” Your client retorts, “Don’t be silly! We’re on our way now to sign on terms they have agreed to.” You say, “Yes, but my professional responsibility is to tell the other side about this change in circumstances.” You are right under the Kutak draft. You are required to tell the other side that your client, through your efforts, has succeeded to getting the zoning changed so the property is worth more, and you can start a new round of negotiations for a higher price to your client. That is not a trial setting, and that is required within the Kutak draft.

However, the problems with the Kutak draft go beyond that. I don’t know whether the Kutak draft’s inconsistencies are purposeful or adopted through simple incompetence, but consider these situations. I outlined for you the disclosure necessary with regard to your former drug client. Compare this case with the case where you find that your client planted a bomb in the Thirtieth Street Station set to go off during rush hour. Under the Kutak draft you are not required to disclose this fact. One case I mentioned earlier is the Lake Pleasant case, where the lawyers learned from their client that
he had killed two young women and knew where the bodies were. As a variation on that, I am asked frequently "what if they were not dead but were dying, what would you do?" I would permit disclosure. The American Lawyers Code permits disclosure. Can you imagine, the Kutak Code is drafted in such a way that you would be forbidden to disclose sufficient information to save the women's lives! 22 I don't think they did that on purpose, but that's how it reads now. This next draft, which will be dynamite, will have the benefit of these criticisms, and I guess will be written more carefully. But as the Model Rules are written now, absurd situations like this arise.

Now to get back more specifically to Professor Frug's question: Why do I think that each of us is entitled to a champion against a hostile world? That is not a question which is easy to answer in a few words. It goes to my understanding of the American system of justice. It goes to my understanding of what a free society is about, as distinguished from a totalitarian society. A group of professors at the University of Havana, for example, announced a little while back that the role of the lawyer in a totalitarian society is not to try to get the client off, or to serve the client's interest, but rather to help the prosecution and the judge in determining the fact of guilt, and setting an appropriate penalty. In a Bulgarian treason trial, the lawyer for the defendant also announced that as his understanding of his role. In the course of the trial he ridiculed his own client's not very credible defense. The client was convicted and executed. Sometime later it was found that this not too credible defense happened to be true after all. Of course, the defendant was rehabilitated.

In a free society, we take a different view of the value of the individual vis-a-vis the state. My job as a lawyer is to serve as my client's champion against a hostile world. Think of it. The United States of America against you; the Commonwealth of Pennsylvania against you; everybody — the judges, the prosecutor, the state troopers, the people — against you; except that one lawyer. And now they want to take that away too. That right to counsel, that entitlement to one champion, speaks in a realistic and tangible way to one of our most basic ideals: that each of us is precious; that each of us has rights; that each of us has a dignity and an autonomy. Yes, the adversary system recognizes that we are human and that people under the threat of being locked up in a cage like

22. See id., Rule 1.7.
an animal, and brutalized, and of being treated in the most inhumane and disgraceful way — people under that kind of pressure might lie. But there are ways of detecting those lies. The prosecutorial system of the States and of the United States of America, have investigatory powers. They have prosecutors, trained to cross-examine. And they have pressures to put on witnesses. We not only maintain a prison system, but we actually take people into it to scare the hell out of them and to induce them to testify the way the prosecution wants them to testify.

In the trial context, sometimes people will lie. Most of the time, almost always, they are caught. Don’t misunderstand, I’m not in favor of lying. I like to think, I’m not sure, but I like to think, that if it were my head on the block, I wouldn’t lie. I can’t answer that for sure anymore than you can. But I would like to know that apart from my wife, there is one person in the world whom I confide in, and who will counsel me and who will represent me and who won’t go running into the prosecutor’s office or to the judge and condemn me. I think the right to counsel includes that. Bear in mind, it’s not the liars who need the right to counsel. It’s each of us. It’s that woman with the bread knife. It’s each of us who has to know that even though I think what I’ve done is a terrible thing, even though I think it’s something that is going to hurt me, there is one person I can reveal it to who might be able to tell me that it isn’t so bad after all. If we make the lawyer reveal in the perjury case, if we make that lawyer give that Miranda warning at the outset of the interview, the relationship of the lawyer to client becomes no different from the relationship of the police to the client. As it is, just about half of the clients represented by public defenders don’t think that their interests have been represented because they see those lawyers as arms of the state. Establishing a relationship of trust and confidence with your client is almost impossible. You have got to work at it. You don’t work at it by reading your client a Miranda warning.

