

11-1-1980

The Role of Lawyers: Beyond Advocacy

William Rich

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law and Society Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

William Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 BYU L. Rev. 767 (1980).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1980/iss4/3>

This Symposium Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Role of Lawyers: Beyond Advocacy

William Rich*

I. INTRODUCTION

Canon 7 of the Code of Professional Responsibility commands that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."¹ This fundamental duty protects both the client as an individual and the legal system as a whole. The only bounds of representation are those established by law. In the course of proper client advocacy, "any lawful objective" should be pursued through every "legally permissible means."² Popular perceptions, professional training, and traditional theories of practice all focus on the extreme role of the lawyer as advocate in the adversary system.

Even superficial consideration, however, confirms that the lawyer's role frequently extends beyond that of advocacy. The Code of Professional Responsibility specifically recognizes the lawyer's role both as an advisor and as an advocate.³ It is appropriate and at times essential that the lawyer as adviser forecast the impact of a client's alternative future conduct on other individuals and the public at large. Furthermore, lawyers frequently recognize the need to act as intermediaries between clients and opposing parties when their clients' best interests are served as a result. The proposed Model Rules of Professional Conduct specifically develop that role.⁴

The principal thrust of this article is to suggest that both lawyers and laymen need to understand the potential of non-adversarial dispute resolution. Litigation is often unnecessary and potentially destructive. Lawyers should be trained to recognize such situations and should be prepared to abandon their role as advocates; an advisory role can promote the long-range

* B.A., 1970, Oberlin College; J.D., 1975, University of California, Berkeley, (Boalt Hall); Staff Counsel at Legal Aid Society, Wichita, Kansas, 1975-77; Associate Professor, Washburn University School of Law.

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY canon 7 (1978).

2. *Id.* at EC No. 7-1.

3. *Id.* at EC No. 7-3. See also Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 578-79 (1961).

4. See ABA MODEL RULES OF PROFESSIONAL CONDUCT 94-98 (1980).

interests of both the parties and society.

II. BACKGROUND

The specific ideas presented here have evolved over a period of several years. In law school, when first confronted with basic advocacy concepts, it was natural for me to ask questions about the lawyer's responsibility when the system breaks down. For instance, what should a lawyer do when one side is inadequately represented, particularly if the skill and resources of counsel rather than the merits of the case determine the outcome? Such questions were virtually ignored. The focus of law school training traditionally has been the development of requisite skills so that in cases of inadequate representation, the better trained attorneys will prevail.

New, nagging doubts about the adequacy of the adversary system emerged when I entered practice. In some cases parties were driven apart and became increasingly hostile towards each other in reaction to the demands of opposing counsel. In other cases the adversary model was incomplete; lawyers frequently engaged in direct dispute resolution, particularly when either the opposing party was unrepresented or when both parties from the outset simply wanted help in resolving their differences. Of course, the admonition against multiple party representation created a natural barrier to direct, evenhanded dispute resolution. It also created general discomfiture for me as a practitioner.

In teaching law I found the pure advocacy-adversary model particularly seductive. The very act of pushing extreme positions and forcing students to do likewise forms the basis of the instruction to "think like lawyers." New questions were piqued, however, through my participation in two seminars: "Humanistic Education in Law,"⁵ and "Law, Society and the Moral Order."⁶ In the second seminar I turned careful attention to the role of the lawyer in dispute resolution. This seminar provided a broad context for my study of this topic. The gap between legal and social norms was viewed in the context of the evolution of

5. The program was sponsored by the Project for the Study and Application of Humanistic Education in Law, directed by Jack Himmelstein of Columbia University School of Law.

6. The seminar was sponsored by the National Endowment for the Humanities, led by Professor Richard D. Schwartz of Syracuse University. It was part of the 1979 Summer Humanities Seminar for Law Teachers.

societies. The multiplication of social control specialists, who tend to develop a subculture with legal norms for administrative convenience, was discussed. Finally, the inherent problems of a pluralistic society, with the inevitable conflict between uniform legal norms and diverging normative views within the society, was examined.

The theoretical background I have described led in turn to the secondary questions that are of particular relevance to this article. If a gap exists between legal and societal norms, how can that gap be bridged in individual cases? If a source of the problem is the specialization of lawyers, how can their role be changed to promote flexibility rather than the enforcement of expedient external norms? And given the realities of pluralism, how can the lawyer's role be adapted to lessen the clash between individual values and uniform legal norms?

