Charles H. Miller Lecture – Lawyers and Their Public Responsibilities

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I am delighted to have been asked to give the first Charles H. Miller Lecture on Professional Responsibility. This is a special privilege because of the excellence of the University of Tennessee and its School of Law, and particularly because of the man whom we honor today—Charles H. Miller.

Long before clinical legal education became fashionable, Professor Miller had a vision of what could be done to help students learn to grapple with complex legal concerns in an environment that includes real people and their real problems as well as rigorous academic standards. He saw the dangers and the weaknesses of abstracting legal issues from the real-life situations in which they arise, and he expanded the bounds of legal training in response. All of us who care about legal education and the legal profession are deeply in his debt, and I am grateful for this opportunity to join in the first annual celebration of his unique contributions.

My focus, of course, is the professional responsibilities of lawyers. I should state at the outset that I am a member of an
American Bar Association Commission established to develop a new code of professional responsibility, and none of my remarks today should be interpreted as indicating views other than my own. Further, if I have learned anything over the past two decades as a lawyer, it is that my views are constantly changing. You should not, therefore, take my thoughts as more than tentative reactions to difficult problems.

Some have suggested that the current Code of Professional Responsibility should be declared void for vagueness. They complain that it provides no guidance on scores of the hardest questions faced by lawyers in their everyday practice.

Let me tell a true story, told to me by Professor Barbara Babcock, as one example. Imagine that you are a lawyer in a public defender's office in a large urban area. You have been assigned to defend a man accused of robbing a small variety store. The sole witness to the robbery, the storeowner, identified your client in a police line-up. A few days before the trial is to begin you go to check the recollections of the storeowner; you find that the store has closed and that the owner has left no forwarding address. After pondering the situation for a time, you go to the local Post Office and find a new address for the owner. You show the owner a picture of your client, and he reaffirms that your client robbed his store.

The night before the trial is to begin, however, an Assistant District Attorney calls you to say that in all likelihood the case against your client will be dismissed because the District Attorney's office has been unable to locate the storeowner—the only witness to the robbery. Question: Should you tell the prosecutor the whereabouts of the witness? Over the course of a long night, you and your colleagues in the public defender's office debate the issue and finally reach a judgment.

I use the tale simply to illustrate how little guidance is given by the current Code of Professional Responsibility on a number of tough problems. Most of them are in two broad catego-

2. With respect to contact with witnesses, the Code of Professional Responsibility directs that "[a] lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce." ABA Code of Professional Responsibility [hereinafter cited as Code], Disciplinary Rule [hereinafter cited as DR] 7-109(A) (1975), and that "[a] lawyer shall not advise or cause a person to secrete himself . . . for the purpose of making himself unavailable as a witness . . . ." id. DR 7-109(B). Ethical Consideration [hereinafter cited as EC] 7-23 suggests disclosure to the judge of adverse law
ries—issues concerning disclosure of matters adverse to a client on one hand and conflicts of interest on the other.

Remember, however, that the Code of Professional Responsibility is not designed merely to give guidance. It establishes enforceable rules, and violations of those rules lead to sanc-

if the opposing counsel has not discovered it, see ABA Opinion No. 280 (1949), but the rule is generally viewed as not extending to disclosure of adverse facts. See Brosnahan & Brosnahan, The Attorney’s Ethical Conduct During Adversary Proceedings, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 165 (1978). Further, “a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client.” Code, supra, DR 4-101(B).

All requirements and ethical considerations are qualified by the general rule that defines misconduct. “A lawyer shall not . . . [c]ircumvent a Disciplinary Rule through actions of another [or] engage in conduct that is prejudicial to the administration of justice.” Id. DR 1-102(A).

3. For rules concerning disclosure, see Code, supra note 2, DR 4-101 (preservation of confidences and secrets of a client); id. DR 7-102(A)(3) (revelation when required by law); id. DR 7-102(B)(1) (revelation of client’s fraud upon the court except when privileged); id. DR 7-106(B)(2) (revelation of client’s or employer’s identity unless privileged or irrelevant); id. EC 4-1 (obligation to hold confidences and secrets inviolate); id. EC 4-2 (permissible disclosures); id. EC 4-3 (permissible disclosures); id. EC 4-4 (obligation to advise client of attorney-client evidentiary privilege); id. EC 4-5 (obligation not to use confidential information and to prevent misuse by others); id. EC 4-6 (continuation of obligation not to reveal after termination of relationship).

