

South Carolina Law Review

Volume 45
Issue 4 *SYMPOSIUM ON LEGAL MALPRACTICE*

Article 5

Summer 1994

The Fundamentals of Professionalism

L. Ray Patterson
University of Georgia

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THE FUNDAMENTALS OF PROFESSIONALISM

L. RAY PATTERSON*

I. INTRODUCTION	707
II. THE MEANING OF PROFESSIONALISM	709
III. THE NEED FOR AN ANALYTICAL FRAMEWORK	710
IV. THE ANALYTICAL FRAMEWORK	713
<i>A. The Meaning of Lawyer Responsibility</i>	713
<i>B. Uniform Criteria: The Right Question</i>	714
<i>C. The Sources and Nature of the Lawyer's Duties</i>	715
V. THE PRINCIPLES OF PROFESSIONALISM	718
<i>A. Power is the Source of Responsibility</i>	719
<i>B. Rights Must be Exercised in Good Faith</i>	720
<i>C. Duties Must be Fulfilled in Good Faith</i>	722
VI. CONCLUSION	724

I. INTRODUCTION

The purpose of this essay is to analyze the law of professionalism and the duties of the lawyer as a professional. Most people view professionalism as a matter of adherence to rules. My thesis is that professionalism is a matter of adherence to principles. Therefore, because traditional authorities — cases, statutes, and rules of ethics — are authority only for rules, I do not rely on them to support what I say. My goal is to analyze ideas, not to compile precedents.

A professional is one licensed by the state to perform services for others by reason of compliance with educational and character standards. The standards are rigid because the professional has the power to control the affairs of another, either directly or indirectly. While a physician usually acts for the patient directly without dealing with a third party (it is the patient for whom the doctor prescribes the medicine), a lawyer may act for the client either directly (as when drafting a will) or indirectly as a surrogate of the client (as when trying a case).

This surrogacy role as an agent for the client is an important aspect of professionalism for the lawyer. A dictionary definition of surrogate is one appointed to act in place of another, and no where is the surrogate's role more

* Pope Brock Professor of Law, University of Georgia; A.B., 1949, LL.B., 1957, Mercer University; M.A., 1950, Northwestern University; S.J.D., 1966, Harvard.

dominant than in the legal profession. Indeed, the power of the lawyer over the affairs of the client is such that a special body of law exists to govern lawyers. This is the law of professionalism, which is viewed as being separate from the law that governs clients. For convenience, I refer to the two bodies of law as “lawyer’s law” and “client’s law.”

The purpose of lawyer’s law is to govern the lawyer in administering client’s law, and its emphasis is on the lawyer’s status as lawyer. This emphasis implies that the two laws run on separate, albeit parallel, tracks — a way of saying that lawyer’s law is distinct from, and independent of, client’s law. My argument is that this treatment of lawyer’s law is wrong. The treatment of lawyer’s law as a separate type of law applicable only to lawyers is, in fact, the source of the major defect in lawyer’s law: the lack of a coherent structure, as shown in the fact that lawyer’s law itself consists of three different bodies of law — substantive, procedural, and ethical. The substantive law consists of malpractice rules, which are found largely in legal opinions; the procedural law is found in the procedural rules; and the ethics law is found in codes of professional conduct and responsibility promulgated by the American Bar Association and adopted by the various states.

While the three bodies of law are directed to the same purpose — the proper conduct of lawyers — they all have different functions. Malpractice law imposes liability on lawyers for doing harm to their clients; procedural law imposes fairness standards for the orderly conduct of litigation; and ethics law imposes standards for disciplining lawyers for improper conduct (primarily in relation to their clients) as officers of the legal system.

The different functions of these bodies of law give rise to different rules that are treated as unrelated despite their common purpose. There may be some overlap, but generally, a lawyer who is guilty of mere negligence in the representation of a client is subject to a malpractice action, but not to a disciplinary proceeding or procedural sanction. A lawyer who abuses the legal process may be subject to procedural sanctions (for example under Rule 11 of the Federal Rules of Civil Procedure), but not to discipline or liability for malpractice. And a lawyer who violates a rule of ethics (for example, a breach of a client’s confidences) may be subject to discipline, but the breach of ethics rules, as both the ABA Model Code of Professional Responsibility and ABA Model Rules of Professional Conduct make clear, does not serve as a basis for a malpractice action, or presumably, procedural sanctions.

My argument is that the different bodies of law should be integrated with each other and the general law, because the source of the rights and duties of both the client and the lawyer is the same: It is the law that governs all. Therefore, integration will benefit the bar, the courts, and clients. The fact that lawyer’s law does not apply directly to clients is irrelevant for two reasons: (1) The client is a third party beneficiary of lawyer’s law; and (2) applicability of the law is always subject to the condition that one have the characteristics to which the law applies. For example, the income tax rate for

individuals with an income of one million dollars a year applies to anyone who makes one million dollars a year. The point is that while all rules govern all citizens, the rules apply not to individuals, but to classes of people, and a rule applies equally (or should) to all members of the same class.

The road to an integrated law of professionalism, however, is a long one and will not be easily traveled. For one thing, the meaning of professionalism is not at all clear, and no agreement exists regarding the appropriate method for analyzing ethics problems. Therefore, the first step is to agree on the meaning of professionalism and secure an understanding of the premises for an analytical framework. These steps will naturally lead to a better understanding of the rules of malpractice, procedure and ethics, and will provide the basis for integrating them into a coherent law of professionalism. This integration will illustrate the hidden fundamental that the general law is the source of rights and duties for both the lawyer and the client. From this understanding emerge three basic principles of professionalism: (1) Power is the source of responsibility; (2) rights must be exercised in good faith; and (3) duties must be fulfilled in good faith.

