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INTRODUCTION

The need for a comprehensive, coherent, and enforceable code of ethical conduct for lawyers is manifest. Efforts to achieve such a code, however, are in a state of uncertainty, if not disarray.

The first nationally applicable set of rules governing the professional conduct of lawyers was the American Bar Association's *Canons of Professional Ethics,* promulgated in 1908.[1] The *Canons,* however, were critically flawed. As acknowledged by the ABA itself in 1969, the *Canons* were largely devoted to petty details of form and manners, omitted coverage of important areas of concern, lacked coherence, failed to give ethical guidance, and did not adequately lend themselves to practical sanctions for violations.[2] That is, of course, a devastating indictment of the rules under which the organized bar governed the profession for more than half a century.

The *Canons* were succeeded by the ABA's *Code of Professional Responsibility* (Code). Vigorously promoted by the ABA as a model of substance and drafting, the Code was rapidly adopted, with only occasional modifications, in virtually every state. However, the Code soon came under critical attack,[3] which broadened as lawyers became familiar with the Code's serious inadequacies. Only ten years after its promulgation, the Code was denounced by an ABA spokesman, as "inconsistent, incoherent, and unconstitutional," and as "failing to give lawyers any guidance" on some of the most fundamental issues of lawyers' ethics.[4] That, again, is a sweeping condemnation of the established bar's efforts at regulation of the profession.

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1. *Preface,* ABA CODE OF PROFESSIONAL RESPONSIBILITY 1979 [hereinafter cited as ABA CODE].

2. *Id.*

3. *See, e.g.,* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

4. Robert J. Kutak, Chairman, ABA Commission On Evaluation of Professional Standards, quoted in Winer, *"ABA Group Overhauls Ethics Code,"* NAT. L. JOUR., AUG. 13, 1979 at 23.

Recognizing the serious inadequacies of the Code, the ABA in 1977 appointed a 13-member Commission on Evaluation of Professional Standards. The Commission is known, after its chairman, Robert J. Kutak, as the Kutak Commission. After almost three years of work, the Kutak Commission published in January of 1980 its proposed Model Rules of Professional Conduct.[5] The Model Rules are completely new in both form and substance, reflecting the Commission's judgment that the Code is so thoroughly flawed that it must be scrapped entirely.[6]

Unfortunately, in important areas of substance the Model Rules are inferior to the Code they were proposed to replace. As a result of heavy opposition within the ABA, therefore, the Kutak Commission was compelled to postpone presentation of the Model Rules to the ABA House of Delegates from August 1980, until August 1981.[7] Subsequently, presentation was delayed until sometime in 1982.[8]

In the meantime, the Roscoe Pound-American Trial Lawyer's Foundation formed a 30-member Commission to draft a comprehensive code of conduct that would correct the failings of the ABA codes. In June, 1980, that body issued a public discussion draft of the American Lawyer's Code of Conduct, and a revised Reporter's Draft was completed in August, 1981.

Simply in terms of form and style, the American Lawyer's Code is a departure from the three ABA efforts.[9] First, it is readable and understandable, not only by lawyers but by lay people. The rules are set forth in terms as direct and simple as the subject matter will permit. Exceptions or qualifying rules are identified by immediate cross-reference, both by rule number and by a brief summary statement of the substance of the exception or qualifica-

5. ABA MODEL RULES OF PROFESSIONAL CONDUCT, PROPOSED DISCUSSION DRAFT (Jan. 30, 1980) [hereinafter cited as MODEL RULES, 1980 DISCUSSION DRAFT]. Professor Freedman used the draft of the MODEL RULES in the preparation of this article. Ed.

6. *See* Kutak, *Coming: The New Model Rules of Professional Conduct,* 66 A.B.A.J. 47 (1980). *See also Preface* MODEL RULES, 1980 DISCUSSION DRAFT.

7. *"ABA Convention Notes," Legal Times of Washington,* August 11, 1980, at 2, col. 4.