This article focuses on the benefits that may accrue by deviating from the traditional adversarial model. First, the proposal of direct private dispute resolution in the context of available social-scientific evidence is examined. Next the principal anticipated criticisms of such a proposal are addressed. Finally, the proposal is reviewed in relation to major shortcomings of the current legal system.

III. DIRECT DISPUTE RESOLUTION IN LIGHT OF SOCIAL-SCIENTIFIC EVIDENCE

A. *Proposals for Direct Dispute Resolution*

Lawyers should, on occasion, forego their role as advocates and expand their role in direct private dispute resolution. Although this proposal presents a radical departure from the theory of the traditional adversary model, in practice much of what is described is commonplace. From such a perspective the proposal is partly polemic—a mere change in titles, or at most a moderate change in emphasis on themes well grounded in the traditional role of the American lawyer.

Both mediation and formal arbitration are accepted terms of legal parlance. This proposal draws heavily from both. Unlike mediation, however, the lawyer at the request of the parties might assume an arbitral role to resolve an impasse. At the same time, the full trappings of formal arbitration would not be consistently necessary. Although the concepts of mediation and arbitration are separate and distinct, I suggest that a single lawyer

can bring both concepts to bear in the context of resolving an individual dispute and can thereby replace traditional representation. Both mediation and arbitration have become highly formalized, and in the process their application has become unduly limited. Greater emphasis and more flexibility could lead to the expanded application of these two concepts.

Two examples will illustrate this reorientation towards direct dispute resolution.

1. *Domestic relations*

Few areas of the law strain the limits of the judicial system more than domestic relations. Both lawyers and judges agree that courts are ill-equipped to resolve the social and psychological problems that typically arise in divorce and custody disputes.⁷ Accordingly, there has been substantial discussion of alternative dispute resolution processes varying from "summary dissolution" divorce laws⁸ to formal arbitration.⁹ Coogler has proposed structured mediation in divorce settlement.¹⁰ Spencer and Zammit have proposed "mediation-arbitration" for private resolution of disputes between divorced or separated parents.¹¹ Mnookin and Kornhauser have described the advantages of the "private ordering" of domestic disputes.¹²

Most lawyers involved with divorce proceedings have had experience with the couple who, having agreed upon a divorce, jointly request that the lawyer "do it for *them*." The traditional, recommended response of the lawyer is to stress the adversary nature of the contemplated proceedings and the restriction that the lawyer can represent only a single party.¹³ Frequently, ways will be found to realize the couple's request without forcing the involvement of a second lawyer or doing violence to their prior

7. See generally Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226 (1975); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 990-96 (1979).

8. See CAL. CIV. CODE §§ 4550-4556 (West Supp. 12A 1980).

9. See Spencer & Zammit, *Reflections on Arbitration under the Family Dispute Services*, 32 ARB. J. 111 (1977).

10. O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978).

11. Spencer & Zammit, *supra* note 7, at 930-38.

12. Mnookin & Kornhauser, *supra* note 7, at 952-58.

13. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY canon 5 (1978) and the associated ethical considerations and disciplinary rules.

agreement. Such arrangements, however, are the exception rather than the rule.

As an alternative approach, lawyers should be encouraged to meet jointly with parties who agree that neither would actually be "represented" in the divorce process.¹⁴ The lawyer would explain the issues that must be resolved in the divorce process, discuss operable legal principles that are likely to be relied upon by a court, and assist the parties in reaching an agreement regarding those issues. If agreement is reached, the lawyer would then draft a petition, an answer, and a proposed journal entry, all to be presented by the parties to the court.¹⁵

2. *Partnership disputes*

A second example should further demystify this proposal. The lawyer's role in drafting contracts, partnership agreements, or articles of incorporation is well accepted.¹⁶ In such cases the lawyer who acts as more than a separate advocate is directly resolving disputes. That lawyer should recognize this and explain to the parties the potential conflicts of interest present.¹⁷ With proper attention paid to potential conflicts, the lawyer's role could expand to direct resolution of disputes among partners or small businesses without assuming an advocacy posture.¹⁸

14. Note that the newly proposed Model Rules, note 4 *supra*, do contemplate "representation" of clients as an intermediary. This article, in contrast, does not contemplate separate representation. During the formative stages of an agreement, "representation" need not occur. Upon reaching agreement, however, the agreement itself provides at least a theoretical basis for representation without conflict. In any circumstance, it should be clear that disclosure, not hairsplitting definitions of representation, forms the basis for ethical behavior in this context.