II. THE MEANING OF PROFESSIONALISM

Professionalism is a term designating integrity in the performance of one's service to another as a professional. Integrity, in turn, implies coherence and consistency in that conduct. A working definition of professionalism for lawyers, then, is responsibility in the exercise of power on behalf of clients. This means that the essence of professionalism is good judgment, which is to the lawyer what proportion is to the architect: Both require an understanding of the parts in relation to each other and to the whole and conduct consistent with that understanding.

As architectural design requires proper proportion in measurement, representation of a client requires sound judgment in the application of ideas. One is essential for beauty in structures, the other for fairness in the administration of the law, and both can occur only when the actor — architect or attorney — acts with integrity. Professionalism in the administration of the law thus has both a moral and intellectual dimension, because the law being administered has moral dimensions. Justice, a moral concept, is its goal.

The moral dimension relates to principles of right and wrong behavior, and the intellectual dimension relates to analysis of the rules and rationalization of the desired course of action. Therefore, the intellectual dimension of professionalism enables the lawyer to know what to do and how to do it, while the moral dimension enables the lawyer to know whether the action is right or wrong. The following question dramatizes this point: Should the lawyer evict poor Widow Brown and her five little children on a snowy Christmas Eve?

The question involves a moral issue, and the reaction of most lawyers will be that the decision is not theirs to make, and therefore, they cannot answer

the question. The reasoning is that the lawyer acts as an agent for the client, and the rationalization is that moral decisions regarding the client's conduct are not for the agent to make. The lawyer, in short, is not required to make moral decisions for the client in the lawyer's capacity as a representative of the client because the lawyer's moral duty is only to (not for) the client. As this line of reasoning shows, lawyers have subordinated the moral aspect of professionalism to the intellectual aspect, by relying on their unique position in the hierarchy of moral conduct.

However, moral questions about the appropriate course of conduct are dilemmatic in nature. Therefore, refusal to answer such a question in fact answers it. The choice is either moral or amoral — or possibly immoral — conduct. By refusing to answer the question, the lawyer thus rejects a responsible role in the administration of law consistent with the public welfare in favor of an amoral role in the service of the client.

The argument for the limited role of the amoral lawyer is that the lawyer devoted only to the client is, and should be, responsible only for the exercise of the lawyer's power, not that of the client. The fallacy in this view is the idea that the lawyer does not exercise the client's power. The lawyer's power, however, is derived from the client, whose power may exist by reason of either rights or resources. To the extent that the lawyer uses the client's power, the lawyer cannot properly avoid moral decisions regarding the propriety of the client's conduct. Thus, we return to the idea that the source of the lawyer's rights and duties is the same as that of the client's rights and duties. This means that the lawyer's conduct has a moral base to the extent that the law has a moral base.

III. THE NEED FOR AN ANALYTICAL FRAMEWORK

The purpose of a framework for analyzing ethical issues is to provide common premises to promote common solutions, because solutions for common issues should be similar. The Oregon lawyer should reach the same conclusion as the Georgia lawyer with the same problem. But given the complexity of ethical issues, the goal of uniformity is likely to remain beyond reach unless a framework is developed to provide a common ground for analysis.

An analytical framework for professionalism is a series of propositions that serve as the premise for resolving issues that arise in the representation of clients. The propositions must be principles rather than rules. While the two terms are used interchangeably, for present purposes, I use the term principle to mean a more comprehensive guide to conduct than a rule provides. For example, a principle is that the lawyer is a fiduciary of the client; a rule is that the lawyer shall not commingle client funds.

The importance of principles becomes apparent when two obstacles to the goal of uniform solutions to ethical issues are considered. One is the variety

of factual situations encountered; the other is the narrow scope of the ethics rules. The first obstacle provides an opportunity to manufacture solutions as if, for example, it makes a difference that the names of the parties in the precedent differ from the names of the parties in the problem. The second obstacle creates an artificial wall between ethical and legal issues; the traditional view being that the breach of an ethical rule is not cause for lawyer liability.

The problem comes into sharper focus when considering the two kinds of ethical issues: simple and dilemmatic. A simple ethical issue entails the naked breach of a rule defining the lawyer's duty to the client, such as the rule that requires competence in the representation of a client. A dilemmatic ethical issue entails a choice between duties, or potential duties, owed to the different persons — client and another person — each of which has (or appears to have) merit. For example, should the lawyer inform the intended victim of the client's potential fraud? While there is merit in protecting the client's confidences, there is also merit in preventing the consummation of fraudulent schemes.

This example is sufficient to explain why the ethical rules have, for the most part, been limited to rules designed to resolve simple ethics issues — duties to the client. The attempt to limit the lawyer's duties to the client, however, inevitably fails because some of the duties described as simple are really dilemmatic in nature. For example, although two components of the duty of loyalty — competence and communication with the client — are simple duties, two other components of the duty of loyalty — rules regarding conflicts of interest and confidentiality — are dilemmatic. Thus, a conflict of interest involves two clients: either two concurrent clients or a current and former client. A breach of confidentiality involves the revelation of client information to a third party. The examples make the point: The impact on the rights of third parties is the major characteristic of a dilemmatic duty.

