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## Ethical Ends and Ethical Means

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# Ethical Ends and Ethical Means

Monroe H. Freedman

With characteristic insight, Thomas Shaffer has posed two questions that I think each of us might try to answer and urge our students to try to answer.<sup>1</sup> The first question is, "Who is the client?" That is, how do I view my client with respect to my role as a lawyer? The second question is, "What is the concern of lawyers' ethics?" Shaffer's answer to the first question is that the client is "this other person, over whom I have power."<sup>2</sup> His answer to the second question is that legal ethics is "concern[ed] with the goodness of someone else," that is, the client.<sup>3</sup> He adds that the subject of legal ethics begins and ends with Socrates' question to the law professors of Athens: "Pray, will you concern yourself with anything else than how we citizens can be made as good as possible?"<sup>4</sup> Even if one disagrees, as I do, with Shaffer's answers,<sup>5</sup> the process of finding one's own answers to his questions provides considerable insight into one's perspective on legal ethics and how it affects one's answers to particular issues.

My own answers to Shaffer's questions are surely affected by my having come to legal ethics from litigation involving civil rights, civil liberties, and the representation of indigent criminal defendants. Accordingly, although I agree that the concerns Shaffer expresses are important to lawyers' ethics, my attitude toward my client has a different emphasis. I identify the client not as "this other person, over whom I have power" but as "this other person whom I have the power to help." Thus, my central concern is not so much how I can make my client a better person but rather how far I can ethically go—or how far I should be required to go—to achieve for my client full and equal rights under law.<sup>6</sup> Shaffer thinks of lawyers' ethics as rooted in moral philosophy, while I think of lawyers' ethics as rooted in the

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1. See Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 *Cath. U.L. Rev.* 319 (1987).
2. *Id.* at 319.
3. *Id.*
4. *Id.*
5. Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 *Cath. U.L. Rev.* 331 (1987).
6. These are, of course, differences in emphasis only. Shaffer is not unconcerned about individual rights, nor am I unconcerned about my clients' and my own morality. Nevertheless, our differences are of considerable importance when it comes to drafting, interpreting, and teaching the rules of lawyers' ethics.

Bill of Rights as expressed in our constitutionalized adversary system.<sup>7</sup> My view of lawyers' ethics is, therefore, client-centered, emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free society.

I also believe that the lawyer's autonomy must be respected. Except in the unusual circumstances of a court appointment, the lawyer is unconstrained by ethical rules in her choice of areas of practice, causes, and clients. I impress on my students, therefore, that clients lie, cheat, and even kill out of pure greed. If you are not able to deal with that fact of professional life, I caution them, you should not go into the practice of corporate law. Contrary to Charles Fried<sup>8</sup> and other commentators, however, I do not consider the lawyer's decision to represent a client or cause to be morally neutral.<sup>9</sup> Rather, a lawyer's choice of client or cause is a moral decision that should be weighed as such by the lawyer and that the lawyer should be prepared to justify to others.<sup>10</sup>

Only after the lawyer has freely chosen to represent the client is the lawyer under an ethical obligation to provide zealous representation of the client's interests as the client sees them. Even then, the lawyer has limited but significant scope to avoid involvement in conduct that he or she finds morally offensive. The lawyer should be permitted to withdraw on moral grounds in three circumstances: (1) if the client consents; or (2) if withdrawal can be accomplished without significant harm to the client's interests; or (3) in a matter other than criminal litigation, if the lawyer discovers that the client has knowingly induced the lawyer to take the case or to take action on the client's behalf by material misrepresentations about the facts of the case, and if withdrawal can be accomplished without direct divulgence of the client's confidences.<sup>11</sup>

Grounded in the fundamental values of the Bill of Rights, my analysis of lawyers' ethics gives individual dignity a central place. I expressly reject moral neutrality and nonaccountability; indeed, I believe that moral discourse between lawyer and client is an essential aspect of the lawyer's