15. I would further propose that the attorney be allowed to appear with the parties, not as their "representative" but as someone to provide explanation and to facilitate court review and adoption of the proposed decree. This proposed scenario could be modified without doing violence to the basic role of the private lawyer in bringing parties to a divorce together for a resolution, rather than driving them apart. For a more elaborate proposal, see Spencer & Zammit, *supra* note 7, at 930-38.

16. Note that the central representative role of the attorney in such a situation is normally to the entity. See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC No. 5-18 (1978). It is important to observe, however, that in the context of such representation other parties affected by the contract or agreement are normally not separately represented and in effect rely upon the attorney to fairly protect all interests affected by the representative action.

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC No. 5-16 (1978).

18. Note that large commercial interests regularly engage in an analogous process through formal arbitration, the costs of which are often prohibitive at the small business level. See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 125-26 (1976).

A dispute resolution role for lawyers has been recognized by a Supreme Court Justice. In 1916 Justice Brandeis described essentially the same professional role as that of "lawyer for the situation."¹⁹ The concept was developed in response to an attack at his Senate confirmation that he had upon occasion unethically represented multiple clients with conflicts of interest. Brandeis defended the complex mediative roles he had played as both common and proper.²⁰ Eventually the charges against him were dropped amid concessions from other reputable lawyers that they had often acted in the same manner.²¹

More recently, Roland Paul has advocated a new role for lawyers in contract disputes.²² Paul forecasts economy in both time and expense by eliminating the "tug of war" between counsel. The middle-counsel or counsel for the transaction would be assigned to prepare and recommend an agreement believed to be "fair and in the interest of both parties."²³ Paul illustrates the advantages of the proposal as well as its compliance with ethical constraints.

The divorce and contract examples described are not meant to suggest the limits of the concept. Roughly analogous legal roles have been described in such diverse contexts as landlord-tenant disputes²⁴ and criminal complaints.²⁵ The theme throughout is dispute resolution with minimal state involvement and without imposition of external norms inconsistent with the individual values and relationships involved.

B. Social-Scientific Evidence

The social need for nonadjudicative dispute resolution has been identified by numerous researchers. Anthropologists have provided insight as to the breadth of alternative dispute resolution processes²⁶ and the particular importance of mediative as

19. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 58 (1978).

20. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

21. G. Hazard, *supra* note 19, at 61.

22. Paul, *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A. J. 93 (1976).

23. *Id.*

24. Comment, *Arbitration of Landlord-Tenant Disputes*, 27 AM. U.L. REV. 407, 418-32 (1978).

25. Snyder, *Crime and Community Mediation—the Boston Experience: A Preliminary Report on the Dorchester Urban Court Program*, 1978 WIS. L. REV. 737.

26. See, e.g., K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941); Nader, *Up the Anthropologist—Perspectives Gained from Studying Up*, in *REINVENTING ANTHROPOLOGY* (D. Hymes ed. 1972).

well as adjudicative roles.²⁷

In his analysis of dispute resolution in America, Felstiner identifies the complementary nature of adjudication, mediation, and avoidance.²⁸ Costs and limitations are associated with all of the alternatives. Mediation is viewed as having limited applicability in a technologically complex, rich society because of a lack of mediators who have shared cultural and social experiences with the disputants. Avoidance is the primary mechanism that Felstiner identifies as replacing inadequate dispute resolution. But even as described by Felstiner, avoidance is not a palliative for dispute resolution. Avoidance implies a lack of answers to the dispute and frequently disrupts relationships. In a complex society avoidance exacts substantial social and psychological costs.²⁹ This simply underscores the need for improved dispute resolution.