The essential problem in dilemmatic issues is to what extent the lawyer's duty to the client may — or should — override the rights of third parties. The source of the problem is the degree of particularity found in the ethical rules, which provides less leeway for discretion than the generality characteristic of principles. There is a difference between the rule saying that a lawyer shall not represent clients with conflicting interests and the principle saying that a lawyer shall exercise independent professional judgment on behalf of a client. Even though a lawyer could not exercise independent professional judgment while representing clients with conflicting interests, the rule that merely proscribes conflicts of interest often provides the necessary loophole to escape censure.

The point is demonstrated by the rules under Canon 5 of the ABA Model Code of Professional Responsibility. A careful reading of the rules shows that they are designed to allow the lawyer to have a conflict-of-interest in the representation of clients if the client consents. But, does not the lawyer who

must secure the client's consent to represent the client while engaged in a conflict of interest have a conflict of interests in securing that consent?

The ease with which rules can be manipulated explains the preference for rule-based ethics, one of the dangers of which is the manipulation of principles disguised as rules. An example is the principle of confidentiality treated as a rule that the lawyer shall not breach the confidences of a client. As a principle, the duty of confidentiality requires a justification (or a premise) that aids implementation; as a rule, however the duty of confidentiality must be adhered to.

A principle disguised as a rule thus obscures the dilemmatic nature of the problem, which is treated as a simple ethics problem by default for lack of analysis, and any rights of third parties are lost — or never come into existence. Consider, for example, the protection of the client's confidences over a third party's right to protection from the client's fraud, as in Rule 1.6 of the Model Rules of Professional Conduct that prohibits the lawyer from revealing the client's intent to commit a fraud. Thus as a rule, the duty of confidentiality narrows the moral basis of the lawyer's conduct because the effect is to negate the generic — if not legal — rights of others. Surely the third party has the right not to be the victim of a fraud.

The root of the problem is the specificity of the rules, which gives them the characteristic of a sword as well as a shield. Once this is recognized, it becomes apparent that the solution to both the factual and the legal specificity that leads to these problems is essentially the same: class treatment of both facts and rules. The class treatment of facts is more familiar than class treatment of rules because class terms are used throughout the law, perhaps the most common being the terms "plaintiff" and "defendant." These terms designate a class of which any citizen, fulfilling the necessary requirements, may be a member. Therefore, it is not the identity of the individual that determines membership in the class, but instead the characteristics that identify members of the class.

The class treatment of rules takes the form of principles. Thus, both rules and principles can be viewed as requiring abstractions of conduct, although a rule requires the abstraction of a particular type of conduct, while a principle requires the abstraction of a general type of conduct. The line between the two is not always sharp, and understanding the effect is more important than defining the difference. Generally, the effect of a rule is to define proscribed conduct narrowly, while the effect of a principle is to define prescribed conduct broadly. Rules are used to implement principles. For example, the principle that a lawyer shall be loyal to the client is implemented by four rules that require competence, communication with the client, avoidance of conflicts of interest, and protection of the client's confidences.

Principles are the source of the rules and are the key to coherence and consistency in the law. Their utility lies in the fact that they have a higher level of abstraction — and thus are weighted with less self-interest — than

rules and provide the lawyer with perspective. This perspective enables the lawyer to view ethical issues in the context of the legal system, as opposed to merely the context of the client's (and lawyer's) emotions. The principles forming the analytical framework thus are the key to integrity in the lawyer's administration of law on behalf of the client.

IV. THE ANALYTICAL FRAMEWORK

The analytical framework requires agreement between several points: (1) the meaning of lawyer responsibility; (2) uniform criteria for ascertaining the right question; (3) an understanding of the source and nature of the lawyer's duties; and (4) the three basic propositions of professionalism.

A. The Meaning of Lawyer Responsibility

As implied by the above comments, the core issue of lawyer responsibility is whether and to what extent that responsibility extends beyond the client both to the legal system and to the public at large. The judicial answer in theory is that it does; the bar's answer — in practice — is that it does not. The justification for the bar's view is that in an adversary system of law administration, the lawyer must act only in the client's best interest because the client has no other friend. The true reason, however, is surely the self-interest of the lawyer and the client — he who pays the piper calls the tune.

This issue can be phrased in a different way: Is the lawyer a private administrator of law or is the lawyer merely an advocate for the client? Although most lawyers will choose the latter characterization, that characterization is both parochial and dangerous. The merely-an-advocate characterization is parochial because it overlooks two fundamental points: First, it is the legal system that enables the lawyer to act as advocate for the client. Second, the legal system requires that the lawyer act in the best interest of the client only in terms of the client's legal rights and duties.

The merely-an-advocate characterization is dangerous because it undermines the concept of justice on which the legal system rests. In practical terms, justice can best be translated as fairness in the administration of the law. Yet, limiting the lawyer's responsibility to the client assumes that the lawyer is entitled to corrupt the legal system for the benefit of the client.

A more subtle factor is at work here. When lawyers are good lawyers and clients are good clients, there is no need to be concerned with whether the lawyer's responsibility extends beyond the client both to the legal system and the public at large. The issue arises only when the client is a bad client whose goal is to avoid accountability for wrongful acts. Thus, it is the bad client who demands the lawyer's role of absolute advocacy on her behalf; a position the lawyer, seduced by self-interest, tends to accept without question. The

irony here has gone largely unnoticed: We use the model of the bad client to shape our ethics rules and mold our concepts of professionalism.

This irony makes clear that lawyer responsibility extends beyond the client to the legal system and thus to the public at large. The lawyer has not only a duty of loyalty to the client, but also a duty of candor to the court and fairness to the adversary. However, evidence of these extra-client duties is by and large limited to isolated cases and procedural rules, where the duty is deemed to be unique, not universal.

