

THE INFLUENCE OF THE AMERICAN LAWYERS' CODE OF CONDUCT ON ABA RULES AND STANDARDS

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I. INTRODUCTION

In 1980, the Kutak Commission published a Discussion Draft of the American Bar Association's Model Rules of Professional Conduct ("Model Rules").¹ Out of concern that the Model Rules would not adequately reflect the views of practicing lawyers, or adequately protect the interests of clients, the Roscoe Pound American Trial Lawyers Foundation asked me to serve as Reporter for what became The American Lawyers' Code of Conduct ("ALCC"). The ALCC was published in 1980 as a Public Discussion Draft.²

My work as Reporter was overseen by a commission on professional responsibility, which consisted of twenty-eight lawyers, judges, and non-lawyers.³ The Commission met to discuss drafts of provisions as they were being prepared, and made significant contributions.⁴

This essay was prompted by a comment in the Morgan and Rotunda casebook on Professional Responsibility that the ALCC "has not proved to be influential."⁵ In fact, the American Bar Association ("ABA") has adopted at least eight important provisions from the ALCC, usually using identical or similar language. The error in the Morgan and Rotunda casebook is understandable, however, because the ABA has taken thirteen to twenty-two years to adopt the ALCC provisions, and it has never acknowledged the ALCC as its source.⁶

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1. MODEL RULES OF PROF'L CONDUCT (Discussion Draft 1980).

2. AM. LAWYER'S CODE OF CONDUCT (Public Discussion Draft 1980).

3. *Id.* They included Gary Bellow, Aryeh Neier, Hugo A. Bedeau, Ira Glasser, and Robert H. Aronson. *Id.*

4. AM. LAWYER'S CODE OF CONDUCT pmb1. at 1-2.

5. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 442 & n.3 (9th ed. 2006).

6. AM. BAR ASS'N, *Preface* to A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-1998 (1999) (summarizing the development of

The ALCC provisions that have been adopted by the ABA permit disclosure of confidential client information in order to protect innocent human life;⁷ permit disclosure of confidential client information to prevent the corruption of a judicial proceeding;⁸ forbid a lawyer to begin sexual relations with a client during the lawyer-client relationship;⁹ discourage service by a lawyer as a director of a corporate client;¹⁰ forbid a prosecutor to show favoritism for, or to invidiously discriminate against, any person in investigating or prosecuting a criminal matter;¹¹ forbid a prosecutor to intentionally interfere with the independence of a grand jury, preempt a function of a grand jury, or abuse the processes of a grand jury;¹² forbid a prosecutor to condition a dismissal of charges, *a nolle prosequi*, or a similar action, on the accused's relinquishment of

the Model Rules with no reference to the ALCC).

7. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 1.4 (Alt. A) (Public Discussion Draft 1980) ("A lawyer may reveal a client's confidence when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life."), *with* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.").

8. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 1.5 (Alt. A) ("A lawyer may reveal a client's confidence when the lawyer knows that a judge or juror in a pending proceeding . . . has been bribed or subjected to extortion."), *with* MODEL RULES OF PROF'L CONDUCT R. 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

9. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 8.8 ("A lawyer shall not commence having sexual relations with a client during the lawyer-client relationship."), *with* MODEL RULES OF PROF'L CONDUCT R. 1.8(j) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

10. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 8.9 ("A lawyer shall not act as officer or director of a publicly held corporation that is a client of the lawyer . . ."), *with* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 35 ("A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. . . . If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise.").

11. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 9.2 ("In exercising discretion to investigate or to prosecute, a lawyer serving as a public prosecutor shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated."), *with* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

12. *Compare* AM. LAWYER'S CODE OF CONDUCT R. 9.4 ("A lawyer serving as a public prosecutor before a grand jury shall not interfere with the independence of the grand jury, preempt a function of the grand jury, or use the processes of the grand jury for purposes not approved by the grand jury."), *with* ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE ON PROSECUTION FUNCTION 3-3.6(f) (1993) ("A prosecutor in presenting a case to a grand jury should not intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, or abuse the processes of the grand jury.").

the right to seek civil redress;¹³ and forbid a prosecutor to make extrajudicial comments that have a substantial likelihood of heightening public condemnation of an accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that also serve a legitimate law enforcement purpose.¹⁴

In addition, Morgan and Rotunda attribute an outrageous illustrative case to the ALCC, quoting a "Revised Draft" that was published in 1982.¹⁵ This illustrative case is based on the "Buried Bodies" case, in which the lawyer viewed the hidden bodies of two young women who had been killed by his client, and did not reveal the information.¹⁶ Here is illustration 1(g) from the ALCC's Revised Draft: "[The young woman] is seriously injured and unable to help herself or to get help. The lawyer calls an ambulance for her, but takes care not to be personally identified. The lawyer *has committed a disciplinary violation . . .*"¹⁷