Danzig and Lowi reply to Professor Felstiner by stressing both the costs of avoidance and the unmet demand for mediation.³⁰ They posit the need to complement the courts by "the creation of fora where the process of mediation may flourish."³¹ Danzig and Lowi advocate alternative mediative models—"community moots."³² In doing so, however, they recognize the traditional lawyer's mediative role. Their description of both the demand for and the benefits of such an alternative clearly complements the need for renewed emphasis of this role.³³

Felstiner's analysis of the anticipated social, psychological, and economic costs of alternative dispute resolution provides a basis for identification of those cases most susceptible to private dispute resolution. Cases in which the cost and delays of adjudication are high and the cost of avoidance is also high should be best suited for such an alternative. More specifically, long term relationships with deep social and psychological roots, such as

27. See generally Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

28. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & Soc'y REV. 63, 69-76 (1974).

29. A discussion of these "costs" appears in Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 L. & Soc'y REV. 695 (1975).

30. Danzig & Lowi, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 L. & Soc'y REV. 675 (1975).

31. *Id.* at 675.

32. *Id.* at 685.

33. The "community moot" idea is particularly aimed at resolving neighborhood disputes through a broader call for increased mediative channels for dispute resolution.

the divorce or partnership relationships previously described, are most apt for such treatment.³⁴

Along with the identification of cases best suited for such a process, it is also important to acknowledge the type of cases for which assistance in dispute resolution without representation is particularly *inappropriate*. Any case in which either party is unable or unwilling to voluntarily and unequivocally agree to the informal settlement arrived at through such a process should be rejected. Cases in which the parties do not know each other and are unlikely to have substantial future contact are less likely to result in voluntary private dispute resolution unless both have particular trust and confidence in the lawyer involved. Cases in which the parties have significant mental problems, cases involving abuse, or cases with a long history of litigation are also unlikely to be amenable to settlement without representation.³⁵ In addition, cases in which parties appear to occupy significantly unequal bargaining positions may well require that each be represented in order to help equalize their relationship.³⁶

The vast majority of divorces and partnership disputes may be best settled by separate representation. In many cases separate representation is the only possible alternative. But in many other cases the parties are capable and even anxious to settle and to preserve a good working relationship. Rather than frustrate these interests and force parties apart, the legal profession should assist parties in coming together.

IV. ANTICIPATED CRITICISMS OF THE PROPOSAL

A. *Why Lawyers?*

One of the first questions asked when this proposal was initially drafted was: "Why should lawyers be the ones to under-

34. See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 119 (1976).

35. J. Pearson, *Process of Dispute Resolution: Mediation in Criminal, Civil, and Domestic Relations Cases* (June 7, 1980) (findings presented to the Law and Society Association, Research Committee on Sociology of Law, at Madison, Wisconsin).

36. See R. Cook, *Neighborhood Justice Centers: What Types of Disputes are Appropriate?* (June 7, 1980) (unpublished paper presented to the Law and Society Association, Research Committee on Sociology of Law, at Madison, Wisconsin). In the experience of the neighborhood justice center experimental programs, one general conclusion was that in unequal bargaining power situations, the more powerful party to a dispute was unlikely to cooperate with a voluntary mediative settlement. However, the obvious irony is that the legal system itself inadequately resolves disputes where inequality persists. See Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974).

take this non-advocacy role?" There are a number of straightforward answers to the question. First, lawyers are frequently performing such roles already, although generally without explicit acknowledgment. Secondly, the proposal does not necessarily imply that only lawyers should assume such roles; counselors, police, social workers, therapists, referees, ombudsmen, and the like can play substantial roles in direct dispute resolution. Finally, the "community moot," consumer complaint centers,³⁷ and other proposals of the same genre are essentially complementary rather than competitive concepts for improving the effectiveness and availability of dispute resolution.

Beyond these defensive responses, however, several specific reasons exist why lawyers are best suited to handle dispute resolution. Perhaps the most important is the need to recognize the future legal implications and legal objectives of any given settlement. Turning to the divorce situation as an example, proper anticipation of complex tax issues, of the problematic ambiguities of a visitation agreement, or of the need for education and medical expenses is best done by a lawyer. And the lawyer is best suited to draft the documents necessary to actually carry out such an agreement.