Why has general recognition not been taken of this phenomenon of using the bad client to shape our concepts of ethics and professionalism? The reason is one of default as much as any other. No one has yet provided an answer to the claims of due process, presumption of innocence, and the rights of all individuals — the bad as well as the good — represented by lawyers. The answers have not been provided because the right questions have not been asked; and the right questions have not been asked because of the lack of uniform criteria.

B. Uniform Criteria: The Right Question

The most important aspect of resolving legal problems is asking the right question. While the right question does not always lead to the right answer, the wrong question will necessarily lead to a wrong answer. Consider, for example, the question of whether a lawyer representing a juvenile should, contrary to the client's wishes, inform the parents of the client's drug dependency, confident that such a revelation is in the best interest of the client. Two questions must be answered in order to resolve this issue: First, does the lawyer have a duty to obey a client's wishes, or instead act in the best interest of the client? Second, does the same answer apply to both competent and incompetent clients? Such questions are not easily answered, but without awareness of the relevant principles, they likely will not even be asked. Thus, important issues of professionalism are often resolved by default, a defect in the legal system that is a disservice to all.

Part of the reason for this defect is that lawyers tend to determine the question in terms of the answer they desire. This is the primary disadvantage of having different bodies of legal rules directed to the same type conduct by the same category of persons, as with the law of professionalism. Each body of rules provides different answers from which the lawyer will choose to formulate the question. An example will demonstrate the oddity here involved, and for this purpose the identity of the client — which often raises issues about both the person who may be a client and the lawyer's responsibility to the client — is a useful problem.

Consider the following: Most of the rules relating to lawyer responsibility are based on the premise that the client is an individual who is fully competent. But clients come in all shapes and sizes; for example: the incompetent

client (a minor), the group client (the members of a class action), the third party client (the beneficiaries of a trust when the trustee is represented by a lawyer), and of course, the organization client (a corporation). Obviously there cannot be a rule dealing with each individual client, but there can be rules for classes of client. The questions, then, are what should the classes be and who should be a member of what class.

A person who employs a lawyer to represent him or her is a client under the rules of malpractice, procedure, and ethics. A person who consults with, but does not hire a lawyer may be treated as a client under the rules of ethics, but not under the rules of malpractice or procedure. A person who is CEO of a corporation represented by a lawyer presumably is not a client under the rules of ethics or malpractice, but may be considered a client under the rules of procedure. When the trustee of a private trust hires a lawyer to represent the trustee, the lawyer may represent the beneficiaries of the trust for purposes of malpractice and procedure, but not under the rules of ethics.

Each of these examples represents a class of clients. The first is the plenary client: a person who is a client for all purposes; the second, the person who consults but does not employ the lawyer, is a putative client: a person treated as a client for some purposes, but not all; the third situation, the CEO, can be characterized as a client in a representative capacity: a person who as a client must act in the interest of those whom the client represents, in this case, the constituents of the corporation. In the fourth situation, the beneficiaries can be classed as derivative clients: a person whose relationship with the lawyer is derived through a client in a representative capacity.

While these classes exist, they have not always been recognized as such, but the identity-of-the-client problem is used only to demonstrate my point: Accepted principles that form the basis for analyzing problems of professionalism are lacking. Without such principles, no basis exists for shaping the problem in order to analyze it, and there is thus no basis for integrity in the interpretation and development of the law of professionalism. This defect prevents lawyers from identifying problems in order to resolve them beforehand, and prevents courts from understanding the problems in order to impose sanctions to prevent their future recurrence. In both instances, the defect can often be traced to the wrong question.

Most controversies in the law of professionalism, therefore, are not about the answer, but about the question. There is, however, reluctance to acknowledge the point because to acknowledge it would be to admit that lawyers seek to benefit the client at the expense of justice; but the admission ignores the surrogacy role of the lawyer and rejects the relevance of the sources and nature of the lawyer's duties.

C. The Sources and Nature of the Lawyer's Duties

All issues of professionalism require the answer to one of two questions: What is the client's right, and what is the client's duty? Traditionally, lawyers

have asked only what is client's right and ignored the client's duty without realizing that the two questions are one question with two sides, like the heads and tails of coins. The proper answer to the questions, however, requires an understanding of the sources and nature of the lawyer's duties as surrogate for the client.

The surrogacy role of the lawyer is a process that entails two powers: the power of the person to be appointed and the power of the person to appoint. The lawyer's power to be appointed is provided by the state in the form of a license to practice law. The client's power to appoint is derived from the law of agency. This dual aspect of appointment means that there are two sources for the lawyer's authority: the lawyer's status as a lawyer, and the client's appointment of the lawyer for the purpose of representation.

The lawyer's duties thus have their source either in the lawyer's status as lawyer or the lawyer's relationship with the client. In the former, the lawyer's duties can be characterized as independent because they are independent of any duties of the client. In the latter, the lawyer's duties can be characterized as dependent because they are determined by, and thus depend on, the client's duties.

The distinction between the two types of duties is that in one instance the lawyer is acting for himself, in the other the lawyer is acting as a surrogate for the client. Thus, if the lawyer is acting for himself and is fulfilling a duty only to the client, the duty is derived from the lawyer's status as lawyer and is independent in nature. The classic example is the duty of loyalty, which consists of the duties of competence, communication, avoidance of conflicts of interest, and confidentiality. For example, if the lawyer has a conflict-of-interest in representing the client, the court may disqualify the lawyer even though the client does not object. The duty to avoid conflicts of interest is a duty derived from the lawyer's status as lawyer and as such affects the integrity of the administration of law. Therefore, it is independent of the client's duties. Similarly, the court appointed lawyer has a duty to competently represent the client regardless of the crime with which the client is charged.