7. For an explanation and defense of our constitutionalized adversary system, see Monroe H. Freedman, *Understanding Lawyers' Ethics*, ch. 2 (New York, 1990).
8. Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976).
9. Compare my assertion with Model Rules of Professional Conduct Rule 1.2(b) (1983): "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."
10. See Sissela Bok, *Lying: Moral Choice in Public and Private Life* 92 (New York, 1978): "[A] moral principle must be capable of public statement and defense." For an illustration of this kind of moral accounting for the choice of a despised client, see Freedman, *supra* note 7, app. A: *Why I Represented Bernard Bergman*.
11. See Freedman, *supra* note 7, at 102; Freedman, *supra* note 5, at 333; *American Lawyer's Code of Conduct Rules 6.2 & 6.5* (1980). See also Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 53-54 (Indianapolis, 1975) (because there are important differences between criminal and civil litigation, different responses are appropriate to such issues as client perjury).

role.<sup>12</sup> I am therefore nonplussed to find my views cited as a paradigm of moral neutrality, and to find myself accused of favoring zeal and confidentiality as ends in themselves, of being cynical, and of ignoring the concerns of justice.

### Simon's Moral Discourse

Illustrative is the work of William H. Simon, who makes a practice of refuting a simplistic and distorted characterization of my views.<sup>13</sup> According to Simon, I show no indignation at the conviction of innocent people and speak of cases "not in terms of justice or suffering, but in terms of probabilities of acquittal."<sup>14</sup> In making his criticisms, Simon chooses to ignore my first book, *Lawyers' Ethics in an Adversary System*, in which I repeatedly stressed the moral imperatives of "a system of administering justice which is itself essential to maintaining human dignity."<sup>15</sup> With specific reference to the suffering of the innocent defendant, I wrote:

[M]erely to be charged with a crime is a punishing experience. The defendant's reputation is immediately damaged, usually irreparably, despite an ultimate failure to convict. Anguish and anxiety become a daily presence for the defendant, and for the defendant's family and friends. The emotional strains of the criminal trial process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused's children. The financial burden can be enormous, and may well include loss of employment because of absenteeism due to pretrial detention or time required away from work during hearings and the trial, or because of the mere fact of having been named as a criminal defendant. The trial itself, building up to the terrible anxiety during jury deliberations, is a torturing experience. . . . [I]t is said that the government wins its point even when a not-guilty verdict is returned. That is true also in a less idealistic, more cynical sense: the prosecution wins even when the defendant is found innocent because, typically, the defendant will carry for life the severe scars of that encounter with justice.<sup>16</sup>

I quote at length so that the reader can judge the accuracy and fairness of Simon's charge that I show no indignation over the plight of the innocent defendant and express no concern with injustice or human suffering.<sup>17</sup>

Simon and I have other disagreements. For example, he purports to favor resolving moral disagreements between lawyer and client through moral discourse.<sup>18</sup> So do I. What Simon and I mean by moral discourse, however, are different things. I understand the process to include explanation, argumentation, and remonstrance—short of coercion. I would not consider it moral discourse if a client threatened to scuff my shoes if I did not accept his position. Nor would I define moral discourse to include

12. See, e.g., Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 *Cath. U.L. Rev.* 191, 199–200, 204 (1978), and *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *Mich. L. Rev.* 1469, 1478 (1966).

13. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083, 1087, 1089 (1988) [hereinafter *Discretion*], and *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 36 [hereinafter *Ideology*].

14. Simon, *Ideology*, *supra* note 13, at 36.

15. Freedman, *Lawyers' Ethics in an Adversary System*, *supra* note 11, at 2.

16. *Id.* at 84–85.

17. See also *id.* at 1–2, 3, 4, 8, 12, 88–96, 120–21.

18. Simon, *Ideology*, *supra* note 13.

blackmail: "Do it my way, or I will expose your guilty secret."<sup>19</sup> Simon, however, objects to strict protection of lawyer-client confidentiality precisely because it deprives the lawyer of the power to overbear the client's will. As Simon expresses it, strict confidentiality deprives the lawyer of "the leverage of threatened disclosure," which gives the lawyer her "best chance of succeeding."<sup>20</sup> In Simon's moral universe, what the lawyer conceives to be a moral end apparently justifies the use of coercive means.<sup>21</sup> Of course, with the lawyer prepared to reveal what the client wants to keep confidential, any discussion between lawyer and client about whether the client should reveal the truth is moot, and "moral discourse" is, at best, a charade.

### The Janitor's False Testimony

In planning our panel discussion for the Mini-Workshop on Teaching the Law and Ethics of Lawyering Throughout the Curriculum, Geoffrey Hazard and I agreed to discuss two cases, one involving client fraud on a court, the other involving fraud on a third person. This is the first case:

A lawyer represents a plaintiff in a negligence action involving a man who was killed when he used a defective elevator. A crucial issue is whether the defendant was on notice of the defective condition. The most important witness on that issue is the defendant's former janitor, now retired.