Lawyers have been criticized, often justly, for getting carried away with their advocacy role. The question that follows is whether they would effectively reorient themselves towards direct dispute resolution if they turned away from advocacy. In addition to being trained as adversaries, however, lawyers are also trained to resolve disputes. Only the poor lawyer mechanically applies legal principles and in so doing fails to recognize a client's underlying interests and emotions. The prospect of mediating such interests and of bringing parties together in the process is not without foundation in the traditional practice of law.

Those who strongly advocate *mediation* as an alternative to adjudication may question both the lack of structure in the dispute resolution proposal and the capability of lawyers to perform such tasks. Coogler, in his description of the "structured mediation" alternative, describes it in stark contrast to the lawyer's role.³⁸ At a recent conference a person involved with a me-

37. Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1003 (1979).

38. Coogler, *supra* note 10, at 4.

diation experiment described with a look of horror the lawyer who apparently blew a divorce settlement by exclaiming: "You mean you're going to accept *that*?"³⁹ But it is precisely for such reasons that I am proposing an alternative to traditional mediation. Parties to a dispute *should* have some understanding of the likely consequences of submitting their case to a court. The mediating lawyer would supply that understanding of consequences. The introduction of an element of mediation should not imply that the parties must totally abandon their knowledge of or contact with the standards and experiences of the general court system.

In reference to the anthropological perspective discussed earlier, one should acknowledge that lawyers do not have the same shared community experience of the village leader in a traditional society.⁴⁰ However, many law practices, particularly those in small towns and rural areas, are developed through strong community ties. The most dramatic shortcoming of the lawyer would arise in dealing across ethnic and socioeconomic lines. Even in that respect, a lawyer with an established divorce practice may gain substantial insight into the feelings and priorities of persons of different backgrounds within a specific community. Thus, to the extent that lawyers are willing to reorient themselves towards direct dispute resolution and to apply both their knowledge of the law and their experience with parties to disputes, they may in fact be the persons with the best potential for fulfilling the adjudicative and mediative roles fulfilled by the community leader in traditional society.

The proposal I am describing would draw heavily upon the legal expertise of the lawyer. It would also draw from the lawyer's sensitivity to individual and community values, which should already be an integral part of the practice of law. Rather than implying that lawyers are simply handy and that anyone could *really* perform the tasks described, this proposal implies that lawyers, who have substantial experience and expertise, should be the ones to undertake such a role. I do not mean to imply that lawyers are presently well-equipped for the intermediary role described. The process should not be oversimplified, and the need for further professional training should be recog-

39. J. Pearson, *supra* note 35.

40. See Felstiner, *supra* note 28, at 74-76. But see Danzig & Lowi, *supra* note 30, at 682-85.

nized. Both legal education and the lawyering process could benefit from careful attention to the skills and concepts needed for effective nonadversarial dispute resolution.

B. *Ethical Implications*

This article started with a reference to the lawyer's duty as an advocate. When added to the prohibition of multiple representation in canon 5 of the Code of Professional Responsibility, this duty creates a potential barrier that could prevent lawyers from fulfilling the proposed dispute resolution role.⁴¹ On closer analysis the role described may appear to be not only desirable but necessary if the ethical obligations of the lawyer are to be met. Ethics imply that the public be served honestly. From the most basic perspective, an educated public may both desire and be better served by a relationship that does not involve actual representation or advocacy.

Thomas Morgan addressed this question of values in his article, *The Evolving Concept of Professional Responsibility*.⁴² Morgan argued that the public interest in "seeing justice done" and the related interest in expeditious and low cost dispute resolution deserve highest priority in the formulation of ethical norms.⁴³ Thus, in some situations the public interest is best served by one lawyer acting as an intermediary.⁴⁴ His examples, drawn from contract and divorce disputes, posit less disruption and better service from a single lawyer engaged to resolve differences by eliminating the "combatant" role.⁴⁵

The American Bar Association's discussion draft of the Model Rules of Professional Conduct devotes an entire section to the definition of the lawyer's role as "Intermediary Between Clients."⁴⁶ The introduction to the section notes that "a lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis." It then describes that role with examples ranging from financial reorganizations to probate. Both the "substantial ad-

41. The central purpose of canon 5 of the ABA Code of Professional Responsibility (1978) is that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

42. 90 HARV. L. REV. 702 (1977).

43. *Id.* at 704.