But if the lawyer is acting as surrogate for the client in relation to third parties, the lawyer's duty — which is derived from the relationship with the client — is determined by the client's duty to the third parties and is therefore dependent in nature. An example is the lawyer's duty in negotiating an agreement for the client. If, for example, the opposing party makes an arithmetical error in determining the value of the property in issue, the client, and thus the lawyer, would have a duty to correct the error. Of course, this type of duty is the subject of the law of fraud and deceit.

The independent or dependent nature of the lawyer's duties is the core problem of professionalism because the nature of the duty determines the content of the duty. However, the determination of whether a duty is independent or dependent is not an issue for most lawyers because the duties

are given class treatment in the various branches of law that comprise the law of professionalism.

Generally speaking, if the issue is one of malpractice for the breach of a duty to the client or discipline for the violation of an ethics rule, the lawyer's duty is treated as independent from the client's duty. Thus, the client in a malpractice action alleges the lawyer violated a duty owed to the client, most commonly the failure to represent the client competently. The duty of competence is by definition an independent duty that arises from the lawyer's status as lawyer. The evil client has the same right to competent representation as the sainted one, and if the lawyer is negligent, it makes no difference which the client is.

The same analysis applies in disciplinary proceedings for the lawyer's violation of an ethics rule. The duty to obey ethics rules is a duty that arises from the lawyer's status as a lawyer and any duties of the client are irrelevant. But if the issue is a procedural matter, the lawyer's duty is treated as dependent in nature, and the above analysis does not apply. This is because in the courtroom it is clear that the lawyer acts only for the client. Thus, only the client has standing to file suit or to prosecute an appeal. Therefore, when there is an issue about a lawyer's course of action, the question is what is the client's right or duty, because it is the lawyer's duty to protect the client's right and to implement the client's duty.

Lawyers prefer that their duties be independent. This view is evident in codes of ethics that have traditionally dealt only with independent duties owed to the client. The premier duty owed by an attorney was one of loyalty to the client. This duty of loyalty includes: competence, communication with the client, avoidance of conflicts of interest, and confidentiality. As duties owed to the client, each duty was correlative of a client's right. Thus a client has a right that her lawyer be competent, keep her fully informed, avoid conflicts of interest, and protect her confidentiality.

Emphasis on the independent nature of a lawyer's duty to the client had another beneficial effect for the lawyer. It meant that the early codes avoided the concept of dependent duties, because they did not deal with a lawyer's duty to others — the court or the adversary. Because a lawyer's duties to others are determined by the client's duties, to have dealt with a lawyer's duties to others would have required the drafters to treat the lawyer's duties as being dependent — that is — as being derived from and determined by the client's duty. This is because the lawyer is an agent of the client, and the rights and duties of an agent are determined by the rights and duties of the principal. Therefore, the ethics codes either did not deal with a lawyer's duties to others or dealt with them abstractly.

A classic example of this abstract treatment is the rules in DR 7-102 of the ABA Code of Professional Responsibility, "Representing a Client Within the Bounds of the Law." A paradigmatic rule, DR 7-102(A)(1), states that a lawyer in the representation of a client shall not "[f]ile a suit, assert a position,

conduct a defense, delay a trial, . . . when it is obvious that such an action would serve merely to harass or maliciously injure another." The only person who would be injured by such conduct is the adversary. Clearly, then, the language could be interpreted as imposing a duty on the adversary. However, just as clearly, it could be interpreted as imposing a duty on the system, that is, a duty to everyone. This duty to the system is in essence a duty to no one, and that is how courts have interpreted the rule. This interpretation is no doubt consistent with the drafter's intent.

The example above demonstrates how the drafters of ethics codes treated the lawyer's duties in representing a client as being independent of a client's duties. As the example makes clear, the independent nature of the duties increases a lawyer's freedom to act (or not act) on the client's behalf. If the lawyer's duties were dependent, derived from the duties of the client, a lawyer's actions would have to be consistent with what the law requires of the client.

The practical value of independent and dependent duties is that both aid the lawyer in focusing on the relevant issue. With independent duties, the issue is what is the lawyer's duty (and the client's right); in the case of dependent duties, the issue is what is the client's duty (and a third party's right).

V. THE PRINCIPLES OF PROFESSIONALISM

All rules are derived from principles, and the difference between consistent, coherent rules, and inconsistent, incoherent rules is found in the principles from which they are derived. Since the rules of malpractice and ethics are to a large extent inconsistent and incoherent, we can infer that they are derived from bad principles. For example, loyalty to a client is more important than fairness in the administration of the law. Similarly, the rules of procedure tend to be both consistent and coherent. Therefore, we can infer that they are derived from sound principles. For example, fairness in the administration of the law is held to be more important than loyalty to the client. If these sound principles can be identified, they can also serve as a basis for the law of malpractice and ethics, as well as for procedure.

These principles should be directed to the policy of fairness in the administration of law. The major obstacle to this policy may be the logical error in assuming that law consists only of stated propositions, whether they are called rules, principles, or policies. However, the law cannot be limited to words, and a lawyer's concern should be as much to the process of administering the propositions as it is to the propositions themselves. Therefore, the lawyer should view the law as a process rather than merely a product.