8. Slonim, *Kutak Commission After More Time,* 66 A.B.A.J. 1350 (1980). *See also* Letter from Robert Kutak to Members of the ABA. Dec. 5, 1980 (copy on file, Villanova Law Library).

9. *Compare* ROSCOE POUND — AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT. (Public Discussion Draft, June 1980) [hereinafter cited as AMERICAN LAWYER'S CODE] *with* ABA CANONS OF PROFESSIONAL ETHICS (1908) and ABA CODE and MODEL RULES, 1980 DISCUSSION DRAFT.

tion.[10] Each set of closely related rules is then followed by Comments, which serve to justify and/or explain the rules. In that respect, the American Lawyer's Code is similar to the ABA's current Code and Model Rules. The Code provides justification and explanation in the Ethical Considerations (ECs) that precede each set of Disciplinary Rules (DRs). The Model Rules do the same in comments that follow each set of rules. However, the comments in the Model Rules, like the ECs of the Code, are sometimes inconsistent with the rules in important respects, thereby creating confusion rather than clarification.[11]

The American Lawyer's Code also departs significantly from the ABA Codes by including illustrative cases, to assist the reader in understanding the practical application of the rules, and to indicate which rule is to predominate in situations where two rules might appear to be in conflict.[12]

Going beyond these structural differences, there are serious problems of drafting and substance in the proposed Model Rules. An illustration of the former is the confusion in the Model Rules' standard of "knowing"—that is, the lawyer's mental state which triggers a particular ethical obligation. Illustrative of the substantive deficiencies of the Model Rules is the treatment of lawyer-client confidences. Each will be addressed in turn, below.

THE STANDARD OF "KNOWING"

A central problem of drafting rules of lawyers' ethics is establishing the standard or standards of knowledge that will give rise to particular professional obligations. To take a simple illustration,

10. *See, e.g.,* AMERICAN LAWYER'S CODE, 1 *The Clients' Trust and Confidences,* 1.2.

11. *See, e.g.,* MODEL RULES, 1980 DISCUSSION DRAFT, *supra* note 5, RULE 3.1(a)(1) (Candor Toward [the] Tribunal). RULE 3.1(a)(1) provides that a lawyer shall not file a pleading unless "according to the lawyer's belief" there is "good ground" to support it. *Id.*

However, the Comment to RULE 3.1 says, that a lawyer must refrain from making contentions the lawyer "knows lack a factual basis." *Comment,* RULE 3.1.

What then of the case in which the lawyer *believes* that the client is mistaken regarding the facts of a complaint (*e.g.,* the petitioner in a divorce proceeding), but where the lawyer does not *know* that a factual basis is lacking. The lawyer would commit a disciplinary violation by filing the petition under one formula, but not under the other.

12. In a speech at the ABA annual convention in 1976, I recommended that a new code be drafted to replace the Code. Suggesting the use of illustrative cases as a drafting technique, I referred to it as a "Restatement format." Oddly, Mr. Kutak has adopted that phrase and others from the same speech in describing the MODEL RULES, but the MODEL RULES fail to provide illustrative cases.

a lawyer may be forbidden to make a representation to a court *when the lawyer knows* the representation to be false. Thus, the standard of knowledge is an essential aspect of the substantive rule. Further, the enforcement of a rule may be more or less difficult depending upon the standard of knowledge, including whether that standard is expressed in objective or subjective terms. It is far easier, for example, to prove that a *reasonable person* in a lawyer's position *should have known* certain facts, than to prove that *the particular lawyer* in fact *believed beyond a reasonable doubt* that certain facts were true.

Indeed, the most common device for avoiding responsibility, or for proclaiming apparently strict obligations but ignoring their violations, is to set an impracticable standard of knowledge. The clearest illustration is the lawyer who asserts that he would never knowingly present perjury to the court, but then observes that in years of trial practice, he has never "known" that perjury was being offered. Occasionally, the sophistry is added that one can never "know" what was true or false until the jury returns its verdict. In the realm of both law and ethics, however, there is such a thing as acting on legal or moral notice.