44. *Id.* at 727.

45. *Id.*

46. Model Rules, *supra* note 4, at 94-98.

vantages" and the risks of such a role are described by the proposed rules.⁴⁷

Despite the lack of similar definition in the current Code of Professional Responsibility, the prohibition of representation of multiple parties with conflicts of interest should not be interpreted to preclude such an intermediary role. The concepts of arbitration and mediation enjoy firm historical support.⁴⁸ The idea that lawyers can provide neutral advice when consulted by disputants is also well established.⁴⁹ Furthermore, as a matter of practical reality, generations of lawyers have assumed intermediary roles when doing so was perceived to be in the best interest of the parties involved.

While acknowledging the need for disclosure, Justice Brandeis was resolute in arguing that it was "right" to act as "lawyer for the situation."⁵⁰ A lingering ethical cloud, however, has helped make lawyers reluctant to discuss such activities.⁵¹ While the fear of impropriety may have stimulated disclosure in some instances, it is more likely that the same fear has led others to

47. Rule 5.1 defines the "Conditions for Acting as an Intermediary."

(a) A lawyer may act as an intermediary between clients if:

- (1) the possibility of adjusting the clients' interests is strong; and
- (2) Each client will be able to make adequately informed decisions in the matter, and there is little likelihood that any of the clients will be significantly prejudiced if the contemplated adjustment of interests is unsuccessful; and
- (3) The lawyer can act impartially and without improper effect on other services the lawyer is performing for any of the clients; and
- (4) The lawyer fully explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation.

(b) While serving as intermediary a lawyer shall explain fully to each client the decisions to be made and the considerations relevant to making them, so that each client can make adequately informed decisions.

Model Rules, *supra* note 4, at 95. Rule 5.2 provides for withdrawal from the intermediary role.

48. See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC No. 5-20 (1978):

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or future relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

49. See *id.* at EC No. 7-3.

50. See Hazard, *supra* note 19, at 58.

51. "The role of lawyer for the situations may be too prone to abuse to be explicitly sanctioned." *Id.* at 67. He compares such a role to "a doctor's 'authority' to terminate the life of a hopeless patient: It can properly be undertaken only if it will not be questioned afterwards." *Id.*

cover up potential conflicts rather than risk either the loss of clients or censure from their colleagues. This ethical cloud should be recognized as illusory provided the lawyer is consistent and explicit in identifying the role assumed.⁵²

The role of the lawyer as mediator, arbitrator, and adviser is beyond reproach. The real problem is that neither lawyers nor the public have consistently perceived or promoted the potential intermediary role that builds upon these concepts. The valid and substantial ethical complaints in this area accompany actual *representation* of conflicting parties, particularly when the nature of the relationship is shrouded in secrecy.⁵³ The key, underlying reason for avoiding the potential conflicts of multiple parties is the perceived "duty" of the lawyer to avoid diluting "loyalty" to a client.⁵⁴ That basic concern is protected by a clearly adopted intermediary role which does not entail perceptions of independent loyalty and which contemplates withdrawal in the event that separate representation becomes necessary. The lawyers' ethical obligations are thus better protected through an *explicit* assumption of a dispute resolution role than through the more casual and less explicit techniques of "working around" conflicts that have been traditionally tolerated in the legal practice.

V. PRIVATE DISPUTE RESOLUTION AND PROBLEMS WITH THE LEGAL SYSTEM

My final topic examines the need for a reorientation of the lawyer's role in light of current fundamental complaints about the legal system. Three major areas of complaint often arise:

52. Assuming proper disclosure as required by canon 5 of the Code of Professional Responsibility, there are virtually *no* reported instances of disciplinary action based upon such activity. "Brandeis seems to have been the only first-class American lawyer whose professional ethics have been the subject of a formal investigation." Hazard, *supra* note 19, at 59.