Prof. McKay: I’m outraged by Monroe’s refusal to listen and by his assigning motives to the Kutak Commission that simply are not there. The notion that the Kutak Commission would have all lawyers turn over all their clients’ confidences to the prosecution, the notion that the proposal we have can be equated to the Bulgarian or the Cuban system of criminal justice, are so far from anything that could be inferred from a reasonable reading of what is proposed in any of the Kutak Commission Reports that it
seems to me that we are not having a sensible debate at all on these questions. Let me deal with some of the specifics.

On the question of the Miranda warning, the January 1980 Draft does contain the sentence that Monroe read, but he didn’t read the earlier sentences: “A new client should be given a general explanation of the client-lawyer relationship. A client should understand the lawyer’s ethical obligations, such as the prohibitions against assisting a client in committing a fraud or presenting perjury evidence.” Then comes the sentence about the necessity of advising the client about disclosure to insure that the client does not misunderstand. Shouldn’t the client be put on notice that the lawyer is not an instrument to help him commit a fraud or perjury? I cannot believe that anyone would take an opposite view. I am sure that Monroe does not. As to the case of the client who is negotiating a real estate transaction, I don’t have right at hand what the January 1980 draft said, but the 1981 drafts say this: “In the course of representation a lawyer shall not knowingly make a misrepresentation of fact, including misrepresentation about existing law, or knowingly fail to disclose a fact even if doing so requires disclosure of information gained in relation to representation when disclosure is required by law.” That does not apply to the case Monroe described. It speaks of disclosure necessary to correct an inaccurate representation of a material fact that was previously made by the lawyer. The lawyer in Monroe’s case made no misrepresentation.

**Prof. Freedman:** But look at 4.2(b)(2).

---

23. *Id.* at 14 (Comment: Withholding information).


The rule states:

4.2 Fairness to Other Participants

(a) . . .

(b) A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:

(1) . . .

(2) Necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client, except that counsel for an accused in a criminal case is not required to make a correction when it would require disclosing a misrepresentation made by the accused.

*Id.*
PROF. MCKAY: It speaks to disclosure necessary to prevent the perpetration of fraud in a transaction that is the subject of representation. There was no fraud in this case. The lawyer simply had additional information that came along later. The Model Rules require no disclosure.

PROF. FREEDMAN: 4.2(b)(2), Bob. 26

PROF. MCKAY: The language of the rule has been changed in the current version. I am only dealing with the new version, and I'm sorry that you do not have this draft.

PROF. FREEDMAN: That can be remedied if anyone is willing to give it to me.

PROF. MCKAY: What I am saying is look at it as it stands now, and as it comes forth in May. Don't judge anything that was put out on an experimental basis for comment and for correction. Corrections have been made where misstatements or misunderstandings existed, or the rules went too far or did not go far enough.

On the question of the drug dealer, similarly, there is no requirement of disclosure. There is not even permission for disclosure in that particular case, because it represents an entirely different situation. The requirement for disclosure arises where there is threat of death or serious bodily harm — that is, physical injury. Such is not the case in that hypothetical, and there is no permissive disclosure allowed.

PROF. FREEDMAN: Pushing drugs is not life threatening?

PROF. MCKAY: This is not what is meant by that language. Bodily harm, physical injury, rape, assault . . . .

PROF. FREEDMAN: Killing with drugs, hooking . . . ?

PROF. FRUG: Let's now take questions from the audience.