On cross-examination, the janitor is asked whether the plaintiff's lawyer provided the witness with the new suit he is wearing, and whether the lawyer paid the witness \$1,900 to testify in the case. The witness answers no to each question. In fact, each of the answers is false.

The lawyer does not suggest that the witness correct his testimony, nor does he take any other remedial action. On closing argument, the lawyer argues the witness's testimony as evidence in the case.

Has the lawyer acted ethically?

The hypothetical case is based on an actual case in which a personal injury lawyer who had brought a wrongful death action for \$7,000,000 was subsequently prosecuted for attempted grand larceny by trick.<sup>22</sup>

I received several calls from the personal injury lawyer's attorney in the criminal case, asking me to testify as an expert witness. The opinion he sought was that the personal injury lawyer had acted ethically under the *Model Code*. I declined to testify for several reasons. First, the lawyer had in fact paid the money to the witness. Thus, he had given the witness (a retired janitor) compensation in excess of appropriate compensation for his time. The lawyer knew from personal involvement that the janitor's testimony was false. It was the lawyer's own conduct, not something that he had learned from his client, that was at issue. Nevertheless, the lawyer had not even tried to persuade either the janitor or the plaintiff to correct the false

19. I use the word "blackmail" with the dictionary meaning: "to force or coerce into a particular action, statement, etc." Random House Dictionary of the English Language 218, 2d ed., unabridged (New York, 1987).

20. Simon, *Discretion*, *supra* note 13, at 1142 n.129.

21. Perhaps Simon's confidence in the moral superiority of lawyers is greater than mine. This may be what Carrie Menkel-Meadow has in mind when she classifies me as a "realist" and Simon as a "philosopher." Carrie J. Menkel-Meadow, Remarks at the AALS Mini-Workshop on Teaching Law and the Ethics of Lawyering Throughout the Curriculum, Jan. 4, 1990.

22. See Daniel Wise, *Criminal Charges Left Intact Against Personal-Injury Lawyer*, N.Y.L.J., April 26, 1988, at 1, 5.

testimony.<sup>23</sup> Indeed, the lawyer had argued the janitor's testimony as worthy of belief in summation.

When I decide whether to accept a client, I do not take a hired-gun approach.<sup>24</sup> The lawyer in this case did not appear to be the kind of person—or the kind of member of the bar—to whom I wanted to lend my support as an expert witness on lawyers' ethics.<sup>25</sup> I read thereafter that the lawyer had been acquitted and that Geoffrey Hazard had testified on his behalf as an expert witness. Because his testimony was based on the same facts that had been presented to me, the case provides a good opportunity to examine some of our differences.

The substance of Hazard's testimony was that the lawyer had acted consistently with DR 7-102(B)(2)<sup>26</sup> and DR 7-102(A)(4).<sup>27</sup> His reasoning was in part that the janitor's false testimony had been "collateral" and not "material."<sup>28</sup> He did not explain the basis of this distinction. It is contrary, of course, to the general rule of evidence that a witness's bias, interest, or corruption is not collateral.<sup>29</sup> Hazard was then asked, in a hypothetical question, whether the lawyer had been guilty of "us[ing] . . . false evidence" in violation of DR 7-102(A)(4) when he argued the witness's credibility in summation and referred to the witness as "disinterested." He replied in the negative; in arguing the witness's credibility, the lawyer had come to "the margin of impropriety" but had not violated his ethical responsibilities.<sup>30</sup>

23. Note that the *Model Code* fraud-on-the-court rule that is relevant in this case is not DR 7-102(B)(1), which relates to fraud by the client. Rather, the relevant rule is DR 7-102(B)(2), which relates to fraud by a nonclient witness. Although the wording of the two rules is significantly different, I believe that DR 7-102(B)(2) should be construed in the light of the wording and legislative history of DR 7-102(B)(1). Accordingly, the lawyer would be required to urge that the fraud be corrected, although he would not be permitted to correct it himself without the client's consent.

24. See Freedman, *supra* note 7, app. A. This appendix relates specifically to my role as an advocate, but testifying under oath as an expert witness would be a stronger case, of course, for rejecting a hired-gun attitude.