4. For rules concerning conflicts of interest, see id. DR 5-101 “Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment”; id. DR 5-102 “Withdrawal as Counsel When the Lawyer Becomes a Witness”; id. DR 5-103 “Avoiding Acquisition of Interest in Litigation”; id. DR 5-104 “Limiting Business Relations with a Client”; id. DR 5-105 “Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer”; id. DR 5-106 “Settling Similar Claims of Clients”; id. DR 5-107 “Avoiding Influence by Others than the Client”; id. DR 8-101 “Action as a Public Official”; id. DR 9-101 “Avoiding Even the Appearance of Impropriety”; id. EC 5-14 to 5-20 “Interests of Multiple Clients.”

5. The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.
tions—censure, suspension, and sometimes even disbarment. Perhaps it is not surprising, therefore, that some matters are left to the individual lawyer's conscience.

What ethical issues are so basic to the lawyer's role in our society, however, that wrong judgments on those issues—or wrong actions involving them—should invoke sanctions? In other words, what ethical imperatives are necessarily implied by the very status of being a lawyer?

Lawyers, of course, have a monopoly on the delivery of legal services. It is unlawful by statute in many states to provide legal counsel unless you are a lawyer, and judicial rules in other states preclude so-called unauthorized practice of law. Why is this? If the lawyer is just a hired gun, the tough guy in the adversary process, why not allow lay representation? Is it that laymen will not be familiar with the legal process—that they will not play by the rules? If so, it would seem reasonable to narrow unauthorized practice rules and allow lay advocacy at least until it runs afoul of the legal process.

Is it a matter of competency? Of adequate representation of a party? Why then is an individual allowed to represent herself or himself? Further, once a lawyer is admitted to the bar, there

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_CODE, supra note 2, Preliminary Statement (footnotes omitted).

The Code derives its legal force, however, from the effect given to it by disciplinary bodies in the various states... The new Code... has been formally adopted in all states and the District of Columbia, albeit with a variety of omissions and alterations, sometimes substantial, that must be examined with respect to any particular jurisdiction.

A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976).

6. See, e.g., TANN. CODE ANN. § 29-303 (Cum. Supp. 1978): "No person shall engage in the 'practice of law'... unless he shall have been duly licensed therefore, and while his license therefore is in full force and effect..."

7. E.g., U.S.C. § 1654 (1977) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct cases therein."); TANN. CODE ANN. § 29-109 (1955) ("Any person may conduct and manage his own case in any court of this state."). See Faretta v. California, 422 U.S. 806 (1975), in which the Court held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so," id. at 807 (emphasis in original); Carter v. Illinois, 329 U.S. 173, 174-75 (1946), in which the Court held that self-representation is implicit in the sixth amendment right to defense and to assistance of counsel; and, Adams v. United States ex rel. McCann, 317 U.S. 269 (1942), in which the Court said that the sixth amendment right to counsel
is generally no control or review of competency short of the grossest kind of malpractice. Apart from Martindale-Hubbell there is usually only word-of-mouth among lawyers, and neither could be called a discriminating guide.

Obviously, concerns about the adverse impact of unauthorized practice and about competency are part of the basis for the lawyers' monopoly of the provision of legal services. But the heart of the matter, in my view, is this: lawyers have that monopoly because they are an integral part of the justice system. As officers of the court, they are a key component of the justice system as are courts, administrative agencies, and legislatures. It follows, I believe, that with the lawyers' monopoly come substantial obligations to that system.

Our justice system is one that the residents of this country have no choice about. They must use it. They must live under the law. Society as a whole, through government, requires that commitment of everyone. In turn, it seems to me, the opportunity to use the legal system is an inherent right of citizenship. If political liberty means anything at all, it must mean that. For the vast majority of people, this right, this aspect of liberty, can be realized only with access to a lawyer. Lawyers make the justice system work; they are a vital component of the system.

This rationale for the lawyers' monopoly seems frequently overlooked. Most of our legal tradition and rhetoric emphasizes the lawyer's role in the adversary system rather than in the justice system. The current Code of Professional Responsibility retains that focus. The Code makes defense of the paying client against an adversary in a private dispute the starting place for considering almost any ethical issue. It assumes that since the lawyer would not be involved in a matter without the client, the client is key. The role of a court is to resolve the dispute before it, and that resolution can best be achieved if each lawyer represents his or her client with utmost zeal.

includes a "correlative right to dispense with a lawyer's help. . . . [T]he Constitution does not force a lawyer upon a defendant," id. at 279.

8. "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits." CODE, supra note 2, EC 7-1.

