Department of Justice

REMARKS OF

BENJAMIN R. CIVILETTI

ATTORNEY GENERAL OF THE UNITED STATES

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Abraham Lincoln made the greatest speech ever made by an American: the Gettysburg address. Even it was totally wrong in one respect. He said: "The world will little note nor long remember what we say here." Unlike President Lincoln, I can say that same phrase with assurance of its truth. More than that, not one of you will remember much of what I am about to say for so long as one week. I am sure that does not disturb you graduating students. I hope that it does not disturb those of your parents who are here and who have given you so much of their devotion, their encouragement, and their financial support.

I am going to speak to you about ethics and responsibility in the law -- the differences between a lawyer and a legal technician. Since I understand many of you have completed a course in this subject, none of the concepts with which I shall deal will be unfamiliar to you.

In recent years, the three principal areas of debate concerning the rules of ethics for lawyers have been: advertising and solicitation, conflicts of interest, and the duties of confidentiality when a client reveals a wrongful or illegal act to his or her lawyer.

At last we seem to have resolved the debate on advertising and solicitation by changing the rules to permit almost all kinds of lawyer advertising except that which is false, misleading, or whose claims are not capable of proof. As for solicitation,

many jurisdictions have already liberalized, or are actively considering liberalization of, their rules to permit solicitation by a lawyer of a client when undertaken in situations that do not involve coercion or harassment. Both changes are in the public interest. They may increase price and quality competition among lawyers and certainly will increase the public's knowledge of the variety and cost of legal services.

Much progress remains to be made, however, in adopting sound rules concerning the other two major problems of professional responsibility. It is these two which I propose to discuss today.

I

Let me turn first to the subject of conflicts of interest. It has long been settled law that a lawyer may not use information gained while working for one client to the disadvantage of a subsequent client. The bar and the courts have developed specialized rules to apply this broad principle to the lawyer who leaves the government employ to enter or return to private practice. The codes in effect in most jurisdictions provide as follows: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

While arguments still remain as to just what the words "matter" and "substantial responsibility" mean, the broad principle of this rule commands widespread support from the bar and the public. However, some judges -- notably the U.S. Court of Appeals for the Second Circuit -- go further in interpreting these codes so as to prevent all lawyers in a firm from accepting

employment in a matter on which a former government lawyer in the firm is disqualified. Moreover, the American Bar Association, in its new proposed Model Rules now being debated, endorses this sweeping disqualification of an entire law firm.

The Department of Justice and other government agencies vigorously oppose this position. We are convinced that the effect will be to make it much more difficult to attract able lawyers to work in the government. Under this rule, a government lawyer seeking to enter, either for the first time or, if older, to re-enter, private practice, becomes in effect a pariah to firms who might employ him. These firms fear that employment of the former government attorney will have the effect of requiring the firm to decline a substantial amount of legal business because of the prior government lawyer's connection with it. The result is bound to be to discourage lawyers from accepting employment in the federal government.

Each year, the federal agencies hire substantial numbers of recent law school graduates like you. Perhaps a majority of these lawyers are uncertain at the outset whether they will make a career of government service, and the agencies fully expect that many will enter private practice or other pursuits after a period of several years. Other attorneys accept supervisory positions or political appointments in the government at a later stage in their careers. It is essential for the President and the agency heads to have the ability to appoint experienced attorneys of their choosing to these positions of responsibility;

it is likewise essential that federal agencies continue to attract capable, young attorneys.

This movement into and out of government is not accidental. It is the result of a deliberate policy choice by the Congress and responsible Executive Branch officials -- a policy choice reflected and affirmed in the determinations made by the Congress and the Executive Branch regarding the conflict of interest and ethical restrictions that should be imposed on persons who enter and leave government employment. Arriving at the appropriate ethical restrictions has required a careful balancing of the need to protect the integrity of government processes and the competing need to preserve the government's ability to attract and utilize the services of highly qualified lawyers.

One of the current depredatory buzz words in the American language is "revolving door." There is a considerable body of opinion to the effect that it is wrong for a person of stature and achievement in private life to enter government service, remain several years, and then return to his private career. I disagree with this point of view.

We are not a nation, like England, which has chosen to develop a permanent civil service for all but the very top positions in government. Instead, we have chosen to have a system under which every so often the management of government departments changes. I refer here not only to cabinet officers, but to their deputies, and to the assistant cabinet officers and to their

deputies as well. In effect, we have chosen a system of talented amateurs rather than permanent civil servants for the top positions. Such a system tends to prevent intellectual stagnation and brings a fresh point of view to the job. By regularly replacing high government officials with persons having had recent experience in the academic, business, legal, and scientific communities, we hope to avoid bureaucratic inflexibility. Changes at and near the top permit us to bring to government a greater awareness and sensitivity to the perceived needs, opinions and attitudes of those who are subject to the government's action. It is an inefficient system but there are values and benefits greater than efficiency.

The impact of the proposed Model Rules, unless amended, on supervisory attorneys, will be particularly great. Senior attorneys supervise literally hundreds of cases, and exercise substantial control over each of them. Under the proposed Model Rules, senior agency attorneys would be barred from joining with any law firms which have an active practice in his or her field of specialization. The result is just as troubling for United States Attorneys. In some cities, every major law firm may have at least one case pending against the government. Under these circumstances, local firms might be very reluctant to hire former United States Attorneys or their chief assistants.

We shall suggest to the ABA that it modify its proposed Model Rules by adopting a procedure which would screen the

disqualified former government attorney from any contact with the case which his firm is handling. I am pleased that the local Court of Appeals for the District of Columbia is currently considering a change in its Code of Professional Conduct along the same lines as the proposal we intend to make to the ABA. More specifically, under our proposal, a law firm would be required to file an affidavit guaranteeing that the firm has implemented procedures to screen the personally disqualified attorney from participating in any way in the subject matter of his personal disqualification or sharing in the remuneration generated by that subject matter.