25. I learned subsequently that the prosecution had taped conversations in which the lawyer instructed a prospective witness to offer a narrower picture of their pretrial discussion than had actually taken place and to deny that he had received money in connection with his testimony when in fact he had. See Wise, *supra* note 22.

26. "A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

27. "In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."

28. Transcript at 2586–93 (available from the author on request). Hazard defined "fraud on a tribunal" as "a substantial misrepresentation to the Court that misleads the Court in understanding what the facts are so that it gets the wrong results." *Id.* at 2597; see also *id.* at 2603. Thus, Hazard's test appears to be whether, *but for* the false testimony, the result in the case *would* have been different.

29. Charles Tilford McCormick, *Evidence* § 40, at 89, 3d ed. (St. Paul, Minn., 1984).

30. Transcript, *supra* note 28, at 2617–18, reads as follows:

Q Assume that a witness has testified that he was not paid, he was not transported to court, that he has not met with counsel or his investigator and that he has not received a suit . . . . Assume further that those answers are false. Would it be the use of perjured testimony to sum up to the jury on the witness as a disinterested witness?

A Well, I don't—I am not sure. I think that if— you used the word disinterested witness. You usually, sir, it means someone who is not affiliated with a party, and

### The Fraudulent Real-Estate Deal

The second case Hazard and I agreed to discuss comes from a discussion of fraud on a third party in *The Law of Lawyering*.<sup>31</sup> Assume that a lawyer has closed a real-estate deal for which she prepared the deed. She then learns that her client had induced the deal by fraud. The lawyer still represents the client for some postclosing matters. What must/may/should the lawyer do?

Under the *Model Code of Professional Responsibility*, the answer is governed by DR 7-102(B)(1) and DR 4-101. When a lawyer "receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud upon a person or tribunal," the lawyer is required by DR 7-102(B)(1) to "promptly call upon his client to rectify the [fraud]." Further, if the client does not do that, the lawyer "shall reveal the fraud to the affected person or tribunal." DR 4-101(A) does protect the confidentiality of all information gained in the professional relationship, but DR 4-101(C)(2) permits the lawyer to reveal confidential information when permitted to do so under any other disciplinary rule. Thus, depending on how you read the applicable provisions, the *Model Code* appears either to require the lawyer to divulge the client's past fraud (DR 7-102(B)(1): "shall reveal") or to permit the lawyer to do so (DR 4-101(C)(2): "may reveal").

We now know, however, that the drafters of the *Model Code* did not intend either result. DR 7-102(B)(1) was included in the *Model Code* late in the drafting process, and its effect on DR 4-101(C) was "not appreciated" by the drafters.<sup>32</sup> According to a member of the drafting committee, the apparent effect of DR 7-102(B)(1) was the result of an "oversight" and a "drafting error."<sup>33</sup> As stated by the ABA Committee on Ethics and Professional Responsibility, for reasons of both tradition and policy it would be "unthinkable" for a lawyer to disclose a client's fraud in violation of confidentiality.<sup>34</sup>

Accordingly, the ABA clarified DR 7-102(B)(1) in 1974 by adding an "except" clause. As a result, the lawyer is required to reveal the client's fraud "except when the information is protected as a privileged communication." The ABA Committee on Ethics and Professional Responsibility then explained that the phrase "privileged communication" refers to what the *Model Code* calls "secrets," which include information that might be embarrassing to the client.<sup>35</sup> As Hazard has wryly remarked, "fraud is

I don't think anything you have said indicates that he was affiliated to a party.

If you said something like "that this witness had no connection with either party," well, that I think is suggesting that he hadn't been interviewed extensively in the preparation and I think that would be getting at the margin of impropriety.

31. Geoffrey C. Hazard, Jr., & W. William Hodes, 1 *The Law of Lawyering* 108, 1st ed. (New York, Supp. 1986).

32. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

33. American Bar Foundation, *Annotated Code of Professional Responsibility* 307 (Chicago, 1979).

34. ABA Formal Op. 341, *supra* note 32.

35. *Id.*

always embarrassing,” and the addition of the “except” clause to DR 7-102(B)(1) therefore “eviscerated the duty to report fraud.”<sup>36</sup>