Codifiers of professional rules have used a haphazard variety of standards of knowledge, frequently rendering the rules virtually meaningless for practical purposes. *The Code of Professional Responsibility* uses a subjective standard, such as *knowingly,* in at least half a dozen contexts,[13] and uses at least four variations on an objective standard,[14] including whether the lawyer *should know* certain facts, and whether certain facts were *obvious* at the time the lawyer acted. There is no apparent pattern in the use of the several standards in different contexts in the Code. In addition, it is usually unclear whether the lawyer is under a duty to seek knowledge.

Although criticism of the Code and other ethical rules has pointed up the problem of multiple and inconsistent standards of knowledge,[15] the new *Model Rules* use at least ten different such standards.[16] Those range from whether the lawyer, subjectively, is *convinced beyond a reasonable doubt,*[17] to whether the lawyer, ob-

13. *See, e.g.,* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102 (A)(2), (3), (4), (5), (7); EC 7-26.

14. *Id.* DR 2-109; 2-110(B)(1), (2); 4-101(C)(3), and n.16; 7-102(A)(1), (6); 7-102(B); 7-103(A).

15. *Freedman, supra,* note 3, ch. 5.

16. *See, e.g.,* ABA MODEL RULES, RULE 1.6(6); RULE a.4; RULE 3.1(a)(1)(2), (3), (4), (b), (c), (d), (e); RULE 3.1 *Comment, False or Fabricated Evidence*; RULE 4.3; RULE 7.2 *comment*; RULE 10.3.

17. ABA MODEL RULES at 59.

jectively, has *information indicating*[18] certain facts. Conceivably, those varying standards reflect subtle distinctions based upon painstaking analysis and drafting. Demonstrably, however, that is not the case.[19]

By contrast, the American Lawyer's Code generally uses the words *know, knowingly,* and *knowledge* whenever the lawyer's mental state is relevant.[20] Those words are explained to mean that a lawyer knows certain facts, or acts knowingly or with knowledge of facts, when a person with that lawyer's professional training and experience would be reasonably certain of those facts in view of all the circumstances of which the lawyer is aware.[21]

A duty to investigate or inquire is not implied by the use of these words, but may be explicitly required under particular rules. However, an absence of a duty to investigate does not mean that a lawyer may deliberately avoid uncomfortable conclusions reasonably inferred from certain behavior.[22]

There are other instances where under the American Lawyer's Code the lawyer may be permitted to act either on his or her own discretion or on the basis of incomplete knowledge. In such cases the governing standard is the lawyer's *reasonable belief.*[23]

THE ADVERSARY SYSTEM AND CONFIDENTIALITY

The most serious substantive problem in the proposed Model Rules relates to lawyer-client confidences.[24] Let me illustrate that problem with two cases that serve to contrast the American Lawyer's Code of Conduct with the Model Rules.

First, assume that you are the mother in a child custody case. Your lawyer has told you that he can represent you effectively only if you confide fully in him. You tell him, therefore, that you had

18. *Id.* at 131.

19. *See, e.g.,* MODEL RULES, 1980 DISCUSSION DRAFT RULE 3.1(a)(3).

20. AMERICAN LAWYER'S CODE, *Introductory Comment on "Knowing"* at 8.

21. *Id.*

22. For example, when one of the Watergate principals, responsible for Republican campaign funds, was asked by a young associate why large sums were being turned over to Gordon Liddy, he was quoted as responding: "I don't want to know, and you don't want to know." *Id.*

23. *Id.*

24. Other serious substantive deficiencies relate to trial publicity, solicitation, prosecutors' ethics, competence, client autonomy, the revolving door problem, and various other aspects of the lawyer-client relationship.

sexual relations with a man other than your husband, once, before your divorce became final. Your lawyer tells you that the judge would weigh that information against you, and for that reason, he insists upon telling your husband's lawyer, over your objections.