The law as a process entails the exercise of rights and the implementation of duties. The goal is that the power be exercised responsibly, which means

that rights and duties must be exercised and implemented in good faith. Therefore, the following principles are relevant. First, power is the source of responsibility. Secondly, a person must exercise legal rights in good faith. Finally, a person must fulfill his or her duties in good faith.

These principles are related to professionalism in the following way. The first relates to the client, who is the source of the lawyer's authority to act. The second relates to the proper functioning of the adversary system in which persons are responsible for acting in their own interest. The third is a guide for the lawyer, whose loyalty to the client does not justify depriving others of their rights for the benefit of the client.

A. Power is the Source of Responsibility

The first principle of professionalism — power is the source of responsibility — raises the question of the source of a lawyer's authority to act. Because a lawyer acts only as a representative of the client, the source of the lawyer's authority to act arises from an agency relationship. In conformity with agency law, a lawyer's rights and duties that arise from his representation of the client are governed by those rights and duties of the client.

The failure to accept this basic proposition results in a major analytical error lawyers make in dealing with the law of professionalism and malpractice. Lawyers view the law primarily from a lawyer's perspective and often at the exclusion of the client's perspective. The truism that a lawyer's authority to act for the client originates from the client makes the fallacy of this approach apparent. This truism has been obscured because the true source of the lawyer's general authority to act arises from the state. Authority that arises from the client (by reason of the attorney-client contract) is only for a lawyer's authority to act in a particular matter.

However, in the administration of the law the particular authority to act is a necessary trigger to make the general authority to act meaningful. This is true because a lawyer is licensed by the state to administer law only on behalf of clients as permitted by the law. Therefore, one should not confuse the two sources of a lawyer's authority to act — licensure by the state (membership in the bar) and the contract (express or implied) with the client. To do so is to obscure the client's responsibility, which exists by reason of the fact that the client is the principal in an agency relationship.

Because a lawyer is an agent for the client, agency law would normally hold that a client's rights and duties govern the relationship. However, lawyers have treated the attorney-client relationship as being *sui generis* primarily because the ethics codes were drafted by lawyers for lawyers. Because the bar did not have jurisdiction over clients, and ethics codes were intended to improve a lawyer's conduct, clients were excluded from the codes except to the extent that they were the object of the lawyer's fidelity.

A code dealing with an agency relationship that does not deal with the principal's duties is necessarily limited to dealing with an agent's duties to the principal. The early codes thus treated the attorney-client relationship as *sui generis*, because they primarily dealt with a lawyer's duties to the client and ignored the lawyer's duties to others. They treated a lawyer's duties to the court summarily and gave no consideration to those duties owed to the adversary. If duties to the court and adversary existed, they were deemed to be client's duties. As such, the bar could not exercise jurisdiction over such duties. While the exclusion of a client's duties to others did not mean that such duties did not exist, it did mean that they were not the bar's concern.

The fallacy with the above *sui generis* theory lies in the assumption that a lawyer's duties to the client are independent of the client's duties to others. But, a lawyer's duty to the client cannot be properly separated from the client's duty to others because when a lawyer acts on behalf of the client, the lawyer is fulfilling a duty *to* the client while fulfilling a duty *of* the client. For example, in responding to interrogatories, the client has a duty to be truthful — even though the truth is harmful — and the lawyer who fails to respond truthfully on behalf of the client places the client at risk. The duty of competence requires proper implementation of a client's duties.

Then the lawyer's duty *to* the client is an integral aspect of the lawyer's duty to others in acting for the client. Therefore, when an issue involves a lawyer's conduct towards the client, the question is always what is the duty of the lawyer and the right of the client. When the issue involves conduct of a lawyer acting for the client in relation to others, the question is always what is the duty of the client and the right of the third party. Since the client is the ultimate source of a lawyer's authority, the client is also the ultimate beneficiary of the lawyer's responsibility.

B. Rights Must be Exercised in Good Faith

The exercise of a right is the exercise of power, and the second principle of professionalism is that rights must be exercised in good faith. In this context, good faith requires conduct consistent with the purpose as well as the function of a rule. This goal requires conduct without deception as to means or deceit as to intent.

While the proposition that rights must be exercised in good faith is clearly sound in reference to substantive rights, it is not so clear when referring to procedural rights. The problem is that in an adversary system, the power is vested in the parties to resolve their own disputes with the lawyer making the procedural decisions and the client making the substantive decisions. This delegation of power to the parties is not deemed to include directions as to how the rights are to be exercised beyond what is permissible, because it is the lawyer who exercises them. Therefore, a sleazy tactic is deemed acceptable if a lawyer can get away with it. Thus, the notion that

rights must be exercised in good faith is at odds with the adversary system, because the system consists of procedural rules.

The view that procedural rules are unique, of course, is supported by their status as a special branch of law. However, the fallacy of this view is that both procedural and substantive rights are hierarchial in nature. Procedure is merely the means of implementing and exercising substantive rights and to deny one is to defeat the other. Without the procedure, the substantive rights cannot be enjoyed, and without the substantive rights to be enjoyed, there is no need for the procedural right.

The artificial dichotomy between procedural and substantive rights means that the common law adversary system is a classic example of theory at odds with practice. The theory is that giving each party the responsibility for his or her position and the duty to prevail over the opposition by one's own merits will bring about truth and justice. The practice is that procedural rights become a weapon. The results are: the adversary system favors the powerful over the weak, the rich over the poor, the popular over the hated, and bad precedent over a good result.