Because the fraud in our hypothetical case has been completed (the real-estate deal has been closed), there is no ground under DR 2-110 for the lawyer to withdraw. Whether the lawyer can withdraw in such a way as to wave a red flag regarding the client’s fraud is an issue that does not arise under the *Model Code*. In the *Discussion Draft of the Model Rules* (1980), the proposed *Model Rule* 1.6 would have permitted the lawyer to reveal information to rectify the consequences of a client’s fraud when the lawyer’s services were used to further the fraud. The provision, however, was defeated by the ABA House of Delegates in a substantial vote of 207–129. As a result, the lawyer’s responsibility to reveal client fraud under the *Model Rules* is governed solely by MR 1.6(a), which says flatly that the lawyer “shall not reveal information relating to the representation of a client . . . .” Nevertheless, to prevent fraud, the people who controlled the ABA proceedings used an admittedly disingenuous means to change the rule. The result, in Hazard’s words, is that “some fools may not understand that Rule 1.6 does not mean what it seems to mean.”<sup>37</sup>

As Hazard has acknowledged, the ABA debate on divulgence of client fraud on third parties was “both exhaustive and indicative of House sentiment” in favor of confidentiality and against revealing the fraud.<sup>38</sup> The House of Delegates did not, however, address at that time the comments to the rules it adopted. The comments were left to a subsequent meeting, when they were adopted without the same close attention and thorough debate. As a result, Hazard and a small group of ABA members were able to create an exception that they “buried disingenuously” in a “brief and cryptic” comment to MR 1.6.<sup>39</sup> Hazard has since suggested that the exception could be “broader than any ever proposed by the Kutak Commission”<sup>40</sup> and could result in “far *more*” disclosure of clients’ confidences.<sup>41</sup>

This “hidden” exception,<sup>42</sup> which threatens to vitiate the rule that had been adopted by a strong majority of the House of Delegates, was appended to MR 1.6 by the addition of a comment headed “Withdrawal.” The new comment to MR 1.6 provides that “[i]f the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw . . . .” Then, after withdrawing, the lawyer may “giv[e] notice of the fact of withdrawal, and . . . may also withdraw or disaffirm any opinion, document, affirmation, or the like.”

36. Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 27 (New Haven, 1978).

37. Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 *Emory L.J.* 271, 306 (1984).

38. *Id.* at 302.

39. Hazard & Hodes, *supra* note 31, at 106, 108.

40. *Id.*

41. *Id.* at 109 [emphasis in original]. See also Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 *Ore. L. Rev.* 455, 481 (1984): “In some respects the decision to file a noisy notice of withdrawal may hurt clients more than open disclosure.”

42. Hazard & Hodes, *supra* note 31, at 108.



As Ronald Rotunda has said, the *rule* forbids the lawyer to blow the whistle on client fraud, but the *comment* allows the lawyer to wave a red flag.<sup>43</sup> Using our real-estate hypothetical, Hazard has explained the effect of the comment:

Thus, for example, the "withdrawal" Comment would allow a lawyer who has closed a real estate deal, and who then finds that the deal was fraudulent, to terminate his representation and to notify the other party that the deed he prepared is "withdrawn." Similarly, he may "withdraw" an SEC filing, or a document that has come into the hands of successor counsel. In each case, the third party can consider what the withdrawal might mean and act accordingly.<sup>44</sup>

There are, however, a number of problems with this conclusion.

One problem is that the "fools" among us might turn on those who tried to dupe us; we may read the rule to mean exactly what it "seems to mean." In doing so, we would be supported by the rule of construction that the *Model Rules* provides: the comments are merely "guides," while the text of the rule is "authoritative."<sup>45</sup> Particularly in the light of the admittedly disingenuous way in which the comment was added to change the meaning of the text, we would be more than justified in following the clear meaning of MR 1.6 itself.

Another problem is revealed in the last sentence of Hazard's explanation. "*In each case,*" he says, "the third party *can consider what the withdrawal might mean, and act accordingly.*" The difficulty is that lawyers withdraw from cases for a variety of reasons,<sup>46</sup> including ill health, inability to work with co-counsel, or the client's inability to continue paying the lawyer's fees. Withdrawal could present serious, unintended consequences because third parties may assume the worst about what the action means. As Hazard has acknowledged, withdrawal could become "a euphemism for client fraud," with the result that "lawyers and clients alike may suffer embarrassment in terminating a relationship for perfectly innocent reasons."<sup>47</sup>