Second, consider a case from the other side. You are the husband in a hard-fought divorce case. Your wife's lawyer is trying to take every penny you own. He compels production of your tax returns, and you testify that they are complete and accurate. On the basis of information you have confided in your lawyer, however, your lawyer has concluded that you have undeclared income. You agree to straighten out the matter with the IRS after the divorce is over, but your lawyer is unwilling to wait. He tells your wife's lawyer and the judge.

Under the Model Rules the lawyer would be *permitted* to violate his client's confidences in the first case,[25] and would be *required* to do so in the second case.[26] Under the American Lawyer's Code the lawyer would have committed a disciplinary violation in each case by betraying the client's confidences.[27] The difference between the two codes derives, I believe, from the Kutak Commission's failure to appreciate the constitutional and policy considerations underlying the adversary system and lawyer-client confidentiality.[28]

The Supreme Court has noted that, "The Constitution recognizes an adversary system as the proper method of determining guilt. . . ." [29] The most obvious constitutional component of the adversary system is the sixth amendment right to counsel, which has been described as the "most fundamental right" because it affects the ability to assert any other right one might have.[30] At the same time, the Supreme Court has characterized the fifth amendment privilege against self-incrimination as "the essential mainstay of our adversary system." [31] Closely intertwined with both those

25. *See* MODEL RULES, 1980 DISCUSSION DRAFT, *supra* note 5, RULE 3.1(e).

26. *Id.*, RULE 3.1(b).

27. *See* AMERICAN LAWYER'S CODE, *supra* note 9, RULE 1.2.

28. *Compare Preamble* AMERICAN LAWYER'S CODE *with Chairman's Introduction.* ABA MODEL RULES OF PROFESSIONAL CONDUCT, PROPOSED FINAL DRAFT (May 30, 1981).

29. Singer v. United States, 380 U.S. 24, 36 (1965).

30. United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973), *quoting* Schaefer, *"Federalism and State Criminal Procedure,"* 70 HARV. L. REV. 1, 8 (1956).

31. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

constitutional rights is the lawyer-client privilege of confidentiality, which protects, and is protected by, each of them.

For example, Justice Rehnquist has observed that, "The sixth amendment, of course, protects the confidentiality of [lawyer-client] communications." [32] As expressed by Chief Justice Burger for the Supreme Court, the lawyer-client privilege rests on the need for the lawyer — not only as advocate, but as counsellor — to know all that relates to the client's reasons for seeking representation.[33] The privilege is therefore "rooted in the imperative need for confidence and trust" between lawyer and client.[34] Without that confidence and trust, and the full communication that flows from it, professional responsibilities could not be carried out.[35]

Those opinions relate lawyer-client confidentiality to the sixth amendment. However, in *Fisher v. United States*,[36] the Supreme Court considered "whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the fifth amendment." [37] In an opinion by Justice White, the Supreme Court held that the lawyer-client privilege is recognized "to encourage clients to make full disclosure to their attorneys." [38] Expressing a common-sense truth, the Court said further:

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.[39]

Accordingly, as summed up by Professor Charles Whitebread, the Supreme Court has "extended the Fifth Amendment protection to the attorney-client privilege for the express purpose of encouraging the uninhibited exchange of information between citizens and their

32. United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting).

33. Trammel v. United States, 445 U.S. 40, 51 (1980).

34. *Id.*

35. *Id.*

36. 425 U.S. 391 (1976).

37. *Id.* at 402.

38. *Id.* at 403.

39. *Id.*

attorneys." [40] Those basic precepts were reiterated and reaffirmed just this year in *Upjohn v. United States*.[41] There Justice Rehnquist held for a unanimous Supreme Court that the attorney-client privilege is "founded upon necessity," that knowledge of all facts is "essential to proper representation," and that the assistance of counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." [42]

Thus, the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination have been linked together as constitutional expressions of the adversary system, and each has been held to be a constitutional basis for the lawyer-client privilege of confidentiality.[43]

Other substantial policy and constitutional concerns underlie confidentiality. Citizens in our society are governed by extensive and complex laws and regulations. Therefore, they require legal assistance in understanding their rights and obligations and in achieving equal protection of the laws. Further, the lawyer who has been taken fully into the client's confidence is thereby in a position to counsel the client to act in socially desirable ways when,

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40. C. B. WHITEBREAD, CRIMINAL PROCEDURE 257 (1980).