53. Disciplinary Rule 5-105 of the ABA Code of Professional Responsibility (1978) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

54. Canon 6 of the ABA Canons of Professional Ethics (1936), the predecessor of the current ABA Code of Professional Responsibility (1978), specified that "a lawyer represents conflicting interests when, in behalf of one client it is his duty to contend for that which duty to another client requires him to oppose." Ethical consideration 5-14 of the current code precludes "acceptance or continuation of employment that will adversely affect his judgement on behalf of or dilute his loyalty to a client."

problems relating to access (cost and delay), problems stemming from adversary relationships, and problems arising because of the gap between individual and legal norms. Admittedly, these are not the sole or even the most fundamental problems with the system, and the suggested change in the lawyer's role is by no means a "solution" to the problems. Nevertheless, the relationships between these problems and the proposal are relationships that should be identified and explored when analyzing the potential merit of this or any other proposal for reform of the legal system. Since this identification of issues is provided without an empirical base, it should be viewed simply as a potential framework for future analysis.

A. *The Problem of Access*

The most basic bar to access of the courts has long been cost. The term "law" has dramatically different connotations as viewed by the rich vis-a-vis the poor. For the wealthy it connotes justice; for the poor it creates apprehension. Even though legal services attorneys and public defenders have taken on the challenge of remedying the traditional exclusion of the poor, the challenge is still far from being met. Furthermore, the high price of professional litigation has driven a large segment of the middle income population away from the courts.⁵⁵

It is impossible to prove that substantial reductions in cost would result from the proposal presented here.⁵⁶ However, even if additional costs were incurred because the proposal were implemented and failed, a key difference exists between this proposal and many of the already attempted, formal efforts at mediation and arbitration. This process is intended to operate simply and inexpensively, with only one lawyer and without actual "legal representation." Consequently, this proposal would arguably result in greater savings than proposals ordinarily associated with formal arbitration.⁵⁷ The simplicity of the proposal

55. The question of who can "afford" legal services is problematic given alternative demands against individual income and variations in the perceived value of legal representation. Thus, despite potentially "adequate" incomes, individuals may choose to avoid disputes rather than pay the cost. See generally Felstiner, *Influences of Social Organization on Dispute Resolution*, 9 L. & Soc'y Rev. 63 (1974).

56. Note, however, that Paul projects "an initial over-all savings of at least 35 to 40 percent." Paul, *supra* note 22, at 93. Paul predicts not only direct savings because of the elimination of a lawyer, but also indirect savings because of a simplified negotiation process.

57. Thus, traditional, formalized arbitration required that the litigants not only pay

would make it more acceptable to a broad range of potential litigants.

The other major access problem in the legal system is delay. Although the claim that "justice delayed is justice denied" is not as poignant as the claim that "justice goes to the highest bidder," it nevertheless has a ring of truth. Again, when this proposed settlement process breaks down and the parties are forced to seek separate counsel, even further delays would result. However, the option of working with a single lawyer at least offers the potential of cutting through delays.⁵⁸

B. Problems with the Adversary Relationship

Events in recent years have brought into question lawyers' basic morality. Lawyers represent both sides in a controversy regardless of whether one side is "good" or the other "bad." The theory, of course, is that the role of the judge or jury is to resolve the morality of the dispute. Meanwhile, the lawyer safeguards the integrity of the system through advocacy on behalf of a single party to the dispute.⁵⁹

A primary problem is not the morality of the system as conceived but rather the difficulties that arise when the system fails. Implicit in the basic assumptions of legal training is the underlying belief that the lawyer's competence and effectiveness *make a difference*. But what happens to our concept of justice if results really do hinge on the competence of the advocate and not on the merits of the case?⁶⁰ Of course, this question has been around as long as the adversary system itself. The standard response gives due deference to both the workability of the system

for the arbitrator (who performs the role of judge but is not publicly supported) but also pay for the extensive involvement of their own counsel.

58. See Paul, *supra* note 22, at 93-95, for a comparative analysis of the pace of negotiating a contract with a single lawyer acting for both parties as compared to that of two lawyers representing opposite sides.

59. The morality of the lawyer should be contrasted with "Watergate morality." The lawyer serves a *client* (who can never be "above the law") to the maximum extent permitted by the law (while remaining true to the system). Legal ethics not only permit, but require, strong advocacy on behalf of the client once that relationship has been established.

60. These questions are, of course, presented in their most extreme form when only one party to a dispute is represented. Conceivably, the judge can act to restore balance, but the felt need for representation belies such a solution. The problem is even more extreme if it can be shown that the system is skewed in favor of certain claimants, *i.e.*, if the "haves" are more likely to win than the "have nots." See Galanter, *supra* note 36, at 95.