9. Canon 7 of the Code, supra note 2, requires that "a lawyer should represent a client zealously within the bounds of the law."
In my view, this is a mistaken overemphasis on the adversary aspects of the justice system. Remember, a courtroom is a substitute for jousting, not itself a battlefield. At the very least, the tension between the lawyer’s duty to the client and his duty to the justice system needs to be more clearly acknowledged in any new code. By focusing almost exclusively on the relationship between a lawyer and a paying client in a courtroom context, the current Code fails to deal with many of the most difficult problems.

Two interrelated developments in the justice system intensify this failing. The first is that the two-party dispute before a court involving a private transaction is no longer the prototype of the lawyer’s task—if, indeed, it ever was. Most evident, much of what most lawyers do is outside any tribunal. They give advice and counsel on how best to design arrangements furthering their clients’ interests. They are, in essence, private lawmakers. Further, the individual lawyer often assumes the role of intermediary between individuals or groups and acts quite apart from any formal institutional setting. She or he may help several parties to a prospective arrangement work out the details of that arrangement so that it serves all their interests, while recognizing that those interests are far from identical. A code built solely around an adversary system is inadequate to cover the range of those responsibilities.

Even when a tribunal is the forum for a lawyer’s efforts, it is less often a court than one of a variety of other lawmaking institutions. The adversary process, in the classic sense, is rarely involved.

This is most obvious when the appearance is before a legislature. Legislative bodies seek to provide democratic resolution of complex political issues. Is it adequate to say that the lawyer’s ethical responsibilities in such situations are no different from those in the courtroom? Legislative hearings are designed to help shape public policy. Do private lawyers at those hearings have any special obligations, particularly when only a limited range of interests is represented?

10. “The adversary system has deep roots in the Anglo-American legal tradition. Its antecedent is often said to be the Norman trial by battle, wherein issues in doubt were resolved by the outcome of a duel.” G. Hazard, Ethics in the Practice of Law 120 (1978).
When a lawyer is involved in an administrative proceeding, the situation may be equally far removed from the prototype two-party private dispute before a court. The role of many administrative agencies in their procedures is to protect a variety of public interests. A number of those agencies have concluded that private lawyers must help to provide this protection, even when their clients' interests are adversely affected. The recent efforts by the Securities and Exchange Commission to require private lawyers to reveal misdealings by their clients are a prime example. Lawyers must, says the SEC, blow the whistle on their clients.

Even in judicial proceedings, it is no longer possible to view a two-party dispute involving a private transaction as the norm. The federal courts in particular are increasingly at centerstage in the resolution of basic social policies. Whether one views the trend as wise or otherwise, it is a reality, as Professor Abram Chayes of Harvard has explored at some length.

What do these developments mean for the lawyer's ethical responsibilities? I am by no means sure of all the implications, but I am clear that it is no longer satisfactory, if it ever was, to view the lawyer's role solely in terms of the adversary process and the zealous representation of a client's interests.

The problem is also intensified because of shifts in the roles of lawyers in relation to their clients. In the traditional litigation context, the lawyer may have to make a variety of tactical judgments concerning various courses of action. But the basic decisions are made by the client, and the lawyer's role is to advance the interests of that client. The lawyer is seen as one with expertise in making the adversary system work.

Under this approach, the client is assumed to be fully able to define his or her best interests and to communicate those interests to the lawyer. The role of the Code of Professional Responsi-
bility is primarily to ensure that the lawyer does not use personal expertise to further personal ends or to disadvantage a client. At the same time, of course, absent malpractice the lawyer is relieved from any responsibility for the substantive outcome of a matter.

This traditional relationship between client and attorney does not fit many lawyering situations today. The point is most obvious in terms of public-interest law firms that are organized to further particular public causes—some by environmental groups, some by business organizations, some around other causes. These firms generally have a wide range of potential cases within their fields of interest, and the choice of which matters to pursue is usually made in terms of fundamental long-term goals.

The key issue is often which potential plaintiff's case will best further those goals. Once that decision is made, the firm can easily attract willing clients. As a result, the ordinary client-lawyer relationship is inevitably altered.

This approach is obviously not without problems. As every law student knows, courts bound by article III of the United States Constitution are prohibited from giving advisory opinions. The law requires that there be a real case or controversy, and the rule that every litigant must have "standing" is one of the ways to ensure that this requirement is met. The Supreme Court has recognized that standing is a constitutional requirement. It is the responsibility of the client to choose a case that will provide the necessary standing. In this way, the client-lawyer relationship is fundamentally altered.

14. See, e.g., Code, supra note 2, EC 5-1, which provides: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons, should be permitted to dilute his loyalty to his client.

15. ABA INFORMAL OPINION No. 1273 (1973) indicates that "[n]eglect cannot be found if the acts or omissions complained of were ... the result of an error of judgment made in good faith." See Code, supra note 2, DR 6-101(A).