41. 449 U.S. 383 (1981).

42. *Id.* at 389, *quoting* Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

43. The underlying basis to the disclosure requirement contained in the MODEL RULES is the idea that in some circumstances the need for truth in our legal system takes precedence over lawyer-client confidences. However, the cases cited by the MODEL RULES as support for their disclosure requirements, although concerned with the need for truth in the legal system, do not confirm this analysis. *See, e.g.*, MODEL RULES, PROPOSED FINAL DRAFT, RULE 3.3, *Legal Background*. United States v. Havens, 446 U.S. 620 (1980); Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). Those cases permit the government to impeach a defendant by using evidence that was unavailable in the government's case in chief because of the exclusionary rule. The court held that "truth is a fundamental goal of our legal system," and that "when defendants testify, they must testify truthfully or suffer the consequences." United States v. Havens, 446 U.S. at 628. The consequences discussed by the court include "the risk of confrontation with prior inconsistent utterances," which is the "traditional truthtesting [device] of the adversary process." Harris v. New York, 401 U.S. at 645-46. Significantly, however, despite the court's assumption that perjury was presented in those cases, the court did not suggest that counsel acted improperly in not disclosing it. Implicit in the court's silence is the idea that unlike impeachment by adverse counsel, the violation of confidences by one's own attorney is not a "traditional truthtesting [device] of the adversary system."

See also New Jersey v. Portash, 440 U.S. 450 (1979), holding that a defendant has a right to testify in his defense without being impeached through the use of his own materially inconsistent grand jury testimony, which had been elicited under a grant of immunity. Thus, truth is not the paramount value, even in the context of impeachment.

without the benefit of an attorney's advice, the client might act improperly.

Professor Charles Fried has explained, for example, that our social institutions are so complex that, without the assistance of an expert adviser, a lay person cannot exercise the personal autonomy to which he or she is morally and constitutionally entitled. "Without such an adviser, the law would impose constraints on the lay citizen (unequally at that) which it is not entitled to impose explicitly." [44] The lawyer's purpose, therefore, is "to preserve and foster the client's autonomy within the law." [45] Similarly, Professor Sylvia A. Law has written:

> A lawyer has a special skill and power to enable individuals to know the options available to them in dealing with a particular problem, and to assist individuals in wending their way through bureaucratic, legislative or judicial channels to seek vindication for individual claims and interests. Hence lawyers have a special ability to enhance human autonomy and self-control.[46]

Those observations apply equally, of course, to civil and criminal practice, and to the lawyer as counsellor as well as litigator. The same is true of Justice Jackson's statement, in a civil case, that, "law-abiding people can go nowhere else [but to the lawyer] to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." [47] In Justice Stevens' words, "the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen." [48]

Returning to the Court's recent and nearly unanimous opinion in *Upjohn,* we find explicit recognition that the privilege of confidentiality embraces both the advice given by the lawyer, and the information that must be given to the lawyer "to enable him to give sound and informed advice." [49] The Court quoted with approval

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44. Fried, *"The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,"* 85 YALE L.J. 1060, 1073 (1976).

45. *Id.*

46. S.A. LAW, *"Afterword*: THE PURPOSE OF PROFESSIONAL EDUCATION," LOOKING AT LAW SCHOOL 205, 212-13 (S. Gillers ed. 1977).

47. Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

48. Brewer v. Williams, 430 U.S. 387, 415 (Stevens, J., concurring).

49. Upjohn v. United States, 449 U.S. 383 (1981).

Ethical Consideration 4-1 of the ABA *Code of Professional Responsibility*:

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent and professional judgment to separate the relevant and the important from the irrelevant and unimportant. The observance of the ethical obligation of the lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.[50]

The Court added that a broad protection of confidentiality serves to foster sound advice and valuable efforts by counsel to ensure the client's compliance with the law.[51]

The Kutak Commission's proposals regarding confidentiality are fundamentally inconsistent with the constitutional components of the adversary system, and with the values and policies to which they give meaning. The Model Rules require that prior to representation, the lawyer "advise a client of the relevant legal and ethical limitations to which the lawyer is subject. . . ." [52] However, a lawyer cannot establish a relationship of confidence and trust while giving the client a *Miranda* warning.[53] As acknowledged by the Kutak Commission, "the warning may lead the client to withhold or falsify relevant facts, thereby making the lawyer's representation less effective." [54] Moreover, even if such a warning were not given, the public would not be long in becoming aware that

50. *Id.* at 391, *quoting* ABA CODE, ETHICAL CONSIDERATION 4-1.

51. 449 U.S. at 392. The point is no less valid in the case of perjured testimony. Judge James G. Exum, Jr., of the North Carolina Supreme Court, has written that "experienced defense lawyers have pointed out time and again that, permitted to continue to counsel with their criminal clients up to the very hour of the client's proposed testimony, they almost always were successful in persuading the client not to take the stand to testify falsely." Exum, *"The Perjurious Criminal Defendant: A Solution to His Lawyer's Dilemma."* VI *Social Responsibility: Journalism, Law Medicine* 16, 20 (L. W. Hodges ed. 1980).

52. MODEL RULES, 1980 DISCUSSION DRAFT, RULE 1.4(b).

53. *See id.* My objection, of course, is not *per se* to giving such a warning. If the lawyer is going to betray the client's confidences, the client is entitled to notice. My basic objection is to the betrayal of confidences, and the adverse consequences of such a practice among lawyers.

54. *Id.*, Comment to RULE 1.4(b).

the lawyer is a conduit of confidences to the court and to adverse parties.

The burden would then be upon the client to keep the lawyer "selectively ignorant," [55] by deciding what is incriminating and what exculpatory and by withholding what the client believed, correctly or incorrectly, to fall into by the former category. That kind of decision, however, is uniquely the lawyer's responsibility by virtue of special training and skills.[56]

Thus, the essential fallacy of the Kutak Commission's proposal can be briefly summarized. The Commission begins with the proposition that lawyers know a great deal of truth about their clients' matters. That is accurate enough. They then proceed to the notion that if the lawyers were to share that knowledge with their clients' adversaries and judges, there would be more truth in the legal system. That is wrong, or, at least, it is correct only in the short run. The result inevitably would be that clients would withhold the less pleasant and less comfortable truths from their lawyers. The lawyers might then be able to say that they were unaware of perjury or other wrongs committed by their clients, but the incidence of such misconduct would not decrease Indeed, it would be likely to increase, because one of the costs of destroying confidence and trust between lawyers and clients is that lawyers would lose the opportunity to give sound legal and moral advice based upon full knowledge of the matters entrusted to them. As a consequence, our clients, and society in general, would be the losers.

Furthermore, should the Model Rules be adopted, not only would their anticipated benefits fail to materialize but the Rules would produce an inevitable conflict between a client's constitutional rights and the duty of a lawyer to disclose. The right to confidentiality stems from a defendant's fifth and sixth amendment rights. The defendant has a privilege against self-incrimination and a right to effective assistance of counsel. Those rights would be meaningless if the lawyer were to incriminate the defendant by disclosing confidences, or if the lawyer's effectiveness as a counsellor and advocate for the defendant were to be impaired because the client would no longer entrust the lawyer with possible harmful information.

In effect, the Model Rules place the lawyer in the position of having to violate the client's constitutional rights to effective coun-

55. *See Freedman, supra* note 3 at 4-5, 35-36.

56. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947).

sel in order to conform to a "model" rule of conduct. This is both unnecessary and unjustifiable. Confidentiality is basic to effective lawyering. Thus, by undermining the confidentiality between the lawyer and the client, the Model Rules would destroy the most fundamental of constitutional rights.