(the system may be bad but it is the best we have) and the morality of the system when it is in balance (assuming that all lawyers strive to be as good as their colleagues).

Without demeaning the functional responses, I suggest this addition to the implicit traditional means versus ends calculus. Lawyers are taught that as advocates they should press the maximum lawful claims of their clients. That process, however, forces a depersonalization of the adversary; the lawyer's concern for humanity are essentially limited to their own clients.⁶¹ Furthermore, the adversary process infuses the parties with the same spirit of adverseness and depersonalization. Although the process of settlement generally "brings the parties together" as to the terms of their specific dispute, it can also serve to deteriorate the parties' underlying relationship. A graphic example regularly occurs in divorce law. Many a couple reconciled to separation has been driven to hostility by the maximum demands asserted by their spouse's lawyer. The typical response is: "If (s)he's going to try to wipe me out, then I'm going to fight over the kids."⁶²

My concern is for that category of cases where this process of alienation could be successfully avoided without doing violence to the justifiably adverse interests of the persons involved. In this vein Professor Fuller notes that a primary result of mediation is the role played in reorienting the parties towards each other.⁶³ The lawyer's role is also to maintain sensitivity towards the personal interests of both parties. One could again posit the particular benefit of such a process in the divorce context. As the growing number of alternative, no-fault divorce practices exemplifies, it should be clear that separate advocacy is not always essential in that context. Furthermore, the possibility of reducing hostility—and in particular the lasting scars of a custody battle—provides substantial impetus for appropriate alternatives like those proposed here.

61. For a discussion of the problems stemming from the narrow loyalty of lawyers to their clients, as well as the domination by lawyers of their clients, see Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS L. REV. 1 (1975).

62. And to return to the spectre of unequal representation in this context it can be asked, "Where is the solace for the lawyer who knows that an issue such as child custody may rise or fall as a result of the skill and energy devoted to a particular client?"

63. See Fuller, *supra* note 27, at 325.

C. Restraints of the Legal Order

The third area of complaint against the legal system is more theoretical. In several ways the modern system has created a gap between legal norms and actual values or interests of individuals in the society. First, the mere (and necessary) formality of the rules of evidence and procedure can drive up cost, increase delays, and exclude from the court's consideration information that all parties might otherwise consider relevant and reliable. Second, and even more basic, the rules of law themselves may be out of step with the parties' values. Pluralism by definition suggests differences in perspective and potential conflicts in values. This problem is aggravated by efforts to minimize judicial discretion in order to maximize predictability and efficiency.⁶⁴ Such developments may of necessity increase alienation towards the legal system in cases where freer discretion would produce more equitable results.

Finally, legal rules are designed to be administered by lawyers. The language and the formalities create barriers between the parties and the resolution process. The lawyer's "professionalism" discourages either participation or a genuine sense of control over the outcome of the dispute. The "priesthood" of lawyers reinforces this process.⁶⁵

The current legal order tends to place primary attention on rules of law and on the lawyers who understand and manipulate those rules rather than on the interests and values of the parties to a dispute.⁶⁶ This problem can be somewhat ameliorated in the context of private direct dispute resolution. As an intermediary, the lawyer's task parallels that described by Professor Fuller: "[M]ediation is commonly directed, not to achieving conformity to norms, but toward the creation of the relevant norms themselves."⁶⁷ Although legal rules and potential legal consequences are not rendered irrelevant by such a role, they should be dislodged from the central role normally assumed when they interfere with the true goals of the parties. Individuals, lawyers and the legal order would all get along better if lawyers would act as intermediaries when the situation dictates.

64. See generally Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

65. See Auerbach, *Plague of Lawyers*, HARPER's, October 1976, at 37.

66. For a discussion of this perspective, see J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

67. Fuller, *supra* note 27, at 308.

VI. CONCLUSION

Although traditionally identified with "good lawyering," an intermediary role is contrary to popular perceptions of the lawyer as advocate. The time has come to bring the intermediary out of the closet. The proposed Model Rules of Professional Conduct will undoubtedly stimulate debate within the profession and force movement in that direction. Significant change will only occur, however, when both the bar and the public discover the potential role of lawyers beyond advocacy.