AUDIENCE: Let me address something a little less sexy than the confidentiality question, but something that is, in my opinion, the most serious issue of professional responsibility — something which the ABA Model Rules mention in Rule 2.1.1 27 — the question of

26. Id.
27. MODEL RULES, 1980 DISCUSSION DRAFT, supra note 5, Rule 2.1.1.
competence. Is there a role in any the new codes and in the enforcement of these codes to improve the competence of lawyers? What can be done in the disciplinary system to insure competence? I am quite stricken by the figures that I heard from Mr. Unkovic and Mr. Zerfoss. I assume that if only twelve lawyers in Pennsylvania were disbarred last year, that they were only the lawyers who were convicted of crimes. I can't imagine that anyone was disbarred for much more than that. It seems to me that beyond these twelve there is a vast sea of incompetent representation which is unprofessional and needs to be addressed.

Prof. Freedman: I don't think that the Kutak Code has made any advance over the present admittedly vague standard with regard to competence. It says in Rule 1.1: "A lawyer shall undertake representation only in matters in which the lawyer can act with adequate competence."

Adequate competence is then defined in terms of acceptable practice. The Model Rules do not specify acceptable to whom. They do not say acceptable where. It is as vague as a standard can be. There are then given a limited number of specifics that deal with minimum standards.

Under the American Lawyers Code, there is first a general provision under Part IV that says that at a minimum a lawyer shall serve a client with skills and care commensurate with that generally afforded to clients by other lawyers in similar matters. That is still vague language, but is much more readily indentifiable. Then, however, the American Lawyers Code follows with specific minimum standards which are generally missing from the present Kutak draft. Rule 4.2 of the American Lawyers' Code states: "A lawyer shall take such legal action as is necessary and reasonably available to protect in advance a client's interests in the matter entrusted to the lawyer by the client." Competence, then, is defined in terms of the matter that has been entrusted to the lawyer. It continues: "A lawyer shall seek out all facts and legal authorities that are reasonably available and relevant to a client's interests in the matter entrusted to the lawyer by the client." This imposes a requirement of diligence of investigation. Incidentally, you will note that even as I read these orally to you you can understand

28. Id.
30. Id., Rule 4.2.
31. Id., Rule 4.3.
them. The American Lawyers' Code is unique in that it is written in simple, understandable language. One reason for that is that the secretaries who typed it were asked to tell us anything they didn't understand. I want clients as well as lawyers to be able to understand what we are saying. "A lawyer shall give due regard not only to established rules of law, but also to legal concepts that are developing and that might affect the client's interest." 32 Now, note what we are talking about. It is not just what is acceptable practice, even if you can figure out what exactly acceptable is. As we know from Learned Hand's decision in the T.J. Hooper 33 case, if everybody is acting negligently or incompetently, that should not be a defense. It would be under Model Rule 1.1. It would not under Part IV of the American Lawyers' Code. There are additional provisions for specific minimum things which must be done by the lawyer in order to satisfy the requirement of competence. Rule 4.1 begins by requiring at a minimum that you must do as well as is being done generally in that area. But that's only a minimum. These provisions come a lot closer to defining in a meaningful way what competence is.

MR. ZERFOSS: May I comment? I would take issue with the finding of clarity that Professor Freedman would have espoused as being available in his Code. For example, reading under Part 8.1 of the American Lawyer's Code — now, as these words trip over my tongue, I would like you to put yourselves in the role of a particular lawyer seeking guidance as to the prospective conduct, and figure out how you would apply this. You can also put yourself in the position of a disciplinary counsel trying to enforce such a rule. The Rule says that "[a] lawyer shall not engage in unlawful conduct of a kind that creates substantial doubt that the lawyer will comply with this Code of Conduct." 34 What did I say?

PROF. FREEDMAN: I'll tell you what you said. You said something much more specific than the current rule. The present Code, with which apparently you are satisfied, says a lawyer shall avoid the appearance of impropriety. Now if you know what that means then you know what it means to act in a way that raises a substantial doubt that you are going to comply with the provisions of the ATLA Code. That is a far more nearly precise rule, a far more

32. Id., Rule 4.4.
33. The T. J. Hooper, 60 F.2d 737 (2d Cir. 1932).
34. AMERICAN LAWYER'S CODE, supra note 1, Rule 8.1.
substantive rule, than “avoid the appearance of impropriety” which is the present mandate.