I trust that many of you are going to seek, or have already found, legal positions in government agencies. I am confident that some of you will find rewarding lifetime careers in government. We welcome you and it is important that your career at the bar not be penalized by performance of public service.

II

The remaining issue of professional responsibility presents far more difficult problems than the conflict of interest question. It is more difficult because it presents a head-on collision between the duty of loyalty that a lawyer owes to his client with the corresponding duty the lawyer owes, as an officer of the court, to see that our system of justice is honestly administered. It presents the basic question of whether

a society is better served by a strong rule of attorney-client confidentiality than by attorney disclosure of clients' wrongs committed during the course of the representation. This problem has perplexed lawyers as long as there have been codes of ethics.

The existing codes vary from state to state. Almost all of the states' rules provide that when a lawyer discovers that his client has committed a fraud on a person or a tribunal he shall first call upon his client to rectify the fraud. Almost all states and all reasonable lawyers I know agree that that much the lawyer must do. There is widespread disagreement in the codes themselves as to what the lawyer shall do if the client refuses or is unable to rectify the fraud.

These codes, while significantly modified in the early 1970's, were based on earlier codes adopted before the enormous growth in power and influence of the widely owned public corporation. The day is past when we can analyze the affairs of billion-dollar corporations owned by tens of thousands of people in terms of the affairs of a corporation owned by one close-knit family.

When a lawyer represents a corporation, although it is the corporate entity which is the client, the lawyer usually acts as if the officers were his clients. The distinction between the officers and the corporation rarely presented any difficulty when the client was a closely held family corporation

because there was no distinction between management and ownership. The distinction, however, became crucial with the rise of the modern corporation, whose capital stock is widely owned by members of the public. The lawyer representing a large modern corporation owned by the public has a higher duty than that of subservience to the officers or even the directors when someone in power in a corporation proposes to or has committed a wrongful act on behalf of the corporation.

We have come a long way from the happy little picture of a lawyer and client, working together on an intimate and candid basis, withholding nothing from each other. Yet it was in the days when the lawyer's relation to his client (there were no hers) was that simple that the rules of professional responsibility with which we are concerned today were developed. And I think a strong case can be made for the proposition that those rules simply don't fit the modern relationships between large publicly owned corporations and their lawyers.

Lawyers in the large corporate law firms argue that, if lawyers have to report their corporate clients' frauds, their clients will cease to consult with their lawyers candidly, and this will destroy the ability of lawyers properly to represent their corporate clients. I think those lawyers could make a stronger, though more self-serving, argument as follows: if we, who are honest lawyers and who obey the law, have to blow the

whistle on some of our clients, these clients will switch to lawyers who are not so honest and who will not blow the whistle, with obvious adverse consequences to the very objective you are seeking. There may be practical force to this argument, but it is hardly a basis for establishing ethical standards.

The Securities and Exchange Commission has been urging the bar to adopt a new approach to the responsibility of lawyers retained by corporations whom the lawyer learns have committed a wrongful or unlawful act during the course of the representation. The new proposed Model Rules of the American Bar Association, to which I have already referred, also propose important and radical changes from the existing code in the area which we are now considering. Provisions in the recently proposed Model Rules authorize, but do not compel, a lawyer to disclose information, whether or not secret, about a client -- whether a corporation or an individual client -- to the extent "necessary to prevent or rectify the consequences of a deliberately wrongful act by the client," provided, of course, the wrongful act occurred during the course of the lawyer's employment (Rule 1.7). Another proposed rule provides that a lawyer for a corporation who "knows" that an officer of the corporation has violated or intends to violate the law in a way which "is likely to result in significant harm" to the corporation, "shall use reasonable efforts to prevent the harm." This proposed rule further provides

that if the lawyer is unable to rectify or prevent a clear violation of law "likely to result in substantial injury to the organization, the lawyer may take further remedial action, including disclosure of client confidences to the extent necessary." (Rule 1.13).

These proposed rules constitute a substantial step toward resolving the conflict inherent in the Rules of Professional Responsibility between a lawyer's loyalty to his client and his obligation to support our system of justice. Some change in the requirement that lawyers maintain silence when, during the course of representation, officers in the corporation they serve violate a law, is long overdue. Is it enough to say that a lawyer in these circumstances may blow the whistle? Should he be compelled to do so where the wrongful act is clear and all other efforts to rectify it have failed?

If the bar and the courts resolve this issue by permitting, but not compelling, the lawyer to blow the whistle, each of you will have to resolve this question for yourself. I believe that you should resolve it in a fashion not prescribed in the proposed Model Rules. Let me explain. If you are unable to convince your corporate client's officers to refrain from engaging in clearly wrongful acts, you are free to resign your employment if you are in-house, or to withdraw from the representation if you are in private practice. You must of course be absolutely

sure, first, that the conduct of which you complain is clearly wrongful or illegal and second, you must endeavor by every other reasonable avenue to persuade your client to refrain from the wrongful act or, if it has already been committed, to rectify it. At that point, it seems to me, if all else has failed, you must not continue to represent the client. You will of course have to discuss this most carefully with the partners. But when the chips are down, if you are convinced that you are right, you must act either by withdrawing or by blowing the whistle. This is another way of giving you the advice that Shakespeare had Polonius give his son: "Above all else, to thine own self be true."

If you choose to go along with the officers of a corporation when they commit clearly wrongful acts during the course of your representation, it seems to me you are converting your role as a member of a learned and honored profession, as Chief Justice Stone put it, to that of an "obsequious servant of business." (48 Harvard L. Rev. 1, 7 (1934)).