Yet another problem with the example that Hazard uses to elucidate the comment to MR 1.6 is that the example goes significantly beyond the comment itself.<sup>48</sup> In the example, the lawyer "has closed" the real-estate transaction. The comment, however, refers only to a case in which the lawyer is required to withdraw because the lawyer's services "will be used" in materially "furthering" a course of criminal or fraudulent conduct. The comment cites MR 1.16(a)(1), which deals expressly with withdrawing to avoid a *future* violation of law or disciplinary rules, but makes no reference to MR 1.16(b)(2), which permits the lawyer to withdraw when the client "has used" the lawyer's services to perpetrate a crime or fraud. Thus, the comment does allow the lawyer to "withdraw or disaffirm any opinion,

43. Rotunda, *supra* note 41.

44. Hazard & Hodes, *supra* note 31, at 108.

45. Model Rules of Professional Conduct Scope (1983).

46. See, e.g., DR 2-110, MR 1.16.

47. Hazard & Hodes, *supra* note 31, at 109 (Supp. 1986). Nor would it be an adequate solution to have lawyers explain to all relevant third parties their true reasons for withdrawing in all cases. For example, the fact of the lawyer's illness—or the nature of the illness—might be something the lawyer would want to remain private.

48. In the light of history, one has to wonder whether this is a further instance of disingenuous rewriting of MR 1.6.

document, affirmation, or the like.” That act can take place, however, only when the lawyer’s withdrawal from the representation has been required *to avoid furthering a crime or fraud that has not yet been completed*. In our real-estate case, of course, the fraud has already been completed, and the lawyer, therefore, can no longer withdraw or disaffirm the deed.

When limited in that way, the exception in the comment makes sense. It would permit the lawyer to withdraw a document in which the lawyer has unwittingly been used by the client to further a crime or fraud, but only when the lawyer’s document is still capable of inducing material reliance by the third party. That is, the lawyer would not be permitted to call back a document to expose a fraud that has been completed, but the lawyer would be permitted to call back her own words when those words are false and are still capable of causing future harm. As I said, such a rule would make sense.<sup>49</sup> It is not the rule, however, that the House of Delegates adopted in MR 1.6.

### Conclusion

William Simon’s admission that he does not want lawyers to be bound by a strict rule of confidentiality because the rule would deprive the lawyer of “the leverage of threatened disclosure” betrays a readiness to use coercion in a way that seems to me to be the antithesis of moral discourse. In the case of the comment to MR 1.6, Hazard has explained that his purpose was to improve on a decision that the ABA House of Delegates had made after the most thorough debate and deliberation. In Hazard’s view, the House of Delegates made an egregious mistake, which would result in more client fraud.<sup>50</sup> He therefore felt justified in taking admittedly disingenuous action to change that result.<sup>51</sup> Ironically, in both cases teachers of ethics appear willing to achieve ethical ends by means that are less than ethical.

49. The rule assumes a situation in which the client has rejected a relationship of trust and confidence and has betrayed the lawyer into unwittingly furthering a crime or fraud. Compare American Lawyer’s Code of Conduct Rule 6.5 (Reporter’s Draft 1980):

In any matter other than criminal litigation, a lawyer may withdraw from representing a client if the lawyer comes to know that the client has knowingly induced the lawyer to take the case or to take action on behalf of the client on the basis of a material misrepresentation about the facts of the case, and if withdrawal can be accomplished without express divulgence of the client’s confidences. The lawyer may also retract or disaffirm any opinion or statement of fact made by the lawyer as a result of the client’s misrepresentation, if the lawyer reasonably believes that the opinion or statement is likely to be relied upon by others to their detriment.

50. The premise is questionable. See Freedman, *supra* note 7, at 87–88, 97–98.

51. Hazard seems to have attempted a similar kind of revisionism with MR 3.3(a)(3). See *id.* at 106–107.

## Editorial Note

Geoffrey C. Hazard, Jr., was invited to respond to Monroe H. Freedman's article. He declined, stating:

Regarding the testimony I gave in the criminal case, I consider it inconsistent with the duties of loyalty and confidentiality I assumed in the trial in question to comment on the testimony I gave. The problem of candor in drafting Model Rule 1.6 already existed when the ad hoc committee, which I assisted, came into being. The committee did the best it could under the circumstances. I think the formulation in Rule 6.5 of the American Lawyer's Code of Conduct is superior to the final ABA product, but that is another story.