It is this point that makes relevant a psychological effect of the adversary system not often noticed. This effect may well explain the procedural-substantive dichotomy. To work properly, the adversary system requires a voluntary sacrifice of self-interest. But because the adversary system provides the parties so much freedom in resolving their dispute, psychologically it has the effect of codifying the law of self-interest. Most people can justify conduct that they think will benefit themselves, regardless of an objective assessment. For example, the ill-treated niece caring for the rich uncle can easily rationalize her forgery of his will because she feels the inheritance is her due.

Self-interest, being the prime motivation for all human conduct, cannot be all bad, and often self-interested conduct produces socially desirable consequences. For example, the maternal instinct that ensures protection and care for the infant is surely a prime example of self-interest. However, certain self-interested conduct may degenerate into merely selfish conduct. The factor that keeps self-interest within reasonable bounds is not only the correlation of desirable conduct with reward, but also the correlation of deviant conduct with punishment. For this reason, lawyers serve themselves in their attempts to separate conduct from consequences by distinguishing procedural and substantive duties. In essence, they are separating the respective duties of client and lawyer. For example, the lawyer who files a groundless action is not held responsible to the victim for damages, because he filed that action in fulfillment of the lawyer's duty of loyalty to the client. When a lawyer in negotiations for a contract commits fraud that is later discovered, the client is the one who will usually suffer when the contract is vitiated. This separation of client's and lawyer's duties thus enables the lawyer to engage in and justify that conduct beyond the limits of propriety which places the client at risk.

The effect of this dichotomy is to downgrade the notion that all rights must be exercised in good faith. However, the effect has for the most part gone unnoticed, because in the adversary system, fairness is equated with the rules of procedure. Thus, the rules set the time limits, and if the complaint is filed one day beyond the statute of limitations, it is not unfair to move for its dismissal, however meritorious the claim otherwise might be.

In short, the common law adversary system is a rule based system, and strict compliance with the rules is demanded for the sake of order. This order is deemed to result either in justice or a satisfactory equivalent, such as, finality. However, procedural rules do not distinguish between a knowledgeable litigant and an ignorant litigant, and the adversary system often proves to be incredibly unfair, especially for those whose resources are limited or non-existent. Lack of funds for litigation means that one's voice is weak so that the pleas reach the court only in the form of a hoarse — and sometimes whining — whisper. The common law adversary system often means that power determines rights, for that system canonizes rights at the expense of responsibilities.

Herein lies the importance of the principle that rights must be exercised in good faith. Since the client has a duty to exercise rights in good faith, the lawyer exercising the rights for the client has a similar duty. The rules of procedure are not entitled to an exemption from this principle.

C. Duties Must be Implemented in Good Faith

One exercises a right and fulfills a duty. When the lawyer acts for the client, she may exercise the client's right for the client. However, if a lawyer is fulfilling a duty for the client, it is useful to use the term "implement" to distinguish the lawyer's actions from those of the client. Then as a matter of professionalism, we say that the lawyer must exercise the client's rights and implement the client's duties in good faith.

The third principle of professionalism is that duties also must be implemented in good faith. There is a difference between exercising a right and fulfilling a duty. The latter is not merely complementary of the former. The exercise of a right is a matter of self-interest that may or may not involve others. The fulfillment of a duty is generally contrary to one's self-interest in that the absence of the duty is to one's advantage, because duties involve obligations to others.

For the lawyer, the exercise of the client's right is consistent with the client's interest, but generally the implementation of a duty is not. The matter of implementing the client's duty thus presents a complex problem for several reasons. First, the adversary legal system is essentially a rights oriented system, and a lawyer views his primary task as protecting and furthering the client's rights. Second, in terms of ethics, the lawyer has duties to the client, but not to third parties. Finally, the lawyer's duty to implement the client's

duty to others ostensibly contradicts the lawyer's duty to his client. The duty principle is thus more subtle than it appears to be. To fulfill one's own duties in good faith is one thing, to implement the duties of another subject to the good faith requirement is quite a different matter. This issue is directly related to the lawyer's role as a fiduciary.

While the lawyer has many roles, the overriding role that applies to all duties is that of fiduciary. A person is a fiduciary when there is a grant of power which she exercises in managing the affairs of another. The lawyer, as trustee, is entrusted with the client's legal rights and duties and, in many instances, even the client's future.

There are two aspects of a lawyer's fiduciary role. One is that as a fiduciary, the lawyer must subordinate her interest to that of the client-beneficiary in regard to matters that are relevant to the fiduciary relationship. The other is that as a fiduciary, the lawyer must implement the duties of the beneficiary. The first requirement that the fiduciary subordinate her interest to that of the beneficiary's is the essence of the fiduciary relationship. This is because of the power the fiduciary has over the affairs of the beneficiary. For example, the trustee of a private trust has legal title to the corpus and in theory could transfer that title for her own benefit.

There is a significant difference between the trustee of a private trust as fiduciary and the lawyer as fiduciary. For the lawyer, the duty of subordinating her interest is manifested in the lawyer's duty of loyalty to the client. But unlike the trustee, who acts as a surrogate of the beneficiary only in regards to the disposition of the property in trust, the lawyer continuously acts as a surrogate for the client in various matters. Then, the lawyer's actions for the client involve not only the rights and duties of the client, but also the rights and duties of others as well.