Mr. Zerfoss: I invite your attention to page 49 of the NOBC Report,\textsuperscript{35} where we have incorporated those sections of the Kutak proposals with the present code sections. I think you will find there clarity and specificity that can be applied in a disciplinary context, and can be applied in a context where a lawyer would seek guidance as to his own conduct.

Professor McKay in his introductory remark referred to Polonius’ advice to Laertes. If my memory serves me correctly, in addition to “to thine ownself be true” another part of Polonius’ advice suggested to “[b]eware of entrance to a quarrel, but, being in, it bear’t that the opposed may beware of thee.”\textsuperscript{36} I wish to go on record to both Mr. Freedman and Mr. McKay that we are going to be the gadfly in whatever proposal comes out, insisting that where you call a rule a rule, which is purportedly to be used in enforcing a standard throughout the country, it be a standard that can be understood by the lawyer, and clear enough so that the normal lawyer can be guided by it. I find much difficulty in many sections of the Kutak proposal. I would invite your attention to one as an example, a provision in the Model Rules titled “Appearing Against an Unrepresented Party.”\textsuperscript{37} Again, put yourself in the role of the disciplinary counsel trying to enforce a rule as a standard. It says: “When an opposing party is unrepresented, a lawyer shall refrain from unfairly exploiting that party’s ignorance of the law or the practices of the tribunal.”\textsuperscript{38} I would like you to figure out how that can possibly be enforced. In conclusion, I would encourage those law students who are going to be admitted to the Bar and are going to have to perform in their profession under the guidelines of the code that’s adopted in their jurisdiction, to be concerned with what rules you will operate under. We are going to remain concerned, and we will insist the rules be clear, that they be meaningful, and that they be enforceable. We so notify all concerned.

\footnotesize

\textsuperscript{35} National Organization of Bar Counsel, Report on a Study of the Proposed ABA Model Rules of Professional Conduct with Recommendations.

\textsuperscript{36} W. Shakespeare, Hamlet, Act I, scene iii.

\textsuperscript{37} Model Rules, 1980 Discussion Draft, supra note 5, Rule 3.6.

\textsuperscript{38} Id.
AUDIENCE: I would like to use an example for my question an actual case. I am stockholder in a corporation, and am speaking as a lay person. A lawyer was involved in a situation where, unexpectedly, $90,000 in fees were run up against a very small corporation. The lawyer, a prominent Philadelphia attorney, had difficulty in settling the case against a multi-billion dollar corporation. He insisted on continuing to represent the corporation, when I, as a stockholder, came forward and said I had expertise to settle the matter. The lawyer said it was likely that the stockholders would bring suits against me if I took over, because I was not expert. He then settled the case for $100,000. Of that, more than $95,000 went to him. No action was brought for disciplinary proceeding and I don't think any can be brought under past, present or future codes. We as lay people, find this is a problem with the whole system.

PROF. FRUG: Is your question the rigid hold we maintain on the right to practice, or are you asking whether we are changing that position? Are you not as concerned with your inability to represent the corporation as a lay person as you are with excessive fees that you feel were assessed?

AUDIENCE: I was trying to avoid prolonging the negotiations, and was trying to settle the matter in a way that would result in an optimum settlement. But the lawyer was solely interested in a settlement that would obtain for him the fee he wanted.

PROF. FRUG: Professor McKay would you like to discuss how the Model Rules address this issue?

PROF. MCKAY: The Model Rules would not deal with that specific question, what they do say is that the fee must be reasonable. They then give a series of criteria for assessing the reasonableness of the fee. They also impose the requirement that in the future the lawyer should provide fee information in advance when possible, and that some agreement should be reached from the outset. As far as settlements, the present Code, as well as the Model Rules drafts, include the notion that any settlement offer

---

40. See ABA Code, supra note 7, Canon 7, EC 7-7.
41. Model Rules, 1981 Proposed Final Draft, supra note 6, Rule 1.2; Model Rules, 1980 Discussion Draft, supra note 5, Rule 1.3.
that is made must be disclosed to the client, and the client must accept it or reject it. It is not the lawyer’s decision to determine the settlement. Now I don’t know who negotiated on behalf of your stockholders but somebody must have agreed to the approach. If not there would in fact be a disciplinary problem.