The Revised Draft in which this illustration appears includes Thomas Lumbard's name as a Reporter and, in fact, he prepared it.¹⁸ Virtually all Lumbard did, however, was make changes in some

13. Compare AM. LAWYER'S CODE OF CONDUCT R. 9.6 ("A lawyer serving as public prosecutor shall not condition a dismissal, nolle prosequi, or similar action on an accused's relinquishment of constitutional rights, or of rights against the government, a public official, or any other person, other than relinquishment of those rights inherent in pleading not guilty and proceeding to trial."), with MODEL RULES OF PROF'L CONDUCT R. 3.8(c) ("The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.").

14. Compare AM. LAWYER'S CODE OF CONDUCT R. 9.11 ("A lawyer in public service shall not engage in publicity regarding a criminal investigation or proceeding, or an administrative investigation or proceeding involving charges of wrongdoing, until after the announcement of a disposition of the case."), with MODEL RULES OF PROF'L CONDUCT R. 3.8(f) ("The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . .").

15. MORGAN & ROTUNDA, *supra* note 5, at 442 n.4.

16. *Id.* at 440 & n.2 (citing *Lawyer Who Found Victim of a Client Is Cleared Upstate*, N.Y. TIMES, Feb. 8, 1975, at 54); see *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975) (dismissing indictment on the grounds of a privileged communication and in the interests of justice), *aff'd*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976). See generally Lisa G. Lerman et al., *The Buried Bodies Case: Alive and Well After Thirty Years*, J. PROF. LAW. (2007), available at <http://www.abanet.org/cpr/pubs/symposium.html> (transcript from the thirty-third annual ABA National Conference on Professional Responsibility in which the Buried Bodies case is examined).

17. AM. LAWYER'S CODE OF CONDUCT ch. 1, illus. 1(g) (Revised Draft 1982) (emphasis added).

18. AM. LAWYER'S CODE OF CONDUCT (see copyright page listing Thomas Lumbard as a Reporter for the 1982 Revised Draft and Appendix).

introductory material and in the format.¹⁹ He made no significant changes in the substance or wording of the substantive provisions, with the exception of the quoted version of illustration 1(g) that Morgan and Rotunda use in *Professional Responsibility*.²⁰

Ironically, Lumbard's Illustrative Case 1(g) is consistent with what was then the confidentiality provision of the ABA's Model Code of Professional Conduct (1969),²¹ and it is also consistent with Model Rule 1.6, as that rule was adopted in 1983 and existed until 2002.²² As of 2002, however, the ABA adopted what is now Model Rule 1.6(b)(1), permitting disclosure "to prevent reasonably certain death or substantial bodily harm."²³ That provision derives from the 1980 ALCC Public Discussion Draft, Rule 1.4 (Alternative A).²⁴

In the Commission discussions of the 1980 version, I was able to persuade a majority to adopt what was Alternative A in Section I, which deals with confidentiality. Rule 1.4 of Alternative A reads: "A lawyer may reveal a client's confidence when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life."²⁵

The only illustration of that rule in the original, 1980, version of the ALCC is also numbered 1(g). It reads: "[T]he woman is not dead. However, she is seriously injured and unable to help herself or to get

19. Compare AM. LAWYER'S CODE OF CONDUCT ch. 1, illus. 1(g) (Public Discussion Draft 1980), with AM. LAWYER'S CODE OF CONDUCT ch. 1, illus. 1(g) (Revised Draft 1982).

20. Compare AM. LAWYER'S CODE OF CONDUCT (Public Discussion Draft 1980), with AM. LAWYER'S CODE OF CONDUCT (Revised Draft 1982), and MORGAN & ROTUNDA, *supra* note 5, at 442 & n.4.

21. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(2) (Final Draft 1969) ("A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.").

22. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.").

23. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

24. AM. LAWYER'S CODE OF CONDUCT R. 1.4 (Alt. A) (Public Discussion Draft 1980).

25. *Id.* The word "imminent" was included to attract some otherwise negative votes; I preferred to omit it. This provision is consistent with an effort, which I had previously begun, to introduce a human-life exception to confidentiality. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 152 & nn.126-27 (3d ed. 2004). The reference to "substantial bodily harm" comes from the version that I persuaded the American Law Institute to adopt in 1996; it became section 66(1) of the Restatement of the Law Governing Lawyers. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 66(1) ("A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person."); Monroe Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1637, 1639 (1996) (noting my attempt to revise section 117A of the First Restatement of the Law Governing Lawyers).

help. The lawyer calls an ambulance for her, but takes care not to be personally identified. The lawyer has *not* committed a disciplinary violation”²⁶

In Lumbard’s 1982 version, this was changed to Illustrative Case 1(g) that is quoted in *Professional Responsibility* and that Morgan and Rotunda properly mock.²⁷ That change (and relegating the original Rule 1.4 to a new Rule 1.6, which is set in exclusionary brackets) is virtually the only substantive change that Lumbard made in the version that bears his name as a Reporter.²⁸

The parallel columns that follow show the extent to which the 1980 Public Discussion Draft of the ALCC influenced the language as well as the substance of the ABA provisions.²⁹

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[1980] R. 1.4. (Alt. A): “A lawyer may reveal a client’s confidence when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life.”

ABA MODEL RULES OF
PROFESSIONAL RESPONSIBILITY
AND STANDARDS OF CONDUCT

[Adopted 2002] MR 1.6(b): “A lawyer may reveal [confidential] information . . . to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.”

26. AM. LAWYER’S CODE OF CONDUCT ch. 1, illus. 1(g) (Public Discussion Draft 1980) (emphasis added).

27. MORGAN & ROTUNDA, *supra* note 5, at 442; *see supra* note 17 and accompanying text.

28. *See supra* notes 19-20 and accompanying text.

29. Compare AM. LAWYER’S CODE OF CONDUCT (Public Discussion Draft 1980), with MODEL RULES OF PROF’L CONDUCT (2008), and ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>.

[1980] R. 1.5. (Alt. A): “A lawyer may reveal a client’s confidence when the lawyer knows that a judge or juror in a pending proceeding in which the lawyer is involved has been bribed or subjected to extortion. In such a case, the lawyer shall use all reasonable means to protect the client, consistent with preventing the case from going forward with a corrupted judge or juror.”

[1980] R. 8.8: “A lawyer shall not commence having sexual relations with a client during the lawyer-client relationship.”

[1980] R. 8.9: “A lawyer shall not act as officer or director of a publicly held corporation that is a client of the lawyer, of the lawyer’s partner or associate, or of any firm or attorney with whom the lawyer has an of counsel relationship.”

[1980] R. 9.2: “In exercising discretion to investigate or prosecute, a . . . prosecutor shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated.”

[1980] R. 9.4: “A . . . prosecutor before a grand jury shall not interfere with the independence of the grand jury, preempt a

[Adopted 2002] MR 3.3(b): “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

[Adopted 2002] MR 1.8(j): “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”

[Adopted 2002] MR 1.7, cmt. [35]: “If there is material risk that the dual role [of lawyer and corporate director] will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director”

[1993] Std. 3-3.1(b): “A prosecutor should not invidiously discriminate against or in favor of any person . . . in exercising discretion to investigate or to prosecute.”

[1993] Std. 3-3.6(f): “A prosecutor in presenting a case to a grand jury should not intentionally interfere with the

function of the grand jury, or use the processes of the grand jury for purposes not approved by the grand jury.”

[1980] R. 9.6: “A . . . prosecutor shall not condition a dismissal, nolle prosequi, or similar action on the accused’s relinquishment of constitutional rights, or of rights against the government, a public official, or any other person, other than relinquishment of those rights inherent in pleading guilty and proceeding to trial.”

[1980] R. 9.11: “A [prosecutor] shall not engage in publicity regarding a criminal investigation or proceeding . . . until after the announcement of a disposition of the case. However, the lawyer may publicize information that is (a) necessary to protect the public from an accused who is at large and reasonably believed to be dangerous; (b) necessary to help in apprehending a suspect; or (c) necessary to rebut publicized allegations of improper conduct on the part of the lawyer or the lawyer’s staff.”

Cmt.: “Despite their inherent harmfulness, indictments must be publicly available . . . There is no adequate justification, however, for a public official to

independence of the grand jury, preempt a function of the grand jury, or abuse the processes of the grand jury.”

[1993] Std. 3-3.9(g): “The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused’s relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.”

[Adopted 2002] MR 3.8: “The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused”

[1993] Std 3-1.4, cmt.: “An accused may never be more in need of the First Amendment right of freedom of speech . . . than when officially

promote publicity . . . having the effect of impairing or destroying the reputation of an accused person without the due process of a trial or hearing. An accused, on the other hand, may never be more in need of the First Amendment rights to freedom of speech than when he or she stands accused as a wrongdoer before family, friends, neighbors, and business associates.”

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