17. Muskrat v. United States, 219 U.S. 346 (1911) (Congress cannot grant jurisdiction to the Supreme Court to render an advisory opinion, since U.S. Const. art. III, § 2, cl. 1, requires that there be an actual case or controversy before the Court before it can render an opinion).

Court has stated that even when organizations such as the Sierra Club are involved, the normal rules of standing apply and such institutions must establish their own unique relationship to the situation at issue; otherwise, the case will be dismissed for lack of standing.19

The Supreme Court has also, without indicating any possible inconsistency, recognized the special nature of public-interest lawyers and their footing, if not their standing, in the courts. In Re Primus,20 for example, made clear that the first amendment prohibits application of solicitation rules against an organization that seeks a client not to obtain private gain but to advance a political purpose. In other words, such an organization may seek out a client as a means to force a court to decide an issue that otherwise would not come before it.

One may ask why it should be necessary to have a client at all, if it is the cause for which the organization is established that is to be furthered. But my point here is that when an ideology of an institutional law firm, rather than the interests of an individual client, is dominant, the responsibilities of lawyers working for the institution are obviously different, and some effort to think through the ethical implications of the differences is necessary in preparing a new code.

In many matters brought by public-interest firms, of course, individual or group plaintiffs play significant roles in the development of litigation. The firms' boards of directors and sponsoring organizations may also have an important voice in decisions. But the litigation is often conceived and carried out with relatively little involvement by the clients and, more basically, without the constraints of particular clients' interests at stake.

A monetary or other settlement offer late in the litigation process, for example, may be extremely attractive to an individual party but not to the public-interest firm that represents the party. School desegregation cases are one example. May the firm ethically require the party to agree in advance not to accept such a settlement, as a condition to taking the case?21

Some have argued that these problems are a reason for op-

posing public-interest law firms. My own view is quite the reverse. Once it is recognized that courts, like legislatures and administrative agencies, are inevitably instruments of social change, it should not make "a fundamental difference that the motive force of the process is a lawyer rather than a layman," as Professor Chayes has stressed. There is a more basic point, as Professor Chayes has also suggested. The question "who is the client?" is difficult to answer in a wide range of situations, seemingly far removed from public-interest litigation. The problem is not simply a quirk in the justice system that results from foundations funding public-interest law firms around the country. The same basic problems arise over and over again in the general counsel's office of every government agency, and in private companies as well. Professor Geoffrey Hazard chronicles many of them in his new book on legal ethics in representing large commercial organizations.

Assume, for example, you are counsel for a major corporation and discover evidence of possible illegal conduct by the president of the company. What do you do? And when you do it, are you acting as counsel for the company president, the other officers, the board of directors, the present stockholders, the future stockholders, or some or all of those groups? In fact, their interests often conflict sharply, and no easy resolution of those conflicts will be possible. One SEC official has suggested that corporation counsel should be hired by a committee representing the various interests involved in a corporation—stockholders, directors, officers, and others. Under this approach, counsel for a corporation could take positions at odds with that of any one of those interests. This procedural approach has much to recommend it. But in the interim, the question "who's the client?" remains.

The problems of a code premised on the lawyer as part of an adversary system instead of the lawyer as part of a justice system are multiplied when we look at the extraordinary range of respon-


sibilities that lawyers assume. Lawyers are everywhere—to the consternation of many outside the bar. Should a new code apply to their activities whatever the context, or only when they are acting in some dominantly lawyering role?

What of the lawyer-administrator, for example? Most people would agree that the felons in the Nixon Administration were properly precluded from further law practice, but how far should the principle behind that judgment be carried? Once a lawyer, always a lawyer? Or should the reach of the code be limited to the work of lawyers acting as lawyers, except only if they actually violate the law by a crime involving moral turpitude? Should an administrator who is also a lawyer, for example, be subject to bar discipline for failing to carry out his or her administrative responsibilities when those responsibilities do not require membership in the legal profession? These are among the hard questions we are wrestling with in the ABA Commission charged with producing a new code.

Only when we shift to the individual client does the traditional lawyer-client relationship in an adversary context seem to have some semblance of utility. And, in terms of the total number of lawyers and their legal work, the share here involved is a relatively small one. Even in this situation, the picture is clouded. The clouds are obvious when the competency of the client is limited; a child or someone in a mental institution is an example. Some special problems also exist for legal services lawyers who are paid with public funds. A private client decides whether the potential benefit of a favorable outcome is great enough to warrant the cost of carrying a case forward at any particular point. But for legal services clients, like the clients of the public-interest lawyer, generally no costs are involved. For the public-interest lawyer, the issue usually is whether the benefits from a particular case are outweighed by its costs, in terms of the cause that is being pursued by the firm.25 Although as a formality the consent of the client is required, as a practical matter the lawyer can end a matter if he or she decides that the benefits in a particular case are offset by the costs.