AUDIENCE: I have trouble putting together the competence proposal and the proposal on referrals. It seems to me that all proposals validate referrals — the Kutak Commission obviously has a little bit of a caveat which simply requires that you have to assume responsibility. What happens in practice is that, applying the competence requirement, you don’t represent if you are not qualified. But you can try to make the fee agreement and collect a portion for making the referral. I think that is inconsistent. If someone comes to you with a sophisticated corporate matter that you are incompetent to handle you should render service by charging two hours’ fee for the evaluation of the problem, determine that you can’t handle it, and make the best referral you can, to a firm which in your judgment can handle the case. For that charge $250, rather than take 10% off of a 40% contingent fee. The other approach just runs up contingent fees and is anti-competitive. Both proposals ought to relate to competence in the referral practice — the fee splitting practice in some cases is very useful. For example, if you have a client in Erie, Pennsylvania and a trial in Philadelphia, someone has to gather the evidence. There is work in proportional amount which can be reflected in a fee splitting arrangement. But when you make a simple referral — Professor Freedman’s Code simply says that the clients must consent.42 How can it be a meaningful consent? The lawyer said here sign, 40% — the client signs. What do they care how you hack it up. Maybe that’s the economics of the transaction. But I think there are inconsistencies there. If you are incompetent you ought to be able to take a referral fee, and that’s all.

PROF. FREEDMAN: The rule is not simply based on consent and I think there is substantial agreement between the two new proposals on this. There must be informed consent. This relates to other provisions which require — I think uniquely in the American Lawyers Code — that the retainer agreement be made clear to the client and be in writing.43 The American Lawyers Code also

42. ATLA Code, supra note 1, Rule 5.4.
43. Id. Rule 5.2.
provides that a lawyer shall treat a client fairly and in good faith giving due regard to the client's position of dependence upon the lawyer, the lawyer's special training and experience, and the high degree of trust which the client is entitled to place in a lawyer. As one who teaches Contracts, I can assure you that those phrases have real significance, and it would put the lawyer at a disadvantage if there is any overreaching whatsoever in the situation.

AUDIENCE: How do you answer the hypothetical? You are incompetent by your training or your specialty to handle the matter. Is it appropriate to take a percentage of the contingent fee or should you merely charge an hourly fee for evaluation?

PROF. FREEDMAN: I do not myself accept referral fees, although I have referred a lot of cases, so I hold no particular belief in it. One of the arguments that is made out in support of referral fees arises out of a practical concern: this kind of arrangement encourages lawyers to refer cases that they either do not have the ability or the time to handle. Now that is not an attractive reason but in practical terms, it is a significant reason, and one in the interest of clients. My concern is that the client know what is going on, and the American Lawyer's Code, unlike the others, requires that the client know about it in clear, written terms. When you have that kind of informed consent, I am not offended by the fact that whatever the standard contingent fee is going to be, a piece of that is going to go to one lawyer rather than the other.

PROF. MCKAY: In view of my earlier, perhaps unseeming outburst, let me try to be a little more conciliatory on the competence question and other related issues. In the first place, I go along with Monroe's suggestion that the competence question has so far not been satisfactorily resolved in any of the proposed drafts — so far. It's a very difficult question. The Kutak Commission, however, makes an advance over the present Code which simply says that a lawyer shall represent clients competently, but gives no help as to what that means.

On the fee-referral question, we have had a great deal of difficulty in trying to work that out. We recognize the practicality of the arguments that Monroe just made about what lawyers really do, and why they say that it's better to have some sharing or the incompetent lawyer will be encouraged to keep the case and handle it badly. I don't think that is enough. Our present provision says
this: "A division of the fee between lawyers who are not in the
same firm may be made only if: (1) the division is in proportion
to the services performed by each lawyer, or by a written agreement
with the client all lawyers assume responsibility for the representa-
tion." It is not a perfect solution yet, but it's a great advance
over what we have had so far.

