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Bramblebush Revisited

Don Burnett

Few law students complete their first year of study without reading Karl Llewellyn's monograph characterizing the law as a "bramblebush". Ironically, lawyers in practice find that one of the most impenetrable thickets is not the law governing clients' affairs, but the rules regulating the lawyers' own conduct.

For example, the Idaho Code of Professional Responsibility says that a lawyer who "receives information" clearly establishing that a client, during the course of the lawyer's representation, has committed a fraud, must reveal the fraud to the affected person or tribunal if the client refuses to rectify it. DR 2-702(B) (1). However, the Code also says that a lawyer may not disclose the "confidences or secrets" of a client, without the client's informed consent. DR 4-101(B) (1). The enumerated exceptions to this rule make no mention of fraud, and authorize the lawyer to disclose, without a client's consent "when permitted by the Disciplinary Rules," only "secrets" (defined as information gained in the course of legal representation, which is not protected by attorney-client privilege). DR 4-101 (C) (2).

Now, what if a lawyer concludes from a "confidence" (information received from the client within the attorney-client privilege) that a fraud has occurred? Should he reveal it under DR 2-702 or conceal it under DR 4-101? And what rule, if any, applies where the fraud is not complete, but is ongoing?

More generally, an underlying thrust of the Code of Professional Responsibility is that the lawyer must be loyal to the client. But the Code also contemplates that the lawyer must be candid with a tribunal. In the event of conflict, where does one duty end and the other begin? Is there (or should there be) a broader duty of candor to other lawyers or to non-clients? These questions go to the heart of the public's perception of lawyers and the legal system. But the Code is silent.

These examples, both specific and general, illustrate two fundamental difficulties with the present Code. First, the ethical duties of lawyers are expressed in aspirational terms, without clear direction on how to proceed when duties come into conflict. Second, the Code, which is largely based upon the American Bar Association model of 1969, fails to articulate--even in an aspirational way--all of the duties emerging from post-Watergate public opinion and recent court decisions.

In 1977, the ABA, recognizing the deficiencies in its model code, established a Commission on Evaluation of Professional Standards ("Kutak Commission"). The Commission was charged with "undertaking a comprehensive rethinking of the ethical premises and problems of the profession of law." The Commission has now produced the final draft of its Model Rules of Professional Conduct. The Rules will be considered by the ABA House of Delegates in February and August, 1982. If the Rules are approved by the ABA, it will be up to the states to decide whether to adopt them.

The Commissioners of the Idaho State Bar believe that, regardless of whether the ABA approves the final work of the Kutak Commission, the time has come for serious re-examination of the Code of Professional Responsibility in our state. A special committee, consisting of lawyers, judges and citizen members has been created. The committee will examine the final Kutak draft as well as standards proposed by the Association of Trial Lawyers of America, the National Organization of Bar Counsel, and other responsible professional organizations. The committee will solicit input from the bar and the public in Idaho. The committee's findings and recommendations will be transmitted to the Commissioners. If new standards of professional conduct are proposed, they will be submitted to the bar membership through the resolution process.

The Idaho State Bar is undertaking this effort because no profession has such a profound impact upon society, or is subject to more conflicting demands, than is the practice of law. The lawyer is expected to be an officer of the legal system, an advocate for clients, and a public citizen responsible for improvement in the administration of justice--all at the same time. The standards of our profession necessarily embrace each function. Hence, the bramblebush. But the arduous and potentially controversial nature of the task cannot deter us from taking a fresh look at our standards. It is time to revisit the bramblebush in Idaho.