A legal services lawyer faces a more difficult problem. If the

will of the client is to prevail, as it does with the private lawyer, the client will almost always want to proceed since nothing is at risk. Is the legal services lawyer entitled to weigh the possible benefits to the clients against the costs that may result to other potential legal services clients who cannot be served?

This is only one of scores of matters for which the current Code of Professional Responsibility provides no answers. It fails to provide answers, I suggest, because the situation at issue was simply not considered by the drafters of the Code who made the lawyer in the adversary setting the focus of ethical attention.

Even when a single, fee-paying client is involved, of course, serious ethical issues may arise, and many are not covered by the current Code. Assume, for example, that your client is involved in a complex business proceeding in which the tax consequences of the transaction are paramount. You advise the client that in your judgment, the course of action that she is planning would violate the tax laws. Your client then asks about the likelihood of getting caught. May you ethically respond, giving your own judgment based on your own experience? Or are you, as an officer of the court, charged with promoting solely law enforcement and not law evasion? What if your client is a trucking company that seeks your help concerning the purchase of CB’s for all the company trucks, with the apparent purpose of ensuring that its drivers violate the speeding laws only when there is little likelihood that they will be caught? What are your ethical responsibilities?

These and scores of other tough issues are unclear under the present Code. I am by no means certain that the new ABA Commission will do better. I am, however, clear about one point, although it may not be covered in any code. Countless lawyers, I believe, engage in conduct on behalf of their clients that they would never countenance on behalf of themselves.26 “I am only doing my client’s bidding,” they say. “That is what lawyering in the adversary system is all about.” In my view, that approach is totally wrong—a dangerous consequence of the focus on the lawyer’s role in the adversary system rather than in the justice system. It is dangerous to the legal profession, and, most of all, dangerous to the public.

Until now I have been considering the professional responsibilities of lawyers when they have agreed to provide representation on the basis of an individually negotiated fee for a private client or a salary from a public source. But there is an equally important cluster of professional responsibilities; it also arises from the role of the lawyer as part of the justice system. These responsibilities concern the provision of representation to the otherwise unrepresented.

For some time, I have been urging upon the organized (and disorganized) bar the idea that lawyers have an obligation to provide some of their time and talents *pro bono publico*. This claim can be based on Canon Two of the current Code of Professional Responsibility, which provides that a lawyer should “assist the legal profession in fulfilling its duty to make legal counsel available.” But I admit the Code now sets no standards for how a lawyer should meet that responsibility or what happens if she or he fails to do so.  

My convictions about this responsibility of lawyers are rooted in my view that every lawyer is part of the justice system with an obligation to help make that system work. We have a monopoly of legal services, and with the monopoly comes an obligation to serve the public. In my view, the operational consequences of that obligation are a requirement to provide some representation to those who would be otherwise unrepresented.

Equally important, society as a whole has an interest in the sound workings of the legal system. Society as a whole has an interest in ensuring that the law is followed by all persons and entities, regardless of their economic resources. If this does not happen—if some people, including those in government, are effectively outside the law because others do not have the economic resources to bring them to account—then the whole system is skewed.

These are the reasons why the legal profession has an obligation to ensure that legal services for the poor are available. These are the reasons why legal services are different from other necessary services provided by government—services for which one might argue that the poor should be able to take the equivalent value in cash.

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27. Although the Code suggests that lawyers should support efforts to provide legal services to persons unable to pay, Code, supra note 2, EC 2-16, no Disciplinary Rule makes that obligation mandatory.
Much more federal funding is needed for legal assistance to the poor. It is my hope and expectation that over future years that funding will increase substantially. Legal assistance will never be available to all who need it, however, unless private lawyers provide some of their time and talents pro bono to that end. Many do so now, but a minimum amount of pro bono service is needed from all private lawyers.

In my own view, unless private lawyers take the lead—and it is a moral lead that is required—the government will do it for us. Lawyers are part of the justice system, not merely the adversary system. Their roles in the justice system require, above all, a sensitivity to the needs of our citizenry, who must live under that system.

This, I believe, was Charles H. Miller's message and his aim when he led in establishing clinical legal education here. He deserves our deep gratitude for the lasting monument that he has created for generations of law students at this school, and for the public they serve so well.