AUDIENCE: I'm concerned with the problem of advertisement
and competency. In this regard I refer to an article in Wednes-
day's paper referring to an attorney in Syracuse, N.Y. who advertised
himself as a specialist in 28 different areas of the law, including
maritime law, labor law, and others. For this he was given a reprimand by the New York Bar Association. I wonder how this type
of problem, which is becoming more common now, as attorneys
can advertise specialties, would be handled by any of you?

PROF. MCKAY: First I will speak in general, and then set out
exact Model Rules provisions. The advertising rule is now con-
trolled in part by the Supreme Court's holding that advertising is
permissible within some not very clearly defined limits. The Kutak
Commission takes the general position that advertising is permitted,
so long as it is not fraudulent or unfair. That's not the exact lan-
guage, nor is it the last word — certainly there will be further
litigation on the question. As to certification and specialization,
different states have different rules, and I think whichever Code is
ultimately adopted will have to have some flexibility for each state
to make its own separate provisions, depending upon whether it is
a certification state, a specialization state or a self-certification state.
It must be recognized that we are still in an evolutionary stage of
that very complex question.

MR. ZERFOSS: I would like to respond a bit to that. The
Kutak Commission's proposal is in section 9.1. The NOBC has
suggested that it be adopted because it helps us in enforcing a
standard of conduct for lawyers. The basic rule is that the lawyer
shall not make any false, fraudulent or misleading statement about
the lawyer or the lawyer's services to a client or prospective client.
Pennsylvania has adopted the general rule that a lawyer shall not
make any misleading, fraudulent statements. You must recognize

44. Model Rules, 1981 Proposed Final Draft, supra note 6, Rule 1.5(d).
46. NOBC Report, supra note 55 at 14.
that under our disciplinary system, we receive complaints from
people who feel they have been injured by a lawyer's activities. If
we as a disciplinary board, saw something like what was described,
we could act on our own. But what we would be doing is seeking
a remedy, not necessarily to penalize the lawyer but to correct the
situation. For the most part our discipline seeks to deter similar
conduct of others, so we would take disciplinary action and probably
would have a reprimand if remedial action wasn't taken promptly.

AUDIENCE: I would like to address the two gentlemen from
Pennsylvania. You mentioned that as lawyers we are subject to
disciplinary rules that are self-imposed, and to regular standards of
conduct as well as the laws of the state. What about the recent
decision handed down holding that the Pennsylvania Code of
Ethics which was adopted by the Pennsylvania Legislature, did not
apply to lawyers because they were only subject to the Professional
Code of Responsibilities. How does this decision square with the
dual role that we, as lawyers, have?

MR. UNKOVIC: What we have is a statute which requires all
employees of an identified category to refrain from conflicts of
interests while they engage in public business. It requires a report
of such activities as may represent a conflict of interest so that the
Ethics Commission can make a determination. In the particular
decision that you refer to, the Supreme Court held that in this
particular instance they view the supervision of the conduct of
lawyers as one of the court's exclusive rights under the State Con-
stitution, with its interpretation of division of the powers of govern-
ment. This goes back to the officer-of-the-court role that the
lawyer plays. Now this has been subject to criticism from time to
time and undoubtedly will be subject to criticism in the future be-
cause of the problems that come into being between a lawyer's
role in different categories and in different types of service. We
have on occasion had to proceed against District Attorneys, and
District Attorneys can only be removed from office by impeachment.
We have proceeded against the Consumer Advocate for
revealing information or making comments during the course of an
administrative proceeding. In both those cases, the action that we
took was on the basis of the Code of Professional Responsibility.
The Code of Professional Responsibility does provide prohibitions
against the conflicts that the state ethics law includes, and so the
hope would be, and I don't know how this is going to work out,
but the hope would be that there is a body of law which will apply to lawyers to keep them on the straight, and they need not be subjected to additional legislation.