This factor relates to the second point mentioned above: the lawyer as fiduciary must implement the duties of the client. This aspect of the fiduciary nature has not been fully developed and analyzed because of the rights-oriented nature of the adversary system. The lawyer's duty is to protect and secure the client's rights, not to implement the client's duties. The major exception is the procedural rules where the sanctions for the failure to implement the client's duty tends to be swift and punitive. A default judgment for failure to answer a complaint is a prime example. Even in this context the practice has been to state the rule with precision.

Therefore, it is not surprising that the duty to implement a client's duty has neither been analyzed nor completely understood. The fiduciary principle that requires the subordination of an attorney's self-interest to that of the client is readily acceptable. What has been lacking is a development of the fiduciary principle as it applies to the attorney's duty to implement a client's duty. Presumably this is because the profession views the lawyer as being able to secure and protect the client's rights. The underdevelopment of the fiduciary

principle in this area facilitates this role in that it enables the lawyer to negate the rights of others in order to benefit the client, usually with impunity.

The benefit to the client comes at a high price — integrity in the administration of the law. As suggested above, integrity in the law requires coherence and consistency in the rules. To the extent the lawyer as administrator assumes the right to manipulate and shape the rules to serve only the client's ends, justice is cheated and the system is corrupted. An antidote to this corruption is an explicit recognition of what is implied through the law: The lawyer is not empowered to negate the rights of others for the benefit of the client. Of course, the proposition is merely a corollary of the lawyer's duty to implement the client's duty in good faith.

Furthermore, this proposition finds confirmation in the law of fraud and deceit and is fundamental to the administration of the law because of the tension between the rights of the client and the rights of others. The dissipation of the tension will never occur within the confines of a lawyer's duty only to secure and protect a client's rights. This is why the client, as the source of the lawyer's authority, must share responsibility for the lawyer's actions, and why the lawyer, as fiduciary, is not entitled to abrogate the rights of others to serve his client. Therefore, the lawyer must be aware of the client's responsibility as the source of his authority and utilize the adversary system in a manner consistent with the principle that rights must be exercised in good faith.

VI. CONCLUSION

The law of professionalism can be reduced to two questions and three principles. The questions are: (1) What is the client's right, and (2) What is the client's duty? The three principles are: (1) Power is the source of responsibility; (2) Rights must be exercised in good faith; and (3) Duties must be implemented in good faith. The essence of professionalism is found in the third principle, for it is this principle that tells us that lawyers have a duty not to negate another's rights for the personal benefit of either the lawyer or the client.

The core principle is the source of responsibility, for it is this principle that brings the client into the professionalism equation. The client's good faith exercise of his rights is necessary for a lawyer to act with integrity in representing the client. The difficulty is in translating these principles into rules in order to effectuate them. The heart of the problem is found in the adversary system, its very name implies conflict. To enable the parties to resolve their disputes, common law lawyers created a system of procedural rules giving one the power to seek a remedy, which is distinguished from a right. Under the adversary system, justice is deemed to have been accomplished even if the rules have been followed regardless of whatever rights may have been defeated.

Part of the reason for this problem is the result of a concession to the shortness of life and the need for finality. Furthermore, another cause is the notion that the adversary system has a therapeutic value by giving litigants some control over their affairs. However, this therapy is likely to be more beneficial to winners than to losers. Therefore, it is well to recognize that an adversary system, despite its long history, has its defects. That is why in modern America, the system is continually undergoing an evolution. It is also why it will be useful to pause and consider that the historical heritage that lawyers have so often praised may not be as great as claimed. The adversary system works best when the participants have equal, or nearly equal amounts of resources. Thus, in a class based society, it works well for the privileged, but not for the less fortunate. The American adversary system was developed in a highly stratified English society and worked well for those in the upper stratum.

In theory, the United States is not a classed society, but even so, there are still those privileged few. For them, the adversary system is ideal. They have the means to employ the best and most effective attorneys who are skilled in administering the law for the benefit of their clients. Contributing to this inequity is the fact that the common law system is basically a rights-oriented system. A rights-oriented system emphasizes rights at the expense of responsibilities, a point of major concern to those who have the rights — for the wrong reasons. The lack of responsibility enables them to keep their rights to the exclusion of others.

The privileged can use the claim of rights to enhance their position and win most controversies. But, they can do this only so long as the universality of legal rights remains unknown. In societies with poor communication, this condition tends to prevail. When communication improves, the news of the universality of rights tends to spread. Then, we have the rise of special interest groups clamoring for the recognition of their rights. Consider the twentieth-century claims of minorities, whether because of skin color, religion, gender, or sexual orientation.

The point is this: A society in which everyone is claiming their rights cannot work unless the claimants also recognize their corresponding responsibilities. So long as rights were for the most part parsed out to the privileged few, lawyers could represent their clients without concern for their client's corresponding responsibilities. The ethics code also ignored the client's responsibilities to third parties.

There was an unfortunate effect of this dichotomy. In practical terms, for the lawyer it meant a separation of personal and professional ethics. Thus, a lawyer would often do what she felt her professional duty required her to do for the client even though she knew that the conduct was wrong. For example, a lawyer who would not commit perjury on a witness stand felt constrained to remain silent in the face of her client's perjury all the while knowing that serious injustice might result. The common law lawyer had

conflicting values to live by, a condition that surely has its psychological limits.

We now come to understand why it is important to the integrity of the law, its administration, and to the professionals within the system that a client's responsibility be integrated with a lawyer's responsibility and vice versa. Only by integrating the two can we integrate the values by which we should all act and live. Legal ethics is an integral part of the law and the law is an integral part of legal ethics.