AUDIENCE: Even when they're functioning as legislators?

MR. UNKOVIC: That's right.

PROF. FREEDMAN: I think it's absurd, that lawyers, as public servants, should be given more lenient treatment regarding conflicts of interest.

MR. UNKOVIC: Well, it was based upon the separation of powers doctrine. Whether or not it was a valid application of that doctrine is probably the question.

AUDIENCE: Mr. Unkovic mentioned that the lawyer that lets his desire for money outweigh his desire to do public good and to serve the public was headed for trouble. It seems to me that, applying that standard, a good majority of lawyers are flirting with danger. I wonder if there is any agreement among you gentlemen, or among your proposals, with respect to mandatory pro bono work?

PROF. FREEDMAN: I have a consistent position on that. I don't think Prof. McKay does. Originally the Kutak proposal required it. I understand they are dropping it now. I don't want to get autobiographical, but I think it is relevant to say that the major part of my time in the last quarter of a century has been spent in public interest work. I left a large Philadelphia law firm to go into law teaching in substantial part because I wanted to use that as a base to do indigent criminal defense work without a fee and to do civil rights and civil liberties work. Most of the litigating I have done, indeed the overwhelming majority of the litigating I have done has been on a pro bono basis. Clearly I am not against pro bono work — I think that's important to understand. But I do not consider it a service either to clients or to the Bar to require that lawyers do pro bono work. First let me say that the present Kutak draft doesn't do that in a meaningful sense anyway. For example, if you spend time as a member of the Securities, Banking and Finance Committee of the American Bar Association, you have fulfilled your requirement. That's not the kind of pro bono

you and I are talking about. On the other hand, I have seen lawyers who have no sympathy, no respect for poor people or people of racial minorities, forced into the position of representing those people, and doing a very bad disservice to their clients (and to the image of the Bar — if that is important). Nor do I think it's appropriate in a free society for the organized Bar of a state or for that matter, anybody else, to tell me or any other lawyer, "If you have spare time you cannot spend it on the Red Cross, on being a Big Brother, on working with the Police Benevolent Association, on demonstrating against the war in Vietnam, on helping starving children in Cambodia; you are required to use your free time in the way that we tell you, at least to the extent that we deem it appropriate." I don't think that should be done. If it's truly pro bono, if it's really going to be a service to the people who are nominally being served, and if we are going to maintain any degree of autonomy then it seems very clear to me that it's not the function of the state or an official or quasi-official body to be directing people as proposed.

PROF. FRUG: Professor McKay, what is the Kutak Commission current proposal in this area?

PROF. MCKAY: The present provision is this. "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession." The arguments that Monroe has just given against a mandatory pro bono are the ones that prevailed with the Kutak Commission, and were very strongly supported by the Bar as a whole.

MR. ZERFOSS: And the National Organization Bar Counsel would say that particular rule or proposal should not be a rule. It should be an ethical consideration. It is unenforceable and therefore should not be mandatory, but rather an aspirational guide.

PROF. MCKAY: The comment does say that this rule is aspirational. 49

48. MODEL RULES, 1981 PROPOSED FINAL DRAFT, supra note 6, Rule 6.1.
49. Id., Comment.
MR. UNKOVIC: May I ask Professor Freedman a question? If the court is going to appoint you on something because you are "an officer of the court" would that be an exception to what you are saying?

PROF. FREEDMAN: I have taken innumerable appointments, although I don't think that lawyers should be required to accept an appointment. I think it should be possible for a lawyer to be excused from accepting such an appointment. It's my view that access to the administration of justice is so fundamental that it should not be left to the good graces of the Bar, or to a mandate by the Bar or by the state to particular lawyers. This is something that is a societal function and it is the obligation of society to find the resources to provide the services. It's that simple. What we want to do as we typically do in the administration of justice is to do it cheaply — to cut corners and to end up giving people far less than they are entitled to. The voluntary legal aid business and the mandatory pro bono business is simply a way of allowing society to fail to face up to the fact that the administration of justice in the United States is indeed worth a miniscule fraction of what we spend on armaments.